In re Estate of the Late Arvind Kanji Premji Patel Moza Abdillahi Mohamed (Succession Cause 336 of 2013) [2024] KEHC 6888 (KLR) (3 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6888 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

SUCCESSION CAUSE 336 OF 2013

G MUTAI, J

MAY 3, 2024

BETWEEN

MOZA ABDILLAHI MOHAMED .... 1ST APPLICANT

KHALID ARVIND KANJI PATEL .... 2ND APPLICANT

KHALIDA ARVIND KANJI PATEL .... 3RD APPLICANT

AND

HASMUKH KANJI PREMJI PATEL .... RESPONDENT

JUDGMENT

Introduction

1. What is before this Court is the Summons for the Revocation of Grant dated 13th February 2023 filed by the Applicants. The Applicants seek the revocation of the grant of probate of the written will of Arvind Kanji Premji Patel (hereafter the “deceased”), dated 29th January 2014, issued to the Respondent and for the appointment of the 1st Applicant and or either the 2nd or the 3rd Applicants as the administrators of the estate of deceased. The Applicants also sought to have monthly upkeep they had hitherto received from the Respondent to be paid uninterrupted and for reasonable provision to be made for the 2nd and 3rd Respondents to pay for their university education and reasonable living expenses.

2. The deceased died on 1st May 2013 at the Mombasa Hospital. At the time of his demise, he had a wife, Bhanu, with whom he had two children, Suraj Arvind Kanji Patel and Yashica Arvind Patel.

3. In Paragraph 11 of the impugned Last Will and Testament dated 19th January 2013, the deceased stated as follows:-

> " I confirm that my wife BHANU is my only wife. I further confirm that MOZA is not my wife and I have made reasonable financial provision for Moza, Khalid and Khalida out of my responsibility to my children Khalid And Khalid."

4. In the said Last Will and Testament (hereafter the "Will"), the Respondent was appointed the Executor and Trustee thereof.

5. As noted in the impugned Will the Deceased had two children with the 1st Applicant, to wit, the 2nd and 3rd Applicants.

6. The Applicants contest the validity of the will. They aver that the deceased did not execute it, and that the contents thereof do not represent his wishes. The Respondent, on the other hand, affirms the Will and seeks to discharge his obligations in accordance with it.

Pleadings

7. In the Summons for the Revocation of Grant dated 13th February 2023, the Applicants sought the following prayers:-

    a. Spent;

    b. Spent;

    c. That this Honourable Court be pleased to revoke the Grant of Probate of Written Will dated 29th January 2014 issued to the Respondent herein;

    d. That consequent to the revocation of the Grant of Probate of Written Will dated 29th January 2014, this Court to appoint either Moza Abdillahi and or either Khalid Arvind Patel or Khalida Arvind Patel as Administrators of the Estate of Arvind Kanji Premji Patel- Deceased;

    e. That this Honourable Court be pleased to make reasonable provision for Khalid Arvind Kanji Patel or Khalida Arvind Kanji Patel to pay for University Admission and reasonable living expenses from the estate of Arvind Kanji Premji Patel (Deceased); and

    f. Costs of the Application be provided for.

8. The grounds upon which the Application was based were as follows:

    a. The Will was invalid;

    b. The signature of the testator on the Will was forged;

    c. The testator was unduly influenced in making the will;

    d. The testator had no capacity to make the will and so did not know or approve the contents of the will;

    e. The proceedings leading to the issuance of the grant of probate of the written will of the deceased were defective;

    f. The Respondent is guilty of intermeddling.

9. The Respondent filed his Replying Affidavit sworn on 6th March 2023. There were other Replying Affidavits by Mona Ketan Doshi, Dr. Subhashchandra Manchand V Shah, Mohammed Adil Mohamed Fazil, Ramesh Dhanji Harji, Samir Gulamabbas Baloo, Dipak Jasvantray Talakh Mehta, Abbas Ahmed Haji Mohamed and Wisdom Mwadime Fumbu.

10. The 1st Applicant also filed a Supplementary Affidavit sworn on 13th March 2023.

11. The Respondent filed a Further Affidavit on 4th April 2023 in response to the Supplementary Affidavit.

12. A number of applications, resting with that of the Respondent dated 21st August 2023 were filed. The applications have all been dealt with.

Evidence of the Applicants

13. The matter proceeded by way of oral evidence. The 1st witness for the Applicants was Gilbert Tonui. Mr Tonui introduced himself as a document examiner.

14. He stated that he was a forensic document examiner based at the DCI Headquarters. He produced his forensic examination report dated 9th February 2023.

