



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 26 OF 2012

IN THE MATTER OF THE ESTATE OF ABENGE LUBUBI (DECEASED)

JUDGMENT

1. The matter herein relates to the estate of Abenge Lububi, who died on 13th November 2011, according to certificate of death dated 7th December 2011, serial number 075086. Representation to his estate was sought by Gabriel Ambenje, vide a petition for grant of probate of written will, filed herein on 16th January 2012, in his capacity as executor of the last will of the deceased. According to the affidavit in support, sworn by the petitioner, on an unknown date, but filed herein on 16th January 2012, the deceased died testate, on 31st November 2011, having made a written will, dated 30th August 2011. The assets that he was said to have died possessed of are listed as Kakamega/Lugari/1463, three heifers, five bulls, handcart, household furniture, electronics and a mobile phone. He is said to have been survived by four sons, five daughters and two grandsons, namely Gabriel Ambenje, Victor Asimukha, Patrick Ambani, Michael Shikhoba, Clementina Mmbone, Catherine Mulari, Anne Injehu, Jacinta Ivelia, Polycarp Ambenje and Nisepha Ambenje. I shall hereafter refer to the petitioner as the executor. Curiously, letters of administration intestate were made to the executor on 7th May 2012, and a grant was duly issued, dated 16th May 2012.

2. A copy of the will of 30th August 2011 is attached to the petition. It is dated 30th August 2011 on the cover page, which describes it as the last will of Abenge Lububi, and it is said to have been drawn by the said Abenge Lububi. The will is not paginated, but the next page contains the details. It describes itself as a will dated 15th August 2011 by Abenge Lububi. It carried the usual revocation clause, and appoints Gabriel Ambenje, of Nairobi, as executor. It devolves two acres of Kakamega/Lugari/1463 to Michael Shikhoba, ½ acre to Nisepha Ambenje, 1.9 acres to Gabriel Ambenje and ½ acre to Polycarp Ambani. The cows are shared out, so that the four daughters share one, Patrick Ambani is given one cow and a small brown bull, Victor Asimukha three cows, three to Michael Shikhoba and two to Gabriel Ambenje. Four cows were to be slaughtered at his funeral, two to be given to Gabriel Ambenje, together with the handcart and the cart yoke. Patrick Ambani was directed to collect his furniture and other items from the house of the deceased at the time of the funeral ceremony. It was finally provided that no child or other person was to bring to the hotchpotch or account for any advance settlement or any other gift made to the them by the deceased during his lifetime. The execution and attestation clause indicates that the will was signed on 30th August 2011, by Abenge Lububi, in the presence of Oliver Kadenge and Elisha Iminy, and a third person from the law firm involved in the preparation of the will.

3. The executor then filed a summons on 22nd June 2015, dated 22nd April 2014, seeking confirmation of his grant of 16th May 12. He lists the children of the deceased as Gabriel Ambenje, Patrick Ambani, Victor Asimukha, Jacinta Evelia, Anne Injehu, Catherine Mulari, Clementina Mmbone and Michael Shikhoba. Nisepha Ambenje and Polycarp Ambenje are listed as dependants. Distribution is proposed as per the will of 30th August 2011.

4. Patrick Ambani Ambenje and Victor T. Ambenje filed a summons for revocation of grant on 18th May 2016, of even date, seeking revocation of the grant made to the executor. I shall refer to the two as the applicants. They complain that the executor did not consult the family before filing for representation, their consent was not sought.

5. The executor reacted to the revocation application by filing grounds of opposition on 1st November 2016, of even date, where he argues that the application is malicious and fictitious, and the same ought to be dismissed. At the same time, he filed an affidavit sworn on 1st November 2016, where he says that the deceased did not trust the applicants, for they had assaulted him at some point, and were charged in court in Eldoret over the same. He asserts that the deceased had made a will dated 30th August 2011.

6. After the applicants engaged an advocate to represent them, Mr. Shifwoka, they filed a second revocation application, dated 8th October 2018, and filed herein on 9th October 2018, seeking revocation of the grant in force, and the making of a fresh one. The grounds upon which the application was premised was that there was non-disclosure of all the beneficiaries, the will was forged or fraudulent, the proceedings to obtain the grant were defective, the executor was not a fit person to administer the estate, and the circumstances merited that an opportunity be given for representation to be obtained through a proper process.

7. In their joint affidavit in support, the two applicants that aver the deceased had died on 13th November 2011, at the Lumakanda District Hospital, of hypoglycemia. They state that the deceased was illiterate, for he had had no formal education. They further aver that after his death, and throughout the process of mourning and funeral, no disclosure was ever made of an apparent will. They express surprise that the deceased was now being said to have had made a written will. They aver that the said will was never at any point disclosed or read to them. They aver that the alleged will and the processes that followed after its making were all meant to perpetuate frauds. They state that their attention to the existence of the cause was brought by a neighbour who had happened to come to court and heard the matter being called out. They assert that the proceedings were premised on an illegality and material defect to the extent that they were founded on a will which they describe as forged fraudulent or false, for the deceased neither knew how to read or to write. They assert that the executor and his cronies were trying to inherit the entire estate by dubious means. They also argue that the executor was not a fit person to administer the estate as he was dishonest, cruel, fraudulent, violent and divisive character. They state that he has previously used violence on them as he tried to have an ironclad hold on the estate. They assert that they were the ones who took the deceased to hospital, and have attached documents to support that assertion. They further aver that the rest of the family was in their support, and have attached documents to support that too.

