



REPUBLIC OF KENYA



**In re Estate of David Patrick Mitchell (Deceased) (Succession Cause
2 of 2020) [2024] KEHC 8857 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 2 OF 2020
JN ONYIEGO, J
JULY 24, 2024
IN THE MATTER OF THE ESTATE OF THE
LATE DAVID PATRICK MITCHELL (DECEASED)**

JUDGMENT

1. The deceased in respect of whose estate these proceedings relate died in Marbella Malaga hospital in Spain on 23-9-2019 while domiciled in Kenya. Brief background regarding his life preceding his death is that; he got married to one Rosa Maria Mitchell on 11-08-1973. That their marriage was blessed with three children namely; Nicole Lovece Mitchell, Erica Mitchell and Gayle Mitchell (hereafter the objectors). The said marriage was dissolved sometime in May 1989 and Maria Rosa moved out with their three children.
2. Subsequently, the deceased married one Simona Longoni on 11-09-1990 with whom they were blessed with a son known as Thomas David. Having battled with a heart condition and cancer, the deceased lost the battle on 23-09-2019.
3. Consequently, Tushar Ramniklal Thakershi pujara (hereinafter the petitioner/executor) petitioned this court on 17-01-20 seeking a grant of probate of written will in respect of the estate of the deceased. According to the petition, the deceased was survived by a widow known as Simona Longoni Mitchell and a son by the name of Thomas David Mitchell.
4. He went further to list assets belonging to the estate as follows;
 1. Plot no. A152 on L.R.No.24880-Vipingo ridge.
 2. Plot No. A 108 on L.R No.24880 - Vipingo ridge
 3. Shares in Vipingo Ridge Limited
 4. Shares in Vipingo Ridge Beach Properties Limited
 5. Shares in Sunsail Trading Company Limited.
 6. One share in Vipingo Ridge Development Limited



7. Motor Vehicle (Land Cruiser) Registration Number KAT 500V
 8. Motor Vehicle Registration Number KAY 558B
 9. Funds (Kenya Shillings) in Diamond Trust Bank Limited (Mtwapa Branch)- Savings Account Number 5205685001
 10. Funds (Kenya Shillings) in Diamond Trust Bank Limited (Mtwapa Branch)- Current Account Number 0205685001
 11. Funds (United States Dollars) in Diamond Trust Bank Limited (Mtwapa Branch)- Current Account Number 5205685002
 12. Funds (Kenya Shillings) in Diamond Trust Bank Limited (Mtwapa Branch)- FDR Account Reference Number 042FDLC180570001
 13. Funds (Kenya Shillings) in NCBA Bank Kenya PLC(Nyali Branch)- Account Number 10xxxx9464
 14. Funds (United States Dollars) in NCBA Bank Kenya PLC(Nyali Branch)- Account Number 10xxxx108
 15. Funds in Imperial Bank Limited (In Receivership)- Savings Account Number 72xxxxx2828
 16. Funds in Imperial Bank Limited (In Receivership)- Fixed Deposit Account Number 002DEPxxxxxx0012
5. According to the petitioner, the deceased did execute a will dated 25-04-2019 appointing him as the executor and trustee of his estate. That the will stipulated that in the event of the executor's death, Saleem Ghalia advocate to step into his shoes as the trustee. At paragraph 4 of the will, the deceased bequeathed to his wife Simona Longoni his entire estate real or personal within Kenya or otherwise subject to payment of all his debts together with funeral or testamentary expenses. The deceased further stated that in the event of his wife' death, the estate be held in trust for his son David Thomas Mitchell.
 6. In response to the petition, Erica Mitchell a daughter to the deceased with authority from her two siblings Nicole Lovece and Gayle Mitchell being daughters of the first wife(divorced) filed answer to petition for a grant following an objection to the petition application lodged on 14-04-20. The answer to petition raised three grounds for objection to the petition for a grant as follows;
 - a. That at the time of execution of the will referred to herein, the deceased did not have necessary capacity arising from his grave illness.
 - b. That the deceased was under coercion and or under undue influence and thus lacking the necessary free agency
 - c. That the objectors, who are daughters of the deceased, were not provided for in the will.
 7. Contemporaneously filed with the answer to petition, is an affidavit in support of the petition for cross petition-application for a grant sworn by Eric Mitchell on her own behalf and that of her aforesaid siblings on 1-06-2020. She averred that at the time her father purportedly executed the will in question, he had no mental capacity to do so due to mental illness occasioned by poor health out of lungs cancer. She deposed that when she visited her late father and Simona in Scotland in December 2018, she noticed that her father's health was deteriorating rapidly. She stated that sometime on 07-03-2019, her father disclosed to her that he was suffering from lungs cancer and was undergoing chemotherapy.



