Kariuki v Kiore & 4 others (Civil Appeal 171 of 2016)
[2022] KECA 864 (KLR) (22 July 2022) (Judgment)

Neutral citation: [2022] KECA 864 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 171 OF 2016

W KARANJA, MSA MAKHANDIA, F SICHALE, HA OMONDI & KI LAIBUTA, JJA

JULY 22, 2022

BETWEEN

BEATRICE WAIRIMU KARIUKI ..... APPELLANT

AND

SOLOMON NJOROGE KIORE ..... 1ST RESPONDENT

TINA LOUISE BELCHER ..... 2ND RESPONDENT

CLARA AMY COX ..... 3RD RESPONDENT

JONATHAN MUNYWOKI MULI ..... 4TH RESPONDENT

SHADRACK MBAI MBUI ..... 5TH RESPONDENT

(Being an Appeal against the Ruling and Orders of the Probate and Succession Court at Nairobi (Luka Kimaru, J.) delivered on 21st November, 2014inSuccession Cause No. 1788 of 2009))

JUDGMENT

1. A brief background of the appeal is that Anthony John Thompson (the deceased) died between 23rd June, 2009 and 6th July, 2009 at Saint Claire Sur Elle (Manche), 14 LA Haye Besvet in the Republic of France. According to the death certificate issued by the French authorities, the deceased's body was found in his house on 7th July, 2009. Following the deceased's death, Beatrice Wairimu Kariuki (hereafter the appellant) filed Succession Cause No. 1788 of 2009 on 14th August, 2009 seeking to be issued with a Grant of probate in respect of the last Written Will of the deceased. About one month later, another petition seeking a Grant of letters of administration intestate to the estate of the deceased was filed on 11th September, 2009 before the Family Division of the High Court at Nairobi by Solomon Njoroge Kiore (hereinafter, the 1st respondent) in what he said was his capacity as a director of a company known as Furncon Limited. The petition was registered as Succession Cause No. 1965 of 2009. The said company had allegedly purchased from the deceased a parcel of land registered as LR

No. 1012/47/2 measuring 4.8 acres or thereabout situated at Roysambu along Nairobi Thika Road. As at the time the deceased passed on, the said land had yet to be transferred to the 1st respondent, and it was the subject of litigation before the High Court.

2. In her petition, Beatrice claimed that the deceased had written his last Will on 28th May, 2009 bequeathing to her his Kenyan estate. The petition was opposed by Tina Louise Belcher Cox (the 2nd respondent), who deposed that she was the mother of Clara Amy Cox (the 3rd respondent), and daughter of the deceased. She had also been issued with a Grant of letters of administration over the deceased's estate by the court in Saint Lo Cedex (Manche) in the Republic of France. She denied the appellant's assertion that the deceased had appointed her as the executor of his Will in respect of his estate in Kenya, or that the deceased had also appointed the appellant as such beneficiary.

3. An objection to the grant of probate of the Will was filed by the 1st respondent on 27th October, 2009. Another objection to the grant of probate of the Will to the appellant was also registered on behalf of the 3rd respondent. In their objections, the respondents averred that the deceased died intestate and never executed the alleged Will propounded by the appellant. It was contended that the said Will was not genuine. It was also urged that the deceased did not have testamentary capacity at the time of executing the said Will; that the property bequeathed by the deceased in his Will was not free property; and that the execution of the will had been obtained by fraud, undue influence and coercion on the part of the appellant. It was therefore contended that the Will was invalid.

4. There were various applications filed by the parties in these proceedings in the two causes. It became clear to the High Court that the two separate proceedings relating to the estate of the deceased would be more efficiently and efficaciously handled if the causes were consolidated. The two succession causes, being Succession Cause No. 1788/2009 and Succession Cause No. 1965/2009 were, therefore, duly consolidated. It also became apparent that the issue that would be given priority in determination was proving, of the Will.

5. It is upon the determination of the validity of the Will that other issues would be determined. In that regard, the court directed the parties to file their respective written submissions for the court to determine the validity or otherwise of the Will. The parties to those proceedings duly complied and filed their respective written submissions. The court fixed the consolidated causes for hearing on various dates where the parties to the succession cause were given an opportunity either in person or through counsel to highlight their written submissions. The hearing commenced on 1st April, 2014. The cause was heard on various subsequent dates and was concluded on 22nd October, 2014.

6. At the hearing, Mr. Oriema, learned counsel for the appellant, submitted that the Will was executed by the deceased and duly attested by two qualified witnesses; that the appellant was appointed as the executrix of the Will; and that the deceased had capacity to make the Will. To support his assertions, the appellant placed reliance on the affidavits deposed by James Otieno Okeyo, the advocate who is said to have drafted the Will and supervised the execution and attestation of the Will, and on the affidavit of Collins Ochieng Oyomba, an attesting witness. He submitted that this demonstrated that the statutory requirements for due execution of the Will were satisfied; and that the said attesting witness had sworn that he was present and saw the testator affix his signature to the Will. He also appended their signatures to the Will in the testator's presence. It was further urged that the deceased was of sound mind when he executed the said Will. Thus, it was the appellant's case that the requirements of sections 5(1), (3), (4) and 11 of the *Law of Succession Act* were complied with; and that the 1st respondent's claim in the estate was that of a buyer, which could be argued later after the Will had been proved during the determination of the extent of the deceased's estate.

