



**In re Estate of Joshua Mang’ati M’imathiu alias Joshua Mathio M’iberi (Deceased)
(Succession Cause 95 of 2016) [2024] KEHC 7576 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 95 OF 2016
EM MURIITHI, J
JUNE 20, 2024**

BETWEEN

HILDA MUKWANYAGA MATHIO M’IBERI PETITIONER

AND

JANET GAITI ARITHO 1ST OBJECTOR

GLORY NKATHA IMATHIU 2ND OBJECTOR

NEWTON MURITHI JOSHUA IMATHIU 3RD OBJECTOR

HENRY MUGAMBI IMATHIU 4TH OBJECTOR

CATHERINE KANYIRI IMATHIU 5TH OBJECTOR

PETER GATOBU IMATHIU 6TH OBJECTOR

AND

KENOL KOBIL PLC INTERESTED PARTY

AND

KIRIMI RINGERA PROPOSED INTERESTED PARTY

JUDGMENT

1. By its ruling of 18/5/2023, this court directed that;

“Accordingly, for the reasons set out above, the application dated 28/9/2022 is dismissed. The matter shall be expedited to conclusion of hearing and determination by oral evidence of the main dispute relating to the validity of the Will and application for provision for dependants.”



Statements

2. In his statement dated 18/8/2023, the proposed interested party stated that the deceased and him were equal joint owners and share holders in a company known as Isiolo Bomen Hotel Limited. He ran and managed the hotel business while the deceased derived a benefit therefrom by virtue of being a business partner. During his lifetime, the deceased introduced him to his grandson, Denis Miriti who was to take over the deceased shares in their joint business. It is within his knowledge that on 17/4/2015, the deceased made a written will and expressly gave all his shares in their joint business to Denis Miriti alias Miriti Kimathi. Denis became his business partner effectively taking over the deceased shares in the joint business. Subsequently, the said Denis expressed his willingness to surrender the shares bequeathed to him by the deceased to him for a consideration of Ksh. 30,500,000. Denis did so with the knowledge of all other family members who had no objection to the said arrangement which would later be reduced into a written agreement witnessed by two executors of the deceased's will. Denis Miriti has since confirmed that he has no further claims and/or interest in Bomen Hotel and by extension the deceased's estate has no claim thereon.

Oral Evidence

3. PW1 Lawrence Kiautha Arithi testified that, "I am an advocate of the High Court of Kenya having been admitted on 8/12/1988. I am a CEC in charge of legal affairs, public management and administration. At the material time I practiced as Kiautha & Arithi and Co. advocates at Meru. I am familiar with the estate of the deceased. I prepared the will dated 17/4/2015 for the deceased. I even have my file copy. I released two to the estate. The will contains his instructions on distribution of his estate. The will was done in accordance with the provisions of the *law of Succession Act* because:

- a. It was witnessed by two witnesses who were present when the testator affixed his signature
- b. He signed at page 5. He also signed every page and thumb printed every page (left thumb print)

When he appeared before me he was in good health. On 17/4/2015 as I was coming to court in the morning, the deceased called me and indicated that he wished to see me urgently. I gave him an appointment for 1.00 o'clock. We agreed that I go to his office at Gitimbine Kenol Petrol station. I went there at 1.00p.m. Worker showed me his office. I found him seated in the office eating fruits (pawpaw). We greeted one another. He took out an envelope which he told me contained contents of his will. I read it. The will had been drawn by Mithega & Kariuki and completely attested but in one of the pages the number of one of properties had been changed in blue biro. He told me that he made the correction to misdescription of the property. We went through the will with him item by item and we found it was ok except for the alteration he had made. I asked him to call Mr. Kariuki to come and alter to the alteration instead of re-doing the entire will. He told me he had tried in the 3 previous days to contact Mr. Kariuki in vain. So he called me. I agreed to re-do it again but in the present of witnesses. He told me the same witnesses will be available. I retyped the will. I proofread it and bound 3 copies – one of which I still keep. I took the 3 copies the same afternoon to his office as he had instructed. I found him relaxing reading a newspaper in his office. I took him through each paragraph of the will I drew. He confirmed every detail – that is the way he wanted it. I asked him to call the witnesses. The witnesses came. I identified them with their ID cards. These were: Julius Mputhia M'Mwirichia and James Ndumba M'Ambutu.



