



In re Estate of Josephine Auma Maende (Deceased) (Succession Cause 3 of 2017) [2023] KEHC 934 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KEHC 934 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 3 OF 2017
AN ONGERI, J
FEBRUARY 10, 2023**

IN THE MATTER OF THE ESTATE OF JOSEPHINE AUMA MAENDE (DECEASED)

BETWEEN

CLEOPHAS MAENDE MAKOKHA PETITIONER

AND

STELLA WATENDE MAENDE OBJECTOR

JUDGMENT

1. The Petitioner herein Cleophas Makokha Maende filed this Petition in respect of the Estate of the Late Josephine Auma Maende whom he alleges was his wife.
2. The deceased died on 7/9/2014 domiciled in Kenya.
3. The Petitioner filed three Succession Causes in the same Estate as follows:-
 - i. Kitale Succession Cause No.129 of 2015.
 - ii. Kakamega Succession Cause No.327 “B” of 2015 and
 - iii. Kericho Succession Cause No.3 of 2017.
4. The three Succession Causes were consolidated and the holding file is Kericho Succession Cause No.3 of 2017 (this file).
5. This Court annulled the grant of Letters of Administration which had been issued to the Petitioner after the Objector, Stella Wetende Maende a daughter to the Deceased raised an Objection to the grant of Letters of Administration to the Petitioner on the ground that the deceased left a written Will.
6. The Court directed that the validity of the will be determined by viva voce evidence.



7. The Objector told the Court in her evidence in chief that the deceased was her biological mother and the Petitioner her biological father.
8. She said that the deceased and the Petitioner were not living together prior to the demise of the deceased.
9. The Objector said the deceased left behind two daughters and two grandchildren as follows:-
 1. Stella Wetende Maende – Daughter.
 2. Faith Mende – Daughter
 3. Samwel Makhokha – Grandson
 4. Nicole Auma - Granddaughter
10. The Objector said her mother was living in Kericho at the time of her demise and their father was residing in Eldoret.
11. The deceased was working as a Medical Doctor at James Finlay while the Petitioner is a Lecturer.
12. The Objector said one week after the burial of the deceased, she was called by the Firm of Alice Bett where the Will dated 8/7/2014 was read to them in the presence of the Executor CALeb Masakhwe Olunga and her Sister Faith and the Petitioner.
13. The Objector said the Will did not provide for the Petitioner but to the best of her knowledge, there were properties that were bought jointly with the Petitioner which were left out of the Will.
14. The Objector produced the title deed of East Lwanga/Luvinu/2468 that was jointly owned by the Petitioner and the deceased that was left out of the Will.
15. The Objector said the matrimonial home at East Lwanga/Luvinu/3131 and another property East Lwanga/Luvinu/1347 were also left out of the Will.
16. The Objector said the deceased was not supporting the Petitioner immediately before her demise since he was making a living as a Lecturer.
17. The Objector said the Will dated 8/7/2014 was written by the deceased and she asked the Court to give effect to it.
18. The Objector said even after the reading of the Will, the Petitioner filed several Petitions seeking Letters of Administration which he did in bad faith.
19. The Objector said the Petitioner never supported her and her sister and that it was the deceased who raised her and paid her school fees.
20. She also said all the properties in the Will were acquired by the deceased without the assistance of the Petitioner.
21. The Objector also said there are two Motor Vehicles that were taken by the Petitioner while the deceased was in Hospital.
22. The Objector adopted her written witness statement as her evidence.
23. OW.2 – Caroline Chebwogen who used to work at the Law Firm of Bett & Company Advocates as a Secretary said she typed the Will dated 8/7/2014. She knew the deceased as a client of the firm, she also witnessed the signing of the Will of Caleb Koech.



24. OW.3 Caleb Koech also said he witnessed the Execution of the Will. He said at that time he was a student doing pupillage at the Firm of Bett and Company Advocates.
25. OW.4 – Alice Bett, and Advocate of the High Court of Kenya practicing under the name and style of Bett and Company Advocates said she drafted the will on 8/7/2014 and it was signed on the same day.
26. OW.4 adopted her written witness statement dated 18/3/2021 in which she stated as follows: -
27. That she was the proprietor of the said will and knew the deceased Josphine Auma Maende who died on 7/9/2014.
28. That her knowledge of the said deceased was purely professional since at the time prior to her demise, all her legal services were handled by her firm.
29. She said that sometime in July 2014, the deceased went to her chambers with handwritten notes which contained her last wishes and Testament and that after a brief talk, she informed her that she intended to make a Will to bequeath her property upon her dependents after which she caused the deceased Will to be typewritten by OW.2 who was her office secretary at the time; with strict instructions to type each word as the deceased wished.
30. She also said that the deceased read the Will over and over again after the document was typed and proceeded to append her signature on each page in the presence of OW.3 and OW.2
31. She said that at the time of making of the Will, the deceased was of sound mind, jovial as was her nature all the time that she met her and that the deceased understood the effect of all the dispositions that she intended to make and that she did not suffer from any delusionary influence at the time.
32. She said that the deceased informed her that she was suffering from cancer but she was in good health. That the deceased was alone at the time of drawing the Will, she was not with any member of the family and that she was provided with a separate room to re-read and approve the Will again before it was executed and she could tell that the deceased was in proper state of mind as she was able to identify all the persons that she was bequeathing, including the minor dependents.
33. She said that the signature as placed on the Will was so equivocal and was properly appended in such a way that it indeed intended to give effect to what the deceased intended to bequeath and that the said signature was not forged as she had interacted with the deceased signature in other documents that she had prepared.
34. She also said that after the execution, the attested will was presented to her for her custody whereas she kept the documents in safe custody until sometime in September, 2014 when she learnt that the deceased had passed on.
35. She further said that upon learning of the deceased demise, she personally called the Objector, Stella Watende Maende and asked her to present all the family members into their offices for Reading of the Will and that all the family members including the Petitioner appeared before her and she read the contents of the Will to them.
36. She said that she later learnt that despite the contents of the Will being made known to all the parties, the Petitioner had proceeded to Petition for Letters of Administration Intestate.
37. The Petitioner in his evidence before the Court said that the will dated 8/7/2014 was not valid for the reasons he had stated in his written witness statement.
38. The Petitioner adopted his witness statement in which he stated as follows:-



39. That he had been married to the deceased for 33 years by the time the deceased passed away.
40. That he learnt that a Will existed from her daughter Angeline who called him and informed him when and where the deceased Will was to be read in Kericho.
41. That he travelled to Kericho and upon the contents of the Will being read his name was not mentioned as a dependent despite the fact that the deceased was his wife of 33 years and he was her next of kin in all her hospital admissions and he was in possession of the burial permit and the death certificate.
42. That when he looked at the will he noticed that the deceased signature on the first page of the will did not match the signature on the second page of the will, he was not named as the beneficiary in the will despite being the deceased husband, one of the beneficiaries' name was spelt as Makhoha instead of Makokha, another beneficiary was Faith Auma yet his other daughter is Faith Angeline Nyongesa, not all properties registered in the deceased name were Willed and that the signatories were persons not known to the deceased and that such discrepancies made him conclude that the said Will was forged.
43. The Petitioner said he got married to the deceased on 21/5/1981 and they stayed together as husband and wife until her demise on 7/9/2014.
44. He said during that period, they did not have any disputes Except the normal disputes in a normal family.
45. The Petitioner said their marriage was blessed with three issues but one died.
46. The Petitioner said he is an Engineer and the deceased was a Medical Doctor and further that the deceased was his only legal wife until her demise.
47. The Petitioner said most of the properties they acquired were registered in the name of the deceased because he was out of the country most of the time.
48. He said at the time of reading the will, his daughter Faith called him. He was based at Kitale. He went to the Hotel the Will was read with his brother-in-Law Caleb in the company of the Objector and Faith.
49. He said the Objector started sharing properties and they went and cleared the Office of his late Wife without involving him.
50. The Petitioner contested the validity of the will and said there was no way the deceased would have excluded him from the Will.
51. The parties filed written submissions as follows:-
52. The Objector submitted that the will was valid as the deceased had testamentary capacity as provided for in Sections 5 and 11 of the *Law of Succession Act* in that she was of sound mind, she comprehended and appreciated the nature of her testament and was able to understand all her properties and the persons that she intended to bequeath. She cited the case of *Banks v Goodfellow* (1870) LR 5 QB 549.
53. The Objector maintained that the deceased was of sound mind at the time of making the Will and that the petitioner's allegation that the deceased was ill and could not comprehensively make any proper disposition is unfounded. The petitioner further submitted that as per section 5 of the *Law of Succession Act*, the onus laid with the petitioner to satisfy the court that at the time of making the will, the deceased was too ill or affected by medication to know what she was doing. She continued that being that there was no medical report or contrary professional opinion concerning the state of the deceased mind was filed, the presumption that the court can make is that the deceased was of sound mind at the time of making the Will. She cited the case of *Ngengi Muigai & another v Peter Nyoike Muigai & 4 others*



[2018] eKLR Civil Appeal 13 & 56 of 2007 (Consolidated) and *In re Estate of Wilfred Koinange Gathioni (Deceased)* [2020] eKLR Kiambu Succession Cause 12 of 2018.

54. The Objector maintained that the capacity to make the will was not in any way interfered with and that the same passed the testamentary capacity stipulated in section 7 of the *Law of Succession Act* as it was demonstrated that the deceased was alone at the time of making the Will, she was not coerced or influenced in any way and was in fact given a separate private room to ensure that she fully concentrated on the making of the Will.
55. The Objector reiterated that with regard to the formality for a valid Will, the Testator did affix her mark/signature on all the pages of the Will dated 8/7/2014 and the same was witnessed by two competent adults and that the said Will captured all the properties that the deceased intended to bequeath.
56. The Objector submitted that the witnesses to the Will were independent and there was no reason they would have any conflict of interest despite being the employees of the Law firm that drew the Will since they did not benefit in any way. She cited the case of *In re Estate of Andrew Kabera Gachini (Deceased)* [2020] eKLR Nyahururu Succession Cause 107 of 2017 and *In re Estate of Julius Mimano (Deceased)* [2019] eKLR Nairobi Succession Causes 417 of 2005 & 1345 of 2014
57. The Objector submitted that failure to provide for a beneficiary in a Will does not invalidate the Will as Section 5 of the *Law of Succession Act* gives a Testator all the testamentary freedom. She cited the case of *Curryian Okumu v Perez Okumu & 2 others* [2016] eKLR Mombasa Succession Cause 46 of 2014 and *James Maina Anyanga v Lorna Yimbiba Ottaro & 4 others* [2014] eKLR Nakuru Succ Cause 1 of 2002
58. The Objector submitted further that the Petitioner was not included in the Will; because he was substantially and comprehensively provided for in the properties that he co-owned with the deceased and that per law all the properties co-owned automatically became his properties upon the demise of the deceased hence there was no need to be provided for in the Will. She continued that the petitioner was not entitled to be included in the Will having testified that he was never maintained by the deceased at any point in time and that the deceased children in any event required the properties more than him.
59. The objector submitted that the petitioner without the consent of either party, was in exclusive use and control of all the deceased's Motor Vehicles that is Registration No. KAV 374D belonging to the deceased and further Motor Vehicle Registration No. KBP779X belonging to Faith Maende which the deceased had bought for the said Faith to cater for her transportation when attending to her medical check-ups.
60. The Objector urged the Court to find that the deceased Last Will and Testament dated 8th July, 2021 was valid and proceed to order that the Estate of the deceased be distributed in accordance to the Last Wishes of the Testator.
61. The Petitioner submitted that the will was invalid by virtue of the deceased testator not being of sound mind and being under undue influence since at the time of making the Will the deceased was very sick, suffering from stomach cancer and therefore it was easier for her to have been influenced to write the Will against her own wishes and disinherit the petitioner.
62. The petitioner further submitted that the fact that the Deceased did not have a recollection of all her properties as she left out the Motor Vehicle Registration Number KAV 374D, Honda CR-V which was registered in her name coupled with the fact that she could not remember the full name of her own daughter Faith Angeline Nyongesa and wrote it down as Faith Auma and re-read the Will without making correction showed that the deceased was not of sound mind.



