



REPUBLIC OF KENYA



**In re Estate of JNK (Deceased) (Succession Cause 3 & 4 of 2017  
(Consolidated)) [2022] KEHC 15696 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15696 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
SUCCESSION CAUSE 3 & 4 OF 2017 (CONSOLIDATED)**

**RM MWONGO, J**

**NOVEMBER 17, 2022**

**IN THE MATTER OF THE ESTATE OF JOSEPH NDERITU KINGORI (DECEASED)**

**RULING**

**Background**

1. The deceased died on February 6, 2017. At the time of his death he was the subject of a guardianship order, recorded by consent, in which his wife Mariana Njeri Gathenya, his daughter Jane Wangari Nderitu and son John Mwangi Nderitu were the legal guardians.
2. For purposes of giving a full picture, it is important to highlight that prior to the deceased's death, the deceased's daughter Jane Wangari Nderitu and Deceased's brother Patrick Gichuki Kingori filed Miscellaneous Family Cause No 2 of 2016, on 1<sup>st</sup> February, 2016. In that cause the petitioners sought to be appointed as guardians to the estate on the grounds that the deceased was suffering from gross memory impairment and was not in a state to manage his affairs.
3. By consent, this court appointed Jane Wangari Nderitu, Marianna Njeri Gathenya and John Mwangi Nderitu, respectively the deceased's daughter, wife and son, to be the deceased's legal guardians. The court also allowed withdrawal of the sum of Kshs 300,000/= for the maintenance of the subject of the guardianship order. In addition, the court allowed a sum of Kshs 200,000/= to be withdrawn monthly from the deceased's account for the maintenance of the deceased's wife.
4. Upon his death, two probate causes were filed being P & A No 3 of 2017 and P & A No 4 of 2017. These are now consolidated. Objections were also filed in respect of each petition, and the court directed that the objections be treated as cross-petitions to each other.
5. In P & A No 3 of 2017 Marianna Njeri the deceased's wife has filed a Petition for letters of administration intestate on 29<sup>th</sup> March 2017. She lists the following survivors of the deceased:
  1. Herself as widow
  2. Joyce Mugure Thuita and



3. Jane Wangari Nderitu (as daughters)
4. Jeremiah Muthee Nderitu and
5. John Mwangi Nderitu as living sons, and
6. Peter Kironji Nderitu (deceased) and
7. James Mukundi Nderitu (deceased) also as deceased sons

She lists the estate as valued at Kshs 100 million.

6. In P & A 4 of 2017 George Ndungu Kimani, Advocate, on 30<sup>th</sup> May 2017 filed a Petition for Probate of the Will of the deceased dated 6<sup>th</sup> March 2008. The Petitioner is named as the executor in the will. The Petition names the deceased's survivors as:

1. Mariana Njeri Gathenya (wife)
2. Joyce Mugure (Step Daughter)
3. Peter Kironji (Step Son)
4. Jeremiah Gathenya (Step Son); and
5. John Mwangi (Step Son) and
6. Jane Wangari Nderitu (as daughter)

The will of the deceased was also lodged with the petition.

7. As earlier noted objections were filed to each of the petitions which are being treated as cross-petitions. The Objector in Petition No 3 of 2017 is Jane Wangari Nderitu (deceased's daughter) who is also a beneficiary. The Objector in Petition No 4 of 2017 is Mariana Njeri Gathenya (wife), and Jane Wangari Nderitu is a beneficiary/Interested Party.

### **Documentation and Parties' Positions**

8. The parties agreed that the first order of business should be a hearing to prove the deceased's Will through viva voce evidence. Mr Ngunjiri for Mariana Njeri noted that the documents filed and to be relied on were:

1. Objection and affidavit dated 12<sup>th</sup> April, 2019;
2. Answer to Petition filed on 15<sup>th</sup> November, 2017;
3. Affidavit of Mariana Njeri filed on 15<sup>th</sup> November, 2017;
4. Affidavit of Joseph Gathendu filed on 15<sup>th</sup> November, 2017;
5. Medical Report by Dr Okonji annexed to Affidavit of Jane Wangari.

Ms Koki for Jane Wangari would rely on the following:

1. Affidavit dated 22<sup>nd</sup> November, 2017 by Jane Wangari
2. Will of the deceased dated 6<sup>th</sup> March 2008

Mr Kimani would be called to give evidence both as the Advocate who drew the deceased's Will and as Executor named in the Will. He also filed:



1. Answer to Petition objecting to intestate proceedings dated 2<sup>nd</sup> November, 2017 with affidavit of even date annexing the Will.

