In re Estate of Alfred Wadidwa Walekhwa (Deceased) (Succession Cause 2 of 2020) [2024] KEHC 3827 (KLR) (19 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3827 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE 2 OF 2020

WM MUSYOKA, J

APRIL 19, 2024

IN THE MATTER OF THE ESTATE OF ALFRED WADIDWA WALEKHWA (DECEASED)

RULING

1. On 27th October 2023, I delivered a ruling herein, on 2 applications, being a summons for revocation of grant, dated 11th February 2022, and a summons for confirmation of grant, dated 31st October 2022, where I declined to determine the 2 based on written submissions, on grounds that the 2 raised fundamental issues that could only be best addressed through viva voce evidence. I addressed those issues in paragraphs 10, 11 and 12 of the said ruling.

2. At paragraph 10, I wrote:

> "I have read the file herein, for the purposes of writing the ruling, and I am persuaded that the only way to deal with the issues is through viva voce evidence. The main issue is the validity of the will upon which the grant herein is predicated. Whether the administrators were properly appointed, will depend on whether the will, which was the basis of their appointment, was valid; and whether the grant ought to be confirmed will depend too on its validity. A trial has to be conducted on the validity of the said will, for the issues arising cannot be canvassed by way of submissions. There is need to take oral evidence on how the will was made, where it happened, who was present, and who saw the deceased sign the document. The persons who witnessed the execution of the will, said to be Herbert Egesa Odoli and Wilson Bwire Samba, have not sworn and filed affidavits herein, on the circumstances under which they appended their signatures on the alleged will on 23rd July 2019 and 29th September 2019. They will have to testify, together with any person who claims to have been present when the deceased made the will."

3. At paragraph 11, I said:

> "The applicant has raised issues in his application for revocation, around the signature on the alleged will not being that of the deceased, there being several wills, about the deceased having sold Bukhayo/Mundika/2802 to him, and about the family holding meetings

about the will and Bukhayo/Mundika/2802. Those alleged wills have not been placed on record, and the issue as to whether the deceased sold Bukhayo/Mundika/2802 to the applicant is contested, for that property has been disposed of by the contested will, and the administratrix is proposing to devolve it upon herself. These are issues that can only be resolved through oral evidence. The applicant has to testify on the alleged several wills, the alleged sale of Bukhayo/Mundika/2802 to him, and the alleged meetings alluded to in his affidavit. He will also need to provide concrete evidence about the signature on the alleged will not being that of the deceased."

4. Finally, at paragraph 12, I stated:

> " In the affidavit sworn in support of the summons for confirmation of grant, apart from averments on the will, the administratrix alleges that the deceased had distributed property to each of the children during his lifetime. These are facts that she will need to testify on orally, to give details or particulars on who was given which land and when. "

5. Oral evidence was subsequently taken from witnesses from both sides, ostensibly to address the issues that I have identified above.

6. The first on the stand was Sorophina Makokha Walekhwa, the administratrix, who testified on 14th December 2023. I shall hereafter refer to her as the administratrix. She identified the deceased as her late husband, who had married 3 times, and had 16 children, among them being Robert Juma Walekhwa, the applicant in the revocation application, who I shall refer to hereafter as the applicant. She stated that there was a will, which she disclosed to the children after the burial of the remains of the deceased. The said will, just 1, was read to all the children of the deceased, and none of them objected to it. She stated that she knew the land of the deceased, and that the deceased had distributed his lands amongst his children, retaining a portion for himself, being Bukhayo/Mundika/2802. He put up rental houses on that piece of land, and encouraged his children to do the same. The family boma, which she occupied, was separate from the land that the deceased had set apart for himself. She stated that 2 of the sons, Patrick and Philip, had put up their own houses on the family boma. She stated that it was not the applicant who had put up the houses on Bukhayo/Mundika/2802, after he went to Qatar, saying that the houses were constructed even before he went to Qatar. She asserted that, according to the will of the deceased, she should have been collecting rent from the houses on Bukhayo/Mundika/2802. She accused the applicant of forcibly collecting the rent, effective from the date of the demise of the deceased. She explained that the applicant had lodged a caution against Bukhayo/Mundika/2802, during the lifetime of the deceased.

7. During cross-examination, she stated that she was the one who raised the applicant, from infancy, after the deceased separated from his mother. She said that she did not know where the will was prepared, adding that she found it at the home at Busia. She said that she knew the persons who acted as the attesting witnesses, Herbert Egesa Odoli and Wilson Bwire Samba, but said that she did not know the Advocate who drew the will. She could not explain why the witnesses signed the will days after it had been executed by the deceased. She could also not tell why numbers of the title deeds were not cited in the will. She testified that no trust fund was set up, the issue had been raised by the deceased during his lifetime, the children were to raise the money for the trust, but it never materialized. She said that the Buyosi plot was distributed by the deceased to his children during his lifetime, and Margaret and Valentine Walekhwa got their share of that land, and were issued with title deeds. After the deceased died, the family sat, and gave the rest of the Buyosi land to the siblings of the applicant. She stated that the deceased had not directed, in his will, that she make use of the portion meant for him, but she said that he had asked her, during his lifetime, to get a title deed for it. She said that he allowed her to use

the land, as the children were not keen on using it. She stated that it was not his wish that the rent accruing from the land be utilized for setting up a trust fund. She said that she was not aware whether the deceased had money in the bank, nor whether there were debts. She said that it was the deceased who facilitated the applicant, financially, to go to Qatar, and if the applicant had given any money to the deceased, for development of Bukhayo/Mundika/2802, the deceased would have told her about it. She stated that while the applicant was at Qatar, the deceased put up a house for him, on the land that he had given to him.

