REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 250 OF 2007

(IN THE MATTER OF THE ESTATE OF MAAKA MUHUHI MUGWERU (DECEASED))

ELLEN NYATETU MUGWERU……..…….1ST PETITIONER

RUTH WANJIRU MUGWERU……..…….2ND PETITIONER

VERSUS

DANSON WERU…….....…….……...1ST OBJECTOR

GICHUHI KIMIRA…….……2ND OBJECTOR

LOISE WAIRIMU MUGWERU……...…….3RD OBJECTOR

WINNIE WANGU MUGWERU……..……..4TH OBJECTOR

MIRIAM WANJIRU MUGWERU……..…….....5TH OBJECTOR

GRACE WANJUGU MUGWERU……....6TH OBJECTOR

DAVID MWANIKI……...…….….7TH OBJECTOR

OLIVE MUTHONI……...…….....….8TH OBJECTOR

RULING

On the 31st May 2007, the petitioners lodged in this Honourable Court a petition for probate of a written will in respect of the estate of **Maaka Mukuhi Mugweru** (herein "the deceased"). According to a copy of the certificate of death which they filed alongside the petition, the deceased died of cancer on 24th January, 2007. She was then domiciled in Kenya and her last place of residence was at Karindudu in Nyeri County.

In the affidavit which the petitioners swore in support of their petition, the deceased is said to have died testate having executed a valid will on 6th July, 2006 in which the petitioners were named as the executrixes. They listed 25 immovable properties as comprising the deceased's estate; these are, **Title Nos. Konyu/Baricho/1147, 1148, 1153, 1159, 1163-4, 1167-74, 2583, 86, 91, 93, 95-96 and 3173**.

Others are **Karatina Township Plot B1/186 (Mugweru House) and LR No. 13041/2 (IR No. 85810)** at Kasarani in Nairobi. The estate was estimated to be worth Kshs 50,000,000.00 as at the time the petition was lodged. The only item indicated as a liability to estate is the legal fee though the exact amount due and to whom the fee is owed are details that have not been specified.

Apart from the petitioners themselves, other dependants listed in the affidavit as having survived the deceased are:

1. Miriam Wanjiku Mugweru (daughter)

2. David Mwaniki Mugweru (son)

3. Loise Wairimu Muita (daughter)

4. Danson Weru Simon (son)

5. Winnie Wangu Kareithi (daughter)

6. Grace Wanjugu Mwai (daughter)

7. Olive Muthoni Kariaku (daughter)

On 13th August, 2007, the first objector filed an answer to the petition and objected to the grant of probate for the reason that the will annexed to the petition was fraudulent. As a son to the deceased and a beneficiary to her estate, he also filed his own petition by way of cross petition. In the affidavit he swore in support of his cross petition he listed more less the same properties listed by the petitioners as comprising the deceased's estate except **Title Nos. Konyu/Baricho/1174, 2583, 93, 95-95** which were not part of his list and **Title Nos. Konyu/Baricho/1150-1152,1154-1158,1160-1162,1165-1166** and **2526** which he added on his own list. Other new inclusions on his list of assets were **Parcel Nos. Suguroi 452, Rumuruti 6724, 2372/Block 2/Ruiru, Mwichuri/217.** He also listed several other items as comprising liabilities to the estate; these are the rates due to Nairobi City Council and Karatina Municipal Council and legal fees due to three different advocates. Kenya Commercial Bank (Kenyatta International Conference Centre Branch) is also listed amongst the liabilities but it is not clear from the first objector's affidavit what it is that the deceased owed the bank.

The second objector filed his own objection on 24th August, 2007 on the ground that there was a dispute pending in court over parcel number 13041 yet this property has been listed as being part of the estate of the deceased.

The third and fourth objectors also questioned the validity of the will annexed to the petitioner's petition; it was their case that the will was not voluntary and in any event the testatrix was so ill at the time the will is alleged to have been written that she could not have understood the contents thereof. It was their case that the will reflected the wishes of the petitioners and not those of the deceased. Accordingly, they followed suit and also filed their own objection to the grant of probate on 19th September, 2007. They were joined in the fray by the fifth, sixth, seventh and eighth objectors who alleged that the will was invalid for the reason that the deceased only held the property comprising the estate as a trustee and not as its owner.

