In re Estate of Wilfred Awinja Nyamwanda (Deceased) (Succession Cause 4 of 2023) [2025] KEHC 12837 (KLR) (16 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12837 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

SUCCESSION CAUSE 4 OF 2023

JN KAMAU, J

SEPTEMBER 16, 2025

IN THE MATTER OF THE ESTATE OF WILFRED AWINJA NYAMWANDA (DECEASED)

BETWEEN

WYCLIFFE MUHUNYI AWINJA ..... APPLICANT

AND

CONCEPTA NAKHUMICHA ..... 1ST RESPONDENT

KENNEDY AWINJA ..... 2ND RESPONDENT

RULING

Introduction

1. In his Summons dated 9th June 2023 and filed on 15th June 2023, the Applicant herein sought conservatory orders to restrain the 1st Respondent herein from receiving rent from the property known as East Bukusu/Kanduyi/1206 (hereinafter referred to as "the subject property") pending the hearing of the succession cause herein. He also prayed that the Respondents account for all the proceeds collected from the rental houses in Bungoma as the deceased's alleged Will (hereinafter referred to as the "impugned Will") was never admitted to probate, that the fraudulent impugned Will be examined by a competent document examiner for purposes of ascertaining its authenticity and that the same be annulled as it was procured fraudulently.

2. He swore an affidavit in support of the said Summons on 9th June 2023. He averred that he was the deceased's son hence a beneficiary of the estate herein. He stated that the deceased died without a will after prolonged suffering of a stroke and he was admitted at Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH).

3. He contended that there was need for the court to issue conservatory orders against the 1st Respondent to restrain her from collecting rental income from the subject property as she lacked the legal capacity to act on behalf of the deceased's Estate. He was surprised that although the impugned Will was allegedly

drafted in 2016 and had never been admitted to a grant of probate, the 1st Respondent had already transferred the prime properties of the estate to herself and disinherited other beneficiaries.

4. He was emphatic that the deceased never left a will behind and that the fact that the same had a thumbprint explained it as the deceased was literate. He added that the Respondents had instituted parallel cases alleging to be the owners of the properties of the estate when they had a grant for representation.

5. He further stated that the 1st Respondent was their house girl in the year 1982 and that she pushed herself to have an affair with the deceased in order to be part of the family. He asserted that there had been no opening of the impugned Will which was a standard procedure for testate matters which was proof that the Respondents' intention was to unjustly enrich themselves.

6. He asserted that the impugned Will contained fallacious information as it failed to recognise all the dependents of the family like one Jason and was, therefore, irregular. He added that it had grammatical mistakes of the properties mentioned while other properties had been left out, a clear indicator that it was a sham.

7. He prayed that the impugned Will be revoked so that a proper succession could proceed. He added that he would suffer substantial loss unless the orders sought in the application are granted.

8. In opposition to the Applicant's Summons, the 2nd Respondent swore a Replying Affidavit on 26th July 2023 on his own behalf and on behalf of the 1st Respondent who was his mother. The same was filed on 7th August 2023.

9. He averred that he was also a son to the deceased and a step-brother to the Applicant herein. He stated that the deceased died testate and left a valid Will. He denied the Applicant's averments that the deceased suffered a stroke and was admitted at JOOTRH. He added that the Medical Report the Applicant annexed was a forgery and a product of his imagination.

10. He contended that it was during the hearing of the Vihiga SPMC ELC Case No 50 of 2020 that he learned of the existence of the purported medical records and reports adduced in court. He pointed out that they instructed their advocates to verify the said documents from JOOTRH which denied having any client bearing the deceased's name.

11. He pointed out that the 1st Respondent was legally entitled to the rent collected from the subject property which was jointly registered in her name, his name and that of his brother, one Godfrey Oyaro Awinja and was therefore not part of the deceased's Estate.

12. He asserted that the Applicant had chosen to use derogatory statements against the 1st Respondent while aware that he was not privy to the affairs leading to the relationship between her and the deceased. He was categorical that it was the Applicant who was causing strain in the family and had always rejected any efforts for a family meeting to agree on the institution of the probate proceedings.

13. He was emphatic that the impugned Will was valid and was duly made by the deceased long before his death and ought to be upheld. He asserted that the application herein was sub judice due to the pending of Bungoma High Court ELC Case No 158 of 2016. He added that the application was a continuation of harassment by the Applicant to deny them the peaceful utilisation of their parcels of land that were given and transferred to them by the deceased prior to his death.

14. He said that the Applicant's application was bad in law, scandalous and smirked of mischief. He termed it as lacking in merit, an abuse of the court process, a misrepresentation of facts and hence, ought to be struck off in its entirety.

15. The Applicant's Written Submissions were dated and filed on 6th May 2024 while his Further Submissions were dated and filed on 18th June 2024. The Respondents' Written Submissions were dated 5th June 2024 and filed on 7th June 2024. The Ruling herein is based on the said Written Submissions which both parties relied upon in their entirety.

LEgal Analysis

16. Having considered both parties' affidavit evidence, it appeared to this court that the issues that had been raised before it for determination were as follows:-

    a. Whether or not the impugned Will was valid, and if not, whether it ought to be annulled.

    b. Whether or not the Applicant had met the threshold for grant of conservatory orders;

    c. Whether the Respondents should render an account of the rent proceeds on the subject property;

I. Validity Of The Will

17. The Applicant cited Section 55 and 71 of the Law of *Law of Succession Act* and argued that the transfers done by the Respondents were null as they were not supported by any grant of representation and they had thus used uncouth means to disinherit other beneficiaries. He contended that whether or not the deceased was admitted in hospital was of little probative value in the circumstance of this case.

18. He explained that he lodged a complaint on the authenticity of the Will at Buruburu Police Station through OB entry No 24/24/08/23 and that investigations confirmed that the thumbprint on the impugned Will did not match with the deceased's own marks in the National Registration Bureau. He was emphatic that the impugned Will was fraudulently procured and should be annulled.

19. He submitted that he was neither notified of the existence of the impugned Will by any advocate nor invited for the will reading. He argued that the Advocate who witnessed the execution of the impugned Will was never called as a witness to explain the circumstances. In this regard, he relied on the case of Re Estate of Francis Andabwa Nabwangu (Deceased)[2021]eKLR where it was held that allegations of forgeries of signatures on a will were best resolved by being referred to handwriting experts or document examiners for comparison with the known signatures of a deceased.

20. He contended that no reason had been expounded to the court on why the original copy of the will was not produced in court to prove its genuineness as required under Rule 50(c) of the Probate Rules. He submitted that the impugned Will did not mention all the beneficiaries of the deceased and that there was also misdescription of the properties of the deceased. He argued that the guidelines set out in Section 11 of the *Law of Succession Act* were not followed. He blamed the Respondents for not summoning the witnesses of the impugned Will to prove the mode it was attested.

21. To buttress his point, he placed reliance on the case of Re Estate of Sasom Kipketere Chemirmir (Deceased)[2019]eKLR where a will was rendered invalid as it had not met all the requirements of a valid will envisaged under Section 11 of the Law of *Law of Succession Act*.

22. He further asserted that courts had held that expert witness was not conclusive evidence on the validity of a will but that circumstances in which a will was procured were sufficient to raise doubt. He added that courts had also held that an advocate or witness were key players in assisting the court to make a determination on the process of writing the will.

23. In that regard, he relied on the case of Re Estate of Veronica Njoki Mungai (Deceased) 2017]eKLR where it was held that the omission to call an advocate as a witness did not have much value so long as one of the other key players in the alleged making of the will testified. He also referred this court to the case of Rahab Nyakangu Waithanji vs Fredrick Thuku Waithanje[2019]eKLR where the court found a will invalid after it directed the advocate who was alleged to have prepared the same to appear in court but he failed to do so.

24. He urged this court to find that the impugned Will was forged and, therefore, invalid and that the deceased died intestate, thus, all his beneficiaries should be allowed to inherit in a just way that prevents unjust enrichment.

25. On their part, the Respondents submitted that the deceased executed a Written Will on 25th November 2016 through an Advocate by the name Violet Lunani based in Bungoma. They contended that a will was valid unless it was challenged on grounds of incapacity of the testator, or that it was caused by fraud, coercion, importunity or mistake.

26. They asserted that the burden of proving the above grounds vested on the party challenging the will. They pointed out that there was nothing on record to show that the deceased suffered partial stroke incapacitating him as the letters filed by the Applicant were mere forgeries.

27. They further contended that a will could be executed by signing, thumbprinting or by making an impression on it and that the maker had the option of deciding on how to execute the will. They pointed out that the Applicant invited to court a document's examiner to prove that the impression on the copy of the will presented to him was not a thumb-print but that the said examiner admitted in cross-examination that he used a copy of the will and not the original will.

