REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO.28 OF 2017

IN THE MATTER OF THE ESTATE OF IGNATITUS NDIRANGU KAMAU (DECEASED)

JOSEPHINE WAMWATHI.....PETITIONER

V E R S U S

ZACHARY NGANYE NDIRANGU.....1ST OBJECTOR

STEPHEN MWANGI NDIRANGU.....2ND OBJECTOR

JUDGMENT

Ignatitus Ndirangu Kamau died at the age of 88 years on 28/5/2012 at Githioro, Miharati. He was survived by two houses, the first wife, Esther Wamere Ndirangu who had eight children and the 2nd house of Josphine Wamathi Ndirangu with seven children. The beneficiaries are as here under:-

1st House of Esther Wamere Ndirangu:

(a) Esther Wamere Ndirangu - Widow

(b) Joseph Mwaniki Ndirangu - Adult son

(c) Moses Kamau Ndirangu - Adult son

(d) Ibrahim macharia Ndirangu - Adult son

(e) Pius Irungu Ndirangu - Adult son

(f) Teresia Nyambura Ndirangu - Adult daughter

(g) Stephen Mwangi Ndirangu - Adult son

(h) Zachery Nganye Ndirangu - Adult son

(i) Lawrence Njue Ndirangu - Adult son

2nd House of Josphine Wamwathi Ndirangu:

(a) Josphine Wamwathi Ndirangu - Widow

(b) Ignatius Ndungu Ndirangu - Deceased son

(who was survived by Nicholas Ndirangu Ndungu, Phillip Mungai Ndungu, Kamau Ndungu, Charles Ng'ang'a Ndungu and Wamwathi Ndungu)

(c) Peter Kamau Ndirangu - Adult son

(d) John Waweru Ndirangu - Adult son

(e) David Macharia Ndirangu - Adult son

(f) Muthoni Karanja - Adult daughter

(g) Wambui Ndirangu - Adult daughter

(h) Wanjiru Ndirangu - Adult daughter

The deceased's estate comprises five properties listed at paragraph seven of the objectors' joint affidavit:

(a) *Title No.Nyandarua/Kipipiri/1524 measuring 2.02 hectares;*

(b) *Title No.Nyandarua/Kipipiri/2039 measuring 23.48 hectares;*

(c) *Title No.Nyandarua/Miharati Township/85 measuring 0.112 hectares;*

(d) *Shares with Kenya Commercial Bank Ltd*

(e) *Plot No.2 Mukindu Trading Centre, Nyandarua County.*

The background to this petition is that the petitioner filed a citation dated 24/5/2013 in *Nakuru H.C.Succ.329/2013* against Esther Wamere (Citor), the 1st widow calling upon her to accept or refuse letters of administration intestate.

The Citation was filed by the firm of Ikua Mwangi & Co. Advocates. The said proceedings were compromised and the petitioner was allowed to file this cause to propound the contested will.

On 15/9/2015 the objectors Zachary Nganye Ndirangu and Stephen Mwangi Ndirangu filed a notice of objection to the making of a grant to the petitioner on grounds that the deceased died intestate and the purported will was a forgery and hence a nullity. It was also the objector's contention that the said will is skewed in favour of the petitioner's house and has totally disinherited the first house unfairly; that the will only came to the fore three years after the deceased's demise despite the fact that the petitioner had earlier indicated that the deceased died intestate.

Directions were taken that the matter be disposed of by way of viva voce evidence after the parties filed witness statements and the lists of documents.

