

**IN THE COURT OF
APPEAL AT
NAIROBI**

(CORAM: W. KARANJA, GATEMBU, & NYAMWEYA, JJ.A.)

CIVIL APPEAL NO. 1 OF 2020

BETWEEN

DAVID NJOROGE GITAU.....APPELLANT

AND

RICHARD KARURU GITAU.....1ST RESPONDENT

**CHARLES KAMWERU GITAU.....2ND
RESPONDENT**

*(Being an appeal against the Judgment of the High Court at Nairobi
(W. Musyoka, J.) delivered on 21st June
2018 in*

Succ. Cause No. 2783 of 1997)

JUDGMENT OF THE COURT

1. The appeal arises from the judgment of W. Musyoka, J. dated 14th June 2018 and delivered on 21st June 2018 at the High Court at Nairobi in a succession dispute relating to the estate of the late Gitau Njoroge 'B' (deceased), who died on 17th June 1997. The deceased was said to have died testate. The dispute concerned the validity of the Wills dated 7th September 1993 and 20th January 1995.
2. The appellant and his brother Peter Njoroge Gitau, both sons to the deceased, filed summons for a grant of representation to the

estate of the deceased in a petition for probate of written will with the Will annexed on 19th December 1997. A grant of probate of written will

was made on 3rd March 1998 and a certificate of confirmation of grant of probate was issued to them on 30th April 1999.

3. Richard Karuru Gitau and Charles Kamweru Gitau (the respondents) also sons to the deceased, lodged summons for revocation of grant dated 10th January 2003. The respondents alleged that the grant on record had been obtained fraudulently as it was concealed from the court that the deceased had made a Will dated 20th January 1995 which revoked the earlier one of 7th September 1993.
4. In response the appellant objected to the application for revocation on the ground that the deceased never made any other Will apart from that of 7th September 1993 and that the subsequent one dated 20th January 1995 was a forgery.
5. The parties opted to dispose of the application through *viva voce* evidence, with the 1st respondent testifying as the first witness to take the stand. He testified that they were not agreeable to the Will made in 1993. He stated that after the petition was filed, they discovered from their father's file a receipt from an advocate called P S K Kimiti which indicated that the deceased had made a Will before him. He stated that the receipt was dated 23rd January 1995. He told the court that he went to the offices of the said lawyer who

admitted that he was holding a Will made by the deceased but said that he could not disclose its contents to him unless he was accompanied by some two men, Thuo Njenga and Muiruri Wainaina, who were in fact his brothers-in-law, on account of their being husbands to his sister and half-sister, respectively. He stated that he took the two to the lawyer the next day and they were shown a copy of the Will made on 20th January 1995. He stated that he was happy with it as it distributed the estate to all the beneficiaries, while the other Will had not.

6. Christopher Mungai Gitau testified that he was a nephew of the deceased. He also testified on the meeting of 10th February 1996 when the deceased allegedly distributed his property amongst his widows and children. He also stated that the deceased had sold a portion of the land to one Francis Gatiba. He said he did not know whether the deceased left a Will, and he also said that he did not hear him tell the elders that he had one. He stated that he never discussed about a Will with him, and he would not have been surprised to hear that he had made one.

7. Geoffrey Thuo Ng'ang'a testified that he understood that he had been named an executor in the deceased's Will. He said he came to know of the Will through Richard Kamau Gitau, who told him that an advocate called Kimiti had said he had a letter which he could

not release unless he was present. He then went to the offices of that lawyer with Richard Kamau and Muiruri Wainaina, who had also been named in the Will as executors. He stated that he and Muiruri were sons in-law of the deceased. When they met the lawyer, he asked for their identity cards before pulling out a large envelop. He said he had a Will and he would read it to them. The

witness stated that the document had the deceased's signature, and

had been witnessed by Mr. Kimiti and his secretary. There was map

attached to the back of the said Will. He said he was unaware that

anyone had applied for representation based on the said will.

8. He said that at the meeting with the lawyer there was no child from

the second house. He said that when he shared information about

the new Will with David Njoroge of the second house, David Njoroge

said that they in the second house had another Will, and were not

interested in his Will. He said he had never seen the earlier Will,

but the one that named him executor had made a fair distribution

of the estate, as it has provided for all beneficiaries equally.