15. He stated that he relied on the signature on the certified copy of the testator's last will, which he compared with his known signatures. He testified that, after the forensic tests and analysis, he found that the signatures on the impugned Will and those bearing his known signatures were made by different people.

16. Upon cross examination, it was his case that his findings were subjected to analysis by a quality assurance team, who are trained forensic examiners. The said team agreed with his findings on the dissimilarity signatures. He disagreed with the proposition that copies are less reliable, although he conceded that it would have been ideal to conduct the test with the original document.

17. The 1st Applicant was the second witness. She relied on the contents of her affidavits dated 13th February 2023 and 13th March 2023, respectively. She also relied on the annexures to the Affidavits. It was her case that although the deceased was of ill health, he was not of ill mind. She stated that despite not being a wife to the deceased, she was his dependant and had two children with him. She averred that she started getting payment before the death of the deceased and had received about Kes.60,000,000/- from the Respondent

18. She testified that the will provided for payment of Kes.10,000,000/—to her and her two children once they attained majority.

19. She further testified that the deceased had told the 2nd and 3rd Applicants that they would attend universities of their choice. The children turned 18 in 2021 and finished their A-level education in July 2022. It was her testimony that she was forced to file proceedings after the Respondent refused to pay for the education of the 2nd and 3rd Applicants in overseas universities. Moza averred that as the deceased had enrolled the 1st and 2nd Applicants in international schools with international curriculum it would only be fair and just if they completed their education overseas.

20. The second witness was 3rd Applicant. It was her case that she started school in Aga Khan Nursery, before proceeding to Aga Khan Academy and then to the Oshwal Academy, from where she completed her A-Level education. She graduated in June 2022 after sitting her exams.

21. She testified that she had selected Leicester University to study law but that she was unable to do so as the Respondent refused to pay for it.

22. When cross-examined, she testified that she had known her father for 10 years before he passed on. She conceded that her school fees had been paid with money received from the Respondent through her mother.

23. The Applicants' 4th witness was 2nd Applicant. It was his case that he finished A Levels in June 2022 and qualified to join university. He testified that the Respondent refused to avail funds for his university studies. It was his further case that he hadn't known about the will until October 2022. That notwithstanding the Respondent used to finance their school fees and expenses.

Evidence of the Respondent

24. Ms Mona Ketan Doshi, a partner in the firm of Anjarwalla & Khanna Advocates, was the 1st witness for the Respondent. She adopted the contents of her affidavits dated 6th March 2023 and 12th April 2023 as her evidence. It was her case that she prepared the original will on the instructions of the deceased. The will was dated 19th January 2013. She testified further that she was not present when the will was signed by the deceased.

25. When cross-examined, she stated that the execution page of the Will was not dated but that the execution page of the original Will in court was dated. She testified that when she was instructed to prepare the Will, she was informed that the 1st Applicant had two children who were to be listed as beneficiaries in the Will she was preparing.

26. Lastly, she testified that she gave the original will to the executor, the Respondent.

27. The Respondent's 2nd witness was one Emmanuel Karisa Kenga. Mr Kenga identified himself as being a forensic document examiner. It was his testimony that he received the documents from the Respondent's advocate to carry out forensic test on the signatures. Upon his analysis, he found that the signatures were similar and indistinguishable and were made by one and the same person.

28. He further testified that when carrying out document examination, the original document is ideal. In this case, he was given the original will. He examined the signature on the impugned original will against the deceased's known signatures.

29. The 3rd witness for the Respondent was Daniel Muchungu Gutu. Mr Gutu also identified himself as being a qualified forensic document examiner. That in his analysis, the signature on the will were made by the same person. It was his case that a photocopy was illegible and would be harder to examine but that an original document was direct and legible.

30. The 4th witness was Dr. Subhashchandra Manchand V Shah. It was his case that he witnessed the Deceased sign the will. He averred that Deceased was competent to sign the will and that he understood its contents.

31. On cross-examination, it was his case that he witnessed the deceased signing the will and that there were other witnesses to the said act.

32. The 5th witness was Samir Gulamabbas Baloo. Mr Baloo is an MCA of Tudor Ward in Mombasa County. It was his case that on 6th July 2013, he received a call from the Respondent. The Respondent instructed him to collect the will and to hand the same to the 1st Applicant, and he did so. He further testified that the 1st Applicant refused to sign the delivery book.

33. Abbas Ahmed Haji Mohamed was the 6th witness. It was his case that he knew where the 1st Applicant lived and had been sent to deliver an envelope from the Respondent. He testified that he did not know the contents of the envelope.

34. The seventh witness was Ramesh Dhanji Harji. It was his case that he saw the deceased sign the will. He conceded that he was named in the will as second executor should the Respondent be in any way unable to carry out his roles. It was his case that the deceased had two children with the 1st Applicant and two more children with one Bhanu, making a total of 4 children.

