**In re Estate of the Late Reuben Njoroge Njenga (Deceased) (Succession Cause 563 of 2011) [2025] KEHC 5862 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5862 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**SUCCESSION CAUSE 563 OF 2011**

**SM MOHOCHI, J**

**MAY 9, 2025**

**IN THE MATTER OF THE ESTATE OF THE LATE REUBEN NJOROGE NJENGA (DECEASED)**

**BETWEEN**

**PHYILLIS WAIRIMU NJOROGE ........................................................ APPLICANT**

**AND**

**JOB MWANGI NJOROGE .................................................................. PROTESTOR**

**RULING**

**Background**

1. The deceased herein Reuben Njoroge Njenga died on 3rd September, 2011 and Letters of Administration jointly issued to Phyllis Wairimu Njoroge and Job Mwangi Njoroge on 28th September, 2012.

2. A chief's letter dated 27th September, 2011 indicated that, the Deceased was survived by the following persons: -

    a. Phills W. Njoroge Widow

    b. Jane Njeri Reuben Daughter

    c. Nancy Muthoni Njoroge Daughter

    d. Fredrick Njenga Njoroge Son

    e. Elizabeth Wanja Njoroge Daughter

    f. Elizaphan Kinyanjui Njoroge Son

    g. Job Mwangi Njoroge Son

3. The Applicant Petitioned for Letters of Administration Intestate on 12th October, 2011 *Succession Cause No. 563 of 2011*. The Protestor had Petitioned Grant of Probate with Will annexed in *Succession Cause No. 551 of 2011* and further challenged the *Succession Cause No. 563 of 2011*.

4. On 19th April, 2012, the Justice H. Omondi ordered inter alia the consolidation of *Succession Cause No. 563 of 2011* and *Succession Cause No. 563 of 2011* with *Succession Cause No. 563 of 2011* being the control file.

5. By consent dated 28th September, 2012 the advocates of the parties herein entered into a consent where Phyllis Wairimu Njoroge and Job Mwangi Njoroge were appointed as administrators and the same was adopted as an order of the Court by Justice Ouko.

6. The Applicant filed Summons for Confirmation of grant dated 22nd May, 2013 while the Protestor filed Affidavit of Protest dated 5th November, 2013.

7. The Protestor thereafter made several applications in Court which were dismissed and further moved to the Court of appeal to challenge the Ruling of 29th December, 2019 which appeal was also disallowed.

8. The Court directed that both the Summons and the Protest shall be determined together. The matter proceeded by viva voce hearing.

**Protestor's Case**

9. The Protestor called 3 witnesses in support of his case himself, Advocate Mwangi Waiganjo and Advocate Job Karanja. The Protestor's case is on the basis that the deceased died testate and left behind a written will and appointed him as the executor of the Will. That the Will was not tampered with and was in the deceased safe which he had the keys to and that the deceased provided for all his children in the Will

**Applicant's Case**

10. The Applicant called two witnesses in support of her case herself and her son Elizaphan Kinyajui Njoroge. There was denial of knowledge and existence of a Will. That the deceased called his children in June of 2011 to agree on succession.

11. It was the Applicant's case that the deceased wished to have the estate distributed equally to all his beneficiaries and the bequeath in the Will is unacceptable for the deceased had both boys and girls and what is in the Will was not in line with the wishes of the deceased.

**Applicant's Submissions**

12. The Applicant raised two issues:

    a. Whether the Protest has merit,

    b. Whether the Grant of letters should be confirmed

13. On whether the Protest has merit, it was submitted that the protest is hinged on the will of the deceased and the matter is obsolete by the Ruling of Ndungu J of 10th November, 2019 where the Court affirmed that the estate is testate and that decision has not been set aside. That the protest is a backdoor attempt at reviewing the consent order by Ouko J (as he then was) of 28th September, 2012.

14. The Applicant made reference to the case of *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamiota Nyasende* [2022] KEELC 1631 to submit that such issues cannot be re-litigated in this Court under the principle of finality unless the said Ruling of the Court is set-aside or quashed.