9. Patrick Simon Kuria testified that he was the advocate who drafted the Will dated 20th January 1995 and was paid a fee of Kshs. 4,000 for his services. He produced a receipt that he issued for the payment, dated 23rd January 1995 serial number 089. He stated that the Will bore the signature of the deceased and the same was

executed in his presence. He attested the deceased's signature, together with Sarah Wangui Nguie, his secretary. He explained that the Will was executed in his presence, then he called his secretary to come and sign as an attesting witness. He stated that the Will bore a standard revocation clause. He said that the deceased was not his client before then and he had not previously acted for him

in any other matter, and that he was introduced to him by his

regular advocate, Mr. Kamonde, for the purpose of preparing the

Will.

10. He stated that he could not recall whether the deceased came into

his chambers accompanied by any other person. He said that he did

not know the executors of the Will, but they were named in the Will.

Neither did he know how they were related to the deceased, although

the Will said that they were the testator's sons in law. He said he

did not know of the deceased's relatives, including Richard Karuru

and Charles Kamweru. He said he could not recall whether the

testator had told him that he had a previous Will or other Wills.

He said that he did not know how the existence of the Will of 20th January 1995 was discovered. He said that except for Mr. Kamonde, none of the family members would have known that he had the Will. He stated too that he was unaware that the said Will and another Will, purportedly made earlier, had been subjected to

forensic examination, adding that he would be surprised if the handwriting expert were to say that the signature on the Will of 20th January 1995 was not that of the deceased.

11. The appellant, David Njoroge Gitau testified that the deceased was his father and that he was one of the administrators of the estate.

He said that the deceased called the family sometime in 1993 and

told them that they were to go to Nairobi and visit the firm of Vohra

& Gitau, Advocates. They did so, and while at the chambers they

were introduced to Mr. Gitau, advocate. The deceased told Mr. Gitau

that in his absence he was to release his Will to him, the witness,

and Peter Njoroge. He stated that they were not shown a copy of the

Will, and the deceased merely introduced them to the lawyer. After

the deceased died in 1997, of high blood pressure and diabetes, and

was buried, the witness and Peter Njoroge, went to see Mr. Gitau,

who gave them the Will the deceased had talked about, and advised

them to take it to their advocate. They took it to Mr. Kiania Njau

who then moved the court in this cause for probate.

12. Thereafter, the two went home and informed the family about the Will. Some rejected it, protesting that the deceased had already subdivided his property. At that point no one talked of another Will. Later, the applicants moved for revocation of the grant of probate on grounds that the deceased had left another Will made on

20th January 1995. He said that he and his co-administrator had not concealed the existence of the second Will. He said that the two Wills were subjected to examination by an expert who said that the signatures on them did not match that of the deceased, whereupon he and his co-administrator accepted the verdict, and so did the applicants. He said that the second Will named his brothers in law as executors. He asserted that his father could not have done so as he was not in good terms with them for reasons that he stated in his testimony. He asserted that the Will was not genuine as it had displaced him and his mother from the spots on the ground which they had developed. He conceded that there was a case at the Githunguri Law Courts between him and the deceased over the land in question.

13. Nicholas Kiania Njau testified that he was an advocate of the High court of Kenya practising at Nairobi. He said that in 1997 Peter Njoroge and David Njoroge brought him a Will which had been prepared by the firm of Vohra & Gitau, Advocates. He was instructed to obtain probate of the said Will. He did so, and a grant of probate was issued. Later, another Will cropped up,

prepared by PSK Kimiti, advocate. A dispute arose as to which of the two Wills was genuine. Mr. Kamonde came in at that time to apply for revocation of the grant and produced the second Will. He and Mr. Kamonde agreed to

subject the two documents to examination by a document examiner. They did so and the document examiner found that the signatures on both Wills did not match the known signatures of the deceased. He stated that neither he nor Mr. Kamonde had a quarrel with the report. He said that he was not instructed to dispute the findings of the handwriting expert. He confirmed that he did not draft the first Will, it was merely brought to him to propound. He stated that as a lawyer his position would be that once the document examiner found the two signatures did not match those of the deceased then the grant on record ought to be found not to have been proper.

