

**IN THE COURT OF
APPEAL AT NAIROBI
(CORAM: MUSINGA, (P), MUMBI NGUGI & ODUNGA,
JJA.) CIVIL APPEAL NO. 237 OF 2019**

BETWEEN

KENNEDY KARIUKI MWANGI.....APPELLANT

AND

PETER NJOMO MWANGI.....RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court of Kenya at
Nairobi (R. Nyakundi, J.) dated 3rd October 2018*

in

High Court Succession Cause No. 28 of 2017)

JUDGMENT OF THE COURT

1. This appeal arises from the ruling and order of the High Court **(Nyakundi, J)** delivered on 3rd October 2018 in Nairobi High Court Succession Cause No. 28 of 2017. In that decision, the learned Judge dismissed the application dated 8th December 2016 with no order as to costs.

2. To contextualise the dispute, the matter before the High Court was a Succession Cause in respect of the estate of Agnes Nyambura Githinji (the deceased), who died on 1st April 2014. The deceased was survived by three children, Alphonse James

Irungu Mwangi, Peter Njomo Mwangi (the respondent) and Kennedy Kariuki Mwangi (the appellant). Following the death of the deceased, the respondent applied for grant of letters of administration intestate, which was issued to him on 27th April 2015. The grant was, however, not confirmed due to the disputes that arose thereafter regarding the distribution of the estate, particularly with respect to Plot No. 65, Kitengela (the plot).

3. By an application dated 8th December 2016 filed in court on 12th April 2017, the appellant, pursuant to rule 13 of the ***Probate and Administration Rules***, sought for proof of what he alleged was an oral Will left by the deceased. Supporting the appellant's case were two deponents, Peter Njoroge and Diana Njeri, a husband and wife, who were tenants in the said plot. They swore their respective affidavits on 11th October 2016 and 26th October 2016 and they were both filed on 21st November 2016.
4. The respondent, opposed the application by way of his own

affidavit and that of his other brother, Alphonse James Irungu

Mwangi, both of which were sworn on 27th April 2017 and filed in court on 14th May 2017.

5. The application was disposed of by way of *viva voce* evidence.
6. According to Diana Njeri, testifying as PW1, the deceased was her landlord in the said plot and was also her friend. She rented a house in that plot in 2006. It was her evidence that they would discuss numerous issues, including those affecting the welfare of their children. Regarding payment of rent, the deceased told her that if she handed over the money to the appellant, it would reach her since the appellant was the one in whose benefit the rent was being spent as he was the last born. One day when she visited the deceased in hospital, in the company of her husband, PW2, the deceased told them that they should be giving the rents to the appellant.
7. PW2, Peter Njoroge, confirmed that he, together with his wife, PW1, were tenants in the deceased's plot where they had lived for 12 years. According to him, the deceased told her that

whenever she was not around, the rents should not be paid to

anyone else apart from the appellant. He confirmed that, in the company of PW1, they, on 8th April 2016 (sic) visited the deceased at the hospital during which the deceased, in the presence of the appellant, informed them that the plot belonged to the appellant. According to PW2, the deceased was in stable condition when they spoke but died one month later. It was his evidence that the deceased did not talk about the distribution, although she also mentioned other properties in Athi River.

8. The appellant, who testified as PW3, stated that the deceased passed away on 1st April 2014. It was his evidence that he was solely bequeathed the plot, which he was managing even during the lifetime of the deceased. The deceased's wishes, he stated, were disclosed to PW1 and PW2 when the two went to pay rent and was also conveyed by the deceased to his uncles. He recalled that on 8th February 2014, when PW1 and PW2 visited the deceased in hospital, the deceased declared the appellant as the "heir to plot no. 65". According to his

evidence, the deceased never trusted the respondent. In his
evidence, the said plot was

