In re Estate of Joseck Thuo Ngeta (Deceased) (Succession Cause E076 of 2022) [2024] KEHC 3696 (KLR) (17 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3696 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

SUCCESSION CAUSE E076 OF 2022

HM NYAGA, J

APRIL 17, 2024

BETWEEN

WAIHARO HARRISON NGETA ..... 1ST PETITIONER

NAHASHON MAHUGU KABIRI ..... 2ND PETITIONER

AND

SUSAN WANJIRU THUO ..... 1ST OBJECTOR

NIXON KARIUKI THUO ..... 2ND OBJECTOR

MJMT (ACTING THROUGH HER MOTHER & GUARDIAN SWT) ..... 3RD OBJECTOR

RULING

1. The objectors vide summons dated 16th February, 2024 brought under Section 11 of the *Law of Succession Act*, Rules 63,73 of the *Probate and Administration Rules* and the *Evidence Act*, seek the following orders:-

   I. That this Honourable court be pleased to order that the purported will of the late Joseck Thuo Ngeta stands inadmissible pending the hearing and determination of this Application.

   II. That the entire collection of the 3 counterparts and alleged original will submitted by Adv. J.G. Kagucia of the late Joseck Thuo Ngeta be subjected to forensic document examination to investigate the signatures, handwriting and prints and preferably the same be done by the Director of the Criminal Investigations.

   III. That upon the examination of the signatures, handwriting and prints of the copies of the will, the investigative agency be allowed to file a report in this Honorable Court on its findings.

   IV. That costs of the application be in the cause.

2. The Application is premised on grounds on its face and supported by an Affidavit of Susan Wanjiru Thuo and Nixon Kariuki Thuo who are the 1st and 2nd objectors respectively.

3. They believed the some people accessed the will and changed its contents as it contained signatures that looked suspicious, it purported to devolve property which did not belong to the deceased and it left out some of the deceased's properties.

4. They deponed that they subjected a copy of the will to a forensic document examination and the forensic document examination Report dated 2nd September, 2022 by Emmanuel Karisa Kenga revealed that the signatures, handwriting and prints therein were manipulated and inserted, which revelation coincidentally matched their fears.

5. They prayed that this court do order that all the four (4) copies of the deceased's purported will be subjected to Forensic Document examination to establish the true status of the presented will and preferably the same to be conducted by the Director of the Criminal Investigations (DCI).

6. The Respondents opposed the summons through their joint Replying Affidavit sworn on 21st February, 2024.

7. They averred that application is a deliberate move by the objectors calculated to make the other beneficiaries capitulate in their scheme to force the abandonment of the will of the deceased and to have the estate of the deceased administered intestate hoping that by virtues of their current control in the running of the affairs of the deceased, they would obtain more than their respective shares of the estate as outlined in the will.

8. They also deponed that the application is clearly an afterthought as it has been filed after hearing of the objection and that if the objectors had wanted numerous reports from whatever experts as part of their objection, they would have caused the examination of the will attached to the petition which is the relevant document in question and filed these in evidence.

9. They averred that having admitted on oath that the signatures borne on the last page of the will where testation is supposed to be and was borne in the will and once the individuals who witnessed the execution have confirmed the same, then the other signatures that the testator affixed to every page and which the objectors are preoccupied and or obsessed with or seek verification of are superfluous, extraneous and cannot justify the processes that the objectors are asking the court to sanction.

10. They further asserted that the question of whether the will sufficiently defines and deals with the estate or if it contains and contemplates the assets that do not belong to the deceased or leaves out certain assets are matters that the executors are mandated to deal and for the court to interpret, and these are issues that the objectors should have raised in their testimony if that formed part of their ground.

11. They contended that even if there are other assets which the objectors may be aware of and are not covered by the will, the same can then be handled in accordance with the provisions of the *Law of Succession Act* which govern properties that had not been mentioned in the will.

12. They asserted that it is not true that there are discrepancies on the signatures of the said will and that the will has been made by a very competent and extremely meticulous and scrupulous advocate of vast experience, and it would be grossly wasteful of the court's time to go about fishing for nefarious grounds to challenge it only for the sake of delaying the matter and it would be ironical if the elongation is facilitated by court in the manner the objectors seek.

13. They believed the said allegations are ill willed and only made to handicap the process of distribution of the estate of the deceased herein.

14. They stated that the Application is incompetent and an abuse of the court process.

15. The Application was canvassed through written submissions.

Applicant's Submissions

16. The Applicants framed three issues for determination. Namely;

    i. Whether the Applicants have discharged their burden of proof.

    ii. Whether the expert evidence "trumps all other evidence"

    iii. Whether there is conflicting expert opinion.

