



**In re Estate of Felista Wanjiru Kanyi (Deceased) (Succession Cause 481 of 2018)
[2022] KEHC 15848 (KLR) (Family) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 481 OF 2018
MA ODERO, J
NOVEMBER 25, 2022
IN THE MATTER OF THE ESTATE OF FELISTA WANJIRU KANYI (DECEASED)**

BETWEEN

TERESIA WAITHIRA WANJIRU 1ST APPLICANT

DAVID MUCIRI KANYI 2ND APPLICANT

AND

MOSES MUCHIRI NYAKIO RESPONDENT

**SUED AS THE EXECUTOR OF THE ESTATE OF FELISTA WANJIRU KANYI
(DECEASED)**

JUDGMENT

1. Before this court is the Amended summons for Revocation or Annulment of Grant dated February 5, 2019 amended on July 1, 2019 and Further Amended on March 2, 2020 by which the Objectors Teresia Waithira Wanjiru and David Mucai Kanyi seek the following orders:-

- “1. Spent
2. Spent
3. That upon hearing interpartes, a forensic document examiner from the Directorate of Criminal Investigation be hereby order to scrutinize the purported will dated August 24, 2017, to verify the authenticity of the thumb print and/or signature of the purported and submit a forensic expert examiner’s report on the same to this Honourable court.



4. That upon hearing interpartes, the Respondent/Executor herein be ordered to furnish the Applicants and this Honourable Court with a full detailed and accurate account of the deceased's estate including all income and expenditure from August 7, 2018 when he was issued with a grant of administration of the said estate to date. Within 14 days of filing of this summons.
 5. That upon hearing and determination of this summons, the Grant of Letters of Probate with a written will issued to Moses Muchiri Nyakio on August 7, 2018 be revoked and/or annulled and the will the basis of the said Grant dated August 24, 2017 be annulled and/or declared a nullity.
 6. That the applicants herein be appointed as Administrators of the Estate of the late Felista Wanjiru Kanyi in place of Moses Muchiri Nyakio.
 7. And/or In The Alternativethis Honourable court do hereby make such reasonable provision out of the net estate of the late Felista Wanjiru Kanyi for the 1st Applicant, Teresia Waithira Wanjiru as a dependant of the Deceased as it deems fit.
 8. That upon grant of prayer (7) hereinabove, the Applicants and the Respondent/Executor herein be appointed co-Administrators of the Estate of the late Felista Wanjiru Kanyi (Deceased).
 9. That the costs of this summons be provided for in the cause".
2. The summons was supported by the Affidavit of even date and the Further Affidavit dated August 26, 2020 both sworn by the 1st Applicant.
 3. The Executor/Respondent Moses Muchiri Nyakio opposed the summons through his Replying Affidavit dated July 18, 2019 and August 7, 2020. The summons was canvassed by way of *viva voce* evidence. The Objector called four (4) witnesses in support of his case whilst the Respondent also called four (4) witnesses.

Background

4. This Succession Cause relates to the estate of Felista Wanjiru Kanyi(hereinafter 'the Deceased') who died on March 2, 2018. A copy of the Death Certificate Serial No xxxx forms part of the record. A letter dated April 3, 2018 written by the Assistant Chief of Kahawa Sukari sub-location in Ruiru District indicated that the Deceased was survived by the following persons:-
 - (i) BW- Daughter (minor)
 - (ii) Teresia Waithira Wanjiru – Daughter
 - (iii) Moses Muchiri Nyakio - nephew
5. Her estate comprised of the following assets:-
 - i. Equity Bank a/c No xxxx, Kariobangi Branch
 - ii. Embakasi Ranching Company Ltd Certificate No xxxx (RUAI)
 - iii. Plot No 3939 Business Trade Centre (Namanga)
 - iv. Plot No 218/2XX LR 53766 HXXX



- v. Plot No 218/1XX LR 59891 H6X
- vi. Plot No 209/79XX/3XX Kiamaiko LR 35650 HXX
- vii. Kahawa Sukari Plot No 11XX Allotment Advice 9475/9XXX7/103XX
- viii. G103/G1XX Huruma Mathare
- ix. Kiamworia, Kiganjo/Gachika/10 of Kiganjo Location Kiambu
- x. Motor Vehicle Reg. No KAU 8XX N No Toyota Corolla
- xi. Motor Vehicle Reg No KBL 7XX V, Toyota Fielder
- xii. Embakasi Ranching Company Ltd main P 2677, LR No 109XX/2 (Ruai)
- xiii. Plot No 3XX Business Namanga Trade Centre.