14. Mackenzie Mweu testified that he was the document examiner to whom the two Wills were given for examination. He testified that after examining the disputed signatures as against the known signatures of the deceased he concluded that they did not conform to the pattern of formation in the known signatures of the deceased. He stated that signatures are often affected by the age or sickness of the persons making them, but he added that their individual characteristics persist. He said he could not recall the dates of the known signatures of the deceased.
15. Ann Nyawira Gitau testified and described herself as a daughter of the deceased. Regarding the Wills, she testified that the first

one reflected the wishes of the deceased as expressed by him previously,

while the last Will did not capture those wishes. She stated that the execution of the last Will would dislocate her mother. She stood by the opinion of the handwriting expert that the signatures on both Wills were not authentic.

16. The learned trial Judge, after taking the evidence and considering it against submissions filed by the parties formed the opinion that the only issue for determination was which of the two Wills is valid.
17. The learned Judge, found the Will allegedly executed by the deceased on 20th January 1995 to be a valid Will and testament. The Judge stated that there was ample material on record to demonstrate that the validity of the Will of 7th September 1993 was not challenged by the applicants. Further, as to whether the first Will was valid as at the date of the deceased's death, the Judge held that having perused the Will of 20th January 1995, he noted that it carried a standard revocation clause at clause 1 which said; *"I revoke all my former Wills and other testamentary dispositions hitherto made by me and declare this to be my last Will."* The learned Judge held that the effect of that clause was no doubt to revoke earlier Wills which include that made on 7th September 1993. Consequently, the Judge held that as at the date of the demise of the deceased in 1997 the Will made on 7th

September 1993 was no longer valid having been revoked by the Will of 20th January 1995.

18. The final orders of the court were that:-

“The Wills on record were properly and validly made by the deceased; that the Will dated 20th January 1995 revoked that made on 7th September 1993 and the distribution of the estate herein shall hereafter be based on the said Will of 20th January 1995; that as a consequence the grant of probate of written Will made on 3rd March 1998 is hereby revoked, the orders made on 30th April 1999 confirming the said grant are hereby set aside and the certificate of confirmation of grant issued is hereby cancelled; that any and all transactions carried out on the strength of the said grant of probate and the certificate of confirmation of grant are hereby declared null and void; that I hereby grant probate of the written Will made on 20th January 1995 to Thuo Nganga and Muiruri Wainaina and the relevant certificate of probate shall issue to them accordingly and that the executors shall move with dispatch thereafter to have the grant confirmed.”

19. The appellants were dissatisfied with the decision of the learned trial Judge and so filed this appeal. The memorandum of appeal raises 18 grounds. We have carefully considered them and find that the only issue that arises from those grounds and which calls for our determination is: Whether the learned trial Judge erred in finding that the deceased's Wills dated 7th September 1993 and 20th January 1995 were both valid and that the Will dated 20th January 1995 had revoked the one dated 7th September 1993.

20. The appellant prays that the judgement and decree of the High Court dated 14th June 2018 be set aside in its entirety and

replaced

with a finding that the deceased died intestate. He also asked for costs.

21. We heard this appeal through this Courts virtual platform on 19th March 2025. Both parties had filed written submissions in support of their rival positions in the matter. Present for the appellant was learned counsel Mr. Karuga Maina who relied on his submissions and also made brief oral highlights. There was no representation for the respondents, but their advocates on record had filed submissions which the Court considered.
22. The appellant relied on his written submissions dated 5th October 2020, which he also highlighted. The appellant submitted that none of the parties raised issues with the document examiner's report either as a whole or any aspect of it, and there was no challenge mounted against it.
23. The appellant accused the learned Judge of ignoring the affidavit evidence by the applicants at the High Court who stated that the deceased had orally expressed his wishes before elders and, therefore, the alleged discovery of the second Will almost three (3) years after the grant of probate was issued was an after-thought and a crafty work of the respondents meant to deceive the court.

