



REPUBLIC OF KENYA



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**In re Estate of Njeri Ngoru (Deceased) (Probate & Administration
E1026 of 2023) [2025] KEHC 302 (KLR) (Family) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 302 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

PROBATE & ADMINISTRATION E1026 OF 2023

H NAMISI, J

JANUARY 23, 2025

IN THE MATTER OF THE ESTATE OF NJERI NGORU (DECEASED)

BETWEEN

**JOHN NJOROGE GATURA 1ST OBJECTOR
GRACE KANYI NJOROGE 2ND OBJECTOR
JOSEPH NGUGI NDUTA 3RD OBJECTOR
LEAH WANGARI NDUTA 4TH OBJECTOR**

AND

**TERESIAH WANJIKU NDIBA 1ST PETITIONER
FRANCIS TURITU 2ND PETITIONER**

RULING

1. The Deceased died on 6 June 2023 at Kenyatta National Hospital. According to the Petition for Probate of Written Will, the Deceased died testate, leaving a Will dated 6 November 2019 and Codicil dated 7 June 2022. Teresiah Wanjiku Ndiba, Leah Wangari Nduta and Francis Turitu are named as Executors in the Will. The Codicil named Teresiah Wanjiku Ndiba and Francis Turitu as the Executors. The Petition herein has been presented by Teresia Wanjiku Ndiba and Francis Turitu.
2. The Petitioners/Respondents are the niece and nephew of the Deceased, respectively. The Objectors are children to Agnes Nduta Kanyi, who is a cousin to the Petitioners/Respondents. By extension, the Objectors are grand children of the Deceased. The Deceased did not have any children of her own.
3. The Will dated 6 November 2019 bears thumb prints as the Testator's signature. The Will was witnessed by Bella A. Onyango, Advocate and Chuhi Ndiba. The Codicil dated 7 June 2022 also bears



thumb prints as the Testator's signature. The Codicil was witnessed by Bella Onyango, Advocate and Johnson Mwangi Ngacha, a Clerk.

4. In the Codicil, the Deceased revoked the appointment of Leah Wangari Nduta as one of the Executors, leaving Teresiah Wanjiku Ndiba and Francis Turitu as the Executors. The Deceased also revoked the initial bequest of property LR Number Dagoretti/Waithaka/T.128 to Teresiah Wanjiku Ndiba, John Njoroge Gatura, Grace Kanyi Njoroge, Joseph Ngugi Nduta and Leah Wangari Nduta and bequeathed the said property to Teresiah Wanjiku Ndiba for her own use and benefit absolutely. Teresiah Wanjiku Ndiba was a niece to the Deceased.
5. On 21 November 2023, John Njoroge Gatura, Grace Kanyi Njoroge, Joseph Ngugi Nduta and Leah Wangari Nduta gave notice of their objection to the making of grant of representation on the grounds that:
 - i. The alleged Will (and Codicil) was not duly executed in accordance with the law in force at the material date;
 - ii. The alleged Codicil purports to disinherit the above-named Objectors without giving reasons as to why
6. Three Affidavits were filed in support of the Objection. One Affidavit was sworn on 21 November 2023 in which the deponent, Martha Njuhi Kimani, aged 80 years old, states that she and the Deceased had been friends since 1978 and that the Objectors, who are children of the one Agnes Nduta Kanyi, are known to her. Agnes Nduta Kanyi was a niece to the Deceased. It is averred that since the Deceased did not have any children of her own, she took in the three Objectors as well as the Petitioners and raised them as her own children.
7. Similar averments are contained in the second Affidavit sworn by Teresa Wahu Ndwaru, a niece to the Deceased. However, in this Affidavit, the Deponent averred that Francis Turitu never lived with the Deceased but rather grew up with his parents in Riruta, Kawangware. Notably, at the hearing, Counsel for the Objectors applied to strike out the evidence by Teresa Wahu Ndwaru.
8. The third Affidavit was sworn by the 1st Objector. He averred that the Deceased was his grandmother, while the Petitioners are his aunt and uncle, respectively. He asserted that the Will and Codicil are riddled with falsehoods, intended to mislead the Court. In his view, the Deceased's intention was to subdivide the property LR Dagoretti/Waithaka/T.28 equally between the Objectors and the Petitioners. He annexed a copy of Land Control Board Consent Application dated May 2013.
9. The 1st Petitioner filed a Replying Affidavit. She averred that at the time of creating the First Codicil, the Deceased was in good health and of the requisite testamentary disposition. When the Objectors were invited to attend the opening and reading of the Will and Codicil on 11 July 2023 at the offices of Mohammed Muigai LLP, they declined the invitation through a letter dated 8 July 2023 by Njoroge Ndungu Associates Advocates.
10. The 1st Petitioner further averred that the Deceased had commenced the process of transferring parcel Number LR Dagoretti/Waithaka/t.28 to her. The Deceased had executed a transfer of the property, a copy of which was annexed to the Affidavit. Copies of the Land Control Board Application Form and Consent were also attached. The Deceased had engaged the services of Berta Holdings, a real estate company, to assist her in the conveyancing process. Unfortunately, the process had not been completed by the time of the demise of the Deceased.
11. The objection was canvassed by way of viva voce evidence.