Total value approximately Kshs 100 million

6. The Deceased is said to have died testate having left a written Will dated August 24, 2017 in which she bequeathed her property to the Respondent and her youngest daughter BW, in equal shares.
7. Following the demise of the Deceased the Respondent applied for and obtained Grant of letters of Probate, which were issued in his name on August 7, 2018. To date the Grant is yet to be confirmed.
8. The Objector Teresia Waithira Wanjiru (who is the eldest daughter of the Deceased) has filed this summons seeking revocation of the Grant which was issued to the Respondent. She claims that the Deceased who was her mother lacked the mental capacity to make a will. The Objector contends that the Respondent who is not a child of the Deceased ought not to have been appointed as Executor of the Will. That she and her younger sister who are the biological children of the Deceased rank in priority over the Respondent.
9. Finally the Objector prays that the court order that adequate provision be made for her out of the estate of the Deceased.

The Evidence

10. The Objector Teresia Waithira told the court that she is the daughter of the Deceased. She states that the 2nd Objector who is the brother of the Deceased is her uncle. The Objector confirms that the Deceased passed away on March 2, 2018 and was survived only by herself and her younger sister BW who was at the time of filing this summons a minor aged twelve (12) years. That the family initially resided in Huruma Estate and later moved to Kahawa Sukari in Kiambu County where the family home is located.
11. The Objector confirms that the Respondent Moses Muchiri was a son to one Agnes Nyakio who was the sister of the Deceased and is therefore a nephew to the Deceased.
12. The Objector states that when the Deceased became critically ill the Respondent often came to their home to assist in her care. She denies that the Respondent resided with their family but states that he would visit them during school holidays. The Objector stated that the Deceased paid fees for the Respondent when he was at Chania High School and that during the period he was a student at that school the Respondent resided with the Deceased and her family since their home was close to the school.



13. The Objector avers that the Respondent runs his own Auto Spares business, is married with a wife who works and that he was not a dependant of the Deceased. She accuses the Respondent of forcefully moving into the family home in Kahawa Sukari after the death of the Deceased with his fiancé and kicking her out of the home and mistreating her younger sister.
14. The Objector states that she was totally unaware of the existence of the Will. She takes issue with the fact that no provision was made for her in the said Will rather the Will provided that she was to be taken care of by the Respondents and her younger sister. The Objector categorically denies the claims that she is mentally challenged. She further objects to the clause in the will directing that her younger sister BW would only get her share of the estate upon attaining the age of twenty-five (25) years.
15. The Objector states that her late mother was critically ill and was constantly in and out of hospital and therefore had no capacity to make a Will. She accuses the Respondent of manipulating the Deceased to make a will that would favour him and disinherit the children of the Deceased.
16. The Objector states that the Deceased had several rental properties which realized a sum of Kshs 500,000 per month. That this money has been going to the Respondent alone and that she as the Deceased's daughter has derived no benefit at all from the estate. The Objector proposes that the estate of the Deceased be divided equally between herself and her younger sister.
17. The Objector urges the court to declare the Will purportedly made by the Deceased invalid and asks that the Grant issued to the Respondent be revoked.
18. PW2 Simon Maina Kihiko told the court that the Deceased was his aunt. He stated that he found it strange that the Deceased would write a Will without informing and/or involving any family member.
19. PW2 confirmed that the Deceased was ailing and frequently visited the hospital. He opines that she did not have the mental capacity to make a Will. PW2 states that the written Will dated March 24, 2017 could not have been written by the Deceased, she was admitted in hospital on August 24, 2017 when it was allegedly written. He states that the Will is discriminatory as it disinherits the 1st Objector. He asserts that the 1st Objector is not mentally challenged.
20. PW3 Dr David Muchiri Kanyi is a medical practitioner working at Nyamu Practitioners Upper Hill Medical Centre. He told the court that the Deceased was treated by his Senior Dr Mureithi Nyamu from June 2016 until she met her death. The witness produced as evidence a medical report dated July 27, 2017 from the Mater Hospital as well as discharge summary dated October 12, 2017 from the Kenyatta National Hospital.
21. The Doctor stated that the Deceased who was obese was being treated for Diabetes, leg ulcers, Kidney Disease, High Blood Pressure and Anaemia. That she was admitted at Kenyatta National Hospital from August 1, 2017 to September 27, 2019. According to PW3 the medical condition of the Deceased could have affected her mental capacity.
22. PW4 Paul Kimani Kamau told the court that the Deceased was his cousin. He told the court that the deceased bore three (3) children but one (1) of them had died leaving the Objector Teresia Waithira and BW as the only children of the Deceased.
23. PW4 objected to the will on grounds that no family member was present when the same was written. He also objected to the will on the basis that it denied the 1st Respondent her right to inheritance.
24. The Respondent Moses Muchiri Nyakio testified on his own behalf. The witness relied entirely upon his written statement dated May 20, 2019. He told the court that he was a son to Agnes Nyakio who was a sister to the Deceased Felista Wanjiru Kanyi. As such, the Respondent was the nephew of the