35. The 8th witness was Dr Mohammed Abdul Fazil. It was his case that he witnessed the signing of the will that the deceased was of sound mind and knew what he was doing at the time he executed the Will.

36. Hasmukh Kanji Premji Patel, the Respondent herein, was the 9th and last witness. He testified that he was the Chief Executive Officer of the Corrugated Group of Companies and that the deceased was his brother. He testified that he was appointed under the will as the executor.

37. Further, he testified that the deceased died on 1st May 2013, on Labour Day.

38. He also testified that the Deceased was married to Bhanuben,, with whom he had two children: Suraj Arvind Patel and Yashica Arvind Patel. He averred that the deceased signed the original will of free will without any coercion, and it was not true that the deceased had no capacity to sign the will.

39. He testified that the will made provisions to the 1st Applicant and her children and that he, as the executor thereof, followed it to the latter by giving her more than Kes.60,000,000/-, to be used for the maintenance of the 1st Applicant and her children as per the wishes of the deceased in his will.

40. It was his case that he was under obligation to pay the school for the children locally but that they had opted to go to schools in the United Kingdom.

41. He further testified that he had the obligation to buy a house for the Applicants whose value did not exceed Kes.6,000,000/- that but that she got a house for Kes.8,000,000/-, which sum exceeded the amount stated in the Will.

42. The Respondent reiterated that 1st Applicant knew about the will two months after the deceased died as he sent the will to her through Abbas and Samir.

43. When cross-examined by Mr Ngari for the Applicants, the Respondent testified that he provided for them from the funds he referred to as a “bounty.” He denied that the deceased had any assets at the time of his demise. Mr Patel stated that he did not seek the consent of Bhanuben, Siraj and Yashica before filing the Petition for the grant of probate of the will of the deceased.

The Applicants’ Submissions

44. The Applicants filed their submissions dated 14th February 2024.

45. It was submitted that the will was invalid. They relied on Banks vs Good Fellow 1870 LR 5QB 549 that the testator had no capacity as he had no understanding of the nature of the business he was engaged in.

46. They also relied on the case of In re Estate of Murimi Kennedy Njogu (Deceased) [2016]eKLR to submit that the four requirements for formation valid will as stated below were missing:

    a. Testamentary intent;

    b. Testamentary capacity;

    c. Free of fraud duress, undue influence or mistake; and

    d. Duly executed

47. Further, they submitted that the deceased could not have had the capacity and proceed to make bequests without stating the source of funds. Therefore, the deceased lacked testamentary capacity. Further reliance was placed on the case of Ngengi Muigai & Another vs Peter Nyoike Muigai & 4 Others [2018]e KLR.

48. It was further submitted that the will did not meet the requirements under Sections 8 to 16 of the *Law of Succession Act* as it was not signed.

49. The Applicants urged that there were contradicting expert reports on the forgery of the signature of the will and the court should give its independent finding and reasons thereof. They relied on the case of Iskorostinskaya Svetlana & Another s Gladys Naiserian Kaiyoni [2019]eKLR.

50. They submitted that the proceedings leading to the grant of probate were defective. It was urged that the letter from the chief was also fraudulently obtained. They relied on Section 76 of the *Law of Succession Act* and the case of James Kironyo Njoroge vs Ruth Waithira Ngugi [2022]eKLR to submit that proceedings were defective and for that reason should be set aside.

51. The Applicants further submitted that the Respondent intermeddled with the estate of his deceased brother and that he had not been candid when dealing his said brother's estate. They cited In re Estate of Daudi Owino Olaka [2022]eKLR.

52. I was urged to allow the Summons by revoking the grant and also by issuing the orders sought in the application.

Respondent's Submissions

53. The Respondent filed submissions dated 4th March 2024.

54. It was submitted that the power to revoke a grant under Section 76 of the *Law of Succession Act* is a discretionary one and exercisable only if there is any wrongdoing by the testator in the will. They relied on the case of In re Estate of Benjamin Kuregenyi Muiri [2022]eKLR.

55. The Respondent urged that there was no proof of forgery of the signature of the deceased as alleged. It was further submitted that the original copy of the will was superior evidence and the Applicants" copy would not be used to substitute a finding of fact in case of contradictions. Reliance was placed on the case of In re Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu [2016]eKLR.

56. It was further submitted that allegations of fraud must be pleaded and strictly proved, which was not done by the Applicants. Reliance was placed on the decision of the Court in Kinyanjui Kamau vs George Kamau Njoroge [2015]eKLR in support of the submission that it was not merely enough for the Applicants to infer fraud from the facts but the Respondent also failed to strictly and distinctly prove the allegations that the will was forged.

