



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 117 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE SAMSON KIPKETER CHEMIRMIR (DECEASED)

RULING

1. Samson Kipketer Chemirmir died on 27/11/2010 at the MP Shah Hospital Nairobi.
2. Timna Norah, Emily Tenge, Thomas Kipsimbai and Titus Barmazai petitioned for probate of written will through their petition dated 11/3/2011 and filed in court on the same day. They annexed thereto a will dated 20/4/2010.
3. M/s Birech Ruto and Company Advocates filed objection to the making of grant of probate through their notice dated 10th May, 2011 and filed in court on 19th May 2011.

This notice of objection was filed on behalf of:-

- (i) Oscah Kipkerich,
- (ii) David Kipchumba Chemirmir,
- (iii) Jepkemboi Pauline Muraya,
- (iv) Susan Chepchirchir Chemirmir,
- (v) Doris Jerotich Chemirmir,
- (vi) Patrick Kipsambu Chemirmir and
- (vii) Lembus Chemirmir

The grounds of objection advanced on their behalf were:-

- (i) That the testator was incapable of executing the will due to illness, serenity and physical inability and lack of mental capacity.
- (ii) That the will was not properly executed.
- (iii) That the will was caused by fraud or coercion and hence not made of free will.
- (iv) That the will was unjust.
- (v) That the will was unjust for not showing there were 2 houses.
- (vi) No proper inventory or accounts were made.
- (vii) That the firm of Gresswell Maron & Dodd had detrimental note (sic).
- (viii) That the witnesses were not competent.

4. A further objection was filed by Naomi Wangui Njeri on grounds;

- (i) That the deceased did not make a reasonable provision for her (Naomi) and her 2 children.
- (ii) That there was a non-disclosure of all the assets of the deceased will.
- (iii) That some of the deceased assets were transferred before he died.
- (iv) That the deceased did not have a mental capacity to make the will.

5. Yet another objection was lodged by Judy Chepkorir Chemirmir on the 18.5.2011. Her grounds of objection were;

- i. That the will did not make adequate provisions for dependants.
- ii. That there were no disclosure of the assets of the deceased.
- iii. That major assets of the deceased were transferred to one beneficiary to the detriment of the objector.
- iv. That money and shares in bank had already been withdrawn.
- v. That the deceased was incapable of making the will due to his state of mind.
- vi. That there was intermeddling of the estate of the deceased.
- vii. That the deceased made the will under duress or undue influence.
- viii. That there was intermeddling with the estate.

6. Patrick Kipsambu, one of the objectors, subsequently changed advocates and Ms Kiplenge and Kurgat advocates whom he appointed moved the court vide an application dated 6/6/2012 seeking that the will annexed to the petition be subjected to a document examiner.

7. On the 19/4/2012, the court (**Omondi J**) directed that the validity of the will be determined first by way of *viva voce* evidence.

THE OBJECTOR'S CASE

8. The objector called two (2) witnesses. These are Chief Inspector of Police Geoffrey Chania attached to the National Police Service Directorate of CID forensic document examination and Judy Chemirmir.

9. Chief Inspector Geoffrey Chania is a trained document examiner. He testified that he received a letter dated 28/11/2012 from Ms Kiplenge and Kurgat advocates enclosing an order of this court. He also received;

- (1) Original will dated 20/4/2010 listed as the disputed document.
- (2) An affidavit dated 27/5/1975 listed as containing known signature.
- (3) An affidavit dated 5/7/1985 (a photocopy) listed as containing known signature.

10. The request as per the court order was to establish whether the specimen signatures presented and the signature on the will were made by the same person. On examination he made a finding that the signatures were not made by the same person. The conclusion made was that Samson Chemirmir, the deceased herein, did not sign the disputed will. The witness tendered the specimen signatures and the disputed signatures as exhibits as well as his final report.

11. On cross-examination, the witness said that the impression given was that the signature in the will was forged. He added that he considered time difference in the period when the respective signatures were made and despite the time lapse, he was satisfied same were a forgery. Further cross-examined by Mr. Kamonjo Kiburi, he stated opinions do not differ on the same document.

12. Judy Chemirmir testified that she was the first wife to the deceased. She said she has never seen the will presented to court. The signature on it is not the deceased's. She knew his signature. The witness and the deceased worked at the prison's department. She identified 2 affidavits signed in 1975 and 1985 respectively by the deceased and she recognized the said signatures as the deceased's.

13. On cross-examination by Mr. Kiburi, the witness stated that she divorced the deceased in 1986 and since then they never lived together again. She confirmed that she was present when the will was read to the family by Mr. Githua Advocate.