I asked him to sign the will. He signed at page 5. I also asked him to sign at the bottom and thumbprint (left thumb print) on all the pages. He did so. I asked the witnesses to sign page 5 of the will. They did so in the three copies. He signed in the present of each other. I signed, rubber stamped and dated each page in my own handwriting. He paid my fees and I gave him two copies. I retained 1 copy as was my practice when I draw documents. He paid Kshs. 10,000/= and left. I produce the will (Original will) as P Exh 1. All copies were signed in original. I later learned that there was a pull and push between Hilda, the deceased and some beneficiaries. He indicated his will was at Standard Chartered Bank, Kenyatta avenue Nairobi. The keys to safe room were given to Lawrence Kimathi who was living at Nairobi. The will I have produced is his will. I prepared on his instructions.”

4. On cross examination by counsel for counsel for the 1st, 5th and 6th objectors, he stated that, “I observed he was of sound mind. We talked for a long time and never occurred that he was of unsound mind. He died two weeks after the will. He was seated. I did not know whether he was ill. He did not inform me that he was unwell. He did not appear unwell. He has disposed some properties. We went through the document by Kariuki with him and he confirmed all the details. He has listed 8 bank accounts but with his actual numbers. He did not specify the amount in the bank. But at paragraph 24 he indicated the accounts in some fixed accounts. He told me clearly that I should only change the property that was not properly described. No specific list of beneficiaries but he made provision to specify beneficiaries. At paragraph 3 he created a trust on the shares. He gave clear instructions on what I should do. I did not ask why the trust.

(By counsel: A bank account with Kshs. 10,000,000/= was left out. Was it inadvertently). I do not want to speculate. The witnesses availed themselves in that afternoon. I came back and found them there.”

5. On cross examination by counsel for Lawrence and Kepha (beneficiaries), he stated that, “I confirmed he expressed his wishes. He was ok for purposes of the will. I went there two times. As long as dependants are provided for no requirement of listing the beneficiaries in a separate item.”
6. PW2 Julius Mputhia M’wirichaia testified that, “I come from Meru County, Buuri Each, Maitei location. I am self employed businessman. I knew the deceased since my childhood. I was 51 years old in 2015. I recognize my signature and ID number. I appended it in the will. I signed the sill after he requested me to attest his will. He convinced me his will was about his family matters. I signed on 17/4/2015. I signed in his office situated at Gitimbine petrol station. The deceased, a lawyer and another witness introduced to me by the deceased as Ndumba were present. I was there too. I did not know the content of the document which he told me concerned his family matters. This is the document I signed (witness identifies the will P Exh 2).”
7. On cross examination by counsel for the 1st, 5th and 6th objectors, he stated that, “I signed the will. The deceased signed first. This is the only document I signed for the deceased.”
8. PW3 James Ndumba testified that, “I come from Giteba village. I am a farmer. I knew the deceased. I signed this will. The sign is mine (He refers to P Exh 1) The deceased called me and asked me to sign the document. He told me should I be asked what I signed, I say that it was his wish. I did not know the contents of the will. I have never signed for him any documents. He did not tell me the contents of this document. I signed it in his office at his office at Gitimbine petrol station. I was with the deceased, advocate Arithi and Mputhia. This is his document i.e. the deceased.”
9. PW4 Hilda Mukwanyaga Iberi testified that, “I come from Meru, Milimani where I work. I am the petitioner. I have brought the will for confirmation by the court. It took me long to discover the will. I



discovered it when the court gave us an order to get documents from Standard Chartered Bank. I saw the will then. I wish the estate to be distributed as per his will. The will are his wishes. I am the widow of the deceased. I was married in 1979. We have 3 children with him. 1 is deceased. The executors are Hilda Mukwanyaga, Peter Gitobu, Lawrence Kimathi and Miriti Kimathi. This is per the will.”

