



REPUBLIC OF KENYA



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In re Estate of Walji Narayan Mulji Patel (Deceased) (Succession Cause E122 of 2021) [2024] KEHC 2984 (KLR) (6 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2984 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE E122 OF 2021**

G MUTAI, J

MARCH 6, 2024

IN THE MATTER OF THE ESTATE OF WALJI NARAYAN MULJI PATEL (DECEASED)

BETWEEN

VINODKUMAR LALJI KANJI VARSANI 1ST PETITIONER

BHANUBEN HIRANI 2ND PETITIONER

AND

KANJI VALJI NARAN PATEL 1ST OBJECTOR

KETAN VISRAM VALJI PATEL 2ND OBJECTOR

JITEN VISRAM VALJI PATEL 3RD OBJECTOR

RULING

1. Before the court is an Objection to the making of the grant on the ground of want of due execution of the alleged will dated 24th March 2022. The Kanji Valji Naran Patel, Ketan Visram Valji Patel and Jiten Visram Valji Patel (together referred to as “the Objectors”) are opposed to the making of the grant of probate of the estate of the deceased herein, who died on 25th October 2021 pursuant to the petition filed on 8th December 2021 on the grounds that the alleged will dated 29th September 2020 was not duly executed in accordance with the law for the reasons that the deceased did not have the mental capacity to execute the said will and the said will was obtained through fraud and coercion.
2. The objectors claim that they are the eldest son and grandsons, respectively, of the deceased and, thus, the dependants of the deceased at law. The 2nd and 3rd Objectors aver that they were partners, shareholders, and/or directors of various companies and businesses with the deceased herein that they were running and managing jointly.
3. They further stated that the deceased did not have the mental capacity to execute the alleged will as his mind was impaired by chronic illness. They also stated that the deceased executed the will through



- coercion and undue influence on the part of the Petitioners. Further, they had not been provided for in the will, and the deceased's purported displeasure with them was not raised during his lifetime. They also stated that the said will violates the law relating to companies and is, therefore, incapable of being executed.
4. They averred that the Petitioners failed to disclose all the assets owned by the deceased and that they have been harassing and intimidating them, demanding they surrender the company and business documents and other documents relating to the deceased.
 5. Further, the executor of the alleged will, Vinodkumar Lalji Kanji Varsani, together with Mahendra Hirani, husband to Bhanuben Hirani, have been visiting the company premises located at Manson Hotel building and causing mayhem and havoc, demanding documents from them. The two have also been harassing, assaulting, and threatening to kill, fire and imprison the staff of the company under the leadership of the 2nd and 3rd Objectors.
 6. The Objectors, upon receipt of the Notice from the court, filed a Petition for Grant by way of Cross Application for Grant dated 10th June 2022 and filed on the same day.
 7. In response the Petitioners filed an affidavit sworn on 25th November 2022 by the 1st Petitioner.
 8. The 1st Petitioner stated that there are inconsistencies in the grounds of Objection and that whoever alleges must prove. He deposed that none of the parties was present during the execution of the will as he was also out of the country from February 2020 to October 2021, while the will was executed on 29th September 2020. Thus, there is no proof to show how the Petitioners coerced the deceased to execute the same. In his view, the issue in question before the court is the validity of the said will.
 9. He further stated that it's not the duty of an executor to probe the reasons why the deceased opted to exercise his testamentary freedom in the manner he did, as his mandate and that of his co-Petitioner is to abide and execute the same in accordance to the wishes of the deceased. He interacted with the deceased before his demise, and he had a sound mental capacity and was actively engaged in his business affairs. He, therefore, urged the court to dismiss the Objection, Answer to the Petition for a Grant and Petition by way of Cross-Application for Grant and allow the probate proceedings to proceed.
 10. Mr. Mutisya, the advocate who drew the alleged will, filed an affidavit sworn on 23rd November 2022 and filed on 25th November 2022. He stated that the deceased visited his office with instructions to draw his last will and testament. On 29th September 2020, the deceased visited his office accompanied by two witnesses, Mr Kishore and Mr Kalpeshkumar, who were known to him, having been customers of his hardware business. The deceased also had his passport sized photos and ID and was very aware and conscious and appeared well, of sound mind and fully understood the contents of his last will and testament and freely and wilfully executed the same.
 11. Further, on 8th July 2021, he received a call from one of his clients, Peter Ochieng, who told him that his boss, Mr Kanji Valji Naran Patel, required a special power of attorney. The two visited his office, whereupon he prepared the same. They took him to the residence of the director at Fort Properties Limited, whom he recognised as the deceased, and upon reading the said special power of attorney, the deceased told him that he had not given such instructions and, therefore, refused to sign. Therefore, the allegations that the deceased was of unsound mind are not founded.
 12. The Objectors filed an affidavit sworn on 5th May 2023 sworn by the 2nd Objector. He stated that prior to the deceased's death, the deceased, 2nd Objector and the 3rd Objector ran and managed several companies together. They were joint shareholders and directors in the following companies: Fort Properties Limited, V. Naran Mulji Properties Limited, Manson Limited, Shreeji Adi Narayan



