



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 1721 OF 2000**

**IN THE MATTER OF THE ESTATE OF JOSPHAT GATIA MUCHIRI (DECEASED)**

**JUDGMENT**

1. The deceased herein died on 28<sup>th</sup> November 1992. Representation to his estate was sought by Mary Wairimu Gatia, in her capacity as widow of the deceased, in a petition lodged in Thika SPMSC No. 32 of 1994 on 15<sup>th</sup> February 1994 for a grant of letters of administration intestate. The deceased was said to have died intestate and to have been survived by two widows and thirteen children. He was expressed to have died possessed of Plot No. 4953/52 Thika, Plot No. 54 Nairobi, Loc. 7/Gakoigo/817 and money in an account with the Barclays Bank Maragua.
2. A petition for limited grant of probate of a will was lodged in the same cause on 1<sup>st</sup> March 1994 by Mary Wairimu Gatia, the petitioner in the petition lodged herein on 15<sup>th</sup> February 1994. She swore two affidavits in support, both dated 26<sup>th</sup> February 1994, where she avers that the deceased had died testate having made a valid will dated 21<sup>st</sup> July 1991. The survivors listed are the same as those in the petition in intestacy, but it is averred that the deceased died possessed of Loc 7/Gakoigo/817, Kakuzi/Kirimiri/Block 8/1051, ½ share in Maragua Plot No. 54, shares in several firms, and money in a bank and a cooperative savings society. She stated that the deceased also had a share in Plot No. 4953/52 Thika, where he operated a garage with other persons, and that the partners had agreed to dispose of the property, and that she sought the limited grant to facilitate the sale and transfer of the property.
3. A grant of letters of administration with written will annexed was made on 20<sup>th</sup> April 1994. The said grant was confirmed on 13<sup>th</sup> July 1994 on the basis of an application dated 4<sup>th</sup> July 1994.
4. The applications were mounted at the High Court in HCSC No. 1721 of 2000, HCSC No. 1004 of 2005 and HCSC No. 792 of 2014, seeking revocation of the grant made in Thika SPMSC No. 32 of 1994. The three High Court causes were consolidated by an order made in HCSC No. 1004 of 2005 on 9<sup>th</sup> October 2015, with HCSC No. 1721 of 2000 being the lead cause. It was directed that the issue as to whether the said grant ought to be revoked be dealt with. Directions were taken on 1<sup>st</sup> December 2015 for disposal by way of oral evidence. It was agreed by consent that the parties proceed on the basis of the application dated 25<sup>th</sup> April 2005 filed in HCSC No. 1004 of 2005.
5. The application dated 25<sup>th</sup> April 2005 was brought at the instance of Francis Ndung'u Gatia, on the grounds that he and his siblings were children of the deceased yet the cause in Thika SPMSC No. 32 of 1994 had been initiated without their knowledge and involvement. He asserts that he and his siblings are entitled to a share in the estate of the deceased, and further that the will the basis of Thika SPMSC No. 32 of 1994 was invalid for it was made when the deceased was not of sound mind and was procured by fraud or coercion or importunity.
6. There is a response to the said application through an affidavit sworn on 14<sup>th</sup> July 2005, by the administrator, Mary Wairimu Gatia. She acknowledges the applicants as children of the deceased by a co-wife, who she states left the deceased and had two children outside of wedlock. She further claims that the bulk of the estate was acquired by her jointly with the deceased after the applicant's mother left the fold. She further asserts that the deceased had left a valid will, and that the cause in Thika SPMSC No. 32 of 1994 had been properly initiated.
7. The oral hearing commenced on 15<sup>th</sup> March 2016. The first on the stand was Paul Muchiri Gatia. He testified that he was the first born son of the deceased by his first wife, Esther Wanjiku Muchiri, also known as Lucy Wangari Muchiri. He acknowledged the administrator as the second wife of the deceased, who was also his aunt. He alleged that the administrator came to stay with the family at Thika, where his parents were working, while attending school, but when his mother went to live upcountry the administrator apparently had an affair with his father and she eventually became his wife. The resulting circumstances created a rift between his mother and the deceased which culminated in her leaving Thika to settle at the upcountry home at Maragua and to eventually move to Nairobi, leaving them at the Maragua home. The administrator also eventually relocated to the upcountry home, but lived in rented premises near the home. He said that he was in Nairobi when the deceased died at Maragua, where he lived with the administrator, but he was aware that he had had complained of a headache and issues with his blood. He explained that they tried to agree on distribution of the property as between the two sides of the family shortly after the deceased's demise, and did hold a meeting at the offices of the local Chief. However, the administrator apparently moved stealthily to court in Thika SPMSC No. 32 of 1994 and obtained documents that enabled her to have estate property transferred to her name. On the will, he said he heard of it when the family held meetings at the Chief's office shortly after the demise of the deceased, but he never saw the original of the alleged will. He said he could not identify the signatures on the will, saying that the one purported to be the deceased's was not his.