12. Martha Njuhi Kimani, aged 81 years, testified that she knew the 1st Objector, John Njoroge Gatura. She was aware that the 1st Objector and the Deceased had lived together for a long time. She adopted her Affidavit dated 21 November 2023 as part of her evidence in chief.
13. The 1st Objector adopted his Affidavit dated 21 November 2023. It was his testimony that when he and his siblings were young, their mother left them at the Deceased's home and lived there for a long time. The Deceased did not know how to read, and neither does the 1st Objector. He stated that the Deceased had sub-divided the parcel of land and placed beacons on it. On cross examination, the 1st Objector, a 52-year-old man, confirmed that the Deceased was a sister to his grandmother. The Deceased had requested to have the children (Objectors) reside with her and she catered for all their needs until the time of her passing.
14. The 1st Petitioner adopted her Replying Affidavit dated 4 April 2024 as her evidence in chief. She testified that the Deceased was her aunt, a sister to her mother. The 1st Petitioner had lived with the Deceased for about 20 years. The 1st Objector is her nephew, being son to the 1st Petitioner's cousin. On cross examination, the 1st Petitioner stated that the Deceased had obtained the Land Control Board Consent on 7 June 2022 but passed away on 26 June 2023.
15. It was the 1st Petitioner's testimony that the 1st Objector had threatened her on more than one occasion and she had reported the matter to the Police. She further stated that the Objectors had been evicted by the Deceased but they returned. They do not pay any rent.
16. Parties filed their respective submissions.
17. In their submissions, the Objectors addressed three issues, namely (i) Were the Will and Codicil validly executed; (ii) Are the Objectors dependants of the Deceased; and (iii) is the Will valid
18. The Objectors began their submissions with the proverb "People in glass houses should not throw stones". They submitted that the Petitioners went to great lengths to discredit the Objectors because they are illiterate and could not read their own Affidavits. Similarly, the Petitioners submitted that the Objectors are guilty of approbation and reprobation. On the one hand, the Objectors claim that the testator was not literate enough to understand the contents of the Will whereas on the other hand, they seek to rely on an Application for Land Control Board Consent executed by the Testator to demonstrate her intention to subdivide the property to the Objectors and Petitioners.
19. At the end of the day, the issue for determination by this Court is whether or not the Will and Codicil were validly executed.

Analysis and Determination

20. I have carefully read the Application, respective Affidavits and submissions. To my understanding, the issue that requires consideration and determination is the validity of the Will and Codicil. From a reading of the Affidavits by the Objectors, the actual bone of contention appears to be with the Codicil dated 7 June 2022.
21. In the Notice of Objection dated 21 November 2023, the Objectors' grounds are:
 - i. The alleged Will (and Codicil) referred to in the said Petition was not duly executed in accordance with the law in force at the material date
 - ii. The alleged Codicil purports to disinherit the above-mentioned Objectors without giving reasons as to why



22. The Affidavit by Martha Njuhi Kimani appears to have been sworn in support of the second ground. The Deponent states that the Objectors resided with the Deceased since they were children until her demise. She further states that she had no idea that the Deceased had intended to write a Will. The Affidavit by the 1st Objector focusses on the Codicil. The Objector averred that he was not aware of the Codicil and that if the Deceased had signed such a Codicil then she had no capacity to do so since she was 83 years old and ailing.

23. At the hearing, the Objectors challenged the Codicil on the basis that the Deceased was illiterate and could not read. There was no mention of which languages the Deceased understood. Interestingly, in their submissions, the Objectors conclude as follows:

“It is our humble submission that failure by the petitioners to call any witnesses who witnessed the will and provide evidence that the testator who was illiterate and only understood English knew the nature and effect of the document she was appending her signature means that the will and codicil are void and that this court should proceed with case intestate.”

(emphasis mine)

24. Section 11 of the *Law of Succession Act* sets out the requirements for the validity of a written will 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.”

25. In addition to being made in the proper form, section 5 of the Act also requires a person making a will to be of sufficient age and of sound mind for the will to be valid. Section 5 provides as follows:

- “(1) Subject to the provisions of this Part and Part III, every 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.”