It became clear that the contest between the petitioners and the objectors revolved around the validity or lack thereof of the will executed by the deceased allegedly bequeathing what she assumed to be her properties. Inevitably, on 2th June, 2009, the court (Makhandia, J, as he then was) directed that the question of the validity of the will be determined as a matter of priority; the learned judge directed further that the evidence on this issue be taken orally.

The hearing commenced in earnest on 15th October, 2009 when Mr. Samwel Gathiga Mwangi, an

advocate of the High Court of Kenya, testified and confirmed that he drew the will in dispute. His evidence was that on 6th July, 2007, the deceased visited his office accompanied by an elderly man called Daniel Muriithi. She instructed him to prepare a will for her. The learned counsel advised the deceased that she needed an additional person, apart from Daniel Muriithi, to attest the will. It is then that she asked counsel to call one Hannah Nyokabi, a state counsel attached to the office the Public Trustee for this purpose. Mr. Gathiga proceeded to prepare the will on which the deceased affixed her mark by way of a left-hand thumb print in the presence of Daniel Muriithi and Hannah Nyokabi. The mark was placed on each of the 11 pages of the will and it was counsel's evidence that each mark was witnessed by the deceased's two witnesses. He prepared a certificate to the effect that the deceased had confirmed that she understood the will after he read it to her. It was also his evidence that at the time he prepared the will the deceased looked fit, both mentally and physically. Counsel testified she executed the will voluntarily without any coercion and that she had even carried along a document on which she had written notes on her bequests. I understood counsel to say that he relied on this document to draw the will.

Upon the deceased's demise, counsel brought the will to the attention of some members of the deceased's family.

Counsel testified that he did not know the deceased before and that she was referred to his office by officers of District Commissioner's office in Nyeri. Initially, counsel testified that his services were ex gratia and that did not charge the deceased for his services; however, later in his testimony, during cross-examination, he changed to say that he had agreed with the deceased that he would be paid after the execution of the will.

Hannah Nyokabi Waititu testified that she was a state counsel at the office of the public trustee. She recalled the deceased had come to her office seeking assistance in drawing of a will. Since she could not do it for her, she directed the deceased to the offices of Gathiga Mwangi; he later called her and asked if she could attest the will. She agreed and went to the counsel's office where she witnessed the deceased affix her thumb print on the will.

The elderly man who is said to have accompanied the deceased to the advocate's office, Daniel Muriithi, testified that he was aged 86 and a member of the deceased's family. He testified that he was aware of the contested will and that he was also aware that the deceased signed it because he was one of the people who saw her put her thumb print on it at the advocate's office. He confirmed that one of the signatures on each of the signed pages of the will was his. It was his evidence that the deceased had been in the advocate's office earlier and that she had been advised to go and bring an elderly person to witness her signature. He, however, testified that he could not tell when the will was prepared or signed. He also could not tell the contents of the will. During cross-examination, he also admitted that the will had been prepared long before they went to sign it at the advocates' offices.

The first objector confirmed that the petitioners are his sisters except that he only learnt of their petition for grant of probate in the Kenya Gazette. It was his evidence that nobody informed him of the will on which the petition was based and that he only stumbled on it under the door to his house. The deceased, according to him, was sickly since 2003 until 2007 when she passed on. He denied knowing any of the petitioners' witnesses' including David Muriithi who alleged that he was a member of the deceased's family. Going by her age and state of health, so the objector testified, the deceased could not have remembered a list of all the properties she is alleged to have willed away and in the same breath he doubted that she could have been the author of the document which Mr Gathiga Mwangi claimed that she carried to his office and which he apparently used as the draft of the will.