7. On his part, Mr. Munyalo, learned counsel for the 1st respondent, challenged the validity, content, execution and attestation of the alleged Will. The 1st respondent argued that the alleged Will was an attempt to bequeath to the appellant property that was not free and available for distribution by the deceased; that the foreign property referred to in the Will had been sold to the Objector; that that notwithstanding, the said property was jointly owned by the deceased and his late sister, Sheila Thompson; and that, therefore, the deceased did not have the capacity to dispose of it. On the other hand, it was argued on behalf of the 1st respondent that, if at all the deceased made the said Will, he did not execute the same out of his own free will. To support this assertion, counsel tried to demonstrate that the Will was allegedly made under suspicious circumstances by asserting that the deceased had been confined in the appellant's house at the time the Will was allegedly made and was under tight security; and that the appellant played a critical role in procuring the execution of the said Will through coercion.

8. Counsel submitted that the Will was not valid for the reason that it did not have a schedule of assets contrary to section 3 of the *Law of Succession Act*; and that the court could not therefore assume that the property that was the subject of the suit was part of the deceased's estate; that the deceased was not of sound mind at the time he was alleged to have executed the Will. To support this assertion, counsel relied on a letter by the deceased written in 2004 in which he had indicated that he was suffering from a brain tumor disease which required him to be on constant medication.

9. On behalf of the 2nd respondent, learned counsel Mr. Kabucho contended that the Will was invalid. Mr. Kabucho also joined issue with the 1st respondent in regard to the argument that the Will could not have been valid in so far as it purported to dispose a property that was not free for disposal. Mr. Kabucho submitted that, even if the deceased made the Will, the same was made in circumstances where a mistake may be presumed to have occurred ab initio.

10. On his part, Mr. Solomon Kiore, who was also the petitioner in Succession Cause No. 1965 of 2009, challenged the execution of the alleged Will on the ground that the same was procured through coercion. According to him, the fact that the deceased deliberately misrepresented his Passport number to the drafters of the Will demonstrates that the deceased must have been in danger; that the Will was invalid since it was not drawn by the deceased himself; and that it was forged and that it concerned properties of the deceased outside Kenya.

11. In a rejoinder, counsel for the appellant denied all the allegations contained in the objections and specifically reiterated and reaffirmed the averments in the appellant's pleadings. He stated that the Will could not be invalidated simply because a property stated therein was not free, or that it did not have a schedule of assets; and that no medical evidence was adduced to prove the deceased lacked mental capacity to draw the Will. On the issue of the Will containing an erroneous passport number of the deceased, Mr. Oriema submitted that the affidavit of James Okeyo, the lawyer who drafted the Will, did not specifically state that the Will contained the correct passport number. He, therefore, urged the court to disregard the allegation that the error was intentional and meant to invalidate the Will. According to Mr. Oriema, it was not a requirement that the Will be personally prepared by the deceased for it to be deemed as valid. In view of the foregoing, counsel for the appellant urged the court to find that the Will was indeed valid.

12. The court considered the rival submissions, both written and oral, made by the parties to the succession cause and formed the view (a view which was accepted by the parties) that the first issue that ought to be determined was the validity of the Will. The Will that was the subject of these proceedings is dated 28th May, 2009. The deceased died about a month later after allegedly executing the Will.

13. The court found that the deceased may have lacked mental capacity to make the Will at the time he was alleged to have made the Will. The court also found that the appellant as a beneficiary should have insisted that the deceased defines the extent of what he considered to be his foreign estate; and that the fact that the deceased allegedly made a general bequest without defining the extent of his estate, in light of the numerous suits pending in court, prompted the learned Judge to conclude that the deceased was not exercising his free will when making the Will. The court also found that it was improbable that the deceased would have excluded his only child as a beneficiary to his estate in favour of a friend. The court thus found that the Will was procured by undue influence with a view to fraudulently conferring an advantage to the appellant as compared with other claimants in the suits pending before the court. The court further held that since the court had declared that the purported Will was void, the dispute would proceed as if the deceased died intestate. The appellant's petition for Grant of probate of the alleged written Will was dismissed with costs to the 1st and 3rd respondents.

14. Aggrieved by the above findings, the appellant proffered the instant appeal citing fourteen (14) grounds, that the trial court erred, inter alia, by failing to consider all the evidence presented by the appellant in its ruling dated 21st November, 2014. In particular, the court is said to have disregarded the evidence presented in form of affidavits of Collins Ochieng Oyomba and James Otieno Okeyo who drew and witnessed the Will of the deceased, and who are also officers of the court. The trial court was also faulted for failing to determine whether the said Will was invalidated on account of coercion, undue influence or lack of mental capacity; in holding that the appellant was guilty of having unduly influenced and/or coerced and/or fraudulently influenced the late Anthony Thompson James to make the said Will for the benefit of the appellant; in holding that the brain tumor that the appellant suffered from since 2004 rendered him incompetent to make the said Will despite the respondent not producing any scientific or acceptable evidence, and for proceeding to demolish the Will in the absence of any credible evidence in proof of the fact that the testator did not have the necessary capacity to make the said Will.