- Deceased. The Respondent told the court that he began to live with the Deceased way back in the 1998 when he was in class four and continued to reside with the Deceased until he completed his University Education. The Respondents told the court that the Deceased treated him as a son and that he lived with the Deceased and her two daughter in the family home in Kahawa Sukara. That it was the Deceased who paid his school fees up to University level.
25. He states that the Deceased had a stormy relationship with her daughter Teresia Waithira who was rude and disrespectful to her mother. He states that the Objector dropped out of school in class 6 and that attempts by the Deceased to establish a business for her daughter failed.
 26. The Respondent denies that he influenced and/or manipulated the Deceased in any way to make her Will in his favour. He states that although the Deceased suffered from physical ailments she did not suffer any mental disorder. He states that the Deceased was an astute and hardworking businesswoman who managed all her properties successfully.
 27. The Respondent denies having forcefully evicted the Objector from the family home. He states that the Objector left the home of her own volition saying that she wanted to go to Nakuru to further her education.
 28. The Respondent insisted that the written will dated August 24, 2017 was the genuine Will of the Deceased and he urged the court to give effect to the said Will. He stated that the share left to BW was to be used to pay for her education. The Respondent claimed that B was more capable of taking care of the estate of the Deceased than the Objector whom he says is mentally challenged.
 29. The Respondent denies having intermeddled in the estate of the Deceased. He states that all the rental income is collected by agents and is utilized for the benefit of the entire estate. The Respondent concedes that he and his wife did move into the home of the Deceased after her demise but says that the only did so in order to look after B who was a minor and who had been left alone in the compound after the Objector left to Nakuru.
 30. Finally, the Respondent avers that the Objector is merely being misused by relatives who are out to grab the property of the Deceased.
 31. DW1 Richard Mubua Mutiso is an Advocate of the High Court of Kenya. He confirms that the Deceased was his client. The Advocate states that sometimes in August 2017 the Deceased instructed him to Draft her Will. That he advised the Deceased to avail two persons to witness the Will.
 32. DW1 told the court that on August 24, 2017 the Deceased came to his office with the two witnesses. One was Nancy Nungari who was a longtime friend of the Deceased and was also her driver. The second John Muchiri Kio was a cousin to the Deceased.
 33. DW1 asserts that when the Deceased came to his office she was in good health and her demeanour was normal. The Advocate did not notice anything amiss regarding the mental state of the Deceased. He states that the Deceased executed her Will by signing the document and affixing her right thumbprint and that the two witnesses also executed the document by signing the same.
 34. DW1 told the court that the Written Will dated August 24, 2017 was drafted in accordance with the wishes of the Deceased. He states that the Deceased failed to leave any properties to the Objector because she feared that someone would take advantage of her. DW1 states that the advised he Deceased to appoint a legal guardian for the Objector. That the Deceased decided that the Respondent and BW would take care of the Objectors interests.
 35. DW1 states that as legal counsel his duty was only to advise the Deceased. He could not dictate to the Deceased how she was to distribute her estate.