not available for distribution. James Irungu, according to him, was allocated Kisumu Ndogo plot no. 301, while the respondent was allocated plot no. 64 Athi River. In addition to plot no. 65 Kitengela, he was also allocated plot no. 43 Athi River. The distribution, according to him, was witnessed by a Mr Joseph Githinji. He insisted that all the tenants were paying rents to him and disclosed that the deceased, at the time of her death, had separated from his father. Although he admitted that he signed the documents in support of the petition, he explained that he was tricked into so doing by being informed that they were for the purposes of getting money from the plot. In cross examination, he however stated that James, the elder brother, was receiving rents from 5 houses in the said plot while he was receiving rents from 24 houses. The respondent, he stated, had also been receiving rents from the houses in the plot although from 2017, he stopped giving him money. He further explained that whereas plot 65 was developed with houses, the other plots were not developed.

9. The respondent, testifying as DW1, stated that he was not aware of the oral Will left by the deceased. According to him, he was in a cordial relationship with the deceased and was the one involved in the management of her property and kept all the documents relating to her properties. In his evidence, plot no. 65 was the “*heartbeat of the estate*” as it was the only income earning property. While confirming that PW1 and PW2 were tenants in the said plot, it was his evidence that they were not people the deceased could rely on in making an oral Will. In any case, he stated, the deceased was not expecting her death in order for her to make an oral Will. He blamed the appellant for obstructing him in the administration of the estate and explained that the only dispute was as regards the said plot. He stated that he was residing on plot no. 68 Athi River Bondeni, which was given to him by the deceased, although it was registered in the name of his father. He disclosed that PW2 was one of his witnesses when he was applying for the grant, the documents having been taken to him by the appellant.

10. Alphonse James Irungu Mwangi, DW2, the eldest son of the deceased, denied that there was an oral Will left by the deceased. While admitting that PW1 and PW2 were paying rents to the appellant, he stated that he was receiving rents from some of the tenants, while the rest were being collected by the appellant. In his view, the subject plot is 80% the value of the deceased's estate. He had no problem with the respondent, his younger brother, administering the estate.
11. In his judgement, the learned Judge found: that the only issue for determination was whether the oral Will made by the deceased on the 8th February 2014 had been duly proven as alleged by the appellant; that taken at face value, the evidence tendered by the appellant seemed to point to all the requirements of a valid oral will having been met; that the fact that the appellant used to collect rent on behalf of his late mother during her lifetime did not entitle him to possession of the property under the guise of a valid oral Will; that the testimonies of PW1 and PW2 that the deceased

stated that plot 65 would devolve to

her son, the appellant, in the event of her death, did not fit the bill so as to be considered as a term of her Will; that it was curious that the deceased would only mention plot 65 if she was indeed making an oral Will on how her estate ought to devolve; that it was not clear whether, on the day of the visit by PW1 and PW2 to the deceased, they were invited by the deceased for purposes of witnessing the Will or it was just a normal hospital visit to check on the welfare of their landlady; and that there is no one apart from the witnesses and the applicant (appellant?) who was present at the time the deceased made the utterances said to amount to an oral Will; that if at all the deceased made the utterances as alleged by the appellant, she would have made her intention as to the administration of the estate and identified each share of the estate and the respective beneficiaries; that the visit at the hospital when the deceased confirmed who would be receiving the rent during the interim period of hospitalization did not rise to the level of making an oral Will; and that when PW1 and PW2 visited the deceased in hospital,

they did so not for the

purpose of being witnesses but as concerned tenants visiting their ailing friend and landlady.

12. According to the learned Judge, the issues in the dispute boiled down to the premium value to be attached to parcel number 65 Kitengela township which the appellant, by virtue of his close relationship with the mother, did not want to part with; that the appellant being the last born son, there was nothing strange about him being close to his mother; that from the two divergent views on the inheritance of plot number 65, there was doubt as to whether the utterances from the deceased to the tenants to continue paying rent to the objector amounted to the making of an oral Will; and that the alleged utterances by the deceased on the 8th of February 2014 did not meet the legal threshold set out in section 9 of the **Law of Succession Act** (the Act) for them to be considered as an oral Will of the deceased.
13. Dissatisfied with the decision, the appellant filed the instant appeal in which he identified a whopping 21 grounds of

appeal. The grounds, basically, challenge all the findings made by the

learned Judge, and we see no need to set them out in this judgment.