Objector's case:

The first objector Zachary Nganye Ndirangu testified as PW1 and called three other witnesses namely David Thuo (PW2) Chief Inspector Alex Mwongera (PW3) and PC Thike (PW4). PW1 testified that he is the son to the deceased from the first house; that his mother Esther Wamere died in 2016. He denied that the deceased left a will; that after the deceased was buried on Plot 1524 Mawingu belonging to his sister Rose Wambui, the two houses had a meeting and they agreed that the father did not leave a will and that Josephine, the 2nd wife should file a Succession Cause; that Josephine filed a Citation in NKU.329/2013, inviting his mother Esther Wamere to join her file a Succession Cause; that in her affidavit, the petitioner indicated that the deceased died intestate (P.Ex.No.1) Esther Wamere did not accept to file the petition but when the petition was filed, it was filed as petition for grant of probate; that when the petitioner claimed that there was a will, PW1 visited the firm of Ikua Mwangi Advocate but the Advocate did not give him a copy of the will but referred him to seek advice from his own advocate. The will was later supplied through the advocate and he followed up with Francis Ndungu Mugwe and Daniel Thuo Njoroge who were named in the will as executors; that Daniel Thuo PW2, denied having witnessed the will while Francis Ndungu (DW2) claimed to have witnessed the will at Ikua Mwangi offices in Nakuru.

PW1 made a report to Kipipiri Police Station where the two men, PW2 and DW2 recorded statements. Francis' statement dated 16/10/2015 while that of Thuo is dated 23/10/2015. PW1 later took a copy of the will and the deceased's known signatures to the CID Headquarters to ascertain whether they were signed by the same hand. PW3 CIP Mwongera, a handwriting expert, produced his report dated 16/3/2016 confirming that the signature on the will and the known signature were not made by the same hand P.Ex.3a, b & c. It is PW1's evidence that if the father had left a will, the deceased would have told him about it as they used to have a good relationship and the deceased would have confided in him.

PW1 said that the will, though signed by Francis Mwangi Advocate, it was not revealed to the family till after 3 years after deceased's death. He denied that one Julius Mwangi named as a beneficiary in the will was a beneficiary of the deceased's estate but a son of Peter Ndirangu who was named as an executor and that he had never come up to claim the portion allocated to him; that the will indicated that the deceased would be buried on Plot 775 belonging to Peter Kamau Ndirangu, deceased's son, but burial was done on Plot of Rose Wambui and nobody questioned it.

PW1 also questioned the distribution of the estate which favoured the second house which got 63 acres whereas the first house only got 40 acres. He prayed that the grant be issued to him together with his brother Stephen Mwangi and the estate be shared equally between the two houses.

PW2 Daniel Thuo knew the deceased as a customer who regularly visited his clinic at Miharati and that he even visited the deceased during his illness. He denied that the deceased ever called him to witness the writing of a will. He identified his name and identity card on the will

but denied that the signature against the name was his. He denied knowing Frank Mwangi Advocate. He also denied knowing Francis Ndungu Mugwe or Francis Mugure.

PW3 CIP Alex Mwongera of DCI Headquarters a handwriting examiner received some exhibits for examination, that is, a copy of a will dated 23/9/2006 with a questioned signature and exhibits C, D, E, F & G containing known signatures of the deceased Ignatitus Ndirangu. A request had been made to OC Land Fraud from Mr. Gakuhi Chege Advocate to have the signatures examined. After the examination, PW3 formed the opinion that the characteristics on the questioned signature did not tally with the known signatures of the deceased and hence the questioned signature was not made with the same hand as the known signature.

PW4, an officer from Kipipiri Police Station came to testify on behalf of PC Francis Otieno who resigned from the police force PC Otieno handed over to PW4 a file vide O.B. 10/15/10/2015 relating to a forgery case; that the report had been made by Daniel Thuo against Josephine. It was in respect of a signature allegedly made by Daniel Thuo on a will; that on 16/10/2015, Francis Mugwe recorded a statement confirming that he was present when the will was made at Nakuru KCB Building in the lawyer's office (P.Ex.4). He also produced the statement of Daniel Thuo who recorded a statement (P.Ex.6). He found out that another matter was before the court and left the issue to be dealt with by the court.

