

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY AND PROBATE DIVISION
SUCCESSION CAUSE NO. 431 OF 2014
(CONSOLIDATED WITH MALINDI HIGH COURT SUCCESSION
CAUSE NO. 14 OF 2014)
IN THE MATTER OF THE ESTATE OF LILLI JORGENSEN
(DECEASED)

SALLY NJAMBI MAHIHU.....1ST PETITIONER
RUPERT PATRIDGE.....2ND PETITIONER

VERSUS

JEFWA ERICKSON.....1ST OBJECTOR
MWANGUDZA KAI DECHE.....2ND OBJECTOR
EVA DAMA THUMA.....3RD OBJECTOR
SARAH KARISA TETE.....4TH
OBJECTOR
THOMAS KENGA KALU.....5TH OBJECTOR
CHANGAWA NDUNDI MUNGULE.....6TH OBJECTOR
SAFARI CHENGO KAMBI.....7TH
OBJECTOR

JUDGMENT

1. The deceased, whose estate is the subject of these proceedings, Ms **Lilli Jorgensen**, died on **11th September 2014** at Konjora, Kilifi County. The cause of her death was given as

pneumonia/jaundice. At the time of her death, she was domiciled in Kenya.

2. There is contestation as to whether the deceased had a written will in which she appointed the petitioners as the executors or if she made an oral will on 31st July 2014 bequeathing her estate to the objectors.
3. The petitioners, Sally Njambi Mahihu and Rupert Partridge, filed a petition for the grant of probate of the written will dated **25th July 2013**. The alleged Will was drawn by the firm of **Bowyer Mahihu & Co, Advocates**, and supposedly executed by the testator on the said date in the presence of Ms Selina C Egesa, described as a lawyer, and Ms. Lilian M Mutuku, described as a secretary.
4. In the said will, whose provenance is the subject of these proceedings, the deceased appointed Ms **Sally Njambi Mahihu of Bowyer Mahihu & Co, Advocates** of Mombasa, and Mr **Rupert Partridge** of Kilifi to be the executors and trustees of the said will. Mrs Jorgensen made several bequests of her property to various parties, the most significant of which was her house on **Plot No. LR No. Group XI/22, Fumbeni**, to the Green Belt Movement, Kenya, of Adams Arcade, Kilimani Lane, off Elgeyo Marakwet Road, P.O. Box 67545 - 00200 Nairobi. She indicated that the

property must not be sold but shall be used for the education of the local children.

5. The deceased left the residuary of her estate to **Carl Jorgensen, Eric Jorgensen, Ned Jorgensen, Steven Culverhouse, Svend Culverhouse**, and Sandra Jorgensen of Cornwall in the United Kingdom, and her employees, **Katisho Kenga Kalu, Thomas Kenga Kalu, Erickson Sampuli Jefwa, and Changawa Mwabzuyi**. Each of these individuals was to get an equal share of the residue of her estate.
6. The executors filed a petition for the grant of probate on 10th October 2014 in Mombasa High Court, *to wit*, **Mombasa High Court Probate & Administration Cause No 431 of 2014; In the Matter of the Estate of Lilli Jorgensen (deceased)**.
7. On **26th March 2015**, they were issued with a limited grant of letters of administration *ad colligenda bona defuncti* under section 67(1) of the Law of Succession Act.
8. The objectors, on their part, filed a petition for the grant of probate of the written will in Malindi High Court Probate & Administration Cause No 140 of 2014; re Estate of Lilli Jorgensen (deceased). It would appear that a grant was issued in the objector on **24th**

March 2015. The said grant was confirmed on **31st October 2016** by the Hon Mr. Justice Said Chitembwe. In the certificate of confirmation of grant, the objectors were identified as the sole beneficiaries of the estate and were granted the entire estate to be shared equally by them.

9. The petitioners herein were the objectors in the Malindi succession cause. The Malindi cause was heard and 2 decisions were made by Chitembwe J, a judgment delivered on **27th October 2016**, and a subsequent judgment delivered on **6th June 2017**, in which he dismissed the objection of the petitioners herein and held as follows:-

“Since the objection lacks merit, the grant is hereby confirmed as per my earlier judgment delivered on 27th October 2016. There is no dispute on the distribution of the estate amongst the deceased employees who are hereby deemed to be the only beneficiaries of the deceased’s estate. Parties shall bear their own respective costs.”

10. The Court file in respect of this matter was lost. What the Court presently has is a skeleton file prepared pursuant to the Court's leave. It is apparent that the Court consolidated the matter before the Malindi Court and this Court. The petitioners in the Mombasa

cause remained as such, while those in the Malindi cause became the objectors.

- 11.** This Court allowed the reconstruction of the Court filed vide orders it made on **26th December 2023**. On **13th March 2024**, the parties agreed that what was pending was
 1. The petition for letters of administration with oral will annexed filed in Malindi;
 2. Confirmation of grant in respect of P&A No 431 of 2014; re Estate of Lilli Jorgensen (deceased); and
 3. Objection to the making of the grant in the Malindi Succession cause.

- 12.** This court issued directions to the effect, *inter alia*, that this matter, as consolidated, would proceed by way of viva voce evidence on **17th February 2025**. I will summarize each witness's evidence in the succeeding parts of this judgment.

- 13.** The first witness for the objectors was Mr **Erickson Sampuli**. Mr Sampuli testified that he worked for the deceased for over 9 years and that everywhere she went during her sunset years, he was with her. It was his testimony that the deceased left an oral Will, bequeathing everything she owned to her employees. The alleged oral will was made in the presence of her employees. He

denied that he and the other employees had schemed to take over the deceased's estate. He also denied approaching Ms Sally Njambi Mahihu for an out-of-court settlement of the matter.

- 14.** Mr Sampuli categorically denied that Mrs Jorgensen could have gone to see a lawyer in 2013. She testified that Mrs Jorgensen had severed her relationship with Ms Mahihu and revoked the will that Ms Mahihu had prepared for her.
- 15.** Mr **Mwangudza Kai Deche** was the second witness for the objectors. Mr Deche is a clinical officer working in Kilifi County. It was his evidence that Mrs Jorgensen had been his patient since 2009 up to the time of her death in 2014. He admitted that he was mentioned as a beneficiary in the alleged oral will. When cross-examined by Mr. Kamami, Mr. Deche conceded that he took the deceased's motor vehicle, registration number KBK 304X Peugeot, prior to her death, but contended that she had given it to him. He denied knowing Ms Mahihu.
- 16.** Mr Deche testified that Mrs Jorgensen was unwell from 2011 to 2013. Her health worsened in 2014, and she died the same year. Although he stated that he hadn't filed medical reports, he testified that there were no medical reports contradicting his reports that had been filed.

- 17.** Ms **Eva Dama Thuva** was the third witness for the objectors. Ms Thuva testified that she was a resident of Kilifi and worked for Mrs. Jorgensen during her lifetime as her cleaner and messenger. It was her evidence that the deceased left an oral Will vide which she divided her estate among her employees.
- 18.** Ms Thuva testified that they wished to have Ms Mahihu and Mr. Rupert Partridge removed as the executors of the estate. In her view, the deceased made an oral will through which she bequeaths the whole estate to them.
- 19.** The said witness averred that the estate was worth **Kes.50,000,000/-** in 2014. When cross-examined by Mr Kamami, learned counsel for the petitioners, she denied that she had lied to the Court, stating that she had lived without the help of the deceased for over 10 years.
- 20.** The last witness for the objectors was Ms **Sarah Karisa Tete**. Ms Tete testified that the oral will was made in her presence as well as that of Mr **Jefwa** and Ms **Dama**. It was her testimony that Mrs Jorgensen informed them she would leave her entire estate to her employees. Ms Tete also categorically denied that Mrs Jorgensen ever made up with Mrs Mahihu. It was her testimony

that from 2011, the deceased was unwell and had no capacity to write anything. She testified that she was always with the deceased in the last part of her life and was aware of most of the things that happened around her. When shown a cheque allegedly signed by Mrs Jorgensen, Ms Tete testified that it did not state the reason for payment. The witness said that the written will was not genuine.

- 21.** Ms **Sally Njambi Mahihu** testified in support of the case of the petitioners/respondents. It was her evidence that she had practiced law since 1985. Due to the fact that counsels for the objectors sought to see the original will, Mrs. Mahihu was stood down. The hearing proceeded on **27th March 2025**.
- 22.** Mrs. Mahihu further testified that the grant sought to be revoked is the one dated **26th March 2015**, which was a limited grant ad colligenda. It was her evidence that the grant in her favour was dated **6th June 2020**. She testified that she had not fallen out with Mrs Jorgensen and that there had been a robust discussion about the issues of fees.
- 23.** Regarding the alleged will, Ms Mahihu testified that the same was executed in her presence. She had opted not to be a witness as she had been appointed an executor. She denied any personal

interest in the estate and asserted that she was not a beneficiary thereof. She also averred that she had not been paid for her services, asserting that she was serving her client's interests as a matter of principle.

- 24.** Ms Mahihu testified that she got her instructions on the phone. It was her evidence that writing a will isn't a single-day event and that there could have been a series of meetings. In her view, Mrs. Jorgensen was lucid in 2013, mobile, and, when she came to sign the will, climbed a flight of stairs to reach her office. Mrs Mahihu testified that the will was signed by the deceased in her presence after she read it over to her.
- 25.** When questioned as to why she didn't attend Mrs Jorgensen's funeral, Ms Mahihu testified that it wasn't her style to attend clients' funerals.
- 26.** When cross-examined by Ms Mutanu for some of the objectors, Ms Mahihu denied that there had been a disagreement between her and Mrs Jorgensen or that her relationship with the deceased was broken. It was her evidence that on the day the deceased came to her office to sign the will, she was alone.

27. Ms Mahihu insisted that she communicated with the deceased by phone. She denied knowledge of the existence of another will.
28. The last witness for the executors/respondent was Ms **Selina Chebet Egesa**. Ms. Egesa is an advocate of the High Court of Kenya. It was her evidence that she visited the home of the deceased with a view to taking instructions on the preparation of the will. At the time, she was a student at Ms Mahihu's firm. It was her evidence that the deceased came to the office of Mrs. Mahihu to sign the will, which she did in her presence as well as that of Ms Mutuku.
29. Ms. Egesa testified that she was admitted to the bar on **19th January 2014**. She testified that Mrs. Jorgensen was mentally fit when she signed the will. It was her testimony that though she was of advanced age, Mrs Jorgesen could walk unassisted. She denied that the signatures on the document are different.
30. Ms. Egesa testified that Mrs. Jorgensen was asked to come to the office of Ms Mahihu as the workers were beneficiaries.
31. Upon the conclusion of the hearing, the Court directed that the parties file written submissions. I shall briefly refer to the parties' submissions below.

- 32.** The submissions for the 1st, 2nd, 3rd and 5th Objectors are dated **22nd May 2025**. In the said submissions, it was urged that the deceased made an oral will, which was propounded in Malindi High Court Succession Cause No. 140 of 2014. In the said will, the testator bequeathed her entire estate to her employee.
- 33.** Ms Mutanu & Mr Morara, learned counsels for the said applicants, cast doubt on the validity of the will, stating that it wasn't read to them upon her demise. It was urged that the fact that Mrs. Mahihu never attended the funeral created doubt on the validity of the alleged will. Counsels contended that, having no written will, Mrs Jorgensen made an oral will in the presence of Mr Jefwa, Ms Eva, and Ms Sarah.
- 34.** Counsels contended that at the time the alleged will was authored, the deceased had severed her relationship with Ms Mahihu and that she could not have therefore instructed her to prepare a will nor execute any will in her office.
- 35.** Counsels identified the issues coming for determination as being: -
1. Whether the Court should grant a stay of the duties of the administrators;

2. Whether the Court should revoke the grant issued to the executors;
 3. Whether the estate of the deceased should be subjected to the oral will made on 31st July 2014; and
 4. Who should bear the costs of the application?
- 36.** It was urged that the Court should issue a stay of the responsibilities of the executor/respondents. Regarding the second issue, it was urged that the grant be revoked because the will was fraudulent and the signatures were inconsistent. It was submitted that the evidence of Ms. Mahihu and Ms Egesa contradicted each other as to the sequence of events.
- 37.** Regarding issues Nos. 3 and 4, it was urged that the oral will was the only valid. Regarding costs, it was urged that they follow the event.
- 38.** The submissions of the counsel for the 4th, 6th and 7th objectors are dated **19th May 2025**. Vide the said submissions, counsel gave a factual account of the matter that broadly mirrors that given in Ms Mutanu/Mr Morara's submissions.
- 39.** Mr Ileri identified the issues coming up for determination as being: -

- i. Whether the will dated 25th July 2013 was valid; and
- ii. If the answer to the foregoing question was negative, whether the oral will should be propounded.

40. It was urged that the alleged will was invalid as the deceased had withdrawn instructions from Mrs. Mahihu and that she could not therefore have had instructions to prepare it. Counsel pointed out that there was no proper explanation of how the instructions were issued, and that the evidence of Ms Mahihu and Ms Egesa were contradictory.

41. Mr Ileri submitted that even if the will was genuine, which he denied, it was a product of fraud. Counsel relied on the provision of section 7 of the Law of Succession Act, which states that:-

“A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void.”

42. It was further submitted that the will appointed the counsel as the executor while her employees were witnesses, which, in Mr. Ileri's view, denied Mrs. Jorgensen agency. The written will being invalid, it was urged that the only will available was the oral one, which this Court should uphold.

- 43.** Mr Ireri therefore prayed for the summons for revocation of the grant dated **11th April 2024** to be allowed and that this Court be pleased to find that the grant issued in Malindi High Court Succession Cause No. 140 of 2014 be upheld and that the estate be distributed as stated therein.
- 44.** The submissions of the Executors/Respondents are dated **28th June 2025**. The counsel for the executors framed issues for the determination as being: -
1. Whether the written will dated **25th July 2013** is valid;
 2. Whether the oral will is valid;
 3. Whether a limited grant issued on **26th March 2025** is capable of revocation or annulment?
- 45.** On the first issue, it was urged that it was as the requirements of the law were met. It was urged that under section 18(2) of the Law of Succession Act, a written will cannot be revoked by an oral will.
- 46.** Mr Kamami denied, based on the decision of the Court in the case of **In re Estate of Kevin John Ombajo (Deceased) [2021] KEHC 459 (KLR)** and **In re Estate of Evanson Mbugua**

Thong'ote (Deceased) [2016] KEHC 1261 (KLR), that there was no valid oral.

47. On the last issue, it was urged that a limited grant could not be revoked under the provisions of section 76 of the Law of Succession Act.
48. I have read the summons for Revocation of Grant, the responses thereto, the witness statements, oral and documentary evidence, as well as the submissions of the parties whose summary I have given above.
49. In my view, the issues that require determination are the following: -
1. Whether the alleged will of the deceased is valid;
 2. If the answer is negative, whether there is a valid oral will; and
 3. Costs.
50. The law recognized that every person has the testamentary freedom to dispose of their assets as they wish. Section 5(1) of the Law of Succession Act provides that: -
- “(1) Subject to the provisions of this part and part III, any 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.”

51. Section 7 of the said Act provides that: -

“Any will or part of will, the making of which has been caused by fraud or coercion or by such importunity as takes away the free agency of the testator or has been induced by mistake, is void.”

52. In addition to the foregoing provision, section 11 of the Law of Succession Act states what a will must have in order to be valid. It states that: -

“No written will shall be valid unless—

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

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

(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the

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

53. A grant issued in Probate proceedings founded on an invalid will is liable for revocation under section 76(b) of the Law of Succession Act as it would have been obtained fraudulently by the making of a false statement. The revocation may be done by the Court of its own motion or upon an application by the parties.

54. What follows from the foregoing is that for there to be a valid will, a person must have testamentary capacity, and should at that point of time be exercising agency and autonomy. In the case of **Banks v Goodfellow (1870) LR5QB 549**, it was held that:-

“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”

55. It would appear to me that even a person of advanced age, suffering from debilitating illness, has testamentary capacity. In re Estate of Kibor Arap Talai (Deceased) [2025] KEHC 12747 (KLR) Nyakundi, J, quoted with approval a decision of the Supreme Court of Wyoming in In re Estate of Erwin W Schlueter (2000) Supreme Court of Wyoming, No. 98-311, where it was held that:-

"Mere proof that the decedent suffered from old age, physical infirmity, and chronic, progressive senile dementia when the will was executed is not necessarily inconsistent with testamentary capacity and does not alone preclude a finding thereof, as the appropriate inquiry is whether the decedent was lucid and rational at the time the will was made."

56. Did Mrs Jorgensen have agency and autonomy at the time she is said to have signed the impugned will? It hasn't been shown that Mrs Jorgensen had any mental illness. Whereas she was unwell, no evidence was produced to show that her illness was of such a

kind as to poison her affections, pervert her senses, or prevent the free exercise of her mental faculties. Mrs Jorgensen had medical help and was regularly attended to by Mr Deche. The latter produced no medical reports indicating mental illness that could affect her agency. Her death certificate, as a matter of fact, gives the cause of her death as pneumonia/jaundice.

57. The foregoing notwithstanding, it would seem to me that the summons is anchored on section 7 of the Law of Succession Act. what I understand from what the objectors are saying is that the will was made in suspicious circumstances. Suspicious circumstances would include: -

- I. Whether Ms Mahihu actually had instructions to prepare the will;
- II. Whether the will was actually executed by the deceased;
- III. Whether the testator had the capacity to understand and execute the will.

All these would appear to me as raising questions of fraud.

58. In the case of **In re Estate of Julius Mimano (Deceased)** [2019] KEHC 10103 (KLR) Musyoka, J stated as follows: _

“29. What emerges from the cases cited above is that the question of lack of knowledge and approval, and execution of a will under suspicious circumstances, would usually

arise in cases where the testator is in a weakened condition or state caused by either old age, illness, disease, intoxication or the like. ...”

59. It is true that the deceased appears to have severed her relationship with Ms Mahihu as evidenced by the letters they exchanged on 18th January, **5th May**, and **8th May 2007**. That said, the impugned will dated 25th July 2013 has a signature which, in the view of the Court, is similar to that appended on the cheque dated 25th July 2013, which appears to have been deposited in the bank account of Bowyer Mahihu & Co. Advocates as indicated by the deposed statement which was produced.

60. Fraud is a serious allegation. It is trite law that the allegation of fraud must be strictly proved. In the case of **Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another [1979] KECA 15 (KLR)**, where the Court of Appeal quoted with approval the following holding in the case of *Ratilal Gordhanbhai Patel v Lalji Makanji* [1957] EA 314, 317: -

“...Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no

specific indication that the learned judge had this in mind: there are some indications which suggest he had not.”

61. In re Estate of Samuel Ngugi Mbugua (Deceased) [2017]

eKLR, the court held that: -

“The allegation that the said signature was not that of the deceased amounts to a claim that the signature was forged or that fraud was exercised in the procurement of the alleged will. That is to say that someone other than the deceased had affixed that mark on the will with the intent of passing the same as the signature of the deceased. Forgery is a criminal offence. The applicant is in fact imputing criminal conduct on either the person propounding the will or those who were involved in the operation that is purported to have been its execution. The burden of proving forgery lies with the person alleging it. In *Elizabeth Kamene Ndolo vs George Matata Ndolo* Nairobi Court of Appeal civil appeal number 128 of 1995 it was stated that the charge of forgery or fraud is a serious one, and the standard of proof required of the allegor is higher than that required in ordinary civil cases.”

62. The objectors, while casting doubts on the signature on the will, did not call a document examiner as a witness with a view to demonstrating that the signature of the deceased was forged.

Production of such evidence would have assisted the Court in understanding the matter. As the people challenging the will, the objectors had the burden of proving that the same was fraudulent by producing cogent evidence. They failed do so.

- 63.** In my view, the allegation of fraud simply wasn't proved. It must also be noted that the petitioners/respondents do not appear to have a personal interest in the estate and are not, in any event, beneficiaries under the will. I am therefore unable to accept that they had any motivation to engage in fraud.
- 64.** Having concluded as a foregoing, it would appear to me that the will is valid and that it wasn't marred with fraud or importunity as to justify its invalidation. The testator went into great detail to provide for various parties. That to me demonstrates the presence of mind and lucidity on the part of the testator at the time she executed the last will and testament.
- 65.** Since the deceased had a written will, it follows that the oral will is of no effect. In the circumstances: -
- i. I find and hold that the deceased died testate and that the deceased and that the will dated 25th July 2013 is valid and binding, being the testator's last will and testament;

- ii. I revoke the grant issued in Malindi High Court P&A No 140 of 2014 in respect of the estate of the deceased; and
- iii. I direct that the executors file the summons for confirmation of the grant of probate issued to them within 60 days of the date hereof. The said summons shall be filed in Mombasa HC P&A No 431 of 2014.

66. This is a succession cause between executors and the former employees of the deceased who are beneficiaries under the will. In the circumstances, I see no reason to award costs. The costs would be unfairly burdensome to the objectors who, having worked faithfully for the deceased, had a legitimate expectation that they would be provided for in her will. As costs are at the court's discretion, I make no order as to costs.

67. In closing, I beseech the petitioners/respondents to carry out the wishes of the deceased faithfully as she wanted.

68. It is so ordered.

Dated and signed this 5th day of **November 2025**. Delivered
virtually through **Microsoft TEAMS**.

Gregory Mutai

JUDGE

In the presence of

1. Mr Barry Mbari, holding brief for Mr Kamami, for the Petitioners/Respondents;
2. Ms Mmbaka, holding brief for Ms Musyoki, for the 1st, 2nd, 3rd, and 5th Objectors/Applicants;
3. Mr Ileri, for the 4th, 6th and 7th Objectors/Applicants; and
4. Arthur – Court Assistant.

Original