The objector produced a certificate of confirmation of grant dated 6th October, 1998 in respect of his late father's estate showing that the properties which the deceased bequeathed were held by the deceased in trust for his children with the deceased. To demonstrate that there was bad blood between the petitioners and the deceased and therefore the latter could not have bequeathed anything to them or even appointed them as executrixes of her will, the objector produced a plaint filed in **High Court Civil Case No. 148 of 2001 (Nyeri)** showing that the petitioners had sued their mother over ownership of the same properties that they are now alleging were bequeathed to them. Indeed, as a result of their strained relationship, the

deceased could not allow the first petitioner to visit her while she was ailing at Equator Hospital in Nairobi; according to the objector, the deceased complained that the first petitioner had taken her to some office in Nyeri to affix her thumb print on some documents. She retracted those documents by a letter 26th October, 2006 when she realised that she had been duped.

The objector also read bad faith in the petitioners' petition; according to him, the same petitioners had previously filed another succession cause in **Nyeri High Court Succession Cause No. 422 of 2009** which was dismissed after he objected to it; however, before the cause was dismissed, the petitioners had taken advantage of a grant they obtained in that cause and withdrawn a sum of Kshs 105,000/= from the deceased's account. He produced bank statement in proof of this fact. His conclusion was that the purported will was not genuine. He found support on this stance from his uncle, David Mugure who testified that his sister, the deceased, was quite ill at the time she is alleged to have written her will. Similarly, his sister, Winnie Wangu Mugweru attested to the same fact that their mother was ill for a long time and she could not have come to Nyeri alone at the time she is alleged to have visited the advocates' office and signed a will. It was also her evidence that her mother was illiterate. In any event, so she testified, her mother could not will away properties that she only held in trust for the benefit of her children.

This is the evidence that this honourable court has to evaluate in determination of the question whether the impugned will is valid or not. The analysis of the evidence is, of course, only one step towards the direction of finding an answer to this question; the court has to go further and also consider the law applicable and in particular the law relating to the making of wills.

Part II of the **Law of Succession Act cap 160** on wills comes in handy in this regard; of particular interest to the question before court are those provisions in that part of the Act which deal with the capacity to make valid wills and the form which those wills take. **Section 5(1)(2),** for instance, says that any person of either gender and who is of age and sound mind is capable of disposing any or all of his free property by will. Under **section 5(3)** a person making or purporting to make a will is deemed to be of sound mind and unless he is, at the time of executing the will, in such a state of mind, for whatever cause, as not to know what he is doing.

Section 11 of the Act is also informative and sheds some light on this question; at its core is the benchmark of what in law is deemed a valid written will; it states as follows:

> ***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.***

It is therefore apparent that the legal scales upon which the deceased's will has to be weighed are clearly set out; they would balance in favour of the petitioners if there is sufficient evidence to support their contention that the will is valid; on the other hand, they would tilt against them if the available evidence tends towards the invalidity of the will. The onus is on this honourable court to do the balancing act and in this regard, I find the analysis of the evidence of Mr Gathiga Mwangi who is alleged to have taken the deceased's instructions and drawn the will to be the appropriate first port of call. To quote part of Mr

Mwangi's testimony pertinent to the issue at hand, counsel said:

> ***I prepared the will which is 11 pages. She thumb printed on each every(sic) page. The thumbprint was witnessed by two witnesses on each page.***

I have had occasion to examine the will. It is true, as counsel testified, that it is an 11-page document. The page numbers of the first nine pages are typed while the last two are handwritten. Contrary to the learned counsel's assertion that each of the 11 pages has thumbprint of the deceased and the signatures of her two witnesses, the last page which is the certificate that counsel alluded to, bears neither the mark of the deceased nor the signatures of any of her witnesses.

There is no doubt that the last page of the will was a pertinent part of the will because, taking the counsel at his own word, the deceased could sign yet she chose to affix a mark by way of a thumbprint on the will. He thought a certification to the effect that the thumbprints on the will were hers was necessary. Secondly, again according to the learned counsel, since he took instructions in Kikuyu language but drew the will in English language he thought it was necessary that he should read out the will to the deceased before she affixed her mark on it. Indeed, the reading out of the will to the deceased was mandatory since there is nothing in evidence that suggests the deceased read the will prior to her affixing of the thumb prints. In the words of the statute, she had to know what she was doing. (see **section 5(3)** of the Act).