10. On cross examination by counsel for the 1st, 5th and 6th objectors, she stated that, “I discovered the will after orders were issued by this court. I was living with him before his death. Kephah was working with the deceased. Silvia Kemunto was my house-girl. There was no other relationship. I met the first wife here in court. They were divorced in 1975. I learned of the divorce when I was courting. He had told me about her. I saw the divorce certificate. He had other children. I took care of them. Peter Gatobu, Glory Nkatha, Lawrence Kimathi, Catherine Kanyiri and Newton Murithi. I was not aware of Henry Mugambi being his son. I never lived with Henry Mugambi. I lived with all the others and I knew him. Henry was not introduced to me. I cannot remember where I was on 17/4/2015.

(By counsel: Paragraph 2 (a) of the will authorizes you to administer Bank accounts). Standard Manager were called in court and explained these accounts.

(By counsel: Refer to paragraph 24 of the will the wish of the deceased was to be shared equally to persons named) Kephah and Silvia Kemunto were given 2-5 million. Henry Mugambi was not named. He is not even named as grandchildren.

(Referred to paragraph 19 of the will by counsel): That is joint account and such property cannot be shared under the law. Naari 233 & 847 are indicated. But we bought No. 847 with him. It was 2 acres. He shared 233 to Lawrence and I during his lifetime. Each to date was his/her respective part of the land.

(By counsel: Lawrence, and his children named Kephah and Miriti Kimathi benefitted the most in the will). 8 acres goes to Lawrence in paragraph 10. Paragraph 4 gives property to Miriti Kimathi. I learned Miriti sold it for Kshs. 30 million. I am not aware what was sold. I was not told they were selling anything. I am not sure the hotel was sold. The sale was after the death of the deceased. They have sold many other things without my knowledge. Miriti should not keep the 50% of the hotel. The hotel is where Miriti has 50% share. Not the land because the land is jointly owned. The property should go to myself and the children i.e. (Isiolo Hotel called Bomen Hotel). The land is owned in common in equal shares between Kirimi Ringera and the deceased. Miriti also got archers post at paragraph of the will. Kephah gets at paragraph 8. Former plot not developed. Latter plot is developed. Lawrence Kimathi and Karwitha at paragraph 13 are provided for. On this land rest hardware and supermarket. There are rental earners property. See also paragraph 2 on Lawrence. And paragraph 23, 24 also provides for Kimathi. Kenol petrol station is in paragraph 24. Family of Kimathi was favoured. Glory lives at Milimani and so Kephah. Glory was outside the country. She came after the death of the deceased. The deceased was of sound mind when he made the will.”

11. On cross examination by counsel for the interested party, she stated that, “The deceased was of sound mind when he made the will. At paragraph 4 no explanation on hotel and land. But I am lay.”
12. On cross examination by counsel for the beneficiaries, she stated that, “The will was his wish. I agree with it entirely. Lawrence has always lived in No. 233. He was assisting the deceased in his lifetime. Only children named are the children of the deceased. He provided his children in accordance with his wishes. He only left to me what I owned.”
13. On re-examination, she stated that, “Property at paragraph 12 is mine. I have a title in my name.”



14. AW1 Kirimi Ringera, a businessman and a resident of Isiolo County adopted his statement of 18/8/23 filed 25/8/2023 as his evidence in chief. The documents attached to affidavit is support of the application dated 24/11/22 were produced in photographs without objection by counsel for the Respondents and marked AW Ex 1, 2, and 3 (c) and (b) as marked in the affidavit.
15. On cross examination by counsel for the petitioner, he stated that, “Bomen Hotel Ltd. Deceased and I were share-holders. Bomen Hotel Ltd is not the registered proprietor of plot LR 7918/564, the land on which it stands. The owners of the land are my uncle Joshua Imathiu and I. Transfer of shares in Bomen is not the same as transfer of the land. Isiolo Bomen Hotel is a separate company.

