



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 25 OF 2016 (O.S)

IN THE MATTER OF THE ESTATE OF THE LATE LUSILA WAIRU WAWERU

AND

IN THE MATTER OF THE LAW OF SUCCESSION ACT

AND

IN THE MATTER OF THE LATE LUSILA WAIRU WAWERU'S WILL DATED 25TH AUGUST 2013

BETWEEN

EMMANUEL JULIUS NYOTA

WILBERT NJUKI THUMBI

MARGARET THUMBI KONA.....OBJECTORS

AND

AGUSTA RWAMBA THUMBI

JOAKIM IRERI THUMBI.....RESPONDENTS

Coram: Hon. Justice R. Nyakundi

Okello Kinyanjui Advocates for the Petitioners

Asige Keverenge & Anyanzwa advocates for the Respondents

JUDGMENT

The succession cause herein relates to the estate of **Lusila Wairu Waweru** (the deceased) who died on 15th October 2015 at Mtwapa within Kilifi County. The applicants are contesting the validity of the Will of the deceased dated 25th August 2013 by which she appointed her daughter **Agusta Rwamba Thumbi** and her son **Joakim Ileri Thumbi** as the executors of her will and left out the applicants as beneficiaries of her estate.

The deceased was survived by:

- | | |
|----------------------------------|------------|
| (a). Peter Waweru Wairu | Son |
| (b). Joakim Ileri Thumbi | Son |
| (c). Emanuel Julius Nyota | Son |

- (d). *Wilbert Njuki Thumbi* *Son*
- (e). *Agusta Rwamba Thumbi* *Daughter*
- (f). *Hellen Wanjiru* *Daughter*
- (g). *Magdalin Wanjiru Thumbi* *Daughter*
- (h). *Margaret Thumbi Kona* *Daughter*

She also had the following properties:

- (a). *Parcel of land no. MN/III/2957*
- (b). *Parcel of land no. MN/III/2958*
- (c). *Parcel of land no. MN/III/2959*
- (d). *Parcel of land no. MN/III/2960*
- (e). *Parcel of land no. MN/III/2961*
- (f). *Parcel of land no. MN/III/8104*
- (g). *Parcel of land no. SOKOKE/DIDA/1105*

On 12th October 2016 the applicants; **Emmanuel Julius Nyota (Son), Wilbert Njuki Thumbi (Son) and Margaret Thumbi Kona alias Wakini Kona (Daughter)** commenced suit vide originating summons dated 29th September 2016 for determination of the following questions:

1. *That alleged Will dated 25th August 2013 alleged to have been made by LUSILA WAIRU WAWERU (the deceased) be declared invalid on the basis that at the time the alleged Will was made the deceased is alleged to have been of unsound mind such that she did not have full recollection and incapable of making a valid will.*
2. *That the Will hereinabove mentioned is invalid on the basis that the testator did not clearly understand her actions such that she could not recollect all her assets and excluded from the Will LR No. SOKOKE/DIDA/1105 and also she wrongfully included in her Will LR No. MN/III/2960 which at the time of the making of the Will had been subdivided into LR No. MN/III/2960 which at the time of the making of the Will had been subdivided into LR No. MN/III/8103 and MN/III/81034 and MN/III/8103 transferred vide a sale agreement to the 1st applicant who paid full consideration for the same.*
3. *That the testator's Will be invalidated since it excludes and does not make any provisions for some of the dependants of the deceased's namely Margaret Thubi Kona and Peter Michael Waweru.*
4. *That the testator's Will be cleared invalid for want of signature since the signature of the testator in the Will differs from her known signatures.*
5. *That the testator's Will be cleared invalid as the same seeks to create a Trust without complying with the substantive provisions of the Law of Trust.*
6. *That the applicants be allowed to administer the estate of their deceased mother, in lieu of the respondents.*
7. *That costs of this application be provided for.*

Their application was based on the following grounds:

- i. *The applicants are children of the deceased.*
- ii. *The deceased is alleged to have died testate living a Will which Will is invalid and devoid of legal merit since the testator at the time of making the Will was known to be a person not in full control of her mental faculties since she had been suffering from senile dementia.*
- iii. *The alleged signature in the Will differs substantially with the known signature of the applicants of the deceased.*
- iv. *The testator did not clearly understand her actions such that she could not recollect all her assets and since she excluded from the Will LR No. SOKOKE/DIDA/1105 and also the deceased wrongfully included in her Will LR No. MN/III/81034 and*

MN/III/8103 transferred vide a sale agreement to the 1st applicant who paid full considerations for the same.

v. The testator has left out in the Will the 3rd applicant who was her daughter and dependant and also Peter Michael Waweru who was her dependent living with and being provided for by the deceased at all material times until her death and the two have now been rendered destitute for lack of provision in the Will.

vi. The deceased included in her Will land Reference No. MN/III/2960 that she had prior to making her Will subdivided into LR No. MN/III/8103 and MN/III/81034; and the testator had transferred land reference No. MN/III/8103 to the 1st applicant and a certificate of title was duly issued to the 1st applicant prior to making the Will.

vii. The deceased excluded in her Will land Reference No. SOKOKE/DIDA/1105 despite acquiring the same prior to making the Will.

viii. The deceased signature on the Will does not match her signature on her identification card and the one transfer of parcel LR No. MN/III/8103.

ix. The deceased was seriously ill and undergoing medication and or treatment at the time of making the Will.

x. The Trust created under the Will is invalid as it is not supported by a duly registered trust deed it does not define the duration of the Trust, it does not outline the properties donated to the trust it does not provide the mode of distribution of the benefits of the trust and the beneficiaries of the trust are all adults who have capacity to manage their shares from the estate.

xi. That the Will being invalid the estate of the deceased should be declared intestate.

xii. The applicants are persons entitled in equal priority to apply for letters of administration on intestacy.

The case

The applicants **Emmanuel Julius Nyota, Wilbert Njuki Thumbi and Margaret Thumbi Kona**, through their advocate **Gikera & Vadgama Advocates**, contest that they as children of the deceased are also beneficiaries of the estate of the deceased. They allege that the fact that the deceased/testator did not include them in the Will as well as the fact that the deceased failed to include a part of her estate and further that she included a part of her estate that she had already transferred proves that the Testator was not capable of making the Will.