8. Patrick Juma Walekhwa testified next. He was 1 of the 16 children of the deceased, and an administrator of the estate. He said that he was aware of only 2 assets, one being where the surviving spouse, the administratrix, lived, and the other where the deceased carried on business. He could not recall their reference numbers. He stated that he got to know of the will on the date of the burial of the remains of the deceased, after the administratrix mentioned it to him, and asked him to coordinate a gathering for the following day. He stated that the document alleged to be the will was presented at that gathering the day after the burial, attended by all the children, except for 3, who were outside the country. The meeting was also attended by 2 local government officials and a clan elder. Minutes were kept of the meeting. He said that the applicant was present at the meeting, and he did not raise any reservations on the document presented as the will of the deceased. He said that the applicant informed the meeting that he had loaned the deceased some Kshs. 600,000.00, and for that reason he was to become the owner of Bukhayo/Mundika/2802, after the demise of the deceased. He said that he was not aware that the deceased had given the applicant the said plot. He stated that the deceased had shared out his lands to all his children, both male and female, with each getting 2 plots, except for 1 son who was given 1 plot, for the deceased died before he could give him a second plot. He further stated that a sister of the applicant, named as Elizabeth Liaka, was left out. He said the rest had title deeds to what was given to them by the deceased, and that what was before the court for distribution did not include those assets. He said that the applicant had been given 2 plots, like the rest of the other children.

9. On the trust fund, he stated that the same did not materialize. He said that many of the children did not share the vision of the deceased on that trust fund. He stated that Bukhayo/Mundika/2802, on Mauko road, belonged to the deceased. It was intended that the rent from that property be paid into the trust fund. He said that that never happened, as the applicant was collecting the rent. On Buyosi, he said that it was ancestral land, part of which was given to Margaret, Valentine, the administratrix and the applicant. He said that the applicant sold his share of Buyosi, during the lifetime of the deceased. He stated that after the demise of the deceased some of the children, mostly the siblings of the applicant, felt disadvantaged, and the family agreed that they could be compensated, and that compensation came from the land at Buyosi that had been given to the administratrix. He said that he was not aware of any other wills. He stated that he was not aware that Bukhayo/Mundika/2802 had been given to the applicant. He said that the applicant claimed that he had lent the deceased some Kshs. 600,000.00, but that could not be verified. He said that the applicant produced a document, but the signature on it, alleged to be that of the deceased, could not be verified. He said that he could not tell the circumstances under which the deceased put up additional structures on Bukhayo/Mundika/2802. He said all the children used to give money to the deceased for upkeep and medication. He said that the last construction on Bukhayo/Mundika/2802 started at about the time the applicant left for Qatar, while the rest had been put up when the applicant was in school. He said that the latest structure could not have utilized Kshs. 600,000.00. He stated that the applicant had registered a caution against the title, during the lifetime of the deceased. He said that the deceased had money in the bank, but nothing was declared when the will was read. He said that he knew that the money in the bank accounts was utilized during the illness of the deceased.

10. During cross-examination, he stated that as far as he was concerned, a person could sign a will, then take it to a witness to attest it, and the witness would then sign in his presence. He said that he was not present when the will was signed. He said that no property was transferred to the name of the administratrix after the demise of the deceased. He said that the deceased transferred property to his children before he died. He said that he had no details of the property given to the administratrix, adding that there was no dispute over that. He said that the grant made was of letters of administration intestate. He stated that he understood it to relate to the assets that had not been given out by the deceased, including Bukhayo/Mundika/2802. He said that he did not leave out any assets, adding that there were only 2 in the name of the deceased. When shown a certificate of official search for Bukhayo/Mundika/8298, he said that he was unaware of that property, although he conceded that it was shown to be registered in the name of the deceased. He said that the deceased had bought several pieces of land for the applicant and his siblings, and Bukhayo/Mundika/8298 could be one of them. He said that there could be other assets in the name of the deceased, bought secretly.

11. He said that the deceased and the applicant always disagreed. He said that they agreed, assuming that the applicant had lent some money to the deceased, that he, the applicant, could collect rent from Bukhayo/Mundika/2802, for 2 years, to recover his money, after which the property would revert to the administratrix. He said that the administratrix previously used to collect the rent, and give the applicant 50% of it, but he later changed and began to collect everything. He said that they got into that arrangement so as to get peace in the family. He said that a new building was put up on Bukhayo/Mundika/2802, while the applicant was in Qatar. He said that the house of the administratrix had 11 children. He said that it was the deceased who used to put up houses for his children, and it was inconceivable that he would have put up a house for the applicant, and then receive money from the applicant to put up a house for the applicant. He said that the daughters had been given land, but that what had been given to them was not enough. He said that his late brother had also been given a relatively smaller share. It was because of that, he added, that they decided as a family, for the sake of fairness, to give them additional land. On the Buyosi land, he said that the will had provided for the land, but the same was later transferred during the lifetime of the deceased, to the administratrIx, a year before the deceased died. He said that for that piece of land, the wishes expressed in the will could not be carried to effect. He said that the only dispute was on Bukhayo/Mundika/2802, adding that the applicant was not claiming anything apart from it. He said all of them contributed to the development of Bukhayo/Mundika/2802, and that was why the deceased was thinking of a trust fund, where all had shares. He said that he saw the certificate of official search for the first time in court, relating to Bukhayo/Mundika/8298, and that that property was not mentioned in the will, as that document only touched on the land at Buyosi and Mauko. He said that the applicant and the deceased had disputes over a caution that he had lodged against 3 titles. He said that the issue of the applicant lending money to the deceased came up after the demise of the deceased.

12. Herbert Egesa Odoli testified next. He was a cousin of the deceased, and he and the deceased used to attend the same church. He said that he signed the will as an attesting witness. He said that the deceased had told him that he had prepared a will, and that he wanted him to sign it as a witness. He said that he was not present when the deceased signed or executed the will, but the deceased brought it to him to sign. He said that when the will was brought to him, the deceased had already signed his part, but the Advocate was yet to sign his part. He said that the part for the other witness, Wilson Bwire Samba, had already been signed. He said that he signed the will in the presence of the deceased. He said that he knew the other witness, Wilson Bwire Samba, as the Assistant Chief, for Mjini Sub-Location. He said that he was not present when Wilson Bwire Samba signed the will. He said that he did not know Ainea Otto, Advocate, and he was not present when the Advocate signed the will. He said that he read the will and understood it, to mean that the lands in question would revert to the widow of the deceased. He

said that he knew the family of the deceased well, including the mother of the applicant. He stated that after her demise, her remains were interred on the land, but not at the same location with the deceased.

