

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. E034 OF 2024

**IN THE MATTER OF THE ESTATE OF STEPHEN
MACHARIA MURAI (DECEASED)**

ALEXANDER MURAI

GIKIRIA.....APPELLANT

VERSUS

SARAH WANJIRU MWANGI.....

RESPONDENT

JUDGEMENT

1. The appeal herein emanates from a succession cause where the deceased died on 5th January 1998. A grant that had initially been issued to *Josephine Watiri Michuki* and *Nikora Mugwe Stephano* was revoked on 30th April 2004 resulting in the hearing subject of this Appeal.
2. PW1 Sarah Wanjiru Mwangi produced a Will dated 21st October 1997 which she alleged that was the Last will and testament of the deceased. She had bought 3 acres of land from the deceased and the deceased had bequeathed her his other two acres being Land No. 1018 and 1019. The said Will was witnessed by two people *Kamau Gakio* and *Muchina Nyutu*. She maintained that she was not present when the deceased recorded the Will, however, once the Will was recorded, the deceased gave her a copy of the Will. PW2 *Kamau Gakio* confirmed that he had indeed witnessed the deceased's Will that had been produced by PW1. He also confirmed that the Will was also witnessed by *Muchin Nyutu* and *Mwangi Maguru*. He clarified that he knew he was signing a sale agreement. It was his testimony that the advocate read the Will over to the deceased before the deceased signed it. He denied being related to the deceased but had in

fact gone to sign as the deceased was distributing his properties.

3. *Thomas Kimangu Murai O-1* and a brother to the deceased was categorical that his deceased brother had died as a result of liver cirrhosis which had affected his brain. He confirmed that his brother was unmarried but had children who were unrecognized. He was aware that his brother had two properties and prior to his death had attempted to sell land to PW1. He attached three copies of titles for No. 920 registered in the name of the deceased, no 1018 registered in his nephew's names- *Thomas Mugwe Mucheru* and No. 1019 registered in the names of *Alexander Murai Gakiria*. Although he was aware that the grant was nullified, the cancellation of the title deed for the said grant was revoked. He clarified that the deceased never took any parental responsibility of any child.
4. The trial court noted that no medical doctor was called to testify as to the relationship between the deceased's sickness and the cause of death and his state in executing the Will. *He had died of cardiorespiratory failure, brain atrophy in liver cirrhosis* and he had made his Will four months before his death.
5. The court further observed that there was no evidence of forgery proved by the objector. The court also noted that the objectors evidence raised suspicion as to the testator's mental capacity while signing the Will but the same was not proved to the required standard. While the objector questioned the mental capacity of the deceased testator to make the Will, the court found it rather interesting that he would allege lack of mental capacity to make a will finds him of competent capacity to enter into an agreement, two days prior to his death.

6. It was also a finding of the court that the Respondent needed not call the advocate who drafted the Will as a witness since the witness that she had already called to rely on was cogent and consistent. Ultimately, the trial court found that the deceased died testate having left a valid will dated 21st October 1997.
7. Aggrieved and dissatisfied with the decision of the trial court, the Appellant lodged the instant appeal on grounds that:
- i. The learned trial magistrate erred in law and fact by concluding proceedings without hearing the objection proceedings on their merit thereby impeding the objector's constitutional right to be heard.*
 - ii. The learned trial magistrate erred in law and in fact by inferring, considering and declaring Thomas Kimangu Murai a objector and taking his evidence as such in place of the deceased objectors.*
 - iii. The learned magistrate erred in law and fact by making a determination without hearing the objection proceedings.*
 - iv. The learned magistrate erred in law and fact by making a determination without the anchorage of any evidence or legal rationale.*
 - v. The learned magistrate erred in law and fact by holding that the deceased died on 5th January 1997 whereas the decease actually died on 5th January 1998 and on this premise, inferring that the deceased had the mental capacity to make a will at the time of his death because he signed a refund agreement on 3rd January 1997, two days allegedly to his death.*
 - vi. That the learned magistrate erred in law and fact by amending the Will in her judgment to*

the extent that she entered judgment in respect of LOC. 8/Kandenyé/1018 whereas the Will referred to LOC.8/Kandenyé/10181

