REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 1141 OF 1999

IN THE MATTER OF THE ESTATE OF JACKSON MUBEA WAWERU (DECEASED)

JUDGMENT

1. Directions were given in the matter on 22nd April 2008 to the effect that the court would take *viva voce* evidence to determine whether or not the deceased had left a valid will. Earlier directions had been given on 26th September 2000 that the petition and cross-petition would be disposed of by way of oral evidence.

2. The hearing commenced on 22nd April 2008, with, Joshua Mungai, taking the witness stand, as PW1. He stated that he knew the deceased. He said that on 26th February 1979, the deceased paid him a visit at Punda Milia Primary School, where he was working as a teacher and requested him to write something down for him. He produced a black book and asked him to write down whatever he was going to dictate to him. The deceased made the dictation, and the witness recorded it in the book. He identified the alleged book and the same was marked as Exhibit 1. The transcript covered two pages; an extra page was added on 4th March 1979. On the said date, 4th March 1979, the witness went to the home of the deceased on his invitation. On that day, said to be a Sunday, the witness found the deceased's wives and children, including the petitioner herein and the objector. Apart from family members were other persons, who included Hadad Muiruri, an ex-Chief of Kamahuha Location, and Perminus Kariuki, the Assistant Chief for Kaharu Sub-Location. There were four other persons – Kamau Ng'ethe, Waweru Kongo, Wilson Mburu and Paul Nduati – who were there as elders. At the gathering, the deceased produced the black book where the witness had recorded the deceased's wishes on 26th February 1979, and he asked the witness to read out those wishes to the gathering. The witness obliged by reading out the two pages he had written on 26th February 1979. He thereafter added another page comprising of the names of the persons who were in attendance. All the elders present signed the document save for Hadad Muiruri and Perminus Kariuki, because they left early. The deceased also signed the book. In total five persons signed the document. There were cancellations on the document, which were done as the deceased could not remember the full details of his land and the title deeds were not available. The other cancellations were corrections of the names of the children as the deceased could not remember their baptismal names. The witness then retained 26th February 1979 as the effective date for there were no substantial additions.

3. On cross-examination, the witness confirmed that he knew the objector as he had taught him as a pupil at some stage, and stated that he was not related to the family of the deceased in any way. He said that the document was not signed by the children as they were not its authors, and that the deceased signed last after the elders had signed. He testified to having been aware that the deceased had been admitted at Mathari Hospital, but said that he never visited him there and he only learned of it when the deceased mentioned it.

4. The next to take the stand on the petitioner's side was the petitioner himself, John Waweru Mubea, as

PW2. He testified to being the eldest son of the deceased and the petitioner for grant of probate in the matter. The petition was initially lodged at the magistrates' court at Murang'a where he was asked to avail the original will. He could not trace the original, whereupon he was asked whether any of the witnesses was alive so that he could prepare another will with the assistance of the witnesses. I understood him to say that he prepared another will with the assistance of the witnesses, and took it to court. Those present when he made the will were said to be Njoroge Muhia, Waweru Kinyo and Wilson Mburu. He was advised by the court to petition again for probate should he find the original will. He found the original will and filed the instant petition, to which he attached the original will.

5. He testified that he was at home on 4th March 1979 when the deceased asked him to remain behind as he wanted to make a statement. He was joined by elders, who included PW1. The deceased then called his two wives and the witness's step-brother, Muguro. He identified the elders present as Hadad Muiruri, Perminus Kariuki, Wilson Mburu, Waweru Kongo and Kamau Ng'ethe. The deceased then produced the document herein marked as exhibit P1 and asked PW1 to read it out to those present. According to the document, he bequeathed his land Loc 17 to his wife Mbaire, and consolidated the witness's land with his own and requested those present to give the land to the witness's sister as she was not married. The sister had acquired her own land which the deceased was then seeking to consolidate with his. He bequeathed Plot 10 Muthithi to Peter Nduati, Plot 4 Muthithi to Muguro, Plot 27 Muthithi to Njogu Jackson, Plot 1 Mungu-ini to his two wives, and Plot 2 Mungu-ini to John Waweru. After the document was read out, the elders signed it and so did the deceased. No one raised any queries. Thereafter Mbaire moved into a house constructed for her by the deceased in her farm, Loc 17 Iganjo, also known as Kamahuha. She moved to the Iganjo farm with all her children, save for Muguro who refused to go with her and remained at the ancestral home at Nginda. The rest of the family was left at Ichagaki, Nginda. At the time of the deceased's death, the two families resided at the two addresses, Nginda and Kamahuha.