The question that then arises is this: if the deceased did not sign the certification page, can the court proceed on the presumption that the will was read out to her and therefore she is deemed to have been aware of what she was doing when she affixed her mark on the rest of the pages of the will? My answer to this question is in the negative. I am of this persuasion because the learned counsel must have come to the conclusion that a certification was necessary for at least two reasons; first, to authenticate the deceased's thumb print and thus bind her to her testament and, second, to demonstrate that the will had been read out to her and therefore she was aware of what she was doing when she affixed her thumbprint. The moment the learned counsel came to this conclusion, there had to be some proof that thumbprints had been duly authenticated and the will had been read out as alleged. In my humble view, there could be no better and conclusive proof of these facts than the deceased's marks or signature on the last page of the will noting that counsel himself testified that the deceased affixed her thumb print on all the pages of the will though, as noted, the available evidence is to the contrary.

It is also apparent on the face of the certification that it was the learned counsel who certified himself as having read the will to the deceased. The purported certification does not show that deceased acknowledged that the will had been read out to her and that she had understood it. It is necessary to reproduce here that part of the certification to understand the point I am making; it states:

> ***We Messrs. Gathiga Mwangi & Company Advocates do hereby certify that each and every content of the implications and intendments of will and testament of Maaka Mukuhi Mugweru ID/7013864 and/or signatures therein have been explained to her and understood.***
>
> ***Dated at Nyeri this 6th day of July, 2006***
>
> ***Signed***
>
> ***Gathiga Mwangi and Company Advocates***

Going back to the learned counsel's testimony in chief an excerpt of which I have reproduced above, it is also clear that after he prepared the will the deceased affixed her mark and then witnesses attested it. There is no suggestion from his statement that he read the will over to the deceased before the latter affixed her mark to it. He only says that he prepared a certificate of thumb print to say that the will was read out but there is no evidence of such reading before the deceased affixed her mark and thereby committed herself to the will.

Mr Daniel Muriithi whom the petitioners themselves called as their witness compounded their case even

further; it was his evidence that the will was prepared "long before" he attested it. In fact, according to his evidence, the deceased went to look for him after the will had been prepared implying that by the time they went to Mr Gathiga's office, the deceased already had the will. If his evidence is true, and I see no reason to doubt it, it provides what I perceive to be the missing link in the Mr Gathiga's evidence. Counsel testified when the deceased went to his office accompanied by Muriithi she had some document on which the names of the deceased's children and the properties that she willed away were listed. The learned counsel could not remember in whose handwriting this paper was but for some unexplained reason he did not keep the paper.

Considering the evidence of Mr Muriithi and Mr Gathiga in its entirety, the inference that one can draw is that there was no other paper that the deceased carried to Mr Gathiga's office other than the will which is purported have been prepared in that office. If at all the deceased had any other document which the learned counsel used to draw the will, I cannot think of any other reason why he could not retain it in the deceased's file and produce it whenever it was required, particularly, as it turned out, when the circumstances under which will was made were contested.

My evaluation of the evidence proffered by both the petitioners and the objectors leads me to the conclusion that the will purportedly made by the deceased falls short of the legal parameters of a valid will. I am not satisfied that the deceased knew what she was doing or was aware of the import of the document on which she affixed her mark. The possibility that the will could have been prepared elsewhere by somebody else other than Mr Gathiga is suggestive of the fact that the will was fraudulent. I am also persuaded that by the mere affixing of her mark to parts of the purported will, the deceased did not intend to give effect to the document as a will. The net effect of all these vitiating factors is that the will is invalid and I hereby declare it so. This being the case, the deceased died intestate.

