Wanjau & 2 others v Kamau (Civil Appeal 102 of 2019)
[2023] KEHC 1800 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1800 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 102 OF 2019

FR OLEL, J

MARCH 16, 2023

BETWEEN

JOHN WANJOHI WANJAU ..... 1ST APPELLANT

WAMUTIRA BUNDI KAMAU ..... 2ND APPELLANT

JOSEPHAT MWANGI WANJA ..... 3RD APPELLANT

AND

JECINTA WANJIKU KAMAU ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. Y.M Barasa (SRM) delivered on 6th December 2017 in Kerugoya Chief Magistrate Court Succession case no.471 of 2021)

JUDGMENT

Introduction

1. The appellant seek to overturn the judgment/decision of Hon. Y M Barasa (SRM) rendered on 6th December 2017 when she dismissed the protest filed by the appellants and further allowed the petitioner's application for confirmation of grant.

The duty of a first appellant court.

2. A first appellant court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent conclusion on whether or not to allow the appeal. Further the first appellant court is empowered to subject the whole of the evidence to a fresh and exhaustive evaluation/scrutiny and make conclusion about it, bearing in mind that it did not have the opportunity

of seeing or hearing the witness (see Selle and Another versus Associated motorboat Co. ltd and others). It was also held by the court of appeal of East Africa in Peters versus Sundey Port Ltd.

> "It is a strong thing for the appellant court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellant court has indeed, jurisdiction to review the evidence. In order to determine whether the conclusion originally reach upon that evidence should stand. But this be jurisdiction which should be exercised with caution, it is not enough that the appellant court might itself have come to a different conclusion."

3. A first appellant court in the final court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellant stage. Anything less is unjust. In the first appeal parties have a right to be heard both on the question of fact and law and the first appellant court is required to address itself to all issues and decide the case by giving reasons while considering the scope of section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.

The Pleadings

4. The appellants filed an affidavit of protest dated 27/4/2018, further affidavit of protest dated 3/8/2018 and the last further affidavit of protest dated 14/8/2019. They also filed a witness statement of one Karani Mwaniki Ngondo. The petition filed her replying affidavit dated 17/5/2018 and witness statement of John Ndana advocate dated 12/9/2018. Direction on how to hear the protest was taken on 12/6/2018 and parties agreed to proceed by way of viva voce evidence.

Brief Facts

5. The first witness was John Ndana, an advocate of the High Court of Kenya who stated he ordinarily practices in Kerugoya town. He testified that on 21/3/2012 one Wanjau Kamau came to his office and requested for his last will to be made. He specified how he wanted the distribution affected and upon the will being prepared, he signed it by placing his thumb print on it and it was witnessed by two persons Karani Munuki Ngundo and Francis Munene Njeru. He confirmed that the testator and the two witnesses all signed at the same time and proceeded to produce the said will as exhibit 1. In cross examination he stated that he did not indicate the age of the testator and also the testator did not have medical evidence to show that he was medically fit to prepare the will. He also confirmed that the testator signed by placing his thumb print and must have known the content thereof.

6. PW2 Wamutira Bundi Kamau relied on the affidavit sworn on 27/4/2018. She stated that the deceased Wanjau Kamau and Stephen Kamau (her deceased husband) were brothers being children of the late Ephantus Kamau and Peris Waruguru. She stated that she lived on plot 290 from 1980 when she got married. She lived in one acre with her children. She gave her preferred mode of distribution at paragraph 10 of her affidavit and suggested that each of them be given ½ an acre. As regards plot 30, she stated the same could be bequeathed to Jacinta Wanjiku as she resided thereon.

7. In cross examination she stated that the will was written when the deceased was unwell. The deceased had started becoming sick in 2013 but she did not know what he was suffering from. Before 2013 the deceased was Ok. She also stated that she did not know the size of the suit parcel and had indicated the portion to be given to the deceased's wife and children. She also confirmed that she had not subjected the will to forensic examination, and objected to the will because it was not genuine as the deceased was unwell when he signed it.

8. PW2 was stood down and filed a further Affidavit dated 14/8/2019 when she annexed a copy of the land search and amended the portion for distribution according to acreage contained in the search. She stated that she had provided for everybody in the family. During cross examination she stated that the acreage as per the land search and last statement will were the same and that the situation on the ground was per her affidavit. She proposed that the land be distributed equally as per the proposal and the will be disregarded. In re-examination she stated that her mode of distribution is the way the deceased had distributed the suit property.

9. Karani Mwaniki Ngondu stated that he did not witness any will, but confirmed that the thumb print thereon was his. He confirmed signing it at the advocate's office but did not know the document he was signing. He further stated that the document was read to him, but could not recall the contents as he was illiterate. He reiterated that he was made to sign not knowing what he signed and that it was the petitioner Jacinta Wanjiku who made him sign the will.

10. In cross examination the witness averred that the deceased was not his friend and they came from different clans but confirmed going to Ndana Advocate office and signing the will by his thumb, he also confirmed that his national identity card also appeared on the will. In re-examination, the witness stated that he was removing himself because he did not know what he signed and that it was the petitioner who called him to sign the will at Ndana Advocate office.

11. The petitioner was the last witness. She stated that the deceased was her husband who died on 31/10/2015 and she filed the petition attaching the will of the deceased. The will was dated 21/3/2012. The petitioner testified that before her husband died he told her that he had left his will at Ndana Advocate office and it is the same will she is using to distribute the estate. The deceased left land no.Inoi/kariko/290 and as per her summons for confirmation of grant dated 2/3/2018 she had set out the shares as per the will.

12. The petition also stated that the deceased had a plot no.90 at Banana and that was left for her. She prayed that the protest be dismissed and grant be confirmed as per the will. In cross examination the petitioner denied being present where the will was made and stated she only became aware of the same when told by her husband. She concluded by saying that the land should be shared as per the will.

13. Upon considering the evidence present and submission filed at the trial magistrate did dismiss the protest and confirmed the grant as presented by the petitioner. The protestors being aggrieved by the said filed this appeal raising 5 grounds of appeal that;

    a. The learned trial magistrate erred in law and fact in failing to consider that the deceased in his lifetime distributed his estate as he wished and that the family members did not protest or change the mode of distribution which they had opportunity to do during his lifetime.

    b. That the learned trial magistrate erred in law and fact in failing to consider that it had not been demonstrated and/or shown by the Respondent that the deceased wishes were illegal, unfair discriminating and unjust to the beneficiaries.

    c. That the learned trial magistrate erred in law and in fact in failing to consider that the deceased gave out gifts before his death and that the same are protected by the law and were not subject to disruption change or frustration.

    d. That the learned trial magistrate erred in law and fact in holding that the deceased had died testified and had a valid will.

    e. That the learned trial magistrate erred in law and fact in holding that the 2 appellant was not a dependent within the meaning of section 29 of the *law of succession Act*.

f. That the learned trial magistrate erred in law and fact by basing his judgment on extraneous matters not pleaded and subsequently made a judgment not supportive by the evidence and the relevant law.

Submissions

14. The appellants stated that there was a failure on their part to include the certificate of confirmation of grant and/or decree appellant from but that was not fatal to this appeal as it was a procedural lapse and a technicality protected by article 159(2) (d) of *the constitution* of Kenya 2010. They relied on the citation of *Nyota Tissue products versus Charlse Wanga Wanga and 4 others* (2020)eKLR and *Eliza Nyaga Investments limited versus Leen Energy Solutions* (2021)eKLR.

15. The appellants further submitted that the will attached by the petitioner was invalid as the deceased Wanga Kamau had physical illness and was incapable of making a will as set out under Section 5(3) of the law of succession. They relied on the evidence of PW1 John Ndana and the 2nd appellant who in their evidence to show he was not fit to prepare the will and/or was unwell to so prepare the said will. It was then submitted that the trial magistrate ignored this evidence and arrived at the wrong conclusion.

16. Further they submitted that under section 11 (c)of the Succession Act one of the witness Karani Mwaniki Ngondu denied attesting the purported will dated 21/3/2012. In the presence of the testator nor did he see the testator sign or affix his signature as required in law, thereby making the said will to be invalid.

17. The appellant also submitted that the deceased had distributed his estate during his lifetime and fixed clear boundaries which no one interfered with and this was confirmed by the evidence of the second appellant and Respondent in cross examination. It was thus the appellant submission that the deceased acts or settlements affected should not be subjected to description change or frustrations as they are protected under section 42 of the *law of Succession Act*. They relied on the case of *Joseph Wairuga Migwa versus Makulina Ngina Mungai* (2010)eKLR and *Joseph Wairuga Migwa versus Miliena Ngina Munga* (2016 eKLR.

18. The final issues raised by the appellant was if they were dependent within the meaning of Section 29 of the *law of Succession Act*. The appellant submitted that they were the sister in law and nephew of the deceased and thus dependent's within the meaning of section 29(6) of the *Law of Succession Act*. Further dependency cannot be denied as the deceased also provided for the 2nd appellant and her children in clause 4 of the will dated 21st March, 2022 and this confirm dependency. They prayed that this appeal be allowed and the judgement be set aside and the protest be allowed as prayed for in the affidavit sworn on August 4, 2019.

19. The Respondent did raise the issue that this appeal was incompetent for the simple reason that there was no decree filed and thus it offended provision of section 79 of the *Civil Procedure Act* and order 42 rule 13 sub rule 4 (f) of the *Civil Procedure Rule* which made it mandatory that the decree must be filed and failure to do so rendered the appeal field to be incompetent.

20. The Respondent also submitted that it was not in doubt that the deceased died testator and his will was valid and passed to validity test as set by Section 11 of a law of success Act and that the magistrate's conclusion was correct in holding that the will was valid.

21. Further the appellant stated that it was proper and correct to distribute the estate property as per the will. The main asset was agricultural land and if indeed he wanted to gift part of it during his lifetime, he would have taken the appellant through the land board and obtained consent to transfer the said portion to them. In absence of land control board consent the appellant contention that they were

given a portion thereof as gift inter vivos could not stand. The will dated March 21, 2012, was also very clear and indicates that he had revoked all former wills, codicils and/or testamentary dispositioning made prior to 21st March 2012 and that superseded any other disposition.

22. The final issues raised in the appellant was that the within the provision of Section 29 of the Succession Act, the appellants could not be described as an beneficiary as the said definition did not include sister in law and that the decision of the trial magistrate was correct and should be upheld. The Responded prayed that the application be dismissed with costs.

Issues for determination

a. If the appeal is filed without the decree incompetent for faith to comply with section 79 of the *Civil Procedure* At and order 42 rule 13 sub rule 4(f).

b. Did the deceased (Wanjau Kamu) die testator of intestate

c. Did the trial court error in law and fact by failing to consider that the deceased had during his lifetime distributed the estate/ gave out gift before his clients.

d. Were the deceased (Wanjua Kamau's) wishes illegal, unfair, discriminating and unjust to the beneficiaries

e. As the appellant dependent within the meaning of Section 29 of the law Succession Act.

f. That the learned trial magistrate erred in law and fact by basing the judgment on extraneous matters not pleaded and subsequently made a judgment not supported by the evidence and the relevant law.

g. What should be the cost of this appeal.

A. Is this appeal incompetent for having been filed without a decree thereby failing to comply with Section 79 of the *Civil Procedure Act* and Order 42 Rule 13 Sub Rule 4(f).

23. Order 42 rule 13 (4) (f) provides that;

> " Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court records and that such of then as are not in the possession of either party had been served on that party, that is to say;
>
> a. Memorandum of appeal
>
> b. Pleadings
>
> c. The notes of the trial magistrate made at the hearing.
>
> d. The transcript of any official shorthand, typist notes, electronic recording or palantypist notes made at hearing.
>
> e. All affidavits, maps and other documents whatsoever put in evidence before the magistrate.
>
> f. The judgement, order or decree appealed from and where appropriate, the order (if any) giving have to appeal.

24. The Respondent submitted that there was failure by the appellant to file/include the decree in the record of appeal and this was fatal and renders the appeal to be incompetent. They relied on the case of *Kaduda versus Douglas* (1981) KLR 260. The appellant on the other hand did submit that non-inclusion of the decree and/or order was not fatal and was a procedural technicality protected in virtue

of provision of article 159(2) of *the constitution* of Kenya (2010). They relied on *Nyota Tissue Products versus Charlse Wanga Wanga and 4 others* (2020)eKLR and *Elizanyaya Investments Limited versus Leen Energy Solutions* 2021 eKLR.

25. I do agree with the Respondent that non-compliance with provision of order 42 rule 13 (4) (f) is not fatal and is cured by provision of Article 159 (2) (d) of *the Constitution* of Kenya (2010). As noted with approval in *Nyota Tissue Products versus Charles Wanga Wanga and 4 others* (2020) eKLR.

> " The rule applicable to appeal to the High court are made under provisions of order 42 rule 13 (4)(f) of the Civil Procedure Rules. It provide for filing of the judgement, order or decree appealed from and does not make it mandatory to attach the judgement and the decree".

26. The court in the said citation also cited the case of "Silver bullet Bus with approval where it was held that it would be too draconian to strike out the appeal of these circumstances.

27. Also cited with approval was the case of *Bwana Mohammed Bwana versus Silvano Buko Boyana and 2 others* (2015) eKLR at paragraph 4. It was held that "without a record of appeal a court cannot determine the appeal cause before it" as the judgment of the trial court was attached to the record of appeal and in the understanding of the procedure law, a decree is the formal expression of the judgement. In essence to determination of the trial court which is the decision appealed to fully set out in the judgment of that court and it is the essence which the appellant court should consider hearing the appeal. The court is not hindered by the lack of the formal expression of the decree if the full judgment of the trial court is exhibited in the record of appeal, and this the essence of the order 42 rule 13(4)(f) of the *Civil Procedure Rules*, which requires attachment only of judgment, order or decree appealed from.

28. It is thus clear that a party can attach either the judgment, order or decree. The record of appeal has the judgement at pages 83 – 93 of the record of appeal that satisfy the provision of order 42 rule 13(4) (f). The appeal as filed is therefore competent and cannot be struck out.

B. Did the deceased (Wanyua Kamau) die testator or intestate

29. The respondent who is the wife of the deceased did apply for probate of written will (found at pages 31 – 34 of the Records of appeal). She did request for confirmation of grant and the appellants who is the sister in law and nephew of the deceased objected and filed a protest on the basis that the deceased was unwell and was not in the right state of mind/incapacitated thus incapable of making the will in 2012. Further they stated that the will was a forgery and did not represent the wishes of the deceased.

30. Section 5 of the *law of succession Act* provides that ;

(5) Persons capable of making will and freedom of testation

(i). Subject to the provisions of this part III, every person who is of sound mind and not a minor may dispose off all or any of his free property by wills and may thereby make a deposition by reference to any secular or religious law that he chooses.

(ii). A female person, whether married or unmarried, has the same capacity to make a will as does a male person.

(iii). 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 is not to know what he is doing.

(iv). 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.

31. The 2nd appellant swore an affidavit of protest dated 27/4/2018, when she alleged that parcel of land Inoi/Kariko/290 is clan land and the deceased Wanjua Kamau held it interest for the sons of his brother Ephentus Kamau Ndigoya. She stated that on the ground then were fixed portions where each party resided and put up their houses/structures, planting tea bushes and coffee amongst other crops and that the mode of distribution in his lifetime should be maintained.

32. The protestor had a witness on Karani Mwaniki Ngondu who filed a witness statement. It was filed in court on 23rd August 2018. He did state therein that, he was a tea farmer and resided within Karini village within Kirinyaga County. That sometimes in March 2022 the petitioner approached him to guarantee a loan at Bigwa Society Ltd which request he accepted. The petitioner later called him and the late Francis Munene Njeru (now deceased) to her home where they placed their thumb print in a document. They believed that they were guaranteeing the loan and that on the material day Wanjau Kamau was unwell and did not speak to them.

33. In his witness statement the witnesses denied ever visiting M/s Ndana and Company Advocate, signing any will with respect to the late Wanjau Kamau and placing his thumb print on his will.

34. In her evidence in chief the protestor adopted her Affidavit of protest and in cross examination alleged that he deceased got sick in 2013. She did not know the decease he suffered from but before 2013, he was okay. She indicated that the will was not written in 2012. Mr. Karani Mwaniki Ngondu also testified and adopted his statement of 3/8/2018. He was shown the written will and confirmed that he signed it at the advocate office but did not know what he was signing. The document (will) was read to him but he could not recall its content.

35. In cross examination, he stated that "I don't agree with what is indicated in my statement". I thumb printed the will at advocate Ndana office". He further stated that it was the petitioner who made him sign the will but did not specify its content.

36. The appellant's submitted that there was enough proof that the deceased was unwell in 2012 and thus lacked capacity to make and /or execute a will and thus the magistrate was wrong erred by holding that they adduced no evidence showing that indeed the testator was unwell.

37. Section 5(4) of the *Law of Succession Act*, places the burden of proof on the party who alleges that testator was unwell and this incapable of signing of witnessing his/her will.

The legal burden of proof is provided for by section 107 of the *Evidence Act* Cap 80 Laws of Kenya. The said section stated that;

Section 107 of *Evidence Act*

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

ii. When a person is bound to prove the existence of any fact, it is said that eh burden of proof lies on that person.

38. It was therefore the burden of the petitioner who sought annulment of the Will dated 21/3/2012 to prove to the court satisfaction that indeed the testator was unwell and did not have capacity to make the will. That is the legal burden of proof.

39. There is also the evidential burden of proof. In the majority decision of the supreme in president Petition no.1 of 2017 between *Raila Amolo Odinga and another versus IEBC and 2 others* (2017)eKLR, the court had the following to state on the evidential burden of proof at paragraph 132 and 133 thereof;

(132) 132) though the legal and evidential burden of establishing the facts and contentions which will support a party case in static and remained constant through and trial with a plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keep, shifting and its position at any time to determine by answering the question as to who would lose if no further evidence were introduced.

(133) 133) it follows therefore that once the court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controversial, then the evidence burden shift to the respondent. In most cases the elected body to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or if the ground is on any irregularities, that they did not affect the results of the elections. In other words, while the petitioner bears an evidentiary burden to adduce "factual evidence of prove his/her allegations of breach, then the burden shifts and it behoves the Respondent to adduce evidence to prove compliance with the law.."

40. In *Mbuthia Macharia versus Annah Mutua and another* 2017eKLR, it was stated that;

> "The legal burden is discharged by way of evidence with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes of evidential burden. Therefore, while both the legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As the weight of evidence given by either side during the trial varies so will the evidential burden shift to the party who would fail without further evidence" in this case, the incidence of both the legal and evidential burden was with the appellant".

41. From the evidence adduced it is clear that the protestors/appellants did not prove the legal and evidential burden placed on them. The 2nd appellant did not even plead in the protest affidavit filed and dated 27/4/2018 and further affidavit of protest dated 3/8/2018 that the deceased Wanjua Kamau was unwell and not capable of making a will. This issue only came up during cross examination when she stated that the deceased Wanjua Kamau "got sick in 2013, I don't know which desease he was suffering from. Before 2013 he was Ok."

42. The will sought to be impugned is dated 27th March,2012. This means that by the time deceased was making his will he wasn't unwell, going by the evidence of the protestor who stated that he got unwell from 2013. Further even if assuming the protestor was unwell, the appellant did not place any documentary or any other evidence to conclusive prove that fact and also prove that due to his illness, how was mentally incapacitated. The party who would fail without further evidence is the appellant and indeed this ground of appeal must fail.

43. The appellant's witness Karani Mwaniki Ngondo literally disowned his evidence filed through his witness statement. There he had alleged that the Respondent tricked her and made him believe that he was guaranteeing him at Bigwa Sacco Society Ltd and the document he signed were in the respondents house while testifying in court he completely distanced himself from his statement and said it was not correct.

44. The appellant witness indeed confirmed that they went to the office of John Ndana "I thumb printed the will at advocate Ndana office". He confirmed that he was with Lucy Bundi and his national identity card not reflected in the will was correct.

45. The Will of the deceased dated 21/3/2012 was properly drawn by Mr. John Ndana Advocate who confirmed that same and the deceased and his witness expressly signed by placing their thumb print so that nobody could dispute the said signature. Mr. Karani Mwaniki Ngondu too confirmed that in 2012 he went to the said advocate's office and witnessed the will. The said will is witnessed by two competent person and there is no basis whatsoever in rejecting the same. This court thus finds that the deceased Wanjua Kamau died testate

C. Did the trial court erred in law and fact by failing to consider that the deceased had during his lifetime distributed the estate/gave out a gift before his death.

46. The trial court did by his judgment dated 6th December 2019 considered the grounds raised by the appellants at page 73 thereof stated that;

> " The 2nd protestor stated that the testator was unwell at the time of will written. However no evidence was adduced showing that the testator was hence incapable of writing a will".
>
> "mere oral evidence isn't sufficient to discharge the burden of proof on a balance of probability. There ought to have been at least a mutual report to that effect."

This clearly shows that the court did indeed consider the issue of 'gift' as alleged by the appellant and rejected the said assertain.

47. The will dated 21st March 2012 also at paragraph 1 did clearly stated that "I hereby revoke all former wills, codicils and testamentary disposition hereto fore made and declare this to be my last will and testament" the appellant have not shown how this will is biased nor did they show that the alleged gift was made after/effected after this will had been made. The protestors evidenced it that they have resided there since time in memorial. That maybe so but they failed to prove that their portion was gifted to them by the deceased Wanjua Kamau. If the pleading (the affidavit of protest is anything to go by) it was their case that the deceased held land parcel inoi/kariko/290 (a clan land) for his family and in trust for the sons of his late brother Ephantus Kamau Ndigoya distributed it during his lifetime. Nowhere it is pleaded he gifted them a portion.

D. Were the deceased (Wanjua Kamau's) wishes illegal, unfair, discriminating and unjust to the beneficiaries.

48. The deceased Wanjua Kamau left a will dated 21st March 2012 and his proposed distribution which include the appellants was captured by the petitions supporting affidavit to the summons for confirmation of grant dated 2nd March 2018 at paragraph 9. The identity and shares of all the person beneficially entitled to the said estate as having been ascertained was as follows;

    a. Land parcel inoi/kariko/290 to be shared as follows;

        1. Ephantus Kamau Wanjua 0.16ha

        2. Antony Muthii Wanjua 0.16ha

        3. Henry Kinyua Wanjua 0.16ha

        4. John Wanjobi Wanjua 0.16ha

5. Josephat Mwangi Wanjua 0.16ha

   Total (0.8ha or 1.9768 acres approximately 2 acres)

6. Jacinta Wanjiku Munene

7. Patrick Maina Wakuthii

8. Mary Nyawira Muthii 0.4ha

9. Margaret Wambui Wanjua

10. Lucy Muthoni Wanjau

    (0.4ha or 0.9842 acres/approximately 1 acre

11. Lucy Bundi

12. Kamau Bundi 0.3ha

13. Muchene Bundi

    (0.3ha or 0.7413 acres/approximately ¾ acre)

b. Lock up plot no.30 Baricho Jacinta Wanjiku Munene –whole share

49. After the protestor had testified at the request of her counsel she was stood down and given leave to file a further affidavit of protest (filed in court on 16/8/2019) where she gave her own counter proposal on distribution and annexed the land search of Inoi/kariko/290 dated 5th July 2019. The whole parcel measured 1.5ha or 3.706 acres.

50. At paragraph 6 of the further affidavit of protest, the appellant did propose the following mode of distribution

a. Inoi/kariko/290

1. Wamutira Bundi Kamau

2. Fith Nyanguthii

3. Ephantus Kamau

4. Grace Wanjau 1 acre jointly

5. Daniel Karimi

6. Patrick Macharia

7. Margaret Wanjiru

   (1 acre is equal to 0.404 ha)

   1. Ephantus Kamau Wanjua 0.45acre

   2. Antony muthii wanjau 0.45acres

   3. John Wanjohi Wanjua 0.45acres

   4. Josephat Mwangi Wanjua 0.45acres

   5. Henry Kinyua Wanjua 0.45acres

(2.25 acres or 0.9105 ha)

1. Jacinta Wanjiku Munene
2. Mary Nyawira Muthii
3. Margaret Wambui Wanjua 0.45 acres jointly
4. Lucy Muthoni Wanjua

5. Patrick Maina Wakuthii

(0.45acres or 0.18 ha)

b. Plot no.30 Baricho

1. Jacinta Wanjiku Munene
2. Ephantus Kamau Wanjua
3. Antony Muthii Wanjua
4. John Wanjohi Wanjua equal shares
5. Josephat Mwangi Wanjua
6. Henry Kinya Wanjua

51. The appellants urged this court to find that the deceased provision under his will was illegal unfair discriminating and unjust to the beneficiaries and thus the will should be declared null and void.

The court in *Currupian Okumu versus Perez Okumu and 2 others* (2016)eKLR the court held the view that;

> " The legal position is clear however that failures to provide for a beneficiary in a will does not invalidate a will section 5(1) of the Act gives a testator testimony freedom as follows;
>
> "subject to the provision of their part 2 part III every person who is of sound mind and not a minor may dispose off 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..."

...the freedom of a testator to dispose off properly of his free properly by will is however not absolute. The court can after the death of the testator alter the terms of a will following an application under section 26 of the Succession Act.

52. The same emphasis were laid in *James Maina Anyango versus Lorna Yimbuha Ottero and 4 others (*2014)eKLR where the court held that

> " failure to make a provision for a dependent by a deceased person in his will does not invalidate the will a the court is empowered under section 26 of the *law of Succession Act* to make reasonable provision for the dependant".

53. As held earlier, the will dated 21/3/2012 is valid. According to the appellants own proposed of distribution which is elaborately set out above, the appellants prayed to be granted 1 acre of land jointly. The said 1 acre of land is exactly what has been given to them under the will. The only difference is that it is set out as 0.4ha and not acres. In essence what the appellants are fighting for they have received. It therefore cannot be said that there is anything unfair, discrimination or unjust in the will. Further

while testifying the 2nd appellant that plot 30 Banana should be left for Jacinta Wanjiku as she lives there she said " Jacinta and her children should have it. I have no interest in it".

54. This ground of appeal too fails for obvious reasons as stated above.

E. That the learned trial magistrate erred in law and fact in holding that the 2nd appellant was not a dependent within the manning of Section 29 of the *law of Succession Act*.

55. Section 29 of the Succession Act defines dependent as;

    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 parents, step parents, ground parents, grandchildren, stepchildren, children, whom the deceased had taken into his family as his own brothers and sisters and half brothers and half sisters as were being mentioned by the deceased immediately prior to his death and;

    c. Where the deceased was a woman, her husband if he was been mentioned be her immediately prior to the date of her death.

56. The appellants submitted that they were dependent by virtue of being wife and children of the deceased late brother one Stephen Bundi Kamau and this fall within the meaning of dependent by virtue of section 29(b) of the *law of succession Act*.

57. For the appellant to claim to be beneficiary under section 29(b) of the *Law of Succession Act*, they ought to have presented evidence to court to show that prior to his death, Wanjua Kamau deceased was maintaining them. No such evidence has been availed or any suggestion to that effect made.

    *In the Estate of Alfred Muture Munya (deceased)*eKLR the court held that;

    > " a perusal of the pleadings indicates that the applicant has not been listed as a beneficiary of the estate of the deceased and his claim cannot be tried in a succession cause section 29 of the *Law of Succession Act* into the effect that a brother of a deceased will only be considered as a dependant, if maintained by the deceased prior to his death and hence is entitled to the estate of the deceased merely stating that the deceased was his brother is not enough for the Applicant to lay claim to the estate of the deceased without any proof that he was being maintained by the deceased as a dependent.

F. That the learned trial magistrate erred in law and fact by basing the judgment on extraneous matters not pleaded and subsequently made a judgment not supported by the evidence and the relevant law.

58. The appellant never made any submission at this point. Also having analysed the judgement dated 6th December 2019, there is nowhere this court has not picked out any extraneous issues determined by court.

Deposition

59. All considered, none of the grounds of appeal have any merit and this appeal is dismissed in it's entirely with costs to the respondent.

60. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF MARCH 2023.

FRANCIS RAYOLA

JUDGE

In the presence of;