36. DW2 Washington Wokabi is a Registered Medical Practitioner practicing in Nairobi. He produced a Forensic Medical report dated March 15, 2022 which he had prepared in respect of the Deceased. DW2 told the court that he compiled this forensic medical report on the basis of various medical documents supplied to him by the Advocate. That his duty was to evaluate the mental competence of the Deceased.
37. Upon evaluating the medical reports DW2 concluded that the Deceased suffered from multiple medical illnesses including diabetes, heart disease, ulcers and pulmonary embolism. However, the doctor confirms that he saw no indication that the Deceased was receiving any treatment for a mental disorder. He confirmed that he never actually treated the Deceased during her lifetime.
38. DW3 John Muchiri Kio told the court that he was a cousin to the Deceased. He told the court that the Deceased had three (3) children one of whom (Muthoni) had passed away. DW3 stated that the Deceased had taken the Respondent into her home and lived with him from the time he was a toddler until the Respondent completed his University education. He confirms that the Deceased paid the school fees for the Respondent until he completed University.
39. DW3 told the court that the Deceased did not have a good relationship with her daughter Teresia Waithira. That Teresia had mental problems and was not in a position to take care of her younger sister B.
40. DW3 states that on August 24, 2017 the Deceased told him to meet her at the Advocates office. That upon arrival at the said office he met the Deceased, her driver Nancy Nungari (who is also now deceased) and her the Advocate. DW3 states that the Advocate read out the contents of the Will which Deceased then executed. That he and Nancy Nungari also executed the written Will as witnesses thereto.
41. DW3 stated that the Objector had mental problems and was not in a position to manage the estate. He confirmed that the bequest to the Objector were to be managed by the Respondent and B.
42. Emmanuel Mwangi Njuguna told the court that the Deceased was a family friend as both his family and Deceased were neighbours in Namanga. He states that knew the family of the Deceased well. He described Teresia as a 'free bird' who was stubborn and always did what she wanted. That the Objector was careless and always had to be supervised, even in minor tasks like cooking.
43. DW4 told the court that when he came to University in Nairobi he would stay at the Deceased's home during the holidays. That he resided there with the Respondent who was a nephew to the Deceased. DW4 did not have any evidence to offer regarding the Will of the Deceased.
44. Upon close of oral evidence parties were invited to file and serve their written submissions. The Objector filed the written submissions dated May 31, 2022 whilst the Respondent relied upon his written submissions dated June 29, 2022.

Analysis and Determination

45. I have carefully considered the Amended summons for Revocation of Grant, the Replying Affidavit filed thereto, the evidence adduced in court as well as the written submissions filed by both parties. The following are the issues which arise for determination.
 - (i) Whether the written Will dated 24th August is valid.
 - (ii) Whether the Respondent should provide a Statement of Accounts.
 - (iii) Whether the Objector is entitled to reasonable provision from the estate.



(i) Validity of the Written Will

46. It is common ground that the Deceased herein passed in Ruiru on March 2, 2018. The Deceased was survived by two biological daughters—Teresia WaithiraBW as well as a nephew Moses Muchiri Nyakio the Respondent herein. The Deceased left behind a sizeable estate.
47. Grant of letters of Probate in respect of the estate of the Deceased were on August 7, 2018 issued to Moses Muchiri Nyakio.
48. In obtaining the Grant the Respondent annexed to his petition for Grant of Probate a written Will dated August 24, 2017. The Objector challenges the validity of the said Will.
49. The legal requirements of a valid Will are contained in Section 11 of the Law of Succession Act, which provides as follows:-
- “Written wills.
- No written will shall be valid unless—
- (a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
 - (b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;
 - (c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”
50. The written Will dated August 24, 2017 is annexed to the supporting Affidavit dated July 1, 2019 (Annexure TWW ‘2’). The Document bears the signature and right thumbprint impression of the Deceased on each page and is witnessed by two (2) persons John J Muchiri – ID No xxxx and Nancy Nungari Karanja – ID No xxxxxx.
51. DW2 Richard Mutiso Advocate of the High Court of Kenya told the court that it was he who drafted the Will based on instructions given to him by the Deceased. DW1 confirms that the Will annexed to the Petition for Grant of Probate is the Will, which he drafted. He confirms that he was present when the Deceased and the two (2) witnesses execute the document.
52. DW3 confirmed to the court that he was present in the office of the Advocate and saw the Deceased append her signature and thumbprint on the Will. DW3 stated that he also appended his signature as a witness. He confirmed that one Nancy Nungari also signed the Will as a witness. DW3 confirms that the Will which is annexed to the Petition for Grant of Probate is the document which he signed.



53. Although the issue was not raised by the Objector, my own perusal of the Written Will dated August 24, 2017 reveals that the Deceased did not appoint an ‘Executor’. The failure or omission to appoint an Executor does not invalidate a written Will.

54. Section 60 of the [Law of Succession Act](#) which deals with the Appointment of Executors provides as follows:-

“A persons may by will appoint an executor or executors (own emphasis).

55. The word used in section 60 is ‘may’ which leaves the discretion of whether or not to appoint an Executor to the Testator. As such, a Testator is not obliged to appoint an Executor to his/her Will. Section 11 of the [Law of Succession Act](#) which sets out the legal requirements of a written Will does not make it mandatory requirement that an Executor be appointed. I therefore find that the failure to appoint an Executor did not invalidate the written Will of the Deceased.