15. On whether the Grant of letters should be confirmed, it was submitted that Section 38 of the *Law of Succession Act* enshrines the principle of equal distribution of the net intestate estate and Section 36 of the *Law of Succession Act* entitles a surviving spouse to an equal share of the estate and a life interest over the estate. Therefore, the proposed mode of distribution would be fair for confirmation.

**Protestor's Submissions**

16. The Protestor raised the following issues

    a. Whether the deceased left behind a valid written will

    b. Whether the deceased left behind a valid oral will

    c. What is the fate of the Application for confirmation of Grant

17. Regarding the first issue, it was submitted that the Will was prepared by Waiganjo Mwangi Advocate who was called as a witness. That the Will was witnessed by two friends of the deceased who known to the family. The witnesses signed the Will in the presence of the advocate.

18. It was argued that the Applicant's quarrel is that the mode of distribution is not acceptable to her and not that the will is invalid.

19. He places reliance in *Ndirangu v Ndirangu* [2022] KCEA 1296 (KLR) to submit that the deceased left a valid written will. that the other beneficiaries were all provided for and none was left out.

20. Pertaining the second issue, the Protestor submitted that the allegation that the deceased made an Oral Will has no conviction since the Applicant has not prosecuted a Petition for Probate with Oral Will. Further that the existence of a valid oral Will has not been proven and the same does not meet the requirements of validity under Section 9 of the *Law of Succession Act*.

21. Thirdly, it was submitted that the Court cannot disregard the existence of a Valid Will since the grounds for the protest have been established. Therefore, the fate of the Application for Confirmation of Grant lies with dismissal and the Court in confirming proof of probate.

**Analysis and Determination**

22. I have considered the Summons for Confirmation of Grant herein, the Affidavit of Protest together with the supporting materials thereof. I have also considered oral evidence tendered by both parties and rival submissions by their respective counsel.

23. There is also the argument by the Applicant that the Grant of Letters of Administration issued on 28th September, 2012 is manifest that the estate is intestate. I respectively disagree. The order consolidating *Succession Cause No. 563 of 2011* and *Succession Cause No. 551 of 2011* was for the matters to be determined together. The same did not dispose off Succession consolidation of *Succession Cause No. 551 of 2011* but only made *Succession Cause No. 563 of 2011* the primary file.

24. The consent adopted for Joint Letters of Administration to be issued to the Applicant and Protestor was management of the estate. It did not in any way invalidate the Will or address the issue of whether the deceased died testate or intestate.

25. The issues that arise for determination are therefore;

a. Whether the deceased left behind a Valid Written Will and whether the Will dated 22nd March, 2022 is valid.

b. Whether the deceased made adequate provisions for all his dependants in the Will.

c. Costs of the cause

26. The Protestor annexed in his Affidavit of Protest a Will dated 22nd March, 2007 which according to him represented the wishes of the deceased and signed by the deceased. The validity of the Will and distribution of the estate as per the Will was put to question for a number of reasons alluded to in the oral testimonies and the filed witness statements of Phyllis Wairimu Njoroge and Elizaphan Kinyanjui Njoroge.

27. The question on validity of a written Will is pegged on two concepts, that is, the capacity of the testator to make a will at the and fulfilment of the requirements for the making of a valid Will and the after compliance of the said requirements.

28. Section 5 of the *Law of Succession Act*, deals with capacity to make a will, and of testation and provides that any person who is sound of mind and not a minor may dispose of his free property as defended under Section 3 of the *Law of Succession Act* and shall be deemed to be of sound 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.

29. 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.

30. In *re Estate of Gatuthu Njuguna* (Deceased) [1998] eKLR, the court held: -

> " As regards the testator's mental and physical capacity to make the will, the law presumes that that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind.."

31. Section 11 of the *Law of Succession Act* sets outs the ingredients of a valid written Will: being a written will it must first and foremost be in writing. To meet the test of time, it has to be signed by the testator or by a person authorized to by the testator in the presence or direction of the testator, it has to be witnessed by at least two competent witnesses who are not beneficiaries and have to have witnessed the testator affixing his signature.

32. The Will produced in Court by PW2 as Exh 23 was in writing, PW2 Mr. Waiganjo Mwangi an advocate of the High Court of Kenya confirmed in Court that he knew the deceased during his lifetime and that he drafted the Will under the directions of the deceased. He also confirmed the contents of the Will and that he did not notice anything peculiar. He also confirmed that the Will was executed and witnessed in his office.

