



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. E914 OF 2021
IN THE MATTER OF THE ESTATE OF THE LATE MARTIN
NJOROGE LUTHER (DECEASED)

LAURENE WAMBUI LUTHER

LEONE KEITH KIMANI LUTHER
OBJECTORS

VERSES

IRENE SYLVIA LEVI
PETITIONER

JUDGEMENT

1. The late Martin Njoroge Luther passed on due to covid complications on 5th February 2021 in Beirut Lebanon.
2. After his demise the Applicant filed for letters of administration with Will annexed. She was granted letters by this court on 17th August 2021.
3. The Respondents/Objectors filed objection proceedings dated 28th July 2021 arguing among others that the Will was invalid and that the same cannot be relied upon and ought to be dismissed.
4. The court during directions ordered the objection proceedings to be heard by way of *viva voce* evidence.

The Objector testified and did not call any witness and the petitioner called two witnesses.

5. Subsequently and after the close of the case the parties were directed to file written submissions which they complied.

OBJECTOR'S CASE

6. **Lorraine Wambui Luther** the daughter to the deceased testified on her behalf and that of her co objector that their father did not include her and his brother in the Will something which she found to be unusual. That they were born two from her mother's side and there was no reason at all why they were left from the Will.
7. When re-examined she said that the deceased did not sign all the pages of the Will neither did the witnesses.
8. The petitioner **Irene Olivia Levi** testified that they had two children with the deceased and that the deceased had two adult children whom he got with another woman. She was formally married to him under the tenets of Christian marriage on 21st December 2002.
9. He denied that she had anything to do with the Will and that the Objectors though not in the Will had benefited from the gratuity from the United Nations each totaling about Kshs. 8 million.

10. She said that the Objectors were already past their college days and had graduated from USIU and Daystar universities respectively.
11. Concerning the Will, she said that she was informed by Dw3 Mr. Belsoi who was the deceased friend and that although the Objectors were invited during the propounding of the Will they did not turn up for reasons best known to them
12. She said that she was not aware of the reasons why the deceased left out the Objectors in his Will. Further she was not aware why the deceased made the minors executors of his Will.
13. **Dw2 Stephen Otieno Radian** a retired army officer testified that the deceased was his friend having known each other in their military circles and that he witnessed the will in a petrol station along Langata road. He said that he did not hesitate to sign the same because the deceased was his friend.
14. When cross examined, he said that the will had only signatures on the last page and not the others and that the lawyer who witnessed the will wasn't there when he signed his part.
15. **Dw3 Henry Soi Belsoi** on the other hand testified that he signed the will in the presence of the deceased at the offices of Simon Ndege Advocate who was well known to him. He also said that the deceased had been his friend for many years.

16. When cross examined, he said that he had introduced the deceased to Simon Ndege the lawyer who prepared the will.

OBJECTORS SUBMISSIONS

17. The Objectors took issues with the will arguing strongly that the same did not meet the threshold set out under Section 11 of the Act. That the same was not executed in all the pages contrary to the law.
18. Further that the deceased contrary to the provisions of the law introduced minors as his executors something which was strange. The minor children mentioned under the Will as executors by all intent and purposes cannot execute the said purported Will.
19. At the same time, they took issues with the fact that the Will was not prepared by a qualified advocate, Simon Ndege. According to the Objectors he did not have a practicing license at that period and thus the purported Will was invalid.
20. They also submitted that the Petitioner since he was not an Executor mentioned in the Will could therefore not apply for probate hence the proceedings ought to be dismissed.
21. The Objectors questioned the paternity of the last child whom they wish the court to undertake a DNA exercise.

PETITIONERS SUBMISSIONS

22. The Petitioner countered the line taken by the respondents by contenting that the will was properly executed and that there was no requirement that every page of the Will must be signed or witnessed.
23. That there was no issue raised by the Objectors regarding the invalidity of the Will in terms of signatures or otherwise. Regardless of their contention she submitted that the same was executed in line with section 11 of the Act (Cap 160).
24. As regards minor Executors she submitted that the provisions of schedule five of the Act presupposes that the will shall be put on hold till they attain the age of the majority.
25. She therefore submitted that nothing ought to change the testamentary freedom of the testator and that the parties nor the court should interfere with his wishes.
26. She further submitted that the Objectors had benefited from the hefty payments made by the deceased employer, the United Nations and that the deceased may have been aware of the same and that is why they were not factored in the will.

ANALYSIS AND DETERMINATION

27. I have carefully read the proceedings herein, the submissions by the parties and the law as well as the authorities cited.

28. The germane issue herein is the validity of the Will. There is no doubt that the deceased left behind the two adult children, the Objectors, as well as the Petitioner with her two younger children.
29. There is no doubt as well that the Will does not take into consideration the Objectors.
30. At the same time the Will mentioned only two properties and if there are some which according to the Objectors, they are left out, then they shall be dealt with under the intestate process.
31. The issues of DNA and paternity of the last child Penda Njoroge Luther came late in the day by the Objectors. What is before me is the issue of the Will and not necessarily the beneficiaries. In other words, they can still raise the same, if need be, at a proper forum but not after close of the oral hearing.
32. The will to be compliant must meet the threshold set out under Section 11 of the Act. The same states as hereunder;

“No written will shall be valid unless—

(a) he testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

33. I have gone through the Objector’s evidence and nowhere do they raise an issue concerning the inability or otherwise of the deceased to make the said Will. There is no evidence that he was coerced or was under any undue influence or lacked capacity when making the same.
34. Neither do the Objectors question his attestation of the same. They did not argue that the signature was not his. The only argument was that he did not attest all the pages. Similarly, the witnesses failed to do so.
35. The substance of their argument is that they were left out of the will. Section 5 of the Act provides as hereunder:

“Persons capable of making Wills and freedom of testation

(1) Subject to the provisions of this Part and Part III, 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.

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

(3) Any person making or purporting to make a Will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the Will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

(4) The burden of proof that a testator was, at the time he made any Will, not of sound mind, shall be upon the person who so alleges.” (Underlining mine)

36. The above portion of the law reinforces the testamentary freedom of the deceased. None including the two witnesses questioned him why he left the Objectors. This court has no reason to do so. The Objectors in as much as they were his children, this court cannot question such for want of testamentary freedom envisaged by the Act.
37. In any case the properties in question belonged to him. They did not acquire it jointly with them. He could thus will them as he wished.
38. The only solace is Section 26 of the Act which enables the Objectors apply for reasonable provisions from the estate.

It is not lost of course to this court that they have also benefited from the deceased gratuity from United Nations running into some good millions of shillings.

39. I respectfully do not agree with the line of argument by the Objectors that the Will must be signed in all the pages. There is no provision under Section 11 above. It is however a good practice but its absence does not water down the validity of the will. The crucial part in my view is the last part of the Will.
40. Looking at the Will at hand the deceased and his two witnesses duly executed the same in the presence of the deceased whether along Langata road in a petrol station as in the case of Dw2 or at the advocates office like Dw3. They both saw the deceased signing it.
41. The argument that Simon Ndege Advocate did not have capacity to prepare the Will for want of practicing certificate for that period does not hold water. In my view to the extent that the two mandatory witnesses executed the same, the presence of whoever prepared the will does not invalidate the will.
42. In any case the issue of Simon Ndege advocate came late in the day and there was no evidence tendered formally in court to suggest that he did not qualify to draft the Will.
43. On the issue of minor executors, it is true that the two executors mentioned in the Will were still minors. Does that invalidate the will? I do not think so. It is not for the court to scrutinize the wishes of the deceased and more

so why he decided to have the minors as executors. The most important portion is compliance with Section 11 of the Act.

44. If for any reason the Will becomes unenforceable then it shall be the business of the Executors or Beneficiaries for that matter to notify the court of such difficulty.
45. By way of example, if there is no such property or beneficiary mentioned by the deceased in the Will, then it becomes the business of the court upon being moved by any of the interested parties to make a determination on those specific issues.
46. Otherwise, I think the testamentary freedom guarantees the testator to Will his properties or estate to whomever he wishes as long as he complies with Section 11 above.
47. Luckily the 5th schedule section 8 comes into their aid. The same states:

“When there are two or more minor executors and no executor who has attained majority or two or more residuary legatees and no residuary legatee who has attained majority the grant shall be limited until one of them has attained full age.”

48. In view of the above observations, I do not find merit in the objection proceedings. The deceased Will complied with all the legal requirements mentioned above. There is no evidence of any misrepresentation fraud, coercion or undue influence. The two witnesses simply executed their

part in the presence of the deceased who was their long-term friend.

49. The argument that the deceased was not in the country at the time he allegedly made the Will as submitted by the Objectors was not backed by any tangible evidence. It came too late in the day.
50. **In the premises, the objection proceedings are disallowed and the cause to proceed to the confirmation of grant as per the will annexed.**
51. **Costs in the cause.**

**Dated signed and delivered via video link at Nairobi
this**

20th day of November 2025.

**H K CHEMITEI
JUDGE**