Investment Group Limited, and Kerai Chemicals Limited. They were joint proprietors with the deceased and ran and managed together Mistry V. Naran Mulji & Company and Manson Hotel. Due to the old age of the deceased, he and the 3rd Objector actively participated in the day-to-day running and management of the said companies and businesses while the deceased played a peripheral and minimal advisory role.

13. He averred that they developed a close relationship with the deceased, in family, social and business life while his children kept off with most of them living abroad. It was he and the 3rd Objector who used to walk with, guide and offer assistance to the deceased in many aspects of life due to his old age. They accompanied him and made sure he was comfortable and well taken care of at all times. They would accompany him to the hospital for treatment, with the 3rd Objector accompanying him to India for treatment at some point. The 2nd Petitioner, who is the deceased's daughter, on the other hand, has been living abroad and did not play any role in the deceased's life or in the management and running of the businesses and companies.
14. He stated that after the demise of the deceased, they continued to run and manage the businesses and companies; however, the 1st Petitioner attempted to take control of the businesses, demanding they hand over all documents relating to the businesses to him. On demanding to know the basis the 1st Petitioner was acting upon, he was furnished with the alleged will dated 29th September 2020 in which the 1st and the 2nd Petitioner were appointed as the executors of the estate by the deceased.
15. He further stated that the Petitioners and one of the beneficiaries of the purported will, Yashvanti Dabasia, procured and obtained the will through fraud, coercion and misrepresentation by compelling the deceased to execute the will when he did not have the mental capacity to do so and did not understand the full consequence, import and tenor of the bequest. The fraud began sometime in February 2020 when the 2nd Petitioner's husband, Mahendra Hirani, and the said beneficiary, Yashvanti, came to Kenya to live in the deceased's house located in Mombasa, opposite Uhuru Gardens. At that time, he was living with the deceased in the said house, taking care of him. He deposed that Mahendra and Yashvanti caused chaos and commotion in the house forcing him to leave the house to a nearby house for the sake of peace.
16. He stated that the duo attempted to control the deceased's mind and decision-making. They were joined by the 1st Petitioner and together caused the deceased to execute a general power of attorney dated 4th February 2020, donating powers to the 1st Petitioner to do all and sundry that would otherwise have been done by the deceased. They timed when the deceased was ill and had no mental capacity to understand and appreciate the implications of writing a will and took him to the advocate who prepared the purported will.
17. He termed the said will as invalid for the reasons that the deceased did not have the mental capacity to understand, comprehend and appreciate the important nature of the will, its implication and the bequests made therein; the deceased did not execute the will out of his free will; it is not the deceased who prepared and or freely executed the will; the will left out some companies where the deceased was a shareholder; the will excludes the intervention of the courts in the management of the deceased's estate and any religious charity; and in article viii (b) it purports to provide that the estate of the deceased be settled, mortgaged, leased, sold, exchanged and conveyed without an order of the court and without confirmation. Further, due to the fact that Stephen Mutua Mutisya Advocate never acted as the deceased's advocate at any given time as the deceased would only instruct three advocates, namely; Pandya & Talati Advocates, K.M. Karimbhai Advocate and Wandai Matheka Advocates and if the deceased were of sound mind, he would not have brought a new advocate on board to prepare such an important document.