15. Further, that the trial court failed to appreciate that in so far as the 1st respondent was concerned, there was massive evidence as to how he had fraudulently attempted to acquire the subject assets of the estate, namely Plot No. 1012/47/2 Roysambu Kasarani, by failing to give proper weight to the agreement that had been signed by the second and third respondents with the appellant in relation to the manner in which the entire estate of the deceased was to be distributed in that: it, firstly, did not make any reference at all to the said agreement, which meant that the trial court was quite dismissive of the appellant's case; secondly, it failed to hold that as the said agreement had been acted upon by the parties thereto and indeed the 2nd and 3rd respondents had already derived a benefit therefrom and that, in the result, the 2nd and 3rd respondents were thereby estopped from taking the position that they took in challenging the Will and, in particular, in challenging the right of the appellant to benefit from the deceased's Kenyan estate.

16. The firm of Kamau Kuria & Co. Advocates filed very lengthy submissions on behalf of the appellant. We have tediously gone through them and will attempt to summarise them as hereunder. On the validity of the deceased's Will, the appellant submits that grounds 1, 5 and 9 of the Memorandum of Appeal address this issue. She submits that the deceased had the freedom to make a Will and bequeath his estate to whomever he wished, including the appellant in this case; that the main issue in contention was whether that Will was valid; that two petitions were filed in the High Court in respect of the deceased; that the first one in time was the appellant's petition for Grant of Probate dated 12th August, 2009, and that the second was the 1st respondent's petition for grant of letters of Administration Intestate; that the 2nd and 3rd respondents being the former wife and the daughter of Anthony filed objections to the making of the Grant questioning the validity of the Will; that any party challenging

the validity of a Will must follow the procedure set out in rule 17 of the *Probate and Administration Rules*; that these two were wrongly consolidated with the estate of Sheila, compounding the violation of the rules of procedure; that Hon Justice Dulu gave directions on how to proceed with the two petitions after their consolidation, in that he ordered that the hearing of the petitions do proceed by way of affidavit evidence; and that, despite the fact that the issue in contention was the proving of the Will, and that there were disputed facts, the court ordered that submissions be filed without further proof.

17. On the procedure used in determining the validity of the Will, it was submitted that under section 11 of the *Law of Succession Act*, a Will is valid if it is signed by the testator, the signature appears that it was intended thereby to give effect to the writing as a Will and is attested by two or more competent witnesses; that the Will was executed by the deceased and attested by two advocates of the Court; that there is no evidence that has been led to the effect that the signature of the deceased on the Will had been forged or that it was not his; and that there was no allegation that the above section was not complied with.

18. The appellant further submits that, in view of the fact that the execution and attestation was done in accordance with the law, there is a presumption that the said Will had been duly executed which can, however, be rebutted by the attesting witnesses; that none of the attesting witnesses sought to rebut that presumption; that neither have the respondents done so and are deemed to have accepted the execution and attestation as proper; that no advocates, whether from Muthoga Gaturu and Company Advocates or from any of the law firms in Kenya or in the world, would have allowed a testator, like the deceased, to execute the Will without making him understand its contents; that if there was any question as to his mental capacity, Muthoga Gaturu and Company Advocates were mandated to either have a medical practitioner present at the execution and attestation of the said Will or sent him to see a medical practitioner to confirm his mental capacity; and that they did not do so, and that it is clear that they did not question his mental capacity when he instructed them to write his Will, had him execute it at their offices and thereafter attest to his signature.

19. Further, that in view of the presumption that the deceased was sane when executing his Will, the burden of proof is on the respondents claiming that Anthony lacked mental capacity to execute the Will dated 28th May, 2009; that, in his ruling of 21st November, 2015, Kimaru J. relied on affidavit evidence of Anthony in 2004 of the fact that he was suffering from a brain tumor and needed medication to ameliorate his health; that in her affidavit sworn on 24th May, 2012, contents which remain uncontroverted, the appellant demonstrated how the deceased conducted his financial affairs; that the test for mental capacity is not a medical one but a legal question; and that the fact that he chose to leave his entire estate to the appellant does not, and cannot, mean that he lacked testamentary capacity.

20. She submitted that it is noteworthy that the deceased had flown into the country on 15th May, 2009 to attend the hearing of his Summons for Revocation of Grant in respect of his late sister's Sheila's estate dated 16th January, 2009 that had been issued to the 1st respondent, and was scheduled to take place on 18th May, 2009; that he executed the Will on 28th May, 2009; that if he was ready to take the stand for cross examination on his affidavit, he must have been able to execute his Will; and that no evidence was tendered to the effect that that deceased's health had so deteriorated that he was unable to understand what he was doing when he executed his Will on 28th May, 2009.

21. According to the appellant, there are no medical reports of the deceased's health from 2004 – 2009; that, however, evidence shows that he arrived in Kenya on 15th May, 2009 in order to appear in the High Court for his hearing on 18th May, 2009 and the firm of Satish Gautama prepared him for that

cross-examination; that the issue of the validity of the Will and the capacity of the deceased to make a Will ought to have been proved by medical evidence, oral evidence of the witnesses who knew the testator, or by circumstantial evidence, and the question of the capacity was one of degree, and that 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.

