



In re Estate of Kevin John Ombajo (Deceased) (Succession Cause 555 of 2018) [2021] KEHC 459 (KLR) (7 July 2021) (Judgment)

In re Estate of Kevin John Ombajo (Deceased) [2021] eKLR

Neutral citation: [2021] KEHC 459 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
SUCCESSION CAUSE 555 OF 2018
LA ACHODE, J
JULY 7, 2021
IN THE MATTER OF THE ESTATE OF KEVIN JOHN OMBAJO
(DECEASED)

BETWEEN

TRACY KAMENE PETITIONER

AND

JACQUELINE VIVIAN AKINYI RESPONDENT

Audio-visual recordings of a deceased person’s wishes cannot be used to revoke a written will.

The cause involved a determination of the legal status of audio-visual recordings that were intended to be converted into a written will. The deceased made a written will. However, he later sought to vary the terms of the will and made audio-visual recordings. The court held that the audio-visual recordings were an attempt at making a will that was intended to be reduced into writing but the deceased died before the recordings were reduced into writing. Additionally, the court held that although there was an attempt at making a will, the legal threshold with respect to validity of the will had not been met.

Reported by Beryl Ikamari

Law of Succession - probate - validity of a will - testamentary capacity - whether the maker of a will was of sound mind - whether allegations that a deceased person was too ill to understand things and was amenable to manipulation and misguidance at the time that an alleged will was made, were established in evidence - Law of Succession Act, cap 160, section 5.

Law of Succession – probate – wills – types of will – oral will vis-à-vis a written will – where a deceased recorded an electronic audio-visual will with the purpose of amending a previous written will - between a written or an oral will, what form did an electronic audio – visual take to fit into Kenya’s legal succession framework - whether an audio – visual will could revoke a written will - whether electronic (audio-visual) wills were acceptable in Kenya without the requisite legal framework. – Law of Succession Act (CAP. 160) sections 8, 9, 11, 17 and 18(2)



Brief facts

The petitioner was the wife of the deceased who died testate. She filed a petition for probate of the written will dated February 20, 2012, in which she was a joint executrix with the deceased's sister. Her efforts to file a joint petition with her co-executrix were unsuccessful but in her petition, she sought for the probate of the deceased's will to be granted to them jointly.

The respondent opposed the petition for the grant of probate and filed an objection and a petition by way of cross-application. In the application she sought a grant of representation of the deceased's estate on grounds that the deceased's last will was recorded in an audio-visual medium on December 23, 2016, and that the written will dated February 20, 2015 stood revoked.

Issues

- i. What were the circumstances in which the maker of a will would lack testamentary capacity on grounds related to soundness of mind?
- ii. Between a written or an oral will, what form did an electronic audio – visual take to fit into Kenya's legal succession framework?
- iii. Whether electronic (audio-visual) wills could be deemed to be acceptable in Kenya without the requisite legal framework.
- iv. Whether an audio – visual will could revoke a written will.

Held

1. The Law of Succession Act did not provide for audio-visual recordings. However, the Evidence Act under sections 78A, 106A and 106B provided for the conditions upon which electronic records were admissible in court. The electronic evidence tendered met the conditions for admissibility set out under section 106B(2) of the Evidence Act.
2. The audio-visual recording had to be tested strongly against the well-established principles of succession law. The validity of a will was dependent on the capacity of its maker and whether it was made in proper form. The law on testamentary capacity was set out in section 5 of the Law of Succession Act. The maker of a will ought to be a person of sound mind and not a minor.
3. Under section 5 of the Law of Succession Act, the soundness of mind of the maker of a will had to be presumed unless at the time of executing the will the maker was in a state of mind, whether arising from mental or physical illness, drunkenness, or from any other such cause, as not to know what he was doing. The burden of proving that the maker of a will was not of sound mind lay on the person alleging that the deceased lacked such capacity.
4. The onus lay with the petitioner to satisfy the court that the deceased at the time of making the audio – visual recording was too ill to know what he was doing. No report by a medical officer or other professional witness on the score was proffered. There was nothing to suggest that the deceased's condition had deteriorated progressively to a stage where he was mentally incapacitated.
5. The deceased had medical issues over time and sought treatment both locally and abroad. On record were discharge summaries of the deceased of various dates in 2016. There was however no medical report to indicate that the deceased's condition affected his mental capacity. There was no material before me upon which the court could hold that the deceased did not have the requisite testamentary capacity on the date when the audio-visual recording was made.
6. Section 8 of the Law of Succession Act provided that a will could either be written or oral. The deceased had a written will dated February 20, 2015. As required under section 11 of the Law of Succession Act, that written will was executed by the deceased and attested by two witnesses. The contents of the written will and the deceased's testamentary capacity at the time of executing the will were not challenged.