It would have been appropriate to conclude this ruling at this point because the only question that was put forth for determination in the directions given by this court on 12th June 2009 has been disposed of; however, one other issue I have agonised over and which I feel compelled to address is, assuming that the will was valid on its face, did the deceased have the capacity to bequeath the properties as if they were her free properties? Having established that the will is invalid, this question may appear moot but it is not for two reasons; first, from the evidence available, this court is in a position to state with some measure of certainty what did not belong to the deceased and therefore does not constitute her estate. Second, a resolution on the status of the property that the deceased bequeathed in what has turned out to be an invalid will would help, so I suppose, forestall another phase of long-drawn court contest over this property amongst the deceased's children.

In my attempt to resolve this question, I must caution at the very outset that, in their submissions, both counsel for the petitioners and the objectors tied the issue of ownership of the property to validity or lack thereof of the will. It is therefore inevitable that though I have made up my mind on the question of the validity of the will, arguments by counsel on this issue will pop up again to the extent that they are entangled with the status of properties which the deceased purported to bequeath.

A central factor in interrogating the question whether the deceased had the capacity to bequeath the properties in the impugned will is that almost all the bequests in the deceased's will comprised what initially was the deceased's husband's estate. The record in respect of succession to the deceased's husband's estate, that is **Nairobi High Court Succession Cause No. 525 of 1997** shows that the petitioners and the objectors agreed that their father's estate was to be held by their mother, prior to her demise, in trust for them. For avoidance of doubt, their agreement was eventually adopted in the certificate dated 6th October, 1998, confirming the grant of letters of administration intestate of that estate. This was captured on the face of the certificate as follows: -

SCHEDULE

Name	**Description of Property**	**Shares of Heirs**
MAAKA MUKUHI MUGWERU	"SEE SCHEDULE ATTACHED"	TO BE REGISTERED IN HER NAME TO HOLD IN TRUST FOR

The properties described in the attached schedule comprised a set of 46 distinct immovable properties 35 of which now comprise the bequests in the deceased's will. As far as I can gather the only properties in the will which are not in the schedule are properties referred to as **Rumuruti 6724** which has been bequeathed to Miriam Wanjiku and **Title No Konyu/ Baricho/2593** gifted to Ellen Nyaetu.

If it is accepted, and I have not found any suggestion to the contrary, that this certificate of confirmation of grant represents the true state of affairs of the properties that now form the substratum of the contested will, then it ought to be acknowledged, by the same token, that the deceased was only a trustee who, as the wording of the certificate itself suggests, was vested with the properties "to hold in trust for her children."

The inescapable conclusion that can readily be drawn from the certificate of confirmation of grant is that a trust relationship between the deceased and her children came into being; the deceased became the trustee while her children attained the status of *cestuis que trust* otherwise known as beneficiaries. In this kind of relationship, the deceased's children were always, and have so remained, the beneficial owners of these properties, the subject matter of the trust; they were such owners prior to and after their mother's demise. As a trustee their deceased mother held these properties, not as her own, but for her children's benefit. This concept of trust has been defined in **Modern Equity, 13th Edition, By Jill E. Martin** as follows:

> ***A trust is a relationship recognised by equity which arises where a property is vested in (a person or) persons called the trustees, which those trustees are obliged to hold for the benefit of other persons called cestuis que trust or beneficiaries. The interests of the beneficiaries will usually be laid down in the instrument creating the trust, but may be implied or imposed by law. The beneficiaries interest is proprietary…The subject matter of the trust must be some form of property." (see page 46-47).***

The point to note here is that a trustee is under obligation to hold the property vested in him or her for the benefit of a beneficiary. Although the legal title may be in the trustee the equitable and the beneficial title is always in the beneficiary; as a matter of law, the trustee retains the legal title only because a trust cannot be valid unless the title to the property is in the trustee. The beneficiary or beneficiaries are owners of the property in equity and thus a trustee cannot deal with it as his or her own.

I need not belabour the point that the property which the appellant bequeathed was not her own; the simple question that I should now be concerned with is whether, as was the case here, one can will away property that is not hers.