They allege that the deceased at the time of making of the Will was a person of unsound mind having suffered senile dementia and an illiterate person who only spoke Kikuyu and broken Swahili as such could not have understood the contents of the Will written in English. They further allege that the deceased had also failed to include **Peter Michael Waweru**, her first grandson, who was also a dependant as he had lived and had been cared for by the deceased.

The respondents on their part allege that the applicants had been left out of the deceased's Will because the deceased had a strained relationship with them. They allege that the 1st applicant had been disinherited for allegations that she had committed incest with her father (the deceased's former husband). While the 1st and 2nd applicants were to be disinherited if they did not cooperate with the other beneficiaries.

The Evidence

The applicants case

It all started with the testimony of **PW1 – Wilbert Njuki Thumbi**, who stated in Court that as one of the sons of the deceased he is challenging the purported Will which makes an attempt to dispose off the assets that he considers prejudicial to this interest.

It was his evidence that the deceased died at the age of 84 years on 15.10.2015 but prior to that fateful date she was ailing and suffered from health pre-existing conditions like diabetes. He strongly objects to the last testamentary Will because it does not represent the interests of all the beneficiaries more so the name of one **Margret** was never taken into account.

In relation to his own benefit there is a reservation clause with the rider (subject to co-operation.) That from the inventory of assets and properties he disputed that the deceased left any cash deposits with KCB account Mtwapa.

According to **(PW1)** during the life time of the deceased he was acquainted with her signature and the inferences drawn from testamentary Will there are marked differences to that signature sealing the instrument. In support of this the witness urged the Court to place reliance in the previous annexures duly executed by the deceased.

In his evidence (PW1) believed that the handwriting on the Will is not that of the testator. To render credibility to this, (PW1) asserts that in the aforesaid Will there are some properties referred to as L.R. MN/111/2960 which were stated as free property of the deceased whereas the transfer and subsequent title deed indicate they belong to the 1st applicant – **Emmanuel Nyota**.

That owing to the non-provisions of any benefit to one of her daughters – **Margret Thumbi, (PW1)** and another dependant by the name **Peter Waweru**, the will end up being rendered void.

The next witness objector to the making of the Will is one **Margret Thumbi Kona**. As one of the daughters to the deceased she testified that contrary to allegations she enjoyed a cordial relationship with the testator and on several occasions made visits to her residence in Mtwapa – Kilifi. She vehemently denied having any romantic relationship with the father. That she engaged herself romantically with the father. She denied ever abandoning the deceased or engaging in any other frolic activities to bring dishonor and disrepute so to speak to the deceased during her lifetime. Further, to the circumstances which followed the death of the deceased, **PW2** stated in Court that her complaints are in respect of the existence of last Will testamentary which completely failed to make any provisions for her or benefit from the estate of the deceased. She stated that knowing her mother, there could have been no reason to disinherit or altogether to omit her name as one of the beneficiaries. **PW2** swore and disputed the assertion that there was a meeting called by the deceased to declare her last wishes in the form of a Will. That even, if such a meeting was to take place there existed no extenuating circumstances that could weigh in against the deceased not to find it favorable to consider distributing part of the property for her benefit, like other siblings.

According to **PW2**, evidence the impugned Will is therefore challenged for reason that the deceased was entitled to distribute her property as she pleased but she was not entitled to discriminate without any reasonable provisions. It was **PW2** contention that the deceased neither had the mental capacity nor the understanding to approve of the contents of the Will which resulted in her being discriminated against all other bloodline beneficiaries catered for in the Testators Estate.

Respondents case

It all started with the evidence of **Mr. Nyameta Bichanga** an advocate of the High Court retained by the deceased to provide professional legal services. As stated in Court **Mr. Nyameta** clarified that on 25.8.2013 he was asked by the deceased to attend a meeting in her house where she proposed to make the Will.

Having considered all the circumstances prevailing, **Mr. Nyameta** told the Court that he went ahead to record the specific elements that the deceased required to be outlined in the last Will and Testamentary. In approaching the making of the Will it was **Mr. Nyameta's** testimony there was not any preliminary impairments as to capacity or delusions that could have arguably impaired the drafting of the Will on the material day. As explained by **Mr. Nyameta**, the impugned Will was executed by the deceased witnessed accordingly by **Jemimah Kavengi Mwana** and **Mugure Nganga**. In that circumstances he found no lists of incapacity or red flags that could have deterred him from drafting and sealing the last Will and Testamentary of the deceased. The next witness **Agusta Rwamba** set out in her evidence that on or about April 2013 the deceased summoned all her children to attend a meeting with exception of **Margret Thumbi Kona**, where it was agreed that certificates of titles and other formal documents be entrusted to her for safe custody.

Secondly, a further meeting of all children save for Margret was also called by the deceased which included **Mr. Nyameta Advocate (DW1)** to seek further assistance surrounding the estate that would become available to them. **(DW2)** enumerated to Court that the deceased took steps to seek their leave of absence from the meeting so that she could confer with **Mr. Nyameta** alone. It was at that meeting a statutory Will was made and the effect of it is as contextualized in the last Will and Testamentary dated 25.8.2013.

Thereafter, **Agusta Rwamba** testified that in early 2016 a meeting called under the direction of the Chief of Mtwapa provided a forum in which **Mr. Nyameta**, the legal counsel revealed the contents of the last Will and testamentary.

According to **Agusta Rwamba**, evidence, as to the criteria to Judge whether the testator's Will had applied the best interest of the dependants, her argument was to the effect that sour relationship existed with her sister **Margret**. As explained on oath, in her evidence, that relationship between the deceased and her daughter was irreconcilable even in death. She contended in her evidence that may be the reason underlying why she was left out of a right to inheritance in the Will.

On the other hand, she denied intermeddling with the testator's estate incompatible with the provisions of the Will or to deprive other beneficiaries the means provided for in the Will making scheme.

1st Respondent's case

DW1- Joakim Ireri Thumbi on his part testified to the effect that the deceased executed a valid Will and there are no grounds discernible to substantiate to its invalidity. He also asserted that sometimes back in 1979 he had borrowed out some money to the deceased and during the year 2010 as a set off for the debt title deed LR SOKOKE/DIDA/1105 was conveyed to him by the deceased. He further told the Court that in April 2013 the deceased never informed other family members the factual background of the debt and the mode of compensation she had taken in transferring the referred title to that effect.