6. On cross-examination, he stated that the deceased had married two wives, Priscilla Wanjiru and Mbaire. He said that the family had filed only one petition at the Murang'a law courts, before he filed the present cause after discovering the deceased's will. He indicated that the will was discovered after the petition had been filed at Murang'a. He stated that the petition at Murang'a was for a grant of probate although no will was attached to the petition. The papers filed in the Murang'a were prepared for the witness by a court clerk based on information provided by the witness, which was from a document presented to the clerk by the witness. The said document was not a will but a document presented for the purposes of the petition. The same had not been signed by the deceased. The witness testified that the said document was not a will. He could not recall the outcome of the proceedings before the Murang'a court, save that he was not happy with it, hence he appealed against it at the High Court. He was not able to provide the cause number of the appeal nor state what its outcome was. Thereafter his stepmother, Mbaire, escalated the matter to the area Chief complaining that the proceedings were taking too long, and at the Chief's office it was allegedly agreed that the current cause be initiated. .

7. He stated that he ran a restaurant called Steps on Plot No. 17 and a shop on Plot No. 2001, both within Maragua town. He stated that the two plots did not belong to the deceased. He said that Plot 10 Muthithi belonged to the deceased; it was unoccupied and was not developed. The deceased was said to have had rental houses elsewhere within Muthithi town and at Mungu-ini. He stated that rents from the properties in the said plots were being collected by Peter Nduati. The deceased was also said to have had one share in KGGCU, which he transferred to the witness before his demise. .

8. On re-examination, the witness reiterated that at the time he lodged the petition at Murang'a he had not yet seen the deceased's will, but he did know that the book which contained the will existed. He knew the will was in the book as he was present when the deceased made his wishes known. He stated that what he placed before the court in the Murang'a case complied with the wishes of the deceased as expressed in the will as he remembered them. According to the document presented to the court at Murang'a, the deceased had distributed his estate as follows:-

a. Mbaire – Loc 17 Iganjo (which was a farm at Kamahuha measuring 9.2 acres),

b. Laura Njeri – Loc 6 Mungu-ini (which measured 4 acres),

c. John Waweru, Stephen Ndung'u and Peter Nduati – Loc 6 Mungu-ini (11 acres),

d. Priscilla Wanjiru and Mbaire – Plot No 1 Mungu-ini (which was a market plot),

e. John Waweru – Plo2 No. 2 Mungu-ini,

f. Peter Nduati – Plot No. 10 Muthithi,

g. Lawrence Muguro – Plot No.4 Muthithi,

h. Njogu Muguro – Plot No. 27 Muthithi

i. Njogu and Muguro were to get their share from Loc 17 Iganjo which had been given to their mother, Mbaire

9. The witness indicated that the Murang'a court did not follow those proposals, and that that was the reason he was aggrieved, and decided to appeal. Mbaire was given Plot 10 Muthithi instead of what the witness had proposed, and five (5) acres at Mungu-ini. He said the appellate court ordered for a retrial. He was required to file a fresh petition hence this cause. By then he had found the book with the will, which he then lodged in court herein. He insisted that he saw his father sign the will in the book. Muguro was said to have been present at the signing. It was only the wives of the deceased and the first sons who were present.

