



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1781 OF 2013

IN THE MATTER OF THE ESTATE OF NYORO JULIA NGUHI WANJIRU (DECEASED)

VIRGINIA GATHONI MWANGI.....PETITIONER

VERSUS

HUMPHREY MUHAKO EFETHA.....1ST OBJECTOR

DANIEL MWAURA NDUNG’U & 3 OTHERS...2ND OBJECTOR

JUDGMENT

1. Nyoro Julia Nguhi Wanjiru, the deceased whose estate is in issue herein died on 27th May, 2013 at the St. Margaret’s Hospice in Glasgow Scotland. A certificate of death of a citizen of Kenya occurring abroad of Serial Number 0898 is on the record.

2. On 19th July, 2013, Virginia Gathoni Mwangi, the Petitioner herein, filed a Petition for Probate of Written Will dated 18th July, 2012 seeking to be appointed as Executor of the said will. The Petition is supported by an affidavit sworn by the Petitioner on 18th July, 2013 in which she depones that the deceased died testate and left a written will dated 21st May, 2013. A copy of the will is annexed to the affidavit.

3. The Petitioner states that the deceased was domiciled in Kenya at the date of her death and her last known residence was Kikuyu. She is seeking a grant of representation to the deceased’s estate on the ground that she is the executor named in the deceased’s written will. She gave a full inventory of the deceased’s assets which are of an estimated value of Kshs. 40 million as follows:

- a. Kikuyu/Kikuyu Block I/729 measuring 0.0980 Ha
- b. Dagoretti/Uthiru/1218 measuring 0.101 Ha
- c. Karai/Gikambura/3791 measuring 0.0465 Ha
- d. L.R. No. 209/10498/2
- e. L.R. No. 209/8552/27
- f. Clothes
- g. Gold worth 2000 pounds.
- h. Savings Account at National Bank of Kenya Limited
Account number [xxxx]
- i. Savings Account at Fina Bank.

She asserted that the deceased had liabilities estimated at Kshs. 242,660/- comprising funeral and travelling expenses.

4. On 2nd December, 2013 Humphrey Muhako Efetha, the 1st Objector herein, filed an application via a Notice of Motion dated 29th November, 2013 under certificate of urgency seeking stay of the issuance or execution of the grant of representation in respect of the

deceased's estate and extend time within which he may file his Notice of Objection to making of Grant. He asked the court to deem the Objection annexed to the application as duly lodged upon payment of the requisite filing fees. On 5th February, 2014 he consequently filed an Objection to making of a grant dated 31st January, 2014.

5. Mr. Efetha gave an inventory of the deceased's assets and liabilities as at the date of her death as follows:

Assets

- a. L.R. No. 209/10498/2
- b. L.R. No. 209/8552/27
- c. Dagoretti/Uthiru/1218 measuring 0.101 HA
- d. Kikuyu Block 1/729 measuring 0.0980 HA
- e. Karai/Gikambura/3791 measuring 1.4645 HA
- f. National Bank of Kenya A/c No. [xxxx]
- g. Fina Bank approximately Kshs. 53,000/-
- h. Nationwide Building Society in UK cash worth approximately 3,000/- pounds.
- i. Gold worth 2,000/- sterling pounds

Total estimated value Kshs. 40,000,000/-

Liabilities

Total estimated value medical expenses 47,319 euros.

6. On 10th March, 2014 the Petitioner, Virginia Gathoni Mwangi filed a replying affidavit sworn by herself on 5th March, 2014 in response to the 1st Objector's objection to making of grant, Answer to petition for a grant, Petition for sealing of a grant issued by another country and affidavit in support thereof. She contended that when the deceased was admitted to St. Margaret's Hospice in Scotland for palliative care, the deceased listed her as the next of kin. It was on this basis that the Hospice doctors requested her to fly to Glasgow to see the deceased.

7. There is a second objection filed on 5th May, 2014 by the 2nd Objector Daniel Mwaura Ndung'u on behalf of himself and his siblings Lucy Wanjiru Karanja, Anne Wanjiku Njehu and George Kiganya Ndung'u who are his co-objectors. The objection is to the making of a grant of probate as sought in the Petition for Grant of Probate dated 2nd May, 2014 and in the Objection of the 1st Objector.

8. Daniel contends that the will presented by Virginia Mwangi is fraudulent and should not be admitted to probate. That it is a scheme by the Petitioner to enrich herself and disinherit the lawful beneficiaries of the deceased's estate. He urged that it is he who has always managed the deceased's property in Kenya and sent her the proceeds abroad. That he is therefore best suited to administer her estate for the benefit and on behalf of the lawful beneficiaries.

9. The 2nd Objector also filed an Answer to the Petition for Grant sworn by himself on 2nd May, 2014 in which he deposes that he and his co-objectors are siblings of the deceased herein and are therefore the lawful beneficiaries of the deceased's estate. That the deceased came from a family of six all of whom were dependent on her.

10. The 2nd Objector contended that Virginia Gathoni Mwangi, the Petitioner herein, is a distant niece of the deceased and is therefore not entitled to petition for a grant of the estate of the deceased. He asserted that the petition was filed without the consent of the lawful beneficiaries and further that the alleged will annexed to the petition is fraudulent, irregular and untenable both in law and in fact.

11. The 2nd Objector provided an inventory of the deceased's assets in Kenya at the time of her death as:

- a) 20 units in Huruma Plot No. D6/4 estimated value Kshs 6 million.
- b) Title No. Karai/Gikambura/3791 estimated value Kshs 1 million.
- c) Title No. Dagoretti/Uthiru/1218 estimated value Kshs 10 million.
- d) Title No. Kikuyu/Kikuyu/1729 estimated value Kshs. 20 million.
- e) Land Reference No. 209/10498/2 estimated value Kshs 10 million.

f) Kshs. 1.6 million at National Bank of Kenya Account No. [xxxx].

g) Kshs. 52,397.69 at Fina Bank – Kenya Account No. SV [xxxx].

12. The 2nd Objector noted that all liabilities accruing from the deceased's estate have so far been settled. He contended that the Petitioner's claims that she had withdrawn money to settle outstanding bills is unfounded and absurd. He urged that if any bills were outstanding, the deceased's body would not have been released from hospital and flown to Kenya for burial.

13. On 5th May, 2014 Humphrey Efetha the 1st Objector filed a supplementary affidavit sworn by himself on 28th April, 2014 in which he denies the Petitioner's averments and maintains that he was married to the deceased herein and all the properties listed in the Petition were accumulated as a result of their joint efforts.

14. On 25th July, 2014 the Petitioner filed an affidavit sworn by herself on 25th July, 2014 in reply to the 2nd Objector's objection to the making of grant. She deposed that the objection is based on falsehood and misrepresentation and is calculated to mislead this honorable court.

15. The Petitioner denied the 2nd Objector's claims that she petitioned for the grant of probate secretly and asserted that the objectors were duly notified of the Petition. The matter was gazetted on 30th September, 2013. She contended that even though the Objectors are siblings of the deceased, they were not dependent on her. That the only people who were dependent on the deceased were the deceased's mother Flora and her sister Mary Mumbi Ndung'u.

16. She denied the allegations that she was wasting and squandering the deceased's estate and contended that she has no other interest in the deceased's estate other than to ensure the deceased's wishes are fulfilled. She urged the court to issue her with a grant of the deceased's estate.

17. In reply to the 2nd Objector's Answer to the Petition for Grant, the Petitioner filed an affidavit sworn by herself on 25th July, 2014 in which she reiterates that she has no vested interest in the deceased's estate other than to ensure the deceased's wishes are fulfilled. That she has the right to petition for the grant since she is the executor named in the deceased's last will. Further that the will dated 21st May, 2013 which she presented in court is valid as it was drafted according to the instructions and wishes of the deceased.

18. The Petitioner also filed a further affidavit on 25th July, 2014 in response to the 1st Objector's supplementary affidavit and denied the 1st Objector's allegations that she was dependent on both him and the deceased. She urged that she has always worked and taken care of all her expenses in the UK.

19. The Petitioner denied the allegations that she owed the deceased money and stated that on the contrary it is she who used up her money in taking care of the deceased.

20. On 28th July, 2014 Kimaru J directed that the issue to be determined first would be the validity of the alleged wills of the deceased. Further that the hearing would proceed by way of *viva voce* evidence.

21. On 19th November, 2014 the hearing of the cause commenced with the Petitioner's case. Virginia Gathoni Mwangi, the Petitioner herein, gave sworn testimony in which she reiterated the contents of her pleadings and stated that while several objections have been filed against her Petition for grant, the allegations that she forged the deceased's signature in the will are false.

22. According to the Petitioner, the deceased was admitted to the St. Margaret's hospice to prepare her for the end of life since the hospital could not treat her anymore. The admission was done on 3rd April, 2013. While in the hospice, the deceased stated her wishes on her interment and how her properties should be shared upon her demise. The deceased dictated her wishes which the Petitioner then recorded in the presence of the deceased and one Jane Phillips.

23. The Petitioner contended that she did not misuse the monies held in the deceased's bank accounts as the monies she withdrew were used to cater for the deceased's funeral expenses to accord her a decent send off. She urged that the total expenses incurred in the UK were 6131 pounds yet the deceased only had roughly 400 pounds in her accounts which were not enough to settle all the liabilities. To cater for the deficit, she therefore used her own finances.

24. On cross-examination by Mr. Agwara counsel for the 1st Objector, the Petitioner stated that she is a nurse registered to practice as such in the UK. She studied nursing in the UK during which period she lived with her aunt one Gladys Mwaura and later her cousin Jane Phillips, but never lived with the deceased as alleged. That she is in fact the one who hosted the deceased on several occasions when the deceased would visit the UK after her relocation back to Kenya. However, during the period when the deceased resided in the UK they often visited each other since they lived only three (3) streets apart.

25. The Petitioner noted that at the time of leaving the hospital in France, the deceased was not terminal. That it was only when the hospital in Scotland referred the deceased to the Hospice that she learnt that the deceased was in her last stages. The deceased was in the Hospice for about one (1) month before her death on 27th May, 2013.

26. Flora Wambui, the deceased's mother, testified as PW2 in support of the Petitioner's case and stated that she lives in Kikuyu with her daughter Mary Mumbi who looks after her. The deceased was her youngest daughter. Her testimony was that the Huruma property belongs to her and she only gave it to the deceased to develop further. She was however not aware that the deceased left a will.

27. On 22nd July, 2015 Daniel Mwaura Ndungu, the 2nd Objector, gave sworn testimony and stated that the deceased was his younger sister. He asked the court not to issue the grant of probate to the Petitioner stating that she is their distant niece. The Petitioner's father is their paternal cousin.

28. Daniel asked the court to reject the wills dated 3rd March, 2013 and 21st May, 2013 presented by the 1st Objector and the Petitioner respectively and find that the deceased's mother and siblings are the rightful beneficiaries of the deceased's estate.

29. The 1st Objector Humphrey Efetha gave sworn testimony on 15th November, 2016 and stated that he is a medical doctor currently specializing in radiology at the University Hospital in the UK. He moved to the UK in the year 2000 and while there met the deceased at a birthday party. They courted and moved in together in 2002 before eventually getting married in 2004. He presented a Certificate of Marriage duly certified by the Registrar of Marriage.

30. Mr. Efetha alleged that he and the deceased had various properties in Kenya but it was the deceased who managed the properties. He urged that the deceased moved to Kenya to manage the properties since he was still studying in the UK at the time. The properties include:

- a. A house in South C.
- b. A house in South B LR No. 209/10498/2.
- c. Dagoretti/Uthiru/1218.
- d. Kikuyu Bloc 1/729
- e. Gikambura/3791.
- f. D 6/4 Huruma.

31. Later on 28th November, 2016 this court ordered that the grant issued by the High Court of Justice, the District Probate Registry at Oxford dated 3rd September 2013 be authenticated through the British High Commission in Kenya that it is the Grant of Representation of Julia Nguhi Wanjiru Nyoro.

32. Learned Counsel Mr. Ochieng' filed written submissions dated 20th March, 2018 on behalf of the 1st Objector in which he stated that the 1st Objector had proved that the will dated 31st March, 2013 is the valid last will and testament of the deceased. Counsel urged the court to dismiss the Petition for grant of probate and allow the 1st Objector's petition dated 31st January, 2014. Counsel contended that some of the properties listed in the Petition for Grant of probate were acquired during the subsistence of the marriage between the deceased and the 1st Objector and therefore constitute matrimonial property which does not qualify for distribution as part of the deceased's estate.

33. It was Mr. Njau's submission that the documents tendered by the 1st Objector issued by different departments of the same government are marred with inconsistencies which raise genuine suspicions of fraud. That the grant of representation purportedly issued to the 1st Objector by the High Court of Justice, District Probate Registry at Oxford is therefore invalid on the grounds of fraud, misrepresentation and non-disclosure of material facts. He urged the court to dismiss the Petition for Grant of Probate with written will filed by the Petitioner and the Cross-Petition filed by the 1st Objector, and find that the 1st Objector was not married to the deceased.

34. Ms. Machio contended that the will presented by the Petitioner met the formal requirements of a valid will as stipulated under **section 11** of the **Law of Succession Act**. She urged that the deceased's will of 21st May, 2013 is a valid will and should therefore be admitted to probate.

35. Ms. Machio filed additional submissions dated 24th September, 2018 on behalf of the Petitioner in response to the 2nd Objector's submissions and submitted that although the deceased's medical condition qualified her to be granted disability living allowance, her condition did not impair her mental capacity. That it was upon the 2nd Objectors to demonstrate that the deceased lacked mental capacity to comprehend or give instructions for the making of the will and this they failed to do.

36. Ms. Machio expressed the Petitioner's support of the 2nd Objector's submissions on the question of validity of the purported will dated 31st March, 2013 and the legality of the purported marriage between the deceased and the 1st Objector.

37. On 24th October, 2018, the 1st Objector filed further submissions in response to the issues raised by the Petitioner in her written submissions. He urged the court to examine the will dated 21st May, 2013 and arrive at its own conclusion on whether the signature appearing on the will resembles that of the deceased.

38. I have carefully considered all the pleadings on record and the submissions filed on behalf of the parties by the learned Counsels on record and the authorities relied on. In my view, the following are the key issues for determination:

- a. Whether the will dated 21st May, 2013 which is the basis of the Petition herein is a valid will of the deceased.
- b. Whether the 1st Objector Humphrey Efetha's application for resealing of grant issued in the UK on the strength of the deceased's

will dated 31st March, 2013 is merited.

c. Whether there was a valid marriage between the 1st Objector Humphrey Muhako Efetha and the deceased and if so, whether this affects the deceased's testamentary dispositions.

d. If the properties listed in the petition for grant of probate are available for distribution.

e. Whether the 2nd Objector and his siblings are dependants of the deceased within meaning of **section 29** of the **Law of Succession Act**.

39. The deceased herein is said to have died testate on 27th May, 2014. She therefore died after the **Law of Succession Act** came into force. In deliberating on the first and second issues therefore, I will test the validity or otherwise of the two purported wills against the provisions of the **Act**.

40. Both the Petitioner and the 2nd Objector stated that the deceased was domiciled in Kenya at the point of her death. The 1st Objector on the other hand states in his submissions that at the time of her death, the deceased was domiciled in both Kenya and the United Kingdom. This is a misguided contention as one can only have one domicile at any given time.

41. The **Black's Law Dictionary, 10th edition** at **page 592** defines domicile as the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which the person intends to return and remain even though currently residing elsewhere. Of importance however, is that domicile may be divided into: domicile of origin, domicile of choice and domicile by operation of the law.

42. The evidence on record demonstrates that the deceased left Kenya for the UK in 1993 in search of employment. She succeeded in acquiring British citizenship which was granted to her on 26th April, 2006. The deceased worked in the UK from 1993 until July, 2010 when she returned to Kenya. The deceased stayed in Kenya from July, 2010 until 17th February, 2013 when she travelled to France and later to the UK to seek medical treatment. After her return to Kenya, the deceased visited the UK once every year since she was still a British citizen.

43. In view of the above therefore, my conclusion is that at the time of her death, the deceased was domiciled in Kenya but resident in both Kenya and the UK.

44. In the instant case, there are two wills: one dated 31st March, 2013 for which the 1st Objector obtained a grant abroad which he now wants sealed and another dated 21st May, 2013 on which the Petitioner seeks to have a grant of probate made to her. I will first deal with the will dated 21st May, 2013 which was filed by the Petitioner in petitioning for a grant of probate. This is because it is the alleged last will of the deceased and **section 18** of the **Law of Succession Act** clearly states that a will shall be revoked by a subsequent will.

a. Whether the will dated 21st May, 2013 which is the basis of the Petition herein is a valid will of the deceased.

45. According to the Petitioner, the deceased was admitted to the St. Margaret's hospice to prepare her for the end of life on 3rd April, 2013. While in the hospice, the deceased stated her wishes on her interment and how her properties should be shared upon her demise.

46. The Petitioner filed an affidavit dated 10th March, 2014, in which she asserted that on 21st May, 2013 the late Julia Nguhi Nyoro, the deceased herein requested her to write down her last wishes in the presence of one Jane Phillips. The deceased dictated her wishes which the Petitioner wrote down as her last will. The will was witnessed by the Petitioner and Jane Phillips. She alleged that Jane Phillips filmed the whole will writing session. She urged that the will which appoints her as the sole executrix meets all the requirements prescribed under the **Law of Succession Act** and is therefore valid as the deceased's last will and testament.

47. In a further affidavit sworn on 25th July, 2014 the Petitioner expressed her willingness to provide a tape recording made during the time when she recorded the deceased's last wishes as dictated by the deceased.

48. The Petitioner asserted that the deceased's siblings were aware of the existence of the will dated 21st May, 2013 as it was read in their presence. Further that when she filed the petition for grant of probate, she informed them of the proceedings through a letter prepared by her Advocate Lilian Machio which was sent to the postal address they had availed.

49. A will is defined under **section 3** of the **Law of Succession Act** as the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death. From the definition, it is evident that the maker of a will must exercise their free will while expressing their personal wishes and intentions. To be valid, a will must also comply with all the legal requirements as to capacity and formal validity.

50. Part II of the **Law of Succession Act** provides the law on wills. In determining the question of validity of a will, it is important to interrogate the capacity of the maker and whether the will is compliant with all the requirements as to formal validity.

51. The law on testamentary capacity is found under **section 5** of the **Law of Succession Act** which provides that every person who is of sound mind, and not a minor, may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses. Under the section, a female person like the deceased herein, has the same capacity to make a will as does a man regardless of their marital status.

52. The provision goes on to state that the maker of a will is presumed to be of sound mind unless at the time of executing the will, he was in such a state of mind as to not know what he was doing either on account of mental or physical illness, drunkenness or any other cause.

53. With regard to testamentary capacity, both the 1st and 2nd Objectors led evidence to suggest that at the time of the alleged preparation and execution of the will dated 21st May, 2013, the deceased was not in a state of mind to understand what she was doing due to physical illness.

54. On his part, the 2nd Objector argued that the deceased was not in a position to write a will as she was critically ill and bedridden and could neither hear nor see. He did not however produce any medical documents to support his claims.

55. The 2nd Objector asserted that he only became aware of the will dated 21st May, 2013 presented by the Petitioner when their lawyers informed them of being in receipt of the will. He contended that he is familiar with the deceased's signature as shown on the deceased's passport which does not match that which is in the will. He referred to page two (2) of the will which deals with gifts and legacies, and alleged that the Petitioner had signed therein as both the testator and the attesting witness. Further that the Testator's signature in form one (1) and that in form two (2) are at variance.

56. In the written submissions dated 20th March, 2018 filed on behalf of the 1st Objector, learned Counsel Mr. Ochieng' contended that the 1st Objector had visited the deceased on 17th May, 2013 four (4) days before the preparation of the alleged will. During his visit he established, as a qualified radiologist, that the deceased was in great pain which was managed by heavy doses of morphine occasioning her confusion and hallucinations. That she had lost 50 percent of her vision and the left side of her head was swollen from the brain tumor.

57. I note that there is however no evidence that the 1st Objector travelled to Glasgow on the 17th May, 2013 as alleged or that the 1st Objector, as a radiologist, was able to make any such conclusions. In any event, the only acceptable evidence as to the condition of a patient is a medical report from the hospital, prepared and signed by the attending doctor.

58. The *locus classicus* on testamentary capacity is **Banks vs. Goodfellow [1970] LR 5 QB 549** in which the court set out the test of testamentary capacity as follows:

“a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound would not have been made.”

59. In answering the question on testamentary capacity, the Petitioner testified that at the time of writing the will, the deceased was talking and could express herself clearly; she was able to stand and could even write. However due to lymphoma in the deceased's armpit, she instructed the Petitioner to write the will for her after which she signed the will which was attested by the Petitioner and her cousin Jane Phillips.

60. Further, in the written submissions dated 24th September, 2018 filed in response to the 1st Objector's submissions, Ms. Machio Advocate submitted that the Petitioner had demonstrated that the deceased had capacity to make a valid will, which she did on 21st May, 2013. She urged the court to admit the will to probate to enable the administration and subsequent distribution of the deceased's estate.

61. Ms. Machio contended further that the deceased prepared the will dated 21st May, 2013 of her own volition during which time she had the requisite capacity to do so. To buttress her argument, Counsel cited **section 5(3)** of the **Law of Succession Act** and referred to the case of **Banks vs. Goodfellow supra** in which the essentials of testamentary capacity were laid out. Counsel urged that the Objectors had failed to demonstrate that the brain tumor impaired the deceased's mental faculties.

62. Under **section 5(3)** of the **Law of Succession Act** there is a rebuttable presumption that a person making or purporting to make a will is of sound mind at the time of executing the said will. This is echoed by **Halsbury's Law of England 4th Edition Vol. 17 paragraph 903** where the author stated thus:

“Generally speaking, the law presumes capacity and no evidence is required to prove Testator's sanity, if it is not impeached. A will, rational on the face of it and shown to have been signed and attested in the manner prescribed by law is presumed in the absence of any evidence to the contrary, to have been made by a person of competent understanding...”

63. It is not in doubt that the deceased was admitted to St. Margaret's Hospice for palliative care. What is contested is her mental state at the time of writing the will and by virtue of **section 5(4)** of the **Law of Succession Act**, the burden of proving that the testator was not of sound mind at the time is cast on the person who alleges so, being the 1st and 2nd Objectors in the instant case. They however failed so to do.

64. In view of the evidence tendered in the present case, it is my conclusion that the Objectors failed to demonstrate that the deceased was in such a state of mind as to not know what she was doing. It is therefore my conclusion that the deceased had the requisite testamentary capacity at the time of executing the purported will of 21st May, 2013.

65. On the question of the formal validity of the deceased's purported will dated 21st May, 2013 the 1st Objector argued that for a document signed in a Health Institution, there should have been present a doctor's note that the patient could not sign a document, two witnesses and an attestation clause explaining under what circumstances the will was signed, all of which were not done. He did not however state the basis of his argument. I note that under our **Law of Succession Act**, there is no provision for any such requirements for documents signed in Health

institutions.

66. The formal validity of wills is provided under **section 11** of the **Law of Succession Act** which provides thus:

“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 acknowledgment 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.”

67. **Section 16** of the **Law of Succession Act** further provides for the formal validity of other wills as follows:

“Notwithstanding the provisions of this Part, every will, whether of movable or immovable property, and whether executed before or after the commencement of this Act, shall be treated as properly executed if its execution conformed, either at the time of execution or at the time of the testator’s death, to the law in force-

(a) in the state where it was executed; or

(b) in the state where the property is situated; or

(c) in the state where, at the time of its execution or the testator’s death, he was domiciled; or

(d) in a state of which the testator was a national either at the time of its execution or on his death.”

68. The contested will dated 21st May, 2013 was prepared one (1) week before the deceased’s demise on 27th May, 2013. At the time of writing the alleged will, the only people present were the deceased, the Petitioner and one Jane Phillips, the Petitioner’s cousin, who is also a niece of the deceased.

69. At page 8 and 9 of the Petitioner’s Replying Affidavit dated 5th March, 2014 there are boarding passes for both Virginia Mwangi the Petitioner herein, and Jane Philips. The boarding passes, indicate that both the Petitioner and Jane Philips were checked in to fly with EasyJet on 20th May, 2013 from London Luton to Glasgow. The flight was to depart at 0700 hours. The Petitioner whose boarding pass bears serial number “ELCGZPH S543” was assigned seat 16F while Jane Philips whose boarding pass bears serial number “ELCGZPH S542” was assigned seat 16E.

70. The information on the boarding passes is consistent with the Petitioner’s testimony that the doctors at St. Margaret’s hospice had requested her to fly to Glasgow to see the deceased. And further that she was accompanied by her cousin Jane Philips who was present when the will was prepared and is also one of the attesting witnesses.

71. A cursory glance at the alleged will of 21st May, 2013 demonstrates that it was prepared on a prescribed England and Wales Will form which comprises two parts: Form 1 – Simple Gift of the Residue and Form 2 – Residue to an Adult but if he/she dies to children. The legacies on Form 2 are a continuation of the legacies under Form 1.

72. Under the will, the Petitioner herein is appointed as Executrix, and in the event that she fails, or is unable to administer the deceased’s estate, one Jane Phillips, the deceased’s niece, has been appointed to fill the vacancy.

73. The will goes on to enumerate the specific gifts and legacies to the deceased’s named beneficiaries. The relevant part states as follows:

“(1.1) I GIVE MY MOTHER FLORA WAMBUI NYORO THE HOUSE IN KIDFARMACO AREA,

(1.2) I GIVE MY SISTER MARY MUMBI THE FOLLOWING PROPERTIES: UTERU PROPERTY, HURUMA PROPERTY AND MAU EHII PROPERTY,

(1.3) I GIVE MY CHURCH IN SOUTH B MY HOUSE (PROPERTY) IN SOUTH B.

(1.4) CATHERINE MUKURU WHO IS MY NIECE IN FRANCE HAS MY NATIONAL BANK CARD (KENYA) WHICH HAS AN ESTIMATE OF 1.6 MILLION (KENYA SHILLINGS), (ONE MILLION AND SIX HUNDRED THOUSAND KENYA SHILLINGS). THESE MONEY SHOULD CATER FOR MY FUNERAL EXPENSES BOTH IN UNITED KINGDON AND KENYA. IN CASE OF ANY BALANCES, THE CASH SHOULD BE SHARED EQUALLY TO THE IMMEDIATE FAMILY.

(1.5) ALSO MY IMMEDIATE FAMILY SHOULD EQUALLY HAVE A SHARE OF MY ESTIMATED CASH OF FIFTY FOUR THOUSAND KENYA SHILLINGS (54,000 KSH).

(1.6) MARY MUMBI TO FOLLOW UP ALL THE CASH STILL OWING FROM ALL PROPERTY AGENCIES.

(1.7) I GIVE ALL MY CLOTHES TO THE DAUGHTERS OF MY TWO BROTHERS TO BE DIVIDED EQUALLY. I ALSO GIVE MY JEWELRY OF GOLD WORTH APPROXIMATELY £2,000 (TWO THOUSAND POUNDS) TO THE DAUGHTERS OF MY TWO BROTHERS TO BE DIVIDED EQUALLY.”

74. Under the heading “Residuary Gift”, the will states that the residue of the estate is to vest in the executors to hold in trust to pay the deceased’s debts, funeral and testamentary expenses and to pay the residue to Virginia Gathoni Mwangi, the Petitioner herein.

75. It is not in doubt therefore that the will described the deceased’s property in a manner sufficient to identify each property and to whom each of the properties should vest. Further that the Petitioner is named in the will both as an Executor and a beneficiary.

76. Attention was drawn to the manner in which the alleged will was executed and attested. The 2nd Objector suggested that the Petitioner is both an executrix, attesting witness, testator and beneficiary in the purported will of 21st May, 2013.

77. Evidence of execution of a will can be found in the testimony of the attesting witnesses and that of any other person present at the time the will was executed.

78. The 2nd Objector contended that the signature in the will differs from that of the deceased with which he is familiar. He referred to form two (2) of the will and accused the Petitioner of signing therein as both the testator and the attesting witness.

79. Indeed, the signature of the Testator in form one differs with that in form two. In form one, there is a signature part of which bears the name “Julia”. The form one is attested by the Petitioner and one Jane Phillips both of whom have signed by noting their names on the jurat page. However, in form two of the will, the section designated for the Testator’s signature on the jurat page bears the name “virginia” after which her name, address and occupation is listed underneath as one of the attesting witnesses together with that of Jane Phillips.

80. I note however that an examination of the documents reveals that the intent of the Petitioner was not to sign as Testator but as the attesting witness. This is because there is only one and not two signatures as alleged, after which her details are listed and which conform to those on Form 1. Further, the said Form 2 is merely a continuation of the will on Form 1 as it only adds an additional paragraph (1.7) under the Specific Gifts and Legacies.

81. Whereas the 2nd Objector alleged that the signature on the will was not that of the deceased, it is noteworthy that the will was made one (1) week prior to the deceased’s demise at which point she had been ailing for about five (5) months and it is likely that she was frail at the time. It is therefore not surprising that her signature would vary with those from when she was strong and in good health.

82. The 2nd Objector drew the court’s attention to the fact that the Petitioner is an attesting witness, executor and beneficiary under the will. The Petitioner however maintained that she is named in the will of 21st May, 2013 as an executor and not as a beneficiary. She admitted that the will contains a statement “pay the residue to Virginia Gathoni Mwangi” but stated that this was in reference to payment of expenses and for execution of the will.

83. An interrogation of the section of the will to which the 2nd Objector referred, and which is titled “Residuary Gift” demonstrates that there are two parts to it. First, it vests the residue of the deceased’s estate to the executor to hold in trust to pay the deceased’s debts, funeral and testamentary expenses and to thereafter pay the residue to Virginia Gathoni Mwangi. The section goes on to state that whatever vests in Virginia is a gift. The relevant part of the will states as follows:

“I GIVE the rest of my estate to my executors and trustees to hold on trust to pay my debts, funeral and testamentary expenses and pay the residue to

VIRGINIA GATHONI MWANGI

But if he/she or (if I have indicated more than one person) any of them fails to survive me by 28 days or if this gift or any part of it fails for any other reason, then I GIVE the residue of my estate or the part of it affected to

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84. In answering the question whether the bequest to the Petitioner who is both an executrix and attesting witness affects the validity of the will, I find guidance in **section 13** of the **Law of Succession Act**, which stipulates thus:

“(1) A will shall not be considered as insufficiently attested by reason of any benefit thereby given, either by way of bequest or by way of appointment to any person attesting it, or to his or her spouse.

(2) A bequest to an attesting witness (including any direction as to payment of costs or charges) or a bequest to his or her spouse shall be void, unless the will is also attested by at least two additional competent and independent witnesses, in which case the bequest shall be valid.”

In the instant case, the will is not attested by at least two additional competent and independent witnesses. This does not however mean that the will was insufficiently attested, but only that the residue that was to vest in the Petitioner shall fail.

85. I wish to observe that there is no provision in the **Act** to bar a beneficiary under a will from being appointed as an executor of the said will as argued by the 2nd Objector. All the **Act** does is state under its **section 6** that a person may, by will, appoint an executor or executors.

86. The 1st Objector through his counsel Mr. Ochieng' asserted that the Petitioner had failed to demonstrate that the deceased freely and consciously dictated and executed the will, which was written under her direction. These sentiments were echoed by Mr. Nyamu counsel for the 2nd Objector who submitted that the Petitioner had failed to tender evidence to demonstrate that the deceased read what the Petitioner had written and approved the contents thereof as her last will and testament. That in the absence of additional evidence thereof, the court should find that the will is invalid as it was made under suspicious circumstances.

87. It emerges from the testimony of Flora Wambui the deceased's mother that it was the Petitioner who cared for the deceased when she fell ill up to the point of her death. The evidence suggests that the Petitioner was by the deceased's side from the point when she left France until she got to Scotland, and during the days leading up to her death, during which time she prepared the will dated 21st May, 2013. Her sentiments were echoed by the 1st Objector Mr. Efetha who testified that the Petitioner took care of the deceased during the entire period of her illness.

88. According to Mr. Efetha, it is the Petitioner who picked the deceased from France and travelled with her to Scotland for treatment; processed the deceased's death certificate and travel arrangements and accompanied the deceased's body to Kenya. The 1st Objector was notably absent during these major events. At the time of the deceased's transfer to the hospital in Scotland, he claimed to have been taking his exams, and to have been taken ill and admitted in hospital when the deceased's body was being transported to Kenya for burial. He did not however produce any documentary evidence in support of any of these claims.

89. Mr. Efetha contended that he attended the deceased's burial on 8th June, 2013 even though he had previously stated that he was admitted in hospital from 4th June, 2013 until 7th June, 2013. He pointed out that the flight from the UK to Kenya takes eight (8) hours but did not produce the air ticket as evidence of his travel to attend the burial. None of the deceased's family members who testified in this cause admitted to seeing the 1st Objector at the funeral. During cross-examination by Mr. Karuingi for the 2nd Objector, he stated that the only proof that he attended the deceased's burial was himself.

90. I am satisfied that the evidence tendered by the Petitioner demonstrates that the will dated 21st May, 2013 was prepared under the direction of the testator who duly executed it after which it was attested by two (2) competent witnesses being the Petitioner and one Jane Phillips, in the presence of the Testator in line with **section 11** of the **Law of Succession Act**. A competent witness is defined under **section 3** of the **Act** to mean a person of sound mind and full age.

91. In the absence of additional evidence by the Objectors to the contrary, I am inclined to conclude that on the said 21st May, 2013 when the deceased asked the Petitioner to put her dispositions in writing, she knew what she was doing and was aware of the property she was disposing of and the persons she was to provide for. Further that the will dated 21st May, 2013 meets all the requirements as to its formal validity and is therefore a valid last will and testament of the deceased.

b. Whether the 1st Objector Humphrey Efetha's application for sealing of the grant of probate issued in the UK on the strength of the deceased's will dated 31st March, 2013 is merited.

92. Having found that the will dated 21st May, 2013 is a valid will of the deceased herein, I will not belabor the question of the validity of the will dated 31st March, 2013 for which Mr. Efetha, the 1st Objector obtained a grant of probate abroad. The will dated 21st May, 2013 declared the deceased's intention to revoke all previous wills and codicils in line with **section 18** of the **Law of Succession Act** which explicitly states that a will shall be revoked by another will declaring an intention to revoke it. I will nonetheless highlight the evidence of the parties with regard to the will dated 31st March, 2013 in determining the 1st Objector's application for sealing of the grant issued in the UK.

93. In his affidavit sworn on 29th November, 2013 in support of his case, the 1st Objector deposed that the deceased's valid last will and testament was duly executed on 31st March, 2013 and names him as the sole executor and beneficiary.

94. On the issue that the said will failed to describe the deceased's properties, the 1st Objector contended that the **Law of Succession Act** does not prohibit a testator from making a will which bequeaths her property generally without specifically defining what constitutes her estate and the extent of what she owns.

95. The deceased's purported will dated 31st March, 2013 presented in court is typed. During cross-examination by Mr. Karuingi learned counsel for the 2nd Objector, Mr. Efetha stated that he was not present when the alleged will was prepared as he had left the house for college at 8.00 p.m. and did not return until 7.00 a.m the next morning. He could therefore not testify as to how the will was typed, or how the witnesses appended their signatures and in what order.

96. I note that none of the witnesses who allegedly attested the will dated 31st March, 2013 testified in support of the 1st Objector's case, neither did the 1st Objector lead evidence to show that they testified during the probate of the alleged will in the High Court of Justice in England. The proceedings of the High Court of Justice in England were not supplied. There is also no evidence on who prepared the will or how it was typed. All the 1st Objector did is testify that no one had ever challenged the grant which he claims was admitted by the Nursing and Midwifery counsel, Department of works and pensions and the Police in the UK.

97. It is curious that the Petitioner, the 2nd Objector and the deceased's mother Flora only learnt of the purported will during these proceedings. They all claimed that the Petition for Probate of the will dated 31st March, 2013 was filed by Mr. Efetha secretly in England without the involvement and consent of any of the deceased's family members. No evidence of notice to the deceased's beneficiaries was presented in court. In the circumstances therefore, the 1st Objector cannot claim that the grant has never been challenged when the deceased's family were not afforded an opportunity to question the validity of the will.

98. Questions were raised regarding the day on which the purported will was prepared and executed. The 1st Objector admitted that on the said 31st March, 2013 the deceased travelled back to the UK from France and on arriving in the UK, she headed straight to their shared house in Reading. Later that evening, she allegedly prepared and executed the will dated 31st March, 2013. He contended that he was not present at the time the will was prepared and only found it in the house after the deceased left for Scotland.

99. As rightfully pointed out by the Petitioner and the 2nd Objector in their arguments, it emerged from the train tickets produced in court that the deceased left Paris for London on 31st March, 2013 at 1601 hours and was expected to arrive in London at 1739 hours. The deceased was therefore en route to London on the day when she allegedly made the purported will of 31st March, 2013. At page 26 of the Petitioner's replying affidavit dated 5th March, 2014, there is a ticket for the Petitioner at the same time and place to the same destination. Both the Petitioner and the deceased were in Coach 14 and in adjacent seats: 21 and 22 respectively. There is therefore no doubt that the deceased and the Petitioner were travelling together at the time.

100. The Petitioner vehemently denied any knowledge of the will dated 31st March, 2013 and stated that it is on that date that she and the deceased were travelling to London from France. She urged that upon their arrival in London, they did go to her (Petitioner's) house in Reading and the following day proceeded to Glasgow Scotland where the deceased was admitted. That there was therefore no time for the deceased to prepare the will as alleged by the 1st Objector.

101. I am satisfied from the foregoing that on 31st March, 2013 the deceased was on transit from the Paris Nord railway terminus to the London St – Pancras railway terminus, and that the following morning she proceeded to Glasgow Scotland accompanied by the Petitioner. The Petitioner's version of the story that upon their arrival in the UK on 31st March, 2013 they proceeded to the Petitioner's house at 270 Basingtoke Road Reading, RG2 OHN where they spent the night is more credible in the circumstances on a balance of probability. This is bearing in mind that the 1st Objector has not denied that it was the Petitioner who accompanied the deceased from France to London and from London to Glasgow Scotland. He merely disagrees about where the deceased spent the night without any proof thereof.

102. It is curious that the purported will of 31st March, 2013 is typed yet the 1st Objector never led evidence to demonstrate how this was done. All he did was state that he left the house at 8.00 p.m. and returned at 7.00 a.m. to find the will in his house. The Petitioner who accompanied the deceased from Paris to London and from London to Glasgow, and was therefore in the deceased's company on 31st March, 2013 denied seeing the deceased prepare or execute any document purported to be her last will and testament on the said day.

103. In the circumstances therefore, I am inclined to conclude that the suspicions raised regarding the preparation of the will of 31st March, 2013 have not been settled by the evidence provided by the 1st Objector. It is my considered view that the deceased could not have prepared and executed a will while on transit and even if this were possible, the Petitioner who was by her side on this day would have had knowledge of it, which she did not.

104. There are various discrepancies in the 1st Objector's testimony and the evidence on record. The 1st Objector accused the Petitioner of intermeddling with the deceased's estate and alleged that the Petitioner obtained funds from the deceased's account as a beneficiary. The declaration form filled by the Petitioner in closing the deceased's account and which was produced by the 1st Objector as Exhibit 10, shows that the Petitioner declared that no grant of probate/letters of administration or confirmation had been granted to the deceased's estate, and that she was entitled under the will to the balances in the deceased's accounts. I note that the Form indicates that the declaration is made in instances where Probate has not been obtained. In the instant case, the Petitioner was entitled to handle the deceased's accounts in her capacity as the executor appointed under the deceased's will of 21st May, 2013.

105. Whereas at the time of closing the accounts a grant of probate had not been made to the Petitioner, the law is clear that the rights of an executor exist as from the death of the testator and the grant is only required as evidence of this. An executor can therefore release a debt before a grant is made to her and which the Petitioner did in accessing the deceased's accounts to pay the deceased's debts and funeral expenses, and in closing the said accounts. In **Kothari vs. Qureshi & Another [1967] E.A at page 566** Rudd J opined thus:

“It is elementary law that an executor's title dates from the date of the death of the deceased and springs from the will not from the grant of probate.

An executor's actions before probate are valid in themselves without recourse to any doctrine of relation back and they have effect by virtue of the will. Probate is merely authentication of the will in such cases and if the will is ultimately proved no one can question the validity of such acts.

An executor can before grant of probate commence an action, release a debt and generally act as the personal representative of the deceased until he is required to prove his title as such.”

106. Later on 5th February, 2014 the 1st Objector filed an Answer to the Petition for Grant sworn by himself on 31st January, 2014 in which he urged that the will was admitted to probate and he was issued with a Grant of Representation by the District Registrar in the District Probate Registry of the High Court of Justice at Oxford on 3rd September, 2013, which he seeks this court to seal. On 20th June, 2017 Mr. Ochieng' Advocate for the 1st Objector produced a sealed grant from the High Court of Justice Oxford, UK in evidence as the 1st Objector's

107. The law on sealing of foreign grants is provided under **section 77** of the **Law of Succession Act** which states *inter alia* that a grant of probate, or letters of administration issued by a court in any commonwealth country, “may” upon being produced to, and a copy thereof deposited with the High Court be sealed with the seal of that court, and thereupon shall be of like force and effect, and have the same operation in Kenya, as if granted and confirmed by that court.

108. Before sealing a grant, the High Court is required to satisfy itself as to the payment of estate duty; require evidence if any as it thinks fit concerning the domicile of the deceased person, and on application of any creditor of the estate, require that adequate security be given for payment of debts due from the estate to creditors residing in Kenya. In the present case, it has been established that at the time of her death, the deceased was domiciled in Kenya. The applicable law therefore is the **Law of Succession Act, Cap 160 Laws of Kenya** whose provisions should have been complied with in obtaining a Grant of probate to the deceased’s estate.

109. The provisions of **section 77** of the **Law of Succession Act** cited above explicitly use the term “may” as opposed to “shall”. In the case of **Peter Muturi Njunguna vs. Kenya Wildlife Service Civil Appeal 260 of 2013 [2017] eKLR** the court of appeal (Waki, Nambuye, Kiage JJ.A) stated that ordinarily the word “may” is permissive and not mandatory but the contextual meaning would vary with the intention of the drafters. The appellate court further cited the Australian case of **Johnson’s Tyne Foundry Pty Ltd vs. Maffra Shire Council (1948) 77 CLR 544 at 568** in which Williams, J stated thus:

“‘May’ unlike ‘shall’, is not a mandatory but a permissive word, although it may acquire a mandatory meaning from the context in which it is used, just as ‘shall’ which is a mandatory word, may be deprived of the obligatory force and become permissive in the context in which it appears.”

110. In the instant case, the use of the word “may” is permissive. It means that it is not every commonwealth or foreign grant that will be admitted and sealed as if granted and confirmed by the High Court of Kenya. Bearing in mind that the 1st Objector’s evidence is marred with grave inconsistencies as demonstrated in the foregoing paragraphs. In any case, having found that the will of 21st May, 2013 was valid and entertaining serious doubt on whether the deceased ever drew up a will on 31st March, 2013, I decline to grant the 1st Objector’s application for sealing of grant.

c. Whether there was a valid marriage between the 1st Objector Humphrey Muhako Efetha and the deceased and if so, whether this affects the deceased’s testamentary dispositions.

111. Having established that the will dated 21st May, 2013 is valid and having rejected the 1st Objector’s application for sealing of grant, I will proceed to interrogate whether there was a marriage between the 1st Objector and the deceased herein and whether this affects the deceased’s dispositions in the will dated 21st May, 2013.

112. In the Answer to Petition for a Grant dated 31st January, 2014 the 1st Objector contended that he is the husband of the deceased herein. They solemnized their marriage on 28th September, 2004 at the Registrar’s office in Reading, United Kingdom. He presented a copy of a marriage certificate of serial number xxxx in support thereof.

113. The 1st Objector accused the Petitioner of misrepresenting the deceased’s marital status at the office of the Registrar of death which saw the death certificate issued represent that the deceased was single. He also accused the Petitioner of character assassination, while insisting that there was never a boyfriend girlfriend relationship between himself and the Petitioner as alleged.

114. While the Petitioner admitted that she was the maid of honour at the wedding between the deceased and the 1st Objector, she asserted that the marriage was one of convenience. That the deceased was merely assisting the 1st Objector to acquire British citizenship.

115. The Petitioner urged that the 1st Objector was nowhere to be seen when the deceased was taken ill in January 2013 while in Kenya. He was not there later when the deceased travelled to France and thereafter to Scotland to seek medical treatment. She contended that even though the deceased and the 1st Objector contracted a marriage, they never cohabited nor did the deceased change her maiden name to that of the 1st Objector as is customary. That upon the deceased’s admission to hospital in Scotland, she indicated that she was single and listed the Petitioner as her next of kin.

116. After the deceased’s death, the Petitioner took out a death certificate which indicated that the deceased was single because to her knowledge, the 1st Objector and the deceased had divorced. However once the 1st Objector informed her that he and the deceased were still married, the death certificate was duly amended as such.

117. The case of the 2nd Objector was that Mr. Efetha the 1st Objector is a stranger to the deceased’s family and not a husband to the deceased. He contended that it was absurd for Mr. Efetha to claim that he was married to the deceased for a period of ten (10) years, yet the deceased had never informed any of the family members about the existence of any such marriage. This was contrary to Mr. Efetha’s allegations that he and the 2nd Objector were always in constant communication. To the 2nd Objector’s knowledge, there were never any customary ceremonies, marriage rites or dowry payments made by the 1st Objector to the deceased’s family. Further, Mr. Efetha never participated in the deceased’s funeral arrangements nor did he attend the deceased’s funeral.

118. The 2nd Objector took issue with the authenticity of the marriage certificate presented by Mr. Efetha. He pointed out that the certificate indicates the deceased’s father’s name as Michael Nyoro whereas their father was never baptized and only used the name Nyoro Kamau. Further that the marriage certificate is not certified or sealed and does not bear the deceased’s signature.

119. On her part, the deceased's mother Flora Wambui testified that during the deceased's lifetime, she never heard of or saw anyone said to be the deceased's husband. That the deceased never mentioned that she was married, or that she lived with a man abroad. Upon the deceased's death, no one came forward as her husband to claim her body. To her knowledge therefore, the deceased died a spinster. She urged that it was the Petitioner who cared for the deceased when she was taken ill up to the point of her demise. This was in spite of the 1st Objector's claims that he met the deceased's mother at Kidfarmaco in the year 2002.

120. It was the submission of Mr. Ochieng' for the 1st Objector that the deceased and the 1st Objector got married in accordance with the **Marriage Act, 1949 Laws of the United Kingdom** on 28th September, 2004 following a ceremony at the Registrar's office in Reading, United Kingdom.

121. Mr. Nyamu Advocate for the 2nd Objector on the other hand submitted that the alleged marriage between the deceased and the 1st Objector was non-existent. That the marriage certificate produced by the 1st Objector is suspect since it was not signed by the bride and groom and the details therein are inconsistent with the 1st Objector's evidence on the occupation of the parties at the time. The certificate also refers to the 1st Objector as Humphreys and not Humphrey.

122. Counsel urged that the 1st Objector never paid any dowry to the deceased's family, and upon her death, he did not participate in any of her funeral preparations as a husband would.

123. On this, Ms. Machio Advocate submitted on behalf of the Petitioner that the marriage between the deceased and the 1st Objector was one of convenience. That the deceased and the 1st Objector never cohabited either in the UK or in Kenya. Counsel urged that the 1st Objector was absent during the entire period when the deceased was ailing and even upon her death. He was absent during these crucial times and the explanations he gave had no documentary evidence in support thereof.

124. Marriage is defined under **section 3** of the **Marriage Act** as the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Act.

125. The 1st Objector's case is that he and the deceased validly contracted a civil marriage whose subsistence lapsed upon the deceased's death. **Section 40** of the **Marriage Act** provides *inter alia* that a civil marriage contracted in a foreign country shall be recognized as a valid marriage if:

- (a) it is contracted in accordance with the law of that country;
- (b) it is consistent with the provisions of Part IV of the Act; and
- (c) the parties have capacity to marry under the Act.

126. On record is what is purported to be a certified copy of a marriage certificate of serial number xxxx. The certificate shows that Humphrey Muhako Efetha, the 1st Objector, and Julia Nguhi Wanjiru Nyoro, the deceased herein, got married on 28th September, 2004 at the Registrar's office in the district of Reading, in the County of Reading. The Marriage was witnessed by one L.EH Masija and one Virginia.

127. I note however that the information on the marriage certificate is inconsistent with the testimony of the 1st Objector. In his testimony, the 1st Objector stated that at the time of marrying the deceased, he was a high school teacher. He did not however produce any evidence in support thereof. The marriage certificate on the other hand shows that the 1st Objector was a student at the time when he and the deceased celebrated their marriage. The deceased was a patient line advisor at the time.

128. It is curious that while the marriage certificate produced has been certified as a "True copy of the original" by a Solicitor, it does not bear the seal of the General Register Office, England. On the flip side of the copy of the certificate is an Apostille. The **Black's Law Dictionary 10th edition** defines an Apostille as a standard legal certificate attesting that the signatures, seals, or stamps are authentic on a public document used in a foreign country.

129. While I was able to verify the Apostille through the verification link provided on the Apostille, I note that the Apostille categorically states that it does not confirm the authenticity of the underlying document, nor does it authenticate either the signature on the original document or the contents of the original document in any way.

130. In the instant case, the 1st Objector failed to produce the original copy of the marriage certificate for interrogation by the court. A marriage is a contract and it is therefore required that the parties to the marriage append their signatures thereon to bind them to the contract.

131. One of the requirements for recognition of civil marriages is that they conform to the provisions of **Part IV** of the **Marriage Act**. **Section 35** which falls under **Part IV** requires the Registrar of Marriage to cause the marriage certificate to be signed by the parties and by the witnesses to the marriage. The parties are then issued with two copies of the marriage certificate while the Registrar retains one copy thereof. The 1st Objector did not however produce any such copy duly signed by both himself and the deceased nor did he state his reasons for not producing the documents. Without any such document, it cannot be ascertained that the marriage certificate produced was authentic.

132. The Petitioner however confirmed in her testimony that she was the maid of honour at the wedding between the deceased and the 1st Objector thereby lending credence to the 1st Objector's assertion that he and the deceased contracted a marriage. What is disputed however is whether the parties cohabited as husband and wife following the said marriage and the reason for contracting the said marriage. The

Petitioner herein claimed that the marriage between the deceased and the 1st Petitioner was one of convenience.

133. It is perplexing that while the 1st Objector contended that he and the deceased had their matrimonial home at Kidfarmaco in Kikuyu area, the deceased's mother Flora who lives on that property denies ever meeting the 1st Objector or that they were acquainted. The 2nd Objector Daniel also stated on his own behalf and on behalf of his siblings that they only learnt of the alleged marriage between the deceased and the 1st Objector during these proceedings. To them Mr. Efetha is a stranger who is attempting to reap where he did not sow.

134. Whereas the 1st Objector did not adduce sufficient evidence to show that he and the deceased cohabited as husband and wife, from the evidence on record, it is more likely than not that the deceased and the 1st Objector contracted a marriage. What this court cannot ascertain is the reason for the marriage or what transpired after the said marriage was contracted. From the evidence on record, it is not clear whether the parties ever cohabited together as husband and wife after the marriage, or if the marriage was ever dissolved, or if the marriage was void on account of fraud.

135. The Petitioner's case was that the marriage was one of convenience tailored to help the 1st Objector acquire British Citizenship. In the absence of additional evidence, this court is inclined to find that there was a civil marriage contracted between the deceased and the 1st Objector, which was subsisting at the time of her death.

136. While the deceased's mother Flora and the 2nd Objector contended that the deceased has never paid any dowry or performed any customary marriage rites, it is noteworthy that the marriage in question was a civil one celebrated at the office of the Registrar in Reading. Civil marriages are distinct from customary marriages which are celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage. What the 2nd Objector and his mother Flora are alluding to are the requirements of a customary marriage which are inapplicable in this case.

137. Having determined that there was a valid marriage between the deceased and the 1st Objector, I will now proceed to determine whether the marriage affects the deceased's dispositions under the will dated 21st May, 2013.

138. The valid last will and testament of the deceased herein was made on 21st May, 2013 while the marriage was contracted on 28th September, 2004. The will was therefore prepared nine (9) years after the deceased and the 1st Objector contracted their marriage. Since the marriage preceded the will, **section 19** of the **Law of Succession Act** which provides for the revocation of a will by the testator's marriage is inapplicable in this case.

139. The 1st Objector's name is notably missing from the will of 21st May, 2013. This lends credence to the evidence of the Petitioner that theirs was a marriage of convenience meant only to assist the 1st Objector gain British citizenship, but after which the parties went their separate ways and lived lives independent of each other. In other words, the marriage was a sham. I note further that **section 5** of the **Law of Succession Act** explicitly states that a person may dispose of all or any of his free property by will as he wishes. This applies to a female person whether married or unmarried. In view of the above, it is my conclusion that the deceased's testamentary dispositions were not affected by her marital status.

d. If the properties listed in the petition for grant of probate are available for distribution.

140. The case for the 1st Objector is that the properties listed in the Petition for grant of probate and which the deceased bequeathed in her will are matrimonial property and are therefore not available for distribution.

141. Matrimonial property is defined under **section 6(1)** of the **Matrimonial Property Act** as:

- (a) the matrimonial home or homes;
- (b) household goods and effects in the matrimonial home or homes; or
- (c) any other immovable and movable property jointly owned and acquired during the subsistence of marriage.

142. The matrimonial home is defined under **section 2** of the **Matrimonial Property Act** to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.

143. To succeed, the 1st Objector must demonstrate on a balance of probabilities that he was married to the Respondent when the properties were acquired and that he made a contribution to the acquisition of the said properties.

144. It is Mr. Efetha's contention that he and the deceased acquired Kikuyu Block 1/729 known as KidFarmaco in the year 2010 for use as their matrimonial home. On cross-examination by learned Counsel Miss Machio for the Petitioner, Mr. Efetha asserted that he gave the deceased the sum of thirty thousand (30,000) Pounds to buy the property known as Kikuyu 1/729 (Kidfarmaco). He did not however produce any documentary evidence in support of such payment towards the purchase of the property.

145. The evidence on record shows that the property known as Kikuyu/Kikuyu Block 1/729 is occupied by the deceased's mother Flora and the deceased's sister Mary Mumbi both of whom have lived on the property for several years. It was Flora's testimony that she did not know in whose name the property is registered but that whenever the deceased visited Kenya, she lived with them on the property.

146. While the 1st Objector claims that the Kikuyu property was his matrimonial home, none of its occupants are aware of his claims, neither had he ever stayed in the home with or without the deceased. The testimony of the deceased's mother Flora and the 2nd Objector was that they first encountered the 1st Objector during these proceedings. It is noteworthy that the 1st Objector did not dispute that the deceased's mother Flora lives on the property, or that she had never met him before this case.

147. Without additional evidence therefore, I find that the 1st Objector has failed to demonstrate that he and the deceased purchased the Kikuyu (Kidfarmaco) property together, or that they utilized it as their family home. As such, the property cannot be regarded as a matrimonial home.

148. It was the 1st Objector's argument that before marrying him, the deceased had nothing to her name. He contended that he and the deceased acquired and accumulated the properties as a result of their joint efforts, but it was the deceased who was at the forefront in managing the properties to allow him to concentrate on his studies.

149. He averred that it was not possible for the deceased to acquire property alone on her meagre pay. He urged that at the time of their marriage, the deceased had not acquired any property. He did not however adduce evidence of his own earnings or any other evidence to demonstrate that he had a higher earning capacity than the deceased at the time of and during the existence of their marriage, which enabled him to acquire the properties.

150. Whilst it is true that the properties in question were acquired by the deceased post 2004, the 1st Objector has not tendered evidence to demonstrate that the properties were acquired as a result of their joint effort, and that they were, at the time of their acquisition, cohabiting as husband and wife. If anything, he told the court that he was a student during the period.

151. Cohabitation is at the heart of a marriage. This is because consummation and enjoyment of conjugal rights is part and parcel of marriage. A break in cohabitation without mutual agreement amounts to desertion which is a ground on which a party may petition for a grant of divorce. In the instant case, the only evidence of cohabitation is found in the testimony of the 1st Objector but is not supported by any evidence, documentary or otherwise.

152. The 1st Objector claimed that he and the deceased lived together but the documents of the deceased which bear an address similar to his are those issued after the deceased's death. All of the deceased's family members who testified in this cause denied any knowledge of the said cohabitation. In fact, only the Petitioner was aware that a marriage was ever contracted between the deceased and the 1st Objector, but even she averred that the two never cohabited.

153. Save for the copy of the marriage certificate produced by the 1st Objector, there was no evidence *prima facie* or otherwise of any members of the deceased's family members indicating that the deceased and the 1st Objector were considered husband and wife or cohabited together. Further, there was not a single instance where the 1st Objector could demonstrate that the deceased outwardly held out as his wife.

154. Whereas the 1st Objector alleged that he contributed towards the acquisition of the deceased's various properties, he did not produce any shred of evidence in support thereof. He has also not tendered evidence to demonstrate that he was in any gainful employment during the period in which the deceased acquired the properties that would have enabled him to acquire the properties.

155. **Section 14** of the **Matrimonial Property Act** provides that where matrimonial property is acquired in the name of one spouse, the presumption is that the property is held in trust for the other spouse. Where the property is registered in the joint names of the parties, the presumption is that their beneficial interests is equal and it is to be divided equally in the event of divorce. These presumptions are however rebuttable by evidence. The provisions of **section 14** are subject to **section 7** so that in determining how to distribute matrimonial property, the court will take into account the contribution of either spouse to its acquisition.

156. **Section 7** of the **Matrimonial Property Act** provides that:

“Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

157. Contribution is defined by **section 2** of the Act to include both monetary and non-monetary contribution. According to the definition, non-monetary contribution includes domestic work and management of the matrimonial home, child care, companionship, management of family business or property and farm work. The section defines family business as any business run for the benefit of the family by both spouses or either spouse and which generates income or other resources wholly or part of which are for the benefit of the family.

158. The Petitioner told the court that the deceased worked and acquired her property on her own. Her sentiments were echoed by the 2nd Objector in his testimony.

159. According to the 2nd Objector, it was he who suggested to the deceased that they should get into the business of buying and selling plots. Their first project was in the year 2002 and involved building additional floors on their mother's Huruma property. In 2005, they purchased a maisonette at Akiba Estate South B at a cost of Kshs. Four (4) million. The deceased who was abroad at the time used to send him money which he used for the purchase of the maisonette. In 2007, they purchased a plot in Uthiru and constructed semi-permanent buildings for rental purposes.

160. Further that the deceased purchased the Kikuyu (Kidfarmaco) property in 2010 and constructed a home on it in which their mother Flora

and sister Mumbi live. Later in the year 2012, the deceased purchased a parcel of land at Karai Gikambura. He attached copies of letters from the estate agents who managed the properties, cheques drawn in his name on behalf of the deceased and statements of accounts and banking slips in support of his case.

161. From the evidence on record, the deceased moved to the UK in 1993. At the time of the purported marriage in 2004, she had been living and working in the UK for a period of about eleven (11) years. The 1st Objector on the other hand had been living in the UK for four (4) years at the time of the marriage and was a student. Nothing was produced to support the 1st Objector's assertion that he was working as a High School teacher at the time of the marriage with a higher earning capacity than the deceased. In the absence thereof, the only evidence of his occupation is the marriage certificate produced in court which indicates his occupation as a student.

162. Based on the foregoing, I am not persuaded that the 1st Objector contributed towards the purchase of the deceased's properties or that they were acquired during the period of their cohabitation as husband and wife. It emerges that while the deceased and the 1st Objector may have contracted a civil marriage, they kept their affairs separate and lived separate lives. This is the story that has been unraveled by the evidence on record.

163. Marriage is a contract and the parties to a marriage are at liberty to define how they conduct their affairs. It is noteworthy that the 1st Objector was notably absent during all the major events in the deceased's life. He claimed to have visited the deceased in hospital, when she was taken ill but whereas the Petitioner produced train tickets to show her movement, the 1st Objector had no proof whatsoever to corroborate his testimony. He notably failed to accompany the deceased's body to Kenya for burial. Although he attributed this to having been taken ill and admitted in hospital, he did not produce any medical documents in support thereof. While he contended that he attended the deceased's funeral, no one appears to have seen him there nor was he recognized in the funeral programme.

164. Whereas there is no documentary proof on how the parties hereto managed their affairs, I am persuaded that theirs was a marriage in which each one lived separate lives. That is the version of the story this court finds believable. Nothing in the evidence presented at trial demonstrates that the 1st Objector made a contribution, monetary or otherwise, towards the purchase of the deceased's properties. I am therefore inclined to find that the parties acquired property and managed their affairs separately.

165. Having found that the deceased and the 1st Objector managed their affairs separately, I find that the properties listed under the will do not constitute matrimonial property and are therefore available for distribution as part of the deceased's testate estate. Further, since the marriage preceded the will dated 21st May, 2013 I find that it does not affect the deceased's dispositions under the said will.

e. Whether the 2nd Objector and his siblings are dependants of the deceased within the meaning of section 29 of the Law of Succession Act.

166. The gist of the 2nd Objector's case was that they are siblings of the deceased, who were dependant on the deceased during her lifetime and are therefore lawful beneficiaries of the deceased's estate.

167. Mary Mumbi is the only one of the deceased's siblings provided for under the will of 21st May, 2013. Mary is to receive ninety (90) percent of the deceased's estate.

168. **Section 29 of the Law of Succession Act** defines a dependant to mean:

(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 her death;

(c) where the deceased was a woman, her husband where he was being maintained by her immediately prior to the date of her death.

169. Whereas **section 5(1) of the Law of Succession Act** provides that a testator has testamentary freedom to dispose of all, or any of his property by will in any manner he sees fit, a Testator is not entitled to hurt those for whom he was responsible during his or her lifetime in exercising that freedom. In the case of **Erastus Maina Gikunu & another vs. Godfrey Gichuhi Gikunu & another [2016] eKLR** the Court of Appeal while explaining the purport of **section 5(1)**, cited and applied the case of **Elizabeth Kamene Ndolo vs. George Matata Ndolo Nairobi Civil Appeal No. 128 of 1995**, in which the Court of Appeal observed thus:

“This court must, however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled, the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is expressly recognized by section 26 of the Act...”

170. **Section 26 of the Law of Succession Act** empowers the court to make reasonable provisions for dependants not adequately provided for by will or on intestacy, upon an application by or on behalf of such dependant. Before such order is granted however, the applicant must demonstrate that they are a dependant within the meaning of **section 29** of the **Act**.

171. It was the 2nd Objector's contention that the deceased preferred to have her resources distributed equally amongst all family members and at no point did she leave out any member of the family. He urged that even though they did not depend on the deceased entirely, she was the backbone of their family on whom they all depended for financial support. Upon being cross-examined by Ms. Machio Advocate for the Petitioner, he reiterated that the deceased did not solely sustain their family but merely supplemented their incomes. He did not however tender any evidence in support of his claims.

172. It is noteworthy that the 2nd Objector also told the court that whenever the deceased visited Kenya, she would pay him a sum of money in appreciation for the work he was doing for her. This suggests that whatever monies the 2nd Objector received from the deceased he received as payment for the services he rendered as foreman and manager of her properties when she was abroad. He also confirmed that when the deceased moved back to Kenya in July, 2010 he handed over the properties to her and ceased overseeing their development and management.

173. On her part, the deceased's mother Flora contended that the deceased supported her with two of her children: Mary Mumbi and Daniel Mwaura Ndung'u, the 2nd Objector herein. She stated that the deceased bought the 2nd Objector a large piece of land in Limuru on which he put up a house and lives to date, a statement the 2nd Objector vehemently denied. That since the 2nd Objector has the parcel of land, he ought not to inherit anything else from the deceased's estate. She did not however know in whose name the Limuru property is registered. She wished to have the property in South B distributed to her other children.

174. The Petitioner confirmed to the court that the deceased maintained a good relationship with her siblings as alleged but stated that only her sister Mary Mumbi was dependent on her.

175. Looking at the evidence on record, and the submissions filed by the parties I am not persuaded that the 2nd Objector and his siblings were dependants of the deceased within the meaning of **section 29** of the **Law of Succession Act**. In the absence of additional evidence, this court cannot make an order for a reasonable provision for them out of the deceased's estate.

176. While the 1st Objector did not argue on dependency, I will nonetheless point out that from the evidence on record, it is safe to conclude that the 1st Objector was not maintained by the deceased immediately prior to her death and does not therefore qualify for a reasonable provision out of her estate even though he was her husband.

177. Having considered the law on the issues raised in the arguments of each of the parties hereto, the oral evidence of the witnesses, the submissions of their counsels and the pleadings filed in this cause, I am inclined to determine this cause in the following terms:

- (a) The will dated 21st May, 2013 is the valid last will and testament of the late Nyoro Julia Nguhi Wanjiru.
- (b) The will dated 31st March, 2013 is declared to be an invalid will of the late Nyoro Julia Nguhi Wanjiru and is therefore a nullity.
- (c) The application for sealing of the grant issued on the strength of the will dated 31st March, 2013 lacks merit and is therefore denied.
- (d) The 2nd Objectors have failed to prove dependency and are therefore not entitled to a reasonable provision out of the deceased's estate.
- (e) The estate of the late Nyoro Julia Nguhi Wanjiru shall be distributed in accordance with her valid last will and testament dated 21st May, 2013.

SIGNED DATED and DELIVERED in open court this 15th day of May, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Petitioner.

In the presence ofAdvocate for the 1st Objector.

In the presence ofAdvocate for the 2nd Objector.