Deceased’s will

I was not present when the will was made. It was the year 2015 when my uncle fell sic. He told me he had made a will. It was after he had written the will. This was after 12/4/2015. Exhibit 1 “KR1” on Affidavit Registrar of companies from C R 12. I confirm that as 26/1/222 Joshua Mathiu was registered a shareholder of Isiolo Bomen Hotel Ltd. Transfer of shares Paragraph 13 of supporting affidavit. It is true I paid the money for Dennis Miriti from his shares bequeathed under the will. This was in 2016. Did you confirm that Dennis Mwititi had any other or was a registered shareholder? Yes, he has shares. The deceased gave 50% of his shares in Bomen Hotel and also the plot of land on which it stands. I relied on the will. Were any charges ever made in the company Registry office? I have not seen any charges in the company registry. Agreement dated 18/2/2016 Ex 3 (b) –(KR 3 (b) in Affidavit). It is dated 18/2/2016 At this point Dennis Miriti was not a registered share holder of Bomen Hotel Ltd.”

16. On cross examination by counsel for the 1st, 5th and 6th objectors, he stated that, “Joshua died on 1/5/2015. He died in Nanyuki Cottages Hospital. He was admitted on 28/4/2015. It was I who took him there. He was taken by his daughter Catherine and son Muriithi and I. I drove him in my car to Nanyuki hospital cottage. It was 28/4/2015. On 27/4/2015, I had seen him and I advised that he was not in good shape and he should go to hospital. I was very close to him because he was my uncle. He was my maternal uncle. Joshua was the last son of my grandmother. Joshua lived with me and my mother, his sister. Joshua gave me his will. It is dated 17/4/2015.

On 27/4/2015, I was with Joshua and he was admitted 28/4/2015. He died on 1/5/2015 at Nanyuki Cottage. From the 17/4/2015 of the will, he died about 13 days. He had complications of cancer and renal He had been on treatment for a long time. He has at one time been at Nairobi Hospital before Nanyuki Cottage. Bomen Hotel Ltd. The official name is Isiolo Bomen Hotel Limited. The company was running a hotel business. The hotel is constructed on land in Isiolo LR. 7918/564. The limited liability company the deceased and I had had 50:50 shares. In the business of the Hotel, we were also running on 50:50 shares. The land LR 7918/564 belonged to the deceased and I as interest in common holding equal shares. There are three aspects of the business, the land, the company and the Hotel business we were equal share-holders also in the building on the land.

Joshua said he wanted to transfer his shares in the joint business to Dennis Miriti. He has a statement at the time. Joshua introduced me to Dennis as the person who would take the share in the joint business. I was not familiar with Dennis at the time. His father, my cousin is same that I knew. His father is the 1st born son of Joshua with his wife Janet (1st objector). The father of Dennis Miriti, Lawrence Kimathi is my cousin. After the introduction Dennis became my business partner. Joshua said he did not want family members to fight over the Hotel business and his land. Deceased did not call any meeting of the family. If he did I am not aware of it. Joshua did not sign any document other than the will transferring the property and shares in the Hotel business and company to Dennis. The deceased did not sign any transfer of land on 7918/564 to Dennis. I did not see any but he had verbally said it. If he did, I would



have expected him to give it direct to me. He gave me his will. I read the will particularly the part which concerns me. The will was not sealed. He gave me because he did not want there to be quarrels and he had deposited one of the will at Standard Bank. Will dated 17/4/2015 PExh No 1.

Paragraph 2 – I appoint and expressly directing that my said executrixes shall not be requires Probate master. I was aware that the will should be proved in court. You proceeded to take over Joshua’s Company even knowing that the will was to be subjected to proof in court? for 3 will for the Hotel, land and business. I have been running the business on my own. I seek the court to transfer the land, and Hotel business to me.

[Paragraph 3 –distribution of the estate.

He is directing for documents to be done after his death. Item No.4 Bomet Hotel Isiolo – “my 50% share to go Miriti Kimathi”. Name of the company is not “Bomen Hotel Isiolo” The name is Isiolo Bomen Hotel limited. There is no reference to Isiolo Bomen Hotel Ltd. There is also no mention of LR. 7918/564. Joshua deceased of course knew about the hotel and the land.

We bought the land in 1981 from Jedial. We bought the land together.

Q. It is not the only land that you owned 50:50? There is no other.

Search: Ex AW Ex1CR 12 Company registry extract. Isiolo Bomen Hotel Ltd.

Reproduce office of the Company P.O Box 67 Isiolo Building 7918/120

The property we bought from Jediel Mupungu is LR. 7918/564. The holding is for 99 years from 1.1.1971. The Survey deed plan is given as 158742.