33. The Will is signed by the deceased and the question on authenticity of the signature did not arise neither was the signature challenged by the Applicant or the other beneficiaries. PW2 stated that the Applicant confirmed the signature of the deceased prior to reading of the Will. The Applicant stated in her testimony that she did not see the signature.

34. There is therefore no proof that the signature was not the deceased's and in the absence of such proof, the signature must be deemed to be that of the deceased.

35. On witnessing, the same has been witnessed by two individuals. The Applicant herself confirmed that the two witnesses were known to her as friends of the family. The Applicant in her statement added that, the witnesses had been called by the deceased and had declined. At the time of reading the Will, the two witnesses were alive but one was deceased by the time this matter came up for hearing. The surviving Witness was not called to confirm of deny the signature or the Will. The authenticity of the Witnesses or their signatures was also not challenged.

36. The capacity of the deceased to make the Will did not also arise. The Parties confirmed the deceased was of serious ill health towards the end but his mental state was not questioned. In *re Estate of Gatuthu Njuguna (Deceased)* [1998] eKLR, the court held:-

> " As regards the testator's mental and physical capacity to make the will, the law presumes that that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind.."

37. Since there was no challenge at to the capacity of the deceased to make the Will, the deceased is deemed to have had testamentary capacity.

38. On record there is an affidavit one of the attestors Samuel Wachira Thuo sworn on 10th January, 2022 confirming being an attestor of the Will of the deceased on 22nd March, 2007 at the offices of Waiganjo & Co. Advocates. The Affidavit goes on further to suggest that the deceased on 18th May, 2011 called him to his house and informed that he had opted to change his will but the same had disappeared.

39. There is a letter to Court addressed to the Deputy Registrar by the other testator Stephen Njuru Githahu dated 20th April, 2012 confirming being an a testor of the Will of the deceased on 22nd March, 2007 at the offices of Waiganjo & Co. Advocates. The letter goes on further to suggest that the deceased on 26th March 2011 called him to his Nakuru Farmers Guest House and informed that the son he had bequeathed had left home and had decided to change his will but the same was missing.

40. It is not clear the purpose and intent of these documents that were filed in Court and even addressed to the Deputy Registrar. The Court shall disregard these documents as the makers did not produce them

41. Having stated the foregoing, in my considered view, and for all intents and purposes of this case, the will was in writing connoting intent, the testator had testamentary capacity, the Will was duly executed and there is no indication that the Will was executed with undue influence the will was Witnessed by two witnesses as contemplated by the law.

42. The Will on the face of it has met the legal requirements of validity as stipulated under the Law and is deemed valid.

**Whether the Deceased Made Reasonable Provisions for all his Dependants in the Will.**

43. It is not in contention that the Applicant is the wife of the deceased or who the children of the deceased. It is also worth noting that a testator has the free will to dispose of his or her free property as he or she chooses to. There is no obligation that is placed by law or otherwise that a testator has to provide equally to his beneficiaries. The discretion on how the testator's estate will be distributed is upon the testator.

44. The deceased did make provision for his children in the Will. The Applicant insists on equal provision for all her children and contends that those were the wishes of the deceased. The proposed mode of distribution by the Applicant caters for all children.

45. Based on the evidence on record and having determined that the Will is valid the question that comes to mind is the choice or formula used in disposition of the properties of the deceased to his children and his widow. Was there adequate or reasonable provision for all the dependants of the deceased?

46. Part III of the *Law of Succession Act* in particular Sections 26, 27 and 28 provide for circumstances where the Court can intervene and interfere with the wishes of a deceased for dependants not adequately provided for by Will or on intestacy as follows: -

(26) Provision for dependants not adequately provided for by will or on intestacy

> “Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.”

(27) Discretion of the Court in making Order

> “In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependants, or to make such other provision for him by way of periodical payment or a lump sum, and to impose such conditions as it thinks fit.”