28. They argued that the Applicant did not attempt to obtain the original will from them or the Advocate who attested the will. They added that the alleged fraud was never reported to the police for further investigations and that none of them had ever been arrested and charged with the offences of fraud, forgery or uttering a forged document. It was, therefore, their assertion that the impugned Will was unchallenged hence should be presumed to be valid as the allegations of fraud were not proved.

29. Notably, on the formal requirements of validity of a will, the law is in Section 11 of the *Law of Succession Act*. It states that:-

> " 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."

30. Section 109 of the *Evidence Act* Cap 80 (Laws of Kenya) therefore placed the burden of proof on a party who asserted a fact. The provision states that:-

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person."

31. The Applicant herein disputed the validity of the impugned Will on the ground that the thumbprint on the said impugned Will purported to be that of the deceased were not his. The allegation of forgery placed a heavy burden on him to prove beyond reasonable doubt, or at least beyond balance of probability, that indeed the thumbprint was forged.

32. He led evidence on the alleged forgery. He called a forensic document examiner, one Martin Esakina Papa who testified that the impressions in the impugned Will did not show any characteristics that could be individually analysed, compared and matched with the impressions of the deceased obtained from the National Registration Bureau. He added that he could not tell whether the impression on the impugned Will was a fingerprint impression or not as it was just a mark. It was his finding that the individuality and identity of the impressions in the impugned Will did not match with the identity and individuality of the deceased in the sample supplied.

33. The Respondents did not call any witness to rebut the aforesaid evidence. This was surprising, given that the purpose of attesting witnesses was to give evidence on the process of the making of a will should its validity be challenged. It was not clear why they chose not to call the witnesses or the advocate who drafted and attested the impugned Will.

34. In the absence of any evidence to the contrary, the Applicant herein therefore led evidence to demonstrate that the said thumbprints were not made by the deceased and that the impugned Will was forged. His testimony was not shaken even on cross-examination. It was clear, therefore, that he discharged the burden of proof and thus his allegation of forgery succeeded. This court was, therefore, satisfied that the impugned Will before it was irregular on the face of it and thus, a nullity ab initio.

35. Going further, this court had due regard to the case of Curryian Okumu vs Perez Okumu & 2 Others [2016]eKLR where it was held that failure to provide for a beneficiary in a Will did not invalidate a Will as Section 5(1) of the *Law of Succession Act* gave a testator freedom to dispose of all or any of his free property by will.

36. Indeed, the court is empowered under Section 26 of the *Law of Succession Act* to make reasonable provision for the dependant. As the deceased herein was at liberty to dispose of his Estate in a manner that was suitable to him, if at all the will was genuine, failure to provide for some beneficiaries could not have invalidated the impugned Will because the court could have made provision for dependants if the same was properly demonstrated and proven that such provision ought to have been made.

II. Conservatory Orders

37. The Applicant submitted that it was common understanding that a will could only take effect after a deceased person had died. He invoked Section 3 of the *Law of Succession Act* and argued that the deceased's subject property was bequeathed in the impugned Will and allegedly transferred prior to his death in 2016 and that that was a case of fraud calculated on disinheriting other beneficiaries.

38. He argued that it was mandatory that a will once drafted must undergo the probate procedure provided under succession law. He further invoked Article 40(6) of *the Constitution* of Kenya, 2010 and submitted that the subject property failed the test of being bequeathed as it was not admitted to

probate. He added that no grant of probate was made as stipulated under Section 55 of the *Law of Succession Act*.

39. He pointed out that the Respondents were aware that the subject property was owned by the deceased and hence the reason they attached a fake Will to validate their fraud. He asserted that the deceased had a signature and was literate, having worked as a cashier at the National Cereals and Produce Board, thus, was not in anyway incapacitated from signing documents requiring him to use a thumbprint as alleged.

40. He contended that the impugned Will was also void for lack of being accompanied with an Affidavit to the effect that its contents were read out to the testator as required under Rule 52(2) of the Probate Rules. He added that it was procured without his knowledge or participation hence fraud. He argued that he had met the threshold for injunctive orders and placed reliance on the case of Giella vs Cassman Brown (1973) E.A 358 where it was held that one must satisfy that he/she had an arguable case, if the orders sought are not granted, it would lead to irreparable harm and the balance of convenience tilts in his/her favour.

41. He asserted that the narration of both parties was that they were related to the deceased either through marriage or blood but that the common denominator was that the subject property was owned by the deceased prior its transfer which was pegged on a will. He was emphatic that he had established a prima facie case which mandated this court to issue conservatory orders. He added that the court had the power to make a finding if the deceased died testate or intestate, prevent illegalities and order cancellation of properties obtained through deceit.