56. The Objector takes issue with the Will exhibited in court and submit that the same is not valid. She raises several grounds in challenging the Will. One of the grounds raised by the Objector in challenging the written Will is that the Deceased who was ailing lacked the mental capacity to make a Will.

57. Section 5(3) of the [Law of Succession Act](#) Cap 160 provides:-

“(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.” (own emphasis)

58. Therefore Section 54 of the [Law of Succession Act](#) presumes that a Testator has capacity to make a Will. The burden lies on any person disputing this presumption to prove otherwise.

59. The essentials of testamentary capacity were set out in the case of [Banks vs Goodfellow](#) [1870] LR 5 QB 549 in which the court stated –

“a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made.”

60. It is trite law that he who alleges must prove. The [Evidence Act](#) places the burden of proof of any fact on the person who wishes to rely on the same. Section 107 of the [Evidence Act](#) Cap 80, Law of Kenya provides as follows:

‘Burden of Proof

(1) “Whoever desires any court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.



- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
61. No evidence has been presented to this court to prove or even indicate that the Deceased was suffering from any mental infirmity. No report from a psychiatrist has been tabled as evidence to show that the Deceased had any type of a mental disorder.
62. PW3 Dr Daniel Muriuki gave a narration of the various ailments which the Deceased suffered from. He produced as evidence a medical report dated July 23, 2021 prepared by Dr Mureithi Nyamu who was treating the Deceased immediately prior to her demise.
63. Nowhere in the report is it indicated that the Deceased was suffering from a mental disorder. Under cross examination DW2 states:-
- “..... her (Deceased’s) ailments could have affected her mental capacity. I have no evidence of mental incapacity (own emphasis)
- DW2 goes on to admit that he is not a licensed psychiatrist.
64. The other medical practitioner who testified in this matter was DW2 Dr Washington Wokabi. He told the court that he conducted a forensic analysis of all the Deceased’s medical reports and prepared his own report dated March 15, 2022. DW2 confirmed that the Deceased suffered from a variety of physical ailments, but confirms that there was no indication that she was under treatment for any mental infirmity.
65. Indeed DW2 told the court that there was no nexus between the physical ailments the Deceased suffered from and mental illness. The doctor concluded cross-examination by saying that:-
- “I cannot attest as to the mental capacity of the Deceased .”
66. I therefore find that there exists no medical evidence to show that the Deceased was in any way mentally incompetent.
67. DW1 the Advocate and DW3 who witnessed the Deceased execute her written Will both state that the Deceased was in reasonably good health and was in her normal (right) senses on August 24, 2017 when she executed the Will. Neither noticed any mental incapacity on the part of the Deceased.
68. PW2 who was a nephew to the deceased told the court that whenever the Deceased fell ill she also lost her mind. However, PW2 immediately goes on to say, “I have no evidence that she was of unsound mind....”. He declared that the Deceased could not have executed the Will on August 24, 2017 because on that date the Deceased was admitted in hospital.
69. I have carefully perused the medical records relating to the various admissions of the Deceased into hospital. There is a case summary from the Kenyatta National Hospital indicating that the Deceased was admitted on August 1, 2017 and was discharged on August 12, 2017. There is another case summary indicating that Deceased was admitted at KNH a second time on September 26, 2017 and was discharged on October 12, 2017.
70. The claim that the Deceased was admitted in hospital on August 24, 2017 is not true. There is no evidence to prove that on August 24, 2017 the Deceased was admitted in any hospital. She therefore could have easily gone to her Advocates office on that day to execute her Will.