57. On the Deceased's mental capacity, it was the submission of the Respondent that there was no evidence of mental incapacity produced in court. They cited the case of In re Estate of Samuel Ngugi Mbugua-deceased [2017]eKLR.

58. Further, the Respondent submitted that the testator had testamentary capacity and that he appended his signature on the will in the presence of two witnesses as required under the law.

59. It was also submitted that the Applicants had not discharged the burden of proof as required by Section 109 of the *Evidence Act*.

60. It was urged that the alleged intermeddling did not go to the root of the validity of the will and could not be used to invalidate the will in this case.

61. On the chief's letter, it was submitted that the chief had no role in succession proceedings. They relied on the case of In re Estate of Mukhobi Namonya (Deceased) [2020]eKLR where the court stated as follows:-

> 2. Before I get into the substance of the matter before me, it is critical that I deal with the importance of the letter from the Chief. It is not a requirement of the law, for it is not provided for in the *Law of Succession Act*, Cap 160, Laws of Kenya, nor in the Probate and Administration Rules. It was a device resorted to by the court to assist it identify the persons who survived the deceased, for the court has no mechanism of ascertaining the persons by whom the deceased was survived save by relying on officers of the former provincial administration, who represent the national government at the grassroots and are in contact with the people, and therefore, the best suited to assist the court identify the genuine survivors of the deceased.
>
> 3. The Chief has no role in succession proceedings beyond what I have stated in paragraph 2. There is no role for the Chief to play in the distribution of the assets. He should simply give the court the names of the survivors, he has no duty of suggesting how the estate should be distributed. Distribution of an estate is the responsibility of the court, guided by the provisions of the *Law of Succession Act* and customary law, where the latter is applicable. A letter from the Chief, which does not identity the survivors of the deceased and just throws in names without identifying who those individuals were to the deceased, is of no utility to the probate court.

62. On the dating of the will, it was submitted that the lack of a date does not invalidate a will. They relied on Section 11 of the *Law of Succession Act* to submit that the only requirements were signature or mark and two or more witnesses.

63. The Respondent thus urged the Court to dismiss the Summons for Revocation of Grant.

The Applicable law

64. As fundamentally characterized in the works of Professor Lon L. Fuller, Consideration and Form, 41, Colum. Law Review, 799 (1941), the traditional function of wills formalities has remained the cautionary or ritual function, the protective function, the evidentiary function, and the channeling function.

65. Regarding the legal capacity to make wills, Section 5 of the *Law of Succession Act* provides that:-

> " 1. Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will and may thereby make any dispositions by reference to any secular or religious law he chooses.
>
> 2 ...
>
> 3. Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness or from any other cause, as not to know what he is doing.

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

66. On the free will of the testator, Section 7 of the *Law of Succession Act* further provides that a testator must exercise his free will in the distribution of his estate and that the absence of such free will invalidates a will. It provides-

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

67. On the formality and validity of wills, Section 11 of the *Law of Succession Act* which sets out the formal validity of 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 of 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 acknowledgment 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

68. On the other hand, regarding the revocation of Grants, the *Law of Succession Act* provides for revocation of grants under Section 76, which states as follows:

"

"76. Revocation or annulment of grant

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

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

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

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

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

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

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

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

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

Analysis and determination

69. I have perused the pleadings, evidence as well as the submissions and authorities filed by the parties in support and opposition to their respective cases.

70. The issues before me for determination are as follows:

a. Whether the will herein is invalid; and if so

b. Whether the Grant of Probate should be revoked.

71. The matters alleged by the Applicants are matters of evidence and the Applicants have the burden to prove the allegations they have raised in their Application and Affidavits.

72. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

73. In reiterating the applicability of the *Evidence Act* on the burden of proof, in Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:-

> "As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.".

74. It follows that the initial burden of proof lies on the Applicants in this case, but the same may shift to the Respondent, depending on the circumstances of the case. As was held in Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> "As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

75. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

76. Similarly, Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that:-

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability….."

77. Furthermore in Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties…are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."

78. I have perused the impugned will. The same appears to have been executed by the deceased and 2 witnesses. To that extent it appears to be in compliance with the law. In the circumstances the Applicants have the burden of proof to show on a balance of probability that the allegations that the deceased was of ill health that incapacitated his mind are true.

79. As far as the wills are concerned In Re Estate Of Gatuthu Njuguna (Deceased) [1998]eKLR the Court quoted an excerpt from Halsbury's Laws of England, 4th Edition vol 17 at page 903-904-

> " where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally

disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity."

