



In re Estate of Patrick Maina Stanley Gitu (Deceased) (Succession Cause 16 of 2023) [2024] KEHC 3646 (KLR) (17 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 16 OF 2023
LM NJUGUNA, J
APRIL 17, 2024
IN THE MATTER OF THE ESTATE OF PATRICK MAINA
STANLEY GITU (DECEASED)**

BETWEEN

ANN WANJIRU MAINA (1) ACTING ON HER OWN BEHALF AND AS FAMILY REPRESENTATIVE OF THE CHILDREN OF THE DECEASED AND HIS FIRST WIFE THE LATE JOSEPHINE WAGATU MAINA; (2) KENNEDY NDFATHA MAINA (3) ZACHARIA KURUKWA MAINA, THE SUCCESSORS OF THE LATE (4) MARGARET WARAU MAINA), (5) JUDY MUTHONI NDEGWA MAINA AND (6) JOHN GITU MAINA APPLICANT

AND

FLORENCE NJERI MAINA RESPONDENT

RULING

1. The applicant has filed an application dated 14th December 2023 premised on the grounds set out on its face and in the supporting affidavit thereof, seeking orders that:
 1. Spent;
 2. This honourable court be pleased to issue an order directing the National Registration Bureau to conduct an examination of the fingerprint on the will dated 05th September 2018 and to file a report in court within 30 days of the order of the court;
 3. In the alternative, this honourable court be pleased to issue an order directing the National Registration Bureau to release the fingerprint records of the deceased to Spectral Forensic Services within 5 days of the order for purposes of examination of the fingerprint on the will dated 05th September 2018 and file a report within 30 days;



4. The honourable court be pleased to direct the respondent herein to submit the original copy of the will to the Deputy Registrar of the High Court in Embu within 24 hours of issuance of the order for purposes of the forensic audit;
 5. This honourable court be pleased to direct that the original copy of the will shall form the basis of the forensic audit to be done by the National Bureau or in the alternative, Spectral Forensic Services; and
 6. The costs of this application to be determined in the cause.
2. The respondent filed a petition for grant of probate dated 06th October 2023. The applicant has challenged the existence of the alleged will and the matter is still pending determination, hence this application. The applicant contends that the will was procured fraudulently by the respondent and that it is a forgery. That the court authorized the applicant to use a copy of the will for forensic purposes and the same was examined by Spectral Forensic Services who generated 2 reports. First, that the signature did not display handwriting habits and individualizing characteristics similar with other signatures of the deceased. Second, that the fingerprint impression appended on the will was not similar to the deceased's other fingerprints.
 3. That due to these findings, the forensics experts requested for the original copy of the document for further examination. That the original copy of the will is in the custody of the respondent who has continually been unwilling to release it. That the signature and fingerprint impression on the original copy of the will can only be examined by the National Bureau of Registration or Spectral Forensic Services through an order of the court. That the initial findings of Spectral Forensic Services resulted from analysis without reference to the National Registration Bureau records of the deceased and this order will enable them to access the relevant records.
 4. The application was opposed through a replying affidavit dated 04th March 2024 where the respondent narrated the circumstances under which the deceased died. She stated that she lived with the deceased for 40 years and throughout that period, they lived and worked together in their many businesses, thus she is familiar with the handwriting and signatures of the deceased. That before he died, the deceased told her about the will and what she should do with it in the event of his death. That the applicant has challenged the will on grounds of forgery and fraud and she engaged the services of Spectral Forensic Services to ascertain the validity of the signature of the deceased on the will.
 5. The respondent also filed grounds of opposition dated 2nd March 2024 stating that the original will was already presented to the Deputy Registrar together with a certified copy and after she examined both copies and confirmed their correctness, she returned the original to the respondent. That prayer 4 is convoluted as this court already issued an order authorizing the applicant to use a certified copy of the will for purposes of forensic analysis. That the certified copy was sufficient and that the prayer is vexing to the respondent.
 6. Morris Guchura Njage, counsel for the respondent deposed that the original will was crafted by Beth Ndorongo Advocate practicing in Embu. That he showed the will to her and she confirmed that she did craft the shell of the will and gave it to the deceased for signature. That she has sworn an affidavit to that effect.
 7. Beth Ndorongo, Advocate, deposed that sometime in 2018, she met the deceased in his office and he consulted her about writing a will. That she explained the requirement to him and he later called her back to his office to draft it for him. That he dictated his wishes and she prepared the will for him. That she gave it to him and told him to make sure that it is signed by himself and 2 witnesses. That he did not return the will to her and she was not present when the will was signed.