With all the foregoing in place, the hearing took place between 27<sup>th</sup> February, 2019 and 23<sup>rd</sup> May, 2019.

9. In Succession Cause No 3 of 2017, Jane Wangari Nderitu objects to the intestate petition on the ground that the deceased made a Will whose probate has not been concluded. Equally, the Executor has objected on the grounds that he is named as the Executor in the deceased's Will; that the Petitioner collected and failed to forward the Chief's letter to the Executor, and that it is fair and just that the deceased's Will be honoured.

10. In Succession Cause No 4 of 2017, Mariana Njeri Gathenya's objection dated 12<sup>th</sup> April, 2017 is premised on the following grounds: -

- “1. The deceased herein had no testamentary capacity as confirmed by the deceased's Doctor's medical report.
2. The deceased lacked capacity to make any testamentary disposition of his estate.
3. The deceased did not at the time of alleged execution of the will understand the effect of making a will and its effect.
4. The deceased was not as at the time of preparation and execution of the will sound memory and understanding.
5. The deceased lacked capacity to appreciate that he is morally bound to provide for all his dependants.
6. The deceased lacked understanding to appreciate his children to be his children within the meaning of the Succession Act.
7. The deceased did not have sufficient recollection of all his assets.
8. The deceased did have at the time of preparation and execution of the will lacked sufficient recollection of all his children and grandchildren.
9. The alleged distribution as per the alleged will is unreasonable and was made and or executed under mistake, fraud, coercion and undue influence by one Jane Wangari Nderitu.
10. The alleged will is invalid and cannot be admitted as a proper will, its contents having been disclosed prior to the deceased's death by dint of Naivasha H.C. Misc. Appl. No 2 of 2016 Jane Wangari Nderitu v Mariana Njeri Gathenya.
11. That it is only fair and just that the alleged deceased's will be rejected for lack of capacity and other grounds cited herein and the succession herein be treated as intestate succession.”

11. In his Answers to the Petition for the Intestate dated 2<sup>nd</sup> November 2017, G. N. Kimani who drew the deceased's Will stated, inter alia, at paragraphs 5 and 6 that he attended to the deceased prior to his death as a client, and he was: “aware that the deceased left a valid Will” with his office prior to his



death, and that “any allegation that the deceased died intestate or had an invalid Will is not valid” since his office was aware the deceased died testate.

12. This answer brings into sharp focus the issue of the validity of the Will. The first business of the court is therefore to determine whether or not the Will deposited in court is valid.

### **The Hearing: Proof of the Deceased’s Will dated 6<sup>th</sup> March 2008**

13. The appointed Executor of the Will, Advocate G. N. Kimani, testifying as EW1 and as the deceased’s advocate, said that he practices law in Nairobi and Naivasha. Further, that the deceased was his client from about 2004, and for many years before he passed on. He said that he drew the said Will at the deceased’s request. The Will was witnessed by a professional colleague Njeri Mburu who was his neighbour at St. Georges House, Parliament Road, Nairobi. The Will was also witnessed by two people John Mwangi ID No 981XXXX and Kariuki Gicheru ID No 1081XXXX, and was deposited in court for purposes of probate. The Will is dated 6<sup>th</sup> March, 2008.
14. EW1 stated that after the demise of the deceased, he read the Will out to the family. He said it was the deceased’s wish that he acts as the Executor. He produced the Will as Exhibit 1.
15. In later cross-examination by Mr Ngunjiri for Mariana Njeri, EW1 confirmed he had law offices in Nairobi and Naivasha. He said that the deceased came to Nairobi to have his Will written. He could not confirm that some of the deceased’s properties were left out of the Will, or that the deceased wanted some assets and vehicles left out; he said the deceased left out a business, viz, Shamba la Nyama, some specific vehicles and or Barclays Bank account. He stated that as Executor he would distribute only the estate contained in the Will.
16. EW1 stated that this was the only Will he had prepared for the deceased; that he notified parties of the Will when he found out about the deceased’s death; and that the beneficiaries congregated in his office on 2<sup>nd</sup> March 2017 for him to read it.
17. He said he lost contact with the attesting witnesses in that in 2008 there was no popular way of getting telephone numbers. One of the witnesses, John Mwangi, was a CDF Manager. He said the attesting witnesses did not record statements but they can be availed if the court so desired. The other witness Kariuki Gacheru went to India just the other day. He said the attesting witnesses are real people.
18. In further cross-examination, EW1 said he filed Miscellaneous Application No 2 of of 2016 for guardianship of the deceased where Jane Wangari was a guardian; and at the time the contents of the Will had not been disclosed; he said he acted in furthering the interests of the deceased whose property was under threat as the deceased was alive but ill. In that regard there was no conflict of interest on his part.
19. Mr Ngunjiri took the witness through a number of clauses in the Will, for example, Paragraph H where the deceased provided for Jane Wangari to take care of the deceased’s wife; and which provides for Jane Wangari’s son, whilst no property was assigned to the deceased’s wife. He also pointed out that he did not deal with the other grandchildren of the deceased in the Will as the deceased did not raise the issue. According to him, Jane Wangari was the deceased’s daughter and the others were Step-children. That since it was the deceased’s own choice to make those provisions, as counsel he did as the deceased wanted; and that he could not direct the deceased on what to write in the Will.
20. EW1 concluded that aspect of cross-examination by saying he was not under obligation to correct any impression the deceased had; that the driving seat in the writing of the Will was not in the hands of Jane Wangari; that there was no proof she took a driving seat; and that no beneficiary took the driver’s seat in making the Will.