It is shown on the front page of the title. It is 158742. The parcel is -0.11672 ha. [Witness is shown copy of Grant LR. 7918/120]. The land survey plan No. is 91569 and the acreage is 0.0465 ha. In the will item No. 4. It does not refer LR. 7918/120.

[It is just to the witness that if the will was drawn by Joshua, he left details that he should have known] The details of the land where the hotel stands was not give? No. He said the hotel business as Bomen Hotel Isiolo? I do not agree that Isiolo Bomen Hotel Ltd 50% is not part of the estate. Yes, it is part of this estate. The court has power to say what happens to the part of the hotel business 50% owed by the deceased. I did not make a mistake in dealing with the deceased’s share of the Isiolo Bomen Hotel business and land. Valuation is by a valuer. He valued everything. It is a land valuer.

[There was no mention of the monies that hotel has made over the years in the report? and assets of the hotel other than the land; and the balance sheets over the years?] There is value for the plot and the Hotel. We jointly owned the movables in the hotel. Report AWEx “KR2” to the Affidavit of the Applicant. The report is not by any condition. There is no valuation of the movable? He may have made a mistake. I do not Auditors report.

[It is put that 50% of the money made by hotel belong to the Estate] I do not agree. I have a copy of the will. He gave me the will before he died. It is dated 17/4/2015. He gave me before I took him to hospital. I was at the hotel, Meru, Meru Slopes Hotel that he gave me the will. I can’t remember the date. We were only the 2 of us. Around March 2015 he called me to say that he has been diagnosed with cancer which had spread to the parts of the body. He knew he was not going to live long. He told me verbally that the Hotel, the shares and the land should go to Miriti.

Why did he give you a copy of the will? He said he would leave one will at Standard Bank. He said he would give me another one if anything happened to the one in the bank. I agree with the will produced by Petitioner. The will that I have is the one that was at the Bank. Isiolo Bomen Hotel Ltd and Bomen Hotel Isiolo are not different hotels. You bought the 50% shares when the court had not certified the



Grant. I had no reason to doubt because I had the will. Apart from the shares in the hotel, I had no doubt as to the sharing of the other assets. He had told me verbally.”

17. On re-examination, he stated that, “Joshua told me the share I should give to Dennis before he made the will. Bomen Hotel is built on land. I understood that deceased wanted the Hotel business, land and the company. Valuation at P. 6g Report plot is valued separately and the improvements. The Hotel and land were valued as a whole. When the deceased talked to me, he was okay. He even wrote a cheque for his daughter as I took him to hospital, since 2016, when we started running the business with Dennis there has not been any complaint about it. The deceased did not take day to day operations of the hotel. I was not involved in the petition of succession of the deceased. CR12 Registration Certificate. The Director by name Joshua Mathiu M’Iberi is the same person who is shown as the Secretary. There was only 2 directions. Business registration certificate 7918/120 and 7918/564. The certificate show plot 7918/120 when bought the plot 7918/120 it was small and we asked to obtain an adjacent plot and we were asked to surrender the first lease and we obtained the new number as 564.

Court

Copy of title of plot 564 to be produced as Exhibit with leave for Respondents to file submission on it in the final submissions.

Exh No. 3 (b)

Letter by Dennis Miriti supported his share in the Estate on 19/2/2016. The succession case was filed on 7/6/2016. Upon giving him his share, There was no other claim for any one, The property is not subject to distribution.

Sharing of finances

When in business, I used to give profit to the deceased. Since the filing of the Succession there was no claim for profits except a letter by Catherine which I approved. Why were you in a hurry to give 30.8 million to Dennis? What was the Urgency. I was honest, property was valued at 61 million. It was obligation to give 30.5. He has a statement and he could not actively participate in this business. He was staying in Uganda. Valuation by Land Valuer Report is signed by 2 people. Land valuer and Land examiner.”

Submissions

18. The petitioner urges that the deceased was ill during the period of making the impugned will and some of the properties included thereon do not form part of the estate as they belong to her. She urges that the inclusion of those properties in the will raises doubt whether the testator clearly understood his actions. She urges that being a joint owner of Meru Township Block 1/306, Nairobi/4894/34 Garden Estate and Standard Bank account number 0151263129900, the same automatically passed to her under the doctrine of survivorship. She urges that the purported sale of 50% of shares of Bomen Hotel by an intended beneficiary to the proposed interested party is illegal and it offends section 79 of the [Law of Succession Act](#), as it was done without a court order and/or the involvement of all beneficiaries and the executors, and cites *Virginia Mwari Thurania v Purity Nkirote Thurania* [2017]eKLR. She urges that the burden to prove the deceased mental incapacity before the date of the making the will is on the objectors.
19. The 1st, 5th and 6th objectors urge that the burden of proof lies squarely on the petitioner to prove the authenticity of the will, and cite *Kipkebe Limited v Peterson Ondieki* [2016] eKLR. They urge that the will was not attested to as required under the law and cite *Re Estate of GKK (deceased)* [2013]



eKLR. They submit that the fate of the tower of babylon should befall the will and urge the court to find the will as invalid and direct the estate to be dealt with under the law applicable to intestacy.

20. Beneficiaries Kepha Kimathi Muthuiya, Lawrence Kimathi, Silvia Kemunto and Fridah Kendi urge that the evidence of PW1, PW2 and PW3 clearly shows that the will is valid and a true expression of the wishes of the deceased.
21. The proposed interested party urges that the petitioner's move to seek invalidation of the will on the basis that the deceased lacked capacity as he bequeathed properties that were incapable of passing under the will is unfounded and cites *Re Estate of Wilfred Koinange Gathiomi (Deceased)* [2020] eKLR where the court held that, "A valid will cannot fail on the basis merely that it includes amongst others, property not forming part of the deceased's free property." He urges that the fact that the testator was unwell at the time of making and executing the will is not sufficient to prove mental incapacity and cites *Banks v Goodfellow* [1870] L.R. 5 O.B 549 and *In the Estate of Syevrose Mukulu Machakos HCSC No. 198 of 2005*. He urges that Isiolo Bomen Hotel should be excluded from the assets that form part of the deceased's estate, as the two executors of the will witnessed the execution of the agreement between him and Miriti Kimathi.

Analysis and determination

22. The issue for determination is whether the will dated 17/4/2015 is valid.
23. The onus of proving testamentary incapacity rests on the person alleging that the testator lacked such capacity. In our case, the burden of proof is on the petitioner, the 1st, 5th and 6th objectors.
24. Section 5 of the *Law of Succession Act* provides for persons capable of making wills and freedom of testation as follows:
 - (1) Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses. (2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person. (3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing. (4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges."
25. Section 11 of the *Law of Succession Act* provides that;

"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.”

26. In Re Estate of GKK (deceased) [2013] eKLR, cited by the 1st, 5th and 6th objectors in their submissions, the court (Isaac Lenaola J as he then was) held that;

“From a clear reading of Section 11(c) of the Act, to be present at signing means that the witness must be capable of seeing the testator sign the Will and thereafter attest to that fact. The witnessing is to the signature of the testator and cannot be anything else. In Re Colling [1972] 1 WLR 1440, it was held that if a witness left the room before the testator completed his signature, the attestation will also be invalid. I agree and in my view, the attestation of a Will validates the testator’s signature and in this case, the witnesses allegedly saw the deceased sign one page of a document and they also signed one page of the same document. I have seen the Will which has been produced as evidence in this Court, and each of the 18 pages bears the signature of the testator but the witnesses signatures appear on the jurat page which is page 12 thereof.”

27. The petitioner, the 1st, 5th and 6th objectors contend that the will is invalid while Kirimi Ringera, the intended interested party, Kepha Kimathi Muthuiya, Lawrence Kimathi, Silvia Kemunto and Fridah Kendi maintain that the will is valid and a true reflection of the wishes of the deceased.

28. The will herein was attested by James Ndumba M’Ambutu and Julius Mputhia M’Mwirichia., who testified as PW3 and PW2 respectively.

29. PW2 testified that, “...I knew the deceased since my childhood. I was 51 years old in 2015. I recognize my signature and ID number. I appended it in the will. I signed the sill after he requested me to attest his will. He convinced me his will was about his family matters. I signed on 17/4/2015. I signed in his office situated at Gitimbine petrol station. The deceased, a lawyer and another witness introduced to me by the deceased as Ndumba were present. I was there too. I did not know the content of the document which he told me concerned his family matters. This is the document I signed (witness identifies the will P Exh 2).”

30. That evidence was corroborated by PW3 and PW1 who confirmed that they were indeed with the testator and PW2 at the testator’s office situated at Gitimbine petrol station. PW3 testified that, “...I knew the deceased. I signed this will. The sign is mine (He refers to P Exh 1) The deceased called me and asked me to sign the document. He told me should I be asked what I signed, I say that it was his wish. I did not know the contents of the will...I signed it in his office at his office at Gitimbine petrol station. I was with the deceased, advocate Arithi and Mputhia. This is his document i.e. the deceased.”

31. PW1 testified that, “I am an advocate of the High Court of Kenya having been admitted on 8/12/1988...I am familiar with the estate of the deceased. I prepared the will dated 17/4/2015 for the deceased...The will contains his instructions on distribution of his estate. The will was done in accordance with the provisions of the [law of Succession Act](#) because:

- a. It was witnessed by two witnesses who were present when the testator affixed his signature
- b. He signed at page 5. He also signed every page and thumb printed every page (left thumb print)

On 17/4/2015 as I was coming to court in the morning, the deceased called me and indicated that he wished to see me urgently...We agreed that I go to his office at Gitimbine Kenol Petrol



station. I went there at 1.00p.m...We greeted one another. He took out an envelope which he told me contained contents of his will. I read it. The will had been drawn by Mithega & Kariuki and completely attested but in one of the pages the number of one of properties had been changed in blue biro. He told me that he made the correction to misdescription of the property. We went through the will with him item by item and we found it was ok except for the alteration he had made. I asked him to call Mr. Kariuki to come and alter to the alteration instead of re-doing the entire will. He told me he had tried in the 3 previous days to contact Mr. Kariuki in vain. So he called me. I agreed to re-do it again but in the present of witnesses. He told me the same witnesses will be available. I retyped the will. I proofread it and bound 3 copies – one of which I still keep. I took the 3 copies the same afternoon to his office as he had instructed. I found him relaxing reading a newspaper in his office. I took him through each paragraph of the will I drew. He confirmed every detail – that is the way he wanted it. I asked him to call the witnesses. The witnesses came. I identified them with their ID cards. These were: Julius Mputhia M’Mwirichia and James Ndumba M’Ambutu. I asked him to sign the will. He signed at page 5. I also asked him to sign at the bottom and thumbprint (left thumb print) on all the pages. He did so. I asked the witnesses to sign page 5 of the will. They did so in the three copies. He signed in the present of each other. I signed, rubber stamped and dated each page in my own handwriting. He paid my fees and I gave him two copies. I retained 1 copy as was my practice when I draw documents. He paid Kshs. 10,000/= and left. I produce the will (Original will) as P Exh 1. All copies were signed in original.”

32. On cross examination by counsel for counsel for the 1st, 5th and 6th objectors, he stated that, “I observed he was of sound mind. We talked for a long time and never occurred that he was of unsound mind. He died two weeks after the will. He was seated. I did not know whether he was ill. He did not inform me that he was unwell. He did not appear unwell. He has disposed some properties. We went through the document by Kariuki with him and he confirmed all the details. He has listed 8 bank accounts but with his actual numbers. He did not specify the amount in the bank. But at paragraph 24 he indicated the accounts in some fixed accounts. He told me clearly that I should only change the property that was not properly described. No specific list of beneficiaries but he made provision to specify beneficiaries. At paragraph 3 he created a trust on the shares. He gave clear instructions on what I should do. I did not ask why the trust...The witnesses availed themselves in that afternoon. I came back and found them there.”
33. The petitioner testified as PW4 as follows, “...I have brought the will for confirmation by the court...I wish the estate to be distributed as per his will. The will are his wishes. I am the widow of the deceased... The executors are Hilda Mukwanyaga, Peter Gitobu, Lawrence Kimathi and Miriti Kimathi. This is per the will.”
34. On cross examination by counsel for the 1st, 5th and 6th objectors, she stated that, “I discovered the will after orders were issued by this court. I was living with him before his death. Kephara was working with the deceased...He had other children. I took care of them. Peter Gatobu, Glory Nkatha, Lawrence Kimathi, Catherine Kanyiri and Newton Murithi. I was not aware of Henry Mugambi being his son. I never lived with Henry Mugambi...The deceased was of sound mind when he made the will.”
35. On cross examination by counsel for the beneficiaries, she stated that, “The will was his wish. I agree with it entirely. Lawrence has always lived in No. 233. He was assisting the deceased in his lifetime. Only children named are the children of the deceased. He provided his children in accordance with his wishes. He only left to me what I owned.”
36. From the totality of the evidence adduced by PW1, PW2, PW3 and PW4, and in the absence of any evidence that the alleged illness of the deceased affected his mental capacity, the court finds that the



- deceased possessed the requisite testamentary capacity when he made the will herein. The court further finds that the will herein is valid as it was attested by 2 independent witnesses, PW2 and PW3.
37. Having validated the will, it therefore follows that the bequests made therein are legal inclusive of the deceased shares of Bomen Hotel. The proposed interested party contends that, after his acquisition of the deceased 50% shares of Bomen Hotel in accordance with the will, Miriti Kimathi subsequently sold them to him making him the sole owner of the hotel.
 38. This court finds that the sale of 50% shares of Bomen Hotel to the proposed interested party by a beneficiary so entitled under a valid will is for all intents and purposes lawful and legal.
 39. The petitioner was categorical that the land where Bomen hotel is situate is owned in common by the deceased and the proposed interested party. She stated that, “The hotel is where Miriti has 50% share. Not the land because the land is jointly owned. The property should go to myself and the children i.e. (Isiolo Hotel called Bomen Hotel). The land is owned in common in equal shares between Kirimi Ringera and the deceased.”
 40. That evidence was buttressed by the proposed interested party, who affirmed that L.R No. 7918/564 where the hotel sits is owned by him and the deceased and the transfer was only for the shares and not the land itself. He stated that, “Bomen Hotel Ltd is not the registered proprietor of plot LR 7918/564, the land on which it stands. The owners of the land are my uncle Joshua Imathiu and I. Transfer of shares in Bomen is not the same as transfer of the land... The land LR 7918/564 belonged to the deceased and I as interest in common holding equal shares.”
 41. This court finds that the deceased half share of L.R No. 7918/564, where Bomen Hotel is situated is available to his beneficiaries for distribution.
 42. The contention by the petitioner that the will ought to be invalidated as the testator included some properties which solely belong to her falls by the wayside. In the words of the court (C. Meoli J) in *Re Estate of Wilfred Koinange Gathiomi (Deceased) (2020) eKLR*, the inclusion of properties which do not form part of the estate cannot in itself invalidate a will.

Orders

43. For the reasons set out above, this court finds that the Will dated 17/4/2015 met the threshold under section 11 of the *Law of Succession Act*, and is therefore declared as valid.
44. The court indeed notes that the certificates of lease for Meru Town Block 1/42 and L.R No. 4894/34 Garden Estate are registered jointly in the name of the petitioner and the deceased, and therefore, pursuant to *jus accrescendi*, the doctrine of survivorship, the same wholly pass to the petitioner.
45. The distribution of the estate remains as done in terms of the will, save for exceptions made hereinabove.
46. Any other properties which have not been included in the will shall be dealt with in accordance with intestacy laws.
47. Liberty to apply for any beneficiary.

Order accordingly.

DATED AND DELIVERED ON THIS 20TH DAY OF JUNE 2024.

EDWARD M. MURIITHI

JUDGE



Appearances:

Mr. Ingutya for Objectors 1, 5 and 6.

Mr. Mwirigi for Objectors 2, 3 and 4.

Ms. Kiruai for Mr. Mboga for Beneficiaries Lose Kimathi, Silvia Karwira, Frida Karati, and Kimathi Kepha.

Mr. Mwanzia for Ms. Rimita for Beneficiaries Lawrence and Kepha.

Mr. Ashaba for Interested Parties.

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