- vii. That the learned magistrate erred in law and fact by holding the Will as valid against the weight of the overwhelming evidence in support of the fact that the deceased had no mental capacity to make the alleged Will.***
 - viii. The learned magistrate erred in law and fact by holding the Will as valid despite the admission by one of the witnesses to the alleged will that to the best of his knowledge, he signed against an agreement for sale and not the Will.***
 - ix. The learned magistrate erred in law and fact by holding the will as valid despite the overwhelming evidence that the will was a fraudulent document marred with forgeries.***
 - x. The learned magistrate erred in law and fact by holding the Will as valid against the overwhelming circumstantial evidence as to how the alleged will was made.***
 - xi. The learned magistrate erred in law and fact in failing to consider the Petitioner was claiming the estate as both a purchaser and a beneficiary of the estate.***
8. Reason wherefore the appellant prayed that the judgment of the trial court dated 31st May 2023 in **Murang'a Succession No. E139 of 2022** be set aside and the case be heard a fresh before a different judicial officer.
9. The court directed that the appeal be canvassed through written submissions.
10. The appellant submitted that the appellant has an interest in the estate of the deceased and that the same

was conclusively determined by this honourable court in **Murang'a HCMISC E001 of 2024** where leave to file the instant appeal was granted on the basis that the appellant had demonstrated that he had resided with and cared for the deceased from 1997 until his demise on 5th January 1998 hence a recognized dependant in fact and in law under **Section 29 of the Law of Succession Act.**

11. He further contended that he had been allocated land from the estate of the deceased under a previously confirmed but revoked grant and that he would be directly affected by the decision of the trial court. The Respondent having participated in the proceedings for grant of leave to lodge the instant appeal could not turn around and claim that the appellant had no legitimate interest in the estate of the deceased. That issue was thus *res judicata* and could not be relitigated before a court of concurrent jurisdiction among similar parties.

12. The Appellant also submitted that an Objection is a jurisdictional bar against the finalization of the Petition for grant of letters of administration. That the trial court's failure to hear and determine the objection before rendering a final decision was not a mere procedural irregularity – it was a fatal legal error. It was submitted that the trial court refused to substitute the deceased objectors, thereby leaving the objection formally alive but unprosecuted, the court proceeded to issue a grant, effectively purporting to extinguish the objection without legal basis and ultimately referred to *Thomas Murai* as the objector in the final judgment, a party it had earlier refused to formally recognize as an objector.

13. The appellant faulted the trial court for upholding the validity of the Will dated 21st October 1997 when in fact the appellant had demonstrated that the deceased had medical conditions that cast doubt on his mental capacity to execute the Will as required by law.

14. The Respondent submitted that the Appellant had no known interest in law in the deceased's estate save that of an inter-meddler and that the appeal was an afterthought and a means to delay the succession proceedings while illegally occupying the deceased's estate.

15. As to whether the trial court erred by concluding the proceedings without hearing the objection proceedings, Counsel submitted that it is trite that succession proceedings do not terminate with the death of the objector. That paragraph 14 of 5th Schedule of the Law of Succession Act provides an avenue for substitution through nomination but only when it is necessary. It was submitted that in the instant case substitution was not necessary as the objectors' position was that the will was invalid.

16. It was also argued that it was not necessary for the Objectors to be substituted being that the two had only introduced themselves as sister and nephew therefore, the mere allegation that the will was declared invalid did not make them beneficiaries or creditors. Therefore, upon their death it was not necessary for the court to substitute them for the sole reason for a probate court to test whether the deceased left a valid will or not and to proceed to distribute the property on that basis. Reliance was placed upon the case of **re Estate of Samuel Kiprono Mutai (Deceased) (2021) KEHC 7488(KLR)** where it was emphasized that substitution should be for the court to also determine if the objector had a valid claim for the benefit of their estate. In the instant case, the deceased did not make the objectors beneficiaries.