Petitioner's case:

The petitioner, Josephine Wamwathi Ndirangu, DW1 is the second wife of the deceased and had seven (7) children with the deceased. She called other witnesses in support of her case. Francis Ndungu Mugwe (DW2) and Francis Mwangi Njuguna advocate (DW3).

DW1 recalled that sometimes in 2006, while at home with the deceased, three men came to her home, namely: Ndirangu, Wajuma (DW2) and Baba Kabura; that thereafter, a vehicle arrived with Mr. Ikua Advocate and a lady; she left them to talk as she went to the farm; that they all talked and left; that the deceased then told her that he had told the people what his wishes were regarding his properties and that he had signed a will; that when the deceased died in 2012, they called for a meeting before burial and agreed to bury him in Wambui's land. Another meeting was held with the deceased's sons in which they agreed to file a Succession Cause and she told them about the will but that Zachary (PW1) said there was no will and they proceeded to file a Succession Cause. She denied being present when the will was written and did not know the contents of the will and she denied having seen the will to date.

DW1 also knew that the deceased had indicated that he should be buried in her homestead in Peter Kamau's home but in the family meeting, it was agreed that he be buried in Rose Wambui's land. DW1 said that after the deceased's children contributed money, they went to Ikua's office where she met Mr. Mwangi who agreed to file the Succession Cause.

DW2 testified that in 2006, the deceased whom he had known since 1952 invited him to witness him subdivide his property. Present were the deceased, DW1, Daniel Thuo (PW2) and Peter Ndirangu (now deceased); that thereafter, Mwangi Advocate (DW3) arrived with a lady; that the deceased said he had distributed all his property to his children, gave them the will and he signed and the deceased also signed and so did Daniel Thuo (PW2); that after deceased's death, he was summoned by Zachary (P1) and Stephen to their home and they wanted him to deny how subdivision was done by the deceased but he refused to do so. Thereafter, the police summoned him, he was interrogated on his knowledge of the deceased and recorded a statement; that he was asked if he witnessed the will in Nakuru but he said that it was in Mawingu and that Daniel Thuo also signed.

DW2 also told the court that the petitioner (DW1) was present during the signing of the will.

DW3 Francis Mwangi Njuguna, an advocate of the High Court was a partner in the firm of Ikua Mwangi & Co. Advocates till December, 2018 when the firm was wound up. He adopted his statement recorded on 19/11/2018 in which he confirmed that the deceased was his client for a long time and that he instructed him to draw his last will, gave him all details and particulars on how he intended his estate to be distributed amongst his two families. He drew the will dated 23/9/2006 pursuant to the instructions given to him and went to the deceased's house on the same day, on 23/9/2006 with a pupil from his office. DW3 said that the deceased was with two men whom he introduced as Daniel Thuo and Francis Ndungu Mugwe who were his witnesses; that the will was drawn in English with a translation in Kikuyu to which the deceased appended his signature and the witnesses also signed; that he left with all the documents; that the deceased's wife was present but at the time of signing the will, she was in the kitchen. He learnt of the police summoning the witnesses to record statements over the will but he was never summoned. DW3 stated that Daniel Thuo Njoroge signed the will voluntarily and he denied that Ikua Mwangi ever had offices at KCB Building in Nakuru; counsel also stated that the petitioner filed this cause after the court ordered her to file for probate. He admitted that PW1 went to his office enquiring about the will but he told him to seek advice from his counsel.

Both counsel filed their respective submissions. The objector's case is that the deceased died intestate and did not leave any will. Mr. Chege, counsel for the objector submitted that these proceedings were commenced by a Citation dated 24/5/2013 in *Nakuru HCC.Succ.329/2013* by the petitioner who called upon the Citor Esther Wamere to accept or refuse letters of administration intestate within 15 days and that the Citation was filed by the firm of Ikua Mwangi & Co. Advocate, the same firm which purportedly drew the deceased's will. He questioned why they filed a Citation claiming that the deceased died intestate when they knew that he died testate; that even the Kenya Gazette Notice dated 7651 states that the deceased died intestate; that though the alleged will had appointed Peter Ndirangu Ng'ang'a as the Executor of the will, he was never named as petitioner and the will did not emerge till 3 years after the deceased's death, despite the fact that Zachary (PW1) went to enquire about the will from the advocate's office (DW3) soon after deceased's burial. Further, Francis Ndungu (DW2) who even attended the deceased's burial never informed the family of the existence of the will; that of curiosity is one Julius Mwangi Ndungu who is named as a beneficiary of 2 acres of land, the son of the Executor, Peter Ndirangu Ng'ang'a, who has never come up to claim his stake. Counsel also submitted that it is curious why the will provided for the deceased's place of burial yet he was buried elsewhere; that Daniel Thuo (PW2) who is said to have signed the will denied having signed it.

It was further submitted that DW1 in her testimony denied to have been present on 23/9/2006 when the advocate and others came to sign the will but that she left them and went to the shamba.

Contrary to what DW1 stated, DW2 said that DW1 was present all through the transaction and the signing of the will while DW3 stated that PW1 was partially present and in the kitchen preparing for them a meal; that these contradictions in the testimonies of DW1, 2 & 3 go to confirm that the will is a forgery.

As to the allegations by DW2 that Zachary tried to influence him to deny having signed the will, three years later, it means that there was no intention to influence him; that there were other glaring contradictions, in that whereas DW1 denied having met the advocate (DW3) before, DW3 claimed to have met her through previous engagements.

Counsel also submitted that though DW3 knew of the demise of his client, he did not give an explanation why he did not release the will to the executor or the deceased's family and why the advocates firm filed a Citation when they had the will in their possession. Counsel also noted that the will was not signed on all the pages which made it susceptible to manipulation. For all the above submissions, counsel relied on the decisions of *Re: Estate of Krishna Kumari Bhatti (deceased) [2018] eKLR* where the court held that where a person who writes or prepares the will or plays a central role in its making takes a substantial benefit under it, the will can be rendered void.

In *Re: Estate of Julius Mimano (deceased [2019] eKLR* the court held that he who alleges forgery of a will must prove by calling a document examiner to give expert opinion on the signatures. As to the weight to be given to the document examiner's testimony, counsel relied on the case of *Apex Security Services Ltd v Joel Atuti Nyaruri [2018] eKLR* which followed the decision of *Stephen Kinini Wangondu v the Ark Ltd [2016] eKLR* where the court held that expert evidence must be judged against the background of the other evidence available but should not be elevated above the other evidence. See also *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko CA.205/2001 [2007] IEA 139* where the court held that expert opinions are not binding on the court although it will be given proper respect particularly where there is no contrary opinion.

Mrs. Gatei, counsel for the petitioner also filed her written submissions on 4/2/2020 in which she maintains that the deceased left a will which was properly attested. She submitted that the objector denied the existence of a will even before he saw it; that just because he was not aware of the will because he lived away in the USA and also because the deceased had left a property to a person not a member of the family, does not mean the will was forged; that having seen the will, the objector set out to try and have the will invalidated; that DW1, 2 & 3 were present when the will was signed and that the objector tried to influence DW2 to disown the will but having failed, had the police harass DW2 until he signed a statement that was not read to him but he stood his ground; that PW4 could not explain why he never summoned DW3 who attested the will; that if the investigation was genuine, then DW3 should have been investigated.

Counsel questioned who was the person who forged the will and why the one who forged the will was not arrested and charged. It was also counsel's submission that the document examiner was merely called to put the icing on the well choreographed narrative. Counsel relied on the decision of *NRB C.A.443/2012 Apex Security Services Ltd (Supra).*

Counsel urged the court not to give the document examiner's evidence much weight.

Counsel also urged the court to believe the testimony of DW3 who prepared and attested the will being an officer of this court.