13. The applicant, Robert Juma Walekhwa, followed. He stated that he had brought an objection relating to Bukhayo/Mundika/2802, on grounds that that property was where the boma of his mother was, and that was where her remains were buried, after her demise. He said that he was objecting to the will, which he said that he saw for the first time in court. He said that what was stated in the will was correct, that the deceased had distributed his property before he died. He said 2 days after the burial, the family sat, and it was at that meeting that it was alleged that there was a will, but a copy of it was not shown to them. He stated that the will purported to distribute the land to all the children, which he said was not true. He stated that the will talked of Bukhayo/Mundika/2802, which was a property that he had developed. He said that the will did not specifically mention Bukhayo/Mundika/2802, but talked of where the shops and plots were. He stated that his mother died in 1998, at a time when she was living with the deceased, and doing business at Makokha. Although he denied being raised by the administratrix, he conceded that after the demise of his mother, the administratrix assumed responsibility over him. He said that the title deed for Bukhayo/Mundika/2802 was issued during the lifetime of his mother. He said that it was not true that the deceased had given land to all his children. He said that he and his brother had been given Bukhayo/Mundika/8653, part of which the deceased sold, and bought another piece of land in Uganda. He said that the first son, Chrispinus Walekhwa, was given land, which he sold. Angel Nangira Walekhwa was given her share, through her son Valentine Ojiambo. Margaret Adongo was given 2 pieces of land, 1 in Uganda and the other in Kenya. Richard Akelo had also been given land, which he sold. Alexander Khamala had also gotten land. He said that every child in the first house had been given land. He said that Mary Beatrice Nabwire had not been given land by the deceased, but she was allocated a piece after the demise. He said that he was given land, which the deceased later sold to buy another piece of land in Uganda. Lydia Nabwire was also given some land, which the deceased also later sold. He identified the land given to him by the deceased as Bukhayo/Mundika/8653. After the deceased sold a portion of Bukhayo/Mundika/8653, the remaining portion was subdivided. He said that his residence was on Bukhayo/Mundika/11050, while his brother, Geoffrey, was on Bukhayo/Mundika/11051. He said that Magdalene Nakhosoko was given land by the deceased, while Elizabeth Lyaka was given land after the demise of the deceased. He said each child of the deceased had a piece of land.

14. He said that he did not agree with the contents of the will, and did not agree that the will was authentic. He said that no one witness the will being made. He said that he wanted Bukhayo/Mundika/2802 to be given to him. He said that he did not agree about the trust, and he did not support it. He said that the administratrix had her own land, and that she should not move into his mother's land merely because she survived the deceased. He said that the deceased sold their land, and utilised the money to develop Bukhayo/Mundika/2802, which belonged to his mother. He said that he got on well with the deceased, and that he sent some Kshs. 600,000.00 through his wife. He said that the deceased signed a document. dated 10th July 2014. He said that the money was for development of houses on Bukhayo/Mundika/2802. He said that there were other houses on the land, which had been put up earlier, with money that had been raised from the sale of the land in Uganda. He said that the Kshs. 600,000.00 was utilized to put up 3 units on Bukhayo/Mundika/2802. He said that the sum of Kshs. 600,000.00 was not for the upkeep of the deceased. He said that the other children did not contribute to the development of the 5 units on Bukhayo/Mundika/2802, saying that the money used came from the sale of the Uganda land. He denied ever collecting rent in respect of the 5 units. He stated that he put up a hall where video shows were shown from, and that he did so with permission from the deceased. He said that that was after he had already built some structures for the deceased to collect rent from. He then said that it was him who asked the deceased to develop the land, saying that he part-owned

it with his brother, although the land was still in the name of the deceased. He said that it was the deceased who used to collect rent. He said that he stopped the administratrix from collecting rent from the plots after the deceased died, but that he allowed her to continue collecting rent from 1 unit, as in appreciation for having raised him.

15. During cross-examination, he stated that he was not a rude child, saying that there were issues at home. He said that the will in question was not that of the deceased, arguing that the deceased knew all his children, and knew whether or not he had given them land. He said that the distribution in the will favoured the first house, yet some children in the third house had not been provided for. He said that some of the children, like Nabwire got land after the demise of the deceased. He asserted that he gave money to the deceased, the Kshs. 600,000.00, to put up additional units on Bukhayo/Mundika/2802. He said that the letter, dated 10th July 2014, where the deceased acknowledged receipt of the money, was drafted by the deceased, and that it was the deceased who signed the letter. He said that the money was meant for putting up of 6 units, but they ended up putting up 3 only.

16. Susan Nabwire followed. She was the wife of the applicant. She testified on the amount of Kshs. 600,000.00, allegedly sent to the deceased by the applicant. She stated that the money was meant for buying land, and the deceased was to be a witness to the sale agreement, but the transaction fell through. The deceased then decided that the money be utilised to develop the land, and so, she gave the money to him, after the deceased and the applicant had had a discussion on it. She stated that she gave the money in the presence of Moses Mugwika, a friend of the deceased. She said that she did not follow up on what was done with the money, although she said it was used to develop 2 units on Bukhayo/Mundika/2802. Later, during cross-examination, she said 3 units were built. She said that 5 units had been put up earlier, on dates she could not recall, but she said that the applicant did not contribute to their development, even though he was in business at the time. She said that the deceased had constructed a video hall on Bukhayo/Mundika/2802, with the permission of the deceased, and that that was done after the applicant came back from Qatar. She could not tell whether the applicant had to pay rent to the deceased for the hall. She said that she was doing business from 1 of the units. She said that she later gave up the business, and denied that it was the deceased who had closed the business over outstanding rent. She said that that happened after the applicant had come back from Qatar.