18. He argued that though the Petitioners allege they were not present during the signing of the will, they were working in cahoots with Mahendra and Yashvanti who initiated the process of preparing and executing the will at a time when the deceased did not have mental capacity to understand his actions. The four caused the will to be signed by two witnesses who were tenants of the deceased so that it could appear as though it was validly executed.
19. He averred that upon the demise of the deceased, the 1st Petitioner attempted to forcefully take the death certificate from him but failed. The Petitioners went ahead to fraudulently obtain another Death Certificate No.1276733 dated 12th November 2021 which they used to apply for Grant of Probate in this case.
20. He further averred that an executor is supposed to be a neutral party with no interest in the deceased's estate. However, the 1st Petitioner failed this test by strongly defending the will of the deceased, which is enough proof that the petitioners took advantage of the deceased's illness and caused him to sign the will.
21. He stated that the will excluded him and his co-objectors from the deceased's estate, whereas they are entitled to a share of the deceased's estate as sons and grandchildren who were being taken care of and provided for by the deceased. He and the 3rd Objector are entitled to inherit the deceased's shares in the businesses and companies as persons who have been operating them.
22. He urged the court to allow the objection, declare the will invalid, revoke it, and direct that the deceased's estate be dealt with as an intestate estate.
23. The matter was canvassed by way of viva voce evidence.

Evidence of the Objectors

24. The 1st Witness for the Objectors was Ketan Visram Valji Patel. He testified that he was relying on his affidavit sworn on 5th May 2023 as his evidence in chief and wished to produce the annexures therein as his exhibits.
25. Upon being cross-examined, it was his evidence that the deceased was the majority shareholder in the companies and that he formed and or started doing business, except for Shreeji Investment Group, before he was born.
26. Further, due to his age, the deceased was not engaged in business; however, he used to sign cheques and annual returns. The deceased knew what he was doing. He continued managing the business, given that the deceased was unwell. The 1st Petitioner asked for accounts on several occasions, which he did not supply him with as he was not aware that he had been requested to take over the business.
27. He stated that he used to stay with the deceased at Uhuru Gardens, that Bhanuben used to visit as she lives in the UK, and that the deceased never involved her in the business.
28. It was his evidence that they did not attend the reading of the will due to a religious function that was at the temple. In 2020, one of the deceased's companies transferred land to the temple. The deceased signed the transfer. He conceded that the deceased was well aware of his companies. He also conceded that Links Road SOS belonged to the deceased's company and was sold for Kes. 400,000,000/- which was paid in full, and the deceased was of sound mind to engage in such a sale.
29. It was his evidence that he had done business with Dr Vaghella as he once did repairs to his house.



30. He testified that they were entitled to inherit as they were running the businesses and were left out of the will. He also testified that they inherited his father's share as they were given minority shares by the deceased. He said the will does not represent the deceased's wishes. He said he was informed of the will by Jack Matheka Advocate. He also said that the refusal to bequeath Kanji, his eldest son, was wrong.
31. It was his evidence that the deceased was not of sound mind; however, the signature on the document is that of the deceased, and the witnesses are alive. He stated that he suspects that the deceased was unwell as he couldn't have left out important matters.
32. In re-examination, he stated that the deceased lacked testamentary capacity as he lost his mental acuity in late 2020 due to the deterioration of his health. However, he had the mental capacity to sign transfers in February 2020 and couldn't remember when the deceased last signed the company documents. He averred that the deceased never handed over the businesses to Mr. Vinodkumar.
33. It was his evidence that he used to accompany the deceased for consultation at Dr Vaghela's Clinic.
34. He testified that his father never had anything for himself apart from the shares in the business. He became part of the business when his father died in 2005. He was made a partner of Manson Hotel in 2014 whereas the business was registered in 1991.
35. The Objectors' second witness was Dr Vinesh Pravinchandra Vaghela. Dr Vaghela told the court that he used to treat the deceased, whom he had been seeing since November 2015. The deceased had multiple chronic illnesses and used to visit his clinic in the company of his grandson, Mr Jiten Valji Patel.
36. It was his evidence that in the succeeding 4-5 years, the deceased's health, including his state of mind, deteriorated. He would advise the grandson what to do as the deceased couldn't comprehend. Further, in September, the deceased visited him, but he noted that he couldn't comprehend and understand matters. The deceased would suggest that he speak to the grandson, and the grandson would administer the treatment.
37. It was also his evidence that he explained to the grandson about the deceased's deteriorating health and advised him that further attention was required. The deceased's health worsened, leading to his hospitalisation in the ICU. He died on 25th October 2021.
38. He stated that from September 2020, the deceased couldn't understand anything he was explaining. He was disoriented in place and time. The last visit was around the 17th or 18th of September 2020.
39. On cross-examination, he told the court that he had known the deceased for over 5 years until his demise. The deceased had an irregular heartbeat, high blood pressure, cancer of the prostate and heart failure, which started in 2015. He treated the deceased for the said ailments but did not mention them specifically in his letter.
40. He averred that a psychiatrist is best placed to deal with the state of mind, which he is not. However, his training in internal medicine involves dealing with psychiatry. The deceased's last visit was in September 2020. During the said last visit, he noticed that the deceased's state of mind had deteriorated and that he couldn't comprehend matters; however, he did not certify him as being mentally ill. He also testified that the deceased was frail and weak. He did not, however, refer him to a psychiatrist.
41. It was his evidence that the deceased's daughter, Bhanuben, and her son brought the deceased's alleged will to him at his clinic with the intention of finding out how he had treated the deceased. The relationship between a doctor and a patient is confidential, and he couldn't release the file to them.