24. As to whether the learned Judge ignored the testimonies of the applicants' witnesses who testified that they never heard that the deceased had made a Will, it was submitted that the trial Judge ignored the evidence of Christopher Mungai Gitau who testified for the respondents and stated that the deceased never told him of a Will, and that he also stated that Richard Karuru never told him of a Will. It was further submitted that Christopher stated that he was surprised to hear that there was a Will and that it was strange that the deceased would call a meeting in 1996 to subdivide his land if he had made a Will in 1995.
25. The learned Judge was also cudged for holding that the document examiner's report was shallow and of no assistance to the court, it was submitted that the trial Judge erred by not appreciating that the document examiner testified in court where he was cross examined by counsel for the respondents and he substantiated and expounded on the basis of his expert witness evidence. It was stated that the respondents did not challenge his skills or qualifications and, furthermore, both counsel had accepted the report.
26. Further it was submitted that the learned Judge fell into error when he emphasized on the testimony of P S K Kimiti Advocate

against the evidence of the document examiner when the said advocate did not testify as an expert. It was contended that the trial Judge failed

to examine the totality of the evidence and was quickly swayed by the evidence of the advocate stating that he was not a rogue whose word could not be taken to be the truth. Learned counsel submitted that the learned Judge disregarded the evidence of Mr. Kiania advocate who was also an advocate of long standing and who had testified that the opinion of the document examiner was binding on the parties.

27. We are urged to allow the appeal.

28. The respondents relied on the submissions dated 1st December 2020. As to whether the High Court erred in its finding on the expert opinion, it was submitted that upon filing the summons for revocation of grant, the two Wills dated 7th September 1993 and 20th January 1995 were by consent submitted to a document examiner Mr. Mackenzie Mweu for examination. That the examiner on 11th July 2005 presented a report to court with a verdict that the signatures on the Wills did not conform to the known signatures of the deceased and that it was on this basis that the trial court found that the expert's testimony was not helpful to the court as it was shallow and did not substantiate its findings. Counsel relied on the decision in **Samson Tela Akute - vs- Republic [2006] eKLR** for the proposition that the evidence of an expert is a mere opinion

which is not binding on the trial court.

29. It was submitted that subject to **section 48** of the **Evidence Act** expert opinions are characterised as mere opinions and are not binding on a court, that although they are admissible as evidence, they are not conclusive and the court has to evaluate them alongside any other evidence.
30. It was submitted that the report prepared by Hawk Eye was ambiguous and uncomprehensive in that it did not state the features that were peculiar with the offending signatures on the two Wills, it was stated that the report did not include explanations or interpretations of discrepancies and differences. It was submitted that the statement 'I can find no agreement' in the report was not explained in a manner that would have been of help to the court. Reliance was placed in **Hassan Salum -vs- Rep. [1964] EA 126** for the holding that it was correct to say that the evidence of a handwriting expert was opinion only and the matter was one on which the court had to make a finding. On the value of the expert opinion counsel relied on **Christopher Ndaru Kagina - vs Esther Mbandi Kagina & Another [2016] eKLR.**
31. It was submitted that the document examiner was to furnish courts with information that was outside the court's experience

and knowledge and that the trial court had a duty of weighing expert

evidence and determining its probative value. Further it was urged that the trial Judge upon considering the expert opinion found the opinion of the expert which ought to guide the court was a seventy- three (73) word report which was inadequate and was not capable of being consumed by a court of law to assist in forming an opinion on the authenticity of the documents.

32. Further it was submitted that the report by the handwriting expert did not help the court in any conceivable way to form an opinion on whether or not the signatures in question were authentically the deceased's because the expert did not specifically point out the dissimilarity on the two Wills with the specimens used. It was contended that the trial court was entitled to accept or reject the opinion of the expert. It was contended that the expert opinion was not legally binding on the learned Judge.
33. As to whether the learned Judge evaluated the evidence adduced in totality it was submitted that the only issue for determination at the High Court was which of the two Wills was valid, it was contended that the trial Judge considered the formal requirements that must be complied with for validity of a will or testament as stated in **section 11** of the **Law of Succession Act**.