8. The next to testify for the applicant was Habel Karanja Jotham, a brother of the deceased. He stated that the deceased was married to the administrator and her sister, the mother of the applicant. He testified that the deceased began to mistreat the applicant's mother after he married her sister, which forced her to live with her parents in law, before moving to Nairobi. The ill-treatment allegedly continued even after that forcing her to change her name from Esther Wanjiku Muchiri to Lucy Wangari Muchiri. The deceased was said to have had on occasion driven her children in a car to Nairobi to take them to their mother, but the children refused to be left in Nairobi. He stated that her children grew up at Maragua since birth, although she had two other children while in Nairobi. He said that the deceased was diagnosed with blood cancer in the 1991 after he had had an accident and blood transfusion, and that he was among those who took him to hospital. He said that he was in a lot of pain but he could still communicate. He was admitted for a second time in 1992, when his memory was very poor, he could not even recognize anyone. He stated that after his death, the administrator brought to him an alleged will in an open envelope. He stated that elders met and agreed to have the assets of the deceased divided equally between his two families. Elders came and fixed boundaries between the two households, and the administrator's side of the family took possession. Thereafter it was discovered that the details of ownership of the property had been changed from the deceased's name to that of the administrator without notice to the other side of the family, after succession proceedings to which they were not party. Family fights erupted, which culminated in the administrator and her children leaving the land. When shown the alleged will of the deceased, he said that the signature alleged to be that of the deceased was not his, and that he could not identify any of the signatures on the document as belonging to the deceased. He further said the administrator and the deceased did not have a child called Nahason Ndung'u, saying that was in fact his own brother. He also identified some of the assets distributed in the alleged will. He said that at the meeting at the chief's office neither the administrator nor Onesmus Gitau Mutuamba, the alleged witness to the will, disclosed to them that the deceased had made a will. He said he obtained a medical report on the deceased after his death upon advice from counsel. He denied procuring the same from a doctor friend, saying that he only became acquainted with Dr. Waitara after the deceased's admission at Avenue Hospital. He explained that cancer of the blood could have affected the deceased's brain. He stated that he was with the deceased a day before the execution of the alleged will. He met him at his home after he asked for him to take him to hospital. He asked to be taken to a hospital other than at Murang'a where he used to take him for blood transfusion, and he took him to Avenue Hospital the next day, where he remained for five days. He said that the deceased had been on bad terms with his first wife and her children after he married his first wife's sister, and that he began to frustrate and ill-treat the first wife. He lived with the administrator. He accused her of unduly influencing him, and suggested that she was responsible for procuring the making of the said will.

9. The applicant's second witness was Dr Ben Ndung'u Waitara, a University of Nairobi trained surgeon. He stated that he had attended to the deceased and that he had prepared a medical report dated 14<sup>th</sup> January 2000. He said the latter had been admitted at Avenue Hospital on 22<sup>nd</sup> July 1991, with complaints of general body weakness, pain to the left hip, lots of hiccups, and excessive salivation, otherwise referred to drooling saliva. When he examined him, he noted that he was obese, moved with support and appeared drowsy. He also had marked pain or tenderness on the lower side of the spine. Blood and x-ray examinations were done which revealed that he was suffering from blood cancer, otherwise called multiple myeloma. He was discharged home after five days. The witness opined that in that condition he did not think that the deceased could make a valid will as he was not able to know what was going on. He stated that he was not able to have a discourse with him; saying that the deceased did not understand the witness nor talk to him. He said that he did not see the deceased after his discharge from the hospital. He described multiple myeloma as a blood cancer, where certain blood cells increase and invade the bones. He clarified that the same does not involve deposit of matter in the brain. Its principal effects he said were that the chest collapses a bit and thinking is also affected. He described the deceased as having been at the final stages of the illness at the time that he saw him. He said that he was surprised that the deceased lived for another one and half years thereafter. He said that a person suffering from multiple myeloma would only be affected seriously mentally on the final stages. When the report by Dr Wokabi was placed before him, he said that the same was mere opinion as the said doctor did not interact with the deceased.