17. On the first issue, the Applicants citing the provisions of Section 109 of the *Evidence Act* and the case of *In re Estate of Julius Mimano (Deceased)* [2019] eKLR where the court held that the burden of proving forgery lies with the person alleging it, submitted that they have discharged the burden of proof by adducing a forensic document examination report by Emmanuel Karisa Kenga which revealed that the will had been manipulated and other insertions had been made to it.

18. The Objectors/Applicants in further buttressing their submissions referred this court to the cases of *Elizabeth Kamene Ndolo v George Matata Ndolo* [1996] eKLR for the proposition that the charge of forgery or fraud is a serious one and the standard of proof required of the alleger is higher than that required in ordinary civil cases, & *In re Estate of Samuel Ngugi Mbugua (Deceased)* [2017] eKLR for the proposition that Forgery is a criminal offence and the burden of proving forgery lies with the person alleging it.

19. In regards to the Second issue, the Applicants referred to the case of *Stephen Kinini Wang'ondu v The Ark Limited* [2016] eKLR where Mativo J held inter alia that;

> " Expert evidence does not "trump all other evidence". It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision."

20. The Applicants then submitted that the expert report does not elevate itself above the witness statement of Robert Mathaka Kavilu dated and filed on 12th June, 2023 & 14th June, 2023 respectively but compliments particularly its import in paragraphs 34 to 45 wherein he believes that the will he diligently delivered as instructed by the deceased was not in the originally packaged state and that the said report compliments the import of paragraphs 5-8 of the Affidavit by Mr. Nixon Kariuki Thuo dated 7th June,2023 wherein he adduced pertinent issues that include but not limited to the fact that the purported will has omitted some of the deceased's property, the fact that the purported will left out property that was acquired the same year it was allegedly authored.

21. The applicants argued that the expert witness report as tendered is independent and there is no question as to its admissibility has been raised. To buttress this position the applicants cited the case of Supreme Court of South Africa case of *Kunz v Swart* 1924 AD.

22. With respect to the last issue, the Applicants submitted that their forensic document examination report be given prominence pending the tabling of another report and the adoption of the same by the DCI since there is no other report before court challenging or debunking it. Reliance was placed on the case of *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko* [2006] eKLR where

the court stated that expert opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified.

23. On costs, the applicants submitted that the same should be in the cause.

Petitioners/Respondents Submissions

24. The Respondents reiterated that the Application lacks merit as it is an afterthought, abuse of the court process and a calculated scheme instituted with the aim of delaying the probation proceedings with respect to the deceased estate while the Applicants continue to illegally derive benefit from the former.

25. It was submitted that the will in issue is in compliance with Section 5 of the *Law of Succession Act*. In further buttressing this position, the Respondents cited the case of *Banks v Goodfellow* [1870] R5QB549 where the court laid out the essentials for testamentary capacity.

26. The Respondents submitted that if the Applicants feel that they were not adequately provided for in the deceased will, their remedy does not lie in impugning the will but by making an application for adequate provisions under Section 29 of the *Law of Succession Act*. For this proposition reliance was placed on the cases of *Kamene Ndolo v George Matata Ndolo* [1996] eKLR & *Curryian Okumu v Perez Okumu & 2 others* [2016] eKLR.

27. The respondents relying on the case of Stephen Kinini Wang'ondu v The Ark Limited (supra) argued that expert opinions are not binding on court and the same are considered alongside other duly admitted evidence.

28. The respondents posited that the questions whether the will left out some property belonging to the deceased or whether it made provisions that did not belong to the latter is a question to be ventilated after the probation of the will. In support of this position, reliance was placed on the case of *In re Estate of Atibu Oronje Asioma (Deceased)* (Succession Cause 312 of 2008) [2022] KEHC 11046 (KLR) (22 July 2022) (Ruling)

29. The respondents prayed to be awarded costs of the Application.

Analysis & Determination

30. I have considered the summons, the affidavits both in support of and in opposition to the same and the submissions by both parties.

31. It is my considered view that the fundamental question that this court should answer is whether the entire collection of the 3 counterparts and alleged original will of the deceased should be subjected to forensic document examination.

32. The gist of the Applicants' application is that the said 3 counterparts and the purported original will of the deceased are inauthentic, given that the report by the Forensic document examiner on their copy of the deceased's will revealed that the signatures, handwritings and prints were manipulated and inserted.

33. The Applicants basically impute that the wills in question are forgeries, to the extent that some signatures do not match that of the deceased on the testamentary page.