In his submissions on this question, Mr Oyalo, the learned counsel for the petitioners, cited the case of **Karanja & Another versus Karanja (2002) 2KLR 22** and urged that the inclusion in the will of properties which do not belong to a testator is not a ground for challenging the validity of the will. In that case, some of the grounds upon which the wills and codicils were challenged were, first, that the alleged wills and codicils purported to dispose of properties which the deceased did not have capacity to dispose of as they were jointly acquired by the objector and the deceased and, second, the objectors were not adequately provided for in the wills and codicils. The court (Githinji, J., as he then was) dismissed these grounds and held as follows:

> ***The principal duty of probate court is to decide whether or not a document is entitled to probate as a testamentary paper and who is entitled to be appointed the personal representative of the deceased. When deciding whether or not to grant probate of a will, the probate court is not required to decide disputes of title properties the will purports to dispose or disputes on the validity of such disposition. Further, the probate court is not required to decide questions as to whether properties disposed of are wholly owned or jointly owned by the deceased or whether the deceased had power to dispose some of the properties.***

In conclusion, the grant of probate of a will is only conclusive as to the validity of a will; contents of a will and appointment of the executors. The grant of probate does not predetermine all other disputes which may arise from the will. Thus all disputes raised by objector in her evidence regarding the manner deceased disposed the properties in the will and any other dispute including her claim to part of Muguga farm are matters which are irrelevant at this stage and which should be decided in separate proceedings.

Counsel adopted this proposition and urged this court to follow it. In any event, so he argued, the deceased had already been registered as the absolute and indefeasible proprietor of one of the properties, namely, **L.R. NO. 13041/2** (Nairobi) and therefore she was not subject to any restrictions in dealing with this particular property; as far as he is concerned, she could dispose or alienate the property or otherwise deal with it in any manner howsoever, including bequeathing it, as she in fact did, as a testamentary gift.

The 3rd to 8th objectors on the other hand were unanimous that the deceased had no capacity to bequeath property which did not belong to her. Their learned counsel, Mr Muchiri, made reference to **section 23** of the **Law of Succession Act, cap 160** and the second schedule to the Act which prescribes the manner and circumstances in which testamentary gifts and dispositions fail either by way of lapse or ademption. In particular **paragraph 8 (1)** of the schedule provides that if property which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the gift cannot take effect by reason of the subject thereof having been withdrawn from the operation of the will; in such circumstances, the gift is said to be adeemed. Counsel cited the decision in **Nairobi High Court Succession Cause No. 1298 of 2006**, **Eunice Mumbi Kimani versus John Kamande Kimani & Another** where Lenaola, J., (as he then was) applied this provision and effectively invalidated a will whose testator subdivided a parcel of land that he had previously bequeathed to his sons. The judge held that since the bequest ceased to exist in the form in which it had been bequeathed, the will was invalid; consequently, so the learned judge held, the administration and distribution of the deceased's estate was subject to intestacy provisions of the Act.

This approach appears to be differ from that adopted by Githinji, J., in **Karanja & Another versus Karanja** case (supra) where the status of the bequest or the legacy was held to be of little concern in determination of the validity of a will. In an earlier cause, In the **Matter of the Estate of Moses Kapoya Ole Mosiro (deceased) (1999) eKLR** Githinji, J., was more particular that where a testator bequeaths property which does not belong to him at the time of his death, the gift fails by the principle of ademption. If, on the other hand, the testator bequeaths a gift to a person to whom that property belongs, the principle of election, which is recognised under **paragraph 1(1)** of the **3rd Schedule** to the Act applies. According to the learned judge, none of the two concepts renders a will invalid.