DW1 also avers on oath that he was one of the family members who attended an initial meeting at the deceased residence in Mtwapa which later culminated in the making of the Will. He acknowledged the presence of **Mr. Nyameta**, an advocate called in by the deceased for purposes of drafting the last Will and Testamentary which was carried out in absence of the children. He also detailed the circumstances in which their sister **Margret Thumbi** became to be excluded by the deceased from any such meetings called by the deceased. In addition, he also stated that besides Margret, there appeared to be clear misunderstanding between the deceased, **Emmanuel Julius Nyota** and **Wilbert Njuki Thumbi**. From his perspective **(DW1)** denied that **Peter Michael Waweru** was a dependant of the deceased consistent with Section 29 of the Law of Succession Act.

PW2 – Jemimah Mwema along time friend of the deceased since the year 2003 gave evidence on account of being a witness to the Will executed by the deceased in the presence of **Mr. Nyameta** advocate. During cross-examination by Learned counsel **Mr. Kinyanjui**, the witness told the Court that the deceased communicated her wishes to the advocate in Swahili language. Thereafter she was asked to sign the Will as a witness with one other witness by the name **Rhoda Mugure**.

Besides, the applicants produced as evidence a letter dated 12th September 2016 allegedly written by **Dr. E. M. Kitua** from Jambo Medical Centre which stated that the deceased was her patient for 10 years and had developed multiple organ failure with senile dementia causing her

death.

However, the same was rebutted by the respondents who produced a letter dated 21st October 2016 from the same Jambo Medical Centre in which the same **Dr. E. M. Kitua**, who is a registered Clinical Officer, disowned the said letter produced by the applicants stating at that time of the alleged treatment of the deceased he was in fact still an intern and that the deceased was never treated at his facility. During cross-examination the 1st applicant was unable to authenticate the same.

The Judgment herein is therefore in respect to the validity of the alleged Will of the deceased as well as the exclusion of the applicants in the said Will.

Applicant's Written Submissions

The applicants did file written submissions. The applicant's counsel submitted on the issues revolving around the legality and validity of the Will dated 25.8.2013. Learned Counsel relies on the evidence adduced by **Wilbert Njuki Thumbi** and **Margaret Thumbi Kona** as founded in their testimonies that:

(a). The deceased had no capacity to make the purported Will dated 25.8.2013. The crux of counsels submissions was on the basis that the deceased did not have the mental capacity to directly or indirectly further the process of the making of the Will. Counsel averred that the soundness and state of mind of the deceased remains questionable to have availed herself the opportunity to make the Will to distribute her estate in which she discriminated against some of the beneficiaries. On this counsel relied on the legal proposition in the passage found in **William Musyoka's Text book on the Law of Succession, Law Africa {2006}, Hulsburys Laws of England 4th Edition Vol. 17.**

Further, lifting the principles stated therein counsel submitted that the applicants have discharged the burden of proof that the deceased had no capacity to make the impugned Will. In relation to the signature its submitted that one can distinguish it with the rest known writings and signature of the deceased. Further with regard to the assets of the estate counsel makes the point that some of the properties under reference MN/111/2960 had since been sold and did not belong to the estate to be accounted for distribution. Further Sokoke/Dida/1105 though indicated as conveyed it still remains registered in her name.

According to counsel at the time the disposition and provision was considered by the deceased on 25.8.2013 it would have been expected that such plain issues personally known to her ought not to escape the making of the Will and last testamentary. Therefore the parcel of land Sokoke/Dida/1105 must be reverted to the estate of the deceased for distribution, amongst the beneficiaries.

In other words counsel urged this Court to find that the Will is incapable of being enforced as the testators intention by implication could not have partially distributed the estate.

In giving further meaning to the setting aside of the Will counsel invited the Court to appreciate the wrong inclusion of MN/III/2960 as part of free property of the deceased Will, in essence the same had been transferred on subdivision to **Emmanuel Nyota**. Counsel drew attention to what he called inconsistencies between the claims made by the respondents that Sokoke/Dida/1105 had been given as a 'gift' or 'sale' as set off for the money borrowed by the deceased way back in 1979.

To buttress all these arguments and issues challenging the Will reliance was placed on the following cases. **Christopher Kagina v Esther Mbandi Kagina {2016} eKLR, Banks v Good Fellow {1870} LR 5QB 549, Re- Ngetich {2003} eKLR, Julius Kinyua Chabam & Mary Njagi {2016} eKLR, Rasoa Khasoa Khamba v Agnes Nekesa Khayemba {2016} eKLR, Re JNM (Deceased) {2005} eKLR, Elizabeth Ndolo v George Matata Ndalo {1996} eKLR.**

In addition to above fundamentally counsel submitted the Will in question was never properly executed for reason that the witness **Jemimah Kavengi** did not witness the testator sign the Will. From what transpired, counsel argued and contended that Section (II) of the Act, the principles in **Re-Estate of John Karabu Gichuru (Deceased) {2013} eKLR, William Muthama Mwaka v Marina Centra Ndunguri & Another {2015} eKLR** in the context of the Will, there was no intention by the deceased governing the vesting of the estate to the beneficiaries. Counsel, in his submission, in respect of the executor **Agusta Rwamba Thumbi** argued and submitted that the purported date of the making of the Will, a feature perhaps overlooked is that she must have exerted undue influence or duress on the testator during the whole period to disinherit other beneficiaries to the estate. On the content and the language of the Will, counsel pointed out that the circumstances invariably which vested all powers and execution of the Will to the executor with exemptions of one sibling and some of the free properties remains suspicious to say the least.

According to counsel contention that view is further confirmed by the evidence of **Mr. Nyameta** who acknowledged that there was no draft but verbal instructions which were later to be reduced into writing. To accord credence to this proposition counsel cited and relied upon the case of **Re-estate of Lucy Wangui Muraguri {2015} eKLR**. Upon the strength of those submissions counsel urged the Court to set aside the Will for lack of capacity, that the testator failed to execute it in accordance with Section 11 of the Law of Succession and the entire scheme of making the Will on distribution of the Estate was engulfed in suspicion and mistake.

1st Respondent's Written Submissions

The 1st respondent through his advocate **Asige Keverenge & Anyanzwa Advocates** submitted that they fully reiterate and adopt the 2nd respondent's submissions.

2nd Respondent's Written Submissions

The 2nd respondent through his advocates **Waithera Ngigi** submitted that the applicants did not discharge their burden of proof on the testator's incapacity to making the Will. It was their contention that Section 5 of the Law of Succession Act placed the burden of proof on the applicants to prove that the deceased did not have testamentary capacity. For this assertion they relied on the case of **Re estate of M.K. (Deceased) {2018} eKLR** and **Erastus Maina Gikunu & Another v Godfrey Gichuhi Gikunu & Another {2016} eKLR**.

On the issue of why the property land **Reference No. SOKOKE/DIDA/1105** was not included in the Will, the 2nd respondent submitted that the deceased had willingly handed over the title deed to him as a show of gratitude for monies he had given her in 1979.

As such she knew that it was no longer her's to distribute. Further, he submitted that excluding the said property in her Will cannot have been as a result of failure to recollect her assets and or point to unsoundness of the deceased's mind. It is their submission that the same cannot be a ground for invalidating the Will.

On the matter of whether the deceased understood her actions at the time she made the will, it was their submission that she discussed the matter with **Mr. Nyameta Advocate (DW3)**, dictated the terms of her Will, and gave him a list of the properties and the persons that she intended to be her beneficiaries. She even summoned the witnesses that he wanted to attest her Will. Further, they submitted that no evidence had been adduced by the applicants to suggest that she did not understand or know what she was doing at the time of making of her Will.

On the issue of the property Land Reference No. MN/III/2960 it was submitted that the deceased had not been aware of the alleged subdivision of that property and as such knew that it was still part of the estate. Further, the 2nd respondent had admitted that the title to that property had not been handed over to her by the testator as the deceased believed that it had gotten lost. They submitted that this sufficiently explained why the property was included in the Will. They further submitted that the inclusion of this property did not invalidate the Will and relied on the authority of **Re estate of Jidraff Gathura Githigi (Deceased) {2019} eKLR** and the same would only fail as per Section 23 of the Act and Rule 8 (1) of the Second Schedule.

On the issue of the testator excluding the 3rd applicant in her Will they submitted that the Act under Section 5 gave the deceased the freedom of testation to dispose her property as she pleased to whosoever she pleased. For this they relied on the case of **Re Estate of Julius Minamo (Deceased){2019} eKLR** and **Re Estate of Samuel Njoroge Kamau (Deceased) {2019} eKLR**.

Finally on the issue of whether or not **Peter Michael Waweru** was a dependant of the deceased they submitted that there was no contestation that he was a grandson of the deceased however, there was no evidence that he had lived with the deceased or was maintained by the deceased.

Issues for Determination

Having considered all the evidence before me including the affidavits and attached documentation, the witnesses called by either party, the Will itself and the parties submission. The applicants counsel deciphered seven issues for my consideration, without intending to demean the elaborate exhaustive issues raised by the applicant, in my view their reformulation to three major key questions attach whatever weight I think fits to such answers in the dispute between the parties.

- (a). Whether the deceased had capacity to make the Will dated 25th August 2013 and if she exercised her free will in making the same.**
- (b). Whether the Will dated 25th August 2013 was properly executed, and**
- (c). Whether the deceased made reasonable provisions for all her dependants in her Will.**

Legal Analysis

- (a). Whether the deceased had capacity to make the Will dated 25th August 2013 and if she exercised her free will in making the same.**

There is a rebuttable presumption under Section 5 (3) of the Law of Succession Act Cap 160, Laws of Kenya that a person making a Will is of sound mind and that the Will has been duly executed. In **Harwood v Baker {1840} 3 Moo P. C. 282:**

“It will be noted that in order to constitute a social mind, a testator must not only be able to understand that he or she is by his or her will giving his or her property to one object of his or her regard, but that he or she must also have capacity to comprehend. The extent of his or her property and the nature of the claims of others, whom by his or her will, he or she is excluding from all participation in that property;- whether, he or she was capable of recollecting who (his) or her relations were, of understanding, their respective claims upon his or her regard and bounty, and of deliberately following an intelligent purpose of excluding them from any share of his or her property.”

The threshold of the essentials of testamentary capacity were laid out in the case of **Banks v Goodfellow {1870} LR 5 QB 549** as cited with approval in the case of **Vaghella v Vaghella:**

“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.”

A Will is the means by which a person exercises his or her testamentary freedom to bequeath his or her estate without relying on intestacy rules of probate. What is being said here is that there certain aspects of importance which must exist in the making of the Will, unless, therefore one possesses the right age of maturity, and mental capacity he or she will be considered as being incapable of upholding the legality of the Will.

This passage from **Banks (supra)** must also answer the following questions:

- 1. That he or she is making a Will, and the effect of his or her testamentary disposition.***
- 2. The extent of his or her estate and therefore the property that can be disposed of in his or her Will.***
- 3. Those who have claims on the estate and***
- 4. This understanding must not be impaired by any disorder of the mind and or delusions.***

There is a presumption of capacity to make the Will unless and until the contrary is shown, presumably by the claimant to the estate of the deceased. Thus the heavy burden of proof case on the claimant as to the approach on the question of capacity test has been laid down in **Parker v Felgate {1883} 8DD 171** and which was reaffirmed in **Perrins v Holland {2010} EWCA JCIV 1398** what the Court held that:

“one must then ask of the testator;

(i). Whether at the time he or she gave the instructions he had the ability to understand and give proper consideration to the various matters which are called for. That is whether he or she had testamentary capacity.

(ii). Whether, the document gives effect to his or her instructions.

(iii). Whether those instructions continued to reflect his or her intentions and

(iv). Whether at the time he or she executed the Will he or she know what he or she was doing and thus had sufficient mental capacity to carry out the justice act which that involves, if all those questions can be considered.”

In the affidavit, one can be satisfied that the Will accurately reflects the deceased’s intentions formed at a time when he or she was capable of making fully informed decision.

The burden of proof in the first instance lies upon the person alleging lack of capacity. Once it is established to the satisfaction of the court that in fact the testator was not of sound mind then the onus is shifted to the person propounding the Will to prove the existence of mental capacity. Consequently, I direct my mind to the holding of the Court in the case of **Re Estate of Gatuthu Njuguna (Deceased) {1998} eKLR** where it quoted an excerpt from **Halsbury’s Laws of England, 4th Edition Vol 17 at page 903-904:**

“Where any dispute or doubt or sanity exists, the person propounding a Will must establish and prove affirmatively the testator’s capacity and that where the objector has proved incapacity before the date of the Will, the burden is shifted to the person propounding the Will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator’s capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator’s mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator’s capacity at the time of the execution of the Will which generally disturbs the conscience of the Court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the Will to satisfy the Court that the testator had necessary capacity.”