8. According to her, her father had no mental capacity to execute a will by 25-04-2019. That Simona had disclosed to her that the cancer sickness had affected her father's brain. It was her averment that despite their father's death on 23-09-2019, Simona came to disclose to them on 01-10-2019 long after the body had been cremated.
9. She further averred that their stepmother had consistently excluded them from their father's life and affairs thereby surrounding herself with her relatives who manipulated their dad. It was her position that Simona must have influenced their father to have the will drawn in April 2019 thereby excluding all the children except her son and herself.
10. She lamented that they were never invited to their father's wedding with Simona an indication that Simona did not want them to benefit anything from their father. She averred that while a live, her father used to support her by giving her monthly monetary support. That when she fell sick in 2018, her father met her medical bills despite her being married.
11. Meanwhile, Parties agreed by consent to have a limited grant of letters of administration *Ad colligenda Bona* issued to the petitioner for purposes of collecting and preserving the estate. On 16—11- 20 the court issued the said grant to the petitioner(executor).
12. In response, Simona Longoni Mitchell filed a replying affidavit sworn on 30-04-2021 deposing that the deceased died leaving a valid will duly executed out of free will and without any undue influence. That the deceased was fit and in his right frame of mind when executing the subject will before two competent witnesses. She further stated that the deceased was all through alert and never lost his mental and or cognitive ability until he died.
13. That the deceased's cremation was his wish. She further averred that Erica only made contacts with her father on 19-06-19 since their mother divorced their father and got married elsewhere. She further averred that she was the one who funded Erica's treatment upon request from the deceased. She stated that the deceased led a normal life driving himself around up to 10-09—2019. That other than Erica, the deceased had not developed any relationship with the other daughters at all.
14. She averred that when the deceased divorced the objectors' mother one Rosa, they entered into a settlement through which Rosa received lumpsum amount for her maintenance and the upkeep of their children with whom she migrated to UK leaving the deceased in Kenya.
15. She further stated that the deceased paid for the objector's educational expenses. That she personally supported Erica on gratuitous basis even after the deceased had died. She denied the claim that Erica was dependent on the deceased prior to his death.
16. On his part, the petitioner herein filed his response vide a replying affidavit sworn on 13-05-21. He averred that he had known the deceased for over 30 years having had joint business interest together and that he was the deceased's business advisor and co-director in several companies. He deposed that the deceased expressed his interest to make a Kenyan will early April 2019 while in Spain where he was undergoing treatment. That the deceased requested him to be his executor and trustee to his estate. He further averred that when the deceased engaged Samir Inamdar as his lawyer for drafting the impugned will, he was put in the picture through regular correspondence. He attached E.mail correspondences between Inamdar advocate and the deceased regarding the deceased's request to have the will prepared(see TP1).
17. He deposed that at the time the deceased made his will, he was lucid and sound with nothing suggestive that he was not in a position to make his will. He dismissed the claim of mental incapacity on the part of the deceased at the time he executed the will.