14. We heard this appeal on the Court's virtual platform on 21st October 2025 when learned counsel, **Mr John Wekesa**, appeared for the appellant, while learned counsel, **Mr Maurice Nzavi**, appeared for the respondent. Both counsel relied entirely on their written submissions.
15. In his written submissions, the appellant faulted the learned Judge for pointing out that all the requirements under section 9 of the Act were met, but proceeded to contradict himself by stating that, on summation of the totality of the evidence, a different picture comes to bear. According to the appellant, the learned Judge appears to have deliberately evaded the real issue, which is the fulfilment of the legal requirements of an oral Will, and asserted that while the learned Judge appeared to have appreciated the principle of an individual's autonomy to dispose of his or her free property by Will, he seemed to challenge the same principle when he questioned

why only plot 65 and not the

whole estate was the subject matter of the oral Will. In the appellant's view, section 38 of the Act is of no relevance to plot 65 Kitengela in so far as it was the subject matter of the oral Will. Having successfully adduced evidence in support of the petition for proof of oral Will, with the respondent providing no credible rebuttal, the appellant submitted that it was only fair for the learned Judge to have made a finding that the same was proved. We were urged to allow the appeal.

16. The respondent submitted that the learned Judge was justified to doubt the evidence of PW1 and PW2, and that their evidence was not sufficient to prove the existence of an oral Will. In the submissions of the appellant, no medical document was produced in court by the appellant to confirm the mental firmness of the deceased to make an oral Will. The respondent urged us not to disturb the findings of the learned Judge for lack of merit, and to dismiss the appeal with costs.

17. We have considered the submissions made before us in this

appeal. The only issue for our determination is whether the

learned Judge erred in finding that the evidence adduced before him did not meet the threshold for proof that the deceased had made an oral Will. In determining that issue, we are alive to the fact that we are sitting in this matter as a first appellate court. Our jurisdiction, in that capacity, encompasses a reconsideration and re-evaluation of the evidence on record and drawing our own conclusions, but in doing so, we must be cautious, as we neither saw nor heard the witnesses testify, and must give allowance for this. While we must accord due deference to the findings of fact by the trial court, should we be satisfied that the findings were based on no evidence, on a misapprehension of the evidence, or on wrong principles, we are entitled to interfere. (see ***Selle v Associated Motor Boat Co. Ltd [1968] EA 123*** and ***Jabane v Olenja [1986] KLR 661***).

18. This appeal revolves around the application and interpretation of section 9 of the ***Law of Succession Act*** which provides that:

- (1) No oral will shall be valid unless—**
(a) it is made before two or more
competent witnesses; and

(b) the testator dies within a period of three months from the date of making the will:

Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.

(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by sections 18 and 19.

- 19.** Therefore, in order to be valid, an oral Will must be made before two or more competent witnesses and, subject to the proviso to subsection (1) of section 9 of the Act, the testator must have died within three months from the date when it was made. These are the formal ingredients that validate an oral Will and to that extent, we agree with **Musyoka, J.** in **Re Estate of Evanson**

Mbugua Thong'ote (Deceased) [2016] eKLR that:

“An oral will is made simply by the making of utterances orally relating to disposal of property. In asserting whether the deceased had made a valid oral will, it needs to be considered first whether there was an

utterance of the will. The question being whether there was an oral utterance of the terms of the will. The other consideration is that the utterance ought to be made in the presence of two or more persons.”