Looking at the evidence produced before this Court I am not satisfied that the testator was mentally incapable to make the Will. It is my view that the burden of proof on the deceased’s mental incapacity has not been discharged in this case as there is no evidence to prove that allegation. The applicants’ assertion that the deceased suffered from senile dementia has also not been substantiated.

Section 6 of the Law of Succession Act grants the testator discretion over the appointment of the executor. Consequently, it is my considered opinion having looked at all the evidence produced in this Court that the deceased did in fact chose the 1st respondent as her executor and that this was well within her discretion to do so. I see no need to vary this.

Section 7 of the Law of Succession Act provides that a testator must exercise his free Will in the distribution of his estate and the absence of such free will invalidate a Will;

“7. A will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void.”

From the evidence it is clear that the deceased's mental capacity was not affected by her ill health and no sufficient evidence has been adduced to contradict that. In addition, having listened to the testimony of DW2, the advocate who drafted the deceased's Will I am convinced that the deceased was well aware of the exercise she was undertaking. I am also convinced that there was no undue influence or coercion on the deceased when she was making her Will and that the deceased knew and understood the contents of the Will.

The allegations that she only spoke Kikuyu or broken Swahili has not been proven as evidence had been adduced to her extensive work history and stay in Tanzania and Mtwapa which would indicate that she had the ability to converse and understand fluently Swahili and albeit limited English. This is also evidenced by the two letters produced by the applicants as evidence that were written by the deceased in Swahili meaning that she was not truly illiterate and that she could read and write in Swahili.

In my view the applicants seemed to hinge their case also on the medical report by **Dr. E. M. Kitua** dated 12.9.2016. The report apparently makes reference to the testator's cognitive ability or impairment to act or make a decision. It follows therefore that since this was a heavily contested fact by the respondents, notwithstanding the date of the medical report under Section 48 of the Evidence Act it was incumbent for the medical doctor to be called as a witness to shed light within the meaning of this provisions.

More so, in the instant case the Will having been made in the presence of **Mr. Nyameta**, an advocate of the High Court who for all intents and purposes never cast a doubt to the mental capacity or understanding of the surroundings by the testator, whatever adverse import is in the medical report required a qualification. Characteristics of this impugned Will arises out of the fact that it was drawn by an advocate of the High Court and yet from his evidence he was satisfied that the testator had the necessary capacity to make the Will. The effect would be that the lacuna provided by admissibility of the medical report would be difficult to visualize without calling the maker for cross-examination. In **Gill Woodall & others {2010} EWA CIV 1430** the Court stated that:

"The testatrix at the time of making her Will must be in the language of the Law be possessed of sound and disposing mind and memory. Her memory may be imperfect, greatly impaired by age or disease, yet her understanding may be sufficiently sound for many of the ordinary transactions of life."

This view was repeated by **Zorbas v Sidivo Poolous {2009} NSW 197**.

"Medical condition of a deceased may of course be highly relevant, and may sometimes directly support or deny a capacity in the deceased to have understanding of the matters, in the Banks v Good Fellow criteria. However, evidence of such understanding may come from non-expert witnesses. Indeed, perhaps, the most compelling evidence of understanding would be reliable evidence (for example, a tape recording) of a detailed conversation with the deceased at the time of the Will displaying understanding of the deceased's assets, the deceased family and the effect of the Will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome, the effect of such conversation."

Consequently, it is my humble opinion with regard to the circumstances of this case that the deceased was capable and was of sound mind at the time of the making her will dated 25th August 2013. It is therefore my finding that the deceased clearly knew and understood the nature of the business she was engaged in when making her will and providing for her dependants. The fact that she did not include one of her children and that she included the 1st and 2nd applicants on condition that they cooperate with her executrix did not in my view cast any doubt to her capacity.

b). Whether the Will dated 25th August 2013 was properly executed?

Section 11 of the Law of Succession Act, provides for the formal requirements of a valid Will, it states:

11. 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.

What Section 11 emphasizes explicitly are the formal and procedural requirements to make a Will. The Will must be in writing and signed at the end of it by the testator and at least two witnesses. Such a solemn instrument is expected to be signed in the presence of the two appointed witnesses. The Court is also required to look out for any suspicious circumstances that may have played a role in executing the Will to ensure that was founded on freewill without any undue influence or coercion or duress. The executor of an estate is responsible for collecting the testators assets, paying any debts and thereafter distributing the assets to the beneficiaries.

The making of a valid Will is one of the best instrument that can ensure that the property of the testator will be distributed according to his or her wishes upon death. The applicants in terms of this objection told the Court that the Will by the deceased failed to meet the formal requirements for execution of a valid Will.

They were concerned with the authenticity of the signature, lack of capacity, lack of knowledge and approval of the contents of the assets and liabilities and undue influence. One of the key feature raised against the validity of the Will which the applicants' seeks to invalidate it is in relation with the signature.

In this regard the applicant's contended in their evidence that the testator never signed the Will in the presence of the two witnesses as provided in Section 11 of the Act. Further that the signature in all relevant circumstances defeats the clear known signature of the testator. It's the applicants' submissions that having been acquainted with the testator's signature and handwriting, the one affixed in the Will is clearly at variance.

On the respondents' side, from the evidence of **Mr. Nyameta**, the advocate instructed by the testator did confirm that the Will was validly executed. In contest in the instant case, is the proposition that the signature that is ordained in the impugned Will was a forgery. The question to be answered by the Court is whether the applicants are indeed correct in their contention as a matter of evidence that the cited signature was of a third party besides the testator.

As already observed by reference to **Fuller v Strum {2000} ALL ER 2392** such allegations border on criminality to suppose that the entire context and structure of the Will be deemed essentially invalid. Thus, the Law places a higher standard of proof given the nature of the claim on the part of the applicants. The Court made this point:

“While I recognize, that the standard of proof is in the civil standard on a balance of probabilities, it is well recognized that where a serious allegation like (forgery) is made, the inherent improbability of the event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event has occurred.”

The relevant passage from **Hallsbury Laws of England Civil Procedure Vol 11 {2009} 5th Edition**, the Learned authors observed:

“It is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but that the gravity of the issue becomes part of the circumstances which the Court has to take into consideration in deciding whether or not the burden of proof has been discharged, the more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.”

