REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL DIVISION

CIVIL APPEAL NO. E010 OF 2024

IN THE MATTER OF ESTATE OF GAKINYA KARIUKI* ALIAS *JOHN GAKINYA KARIUKI (DECEASED)

RAYMOND KARIUKI GAKINYA …… APPELLANT

-VERSUS-

JOSEPH KIMANI JOHN GAKINYA …….... RESPONDENT

AND

ANTONY NJOROGE GAKINYA ……. 1ST OBJECTOR

FIDELIS WAIRIMU RUGE …… 2ND OBJECTOR

EUNICE WANGUI GAKINYA ……..… 3RD OBJECTOR

LUCY WATHONI NGWIRO …….... 4TH OBJECTOR

SIMON GAKUHA MUHOHO ……. 5TH OBJECTOR

(Being an Appeal from Ruling of Hon. Ngumi, Senior Principal Magistrate delivered on 4 April 2024 in Gatundu CM Succession Cause NO. E329 of 2022)

JUDGEMENT

1. The dispute at the heart of this appeal concerns the estate of the late Gakinya Kariuki *alias* John Gakinya Kariuki, who met his demise on 28 December 2021. The central controversy posits a fundamental question of probate law: whether a testamentary instrument, propounded as the Last Will and Testament of the Deceased dated 19 February 2021, is valid in law, or

whether it is the product of lack of testamentary capacity, undue influence and a misunderstanding of the extent of the testator's property.

2. The Deceased was a resident of Kiamwangi Sub-location, Gatundu South. He died at the age of 85 years. He was a widower, his wife, Emily Wambui Gakinya, having predeceased him on 22 October 2014. The Deceased was survived by several children, as indicated in the list provided in the Chief's letter dated 29 March 2022. These are:
   (i) Joseph Kimani John Gakinya (Respondent)
   (ii) Mary Njoki Kiguru
   (iii) Regina Wairimu
   (iv) Alice Wanjiku Muchiri
   (v) Lucy Wathoni Ngwiri (Objector)
   (vi) Eunice Wangui Gakinya (Objector)
   (vii) Raymond Kariuki Gakinya (Appellant)

3. Conspicuously absent from this initial list, but centrally featured in the dispute, are Antony Njoroge Gakinya, who claims to be a son of the Deceased, and Fidelis Wairimu Ruge, who claims to be a daughter of the Deceased from a customary marriage to one Hanna Barabiu. The status of Simon Gakuha Muhoho is that of a grandson, representing the estate of his late mother, Jane Njeri Muhoho, a deceased daughter of the Deceased herein.

4. The Respondent petitioned the lower court for a Grant of Probate on 9 September 2022. He relied on a written Will dated 19 February 2021, drawn by Muturi Njoroge & Company Advocates. The Respondent is appointed as the sole Executor and Trustee. The Will lists 8 beneficiaries, excluding Antony Njoroge Gakinya and Fidelis Wairimu Ruge. There are 6 assets listed. The Will was executed by a thumbprint alleged to be that of the Deceased and witnessed by Lukas Kinyanjui Ndungu, Antony Njoroge Mwangi and Isaac Ndungu Maingi.

5. On 27 September 2022, Antony Njoroge Gakinya, the 1st Objector herein, filed an Objection asserting that he was a legitimate son of the Deceased who had been disinherited. He sought to be enjoined as a Beneficiary.

6. On 21 July 2023, the Appellant filed Summons seeking the invalidation of the Will. The Application, which was supported by his annexed Affidavit, was based on 3 main grounds: the lack of testamentary capacity, the lack of knowledge and approval, and undue influence. The Appellant averred that the Deceased was of unsound mind at the time of making the Will, suffering from dementia and age-related cognitive decline. He produced a CT Brain Scan Report dated 28 August 2021.

7. The Appellant also argued that the Deceased could not have understood the extent of his property, as he purported to bequeath land that he did not own, namely JUJA/JUJA EAST BLOCK/1/2103, 2104 AND 2015. The Appellant provided search certificates which showed that these lands were registered in the name of the Appellant, Respondent and one Regina Wairimu long before the Will was executed.