8. In reply to the revocation application, vide an affidavit sworn on 22nd October 2018, the executor avers that the will of the deceased was introduced during the mourning period, and, therefore, everyone was aware, from that date onwards, about how the estate was to be handled. He states further that prior to the making of the will, the deceased had called all his male offspring, two of his daughters, one of his wives and one of his brothers, and had subdivided the property in their presence, and he thereafter indicated that he would be making a will to that effect. He asserts that he was appointed executor of the will that the deceased eventually made, which is the subject of the instant proceedings. He thereafter petitioned for representation of the estate, to have the estate devolved to those named in the will, that is to say himself, Michael Shikhoba, Nisepha Ambenje, Polycarp Ambani and four daughters of the deceased. The first applicant, Patrick had been allocated some movables, while Victor was not given anything. He averred that the two applicants had benefitted from land from the deceased situated elsewhere. On the making of the will, and the fact that the deceased was illiterate, he argues that illiteracy does not make a person unqualified to make a will. In any case, he argues, he had interacted with Europeans and he could sign documents. He points out that the applicants were making varied claims, that they learnt of the probate proceedings from a Fabian, and now they are talking of a Sylvester. He argues that although the applicants were claiming the will was not valid, they had not filed a formal application seeking its invalidation. He asserts that since the applicants have not been named in the will, they had no locus to bring the application. On his fitness to administer the estate, he says that it is the applicants who had a violent temperament, which manifested itself when they assaulted the deceased, and even him on several occasions. He has attached documents to support that assertion. He has also attached a certificate of good conduct from the police, as evidence that he was a person of good standing. He avers that the procedure for obtaining a grant of probate was different from that for intestate succession. He states that the two applicants were present when the will was read to the mourners.

9. Filed simultaneously with the revocation application is a summons dated 9th October 2018, premised on section 26 of the Law of Succession Act, Cap 160 Laws of Kenya, for reasonable provision for the persons excluded from benefit from the estate of the deceased herein. It is averred that there had been no disclosure that the deceased had left a will. When the will was eventually disclosed, had not made provision for the applicants, Patrick Ambenje and Victor Ambenje, and others, for no apparent reasons. It is averred that the distribution in the will was contrary to the law, including customary law. The applicants assert that the same did not take into account the fact that they contributed in the acquisition of the property. The applicants aver that the deceased had no formal education, and did not, therefore know how to read or write. When he died, on 13th November 2011, he was not survived by a spouse, but by eleven adult children, that they have listed in their affidavit, sworn on 9th October 2018.

10. The executor replied to the application, under section 26, by an affidavit sworn on 22nd October 2018. He asserts that the will was valid, and had set out the beneficiaries, who did not include the applicants. He asserts that there was no reason to itemize all the survivors of the deceased in the petition as the deceased had died testate, and a full disclosure of the survivors was only required in cases of intestate succession. He avers that since the applicants had not challenged the will successfully then their case had no value. He avers further that the deceased had discretion to bequeath his property to anyone as he pleased, and there was no obligation to give the applicants the land in question. He asks for strict proof of the claimed by the applicants that they had contributed to the acquisition of the land, saying that, in any event, that did not place any obligation on the deceased to give them any share in the land. He argues that if they had so contributed then they should have treated their contribution as a debt to the estate, and they should have placed their claim before the executor, for consideration, before the devolution of the estate, which they had failed to do.

11. The applicants have also responded to the summons for confirmation of grant dated 22nd April 2014. They largely repeat their previous averments in the applications for reasonable provision and revocation of grant. They identify the survivors of the deceased to be his sons and daughters, named as Patrick Ambani, Victor Thoren, Clementina Anoda, Agnes Bulekhani, Consolata, Catherine Khavai, Merceryne Khayera, Michael Shikhoba, Ann, Jacinta and Gabriel Shimwana. They propose that the land be shared out in a manner where the four sons take one acre each, with the remaining one acre being shared out equally between the seven daughters. They ask that the grant be made to them, and confirmed.

12. Directions were given on 9th October 2018. The application dated 18th May 2016 was withdrawn, and it was directed that the applications dated 22nd April 2014, 8th October 2018 and 9th October 2018, be disposed of simultaneously, by way of affidavit and oral evidence.

13. The oral hearing commenced on 30th April 2019. The first applicant, Patrick Ambani Ambenje, was the first on the stand. He testified that he was not informed before the succession proceedings were initiated, for the executor did not bring any documents to him to sign. He said that he heard about the pendency of the proceedings from neighbors, Fabian and Saleh, who had come to court on a different matter, when they heard the instant cause being called out. He came to court on the date that the executor had been given, but when the executor saw him, he disappeared, and the matter was adjourned. It was after that they lodged the first revocation application. He accused the executor of taking all the documents of the deceased, adding that he never told them that the deceased had made a will. He asserted that the deceased was illiterate, and that it was he who was giving him adult literacy. He also stated that the deceased was ailing, as he had a renal problem and hernia. He then described how the deceased had ancestral land at Idakho Location, and land that he bought at Usirwa village. He then bought land at Lugari, which, when he had difficulties paying for it in full, the witness stepped in, by taking a loan. He said he was, the witness, then working for the national government in the aerodromes department. He asserted that he had a good relationship with the deceased. He said the deceased never told him that he had made a will, adding that the only thing he told him was that if he got money, he would subdivide the land. He asserted that the deceased never travelled to Nairobi, for, after his discharge from hospital, he remained at home, until he died. He

stated that at the time he was alleged to have made the will, in August 2011, the deceased was in hospital, and that he was with him. He said that he could not travel to Nairobi, for he had a catheter. He asserted that the signature on the will was not that of the deceased, for he could not sign any documents. He also stated that he did not know the persons who were said to have witnessed as he signed the alleged will. He said that he was the one who raised and educated the executor, but added that the executor had changed, and had assaulted him on two occasions. He stated that if they had sat as a family they would not have made him an administrator, for he was a person who liked getting or having everything, and, therefore, he could not be trusted to administer the estate. He said that Michael Shikhoba was his brother, while Nisepha was a son of the second applicant, Victor, while Polycarp Ambani was his own son. He asserted that he did not agree with the distribution proposed by the executor, saying that the deceased had four sons and daughters. He said that he had placed his own proposal before the court, and he urged the court to adopt it, saying that he wanted everyone in the family to get a share. He urged that the grant made to the executor be revoked, and another be made to him.