18. As a rejoinder, Erica (1st objector) filed a further affidavit sworn on 02-11-2021 deposing that payments made by the deceased for their maintenance and general upkeep when divorcing with their mother do not substitute their right to inherit their father's property. She deposed that from 1997, their father supported them by sending money to their mother monthly. That the father met her university education expenses from 2001 to 2005 and thereafter kept sending money to her personal account monthly for maintenance. She attached annexure marked exb 2 to prove funds transfer from her father's offshore accounts to her accounts.
19. Regarding her relationship with the deceased, it was her position that it was good. To prove the same, she attached several correspondences between her and the deceased between 2018 until his death (See annexure exb 3 and 4). That although strong willed all through, her father was easily intimidated. She averred that due to his heavy drinking and smoking, sickness and inability to walk long distances he could have easily been manipulated hence the reason why Simona kept their father away from them.
20. During the hearing, Erica Pw1 adopted her affidavit in support of the petition dated 1-6-20, further affidavit sworn on 22—11-21 and the attendant supporting documents.
21. Pw2 Michael John Kearns a resident of Uk and a business partner to the deceased adopted his witness statement dated 31-10-21 confirming that the deceased was his business partner whom he interacted with when both in Kenya and UK. That towards the end of his life, he was confused and that he later learnt that he had cancer.
22. Pw3, Daniel Wright husband to Erica adopted the content contained in his witness statement dated 01-11-2021 simply confirming that the deceased had a good relationship with Erica as evidenced from correspondences attached between the two. He supported the evidence of his wife (pw1) to the effect that the deceased used to support Erica.
23. RW1- Ricardo Rincon Wong a lawyer adopted his witness statement dated 1-10-20 confirming that prior to his death, the deceased was his client. That during his sun set days, the deceased approached him with a request to witness for him a will he had prepared in Kenya for purposes of distributing his estate. He confirmed reading the will together with the deceased who appeared mentally sound although apprehensive that his days on earth were coming to an end soon. He identified the will he witnessed.
24. RW2-Simona Longoni adopted her replying affidavit to the cross petition as her testimony. On cross examination she denied exerting undue influence on the deceased when executing the will. She denied isolating the deceased from his children. She reaffirmed the position that her husband was not coerced in executing his will. That she got to know of the will when the deceased sent her a copy for her record.
25. RW3-Dr. Lourdes Peralta Camisuli told the court that he was the deceased's family doctor and he attended to him when he was sick and that in his opinion, the deceased was all through conscious and of sound mind. He identified the medical reports prepared by himself to prove that he had treated the deceased. In re-examination, he stated that the deceased never underwent mental treatment and that he had died of heart attack.
26. RW-4 Tushar pujara the petitioner herein a business partner to the deceased and manager of the deceased's business stated that it was the deceased who requested him to be his executor in respect to the will in question.
27. Upon close of the hearing, parties agreed to file submissions.



Objectors' submissions

28. Through the firm of SC Judy Thongori, the objectors filed their submissions on 23-02-24, submitting on four issues namely; whether the deceased left a will; whether the will in any event was valid; whether the deceased was subject to any undue influence and; whether the objectors were entitled to a share.
29. Learned counsel submitted that there was no proof that the will in question was made by the deceased. That there was no proof how the will left the deceased's custody while in Spain, to Kenya and then back to the petitioner. That no one was called to identify whether the will that was produced in court was the same one that was signed in Spain.
30. As to whether the will in any event was valid, counsel contended that the law firm of Inamdar who allegedly drafted the will did not testify. That in any event, if the court is satisfied that there existed a will, then it was not freely written while the deceased was in his normal mental status due to cancer sickness.
31. That the deceased did not discharge the burden of proof on how the will was executed. The court was thus referred to the holding in the court of appeal case of [*Ngengi Muigai & Anor vs Peter Nyoike Muigai & 4 others*](#) in the matter of the estate of James Ngengi Muigai(deceased) where the court held that he who alleges mental infirmity of a testator when executing a will has a duty to prove the same.
32. Regarding the question whether the deceased was subjected to undue influence, counsel submitted that the sole beneficiary of the will is Simona the widow who was the only one staying with the deceased throughout until he died. That Simona had excluded all relatives from the deceased's side including the objectors from reaching out to the deceased hence exerting undue influence on whatever the deceased did.
33. As to whether the objectors were entitled to a share of the deceased's estate, counsel submitted that as children, they were entitled to their father's share pursuant to Section 26 of the [*law of Succession Act*](#). That they had not been provided for by the deceased prior to his death. It was opined that the court is therefore empowered to make reasonable provision for the objectors under section 28 of the [*law of succession*](#).
34. That in making an order for reasonable provision, the court be guided by the fact that the deceased had bequeathed several other properties outside Kenya through other wills. To buttress the fact that children to a testator whether provided for in a will or not are entitled to reasonable provision, the court was referred to the case of [*In re Estate of Ezekiel Mabeya Kegoro\(deceased\)*](#)(2019) e KLR
35. Learned counsel contended that there was proof that the deceased used to maintain Erica during his lifetime and even after his death Simona continued to support her.