71. The allegation that the Deceased lacked the mental capacity to make a Will has not been proved and lacks basis. From the evidence available, I find that the written Will dated August 24, 2017 fully complied with the legal requirements set out in Section 11 of the Law of Succession Act.
72. The Objector further challenges the validity of the written Will on the basis that the Respondent who was a nephew to the Deceased manipulated the Deceased into making a Will leaving him the bulk of her estate to the detriment of the biological children of the Deceased. The Objector claims that the Respondent exerted undue influence on the Deceased.
73. In Re Estate Of Julius Mimano (Deceased) [2019] eKLR the Court held as follows: -
“it is the circumstances of the making of the will that are suspicious or ought to raise suspicion. The focus should not just be on the large benefit accruing to the propounder of the will. The argument should be that the benefit was large because the will was made in circumstances where manipulation or fraud or undue influence or pressure or even coercion was brought to bear on the testator. There must be evidence of the intimate details of the making of the will, in terms of what exactly transpired at the event of the making of the will.” (own emphasis)
74. There is nothing to raise suspicion in the manner in which this Will was drafted and/or executed. To merely allege undue influence is not enough. The Objector must demonstrate in what manner this alleged undue influence was exerted
75. PW4 objects to the Will on grounds that the Deceased did not inform her family members that she was making a Will. The law does not require a Testator to inform family members when they are making a Will. The evidence from the Advocate and DW3 is that the Deceased made the Will voluntarily without influence or direction from any person. No evidence of coercion, influence has been shown and I therefore dismiss this ground of objection.
76. Thirdly, the Objector cast doubt on the thumbprint and signature alleged to be that of the Deceased appearing on the document. In the Amended summons, the Objectors prays that the court order an examination of the thumbprint and the signatures on the Will by a document examiner in order to prove their validity. In other words, the Objectors are alleging that the Will is a forgery.
77. In the case of In Re Estate of Samuel Ngugi Mbugua (deceased) [2017] eKLR the court had this to say regarding allegations of forgery during execution of a will:-
“the allegation that the said signature was not that of the Deceased amounts to a claim that he signature was forged or that fraud was exercised in the procurement of the alleged will. That is to say that someone other than the deceased had affixed that mark on the will with the intent of passing the same as the signature of the deceased. Forgery is a criminal offence. The applicant is in fact imputing criminal conduct on either the person propounding the will or those who were involved in the operation that is purported to have been its execution. The burden of proving forgery lies with the person alleging it. In Elizabeth Kamene Ndolo vs George Matata Ndolo Nairobi Court of Appeal Civil Appeal Number 128 of 1995 it was stated that the charge of forgery or fraud is a serious one, and the standard of proof required of the allexer is higher than that required in ordinary civil cases.....”



78. As stated earlier the burden of proof in law lies on the party alleging particular fact. If the Objectors believe that the Will is a forgery then the onus lies upon them to prove this allegation. The Objectors have prayed that the court order a forensic examination of the signatures on the Will to determine if the same were valid. It is not the duty of the court to make orders so as to assist the objectors to prove their allegation of forgery. The Objectors were at liberty to engage at their own cost a document examiner to scrutinize the thumbprint and the signatures on the will. Their failure to do this means that this allegation of forgery remains unproven.
79. In any event, both the Advocate and DW3 stated under oath that they saw the Deceased affix her thumbprint and sign the written the Will. DW2 likewise confirmed and identified his own signature on the will. The two (2) witnesses remained unshaken under cross-examination. Neither were beneficiaries of the estate and neither had anything to gain by lying to the court. I find that there is no evidence that the Will dated August 24, 2017 is a forgery.
80. Finally, the Objectors challenge the validity of the Will on grounds that the same is discriminatory as no bequest was made to Teresia Waithira who was a daughter of the Deceased.
81. A Testator has power to dispose his/her property as they wish. Failure to provide for a dependent in the Will does not invalidate said Will. The aggrieved beneficiary is at liberty to make an application for reasonable provision which the 1st Objector has done *vide* prayer (7) of the summons. This court will shortly consider the merits of this prayer.
82. All in all, I find that the Will dated August 24, 2017 complies with the provisions of section 11 of the *Law of Succession Act*. As such I find the same to be both genuine and valid.

(ii) Accounts

83. The Objectors stated the Respondent has failed in his duties as executor in that he had failed to provide any Statements of Accounts regarding the estate of the Deceased. They pray that the Respondent be ordered by the court to provide a full detailed and accurate account of the Deceased estate from March 2018 to date.
84. The Respondent opposes this prayer arguing that he cannot as Executor be ordered to provide a Statement of Accounts when the Will put no such obligation on him.
85. It is trite law that an Administrator of an estate is a trustee of the same and as such is accountable to all the beneficiaries for the manner in which he handles the estate. Section 83 of the *Law of Succession Act* provides for the ‘Duties of Personal Representatives’. Section 83 (h) provides that –

“ 83 personal representatives shall have the following duties

.....

- (h) to produce to the court. If required by the court either on its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account”.



86. *In Re Estate Of David Kyuli Kaindi (Deceased)* [2016] eKLR Hon Justice William Musyoka stated as follow: -

“the personal representative must give account of the assets and liabilities that he has ascertained, and the assets that he has collected, gotten in, recovered or gathered and the titles he has perfected, and the steps taken to preserve the estate. He should also state the debts and liabilities that he has paid or settled before moving to court for confirmation of the grant, and if he has not yet settled the debts, state how he proposes to have them settled. The account at this state should also state the assets that generate income, stating how much has been collected and how it has been utilized.”