14. During cross-examination, he said that he was the first born son of the deceased. He was cross-examined at length on his claim that he was the one who had raised the executor and catered for his education. He stated that the land in question was family land. The deceased had been given another piece of land by his own father, which he then sold, and bought the disputed land. He said that when the deceased started ailing, he decided to subdivide his land, which he did. He gave to each son one acre, and said that the remaining land was for his daughters. He, however, said that the deceased did not reduce that into writing. When the cross-examination resumed after a break of two months, the witness said that the deceased had not distributed his land before he died, and that he never participated in any such subdivision. He said if the land had been distributed, they would not be in court. He stated that the deceased had thirteen children, and two had died. He asserted that the deceased was illiterate, although he had taught him to sign a signature. He stated that the deceased was in hospital when it was alleged he had made a will. He stated that he contributed to the purchase of the land, and that he had evidence of the purchase, which he had not filed. He said Michael Shikhoba was on the land, having moved into it after the deceased died, for it was not given to him by the deceased, and he was not aware that Michael had been sold a portion of the land by the deceased. He asserted that the portion of the land where he settled had been given to him by the deceased. He stated that he was challenging the validity of the will through the revocation proceedings.

15. At re-examination, he stated that the executor never sat them down and read the contents of the will to them as a family of the deceased, and, therefore, none of the members of the family knew about the will. He said he was with the deceased in hospital at Eldoret, and there was no way the deceased would have left his hospital bed and travelled to Nairobi to sign a will. He said he was not aware of any reason why the deceased would exclude him from benefit. He said further that he never told him, as his first born, that he had made a will. On the allegation that he and his co-applicant had assaulted the deceased, and that there was a criminal case at Eldoret on the same, he denied, saying that they were acquitted. On the sale to Michael, he said he was unaware of it, had never seen copy of any sale agreement between the deceased and Michael, and there was no clause in the alleged will which stated that Michael was being allocated the land he had bought from the deceased. He said Michael was settled on the land, and that he had put up a house on the land just as boys do. He asserted that, as at the time of his death, the deceased had not distributed his land, and there was no documentary proof that he had. He said he never was on the land with the deceased distributing it.

16. The second applicant, Victor Thoren Ambenje, testified next. He explained that he, the first applicant and the executor were all sons of the same father and mother. He said that they were never notified when the executor initiated the succession proceedings, adding that he did not sign any consent to the petition for representation. He also stated that he was not aware that the deceased had signed any will, and the deceased had never informed them that he had made one. He was also unaware that the deceased had travelled to Nairobi to sign a will, saying that he was sick then, and he could not have travelled to Nairobi. He also said that he did not know how to read or write, and that it was the first applicant who was trying to teach him. He stated that when the deceased fell ill, it was he and his co-applicant who took him to hospital at Eldoret, and met his medical bills there. He said that he loved his children equally without discrimination. He added that the deceased sold his inheritance from his parents, that is the ancestral land at Ikolomani, and moved to Lugari, where he bought land. He stated that he did not have enough money, and it was the applicants who met the balance, by topping up. He stated that he and his co-applicant were outside the land, and it was Michael Shikhoba and the executor who were on the land. He said that the deceased lived on the land, and cultivated it. He said that he and his co-applicant were not bad persons, saying that it was the executor who knew approached them to agree on the distribution of the land. He asserted that the executor was biased against them. He stated that they made efforts to have a sitting with the executor, through the church and the clan, but he was adamant in his refusal to cooperate. He said the executor was hostile to them, and whenever they approached him, he attacked them with machetes and assaulted them, and that they had made many reports to the police. He said that even at the burial of the deceased, the executor used the police to bar them from viewing the body of the deceased. He stated that the executor could not be a good administrator due to his violent ways.

17. During cross-examination, he described himself and his co-applicant as the older children and the leaders of the family. He stated that he was not aware whether the other children had issues with the will of the deceased. He stated that he was certain that the deceased had sold his Ikolomani land, before he moved to Lugari. He said that he lived on P/No. Kakamega/Lugari 1464, which he had bought from the same person who had sold Kakamega/Lugari/1463 to the deceased, and which measured three acres. He said that the family never sat to agree on the administrator. He said that they involved elders because there was a dispute. He said that he did not agree with the will. He said that he was not aware that the will was read at the burial of the deceased. He further said that he was not aware that the deceased had distributed his property before he died. He asserted that the deceased was illiterate, although he used to work for a white settler. When shown copy of an identity card that had been issued to the deceased, he confirmed that there was a signature on it, but he asserted that it was not the signature of the deceased, although he conceded that he was not a handwriting expert. He said that he was unaware that the deceased had land at Kitale. He denied being given one acre by the deceased, and then buying two acres from the person who sold the land to them.

18. During re-examination, he stated that the executor had not listed any other property of the deceased, nor given details of any such property. He also said that the pension details were also not given. He also said that he had not been shown any documents to prove that he had been given land by the deceased, and asserted that he was not given any. On the cause of death, the witness said that the death certificate placed on record by the executor indicated that the deceased died of hypoglycemia, while they had filed a discharge summary, dated 19th July 2009, which indicated that he had urinary problems when he was admitted in hospital. On clause 7 of the will, he said the deceased did not tell him to remove his items from his *boma*, saying that the deceased never chased him away. He said the family never sat to have the will read, neither was it read at the funeral. He said the sale agreement, dated 16th July 1982, was in respect of Kakamega/Lugari/672, while the property in dispute was Kakamega/Lugari/1463.