8. Thirdly, the Appellant and Objectors alleged that the Will was procured through the machinations of the Respondent, who allegedly orchestrated the drafting process at the Deceased's home, thereby exerting undue pressure on the ailing testator.

9. Upon hearing the Application, which was canvassed by way of written submissions, the trial court delivered its Ruling, dismissing the Application. The court found the Will to be validly executed in accordance with section 11 of the Law of Succession Act, noting the thumbprint, which was done in the presence of witnesses. The trial court was unpersuaded by the medical evidence, nothing that the CT scan was conducted 6 months after the execution of the Will. The learned Magistrate held that there was no evidence

of incapacity at the specific time of execution. Regarding the Juja properties, the trial court ruled that the Deceased's inclusion of these assets was merely an acknowledgement of gifts *inter vivos.* Finally, the trial court found that the beneficiaries listed in the Will largely mirrored those in the chief's letter and that section 29 of the Act defines dependents, but the Objectors had not sufficiently proved their status or exclusion to warrant invalidating a Will.

10. Aggrieved by the Ruling, the Appellant lodged this appeal on the following grounds:

    (i) That the learned trial Magistrate erred in fact and law in failing to address her mind to the pleadings on record and evidence by the Appellant particularly towards supporting the application to invalidate the Will;
    (ii) That the learned trial Magistrate erred in law and in fact by failing to consider the related Affidavit evidence by the Objectors/Beneficiaries and more particularly, concerning the Deceased's health status, beneficiaries and assets;
    (iii) That the learned trial Magistrate failed to address her mind to or misconstrued the fact that at the time of making the said Will, the Deceased did not own majority of the properties distributed in the Will;
    (iv) That the learned trial Magistrate misconstrued the evidence and the law on gifts *inter vivos.* A miscarriage of justice was occasioned;
    (v) That the learned trial Magistrate erred in law and fact in dismissing the Appellant's application whereas the Appellant had tendered sufficient evidence to warrant the orders sought.

11. The appeal was canvassed by way of written submissions.

12. The Appellant submitted that the trial court erred by ignoring the Golden Rule regarding aged testators. He argued that the Medical Report, though dated August 2021, evidence age-related brain involutional changes, a

chronic and progressive condition that does not appear overnight. This, they argue, proves that the Deceased's mental faculties were already in decline by February 2021.

13. The Appellant contends that the Deceased failed the test in ***Banks -vs-Goodfellow (1870)*** **LR 5 QB 549** which states 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.'*

14. The Respondent vigorously defended the trial court's decision. He relied on the presumption of sanity under section 5(3) of the Act and argued that the Appellant failed to discharge the burden of proof to show that the Deceased was of unsound mind at the precise moment the Will was signed.

15. On the issue of the Juja properties, it was the Respondent's submission that the Deceased's memory was top notch, precisely because he noted in the Will that the titles were "now in their names". He argued that this was a confirmation of past gifts, not a delusion. Regarding Antony Njoroge, the Respondent maintained that he is a grandson, son of Mary Njoki, and thus not a direct dependent entitled to inherit under section 29, unless his mother was deceased.

16. The Objectors align with the Appellant. They emphasized the element of undue influence, alleging that the Respondent chaired the meeting where the Will was made. They further relied on the Affidavit by 2nd Objector, who claims to be a daughter of the Deceased and was completely excluded, arguing that this unnatural disposition signals a lack of proper recollection of the objects of the testator's bounty.

Analysis and Determination

17. The duty of a first appellate court is well settled. It entails revisiting, re-evaluating and considering afresh the evidence presented before the trial court for the appellate court to make its own independent conclusions bearing in mind that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. This was set out in the case of ***Selle & Another vs Associated Motor Boat Company Limited, [1968] EA 123.***

18. It is trite that though an appellate court has mandate to interfere with findings of fact made by a trial court, this mandate should be exercised cautiously and only when it is clear that the trial court's decision or finding of fact was not based on any evidence or was based on a misrepresentation of the evidence or on wrong legal principles.

19. I have keenly read the contents of the Record of Appeal and the submissions by the respective parties. The appeal herein lies on one critical issue: the testamentary capacity of the Deceased to make the Will dated 19 February 2021.