The task of dutifully laying evidence seeking to foster the invalidity and due execution of the challenged Will falls squarely upon the applicants. The Court does not, and cannot set aside the Will unless its able to ascertain that the presumption in favour of due execution has been rebutted. Against the background it turns out PW1 and PW2 in their evidence failed to demonstrate potential characteristics which appropriately distinguishes the known signature of the testator with her subsequent signature that appears on the Will of 25.8.2012. The kernel of the applicant's attack throughout this trial has been that Section 11 on the formal requirements of a valid Will were infringed.

For purposes of inquiry on this aspect to determine the authenticity of the signature it is permissible for the parties to have an opportunity to make representations by an expert to show the differences in the known familiar signature of the testator with the questionable signature in the Will. Thus in **Fuller v Strum (supra)** the Court held *inter alia* that:

“Of Course, in such a case, the views of the expert are entitled to be given great weight, after all, the expert's training and experience will have equipped him or her to draw these inferences from those facts than a lay witness.”

This leads me to construe and hold that the applicants have failed to discharge the burden of proof on the inconsistencies on the questionable signature to the extent for it to be declared as being invalid. It was in this context that the Court in **Re estate of Julius Mimano (Deceased) {2019} eKLR** held as follows:

“It is the applicants contention that the signatures on the Will were forged and did not belong to the deceased. He did not call a document examiner to give expert opinion on the said signatures. The applicant did not express himself to be a qualified document examiner, or handwriting expert, whose word on the matter could be given weight (See Section 109 of the Evidence Act). That places the burden of proof on him. The proviso states that “The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any Law that the proof of that fact shall lie in a particular person.”

The applicants did not lead any evidence to demonstrate that the said signature was not made by the deceased or that its forged. The burden fell on him to lead such evidence. What emerges from the plain reading and scrutiny of the evidence by the applicants is that the assertion on the impugned signature or any parts of it remained in the realm of conjecture and allegation not capable of believe.

Generally speaking, the duty of the Courts will be slow to interfere with the Will, having regard to the fact that the Testator intended the beneficiaries to be bound by the contents in the last Will and testamentary.

Nevertheless, the Courts will do so, whenever this becomes necessary in the interest of justice and will act, if it is shown that the testators purpose and intention in arriving at the last wishes/ Will did so on a wrong application of the Law or lacked capacity to make the Will. These specific guidelines in the first schedule must be construed in a manner that certainly entitles the declaration of the text in the impugned Will.

On the construction of Wills by **Maurine Dommy academia eau/35425630/construction of Wills** observed that:

“The duty of the Court is to interpret the words as used by the testator in the Will regardless of whether they produce an unfair

result, provided that was the intention of the testator. Even where a provision for his lawful dependants. It is not for the Court in interpreting the Will to seek to make provision for these survivors. The Court interprets the Will as it stands and promises that the survivors are not provided for.”

In **Perrin v Morgan 1943 AC 399**, Lord Arhkin stated:

“That the sole object is to ascertain from the Will, the testators intentions.” “it is not about what the testator intended to do when they made their Will. Where there is an ambiguity or a deficiency on the face of the Will, no extrinsic evidence as to the instructions of the testator may be admitted.” (See Maurine Dommy (supra).

The principle in **Re Potters’ Will Trust {1944} CL 70** embodied this legal position that:

“It is fundamental rule in interpretation of Wills, that effect must be given, so far as possible, to the words which the testator has used. It is equally fundamental that apparent inconsistencies must, so far as possible, be reconciled and that it is only when reconciliation is impossible that a recalcitrant provision must be rejected.”

It is essential to note that from the above it is required that the testator must append her signature on the will with an intention of giving it effect as her last will and testament. The fact that the same was typed by another person, acting on the instruction of the deceased, does not invalidate the Will as long as she signed the same acknowledging the typed will as containing her wishes. The deceased then placed her mark on the typed document in the presence of two witnesses and the Executor thus acknowledging her signature. There was no evidence that the signature of the deceased on the typed will had been forged. Further, the Will was executed in the presence of the Advocate, **DW1**, the two witnesses **Jemimah Kavengi Mwema** and **Rhoda Mugure Ng’ang’a** as well as the advocate. It’s worth emphasizing that in this context specified in Section 11 of the Act there is no fault alluded to the witnesses that they were indeed not actually present at the signing ceremony to endorse the Will as drawn by the testator.

Consequently, on evidence adduced in this case it is my conviction that the testator did in fact properly execute the Will dated 25th August 2013 and conformed to the formal requirements under Section 11 of the Law of Succession Act.

C). Whether the deceased made reasonable provisions for all her dependants in her Will

It is right to state that a testator, however poor or rich, should be permitted to exercise his or her full mind voluntarily to distribute his estate without any hindrance. The correct approach is as envisaged by **Knight Bruce in Bird v Luckie {1850} 68 ER 373**:

“No man is bound to make a Will in such a manner as to deserve approbation from the prudent, the wise or the good. A testator is permitted to be capricious and improvident, and is more at liberty to conceal the circumstances and the motives by which he has been actuated in his dispositions. Many a testamentary provision may seem to the world arbitrary, capricious and eccentric, for which the testator, if he be heard, might be able to answer, most satisfactorily.”

As its in the case of a persuasive precedent in **Re Arthur (Deceased) Abakah & Another v Attah Hagan & Another {1972} 1 GL. R435** there exist substantive complexity for the Court to vary or set aside the Will made by a testator. The Court remarked as follows:

“What should be borne in mind is that whatever a Will is granted, the Court is not giving its blessings and support to all the contents of the Will. The Court is only expressing its satisfaction that the Will has been validly executed and that the named executors are at liberty to administer the Estate. The Court should be extra ordinarily show in interfering with the Will of a deceased person because the Will constitutes hallowed granted and no one should tread upon it. If the Court decides to interfere, it does not expunge anything from the Will, if it decides to omit anything on the Will known grounds, the omission is made in the probate and not in the Will itself. For instance, the Court will exclude from a Will any words introduced into the Will by mistake without the instructions or knowledge of the testator. The Court may exclude from the probate and from registration words of atrocious, offensive or libelous character and it will exclude words of a blasphemous character.”

Tinkering with the testators Will and the streams of evidence on inclusion and exclusion of the power to bestow it upon death or during her lifetime forms the cycle of this discussion. It has been contended that by the applicants herein that in disposing the assets in the Will, some of the beneficiaries were left out and the actual assets were never ascertained in the stipulated last Will and Testamentary. The first schedule pursuant to Section 22 of the Law of Succession encompasses 78 rules of Construction of Wills based on basic principles. It is clear from this schedule that in order for the Court to give effect to the validity or invalidity of the Will, it must satisfy itself that the intentions and objector of the testator in making the Will would not be defeated by any misinterpretation that produces prejudice or injustice to the wishes of the testator.