19. The executor took to the witness stand on 23rd June 2021. He conceded that the applicants were his siblings, and that the deceased had

other children besides the three. He described Oliver Kadenge as a witness to the will of the deceased, and that he lived in Nairobi. He described him as his neighbour in Nairobi. He said that Elisha Iminyui was also his neighbour in Nairobi. He stated that the deceased had no residence in Nairobi. He confirmed that he took him to an advocate in Nairobi, although he did not sit with him and the advocate, as they made the will. He said he only came to have possession of the will after the deceased died, although he had mentioned to him, before he died, that he had made a will, and that he had appointed him as executor. So, when the deceased died, he went out to look for the advocate who had made the will. He testified that he was a beneficiary under the will. He said that 30th August 2011 was when he took the deceased to the advocate. He said that the deceased had insisted on travelling to Nairobi to get an advocate, and he arranged for his travel. He went to his Nairobi residence, and randomly picked on one of the city advocates, known as Kennedy Arum. He said that he did not have proof that he travelled. He said that the will bore the stamp of the law firm of the said advocate. He said that the two witnesses were not from near Lugari, and he did not know whether they were acquaintances of the deceased before 30th August 2011. He said that he was not sure whether they had met the deceased before then, although they were his neighbours in Nairobi, and the deceased used to visit him in Nairobi. He said he did not know what the two witnesses did for a living. He denied introducing the witnesses to the deceased, saying that he only introduced the deceased to the advocate. He said that, according to the certificate of death, the deceased died of hypoglycemia, although no postmortem was conducted to establish the cause of death. He stated that he died, at Lumakanda, three months after making the will. He said that he died at the age of eighty years old, and that he was unaware that he had been operated on his hernia. He said he was unaware that he had high blood pressure, diabetes, and other illnesses, but he did know that hypoglycemia had something to do with blood sugar. He said that he knew that the deceased had been admitted for a long period of time. He said that he understood that urinary retention was a problem associated with old people, they might wear diapers or have catheters fitted, which could present them with problems travelling. He said that he did not have a receipt from Arum, advocate, as he was not the one who had instructed him. He also said that he did not have a statement from the advocate, adding that he was not obliged to call him as a witness. He said he did not obtain consent from his brothers, because such consent was not necessary. He stated that the deceased had land at Kitale, and he had mentioned that in the presence of all the children. He said that there was no written evidence that he had made gifts of land to the other children during his lifetime, although he had stated so in a meeting. He conceded that the will did not mention any *inter vivos* gifts being made to any of the children. He stated that all the children were involved in settling the deceased's medical bills, and the first applicant was the conduit through which such bills were settled. He stated that he had no evidence that he sent money to the first applicant to settle medical bills in relation to the deceased's hospitalization or medical bills. He asserted that he could not keep records nor file claims for expenses on his father's medical care. He said that the deceased used to work as an institution cook at Hillcrest, but he said he did not know why his pension was not mentioned in his will. He accused the applicants of abandoning the deceased, even though they lived in Lugari, closer to him, while he was in Nairobi. He mentioned that they even assaulted him, and that there was a criminal case filed at Eldoret against them. He conceded that he and the applicants were not on good terms, and there were many assault cases between them pending at Eldoret. He confirmed that Nicephar and Polycarp were grandchildren of the deceased, while Michael was a son. He said that the deceased did not explain in his will why he did not provide for the applicants.

20. At the close of the oral hearings, on 23rd June 2021, I directed the parties to file and serve written submissions within thirty days. By the time the matter was mentioned, on 27th September 2021, only the executor had filed written submissions, which I have read through and noted the arguments that he has made in them.

21. There are three applications up for consideration, each seeking something different was the other, but they are all inter-related. The earliest in time seeks confirmation of the grant on record, which is of letters of administration intestate, although it is alleged that the deceased had made a will, where he had appointed an executor. The second in time, is for revocation of the said grant, on various grounds, the principal one being that the will, on which it was premised, was not a genuine or valid will. The third application is for reasonable provision, should the court be persuaded that the impugned will is valid, and confirms distribution of the estate on its terms.

22. I will start by looking at the question of validity of the subject will, for determination of that question will pave way for determination of the questions that arise with respect to the other issues. If I find that the will is valid, then there would be basis for me to consider the application under section 26, for an application for reasonable provision has to be considered before the grant is confirmed, and instant will has not provided for some children of the deceased or has made provisions to some of them which do not appear reasonable. Once I make provision, should I be persuaded that I should, then I should go on to determine the application for confirmation of grant, taking into account the reasonable provision for the applicants and others that I will have made under section 26. Should I find that the will is invalid, I should proceed to revoke the grant made based on it, as its making would have been premised on a nullity. After the revocation, I may or may not appoint administrators in intestacy. Where I elect to appoint administrators, I may or may not go on to confirm their grant. The decisions that I could make with respect to the two, above, would depend, of course, on my assessment of what would be just, of the two options open to me. Of course, if I take the revocation route, there will be no need to consider the application for reasonable provision, as I will, thereafter, proceed, not on the basis of the will, which had excluded some survivors from benefit, but rather the intestacy provisions, where I will have to cater for every survivor, unless they have renounced or waived or varied their entitlement in intestacy.

23. The deceased herein died in 2011, long after the Law of Succession Act, had come into force in 1981. His estate is, therefore, for administration and distribution in accordance with the Law of Succession Act. The will, the subject of these proceedings, is written, and the law on written wills is section 11 of the Law of Succession Act, which provides as follows:

“11. 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.”

24. From these provisions, one of the key requirements is that the written will must be signed by the maker, also known as the testator, in this case the deceased herein. Is the document before me signed by the deceased? The written will on record does bear a signature, in the clause meant to be for execution by the maker of the will, who, in this case, is Abenge Lububi. Based on that, one can conclude that the document was, on the face of it, properly executed by the person said to be its maker.

25. The other vital requirement is that the same ought to be signed by the deceased in the presence of two or more independent and competent witnesses, who shall thereafter also affix their signatures. Was the document before court signed by the deceased herein in the presence of two or more independent and competent witnesses? The written will on record bears three other signatures, below that of the purported testator. The first signature is of an unidentified person, presumably he or she is from the law firm of Kennedy Otieno Arum & Co. Advocates, since the stamp of the said law firm is superimposed over the signature of that person, or it is the signature of the attesting witness which is affixed just next to the rubberstamp of the firm of advocates, and I presume it is either of the advocate or other person in that firm, who was responsible, if at all, of having the will drawn and executed. The second signature is purported to be of Oliver Kadenge, of 1446-00800 Nairobi. The third signature is of Elisha Iminyini, of 35 Shinyalu. Again, on the face of it, it can be said that the execution of the written will on record, by the testator, was properly attested by two or more competent witnesses, who subsequently appended their signatures.

26. The other consideration is whether the document itself was intended to be the will of the deceased. A will disposes of the estate of the maker, or, carries directions as to how the maker would like their property distributed upon their demise. The question is, is this what the document on record purports to do? The written will on record has all the hallmarks of a professionally drawn will. It declares who the maker of the will is, carries a standard revocation clause of previous wills and codicils, appoints an executor, and distributes the assets that the maker intends to distribute to named beneficiaries. It largely, therefore, on the face of it, passes the test that it must have been intended to be the will of the person who made it. On the face of it, it appears to be a valid testamentary document for it appears to meet all the requirements of section 11 of the Law of Succession Act.

27. However, the signature on the will said to be of the deceased is contested by the applicants. They argue that the deceased was illiterate, for he had never gone through a formal programme of education, he did not know how to read or write, and, therefore, he could not have signed any document passing as his will and testament. The first applicant appeared to undermine that argument, by deposing in his affidavit, and also stating in his oral testimony, that he had taught him as an adult learner, through adult literacy, to read and write, and to even sign. The executor confronted the applicants with a copy of the national identity card issued to the deceased, which bore a written signature, as opposed to a thumbprint, and they then denied it, saying that even that signature, in the national identity card, without denying the authenticity of the national identity card itself, was not the signature of the deceased. Of course, the best way to impeach a signature is by having it compared with the known or authentic signatures of the deceased, by a document examiner or handwriting expert, who then prepares a report which he then presents in court, where he is exposed to cross-examination on the contents of the report and his findings. That was not done here. See *In re JMN (Deceased)* [2005] eKLR (Kooime J) and *In re Estate of James Mwangi Gakure (Deceased)* [2019] eKLR (Musyoka J).

28. I claim no expertise on matters relating to handwritings, and although the opinion of a handwriting expert or document examiner is not final, for it amounts to mere opinion evidence, and the court can make its own independent opinion and conclusions on the matter, based on eyewitness evidence, such evidence is still very crucial. See *Elizabeth Kamene Ndolo vs. George Matata Ndolo* [1996] eKLR (Gicheru, Omolo & Tunoi JJA). It is not enough to merely allege that a certain signature was made by a certain person or was not made by him. The parties making such arguments and counter-arguments ought to take the further step of getting the genuine signatures of the person in question, and having them compared by the experts, and reports filed for consumption by the court, to assist the court decide the matter one way or the other. In this case, the burden was on the executor to take that further step. It was he who is relying on the will in question, the signature on the document has been contested, by the applicants who claimed that the deceased was illiterate, and could not sign in writing, and suggested that he could only thumbprint documents. It was incumbent on the executor, therefore, to provide proof that the deceased could in fact write and sign documents, by collecting his known writings and signatures, and turning them over to a document examiner or handwriting expert, to compare them with the signature on the alleged will, which is purported to be of the deceased, for authentication. That he did not do. The principle in law is that he who alleges must prove the fact he alleges. The applicants alleged that the signature on the alleged will was not that of the deceased, that suggested that the burden was on them to prove so. However, they took the position that the deceased had no formal schooling and, therefore, he could not write. That was not seriously contested by the executor, he merely relied on a copy of what he said was the national identity card for the deceased, which bore his signature. By alleging that the deceased was illiterate, the applicants effectively shifted the burden on proof to the executor to satisfy the court that the writing in the alleged will, claimed to be the signature of the deceased, was in fact his. He should have done so by presenting a report by an expert. He has not done so, and, therefore, I have no material from which I can find one way or the other that the signature in that document was that of the deceased.

29. Of course, the other way of establishing that fact would have been by him calling the persons who were present at the event of the execution of the will by the deceased. Being present at the execution of the will is so that they can participate at its authentication by way of execution. More importantly, so that they, those witnessing the execution, can provide evidence and testimony, should the authenticity of the execution or the signature be called to question, of the validity of that exercise. It was incumbent on the person relying on that will to call the attesting witnesses, that is the three individuals who appended their signatures to the alleged will as witnesses to its execution by the deceased, to come and attest to the court, that they were indeed present at execution of the will, and that they saw the deceased sign the will, and that the signature on the document, purported to be his signature, was in fact appended there by him, and it was his signature. See *Elizabeth Kamene Ndolo vs. George Matata Ndolo* [1996] eKLR (Gicheru, Omolo & Tunoi JJA). The attesting witnesses are not present at the making or execution of the will for the sake of it, to lend authenticity to the document by merely signing it. No. Their more critical role is to provide evidence in court, in the event the execution of the document is contested, like in this cause. Their role does not end with them witnessing the execution of the will by the maker, on the day the will is made, for the more important role comes later, when the maker dies, and the authenticity of the execution of the will is called to question. They are expected to attend court, to apprise the court on what exactly happened on the day it is alleged that the deceased signed the document placed before the court as his alleged will. See *In Re Estate of Chandrakant Shamjibhai Gheewala (Deceased)* [2006] eKLR (Kooime J) and *In re Estate of Julius Mimano (Deceased)* [2019] eKLR

(Musyoka J). Of course, the law does not require that the attesting witnesses be persons who were known to the family, or even trusted friends of the deceased, they could be perfect strangers to the family. The only requirement is that they would be available at the critical time when they are required. See *In Re Estate of GKK (Deceased)* [2013] eKLR (Lenaola J), *In re Estate of Julius Mimano (Deceased)* [2019] eKLR (Musyoka J) and *In re Estate of Kipkosgei arap Moita (Deceased)* [2020] eKLR (Omondi J).

