In re Estate of Shadrack Magotswe alias Shadrack Moagotswe Domio (Deceased) (Succession Cause 386 of 2015) [2024] KEHC 152 (KLR) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 152 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 386 OF 2015

JRA WANANDA, J

JANUARY 19, 2024

IN THE MATTER OF THE ESTATE OF SHADRACK MAGOTSWE ALIAS SHADRACK MOAGOTSWE DOMIO (DECEASED)

BETWEEN

PETER JUNGULU ALIAS PETER CHUNGULI ..... PETITIONER

AND

THOMAS ILAHALWA MAGOTSWE ..... 1ST OBJECTOR

REBECCA MUSIMBI KOECH ..... 2ND OBJECTOR

BERRYS MARAGA MAGOTSWE ..... 3RD OBJECTOR

MARGARET AUMA MAGOTSWE ..... 4TH OBJECTOR

GLADYS INZERA MAGOTSWE ..... 5TH OBJECTOR

RULING

1. The deceased, Shadrack Magoswe Domoi (also known as Shadrack Moagoswe Domoi) died on 16/02/2010. On 6/10/2015 the Petitioner applied for Grant of Letters of Administration with Written Will annexed in respect of the estate in his capacity as executor of the Will. The Grant was then given by the Court on 21/04/2016. Summons for Confirmation of the Grant was subsequently filed on 2/10/2018. However, before the same could be heard, the Objection the subject of this Ruling was filed.

2. Now before Court is the Application filed by the Objectors and brought by way of the Notice of Motion dated 10/07/2019. It seeks the orders premised as follows:

    i. That the orders issued on the 21st day of April 2016 be set aside.

    ii. That the deceased died intestate.

iii. That the costs of this Application be in the Cause.

3. The Application is filed through Messrs B.I. Otieno & Co. Advocates and is stated to be brought under Order 10 Rule 11 of the Civil Procedure Rules and Section 34 of the *Law of Succession Act*. It is premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by the 2nd Objector, Rebecca Musimbi Koech.

4. In the Affidavit, the 2nd Objector deponed That she swears the Affidavit also on behalf of the other Objectors, That they are all children of the deceased who died at the age of 99 years, That in November 2016 they moved the Court in Succession Cause No. 189 of 2016 at Kapsabet, the Petition was gazetted, one Elizabeth Auma who is also a daughter of the deceased had her name included as a beneficiary, upon gazettement they moved the Court for issuance of a temporary Letters of Administration and That is when it transpired That the said Elizabeth Auma had already filed Eldoret High Court Succession Cause No. 285 of 2013, they did not know about this until 27/12/2017 when the said Elizabeth Auma came and informed the Court That she had since concluded the Succession in That Cause, the Kapsabet Succession Cause was therefore terminated, their Counsel made inquiries and confirmed That indeed Eldoret High Court Succession Cause No. 285 of 2013 existed, they then discovered That in the P&A Form 5 filed therein, they were not mentioned as children of the deceased or beneficiaries of the estate, they also discovered That That the Court directed That their local Chief furnishes the Court with a letter providing particulars of the family members, although a letter to this effect was sent by the Deputy Registrar to the Chief, the order was never complied with, and That on 14/05/2014 the said Elizabeth Auma withdrew the Cause under the pretext That the deceased had left a Will.