87. A perusal of the record in this mater indicates that to date no accounts has been rendered to court by the Respondents. It is therefore not clear how the funds generated by the estate are being managed. Although the Respondent claims that he has been providing fully for ‘BW’ he had not produced any evidence e.g. receipts for payment of her school fees to prove this.

88. The Respondent does not deny that he has failed to render accounts since he took up the role of Executor. This is a statutory duty. The Respondent cannot evade this obligation by claiming that written will makes no obligation on the Executor to file Accounts. The Respondent claims that he has had no access to the estate funds. If this is so then the court needs to know where these funds are going – who is receiving and using said funds. The Will itself is governed by and is subject to the written law. I find that the Respondent has a statutory duty to account to all the beneficiaries regarding the manner in which the estate is being run. He has a statutory duty to render such accounts.

89. I find that the Respondent has failed in this duty of providing accounts. Accordingly, I direct that the Respondent file in court a full detailed and accurate statement of accounts indicating how the estate of the Deceased has been run from the date he obtained the grant to the date of this judgment. Accordingly, I do allow prayer (c) of this application.

(iii) Reasonable Provision

90. The 1st Objector has taken issue with the bequests made by the Deceased in her Will dated August 24, 2017. The 1st Objector laments that all the properties have been left to the Respondent and to her younger sister ‘B’. The 1st Objector particularly riled by the provision in the Will requiring that her interests be taken care of by the Respondent and BW who is her younger sister. The 1st Objector prays that as a dependant of the Deceased the court make reasonable provision out of the net estate for herself. There can be no doubt that the 1st Respondent as the eldest daughter of the deceased falls within the definition of a dependant as defined by Section 29 of the Laws of Succession Act.

91. Moreover the evidence from all the witnesses is that the 1st objector who dropped out of school at class 6 and is unemployed relied entirely upon her late mother for her sustenance and upkeep.

92. Sections 26, 27 and 28 of the *Law of Succession Act* provide for the circumstances situations in which the court may make orders for adequate provision for a dependant.

93. Section 26 of the Act provides as follows:-

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or



the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate." (own emphasis)

94. Section 27 provides that in making provision for a dependant the court shall have the discretion to order that a specific share of the estate be given to the dependant or may order that provision be made by way of periodic payments or by payment of a lump sum. This section also allows the court to impose such conditions as it thinks fit.
95. Section 28 provides –
- “In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—
- (a) the nature and amount of the deceased's property;
 - (b) any past, present or future capital or income from any source of the defendant;
 - (c) the existing and future means and needs of the dependant; (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
 - (e) the conduct of the dependant in relation to the deceased; (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
 - (g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.”
96. The 1st Objector being a child of the Deceased and a beneficiary of the estate ranks in priority to the Respondent. In the written Will no specific bequest is made to the 1st Objector. Instead, most of the estate is left to the Respondent and BW who was at the time a minor.
97. In the written Will it is stated as follow-
- “NOTE: Teresia Waithira Wanjiru ID No. xxxxx (mentally challenged) shall be under the care of BW (MINOR) and Moses Muchiri Nyakio ID No xxxx”
98. By this the Testator sought to explain the reason why she excluded her 1st Objector as a direct beneficiary under her Will.
99. Much was made by the Respondent and his witness of this allegation that the 1st Objector was mentally challenged. The fact that the 1st Objector was mentally challenged (which is not proved) does not justify excluding her from benefiting from the estate of her late mother.
100. Firstly, if the 1st Objector was mentally challenged then she more than any other person would deserve to be provided for from the estate of the Deceased.
101. Secondly no concrete evidence was adduced to prove this allegation that the 1st Objector was mentally challenged. No report from any psychiatrist who evaluated the mental status/capacity of the 1st Objector has been produced in court. The fact that the 1st Objector dropped out of school is not proof of a mental disorder.