22. She submitted that the High Court relied on the deceased's affidavit sworn in 2004 to determine his testamentary capacity and ignored the evidence of 2 advocates, the appellant and the circumstantial evidence of his physical appearance before the Hon. Justice Gacheche with his advocate, Stanley Kihiko; that if the court harbored any doubt of the evidence by those parties, it was empowered to allow the cross examination of all deponents on their affidavits; that none of the respondents lived with the decease or were in constant contact with him as they were not concerned about his welfare until he died; that there is proof of estrangement from his only daughter who lived in England whilst the deceased lived in France; that the appellant has explained the reason for that estrangement, however, that in the event the Court entertains doubt about the capacity to make the Will, there is an option to order for the Will to be proved by way of retrial before the High Court; that in view of the fact that oral evidence was not adduced, the court did not have the complete set of facts with regard to mental capacity of the deceased, it erred in not calling for cross examination of the affidavits of the witnesses who saw the deceased execute his Will; that, as a result, the Superior Court did not have the opportunity to satisfy itself whether or not the deceased had mental capacity to execute the Will; and that it relied on affidavit evidence of the health status of the deceased given in 2004 despite the fact that he had lived for 5 years after that.

23. On the alleged suspicious circumstances, the appellant submitted that the record demonstrates –

    a. the deceased, until his death, was in control of his financial affairs;

    b. he was in regular touch with his solicitor and barrister;

    c. while he had a brain tumour, he lived alone in France and took care of his day-to-day needs and he also spent time with his friends;

    d. neither the 1st respondent nor the 2nd – 3rd respondents communicated with Anthony or knew of his whereabouts until his death; this is despite the fact that they all knew that he was sick; and

    e. he would regularly speak to or be in contact with the appellant.

24. She submitted that the fact that he failed to communicate on 1st July, 2009 made the appellant suspect that he might be in trouble; that the reason that a search investigation was begun on his disappearance on 6th July, 2009 was as a result of the fact that he had failed to turn up for an appointment at the Notaries office; the appellant, her sister and her daughter together with the deceased spent time in France between 27th April, 2009 and 13th May, 2009 and the Will was drawn up by Muthoga Gaturu and Company Advocates and executed in Kenya in the presence of advocates.

25. On the question as to why the deceased had excluded his daughter from the Will, the appellant seemed to insinuate that there was bad blood between the two as the 3rd respondent had made sexual molestation complaints against the deceased in her youth which had resulted in him losing all contact with her and that the deceased was uncomfortable that she had not bothered to clear him of those allegations or get in touch with him; she urges the Court to find that there were no suspicious circumstances as demonstrated through the overwhelming circumstantial evidence.

26. On the alleged undue influence and or coercion, the appellant submits that she was introduced to the deceased by a Mr. David Wahome Nyamu, a person known to her as a real estate agent, who had

informed her that he had found an interested buyer for the suit property and Anthony had travelled to Kenya to follow up on the transaction; that it was when Antony went to retrieve the Certificate of Title from Satish Gautama's office that he was informed that the 1st respondent had been issued with a Grant of Letters of Administration - Intestate in respect of Sheila's estate; that it was only at that point that the appellant came to know about the ongoing litigation pertaining to that property; and that the agreement for sale was thereafter rescinded.

27. The appellant further submitted that there were numerous discussions between herself and the deceased about his properties and assets between January and July, 2009 and the deceased, therefore, reasoned that it was sufficient for him to give a general bequest; that this is demonstrated by the petition filed by the appellant where she demonstrated that she and Anthony were engaged to be married soon, and that he involved her in his financial affairs; that the fact of the bequeathing of general bequests despite the litigation surrounding one of his assets could not invalidate the Will in view of the fact that the appellant and Anthony had previous discussions on his financial affairs and the pending applications; and that, as seen in this case, Anthony's failure to provide for his daughter under his Will following the allegations of sexual molestation could not, and cannot, invalidate his Will dated 28th May, 2009.

28. She further submitted that it is noteworthy that the appellant felt that Clara was entitled to inherit from her late father despite his reasons; that she travelled to France and, on 7 January, 2010 she met with the deceased's lawyer, who assisted in negotiating the terms of inheritance; that, according to that agreement, the 2nd and 3rd respondents would not challenge the validity of the Will whilst Clara would inherit the deceased's assets in France save for Kshs. 10 million paid to him by Kimuri Housing Company Limited and Kshs. 1,500,000 being the fees payable to Satish Gautama Advocates, as well as 25% share in LR No. 1012/47/2; that, however, the 2nd and 3rd respondents subsequently rescinded the agreement and entered into another agreement with the 1st respondent and challenged the validity of the Will; that having proved that Anthony's Will was valid, the only recourse that the 2nd – 3rd respondents had was to apply for provision under section 26 of the *Law of Succession Act* in respect of his assets; and that the 2nd and 3rd respondents have the burden of proving their respective claims to the court so that reasonable provision may be made to them from the deceased's estate.