5. She deponed further That there was no Will left by the deceased because had he left one, the whole family would have been aware, it is not known at what stage the said Elizabeth Auma learnt about the purported Will dated 3/10/2011, the Will bequeathing Nandi/Koibarak A/819 to the said Elizabeth Auma was done during the pendency of a Civil Case, Eldoret High Court No. 264 of 2000 in which the deceased had moved to Court seeking nullification of the allocation of That parcel of land to the Defendants, one of whom was the said Elizabeth Auma, That Judgment in That case was delivered on 2/05/2015 way after the deceased died on 16/02/2013, there was no way the deceased could bequeath a parcel of land which had been sub-divided, allocated, tiles issued and subject of a pending before Court, on 2/03/2015 the High Court ordered That the allocations be nullified, the land registrars be rectified and a permanent injunction was granted to restrain the Defendants, including the said Elizabeth Auma the purported beneficiary of the alleged Will, from trespassing, alienating or in any other manner interfering with the deceased's quiet possession of Koibarak A/819/Nandi. She deponed That from the foregoing, it is clear That the alleged Will was null and void since at the time That the same is alleged to have been made on 3/10/2011, sub-division and allocation of the parcel had been done and titles issued hence the filing of Eldoret HCCC No. 264 of 2000.

Preliminary Objection

6. The Application was opposed by the Petitioner vide the Notice of Preliminary Objection filed through Messrs Angu Kitigin Co. Advocates on 27/11/2019. It was argued therein That by an act of litigation through Eldoret High Court Civil Case No. 264 of 2000 the deceased disinherited the Objectors of their entitlement to share in his parcel of land L.R. No. Nandi/Koibarak "A" Adjudication Section sub-divided into 5 parcels of land as per copy of the Judgment of Mohamed Ibrahim J (as he then was), That smelling death, the deceased prepared a Will and appointed the Petitioner as executor of his Will, That it is the Objectors' intransigence and lack of submission to family authority That led to their being disinherited, the Will was valid as executed before one S.K. Kitur Advocate and witnessed accordingly,

and That the Petitioner/Executor is willing to prove the authenticity of the usual guarantee for costs by the Objectors being posted.

Objectors' Response

7. The Objectors then filed what was referred to as "Response to the Preliminary Objection". In the Response, it was stated That the deceased had intended to disinherit the Objectors together with Elizabeth Auma, the alleged beneficiary of parcel of land L.R. No. Nandi/Koibarak "A"/819 according to the disputed Will, That this was after the said parcel of land had been subdivided into 5 parcels including plot 819, if it is disinheritance, then even the purported beneficiary of plot of No. 819 indicated in the alleged Will and in this case Margaret Auma was also disinherited by the Judgment of the Court, That the deceased filed the High Court case in the year 2002 and Judgment was delivered on 2/03/2015, 2 years after the demise of the deceased, That the deceased died aged 99 years in the year 2013 before the Court made a decision, and That there was therefore no way the deceased could will away a property which was still a subject before Court.

8. It was further argued That the Will is alleged to have been made on 3/10/2011 during which time the deceased was so sick, too old and senile to make a valid Will, That the alleged Will has never been made available and read to the family, the alleged executor is a stranger to the Objectors, whatever transpired was a well calculated move to disinherit the Objectors upon the demise of the deceased, and That the deceased did not leave a Will and therefore died intestate. The question was posed That; if there was a Will, then why did Elizabeth Auma file Eldoret High Court Succession Cause No. 258 of 2013 to the effect That the deceased died intestate?

Ruling on Preliminary Objection

9. By the Ruling delivered on 22/09/2020 by Hon. Lady Justice H. Omondi, the Preliminary was found not to raise pure points of law as per the rule in Mukisa Biscuit Company vs Westend Distributors Limited (1969) EA 696. Omondi J held That the same was full of factual points and issues That needed to be determined by production of evidence. Accordingly, the same was not considered on merits and was dismissed.

Hearing of the Objection

10. Upon dismissal of the Preliminary Objection as aforesaid, the Objectors on 27/09/2022 filed their List of Witnesses and Witness Statements made by the 5 Objectors, respectively. For the Petitioner, 3 witness Statements made by the Petitioner, the said Elizabeth Auma and one Elly Maxwell Simwa were filed on 17/10/2022.

11. On 8/03/2023 when the Advocates appeared in Court me, they informed me That they wished to canvass the matter by way of written Submissions. Pursuant thereto, I gave directions on filing of the Submissions. On 21/06/2023 the parties having complied and filed Submissions, I fixed the matter for Ruling to be delivered on 3/11/2023.