(28) Circumstances to be taken into account by court in making order

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to

a. the nature and amount of the deceased's property;

b. any past, present or future capital or income from any source of the dependant;

c. the existing and future means and needs of the dependant;

d. whether the deceased had made any advancement or other gift to the dependant during his lifetime;

e. the conduct of the dependant in relation to the deceased;

f. the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

g. the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

47. In *re Estate of Lusila Wairu Waweru (Deceased)* [2020] eKLR the Court noted that: -

> “A testator has power to dispose of her property as she pleases and the court is bound to respect those wishes as long they are not repugnant to the Law and she does not leave out some dependants and beneficiaries. Failure to make provision for a dependant by a deceased person in her will does not invalidate the Will as the Court is empowered under Section

26 of the *Law of Succession Act* as demonstrated above to make reasonable provision for the dependant. Section 28 sets out the parameters that this Court should consider when making such provisions.

It is important to understand the role of testamentary freedom of a testator to have unfiltered discretion to dispose of his or her estate and the fundamental moral duty to provide maintenance for his or her children in death. The treatise by Jordan F. R.

> "Limitations of the power of testamentary disposition {1907 – 8} 5 *Common Wealth Law Review* 97 writing for the Court stated: "Children emboldened by the confidence that some share is assured to them in absence of flagrant misconduct, may be tempted to defy parental authority. Any limitation upon a testator's power to dispose of his earnings as he thinks fit tends to weaken one important incentive to industry and thrift. A testator may be prevented from excluding an utterly worthless member of his family except at the risk of exposing a grave family scandal which it is perhaps strongly in the interests of innocent members to conceal. The system relegates to a Court of justice discretionary powers in a matter as to the merits of which the testator must in nearly every case be a much better Judge than the Court can possibly be. Complicated questions of fact may arise regarding previous advancements of the claimant. An opportunity is given for speculative and black mailing actions on behalf of persons who have been properly excluded."

48. I have perused the Will in question and its contents therein. On record, there is a valuation report produced by AW1 done by Applecross Surveyors commissioned by the parties herein vide a joint letter dated 19th October, 2012. The valuation report values the property at approximately Kshs. 75 million. There is no dispute or challenge to the information therein.

49. The following is the summary of the manner in which the estate of the deceased was distributed in the Will dated 22nd March, 2007.

Immovable Properties

a. Elizabeth Wanja (daughter) shares in National Bank amounting to Kshs. 20,030

b. Nancy Muthoni (daughter) Kengen Shares amounting to Kshs. 15,612.50 and Eveready Shares amounting to Kshs. 380

c. Jane Njeri Reuben (daughter )Standard Chartered Bank Kshs 45,000

d. The rest of the shares in the other institutions amounting to approximately Kshs. 798,370 go to the Protestor

Movable properties

a. Elizaphan Kinyanjui Njoroge gets 4 acres worth about Kshs. 2,000,000 in Nyandarua/Mawingu/233 and the remaining 2.6 acres goes to the Protestor.

b. Fredrick Njenga Njoroge gets Nyandarua/Mawingu/ 361 approximately 1.6HA worth Kshs. 2,000,000

c. Nyandarua/Mawingu/234 approximately 3HA which has the main farm house goes to the Protestor subject to the widow of the deceased gets a life interest.

d. The other immovable properties go to the Protestor

50. It is noteworthy that, based the valuation report, in an estate worth more than Kshs. 75 million the daughters of the deceased have been bequeathed movable assets in form of shares of least value of Kshs. 81,022.50 cumulatively. The other two sons get immovable properties worth Kshs. 2 million each also of least value. The widow gets a life interest in one property, livestock, household items and personal effects.

51. All other immovable property of highest value and movable property including the remaining shares also of highest value in different institutions which value is about Kshs. 70 million goes to the Protestor. The Will goes on further to bequeath the Protestor any other property that is not mentioned in the Will.