34. Mativo J in *Caroline Wanjiku Ngugi v Republic*[2015] eKLR held that:

> " Forgery is the false making or material alteration of a writing, where the writing has the apparent ability to defraud and is of apparent legal efficacy with the intent to defraud. Thus the elements of forgery are:-

i. False making of – The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. "Writing" includes anything handwritten, type written, computer generated or engraved.

ii. Material alteration – the person must have taken a genuine document and changed it in some significant way. It is meant to cover situations involving false signatures or improperly filing in blanks on a form or altering the genuine contents of the document.

iii. Ability to defraud – The document or writing has to look genuine enough to qualify as having ability to mislead others to think its genuine.

iv. Legal efficacy – the document or writing has to have some legal significance.

v. Intent to defraud – the specific state of mind for forgery does not require intent to steal but only intent to fool people. The person must have intended that other people regard something false as genuine. A forgery may be committed either by handwriting, through the use of type writer or a computer."

35. The above definition is reaffirmed in *R v Gambling* [1974] 3 All ER 479 where the court held that:

> "...'forgery is the making of a false document in order that it may be used as genuine.' This definition involves two considerations: first, that the relevant document should be false; and secondly, that it was made in order that it might be used as genuine. [...]
>
> Given [...] that each application was 'false' was it made 'in order that it might be used as genuine'? Indeed, what do these words involve in the context of the present case? Clearly they require proof of an intent on the part of the maker of the false document that it shall in fact be used as genuine. We think that they also involve that the untrue statement in the document must be the reason or one of the reasons which results in the document being accepted as genuine when it is thereafter used by the maker. It is this concept which we think is sought to be expressed in the aphorism – as to the usefulness of which views may differ strongly – that the document must not only tell a lie, it must tell a lie about itself. [...] If this is correct, then it seems to us to follow that in cases such as the present in which the falsity of a document arises from the use of a fictitious name or signature, or both, then that document is a forgery only if, as counsel for the appellant contended, having regard to all the circumstances of the transaction, the identity of the maker of the document is a material factor. [..]
>
> In many cases the materiality of the identity of the maker would be so obvious that evidence would be unnecessary: for example, when the document is a cheque or a bill of exchange and the purported signature of the drawer, or endorser, or the acceptor has been written by the someone other than the person whose signature it purports to be. In other cases, such as the present, evidence would be required, and the materiality or otherwise of the identity of the maker of the document must be a matter for the [court]."

36. A high degree of proof is necessary to establish the element of fraud. The burden is higher than that required in ordinary civil cases. The law on the said issue was stated by the Court of Appeal in *Elizabeth Kamene Ndolo v George Matata Ndolo* [1996] eKLR thus:

> "We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was

making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases."

37. W. Musyoka, J explained the above standard of proof in the case of *In re Estate of Kimani Kahehu (Deceased)* [2018] eKLR as follows:

> " It is the applicant who alleges that the will was a forgery. The burden is on him to establish that fact to the required standard. Forgery is a criminal act, and facts to establish it must make out a case beyond balance of probability and towards proof beyond reasonable doubt. See the decision of the Court of Appeal in *Elizabeth Kamene Ndolo v George Matata Ndolo* Nairobi Court of Appeal civil appeal number 128 of 1995. A charge of forgery would be that the signature on the document was not that of the deceased. To establish forgery, it is usually necessary to subject the impugned document to testing of the impugned signature or signatures by a document or handwriting expert. That was not done in this case. No material was placed before me by way of evidence that the signature on the document purported to be that of the deceased was forged."

38. Guided by the above precedents, I will now address the issue at hand.

39. Based on the prayers sought, the Applicants are not required to prove validity of will at this stage but to lead evidence that will make this court find that there is reasonable suspicion that the purported wills were manipulated. The measure for reasonable suspicion was elucidated in the case of Emmanuel Suipenu Siyanga v R (2013) eKLR as follows:

> " .....a suspicion cannot be held to be reasonable if it is founded on non-existent facts. This would be a subjective suspicion and must be based upon grounds existing at the time of its formation. If there are not grounds which then made the suspicion reasonable, it was not reasonable suspicion".

40. The Applicants, in buttressing their case on the alleged fraud, annexed a Report by a Forensic Document examiner one Emmanuel Karisa Kenga. I have perused the same and duly noted its contents.

41. In nutshell, Mr. Kenga describes himself as a retired Commissioner of police and a qualified forensic document examiner of more than 31 years' experience. He is also a document examiner trainer. He states that upon examining the questioned signatures, handwriting and prints on the will he concluded that there was evidence of manipulation and insertion on the will which implies that it is not a true copy of the Original Will.