12. However, when I retired to prepare the Ruling, I discovered That there was no Replying Affidavit filed by the Petitioner. Since the Application concerns the establishment of the validity of a testamentary Will alleged to have been made by the deceased and also since the parties had, as aforesaid, filed respective List of Witnesses, Witness Statements and bundles of documents, it was strange That neither intimated any intention to conduct a viva voce hearing. It was therefore not clear to me whether they wished That the Court adopts the Witness Statements and bundles of documents without calling the makers (witnesses). In the circumstances, on 3/11/2023 I did not deliver a Ruling as earlier scheduled but instead issued directions.

13. In the directions, I stated That in view of the lack of clarity on how the parties wished to canvass the matter, before the same is certified ready for determination of the Application dated 10/07/2019, the Advocates do address the Court on the manner or procedure by which they wish to have the matter determined. I directed That if they wished to proceed by way of written Submissions on the basis of what is already on record without a viva voce trial, then they needed to be clear on whether they wish to have the Witness Statements and bundles of documents admitted in evidence without calling the Witnesses. Since Mr. Angu, Advocate for the Petitioner was absent, I fixed the matter for Mention for 10/11/2023 to enable both Advocates address me.

14. On 10/11/2023, Mr. Angu was again absent. However, Mr. Otieno, Counsel for the Objectors informed me That he had discussed and agreed with Mr. Angu That the Court adopts the Witness Statements and bundles of documents without calling the makers thereof and proceeds to determine the matter on the basis thereof together with the Affidavits on record. He insisted That there would be no need to conduct a viva voce hearing. Although I raised my misgivings over this choice of procedure, I respected and honoured the parties' choice.

15. I will therefore briefly recount the matters stated in the Witness Statements and in the Submissions.

Objectors' Witness Statements

16. The main Witness Statement for the Objectors was the one made by the 2nd Objector, Rebecca Musimbi Koech. The rest of the Objectors simply adopted the same.

17. In her Statement, the 2nd Objector stated That she was the 2nd child of the deceased. However, further in the same statement she also stated That she was the 5th born child. She listed the said Elizabeth Auma as the 4th born. In the end, she recited the matters already deponed in her Supporting Affidavit. I will not therefore recount the same.

Petitioner's Witness Statements

18. In his statement, the Petitioner stated That he is the executor of the Will of the deceased, That before the demise of the deceased, he informed the Petitioner That he had drawn a Will before one S.K. Kitur Advocate, That before burial of the deceased, the Petitioner sent a note to the family of the deceased informing them That he had a Will which he intended to read to the family, That the survivors of the deceased (whom the deceased had sued) refused and rejected the invitation, That the Advocate came and read the Will to the family members who were present, That the deceased had appointed the Petitioner the executor of the Will, That a Grant of Letters of Administration was later made to the Petitioner in this matter on 21/04/2016, the deceased distributed his assets namely, land parcel Nandi Koibarak "A"/819 and motor vehicle registration number KAD 884 in the manner provided in the Will to the said Elizabeth Auma, and Elly Maxwell Simwa and That he was fulfilling the wish of the deceased.

19. On her part, Elizabeth Auma stated That she is a daughter of the deceased, That the deceased had sued the Objectors who are her siblings in Eldoret High Court Civil Cause No. 264 of 2000, That the deceased disinherited the Objectors of their entitlement in the said land parcel Nandi Koibarak "A"/819 which had been illegally sub-divided into 5 smaller parcels of land, That before the deceased passed on he had prepared a Will and appointed the Petitioner as executor, before the burial, Advocate S.K. Kitur sent a note to the family members including the Objectors informing them That he had a Will to be read to the family, That the Objectors refused and rejected the Will, and That the Advocate came and read the Will to those family members who were present.