42. He stated that they are only obligated to sign death notification, but as for the death certificate, the registrar is informed by the hospital.
43. In re-examination, he told the court that the deceased's health was progressively deteriorating; however, he was not mentally ill.
44. The Objectors' third witness was Ravji Valji Hirani, who told the court that he was relying on his witness statement dated 21st June 2023.
45. On cross-examination, he told the court that he got to know the deceased in 2010 during the celebration of the 50th anniversary of the temple. Ketan was the Treasurer of the temple, dealing with temple funds and charity work. The deceased sold his property near the temple for Kes.400,000,000/-. He was shocked when Ketan and his siblings got nothing in the will. He testified that That he didn't know why Vinod was interfering with the family or why Lalji's son was appointed an executor, as he had no relationship with the deceased.
46. He stated that the deceased had three daughters, and in Hindu culture, females do not inherit; they get what the family agrees to give them.
47. On re-examination, he told the court that Ketan was not a treasurer when he signed the agreement.
48. The 4th Witness for the Objector was Kerai Manji Lalji. Kerai testified that he was relying on his witness statement dated 21st June 2023.
49. It was his testimony upon being cross-examined that the deceased was his friend as they worshipped together in the temple. His son was worked for the deceased. The deceased stopped going to the temple around September or October 2020. In July and August, he was of sharp mind. He testified that he only got to know about the deceased's will at the advocate's office on 21st June 2023. He further testified that at no time was the deceased close to Vinod. He last saw the deceased on 1st February 2020.
50. The 5th witness was Mr Peter Ouma Ajulu. Like the previous witnesses, he relied on his witness statement dated 19th June 2023.
51. When cross-examined by Mr. Oloo he stated that he worked for the deceased as a security and that his place of work was the deceased's home. He admitted that Ketan is his employer. It was his evidence that the deceased used to work from home due to his old age but would be taken to the temple by Ketan. From February, Ketan used to do most of the work, and Yashvanti never helped the deceased.
52. The 6th witness was Lenny Muchina. He too adopted his witness statement as his evidence in chief.
53. When cross-examined by Mr Oloo, he told the court that he had attended to the deceased since 2017 and that he used to visit him at home and would treat him, as he was Vitamin B12 deficient. The last time he saw him was in his house.
54. The 7th witness was Mr Shida Katana. He relied on his witness statement dated 21st June 2021 as his evidence in chief.
55. Upon being cross-examined, he told the court that he had been a houseboy of the deceased since 1981. He used to stay with the deceased's family. He testified that Vinod used to visit the deceased home while Yashvanti and her husband came to live with the deceased. On 4th February, there was a commotion between Ketan and Vinod. The verbal altercation was in Hindi, a language he doesn't understand and could not, therefore, tell what the fight was about. It was his evidence that Bhanuben took care of the deceased and that the deceased had good mental health, which, however, deteriorated towards the end and or before his demise.



56. Upon re-examination, he stated that Ketan used to live with the deceased, and even after he left, he continued taking care of the deceased.
57. Mr Bernard Odhiambo was the 8th witness of the Objectors. He, too, adopted his witness statement as his evidence in chief.
58. During cross-examination, he told the court that he was introduced to the deceased by Ketan and Jiten's father, Visram Patel, who was their customer. He used to run errands for Visram and also did his side job, which he would be paid for. He left his place of employment and joined Fort Properties Ltd as an employee of Visram and the deceased. After the death of Visram, Ketan and Jiten joined the company and became answerable to Ketan. In 2006, he moved to Texas Alarms.
59. It was his evidence that he last saw the deceased when he was unwell at Pandya Hospital in September 2020. The deceased was strong until he became sick. He couldn't transact business after September 2020.
60. The 9th witness was Mr Philip Mutua. He adopted his statement dated 19th June 2023. He was employed in 1985 as a foreman. The witness lamented that the Objectors were left out in the will.