102. Likewise the fact that the 1st Objector was unable to unsuccessfully run a business which her mother set up for her is not proof that she was mentally challenged. There are many people in this world who are not particularly suited to running a business successfully.
103. DW3 who knew the 1st Objector as a neighbour and a family friend described her as a ‘free bird’. He explained that she was a person who did exactly as she pleased and did not listen to her mothers counsel.
104. From the description of the 1st Objector she comes across as stubborn and maybe a somewhat rebellious daughter. She was a person who danced to her own tune. I have no doubt that this character trait would have caused the 1st Objector to clash with her mother and indeed the two may have had a strained relationship.
105. Nevertheless a stubborn and/or unruly character is not proof that the 1st Objector was mentally challenged. I have no doubt that the Deceased as a mother may have been frustrated/disappointed in her eldest daughter. She possibly felt that the 1st Objector would not wisely manage or utilize any bequest made to her. However, in my view this does not negate the right of the 1st Objector to benefit from the estate of her late mother.
106. The 1st Objector who told the court that she is forty (40) years old is basically uneducated and is unemployed. She has no means to provide for herself. The 1st Objector told the court that she has now decided to enroll back in school in order to get the education she missed. There is no evidence that the Deceased during her lifetime made any advancement or gift to the Objector. I find that the circumstances of the 1st Objector certainly indicate that she is entitled to adequate provision from the estate of her late mother.
107. In my view, no good reason has been advanced not to make reasonable provision for the Objector who being a daughter of the Deceased was left out of the Will. It would be unfair that the Respondent who is not a child of the Deceased benefit from the Will whilst the biological daughter of the Deceased is left with nothing. From the evidence it is clear that the Deceased educated and provided for the Respondent. This does not give him priority in law over the biological child of the Deceased. In any event, the Objector told the court that her mother was very generous and assisted many people in various way. The daughter of the Deceased cannot be disinherited.
108. The Respondent cannot be said to have been a dependant of the Deceased. He was a married man who ran his own auto spares business. Indeed, in his evidence the Respondent admits that prior to the demise of the deceased he lived with his wife at By-Pass whilst Deceased lived in Kahawa Sukari.
109. In the case of *Elizabeth Kamene Ndolo George Matata Ndolo* [1996] EKLR, the court stated as follows:-

“This section clearly puts limitations on the testamentary freedom given by section 5. So that if a man by his will disinherits his wife who was dependant on him during his lifetime, the court will interfere with his freedom to dispose of his property by making reasonable provision for the disinherited wife. Or if a man at the point of his death gives to his mistress the family’s only home and makes no reasonable provision for his children who were dependent on him during his lifetime, the court may well follow the mistress, under section 26, and make reasonable provision for the dependent children out of the house given to the mistress. So that though a man may have unfettered freedom to dispose of his property by will as he sees fit, we do not think it is possible for a man in Kenya to leave all his property



for the maintenance and up-keep of an animal orphanage if the effect of doing so would be to leave his dependants unprovided for.”

110. Similarly in the case of *James Maina Anyanga Vs Lorna Yimbiba Ottaro & 4 Others* [1014] eKLR, Hon Justice Anyara Emukule (Retired) stated that-

“ A testator has power to dispose of his property as he pleases and the court is bound to respect those wishes as long as they not repugnant to the law and he [she] does not leave out some dependant and beneficiaries.”

111. The Deceased left a vast estate. All the witness state that the Deceased was hardworking and an astute business woman who owned several rental units. The estate in my view certainly raises enough income to enable a portion to be allocated to the 1st Objector.

112. In order to determine what portion of the estate should be allocated as adequate provision for the 1st Objector it is necessary that full and accurate accounts be filed by the Respondent as has been directed by the court. The Objector too must furnish the court with a summary of her requirements and expenses to enable court decide what provision ought to be made to her out of the estate.

113. Finally, I note that as stated above the Deceased did not appoint an Executor for her Will. The Respondent who was a beneficiary under the Will applied to be appointed as the sole Executor of the Will. Given the bad relations between the Respondent and the Objector and given that one of the beneficiaries of the estate (BW) is a minor it is my considered opinion that in order to promote transparency and accountability a second Executor ought to be appointed for the estate. A sole Executor may be tempted to run the estate as his own personal property to the detriment of the other beneficiaries.

Conclusion

114. Based on the foregoing this court now makes the following orders:-

- (1) The Will dated August 24, 2017 is hereby declared to be the genuine Will of the Deceased Felista Wanjiru Kanyi.
- (2) The Respondent Moses Muchiri Nyakio to file within sixty (60) days a full detailed and accurate account of Deceased estate including all income and expenditure from August 7, 2018 when he was issued with the Grant of Probate to date.
- (3) Parties to forward to the court within sixty (60) days the name of a person agreeable to all the parties to be appointed as Co-Administrator of the estate.
- (4) The Objector also to file in court within sixty (60) days a summary of her monthly expenses and requirements.
- (5) A decision on what portion of the estate is to be provided to the Objector as reasonable provision is held in abeyance pending the filing of Accounts and the appointment of a co-Executor.
- (5) This being a family matter each side shall bear its own costs.

DATED IN NAIROBI THIS 25TH DAY OF NOVEMBER, 2022 .

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MAUREEN A. ODERO



JUDGE