20. In his statement, the said Elly Maxwell Simwa Mbutsi stated That he is a Cousin of the deceased. He then recounted the same matters already contained in the statements made by the Petitioner and Elizabeth Auma.

Objectors' Submissions

21. The Objectors filed their Submissions on 21/03/2023. Counsel submitted That the Objectors are biological children of the deceased who died on 16/02/2013 aged 99 year and That the issue for determination before Court is whether the deceased died testate or intestate. According to him, the alleged Will was shrouded with undue influence and suspicious circumstances, That the deceased did not leave a Will and if he left one then the same is not valid. He then reiterated the background already recited in the Supporting Affidavit and in his "Response to the Preliminary Objection".

22. Counsel then submitted That the said Elizabeth Auma the alleged beneficiary of the estate, in her statement has stated That "it is the Objectors' intransigence and lack of submission to our father and family authority That led to their being disinherited" and posed the question; "how did she know That was the reason the Will did not touch her siblings?".

23. He submitted further That this is a case of undue influence and it is possible That she had a hand in the manner in which the alleged Will was written, the circumstances are suspicious, That it is clear from the 3 statements made by the Petitioner, the said Elizabeth Auma and Elly Maxwell Simwa That there was collusion between them since the statements are almost similar in content and format, That had the deceased left a Will the whole family would have known and particularly during the burial. Counsel further submitted That the Objectors did not know at what stage the said Elizabeth Auma came to know about an existing Will and posed the question; if there was a Will, why did she file Succession Cause No. 258 of 2013 at Eldoret High Court?

24. According to Counsel, the said Elizabeth Auma withdrew the Succession Cause not because there was a Will but because the Judge's direction That she furnishes a letter from the Chief could not be complied with, That she decided to do things in darkness but eventually everything came out. He added That neither Mr. Kitur Advocate nor any other witness who is alleged to have witnessed the Will has made any statement or sworn any Affidavit herein,. According to him therefore, there was no Will left behind. He cited several Court decisions.

Petitioner's Submissions

25. Counsel for the Petitioner submitted That a testator's mental status and physical capacity is premised on sound mind and the burden of proof is on the Objectors to prove otherwise through medical evidence. He cited the case of Estate of Gathutu Njuguna (deceased) [1998] eKLR and submitted That the deceased had capacity based on the premises That he testified in Eldoret High Court Civil Case No. 264 of 2000 without a guardian ad litem, was cross-examined and won the case, and That no medical evidence has been adduced to rebut the capacity of state to make a Will.

26. Counsel also cited Section 11 of the *Law of Succession Act* and submitted That under That Section a Will is deemed valid if it is properly executed by the testator and it appears from the signature of the testator That he intended to give effect to the documents as his Will, secondly, the Will must be signed by the testator in the presence of two or more competent witnesses who should also sign the Will in the presence of the testator, That the annexed Will has a signature on the column for the testator and there are three signatures for attesting witnesses in the presence of an Advocate of the High Court. According to Counsel therefore, there is compliance with Section 11 aforesaid and the presumption of due execution, or omnia esse riteatta should arise. He cited the case of John Wagura Ikiki & 7 Others

v Lee Gachigia Muthoga [2019] eKLR and also the case of James Maina Anyanga vs Lorna Yimbiha Ottara & 4 Others [2014] eKLR.

27. On the issue of capacity to make the Will, Counsel submitted That in the case of Estate of Murimi Kennedy Njogu (deceased) [2016] eKLR the Court established the threshold to determine testamentary capacity. On burden of proof, he cited the case of Re Estate of M.K. (Deceased) [2018] eKLR and also the case of Erastus Maina Gikunu & Another v Godfrey Gichuhi Gikunu & Another.