29. On the credibility of the 1st respondent's affidavits, the appellant posits that the 1st respondent is the majority shareholder in Furncon Ltd, which Company is not a party to this appeal and did not participate in the proceedings in the High Court; that the 1st respondent has claimed to be both a beneficiary and holding a purchaser's interest in the estate of Anthony and Sheila; that it is undisputed that he cannot be a beneficiary as he is not related to either of them in any manner; that it is worth noting that the agreement entered into in 1998 between Furncon Limited and the deceased purported to be for the entire LR No. 1012/47/2 and had not been consented to by Sheila, who owned a half share of it, and was thus invalid; that as the court would note, the letters written by Sheila demonstrated that she wanted copies of any correspondence between the Furncon Ltd and the deceased, proper records be kept for any money loaned to her by the 1st respondent so that she would either exercise her right to receive the proceeds of sale and pay him back, or consider selling to Furncon Ltd her share; and that, as seen in the proceedings in the Criminal Court, the 1st respondent admitted to the court that he had not entered into an agreement with Sheila and Anthony for the purchase of the said LR No. 1012/47/2 and, further, that the two could sell the property to anyone else.

30. She submitted that through fraudulent non - disclosure of material facts, first, that he was a majority shareholder in Furncon Ltd and, secondly, that the company had sued both Sheila and Anthony in 2005 for LR No. 1012/47/2 under a purported agreement of sale entered into in 1998; that the 1st respondent applied for and was granted Letters of Administration Intestate in respect of Sheila's estate

on 23rd June, 2008 and that, thereafter, the 1st respondent caused a purported consent order issued on 23rd September, 2008 to be recorded in HCCC No. 109 of 2005 in his capacity as the majority shareholder as plaintiff and the legal representative of Sheila as the 2nd defendant in that suit; that the 1st respondent purportedly entered into a consent order with the 2nd and 3rd respondents herein dated 15th December, 2015 in respect of the deceased's Estate following the delivery of the ruling which is being appealed against; that the effect of the fraudulent actions of the 1st respondent was that he was compromising suits on behalf of the estate of Sheila when he was not a beneficiary, but alleging a purchaser's interest in his own capacity when, in actual fact, it is Furncon Ltd that purported to purchase LR No. 101247/2 from the deceased in 1998; that, in the instant case, the parties to the Succession Cause sought to avoid the requirements of Article 50(1) of *the Constitution* and rules 17 and 63 of the Probate and Administration Rules; and that they wanted to clothe the court with a jurisdiction it did not have.

31. On the holding that the deceased died intestate, she urged the Court to find that the deceased's Will dated 28th May, 2009 was valid, and that the appellant is the rightful heir and executrix of that Will.

32. The 1st respondent has filed submissions. As to whether a purchaser for value can petition for grant of letters of administration, he submits that the issue is an afterthought and was not pleaded nor raised as a ground of appeal; that, in any event and without prejudice to the foregoing, the 1st respondent holds letters of administration to the estate of Sheila Thompson vide a grant obtained way back in 2006 with the consent, knowledge and authority of her deceased brother herein; that the Grant of letters of administration was never challenged or set aside as the deceased had approved the 1st respondent to get the same to defend the property; that the 1st respondent after the demise of the deceased, in good faith, obtained limited grant of letters of administration over the estate of the deceased; that the Court should not give preference to issues of technicality and, in the process, uphold fraudulent acts and deceit; that the property in issue has never been a free asset and cannot be part of the Will; that the 1st respondent has a right to be heard under Article 50 of *the Constitution*, and without undue regard to technicality as per Article 159(2) (d); and that when this matter came for hearing in the High Court before Kimaru .J on 13th May, 2013 parties agreed that the court should proceed with the issue of the validity of the Will.

33. On whether the deceased's Will was correctly invalidated by the court on the ground of mental incapacity and undue influence, he submitted that the medical reports by direct medical health provider University Hospital of Leicester and Consultant Neurosurgeon gave a detailed account of the tumor; that Dr. P.K Wanyoike confirmed that the deceased was suffering from frontal Lobe Syndrome, and was supposed to undergo an urgent neurosurgical operation in March 2007 but he did not turn up; that the state of the deceased as at 28th May, 2009 when he allegedly made the Will was even worse as confirmed by the appellant's own house help, one Lucy Wamaitha, who took care of the deceased at the time as evident in her affidavit; that the appellant's own other former house help and messenger at the appellant's office by the name Jane Ihiga had also sworn an affidavit; and that it is clear from documents and evidence of those who knew the deceased and from deceased himself that he was quite ill and not fit to make the Will.

34. According to the 1st respondent, it is quite misconceived for the appellant to argue that the advocates who drew up the Will under the instructions of the deceased had no reason to question the mental capacity of the deceased; that the appellant did not at all bring any evidence to prove capacity or rebut the above sworn statements on the deceased health; that the burden of proof had shifted upon her to do that; and that, in her submission, she has hidden behind the issue of the validity of the Will with regard to execution and attestation, which is not the issue here as it does not matter if the Will is witnessed or executed if the maker did not have testamentary freedom and capacity.