10. The case for the respondents opened on 6<sup>th</sup> December 2016; the first witness on the stand being Dr Wokabi. He testified that he had been instructed to give a professional opinion to comment as to whether multiple myeloma could cause incompetence for one not to be able to write a will. It described it as a cancerous disease which weakened the bones where it is resident without affecting the intellect of the patient. He said terminally there could be secondary complications, usually affecting the kidney. He said that a person terminally ill as not to have capacity to make a will could not have lived beyond a year after discharge. He explained that Dr Waitara's report did not give an opinion, it was a statement of what he treated the deceased for, adding that the report does not say much about the condition that he treated the deceased for. He asserted that the deceased could not have been terminally ill at the time he was attended by Dr Waitara. He described multiple myeloma as a chronic illness that takes years before a person succumbs to it. He opined that a person suffering from it could write a book.

11. The last witness on the stand was Mary Wairimu Gatia. She described herself as widow of the deceased, the two having contracted marriage sometime in 1960. She stated that the deceased had another wife by then, who was the witness's own sister, Esther Wanjiku. She said that the two of them remained wives of the deceased until he died. They initially had a home at Thika and Gakoigo, but her co-wife later left to live in Nairobi. She testified that the deceased died testate in 1992. She got to learn of the will during the mourning period, when persons who had allegedly signed the document as attesting witnesses came to inform her so. She had not known of the will before then. She searched for the alleged will and found it amongst the deceased's other documents, and she took it to the deceased's brother, Habel Karanja, who said the same was inoperative. A family meeting was held at the Chief's office where parties agreed – in the presence of the chief, clan elders and one of the men who had attested the will - on the distribution of the estate. Everything was to be distributed between the two houses of the deceased. She showed them the will, but they insisted on distribution. She also informed them that she had since commenced succession proceedings at Thika. She testified that the will had been made on 21<sup>st</sup> July 1991. She said that the deceased was unwell then, but he was not badly off. He was said to have sent Patrick Ng'ang'a to go and call Habel Karanja. When the latter came, the deceased walked himself out of the house and held a discussion with Karanja outside the house, where they discussed about Karanja taking the deceased to hospital. They agreed that they would go to hospital the next day, using a vehicle belonging to Chrispus Mungai. The next day they went to Avenue Hospital Niarobi, where the deceased was said to have gotten out of the car unaided and to have talked to the doctor himself. He was admitted, and during that time he personally asked the witness to check on the hospital bill. The bill was said to be Kshs 9,000.00 whereupon he instructed her to get the money from Karanja in exchange for a cow. She did as instructed. She said that she never saw Karanja visit the deceased in hospital, asserting that he was not present at his discharge. He was said to have continued with medication at home, although he never recovered. However, he was not badly off as he was still take grass to the cattle and follow the witness to the farm. He lived for a year after discharge from hospital. She stated that the attesting witnesses were not family members, had died before the trial and had testified at the Thika court. She stated that she was given half the farm while her co-wife's children got the other half. She does not however use her half on account of hostility from her stepchildren. She asserted that Karanja hated her for no good reason. She mentioned that on 21<sup>st</sup> September 1991, the deceased spent the whole day at home and she was with him. She said that Gitumbi and Mwangi Mugeka, the alleged attesting witnesses, did not visit on that day.

12. At the close of the trial, it was directed that the parties do file written submissions. There has been compliance and there are two sets of written submissions on record. I have read through them and noted the arguments advanced by the parties.

13. I am called upon to determine this matter on the basis of the applications for revocation of grant made in the three High Court matters that were collapsed herein. The one in HCSC No. 792 of 1994 is founded on the allegation that the will on record was not valid as the deceased lacked capacity to make it, the respondent widow unduly influenced him into making it and its making was not attended by the two or more witnesses as required by the relevant law. The one filed in HCSC No. 1721 of 2000 is a complete replica of that filed in HCSC No. 792 of 1994.