On the question why the will did not come forth for 3 years, counsel urged that DW3 informed the Executor about the existence of the will and that is all that he was required to do and it was the duty of the executor to inform the beneficiaries. Lastly, counsel urged that the will complied with the provisions of Section 5 of the Law of Succession Act on the making of a valid will and he relied on the case of *Nyeri Succ. Cause No.1141/2011 – Re: Estate of Murimi Kennedy Njogu (deceased)*.

Analysis:

I have now considered all the evidence tendered before the court by both the objector, his witnesses, the petitioner and her witnesses and the rival submissions made by counsel. The only question for consideration at this stage is whether the deceased left a will and if he did, is the will valid? The objectors have questioned the validity of the will allegedly made by the deceased on 23/9/2006.

Section 11 of the Law of Succession Act provides for what constitutes a valid will. It provides as follows:

> "*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."*

In *Nyeri Succ. Cause 1141/2011 – Re: Estate of Murithi Njogu (deceased)* the judge stated that there are four main requirements to the formation of a valid will:

"*(a) The will must have been executed with testamentary intent;*

(a) *The testator must have had testamentary capacity;*

(b) *The will must have been executed free of fraud, duress, undue influence or mistake;*

(c) *The will must have been duly executed."*

In this case, the will was allegedly prepared by DW3, signed by the deceased in the presence of two witnesses though one (PW2) denied having been present. There is a signature alleged to be the deceased's. On the face of it, it looks like a proper will. The court has to consider the allegations by the objector.

The objectors have alleged that the deceased did not leave behind any will and the signature thereon is forged. The law is clear, that he who alleges must prove. Section 109 of the Evidence Act places the burden of proof on the objector to prove the alleged forgery. Section 109 of the Evidence Act states:

"*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."*

In *Re: Estate of Samuel Ngugi Mbugua (deceased) 2017 eKLR*, the court said:

"*The allegation that the said signature was not that of the deceased amounts to a claim that the signature was forged or that fraud was exercised in the procurement of the alleged will. That is to say that someone other than the deceased had affixed that mark on the will with the intent of passing the same as the signature of the deceased. Forgery is a criminal offence. The applicant is in fact imputing criminal conduct on either the person propounding the will or those who were involved in the operation that is purported to have been its execution. The burden of proving forgery lies with the person alleging it. In Elizabeth Kamene Ndolo vs George Matata Ndolo Nairobi Court of Appeal Civil Appeal Number 128 of 1995 it was stated that the charge of forgery or fraud is a serious one, and the standard of proof required of the alleger is more than that required in ordinary Civil cases."*

The question that needs to be considered is whether somebody else affixed the mark (signature) on the will with intent of passing as the deceased's signature.

The objector called an expert witness in the form of a document examiner, PW3. He examined the known writing of the deceased and the signature on the will and formed the opinion that the signature on the will was not made with the same hand as the deceased's known writing. This court must therefore consider what weight it needs to place on the testimony of PW3.

In *Apex Security Services Ltd v Joel Atuti Nyaruri (Supra)* the court followed the decision in *Stephen Kinini (Supra)*. The court in considering expert opinion had this to say:

"*Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all the other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.*

While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account [11] Four consequences flow from this.

Firstly, expert evidence does not "trump all other evidence". 7 It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.

Secondly, a Judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing.12 A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a Judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a Judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones."

The Court of Appeal, in Kimatu Mbuvi T/A Kimatu Mbuvi & Bres v Augustine Munyao Kioko Civil Appeal No.203 of 2001 [2007] 1 EA 139 held that "Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

The sum total of the finding in the above case is that expert opinion cannot be considered in isolation but has to be considered alongside the rest of the evidence tendered. It must be tested against the other evidence that has been adduced and cannot be elevated above the rest of the evidence.