42. It is to be noted that Mr. Kenga only viewed a photocopy of the said will. It is also not clear if the copy of the will he examined is the same one filed in court at the time of filing the petition herein. His opinion is based on the following;

    a. The signatures on pages 1-5 of the will were not similar to those of the known signatures of the deceased as found in K1- K4.

    b. The signature on page 6 of the will was similar to the known signatures of the deceased in K1 –K4.

    c. The handwriting found on page 3 of the will was not in agreement with the known handwriting of the deceased in K5-K6.

d. The signatures on pages 1-5 of the will were of poor quality.

e. The print on the cover page of the will and the last page 6 were made by a different machine/ printer.

f. The prints on pages 1-5 of the will were made by a different machine/printer when compared to pages 1 and 6 thereof.

g. That pages 1-5 were typed by a different machine and inserted in the will.

43. It is settled law that as a general rule evidence by experts being opinion evidence is not considered binding on the court. The court has to consider it along with other evidence and form its own opinion on the matter in issue. The court is at liberty to accept or reject evidence of experts depending on the facts and circumstances of the case before it; see *CD Desouza v BR Sharma* (1953) 26 KLR 41 at page 42 applied in *Amosam Builders Development Ltd v Gachie & 2 others* (2009) KLR 648 at page 654.

44. Subsequent to the filing of the report, all the original three counterparts of the will were availed before the court. Crucially, one was the counterpart retained by Mr. J.G. Kagucia Advocate, who prepared the will in question. Mr. Kagucia confirmed that he had kept a file copy of the will in his office.

45. It is also on record that the two witnesses to the said will confirmed that the deceased signed the will in their presence. They affirmed that they duly attested to the deceased's signature by signing thereon as required.

46. The report in question has compared the signatures on pages 1-5 with the known signatures of the deceased. The analyst has not stated that he actually compared the signatures on pages 1-5 and that on page 6, which was witnessed by the two witnesses who testified.

47. More importantly, one original counterpart of the will was produced by Mr. Kagucia Advocate, who came as witness of the court. He confirmed that the counterpart of the will that he produced was as he drew and it had been in his custody throughout. His further evidence was that when the parties, who included the applicants, went to his office with their counterpart of the will, he confirmed to them that the same was in tandem with the one he held in his custody.

48. So, in essence, the applicants are suggesting that Mr. Kagucia also inserted forged sections of the will in the counterpart that he held in custody, to match the insertions to the ones that were not in his custody. I find this to be quite improbable, if not impossible. Mr. Kagucia came across as very seasoned and scrupulous advocate. His candour cannot questioned and based on his testimony, I have no reason to doubt his evidence.

49. Considering the circumstances of this case, it is my view that the aforesaid expert report tendered to support the Applicants' case does not really raise any valid point to warrant any further investigations. All the 3 counterparts of the will, in their original form, including the one kept and availed by the applicants, are in the custody of the court and can be compared page by page, paragraph by paragraph, word for word and character by character if need be. The examination of the contents thereof, if they raise any conflicting provisions, may the render the same to be probed.

50. In my opinion the application does not disclose any reasonable suspicion that the will in issue might be a forgery.

51. There lies a danger of the court being asked to look at the contents of the will, which is not the function of the court at this stage, when addressing the application to have them examined. What the court is

to be satisfied with is that the will meets the legal threshold as set out in the *Law of Succession Act* and the principles reiterated in the celebrated case of *Banks v Goodfellow* (supra) where it was held that;

> " a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made."

52. I get the feeling that applicants are actually aggrieved by the contents of the will in question, rather than its validity. They had a copy of the will that they have now brought to court. They have not been able to point out any discrepancy in the same or in the other counterparts that would lead to reasonable suspicion that there was forgery. The suggestion that the deceased's signatures do not match and the alleged insertion of pages may be a tempting ruse to order an examination of the documents but looking at the overall picture, that is the three (3) will counterparts, the evidence adduced, I think that this is not really necessary. The allegations by the applicants are in my view only meant to obfuscate the facts and real issues herein.

53. If an issue of inadequacy of provision for any dependant arises or there is any mis-description of any party or property, then it will be considered by the court as provided for by the law, in the objection itself, but those grounds are not sufficient to declare a will invalid.

54. Having considered the matter at length, I find that the application, in so far as it seeks to have the counterparts of the will subjected to forensic examination, lacks merit and I dismiss it. I make no orders as to costs since this is a family issue.

55. The parties should proceed to the next stage of the cause.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 17TH DAY OF APRIL, 2024.

H. M. NYAGA

JUDGE

In the presence of;

Court Assistant Philip

Mr. Mwangi for Karanja for objector

Mr. Kisilah for petitioner