



REPUBLIC OF KENYA



KENYA LAW
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**Mwasi v Nyaboga (Probate & Administration Appeal E001 of 2023)
[2025] KEHC 4569 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4569 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PROBATE & ADMINISTRATION APPEAL E001 OF 2023**

WA OKWANY, J

MARCH 20, 2025

BETWEEN

PENINAH MOKEIRA MWASI APPELLANT

AND

CAROLINE NYABOKE NYABOGA RESPONDENT

(Being an Appeal against the Ruling of Hon. M. C. Nyigei – PM Nyamira dated and delivered on the 11th day of January 2023 in the original Nyamira CMC Succ. Cause No. 66 of 2017)

JUDGMENT

Background

1. The Appellant herein was the Petitioner before the trial court where she filed a Succession Cause in respect to the Estate of Teresa Kemunto Ogora (deceased).
2. The Petitioner, who was represented by the Law Firm of Anassi Momanyi & Co. Advocates, obtained Grant of Letters of Administration Intestate in respect to the deceased's estate. She subsequently filed Summons for Confirmation of Grant on 22nd October 2019 thus precipitating the filing of a Notice of Objection to Making/Confirmation of Grant dated 21st December 2019 by the Objector herein.
3. On 13th October 2021, the trial court issued directions for the hearing of the objection by way of viva voce evidence.
4. On 23rd September 2022, the Petitioner filed a Notice of Withdrawal of the Petition on the basis that the deceased had executed a will dated 24th May 2021 before her death.
5. The Respondent however objected to the withdrawal of the petition on the basis that it was tainted with mischief and brought in bad faith.



6. Parties canvassed the issue of withdrawal of Petition by way of written submissions. In a ruling rendered on 11th January 2023, the trial court declined to allow the Notice of Withdrawal of Petition thereby triggering the filing of this appeal.

The Appeal

7. The Appellant herein was dissatisfied with the ruling of 11th January 2023 and filed the instant appeal in which she raised the following Grounds of Appeal: -

1. The honourable magistrate erred in law and fact in declining to allow the withdrawal of the petition.
2. The honourable magistrate erred in law and fact in holding that the validity or otherwise of the deceased's will ought to be dealt with in intestate proceedings.
3. The honourable magistrate erred in law and fact in delving into non-issues for purposes of the determination of the withdrawal of the petition.
4. The honourable magistrate erred in law and fact in failing to find that testate and intestate proceedings are different and are dealt with and commenced under separate regimes and parameters.
5. The decision of the honourable magistrate is as a whole legally untenable and unjust.

8. The appeal was canvassed by way of written submissions which I have considered.

9. The duty of the first appellate court is to reconsider and re-evaluate the evidence presented before the trial court with a view to arriving at its own independent conclusions. In *Peters vs. Sunday Posts Ltd* (1958) E.A. the court held thus: -

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

10. I have carefully considered the Record of Appeal and the parties' rival submissions. I find that the main issue for determination is whether the trial court arrived at the correct finding by rejecting the Appellant's notice to withdraw the petition.

11. It is to be noted that the Petitioner's reason for withdrawing the petition was that she had discovered that the deceased had left a will.

12. The trial court rendered itself, in part, as follows when disallowing the notice of withdrawal of petition:
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“I find that the petitioner has always been aware of the existence of the Will but had chosen to proceed without it. Her advocate on record is the same advocate who drew the said Will and thereafter the Memorandum of Understanding.

The intended withdrawal will not finalize the issue between the parties but is an opportunity to file another succession cause so that the will is then annexed. The Petitioner has not challenged the jurisdiction of the court to determine the cause.



Section 51 (4) of the Act provides that – No omission of any information from an application shall affect the power of the court to entertain the application.

If indeed there was an omission to annex the will to the cause, then Subsection (4) cures the same.

I shall therefore decline to allow the Notice to Withdraw the petition but instead order the petitioner to regularize the cause herein as provided for under section 51 of the Act so that a determination of the issues between the petitioner and objector is determined herein once and for all. There shall be no order as to costs.”

13. From the above extract of the trial court’s ruling, it is clear that the said court was not convinced that the Appellant’s notice of withdrawal was well intentioned or that the alleged will in question was genuine.
14. My finding is that the trial court was justified in rejecting the Appellant’s intention to withdraw the petition for following reasons; firstly, a perusal of the Record of Appeal reveals that the alleged will was drawn by the Law Firm of Anassi & Momanyi Advocates on 24th May 2011 which is the same Law Firm that filed the Succession Cause on 1st September 2017. I find that the said claim that the said advocates did not know about the will does not arise.
15. Secondly, the said Law Firm proceeded to file an application for Confirmation of Grant in October 2019 and was set to go ahead with the distribution of the deceased’s estate if the Respondent had not lodged her objection on 21st December 2019.
16. Thirdly, the Notice of Withdrawal of Petition was filed much later on 23rd September 2022.
17. Looking at the above narration of the chronology of events that preceded the Appellant’s filing of the Notice of Withdrawal of Petition, one cannot help but read mischief in the Appellant’s conduct. I say so because it does not make sense that the same Advocates Firm that drafted the alleged will way back in 2011 could go ahead and apply for Grant of Letters of Administration Intestate, obtain the Grant and apply for its Confirmation only to make an about-turn and seek to withdraw the petition immediately the Respondent objected to the Confirmation of Grant.
18. From the totality of the facts of this case, this court is not persuaded by the Petitioner’s claim, that she only discovered the existence of the will, albeit conveniently, after the Respondent objected to the grant yet the will was all along with the same Advocate who filed the application for Grant. In my considered view, this case presents a classic case of abuse of court process by a party who does not seem to be willing to finalize her case. I say so because, in the impugned ruling of 11th January 2023, the trial court granted the Appellant time to regularize the cause, in line with the provisions of Section 51 of the [Law of Succession Act](#) so as to include the alleged will that she was seeking to introduce. I am of the view that the trial court’s ruling was well-balanced and reasoned. I find no justification in interfering with the said ruling.
19. In conclusion, I find that the instant appeal is not merited and I therefore dismiss it with costs to the Respondent.
20. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 20TH DAY OF MARCH 2025.

W. A. OKWANY

JUDGE