30. The other reason why the executor should have called the attesting witnesses is that the applicants have sought to raise doubts as to whether the deceased travelled to Nairobi at all around 30th August 2011, when it is alleged that he signed the will, as he was in hospital at Eldoret, with renal problems, and he had a catheter fixed. They assert that he could not have travelled to Nairobi at all due to that. That argument suggests that the alleged event, of execution of the will, never happened, and that the signature on that document was not made by the deceased, for he never was in Nairobi at the time, and it was a forgery by whoever claims that the deceased signed the will. It was incumbent upon the executor to call the attesting witnesses, to confirm whether the deceased did travel to Nairobi, and whether they did appear before an advocate, who prepared the will in question, which was then signed by the deceased in their presence, and that they did also sign it as attesting witnesses.

31. However, the test of validity is not limited to the requirements of section 11 alone. There are other provisions of the Law of Succession Act to be reckoned with. One of them is the capacity of the maker to make the will; and the other relates to the circumstances under which the will was made. The applicants appear to ground their case on these.

32. I will start first by considering the issue of capacity. The applicants suggested that the deceased was extremely elderly, his age was put at eighty, and that he was burdened with various illnesses associated with old age, such as diabetes, high blood pressure, hypoglycemia and urinary problems among others. They did not come out clearly, but they appeared to suggest that due to that great age and the illnesses, he could not have been in a frame of mind to make a valid will. Capacity to make a valid will is predicated on the understanding that the maker of the will knows what he is doing, that is making a document regarding disposal of his property, upon his death, amongst the persons that he is obliged to provide for, due to kinship ties between him and them. See *Banks vs. Goodfellow* [1870] LR 5 QB 549 (Cockburn CJ), *Christopher Maina Kimani vs. Josephine Wairimu Ngari & another* [2016] eKLR (Mativo J), *In re Estate of Sadrudin Ebrahim Jiwani (Deceased)* [2019] eKLR (Machelule J), *In re Estate of Kariuki Ngunyu (Deceased)* [2019] eKLR (Ngaah J) and *In re Estate of Wilfred Koinange Gathiomi (Deceased)* [2020] eKLR (Meoli J). Knowledge about what the will maker is doing may be impaired by illness, old age, drink or drugs. See *Rosemary B. Koinange (suing as legal representative of the late Dr. Wilfred Koinange and also in her own personal capacity & 6 others) vs. Isabella Wanjiku Karanja & 2 others* [2017] eKLR (Waki, Makhandia & Ouko JJA), *In re Estate of Anthony Paul Pape (Deceased)* [2018] eKLR (Thande J), *In re Estate of Augustine Muita Kahare (Deceased)* [2019] eKLR (Musyoka J) and *In re Estate of Maria Mantzini (Deceased)* [2020] eKLR (Ali-Aroni J). These factors are only relevant if they affect or distort the maker's capacity to understand what he is doing. Therefore, being gravely ill, or very old, very high on drink, or drugs is not enough, so long as the same does not impair the capacity to understand what one is doing. See *Erastus Maina Gikunu & another vs. Godfrey Gichuhi Gikunu & another* (2016) eKLR (Makhandia, Ouko & M'Inoti JJA), *In re Estate of Kariuki Wahome Njange (Deceased)* [2019] eKLR (Ndung'u J), *In re Estate of Kariuki Ngunyu (Deceased)* [2019] eKLR (Ngaah J), *In re Estate of Abdullahi Nasir Obwar Owiti (Deceased)* [2019] eKLR (Onyiego J), *In re Estate of M'Thirika Mburire* [2019] eKLR (Limo J) and *In re Estate of Krishna Kumar Sembi (Deceased)*[2020] eKLR (Achode J). The applicants did not lead any evidence that would have suggested lack of capacity on the part of the deceased to make a will, either on account of lack of soundness of mind due to senility because of extreme age, or due to severe illness, or on account of the strength of the drug regime that he had been put under. There is no material, therefore, upon which I can conclude that the deceased did not have requisite testamentary capacity, as at 30th August 2011, when it is alleged the will was made.

33. The second one is about the circumstances under which a will is made. A will may appear valid and proper on the face of it, in terms of execution and attestation, but its validity could be undermined by the circumstances of its making. Section 7 of the Law of Succession Act covers these circumstances. They include fraud, coercion, importunity or mistake, and section 7 provides that any will, which appears valid on the face of it, would be rendered void by those factors. The facts that the applicants presented, and the line of examination of the executor, suggested that they were also pursuing this line. From what was placed on record, the applicants appear to suggest fraud and importunity.