21. In cross-examination by Ms Koki for Jane Wangari, EW1 said that as an advocate he could not vary a client's instructions as that would be wrong and unethical; that the Law of Succession does not require one to will all his property; that there can be partial testacy; that any property not willed is passed on through intestacy and that he was not in a position to dictate to the client to write a codicil.
22. In respect of Paragraph E of the Will, EW1 said it was not his place to ask the deceased why he was not giving property to other grandchildren; that the law has remedies if you are left out of a Will provided you tender evidence. He asserted that: the testator was sane and lucid when he wrote his Will; that he gave the instructions; that he drove himself to EW1's Nairobi office; that he came to Nairobi because he wanted confidentiality; that he came with his own witnesses; and that said he did not want his affairs known all over Naivasha.
23. In re-examination by Mr Wairegi, EW1 reiterated that the Will was authored in his office; that the testator declined to register the Will in the Lands office; that he, EW1, took notes on the Will himself by free hand then gave them to his secretary; that his file notes show that the two attesting witnesses were in his office; that he invited his neighbour advocate, Mary Njeri Mburu, to his office to witness the Will; Jane Wangari was not present; that she was not the driver of the Will; that it was not his role to infringe on his client's privacy by questioning him about his children; and that he learned of the deceased's death in a discussion with a colleague lawyer.
24. Separately, Mr Kimani applied that the estate's Executor under the Will should be represented by Counsel. The application was allowed and Mr Wairegi came on record. As such, the Executor availed Dr Max Manase Okonji to testify.
25. EW2, Dr Max Okonji, is a Consultant Psychiatrist. His qualifications include: a MBChB Degree, a Diploma in Psychological Medicine, MRC Psychology and FRS (Fellow of the Royal Society) of Psychologists. He adopted his statement dated 9<sup>th</sup> April, 2019 and produced it together with his Medical Report dated 22<sup>nd</sup> January, 2016. He testified that he attended to the deceased and recalled that the diagnosis he made of him was dementia and confusion.
26. In his witness statement, EW2 stated that he first attended to the deceased as his patient on 21<sup>st</sup> September, 2012 and diagnosed him with a history of memory lapse as evidenced in his medical report dated 22<sup>nd</sup> January, 2016. In that medical report, Mr Okonji recorded as follows concerning the deceased:

“I first attended to the above named on 21<sup>st</sup> September, 2012 when he presented with two years history of memory lapses, fatigue and poor appetite. The CT scan of the head done on 9<sup>th</sup> October 2012 showed age related atrophy of the brain (thinning of the brain). He was admitted to the Nairobi Hospital from 16<sup>th</sup> January, 2016 to 19<sup>th</sup> January, 2019 when he presented with gross memory impairment, aggressiveness, refusal to eat and refusal to take medication.

I made a diagnosis of dementia and confusion. He was discharged for home nursing care.

Opinion: Joseph Nderitu, aged 75 years suffers from dementia and confusion. He is not fit to manage his estate. He cannot take care of himself and needs 24-hour nursing care. He is not fit to make transaction and has not testamentary capacity.” (Emphasis added)

27. In cross-examination by Ms Koki, EW2 stated that he could not testify on anything that happened in the period before he examined the deceased; that what he observed may have started in 2010; that as of 22<sup>nd</sup> January, 2016, the deceased had no testamentary capacity; that by saying the deceased presented



with 2 years' memory lapses meant that he - the deceased - said he had memory lapse; that in 2012 he had memory lapses and that when he examined deceased in 2016, he had totally deteriorated to the point that he had no testamentary capacity.

