

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(FAMILY DIVISION)

SUCCESSION CAUSE NO E063 OF 2023

IN THE MATTER OF THE ESTATE OF KAHINDI NGOWA JOGOLO
(DECEASED)

KASICHANA KAHINDI NGOWAPETITIONER

VERSUS

LAURINE TSETSE MWARINGA

KASICHANA GLORY KAHINDIOBJECTORS

RULING

1. The deceased person whose estate is the subject of these proceedings is **Kahindi Ngowa Jogolo**. He died on **23rd April 2021** at Premier Hospital in Mombasa. The cause of his death was given, in the certificate of death, as *cardiopulmonary arrest due to Covid 19 pneumonia, due to hypothyroidism/end-stage renal disease*. He was 73 years old at the time of his demise.
2. The deceased died testate. A will dated **29th October 2008** was annexed to the petition for the grant of probate of his written will. The will was written in English with a Kiswahili translation. The will appointed 2 executrices, *to wit: Kasichana Kahindi Ngowa and Dama Kahindi Ngowa*. The said executrices were the wives of the deceased.

3. The deceased identified the beneficiaries of the estate as being Dama Kahindi Ngowa, Kasichana Kahindi Ngowa, Kitsao Kahindi Ngowa, Jimmy Kahindi Ngowa, Ngowa Kahindi Ngowa, and Kimae Kahindi Ngowa.
4. The estate of the deceased comprised 3 leasehold properties identified as CR No. 29, measuring 0.0712 hectare (LR No. 11492/432) in Kilifi, CR No 174, measuring 0.0569 hectare (LR No. 1192/432), also in Kilifi, and CR No 32175, measuring 2.374 hectares (LR No 11492/215) and all the developments standing thereon
5. Kasichana Kahindi Ngowa, the executrix named in the will, filed a petition for the grant of probate dated 27th June 2023, in which she named herself, Dama Kahindi Ngowa, Kitsao Kahindi Ngowa, Kahindi Jimmy Kahindi, Ngowa Kahindi Ngowa, and Kimae Kahindi Ngowa as the beneficiaries. The petition annexed a copy of the death certificate and a letter written by the chief of Mariakani Location that indicated that the 2 wives of the deceased and the 4 beneficiaries were the only rightful heirs of the deceased. The letter is dated 21st July 2023.
6. The petition was gazetted on **3rd November 2023**. There being no objection, the grant of probate of the written will of the deceased was issued on **6th December 2023**.
7. The grant of probate has not been confirmed. Vide and affidavit of protest dated 3rd July 2025, **Laurine Tsetse Mwariga**, on her own behalf, and also on behalf of Kasichana Glory Kahindi, objected to the confirmation of the grant. Ms Laurine averred that she, and other daughters of the deceased,

were denied a benefit of the estate of the deceased on account of being female issues of the deceased. She averred that discrimination based on gender was a gross violation of their fundamental rights and offended the provisions of the Constitution of Kenya, 2010. She deposed that there was no legal justification for their exclusion as beneficiaries solely based on gender. She prayed that the court declare the will unconstitutional to the extent that it excluded them based on gender, vary the mode of distribution to include the protesters as equal beneficiaries, and order what she stated to be a fair distribution of the estate that reflected the constitutional principles of equality, dignity, and justice.

8. The protestor was also aggrieved by the clause in the will that denied the deceased's children the right to demand any benefit from the estate.
9. The protest opposed. The respondent, Kasichana Kahindi Ngowa, deposed to a replying affidavit on 16th September 2025. Ms Kasichana Kahindi Ngowa stated in her deposition that the deceased had other daughters besides the protesters. According to her, the deceased had 3 wives: **Sidi Kahindi Ngowa, Dama Kahindi Ngowa, and Kasichana Kahindi Ngowa.**
10. Sidi Kahindi Ngowa had 4 children, namely **Karisa Kahindi Ngowa, Bahati Kahindi Ngowa, Sanita Kahindi Ngowa, and Fikiri Kahindi Ngowa.** Dama Kahindi Ngowa had 4 children: **Laurine Tsetse, Kitsao Kahindi, Kasichana Kahindi, and Jimmy Kahindi.** The petitioner/executor, **Kasichana Kahindi Ngowa,** had 2 children, **Kimae Kahindi and Ngowa Kahindi.** He had 2 children from a previous

relationship, whose names were given as **Rose Kahindi** and Katana Kalama.