26. The essentials of testamentary capacity were also laid out in the case of *Banks vs. Goodfellow* [1870] LR 5 QB 549 as cited with approval in the case of *Vaghella vs. Vaghella* (1999) 2 EA 351:

“a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made.”

27. In *John Wagura Ikiki & 7 others v Lee Gachigia Muthoga* [2019] eKLR, the Court of Appeal adopted the holding of Githinji J (as he then was) in *Karanja & anor v Karanja* (2002) 2 KLR 22 where the learned Judge stated as follows:

“Where the will is regular on the face of it with an attestation clause and signatures of attesting witnesses and the signature of the testator, there is a rebuttable presumption of due execution (*Omnia esse riteatta*).”

28. As shown in section 5 (3) and (4), there is a rebuttable presumption that the testator knew and approved the contents of the Will (and Codicil) at the time of execution. The burden of proof that a testator was, at the time he made any Will, not of sound mind, falls upon he who alleges. In this instance, the Objectors merely mentioned that the Deceased was ailing at the time of executing the Codicil, but led no evidence to prove this point.

29. The main argument presented by the Objectors in respect to the validity of the Codicil was that the Deceased did not know how to read or write and, presumably, was incapable of approving the Codicil. It is noteworthy that the validity of the Will is not challenged on the same basis. The Objectors submitted that section 5(3) of the Act as read with section 54 (3) of the Probate and Administration Rules provide that where the testator is illiterate the court should require an affidavit showing that the contents of the Will and codicil are read to the testator before executing the Will. They relied on the case of *re: Estate of Salome Wangary Ngungi (Deceased)* [2017] eKLR where the Court stated thus:

“From the evidence tendered by all parties it is clear that the deceased spoke and understood kikuyu. However, the Will in testament was drawn in English. An issue arising is that the deceased could not have attested the said will as she could not understand the contents therein. I find it would have been diligent on the advocate drawing the said will to also draw up a certificate of translation to indicate the contents of the said will had been read out to the Deceased in a language that she understands and she had attested to the same. This was not done.”



30. It is also noteworthy that the issue of the Deceased's literacy was not mentioned in the grounds nor in the Affidavits by the Objectors. It was only raised at the hearing. The Petitioners submitted, and I concur, that they were not afforded the opportunity to respond to this issue.
31. That notwithstanding, the requirements of knowledge and approval of the contents of a will by the testator are set out in Theobald on Wills, 14th Edition at pages 33 -34 as follows:
- “A testator must know and approve of the contents of his will. This is because a will must be the result of a testator's own intelligence and volition, though its contents need not originate from the testator provided he understands and approves them. But a will is invalid if its contents originate from another person and the testator executes it in ignorance of its contents”
32. Other than illiteracy, the Objectors did not lead any evidence of the inability or mental illness on the part of the Deceased that would affect her understanding of the contents of the will in English language, or of the effect of executing the said will. The Deceased, in my view, was of sound mind at the time of making the Will and clearly knew and understood the nature of the business she was engaged in when making her Will and codicil.
33. The Objectors' submission that a person cannot disinherit their identified beneficiaries without giving adequate reason as to why and the law required adequate provision for dependants betrays their motive. The Objectors seem to support the Will, which is written in English, but denounce the Codicil also written in English and executed in the same manner, simply because the Codicil seeks to disinherit them.
34. On the issue of dependency, the Objectors submit that they resided with the Deceased since their childhood and thus, are dependants. Whereas the ages of the other Objectors have not been indicated, the 1st Objector is 52 years old, married with 2 children. On this issue, it is the considered view of this Court that the fact that the Deceased did not provide for the Objectors in the Codicil as they had expected does not in any way cast doubt as to the Deceased's capacity. It is also worth noting that Section 5(1) of the Act provides for testamentary freedom and allows any person with capacity to make any disposition of his or her free property in manner that he or she wishes. However, the Objectors are at liberty to request for reasonable provision to be made out of the estate of the Deceased pursuant to section 26 of the Act.
35. In view of the foregoing, I make the following order:
- i. The Objection dated 21 November 2023 is hereby dismissed.
 - ii. The Grant of Probate of Written Will of Njeri Ngoru alias Lucy Njeri Ngoru (Deceased) dated 6 November 2019 and Codicil dated 7 June 2022 be and is hereby granted to the Petitioners who are named as Executors in the Deceased's Codicil dated 7 June 2022;
 - iii. There shall be no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 23 DAY OF JANUARY 2025.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

.....for the Objectors



.....for the Petitioners/ Respondents

Libertine AchiengCourt Assistant