It is a fact that the petitioner herein first moved the court by way of a Citation in Succ.329/2013 in which she wanted the 1st wife of the deceased, Esther Wamere to, within 15 days of service appear in court and accept or refuse letters of administration of the deceased's estate or show cause why the same should not be granted to the petitioner.

In her affidavit, sworn on 24/5/2013 at paragraph 2 thereof, the petitioner deponed that the deceased died intestate. The matter was not heard. On 29/4/2015, the Citation was withdrawn and the Citee was directed to file probate proceedings within 45 days and in default, the Citor would be at liberty to petition for letters of administration intestate. Interestingly, even after the above order was made, the petitioner went ahead to apply as if the deceased died intestate because, vide Gazette Notice No.51, the cause was gazetted as an intestate cause, yet the petitioner's advocate was aware of will.

In her testimony, the petitioner (DW1) admitted that she was aware that the deceased had left a will. Indeed DW1 was present on the day that the advocate (DW3) went to her home to sign the will and she told the court that the deceased informed her that he had distributed his property.

The question however is why the petitioner decided to file a Citation to prompt the 1st wife to accept or refuse to take out letters of administration when she knew very well that there was a will. As if that was not enough, the Citation was filed by the firm of Ikua Mwangi & Co. Advocates, the firm where DW3 who drew the will worked and was by then in possession of the said will. DW3 did not offer any explanation why their firm filed a Citation yet they were aware of and were in possession of the said impugned will.

The law is that each party is bound by their own pleadings. This was decided in the case of *IEBC & Another v Stephen Mutinda Mule & 3 others (2014) eKLR*, which cited the decision of the *Malawi Railways Ltd v Nyasulu (1998) MWSC 3* in which the Judges quoted with approval, the article by Jack Jacob entitled *"The Present Importance of Pleadings"* which was published in (1960) Current Legal Problems at page 174 whereof the author stated:

> *"As the parties are adversaries, it is left to each one of them to formulate his case if indeed it did happen, if so her presence exerted pressure his case in his own way subject to the basic rules of pleadings for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party then knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….*
>
> *In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."*

The petitioner deponed at paragraph 2 of her affidavit in support of the Citation dated 24/5/2013, that the deceased died intestate. Again, these pleadings were drawn by DW3's office who had drawn the impugned will and were in possession of it. Why would the petitioner be alleging that the deceased died intestate a year after his death when the contents of the will should have already been made public to the deceased's family and beneficiaries? The petitioner is bound by those pleadings that the deceased died intestate. Otherwise, no explanation has been given why the change of mind and why the will was produced till 3 years later.

It is not until 2015, three years after the deceased's death that the questioned will come to the fore. The objector had said that he learnt of the will in 2014 when he came from America and he went to enquire from DW3 if there was indeed a will left by the deceased. DW3 instead referred PW1 to his own advocate for advice because he was not named as executor.

DW3 did not explain to this court satisfactorily why he did not inform the family of the existence of a will immediately after the deceased passed away. DW3 was aware of the death. DW3 explained that he informed the executor. The said will provided for the deceased's place of burial which meant that the executor had to be informed of the contents as a matter of urgency. Ordinarily, wills will be read to the family before the burial or soon after the burial depending on the circumstances. The counsel (DW3), I believe had a duty to inform the executor and beneficiaries of deceased's wishes as regards his burial place. Instead, the families met and agreed on a different burial place. The question that begs is whether the will existed then or at all. If it did, DW3 failed his client by keeping quiet with the will when he was aware of the contents.

The will seems to have come to the fore in 2015 when on 29/4/2015, the court directed the Citee to file probate proceedings. The three years period from 2012 – 2015 was not explained. DW3 said that he had informed the executor above the will. He did not say when he did this. The executor is said to be deceased but it is unknown when he was informed of the will and when he died. The dead do not tell tales and therefore it remains a mystery what happened between May 2012 to 2015.