7. Under section 9 of the Law of Succession Act, an oral will had to be made before two competent witnesses and the testator had to die within three months of the making of the will. The audio – visual recording was made before three witnesses, two of whom gave evidence in support of the averments in the recording. However, the deceased did not expire within a period of three months from the date the recording was made. The deceased died seven (7) months after the making of the alleged will. The alleged will did not qualify to be a valid oral will under the Law of Succession Act, even though the facts as narrated, point to an attempt to make a will.
8. Sections 17 and 18 of the Law of Succession Act provided for the revocation of wills. Under section 18(2) of the Law of Succession Act, a written will could not be revoked by an oral will.
9. The audio-visual recordings made by the deceased were intended to be a will and they were to be reduced into writing and witnessed before Christmas but the deceased died before that could be done. Although there was an attempt at making a will, the legal threshold enabling it to be considered a valid will capable of being enforced by the court, was not met.

Objection dated August 1, 2018 and cross-petition dated August 20, 2018, were dismissed. Petition for probated dated April 16, 2018 allowed.

Orders

- i. *That the will executed by the deceased dated February 20, 2015 was declared to be valid will of the deceased.*
- ii. *That distribution of the deceased’s estate was ordered to in terms of the deceased’s will dated February 20, 2015.*
- iii. *No orders as to costs.*

Citations

Cases

Kenya

1. *In re Estate of Evanson Mbugua Thong’ote (Deceased)* Succession Cause 2519 of 1998; [2016] KEHC 1261 (KLR) - (Explained)
2. *In re Estate of Murimi Kennedy Njogu -Deceased* Succession Cause Cause 1141 of 2011; [2016] KEHC 6302 (KLR) - (Followed)
3. *In the Matter of the Estate of Elizabeth Wanjiku Munge (Deceased)* Succession Cause 2229 of 2010; [2015] KEHC 2240 (KLR) - (Explained)
4. *Wais, Gulzar Abdul v Yasmin Rashid Ganatra & Tariq Abdul Rashid* Succession Cause 290 of 2010; [2014] KEHC 4067 (KLR) - (Explained)
5. *Wambui, Beth & another v Gathoni Gikonyo & 3 others* Civil Appeal 82 of 1983; [1988] eKLR - (Explained)

Australia

1. *Estate of Grant Patrick Carrigan* [2018] QSC 206 - (Mentioned)
2. *Estate of Grant Patrick Carrigan* [2018] QSC 206 - (Explained)
3. *Frizzo v Frizzo* [2011] QSC 107 - (Followed)

Statutes

Kenya

1. Evidence Act (cap 80) sections 78A, 106A, 106B(2) - (Interpreted)
2. Law of Succession Act (cap 160) sections 5, 7, 8, 9(1); 11; 17; 18(2) - (Interpreted)

United States

Covid-19 (Signing of Instruments) (Jersey) Law Regulations, 2020 In general - (Cited)

