

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION CAUSE NO. 176 OF 2000

**(FORMERLY NYERI PMC SUCCESSION CAUSE NO. 82
OF 1989)**

**IN THE MATTER OF THE ESTATE OF KARIMI KAGUNDA
alias KARIMI S/O KAGUNDA (DECEASED)**

PHILLIS WAIRIMU NYAGA.....

APPLICANT

VERSUS

**EPHANTUS GATHEE KARIMI (DECEASED) 1ST
PROTESTOR**

**EDAH WAMBUI MURAYA2ND
PROTESTOR**

**PURITY WAIRIMU KARWEGA 3RD
PROTESTOR**

**AGNES NJOKI KARIMI 4TH
PROTESTOR**

**EPHRAIM KARUMBA KARIMI5TH
PROTESTOR**

RULING

1. There is no way of explaining why this matter is in court this many years. The deceased herein died peacefully on

23.07.1987 at the age of 76 years. The cause was filed as an intestate matter vide Nyeri PMC Succession Cause No. 82 of 1989. Grace Muthoni and Esther Wanjiru Karimi filed a petition dated 17.03.1989. In that petition, the following were listed as beneficiaries:

- a. Wanjiku Karimi -widow
- b. Ephraim Karumba -son
- c. Ephantus Gathee -son
- d. Wachira Karimi-son
- e. Nyaga Karimi -son
- f. Mwangi Karimi -son
- g. Njogu Karimi -son
- h. Ephantus Kagunda -son

2. The petition listed 2 bank accounts and land parcel number Iria-ini/Chehe/186 valued at Ksh 240,000/=. The case was filed on 2.5.1989 and advertised in the Kenya Gazette on 9.06.1989. On 6.03.1990, Nelson Kinyua filed an application to extend the time to file his objection and other papers. They stated that the deceased had a written will. He stated that he saw the cause when an application for a temporary grant was made. The application was filed through the firm of Kagonda and Mukunya advocates for the objector.

3. The matter was transferred to this Court as succession cause No. 176 of 2000. The court is still tracing the order for transfer to this court. It is therefore younger than the period it has been pending in court, which spans

approximately 37 years. In the course of the proceedings, several deaths have occurred, causing a mutation of the matter. The ruling today will also terminate one of the two petitions filed in this cause. The first is a petition for letters of administration intestate, filed by the fifth protestor's mother, Grace Muthoni Karimi, while the other was filed by Nelson Kinyua, a person proposed to serve as executor.

4. The objector filed a petition for probate of a written will on 1.11.1990 and indicated that he is the executor, with someone else. It was posited that there was a will listing 4 assets as follows:
 - a. Iria-ini/Kairia/294
 - b. Iria-ini/Kaguyu/83
 - c. Iria-ini/Chehe/186
 - d. Magutu/ Gathehu/SR 266
5. Nothing happened in the matter until 23.02.2016, when Ephraim Karumba Karimi applied to be substituted in place of one of the original petitioners, Grace Muthoni Karimi, of Chehe/Nyeri, who died on 15.08.2002.
6. On 10.4.2018, Phillis Wairimu applied to be substituted in place of her husband, Kennedy Nyaga Karimi of Thegenge location, who died at the age of 54 on 1.12.2007. He was neither an original petitioner nor an executor.
7. Phillis Wairimu Nyaga made an application for confirmation of grant, dated 2.08.2018. It must be made clear from the outset that no party has a grant capable of confirmation.

The same was based on the false understanding of the ruling of 5.7.2018. The orders were to the effect that:

- a. The application for substitution of the petitioner in the intestate petition is supported by limited letters of administration ad litem and is thus allowed.
- b. The application for substitution of the petitioner in the probate cause is supported by limited letters of administration ad litem and is thus allowed.

8. There was never an applicant for a grant of letters of probate or letters of administration testate with will annexed. The orders sought in the notice of motion dated 10.04.2018 in the probate cause were to the effect that:

- a. The court may be pleased to substitute the intended substitute/applicant, Phillis Wairimu Nyaga for her husband(deceased)
- b. Costs in the cause

9. The main reason for the application was that Phillis Wairimu Nyaga was the administrator of the estate of Kennedy Nyaga Karimi(deceased). She was granted limited letters of administration ad litem in Nyeri CM P & A 1 OF 2017.