Petitioner's submissions

36. Through the firm of Inamdar, the petitioner filed his submissions on 21 -03-2023 thus reiterating his testimony and that of his witnesses. Counsel submitted that it was incumbent upon the objector to prove that the deceased had no mental capacity to execute a will which is not the case. Counsel contended that mere sickness is not enough to prove mental incapacity and that there must be proof that sickness must have affected the mental faculty of the testator. To support that position, the court was referred to the case of [*Estate of Wilfred Koinange Gathomi*](#)(2020) e KLR and [*James Maina Anyanga v Lorna Yimbiba Ottaro and 4 others*](#)(2014)e KLR



37. That there was no proof of undue influence on the deceased from one Simona. That the allegation of undue influence must be proved by way of evidence. In that regard reliance was placed in the case of *Re Estate of Krishna Kumar Bhatti* (2018)e KLR
38. That the failure to provide for the objectors is not sufficient enough to invalidate a will. Reliance in that respect was placed in the case of *Re Estate of Julius Mimano*(2019)e KLR
39. It was contended that the will was properly executed and witnessed by one Ricardo a lawyer who confirmed the deceased was in sound mental status. That Dr. peralta confirmed the mental soundness of the deceased. As to the aspect of dependency, counsel submitted that there was no proof. That in any event, reasonable provision is not automatic but made at the court's discretion and one must make an application seeking for provision; In that respect, reference was made to the case of *Re estate of Robert Otieno Guya*(2020)e KLR.
40. In response to the objectors' submissions on non-existence of the will, counsel submitted that the objectors had not raised the same question in their objection and cross petition hence the same can not be raised at the submission stage thus should be ignored. To support that position, reference was made in regard to the case of *PMM vs MGM*(2021)e KLR and *Arif Ahmedali Sitafuwala Vs Africare Ltd(Medanta)*(2020) e KLR.
41. In response to the petitioner's submissions, the objectors filed further submissions dated 21-04-23 distinguishing case law quoted by the petitioners.

Determination

42. I have considered the application herein, objection thereof and submissions by rival parties. Issues that germinate for determination are;
 - a. Whether the deceased executed a valid will
 - b. Whether the will was executed through undue influence or coercion
 - c. Whether the objectors were entitled to a share of the estate.

Whether the deceased executed a valid will

43. In their objection, answer to petition and cross petition, the objectors who were daughters to the deceased objected to the petitioner being issued with a grant of probate of written will. Their point of contention was that the attached will appointing the petitioner as the executor and trustee of the estate was not valid on grounds that the deceased was not of sound mind by the time he executed the will due to sickness which had affected his brain.
44. It is trite that validity of a will is dependent on two principle factors namely; the capacity of the testator to make a will at the material time and compliance with the formal requirements for the making of a will.
45. Section 5 of the *Law of Succession Act* deals with capacity to make a will and attestation thereof. The relevant provision states as follows;

Persons capable of making wills and freedom of testation-

- (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.

46. It is upon the party alleging mental incapacity of a testator to establish that the mental incapacity compromised his mind to the extent that he could not reasonably comprehend what he was doing. See [*John Kinuthia v Githua Kiarie and others*](#) court of Appeal civil appeal number 99 of 1988 where the court held that any person alleging that illness of the testator affected the validity of a will must lead evidence to show that such illness affected the testator's mind to the extent that the testator did not know what he was doing when he made the will.

47. In the case of [*Elizabeth kamene ndolo v George Matata Ndolo*](#)(1996)e KLR the court held that under Section 5 of the [*law of succession Act*](#) every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. Similar position was held in the case of The [*Estate of Kevin John Ombajo*](#)(2020)e KLR where the court stated that mere sickness without medical evidence that such sickness affected the testator's mental capacity is not enough.

48. Indeed, the court [*in re Estate of Libasi Bidali\(deceased\)*](#)(2019) e KLR had this to say ;

“the court determines validity of a will, and construes it, and does not rewrite or recreate it...”.

49. Section 11 of the [*law of succession*](#) goes further to state that;

Written wills

“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.