80. As was held in the case of Lita Violet Shepard v Agnes Nyambura Munga [2018]eKLR where the Court of Appeal made the following pronouncement when faced with similar issues:

...In our understanding, a Will is just a legal tool or device for determining the fate of a deceased person's estate after his death. As with every instrument, the court must evaluate it in its natural environment, meaning that primarily the provisions of the law of succession were taken into consideration at the time it was made. It is when we place the Will in its proper context, that we will know how to ask the right questions and those questions will guide the answers we give in the event of a dispute. That is the starting point. Again to put the Will into a proper perspective, it is important to appreciate that the deceased had provided for the respondent during his liftetime and the legal wife after death. The sequence is a reflection of the natural environment of providing, for the heart (alleged customary wife) and mind (the legal wife) is the context and contours of what trial Judge was required to appreciate and determine. Unfortunately the maps and compass were not looked at by the trial court. The trial court was not required to look at the Will as a standalone piece of document without giving much or no attention to the circumstances of the whole dispute. The Will read together with the undisputed conduct of the deceased in first distributing portions of the property to the respondent, constitute a single project of harmonious and integral transaction, which provided for both sides of the coin – a reflection of what the deceased intended...

81. Therefore, in determining whether the impugned will is invalid, I have already stated the law herein above as to what amounts to the valid and invalid wills. I understand the Applicants to challenge the validity of the will on a number of reasons which in brief relate to the following:

a. The will was invalid;

b. The signature of the testator on the was forged;

c. The testator was unduly influenced in making the will;

d. The testator had no capacity to make the will and so did not know or approve the contents of the will;

e. The proceedings leading to probate were defective; and

f. The Respondent was guilty of intermeddling;

82. The Court of Appeal had this to say in Ngengi Muigai & Another vs Peter Nyoike Muigai & 4 Others In the matter of James Ngengi Muigai (Deceased) [2018] eKLR:-

" In the recent case of Rosemary B. Koinange (suing as legal representative of the late Dr. Wilfred Koinange and also in her own personal capacity) & 5 Others vs Isabella Wanjiku Karanja & 2 Others [2017] e KLR this court examined the issue of mental capacity (to make a will) and stated as follows:

"The essentials of testamentary capacity were laid out in the case of Banks vs Goodfellow [1870] LR5QB 549 as cited with approval in the Tanzanian Court of Appeal case of Vaghella V Vaghella [1999] EA 351 thus:

" A testator shall understand the nature of the act and its effects, shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the

claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made."

83. The Court of Appeal further stated:

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

84. It is a common ground that the deceased was unwell at the time he signed the will. In my view the kind of ill health that invalidates a will is that which affects and clouds the mind so that the testator does not know what he is doing. It could also be the kind of illness that makes him/her lose his free will.

85. The evidence adduced in this Court indicates that the testator signed the will in the presence of Dr. Subhashchandra Shah, Ramesh Dhanji Harji and Dr Mohamed Fazil. All these witnesses testified that the deceased had the clarity of mind and knew exactly what he was doing. The will complied with the law in so far as it was executed in the presence of 2 witnesses. I therefore hold and find that the will was properly witnessed. The witnesses are all independent.

86. Was the signature on the will that of the deceased? The Court heard 3 witnesses. The Applicants called Gilbert Tonui, while the Respondent called Emmanuel Karisa and Daniel Gutu. In his analysis, Tunoi used a copy of the will, while the two witnesses of the Respondent used the original copy of the will. Their findings were contradictory. However, in my view, the finding of the Respondent's witnesses has better probative value.

87. In totality, I understand that the value of expert evidence is technically persuasive and only considered together with the other available evidence and the circumstances of the case. As was held in Shah and Another vs Shah and Others [2003] 1 EA 290:-

> " The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

88. Further, the Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:-

> " … such 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 although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

89. Furthermore, in Parvin Singh Dhalay vs Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> " It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
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> "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."…"

90. Therefore, on my perusal of the evidence and testimonies of the experts, I have with particular detail directed my mind to the evidence of the expert documentary examiners who filed their forensic reports. As earlier observed, the experts were called both by the Applicants and the Respondent. In my view, I find weight and probative value in the evidence of the two expert witness called by the Respondent. Their analysis was based on the original copy of the will while the analysis of the expert witness called by the Applicants was based on the copy of the will.