14. The only issue for me to determine is whether the will the subject of the proceedings in Thika SPMSCS No. 32 of 1994 is valid. If I find it to be invalid, I should proceed to annul the grant made on it. If I find it to be valid *status quo* shall prevail.

15. A copy of the disputed will was lodged in Thika SPMSCS No. 32 of 1994 on 1<sup>st</sup> March 1994 together with the petition for limited grant of probate. The attached document is a handwritten Photostat copy in Kikuyu language. No translation was provided. It is dated 21<sup>st</sup> July 1991 and has signatures at its foot. I have ploughed through the entire record and I have not encountered a certified translation of the alleged will.

16. I have noted that the applicants are not challenging the existence of the will. They do not allege that no will was ever made by the deceased. To my mind they concede to the existence of the document that has been placed on record. Their case appears to me to be that the document before court cannot possibly be valid as its maker lacked capacity to make it, or that even if he had capacity his freewill to make a valid will had been taken away by the undue influence exercised upon him by the respondent, or that the document was not properly executed.

17. The law on validity of written wills and testaments is stated in sections 5, 7 and 11 of the Law of Succession Act, Cap 160, Laws of Kenya.

18. Section 5 deals with capacity of the maker of the will, and the provision states as follows:-

*'(1). Subject to the provisions of This Part and Part III, any person who is sound of 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) ...*

*(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 was 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.'*

19. It is being alleged in this case that the deceased lacked capacity to make it for he was said to have been so sick and in so much pain as to be unable to know what he was doing. Evidence was led that the alleged will was made purportedly made a day before the deceased was admitted in hospital for five days with what was diagnosed as multiple myeloma. There is conflicting evidence as to his state at the time. The doctor who handled him said that he walked with support and could not talk, while the respondent said he walked himself to the hospital and explained himself to the doctor. The medical opinions also differ. Dr Waitara who attended to him, described his condition as so bad that he could not possibly have made a valid will. Dr Wokabi on the other hand opined that his case could not have been that desperate as he lived on for another one full year before his demise.

20. The deceased was not a minor, so he suffered no disability with respect to age. What needs to be determined is whether he was of a disposing mind. According to section 5(3), a disposing mind is that of a person who, at the time of executing their will, knows what they are doing. So that a person who, on account of mental illness or physical illness or drunkenness, signs a will while in that state of mind, would be deemed to lack a disposing mind for he would not know what he would be doing. According to section 5(4), it is up to the person alleging lack of such a mind to prove it. The side that bears burden of establishing the lack of soundness of mind on the part of the deceased at the time he allegedly made the will is the applicant's.

21. The judgment of Cockburn CJ in *Banks vs. Goodfellow*(1870) LR 5 QB 549, is considered the cause classicus on matters touching on soundness of mind of a testator, he said –

*'He must have a sound and disposing mind and memory. In other words , he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he meant to dispose of, and of the persons who are the objects of the bounty and the manner it is to be distributed between them.'*

22. Put in simple layman's language, it says that the testator must at the material time know what he is in fact doing, disposing of his assets to the persons that he is obligated in law to dispose it of to. He must know that he is making a will, and for that purpose he must be able to know or remember the assets that he should be distributing and the persons who in law should be entitled to such distribution. This would mean that a person who draws or signs a document purporting it to be a will, yet not knowing what he was doing, in terms of not knowing that he is disposing of his property by will is said to lack a sound disposing mind. This should also apply to a person who, while purporting to dispose of property by will, cannot recall the persons that he obliged legally to provide for.