34. It was submitted that the capacity to make a Will has never been in question either before the High Court or subject of this appeal. It was contended that the challenge was as to the validity of the second Will concerning the signature. It was submitted that the trial Judge considered the testimony of Mr. Kimiti the advocate who drafted the second Will and before whom the deceased executed the Will. It was stated that the Will was further attested by the secretary as a competent witness and hence that the formal validity of the second will under **section 11** of the **Law of Succession Act** was satisfied. Further, that the appellant did not challenge the truthfulness of the testimony of the advocate and that this was the basis of the finding by the trial court. It was submitted that no evidence was adduced in court to prove that Mr. Kimiti, an officer of the court, was a rogue whose words could not be taken to be the truth. Reliance was placed on **Siraj Din - vs- Ali Mohamed Khan [1957] EA 25**. The respondents denied that the issue of the second Will was an afterthought.
35. As to whether the learned Judge erred in his finding on the validity of the Will dated 7th September 1993, it was submitted that after the trial Judge arrived at his finding that the Will dated 20th January 1995 was valid there was no basis for considering any previous Wills

as the same are null and void having been revoked as per

section 18 of the **Law of Succession Act**.

36. We are urged to dismiss the appeal with costs to the respondents.
- 37.** This is a first appeal, and that being the case, it behoves this Court to subject the evidence adduced before the trial court to a fresh examination, analysis and evaluation and to draw our own conclusions. See **Selle and another -vs- Associated Motor Boat Co. Ltd & others [1968] EA 123**. We are also mindful that we can only depart from the findings of the trial court if they are not based on the evidence on record; or where the said court is shown to have acted on wrong principles of law as held in **Jabane -vs- Olenja [1986] KLR 661**; or if its discretion was exercised injudiciously as held in **Mbogo & another -vs- Shah [1968] E.A.**
38. The gravamen of the appeal is the validity of the Wills dated 7th September 1993 and 20th January 1995. The application for revocation of grant was based on grounds that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by making false statement or by the

concealment from the court of something material to the case by the appellant, and that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant being

that the deceased had made another Will dated 20th January 1995. From the evidence adduced by the appellant and submissions of counsel the Will was challenged for being a forgery or being fraudulent and for being in-sufficient in terms of provision for some of the beneficiaries.

39. **Section 5** of the **Law of Succession Act** deals with capacity of a testator and **section 5(1)** gives the permissive clause that any person of sound mind and who is not a minor may dispose of all or any of his free property by will.

40. The appellant faulted the learned Judge for relying on the evidence of the advocate who drew the Will for the deceased. We have considered the evidence of Mr. Patrick Simon Kuria Kamiti advocate. His evidence was that being an advocate of long experience in the

field he drafted the Will dated 20th January 1995 and was paid a fee

of Kshs. 4,000 for his services. He stated that the Will bore the

signature of the deceased and the same was executed in his presence. He attested the deceased's signature, together with Sarah Wangui Nguaye, his secretary. He stated that the Will bore a standard revocation clause. He said that the deceased was not his client before then and he had not previously acted for him

in any

other matter, and that he was introduced to him by his regular advocate, Mr. Kamonde, for the purpose of preparing the Will.

41. We note, like the trial Judge, that Mr. Kimiti is an advocate and officer of the court. He testified that he wrote the 2nd Will, he called his secretary as a witness, and he personally witnessed the deceased sign the said Will. He told the court that he did not know the deceased before that date, and he would not have had any sinister motive in the matter. The deceased was taken to him by another renowned advocate. His evidence was, in our view unimpeachable. We are of the view that the evidence of Mr. Kimiti was adequate evidence as to the capacity of the deceased and that it establishes that he had a clear understanding of what he was doing, was clear of the property he was disposing, the persons he was disposing to and that his instructions to the lawyer who made his Will were clear. The learned Judge cannot be faulted for the conclusions he reached on this point.

42. The other complaint against the trial Judge was accepting the Advocate's evidence over that of the document examiner dated 11th July 2005. The appellants' evidence was that despite the fact that the findings contained in the document examiner's report dated 11th July 2005 was not contested by any of the parties, the trial Judge erred in holding that the same was shallow and of no

assistance to

the court and in rejecting the same having been prepared by an expert.

43. With regard to reliance on expert opinion, there is rich jurisprudence on this point. For instance, in the case of **Shah and**

Another -vs- Shah and Others [2003] 1 EA 290, the Court held

that:

“One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct... The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony... The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion”
(emphasis ours)

44. In the case of **Kagina vs Kagina & 2 others [2021] KECA 242**

(KLR), this Court held:

“A Court is entitled to reject expert opinion if upon consideration of such an opinion in conjunction with all other available evidence on the record, there is proper and cogent basis for doing so, and secondly, that a court must form its own independent opinion

based on the entire evidence before it and such evidence must not be rejected except on firm grounds”[Emphasis ours].

45. In the instant case, the trial Judge found that:

“The opinion that I am required to work with is contained in a letter from the document examiner dated 11th July 2005, addressed to NK Njau Advocates. The relevant paragraphs thereof state as follows :-

“I have examined and compared the questioned signatures indicated with arrows on the two wills marked A1 and A2 with the known signatures on the documents numbered 1 - 6.

I can find no agreement. The disputed signatures show a different pattern of formation which does not conform with the pattern of formation on the known signatures. The disputed signatures also show evidence of tremor as opposed to the known signatures which do not show them.””

46. And later in the judgment, the trial Judge stated:

“ 28. With the opinion of the expert amounting to no opinion at all, I am left with nothing more except the testimony of Mr. Kimiti. He is an advocate of the High Court of Kenya of many years standing. He has stated on oath that he drafted the second Will and that the same was executed by the deceased in his presence. He stated further that he signed it as an attesting witness and so did his secretary. No evidence was placed before me to suggest that the deceased was at the material not of testamentary capacity. Similarly, no evidence was placed before me to suggest that the officer of the court, that is Mr. Kimiti, was a rogue whose word could not be taken to be the truth by this court. I have no reason therefore not to believe what he told the court to be the true state of affairs. I find therefore that the will allegedly executed by the deceased on 20th

January 1995 to be a valid will and testament”

We respectfully agree with the trial Judge.

47. The role of a handwriting expert was succinctly explained by Lord Heward in the case of ***Republic -vs- Podmore (1930) 46 T.L.R. 365***

in which he stated:

“... Let me say a word about handwriting experts. Let everyone be treated with proper respect, but the evidence of handwriting experts is sometimes misunderstood. A handwriting expert is not a person who tells you, this is the handwriting of such and such a man. He is the person who, habituated to the examination of hand writing, practiced in the task of making minute examination of handwriting, directs the attention of others to things which he suggests are similarities. That and no more than that, is his legitimate province...”

48. The evidence captured on record shows that the document examiner did not give reasons and an explanation on how he arrived at the conclusion that the signatures on the Wills were not from the deceased. As can be discerned from the above cases, the evidence of an expert, is not by itself conclusive proof of fact. The same must be considered alongside the rest of the evidence before the factor set of facts can be proved. In this case, the document examiner’s evidence, though uncontested was scanty and

needed corroboration by other evidence for it to be taken as conclusive. It is imperative to note that the said expert evidence even concluded that the first Will had not been signed by the deceased, yet there had been no challenge to that Will before.

49. We have compared the evidence of the document's examiner *vis a vis* that of Mr. Kimiti and we have no hesitation in agreeing with the learned Judge as to which of the two sets of evidence was more persuasive in terms of evidential value. We find that the trial Judge was right in disregarding the opinion of the document examiner in the face of the evidence of Mr. Kimiti Advocate who drafted the Will dated 20th January 1995 which had a clause revoking the earlier
50. Ultimately, for the foregoing reasons, we find that this appeal lacks merit and fails in its entirety. We dismiss the appeal accordingly with no order as to costs, this being a family matter, and in the interest of family harmony.

Dated and delivered at Nairobi this 21st day of November 2025.

W. KARANJA

.....
JUDGE OF APPEAL

S. GATEMBU KAIRU, C.Arb. FCIArb.

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the*

original.

Signed

DEPUTY

REGISTRAR.