



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & MURGOR, J.J.A)

CIVIL APPEAL NOS. 196 AND 197 OF 2009

BETWEEN

JOHN WAGURA IKIKI.....1<sup>ST</sup> APPELLANT

TABITHA WANGUI IKIKI.....2<sup>ND</sup> APPELLANT

LUCY BANCY WANJIKU IKIKI.....3<sup>RD</sup> APPELLANT

ESTHER WANJIRU IKIKI.....4<sup>TH</sup> APPELLANT

JOSEPH NDUNGU IKIKI.....5<sup>TH</sup> APPELLANT

SALOME GATHONI IKIKI.....6<sup>TH</sup> APPELLANT

PATRICK MAINA IKIKI.....7<sup>TH</sup> APPELLANT

LEAH NJOKI IKIKI.....8<sup>TH</sup> APPELLANT

AND

LEE GACHIGIA MUTHOGA.....RESPONDENT

*(An appeal from the Judgment of the High Court at Nyeri (Kasango, J.) dated 22nd October, 2008*

in

**Succession Cause No.194 of 2000)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

This family dispute revolves around the testimony of **Mr. Onesmus Ikiki Waithanwa's** (hereinafter referred to as the deceased), intent expressed in a will that was in the event contested, who died on 4th October, 1994 aged 77. The deceased was a solid polygamist and a prolific sire. He had three wives **Tabitha Ikiki**, **Leah Ikiki** and **Mary Ikiki**, and a total of 21 children. Of the 3 houses the first two (2) consisted of ten issues each while the third, had a single issue.

Following the deceased's demise, the respondent, a seasoned advocate of note, who was the executor of his will, petitioned for a grant of probate on 12th June, 2000. The said petition was initially objected to by 7 objectors being **Leah Njoki Ikiki** his 2nd widow; **Tabitha Wambui Ikiki** his 1st widow and by his children **John Wagura Ikiki**; **Patrick Maina Ikiki** ; **Lucy Bancy Wanjiku Ikiki**; **Anthony Wachira Ikiki** and; **Esther Wanjiru Ikiki**; on the grounds that the said will: was null and void for having disinherited the first two widows and their children; was a nullity and incapable of being executed as it purported to bequeath and distribute property that did not belong to the deceased; had contents that were suspicious as the deceased was illiterate and the petitioner could not have been an executor having prepared a defective will; was discriminatory towards the first two wives and favoured the third wife and her child and; was influenced by **Mary Ikiki**, the main beneficiary.

Subsequent to the lodging of the aforementioned objections, the 5th and 6th appellants, **Joseph Ndungu Ikiki** the deceased's son and **Salome Gathoni Ikiki** the deceased's daughter, as dependants, separately lodged their objections to the said will on the ground of want of due execution. This brought the total number of objectors to nine (9).

This evidence was placed before Kasango, J. who in her determination of the matter framed 4 issues as follows:

- “1. Whether the will dated 29th January 1993 is valid.**
- 2. Whether the will dated 29th Jan 1993 was executed in accordance with the law.**
- 3. Whether the will dated 29th Jan 1993 was executed by the deceased Onesmus Ikiki**
- 4. Whether the petitioner/executor and the third wife of the testator influenced the making of the will dated 29th January 1993.”**

The learned Judge, after considering the totality of the evidence and the submissions of the parties, rendered the impugned judgment declaring that the will was valid and dismissed the objections, expressing herself as follows:

***“In considering the issues filed in this matter by the parties for consideration I find that issue no. 1 and 2 are related. The response of the court is that the petitioner has proved to this court that the will the subject of this matter is the valid will of the deceased. It has been proved that it was executed in accordance with the law. Section 11 of the Law of Succession Act was well met. On the third issue this court makes a finding that the will was executed by the deceased. This was clearly stated in the evidence of PW 1, 2, and 3. On the fourth issue no evidence was adduced to prove influence by the petitioner or the deceased's third wife on the deceased in making this will.”***

Being aggrieved by these findings, the appellants unsurprisingly lodged two separate appeals being Civil Appeal Nos. 196 of 2009 and 197 of 2009 which were on 2nd February, 2016 consolidated for the reason that they arose out of the same judgment and revolved around the same issues.