63. The petitioner submitted that he was a dependant under section 29 of the Law of succession (Amendment) Act 2021 since he was the only husband to the deceased and did not need to prove that the deceased was maintaining him prior to her demise and that the testamentary freedom as contained in the subject Will could not be said to override the clear and express provision of the law.
64. The petitioner further submitted that in the alternative, he was entitled to deceased estate as a dependant as per section 26, 27 and 28 of the Law of Succession Act which empowers the court to interfere with the testator's exercise of freedom of testation by making provisions for dependants who had not been adequately provided for. He cited the case of In re the estate of Mirium Jepkios Ngetich [2003] eKLR Eldoret Probate & Administration 29 of 1996 and Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR Nairobi Civil Appeal 128 of 1995.
65. The Petitioner urged the court to find that the will was invalid by virtue of the deceased testator being of unsound mind and under undue influence and therefore the deceased died intestate, that the petitioner's revoked grant of letters of administration be reinstated and the succession concluded under the guidance of the court.
66. I have considered the evidence adduced in this case together with the rival submissions filed by both parties.
67. The issues for determination in this case are as follows:-
- i. Whether the written Will dated 8/7/2014 is valid.
 - ii. Whether the Petitioner is a dependant of the Deceased.
 - iii. How the property of the deceased herein should devolve.
68. On the issue as to whether the Will is valid, Section 11 of the Law of Succession Act provides for the requirements of a valid written Will.
- '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.'

69. I find that the Will here passes the criteria for a valid written Will. It was witnessed by two witnesses and it was also signed by the Testator.

70. The Minor error in the names of Faith who is called Auma instead of Nyongesa cannot invalidate the Will.



71. On the issue as to whether the Petitioner is a dependent of the deceased, the law states that the following are the dependents of the deceased. Section 29 of the Law of Succession Act provides as follows:

For the purposes of this Part, “dependant” means—

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

72. In Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others [2016] eKLR Chuka Miscellaneous Succession Cause 12 of 2016, it was held that;

From the foregoing, a dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts.

73. I find that, in the case where the deceased is a woman, her husband can only qualify to be her dependent where it is shown that she was maintaining him immediately prior to her demise.

74. In the current case, the deceased was not supporting the Petitioner immediately prior to her demise.

75. There is evidence that the deceased and the Petitioner were not living together.

76. There is also evidence that there were several properties jointly owned which the deceased did not bequeath in her Will. The Petitioner should be content with the said properties.

77. I find that the Will dated 8/7/2014 is valid and the Petitioner is not entitled to inherit the deceased’s property as he does not qualify to be her dependant.

78. On the issue as to how the property should devolve, I find that the same should devolve in accordance with the bequest in the Written Will dated 8/7/2014.

79. I direct that the Executors be issued with a grant of Probate and they apply for confirmation of grant in accordance with the Written Will dated 8/7/2014.

80. The petitioner to give vacant possession of any property belonging to the deceased which is bequeathed in the said will within 60 days of this date.

81. The Petitioner also to pay the costs of this case.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 10TH DAY OF FEBRUARY, 2023.

A. N. ONGERI

JUDGE