10. On the other hand, the summons general application dated 19.2.2016, sought the following orders:

- a. The court may be pleased to substitute the intended substitute Ephraim Karumba Karimi for the petitioner Grace Muthoni Karimi.
- b. Costs in the cause

11. The main reason for the application was that Ephraim Karumba Karimi was the administrator of the estate of Grace Muthoni Karimi(deceased). Ephraim Karumba Karimi was granted limited letters of administration ad litem in Nyeri HC P & A700 of 2015.

12. Phillis Wairimu Nyaga in her application for confirmation of grant, indicated that the deceased left the following dependants:
 - a. Ephantus Gathee Karimi
 - b. Phillis Wairimu Nyaga
 - c. Eddah Wambui
 - d. Purity Wairimu
 - e. John Mwangi
 - f. Agnes Njoki
 - g. Ephraim Karumba Karimi
 - h. Christopher Karumba Karimi
 - i. Wacuka Maina

13. She sought that land parcel number Iriaini/Chehe/ 186 be divided equally amongst three living beneficiaries named below, indicating that this was in line with the will:
 - a. Christopher Karumba Karimi
 - b. John Mwangi Karimi
 - c. Phillis Wairimu Nyaga

14. The following were listed, but their share is not given:
 - a. Peter Njogu Karimi (deceased)
 - b. Joseph Wachira Karimi(deceased)

15. Though the will had indicated several properties, the applicant only listed one property. The properties listed in the impugned will were Iria-ini/Kairia/294, Iria-ini/Kaguyu/83, Iria-ini/Chehe/186 and Magutu/Gathehu/SK 266
16. This resulted in the protest filed on 18.10.2018 by 4 protestors, that is:
- a. Ephantus Gathee Karimi
 - b. Eddah Wambui Muraya
 - c. Purity Wairimu Karwega
 - d. Agnes Njoki Karimi
17. They stated that Ephantus Gathee Karimi, Eddah Wambui Muraya, and Purity Wairimu Karwega have no interest in the land. Agnes Njoki Karimi stated that she is an unmarried daughter who was left out and is therefore entitled to a share of land parcel number Iriaini/Chehe/186 together with Christopher Karumba Karimi, John Mwangi Karimi, and Phillis Wairimu Nyaga. Esther Wanjiru Nyaga Karimi is to have a life interest.
18. Upon consideration, the protest by the four is not, in substance, a protest at all, save as it concerns the claim by Agnes Njoki Karimi. She later departed from that position and instead aligned herself with and relied on the submissions of Phillis Wairimu Nyaga.

19. Though they allege the existence of a will, they depart to the largest extent possible from the impugned will. The impugned will indicate as follows:

- a. Ephantus Gathee Karimi was to get land parcel number Iria-ini/Kaguyu/83 with coffee being dealt with by the mother until her demise.
- b. Ephantus Kagunda Karimi was to get land parcel number Iria-ini/Kaguyu/294 less one acre.
- c. Wandeto Karimi was to get land parcel number Magutu/ Gathehu/SK 266
- d. Christopher Karunda, John Mwangi, Peter Njogu, Kenneth Nyaga, and Joseph Wachira were to share land parcel number Iria-ini/Chehe/186. Coffee near Christopher Karunda was to be taken after the demise of his mother.
- e. Christopher Karunda Karimi and Peter Njogu Karimi were to get 0.5 acres for their mother's life interest.
- f. Tea was to be shared equally until all children were out of school.
- g. The impugned will indicates that Esther Wanjiru, the mother of Ephantus Gathee Karimi, was to take $\frac{1}{4}$ of the money. It was not indicated where the money was. The mother to Christopher Karunda, that is, Grace Mweru, was to take $\frac{1}{8}$ of the money. All the children, that's sons and daughters, were to share the balance.
- h. The wives were said to be left with personal effects.
- i. Agnes Njoki and Wacuka Maina were left out of the impugned will.

20. Ephantus Gatheo Karimi got a lion's share, including an extra share from the mother. There is no explanation in the impugned will for leaving any other beneficiaries.
21. Ephraim Karumba Karimi filed a protest that the deceased had two wives, that is:
- a. Grace Gathoni Karimi
 - b. Esther Wanjiru Nyaga Karimi
22. He averred that one of the widows, Grace Gathoni Karimi, died during the proceedings. He posited that the children should share their mothers' portions. The children in each house, thus, should share equally in their mother's share. He pointed out that neither party was alleging the existence of a will. He filed a statement dated 24.3.2022. Interestingly, unlike the applicant herein, he did not claim to have been granted any letters of admission intestate.
23. As we proceeded, it became clear that the parties were involved under mistaken premises. My plea for them to reflect fell on deaf ears. Each side wanted to maximize the benefits they thought they had. It is sad that, 37 years after the cause was filed, there are still no letters of administration for the estate.