17. Geoffrey Walekhwa testified next. He was a brother of the applicant. He testified that the deceased had given to them Bukhayo/Mundika/2802. The deceased then sold a portion of it, and bought land in Uganda. He said that the land at Uganda was also meant for them. The deceased then, according to him, sold the land in Uganda, and used the proceeds to develop Bukhayo/Mundika/2802. He stated that the developments were meant for rentals. Other rental houses were later done, by agreement between the deceased and the applicant. He stated that he witnessed the 3 additional units being developed, and that that was done by the deceased. He said that Bukhayo/Mundika/2802 was in the joint names of himself and the applicant, although he could not recall the registration details. He said that he was little when the land was sold, as he had not yet obtained a national identity card, and the applicant was still in school. He said that they transferred the titles to the buyers, after he and the applicant attained majority age and obtained national identification papers. He said that the deceased had sold 4 plots, but he could not recall when the transfers were done. He also stated that the deceased did not have title deeds for the land in Uganda. He stated that the documents relating to those transactions were in a file kept by the deceased, adding that he did not have those documents himself. He said that they used to utilise the Uganda land, and that he was not around when the land was sold. He said that he lived on land given to him by the deceased, which was registered in his name. He said that the applicant had also been given land by the deceased, but that he did not have the details. He said that he was not present when the deceased was given Kshs. 600,000.00 by the applicant, and that he only got to know about the money when the deceased and the applicant had a dispute over it. He said that he

had been told, by the deceased, that the money was for the purpose of putting up additional units on Bukhayo/Mundika/2802, and an agreement was later produced by the wife of the applicant. He said that whenever he had some money, he would give the deceased some, as pocket money. He said that the remains of his mother were interred on the land that the deceased had said was to be for them. He said that part of that land was sold when he was in primary school. He said that the deceased also showed them the land at Uganda, and told them that it was meant for them. He said he was only aware of a sale agreement relating to the Uganda land, but not about a title deed.

18. At the close of the oral hearings, the parties filed written submissions. The written submissions by the administratrix turned largely on the validity of the alleged will. She cited section 5(3) of the *Law of Succession Act*, Cap 160, Laws of Kenya, and Banks vs. Goodfellow [1870] LR 5 QB 549 (Sir Alexander Cockburn, CJ) and Vaghella vs. Vaghella [1999] 2 EA 351 (Mfalila, Samatta & Lugakingira, JJA), on testamentary capacity, and the burden of proving lack of it. Section 11 of the *Law of Succession Act* is also cited, with respect to the formal validity of a will, to advance arguments about the execution and attestation of the impugned will. The will is said to relate to the only assets making up the estate, Bukhayo/Mundika/2802 and 8862, one of which is allegedly subject to a trust, and the other devolved to the administratrix. The other submission relates to whether Bukhayo/Mundika/2802 had ever been given to the applicant by the deceased.

19. On his part, in his written submissions, the applicant dwells on the validity of the alleged will. It is submitted that, as framed, the alleged will, does not express wishes on what should happen upon death, but rather about how the affairs relating to the land in question were to be run during the lifetime of the deceased, especially with respect to the setting up of the trust fund. Section 3 of the *Law of Succession Act* is cited on the question as to whether the said document was intended to take effect as a will of the deceased, or to guide his affairs during his lifetime The applicant also raises questions about the attestation of the will, and cites section 11 of the *Law of Succession Act*, Rahab Nyakangu Waithanji vs. Fredrick Thuku Waithanje [2019] eKLR (Achode, J) and In re Estate of David Keya (Deceased) [2021] eKLR (Musyoka, J). The applicant also points at the different dates when the document was signed by the alleged testator and the alleged attesting witnesses, to support the contention that the impugned will was neither valid nor authentic. There is also submission that the will was fatally defective and forged. It is asserted that when the administratrix moved the court for representation, she presented the version that the deceased had died intestate, and that the narrative about the existence of the will, was an afterthought. It is also submitted that the will discriminated against the other wives of the deceased, by leaving belongings only to the administratrix, and that even the belongings allegedly being left to the administratrix were not defined. It is further submitted that the bequest of the Buyosi plot was not clear, as it was partially given to both Valentine Ojiambo Walekhwa and Sorophine Makokha Walekhwa, and that there was uncertainty of the terms of the bequest. It is submitted that there were other dependants of the deceased who had been left out of the alleged distribution. Finally, it is submitted that the deceased had gifted Bukhayo/Mundika/2802 to the applicant's side of the family, and that that being the case the said property was not an asset of the estate. It is also submitted that the applicant was entitled to the units on Bukhayo/Mundika/2802, as some were put up there after the land had been given to him and his brother, and the remainder were put up with his own resources.

20. The principal issue arising is whether the deceased died testate or intestate, so that if he died testate, the estate will be distributed as per the terms of the will, and if not, then the estate shall be distributed in accordance with the law on intestacy. I will then have to start with the issue as to whether the deceased died testate or not, the other issues are supplementary; dependent on what I will find on this one principal issue.

21. Contrary to what the applicant has submitted, that the cause herein was purportedly initiated in intestacy, in the sense that the administratrix had sought representation on the basis that the deceased died intestate, that position is not correct, for the petition that the administratrix lodged herein, on 24th August 2020, dated 19th August 2022, was for a grant of letters of administration with written will annexed. A copy of what she claimed was the true and original will of the deceased was annexed. Paragraph 4 of the affidavit, that the administratrix swore in support, on 24th August 2020, indicates that the deceased had left a valid written will, dated 16th June 2019, and the same is attached to the affidavit. So, from the onset, the administratrix made it clear that there was a will, she did not claim that the deceased had died intestate, and the alleged will cannot, in the circumstances, be an afterthought. I have noted that the notice published in the Kenya Gazette of 12th February 2021, announced that the deceased had applied for a grant of letters of administration intestate, which was not accurate, as the petition herein was not for such a grant. Eventually, the grant made to the administratrix, and another, on 30th September 2021, and issued on even date, was for a grant of letters of administration with will attached.