I suppose that styles of signatures may differ, but the whole story as to the variations in the impugned signature and visible characteristics within the known signatures which is not for seeable by an untrained eye can be resolved by expert opinion. That evidence is therefore essential as to whether the testator signed the contested Will. Assuming one was to agree with the applicants in their quest to annul the Will. There were no distinct features on the differences between the known signature and the alleged signature endorsed in last Will and Testamentary.

The critical question in relation to the last Will and Testamentary is the interpretation based on the viewpoints echoed by the applicants on the formula used to exclude or include some of the properties in the Will bearing their rights on to what constitutes free property under Section 3 of the Act. Using the evidence adduced by the applicants, the context prevailing at the time confirms that LR. SOKOKE/Dida/1105 though registered in the name of the testator was explicitly left out of the list of the estate property within the jurisdiction of the Will dated 25.8.2013.

In **Re Bailey {1951} CL 407**:

“It is not the function of a Court of construction to improve upon or perfect testamentary dispositions. The function of the Court is to give effect to the dispositions actually made as appearing expressly or by necessary implications from the language of the Will applied to the surrounding circumstances of the case.”

One of the basic principles in the Law of making Wills and Last Testamentary is for the testator to make his or her intentions known of what he or she desires to be done after death. In that regard he or she must expropriate and appropriate the free property grounded on certain overriding principles. More over in terms of disposition of property the status and regulations of it require the testator to enforce and show all conditions precedent attached to it to fulfil his or her intentions under the said Will.

It must however be noted when the testator left the signed Will, she excluded some of her property namely LR SOKOKE/DIDA/1105. The distribution proposed in the Will does not therefore account for this distinct title save that the 1st respondent claimed it as having been gifted to him during the lifetime of the testator. The 2nd respondent relies on the fact that he had loaned some money to the testator and the property known as SOKOKE/DIDA 1105 is one of those identified for his benefit and compensation for the debt. I find it peculiar that in the authenticated list of the assets inventory no mention was made of this parcel of land as alluded to by the respondents. Pain constrained not to be persuaded by the evidence and submissions made which recognized this title to land to have been transferred to the 2nd respondent – **Joakim Ireri Thumbi**. I also do not find his explanation convincing and clear to enforce the alleged agreement with the testator. The questionable parcel of land cannot therefore be taken as one of those earmarked for distribution under the one execution of the Will. I have followed the arguments by the respondents on this matter but in my view there is a serious flaw and omission against the testators estate and a challenge to bring this particular parcel of land within the language and structure of the Will in accordance with the Law. The record shows clearly that parcel of land referred as Sokoke/Dida was and still registered in the name of the testator. So here, too in my respectful view the principle in **Re Potter’s Will Trust (supra)** applies to the instant case. Why all this?

In **Abbott v Middleton {1858} 11 ER 28** the Court laid down the guiding principle applicable to enforce the testators intention where **Lord Wensleydale** state that:

“We may conjecture that the testator meant to have written the additional words without issue,” and omitted them by mistake. But that is a mere conjecture, and we have no right to give effect to that conjecture. It is clear that the testator has not so written; and all we can do is to explain what is written. We must construe the Will as we find it.”

In accordance with this principle it’s correct to hold that the right of ownership on or use of the parcel of land, referred to as Sokoke/Dida was never gifted or transferred to **Joakim Thumbi**. Buoyed by the first schedule on the cardinal features of construction of Wills governed by Section 22 and Rule 73 of the Law of Succession Act. This Court advances the frontier that the Last Will and Testament is incapable of administering the excluded property. In that case, drawing on my analysis of the Law above, the Will remains valid but identified land Sokoke/Dida 1105 not provided for in the said Will shall be administered in terms of intestacy probate.

It was also contended that the deceased was unduly influenced by 1st and 2nd respondents into making distributions in their favor to the detriment of the other dependants. As I had earlier stated Section 7 of the Law of Succession Act provides that a testator must exercise his free will in the distribution of his estate and the absence of such free will invalidate a will. Undue influence connotes an element of coercion or force, that the deceased did not exercise her free will in writing her will and was pressured by other forces. Such external pressure must be forceful and intended to coerce her into acting out of fear or involuntarily. The onus is on the person who alleges the existence of undue influence to prove the same. The same was not proved in this case.

It was the evidence of **DW1** that all the children of the deceased gathered at her house left the house whereupon he took instructions from the deceased. The handwritten Will was typed and signed the same day and thereafter kept in the custody of **DW2** until the death of the deceased. There is no evidence that the respondents unduly influenced or exercised any dominion over the deceased into bequeathing the properties in their favour to the detriment of the other dependants. The applicants failed to demonstrate to the satisfaction of this court that the deceased was at the time not acting as a free agent.

Section 26, 27 and 28 of the Law of Succession Act (Chapter 26 of the Laws of Kenya) provides for application for adequate provision for dependants not adequately provided for by Will or on intestacy as follows:

26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his Will, or by gift in contemplation of death, of the Law relating to intestacy, or the combination of the Will, gift and Law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for the dependant out of the deceased’s net estate.

27. In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependants, or to make such other provision for him by way of periodical payment or a lump sum, and to impose such conditions as it thinks fit.

28. In considering whether any order should be made under this part, and if so what order, the court shall have regard to:

(a). The nature and amount of the deceased’s property;

(b). Any past, present or future capital or income from any source of the dependant;

(c). *The existing and future means and needs of the dependant;*

(d). *Whether the deceased had made any advancement or other gift to the dependant during his lifetime;*

(e). *The conduct of the dependant in relation to the deceased;*

(f). *The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;*

(g). *The general circumstances of the case, including, so far as can be ascertained, the testator's reason for making the provision for the dependant.*

Section 29 of the LSA is set out the meaning of the term 'dependant' as follows:

For the purposes of this part, "dependant" means:-

(a). *The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*

(b). *Such of the deceased's parents, step-parents, grand-parents, grand-children, step-children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and*

(c) *Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.*

A testator has power to dispose of her property as she pleases and the court is bound to respect those wishes as long they are not repugnant to the Law and she does not leave out some dependants and beneficiaries. Failure to make provision for a dependant by a deceased person in her will does not invalidate the Will as the Court is empowered under Section 26 of the Law of Succession Act as demonstrated above to make reasonable provision for the dependant. Section 28 sets out the parameters that this Court should consider when making such provisions.