The evidence of DW.1, 2 and 3 on who was present when the will was allegedly signed was contradictory. DW1 told the court that once the advocate (DW3) and witnesses had been served with tea, she left and went to the farm, thus removing herself from the scene when the will was signed. DW2 was categorical, that DW1 was present throughout the signing of the will. DW3 on the other hand said DW1 was partially present, seated and sometimes in the kitchen preparing their food. DW1 is one of the beneficiaries of the alleged will with her house being given much more than the first house. One wonders whether it indeed did happen, if so, her presence exerted pressure on the deceased to allocate her house more property than the first wife.

Another reason why the authenticity of the will is doubted is because the second house belonging to the petitioner was favoured. PW1 said that in the will, the 2nd house would be entitled to 63 acres of land while the 1st house would get 40 acres and hence the will is skewed in favour of the 2nd house despite the fact that the houses comprised of equal numbers.

Section 5 of the Law of Succession Act allows all Kenyans unfettered testamentary freedom to dispose of his/her property by will as he/she deems fit to.

However, like all rights, the said right must be exercised responsibly and with fairness with the testator bearing in mind that in exercising that right and freedom, he should not injure or hurt those he was responsible for during his lifetime. In *Elizabeth Kananu Ndolo v George Matata CA.128/1995*, the deceased had made a will favouring one wife and totally disinheriting one. The Court of Appeal interfered with the deceased's testamentary right by making provision for the wife who had been disinherited. In this case, I am of the view that the challenged will was skewed in favour of the petitioner's house who had got over 20 acres more than the 1st house. In my view, this skewed will goes to corroborate the Document Examiner's finding that the said will was not signed by the deceased.

Mr. Chege also pointed out that the 'will' was not signed on all pages. Though it is not a requirement that each page be signed, it is however a good practice for all pages to be signed as the counsel did to avoid the same from being the subject of manipulation.

In *Re: Estate of Krishna Kumari Bhatti (Supra)* the court when considering a will that raised suspicion said as follows:

> *"The circumstances under which a will is made are suspicious, and can lead to the will being rendered void, where the person who writes or prepares the will or plays a central role in its making takes a substantial benefit under it. There is abundant caselaw on this, represented by such local cases as Vijay Chandrakant Sha v The Public Trustee CA.No.63 of 1984, Mwathi v Mwathi and another (1995 – 1998) 1 EA 229 and Wanjau Wanyoike and four others v Ernest Wanyoike Njuki Waweru and another HCCC.No.147 of 1980, and the English cases of Tyrell v Painton (1894)1 P 151, Barry v Butlin (1838) 2 Moo PC 480 and Witle v Nye (1959) All ER 552."*

From all the issues I have considered in this judgment, I find that the impugned will is surrounded by so much suspicion as to its authenticity so that this court finds that the evidence of the Document Examiner was corroborated; first, by the unexplained 3 years delay; the fact that the will was never released and read to the beneficiaries and why the petitioner filed a citation while she knew of the existence of a will. In addition, the conduct of the advocate who allegedly drew the will and had custody of it leaves many unanswered questions as to its authenticity. Due to these many doubts, I find that the impugned will is not a genuine representation of the deceased's wishes. Though it cannot be said who actually altered the will, there is so much suspicion that the court cannot ignore it. In the end, I find the will to be void and I make the following orders:

(1) *I find that the deceased died intestate and the impugned will is null and void;*

(2) *The deceased's property shall be shared equally between the two houses;*

(3) *The objector, Zachary Nganye and petitioner, Josephine Wamwathi are hereby appointed as the administrators of the estate to represent each house and grant be issued to the two accordingly;*

(4) *The Government Surveyor to carry out the subdivision which should take into account where the beneficiaries have settled;*

(5) *This being a family matter, each party will bear their own costs.*

Dated, Signed and Delivered at *NYAHURURU* this *11th* day of *June,* 2020.

……..

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Chege and Mrs. Gatei – agreed that judgment be read

Eric – Court Assistant