REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

HCFA 1 OF 2024

(FORMERLY KIAMBU HCCA E106 OF 2022)

BENSON HARRISON KURIA

……EXECUTOR/APPELLANT

VERSUS

SAMUEL MUGO KARANJA……1ST OBJECTOR/RESPONDENT

ANDREW MOSES KIBE……2ND OBJECTOR/ RESPONDENT

SIMON CHEGE KARANJA……3RD OBJECTOR/RESPONDENT

(Being an appeal from the ruling and order of the honourable court Mr. Oscar Wanyaga SRM dated and delivered at Thika Chief Magistrate's Court at Thika Succession Cause No. E220 of 2021 on the 17th day of May 2022)

JUDGEMENT

1. The appeal herein was lodged via a memorandum of appeal dated 25th May 2022 on grounds that:
   i. The ruling was against the weight of evidence.
   ii. The learned magistrate erred in law and in fact in failing to appreciate the evidence adduced by the Appellant and in particular failing to recognize the advocate who was present at the making and signing of the will by the deceased and as such a competent witness.
   iii. The learned magistrate erred in law and fact in failing to recognize that the deceased had made a valid will and thus died testate.

iv. The learned magistrate erred in law and fact by pronouncing that the deceased died intestate.

v. The learned magistrate erred in law and fact in disregarding the appellant's submissions and failing to properly analyze and consider the evidence before the honourable court and consequently arriving at an erroneous decision.

vi. The learned magistrate erred in law and in fact in failing to appreciate the long-established principle of stare decisis, bringing law into confusion and thereby deriving an erroneous finding/ conclusion.

2. Therefore, the appellant prayed that the appeal be allowed and the ruling of the trial court delivered on 17th May 2022 be set aside with costs and the proceedings in Thika Succession Cause No. E220 of 2021 be stayed until the full hearing and determination of the instant appeal.

3. At the trial court, the validity of the will that had allegedly appointed the Appellant herein as the executor of had been contested. On the first part it was challenged on the basis that it had not been properly attested to as the will was to come into force once both the testator and one of the witnesses, his, were deceased. The trial court found that to the extent that the coming into force of the will was pegged on the death of both the deceased and the witness, the witness could not be competent for purposes of the will. Therefore, the court ordered that the deceased be presumed to have died intestate.

4. Aggrieved and dissatisfied with the finding of the trial court that the deceased died intestate, the appellant lodged the instant appeal.

5. This honourable court directed that the appeal be canvassed through written submissions.

6. The appellant submitted that the trial court erred in law and in fact in failing to recognize that the deceased had made a valid will thus died testate. The appellant contended that the deceased duly signed the will in the presence of an advocate as required by Section 11 of the Law of Succession Act. Reliance was placed on the case of Re **Estate of Wahome Mwenje Ngare (Deceased) [2016] eKLR.** It was further submitted that, the Respondents did not dispute the deceased's signature on the Will instead, their contention is that the deceased's signature was witnessed by the advocate who drew the Will contrary to section 11 (c) of the LSA. The Appellant contended that the LSA does not prohibit an advocate who has drawn a Will from attesting to the same. Mere involvement of an advocate who drafts the Will as an attesting witness does not vitiate the validity of the Will. Therefore, the trial court erred in disregarding the Appellant's evidence.

7. The Respondents submitted that the document presented to court was not a valid Will as the fingerprint that was submitted to the Secretary National Registration Services was not suitable for fingerprint verification. As a result, there was no means of ascertaining that the fingerprint indeed belonged to the deceased. In such circumstances, the trial court was right in finding that the deceased died intestate.

8. **Section 78(2) of the Civil Procedure Act** grants the appellate court the same powers and nearly the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted herein.

9. Being a first appeal, the court relies on a number of Principles as set out in **Selle and another vs.**

Associated Motor Boat Company Ltd & others (1968) 1 EA 123:

> ***"this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence."***

10. I have considered the pleadings, the evidence, the submissions filed by the appellant and the respondent and the ruling appealed against. The main issue that I have distilled for determination is whether the deceased died testate.

11. The deceased herein died long after the Law of Succession Act had come into force in 1981. His estate is, therefore, for administration and distribution in accordance with the Law of Succession Act. The will, the subject of these proceedings, is written, and the law on written wills is section 11 of the Law of Succession Act, which provides as follows:

> ***"11. Written wills***
> ***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."

12. From these provisions, one of the key requirements is that the written will must be signed by the maker, also known as the testator, in this case the deceased herein. It is alleged that the deceased executed the will by affixing his finger print. I have noted that the Will is attested using a fingerprint that is alleged to have belonged to the deceased. When the said fingerprint was forwarded to the Secretary National Registration Services for authentication, it was determined that the same was not suitable for examination. Accordingly, there is nothing before me to authenticate whether the Will before court was actually executed by the deceased.

13. The other way of establishing that fact would have been by him calling the persons who were present at the event of the execution of the will by the deceased. Being present at the execution of the will is so that they can participate at its authentication by way of execution. More importantly, so that they, those witnessing the execution, can provide evidence and testimony, should the authenticity of the execution or the signature be called to question, of the validity of that exercise.

14. According to **Section 11 of the Law of Succession Act**, the other vital requirement is that a valid Will ought to be signed by the deceased in the presence of two or more independent and competent witnesses, who shall thereafter also affix their signatures. The question therefore is whether the Will before the court was signed by the deceased in the presence of two or more independent and competent witnesses.

15. It was incumbent on the Appellant to call the attesting witnesses, that is the two individuals who appended their signatures to the alleged will as witnesses to its execution by the deceased, to come and attest to the court, that they were indeed present at execution of the will, and that they saw the deceased sign the will, and that the signature on the document, purported to be his signature, was in fact appended there by him, and it was his signature. See **Elizabeth Kamene Ndolo vs. George Matata Ndolo [1996] eKLR (Gicheru, Omolo & Tunoi JJA)**

16. The attesting witnesses are not present at the making or execution of the will for the sake of it, to lend authenticity to the document by merely signing it. Their more critical role is to provide evidence in court, in the event the execution of the document is contested, like in this cause. Their role does not end with them witnessing the execution of the will by the maker, on the day the will is made, for the more important role comes later, when the maker dies, and the authenticity of the execution of the will is called to question. They are expected to attend court, to apprise the court on what exactly happened on the day it is alleged that the deceased signed the document placed before the court as his alleged will. See **In Re Estate of Chandrakant Shamjibhai Gheewala (Deceased) [2006] eKLR (**Koome J as she then was).

17. Of course, the law does not require that the attesting witnesses be persons who were known to the family, or even trusted friends of the deceased, they could be perfect strangers to the family. The only requirement is that they would be available at the critical time when they are required.

18. In the instant case, the Will was witnessed by two witnesses, the advocate who drafted the Will and the deceased's wife who is also deceased. The trial court remarked that to the extent that the Will was expected to come into force upon the death of both the deceased and his wife, the deceased's wife could not in the circumstances be a competent witness for the deceased's will.

19. Further, since the other attesting witness was the advocate who had allegedly drafted the will, he does not meet the requirement of an independent witness.

20. I therefore concur with the finding of the trial court that the deceased's wife was not a competent witness as the will was supposed to come into force upon her death.

21. However, the test of validity is not limited to the requirements of **section 11** alone. There are other provisions of the Law of Succession Act to be reckoned with. One of them is the capacity of the maker to make the will; and the other relates to the circumstances under which the will was made. In the instant case, no argument turned on the capacity of the testator or the circumstances under which the Will was made.

22. Capacity to make a valid will is predicated on the understanding that the maker of the will knows what he is doing, that is making a document regarding disposal of his

property, upon his death, amongst the persons that he is obliged to provide for, due to kinship ties between him and them. There is no material, therefore, upon which I can conclude that the deceased did not have requisite testamentary capacity, as at the time, when it is alleged the will was made.

23. The second one is about the circumstances under which a will is made. A will may appear valid and proper on the face of it, in terms of execution and attestation, but its validity could be undermined by the circumstances of its making. **Section 7 of the Law of Succession Act** covers these circumstances. They include fraud, coercion, importunity or mistake, and section 7 provides that any will, which appears valid on the face of it, would be rendered void by those factors. Again, here is no material, therefore, upon which I can conclude that the making of the alleged will was vitiated by circumstances listed in **Section 7 of the Law of Succession Act.**

24. Flowing from the above, I have no reason to disturb the finding of the trial court on the validity of the Will as the Appellant failed to discharge the burden of proof on both execution and attestation of the Will. The trial court was therefore correct in finding that the deceased should be presumed to have died intestate.

25. ***The upshot of the matter is that the appeal herein is dismissed with costs to the Respondent.***

DATED, SIGNED AND **DELIVERED** ELECTRONICALLY THIS **20TH** DAY OF **NOVEMBER,** 2025.

HON. T. W. Ouya
JUDGE