20. Section 5(1) of the Law of Succession Act confers the power to make a Will upon every person who is of sound mind and not a minor. Section 5(3) establishes a rebuttable presumption of sanity. However, the law is clear: once a bona fide doubt is raised regarding the testator's capacity, the burden

shifts to the propounder of the Will to prove affirmatively that the testator was of sound disposing mind.

21. The legal test for testamentary capacity was established in the case of ***Banks -vs- Goodfellow (supra)***, which has been consistently applied by the Court, including in ***In the matter of James Ngengi Muigai (Deceased) [2018] eKLR*** and ***In re Estate of Killian Ansei Mwoloi (Deceased) [2025] KEHC 16187 (KLR)***. The test requires that the testator must understand the nature of the act and its effects, understand the extent of the property of which he is disposing, be able to comprehend and appreciate the claims to which he ought to give effect, and be free from any disorder of the mind or insane delusion that would influence his will in disposing of his property.

22. It is on the second limb of the ***Banks -vs- Goodfellow*** test that the propounded Will faces its most insurmountable challenge. The Appellant contends that the Deceased purported to distribute properties that he did not own. The evidence on record supports this contention incontrovertibly. The Will lists LR JUJA/JUJA EAST/BLOCK 1/2103, 2104 and 2105 as assets of the Deceased. In clause 6, it proceeds to devise them. However, the official search certificates produced in evidence reveal the that Block 1/2103 was registered to the Appellant on 19 June 2003, while Block 1/2105 was registered to Regina Wairimu Kariuki on 19 June 2003. This was done 18 years before the Will was prepared. The only other assets listed in the Will are: KIGANJO/KIAMWANGI/1713 and Co-operative Bank Account.

23. The trial court reasoned that the Deceased was merely acknowledging gifts *inter vivos*. This Court finds that reasoning to be flawed. A Will is a testamentary disposition of the free property of the deceased. Property that has already been transferred to another person during the testator's lifetime is no longer his to give. It is legally impossible for a testator to give, devise

and bequeath property that is already vested in the beneficiary or in a third party.

24. The inclusion of Block 1/2105 is particularly telling. The property belonged to Regina Wambui Kariuki, identified in the proceedings as the Deceased's stepmother, a co-wife to the Deceased's mother Hannah Njoki. Yet, the Will purports to give this land to the Deceased's daughter, Magdalene Njoki Kiguru. A testator of sound mind would know that he cannot bequeath his step-mother's land to his daughter. This is not merely a gift *inter vivos* acknowledgment, it is a fundamental error regarding the ownership of the family estate. It evinces a delusion or a severe memory lapse regarding what the testator actually owned.

25. The phrase in the Will, "*the title is now in his names",* does not salvage the situation. Instead, it creates a cognitive dissonance. If the testator knew the title was already in the beneficiary's name, why list it as his property in clause 5 and purport to bequeath it in clause 6? However, in ***Re Estate of Nicholas Kipchumba Mberia (Deceased) [2024] KEHC 518 (KLR)***, the Court held:

> *"A valid Will cannot fail on the grounds that, it does not include some beneficiaries or some properties that do not form part of the deceased's free property*."

26. Though the decision cited is persuasive, coupled with other circumstances herein, the making of such bequests strongly suggests that the testator herein did not understand the extent of the property that he was disposing.

27. Regarding the medical evidence and the Golden Rule, the Appellant tendered a Medical Report and CT scan from Thika Clinical X-Ray Services dated August 2021. The Report indicates that the Deceased presented with confusion, refusal to talk/feed. The scan revealed age related brain involutional changes. The trial court dismissed this evidence as being too far

removed from the date of the Will, which was February 2021. Respectfully, I disagree. Brain involutional changes refer to cerebral atrophy – the shrinking of the brain. This is a chronic, progressive and irreversible condition often associated with dementia and Alzheimer's disease. It is not a transient ailment like malaria that appears suddenly. If the Deceased had significant brain atrophy and confusion in August 2021, it is medically and logically probable that the condition was present and progressing in February 2021.

28. The Golden Rule as articulated by Templeman J in ***Kenward v. Adams (1975) 121 SJ*** and cited with approval in **Re *Estate of Kimetto Arap Kili (Deceased) [2023] KEHC 636 (KLR)*** *states:*

> *"That In the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest that precautions be taken, the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfied himself of the capacity and understanding of the testator, and records and preserves his examination and finding."*

29. There are differing records on the Deceased's age. He was either 85 or 91 years old at the time of the Will. He had a history of illness. The Will was drawn by an Advocate, yet no medical professional certified the Deceased's capacity at the time of execution. Given the subsequent medical findings of brain atrophy and the objective errors in the Will regarding asset ownership, the absence of contemporaneous medical certification is fatal to the Respondent's case. The presumption of sanity was effectively rebutted by the Appellant's evidence, and the Respondent failed to discharge the shifted burden of proof.

30. On the application of the gifts *inter vivos*, the trial court's finding that the inclusion of non-owned assets was a recognition of gifts *inter vivos* represents a misapplication of legal principles. A gift *inter vivos* is a transfer of property made during the lifetime of the donor, which takes effect immediately and is irrevocable. Once the gift is perfected by way of registration, the property leaves the donor's estate. It has no place in a Will which deals with the distribution of assets upon death.

31. By listing these properties in Clauses 5 and 6, the Will treats them as part of the estate available for distribution. If the Deceased had indeed gifted these properties years prior, a sound mind would simply omit them from the list of assets to be distributed. Including them suggests that the Deceased had forgotten they were no longer his. This confirms the Appellant's submissions that the Deceased lacked the necessary memory to recall the disposal of his assets.

32. The Appellant and Objectors allege that the Respondent exerted undue influence on the Deceased. Section 7 of the Act provides that a Will procured by fraud, coercion or importunity is void. The affidavit evidence suggests that the Will was prepared by the Respondent's Advocate and signed in the Respondent's presence at the Deceased's home, with the Respondent chairing the meeting.

33. While the burden of proving undue influence lies on the person alleging it, and mere persuasion is not coercion, the circumstances here are highly suspicious. The Respondent is the sole Executor and principal beneficiary. The Will excludes other children who were allegedly dependants. The witnesses to the Will are alleged to be associates of the Respondent rather than independent witnesses known to the Deceased.

34. However, having found that the Deceased lacked testamentary capacity due to his inability to comprehend the extent of his property and his medical

condition, this Court need not make a definitive finding on the high threshold of coercion. It suffices to state that the confusion evident in the Will is consistent with a testator who was compliant but cognitively absent, possibly rubber-stamping a document prepared by others without full understanding.

35. In view of the foregoing, the Will dated 19 February 2021 cannot stand. It is the product of a mind that was not sound for testamentary purposes. The estate of the Deceased must be distributed according to the rules of intestacy, which will ensure that all rightful children and dependants receive their fair share.

36. I, therefore, find that the appeal is meritorious and is hereby allowed. The Ruling and orders of the Senior Principal Magistrate's Court at Gatundu in Succession Cause No. E320 of 2022 delivered on 4 April 2024 are hereby set aside in their entirety. The document purported to be the Last Will and Testament of the Gakinya Kariuki *alias* John Gakinya Kariuki dated 19 February 2021 is hereby declared invalid, null and void for lack of testamentary capacity. Any Grant of Probate issued on the basis of the said invalid Will is hereby revoked. The estate of the Deceased shall be administered as an intestate estate in accordance with the provisions of the Law of Succession Act.

37. The matter is remitted to the Chief Magistrates' Court at Gatundu for filing of a Petition for Letters of Administration Intestate. An order of inhibition is hereby issued against **L.R. No. KIGANJO/KIAMWANGI/1713** and any other estate assets, restraining all parties from selling, charging, leasing, or otherwise disposing of the property until the confirmation of the Grant of Letters of Administration Intestate.

38. This being a family dispute, each party shall bear their own costs.

Dated and Delivered at THIKA this 21 day of NOVEMBER 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered virtually in the presence of:

For the Appellant:	Ms. Kasimu
For Respondents:	N/A
For the Objectors:	Ms Simiyu
Court Assistant:	Lucy Mwangi