52. The Court of Appeal in *Elizabeth Kamene Ndolo v George Matata Ndolo* [1996] KECA 209 (KLR) made the following observations: -

> “The seeds of the dispute were sewn by the deceased himself when he failed to make any provision in his will for his first two wives. This court must, however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is expressly recognized by section 26 of the Act which provides as follows:-.....
>
> This section clearly puts limitations on the testamentary freedom given by section 5. So that if a man by his will disinherits his wife who was dependant on him during his lifetime, the court will interfere with his freedom to dispose of his property by making reasonable provision for the disinherited wife. Or if a man at the point of his death gives to his mistress the family's only home and makes no reasonable provision for his children who were dependent on him during his lifetime, the court may well follow the mistress, under section 26, and make reasonable provision for the dependent children out of the house given to the mistress. So that though a man may have unfettered freedom to dispose of his property by will as he sees fit, we do not think it is possible for a man in Kenya to leave all his property for the maintenance and up-keep of an animal orphanage if the effect of doing so would be to leave his dependants unprovided for.

53. The Protestor relied on the Court of Appeal decision in *Ndirangu v Ndirangu* [2022] KCEA 1296 (KLR) to argue that that the Will adequately provide for the beneficiaries. In the same decision the Court of Appeal provided a disclaimer on when the Court can interfere with the wishes of the deceased and stated:-

> “ ...A court can only interfere with the wishes of a deceased person expressed in his will with respect to distribution of his estate in exceptional situations, such as where the will fails to provide for a dependant of the deceased either totally or adequately. Subject to this caveat,

there is no legal requirement for equitable distribution by a testator disposing of his property in a will, and a testator has the right to dispose his property in whatever way he desires. The distribution may be influenced by his rapport with the dependants, and this may result in some being favoured…"

54. The immediately preceding Superior Court decisions is manifest that although the wishes of a testator have to be taken into consideration, the Court at the behest of Justice can invoke its discretion being guided by the *Constitution* and the *Law of Succession Act* to make reasonable and adequate provisions for the deceased's dependants not adequately provided for.

55. The Court sadly notes that in the Will, two of the daughters believed to be married are being referred to "wife to". They are not recognized as his children but as wives of other individuals. The two married daughters get less that the daughter who the Court presumes to be unmarried as the Will does not address her as "wife to". The widow gets a life interest which is clouded by the shadow of ownership of by the Protestor.

56. Even if the Protestor was the deceased preferred beneficiary, Article 27 of the *Constitution* prohibits direct or indirect discrimination and of importance is the prohibition of discrimination on the basis of gender or marital status which is manifest in the bequeath. Further the *Law of Succession Act* caters to all persons named as dependants pursuant to Section 29 of the Act and does not in any way distinguish male or female children or married or unmarried.

57. The Protestor submitted and prayed that the Court does confirm distribution of the estate of the deceased according to the Will. Section 47 of the *Law of Succession Act* confers jurisdiction upon this Court to determine any dispute under the Act and to make any such orders therein as may be expedient and just. In the Court's view this is case where the discretion of the Court under Section 27 to make adequate provision for the beneficiaries is invoked.

58. As regards the fate of the Summons for Confirmation of Grant dated 22nd May, 2013, the same cannot be confirmed on the basis that the Will has been found to have passed the test of time confirming that the deceased died testate the same goes for the proposed mode of distribution.

59. There are two properties listed in the Will at 5E (iii) and (v) which ownership is yet to be clearly established and as such cannot be considered property of the deceased for purposes of distribution.

60. In the upshot and due to the foregoing reasons, the estate cannot be distributed according to the Will, the Affidavit of Protest dated 5th November, 2013 therefore partially succeeds and partially fails with the following orders:

    a. That the Will dated 22nd March, 2007 is hereby declared as valid.

    b. For avoidance of doubt, since the Affidavit of Protest partially fails, Phyllis Wairimu Njoroge and Job Mwangi Njoroge shall remain as administrators of the estate

    c. That the Applicant shall be at liberty to engage the Protestor and agree on reasonable provision for each Dependant not adequately provided for and file an affidavit on the proposed mode of distribution of the estate within 60 days of today's Ruling. In the alternative, in the absence of a consensus, each Party to file a separate proposal.

    d. In default, the Court shall determine the reasonable provision for the dependents.

    e. This being a family matter, each party to bear their own costs.

f. Any Party aggrieved by this Order shall move the Court of Appeal appropriately within 30 days.

g. The Applicant shall fix the matter to be mentioned for directions after 60 days.

It is ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 9TH DAY OF MAY 2025**

**MOHOCHI S. M.**

**JUDGE**