- 11.** The executrix/petitioner deposed that contrary to what was alleged in the protest, the deceased had other daughters. She averred that the deceased, for reasons best known to him, made a conscious decision to appoint only 4 of his sons as beneficiaries under the will. She denied that exclusion was gender-based, as 3 daughters and 3 sons were excluded.
- 12.** She urged that if the protest were allowed, the will would be defeated, and the testator's intention as recorded in his will would be nullified. She urged that the primary duty of the court in probate matters is to give effect to the deceased's wishes as stated in the will, provided the will is valid, executed without undue influence or coercion, and the testator had capacity. She prayed that the affidavit of protest dated **3rd July 2025** be dismissed as devoid of merit, premised on falsehoods, and intended to undermine the sanctity of the deceased's final wishes.
- 13.** In response, the protestor, **Laurine Tsetse Mwaringa**, on her own behalf and also on behalf of **Kasichana Glory Kahindi**, filed a supplementary affidavit in which she contended that the family structure provided by the petitioner/executor confirmed her position. She urged that, among the deceased's 12 children, 7 were male and 5 were female, yet only the male children were beneficiaries, while all 5 females were excluded. She contended that the exclusion was solely based on gender. She stated that the exclusion of female dependants offended Articles 27 (1) and (3) of the Constitution of Kenya, 2010, which guarantee equality before

the law and prohibit discrimination based on sex or gender; Article 28, which protects human dignity; and Article 40, which protects property rights. She further contended that the testator's conscious decision does not legitimize unconstitutional discrimination. The protestor emphatically stated that testamentary freedom cannot be exercised in violation of fundamental constitutional principles.

14. Ms Mwaringa contended, in the said deposition, that the protestors took time to consider the will and to make their decisions on what to do next, and thus the delay on their part in filing the protest. It was urged that the delay was not inordinate and should not prejudice them. She stated that the court had a duty to ensure that private instruments conform to constitutional principles. She therefore prayed that the court allow the protest.

15. The protest was supported by Mr Kitsao Kahindi, a named beneficiary of the estate. In his affidavit sworn on 28th July 2025, Mr Kitsao stated that the protestors were excluded as beneficiaries purely on account of their gender. He averred that the male children that were excluded were so excluded for a reason that was disclosed, unlike in the case of female children. She prayed that the court be pleased to set aside or vary the *"discriminatory provision of the deceased's will that disinherits our sisters."*

16. The protest was canvassed by way of written submissions. I shall give a *precis* of the parties' submissions below.

17. The written submissions of the protestors are dated 8th August 2025. The protestor's counsel identified issues for determination as being:

- a. Whether the deceased's will violates Articles 27, 28, and 40 of the Constitution;
- b. Whether the court can vary or set aside a will;
- c. Whether the testamentary freedom is subject to the Constitution; and
- d. Whether the protestors are entitled to benefit from the estate of the deceased by way of being given a reasonable provision.

18. Regarding the first issue, it was urged that there was gender based discrimination insofar as all daughters of the deceased were excluded. Further, the discrimination offended Article 28 on the right to dignity and also Article 60 (1) of the Constitution that requires the elimination of all gender-based discrimination in land matters. Counsel for the protestors averred that a will, as a form of private conveyance of land, must not entrench customary practices that marginalize women.

19. Counsel submitted that testamentary freedom is not absolute and was subject to overriding legal and constitutional considerations, including the right of dependants, public policy, and the Constitution itself. It was urged that since the will violates Articles 27, 28, and 60 of the Constitution, it was void to that extent. Counsel for the objector relied on the provision of Article 2 (1) of the Constitution in support of the said contention.

20. It was urged that where a will had provisions that were unconstitutional, the court had the power under Article 23(3) of the

Constitution to invalidate, strike out, or vary any provision therein, especially one that discriminated against dependants on the basis of gender, or “infringe on the equal rights of children.” Counsel contended that the will had a clause that excluded daughters without lawful justification. The court was referred to the decision of the Court of Appeal in **Erastus Maina Gikunu & another v Godfrey Gichuhi Gikunu & another [2016] KECA 126 (KLR)**, where it was stated that:

“Because of what we shall be stating later, it is important to say here that, although there is this freedom, section 26 of the Act enjoins the testator to make *reasonable* provision for his dependents. The court is permitted, on application and where it is satisfied that the testator has not done so, to intervene by making what it deems a reasonable provision. The desire of society to protect the family of a testator is the main reason for not only allowing testamentary freedom but also imposing certain limitations and protection against disinheritance.”

21. It was submitted that since the protestors were undisputed children of the deceased, the court had the power to order reasonable provisions where a will failed to do so. Counsel for the protestors relied on the case of *Marete v Marete & 3 others [2024] KECA 371 (KLR)* and **re Estate of Ezekiel Mabeya Kegoro [2019] eKLR**.
22. The submissions of the petitioner/executrix are dated 7th October 2025. The petitioner/executrix identified issues for determination as being:
 - a. Whether the deceased had a valid will;

- b. Whether the exclusion of certain dependants from the will, among whom were the protestors, amounts to unlawful discrimination;
- c. Whether the protestors had made a case for invalidation of the will; and
- d. Whether the protestors proved dependency under section 26 of the Law of Successions Act.

23. Counsel for the executrix averred that the will was valid and that it met all the formal requirements listed in section 11 of the Law of Succession Act. He contended that the protestors didn't prove that the deceased lacked testamentary capacity, was under undue influence, or that the will was a forgery. Reliance was placed on the decision of the court in the case of **Stephen Gitonga M'Muriithi v Faith Ngugi [2015] eKLR**, where the court stated as follows:

“The law is that where there is a valid will, the estate of the deceased should be distributed in accordance with that will.”

It was urged that the attempt to invalidate the will was an unjustified interference with the deceased's testamentary freedom.

24. Counsel for the petitioner/executrix denied that there was gender based discrimination, as both male and female children were excluded. Reference was drawn to the case of **In re Estate of Julius Mimano (Deceased) [2019] KEHC 10103 (KLR)**, where it was held that:

“It is true that the deceased had a freedom to dispose of his estate in a manner that was suitable to him. The freedom is the essence of testate succession, and the fact that the will did not

provide for some beneficiaries does not, and cannot, invalidate the will. The remedy available to the applicant is to move to court appropriately under the provisions of section 26 of the Law of Succession Act, seeking for a reasonable provision out of the estate.”

25. The executrix’s counsel urged that the intention of the deceased person must be given effect unless it is contrary to law, and that a testator has a right to distribute his property as he deems fit, and that the protestors cannot substitute their will for that of the deceased. In support of the said contention, the court was referred to the case of **Wanjiru & another v Kimani & another [1997] LLR 465**, where it was held that:

“The wishes of a deceased person as expressed in a valid will must be respected and enforced by the court unless the will is invalid for reasons such as incapacity or undue influence.”

26. It was contended that the objectors are not dependants within the meaning of Section 29 of the Law of Succession Act and that, whereas Section 26 allows the court to make reasonable provision for dependants who had not benefited from a will, a claim (for reasonable provision) must be supported by evidence of actual dependency. It was contended that the protesters were married adults of means and that no evidence was given in support of the alleged dependency.

27. It was therefore urged that the court be pleased to dismiss the protest and that directions be made regarding the confirmation of the grant.

28. I have considered the protest, the affidavits in support thereof, the response thereto, as well as the written submissions of the parties. In my view, the issues for determination are the following: -

- a. Whether the will is discriminatory;
- b. Whether the will offends the Constitution, particularly Articles 27, 28, and 60;
- c. What remedies should the court grant in the event the will offends the Constitution;
- d. Whether the protestors are dependants; and
- e. Who should bear costs.