35. On whether the appellant acted in bad faith, was guilty of having unduly influenced coerced, and or fraudulently influenced the deceased to make the impeached Will, the 1st respondent submitted that the Will contained the appellant as the only beneficiary of the estate, and was also ambiguous as it lacked specificity as to the extent of foreign estate or the assets it referred to; that the deceased knew that he had personally sold the disputed portion of land to the 1st respondent; that the 1st respondent had not only spent a lot of money defending the premises from fraudsters with the deceased's consent, but had also been in occupation since 1983; that the 1st respondent's factory and other developments sit on the land; that the deceased and his sister Sheila were aware of his legal and/or beneficial interest in the parcel, and that it is doubtful that the deceased, having himself witnessed, or having knowledge of the number of litigations surrounding the parcel of land, would dare give it out in a Will.

36. The 1st respondent stated that he was certain that the deceased was under undue influence and was not in his normal state of mind in that he was held in the appellant's premises against his will and under armed surveillance, which fact is not denied by the appellant as she admitted the same, and even made payments for the alleged security; that any time the deceased came to Kenya for over 20 years, he never came alone but with his secretary, who was his assistant due to his ill health, and he never stayed elsewhere but Jacaranda Hotel; that there was no reason why the appellant would not have allowed the deceased to stay where he was used to; and that the deceased was detained at the appellant's house and made to believe that his life was in danger, and that he needed security which was a lie just to scare and intimidate him. He also stated that he was aware that the deceased had high blood pressure, and was epileptic.

37. It is the 1st respondent's further submission that the deceased was not acting out of his free will and was not even aware of what was happening, and thus did not give reasons why he did not bequeath his wife and the daughter and equally ignored to be specific about his foreign estate; that, if indeed the two had more than a platonic relationship, which is suspicious that it existed, the wording of the Will would have definitely brought that to light; that it is strange for the deceased to bequeath his "friend" all his foreign estate absolutely subject to payment of his funeral expenses and testamentary expenses; that the deceased had a wife, a daughter and 1st respondent as purchaser of the suit premises; and that the two feature nowhere in the Will, and no explanation is tendered by the deceased as to why he opted not to include them in the Will

38. According to him, the appellant is so deceitful that, even after the death of the deceased, she attempted to defraud the family. For instance, she on August 7th 2009, sent an email to the deceased's family, in particular, Peter Cox the step- father of Amy Cox Thompson and confessed in paragraph one that she was the one who made the Will; and that the Will cannot thus be said to have been made by the deceased willingly.

39. The 1st respondent posed the question: how then was she accepting that the property, was sold, and money received and then purport to have a Will on it? He submits that her desire to deceive and have the property was so imminent that she had to do anything, including forging the Will of the deceased after the attempts to sell the property failed; that it was after the aborted sale that the appellant then crafted ways of unduly deceiving, forcing, coercing and influencing the deceased to execute the purported Will, whose contents he seems not to have even been aware of; that all the above, in addition to the home arrest, threats and the diminished health condition of the deceased who was so weak and seemed highly dependent on drugs, point to open undue influence on the deceased

40. He went on to state that the deceased was a gentleman and had already sold the property to the 1st respondent and given his word that nothing and nobody would change that; that the deceased had in his lifetime confirmed in writing through a consent filed in High Court Civil Case No 109 of 2005

filed in court on 3rd September, 2008 that the 1st respondent was the beneficiary of the property known as L.R NO 1012/47/2; that the appellant's alleged Will cannot supersede the consent orders entered into with the deceased during his lifetime because:

a. The consent order has a contractual effect and can only be varied and/or set aside on the grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled, which are not carried out.

b. The grounds for setting aside a consent order as would be in the case of a contract are fraud, mistake or misrepresentation.

41. He submitted that there has never been any application to set aside nor challenge the consent orders, which gives details of the 1" respondent's interest in the property, the beneficiaries thereof and how all his costs incurred in defending the suit will be paid from the estate; that the consent order referred to above is still in force, and that the 1st respondent has fully complied with the same and has even paid the entire purchase price; that he has further been in possession of the suit premises since 1983, and faithfully and actively defended this particular asset of the estate of the deceased in all the suits; that the appellant is guilty of non-disclosure of material facts and did not do the Will in good faith as the 1st respondent had taken the initiative through his advocates to write the letter dated 16th December, 2009 and a further letter dated 24th February, 2009 and copied to Beatrice Wairimu Kariuki, the appellant herein; and that the letters gave the appellant herein a detailed background of the matters touching on the deceased, who was still alive then and she cannot purport not to know the status of the property before the Will was done.

42. On Ground 7, he submitted that it is not correct for the appellant to allege that the court erred by disregarding the agreement that had been signed between the appellant and the 2nd and 3rd respondents relating to the manner in which the estate of the deceased was to be distributed; that she had not disclosed to the deceased's daughter and his mother that the property was actually bought by Furncon limited way back on 23rd April, 1998 and a consent recorded by this Honourable court; that soon after the family realized that the agreement was obtained through false pretenses, it immediately gave their lawyer in France namely Douma, Schofield & Sibenaler Advocates Associates instructions to cancel the said agreement; and that the family further instructed Kimani Kibucho Karuga & Co. Advocates to challenge the same in these proceedings.