Australia

1. COVID-19 Omnibus (Emergency Measures) Act, 2020 In general - (Cited)



2. Wills Act, 1997 In general - (Cited)

Advocates

None mentioned

JUDGMENT

1. Kevin John Ombajo died testate on July 29, 2017 domiciled in Nairobi. The petitioner herein filed a petition for probate of the written will and an affidavit in support both dated April 26, 2018. She stated that she brought the petition by virtue of being a wife to the deceased. In her petition, she stated that prior to his demise, the deceased had written a will dated February 20, 2015 and had appointed her and his sister Jacqueline Vivian Akinyi as joint executrices of the said will. She averred that her efforts to file a joint petition with her co-executrix has been unsuccessful. The petitioner sought that the probate of the deceased's will be granted jointly to them.
2. In an affidavit dated June 26, 2018 the respondent opposed the petition for Grant of Probate. The respondent also filed an objection dated August 1, 2018 and a petition by way of cross application for a grant supported by an affidavit dated August 20, 2018. In the said application, she sought the grant of representation to the estate of the deceased on the ground that the deceased made his last will and testament in a recorded audio-visual medium on December 23, 2016 which revoked the previous written will dated February 20, 2015.
3. On September 18, 2018 and February 20, 2019 when the matter came to Court for directions, the parties by consent agreed to have the letters of administration issued pending the hearing and determination of the objection and cross application on record. Subsequently on July 25, 2019 letters of administration of the estate of the deceased were issued to Tracy Kamene and Jacqueline Vivian Akinyi. Parties were also directed to file their statements of facts and witness statements for the court's determination.
4. In sum, it was the petitioner's case that she is the widow of the deceased who died testate having made a valid written will which was never revoked, amended or cancelled. That by the time the purported audio visual recording was made the deceased was too ill to understand things and was amenable to manipulation and misguidance. She asserted that the contents of the audio-visual recording were a complete departure from the written will which was uncharacteristic of the deceased and that the recording was skewed to portray her in bad light and disinherited her even though they had no differences with the deceased when he was alive.
5. The petitioner contended that the audio-visual recording only surfaced as an afterthought and has too many inconsistencies to be used in place of a written will. She claimed that prior to his demise the deceased had directed her to fully implement his wishes in the written will. She contended that the cross-application is made in bad faith and should be disallowed.
6. The respondent/objector in statement dated January 27, 2020 averred that she is a sister to the deceased and they were partners in a business that they had incorporated. She stated that in 2010 the deceased was diagnosed with brain tumor and sought treatment both locally and abroad. Further that in 2015, the deceased informed her that he had written a will the contents of which were shared with her. However, the deceased's condition deteriorated leading to loss of his eyesight. That when this happened, the deceased took her to his Bankers and made her a signatory to his account. She claimed that he also handed her the keys to his safe deposit box and gave her instructions to handle all his affairs related to his family and business.



7. The respondent averred that on December 23, 2016, the deceased informed her that he had been to his lawyer and had made an audio-visual will that stipulated his last wishes on how he wanted his property to be distributed as he wanted certain things in his previous will changed. Subsequently, the deceased's condition deteriorated leading to his death in 2017. The respondent avers that after the funeral, the family met at Anjarwalla & Khanna Advocates where the contents of the written will executed in 2015 and the audio-visual recording of 2016 were shared with them. However, the parties could not agree on which of the two was a valid will.
8. Rosalinda Njeri Nduati an Advocate of the High Court of Kenya filed a witness statement dated January 27, 2020. She averred that she was the deceased's advocate and in the course of their business the deceased had informed her that he had been diagnosed with a brain tumor. That upon his return from India where he had gone for treatment, she prepared and finalized the Will dated February 20, 2015 which was executed in her office at Anjarwalla & Khanna Advocates in the presence of two lawyers.
9. The witness further stated that in 2016, when the deceased came back to Kenya after another trip to India, he requested her to visit him in a bid to make changes to his last will. She stated that by this time, the deceased's eye sight had almost completely failed. That on December 23, 2016 he stated his last wishes which were recorded in an audio-visual medium, in the presence of Edwin Mbaru and her colleague James Ngugi. Further, that after the session was completed the details that were recorded were typed out. She asserts that at the time the recording was made, the deceased was lucid and clear in his instructions on the changes that he wanted made to his will. She affirms that upon his demise, she invited the deceased's family members and the details of the will executed in 2015 and the 2016 audio-visual recording were given to them.
10. In her evidence the witness also submitted a Certificate of Electronic Record to authenticate the audio – visual recording as a proper record. The certificate indicated that the electronic recording was made partly by her mobile phone and partly on an iPad. That it was stored in a USB flash disk which devices were in her control and custody and were operating properly. That the electronic record is therefore accurate.
11. In his statement dated January 27, 2020, James N. Ngugi an advocate of the High Court of Kenya who had known the deceased since 1989, averred that in November 2016 when he met the deceased his condition had deteriorated. The deceased informed him that he had drawn up a will and intended to make changes to the said written will.
12. Subsequently, in a meeting held on December 23, 2016 at Anjarwalla & Khanna Advocates Mrs. Rosa Nduati led the recorded session. Mr. Ngugi averred that the intention was for the recording to be reduced into writing and witnessed by him immediately after the Christmas season. However, the deceased was in and out of hospital during the subsequent period up until his death. He asserted that although the deceased had lost his sight, he still possessed clarity of thought and maintained a sense of humor. He asserted that the deceased's wishes were properly captured by the audio-visual recording.
13. The petition, objection and cross-petition were canvassed by way of written submissions which were filed and exchanged between the parties. The Petitioner's submissions were filed by Mohammed Muigai LLP while those for the respondent/cross-petitioner were filed by Oraro & Company Advocates.
14. For the petitioner, it was submitted that the 2015 will had fulfilled all the requirements on execution and attestation for the formal validity of a written will. Further, that the respondent does not dispute the validity of the said will on the basis of mental capacity on the part of the deceased in her pleadings. counsel urged the court to find that the will dated 2015 was valid. Reliance was placed in the case of



- Re Estate of Murimi Kennedy Njogu (Deceased)* [2016] eKLR, where the court concluded that where the validity of a written will had not been challenged, the court had no option but to find the will to be valid.
15. The second issue raised was on the validity of the audio visual recording. counsel for the petitioner submitted that the recording does not qualify as an oral will within the provisions of section 9 of the *Law of Succession Act*. It was argued, that although the deceased made the audio visual recording before three witnesses, the deceased did not die within three months of making the audio-visual recording but died more than six months after. Further, that the deceased was neither a member of the armed forces nor a member of the merchant marine in order for the exception of section 9(1) to apply. To buttress this argument counsel cited the case of *Estate of Elizabeth Wanjiku Munge (deceased)* [2015] eKLR where the court held that the date of making an oral will is critical. Further, that the life of an oral will is only three months, unless it is made by a mariner.
 16. It was further submitted that the Audio – Visual Recording is not a codicil within the meaning of section 3(1) of the Act. Furthermore, that none of the actions contemplated by section 18 took place insofar as to revoke the deceased’s written will. Counsel asserted that section 18(2) of the Act affirms that a recording cannot revoke the deceased’s written will.
 17. On the deceased’s capacity to make an oral will, it was submitted that there was reasonable and justifiable apprehension that at the time of making the audio-visual recording his mental health had deteriorated. Counsel asserted that as reflected in the transcript of the audio visual recording, the deceased could not recall his properties with any degree of specificity and could not recall and/or give details on some of the bequests. The case of *Estate of Murimi Kennedy Njogu (deceased)* [2016] eKLR was cited where the court established the threshold necessary to determine testamentary incapacity.
 18. The petitioner through her advocates submitted that the deceased in the purported audio visual recording failed to make adequate provisions for his dependant. It was contended that the recorded will purported to transfer all the shares in their Company to the respondent, leaving the petitioner without an adequate source of income contrary to the deceased’s true wishes. Emphasis was laid in the case of *Gulzar Abdul Wais vs Yasmin Rashid Ganatra & Another* [2014] eKLR where the court stated that the court can interfere with a will where dependants have not been adequately provided for.
 19. Lastly counsel for the petitioner argued that the property allegedly distributed by the audio visual recording was not capable of being distributed by the deceased. It was stated that there was a trust resulting from the shares in the Company that were purportedly distributed to the respondent, and that the petitioner contributed to the success of the Company as a family business even though she was not a shareholder. Counsel asserted that the petitioner was entitled to the deceased’s shares in the Company as a consequence of the resulting trust. Consequently, that the deceased was incapable of independently bequeathing the said shares to the respondent for the reason that the resulting trust in the petitioner’s favour was already in existence.
 20. In their submissions, the respondent/Objector through Oraro and Company Advocates proposed that the only issue for determination was whether the audio-visual recording made by the deceased on or around December 23, 2016 was a valid will under the Law of Succession Act. It was submitted that although audio visual recording is a medium not traditionally contemplated in the making of wills, it still embodied the wishes of the deceased. Counsel urged the court to focus on the deceased’s testamentary intentions rather than the form of the will.
 21. To buttress this argument, they cited the holding in the Supreme Court of Queensland in the *Estate of Grant Patrick Carrigan* [2018] QSC 206. In the said decision the court stated the conditions necessary for a document to form part of a will as: the existence of the document; the document



purports to embody the testamentary intentions of the deceased; and that the deceased by some words demonstrated that it was his intention that the document operate as the last will.

22. In addition, counsel for the respondent submitted that the deceased had lost his sight and could not authenticate that whatever was written was a true reflection of his wishes thus the use of an audio-visual medium. It was argued that the language used by the deceased was intended to convey his testamentary intentions and operate as his last will. Reliance was placed on the case of *Frizzo v Frizzo* [2011] QSC 107 which summarized the issue of testamentary capacity.
23. In sum, it was submitted that despite the deceased being ill prior to making the audio-visual recording, he was of testamentary capacity as is evinced in his clarity of thought in the audio-visual recording. Further, that the only difference between the audio-visual will and the written will is the medium used to capture the wishes of the testator. That both are used to memorialize the wishes of the testator for posterity unlike an oral will where the word and memory of the witness is what is relied upon hence the limited period of its validity.
24. I have carefully perused the evidence laid out before me, the witness statements as well as the submissions of the counsels. To my mind, the only issue for determination in this matter is whether the audio – visual recording is a valid will of the deceased and can dislodge the written will which came before it.
25. In the Kenyan context, no recognition of audio – visual recordings has been provided for in the Law of Succession Act. However, the *Evidence Act*, sections 78A, 106A and 106B provides for the conditions upon which electronic records are admissible in court.

78A. Admissibility of electronic and digital evidence

- (1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
- (2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
- (3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—
 - (a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
 - (b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
 - (c) the manner in which the originator of the electronic and digital evidence was identified; and
 - (d) any other relevant factor.
- (4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and



rebuttable proof of the facts contained in such record, copy, printout or extract.”

26. The conditions upon which such electronic evidence would be admissible are provided for under section 106 B of the same Act. As required under the law, Rosalinda Njeri Nduati in her affidavit stated that the audio-visual recording was created, maintained, modified or transmitted in digital form by a computer system.
27. In her Certificate of Electronic Record, she further stated that the recording was carried out partly by her personal mobile phone (Samsung Galaxy s6 Edge) and her IPad. That once recorded, they were copied and transferred to a USB flash drive all which were in her control. She asserted that the two devices were operating properly and that the electronic record is therefore accurate. On her part, the petitioner did not challenge the admissibility of the electronic record as evidence. Consequently, from the specifics given in the Certificate of Electronic Record, I find that the averments thereon meet the above stated threshold of sub-section 106B (2) of the Evidence Act. In the circumstances, the electronic evidence of Rosalinda Njeri Nduati is admissible as evidence.
28. Having so stated, the audio visual recording, must be strongly tested with regard to the well-established principles of wills. The validity of wills is dependent on the capacity of the maker and whether the same was made in proper form. A will is defined as valid if made by a person with the relevant capacity in proper form. The law on testamentary capacity is set out in section 5 of the Law of Succession Act. The maker of a will ought to be a person of sound mind, who is not a minor.
29. Section 5 goes on to state that the soundness of mind of the maker of a will shall be presumed 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. The burden of proving lack of capacity on account of lack of a sound mind is cast on the person alleging that the deceased lacked such capacity. Under section 7 of the said Act, wills caused by fraud or coercion or importunity or mistake are stated to be void.
30. The petitioner alleged that at the time the audio - visual recording was made the deceased was too ill to understand things and was amenable to manipulation and misguidance. On their part, the witnesses present at the time the audio-recording was made asserted that although the deceased had lost his sight, he still possessed clarity of thought. The advocate who led the session painted her interaction with the deceased as fairly personal and from which she deduced that the deceased was of testamentary capacity.
31. The onus lay with the petitioner to satisfy the court that the deceased at the time of making the audio – visual recording was too ill to know what he was doing. No report by a medical officer or other professional witness on the score was proffered. I have also perused the evidence of the Petitioner and the material placed on record, and I have noted that there is nothing to suggest that the deceased’s condition had deteriorated progressively to a stage where he was mentally incapacitated. It is a fact that the deceased had medical issues over time and sought treatment both locally and abroad.
32. On record are discharge summaries of the deceased of various dates in 2016. There is however no medical report to indicate that the deceased’s condition affected his mental capacity. In view of the above, it is my conclusion that there is no material before me upon which I can hold that the deceased did not have the requisite testamentary capacity on December 23, 2016 when the audio-visual recording was made.
33. Section 8 of the Law of Succession Act provides for forms of wills. It stipulates that a will may be made either orally or in writing. From the pleadings, it is not in dispute that on February 20, 2015 the deceased bequeathed his property to his beneficiaries by way of a written will.



34. The formal requirements of validity of a written will are stipulated in section 11 of the [Law of Succession Act](#). It states -

‘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.’

35. The document under probate as a written will was executed by the deceased and attested by two witnesses. The contents, form of the written will and the capacity of the deceased to bequeath his property as he wished have not been challenged by the respondent/objector. Therefore for all intents and purposes the written will of the deceased dated February 20, 2015 was considered to be his valid last will and testament at that particular time.

36. The respondent claimed that on December 23, 2016 the deceased visited his advocate with the intention of making changes to his written will. These sentiments were supported by the said advocate who gave evidence asserting that indeed the deceased visited her office and sought to make changes to his will. It was averred that since the deceased had lost his sight, his wishes were recorded using partly her personal mobile phone and partly her iPad. The recording was reduced into a transcript and transferred to an USB (Universal Serial Bus) drive. These events took place in the presence of James N. Ngugi who corroborated the evidence and Edwin Mbaru. The question that arises therefore is whether the audio-visual recording qualifies to be an oral will.

37. In the case of [Beth Wambui & Another v Gathoni Gikonyo & 3 Others](#) [1988]eKLR, the Court of Appeal considered two testamentary documents by the deceased, one of which marked ‘B’ was written by a witness upon the dictation or direction of the deceased and confirmed his wishes concerning a certain property. While the court found that the said document did not qualify as a written will, the court stated:

“The document is not witnessed as required. But it expresses the deceased’s wishes. Couldn’t it be regarded as an oral will? There is nothing to prevent a person making an oral will disposing of his property.”

38. Gachuhi JA proceeded to cite the provisions of section 8 and 9 of the [Law of Succession Act](#) before concluding that:

“*In Re Rufus Ngethe Munyua (Deceased) Public Trustee v Wambui* [1977] KLR 137 where the deceased gave instructions of the disposal of his properties to his wives and children,



and that those instructions were written on a piece of paper by the person recording it, the deceased having died few days later, Harris J. held the writing disposing the property to be an oral will. In the present appeal, the deceased gave instructions which were written and signed by him in presence of two witnesses. He died few days later. In this case, on the authority of *Re: Rufus Ngethe Munyua* and Section 8 and 9 of the Law of Succession Act I hold the document dated 12.5.78 (Document B) capable of being construed as an oral will.”

39. With reference to the above precedent, to determine the validity of oral wills, the relevant section of the Law is section 9 of the Law of Succession Act which provides in mandatory terms that:

(1) No oral will shall be valid unless:

(a) It is made before two or more competent witnesses and

(b) The testator dies within a period of three months from the date of making the will.

40. While discussing the requirements of a valid oral will, Musyoka J *in re Estate of Evanson Mbugua Thong'ote (Deceased)* [2016] eKLR stated that:

“An oral will is made simply by the making of utterances orally relating to disposal of property. In assessing whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will.” The honourable judge continued “... The other consideration is that the utterance ought to be made in the presence of two or more persons”

41. In summation of the totality of evidence before court, the audio – visual recording was made before three witness, two of whom gave evidence in support of the averments in the recording. However, the deceased did not expire within a period of three months from the date the recording was made. The deceased herein died seven (7) months after the making of the alleged will. I do not think, in the given circumstances, that the alleged will qualifies to be a valid oral will of the deceased made under the Law of Succession Act, even though the facts as narrated, point to an attempt to make a will.

42. Counsel for the respondent/objector argued that the three month period was only relevant since the word and memory of the witnesses was to be relied upon, which was not the case herein as there was an electronic record which could be relied upon. That maybe the case, but there are other factors that must be considered in the use of modern technology in recording of the last wishes of a deceased.

43. Although not formally recognised in many jurisdictions including Kenya, electronic wills and the use of technology as a medium of documenting evidence is on the rise. As a result of the COVID-19 pandemic they are more relevant than ever. Just like conducting of court sessions virtually, there is need to have policies and regulations in place to ensure that these processes are guarded against the challenges that are already there such as cyber security, obligations to assess capacity, understanding, undue influence and duress.

44. The bottom line is that courts have been reluctant to accept audio-visual recordings due to lack of statutes and policy regulations. Australia for instance, legislated the *COVID-19 Omnibus (Emergency Measures) Act 2020* which gave way to the Regulations providing for electronic execution and remote witnessing of certain documents by modifying the application of statutes such as the *Wills Act 1997*. In the United Kingdom audio-visual recordings have been accepted as a step to solidify written wills. In the state of New Jersey in the USA, the *Covid-19 (Signing of Instruments) (Jersey) Law Regulations*



2020 (Regulations), which came into force on April 23, 2020, provides temporary arrangements to enable wills to be witnessed safely using audio and visual links if the required conditions are met.

45. Another issue raised was whether the audio – visual recording revoked the written will of 2015. There is a specific procedure under sections 17 and 18 of the Law of Succession Act for the revocation of a wills. It provides that:

“ 17. A will may be revoked or altered by the maker of it at any time when he is competent to dispose of his free property by will.

18.

(1) Save as provided by section 19, no will or codicil, or any part thereof, shall be revoked otherwise than by another will or codicil declaring an intention to revoke it, or by the burning, tearing or otherwise destroying of the will with the intention of revoking it by the testator, or by some other person at his direction.

(2) A written will shall not be revoked by an oral will.”

46. The effect of section 18(2) of the Act is that an oral will cannot revoke a written will. As a consequence of the preceding analysis, I have no doubt in my mind that the alleged utterances made by the deceased and recorded in an audio – visual medium on December 23, 2016 may have been intended to be a will. According to the evidence of James N Ngugi who witnessed the audio – visual recording, the intention was to reduce the recording into writing and have it witnessed immediately after Christmas. This however was not to be as the deceased died before it could be done. The document does not therefore meet the legal threshold enabling it to be considered as a valid will capable of being enforced by this court.

47. In the premise, the objection dated August 1, 2018 and the cross-petition dated August 20, 2018 are found to lack merit and are hereby dismissed. The Petition for Probate of the deceased’s written will dated April 26, 2018 is found to have merit and is allowed with the following orders:-

- i. That the Will executed by the deceased herein dated February 20, 2015 be and is hereby declared to be valid will of the deceased.
- ii. That distribution of the deceased’s estate be and is hereby ordered to in terms of the deceased’s will dated February 20, 2015.
- iii. No orders as to costs.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 7TH DAY OF JULY, 2021

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Petitioner

In the presence ofAdvocate for the Respondent/Objector