23. Did the deceased in the instant case know what he was doing when he allegedly made the will? Three witnesses testified for the applicant. Of the three, only two closely interacted with the deceased on the day he was alleged to have made the will on 21<sup>st</sup> July 1991. The first was his brother, Habel Karanja, who told court that he was with the deceased on 21<sup>st</sup> July 1991 when the latter called him to his house to ask him to take him to a hospital the next day, 22<sup>nd</sup> July 1991. The deceased was said to have indicated a preference for a hospital other than the hospital at Murang'a where the witness used to take him for blood transfusion. He was again with the deceased on 22<sup>nd</sup> July 1991 when he took him to Avenue Hospital, Nairobi. The witness described the condition of the deceased then to be that the matter was in a lot of pain. He could still communicate but with difficulty as he was not consistent and was forgetful. He was admitted in hospital for five days, was discharged and died a year later. The other witness was the doctor, Dr Waitara, who attended to the deceased on 22<sup>nd</sup> July 1991. According to him, the deceased walked with support, was drowsy, drooling saliva, in severe pain and unable to communicate. He was diagnosed with blood cancer, which he said does not affect the brain until the final stages. He expressed surprise that the deceased died a year later. He was of the opinion that someone in his state could not possibly make a valid will. The evidence of the respondent was that the deceased was strong on 22<sup>nd</sup> July 1991. He walked out of the car at the hospital and even talked to the doctor. Her witness, Dr Wokabi, never interacted with the deceased. He was called as a witness primarily to give opinion on blood cancer.

24. I am constrained to believe the testimony of the medical professional, Dr Waitara, as against that of the lay person. He attended to the deceased and was the one who made the diagnosis that facilitated his admission. He can therefore speak authoritatively on the general state of health, both physical and mental, of the deceased as at the material time. His testimony tallies with that of the brother of the deceased. This evidence does raise serious doubts as to the capacity of the deceased to make a valid will on 22<sup>nd</sup> July 1991. However, the will was allegedly made on 21<sup>st</sup> July 1991. It is possible that he was in two different states of mind on the two distinct dates. There is evidence that he was the one who suggested to the parties that he needed to be taken to a hospital other his regular one at Murang'a. He was said to have sent for his brother for that purpose. They held a lucid discussion on those issues and arrived at a consensus that he would be taken to hospital the next day. There is evidence that he could communicate on 21<sup>st</sup> July 1991, although his brother explained that he did so with difficulty. I am persuaded that he knew what he was doing on 21<sup>st</sup> July 1991. I do not think that the events of 22<sup>nd</sup> July 1991 should be used as a basis to assess the mental state that the deceased was in on 21<sup>st</sup> July 1991.

25. The applicant invites me to determine whether the will was authentic or forged. This no doubt calls for examination of the law relating to the making of written wills, specifically as it relates to the formalities. This is dealt with by section 11 of the Law of Succession Act, which 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.'*

26. The original document that has been probated as the will of the deceased is in the native language of the deceased, Kikuyu. It is dated 21<sup>st</sup> July 1991 and bears three signatures at its foot. I have stumbled upon two uncertified versions of what pass as translations into English of the document in Kikuyu. Of the two the one that comes closest to capturing every detail of the document in Kikuyu says as follows-

'21/7/1991

SHARING OUT OF MY PROPERTIES TO MY FAMILY MEMBERS ACCORDING TO HOW EACH MEMBER HAS TAKEN CARE OF ME

(1) I have given my parcel of land No. Kakuzi/Kirimiri/Block 8/1051 to Esther Wanjiku together with her children Banley Paul Muchiri, Samuel Nganga, Nahashon Ndungu and Peter Wanyoike. These people will however pay back to Paul Muchiri Kshs., 1 000.00 each being survey fees.

(2) I have given my parcel of land No. Loc 7/Gakoigo/817 to Mary Wairimu Gaita together with all other properties in there and nobody should ever interfere with her possession, even the coffee plants and all the money from it shall be hers.

(3) I have given my share in New Kuranze Farm P35 to Patrick Nganga Gatia.

(4) I have given my piece of land at Narok to George David Muchiri Gatia.

(5) I have given my plot at Weitethie No. 2 as you go to Munyu No. 106 to Jane Njoki Gatia.

(6) I have given my share of in the house in Maragua at Plot No. 54 to George David Muchiri.

(7) I have given my share in Kimuri Garage house in Thika to Patrick Nganga.

(8) Any other property in my name which has not been mentioned above I give it to Mary Wairimu Gatia.

(1) Signed

(2) Signed

(3) Signed'

27. On the face of it, it appears to be a testamentary statement to the extent that it disposes of property. The same bears three signatures. It is not indicated who the three signatories were, but it presumed that it was the deceased and his two witnesses. It is the responsibility of he who alleges that the deceased did not sign it to prove that allegation. It was up to the applicant to establish that the deceased did not sign the document or that none of the signatures on the document were his or that even if one of them looks like his it was forged. The applicant merely said that the signature on the will alleged to be the deceased's was not his. His uncle too said that the same thing. Beyond that no evidence was adduced to demonstrate that it was not the signature of the deceased.