It is important to understand the role of testamentary freedom of a testator to have unfiltered discretion to dispose of his or her estate and the fundamental moral duty to provide maintenance for his or her children in death. The treatise by **Jordan F. R.**

"Limitations of the power of testamentary disposition {1907 – 8} 5 Common Wealth Law Review 97 writing for the Court stated: "Children emboldened by the confidence that some share is assured to them in absence of flagrant misconduct, may be tempted to defy parental authority. Any limitation upon a testator's power to dispose of his earnings as he thinks fit tends to weaken one important incentive to industry and thrift. A testator may be prevented from excluding an utterly worthless member of his family except at the risk of exposing a grave family scandal which it is perhaps strongly in the interests of innocent members to conceal. The system relegates to a Court of justice discretionary powers in a matter as to the merits of which the testator must in nearly every case be a much better Judge than the Court can possibly be. Complicated questions of fact may arise regarding previous advancements of the claimant. An opportunity is given for speculative and black mailing actions on behalf of persons who have been properly excluded."

The provisions of Section 35, 37 and 38 of the Law of Succession Act caters for children and does not distinguish between male and female children or their marital status. Furthermore, the provisions of Article 27 of the Constitution are against any form of discrimination on the grounds of gender or marital status.

I am convinced by the evidence produced in this Court that the relationship between the 3rd applicant and the deceased was a strained one. I am however not convinced that it was because of an alleged incestuous relationship between the 3rd applicant and her biological father (the deceased's husband). As such my mind turns over to the issue of whether or not the 3rd applicant should be a beneficiary of the Estate of the Deceased as envisaged in the Law of Succession Act and whether or not provisions should be made to her seeing as the testator has the right to do as she wishes with her estate.

It is not in contention that the applicants are children of the deceased. The deceased herself acknowledged the 1st and 2nd applicants in her Will but gave them conditions. It is my view therefore that the applicants are not strangers and as such should have been beneficiaries of the Deceased's estate. I thus will invoke the Court's authority under Section 26 to make provisions for them being children of the Deceased from the Deceased's estate.

I am however not persuaded that the **Peter Michael Waweru** was indeed a dependant of the deceased and as such do not make any provisions for him. There was no evidence from the said **Peter Michael Waweru** to state that he was aggrieved by the lack of provision under the Will. Furthermore, the deceased had many grandchildren from her different children and as such if she had wanted to bequeath her grandchildren she would have stated so in her will. It is evident that she only focused on her children, perhaps in the hopes that her grandchildren will be taken care of.

There are two senses in which circumstances of the case, prevailing at the time may be considered so as to disentitle the beneficiaries of entitlement to the Will by a Testator.

The principle underlying this was stated in the persuasive precedent in **Hughes v National Trustees Executors & Agency Co. Australasia**

Ltd {1979} 143 (CLR 134) Gibbs J remarked:

“The question whether conduct is sufficient to disentitle an applicant to relief must depend not only on the nature of the conduct itself, but also to some extent, on the strength of his or her need or claim to the provision from the Estate of the deceased. The stronger the applicant’s case, for relief, the more reprehensible must have been his conduct to disentitle him to the benefit of any provision.”

In Re K {1921} St R. QD 177 Re Osbourne {1928} St RQD 129 at 131:

“The onus of proof of disentitling conduct lies on those who resist the application by alleging disentitling conduct, where an allegation of disentitling conduct is made, the Court considers whether, on the balance of probabilities, it has been proven.” What should a Court make of a Testator’s decision in the Will disentitles. Some of his or her direct bloodline dependents? The deliberate choice of the wording Testamentary Freedom in the making of Wills is a concept tied with certain rights in relation to property.

“Will – making power in turn depends upon a certain understanding of rights in relation to property: defining ownership of property by individuals, and the extent of such rights of ownership, including extension of such rights into postmortem disposition through the medium of a Will, Testamentary Freedom is therefore best summarized as a power with respect to property effective at death.”

Disposition

(a). In the end I find that the deceased herein had capacity to make the Will dated 25th August 2013 and that the same was properly executed.

(b). I also find that no valid objection has been raised against the appointment of the executor and consequently confirm her appointment. Section 6 of the Law of Succession Act grants the testator discretion over the appointment of the executor. The fact that she was not someone that some of the beneficiaries like is not material for purposes of her appointment and it is her who is ranked in priority under Section 62 of the Law of Succession Act to entitlement to be issued with a Grant of Letters of Administration.

(c). In light of the provisions of Sections 35, 37 and 38 of the Act (supra) and the provisions of Article 27 of the Constitution against any form of discrimination on any grounds, I direct the executrix to exercise her powers pursuant to Section 82 (d) of the Law of Succession Act, and to make provision for all the children of the deceased including the applicants save for Margaret Thumbi to get equal shares of the parcels of land and residential plots cited in the Will and in making such provision, the Executrix shall consult the beneficiaries in terms of the proviso to Section 82.

(d). Giving the Will and Last Testamentary a sui generis construction it is to be noted that SOKOKE/Dida/1105 be administered by grant of letters of administration intestate issued to Augusta Rwamba Thumbi pursuant to Section 66 of the Law of Succession Act. In this case of intestacy therefore I come to the inescapable conclusion that the administrator does distribute the property in equal shares to all the beneficiaries as specified and contemplated under Section 38 of the Act.

(e). Based on the evidence, it is clear that the executrix was yet to petition for grant of probate and subsequent confirmation to administer the deceased estate. It is sufficient for this purpose to order and direct the executrix to comply with the Law to petition for the making of Testate Probate, within 45 days from today’s determination.

(f). That certificate of title comprised of and subdivided parcels of land transferred in the name Emmanuel Julius Nyota surveyed subdivision referred as 8103 shall be transmitted under the grant of probate to the rightful owner.

(g). That its recognizable that the deceased Lusila Wairu Waweru estate shall fall within the scope of the probate of the last Will and Testament dated 25th August 2013 and the supposed property excluded in the aforesaid Will be a subject of intestate succession.

Costs to this litigation be borne by the parties.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25th DAY OF JUNE 2020

.....

R. NYAKUNDI

JUDGE

This Judgment has been delivered in absence of the parties pursuant to Article 48 and 159 of the Constitution and practice directions in Gazette Notice by the Chief Justice No. 3137 dated 17.4.2020. *(Please refer to the consent dated 5th June 2020)*