91. This court also finds that the Applicant's allegations that the Testator was unduly influenced were not supported. There was no evidence of undue influence that would persuade this court to find for the Applicants that the deceased was unduly coerces, persuaded or influenced and so did not exercise his free will at the time of making his bequests. In re Estate of Catherine Nduku Malinda (Deceased) [2020] eKLR where the court stated as follows:

> I associate myself with the position in the case of John Wagura Ikiki & 7 others vs. Lee Gachigia Muthoga [2019] eKLR where the court expressed tself as follows:
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> "Having found that the will was valid, it therefore follows that the deceased had the freedom to dispose of all his earthly possessions as he deemed fit. It was within this very exercise of testamentary freedom that the deceased elected to leave out his sons, John Wagura and Joseph Ndungu Ikiki, and in the same breath, bequeathed the lion's share of his estate to his 3rd wife for reasons that were personal to himself. He was under no obligation to give any reasons for so doing. This is indeed the objective of testamentary freedom."

92. The concern of this court is to uphold the testamentary freedom of the testator if there are no vitiating factors to the will. I find and hold that testamentary capacity is noble and must be respected unless

sufficient evidence is led to impute one or more vitiating factors to the validity of the will known to the law.

93. I am fortified by the decision of the court in In re Estate of Samuel Ngugi Mbugua (Deceased) [2018] eKLR where the court stated as follows:

> In construing the contents of a will, the first principle is to discover the intention of the testatrix as clearly stated in the will as a whole. This was articulated by Lord Romer of the House of Lords in the case of Perrin v Morgan 1943 AC 399-420 where the court stated as follows:
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> " I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. To understand the language employed, the court is entitled to use a familiar expression, to sit in the testator's armchair. When sitted there however, the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said.

94. In addition, the court proceeded:

> " rules of construction should be regarded as a dictionary by which all parties including the court are bound, but the court should not have recourse to it to construe a word or phrase until it has ascertained from the language of the whole will read in the light of the circumstances whether or not the testator has indicated his intention of using the word or phrase otherwise than in its dictionary meaning. In other words, whether or not the testator has been in his own dictionary.
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> In Re Bailley 1951 Chancery 421 it was held inter alia that:
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> "the law requires the probate court not to speculate upon what paradventure may have been in the testator's mind. It is not the function of a court of construction to improve upon or perfect the testamentary dispositions. The function of the court is to give effect to the dispositions actually made as appearing expressly or by necessary implications from the language of the will applied to the surrounding circumstances of the case."

... These cases raise profound questions about the nature of family obligations, the relationship between family obligations and the state and the relationship between the freedom of property owners to dispose of their properties as they see fit.

In my considered view a will must be interpreted in a manner that gives effect to the intent of the testator. That means that the court may only rectify a will if it is satisfied on clear and convincing evidence that the will did not reflect the testator's intention in bequeathing his or her to the beneficiaries.

95. In the case of Sospeter Kimani Waithaka succession cause No. 341/1998, the court had this to say:

> " The will of the deceased must be honored as much as it is reasonably possible. Re-adjustments of the wishes of the dead by the living must be spared for only accentric and for only unlawfully harmful testators and weird wishes. But in the matters of normal preferences for certain beneficiaries or dependants, may be for their social goodness to the testator, the court should not freely intervene to alter them".

96. The same position was upheld in the case of Elizabeth Kamene NdoloVs George Matata Ndolo (1996) e KLR the court of Appeal had this to say:

> “ This court must, however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has unfettered testamentary freedom to dispose of his or her property by will or any manner he or she wishes. But like all freedoms to which all of us are entitled the freedom to dispose of property given by Section 5 must be exercised responsibly and a testator exercising that freedom must bear in mind that the engagement of the freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is especially recognized by Section 26 of the Act which provides as follows….”

97. The 1st Applicant denied knowledge of the will and testified that she became aware of the will shortly before she filed the Summons for revocation of the grant. I do not agree with the assertions of the 1st Applicant for the following reasons:

    a. There was credible evidence produced by Samir Gulamabbas Baloo and Abbas Ahmed Haji Mohamed that the 1st Applicant was given a copy of the will;

    b. The 1st Applicant, on her own admission, testified that she received payments from the Respondent that the Respondent was supposed to pay under the will;

    c. She requested the Respondent to purchase a house for her- an obligation that was uncontrovertibly derived from the will; and

    d. She instructed her advocate to peruse the court file and ascertain the validity of the will.

98. In my view, the Applicant opted to challenge the will about 10 years after becoming aware of its existence and having benefitted from it only when the Respondent withdrew the funding.

99. The testimony of the 1st Applicant was largely based on evasions and open attempts to conceal the truth from the court. It is such conduct on the part of a witness that Odunga J (as he then was), alluded to in the case of Kioko Peter vs Kisakwa Ndolo Kingóku [2019] eKLR while referring to the reasoning of Madan J, (as he then was) in the case of N vs N [1991] KLR 685. The Learned Judge lamented as follows:-

> “ Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs N [1991] KLR 685 when he expressed himself in the following terms:
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> “I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted.”