28. What whets my curiosity is that the respondent testified that the deceased spent the whole day at home on 21<sup>st</sup> July 1991, and that the two attesting witnesses, Gitumbi and Mwangi Mugeka, did not visit him at all that day. That was the day when the deceased had called his brother to talk about being taken to hospital. The respondent did not say where she spent the day, but must have been with the deceased throughout as he was not feeling well. She stated that she was not privy to the making of the will and did not in fact know of its existence until after the death. She did not see the attesting witnesses come home that day, and she did not even call them to shed light on the making of the will, yet that is their principal role as such. That then begs the question when could the will have possibly been made on 21<sup>st</sup> July 1991? Who was present apart from the deceased? Did he prepare it all on his own? When did the attesting witnesses sign the will? To my mind these question ought to have the said will called into question. It was upto the propounder of the will to answer them, she did not.

29. An issue was raised by the brother of the deceased to the effect that the will was procured by the respondent through undue influence. Other than that statement no evidence was placed before the court to support the contention. I shall therefore not seek to define undue influence or to analyze the material before me to ascertain whether or not there was undue influence. Needless to say that he who alleges must prove. The applicant should have demonstrated that the respondent in fact forced or coerced or exerted pressure in some way on the deceased so as to make the will in the manner that he did. He did not make any effort to do so. I therefore do not have before me any material that would persuade me that undue influence was exercised on the deceased. The applicant's case appears to have been built on the rather unhappy relationship that was there between his mother and the deceased, and the rather cozy relationship between the respondent, who also was his stepmother and aunt, and the deceased, which persisted till the deceased's demise. It would appear that bad blood had an influence in the way the deceased distributed his estate in the purported will, as the respondent and her side of the family appear to benefit the most from it, but there is no positive evidence of exercise of undue influence.

30. Overall, the parties to this matter presented a rather muddled up case. The facts as presented did not leave the court any wiser. The applicant apparently doubted whether there was a will, but his witness took the position that there was a document capable of taking effect as a will, but it's legitimacy, according to him, was undermined by the fact that when the same was allegedly made the deceased had no capacity and it appeared to him that the document had been procured by the undue influence of the respondent.

31. My understanding of it is that there is before me a document which purportedly bears a signature of the deceased, supported by other signatures. However, the circumstances of the making of the said document is shrouded in mystery as no one appears to have been present when the will was made, as no one was presented to me as having been present when the will was made, and there is no evidence as to whether the attesting witnesses appended their signatures in the presence of the deceased or after he had acknowledged his signature to them. The role of witnesses is to authenticate the making of the will as and when the fact of its making is called into question. They come forward to testify as to having been present at the making of the will or to the acknowledgment by the deceased of his signature on the document before they appended their signatures. It would suggest that there is no proof that the deceased made the will in question. It was allegedly made on a day when the deceased had people all around him as he was unwell, yet no one saw him make it, the witnesses never came to his home that day and he did not himself talk about it.

32. I am persuaded that the deceased did not make the will on record. It is my conclusion therefore that the said will is not valid and ought not have provided basis for the proceedings conducted in Thika SPMSC No. 32 of 1994.

33. The application before me is for revocation of the grant made in that cause. According to section 76 of the Law of Succession Act, a grant of representation is revocable on grounds that it was obtained in defective proceedings, or that there was misrepresentation of facts, among others. The proceedings in Thika SPMSC No. 32 of 1994 were mounted on a will that I have held to have been invalid. Consequently, the said proceedings were defective and a nullity.

34. In view of the above, I shall make the following final order –

**(a) That the grant made in Thika SPMSC No. 32 of 1994 is hereby revoked, and that all consequential orders founded on the said grant are hereby nullified;**

**(b) That the court file in Thika SPMSC No. 32 of 1994 shall be returned to the registry of the Thika Chief Magistrate's Court with directions that the matter of the estate of the deceased do start *de novo* on the understanding that the deceased had died intestate;**

**(c) That all the High Court causes relating to the said estate are now spent and the relevant files shall be closed; and**

(d) That each party shall bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 21<sup>ST</sup> DAY OF MARCH, 2018.

W. MUSYOKA

JUDGE