28. On the issue of the property L.R. No. Nandi/Koibarak "A" which according to Counsel, was illegally subdivided into 5 portions by the Objectors, and was subject to Eldoret High Court Civil Case No. 264 of 2000 and a Judgment delivered in favour of the deceased, the deceased rejected the alleged subdivision and as such knew That it was still part of the estate, the inclusion did not invalidate the Will. He cited the case of Re estate of Jidraf Gathura Githigi (deceased) [2019] eKLR and submitted That the same would only fail as per Section 23 and Rule 8(1) of the Second Schedule of the Act

29. On the issue of the deceased excluding the Applicants in his Will, Counsel submitted That Section 5 of the Act gave him the freedom of testation to dispose his property as he pleased and to whosoever he pleased. He cited the case of Re Estate of Julius Mimano (deceased) [2019] eKLR and also Re Estate of Samuel Njoroge Kamau (deceased) [2019] eKLR.

30. Counsel made further submissions on the issues and also cited more authorities to buttress his arguments.

Analysis and Determination

31. The Objectors deny That any Will was made by the deceased and That the Will produced by the Petitioner is suspicious. Upon examining the record and/or Pleadings, including Affidavits, Statements, bundle of documents, Submissions and authorities presented, I find the one broad issue That arises for determination in this matter to be as follows:

> " Whether the Applicant has presented sufficient material to warrant a finding That the alleged Will made by the deceased never existed or if it did, was made fraudulently or under undue influence and therefore whether it is invalid"

32. The Grant herein was made on 21/04/2016. The Objectors have not in their Application expressly prayed for revocation of the Grant but have simply sought the setting aside of the orders made herein on 21/04/2016. It is therefore safe to presume That what is sought is in fact revocation of the Grant.

33. Revocation of a Grant of Letters of Administration is governed by Section 76 of the *Law of Succession Act*. Under Rule 44 of the Probate and Administration Rules, the same is to be applied for by way of Summons. Again, the Application has not cited Section 76 and has also been brought by way of an ordinary Notice of Motion, instead of Summons by Form 107 as prescribed under Rule 44 of the Probate and Administration Rules.

34. However, since no challenge has been taken on these apparent omissions, in the interest of justice, I will not act on them. I also invoke Article 159 of *the Constitution* and the "oxygen" principles which both command Courts to administer or dispense substantial justice in an efficient, proportionate and cost-effective manner and "without undue regard to technicalities of procedure".

35. Coming back to Section 76 aforesaid, it provides as follows:

> " Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any Interested Party or of its own motion—

(a) That the proceedings to obtain the grant were defective in substance;

(b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding That the allegation was made in ignorance or inadvertently;

(d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) That the grant has become useless and inoperative through subsequent circumstances."

36. The Objector's claims can be interpreted to be That the Grant be revoked because it was obtained by the Petitioner making false statements and concealment of facts That the deceased had left a valid Will. To this end, it is clear That the applicable provisions applicable to the Objectors grievances are sub-Sections (a), (b) and (c) of Section 76 cited above.

37. The validity of a Will depends on the capacity of the testator to make it. Further, a Will must conform to the prescribed legal requirements. There is a rebuttable presumption under Section 5 of the *Law of Succession Act* That the person making a Will is of sound mind and therefore has the capacity to make the Will. Section 5(1) – (4) provide as follows:

"(1) ..... any person who is of sound mind and not a minor may dispose of all or any of his free property by Will .....

(2) .....

(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."

38. Section 7 of the Act then provides as follows:

> " A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void."

39. The above section presumably covers scenarios such as where a testator has the requisite capacity to make a Will but the circumstances surrounding the making of the Will raise doubts regarding its validity. The logic is That a testator must understand the import and effect of the document That he is signing as his Will and he must also have approved of the contents as reflecting his wishes.

40. On its part, Section 11 of the Act sets out the requirements for a Will to be deemed as valid. It provides 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."

41. On the capacity and state of mind of a testator to make a Will, the Court of Appeal in the case of Ngengi Muigai & Another V Peter Nyoike Muigai & 4 Others In the matter of James Ngengi Muigai (Deceased) [2018] eKLR, stated the following:

> " In the recent case of Rosemary B. Koinange (suing as legal representative of the late Dr. Wilfred Koinange and also in her own personal capacity) & 5 Others V Isabella Wanjiku Karanja & 2 Others [2017] eKLR this court examined the issue of mental capacity (to make a will) and stated as follows:
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> "The essentials of testamentary capacity were laid out in the case of Banks V Goodfellow [1870] LR5QB 549 as cited with approval in the Tanzanian Court of Appeal case of Vaghella V Vaghella [1999] EA 351 thus:
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> "A testator shall understand the nature of the act and its effects, shall understand the extent of the 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."

> "Construing the issue of capacity, Githinji J. in the case of In Re Estate of Gatuthu Njuguna (Deceased) (1998) e KLR stated:
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> "As regards the testator's mental and physical capacity to make the will, the law presumes 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, in this case the applicant .... However, paras 903 and 904 of Volume 17 of Halsbury's Laws of England show That, where any dispute or doubt of sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity, and That where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show That it was made after recovery or during a lucid interval. The same treatise further shows That the issue of testator's capacity is one of fact which can be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and That the question of capacity is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems That, if the objector produces evidence which raises suspicion of the testator's capacity at the time of execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof and the burden then shifts to the person settling up the will to satisfy the court That the testator had the necessary capacity."

42. It is therefore clear That for a Will to be valid, four main requirements must be met, namely, it must have been executed with testamentary intent; the testator must have had testamentary capacity; it must have been executed free of fraud, duress, undue influence or mistake; and it must be duly executed.

43. The Will in issue herein bears the thumb-print and signature alleged to be those of the deceased and which are alleged to have been appended by the deceased in the presence of three witnesses. It also bears the signatures and/or thumb-prints of the three alleged witnesses said to have been appended in the presence of each other. On the face of it therefore, the Will was fits the prescribed format since it is drawn, executed and witnessed. Indeed, the Objectors have not taken issue with the form rather the argument That I hear them to be advancing is suspicion That the alleged Will was "manufactured", the signature thereon was not appended by the deceased and is therefore not authentic. Their alternative argument is That even if the Will was truly executed by the deceased and is genuine, considering the age, health and state of mind of the deceased, he could not have known or understood what he was doing or the meaning of the document or he was unduly influenced or misled.

44. Apart from the ground of advanced age, health and state of mind of the deceased at the time That he is alleged to have executed the Will, the Objectors also base their doubts and suspicions on various other grounds. One such other ground is the fact That the property bequeathed in the alleged Will was at That time non-existent having been sub-divided into 5 sub-plots and was at That time the subject of a Court case. Another ground is the Objector's disbelief That the deceased could disinherit his own children and instead bequeath his property to only one child and a cousin of his. The Objectors also claim That had the deceased left a Will, the whole family would have been aware, That it is not known at what stage the said Elizabeth Auma learnt about the purported Will, That the Will bequeathing Nandi/Koibarak A/819 to the said Elizabeth Auma was done during the pendency of a Civil Case, Eldoret High Court No. 264 of 2000 in which the deceased had moved to Court seeking nullification of the allocation of That parcel of land to the Defendants, one of whom was the said Elizabeth Auma. The Objectors also question if there was a Will, then why did Elizabeth Auma earlier file Eldoret High Court Succession Cause No. 258 of 2013 to the effect That the deceased died intestate.

45. On his part, the Petitioner claims That by an act of litigation through Eldoret High Court Civil Case No. 264 of 2000 the deceased disinherited the Objectors of their entitlement to share in his estate, That sensing death, the deceased prepared a Will and appointed the Petitioner as executor thereof, That it is the Objectors' intransigence and lack of submission to family authority That led to their being disinherited, That Section 5 of the *Law of Succession Act* gave the deceased the freedom of testation to dispose his property as he pleased to whosoever he pleased, and That the Will was valid as executed before one S.K. Kitur Advocate and witnessed accordingly. He stated further That before burial of the deceased, the Petitioner sent a note to the family informing them That he had a Will which was to be read to the family but That the survivors rejected the invitation, and That the Advocate came and read the Will to the family members who were present. To demonstrate That the deceased was at the material of a proper state of mind, the Petitioner argued That around the same time the deceased even testified in Eldoret High Court Civil Case No. 264 of 2000 without any guardian ad litem, was cross-examined and still won the case. He also argued That a testator's mental status and physical capacity is presumed as of sound mind and the burden of proof is on the Objectors to prove otherwise through medical evidence. He added That no medical evidence has been adduced to rebut the capacity of the deceased's state of mind to make a Will.

46. There are therefore two adverse and conflicting positions advanced by the protagonist sides. As aforesaid, on several occasions I sought to ascertain from the Counsels whether they really wished to canvass the matter by way of only Affidavits and Witness Statements without cross-examination or generally, without conducting a viva voce trial. On all these occasions, the Counsels were adamant and insisted That viva voce evidence would not be necessary. The parties themselves therefore chose the procedure of determining this matter.

47. Regarding this choice of procedure by parties, Olao J in the case of Francis Njeru Runji & 3 others v Suleiman Njiru Ciara & 5 others [2017] eKLR stated as follows:

> " The "unorthodox" procedure of resolving their dispute through the "Kaurugo" oath was chosen by the parties themselves who not only appended their signatures as a sign of good faith but went even further to agree That no appeal would be pursued after That procedure. They cannot now claim That the procedure was "unorthodox". The Land Adjudication Officer afforded them an opportunity to be heard. They chose That route which they now claim was "unorthodox". Having been given an opportunity to be heard and having squandered it through the route of the "Kaurugo" oath, they cannot be heard to complain, as they have done, That "no witnesses were called and no testimony or other evidence was taken and recorded". There is nothing on the record to demonstrate That the Land Adjudication Officer refused to hear the applicants or their witnesses in support of their claim. In Union Insurance Company Of Kenya Ltd Vs Ramzan Abdul Dhanji C.a Civil Application No. 179 of 1998, the Court held That:
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> "The law is That parties must be given a reasonable opportunity to be heard and once That opportunity is given and is not utilized, then the only point which the party not utilizing the opportunity can be heard is why he did not utilize it"

The applicants themselves chose the procedure to be adopted by the Land Adjudication Officer. As is clear from the case of Kenya Revenue Authority Vs Menginya Salim Murgani (supra), the hearing need not have been by oral evidence more so given the parties own options of applying their traditional dispute resolution mechanism. In my view, the process adopted by the Land Adjudication Officer having been chosen by the parties themselves cannot now be faulted.

(14) More importantly, it has been demonstrated herein That when the directions of 24 June 2020 were given, the Petitioner was acting in person and therefore did not have the benefit of legal counsel. There can be no doubt That the allegations made in connection with the Summons for Revocation are weighty issues, involving allegations of fraud; which allegations entail proof slightly beyond a preponderance of evidence. In the circumstances, to seek That the application be disposed of by viva voce evidence the Petitioner cannot be said to be actuated by malice, for That is the primary way in which facts are tried before courts of law."

48. On the need for viva voce evidence in some instances, Mativo J (as he then was) in the case of Gerald Macharia Njogu vs. Samuel Macharia Murimi [2016] eKLR, observed thus:

> " The law of evidence encompasses the rules and legal principles That govern proof of facts in a legal proceeding. These rules determine what evidence must or must not be considered by the court in reaching its decision, and sometimes, the weight That may be given to That evidence. The law of evidence is also concerned with the quantum, quality and type of proof needed to prevail in litigation ...When a dispute reaches court, there will always be a number of issues which one party will have to prove in order to persuade the court to find in his or her favour. The law must ensure certain guidelines are set out in order to ensure That evidence presented to the court can be regarded as trustworthy. I am fully aware That affidavits are an alternative to oral evidence and are often used particularly in applications. However, the law provides That a deponent in an affidavit can be cross-examined on oath. Further, if credibility is at issue, or if crucial information is not obtainable through the affidavit evidence, then oral evidence will be required as may be necessary ... The advantage of oral evidence is That the witness is available for cross-examination and thus the strength of evidence may be tested. That is why reliable viva voce evidence is sometimes given more weight." (see also Re Estate of George Nderi Nguu (Deceased) [2011] eKLR and Re Estate of M'Ringera M'Kingania (Deceased) [2017] eKLR.

49. It is agreed That the Kenyan legal system is an adversarial one, where it is left to the litigants to bring out the issues for determination and to present evidence to enable the Court determine the issues in dispute. It is not the duty of the Court to enter upon inquiries into the case before it other than to adjudicate upon the matters in dispute which the parties themselves have raised by the pleadings. The burden of calling witnesses and proving each party's case therefore lies at the door step of the parties, the Court ought not to be involved in the search for evidence or fact-finding. It is not the duty of the Court to conduct investigations and gather evidence so as to assist or aid a party to the dispute to prove his case. The Court will be content with the evidence presented by the parties since it is the duty of litigants to place material in support of their case before Court. Evidence is the sole route through which parties introduce their version of facts and facts are to be presented to the Court as evidence whether oral or written.

50. In an adversarial system the burden of proof is always on he who alleges and the Court never goes out to seek facts on its own. It is always incumbent on parties to adduce sufficient evidence to prove the facts which they assert. A trial Court should remain a decision maker and therefore impartial (see the Court of Appeal case of Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & Others (2014) eKLR, the decision of Munyao Sila J in the case of Parkire Stephen Munkasio & 14 others (suing on their own behalf and behalf of their families and all the members of the maasai community living on land reference no. 8396 (IR11977) situated in Kedong) versus Kedong Ranch Limited & 8 others [2015] eKLR, and also the decision of Oguttu Mboya J in the case of Chira & 2

others v Kenya Power & Lighting Company Limited (Environment & Land Case 94 of 2019) [2022] KEELC 2519 (KLR) (4 July 2022) (Ruling).

51. The questions That needed to be answered in this matter are whether the deceased was possessed with the proper mental and physical ability or capacity to make the Will, whether the Will was a forgery or fraudulent or whether the testator was subjected to undue influence. To my mind, those issues could only have been resolved from evidence presented orally and tested in cross-examination. The same are matters That cannot be determined on the basis of mere Affidavit evidence or witness statements only. The Objectors being the side advancing the position That the Will is invalid, having chosen not to offer viva voce evidence on the issues, despite the Court having raised concerns on several occasions over That choice of procedure, it is they who stand to fail.

52. The *Evidence Act*, Cap 80 is clear on the aspect of the burden of proof. In this case, it lay squarely on the Objectors. Sections 107 and 108 of the *Evidence Act* provide as follows:

> Section 107
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove That those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said That the burden of proof lies on That person.
>
> Section 108
>
> The burden of proof in a suit or proceeding lies on That person who would fail if no evidence at all were given on either side."

53. The onus of proof was therefore on the Objectors yet, despite being given the opportunity, they chose not to conduct viva voce trial. They also did not produce any Report from a forensic document examiner to give an opinion on the authenticity of the signatures on the Will nor did they present any Report from a Medical practitioner giving an opinion on the testator's state of mind. It is therefore my considered conclusion That I cannot from the insufficient material before me hold That the deceased was not of sound state of mind or health to make the impugned Will.

Final orders

54. In the premises, I rule as follows:

    i. The Notice of Motion dated 10/07/2019 is hereby dismissed.

    ii. This being a family dispute, I make no order on costs

DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF JANUARY 2024

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WANANDA J. R. ANURO

JUDGE