29. Section 5 of the Law of Succession Act provides that:-

“Subject to the provision of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any part of his free property by will and may thereby make any disposition by reference to any secular or religious law that he chooses.”

In my view, this freedom includes the liberty to dispose of his property by will, to appoint executors of his own choice, to dispose of the property to whomever he wishes, and in any manner he wishes.

30. There is no doubt that the will in this case met all the formal requirements under Section 11 of the Law of Succession Act. The will:

- a. Was signed by the testator;
- b. The signature by the testator was witnessed by 2 witnesses who were present during the signing; and

c. The signature was affixed in such a way that it appears to a reasonable person as having been intended to give effect to it.

- 31.** The formal validity of the will is not contested; however, what is the subject of contestation is whether the will discriminated against the female issues of the testator, and if so, whether the discrimination offended constitutional provisions, in particular Articles 27, 28, and 60 of the Constitution. To enable me do so, I will first look at what the impugned will stated.
- 32.** As earlier indicated, the will appointed 2 executrices, his wives, **Kasichana Kahindi Ngowa** and **Dama Kahindi Ngowa**. Although the deceased had 12 children, 7 of whom were male, he identified only 4 males as beneficiaries of the estate. Was that discriminatory? I have read the will carefully. In my view, given that the deceased appointed female executors, it cannot be said that the testator was prejudiced against women. The deceased left out 3 of 7 male children. That being the case, it would appear to me as speculative to say that the decision made by the testator was solely based on gender.
- 33.** In my view, a testator is not under any obligation to provide for his family (see the case of **In Re Estate of Gatuthu Njuguna (Deceased) [1998] KEHC 6 (KLR)**) or to distribute his estate in a manner that the family deems as fair (see the case of **In re Estate of Philip Nthenge Mukonyo (Deceased) [2018] KEHC 4889 (KLR)**).

34. Based on the foregoing, I am not persuaded that the will of the deceased discriminated against the daughters of the testator.

35. I am not persuaded that there were violations of the rights and freedoms in the Constitution, either. I say so as:

- a. The testator appointed female executors; and
- b. Excluded female and male issues.

The burden of proof lay on the protestors to show that the testamentary dispositions made by the testator were discriminatory based on gender. In my view, this burden wasn't discharged. The protestors made general allegations, unsupported by evidence, and attempted to turn an issue of testamentary disposition into a constitutional matter. In my view, the will was valid, it made valid testamentary dispositions, and is binding.

36. I agree that where cogent evidence is produced showing that the dispositions in the will were discriminatory, the court can invalidate the will. The Constitution binds natural persons and government. Having said so, I must reiterate that in this case, no cogent evidence of discrimination was provided.

37. Section 29 of the Law of Succession Act defines a dependant as:

“the wife, or wives, or former wife or wives, and the children of the deceased, whether or not maintained by the deceased immediately prior to his death.”

38. There is no doubt that the protestors are the children of the deceased. That being the case, there is no need for them to show that they were maintained by him; having so said, the matter before me is a protest to the confirmation of the grant. It is not an application for reasonable provision.

39. In my view, protests and application or reasonable provisions are not the same thing. If the protestors are aggrieved and want a reasonable provision to be made in their favour, they ought to file the application before the grant is confirmed. There is no such application before me presently.

40. From the foregoing, it is clear that no case has been made to warrant interference by the court of the testamentary freedom of the deceased. The will of the deceased is valid and binding. That being the case, the protest filed by Laurine Tsetse Mwaringa and Kasichana Glory Kahindi is dismissed

41. I make no orders to costs as this is a succession matter between close family members.

42. It is so ordered

**Dated and signed in Mombasa, this 9th day of February, 2026. Delivered
virtually through Microsoft TEAMS.**

Gregory Mutai

JUDGE

In the presence of:

Mr Baya, holding brief for Mr Aziz, for the Executrices;

Ms Kanazi, holding brief for Mr Odunga, for the Protestors; and

Ms Bancy – Court Assistant

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