20. Section 9 of the Act, however, does not set out the substance of a valid Will. How, for example, can one prove that there were two witnesses present at the time of the making of the Will? Unlike in the making of a written Will where it is not necessary that more than one witness be present at the same time, an oral Will, for it to be valid, must be made before two or more competent witnesses. Similarly, the issue of the competence of the witnesses is a factual matter that must be determined by the trial court. In addition, whether or not the deceased's utterances amounted to a valid oral Will must be gauged from the prevailing circumstances and the actual words used by the deceased. It is therefore not correct, as the appellant submitted, that once the formalities of a valid oral Will are, prima facie, proved, it must be taken, without more, that there was a valid oral Will. To amount to a valid oral Will, the utterances must unerringly point to an intention by the deceased to bequeath the property or the estate to particular persons. The evidence must be clear that the deceased's action amounted to testamentary disposition at the

time of utterances since, as was held by **Law, J.** (as he then was)

in **Administrator-General, Zanzibar v. Nassor Bin Fazil Bin Nassor & Others [1957] EA 159**, a declaration of intention to make a written will cannot be regarded as an oral Will, because it cannot be inferred that there was an intention that the oral declaration itself should operate as a testamentary deposition. This Court's predecessor, in **Ali Mohamed Rashid v Hamis Said Alawi [1959] EA 877**, held that:

“In order to establish an oral will very strict proof is needed. If any party is bound to strictness of pleading, it is he who sets up a nuncupative will. He, who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place... He who would propound an oral will must satisfy three requirements as to pleading, proof and promptness. He must plead the terms or the effect of the will with precision; he must prove with precision what he has pleaded; and he must have put the alleged will forward with as little delay as is reasonably possible after the deceased's death.”

21. That brings us to the evidence in this case. The appellant, in propounding the alleged oral Will, relied on the evidence of

PW1 and PW2. First and foremost, from the evidence of PW1,
PW2 and
PW3, it is not clear from the record the date when the oral Will

was allegedly made. The evidence by PW2 indicated that the visit to the hospital was on 8th April 2016. Even if we assume that the year was a typing error and that the visit was on 8th April 2014, this could not have been possible since the deceased died on 1st April 2014. PW1 did not testify as to the exact date of the visit, while PW3 stated it was 8th February 2014. The discrepancy in the dates of the visit fails the strict proof of “*every circumstance of time and place*” necessary in the proof of a nuncupative Will.

22. Whether or not there was an oral Will must be determined based on what it is alleged occurred during the alleged hospital visit. According to PW1, on that day, the deceased told her and her husband, PW2, in the presence of the appellant, that they should be giving the rents to the appellant. The closest her evidence came to confirming the oral Will was when, referring to what the deceased said, she stated that:

“At Mater hospital she was talking and able to identify Plot No. 65. She mentioned last

born Kennedy Kariuki.”

23. PW2, on the other hand, testified that the deceased told him that whenever she was not around, the rents should not be paid to anyone apart from the appellant. During the hospital visit, the deceased informed them that the plot belonged to the appellant. It was only the appellant, the beneficiary of the alleged oral Will, who testified that the deceased declared that he was the “heir to plot no. 65”. Although he disclosed that the contents of the oral Will were also disclosed by the deceased to his uncles, none of the said uncles was called as a witness.
24. In our view the mere fact that the deceased may have stated that the plot belonged to the appellant, in light of the fact that she had already given instructions during her lifetime that the rents be paid to the appellant, is not the same thing as saying that she had bequeathed the plot to the appellant. Being a son to the deceased, the appellant was a beneficiary to her estate and could be properly referred to as a putative owner of the plot. That, however, does not necessarily mean that his

interest was exclusive to the interest of the other brothers.

Apart from the fact

that the evidence of PW1 did not allude to the property being bequeathed to the appellant, and therefore failing the test of two competent witnesses, we are not satisfied that the evidence of PW2 proved, with precision, that the deceased left a valid oral Will in favour of the appellant in respect of plot No. 65, Kitengela.

25. Consequently, we find no merit in this appeal, which we dismiss, but as the dispute pits a brother against his other brothers, in the spirit of reconciliation, we make no order as to costs.

Dated and delivered at Nairobi this 25th day of March, 2026.

D. K. MUSINGA (PRESIDENT)

.....
JUDGE OF APPEAL

MUMBI NGUGI

.....
JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is

Nai Civil Appeal No 237 of 2019

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*a true copy of the
original.*

Signed

DEPUTY REGISTRAR.