I must state from the onset that I have great respect for the learned judges' decisions; as much as they appear to be at variance, it is clear that their approaches share a common result which is that a bequest is not effectual if a will is either invalid, for whatever reason, or if the gift it purports to bequeath is adeemed or it is otherwise subject to election. The whole idea is that a testator cannot bequeath what he does not own. It follows that while a will may be appear valid in every respect merely because it conforms to all the formalities of a valid will as by the law prescribed, the bequest may end up being an ineffectual gift if it turns out that a testator purported to give out what in fact does not belong to him. It may not be appropriate, as Githinji, J.A., held, to invalidate such a will on the ground that the testator does not own the property he purports to bequeath but in my very humble and respectable view, such a will serves no other useful purpose once it is established that the very substratum on which it ought to be founded is lacking; if, for this reason it cannot confer what a will, properly so called, is intended to confer then the fate of such a will is as good as a void. I reckon that grant of probate to such a will would be an exercise in futility.

Halsbury's Laws of England (Volume 50) (2005 reissue), 4th Edition paragraph 332 says that apart from the execution by will of a power, a testator cannot effectually dispose by will of property which is not his own or which he holds in a representative capacity. To emphasise this point, paragraph 317 thereof spells out, as one of the conditions of an effectual gift by will, that "*the subject matter of the gift described by the testator must be ascertainable and capable of being disposed of by the will of the*

testator, or, if not, the gift must be validated under the equitable doctrine of election, or otherwise". A property that does not belong to a testator is obviously not capable of being disposed of by his will.

Section 5 (1) of the Law of Succession Act embraces this notion; it states:

> ***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 <u>of his free property by will</u>, and may thereby make any disposition by reference to any secular or religious law that he chooses. (Underlining mine)***

The Act is clear that it is only free property that can be disposed of by will. This kind of property is defined in **section 3** of the **Act** which says:

> ***"free property", in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death;***

The implication is that if a purported testator has no free property which he can dispose of by way of a will the he does not even have the capacity to make the will in respect of the particular property in issue.

If the deceased's will is considered from the foregoing perspective, then the only plausible conclusion one can come to is that except for those dispositions that are not part of the properties set out in the schedule to the certificate of confirmation of grant dated 6th October, 1998, the rest of the gifts would not have been effectual if the will had been held to be valid for the simple reason that they constitute trust property whose beneficial and equitable title is in the *cestuis que trust* who are the children of the deceased and her husband. With due respect to the learned counsel for the petitioners, the trust property includes **LR No. 13041/2 (IR No. 85810);** it does matter that the deceased may have been registered as its absolute and indefeasible owner under any legal regime if the registration was not consistent with the certificate of the confirmation of grant.

With the invalidation of the will, the administration and distribution of those properties in the will that may be proved to exist and which are not in the schedule are subject to intestacy provisions of the Act.

It is tempting to go the full hog and interrogate the current status of the trust and perhaps issue such directions as may be necessary for the running of the trust, its winding up or the distribution of the trust property amongst the beneficiaries; however, the directions issued by this court on 2nd June, 2009 restrict me from going that far and, in any event, I reckon it would not advisable to make any conclusions on these questions before hearing the parties on them. They may, for instance, want to dissolve the trust and share out the trust property or, alternatively, they may want to nominate for appointment a new trustee or trustees to hold the property on their behalf. Whichever alternative they opt for, this court cannot speculate and proceed on the assumption that parties prefer one option to the other; this is a decision that should be left to them to make. In any event, a probate and administration court may not be the appropriate forum in which these questions can be resolved. As I noted earlier, my sincere hope is that the course the parties eventually settle for will not invite a new phase of protracted litigation.

In conclusion and for avoidance of doubt, my final orders are as follows:

1. The will dated 6th July 2007 is declared void.

2. Parties shall, within 30 days of the date of this ruling, agree on an administrator/administratrix or administrators/administratrixes of the deceased's estate, if any exists.

3. In default of an agreement on an administrator/administratrix or administrators/administratrixes as directed in (2) above, this court shall exercise its discretion under **section 66** of the Act and appoint an administrator (s)/administratrix(es) of the deceased's intestate estate, if any exists.

4. This cause shall be mentioned after 30 days from the date of this ruling for any further directions

as may be necessary.

5. This being a dispute amongst the siblings, I make no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 24th day of February, 2017

Ngaah Jairus

JUDGE