22. There are 2 classes or categories of grants of letters of administration, the first being for letters of administration intestate, and the other being letters of administration with the will annexed. Letters of administration are usually issued where a person dies intestate, and there could be a general assumption that the grant of letters of administration issues only in the event of intestacy. That is not so, for the grant of letters of administration would also issue where a person dies testate, but there is no proving executor or executrix, either because one is not named in the will, or, where named, he or she is not willing to take up the executorship, or has renounced the position, or has pre-deceased the testator. The law on that is sections 53(a), 63 and 65 of the *Law of Succession Act*. See also In re the Estate of Riyaz Tadjin Rahemtulla Dhanji (Deceased) [2017] eKLR (Musyoka, J), In re estate of Theresia Nundu Mwau (Deceased) [2017] eKLR (Nyamweya, J), In re Estate of M'Muremera Iria Muguna (Deceased) [2018] eKLR (Gikonyo, J), In re Estate of Gacheri Waiganjo alias Hannah Gacheri Waiganjo (Deceased) [2020] eKLR (Achode, J), In re Estate of Dorcas Omena Binayo (Deceased) [2021] eKLR (Musyoka, J) and In re Estate of George Barbour (Deceased) [2021] eKLR (Onyiego, J).

23. The entire section 53 of the *Law of Succession Act* would be relevant for the purposes of the instant ruling, and it states:

> " A court may –
>
> a. Where a deceased person is proved (whether by production of a will or an authenticated copy or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which the will applies, either –
>
> i. probate of the will to one or more of the executors named; or
>
> ii. if there is no proving executor, letters of administration with the will annexed; and
>
> b. If and so far as there may be intestacy, grant letters of administration in respect of the intestate estate."

24. Section 63, on the other hand, states:

> " When a deceased has made a will, but –
>
> a. he has not appointed an executor; or

b. the only executors appointed are legally incapable of acting, or have renounced their executorship, or have died before the testator or before receiving a grant of probate of the will, or have failed within the time limited by a citation to apply for probate thereof; or

c. all proving executors have died before completing administration of all the property to which the will applies,

a universal or residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much of thereof as may be unadministered."

25. Section 65 of the *Law of Succession Act* provides:

> " When there is no executor, and no residuary legatee or representative of the residuary legatee, or if every such person declines or is incapable of acting, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or the Public Trustee, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly."

26. In this case the purported will did not appoint executors, and the administratrix could qualify, under the alleged will, to be a universal or residuary legatee, under section 63, and, therefore, entitled to be appointed as administratrix under a grant of letters of administration with will annexed. She, and her co-administrator, could also qualify, under section 65, to administer the estate under the will, on the basis of a grant of letters of administration will the will annexed. I shall not dwell much on the appointment, as that is not a major point for determination here.

27. Was the will, the subject of these proceedings, valid?

28. The will on record is in the following terms:

> " LAST WILL OF MZEE ALFRED WADIDWA WALEKHWA AS ON 16TH JUNE 2019
>
> ALFRED WADIDWA WALEKHWA OF ID NUMBER 0453253 LEAVES ALL MY REMAINING BELONGINGS TO MY WIFE SOROPHINE MAKOKHA WALEKHWA OF ID NUMBER 0103456. I AM REQUESTING ALL MY CHILDREN TO JOIN ME START A TRUST FUND WHEREBY I WILL BE BUYING SHARES OF KSHS2000 PER MONTH AND ALL KIDS ARE INVITED TO BUY A MINIMUM OF KSHS2000 TO KSHS10,000. AS SOON AS WE GET ENOUGH MONEY WE START A HARDWARE SHOP WHEREBY AT THE END OF THE YEAR WE SEE HOW MUCH IS THE PROFIT AND WE SHARE AMONG THE SHAREHOLDERS DEPENDING WITH THE SHARES YOU HAVE (BONUS). ANY KID WHO IS NOT A MEMBER WILL NOT BE PART OF THIS TRUST FUND.
>
> THE SHOPS AND THE RENTAL HOUSES IN THE PLOT ON MAUKO TO MABALE ROAD WILL ALSO BE INCLUDED IN THAT TRUST FUND, MY WIFE SOROPHINE WILL COLLECT RENT AND THE AMOUNT WILL BE DEPOSITED TO THE TRUST FUND ACCOUNT.
>
> ON BUYOSI PLOT AFTER GIVING A PART OF IT TO MAGRET ADONGO WALEKHWA AND VALENTINE OJIAMBO WALEKHWA THE REMAING PART

I LEAVE IT UNDER THE CARE OF MY WIFE SOROPHINE M. WALEKHWA, WHEREBY ANYONE IS INTERESTED TO DIG AND GET FOOD FROM IT IS ALLOWED, BUT IT DOESN'T MEAN THAT IT BELONGS TO YOU.

ALL MY KIDS HAVE TO BE SATSFIED WITH WHAT I GAVE THEM, FOR EXAMPLE I PROVIDED EDUCATION TO ALL AND GAVE THEM A PIECE OF LAND AND IF YOU SEE THAT WHAT I GAVE YOU IS NOT ENOUGH AND WANT MORE YOU CAN BUY YOUR OWN TO ADD ON WHAT I GAVE YOU.

ALFRED WADIDWA WALEKHWA

SIGNATURE

DATE: 16/6/2019

WITNESS 1: HERBERT EGESA ODOLI

SIGNATURE AND ID 4812462

DATE: 29/06/2019

WITNESS 2: WILSON BWIRE SAMBA

SIGNATURE AND ID 9228285

DATE: 23/7/2019

ADVOCATE : IRENE OTTO

SIGNATURE

DATE: 19/7/19

RUBBERSTAMP OF:

IRENE A. OTTO

ADVOCATE

PO BOX 25743-00100

NAIROBI "

29. The validity of a will is predicated on 2 essential things or factors: the capacity of the purported testator and the form of the purported will.

30. Section 5 of the *Law of Succession Act* deals with capacity. It states 2 principal requirements: soundness of mind and right age. A will is valid if it is made by a person of sound mind, who is not a minor. The provision also states the presumption that a person making, or purporting to make, a will, has soundness of mind, unless the contrary is proved, that is that he did not know what he was doing, when he made the will, on account of mental or physical illness, or drunkenness, or any other cause. The burden of proving lack of soundness of mind is placed on the person alleging it.