28. In cross-examination by Mr Ngunjiri, EW2 said he prepared the report for the relative who brought the deceased to him in 2012 and also in 2016. He said the patient's condition was progressive and consists of mild stages to very severe stages; that the patient did not tell him he was being treated elsewhere; that the brain atrophy was identified through radiology. He further said it was not possible to establish when the brain atrophy, or thinning of the brain, started.
29. EW2 further testified that when one does an MRI even people with no memory problem may show thinning of the brain. He said thinning is based on X-ray tests and that it is not connected to lineage. He said the patient had no testamentary capacity in 2016, but he could not tell when the deceased lost testamentary capacity. He further said that when he saw the patient in 2012, he did have testamentary capacity; and that dementia, which the deceased suffered from, is a severe mental health condition characterized by loss of memory, disorientation in time, place, person, deterioration of executive mental functions - the functions that enable control of bladder, bowels, when to eat. For example, he said, the person can leave the house and then fail to locate it, they can get lost; they need 24 hour care, they suffer memory loss, siblings and properties are forgotten.
30. On re-examination EW2 reconfirmed that he first saw the deceased on 21<sup>st</sup> September 2012; that he was brought by his daughter; that on the first visit the diagnosis he gave was depression and he started him on antidepressants. He said the patient did have testamentary capacity at that time in 2012. He could not specify when testamentary capacity left the patient because he did not see him between the first visit in 2012 and the second visit in 2016, but something happened in between. He testified that the thinning of the brain - the brain atrophy - was age related and did not affect his testamentary capacity in 2012. He concluded that it can be deemed that the patient had testamentary capacity until the time he examined him and found he had none.
31. PW1 Mariana Njeri Gathenya, the Objector testified that she was the deceased's wife. They got married in 1966. They had children, namely: Joyce Mugure and Jane Wangari. They also had Jeremiah Gathenya, Peter Kironji, James Mukundi and John Mwangi. Peter Kironji and James Mwangi are deceased.
32. She testified in detail concerning the properties and assets acquired and held by the deceased, and stated that those mentioned in the Will were acquired by them.
33. PW1 said she lived with the deceased and that he had a long-term illness from about; 2005; that he would forget things; forget whether he had written cheques; forgot where he bought livestock from; would deny he issued cheques; that he would leave his car parked and people would ask him why he left it. In addition, she said her mother-in-law was also sick with memory loss which she thought was a family problem.
34. She recalled taking the deceased to Nairobi Hospital in 2012, and after a scan the doctor said he should not be involved in money transactions; that he took medicines but there was no change so he was taken for admission in Nairobi Hospital in 2016.
35. PW1 further testified that during his life the deceased never treated any of his children unfairly; and she herself never experienced any unfairness.
36. In cross-examination by Ms Koki, PW1 said she got married to the deceased in 1966 and he was jailed in 1968 for 7 years; was released and jailed again for 5 years until finally released in 1982 or 1983. She said she got married when she already had a child, Joyce Mugure, and that her other children namely,



Jeremiah Muthee, Peter Kironji, James Mukundi and John Mwangi were born when the deceased was in jail. She confirmed that the deceased was not their father. However, when the deceased came out of jail, he took all the children as his own. Jane Wangari, she said, was the only child she bore with the deceased.