100. Further, I think the argument about the dating of the will does not go to the root of the validity of the will. On my perusal of the law, I find no basis to assert that the formality for dating a will is one of the

fundamental parameters the absence of which would invalidate a will. I also agree with the finding of the Court in Corbett v Newey (1996) 3 WLR 729 as follows:-

> The testatrix and the solicitor considered that her signature to the September will was ineffective as the will itself was not dated. Both f them though that it would become effective when the will was dated by the solicitor with the authority if the testatrix. In this, they were both wrong for it is common ground that the validity of a will does not depend on whether it is dated correctly or at all

101. As to the allegations of fraud and forgery as pertains procuring the intention of the deceased in drawing his will, fraud is a serious allegation that must be strictly proved. The need to prove and the burden of proof of such allegations of forgery, fraud, falsehood or dishonesty was elaborated by the court in Christopher Ndaru Kagina vs Esther Mbandi Kagina & Another [2016] eKLR where the court stated that:-

'It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In Belmont Finance Corporation Ltd. v. Williams Furniture Ltd [27] Buckley L.J. said:

"An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."

> In Armitage v Nurse [28] Millett L.J. having cited this passage continued:
>
> "In order to allege fraud it is not sufficient to sprinkle a pleading with words like "willfully" and "recklessly" (but not "fraudulently" or "dishonestly"). This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint."
>
> In Paragon Finance plc v D B Thakerar & Co the court stated that it is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. The burden is always on the claimant to prove fraud on the part of the Respondent. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. It all depends on the nature of the issue and its gravity. Evidence of especially high strength and quality is required to meet the civil standard of proof in fraud cases. It is more burdensome: (see also the cases of Mpungu & Sons Transporters Ltd –v- Attorney General & another. In Jennifer Nyambura Kamau v Humphrey Nandi, the Court of Appeal, Nyeri, emphasized that fraud must be proved as

a fact by evidence; and, more importantly, that the standard of proof is beyond a balance of probabilities.'

102. Based on the evidence produced by the experts called by the Respondent who applied the original version of the will, I have no reason to doubt their finding that the signatures on the will were made by the same person and who is the deceased herein.

103. As to the significant of the chief's letter as contented by the parties, I do no more that agree with the finding In re Estate of Mukhobi Namonya (Deceased) [2020] eKLR where the court stated as follows:-

2. Before I get into the substance of the matter before me, it is critical that I deal with the importance of the letter from the Chief. It is not a requirement of the law, for it is not provided for in the *Law of Succession Act*, Cap 160, Laws of Kenya, nor in the Probate and Administration Rules. It was a device resorted to by the court to assist it identify the persons who survived the deceased, for the court has no mechanism of ascertaining the persons by whom the deceased was survived save by relying on officers of the former provincial administration, who represent the national government at the grassroots and are in contact with the people, and therefore, the best suited to assist the court identify the genuine survivors of the deceased.

3. The Chief has no role in succession proceedings beyond what I have stated in paragraph 2. There is no role for the Chief to play in the distribution of the assets. He should simply give the court the names of the survivors, he has no duty of suggesting how the estate should be distributed. Distribution of an estate is the responsibility of the court, guided by the provisions of the *Law of Succession Act* and customary law, where the latter is applicable. A letter from the Chief, which does not identity the survivors of the deceased and just throws in names without identifying who those individuals were to the deceased, is of no utility to the probate court.

104. As to whether the grant of probate herein should be set aside or nullified on account of defect, I note the objection is predicated on Section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya and Rule 44 of the probate and Administration Rules, which provides that:

76. Revocation or annulment of grant

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

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

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

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

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

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

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

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

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

105. On the other hand, Rule 44 provides:

44. Revocation or annulment of grant

(1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.

(2) There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him—

(a) whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and

(b) the extent to which the estate of the deceased has been or is believed to have been administered or to remain un-administered, together with any other material information.

(3) The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any) shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service; and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice in Form 68, and every person so served may file an affidavit stating whether he supports or opposes the application and his grounds therefor.

(4) When the persons (if any) so directed to be served (or such of them as the applicant has been able to serve) have been served with a copy of the proceedings, the matter shall be placed before the High Court on notice by the court to the applicant and to every person so served, and the court may either proceed to determine the application or make such other order as it sees fit.

(5) Where the High Court requires that notice shall be given to any person of its intention of its own motion to revoke or annual a grant on any of the grounds set out in section 76 of the Act the notice shall be in Form 69 and shall be served on such persons as the court may direct.