31. The language of section 5 of the *Law of Succession Act* is as follows:

> "(1) Subject to the provisions of this Part and Part III, any 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 purposes 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 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."

32. So, did the deceased, if he made the impugned will, meet the test on capacity set out in section 5? It is common ground that he was not a minor, as at 16th June 2019, when he allegedly made the purported will, for the alleged will itself expresses that he had a wife and children, who were possibly adult, given that he had already given them land, taken them through education, and was proposing to get into business with them. Was he of sound mind as at that date? The issue of unsoundness of his mind has not been raised by anyone, not in the filings, nor the oral testimonies, and, therefore, it shall be presumed that he was blessed with a sound mind as at that date. If there was any unsoundness of mind, arising from any of the causes mentioned in section 5(3) of the *Law of Succession Act*, the burden was on the applicant to establish that fact, as required by section 5(4) of the Act. The applicant neither raised the issue of his unsoundness of mind, nor led evidence on it. The issue, as to whether the deceased lacked the requisite testamentary mental capacity, as at 16th June 2019, does not arise, and I shall not discuss it herein, beyond what I have said on it so far.

33. On form of the will, the relevant provisions are in sections 8, 9, 10 and 11 of the *Law of Succession Act*. Sections 8, 9 and 10 are on oral wills; while section 11 is on written wills. The impugned will was not oral in form, for it was written. Consequently, the provisions that apply to it are in section 11 of the *Law of Succession Act*.

34. Section 11 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."

35. The form of the written will requires 2 things: execution of the will by the testator and attestation of the execution by 2 witnesses. I will deal with the 2 separately.

36. Regarding execution of the will by the testator, the provisions in section 11(a)(b) of the *Law of Succession Act* are relevant. They are about execution of the will, and the placing of the execution on the document. Execution is about the signing of the will by the testator. It could take the form of a writing by the testator, or the placing of a mark by him, on the document, to signify his signature, as a way of authenticating the document. Has this requirement been met? I believe it has. There is a signature at the foot of the document, immediately after the body, under the name of the deceased, and it purports to be his signature. It was purportedly affixed or written on 16th June 2019. Was the writing that of the deceased? It is written under his name, and, so, I presume it to have been written by him. Why? The law on this states that where a will appears, on the face of it, to be properly executed, in such manner as to suggest that the testator and the witnesses intended it to be the will of the deceased, a presumption of due execution, also known as omnia esse riteatta, arises. By virtue of that presumption, the burden of proving that the will was not executed by the deceased is cast on the person alleging so. The burden would only shift to the propounders of the will, to establish that the signature on the will was affixed by the deceased, upon the challengers rebutting the presumption. See In Re Estate of Gatuthu Njuguna (Deceased) [1998] eKLR (Githinji, J), Karanja and another vs. Karanja [2002] 2 KLR 22 (Githinji, J), James Maina Anyanga vs. Lorna Yimbiha Ottaro & 4 others [2014] eKLR (Emukule, J), In re Estate of Lucy Wangui Muraguri [2015] eKLR (Musyoka, J), In re Estate of Rhoda Ndini Nzioka (Deceased) [2018] eKLR (Odunga, J), Iskorostinskaya Svetlana & another vs. Gladys Naserian Kaiyoni [2019] eKLR (W Korir, J), In re Estate of Margaret Njambi Thuo (Deceased) [2019] eKLR (Wendoh, J), John Waguru Ikiki & 7 others vs. Lee Gacuiga Muthoga [2019] eKLR (Musinga, Kiage & Murgor, JJA) and In re Estate of IsaacThiongo (Deceased) [2020] eKLR (HA Omondi, J).

37. The administratrix did not identify the writing as the signature of the deceased, although she asserted that the will was made by him, which meant that she recognized the said writing to be his signature. The applicant testified that the signature on the document was not that of the deceased, yet he presented no evidence that would have demonstrated that the writing was not similar to the known writings and signatures of the deceased. An effort ought to have been made to place the known writings and signatures of the deceased before the court, for comparison with the writing in the will, which is purported to be the signature of the deceased, for the court to assess whether or not the 2 were similar or dissimilar, based on section 76 of the *Evidence Act*, Cap 80, Laws of Kenya, on comparison of signatures. See In re Estate of Daniel Muhia Wanjohi (Deceased) [2020] eKLR (Ngaah, J). The

other acceptable way of impeaching handwritings and signatures is through reliance on reports of handwriting experts, who would have been given sample handwritings by the deceased to compare with the writing on the impugned will. See In re Estate of David Keya (Deceased) [2021] eKLR (Musyoka, J). However, although the opinions of handwriting experts are good evidence, they are not binding on the court, being opinion evidence, and they may have to be considered alongside other available evidence. See Elizabeth Kamene Ndolo vs. George Matata Ndolo [1996] eKLR (Gicheru, Omolo & Tunoi, JJA) and In re Estate of the Late Samson Kipketer Chemirmir (Deceased) [2019] eKLR (Ndung'u, J). It is the applicant who challenges the validity of the impugned will, and the burden was on him to prove that the signature on the will had not been placed there by the deceased. He could only discharge that burden in the manner alluded to above. The fact that was not done was fatal.

38. The second aspect to it is about the placing of the signature on the will. According to section 11(b) of the *Law of Succession Act*, "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." Theoretically, the signature or mark of the testator may be placed anywhere on the will, so long as it appears, from the location or placing, to be intended to give effect to the document as the will of the deceased. See In Re Estate of Gatuthu Njuguna (Deceased) [1998] eKLR (Githinji, J), Karanja and another vs. Karanja [2002] 2 KLR 22 (Githinji, J), In re Estate of Veronica Njoki Mungai (Deceased) [2017] eKLR (Musyoka, J), Rahab Nyakangu Waithanji vs. Fredrick Thuku Waithanje [2019] eKLR (Achode, J), In re Estate of Samuel Njoroge Kamau (Deceased) [2019] eKLR (Achode, J) and In re Estate of Krishna Kumar Sembi (Deceased) [2020] eKLR (Achode, J). The basis for this conclusion is the fact that the *Law of Succession Act* does not state where the signature or execution ought to be at on the document. The usual place to situate a signature on a legal document is at the foot of it, after the substance or the contents of the document. That serves as the most effective way of signifying authentication of the contents preceding the signature. In the will herein, the purported signature of the deceased was placed at the foot or bottom of the impugned will, after the substantive provisions. That satisfied the requirements in section 11(b) of the Act.

39. Attestation of the execution of the will by a testator is about its witnessing by the 2 or more persons. The witnessing is of the document being signed by the testator, after which the witnesses append their own signatures as proof of the attestation. See In Re Estate of GKK (Deceased) [2013] eKLR (Lenaola, J). There are 2 elements there, the witnesses being witness to the signing of the document by the maker, followed by the witnesses appending their own signatures to the said documents. There is usually an attestation clause, which states that the witnesses were present when the document was signed by the maker, with the signatures of the witnesses then appended thereafter, or beside the attestation clause. The absence of the attestation clause would not be fatal, so long as there are signatures of the witnesses, on the document, after the signature of the testator, which, by their positioning, would suggest an intention to attest the execution by the testator. In the instant case, it would appear that there was attestation of the execution of the impugned will by the deceased, to the extent that there are 3 counter-signatures by 2 witnesses and an Advocate.

40. Section 11(c) of the *Law of Succession Act* states 2 positions regarding attestation. The first is where the testator signs the document in the presence of two or more witnesses, so that the witnesses are able to see him sign, and thereby placing them in a situation where they can, at a later date, testify that they saw him sign the document, after which they then sign it in his presence. See In Re Estate of Chandrakant Shamjibhai Ghweewala (Deceased) [2006] eKLR (Koome, J), In re Estate of Julius Mimano (Deceased) [2019] eKLR (Musyoka, J), In re Estate of Samuel Njoroge Kamau (Deceased) [2019] eKLR (Achode, J) and In re Estate of Dorcas Omena Binayo (Deceased) [2021] eKLR (Musyoka, J). The second position is where the document is executed or signed by the testator, in the absence of the witnesses, and then he later takes it to them, and shows them his signature on the document, or acknowledges

the signature to them, after which they append their own signatures. So, witnessing is either by the witnesses seeing the testator sign the will in their presence, or by him acknowledging his signature to them later, having signed the same earlier. See In re Estate of the Late Samson Kipketer Chemirmir (Deceased) [2019] eKLR (Ndung'u, J).

41. In the instant case, it appears that the will was signed by the deceased in the absence of the witnesses, after which he then presented it to them, for witnessing. One of the 3 witnesses was availed, Herbert Egesa Odoli, he stated that he did not witness the deceased sign his part, but he brought it to him after he had signed it, and informed him that it was his will, and he wanted him to witness it, whereupon he signed it. Was that adequate? I believe it was. It would have been a good thing if the 3 witnesses testified, but it was good enough to have the testimony of just 1 of them. He connected the deceased with the alleged will, and that would suffice as evidence that the deceased had something to do with its making. There were more than the 2 attesting witnesses required by section 11 of the Act.

42. So far so good. The document was signed by the deceased, and was properly attested by 3 witnesses. I still, however, have to decide on the one issue raised by the applicant, whether the document, even if properly signed by the deceased, could pass as his will. He has pointed out a number of things about this. For one, he says that the document is framed in a manner that suggests that it was not giving directions on how the estate should be distributed after the deceased died, but rather as directions on how he wanted to do business with his children, and on how some of his assets were to be managed. Secondly, the document has not set out the registration particulars of the 2 parcels of land that appear to be the subject of it. Thirdly, that, other than the administratrix, the deceased had not distributed the remaining assets to any other member of the family.

43. Let me start with the last 2 arguments. On the registration details of the assets not being spelt out in the document, I note that the 2 properties are adequately described, as the Buyosi plot, and that at Mauko. Both parties appear to be clear that the Mauko property is Bukhayo/Mundika/2802. However, the identification of the Buyosi plot is not so clear, although there are suggestions that it refers to Bukhayo/Mundika/8662. The fact that land reference details of assets are not disclosed in a will, but the property is described in sufficient details, to assist the executors or administrators ascertain it, would not be a basis for nullification of a will. One of the duties of personal representatives is to ascertain the assets, from the descriptions given in a will. The administrators, in this case, have not pleaded inability to ascertain the 2 assets from the descriptions given.

44. On the will not identifying all the beneficiaries, in terms of the spouses and children, as it only appears to give assets to the administratrix, and to refer to other 2 individuals, namely Magret Adongo and Valentine Ojiambo, I note that the document states that the deceased had distributed the bulk of his property to his children during his lifetime, something that all the parties are in agreement on, save for the 2 assets the subject of the impugned will. The provisions in the document on these 2 appear quite clear on who would be entitled to the same. The Buyosi plot appears to be given to the administratrix, Magret and Valentine; while the Mauko plot was to go to the trust fund, which was ultimately to benefit the individuals who would have contributed to it. I see nothing in the manner the distribution was done which could form basis for declaring that the document was invalid, if it was indeed a will.

45. The major issue should be with whether the document in question could operate as the will of the deceased. The argument is that it does not read as a document intended to operate as a will, in terms of spelling out how the assets are to be divided upon death. It rather reads like a document on how the deceased intended to relate with his children during his lifetime, with respect to some of his assets. In Lita Violet Shepard vs. Agnes Nyambura Munga [2018] eKLR (Waki, Warsame & Murgor, JJA), the will was defined as a legal tool or device for determining the fate of a deceased person's estate after his death. The key elements of what establishes a will were discussed in In In re Estate of Kimani Kagia

(Deceased) [2017] eKLR (Musyoka, J), and were identified as the declaration made by the testator, of his wishes or intentions, in connection with what should happen to his property after his death. It was said that a will was futuristic or a futurity, for it is about what is to happen in the future, and it is about wishes or intentions being carried into effect sometime in the future after the death of the testator.

46. What appears to worry the applicant is the disposal of Bukhayo/Mundika/2802, the so-called Mauko property. The document first of all establishes a trust fund, during the lifetime of the deceased, to which the children were to contribute, in order to be entitled to the benefits accruing. The shops and rental houses on the Mauko property are then made part of the fund, with the rent and income being collected by the administratrix, and paid into the trust fund account. The question then would be, whether the Mauko property, or Bukhayo/Mundika/2802, is disposed of by the terms of the alleged will. I doubt that the clauses on the trust fund dispose of Bukhayo/Mundika/2802 or the Mauko property, for they appear intended to be effective during the lifetime of the deceased. The deceased was to establish the trust fund, together with the children, by depositing a sum of Kshs. 2,000.00 monthly, and he encouraged the children to do the same. He could not possibly do that while he was dead. Therefore, to the extent that the clauses on the trust fund envisaged some action to be taken during the lifetime of the deceased, including by the deceased himself, meant that the document was intended to be effective, not from the date of death, but prior to that. That then meant that it was not futuristic or a futurity. It was meant to be effective from the date it was signed, 16th June 2019. In the circumstances, it cannot possibly pass as the will of the deceased, if it was intended to be effective before he died. A will only become effective upon death. That is when it becomes a binding and effective legal document. Prior to the death, it is a document that has no legal effect whatsoever, as it binds no one, restrains no one, and confers no benefit on anyone. The deceased intended that his alleged will would be effective before he died, and that, by itself, meant that the document could not pass as his will.

47. The other disposal relates to the Buyosi property. As indicated above, there is no clarity as to which property, in terms of registration, this clause refers to. In the petition it would appear to suggest that it is Bukhayo/Mundika/8662. I see a valuation report on Bukhayo/Mundika/8662, which was commissioned by the administratrix, and it would seem that she conceives the Buyosi property to be Bukhayo/Mundika/8662. In the confirmation application, dated 31st October 2022, the administratrix proposes to distribute Bukhayo/Mundika/2802 and 8662, and I suppose by Bukhayo/Mundika/8662 she is referring to the Buyosi property. Curiously, in her supporting affidavit, she has not attached documents of title, whether title deeds or certificates of official search, as evidence of the current ownership of the property. I find it more curious that in the valuation report on Bukhayo/Mundika/8662, which she commissioned, Bukhayo/Mundika/8662 is said to be registered in the name of an Awando Onyango Dan, and not in the name of the deceased. The copy of the title deed attached to that report, dating back to 2009, shows the deceased as the registered proprietor. I cannot reconcile these 2. The body of the report, dated 28th July 2021, shows the registered proprietor as Awando Onyango Dan, but the attached title deed does not read Awando Onyango Dan, but the deceased herein. Why the anomaly? When the alleged will was being executed on 16th June 2019, who was the registered owner of Bukhayo/Mundika/8662? Was it Awando Onyango Dan or the deceased? Why was a certificate of official search not procured for the property when the confirmation application was being mooted? To whom does Bukhayo/Mundika/8662 belong? If it belongs to Awando Onyango Dan, then it does not form part of the estate of the deceased, and it is not available for distribution. A testator can only dispose of, by his will, assets that belong to him, and, more particularly, assets that are registered in his name.

48. With regard to the validity of the alleged will, I will reiterate what I have stated in paragraph 46 hereabove, that, to the extent that the purported will of 16th June 2019 is not futuristic or a futurity, for its principal clause provides for things to be done during the lifetime of the deceased, it cannot pass

as his will, although it describes itself as a will, and was executed and attested as a will would. The effect of that would be that the deceased did not die testate, and his estate is not available for distribution in accordance with the rules or law that governs testate succession. The cause herein should have been initiated in intestacy.

49. The second administrator, Patrick Juma Walekhwa, agrees. He testified that the wishes of the deceased, regarding disposal of the Buyosi land, could not be carried out in the manner proposed in the will, and that the trust fund did not materialise, as many of the children of the deceased did not share his vision on the same. The impugned will only deals with 2 assets, the Buyosi land and the property at Mauko, which is the subject of the trust fund. To the extent that the 2 assets cannot be handled in the manner envisaged in the will, the more the reason the estate should be handled in intestacy. There would be no basis for founding distribution on the purported will when its objects cannot be met, for the reasons advanced by the administrators themselves.

50. The applicant raised a number of issues with regard to Bukhayo/Mundika/2802, as to how the deceased had allocated it to him or his side of the family, how he developed it, and how he was entitled to it. In view of my findings in paragraphs 46 and 48, foregoing, on the validity of the impugned will, I believe it would be premature for me to make a determination on these arguments. That is a case for presentation in a cause properly initiated in intestacy.

51. There is the issue of the money that the deceased allegedly had in the bank. The alleged will does not address the matter of the money, and how it is to be distributed. The money is listed in the petition and the confirmation application as an asset of the estate. To the extent that the alleged will does not deal with the banked money means that the same falls for distribution in intestacy. The purported will, of course, talks about willing away belongings to the administratrix. Belongings refer to movable property in the ilk of chattels, or personal effects, such as clothes, bags, books, stationary, furniture, appliances, and the like, largely personal and household goods. Money does not fall in the category of belongings. As no money is disposed of by the impugned will, it cannot be distributed in this cause.

52. So, what should be my final order? As the deceased did not die testate, and as the cause herein should have been initiated in intestacy, I hereby revoke the grant of letters of administration with the will annexed, made on 30th September 2021, and issued on even date, for having become useless and inoperative, on account of being incapable of use to dispose of any of the assets of the estate of the deceased herein. This cause shall be closed. The parties shall initiate a fresh succession cause, in intestacy, for the administration of the estate of the deceased herein intestate. Each party shall bear their own costs. There is leave to appeal, of 30 days, to the Court of Appeal, by any party, who may be aggrieved by these orders. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 19TH DAY OF APRIL 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant

Advocates

Mr. Makokha, instructed by JP Makokha & Company, Advocates for the administrators

Mr. Okutta, instructed by Ouma Okutta & Company, Advocates for the applicant