THE PETITIONERS' CASE

14. Nathaniel Githua Advocate opened the testimony for the petitioners. He confirmed that he is an advocate of the High Court of Kenya practicing under the name of Gresswell Mann and Dodd Advocates and has practiced law for 44 years.
15. He stated that he was the deceased's lawyer since 1985. He prepared the will in question on request by the deceased. The deceased presented original documents in respect of the properties he wanted included in the will.
16. The deceased, upon being satisfied with the will, signed on every page of the document. Mr. Githua and his office secretary Anne Mathai witnessed the will. The signature on the document was made in front of him. Whether the same looks like another or not was not in his (witnesses') control. The advocate added that he petitioned for a grant of probate but ceased acting when objections arose.
17. Mr. Githua confirmed that he read the will after the death of the deceased to the beneficiaries who included the 1st petitioner, her son and a daughter and other sons of the deceased and Judy Chemirmir. The witness concluded by stating that the will exhibited in court is a proper will. He prepared it and the same was executed in his presence and that of his secretary.
18. On cross-examination, the witness stated that at the time of making the will, the deceased was not very sick. He climbed the stair case to the advocate's office without assistance. He denied any personal interest in the matter.
19. Titus Koskei Barmasai testified that he was a friend to the deceased. The deceased accommodated him when he first ventured into Nairobi in a guest house at his (deceased's) Karen home.
20. Later in life, Titus introduced the deceased to wine business. The deceased disclosed to him that he had made a will. This was on an occasion when Titus was taking the deceased to hospital. Upto the time of his death, the deceased was able to conduct his affairs.
21. Upon the death of the deceased, Titus chaired the funeral organizing committee. He added that he has not conspired with the petitioners to be an executor. He has no interest in anything from the estate.
22. Timnah Norah testified that she was wife to the deceased. She got married in 1984. A civil marriage was conducted in 2005. The deceased fell ill in 2008. He was treated in various hospitals. In his last minutes, deceased mentioned to her that he had made a will and it was at Nakuru. After his death, Timnah was called by Mr. Githua Advocate and told there was a will and she was summoned there with her children. The will was read.
23. Timnah denied allegations of forgery on her part. She indicated the deceased made the will.
24. The last of petitioners' witnesses was Ann Njoki Mathai. She stated that she works at Gresswell Mann and Dodd Advocates where she has been for more than 20 years. She confirmed that she signed as a witness to the making of the will in question. The family of the deceased was later summoned to the office after the death of the deceased and the will was read out to them. The deceased was a client in other matters.
25. On cross examination Ann maintained she signed the will. The deceased was in good health. She signed the document after Mr. Githua and the deceased had signed.
26. Questioned further by Mr. Andama, the witness said, she was not there when the deceased signed the will. On further cross examination by Mr. Waiganjo, the witness stated;

“When I entered, I found the document had been signed by Mr. Githua and the deceased.”

27. Directions were given that parties file written submissions and the learned written submissions of counsel are on record.
28. I have had occasion to consider the evidence in support of the validity of the will and the rival evidence challenging the validity of the will. I have had due regard to counsels' submissions on all urged points of law and fact even those I may not restate in my analysis.
29. Of determination is;
1. Whether the deceased had capacity to make the disputed will.
 2. Whether the disputed will is a valid will.
30. As regards capacity, **Section 5(1)** of the **Law of Succession Act** Provides;

“Sec. 5 (1) Subject to the provisions of this Part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.

(2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.

(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section

unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.”

31. As regards validity of a will, **Section 11** of the **Law of Succession Act Cap 160 Laws of Kenya** provides;

“S. 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.”

32. The evidence by the objectors paints the deceased as so sickly a man as to be incapable of making a will. Evidence on record suggests that the deceased who was suffering from bone cancer would not manage to climb the staircase leading to Mr. Githua Advocate’s 3rd floor office.

33. No attempt whatsoever was made to adduce evidence on the status of the health of the deceased as at the time of making the will. To prove this fact, medical evidence was required.

34. In the absence of medical evidence, the objectors were duty bound to offer oral evidence of the witnesses who knew the testator well or by circumstantial evidence showing to the balance of probabilities that the testator’s capacity to appreciate his actions was questionable.

35. The burden of prove as to the incapacity of the deceased to make a will lay with the objectors. This is in accordance with **Section 107(1)** of the **Evidence Act**. The **Section** provides;

“S. 107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

36. This court had the opportunity to state the applicable principles in the case **Re ESTATE OF GATUTHU NJUGUNA [1998] eKLR** where quoting an excerpt from **Halsbury’s Laws of England (4th Edition Vol. 17 at page 903 – 904)** the court stated;

“where any dispute or doubt on 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.”

37. On the evidence adduced by the rival parties, I come to the conclusion that the objectors did not discharge this burden.

38. There is no demonstration at all that the deceased lacked the capacity to make a will. To the contrary, there is evidence that the deceased discussed the making of a will with his advocate. He was guided on what documents to present (ownership documents in respect of the various properties) and he presented himself to make the will.

39. On the question of the validity of the will, the objectors have called two (2) witnesses to support the allegation of invalidity of the will. The cardinal fact raised is that the will was not signed by the deceased. Chief Inspector Geoffrey Chania has testified that he examined the signature on the will and compared it with signatures of the deceased made in an affidavit sworn on 27/5/1975 and one sworn on 5/7/1985 and he came to the conclusion that the signature on the will was different from the signature on the affidavits. He concludes that the impression made is that the will was a forgery.

40. The other available evidence is that of Judy Chemirmir. She stated that she knew the signature of the deceased and the signature on the will was not the deceased’s.

41. To counter this evidence, we have the evidence of Nathaniel Githua Advocate, Titus Koskei Barmasai, Timnah Norah and Ann Njoki Mathai.

42. Mr. Githua in his evidence holds firmly that the deceased approached him with a desire to make a will. He advised the deceased. A will was prepared in his (Mr. Githua's offices) and was executed by the deceased and Mr. Githua and Ann Njoki Mathai (Mr. Githua's secretary) witnessed it.

43. Looking at the evidence from both divides, it is quite obvious that the objector's case in support of their held position of invalidity of the will rests on the evidence of Inspector Geoffrey Chania, the documents examiner. This is so because the evidence of Judy Chemirmir is of little evidential value in so far as the validity of the will is concerned. The fact that she knew the signature of the deceased and her own impression of the comparisons of the signature are not enough to discredit the will. She is not an expert.

44. Similarly on the other hand, the case of the petitioner's in regard to the validity of the will rests on the evidence of Mr. Githua and Ann Njoki Mathai. This is so because the evidence of Timnah Norah (wife of the deceased) and Titus Koskei Barmasai is of little evidential value in so far as prove of the validity of the will is concerned. The fact that the deceased could have told Titus that he (deceased) had made a will does not necessarily make the will valid neither does the relaying of the same information to Timnah Norah by the deceased make the will valid.

45. Having satisfied myself that the deceased had the necessary capacity to make a will I must move to resolve whether based on evidence before court the formal requirements of a will under **Section 11** of the **Law of Succession Act** are met.

46. The disputed signature takes central focus and must be dealt with before venturing into other parameters of a valid will without the deceased signing the will, other formal requirements amount to nothing.

47. The expert witness called is of the view that the signature on the will and known signatures on documents signed in 1975 and 1985 respectively do not match.

48. The expert evidence herein is one entitled to proper and careful consideration being that of an expert in the field of forensic document examination. But as held in the case of **ELIZABETH KAMENE NDOLO vs. GEORGE MATATA NDOLO [1996] eKLR**, as has been repeatedly held, the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say;

“Because this is the evidence of an expert I believe it.”

49. The other available evidence that I must consider along this expert evidence is that of, first and foremost, Mr. Githua Advocate. He states that he prepared the will on request by the deceased. The deceased signed the will and he (Mr. Githua) and his secretary witnessed it.

50. I observed the demeanour of Mr. Githua Advocate. He struck me as a truthful witness who nonchalantly narrated the facts as had unfolded before him at the material time. He exhibited no other interests whatsoever in the estate. He struck me as a forthright and reliable witness. He is an advocate of almost half a century standing. From his testimony, it was clear that he had nothing to gain from these proceedings. There was no evidence of his prior contact with any of the parties before he called them to read the will. The evidence that the deceased was his longtime client is not challenged.

51. This witness demonstrated in detail the request by the deceased to be advised on the making of a will, the advice he gave the deceased and the ultimate making and signing of the will. Apart from the evidence challenging the signature, the evidence of Mr. Githua Advocate remains uncontroverted.

52. He witnessed the will and so did his secretary (I will revert to the secretary's witnessing later as same is challenged). He, after the death of the deceased, summoned the beneficiaries and read the will.

53. As alluded to earlier, it is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed (See **KOINANGE AND 13 OTHERS vs. KOINANGE (1968) KLR 23**). The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact.

54. In civil cases the balance of proof is to the balance of probabilities. In the case of **MILLER vs. MINISTER OF PENSIONS, (1947) 2ALL ER 372, Lord Denning** stated;

“The... (standard of proof).. is well settled. It must carry a reasonable degree of probability... if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.”

55. Weighing the evidence of the expert and the evidence of the eye witnesses who saw the deceased come to the advocate's office, have the will prepared and signed it, I am persuaded that the evidence of the expert and which is an opinion that is not corroborated is far outweighed on a balance of probabilities by that of the advocate who personally prepared the will, saw the deceased sign it and saw the secretary witnessing it.

56. I am fortified in this finding by the decision of this court in **STEPHEN KININI WANG'ONDU vs. THE ARK LIMITED [2016] eKLR** where it was held;

“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 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. Four consequences flow from this.

Firstly, expert evidence does not “trump all other evidence”. 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. 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.”

57. The decision of the Court of Appeal in KIMATU MBUVI T/A KIMATU MBUVI AND BROS vs. AUGUSTINE MUNYAO KIOKO CIVIL APPEAL NUMBER 203 OF 2001 [2007] IEA 139 illuminates the matter further. The court held;

“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.”

58. And lastly on this point, the decision of the *Court of Appeal of Tanzania at Arusha (Mfahila, Samatta And Lugakingira JJA) in VAGHELLA vs. VAGHELLA E.A. (1999) 2 EA (CAT)* is a gem of jurisprudence on matters opinion evidence. At page 355, the judges expressed themselves thus;

“After our own appraisal of the evidence and the law, we are unable to come to a different view. To begin with, we are conscious of the importance of expert opinions in the field of medical issues. In *Nkinga Hospital v Theodeolina Alphaxed* civil appeal number 49 of 1992 (UR), also cited by Mr. D’Souza, this Court said:

“On such professional and technical issues, courts should not make assumptions based on nothing but conjure. Opinions of professional and technical people in the field is invaluable to enable the Court to make an informed finding.”

We adhere to that view but wish to draw attention to the word “invaluable” in the passage which, in our view, reaffirms the settled position that opinion evidence is by no means conclusive. The opinion of experts are relevant but no binding; the weight to be attached on these opinions would depend on the nature of each case.”

59. On the totality of the evidence before me I am of the finding that whether or not as stated by the expert the signatures on the will and on the affidavits do not match, the fact of the matter is that the deceased appeared before Mr. Githua Advocate and signed a will and Mr. Githua Advocate witnessed it.

60. Did Ann Njoki Mathai attest the will to the satisfaction of the legal requirement placed on witnesses to a will by **Section 11 (c) of the Law of Succession Act?**

61. In her own candid admission, this witness states that she was called into Mr. Githua’s office to sign the will when the deceased and Mr. Githua had already signed. In her own words when cross examined by Mr. Andama Advocate she stated;

“I saw the deceased sign the will. He was in good health. I was not there when he signed.”

62. On further cross examination by Mr. Waiganjo Advocate she said;

“When I entered, I found the document had been signed by Mr. Githua and deceased.”

63. On further cross examination by Mr. Waiganjo Advocate she said;

“When I entered, I found the document had been signed by Mr. Githua and deceased.”

64. **Section 11(c)** of the **Law of Succession Act** provides;

“S. 11. No written will shall be valid unless –

(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.”

65. I have anxiously considered the concerns by the objectors that Ann did not properly witness the signing of the will.

66. The requirement of **Section 11(c)** of the **Law of Succession Act** is to the effect that for a will to be valid it must be attested to 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.

67. Ann Njoki has categorically stated that she did not see the testator sign the will. She has not indicated at all that the testator gave her a personal acknowledgment that the signature on the will was his (testator’s). It is as clear as daylight that Ann never witnessed the will within the meaning of **Section 11(c)** of the **Law of Succession Act**.

68. I am thus satisfied that the deceased in this matter desired to make a will and approached his advocate who proceeded to prepare one and which will was duly executed by the deceased and one witness Mr. Githua advocate. The 2nd witness Ann Njoki Mathai did not see the testator sign nor did the deceased acknowledge the signature on the will as his to Ann Njoki Mathai.

69. The cumulative effect of the foregoing is that the will was witnessed by one person. This flouts the statutory requirement under **Section 11 (c)** of the **Law of Succession Act** which requires that a will be 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.

70. This court cannot ignore this clear statutory requirement as when the deceased chose to go by way of a written will, he was bound by law to ensure that all the formal requirements of a valid will were met.

71. With the result that the will dated 20th day of April, 2010 does not meet all the formal requirements of a valid will envisaged under **Section 11** of the **Law of Succession Act**.

72. I make a finding that the will dated 20th day of April, 2010 is invalid.

73. In view of the relationship of the parties each party is to bear its own costs.

Dated and Signed at Nakuru this 20th day of February, 2019.

A. K. NDUNG’U

JUDGE