Proceedings and Evidence.

24. The court, Mshila J, allowed both applications for substitution by the testate and intestate applicants on 5.07.2018. There has been no appeal to that application. On

26.11.2018, parties agreed to proceed through *viva voce* evidence. The hearing was set for 11.03.2019. On the said date, the matter was adjourned for a date to be taken in the registry. The adjournments continued until 23.05.2022, when the court issued directions again for the matter to proceed by way of *viva voce* evidence and fixed it for hearing on 25.07.2022. On that day, the firm acting for the 1-4 protestors sought to cease acting. That application caused adjournments until 23.03.2023, when Muya J allowed the same.

25. The reed dance continued with 4 protestors seeking more time. The matter was fixed for hearing on 26.03.2024, but could not proceed. A new date was fixed, which coincided with this court's entry into the Nyeri High Court on the same month. On 27.6.2024, I fixed the matter for hearing on 17.10.2024. The protestors sought time to file certain documents. The court gave comprehensive directions and fixed the matter for hearing on 12.11.2024. The parties then proceeded after the court put its foot down.

26. PW1 was James Mwangi, who testified at first virtually. He stated that he was working as a legal clerk in 1986 with the firm of Kagondu and Mukunya advocates. He signed a will of Moses Karimi Kagunda. The 1st to 4th protestors did not cross-examine him because they were on the applicant's side, Phillis Wairimu Nyaga.

27. Mr. Kebuka Wachira cross-examined on behalf of the 5th protestor. The witness stated that he could not remember who accompanied the deceased. He could also not recall the testator's age. I noted the witness was evasive when asked questions about the identity of the alleged testator. He stated that it was Ms. Mukunya advocate who took instructions. He stated that he was there when instructions were given. He then changed his evidence, stating that he just read the will and signed it. He stated that the testator appended the fingerprint but did not sign.
28. Upon being asked about Moses Muriithi and Nelson Kinyua, the witness stated that they were not present. When the next question was put to him, he switched off his camera and appeared to be consulting off-screen. I noted this conduct on the record and stood down the witness, directing that he appears in person before the Court.
29. On a resumed hearing of 14.11.2024, PW1 continued being cross-examined. He now stated that the testator was alone. He did not know whether the testator could read or write. He changed the gain and said he [PW1] had read the document.
30. The witness's evidence was marked by inconsistencies on material aspects. Upon consideration of the totality of his testimony, I was not satisfied that he had met the deceased or that he possessed personal knowledge of him.

Submissions

31. The Applicant filed submissions dated 5.9.2025. It was submitted for the Applicant that the Deceased had testamentary capacity to make the will. Reliance was placed in the case of **Banks v Goodfellow (1870) LR 5 QB 549**, where the Cockburn CJ stated as follows regarding the testamentary capacity of a testator:

He must have a sound and disposing mind and memory. In other words, he ought to be capable of making his Will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, and of the persons who are the objects of his bounty and the manner it is to be distributed between them.

32. It was thus submitted that the ailment that the Deceased was suffering from at the time did not affect his soundness of mind. Reliance was placed on **John Kinuthia Githinji v Githua Kiarie & 2 others C.A. No.99 of 1988**. It was submitted, had testamentary understanding and capacity.

33. The Applicant also submitted that two witnesses, James Mwangi and Nancy Mukunya, were of sound mind and full age when they appended their signatures, and attested to the Deceased having made the will and affixed his mark.

34. They further submitted that under section 3(1) of the Law of Succession Act, a competent witness is defined as a person of sound mind and of full age. In the exercise of the testator's testamentary freedom, the deceased was entitled to appoint any persons of his choosing as witnesses. The mere fact that the witnesses did not originate from the deceased's locality does not, of itself, render them incompetent. If anything, it underscores their impartiality, as they stood to gain nothing under the will.

35. The 5th Protestor filed submissions dated 30.6.2025. It was submitted that there was no valid will, and that the purported will did not meet the legal requirements. No authorities were cited in support of that submission.

36. It was the submission of the 5th Respondent that the deceased had been ailing since 1984 until his demise and the will purported to have been signed by him in 1986 could not have been signed personally by him. Further, the executors Nelson Kinyua and Moses Mureithi were inserted in an already typed document.

Analysis

37. These succession proceedings are as old as we can remember. They were filed during the formative years of the now-almost-defunct 8-4-4 education system. It was at the beginning of the first term of George H. W. Bush, as the 41st President of the United States, and before the fall of the Berlin Wall. Beneficiaries have died, and the case

continues with no end in sight. There does not appear to be a particular poignant outstanding point that could not be agreed upon or litigated. I digress.

38. Succession proceedings are civil in nature. Although the court adopts a more inquisitorial role than is typical in adversarial litigation, the standard of proof remains the same as in civil cases. The court must therefore determine the matter on a balance of probabilities.

39. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

40. This was further enunciated in the case of **Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions** [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller -vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

41. The issues before the court are fourfold, that is:
 - a. Whether the deceased died intestate, testate, or both.
 - b. The beneficiaries of the estate.
 - c. Assets and liabilities of the estate.
 - d. Reliefs to be given, including costs.

42. The duty of the court is to determine whether the party seeking probate has discharged that burden. Upon resolving

that issue, the court must consider the overall justice of the case in light of the parties' respective positions. In doing so, the court must remain mindful of its obligation to give effect, to the greatest extent possible, to the wishes of the testator.

43. It must be noted at the outset that confirmation of grant is not one of the issues falling for determination. This is because there is presently neither a grant of probate nor a grant of letters of administration intestate before the court. Any attempt to confirm a grant in those circumstances would amount to the court acting in vacuo.

44. The outstanding issue for determination is the validity of the will. Although this question is not the anchor issue in the application dated 7.08.2018, it nonetheless arises for determination and is sine qua non to the final resolution of the matter. In **Odd Jobs Vs. Mubia [1970] E.A. 476**, the former court of appeal for Eastern Africa held as follows:

A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision

45. The first duty propounding a when a written will is to find out if the same was executed by the testator, in the joint presence of two witnesses, and the same is legal and valid. This is governed by Section 11 of the **Law of Succession Act** provides as follows:

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.

46. The proof of will is therefore a negative test. It means that if any of the foregoing provisions is found not to exist, the will is invalid.

47. The first issue concerns the identity of the person who executed the will. It was alleged that the will was executed

in the presence of PW2. However, the document does not indicate any form of identification of the signatory. In the absence of known fingerprints of the deceased, the court is unable to ascertain whether the will was in fact executed by the deceased.

48. Further, PW1 was unable to answer a basic question as to whether Moses Muriithi and Nelson Kinyua were present at the time of execution. PW1 maintained that they were not present, while PW2 asserted that they were. This inconsistency goes to the credibility of the evidence on execution.

49. To compound the matter, none of the witnesses signed an affidavit as required by the rule in the form of form number 9, confirming witnessing the will. Further, the proposed executors did not make an application to probate the will. It is Nelson Kinyua who made an objection, but there was no attempt by the other named executors to apply for letters if they died then, that fact ought to have been disclosed.

When a person who has been appointed by a will as an executor thereof has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to renounce his executorship or apply for a grant of probate of the will:

Provided that:

(i) when one or more of several executors have proved a will, the court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved; and

(ii) there may be such limited grants of letters of administration in accordance with the provisions of section 54 of this Act as may, in the opinion of the court, be necessitated by any special circumstances.

50. Returning to the evidence, it is apparent that the testator was unknown to PW1. In the absence of any identification document or identification number on the will, the court is unable to ascertain that the person present and signing was indeed the testator. Although non-beneficial witnesses were said to be present, they did not, in fact, witness the execution of the will.

51. Compounding these difficulties, the advocate did not retain a copy of the will and instead released the original to the client. The document now produced contains details that were clearly inserted on its first page, details of executors, raising uncertainty as to whether the will before the court is in the same form as it was at the time of execution. In the circumstances, the court is unable to be satisfied as to the authenticity and integrity of the alleged will.

52. Secondly, there are two thumbprints on the will. One is indicated to be near the signing location. However, there is another on top of the thumbprint near the line for signing. The first one is placed away from the signing location. It is not clear whether the same was meant to be signing the will. There is, therefore, my finding that the thumbprint is not so placed that it shall appear that it was intended thereby to give effect to the writing as a will. It is also not disclosed who was the person who signed in the signing location and why the testator was thumbprinting in a manner that he did not intend it to be a will.

53. Both witnesses were of the considered view that there was only one thumbprint. The will produced in court has two fingerprints. It is unknown whose thumbprint these were.

54. The court was curious about the number of thumbprints on the will, and he answered that it was only 1. He also did not know when the changes to the will were made. He stated, on re-examination, that he was present when the will was executed. Overall, I did not find him a credible witness because he kept changing his position too much. On a simple question about thumbprints, he said he could only see one thumbprint when the will has two, and it is not clear which belongs to which person. Further, the thumbprints are not placed in a manner that signals the testator intended to execute a will.

55. In evaluating the evidence of PW1, the court was reminded of the decision of Odunga J (as he then was) in the case of **Kioko Peter v Kisakwa Ndolo Kingóku [2019] KEHC 11387 (KLR)**, in which the learned Judge lamented as follows:

Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs. N [1991] KLR 685 he expressed himself in the following terms:

“I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted.”

56. Further, the alleged will does not provide a complete listing of all beneficiaries, nor does it indicate their respective shares. For instance, paragraph 5 refers to the allocation of properties to sons and daughters, yet none are individually named. Similarly, paragraph 4 addresses the subdivision of land without identifying the specific parcels involved. This lack of specificity undermines the clarity and

certainty required for the effective operation of a testamentary document.

57. Further, the thumb print is bogus as it is indicated as a right-hand thumb print. There is no other right-hand thumbprint to compare it with, as the national identity card only has a left thumbprint. Further, there were no identification marks, including the national identity card, to prove that the person who appeared, if he ever did, was the testator. This is quite odd given that the will was allegedly signed in the presence of an advocate of many years' standing. The two thumbprints are between the names "of Moses Karimi Kagunda". It is not clear who placed the handwritten words therein.

58. Further, there are no initials of the deceased or the witnesses on other pages. Page 1 has a recent alteration. The executors' names are typed on a modern typewriter. It is not known what else was changed in the will. The net effect is that there is no way of confirming that the will is that of the Deceased. The two witnesses could not positively identify the testator as the person who signed the will, nor could they identify the point at which it was signed.

59. The court could not order an examination of the signature since before 1995, only the left thumbprint could be found in identity cards. This is evidence in Rule 9 of the Registration of Persons Rules, 1948, then made under the Registration of Persons Act, Cap 107 provides as follows:

9. (1) Where a registered person changes his name or place of permanent residence, he shall, unless he can still be readily located through his previous address, without undue delay, attend before a registration officer, give to him the particulars of the change in the form in the Fifth Schedule, and permit his left thumb impression to be taken on that form.

(2) Where the change of name is as a result of marriage or divorce the marriage certificate or decree of divorce shall be produced; and where the marriage was celebrated in accordance with African customary law, the person requesting a change of name shall produce an affidavit under the Oaths and Statutory Declarations Act (Cap. 15) in such form as may be approved by the Registrar as proof of marriage.

(3) The particulars given under paragraphs (1) and (2) shall be complete in all respects and shall be such as will enable the Principal Registrar readily to communicate with the registered person.

(4) The registered person shall at the same time surrender his identity card and permit his photograph to be taken for the purpose of enabling a new identity card to be issued to him.

(5) The registration officer shall thereupon fill in and sign a certificate in the form in the Fourth Schedule, on which the registered person shall permit his left thumb impression to be recorded, and issue the certificate to the registered person.

60. Though there have been changes in the law, there was no way of confirming the right thumbprint before 1995. A will should be drafted so that it can be authenticated even in the absence of the witnesses. There was no plausible explanation by the advocate as to why she used the right thumbprint, while knowing that it could be compared with any other document. This is in line with Section 8 of Legal Notice Number 348/1995.

61. A will that is not authenticable cannot be said to be valid. Section 7 of the Succession Act provides as follows:

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

62. The question arises as to the alterations on the alleged will, particularly given that PW3 was unable to explain who made the changes. The document contains two thumbprints, for which no explanation has been provided. This inconsistency suggests that the will may have been adjusted after execution, potentially to fit a particular narrative. PW1

and PW3 each observed only one thumbprint, leaving uncertainty about who actually signed the document and the purpose of the signatures. Moreover, several beneficiaries appear to have been entirely excluded without any indication in the will. Taken together, these irregularities undermine the authenticity of the alleged will and render it effectively void, as the court cannot ascertain who executed it or the testator's true intent.

63. The will was also not in the continuous custody of the advocate who drew it. The same surfaced with no explanation whatsoever, regardless of how it came to the applicant. The loopholes are too large for the will to survive. The purported will cannot have been the deceased's free will as per Section 11 of the **Law of Succession Act**.

64. In the case of **In re Estate of the Late Arvind Kanji Premji Patel Moza Abdillahi Mohamed** [2024] KEHC 6888 (KLR), Mutai J, posited as follows regarding wills:

As far as the wills are concerned In Re Estate Of Gatuthu Njuguna (Deceased) [1998]eKLR the Court quoted an excerpt from Halsbury's Laws of England, 4th Edition vol 17 at page 903-904:

-“where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved

incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity.”

65. Further, in looking at the circumstances of making the will, the court is not just supposed to look at the formal validity of the will. The court must look at all surrounding circumstances. In this case, the parties started with the existence of one property, as posited by the 5th protestor, and progressed to 5 properties by the applicant. She had undergone metamorphosis by the time of filing the

application dated 7.08.2018. She had adopted the 5th protestor's position. Why will a testator give out properties that are no longer in his name?

66. From the evidence, all beneficiaries are on the ground in the only property now apparently belonging to the estate. The question in my mind is why, a testator in the absence of any conflict with any of his dependents, while suffering from diabetes mellitus and cancer of the esophagus, will write a will which will result in the eviction of beneficiaries and exclusion of a large percentage of his family.

67. What will make a 76-year-old sick old man forget the names of his daughters and most of his sons? The conclusion is one, the will was either not made by him, or the testator was suffering from an infirmity of mind or body, as not to understand the nature of the document. It could also be signed by an imposter. One of the most crucial omissions was that no-one of his children or neighbours tendered evidence on the state of the mind of the deceased. PW2's husband was 33 in 1986. No one testified that the testator was of sound mind, in spite of the debilitating sickness he was suffering from. In the case of **Lita Violet Shepard v Agnes Nyambura Munga** 2018 KECA 127(KLR, the Court of Appeal [Waki, Warsame & Murgor, JJ.A] held as follows:

In our understanding, a Will is just a legal tool or device for determining the fate of a deceased person's estate after his death. As with every instrument, the court must evaluate it in its

natural environment, meaning that primarily the provisions of the law of succession were taken into consideration at the time it was made. It is when we place the Will in its proper context, that we will know how to ask the right questions and those questions will guide the answers we give in the event of a dispute. That is the starting point. Again, to put the Will into a proper perspective, it is important to appreciate that the deceased had provided for the respondent during his lifetime and the legal wife after death. The sequence is a reflection of the natural environment of providing, for the heart (alleged customary wife) and mind (the legal wife) is the context and contours of what trial Judge was required to appreciate and determine. Unfortunately, the maps and compass were not looked at by the trial court. The trial court was not required to look at the Will as a standalone piece of document without giving much or no attention to the circumstances of the whole dispute. The Will read together with the undisputed conduct of the deceased in first distributing portions of the property to the respondent, constitutes a single project of harmonious and integral transaction, which provided for both sides of the coin - a reflection of what the deceased intended...

68. PW2 Phyllis Wairimu Nyaga testified next. She indicated that she stayed at Karatina, Kahuru, and did not work. She testified that the deceased was the father of her late husband. She adopted her statement and said there was a will. She also adopted her affidavit in support of the summons for confirmation. She was not cross-examined by the nominal protestors, 1-4. She stated that a number of beneficiaries of the deceased's estate agree on the distribution, except for a few who are disgruntled for no reason. She prayed that the application dated 2.08.2018 be allowed.

69. On cross-examination, she stated that the deceased, her husband, died in 2007, and she discovered the case when she came to follow up. She stated that she saw the will in the advocate's office, but did not read it. She did not know whether the husband was given anything. On re-examination, she stated that the will existed.

70. PW3 was Nancy Wanjiru Mukunya, an advocate and farmer. She stated that she joined her husband in the law firm in Nyeri. In August 1986, she believed that she was instructed to make a will for a testator. She drafted the will and read it back to the testator. She signed the same, and the legal clerk signed. She registered the will as an acknowledgment. She stated that she undertook due diligence. She produced the will.

71. She stated that the testator was her client. He was intelligent and knew what he was doing. The deceased

passed on the following year. She stated that she did not do a search for the lands. She took instructions in Kikuyu. The testator went to the office with a few friends but wanted a lawyer to sign. He stated that the aspect of friends serving as executors. The people in the offices showed their national identity cards, and she was sure they were the ones there. She stated that the names of the executors appear to have been added, but they are not correct. She stated that the will was in the client's custody. The witness was left with a copy, which she did not produce.

72. On cross-examination, she stated that there was only one signature on the will, that of the testator. She further explained that the left thumbprint was not visible and that he used the right thumbprint instead. She stated that failure to present a national identity card was an omission. She was then not initializing wills.

73. The testimony of PW3 and PW1 left me wondering whether there was a will. PW3 did not talk about the clerk reading. The clerk indicated he read the will. As far as the wills are concerned, the person who sought to propound the will, did not see or at any time even indicate that the testator was of sound mind. **In Re Estate Of Gatuthu Njuguna (Deceased) [1998] eKLR** the Court quoted an excerpt from **Halsbury's Laws of England, 4th Edition vol 17 at page 903-904-**

“where any dispute or doubt or sanity exists, the person propounding a will must establish and prove

affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity.”

74. The witness was evasive about whether the testator signed in their presence. The two stories contradict. It is either PW1 read the will or not. Secondly, it is the law firm that is supposed to have custody of the will. Leaving it to the client means the professional protection that comes with advocates is missing. Effectively, the parties neither proved nor disproved the existence of a will.

75. What then becomes of the will? That is where section 3(4) of the Evidence Act comes in. the said section provides as follows:

(4) A fact is not proved when it is neither proved nor disproved.

76. Effectively, the existence of the will cannot be supported. In **Re Estate Of Gatuthu Njuguna (Deceased) [1998] eKLR** where it quoted an excerpt from **Halsbury's Laws of England, 4th Edition vol 17 at page 903-904-**

“Where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the

testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity.

77. The application is accordingly dismissed. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited** [2018] KECA 158 (KLR) had this to say:

"It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter, with the usual caveat being that such discretion should be exercised judiciously, meaning without caprice or whim, and on sound reasoning secondly, that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

78. I find and hold the view that due to the failure of the alleged executors to propound the will, the deceased died intestate. I decline to allow the application dated 2.08.2018 as the deceased herein died intestate.

79. The best order is that each party bear their own costs. The hearing will proceed as scheduled until completion.

80. I now turn to confirmation of the grant. Having established that the will is invalid, the distribution the estate herein shall follow the rules of intestacy. Only the

fifth protestor has proved that the deceased died intestate. His petition is therefore allowed. The fifth protestor, being a beneficiary is appointed as an administrator of the intestate estate of the deceased herein. The net effect is that the petition for probate is dismissed.

81. The administrator must file for confirmation of the grant within 60 days. A date for confirmation is to be fixed forthwith. All beneficiaries to attend. The beneficiaries who have since died, their beneficiaries be indicated, and letters be taken out in respect of those estates.

Determination

82. In the upshot, I make the following orders:

- (i) The Application dated 2.8.2018 and the petition for probate are devoid of merit and are hereby dismissed.
- (ii) The deceased died intestate.
- (iii) The fifth protestor, Ephraim Karumba Karimi, is appointed as an administrator of the deceased's estate in the absence of any objection on record.
- (iv) Thereafter, a fresh summons for confirmation grant shall be filed with the preferred mode of distribution by 12.3.2026. Any party wishing to file a protest to do so within 21 days of service.
- (v) Parties wishing to renounce their entitlement to do so by 12.03.2026
- (vi) Summons for Confirmation on 20/4/2025.
- (vii) All beneficiaries to attend
- (viii) Each party to pay its own costs

DELIVERED, DATED and SIGNED at NYERI on this 28th day of January, 2026. Ruling delivered physically in open court.

KIZITO MAGARE
JUDGE

In the presence of: -

Mr. Kebuka Wachira for the 5th Protestor

Mr. Gori for the Applicant.

Court Assistant - Michael