42. To buttress his point, he placed reliance on the case of Estate of Kitur Chepsungulngei (2021)eKLR where it was held that the applicants had established that there was risk of the estate being wasted and had a prima facie case as beneficiaries of the deceased's estate.

43. He cited the case of Re Estate of David William Kigumi Kimemia (Deceased)[2021]eKLR where it was held that petitioner had not given a satisfactory explanation as to who appended the signature attributed to the applicant in the documents which were presented to the court as to create the impression that the applicant had consented and even sworn affidavits.

44. He argued that Section 26 of the *Land Registration Act* and Articles 40(6) of *the Constitution* of Kenya, 2010 removed the protection of securing a title which was procured through fraud. He asserted that because the Respondents were registered owners of the subject property, that did not limit this court from preserving the initial assets of the estate that had been registered through fraud.

45. It was his contention that under Section 47 of the *Law of Succession Act*, courts were obliged to preserve the estate from being wasted. In this regard, he relied on the case of Floris Piezzo & Another vs Giancarlo Falasconi[2014]eKLR where it was held that Section 47 of the Act gives the court all embracing powers to make necessary orders including injunctions where appropriate to safeguard the deceased's estate.

46. He pointed out that there was the case ELC Case No 158 of 2016 in which the 1st Wife of the deceased (the late Concepta Nakhumicha) had sued the 1st Respondent from possessing the subject property. He argued that the deceased had a first wife whom she acquired the subject property with in 1969 but that the 2nd Respondent was controlling the subject property in her exclusion.

47. He was emphatic that based on the evidence issued by the expert witness that the deceased thumbprint could not match with the one under the Registrar of persons was an indicator that the deceased died intestate. He asserted that no prejudice would be occasioned if preservatory orders were granted

preventing the collection of rent from the commercial proceedings pending the hearing of this succession. He pointed out that the subject property fetched a monthly rent of Kshs 150,000/=.

48. The Applicant submitted that he had proved fraud as the genesis of the impugned Will and fraudulent transfer and that if the court finds that the deceased died intestate therefore there was need for the accounting of the proceeds of rental income collected from the subject property. He relied on the case of Re Estate of Makokha Idris Khasabuli (Deceased) [2019]eKLR where the persons who had intermeddled with the deceased assets were directed by court to render an account of the deceased's assets.

49. On their part, the Respondents submitted that the Applicant had failed to demonstrate to the court why the said orders should be issued or what injuries he was likely to suffer should the orders be declined. They asserted that under Article 23 of *the Constitution* of Kenya, a conservatory order was one of the instruments employed by the courts to protect the enforcement of constitutional rights and that they were granted by courts to maintain status quo to ensure that there was no change of circumstance when a matter was ongoing in court.

50. They pointed out that one seeking such orders was required to demonstrate a prima facie case and that the case would be rendered nugatory if the orders were not granted. They argued that the Applicant had not demonstrated a prima facie case as the subject property did not form part of the deceased's estate as they had annexed a certificate of official search which indicated that the title deed of the subject property was issued to them and one Godfrey Oyaro Awinja as joint owners on 27th July 2019.

51. It was, therefore, their contention that the Applicant could not purport to restrain them from receiving rent hence this court could not grant such orders.

52. Notably, a conservatory order was a remedy that was issued to preserve a subject matter until a suit and/or petition was heard and determined. It was an order of status quo ante meant to preserve the sub stratum of the suit so as to not render the substantive matter an academic exercise.

53. The nature and the principles guiding the grant of conservatory orders were now well settled. In the case of Gatarau Peter Munya vs Dickson Mwenda Kithinji & 2 others (Supra), the Supreme Court held that conservatory orders should be granted on the merit of a case and bearing in mind the public interest, the constitutional values, the proportionate magnitudes and priority levels attributable to the relevant courses.

54. This court was alive to the fact that ELC Case No 158 of 2016 was pending hearing and determination at the Environment and Land Court at Bungoma. As both that court and this court were of equal and competent jurisdiction and that the Environment and Land Court was filed before the instant Succession Cause, this court restrained itself from granting interim orders with regard to the collection of rent of the said subject property.

Disposition

55. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Summons dated 9th June 2023 and filed on 15th June 2023 was partly merited. The same be and is hereby granted in terms of Prayer No (e) therein that had sought annulment of the impugned Will.

56. As this was a family matter, this court deviated from the general rule that costs follow event and hereby directs that each party bears its own costs so as to preserve the family ties.

57. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 16TH DAY OF SEPTEMBER 2025

J. KAMAU

JUDGE