10. The next person on the witness stand was John Gachine Munga, as PW3. He was a retired Chief of Nginda Location in Murang'a South District. He testified that in October 1990 Mbaire went to his office and reported that the deceased had made a will but PW2 and his mother had declined to comply with the contents thereof. He was not shown the will. He invited PW2 and his mother, and Mbaire, and asked them to come with elders. A meeting was held whether the two widows and their sons, PW2 and Lawrence Muguro, attended. PW2 and his mother were said to have intimated that they had not refused to comply with the wishes in the will. Mbaire was said to have been saying that the deceased had bequeathed to her a parcel of land in Loc 1, and a plot at Mungu-ini jointly with her co-wife. It was also alleged that she told the witness that the deceased had also bequeathed a plot at Muthithi to Peter Nduati, with two other plots being given to Njogu and Muguro, one plot at Githuya was allegedly given John Waweru and a parcel of land at Mungu-ini to the co-wife, Priscilla. It was reportedly said that the deceased had left out on parcel of land, which PW2 had allegedly taken after the father died, and which he was ready to surrender to Mbaire. The attendees all agreed with Mbaire, whereupon the Chief issued them with a letter addressed to court to introduce them as the survivors of the deceased. The witness reiterated that both factions of the family had been accompanied to the meeting by elders, but he could not recall the names of the elders.

11. On cross-examination, he stated that he did not ask to see the will as the parties did not appear to be in dispute. He stated that it was not brought to his attention that there was a succession cause pending at the Murang'a magistrates' courts at the time. He said that his office used to issue typed letters. He would draft the letters by hand and give them in for typing. He said that the parties hereto might have obtained the handwritten letter presented to court by mistake. He said that Njogu was the Senior Chief of Nginda Location.

12. The case for the objectors opened on 19th January 2009. The first witness was Lawrence Waweru Mubea also known as Muguro Kaberethi, who testified as DW1. He stated that he was a son of the deceased, and a stepbrother of the petitioner. He said that the petition had omitted the names of the daughters of the deceased, that is to say Nyambura, Naomi Njango, Esther Magiri and Martha, but included a Muthoni Mubea who was unknown to the witness. He stated that the deceased passed away in 1987 when the witness was twenty-seven (27) years of age. He asserted that the deceased had not made a will, indicating how he wanted his estate distributed. He denied being party to any of the functions or events alleged to have taken place in 1979, when he was twenty (20) years old. He said that after the burial his mother went to talk to his stepmother about how the two families would conduct their affairs but she declined to discuss the matter. Her mother then took the matter to the local Assistant Chief, who

summoned a meeting. But the first family failed to honour the summons, and the matter was escalated to the area Chief. The area Chief was unable to resolve the matter, forcing them to seek intervention of the District Commissioner (DC) to no avail.

13. The objector stated that the petitioner filed a cause at the Murang'a law courts, being SRMCSC No. 283 of 1989, without involving the second family. In his petition it was alleged that the deceased had left an oral will. The witness stated that he noted that the petition had omitted some assets and some survivors of the deceased. The assets omitted were the sewing machine, the shares in KGGCU and the *posho* mill. The witness filed an objection, which was determined in 1992, where his mother was made a co-administrator of the estate. The issue of the oral will did not arise at the hearing of the objection. The estate was distributed so that the witness's mother got Plot 10 Muthithi Market, while Plot 2 Mungu-ini Market was given to his stepmother, Plot No. 1 Mungu-ini Market was shared equally by the two widows, Plot No. 4 Muthithi Market went to the witness's mother, Plot No. 27 Muthithi was given to the stepmother, his mother got 5.5 acres out of Loc 6/Mungu-ini/189, with the stepmother getting the remainder, Loc 6/Mungu-ini/258 was given to the stepmother, while Loc 17/Iganjo/656 was given to the witness's mother. He was of the view that the trial court had overlooked a parcel of land given to his stepmother prior to demarcation. The KGGCU shares, the *posho* mill and the sewing machine were to be sold and shared between the two families, with the money at the Kenya Commercial Bank being withdrawn and shared in a similar manner.

14. PW2 was reportedly dissatisfied with the distribution, wherefore he lodged an appeal, HCCA No. 17 of 1999, wherein he raised the issue of the oral will. The outcome of the appeal was that the matter was referred back to the Murang'a court to have the issue of the oral will determined, which was never done as PW2 applied instead to have the matter transferred to the Hugh Court. Rather than wait for the transfer of the lower court file, PW2 lodged the instant cause instead. He asserted that he raised the instant objection as the deceased had not made a will as alleged by the petitioner. The witness allegedly saw the will for the first time when it was sent to his advocates by the advocates for PW2. He maintained that he was not at the meeting where the will was allegedly made, adding that he knew nothing about it. He indicated that he knew PW1, as he was related to them by marriage and had been at one time the headmaster of his school. He said that he also knew all the persons who allegedly witnessed the will, but all had died save for one. He pleaded with the court to be appointed a co-administrator of the estate with PW2.

15. DW1 then proceeded to list the assets that, on his part he believed the deceased died possessed of as:-

a. Farms –

i. Loc 6/Mungu-ini/189

ii. Loc 6/Mungu-ini/258

iii. Loc 6/Mungu-ini/801

iv. Loc 17/Iganjo/656 (also known as Iganjo/Kamahuha/656;

b. Plots-

(i) Plot No. 1 Mungu-ini Market

(ii) Plot No. 2 Mungu-ini Market

(iii) Plot No. 10 Muthithi Market;

c. Plots owned with other people –

(i) Plot No. 4 Muthithi Market

(ii) Plot No. 27 Muthithi Market;

d. 65 KGGCU shares;

e. Posho mill at Mungu-ini Market, owned jointly with Kamau Ng'ethe; and

f. 1 sewing machine.

16. On cross-examination, the witness testified to knowing Joshua Mungai, saying that the latter was an in-law. He stated that the Joshua Mungai had lied when he testified that the witness was one of the attendees at the meeting allegedly held at the deceased's home on 4th March 1979. He stated that he was away at the time and therefore there was no way he could have been at the meeting. He stated that he did not know Hadad Muiruri and Perminus Kariuki, but he conceded that he did know Wilson Mburu, Kamau Ngotho, Waweru Kongo and Paul Nduati. When shown P. Exhibit Number 1, which had what was alleged to be the will of the deceased, he said that he could see the names of the persons mentioned above, but he could not see their signatures. He added that there were writings against the names, but he could not tell whether those writings were meant to pass as the signatures of the said persons. He asserted that his name was not in the document, saying his name was not Muguro but Lawrence Waweru Mubea. He dismissed the signatures on the document as false, describing the writing as an act of corruption practiced against his side of the family by those seeking to rely on the document. He stated that although his father's name appeared in the document as Jackson Mubea, his signature did not appear anywhere. He stated that his father did not sign documents by writing out his name, but rather by making out an actual signature. On the testimony by John Gachine Munge, the witness stated that the said witness practised corruption when he wrote a second letter, P. Exhibit Number 2, to introduce the family for the purposes of succession as another letter had been written by another Chief, Boniface Muchoki. He stated that he heard of the will for the first time in 1999, but there was talk of an oral will in the succession cause at the Murang'a Law Courts. He testified that the contents of the oral will before the lower court and the written will before the High Court differed slightly, although in certain respects the two were in tandem. He identified what he considered to be the differences between the two wills. He testified that at the lower court the Petitioner herein did not avail any witness hence the court proceeded to distribute the estate without reference to the alleged oral will. He insisted that the persons who testified for the Petitioner were the latter's friends.

17. During re-examination, he stated that Joshua Mungai and John Waweru Mubea were not named in the will as witnesses, neither was the Chief. He added that the Petitioner was not named either as an executor, asserting that the alleged will had not even appointed an executor. He stuck to his guns that the deceased had not made a will. He asserted that the issue of the written will did not come up in the lower court cause or in the appeal.

18. At the conclusion of the trial, I directed the parties to file their respective written submissions. They duly complied with the directions, by filing their written submissions on 5th June 2015 and 16th June 2016, respectively.

19. The objector submits that the whole story of the deceased's written will is a figment in the imagination of the Petitioner, for at the time he moved the lower court for representation he did not state that there was a written will. If anything, his case then was that there was an oral will. Even with regard to the alleged oral will, no evidence was tendered, and the lower court concluded that the deceased had died intestate and proceeded to dispose of the estate in that belief. The Petitioner moved the High Court on appeal founded on the ground that the lower court had disregarded the oral will, the appeal was allowed and it was directed that the matter revert to the lower court for a determination on the validity of the oral will. That the Petitioner filed a fresh petition founded on a written will rather than proving the oral will as earlier directed was, according to the objector, a matter of concern, which ought to lend credence to the allegation that the deceased had not made a written will as alleged by the Petitioner.

20. On his part, the Petitioner submits that the deceased had made a written will which fully complied with the technical requirements of section 11 of the Law of Succession Act, in the sense that it was duly

executed by the testator and attested by two witnesses. He submitted that the manner in which the testator and his witnesses appended their signatures is neither here nor there so long as the signatures were intended to be signatures by the persons appending them. On the issue of how the current cause was commenced, it is submitted that the succession to the estate was initially sought at the lower court on the basis of an oral will, the lower court allegedly ignored the oral will and proceeded as if the deceased had died intestate, which culminated in an appeal to the High Court, where the proceedings of the lower court were set as and it was directed that the matter of the oral will be addressed, the lower court thereafter held that it had no jurisdiction over the matter in view of the pecuniary value of the estate, and therefore there were no parallel proceedings in the circumstances.

21. The primary issue for determination relates to the validity of the will the subject of the proceedings before me. That is in accord with the directions that were given on 22nd April 2008. I shall therefore venture to deal with that first. The other matters arising from the proceedings can be dealt with simultaneously with it or thereafter.

22. The Petitioner has placed before the court a handwritten document which he urges is the will of the deceased. It bears the alleged signature of the testator, and it is also bears the alleged signatures of the attesting witnesses. The objector on his part asserts that that document was not the will of the deceased, but a creation of the Petitioner with the assistance of his friends.

23. The deceased died on 28th February 1987. It is alleged that he had a made a valid written will on 26th February 1979. The Law of Succession Act came into force in 1981, long before the deceased's demise. As the deceased passed on after the Law of Succession Act had come into force, by dint of section 2(1) of the said Act, his estate fell for distribution in accord with the provisions of the Act. Section 2(1) of the said Act states as follows:-

> *'Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.'*

24. The alleged will, which is the subject of these proceedings, was allegedly made sometime in 1979. That means that the same was allegedly made before the Law of Succession Act came into force. The Law of Succession Act has elaborate provisions in its Part II on wills, covering such diverse areas as capacity of the testator to make a will, the formalities surrounding the making of wills, revocation, and construction, among others. These provisions, however, are only relevant with respect to wills made after 1st July 1981 when the Law of Succession Act came into force. The Law of Succession Act was passed in 1972, but it did not come into force until 1981. At the time the alleged will was made, the Act had been passed but it had not become effective. Any will made prior to 1st July 1981 cannot be said to have been made in compliance with a law that was not yet effective. In the circumstances such a will can only be said to have been made in accordance with the law in force at the time of its making.

25. Will making for Africans prior to 1st July 1981 was permissible under two systems of law. One could make a will in compliance with the customs and practices of his tribe, for testate succession was allowed under customary law. He could also make a will in compliance with the provisions of the African Wills Act, Cap 169, Laws of Kenya. The African Wills Act was repealed by the Law of Succession Act, through its section 100, following the coming into force of the said law in 1981. Counsel appearing in the matter did not address me on the issue as to which law ought to apply with respect to determining the validity of the will, the subject of this cause, allegedly made sometime in 1979. They did not make any submissions on whether it was customary law which applied, or the African Wills Act, or the Law of Succession Act It would appear that it was assumed that the provisions of the Law of Succession Act on validity of wills would automatically apply. Unfortunately that is not the case.

26. Did the customary law of succession relating to wills apply? As mentioned above, the parties did not address me on this, and they therefore did not lead any evidence tending to establish how a valid will can

be made under customary law. That being the case, I have to resort to learned treatises and caselaw. Writing on customary law wills, which were primarily oral in nature, Eugene Cotran in *Restatement of African Law: 2 Kenya II The Law of Succession* (1969) London: Sweet & Maxwell, said at page 15:

> 'A person may make a will in his old age or on his death bed. He calls a meeting of all his close relatives from his *mbari*, or other *muhiriga* relatives and close friends and declares orally how his property is to be distributed item by item, and also declares who shall be his *muramati*. No other formalities are required, but the will is invalid unless the above witnesses are present.'

27. From caselaw there are two important cases, *Re Rufus Ng'ethe Munyua (Dec'd) Public Trustee vs. Wambui* (1976-80) 1 KLR 577 and *Wambui & another vs. Gikonyo & 3 others (1988) KLR 445*. The court in *Re Rufus Ng'ethe Munyua (Dec'd) Public Trustee vs. Wambui* followed the position stated by Cotran in paragraph 26 hereabove., and held that under Kikuyu customary law a valid oral will may be made when the testator is on his death-bed in the presence of his close adult relatives by declaring how his property is to be distributed item by item. The facts in *Re Rufus Ng'ethe Munyua (Dec'd) Public Trustee vs. Wambui* were that 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 died three days later. The court held that the writing disposing of the property was an oral will. In *Wambui & another vs. Gikonyo & 3 others*, the deceased invited close relatives and caused a document to be written which purported to dispose of his land. He signed the document in front of witnesses, but his signature was not attested. He died a few days later, it was held, following *Re Rufus Ng'ethe Munyua (Dec'd) Public Trustee vs. Wambui*, that the said document was capable of being construed as an oral will.

28. In the instant case, the facts as set out in the testimony of the Petitioner and his witnesses, if that testimony is to be believed, are that the deceased caused his wishes to be recorded in a book by PW1. The deceased later called a meeting at his home, attended by his wives, some of his children, elders, an Assistant Chief and the person who had recorded the deceased's wishes in a book, that is to say PW1. The contents of the alleged will were read over at the meeting. Whereupon the writing was signed by the deceased and some of the persons present. The writing disposed of the deceased's property item by item.

29. The issue then that arises is whether that writing could pass as the customary oral will of the deceased. There are hallmarks of the traditional will-making process in this case. The deceased had allegedly summoned a meeting of close family members and elders in accord with what is set out in paragraph 26 above. He thereafter allegedly proceeded to dispose of his property item by item. So far so good. The said event allegedly took place on 4th March 1979, the deceased died on 28th February 1987, some eight (8) years later.

30. From the material in Cotran's seminal text, and the caselaw, one thing stands out. The validity of the customary law oral will depends largely on whether the person making it was very old or on their death-bed. It would appear that not everyone could make a traditional will. It could only be made in the exceptional circumstances mentioned above. In the instant case, the parties did not lead evidence as to the age of the deceased as at the date of making the alleged will. The certificate of death on record, being serial number 198083 given on 23rd September 1987, puts the age of the deceased at eighty-five (85) years at the point of death. That would mean that he was seventy-seven (77) as at the date of the making of the alleged will. Seventy-seven years is a great age, and one can be said to be quite old at that age. But it would appear that the deceased was fairly spritely then, for he lived another eight (8) years thereafter before he died, and even then he did not die of old age or natural causes, for he met his death through murder. Furthermore, for an oral will to be valid the maker ought to die not so longer after making the will. The deceased herein died eight (8) years 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 Kikuyu customary law, eventhough the facts as narrated, if true, point to an attempt to make a will that accorded with Kikuyu customary law.

31. Can the alleged will pass for a valid written will? As mentioned herabove, the law then governing the making of an oral will by an African was the African Wills Act. The said Act does not have elaborate

provisions on wills; instead it applies the provisions of the Succession Act 1865 of India, which was also repealed by section 100 of the Law of Succession Act, to wills made by Africans. On capacity, the Succession Act 1865 of India provides that no person can make a valid will while at a state of mind where he does not know what he is doing.

32. On execution of wills, the Succession Act 1865 of India sets out the rules on execution. It was said in *Wambui & another vs. Gikonyo & 3 others*, that the said provisions are copied word for word in section 11 of the Law of Succession Act, which provides as follows:-

> *'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…'*

33. The starting point is on the question of mental capacity, otherwise known as testamentary capacity. Under the Law of Succession Act, it is provided for under section 5. It states, in short, that a valid will is made by a person who knows what he is doing. It refers to soundness of mind and the fact that the maker ought to be a major. Unsoundness of mind could result from mental or physical illness, drunkenness or any other thing that would cause a person not to know what they are doing at the time of making their will. Cockburn CJ in *Banks vs. Goodfellow* (1870) LR 5 QB 549 said as follows on testamentary capacity:-

> *'Testamentary capacity means that the testator must have a sound and disposing mind, enabling him to understand the nature of will making, a sound memory enabling him to recollect the property he means to dispose of, and a sound understanding, enabling him to remember the persons who should benefit from his estate and the manner it is to be distributed.'*

34. Both parties did not address me on the issue of the mental capacity of the deceased. But from the testimonies of all the witnesses who testified, it would appear that the deceased prior to his death enjoyed a sound state of mind. The testimonies on the events of both 26th February 1979 and 4th March 1979, if they are to be believed, paint the picture of a person who knew what he was doing. He therefore had, in my estimation, the requisite capacity to make a valid will.

35. On the formalities on the making of the will, I should start by stating that I have had occasion to peruse the document filed herein and purported to be the will of the deceased. It is handwritten, and PW1 testified that the document was handwritten by him. At the end of the document, there is written the name 'Jackison Mubia.' PW1 testified that that name was written by the deceased, and that the deceased had intended that writing of his name to be his signature. The petitioner, testifying as PW2, also asserted that he saw the deceased append that signature to the document. The objector stated that the said writing was not the signature of the deceased, and that the deceased did not usually sign documents in that manner. Curiously, the objector did not lead any evidence as to the usual signature of the deceased. The usual manner of contesting a signature is by having the writing or alleged signature subjected to testing by a handwriting expert. The said signature was not subjected to such expert testing. He who alleges must prove. It was the objector alleging that the signature in question was not that of the deceased, he was obliged to lead evidence to prove that assertion. He did not adduce such evidence.

36. On attestation, the alleged will refers to elders who were present at the meeting. There is a list of six individuals. Against the names of four of them are the same names written by a different hand. It was explained by PW1 that some of the elders left before signing the document. The objector asserted that the writings against the names of the alleged witnesses did not amount to signatures. I note though that

section 11 of the Act defines signature to mean any mark intended by the person affixing it to be his signature. It was testified that the marks or writings against the names were by the persons who bore those names, and therefore they were intended to be their signatures. No evidence was led by the objector to support the assertion that these were not the genuine signatures of the persons who were alleged to have affixed the marks.

37. The objector's case is that there never was a will as the deceased never made one. He has renounced the event that was alleged to have been there on 4th March 1979 when the will was allegedly executed by the deceased. I have scrutinized the entire record, inclusive of the proceedings in Murang'a SRMCSC No. 283 of 1989. According to the record of the lower court, the matter was initiated vide a petition for probate of an oral will founded on a document annexed to the petition. When the lower court proceeded to issue a grant of letters of administration and eventually distributed the estate, it apparently proceeded as if the deceased had died intestate as it would appear that no regard was given to the alleged oral will. The petitioner herein was dissatisfied with the said distribution, and lodged an appeal at the High Court at Nairobi, being HCCA No. 17 of 1993. His principal ground of appeal was that the oral will had been disregarded. The appellate court held that the proceedings of the lower court were a nullity in so far as the issue of the oral will was not decided upon. It was directed that the matter be returned to the lower court for retrial.

38. The objector's position appears to be that the will was a creation of the petitioner. He asserts that the issue of the oral will was infact only raised by the petitioner on appeal. That cannot be true. The petition lodged at the registry in Murang'a SRMCSC No. 283 of 1989 on 30th October 1989 was for a grant of probate of an oral will. There is attached to that petition a transcript of the alleged contents of the oral will. The issue of the will is something that the petitioner raised right from the start. Indeed, it was the finding of the court in HCCA No. 17 of 1993 that the petitioner should have been accorded opportunity to prove the alleged oral will. In the circumstances the issue of the will cannot be said to be an afterthought. The petitioner has been quite consistent in his insistence that the deceased had died testate. That persistence is a matter that ought to be taken into account in assessing whether indeed there was a will.

39. The objector was concerned that initially the petitioner was agitating an oral will, and only began to talk of a written will after the order made in HCCA No. 17 of 1993 for retrial. The petitioner has countered this by explaining that the deceased had made a written will, and that it was his intention right from the beginning to prove the written will. However, he could not place it before the lower court as it had been misplaced, and that he was only able to place before court a reconstruction of its contents from the witnesses who were alive as at 1989. He alleged that he only moved the lower court for probate of an oral will, because he did not have the written will, yet he was certain that one existed. He managed to trace the written will after the court in HCCA No. 17 of 1993 ordered a retrial hence he filed the current cause.

40. The explanation given by the petitioner is plausible. The contents of the documents that he lodged with the petition in the lower court largely mirrored the document that was filed herein as the will of the deceased. The persons listed as the witnesses present at the time of the making of the alleged written will are the same persons that the petitioner listed in his papers lodged at the lower court. The only concern could be that the petitioner has not sought to give an account of the circumstances under which the alleged written will was eventually found. He did not give evidence as to when it was found, the place where it was found and the person who had custody of it at the time.

41. The other concern raised by the objector was that none of the persons who allegedly signed the will as witnesses testified, and crucially that the persons who testified did not sign the alleged will, and therefore, according to him, it cannot be said that they were witnesses to its making. It is factually correct that the persons who were said to have attested the alleged will - that is to say Kamau Ng'ethe, Waweru Kongo, Wilson Mburu and Paul Nduati Waweru - did not testify at the trial. It emerged from the testimonies that all had died, save for one. It was not explained why the one was not called to testify.

42. I do however note that those who were called as witnesses at the trial were alleged to have been present when the will was executed on 4th March 1979. The petitioner asserted that he was present at that

event. PW1 said he was the person who reduced the wishes of the deceased into writing, and was present when the deceased signed the document on 4th March 1979. If it is true that these persons were present at that crucial event, it follows that they were competent witnesses to the making of the alleged will, even though they did not sign it as attesting witnesses. Of critical importance is the testimony of the actual writer of the will itself, PW1. The impression that I got from the witnesses' testimonies and their demeanour is that they were telling the truth.

43. The objector also argued that the alleged will did not dispose of the entire estate as some assets were not distributed. The mere fact that some assets were left out of a will does not invalidate it. It is possible that from the wording of the will that such assets would be capable of distribution under the terms of the will. That would be the case where the will is ambulatory. If the assets cannot pass under the terms of the will, then they would fall for distribution in intestacy.

44. The issue as to the propriety of the current cause in view of the order in HCCA No. 17 of 1993 for a retrial in Murang'a SRMCSC No. 283 of 1989 also arose. It was suggested that the petitioner was conducting parallel proceedings, for instead of proceeding in Murang'a SRMCSC No. 283 of 1989 as ordered by the court in HCCA No. 17 of 1993 he had commenced another succession cause at the High Court with respect to the same estate. The petitioner countered that suggestion by saying that the cause in Murang'a SRMCSC No. 283 of 1989 was spent after the said court held that it had no pecuniary jurisdiction over the matter given the value of the estate. The last order in the lower court file was made on 26th April 1999, which I believe should dispose of the issue. The learned magistrate said:-

> 'The court has no jurisdiction to hear this matter and hence the petitioner should file it in the High Court.'

45. The directions of the court made on 22nd April 2008 were that the court records *viva voce* evidence to determine whether or not the deceased had left a valid will. There was compliance with those directions as oral evidence was taken from the parties to the dispute and their witnesses. I have scrutinized the recorded evidence, and it is my conclusion that the deceased herein had left a valid will, which was made on 26th February 1979 and 4th March 1979, but it bears the date of 26th February 1979. The said will did not appoint executors.

46. That being the case, the orders that I am disposed to make are as follows:-

a. **that I do hereby appoint John Waweru Mubia and Lawrence Waweru Mubia as the administrators of the estate of the deceased;**

b. **that a grant of letters of administration with written will annexed shall issue to them accordingly;**

c. **that the administrators, or any one of them, shall apply, within the next thirty (30) days of the date of this judgment, for confirmation of the grant to be issued to them under order (b) above ;**

d. **that as the estate of the deceased comprises of assets wholly situated within Murang'a County this matter shall be transferred forthwith to the High Court of Kenya at Murang'a for final disposal; and**

e. **that there shall be no order as to costs.**

DATED, SIGNED and DELIVERED at NAIROBI this 9TH DAY OF SEPTEMBER, 2016.

W. MUSYOKA

JUDGE