34. On fraud, the principal argument would be that around the signature on the will. They have argued that it is not that of the deceased. I have dealt with that here above. It is about saying that the signature was false, and must have been placed there by someone else, for the deceased himself did not sign the document. That would suggest that the executor manufactured the will, by procuring someone to draft it for him, get false attesting witnesses and then affixed a signature on the document purporting it to be that of the deceased. This is a serious charge, for fraud is a criminal offence. Secondly, a false signature is usually through forgery of the signature of that other, which is also criminal. Faced with these very serious allegations, which imputed criminality on him, the executor ought to have done more to exonerate himself. As stated above, the applicants discharged their burden, the moment they provided proof that the deceased never went through any formal schooling. Of course, that of itself is not proof that a person is totally illiterate, for there could be learning "through the window." The burden shifted to the executor to establish that the deceased could sign by writing. He should have done so through expert evidence. He did not provide any proof of that.

35. The second aspect to it is the argument that the deceased was gravely ill, and could not have travelled at the material time. There was some evidence to that effect. The executor should have called the witnesses, that he says were with him on 30th August 2011, when the alleged will was being signed, to give credence to his case, that the deceased did indeed travel to Nairobi, and executed a will on 30th August 2011. The burden was on him to do so, and he had witnesses he could have called for that purpose, but he did not avail himself of the opportunity. Failure to call crucial witnesses to testify on a particular aspect of a case does not always lead the court to draw adverse conclusions, for the law does not prescribe a minimum number of witnesses, to prove any fact. A fact can be proved on the strength of a single witness. However, with respect to certain facts, failure to call witnesses who are available, and critical, to establishment of some material fact, can invite adverse references, that those witnesses were not called, for their testimony would have been adverse to the case of the party who ought to have called them. A critical assertion was being made here by the applicants, that the will, the foundation of this cause, was not valid, for the deceased could not have had travelled to Nairobi at the time he was alleged to have signed the said will. It was critical for the executor to place the deceased in Nairobi on 30th August 2011. His own word on the matter was not sufficient, for it would have amounted to his word against that of the applicants. He should have done more. He had at least three persons, who were allegedly with the deceased when the impugned will was allegedly being executed, that is to say the advocate, Mr. Arum, and the persons identified on the document as the attesting witnesses, Kadenge and Iminyi, who he could have called. If there was a genuine exercise that happened on 30th

August 2011, then, to avoid an inference being drawn that no such event happened, and that the will of 30th August 2011 was his creation, the executor should have called either or all of the three witnesses.

36. Coercion is about use of force to get someone to make a will or to sign it. Coercion denotes use of brute force, such as where a person is compelled to sign a document or make it under duress, or at gunpoint, or after torture, or upon threats of one kind or other. The term “will” or testament has freedom implicit in it. Will-making must be driven by the freewill of the maker, hence the term freedom of testation or testamentary freedom. Anything that interferes with that freedom or freewill fundamentally undermines the will-making process, and can cause the invalidation of the resultant document. See *Gulzar Abdul Wais vs. Yasmin Rashid Ganatra & Another* [2014] eKLR (Lesiit J). The applicants described the executor as a violent person, given to fits of anger, a tyrant, among others. However, they led no evidence suggesting that he might have directed that violence or anger or tyranny towards the deceased, to force or compel him to make the will before court in the manner he did. Coercion goes together with undue influence or importunity, which is not about force as such, but pressure brought to bear on a person who is in a weakened situation, due to either old age or illness, which that person cannot withstand, and capitulates to it, not because they have been persuaded that it is the right thing to do, but as a measure to get peace of mind, as a means of escape from the pressure. See *Wambui and another vs. Gikonyo and others* [1988] KLR 445 (Gachuhi, Apaloo JJA & Masime Ag JA), *James Maina Anyanga vs. Lorna Yimbiha Ottaro & others* [2014] eKLR (Emukule J) and *In re Estate of Julius Mimano (Deceased)* [2019] eKLR (Musyoka J). Again, the evidence before me does not point to pressure of that kind. There was opportunity for it, when the deceased was in Nairobi, if at all he was, all alone with the executor, for the executor to exert pressure on him, so as to make a will in certain terms. But as I have said above, no evidence was led as to what might have happened between him and the executor when he went to Nairobi. The applicants could not have led evidence on that, because they were not themselves in Nairobi, and, in any case, their position is that the deceased was not even in Nairobi in the first place.

37. Undue influence or importunity is often manifested in what are often referred to as surrounding circumstances. That would mean circumstances surrounding the making of the will, where there is no positive evidence of undue influence or importunity, but the circumstances are such as to suggest that there was or could have been such undue influence or importunity. Such arise in cases where the principal beneficiary under the impugned will appears to have been in control of the circumstances surrounding the making of the will. See *Atter vs. Atkinson* [1869] LR 1 P and D 665 (Sir JP Wilde J) and *In re Estate of Julius Mimano (Deceased)* [2019] eKLR (Musyoka J). That could be where he procures the advocate who draws the will, or suggests the terms of the will, takes the deceased to the offices of the advocate preparing the will, among others. Generally, these would be acts which suggest that the deceased had no control of the situation, and does whatever it is that that person wants or requires him to do.