37. With regard to her assertions of events that occurred from 2005 in her affidavit, PW1 said she had no medical evidence. This included, in particular where she stated in paragraph 7 of her affidavit of 17<sup>th</sup> November, 2017, that the deceased was of unsound mind in 2008, when the Will was allegedly made.
38. PW1 said she objected to the Will because it did not provide for the other children, other than Jane Wangari. She said that she heard of the Will for the first time in court after she had filed Succession Cause No 3 of 2017. She felt each child should benefit from the properties. As for burial, she was unaware of a burial clause in the Will; yet in 2008 she was living with the deceased and had a good relationship. She said the Will had not provided even for her and she wondered what she would live on. She said she wanted the Will invalidated and the property to be distributed as if there was no Will.
39. In re-examination, PW1 said that when the deceased came from jail he found the children at their house and he took them in as his own. She reiterated that the deceased was being told what to do by Jane Wangari; that the deceased needed home nursing care and that his illness started in around 2005. She wanted everyone to be provided for including herself as she was left with nothing.
40. PW2 Joseph Githiga Githendu testified as a friend of the deceased whom he knew from 1982. He adopted his affidavit evidence filed on 20<sup>th</sup> November 2017. He said the deceased's Will was never read to him; and that he noticed the deceased started getting unwell in 2005.
41. In cross-examination he said the deceased would buy things then forget what he bought. The deceased, had asserted, he bought and built the Maryland Plot, on which he built in 2014 - 2015; that he built it himself; that someone without a good mind can do such projects; that he did not know if the deceased was the father of the boys; but that the deceased involved him in all transactions, and would have told him about the Will. He conceded that he was not a doctor despite his assertion in his affidavit that the deceased lacked testamentary capacity. In re-examination, he said he did not know the persons who witnessed the Will.
42. DW1, Jane Wangari Nderitu is the deceased's daughter and a beneficiary. She adopted her affidavit of 2<sup>nd</sup> November, 2017. She testified that she got a letter about two weeks after deceased's burial from Mr Kimani informing her that there was a Will in his office made by the deceased. Before that she did not know of the Will. She went to the lawyer's office where the Will was read to them.
43. She testified further that in 2012, when her father got sick she took him to see a Psychiatrist; that this was on 21<sup>st</sup> September, 2012; and before that the deceased had no problems; that she is aware of the medical report of Dr Okonji; that she is the one who described to the doctor the deceased's condition, and that she got him a nurse. She asserted that she did not get involved in the Will, or advise on it, nor was she present when it was made. According to her, the deceased used to drive himself everywhere until 2016.
44. DW1 in cross-examination said she did not know the witnesses to the Will; that she thought they were independent because they were not from the family; that the deceased was sick in 2010 but his condition deteriorated in 2012; that her mother (PW1) left their house around 2016, and that it was she (DW1) who suggested that Joyce should stay with her father.
45. Shown provisions of the Will bequeathing her property, she said she did not think the deceased was being generous to her, or ungenerous to the other family members. She conceded that her siblings have



children but that the Will only made reference to her children. She reiterated her denial that there was a Will or that she knew she and her son were beneficiaries. Finally, she said that she did not participate in writing the Will.

46. In re-examination DW1 repeated that her father had been jailed for 7 years in 1968 and again from 1974 until 1982. Her siblings are in fact her step brothers and step sister; and that her mother left home in early 1973 and returned in 1984. She said that her parents did not live together in the last years of the deceased's life.
47. During the hearing, the court directed, suo motu, pursuant to the provisions of section 11(c) LSA and Rule 54 of the P&A Rules that evidence be availed by the witnesses who attested the Will for purposes of proof as to its legal formalities including the due execution thereof.
48. Consequently, the following additional witnesses testified: EW3 John Mburu and EW4, Kariuki Gicheru the persons who attested the deceased's Will. The court also allowed the deceased's counsel, EW1, to be recalled on the request of Mr Wairegi for the deceased's estate. After they concluded their evidence, counsel were granted leave to file brief submissions on the content and effect of the said evidence.
49. The additional evidence is as follows:
50. EW3, John Mwangi Mburu filed a witness statement which he adopted as his evidence in chief on oath. He testified that he knew the deceased as a business man, and that the deceased had approached him to witness his Will. He said he knew the deceased's lawyer, too, who also requested him to witness the deceased's will at Nairobi due to confidentiality. He stated that on 6/3/2008, he met with Kingori (deceased) at Naivasha and they went together to Nairobi, to St Georges House, Parliament Road where the lawyer's office, Mr George Kimani was on the first floor, and there was also another person there, one Kariuki Gicheru.
51. According to him, at the lawyer's office a lady, Njeri Mburu, was also there and was introduced by the advocate Mr Kimani, as a lawyer. They then witnessed the document signed by Mr Kingori who appeared to be in good health.
52. In cross examination, he reiterated that he, Njeri Mburu and Mr Kimani were in the office together when they witnessed the deceased sign the Will; that he found Kariuki Gicheru there; that he was to append his signature on a document; that Kingaori had asked him to get a friend of his to witness the Will; that the persons who were in the room were himself, Kariuki, Mr Kimani and the lady lawyer; that Mr Kimani showed him where to sign and he signed; that he was the first to sign, that he couldn't recall who was second and third to sign; that he signed after Kingori had signed; that he couldn't recall the registration number of the pick-up Kingori drove him in. He admitted that he just signed the Will but did not know what it said.
53. On being recalled by the objectors for further cross examination, John Mwangi Mburu testified as follows: that he was the one who invited Kariuki Gicheru to witness the signing of the Will; that he did this on request of the deceased with whom he had spoken the previous day; that he travelled with Kingori Nderitu, the deceased, for the signing; that he met George Kimani, Kariuki, and the lady lawyer (Ms Mburu) there; that Kingori Nderitu signed first, but he could not remember the sequence of signing by the others, other than that he signed after Kingori had signed; that he did not know the contents of the will.
54. EW4, Kariuki Gicheru, filed a witness statement which he adopted as his evidence in chief on oath. He testified that he was approached by his friend John Mwangi Mburu to join him to go and witness the will of Mburu's friend Joseph Nderitu. He left Ruiru, Kimbo, and went to Nairobi on 6<sup>th</sup> March