106. I associate myself with the reasoning of the Court in In re Estate of Kimining Arap Kiboigut(Deceased) [2021] eKLR as follows: -

> under section 76, a court may revoke a grant based on the grounds listed above. The revocation may be on courts own motion or on the application of a party. Generally, there are three grounds upon which a grant may be revoked:
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> a. Where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he or she is a survivor when he/she is not, among other reasons. The above ground has been used by courts to revoke grant in a litany of cases including Mwathi v Mwathi & Another 1 EA 229, In the Matter of the Estate of Mwaura Mutungu alias Mwaura Gichingo Mbura alias Mwaura Mbura Nairobi High Court Succession Cause Number 935 of 2003 and Musa v Musa, 2002 1 EA 182.
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> b. Where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he or she fails to apply for confirmation of grant within the time allowed, or he or she fails to proceed diligently with administration, or fails to render accounts as and when required. For example, In the Matter of the Estate of Mohamed Musa, Mombasa High Court Succession Cause No.9 of 1997, the court revoked grant because the administrators had not kept any records of account of their administration.
>
> c. Where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his or her duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.

107. In my view, the Applicants have not satisfied the legal threshold for revoking the grant of probate herein. The submission by the Applicants that the Respondent failed to properly administer the estate do not go into the threshold to revoke the grant. In re Estate of Mukhobi Namonya (Deceased) [2020] eKLR the court stated as follows:-

> Under section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining the grant was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process

of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator died or loses the soundness of his mind or is adjudged bankrupt.

108. There is therefore no evidence of fraud, coercion or importunity that would make this court to revoke or annul the grant of probate. In the circumstances, I find and hold that the testator had testamentary capacity and the will expressed his wishes.

109. The foregoing notwithstanding, this court notes that the terms of the Will have not been fully implemented in respect of the following matters:-

a. Under paragraph 4 of the will, the executor was supposed to buy a house worthy Kes.6,000,000/- for use by the Applicants;

b. Under paragraph 6 of the Will, the executor was supposed to pay the Applicants Kes.10,000,000/- each upon the 2nd and 3rd Applicants attaining the age of 18;

c. Under paragraph 7 of the Will, the executor was to pay for the university education of the 2nd and 3rd Applicants in a local University

110. The Applicants prayed for reasonable provision for them. In view, payments stipulated in the Will, will go a long way in assisting the Applicants.

Disposition

111. Based on the foregoing, the orders that commend themselves to me are as follows:-

i. I find and hold that the Will of the deceased, dated 19th January 2013, is valid;

ii. I order the Respondent, in his capacity as the Executor of the Will of the deceased, to make the following payments to the Applicants:-

a. Kes.6,000,000/-, to the 1st Applicant for the purchase of a house for the Applicants, as stated in Paragraph 4 of the Will of the deceased;

b. Kes.10,000,000/- each, to the 1st, 2nd and 3rd Applicants, since the 2nd and 3rd Applicants have already attained the age of eighteen years, as stated in Paragraph 6 of the Will of the deceased;

c. The full cost of cost of the university education of the 2nd and 3rd Applicants in a local University. Provided that in the event that the 2nd and 3rd Applicants desire to study outside Kenya, the Respondent will only be required to settle that part of fees equivalent to what is payable in a reputable Kenyan private university. In that event, the 2nd and 3rd Applicants will pay the difference from their own resources.

iii. The amounts stated in (ii)(a) and (b) above must be paid within 45 days of the date hereof; and

iv. Having already received payments amounting to Kes.60,385,560/- as of 31st January 2023, under Paragraph 5 of the said Will, the net amount payable to the 1st Applicant, in respect of Kes.6,000,000/- under Paragraph 4 of the Will, and Kes.10,000,000/-, under Paragraph 6, shall be determined once the Advocates for the Applicants and the Respondent

reconcile the amounts actually paid against what was due according the Will. In the event of disagreement, the court will make a determination upon the application of any party or parties. Reconciliation is necessary so that the 1st Applicant is not unfairly enriched or unfairly deprived of her just dues.

112. The Family Court does not ordinarily award costs in succession matters. This is so because an award of costs does not promote reconciliation and healing. The foregoing notwithstanding, this Court notes that the 1st Applicant testified falsely about her knowledge of the will. She denied instructing the firm of Kiarie Kariuki & Co. Advocates to write the letter dated 29th October 2014 and or to investigate the authenticity of the Will, against the weight of the evidence adduced. Even when she was recalled, she persisted in giving evidence that she knew, or ought reasonably to have known, was not truthful. Judicial proceedings require candour on the part of the witnesses, and it is for that reason witnesses are sworn, or required to affirm, to tell the truth. In the circumstances, this Court must express its revulsion of the said conduct by ordering that she pays the Respondent's costs of the suit.

113. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 3RD DAY OF MAY 2024.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Ngari for the Applicants;

Ms Okata for the Respondent; and

Arthur – Court Assistant.