17. The Respondent also relies on the case of **Re Estate of Mukita Muingo(deceased)(2019) eklr** where the

court ruled that a delay in seeking substitution 4 and 7 years after the death of the objectors without a valid explanation was inordinate, inexcusable and prejudicial. Counsel submitted that in the instant case, no legal representative came up 20 and 13 years respectively before the court to pursue the objectors' case.

18. The Respondent pointed out that Justice Githua had made a ruling in **re Stephen Macharia Muai (Deceased) Succession Cause NO. E008 of 2003 (2-23) KEHC 27038(KLR)** that Thomas Kimangu Murai could not have been an objector and should not be considered as such because he only provided information to the court under Rule 16(1) of the Probate and administration Rules but could not have been elevated to the status of an objector.
19. Counsel maintained that the deceased's will dated 21st October 1997 was valid and that the Appellant though granted leave to appeal as an aggrieved party has not adduced any additional evidence to warrant this court to vacate the trial court's decision on account of his interests being prejudiced. This court is therefore urged to apply the principle that litigation must come to an end and to dismiss this appeal.
20. I have considered in detail, the entire Record of Appeal, the rival Submissions filed both parties before the Trial Court and in this Appeal. This being a first Appeal, I am guided by the dictum in the case of **Selle v Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances.

21. The deceased herein died in 1997, 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 this appeal, is allegedly 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.”

22. 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. Is the document before me signed by the deceased? The written will on record does

bear a signature, in the clause meant to be for execution by the maker of the will, who. Based on that, one can conclude that the document was, on the face of it, properly executed by the person said to be its maker.

23. The other vital requirement is that the same 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. Was the document before court signed by the deceased herein in the presence of two or more independent and competent witnesses? On the face of it, it can be said that the execution of the written will on record, by the testator, was properly attested by two competent witnesses, who subsequently appended their signatures.

24. The other consideration is whether the document itself was intended to be the will of the deceased. A will disposes of the estate of the maker, or, carries directions as to how the maker would like their property distributed upon their demise. The question is, is this what the document on record purports to do? The written will on record has all the hallmarks of a professionally drawn will. It declares who the maker of the will is, carries a standard revocation clause of previous wills and codicils, appoints an executor, and distributes the assets that the maker intends to distribute to named beneficiaries. It largely, therefore, on the face of it, passes the test that it must have been intended to be the will of the person who made it. On the face of it, it appears to be a valid testamentary document for it appears to meet all the requirements of section 11 of the Law of Succession Act.

25. 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. The applicants appear to ground their case on these. I will start first by considering the issue of capacity which is hotly contested in this matter.

26. Although the objector claimed that the testator lacked the mental capacity to execute the will, he did not lead any evidence to demonstrate such incapacity. No medical evidence was called to link the cause of his death with the mental capacity to make a will. It is an established principle that he who alleges must prove. The objector therefore bore the burden of disproving the validity of the deceased will. Hence, the objection on capacity is not sustainable.

27. 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.

28. The objector insinuated the Respondent threatened the testator to bequeath her the properties in question. Unfortunately, this was merely stated without any evidence being led to support the position.

29. The upshot of the matter is that there was no material evidence placed before the trial court to challenge the validity of the testators will. ***I therefore uphold the finding of the trial court that the deceased died testate.***

30. The appellant, beyond being aggrieved with the decision of the trial court, appears to suggest that he is a beneficiary of the deceased estate by virtue of having taken care of the deceased from 1997 to the time of his death.

31. Upon perusal of the record, the Appellant did not provide any evidence to demonstrate that he was in fact a dependent of the deceased to warrant the intervention of this honorable court. He does not fall within the dependents contemplated under **Section 3 of the Law of Succession Act**. Therefore, he bore the burden of proving that he was in fact a dependent.

32. Notwithstanding the above, in the event that the appellant perceived that he deserved a portion of the deceased estate, the proper way to move the court to exercise his discretion through an application under Section 26 of the Law of Succession Act.

33. In conclusion, I find no reason to disturb the finding of the trial court. The appeal herein is without merit and the same is dismissed with no costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF MARCH, 2026.

**HON. T. W. Ouya
JUDGE**

For Appellant.....Njenga

For Respondent.....Ms Maina HB Mr Mwangi

COURT ASSISTANT.....Brian