The appellants filed a memorandum of appeal complaining that the learned Judge erred in some six respects by: dismissing the appellants' contention that failure by the respondent to call the advocate who drafted the will to testify was fatal to its validity; concluding that the will was made by the deceased despite the signature on the said document not being proven to be his; upholding the validity of the will despite the date of making the will being interfered with; dismissing the evidence of the handwriting expert (**DW1**) who stated that there were no similarities between the known signatures of the deceased and the signatures in the will; concluding that the testator was not influenced in making the will despite the 3rd wife getting the lion's share without reason and; failing to require the production of additional evidence surrounding the drafting and making of the will in view of the advanced age and level of education of the deceased.

All parties filed written submissions and opted to entirely rely on them to dispose of the issues with no need for oral highlighting.

In support of the appeal, learned counsel Mr. Mwenesi for the 1st to 4th appellants in his detailed submissions urged this Court to allow the appeal and; to remit the matter to the High Court for *de novo* hearing and determination of the question of validity of the will for the reason that the evidence of DW1, the handwriting expert, was wrongly dismissed and excluded. In this regard, counsel faulted the learned Judge for not receiving in evidence the sworn testimony of DW1 in so far as it bore upon the issue of validity of the will citing, **sections 48, 68 and 69** of the Evidence Act on opinions as to handwriting. It was counsel's submission regarding the objectors' contention of the amended figure "9" on the date of the will, that the trial court ought to have exercised its powers under **section 70 (b)** of the Law of Succession Act to call for further evidence as to the due execution of the will. He posited that, had the learned Judge taken into consideration the aforementioned provisions as in the case of **In the matter of the Estate of Fransisco Gichohi Wariungi (Deceased)**, Nyeri HC Succession Cause No. 47 of 1984, she would have arrived at a different conclusion on the validity of the will.

Counsel posed a series of questions to this Court which he urged to consider in finding that the appeal ought to succeed as follows: **“Why did Mr. Gaturu have to deduce from the deceased's signature that the deceased could read and write? Why did he not say in cross examination that he saw the deceased write his signature or signatures- since there were two different signatures on the will? Why did neither Mr. Gaturu nor Mr. Gichohi testify to any dating by the deceased? Was the will truly executed in the presence of the witnesses? Did Mr. Gaturu merely deduce from a signature or mark he saw and conclude that it was the testator's? What of the two signatures on the will? Was this the manner in which he signed his documents?”**

Counsel submitted regarding the two disinherited sons, that, both the record and judgment show that they were warned by the learned Judge not to be rude to the counsel cross examining them however, there is no record of these witnesses being rude. Equally, the will suggests that the reason for their disinheritance was because they had cases against their father, yet there was no evidence of any case against the deceased. It was submitted that in arriving at the conclusion that DW2 and DW3 were not truthful and disregarding their testimonies, the learned Judge did not pay heed to their affidavit evidence.

Further, it was submitted that the deceased, his family, his dependants and the objectors were persons all affected by Kikuyu Customary law and that **section 3(2)** of the Judicature Act was in force at the time of trial and at the date of determination, hence the trial court was bound to be guided by customary law, more specifically **section 3(5)** of the Law of Succession Act. The learned Judge having failed to do so given the special circumstances of the case, then the matter should be remitted to the High Court for rehearing.

Counsel contended that in determining the validity of a will as eclectic as the one in question, the court should not only confine itself to **section 11** of the Law of Succession Act but must also take into account the making of the will pursuant to **section 5** which then calls into operation the provisions of Part II and III of the aforementioned Act.

With regard to the possible importunity by the deceased's 3rd widow, it was submitted that in view of the objections raised casting aspersions on that widow, it was important that her evidence be heard for the court to effectually and completely dispose of the matter. Substantial justice was not done by failing to call her to clear the air as she had too great an opportunity to influence the making of the will. In view of the foregoing, it was urged that the appeal be allowed.

Also in support of the appeal was learned counsel **Mr. Ombongi** for the 5th to 8th respondent's. In his terse submissions, he opined that the learned Judge erred in dismissing the appellant's contention that it was paramount for the respondent to call the advocate who drafted the will to testify and shed light on the circumstances upon which the deceased gave instructions to have the will drafted. Such failure should have been the first red flag as the issues regarding the validity of will were extremely contentious. Indeed, even on the face of it the will does not state that it was "Drawn by" the said firm of Muthoga Gaturu & Co. Advocates, which was corroborated by the fact that Mr. Gachuiga Muthoga the then proprietor had conveniently forgotten the name of the legal officer who took instructions and typed the said will; which, in counsel's view, was clearly a dishonest assertion.

Contending that it was brought to the attention of the court that the outcome of the handwriting expert's examination was that the said will was not signed by the deceased, counsel faulted the learned Judge for concluding that the said will was made by the deceased, given the undisputed fact that it did not bear the deceased's signature. The learned Judge also failed to consider the evidence that the deceased was senile and could not hold a decent, fluent conversation as he was ailing from acute diabetes. He charged that a doctor's letter produced in evidence was also not considered. Counsel submitted that the date in the will was altered or interfered with rendering it invalid under **section 11** of the Law of Succession Act. The learned Judge ought to have warned herself that since the deceased had a vast estate, and owing to the reasons indicated in the will as to why his two sons were disinherited did not hold water, it was necessary to interrogate the possibility of malice and fraud in the said will especially because the 3rd wife got the biggest chunk of the estate without any justification.

On other mitigating factors, counsel submitted that it emerged during the proceedings that one of the beneficiaries of the estate was Mr. H.W. Gichohi who, together with the deceased and others, was a partner and director of a company called "Umoja Service Station" yet he was not a family member. That it emerged that he colluded with the deceased's 3rd wife to facilitate that irregularity. It also appeared that the executor of the will was biased as he withdrew the money in the deceased's account and gave the entire amount to the deceased's 3rd wife in disregard of the orders given by the learned Judge that the said amount was to be shared amongst the three wives of the deceased. For these reasons it was urged that the appeal be allowed.

In opposition, learned counsel **Mr. Mugambi** tackled the issue of whether the deceased's signature was proved by inviting the Court to consider the evidence of PW1, PW2 and PW3 who gave sworn testimony that they saw the deceased himself sign the will. He referred to **section 11(c)** and **section 3(1)** of the Law of Succession Act to urge that the most important consideration when executing a will is to ensure that the testator is both physically and mentally present. In the present case the deceased was so fit and he himself appended his signature on the will. The deceased chose his trusted friends such as Mr. Lee Muthoga, Mr. Evans Gaturu and Mr. Ezekiel Wang'ombe Gichohi to witness his will rather than picking strangers. Counsel cited in aid **Re Estate of G.K.K (Deceased)** (2013) eKLR, a persuasive decision.

On whether the date of making the will was altered, counsel refuted the arguments by the appellants that the petitioner and his witnesses did not say who wrote the questionable "9" and implied that the learned Judge ought to have been guided by **section 70(b)** of the Law of Succession Act to call for more evidence. To the contrary, it was counsel's submission that: the date appeared beside the signature of the deceased and the two attesting witnesses witnessed the execution of the will and noted the date as being 23rd January 1993. The learned Judge therefore arrived at the correct conclusion in upholding the validity of the will.

Regarding the handwriting expert's evidence, it was pointed out that the appellants in Civil Appeal No. 196 of 2009 filed an application dated 23rd February 2010 for leave to adduce additional evidence on the ground, *inter alia*, that the trial court did not give favourable consideration to the document examiner's evidence because the report was not produced. Vide a Ruling delivered on 2nd December 2011 the Court correctly pointed out that if indeed the report was available the filing of a supplementary record could place it before Court. Counsels noted however that none has been filed to date.

On the attack of the testator's capacity, it was submitted that **section 5(1)** of the Law of Succession Act embodies the principle of testamentary freedom. The evidence of **PW1**, **PW2** and **PW3** proves that the deceased was *compos mentis* at the time of writing the will and no proof to the contrary was tendered by the appellants. On the demeanor of DW2 and DW3, it was submitted that by dint of **Order 18 Rule 7** of the Civil Procedure Rules the trial Judge has the sole benefit of not only hearing but also observing the witnesses while in the witness box. Citing B.K. Somasekhara's, "**The Principles and Precedents of the Art of Cross Examination.**" Counsel dismissed the appellants' challenge on the findings of fact by the learned Judge based on the demeanor and credibility as devoid of merit.

On the question of importunity by the 3rd wife, counsel relied on **section 109** of the Evidence Act and the case of **Karanja V Karanja** (2002) 2 KLR 22, to submit that the burden of proving that a will was procured by fraud, coercion or importunity was on the person alleging the same. By dint of **section 5** of the Law of Succession Act, nothing stops a testator from freely disposing his property to whomsoever and howsoever he pleases. The correct procedure to raise objections against the deceased's will pertaining to the testamentary freedom would have been to file proceedings for adequate provision under **section 26** of the Act, and so that what the appellants are asking the court to do is to change the very intentions of the deceased which beats the logic of a will. In light of the foregoing it was urged that the appeal be dismissed.

Having carefully studied and considered the rival submissions, the record and the law, we perceive that there are three issues that fall our determination;

- i. Whether the deceased's will was valid;*
- ii. Whether the 3rd widow of the deceased influenced the making of the will; and*
- iii. Whether this matter should be remitted to the High Court for de novo hearing and determination of the question of validity of the*

will.

The duty of this Court as a first appellate court, is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own independent conclusions, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. See: **Selle & Another V. Associated Motor Boat Co. Ltd & Others (1968) EA 123.**

Regarding the contest on the validity of the will of **section 11** Act sets out a trio of requirements for the formal validity of written wills as follows:

**"No written will shall be valid unless—**

**(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;**

**(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;**

**(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.**"

(Our emphasis)

The appellants' submissions contained a frontal attack on the validity of the will. It was claimed that it lacked the statutory requirement of proper execution; that the date of the will was questionable; that the signature was not that of the testator/deceased; that the capacity of the deceased to make the will was in question on account of his semi-literacy, ill health and senility; and that the will was obtained by undue influence of the 3rd wife of the deceased.

The learned Judge in determining the issue of validity of the will was fully cognizant of **section 11** of the Act and she observed as follows:

***"The evidence of PW 1 was that he was in the room when the testator executed the will. PW 2 stated that when he arrived at their firm of advocates between 10.30 and 11 a.m. he was invited to be an attesting witness to the deceased will. PW 3 was collected from his office by the deceased with a request for him to be an attesting witness. They both witnessed the deceased executing the will. Thereafter both of them attested to that execution. All the three petitioner witnesses knew the deceased. PW 2 in evidence said that he had occasion to see the deceased even after the signing of the will at their law firm. He described the deceased as a jolly man. I find that the petitioner well met the burden of proof in this case."***

The trial court examined the evidence of the two attesting witnesses and was satisfied that these witnesses were in the room where the deceased signed the will, they both witnessed the execution of the will by the deceased and thereafter attested to that execution. On the allegations that the signature was not that of the deceased, the trial court did not accept the evidence of DW1, the handwriting expert, stating that the said evidence did not assist it to determine whether or not the signature on the will was that of the deceased. On the allegations of the date that the figure "9" had been amended, the learned Judge found that the evidence before her did not suffice to support the finding that it had been changed. She was of the view that the heavy shading could be attributed to the style of writing of the person who wrote the date on the will. Moreover that argument against the will was also said to be an after- thought. Clearly the learned Judge found these witnesses to be credible and believed their testimony. We cannot see how that was erroneous.

In keeping with our first mandate as an appellate court that proceeds by way of a rehearing, we have examined the impugned will. It has been dated 29th January 1993. It contains the name of the deceased, directly below it is his signature and the date 29/1/93. This placement of the deceased's signature shows that he intended to give effect to the contents of his will. Below the deceased's signature is the attestation clause. The said will has been attested to by H.W. Gichohi and E.T. Gaturu, both of whom individually appended their names, signatures and the date of attestation as 29/1/93. In view of the statutory provisions of **section 11** of the Law of Succession Act, the learned Judge cannot be faulted for her findings on the validity of the will. We adopt the holding in **Karanja & Another V Karanja** (2002) 2 KLR 22 which is of persuasive nature, where Githinji, J. (as he then was ) held as follows:

***"Where the will is regular on the face of it with an attestation clause and signatures of attesting witnesses and the signature of the testator, there is a rebuttable presumption of due execution (Omnia esse riteatta)."***

Having found that the will was valid, it therefore follows that the deceased had the freedom to dispose of all his earthly possessions as he deemed fit. It was within this very exercise of testamentary freedom that the deceased elected to leave out his sons, **John Wagura** and **Joseph Ndungu Ikiki**, and in the same breath, bequeathed the lion's share of his estate to his 3rd wife for reasons that were personal to himself. He was under no obligation to give any reasons for so doing. This is indeed the objective of testamentary freedom. The argument that the estate of the deceased ought to have been subjected to Kikuyu Customary Law and divided equally for the reason that the deceased and his family were subject to and affected by the said customary law as stipulated under **section 3(5)** of the Act is untenable given that the deceased did not die intestate. We agree with Mr. Mugambi's assertion that it would have been more prudent for the disinherited sons to raise objections against the deceased's will by filing proceedings for adequate provision under **section 26** of the Act which instead of attempting to invalidate the will or to subordinate it to the dictates of Kikuyu customary law.

On the assault on the deceased's capacity to make the will, we take cognizance of **section 5** of the Act which provides:

**"5. Persons capable of making wills and freedom of testation**

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

**(2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.**

**(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.**

**(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges."**

(Our emphasis)

From the aforementioned section, the burden of proving that the deceased was not of sound mind was upon the appellants. In their submissions it was alleged that the deceased had died from diabetes, he was old, senile and semi-literate, which factors impaired his judgment and capacity to make a will. It is not in contention that the deceased suffered from diabetes which eventually resulted in his death as is evident from the death certificate. It is also not in contention that the deceased was semi-literate. However, the appellants have failed to prove the nexus between the deceased's ailment, literacy and age and his capacity to make a will. Equally, the appellants have failed to prove the allegations of undue influence or importunity by the 3rd wife in the making of the will as required by **section 109** of the Evidence Act. We accept as correct the position propounded by the respondent that the burden of proving that a will was procured by fraud, coercion or importunity was on the person alleging the same as supported by the cited case of **Karanja & Another V Karanja** (supra) at page 29, whereby it was expressed as follows:

***"The burden of prove (sic) was on the objector. She failed to discharge the burden and the ground of undue influence remains unproved."***

The appellants only alluded to the fact that it was suspicious that the 3rd wife who had only one son received 70% of the estate; that the 3rd wife was in cahoots with Mr. Gichohi to benefit from the deceased's estate; and that the executor of the will was biased as he withdrew the money in the deceased's account and gave the entire amount to the deceased's 3rd wife in disregard of the orders given by the learned Judge that the said amount was to be shared amongst the three wives of the deceased. These to our mind remain pure allegations as only the deceased knew why he would consciously and deliberately extend such largesse to his last and youngest wife. It is not for the courts to negate his command. The cure for the allegations of the executor being biased and in defiance of court orders would have been for the appellants to file contempt proceedings. They did not do so.

Lastly, is this a matter that should be remitted to the High Court for re-hearing? Learned Counsel Mr. Mwenesi in his submissions made heavy weather of the fact that the matter should be remitted to the High Court for the reason that the evidence of DW1, the handwriting expert, was wrongly rejected and excluded; and that the learned Judge did not pay heed to the affidavit evidence of DW2 and DW3 whom she found were not truthful hence disregarded their testimonies, yet there was no record of the said witnesses being rude. Also, the will suggests that the reason for the disinheritance of DW2 and DW3 was because they had cases against their father, yet there was no evidence of such cases presented to the court.

To answer this question we are content to reiterate the position by this Court in the case of **Ngengi Muigai & another v Peter Nyoike Muigai & 4 others**, Civil Appeal No. 13 of 2007, where it was stated:

***"We have considered the two consolidated appeals in the manner of a retrial as we are obligated to do under Rule 29 of the Rules of this Court, in order to draw our own conclusions. In the process, it is expected of us to respect the findings of the trial court, especially so where the findings are based on the credibility of witnesses, for then the trial court is a better judge having seen and heard those witnesses. Where, however, such findings are based on no evidence or on a misapprehension of the evidence or the trial court is shown demonstrably to have acted on wrong principles in reaching the finding, or it appears that the trial judge failed to take account of particular circumstances or probabilities material to an estimate of the evidence or where the trial court's impression, based on the demeanor of material witness, is inconsistent with evidence in the case generally, we shall have no hesitation but to interfere. See Mahira Housing Co. Ltd vs Mama Ngina Kenyatta & Another KLR 2008 and Ephantus Mwangi vs Duncan Mwangi Wambugu (1982-88) 1 KAR."***

With regards to the credibility of DW2 and DW3, the learned Judge of the High Court had the first hand privilege of seeing and hearing these witnesses and taking notes on both their testimonies and their demeanor. This was well within the mandate of the learned Judge by dint of **Order 18 Rule 7** of the Civil Procedure Rules which states:

***"7.Remarks on demeanour of witness [Order 18, rule 7.]***

***The court may record such remarks as it thinks material respecting the demeanour of any witness while under examination."***

In the case of **Andrew Peter Ngirichi & another V Wanje Masha Wanje** Civil Appeal No. 17 of 2015, this Court stated as follows:

***"This is a finding on the demeanor and credibility of a witness by the trial court which this Court cannot interfere with unless it***

*is demonstrated that the finding was not supported by evidence or was otherwise plainly wrong. Taking into account all the foregoing, we are satisfied that the learned judge did not base her decision merely on the demeanor of the witnesses as claimed by the appellants, but on the evidence that was adduced by the two parties."*

It is no small matter for this Court to differ in findings of fact by the learned Judge on the question of demeanor of these two witnesses. Such findings go to the root of the credibility of these witnesses. This is what he learned Judge had this to say about them:

*"The evidence however of the objectors was given by the two sons who the deceased has disinherited. The deceased according to his will seemed to have had difficulties during his life time with those two witnesses. It was noted that DW 2 became evasive on being asked whether he lived with the deceased. DW 3 was rude to the petitioners counsel when he was being cross examined. Perhaps the two were displaying the very character that caused them to be disinherited by the deceased. I had an opportunity to observe the two witnesses DW 2 and 3 and I find the two could not be relied upon nor did their testimony come across as being truthful. They both admitted knowing the existence of the will but proceeded to Nairobi High Court and petitioned for grant of letters of administration intestate for the deceased estate. In so doing they were going on the basis that the deceased had not left a will."*

Without belabouring this point, we are fully satisfied that the learned Judge correctly analysed the totality of the two witnesses' evidence and came to the correct conclusion. There is therefore nothing to warrant interference by this Court with her findings.

Regarding the handwriting expert, DW1, whose evidence is complained to have been wrongly dismissed and excluded, we follow the finding of this Court in the case of Kimatu Mbuvi T/A Kimatu Mbuvi & Bros V. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139, where it was stated:

*"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."*

(Our emphasis)

The weight of expert testimony was aptly summarized by Mativo, J. in the case of Stephen Kinini Wang'ondu Vs. The Ark Limited [2016] eKLR of which we approve as follows;

*"Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.*

*While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.*

*Firstly, expert evidence does not "trump all other evidence". It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.*

*Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.*

*Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.*

*Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones."*

The learned Judge had all these considerations in mind in coming to the conclusion that the evidence of DW1 did not assist the court to determine whether or not the signature appearing on the will was that of the deceased. She expressed herself thus:

*"The evidence of DW 1 did not assist this court to determine whether or not the signature appearing on the will was that of the deceased. The objectors at the hearing raised a point in respect of the date on the will alleging that „9? had been amended. PW 2 in cross examination confirmed that to him No. 9 in the date seemed to be stressed on one side. DW 1 also confirmed that it had heavy shading. That evidence before court does not suffice for this court to find that that date was changed. It could after all be*

*the style of writing of the person who wrote the date on the will. No question was put to the petitioner and his witness as to who appended that signature on the will. It should also be noted that raising of that issue was an afterthought because it was not contained in the objections filed. In my view I find that there is no change in the date in the will. "*

We reiterate that, consistent with aforementioned authorities, the court was not bound to accept the evidence of the expert. The totality of the evidence was considered and properly dismissed. We have already observed that indeed no supplementary record of appeal was filed by the appellants notwithstanding that they had every opportunity to do so. In sum, the plea that the matter be remitted to the High Court fails.

The appeal is devoid of merit and it is accordingly dismissed in its entirety with costs to the respondent.

So ordered.

**Dated and delivered at Nairobi this 10<sup>th</sup> day of May, 2019.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**