43. He further submitted that the appellant's actions were marred with fraud, including the cancelled private agreement; that she knew there were orders for status quo to be maintained and, in particular, the order made on 5th March, 2009 and the order made on 24th March, 2009 and, as such, the deceased had no locus to bequeath a property in respect of which that court had ordered the status quo to be maintained; that she is an advocate, and was supposed to give proper legal advice and obey not only the court orders, but also respect earlier dealings with the property before she got involved; that her conduct is full of a series of forgeries and written deceits, which she now seeks to have the court sanction through the fraudulent Will.

44. The 2nd and 3rd respondents have filed submissions. They largely reiterate the submissions of the 1st respondent, which we have paraphrased above in extenso, and which we do not need to rehash. We have however noted the contents thereof and taken the same into consideration.

45. This being a first appeal, it is the duty of this Court to analyze and re-assess the evidence on record and reach its own conclusions. In *Selle vs. Associated Motor Boat Co.* [1968] EA 123, it was expressed as follows:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270.

46. The crux of this appeal is whether the learned Judge erred in finding that the Will was invalid, and whether the trial court erred in proceeding with the matter based on submissions rather than by adduction of viva voce evidence. Bearing this in mind, we will eschew making any findings on the disposition or distribution of the deceased's estate because the mandate lies elsewhere.

47. When the appeal came up for plenary hearing before us, learned counsel Dr. Kamau Kuria (SC) appeared with Mr. Gikandi for the appellant, Mr. Munyalo appeared for the 1st respondent, Mr. Kabucho appeared for the 2nd and 3rd respondents, but the 4th and 5th respondents' counsel, though duly served with the hearing Notice, did not attend Court. Dr. Kuria (SC) adumbrated his submissions dated 12th January 2018. He started by justifying his request to the President of this Court to empanel a 5 Judge bench to hear this appeal, a request that was granted, and that explains the expanded bench sitting on what we actually perceive to be a seemingly simple and straightforward matter on the question of validation of a Will, and the legality or viability of conducting hearings by way of affidavit evidence.

48. The learned Senior Counsel told the Court that his concern was on what he described as "a procedural error that is creeping into the courts where parties were being allowed to prove a Will by way of affidavit evidence, where they are not being cross- examined". Counsel submitted further, that even though there was a consent entered into by the parties in the succession cause to proceed by way of written submissions, parties cannot confer jurisdiction to the court by consent where there is none. In support of this proposition, counsel relied on the Supreme Court decision in *Lemanken Aramat vs Harun Meitamei Lempaka & 2 Others* [2014] eKLR. Counsel faulted the learned Judge for what he termed as abdication of duty in proceeding by way of submissions instead of taking viva voce evidence. This, according to learned counsel, was in violation of Article 50 of *the Constitution* of Kenya, 2010. He urged us to allow the appeal and revert the matter to the High Court for hearing afresh, with orders that the proceedings be conducted by way of viva voce evidence.

49. On his part, Mr. Munyalo, in his succinct oral highlights, reiterated that the only issue before the learned Judge was the validity of the Will, and that the parties to both causes agreed to proceed by way of written submissions and never made a request to cross-examine the witnesses. Consequently, they cannot now be heard to say that they were not given a hearing. Learned counsel was emphatic that the Will was properly nullified after the learned Judge considered all the material placed before him, which included the written and oral submissions by counsel for the parties. He urged us to dismiss the appeal.

50. Learned counsel Mr. Kabucho, submitting on behalf of the 2nd and 3rd respondents, confined his submissions to the validity of the Will and steered clear of the alleged violation of Article 50 of *the*

Constitution and the procedural infractions of the *Law of succession Act* and the Rules as posited by the appellant. Apart from the main contention that the deceased had no mental competence to sign the Will, counsel also highlighted the defects therein, such as the lack of a schedule of the properties that were the subject of the Will. He also expounded that the Will was ambiguous in that it failed to specify what constituted "foreign properties", given the fact that the deceased had property in Britain and he lived in France where he died, not to mention the property in Kenya.

51. We have carefully considered the record, both written and oral rival submissions by counsel and the relevant law. We will start with the procedural challenge highlighted by learned counsel for the appellant. Having heard all counsel on this issue, we are not persuaded that conducting succession proceedings by way of affidavit rather than by calling viva voce evidence has any jurisdictional bearing. It is simply a procedural issue.

52. Conducting proceedings on the basis of written submissions is not an alien concept, and is a procedure adopted in courts in many jurisdictions. It is a practice that is expedient and time saving, particularly in uncontested matters or where the issues for determination are straight forward. It is indeed the modus operandi on appeal where appeals are determined through written submissions as no viva voce evidence is expected to be adduced. The practice is anchored in law. We hasten to state, however, that in contested issues where determination is dependent on adduction of oral evidence, it is good practice to allow parties to adduce viva voce evidence so that the veracity of the evidence adduced can be tested by way of cross- examination.

53. It is trite law that where a case is based on affidavit evidence, cross-examination on an affidavit is at the discretion of the court. Adduction of evidence by way of affidavit is anchored on Order 19 of the *Civil Procedure Rules*, which provides in the relevant part as follows:

> 1. Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable: Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.
>
> 2. Power to order attendance of deponent for cross-examination [Order 19, rule 2.]
>
> (1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.
>
> [Emphasis added]

54. In this case, the sufficient reason on the part of the court was that the court was moved by the parties, through a consent, which is conceded by all parties, to proceed by way of written submissions. The above provision is also explicit on the point that cross examination on the affidavit is allowed at the instance of either party. Leave to cross-examine is not given as a matter of right, and any party who wishes to cross-examine a deponent must satisfy the court that there is a good reason for the witness to be cross examined. In other words, a party ought to lay a proper legal foundation to justify his application for leave to cross- examine the deponent.