8. Jonathan Katana Kaesa deposed that in August 2018, the deceased told him about his intentions to write a will. That sometime later he called him to his office at his construction site in PI area and asked him to witness him signing the will and also to sign the will as a witness, in the presence of Rev Allan Njiru Njagi, who also signed as a witness. That he wrote his mobile number against his signature.
9. Alvin Njiru Njagi deposed that he worked with the deceased in construction for a period of 19 years. That in August 2018, the deceased talked to him about the importance of writing wills. That later, the deceased called him to his office and they were joined by Jonathan Katana Kaesa where he asked them to witness him signing the will and also sign the will as his witnesses. That he signed first and they both signed after him.
10. In her submissions, the applicant urged the court to disregard the responses filed after filing of the submissions as the same were filed outside the period allowed by the court. She raised the argument that a forensics exercise is necessary to determine the validity of the will. She placed reliance on the case of *Re Estate of Kimani Kabebe (deceased)* (2018) eKLR where the court relied on the Court of Appeal decision in the case of *Elizabeth Kamene Ndolo v George Matata Ndolo*, CoA Nairobi Civil Appeal No. 128 of 1995 where the court found that it was necessary for the signature on the will to be examined by a handwritings expert in order to ascertain whether the same was forged.
11. She also relied on Section 48 of the *Evidence Act* and stated that it was upon the applicant to prove that the signature on the alleged will was forged and this can only be done through expert evidence. That the respondent has kept the alleged will a secret and the applicant has never seen the original copy which is required for purposes of the forensics examination. That the rules of evidence dictate that the original document is the most superior evidence and so the same must be produced. She relied on the case of *Re Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu (deceased)* (2016) eKLR where the court relied on sections 67 and 68 of the *Evidence Act* to discuss the 'best evidence principle' and found that the original document was the primary evidence that must be produced in court.
12. That the same sentiments were shared in the case of *Iskorostiskaya Svetlana & another v Gladys Naserian Kaivoni* (2019) eKLR where the court stated that it is necessary that handwriting analysis be conducted on the original document itself. That the initial analysis by Spectral Forensic Services was conducted using a copy of the will and the conclusions were limited by lack of a known impression, poor state of the impression on the will and access to the primary document. That due to the limitations of the initial analysis of the signature and thumbprint, it is also the prayer of the applicant that the National Registration Bureau or Spectral Forensic Services undertake an analysis of the original document while having access to the records of the deceased kept at the Registrar of Persons under section 5 of the *Registration of Persons Act*.
13. That the National Registration Bureau has fingerprints experts who testified on behalf of the state in the case of *Republic v Santalino Ongiro Obore* Criminal Case No. 16 of 2016. The applicant also relied on the case of *Caroline Wambui Macharia & John Henry Mwangi v Republic*, Criminal Appeal No. 156 of 2019 where a fingerprints expert from the National Registration Bureau testified inconclusively on the fingerprint impression on the will. She urged the court to grant the orders sought given that it bears inherent jurisdiction as was discussed in the case of *Kenya Power & Lighting Company Limited v benzene Holdings Limited T/A Wyco Paints* (2016) eKLR.
14. In her submissions, the respondent placed reliance on the affidavits of Morris Guchura Njage, Beth Ndorongo, Jonathan Katana Kaesa and Alvin Njiru Njagi. She submitted that the National Bureau of Registration has nothing to do with this case and that to invoke its action in the manner prayed by the applicant would defeat the rules of natural justice. That the institution can only appear in the



case through the Office of the Attorney General and she placed reliance on Part III of the *Government Proceedings Act*.

15. That the application is brought in bad faith and that the applicant was already granted access to a copy of the will and there is no need to release the original copy as there is no legal basis for analysis of the original copy. Reliance was placed on Rules 6(1)-(7) of the *Probate and Administration Rules*. That a forensics report is only part of the other evidence and all evidence is considered wholesomely in construction of the will dated 05th September 2018.
16. The issue for determination is whether the orders sought should be granted.
17. The prayers are sought on the grounds that the applicant is contesting the validity of the written will. Section 11 of the *Law of Succession Act* provides for written wills 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.”
18. On the will presented by the respondent, there is indeed a signature and a thumbprint, purportedly by the deceased. Under ordinary circumstances, the will would pass as a valid will. However, the applicant has taken issue with the signature and the thumbprint of the deceased on the document and has sought to have the same examined by a handwriting and fingerprint expert either at the National Registration Bureau or Spectral Forensic Services. In principle, he who alleges must prove. This is the provision in section 107 of the *Evidence Act* which lays the burden of proof on the applicant to prove that the will is not valid because it was not executed by the deceased in the manner specified under section 11 of the *Law of Succession Act*.
 19. The will is made valid when it is executed by the deceased himself or by another person under the instruction of and by the direction of the deceased. In the present case, the respondent stated that the will was executed by the deceased himself and that his signature was witnessed by Jonathan Katana Kaesa and Alvin Njiru Njagi. The applicant produced a copy of the forensics report by Spectral Forensic Services analyzing the signature of the deceased on the will in comparison to his signature on other documents. The document examiner used a copy of the will and 4 copies of other documents signed by the deceased as detailed on page 3 of the said report.
 20. The examiner, Martin Papa, formed the opinion that the signature on the other 4 documents were authored by the same person but the one on the will was authored by a different person. The report on fingerprint impression on the will was inconclusive because there was no other fingerprint impression



of the deceased to refer to. This was the basis for the prayer by the applicant to access the deceased's fingerprint records in the national repository held by the Registrar of Persons through the National Registration Bureau.

21. Section 5(1)(h) and (ha) of the [Registration of Persons Act](#) provides that the Principal Registrar of persons should keep a record of all persons in Kenya, of finger and thumb impressions but in case of missing fingers and thumbs, palm or toe or palm and toe impressions in physical form and biometric data. This means that the fingerprint records of the deceased are in the custody of the Registrar of Persons. Therefore, the orders sought for by the applicant are not farfetched since it is their obligation to prove their allegation.
22. Furthermore, Part III of the [Evidence Act](#) provides for documentary evidence. Section 65 therein provides for primary documentary evidence that is in the form of the document itself while Section 66 provides for secondary evidence which includes certified copies of the document. Section 67 of the [Evidence Act](#) makes it mandatory to prove documentary evidence through primary evidence unless in exceptional circumstances when secondary evidence may be adduced. In the present application, the original will is within reach and the respondent deposed that she already presented it in court before the Deputy Registrar who verified it and retained a certified copy of the same. The applicant stated that she used a certified copy of the will for examining the signature and fingerprints thereon through an expert. I also note that when the matter was before the court on 05th February 2024, counsel for the respondent stated that the original will can be provided if the applicant makes a formal application for the same.
23. It is my view that the original will should be made available to the applicant to enable her make her case. Therefore, I find that the application is meritorious and is hereby allowed. The following orders shall issue:
 1. Within 14 days of this ruling, the National Registration Bureau through the Principal Registrar of Persons is hereby ordered to release the fingerprint records of the deceased to Spectral Forensic Services for purposes of examination of the fingerprint on the will dated 05th September 2018 and file a report within 30 days of receipt of the fingerprint records;
 2. The respondent is hereby ordered to submit the original copy of the will dated 05th September 2018 to the Deputy Registrar of the High Court in Embu within 3 days of this ruling for purposes of the forensic audit;
 3. The original copy of the will shall form the basis of the forensic audit to be done by Spectral Forensic Services; and
 4. The costs of this application shall be determined in the cause.

24. It is so ordered.

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

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent

