



REPUBLIC OF KENYA



**In re Estate of Kiiru Chomba (Deceased) (Succession Cause
9 of 2014) [2023] KEHC 17431 (KLR) (15 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17431 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 9 OF 2014**

SM GITHINJI, J

MAY 15, 2023

BETWEEN

JULIUS MUNGIRI KIIRU 1ST PETITIONER

LEONARD GICHORA KIIRU 2ND PETITIONER

AND

PETER KIIRU CHOMBA 1ST OBJECTOR

JOSEPH NJUGUNA KIIRU 2ND OBJECTOR

KARIUKI KIIRU 3RD OBJECTOR

MARGARET NYAMBURA MURAGE 4TH OBJECTOR

KIIRU NGUGI 5TH OBJECTOR

JUDGMENT

1. This succession cause relates to the Estate of Kiiru Chomba (the deceased) who died “testate” on January 19, 2013 domiciled in Eldoret, Uasin Gishu County. The objectors challenge the validity of the will made on February 25, 2008 by which the deceased appointed Julius Mungiri Kiiru and Leonard Gichora Kiiru (his sons) as the executors of the will and left out his one daughter as beneficiary of the estate.
2. At the time of his death the deceased was survived by;
 - a. Leonard Gichora Kiiru son
 - b. Julius Mungiri Kiiru son
 - c. Joseph Njuguna Kiiru son
 - d. Newton Njuguna Kiiru son



- e. Margaret Nyambura Kiiru Daughter
 - f. Kariuki Kiiru son
 - g. Peter Kiiru son
 - h. Kamau Kiiru son
3. The deceased had the following properties;
- a. Plateau/ Plateau Block 2 (Uasin Gishu/47) 20 acres
 - b. Kapsaret/Kapsaret Block 1 (Yamumbi) 4 acres
 - c. Eldoret Municipality/ Block 16 (Kamukunji) 5 acres
 - d. Eldoret Municipality/Block A1/50/1 (Shauri yako estate) 0.0372 Ha
 - e. 1 acre Tanning Extract (Eldoret Municipality)
4. On January 14, 2014, the petitioners filed for Grant of Probate. On 14/04/2014, the objectors filed an application objecting to the grant of probate challenging the authenticity of the will and exclusion of some of the beneficiaries as heirs.

The Case

5. The objectors contest that the will used by the petitioners allegedly made by the deceased is a forged will. They further stated that it was agreed amongst the children of the deceased that the will would be opened and read a year after the death of their father. Further, it was the wish and instruction of their father that the will would be collected from Barclays Bank Eldoret Branch by Peter Kiiru Chomba and Julius Mungiri Kiiru which wishes the petitioners went against.
6. The matter came up for hearing on 13/3/2023. The objectors sought to rely on the 1st objector's affidavit filed on 18/10/2016 and had the objectors' case closed. On their part the petitioners' relied on the affidavit of Julius Kiiru the 1st petitioner sworn on 25/9/2018, the affidavit of Leonard Gichoya Kiiru sworn on 6/1/2017 and a further affidavit sworn by him dated 31/7/2019.

Summary of the Evidence

7. From the adopted affidavit by Peter Kiiru, a summary of the facts is that the deceased did not make the purported will; the will was altered by the 1st petitioner and his son Kevin Kiiru Chomba and that the 1st petitioner had already subdivided land parcel No. Eldoret Municipality Block 21/ King'ong'o 69, transferred it to his children and the 2nd petitioner as of at the time of petitioning. Further, their late father had left a will that was to be read a year after his demise. It is averred that the will that emerged was fraudulent and some of the deceased's properties and beneficiaries have been omitted. It is stated that their home is on Eldoret Municipality Block 21/King'ong'o/69 which the deceased had subdivided informally and showed each of the sons their respective places but no mutation was signed.
8. It was also stated that the mutation purported to have been registered on 8/12/2011 to the subdivision of Eldoret Municipality Block 21/King'ong'o/69 was fraudulent as the consent of the Land Control Board was altered and the 1st petitioner has subdivided the land and transferred it to his children and the 2nd petitioner.
9. It was further stated that the land is fraudulently registered as follows;



- a. Samuel Gitimu Chomba- 2 plots totaling to 1 acre
 - b. Kevin Kiiru Chomba - 3 plots totalling to 1.75 acres
 - c. Wellington Chomba Kiiru- 2 plots totalling to 1.5 acres
 - d. Leonard Kiiru Chomba - 1 plot measuring 0.75 acres
10. The petitioners’ perspective is that the deceased died testate and appointed the petitioners as the executors of the will which all heirs were invited to its opening and reading. That the petitioners acceded to the request to have it read a year after the demise of the deceased. In January 2014 the will was authenticated by the advocate who was present when the deceased wrote the will and the cause was gazetted. It is stated in the various affidavits by the petitioners that the will allegedly made on 06/03/2001 appointing the 1st petitioner and the 1st objector is in law deemed to have been varied by the subsequent one; additionally, it is not clear who was the custodian of the instrument.

Analysis and Determination

11. I have considered the pleadings on record by the parties, and the evidence adduced. I have also considered the submissions by the petitioners as well as the authorities relied upon. At the time of writing this judgment, the objectors had not filed their submissions. The issues arising for determination are;
1. Whether the will dated February 25, 2008 is valid?
 2. If valid, whether the deceased made reasonable provision for all his dependants in it?

Validity of the Will

12. The law which governs validity of written wills is section 11 of the [Law of Succession Act](#), which provides as follows:

“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.”
13. Under section 11 a will is deemed valid, if it is properly executed by the testator, and it appears from the signature of the testator that he intended to give effect, by his signature, to the document as his



will. Secondly, the will must have been signed by the testator in the presence of two or more competent witnesses, who should also sign the will in the presence of the testator. The document, that has been placed on record, as the will of the deceased, has a signature on the column for the testator, and there are two signatures for the two attesting witnesses. Superficially, there is compliance with section 11, and therefore presumption of due execution, or *omnia esse riteatta*, should arise, that the will appears on the face of it to have been properly executed in a manner that shows that the testator and his witnesses intended it to be a will. See *John Waguru Ikiki & 7 others v Lee Gacuiga Muthoga* [2019] eKLR (Musinga, Kiage and Murgor JJA), and *James Maina Anyanga vs. Lorna Yimbiba Ottaro & 4 others* [2014] eKLR (Emukule J). The presumption is rebuttable, and can be displaced by evidence to the contrary.

The question I am now faced with is whether this presumption has been displaced. The Objectors challenge the validity of the will on account that the signature appearing on the will is not that of the deceased. A will whose execution and attestation is founded on forged signatures is void. The explanation for this is that the contents of the will would not be an expression of the wishes and intentions of the deceased, and he would be deemed not to have known nor approved the contents of the document. The way to deal with allegation of forgeries of signatures on a will is to have them referred to handwriting experts or document examiners for comparison of the alleged forged signatures with the known signatures of the deceased, as was said and in the case of *In Re JNM (Deceased)* [2005] eKLR (Kooome J). *In re Estate of the late Samson Kipketer Chemirmir (Deceased)* [2019] eKLR (Ndung'u J). The opinion of document examiners or handwriting experts is critical. I have considered the Forensic Document Examination Report by EACC filed in court on October 25, 2019 which report concludes that the signatures from the samples collected are similar, taking into consideration possibilities of natural variations. Worth noting is that the comparison for the signature was done from exhibits taken from the will dated February 25, 2008 and known signatures dated between 14/6/1989 and 10/11/2011. To this end, I am of the finding that the objectors have failed to discharge the burden of proof on the inconsistencies on the challenged signature of the deceased to the extent where it can be declared as being invalid. It was in this context that the court in **Re estate of Julius Mimano (Deceased)* [2019] eKLR held as follows:

“It is the applicant’s contention that the signatures on the Will were forged and did not belong to the deceased. He did not call a document examiner to give expert opinion on the said signatures. The applicant did not express himself to be a qualified document examiner, or handwriting expert, whose word on the matter could be given weight (See Section 109 of the *Evidence Act*). That places the burden of proof on him. The proviso states that “The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any Law that the proof of that fact shall lie in a particular person.”

Provision for all Dependants

14. A testator has the right to exercise his wish and voluntarily distribute his estate. *Re Arthur (Deceased) Abakah & another v Attah Hagan & another* [1972] 1 GL. R435 there exist substantive complexity for the Court to vary or set aside the Will made by a testator. The court remarked as follows:

“What should be borne in mind is that whatever a Will is granted, the court is not giving its blessings and support to all the contents of the Will. The court is only expressing its satisfaction that the Will has been validly executed and that the named executors are at liberty to administer the Estate. The court should be extra ordinarily slow in interfering with the Will of a deceased person because the Will constitutes hallowed granted and no one should



tread upon it. If the court decides to interfere, it does not expunge anything from the Will, if it decides to omit anything on the Will known grounds, the omission is made in the probate and not in the Will itself. For instance, the court will exclude from a Will any words introduced into the Will by mistake without the instructions or knowledge of the testator. The court may exclude from the probate and from registration words of atrocious, offensive or libelous character and it will exclude words of a blasphemous character.”