Evidence of the Petitioners/Respondents

61. The 1st Witness for the Petitioners/Respondents was Mr Stephen Mutua Mutisya. Mr Mutisya is an advocate of the High Court. He adopted the contents of his affidavit as his evidence in chief. He testified that the deceased was his client and that he had dealt with him prior to the preparation of the will. He saw the witnesses execute the will in his presence. The deceased was of sound mind and fully understood the contents of the will. He further testified that the Objector asked him to prepare a special power of attorney to enable him to manage the estate of the deceased, but he (Mr Mutisya) insisted that he must witness the deceased appending his signature. He visited the deceased in his house, but he declined to do so on the grounds that he had not issued such instructions. He reiterated that the will was properly executed.
62. During the cross-examination, he told the court that he was a witness in this matter and that he drew the affidavit himself, which affidavit was filed by Oloo & Co. Advocates.
63. He stated that he was given a verbal instruction to prepare the will. He took the deceased through the will. He agreed with its contents and signed it. It was then sealed in an envelope. He gave the deceased the will and left. After the death of the deceased, he met all his family members at the Lotus Hotel, where the will was read. The deceased told him the will was self-explanatory however, the executors requested him to read the will. That he did not understand why he was requested to read the will.
64. It was his evidence that the deceased's wishes were that there be no intervention of court, that there was no evidence that he drew the will, that the power of attorney is undated, that he did not see the company's resolution before preparing the same as the deceased assured him everything was above board, and that he acted within the client's instructions.
65. During re-examination, he testified that the deceased's wishes were to have his estate settled without litigation except as permitted by law and that the executor requested him to read the will.
66. When questioned by the court, he stated that there was only 1 copy of the will, that he was given the will by Bhanuben, and that he didn't know who had custody of it.
67. The 2nd Witness of the Petitioners/Respondents was Vinodkumar Lalji Kanji. He relied on the joint affidavit sworn on 8th December 2021 and also on the affidavit sworn on 25th November 2022. He



- stated that the deceased did business with his father, with whom they carried out social, temple and Harambee activities together. He was not aware of the will as he was out of the country from Feb 2020 to October 2020 due to COVID-19, and he did not have any interest in the deceased's estate, nor was he a shareholder of any of the companies.
68. He testified that he is not aware of any assets that have been excluded, that he is not a beneficiary of the estate, and that he did not discuss anything with the deceased regarding the division of his estate.
 69. When cross-examined by Mr Oluga, Mr Kanji testified that he heard from the community that he had been appointed as an executor. He became aware of the will after it was read. Bhanuben was the one who told him. He further testified that his duty is to abide by the wishes of the deceased.
 70. It was his testimony that he didn't know the deceased's mental status at the time of signing the will, that when he came back, the deceased's health was deteriorating, that the deceased was actively involved in business, that he also involved him by having him attend company meetings, that the deceased roped him in for advice on children and business, and that he used to come to Kenya one, two, or three times in a year.
 71. He stated that he got to know the deceased's assets upon reading the will. He stated that the deceased could have forgotten some assets due to old age. At some point, he was given power of attorney as the deceased's health was failing. That he couldn't register the same as he was assaulted, forcing him to leave Kenya. It was his evidence that the deceased asked him not to report the matter.
 72. It was his evidence that the deceased was not happy with the grandchildren, but that he did not have time to oust them.
 73. During re-examination, he testified that the power of attorney was not executed, and he did not use it. Bhanuben gave him the list of assets. He said the deceased instructed him to protect his wealth, as the objectors were stealing money and abusing their position. He urged the court to allow him to execute the will.

Written Submissions of the Objectors/Applicants

74. After the trial was complete, the court directed the parties to file their written submissions. Subsequently, the objectors, through their advocates, Oluga & Company Advocates, filed their written submissions dated 6th November 2023. Counsel submitted on four issues, namely; whether the affidavits which had been objected to by the Objectors should be struck out; whether the will of Walji Narayan Mulji Patel (deceased) dated 29th September 2020 should be declared invalid, null and void; whether the estate of the deceased falls for administration intestate; and whether the objectors should be granted letters of administration of the estate of the deceased.
75. On the 1st issue, counsel submitted that they filed a notice of objection to affidavits dated 23rd May 2023 and that the affidavit of Stephen Mutua Mutisya drawn and filed by Mutisya Associates Advocates is irregularly on record as the said firm is not on record for any party in this case and thus should be struck out. The affidavit of the 1st Petitioner sworn on 13th May 2023 should suffer the same fate for similar reasons as well as his affidavit sworn and filed on 25th November 2022 as the same does not show the person who drew it whereas it is a mandatory requirement under Section 34 and 35 of the [*Advocates Act*](#).
76. On the second issue, counsel reiterated the objector's position and submitted that the deceased, as indicated by the two medical experts who testified on the mental capacity of the deceased as of 20th September 2020. The first one was Dr Vinesh Pravinchandra Vaghela, who testified that the deceased could not comprehend matters. The second medical expert was Mr Lenny Muchina, who testified that



in the months of September and October 2020, the deceased's health had deteriorated and that the deceased was not well-oriented with himself and his surroundings. The deceased could not immediately figure out and identify people around him and would take time to tell simple things such as time. This was made worse by his advanced age.

77. Further, due to the glaring errors and omissions in the will, such as the omission of some businesses/ companies in which the deceased was a shareholder, thus within his knowledge, and taking into account the fact that he referred to himself in the will as Vitahalbhai, instead of his birth name Visram, it was evident that he didn't know what he was doing.
78. Counsel further submitted that the deceased's sense of judgment was impaired and that he did not freely execute the will or understand the legal import of his actions at the time he executed the same as he could not identify one of the executors properly, whereas part of knowing someone is knowing their name. Further for the reason that the will was prepared by an advocate who had never represented the deceased in any legal issue whose evidence was also contradictory. He further submitted that there were other witnesses who testified that the deceased was infirm, including Bernard Odhiambo Aduda, Kerai Manji Lalji, Ravji Velji Hirani and Peter Ouma.
79. On the third issue, counsel submitted that having demonstrated that the subject will is invalid, null, and void, it naturally follows that the deceased's estate falls for intestate administration.
80. On the fourth issue, counsel submitted that the objectors, being the deceased's biological sons and grandchildren, are entitled to grant letters of administration of the estate once the will is invalidated.

Submissions of the Petitioners/Respondents

81. The Petitioners/Respondents, through their advocates, Oloo & Company Advocates, filed their written submissions dated 23rd November 2023. In their submissions, they responded to the 4 issues identified by the Objectors' counsels.
82. On the first issue, counsel submitted that it is a non-issue as all the affidavits were admitted in evidence, and the witnesses were cross-examined at length by the Objectors. The issue was not raised as a preliminary issue and was thus abandoned when the Objectors opted to cross-examine on the contents of the said affidavits.
83. On the second issue, counsel relied on Section 109 of the *Evidence Act* and Section 5 of the *Law of Succession Act* and submitted that the Objectors have the burden of proof to show that the testator was not of a state of mind arising from mental or physical illness, drunkenness or from any other cause, as not to know what he was doing. Counsel relied on the evidence of objector witness Ketan Visram Valji Patel and submitted that the deceased executed the role of a majority shareholder and director of V. Naran Mulji Properties Limited by signing the company's annual returns on 21st October 2020, whereas the will was executed on 29th September 2020 which infers that the deceased possessed the required testamentary capacity to comprehend the nature and consequences of executing a will. The allegation that the Petitioners coerced or made the deceased sign the will is not true, as both petitioners were not in Kenya at the time of the execution of the will.
84. Counsel further submitted that the two medical experts could not confirm the mental status of the deceased as they were not psychiatrists nor qualified to comment on the same. That on the glaring errors/ omissions, the 2nd and 3rd Objectors refused to act on the deceased request for the company's files and documents. On identification of executor, counsel submitted that the 1st Petitioner was properly identified and that there is no legal requirement for one to notify an individual that they have been named as executor in the will. The deceased had the right to choose any advocate he deemed fit for



the preparation of the will which could have been influenced by various factors such as confidentiality, neutrality or simply personal preference. That there was no glaring contradiction in Mr Mutisya's evidence. Further the evidence of the listed witnesses by the objectors could not prove that the deceased was infirm.

85. On the third issue, counsel submitted that it had been the intention of the 2nd and 3rd Objector all along to have the estate become intestate.
86. On the fourth issue, counsel submitted that the objectors did not prove that the deceased had no testamentary capacity and urged the court to find that the deceased had testamentary capacity, that the will was not a product of fraud and coercion, and that the Petitioners could execute the will as per the deceased's wishes.
87. The Objectors, through their advocates, filed supplementary submissions whereby they reiterated the position in their submissions and urged the court to allow the Objection.

Analysis and Determination

88. I have considered the objection, the responses, the viva voce evidence and the rival submissions. In order to make a just determination, this Court must consider whether the impugned Will is valid, bearing in mind the provisions of the [Law of Succession Act](#). As the capacity of the deceased to make the Will is in question regard must be had to the provisions of the [Evidence Act](#).
89. Section 11 of the [Law of Succession Act](#) 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.”

90. Section 5 of The [Law of Succession Act](#) provides:-
 1. Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.
 2. A female person, whether married or unmarried, has the same capacity to make a will as does a male person.
 3. Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing



the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

4. The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.”

91. Section 7 of the said Act states:-

“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.”

92. Section 109 of the *Evidence Act* provides 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 on any particular person.”

93. My understanding of the law is that in these proceedings, the Objectors has the burden of proof to show that the testator was not of a state of mind arising from mental or physical illness, drunkenness or any other cause, as not to know what he was doing. In the event that the Objector proves incapacity the burden then shifts to the Petitioner to show that the Will was made by the testator after he had recovered or during a lucid moment.

94. The Court of Appeal in *Ngengi Muigai & Another versus Peter Nyoike Muigai & 4 others* [2018]eKLR cited the decision of Githinji, J (as he then was) in *In re Estate of Gathuthu Njuguna* (deceased) [1998]eKLR where the learned judge held as follows:-

“it seems that if the Objector produces evidence which raises the suspicion of the testator’s capacity at the time of the 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 setting up the Will to satisfy the Court that the testator had the necessary capacity”.

95. The Court must thus make a determination on the validity of the Will based on the evidence adduced before it and the applicable law.

96. Before doing so, however, I must make a decision on the technical issue raised by Mr. Oluga on the documents filed by Mr. Oloo. I do not agree with him that his objection is valid. Mr Oluga’s objection requires this court to place undue regard on procedural technicalities. Having cross-examined on the basis of the said documents. I do not see what prejudice the Objectors suffered.

The issues for determination

97. I have considered the matter. In my view, I am called upon to make a determination on the following issues:-

1. Whether the deceased had testamentary capacity?
2. Whether the deceased’s Will was a product of fraud, importunity or mistake?
3. Who are the deceased’s beneficiaries/dependants?

I shall look at each of them in turns.



Did the deceased have testamentary capacity?

98. In this case, the objectors have argued that the deceased was not of sound mind at the time of the making and execution of the will due to his deteriorating health and old age. The objectors called several witnesses to confirm the same, including Dr Vaghela, who told the court that when the deceased visited his clinic in September 2020, he noted that he couldn't comprehend and understand matters. During his last visit in September 2020, he noticed that the deceased's state of mind had deteriorated and that he was frail and weak but not mentally ill. The said evidence was collaborated by the 1st, 6th and 8th witnesses of the Objector. The Petitioners/Respondents, on the other hand, did not dispute the fact the deceased was unwell but argued that he was of sound mind and understood the happenings and the contents of the will and executed the same.
99. The fact that the deceased was old and infirm does not invalidate a will of itself. The ill health must be such that his ability to make decisions is thereby impaired. Although Dr Vaghela isn't a psychiatrist, it would appear to me that, being a family doctor, he had the capacity to discern whether or not the deceased could make decisions. It was his evidence that the deceased was disoriented at the material time. His evidence was corroborated by the other witnesses.
100. The deceased does not appear to have ever recovered from his illness, There doesn't appear to have been a lucid moment when he could have made a valid will.
101. In my view, this situation is analogous that in the case of *In re Estate of Gurnam Singh s/o Pritam Singh (deceased)* [2018]eKLR where the Court stated as follows:-
- “... the circumstantial evidence from the medical documents attached indicate that the deceased was critically ill from heart ailment so as to proceed to India heart ailment so as to proceed to India 2 days and almost immediately undergo surgery after signing the Will. The totality of the affidavits deponed by family member's medical records.... He was very sick before he travelled to India and sought treatment... these circumstances depict ill-health that the Court doubts he had the requisite testamentary capacity to make the Will of 25th August 2016”.
102. It is also similar to the one in *In re Estate of GKK (deceased)*[2013]eKLR where the Court stated:-
- “the deceased was so ill at Nairobi Hospital that he had to be transferred to London for special treatment. How could he get well so quickly that he was able to do all that a healthy person could do including a few days after arriving in London, deciding to write a wholly fresh and new Will?”
103. If the deceased were in the right state of mind, he would have been able to provide a complete list of his assets. He would also have been aware that the 2nd and 3rd Objector's father, his son, was called “Visram” and not “Vital”. In all likelihood, he would have disposed of his estate in accordance with his Hindu culture. In this case, however, the will suggests that he went out of his way to ensure that none of his sons or estate inherited anything of note from him. In the circumstances, this court is persuaded that the will did not express his wishes.
104. The deceased was 83 years old at the time of the alleged execution of the will. His age, when taken together with his ill health, and bearing in mind the witnesses' testimonies disturbs this court's mind as to the testamentary capacity of the deceased.



105. Given the evidence that was produced, the deceased was unwell at the time he executed the will. The ill health affected his mental capacity to make a will.

Was the deceased Will a product of fraud, importunity or mistake?

106. The Petitioner submitted that there was no importunity in this respect as no evidence of undue influence was shown. I was referred to the case of *In re Estate of Julius Mimano (deceased)* [2019]eKLR where Musyoka J defined importunity as being:-

“importunity refers to what is often described as undue influence. In such cases there would be no coercion or force or duress as such, but pressure would be brought to the testator of such nature that he cannot resist. He would bend to the pressure, not so much because he is persuaded or convinced that he should make his will in such a manner, but because he would be tempted to rid himself of the pressure by capitulating to it. Mistake would refer to the cases where the testator signed the wrong document, such as that meant for someone else, believing it to be meant for him.”

107. Vinodkumar Lalji Varsani appears to have played an outsize role in the deceased's sunset years. From the evidence adduced, he took an outsize role in the businesses and the family life of the deceased and even got into physical altercations with some of the objectors. His role in this matter does not inspire confidence. It is also noteworthy that he took on all these roles at the time the state of the deceased's health was deteriorating. In my view, Mr Varsani appears to have applied the kind of pressure Musyoka, J talked about in *re Estate of Julius Mimano (deceased)* by driving a wedge between the deceased and his children so that a will favourable to him could be written.
108. The evidence of Stephen M Mutisya was contradictory and did not inspire confidence. How long had he known the deceased and was the deceased his client? His answer to this question were troubling; for contrary to what he had deposed he did not appear to have known the deceased that much. Where was the will executed? His evidence on this issues lacked clarity. Was it in the office or at the home of the deceased?
109. I find and hold that evidence of importunity was proved.

Who are the beneficiaries of the estate?

110. The deceased had 3 daughters and 3 sons. All of them are alive except Visram, the father of the 2nd and 3rd Objectors. The 5 living daughters and sons, the widow of the deceased, and Visram Patel's estate are the beneficiaries of the estate.

Disposition

111. It is my finding that the evidence tendered by the Objectors in respect of the testamentary capacity of the deceased has not been rebutted. Further, the evidence tendered by the 1st Respondent witnesses is contradictory and raises eyebrows on the happenings surrounding the making and execution of the will. It is also not clear what the 1st Petitioner's interest in the estate is considering his actions as an executor since the demise of the deceased. It is also my view that the 1st Petitioner is not a reliable witness as, on the one hand, he wants this court to believe that he was out of the country between February 2020 and October 2020, while on the other hand, he claims he was given a power of attorney dated 4th February 2020 which was not executed and that he used to attend company business meetings with the deceased and advise the deceased on his business and children.



112. The upshot of the foregoing is that the will dated 29th September 2020 is invalidated. It does not express the wishes of the deceased and is coloured with fraud and importunity. I, therefore, find and hold that the deceased died intestate. The disposition of his estate will, therefore, be governed by the laws governing intestacy.
113. To preserve the estate, I direct that the 1st Objector/Applicant, Kanji Valji Naran Patel and the 2nd Petitioner/Respondent, Bhanuben Hirani, file a joint Petition for Letters of Administration Intestate within 30 days of the date of this ruling. The said Petition shall list all the beneficiaries of the deceased's estate as well as all his assets and liabilities at the time of his death. In accordance with section 42 of the [Law of Succession Act](#) any payment or dispositions made by the deceased, to any beneficiary or his estate, during his lifetime, shall be taken into account during the distribution of the estate.
114. This matter shall be mentioned on the 18th day of April 2024 to confirm compliance and for further directions.
115. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 6TH DAY OF MARCH 2024

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Oloo for the Petitioners/Respondents;

Ms Machogu holding brief for Mr Oluga for the Objectors/Applicants; and

Arthur – Court Assistant.

