



REPUBLIC OF KENYA



**In re Estate of ETG (Deceased) (Succession Cause 7 of 2020)  
[2022] KEHC 16087 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 16087 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
SUCCESSION CAUSE 7 OF 2020  
RB NGETICH, J  
NOVEMBER 24, 2022**

**JUDGMENT**

1. This matter relates to the estate of ETG who died on March 22, 2019. He was survived by his wife RM (deceased) and four (4) children namely; JW, MNT, PWN (deceased) and NMT.
2. The petitioner SKT being the executor of the deceased's will dated May 8, 2017 petitioned this honourable court vide a petition for probate with a will annexed dated February 18, 2020 and filed on February 19, 2020. The grant was issued on June 25, 2020.
3. NMT filed summons for revocation of grant dated January 28, 2021 seeking to revoke the grant issued on June 25, 2020 to SKT
4. The summons for revocation dated January 28, 2021 is premised on the following grounds:
  - a. The grant was obtained fraudulently by making false statements and concealment of material facts.
  - b. The purported will attached was made in 2018 and backdated to read 2017.
  - c. When the deceased is said to have written the 2017 will, he was very ill and was not in a capacity to write the will.
  - d. The will is discriminatory and goes against the provisions of article 27 of the *Constitution*.
5. The application is supported by affidavit of NMT who is the son of the deceased. He averred that the deceased had bequeathed the property to all beneficiaries before his demise. Kiamba/Kihara xxxx was subdivided into five (5) plots namely xxxx, xxxx, xxx, xxx and xxxx. That plot xxxx was not distributed while J was given plot xxxx which had the matrimonial home. In exchange for plot xxxx, the deceased further subdivided plot xxxx into xxxx and xxxx. xxxx was given to K and N while xxxx was given to J.
6. According to the objector, the deceased bequeathed his property to all his beneficiaries as per the will dated April 29, 2013.
7. The summons dated August 6, 2021, filed by KKM seek the following orders: -



- i. The court issues an order of preservation of the estate of the deceased, specifically to stop further administration of the estate pending the determination of the summons.
  - ii. The respondent and the interested parties whether by themselves, their agents and or employees be restrained by way of an interim injunction from disposing off, advertising for sale, selling, transferring, mortgaging, charging, offering as security, and or interfering in any way that would affect the titles of properties known as LR xxxx Huruma property, Kiambaa/ Kihara xxxx and Kajiado/ Ntashart xxxx and further the title documents of the properties be deposited in court for safe custody.
  - iii. The interested parties be ordered to produce before the court the original will of the deceased dated April 29, 2013 and the beneficiaries be cross-examined on the contexts of the will dated April 29, 2013.
  - iv. The court is to cross-examine SK, ET and the 1<sup>st</sup> to the 4<sup>th</sup> interested parties in the context of the will dated May 8, 2017.
  - v. An order by the court to cross-examine the 1<sup>st</sup> interested party who is the wife to the deceased.
  - vi. An order be issued to the Directorate of Criminal Investigations to investigate the authenticity of the two fingerprints purportedly by the deceased and the 1<sup>st</sup> interested party on the purported will dated May 8, 2017.
  - vii. An order revoking and/or annulling any grant of letters of administration issued to SKT.
  - viii. An order that the purported will dated May 8, 2017 is void and therefore confirm the will dated April 29, 2013 is the valid will.
8. The application is supported by the affidavit of KKM. He stated that he is a grandson of the deceased and the purported will dated May 8, 2017 is a fraud. According to him the deceased signed the will dated April 29, 2013. He stated that the deceased lacked the capacity to write the will dated May 8, 2017; that the deceased knew how to write and he always signed his documents and not fixing his fingerprint.
9. In response to the application dated August 6, 2021, SK, RM, JW, MN and AT filed the preliminary objection on August 19, 2021 on the following reasons:
- a. The applicant KKM lacks locus standi to institute and prosecute the current application as no grant ad litem for letters.
  - b. That KK is not a party to the main succession cause to enable him file the application without a grant ad litem.
  - c. That the applicant is not a dependent to the estate of the deceased herein within the meaning of section 29 of the Laws of Succession.
  - d. That the alleged will dated April 29, 2013 from which the applicant purports to derive authority to inherit from was revoked by the operation of the last will dated May 8, 2017.
  - e. That the alleged will dated April 29, 2013 from which the applicant purports to derive authority to inherit does not meet the threshold of a valid will as the beneficiaries of the said will are also witnesses to the will.
  - f. Accordingly, the summons dated August 6, 2021 is incurably defective, and lacks merit and the same ought to be dismissed with costs.



10. By directions issued by Justice Mary Kasango on September 7, 2021, the summons dated January 28, 2021 and August 6, 2021 are to be heard together and the preliminary objection dated August 18, 2021 is to be treated as the grounds of opposition.
11. Further directions were that the two applications will be heard by viva voce evidence.

### **Objector's case**

12. During the hearing, the objector called three (3) witnesses. PW1 AET testified that he is a businessman and a grandson to the deceased. He stated that the deceased passed on in March 2019. That the deceased was married to RT and were blessed with four (4) children.
13. During the hearing, he adopted his witness affidavit dated January 27, 2022 as his evidence in chief. He further stated that he has been living with his grandfather since he was young. He stated that the deceased drafted a will in the year 2013, but he contends the deceased did not have the capacity to draft the year 2017 will as he was not in good mental health in the year 2017.
14. He contends the year 2017 will is a forgery and fraud; that the deceased was forced to draft the will by her aunty JW when she came to live with the deceased.
15. On cross-examination, he stated that he had never attended any meeting for the drafting of the will. He said JP was forcing the deceased to change his 2013 will which bequeathed the property to all beneficiaries. He said that the will dated May 8, 2017 only bequeaths two properties Kiambaa/Kihara xxxx and Kajiado/Ntashart xxxx to P, J and M and from year 2013 will, nothing has been taken away from him or his father.
16. Pw2 KM gave a sworn statement. He adopted his witness affidavit dated February 16, 2022. He said that the deceased ET is his cousin. He testified he witnessed the deceased T prepare his will on April 29, 2013. It was his evidence that the will was written by N as T dictated. He stated that the deceased signed the will together with the wife and other beneficiaries. The will bequeathed the property to all family members. He testified he is not aware of any other will prepared by the deceased.
17. Pw3 NMT testified that the deceased ET was his father. He adopted his witness affidavit dated January 28, 2021. He stated that his sisters are taking away land given to his two (2) sons N and K. He stated that he is aware of the 2013 will which was done in his presence but has no idea of the year 2017 will. He added that the fake will was read in the presence of the chief. He said after the deceased prepared the will dated April 29, 2013, the remainder of the land parcel No xxxx would be bequeathed to his sons. That as per the year 2017 will, parcel No xxxx has been bequeathed to his sister P, M and J contrary to the wishes of the deceased.
18. The petitioners did not call any witnesses and closed their case.
19. Directions were taken to file written submissions in which parties complied.

### **Applicant's /objector's submissions**

20. Counsel filed submissions on September 8, 2022 on behalf of the applicant and submitted that the grant issued on June 25, 2020 was issued through fraud and concealment of material facts. That the will dated May 8, 2017 is a forgery which was prepared by J after she relocated from her home to the deceased's home.
21. The applicant further submitted that the deceased lacked the capacity to draft the will as he was sickly and was not in a position to know or approve the contents of the will as per section 5(1) of the Law



of Succession Act; that the deceased was mentally challenged and before his demise, there was a petition filed to have the beneficiaries administer his estate but the same abated after his demise before the orders were issued.

22. Counsel submitted that the burden of proof was shifted to the executor and the beneficiaries of year 2017 will which they failed to discharge and submitted that it was against the deceased's norm to only appoint ET as the executor of the will.
23. Counsel further submitted that plot No Kiambaa/Kihara xxxx was bequeathed to KK and NN and concluded that the applicant and his witnesses have been able to demonstrate to the court the suspicious circumstances surrounding the purported will of May 8, 2017.

### **Respondent's /petitioner's submissions**

24. Counsel for the respondent filed submissions on July 19, 2022 and submitted that the objector has not on a balance of probability justified the revocation of grant issued on June 25, 2020; that the objector failed to prove that the will dated May 8, 2017 is invalid on account of mental incapacity as no medical report was submitted before the court to demonstrate the nature or the mental illness of the deceased.
25. Counsel further submitted that the assertion that the deceased could not have affixed his thumbprint in the signing of the will does not hold water as the Law of Succession Act section 11 provides for three (3) modes of execution of a will as signature, affixing of a mark to the will or signed by another person in the presence of the testator and submitted that the objector failed to discharge the duty of disapproving the affixed thumbprint did not belong to the deceased.
26. Counsel submitted that the will dated April 29, 2013 did not bequeath the sons of objector K and N any property. That the alleged property bequeathed to K and N has not been mentioned in the will.
27. Counsel further submitted that the will dated April 29, 2013 relied on by the objectors is not a valid will as it does not bequeath the property of the deceased; that donations and transfer of the deceased property were done prior to the making of the will.
28. Counsel further submitted that the objector's sons are not heirs of the deceased and should not benefit from the estate of the deceased and submitted further that there is nothing in law that prohibited the deceased from amending his will through the codicil dated May 8, 2017.
29. In conclusion, counsel urged this court to disregard the will dated April 29, 2013 and find that the will dated May 8, 2017 is valid and stands the test of time.
30. Counsel urged the court to dismiss the summons dated January 28, 2021 and August 6, 2021 with costs.

### **Analysis and determination**

31. I have considered grounds of applications and preliminary objection, averments in affidavits filed and the written submissions filed by counsels. The issue for the court's determination are
  - a. Whether the will of May 8, 2017 is valid.
  - b. Whether the threshold for revocation or annulment of the grant have been met.
32. On the issue of a valid will, section 11 of the Law of Succession Act provides: -  
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 acknowledgment of his signature or mark, or of the signature of that 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.'
33. The objector's argument is that the will dated May 8, 2017 is fake as the testator did not have the capacity to recollect his property as he was mentally ill and of old age. Further, the objector disputes the testator's thumbprint and points out that the testator always affixed signatures in his documents and not thumb printing and thus the alleged will dated May 8, 2017 is not genuine and assert that the only valid will is the will dated April 29, 2013.
  34. The petitioner did not call any of the witnesses named in the May 8, 2017 will to testify. The petitioner did not adduce any evidence to demonstrate the validity of the will dated May 8, 2017 despite the objection raised by other beneficiaries. There is no evidence that has been tendered in support of the allegation of the forged will. The petitioner did not call any witness to adduce evidence on the testator affixing his thumbprint on the will.
  35. Pw2 testified that he witnessed the deceased dictate the will dated April 29, 2013 in the presence of all beneficiaries. According to him, the deceased called all the beneficiaries and they were present when the deceased was bequeathing his property to the beneficiaries. Pw2 testified that he witnessed the testator affix his signature.
  36. In the absence of any evidence to demonstrate the validity of the will dated May 8, 2017, I find the same fails to meet the required threshold as to attestation as stipulated under section 11 of the [Law of Succession Act](#). I accordingly declare the will dated May 8, 2017 invalid.

**(b) I now move on to the next issue of whether the grant issued should be revoked.**

37. In the Matter of the [Estate of L A K – \(Deceased\) \[2014\] eKLR](#) the court held as follows: -  
Revocation of grants in governed by section 76 of the [Law of Succession Act](#). The relevant portions of section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.
38. Section 76 of the Succession Act provides as follows: -  
A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
  - a. That the proceedings to obtain the grant were defective in substance;
  - b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;



- c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
39. The objector seeks the revocation of the grant on the basis that the same was obtained through fraud and concealment of material facts.
40. From the petition filed by the petitioner, I note he had listed the four siblings as the beneficiaries of the estates of the deceased, further the chief's letter also describes the four as the beneficiaries of the deceased. The petitioner only describes two properties as forming part of the deceased estate as per the annexed will.
41. I have perused the petition and I have not seen any involvement of the beneficiaries in the process. The petitioner only makes a mention of the names of the children of the deceased. He has not adduced proof of service or any involvement of the beneficiaries in obtaining the grant. The objector stated that he was not aware of the proceedings filed with respect to obtaining the grant.
42. In the upshot, having found that the will upon which the grant was obtained was invalid I find the grant obtained herein is fraudulent and I accordingly revoke the grant issued to SKT on June 25, 2020.
43. From the foregoing, I allow the application for the revocation of the grant dated January 28, 2021 and find summons dated August 6, 2021, filed by KK spent.

**Final orders: -**

1. The will dated May 8, 2017 be and is hereby declared invalid.
2. The grant of probate to the estate of ETG made to SKT on June 25, 2021 is hereby revoked.
3. That the beneficiaries take out a petition for grant of probate with a written will be annexed dated April 29, 2013.
4. Each party to bear own costs.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2022.**

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**RACHEL NGETICH**

**JUDGE**

**In the Presence of:**

Kinyua/Martin – Court Assistant

Mr. Musungu for Executor

Mr. Njoroge holding brief for Mr. Kungu for Objector