2008, where he joined John Mwangi and went to Advocate George Kimani's office. There, the advocate explained to him the purpose of his visit being to confidentially witness and sign a will. He signed his part in the presence of the will maker, Nderitu, the advocate Kimani, a lady Advocate called Njeri Mburu, and John Mwangi. He added that John Mwangi and the lawyer also signed their parts on the Will.

55. In cross examination by Koki Mbulu, Kariuki Gicheru stated that he did not know the testator, and confirmed that it was Mr Mburu who requested his company at the signing. He further said:

“Mr Kingori was not there when I signed. John Mburu was there”

In re-examination, EW4 reiterated that he did not know the testator nor Njeri Mburu EW5; and that by witnessing the will, he understood it to mean going through the will then appending his signature.

56. Clearly, EW4 did not witness the testator signing the will.

57. The Objector's complaint that the testator did not satisfy the mandatory provisions for the Will to be deemed as valid, is threefold. As expressed in the submissions, his reasons are as follows: First, that none of the witnesses saw the testator sign the Will; secondly, that that the two designated attesting witnesses were present to sign the will as opposed to witnessing the testator sign it; and thirdly, that the attesting witnesses were not attesting the execution at the request of the testator.

58. Having set out the evidence, the relevant statutory provisions as to validity of a will are as follows.

59. Section 11(a) and (c) LSA provides as follows on the validity of a will at signing:

“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 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”

60. Under that section, for a testator's will to be valid it must meet the following conditions:

- a. it must be signed by the testator, or affixed with his mark;
- b. his signature or mark must be so placed on the Will as to show an intention that it was intended to give effect to the will
- c. his will must be witnessed by two or more competent witnesses, each of whom must have seen the testator sign



- d. each of the witnesses must sign in the presence of the testator, though not necessarily in the presence of each other, and no particular form of attestation is necessary.

61. What does the evidence show as regards the signing of the Will?

**Has the testator signed?**

62. It is not disputed that the testator signed the Will. There is also no dispute also that the testator's signature is so placed as to show his intention that the Will should have effect. To that extent, there is no need for further enquiry on these points.

Have two or more competent witnesses signed the will each in the presence of the testator and did each of them see the testator sign?

63. For the answer to these questions, the totality of the evidence in chief, cross examination and re-examination has to be evaluated.

64. The two attesting witnesses – named as such in the Will – are EW3 John Mburu and EW4 Kariuki Gicheru.

65. Mr John Mburu EW3 stated, in cross examination by Mr Ngunjiri, as follows:

“I signed at Kimani's office.

All of us were there: Mr Kimani, Mr Nderitu, Kariuki and the lady Lawyer

.....

I signed after Mr Nderitu. First to sign was Mr Nderitu; then the second was either me or...

I can't recall who was second and third. I can't recall the sequence.....

Kingori signed first. I remember I signed after Kingori”

66. In cross examination by Koki Mbulu he was consistent and stated:

“Those who were present were: Nderitu, Kimani, myself, Deceased (sic) and the lady lawyer.

Mr Kingori, deceased, signed first”

67. Thus, Mr John Mburu EW 3 was present when the deceased signed the Will. His evidence clearly shows that he, too, signed after the deceased had signed. He was thus a compliant and valid attesting witness.

68. As already pointed out, EW4 Kariuki Gicheru, clearly stated that “Mr Kingori was not there when I signed.” From his own evidence therefore, EW4 was not present when the testator signed, contrary to the requirement of Section 11(c) *LSA*. Although EW5 Mary Njeri Mburu says that EW4 was present for the signing, his own evidence raises doubt as to the veracity of that fact. As such, he does not qualify as a duly attesting witness.

69. However, lawyer Mary Njeri Mburu EW5 was also present according to the evidence of all the other witnesses, and witnessed the signing by Mr Nderitu Kingori. Her evidence in her cross examination by Mr Ngunjiri is as follows:

“When I arrived, they were in the process of signing. I was confirming that they signed by witnessing their signatures....



The order of execution was Mr Nderitu first...I can't recall the order of signing.. I can't tell who was second; I was third.

What I recall is Mr Kingori signed first.....

I can recall the first to sign was Mr Nderitu then his two witnesses. I can't recall who of the two witnesses signed next....

.....

The two witnesses were there when Kingori was signing; in my presence, I saw the signing; Kingori signed in presence of Gicheru”

70. Mary Njeri recalled that Mr Kingori signed first, that the two witnesses were there when he was signing; and that they signed next. She recalls that she then signed third, but could not recall which of the two attesting witnesses signed first and which signed second.
71. Since EW4 Gicheru, stated that when the deceased signed he, Gicheru, was not present, his word has to be taken for it. Ultimately, although there were three people present with Advocate Kimani and the deceased when the signing ceremony was being done, only EW3 Mr John Mburu and Lawyer Njeri Mburu clearly stated that they saw the deceased sign and that they too signed in his presence.
72. Therefore, the attestation of the Will was complete in that John Mburu and Mary Njeri Mburu were able to testify that they were present when the deceased signed and that they too signed in his presence. Although she is not identified as an attesting witness in the Will, she nevertheless fulfilled that role, and she must be considered as a due attesting witness.
73. In addition, the executor George Kimani who was also the testator's lawyer, testified that he drew the will; that he was present when the testator signed it; and that EW 2, 3 and 4 were all present when the testator executed the will and the witnesses signed in his presence.
74. Section 14 of the LSA allows the evidence of an executor to be taken into account. The section provides:

“No person, by reason of his being an executor of a will, shall be disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.”

Thus, the evidence of Mr Kimani also is also relevant and can be relied upon in these proceedings.
75. The objector's other concern was that the attesting witnesses did not attest the execution of the Will at the request of the testator.
76. Mr Kimani, advocate for the testator testified that the testator came to Nairobi to write his will and brought his own witnesses because he did not want his affairs known all over Naivasha. John Mburu EW3 also stated that he was called by the testator to witness his will, and was driven to Mr Kimani's office by the testator for that purpose. Mr Kimani also witnessed the will of his client, the testator. Similarly, Mr Kimani brought his lawyer colleague Mary Njeri Mburu to witness the Will. She testified that she did so in the presence of the testator.
77. From the above, I see no evidence to suggest that the signing and attestation were not done at the request of, or in accordance with the testator's wishes.

### **Testamentary Capacity of the Testator**

78. Coming now to the main objections dated 12<sup>th</sup> April, 2017 of the Objector, Mariana Njeri Gathenya, in Succession Cause No 4, they essentially impugn the deceased's testamentary capacity from a medical



standpoint. The objections include that: the deceased lacked capacity to make any testamentary disposition of his estate; that he did not understand the effect of making a will and its effect; that at the time of preparation and execution of the will he was not of sound memory and understanding; that the deceased lacked understanding to appreciate his children to be his children within the meaning of the Succession Act; that at the time of preparation and execution of the will he lacked sufficient recollection of all his children and grandchildren; that the alleged distribution as per the alleged will is unreasonable and was made and or executed under mistake, fraud, coercion and undue influence.

79. Section 5 of the *Law of Succession Act*, deals with capacity to make a will, and of testation. The relevant provisions are as follows:

“5

- (1) ... any person who is sound of mind and not a minor may dispose of his free property by will ...
- (2) ...
- (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.” (Emphasis added).

80. The evidence on this aspect of capacity was given by EW2, Dr Max Okonji, a Consultant Psychiatrist who attended to the testator on 21<sup>st</sup> September, 2012. He stated that he had diagnosed the testator with a history of memory lapse in 2012; and dementia and confusion. He filed a medical report dated 22<sup>nd</sup> January, 2016. He stated that in 2012 the testator had a two year history of memory lapses fatigue and poor appetite. A CT scan done on 9<sup>th</sup> October 2012 showed age related atrophy of the brain. That when the testator was admitted to hospital in January, 2016, he presented with gross memory impairment, aggressiveness and refusal to eat and take medicine. A diagnosis of dementia and confusion was thus made. As a result, the doctor opined in 2016, that the testator is not fit to make transactions and had no testamentary capacity.

81. In cross-examination by Ms. Mbulu, EW2 stated that he could not testify on anything that happened in the period before he examined the deceased: He said that what he observed may possibly have started in 2010. He said the patient clearly had no testamentary capacity in 2016, but he could not tell when the deceased lost his testamentary capacity. He further said that when he saw the patient in 2012, he did have testamentary capacity.

82. In cross-examination by Mr Ngunjiri, EW2 said the patient’s condition was progressive and consists of mild stages to very severe stages; that the patient did not tell him he was being treated elsewhere; and that the brain atrophy was identified through radiology. He further said it was not possible to establish when the brain atrophy or thinning of the brain started.



## Statutory

83. The burden of proving unsoundness of mind lay on the objector. The law presumes the person making the Will to be of sound mind.
84. From the evidence availed, the testator wrote his will on 6<sup>th</sup> March, 2008, the date when the attestation was effected. There is no evidence that as at that date the testator had any problems with his mental state that affected his testamentary capacity. The doctor's evidence put to rest the question of testamentary incompetence when he said, in cross examination by Ms Mbulu, that he could not testify on anything that happened in the period before he examined the deceased, and that:

“What I observed may have started in 2010....”

85. Further in cross examination by Mr Ngunjiri, the doctor categorically stated:

“In 2012, he presented with two years memory lapse history. The condition is progressive.....

.....

I can't tell when the deceased lost his testamentary capacity. When I saw him in 2012, he did have testamentary capacity” (Emphasis added).

In re-examination, Dr Okonji reiterated that:

“He did have testamentary capacity at that time in 2012.....

that atrophy was age related – it did not in 2012 affect his testamentary capacity.”

86. In common law, the essentials of testamentary capacity were laid out in *Banks v Goodfellow* (1870) LR 5 QB 549, where 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.’

87. Mr Ngunjiri for the Objector, without expressing the principle, seemed to suggest that, given the circumstances under which the will was executed and in particular that the Will appeared to favour one child, there were “suspicious circumstances”. On the issue of suspicious circumstances, it was stated by Musyoka, J as follows *In re Estate of Julius Mimano (Deceased)* [2019] eKLR:

“On the other hand, the principle of suspicious circumstances has been stated and applied in several local decisions such as *Vijay Chandrakant Shah v The Public Trustee* civil appeal number 63 of 1984, *Mwathi v Mwathi and another* (1995-1998) 1 EA 229, *Susan Wangui Gakuba v Stephen Gakuba* (2016) eKLR, *Wanjau Wanyoike and four others v Ernest Wanyoike Njuki Waweru and another* High Court civil case number 147 of 1980, among others. According to the court in *Karanja and another v Karanja* (2002) 2 KLR 22 and *In the Matter of the Estate of James Ngengi Muigai* High Court succession cause number 523



of 1996, the burden of proof lies with the person alleging lack of knowledge and approval, and existence of suspicious circumstances.” (Emphasis added)

88. The burden of proving suspicious circumstances lay on the objector. Ultimately, no evidence has been availed by the objector or any other party that supports the objector’s claim that the Will was invalid on medical grounds; or that there was coercion, fraud or memory loss due to or connected with testamentary incapacity or frailty or illness of the testator.
89. The upshot of all the evidence is that the objector has not made out a case upon which her objections can be sustained. Accordingly, I find and hold that the deceased’s Will is valid. Therefore, it is hereby admitted to probate.
90. There were questions as to adequacy or otherwise of gifts to certain beneficiaries. There were also issues pointing to the fact that not all property of the deceased was captured in the Will. These are not matters relevant to the validity of the Will, and can be dealt with either under applications for dependency under section 26 *LSA* or by partial intestate succession where the will omits some property.
91. All in all, the Will dated 6<sup>th</sup> March, 2008, is hereby admitted to probate, and the objector application for its revocation or non-admission is declined.
92. Each party will bear its own costs.
93. Orders accordingly.

**DATED AT KERUGOYA THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**R MWONGO**

**JUDGE**

In the presence of:

1. Mr Ngunjiri - for the Objector
2. Mr Wairegi - for the Executor
3. Ms. Mbulu - for the Beneficiary
4. Quinter Ogutu - Court Assistant