38. In this case, the deceased was a resident of Lugari at the time the will was made. His age was put at eighty years old. When the time came for him to make a will, he travelled some four hundred kilometres from Lugari to Nairobi to get an advocate, when he could easily have found one at Kakamega or Eldoret. He had a constitutional right though to get an advocate of his own choice wherever he could find him. So, he travels to Nairobi, specifically to the residence of the executor, and is accommodated at the executor’s house. According to the executor, he had come to Nairobi to get an advocate. He said that the deceased randomly picked an advocate in Nairobi, called Arum. He had earlier said that he took the deceased to an advocate in Nairobi, although he did not sit in as the two transacted their business. The two attesting witnesses were neighbours of the executor in Nairobi. The executor, of course, wants to create the impression that he had no control over the whole affair. According to him, the deceased travelled to his residence in Nairobi, and while there he randomly settled on the advocate who was to draft his will, and all that the executor did was to take him to that advocate. Secondly, the deceased settled on two attesting witnesses, who happened to be neighbours of the executor. The executor says that he did not know whether the deceased knew them before then. The surrounding circumstances are of a sickly illiterate eighty-year-old man, who is not a resident of Nairobi, travelling there, all the way from Kakamega, and randomly choosing an advocate, and picking two witnesses who happened to be the neighbours of his son, who was hosting him, the executor herein, who then takes him, and his witnesses, to the advocate the deceased had chosen randomly for the purpose of making the will. This tale is not believable. The hand of the executor is all over the script. He got the deceased to get to Nairobi, if it is true at all that he travelled to Nairobi, he got him an advocate and escorted him to that advocate, he also got him his two neighbours to stand in as his attesting witnesses. It would appear that the idea of getting the elderly man to Nairobi was take him far away from the rest of the family, to facilitate the making of a will favourable to the executor. He says that all this happened on 30th August 2011. However, it appears that the will was not prepared on 30th August 2011, for it bears two dates of its making, the 15th August 2011 and 30th August 2011, the first date is typewritten, while the second date is handwritten. The rules of construction would give more weight to the handwritten over the typewritten. But that is not the point. Just where did the 15th August 2011 come from? It is significant for the date a will is made is always critical in cases where the will is contested. Every questionable thing must be explained. None of the parties raised the issue, but it is in there. Where did the drafters get 15th August 2011? How did it find its way into the text? The executor should have sought to explain the date. It could suggest that the will was prepared earlier, on 15th August 2011, and then the deceased was brought on 30th August 2011 to sign it, contrary to the story given by the executor. The circumstances surrounding the making of the alleged will point to the executor having had control of and influence over the deceased, at about the time the will was made, if it is true that he had travelled to Nairobi at all, as to suggest that the will was a product of the mind of the executor and not that of the deceased. See *Wanjau Wanyoike and four others vs. Ernest Wanyoike Njuki Waweru and another* Nairobi HCCC No. 147 of 1980 (Cotran J), *Mwathi vs. Mwathi and another* [1995-1998] 1 EA (Gicheru, Kwach & Shah JJA), *In the Matter of the Estate of Naomi Wanjiku Mwangi (Deceased)* Nairobi HCSC No. 1781 of 2001 (Koome J), *In Re Estate of GKK (Deceased)*[2013] eKLR (Lenaola J), *In re Estate of Lucy Wangui Muraguri (Deceased)*[2015] eKLR (Musyoka J), *In re Estate of Krishna Kumar Bhatti (Deceased)*[2018] eKLR (Musyoka J) and *Fadhiya Salim Faraj vs. Faiz Mohamoud Abdalla* [2019] eKLR (Thande J). In all these cases, the scripts were the same, that the testators were removed from their usual surroundings, away from other members of the family, for the purposes of making or executing wills, which were ultimately in favour of the persons who were responsible for shuttling them around.

39. I believe that I have said enough to demonstrate that the will that the executor has placed on record here, cannot be valid for it was made in suspicious circumstances, where it would appear that the deceased came under the sole control and influence of the executor, to the total exclusion of every other member of the family, if the events of 30th August 2011 are anything to go by, and the result was a will that was completely in his favour. A will made under those circumstances cannot possibly stand. I hereby declare the same to be invalid, and I hereby nullify the same.

40. Having nullified the will herein, what next? The grant herein, of 16th May 2012, of letters of administration intestate, which should have been a grant of probate of written will, cannot hold as it was founded on the will that I have just nullified. The grant was obtained in a

defective process, for it was founded on an invalid will. Consequently, I do hereby revoke the said grant of 16th May 2012. Revocation of the said grant would mean that the estate of the deceased will have to be distributed under the Part V of the Law of Succession Act, the intestacy provisions. That would mean that there will have to be an exercise of distribution of the estate, which shall include everyone, as required by the proviso to section 71(2) of the Law of Succession Act and Rules 40 and 41(1) of the Probate and Administration Rules. The application for reasonable provision, under section 26, was necessitated by the will that I have just nullified. The effect of that nullification is that the said application is now moot. The confirmation application was equally premised on the nullified will, it would serve no purpose to attempt to distribute the estate intestacy herein based on it. Let whoever will be granted representation in intestacy mount an application for confirmation of their grant.

41. The applicants invited me to appoint the first applicant as administrator of the estate, ostensibly on grounds that he is the first born child of the deceased. That I shall not do. Firstly, being the first born child does not give one a prior right to administration, over the other children. Secondly, I have not seen a consent by the other children of the deceased, who were not in this litigation, that is quite apart from the applicants and the executor, allowing the appointment of the first applicant as administrator. All the children of the deceased have equal right or entitlement to appointment as administrators with the first applicant. That being the case, they should, as required by Rules 7(7) and 26 of the Probate and Administration Rules, give their consent to the appointment of the first applicant, or renounce or waive their entitlement to such appointment in favour of the first applicant. Let that be complied with before an appointment is made to avoid a future application for revocation of grant based on grounds of lack of inclusiveness.

42. I hereby accordingly allow the application, dated 8th October 2018, and dismiss the applications, dated 22nd April 2014 and 9th October 2018. The matter shall be mentioned, on a date that I shall allocate at the delivery of this judgment, for appointment of two administrators, one of whom shall be a daughter of the deceased. Let the children of the deceased consult on the matter, ahead of the mention, and agree on the names of the persons that the court shall appoint, failing which the court shall impose administrators. Each party shall bear their own costs. Any party aggrieved by these orders, has leave of twenty-eight days, to move the Court of Appeal, appropriately, on appeal.

43. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20th DAY OF December 2021

W. MUSYOKA

JUDGE

In the presence of:-

Erick Zalo – Court Assistant

Ms. Nafuye for Mr. Shifwoka for 1st /2nd Applicants

Gabriel Chimwana Ambenje - Executor