15. It has been alluded that some of the beneficiaries of the deceased were left out of the will. The first schedule pursuant to section 22 of the *Law of Succession* encompasses 78 rules of Construction of Wills based on basic principles. It is clear from this schedule that in order for the Court to give effect to the validity or invalidity of the Will, it must satisfy itself that the intentions and objectives of the testator in making the Will would not be defeated by any misinterpretation that produces prejudice or injustice to the wishes of the testator.
16. Section 26, 27 and 28 of the *Law of Succession Act* (Chapter 26 of the Laws of Kenya) provides for application for adequate provision for dependants not adequately provided for by Will or on intestacy as follows:

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- “26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his Will, or by gift in contemplation of death, of the Law relating to intestacy, or the combination of the Will, gift and Law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for the dependant out of the deceased’s net estate.
27. In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependants, or to make such other provision for him by way of periodical payment or a lump sum, and to impose such conditions as it thinks fit.
28. In considering whether any order should be made under this part, and if so what order, the court shall have regard to:
 - a. The nature and amount of the deceased’s property;
 - b. Any past, present or future capital or income from any source of the dependant;
 - c. The existing and future means and needs of the dependant;
 - d. Whether the deceased had made any advancement or other gift to the dependant during his lifetime;
 - e. The conduct of the dependant in relation to the deceased;
 - f. The situation and circumstances of the deceased’s other dependants and the beneficiaries under any will;



- g. The general circumstances of the case, including, so far as can be ascertained, the testator’s reason for not making the provision for the dependant.

Section 29 of the LSA sets out the meaning of the term ‘dependant’ 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, grand-children, 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.
17. A testator has power to dispose of their property as they please and the court is bound to respect those wishes as long they are not repugnant to the Law and they do not leave out some dependants and beneficiaries unless for a good stated reason. Failure to make provision for a dependant by a deceased person in his or her will does not invalidate the Will as the Court is empowered under section 26 of the Law of Succession Act, as demonstrated above, to make reasonable provision for the dependant (s). Section 28 sets out the parameters that this Court should consider when making such provision.
18. It is important to understand the role of testamentary freedom of a testator to have unfettered discretion to dispose of his or her estate and the fundamental moral duty to provide by way of inheritance for his or her children in death.
19. The provisions of Section 35, 37 and 38 of the Law of Succession Act caters for children and does not distinguish between male and female children or their marital status. Furthermore, the provisions of article 27 of the Constitution are against any form of discrimination on the grounds of gender or marital status.
20. The 4th objector who is a daughter of the deceased has been left out of the will. As already discussed, a testator has the freedom to dispose their estate as they please. A caveat to such disposition is however placed by the above sections. The 4th objector is entitled to a share of the estate as a daughter of the deceased.
21. During the pendency of the case, one Godfrey Kamau Kiiru who was a son of the deceased passed away. I do note that he did not have a wife or children who would account as his beneficiaries. He was entitled to a share of the deceased’s estate as per the provisions of the will. So as not to much interfere with the wishes alluded in the will, I am of the considered view that the share of Godfrey Kamau Kiiru (deceased) should conveniently pass to the 4th Objector. For avoidance of doubt, all other provisions of the will shall remain and be effected as they were explicitly expressed in it.
22. This being a succession matter and between the nuclear family members of the deceased, each party shall bear their own costs.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 15TH DAY OF MAY, 2022.



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S.M. GITHINJI

JUDGE

In the Presence of; -

- 1. Mr Mbugua for the Petitioners.**
- 2. Miss Omunya holding brief for Mr Musudi for the Objector.**

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S.M. GITHINJI

JUDGE

Miss Omuya; We seek leave to appeal if our client would want to go that way. We also pray for a copy of the judgment.

Mr Mbugua; They can make a formal application.

Court; They can have the leave to avoid unnecessary delay if they wish to proceed on appeal. Their prayer is granted. Copies of the finding to issue to the parties.

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S.M. GITHINJI

JUDGE

15/5/2023