50. In the instant case, the objectors testified that when the deceased executed the will, he was not mentally incapacitated hence could understand what he was doing. On her part, Simona stated that despite suffering from a heart condition and lung cancer, he was mentally sound. That when the deceased executed the will in question, he sent her a copy for record.
51. The petitioner went further to tell the court on how the deceased approached him requesting him to be an executor and trustee in respect of his estate in case of his death. He further stated that when the deceased's advocate drew the will, he sent him an e.mail seeking him to check and confirm on his particulars. A copy of the said e.mail was produced as evidence
52. Besides, Dr. Peralta RW-3, a family doctor to the deceased confirmed that he attended the deceased and reviewed his medical notes for cancer treatment. That the sickness did not at all affect his mental capacity up to the time he died of heart attack. To fortify that testimony, RW-1 one Ricardo a lawyer witnessed the will in question at the request of the deceased. According to him, the deceased was of sound mind and understood what he was doing.
53. The objectors did not adduce any evidence to prove that the deceased suffered mental incapacity due to the sickness he was suffering from. It is not in dispute that the objectors never lived with the deceased. Whereas they were living in Britain, the deceased was living in Spain. What made them conclude that the deceased was incapacitated? There was no medical evidence or otherwise to prove mental incapacity. In view of the above holding, I am satisfied that the deceased was mentally fit when executing the will.

Whether the deceased executed the will through undue influence or coercion from simona.

54. It was Erica the objector who claimed that their stepmother had created a barrier between them and their father. That Simona surrounded the deceased with her relatives and in the process intimidated him. That from Simona's conduct and given that she was the sole beneficiary of the estate, she must have unduly influenced or coerced him. This is pure speculation not based on any cogent evidence. It is trite law that he who alleges that a testator executed a will under undue influence or coercion must prove. See *Re Estate of Krishna kumar*(supra). In the circumstances of this case, there was no coercion or undue influence proved. What played out were differences between the objectors and their step mother.
55. Regarding the question whether the will ever existed in the first place, the same was not pleaded. This was an issue brought up during submissions. It is trite that a litigant can not plead a case during submission. I do agree with the petitioner's submissions that the objectors are trying to ambush them. It is a settled legal principle that Parties are bound by their pleadings. To that extent, I do not find it prudent to determine an issue that was not the subject of the pleadings.

Whether the objectors were entitled to a share of the estate

56. The objectors in submission sought for a share of their father's estate which was according to the will bequeathed to the surviving widow as the sole beneficiary. In other words, they urged this court to make an order for reasonable provision. M/s Akwana for the petitioner contended that the claim for reasonable provision was not pleaded for but raised during submission. Counsel contended that the objectors ought to make a specific application for such orders to issue.
57. It true that the prayer for reasonable provision was not pleaded for nor specified as one of the prayers. Senior counsel Judy Thongori was of the view that the court can make a determination on provision for dependants without necessarily having a separate application. There is no doubt that a testator



is a free agent who has the power to determine on how he would wish to have his estate handled or managed in the event he dies. His wishes must therefore be respected. See *re Estate of Abdulkarim Chatur popat*(2020) e KLR where the court held that ;

“ A testator may choose to make equal or unequal or no bequests to his beneficiaries. It is his sole prerogative. All that the law requires is that none is left destitute”.

58. However, courts have time and again found reason where necessary to interfere with the free testamentary agency of a testator if he totally ignores his spouse or children thus rendering them destitute. See *Chatur popat* (supra). Similar position was held in the case of Ezekiel Mabeya Kegoro case(supra) where the court interfered with the deceased’s will for not providing for the daughters hence allowed the daughters to apply for reasonable provision without necessarily proving maintenance nor dependency.
59. In the spirit of the *Ezekiel kegoro* and *Chatur* case, the objectors ought to make an application for reasonable provision. In my opinion, this application can be done at the stage when the confirmation application has been filed.
60. It is my finding therefore, that the prayer for reasonable provision was not pleaded for originally as the objectors were concern with the invalidity of the will. Having found that the deceased executed a valid will, I do not find merit in the objection and the cross-petition herein hence I do dismiss the same with no order as to costs.
61. In the circumstances therefore, I will direct that a grant of probate of written do issue to the petitioner who shall then apply for confirmation within 45 days. Should the objectors find it necessary, they will be at liberty to make an application for reasonable provision in which case the court will consider the same on merit.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF JULY 2024

J.N. ONYIEGO

JUDGE