55. At the risk of belaboring the point, the parties before the trial court consented to proceeding with the matter based on the affidavits and their written submissions. It cannot lie in the appellant's mouth to say that the court erred by proceeding as such, yet she agreed and accepted to be bound by the repercussions of proceeding by way of affidavit evidence and written submissions in such a matter. It was not for the court to remind parties that they had a right to cross – examine deponents of the various

affidavits before the court. Had the appellant applied to cross examine the witnesses and laid proper basis for it, as by law required, and such a request was declined, we would not have hesitated to agree with her on that point. This issue was aptly articulated in the High Court decision in *G G R v H-P S* [2012] eKLR where the court stated:

> "The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross- examined. It would appear that where allegations of matters touching on fraud, mala fides, authenticity of the facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is a conflict of Affidavits on record or where the evidence deponed (sic) to is conflicting in itself. Further the order for cross- examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination." (Emphasis ours)
>
> See also this Court's decision in Republic v Ministry of Roads & Another exparte, Vipingo Ridge Ltd & Another [2015] eKLR.

56. The above decisions are in agreement with the position that cross-examination is a right sought to be exercised by the applicant that is allowed in law and the court has discretion, on application of a party, to order a deponent to appear in court for cross - examination. Our conclusion on that point is that the learned Judge did not violate any law by proceeding in the manner he did with the full blessings of all the parties herein.

57. On whether the learned Judge erred in finding the Will to be invalid, the Court was seized of the evidence on record and submissions by the parties when coming up with that decision. We must be circumspect of the fact that we cannot interfere with the findings of fact by the trial court, unless we have solid reasons to do so within the established guiding principles set by this Court and pronounced in many decisions. For instance, this Court in *Mkube v Nyamuro* [1983] eKLR at 403, Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

58. In this matter, the learned Judge, at page 8 of the impugned Ruling, expressed himself as follows:

> " This court has evaluated the facts of this succession cause in relation to whether or not the will is valid and has taken the following view on the matter..."

The Court continues on page 11 to state:

> " From the affidavit evidence on record, it was clear that the deceased had in the recent past suffered from a brain tumor. The deceased himself indicated that he required medication to ameliorate his health situation. This was in 2004...the fact that the deceased died hardly a month and few days after allegedly making the said will raises suspicion as to whether he had mental capacity to make a will."

59. We are not persuaded that there are sufficient grounds for us to interfere with the above findings of fact made by the learned Judge. Even on our independent re-evaluation and re-appraisal of the evidence adduced before the trial court in obedience to the mandate given to us by Rule 29 (1)a of the Rules of this Court, we still find it difficult to depart from the findings of the learned Judge for the following reasons. Firstly, the so called Will is a very general Will, grossly lacking in specificity and not wanting in ambiguity. It does not have a schedule of property, and does not adequately describe the property. It only states that the deceased bequeathed all his foreign Estate to his friend.

60. It was not clear what the foreign Estate comprised; whether the property in Britain was also foreign property; whether property that had been jointly owned by the deceased and his late sister was part of his free estate; whether the property which the deceased had allegedly sold to the first respondent about 11 years before the said Will was written and which, to the deceased's knowledge, was the subject of active litigation was part of the foreign estate. Was that property the deceased's 'free' estate for purposes of bequeathing it to any beneficiaries? The learned Judge, after considering all the facts placed before him, concluded that the Will in question "was procured by undue influence with a view to fraudulently conferring an advantage to the appellant as compared to the other claimants in the suits now pending before the court". We agree with this observation by the learned Judge, more so because the appellant was not a stranger to the controversy surrounding the property she was claiming through the contested Will.

61. Even without disturbing the learned Judge's findings on the deceased's mental status, the incorrect passport number cited in the Will, the description of the executor, who was also named as the sole beneficiary, we have no hesitation in arriving at the inescapable finding that the "Will" in question did not pass the validity test, and that the learned Judge did not err in invalidating it. The appeal therefore fails on the validity of the will.

62. Lastly, there is the question as to whether the learned Judge erred in consolidating the two appeals. We hold the view that, although it may have appeared efficacious to do so, the two causes were different; the parties were different and although the deceased was the same in both causes, one cause was under the law on intestacy while the other one was proceeding as if the deceased had died testate. The parties' claims were also different with one claiming beneficial interest as a buyer of the parcel of land in question, while the other claimed to be a beneficiary of the entire parcel of land. With respect to the learned Judge, the two causes ought to have been heard separately to allow each party articulate its case without being dragged into issues they were not necessarily involved in.

63. By and large, this appeal is for dismissal. The same is hereby dismissed with costs to the 1st, 2nd and 3rd respondents. We direct that the two succession causes be and are hereby remitted to the Family Division of the High Court for them to be heard separately before any Judge with jurisdiction, other than Kimaru J. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR