



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WAKI, MURGOR & ODEK, J.J.A)

CIVIL APPEAL NO. 25 OF 2017

BETWEEN

HARRISON KARIUKI MAINA.....APPELLANT

AND

ROBINSON GATHII MAINA.....1ST RESPONDENT

EPHANTUS KAUTHA MAINA.....2ND RESPONDENT

WILFRED KAMAU MAINA.....3RD RESPONDENT

HARRISON KARIUKI MAINA.....4TH RESPONDENT

MOSES WANJIGI MAINA.....5TH RESPONDENT

**(An appeal from the judgment of the High Court of Kenya, Family Division, (L. Kimaru, J.) dated
the 9th August, 2016 in P & A CAUSE NO. 362 OF 1993 CONSOLIDATED WITH P & A CAUSE NO. 639 OF 1993)**

JUDGMENT OF THE COURT

The bliss of investing a lifetime for the benefit of loved ones and the woes of succession, once again dovetail in this appeal. The appeal relates to two estates of a hardworking couple who died within three weeks of each other in 1992, but have not rested in peace since. The first is the estate of *Esther Wanjiku Maina (Esther)*

who died on 23rd September 1992; then her husband *Maina Kabutha (Maina)* died on 15th October 1992. They had only one son between them who was already born when they married, but he was accepted by *Maina* as his son. That son is the appellant before us. *Maina* had another wife, *Janet Njeri*, who died in 1972 leaving behind five sons and one daughter who were literally brought up by *Esther*. The sons are the respondents before us.

The contest is between the children of the two respective houses on the manner of distribution of the two estates. When the appellant went to court on 26th February 1993 and filed **Succession Cause No.362 of 1993**, he was simply seeking to inherit six properties registered in his mother's name as he was the only child of his mother. Those properties were as follows:-

- a. LR. No.209/1645, Pangani.
- b. LR. No.Location 14/Gakurwe/811.
- c. LR. No.Location 14/Gakurwe/1269.
- d. LR. No.Location 14/Gakurwe/1265.
- e. Kathereini Adjudication Section Plot No.1079.
- f. Plot No.12 Ongata Rongai Township.

But the respondents had other ideas. They, firstly, objected to the petition as beneficiaries and cross petitioned for a grant of representation since they were step-children of **Esther** and were largely brought up by her. They succeeded in having one of them appointed as a joint administrator with the appellant. When **Maina** died the following month, the appellant filed **Succession Cause No. 639 of 1993** seeking to be appointed as the executor of **Maina's** Will. The Will was made on **29th June 1989** appointing **Esther** and the appellant as the executors and leaving all his money and property to **Esther**. A codicil was subsequently made on **19th February 1990** disinheriting all the respondents whom **Maina** accused of disrespecting him, stealing from him and embarrassing him when he wanted to have a church wedding with **Esther** in December 1989. A further codicil was made on **10th July 1991** disinheriting one of his daughter's in-law who had divorced one of his sons.

The respondents, however, questioned the validity of the Will and the codicils on the basis that **Maina** lacked the requisite mental capacity to make such a Will and codicils at the time they were allegedly made. The objection was heard and determined by **Etyang, J.** who in his Ruling dated on 4th December 2001, found that the formal requirements of making a valid Will and Codicils under **section 11** of the **Law of Succession Act (LSA)** were complied with. However, the learned Judge examined evidence on the mental capacity of **Maina** on the three occasions he made the Will and the codicils, respectively, and held as follows:-

“From the evidence above, I hold that the deceased had, before his death, a medical history of mental disorder both described by Dr. Onyango (DW1) and the Objectors and their witnesses. I hold that the deceased did not have the mental capacity to make a valid Will (Petitioner’s Exhibit No.1) and the codicils (petitioner’s exhibit 2 and 3), as by reason of his mental disorder and unsoundness of mind, he was not able to know what he was doing. I do declare the deceased’s Will dated 29th June, 1989, the 1st codicil dated 14th February, 1990 and the second codicil dated 10th July, 1991 to be invalid, null and void.” Maina was declared to have died intestate for purposes of distribution of his estate under the LSA. There was no challenge by the appellant to that decision. Four administrators were appointed for the estate and the two petitions were consolidated for hearing together.

The respondents basically asserted in their objection to the petitions that **Esther** fraudulently transferred the properties which were in her name during the period of **Maina's** incapacity and the transfers ought to be nullified so that the properties revert to **Maina's** estate. At all events, they contended, after the death of **Esther**, all her property devolved to her husband, **Maina**, and became part of his estate when he in turn died. In addition to the six properties listed above, the respondents added the following other properties which were in the name of **Maina** and sought equal distribution of all the properties amongst all the children:-

- i. LR. No.36/XVII/410 Eastleigh.**
- ii. LR. No.209/2763/37 New Pumwani Nairobi.**
- iii. LR. No.209/2763/38 New Pumwani Nairobi.**
- iv. LR. No. Location 14/Gakurwe/506.**
- v. LR. No. Location 14/Gakurwe/389.**
- vi. LR. No. Igembe/Tigania/1072, 1205, 2005, 1424, 3448, 2723, 3762, 1079, 3646, 3349 and 1581.**
- vii. Monies in the bank in the names of both deceased.**

As they did so, they also disclosed that **Maina** had the following other properties which he had transferred to his children (except two) during his lifetime and there was no intention of disturbing those transfers:-

- 1. Location 15 Gathukeini/1621 transferred to Nancy Wanjiku Kabutha, the widow of Ephantus Kabutha Maina (deceased.)**
- 2. Location 15 Gathukeini/1622 transferred to Robinson Gathii Maina.**
- 3. Location 15 Gathukeini/1623 transferred to Wilfred Kamau Maina.**
- 4. Location 15 Gathukeini/1624 transferred to Susan Wambui Kariuki, the widow of Harrison Kariuki Maina (deceased).**
- 5. Ngong/Ngong/4672 transferred to Harrison Kariuki Maina.**
- 6. LR.No.CIS-Mara/Sakutiek/353 transferred to Harrison Kariuki Maina.**
- 7. LR.No.CIS-Mara/Sakutiek/363 transferred to Harrison Kariuki Maina.**
- 8. LR.No.CIS-Mara/Sakutiek/154 transferred to Harrison Kariuki Maina.**
- 9. Ongata Rongai Plot No.605 (in the name of Harrison Maina Kariuki).**

10. Ongata Rongai Plot No.605B sold by Harrison Maina Kariuki.

After several false starts and other skirmishes, the consolidated petitions fell before **Luka Kimaru, J.** for hearing and disposal on **28th January 2013**. He heard the appellant and one witness for the respondents who were cross-examined

at length on the documents they had filed in support of their respective cases. Upon reviewing the evidence and considering the submissions on record, the learned Judge declared, firstly, that the transfers made by **Maina** to his children during his lifetime would be considered as gifts *inter vivos* and would not be redistributed. Secondly, he held that four of the properties registered in the name of **Esther**, that is: **LR. No. Location 14/Gakurwe/811, LR. No. Location 14/Gakurwe/1265, Kathareini Adjudication Section Plot No.1079** and **Plot No.12 Ongata Rongai Township**, as well as any property that was transferred to **Esther** prior to 1989, shall be inherited by the appellant solely. Thirdly, he took away two of the properties in the name of **Esther** - **LR. No.209/1645, Pangani** and **LR. No. Location 14/Gakurwe/1269** and lumped them together with the other properties above in the name of **Maina**, as well as **Plot No.605, Ongata Rongai**, which was unregistered, *'to be inherited by all the seven (7) dependants jointly and in equal shares'*.

The two properties above were taken away for the reason that *'they were transferred after 9th June 1989 and were so transferred fraudulently because Maina Kabutha (deceased) lacked the requisite mental capacity to execute such transfers'*. The judge latched on the decision of **Etyang, J.** (supra) and reasoned as follows:

"From the evidence adduced before this court, it was clear that the half share in the property known as LR.No.209/1645 was transferred by Maina Kabutha (deceased) to his wife Esther Wanjiku Maina (deceased) on 9th June 1989. Now, if the court held that at the time the deceased is alleged to have written the impeached Will dated 29th June 1989 he lacked mental capacity to do so, what about the transfer that he is alleged to have effected on 9th June 1989? Applying the same reasoning, if Maina Kabutha (deceased) lacked mental capacity to write a Will, then he lacked the requisite mental capacity to transfer the particular property. This also applies to any transfer of property which may have been effected after the said 9th June 1989. Therefore this court holds that the transfers of the properties known as LR. Nos. Location 14/Gakurwe/1265, Location 14/Gakurwe/1269, Plot No.1079 Kitharene Adjudication Section and Plot No.12 Ongata Rongai were fraudulently effected because Maina Kabutha (deceased) did not have the requisite mental capacity to so transfer the said properties. This court therefore holds that the said properties belonged to Maina Kabutha (deceased) and are therefore available for distribution to the dependants of his estate."

That holding, as far as it includes **LR. Nos. Location 14/Gakurwe/1265, Location 14/Gakurwe/1269, Plot No.1079 Kitharene Adjudication Section** and **Plot No.12 Ongata Rongai**, is clearly contradictory to the finding and declaration made earlier that the same properties be solely inherited by the appellant.

The appeal before us is predicated on five grounds, one of which was abandoned. The other four were urged as two grounds in written submissions which were orally highlighted by learned counsel for the appellant **Mr. Stanley King'ara**. Grounds 2, 3 and 4 which were urged as one, relate to **LR. No.209/1645, Pangani** and the finding that half share of it was fraudulently transferred to **Esther** on **9th June 1989** made the entire property be redistributed under the estate of **Maina**. Counsel drew our attention to the indenture in respect of the property which shows that the property was held in common in equal shares by **Esther** and **Maina** after they purchased it on **5th March 1971**. It is only the half share of **Maina** that was transferred on **9th June 1989**. In his submission, therefore, the trial Judge erred in taking away the rights of **Esther** to half share of the property without assigning any reason for such a drastic action.

Counsel further submitted that there was nothing wrong with the transfer by **Maina** of his half share of the property to **Esther** on **9th June 1989** since it was not a gift as she paid for it. He faulted the trial Judge for applying the decision of **Etyang, J.** to the transaction when there was no reason to do so. Firstly, because **Etyang, J.** was not considering any transactions that had taken place before or after the dates of the impugned Will and codicils; and secondly, because the issue before **Etyang, J.** was only the validity of the Will and two codicils. There was no evidence that **Maina** was incapacitated outside the three dates that were considered by **Etyang, J.** and there was no evidence of fraud by **Esther**. In counsel's view, therefore, the finding of fraud was beyond **Etyang, J.'s** ruling and was speculative at best. In sum, he concluded, once the property was transferred on **9th August 1989**, it ceased to be the free property of **Maina** and was not available for distribution under his estate.

Turning to the other properties which **Kimaru, J.** gave to the appellant with one hand and took away with the other, that is: **LR. Nos. Location 14/Gakurwe/1265; Location 14/Gakurwe/1269; Plot No.1079 Kitharene Adjudication Section; and Plot No.12 Ongata Rongai**, counsel drew our attention to the green card on **Location 14/Gakurwe/1265** which confirmed that the original owner of the plot was one **Mwangi Gachao** since **7th February 1992** but he sold and transferred to **Esther** on **9th July 1993**. As such the property could not have been transferred from **Maina**, fraudulently or at all.

As regards **Location 14/Gakurwe/1269**, the green card indicated that it was a subdivision of the original parcel **No. 767** which was registered in the name of **Esther** and the subdivision was registered on **24th October 1985**, four (4) years before the arbitrary cut-off date of **9th August 1989**. It was never in the name of **Maina**.

On **Plot No.1079 Kitharene Adjudication Section**, counsel pointed out that the records held by the Ministry of Lands & Settlement, which were in evidence, showed that the plot was in **Esther's** name and was never transferred from **Maina**, whether through fraud or at all.

On **Plot No.12 Ongata Rongai**, it was registered in **Esther's** name on **17th March 1986** which was long before the arbitrary cut-off date. There was no evidence of fraud relating to any transfer.

In sum, counsel concluded, the finding on these properties was erroneous in fact and in law, and ought to be reversed.

The last ground of appeal related to the apparent contradiction in the findings made by the trial Judge, and it is the prayer of counsel that the findings be reversed and instead a declaration be made by this Court that all the properties in the name of **Esther** at the time of her death

belonged to her and were not available for distribution in the estate of **Maina**. Counsel further urged us to reverse the order lumping the two properties: **LR. No.209/1645 Pangani** and **Location 14/Gakurwe/1269**, as part of the estate of **Maina**.

In response to those submissions, learned counsel for the respondents, **Dr. Khaminwa**, in written submissions which were orally highlighted, took the view that the trial Judge was right to adopt and apply the findings made by **Etyang, J.** that **Maina** lacked the capacity to transfer any property. In his view, **Maina** was not a 'person competent to contract and entitled to transfer property' as envisaged under Section 7 of the *Indian Transfer of Property Act 1882*. As regards **LR. No.209/1645, Pangani**, counsel submitted that it was held in common and therefore after the death of **Esther**, her share devolved to **Maina** under section 35(1)(b) of LSA which provides that "the surviving.. spouse shall be entitled to a life interest in the whole residue of the net intestate estate." He relied on the High Court decision in the **Estate of Gathima Chege HCSC No. 1995 of 1996(UR)** for the proposition that where there is no 'clear and distinct' separation of a title held in common, the destination of the property is with the children.

Turning to the evidence of fraud in respect of all properties transferred to **Esther** after 1989, counsel submitted that **Esther** was married to **Maina** for more than 32 years and so she knew all along that he had mental health problems. As such, preying on **Maina's** vulnerability would be evidence of fraud, or at least bad faith. **Esther** should not therefore benefit from her mischief and deprive the children of their inheritance. He cited the case of **Julius Wainaina Mwathi vs.**

Beth Mbene Mwathi & another [1996] eKLR where this Court nullified a Will on the basis that there were 'circumstances that excited suspicion' around it. Similarly, according to counsel, there was some 'air of suspicion' surrounding the time **Maina** was making his Will and the time the properties were registered in the name of **Esther**. There was nothing wrong, therefore, in **Kimaru, J.** applying the findings of **Etyang, J.** and making the findings he did.

Finally, counsel submitted that the trial Judge had the discretion to do real and substantive justice to the parties and there was no reason to disturb the exercise of that discretion. According to him, the trial Judge weighed the evidence on record fairly and he cannot be faulted. The Indian cases of **K.K. Velusamy v. N. Palanisamy (2011) 11 SCC**, and **Ramji Dayawala & Sons (P0 Ltd v. Invest Import 1981 AIR 2085)** were relied on for those submissions.

In closing remarks, counsel observed that the trial court had decreed the properties **LR. Nos. Location 14/Gakurwe/1265; Location 14/Gakurwe/1269; Plot No.1079 Kitharene Adjudication Section; and Plot No.12 Ongata Rongai**, in favour of the appellant and it was a waste of time to re-agitate an appeal in respect of those properties.

In a quick rejoinder, **Mr. Kingara** submitted that any discretion exercisable by a court of law must be within the law and not arbitrary.

We have considered the appeal fully in the manner of a retrial in order to reach our own conclusions in the matter. See **Rule 29(1) (a)** of the **Court of Appeal Rules**. We are aware that as the first appellate Court, we must accord due respect to, and not lightly differ from, the findings of the trial court which had the added advantage of seeing and hearing the witnesses. Nevertheless, this Court has stated time and again that it will interfere with such findings if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching them. See **Jabane vs Olenja [1986] KLR 661**. In the case of **Mary Njoki vs. John Kinyanjui Muthuru & Others 1985 eKLR, Madan, JA** adopted **Watt vs. Thomas [1947] AC 484** where the court stated:-

"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to decide."

As regards the exercise of discretion, we cannot interfere simply on the ground that if we were sitting at first instance, we might have given different weight to that given by the judge to the various factors in the case. The parameters for interference were admirably restated by **Madan, JA** (as he then was) in **United India Insurance Co. Ltd & 2 Others vs. East African Underwriters (Kenya) Ltd [1985] eKLR** thus:-

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong".

In our view, the major issue that falls for our consideration is whether **Kimaru, J.** properly adopted and applied the ruling of **Etyang, J.** to matters that were outside the Will and Codicils made by **Maina**. We shall come to that issue shortly. The secondary issue that we need not belabour is the contradictory findings made by **Kimaru, J.** that some of the properties be solely inherited by the appellant while at the same time he lumped the same properties with the estate of **Maina** for re-distribution to all the children. It is really a non-issue because learned counsel for the respondents concedes that those properties were indeed decreed in favour of the appellant and there was no cross appeal. In his view, and he was right, it was unnecessary to waste time urging the appeal in respect of those properties.

For clarity, the finding of the trial Judge in respect of those properties was as follows:

"The following properties registered in the name of Esther Wanjiku Maina (deceased) shall be inherited by Harrison Kariuki Maina (Petitioner):

I. LR. No. Location 14/Gakurwe/1265

II. LR. No. Location 14/Gakurwe/811

III. Plot No.12 Ongata Rongai

IV. Plot No.1079 Kitharene Adjudication Section Tigania- Igembe District."

The learned Judge also stated categorically in his Judgment that:

"Any property that was transferred to Esther Wanjiku Maina (deceased) prior to 1989 shall be inherited by the Petitioner, Harrison Kariuki Maina."

We have ourselves considered the evidence on record in respect of those properties, as well as **Location 14/Gakurwe/1269**, and found that they were indeed registered in the name of **Esther** on diverse dates and that in none of them, was there any issue of transfer from **Maina** to **Esther**. The finding of fraud in respect of transfers between **Maina** and **Esther** does not therefore arise. It is our finding that the trial court was right to declare that those properties be solely inherited by the appellant. There was no basis for including them in the hotchpotch, as it were.

We turn now to the main issue, which boils down to the property **LR. No.209/1645, Pangani** which was included in the hotchpotch despite being registered in the name of **Esther**. As correctly pointed out by counsel for the appellant, that holding says nothing about the interest of **Esther** to half the property which she had held in her own right since 1971. Lumping it together with the half share transferred by **Maina** was certainly erroneous and we so find.

As regards the half share transferred by **Maina** on **9th August 1989**, the only reason assigned for nullifying it was the mental incapacity of **Maina**. But there was no evidence on record to prove that **Maina** was mentally incapacitated on the date he transferred his share. The trial court instead extrapolated the finding of **Etyang, J.** on **Maina's** mental capacity to make the Will and the two Codicils. It is important to note that there was only one issue before **Etyang, J.** and he stated it thus:-

"The issue now is whether the deceased was mentally sound on the three occasions when he made the Will on 29th June 1989, the first codicil on 14th February 1990, and the second codicil on 10th July 1991."

And he gave the answer to that issue as follows:

"..by reason of his mental disorder and unsoundness of mind, he was not able to know what he was doing. I do declare the deceased's Will dated 29th June, 1989, the 1st codicil dated 14th

February, 1990 and the second codicil dated 10th July, 1991 to be invalid, null and void."

Was the trial court at liberty to extrapolate that finding and apply it to other dates, prior or post, and to unrelated transactions? We do not think so.

Firstly, because parties are bound by their pleadings and there was no pleading or evidence led on the mental capacity of **Maina** when he entered into the transaction of transfer of his half share in **LR. No.209/1645, Pangani**. There was no pleading of fraud and the particulars thereof either. Needless to say, a decision made on an unpleaded issue or an issue that is not urged by the parties and left to the court for decision, is an aberration. As this Court has said before in the case of **Maithene Malindi Enterprises Limited vs. Kaniki Karisa Kaniki & 2 others**

[2018] eKLR:

"As a general rule a court ought not to make pronouncement on issues not raised in the pleadings filed by parties. This position was restated by this Court in Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR:-

"As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well- intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score."

Nevertheless, a court may base a decision on an unpleaded issue where it appears at the trial that the issue has been left to the court for decision. In the case of **Odd Jobs vs. Mubia** [1970] EA 476. Law,

J.A (as he then was), at page 478 paragraph 9-11 had this to say:-

"On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this Court is not as strict as appears to be that of Courts in India. In East Africa the position is that a Court may allow evidence to be called and may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the unpleaded issue has in fact been left to the court for decision..."

The trial court made findings on fraud when it was neither pleaded nor particularized as by law required. It made a decision on the mental capacity of *Maina* on dates other than the dates of the Will and two codicils, when there was no pleading or evidence led before it, relating to that issue. On that ground we must interfere and set aside the decision.

Secondly, there is always a rebuttable presumption that a person is of sound mind when he executes a Will or enters into a contract. Barring any issues of illegality, public policy and other vitiating elements, freedom of contract is a hallowed principle. In the case of *Fidelity Commercial Bank Limited vs. Kenya Grange Vehicle Industries Limited* [2017] eKLR this Court stated as follows:-

"It is elementary learning that for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration. The traditional view was expressed quite persuasively in the decision of Lord Craighead in the House of Lords' case of *Chartbrook Limited v Persimmon Homes Limited* (2009) UKHL 38 as follows;

"...the very purpose of a formal contract is to put an end to the disputes which would invariably arise if the matter were left upon what the parties said or wrote to each other during the period of their negotiations. It is the formal contract that records the bargain, however different it may be from what they may have stipulated for previously".

The principle undergirding this rule flows from the notion of freedom of contract that is central to the law of contract; that it would be perverse and directly inconsistent with the intention of the parties after reaching a bargain and choosing to record that bargain in writing, for any court to resort to the prior history of exchanges and negotiations in order to resolve a dispute arising from the interpretation of the terms of the written bargain; and that the parties by consensus have themselves chosen not to give their prior negotiations contractual force and instead they have reached an agreement, and documented it. [Emphasis added].

So too, the freedom to dispose of one's property through a Will. In the case of *Ngengi Muigai & Another vs. Peter Nyoike Muigai & 4 others* [2018] eKLR this Court referred to **Section 5 (1)** of LSA which underscores testamentary freedom by declaring thus:

"...any person may dispose of all or any of his property in a manner he deems fit and a testator may change his mind at any time before his death as to how he intends that his property should be disposed of."

The Court further observed that the freedom is not absolute since, amongst other things, the presumption of sanity may be challenged and the Will may be declared void if the making of it is caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been adduced by mistake. See **sections 5 (3), (4)** and 7.

In the case of *In Re Estate of Gatuthu Njuguna (Deceased)* [1998] eKLR, **Githinji, J.** (as he then was) construed the issue of capacity and stated thus:

"As regards the testators mental and physical capacity to make the will, the law presumes that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind, in this case, the applicant (S.5(3) and 5(4) of the L.S.A.). However paras 903 and 904 of Volume 17 of Halsbury's Laws of England show that, where any dispute or doubt of sanity exists, the person propounding a will must establish and prove affirmatively the testators capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of testators capacity is one of fact which can be proved by medical evidence, oral evidence of the witnesses who knew testator well or by circumstantial evidence and that the question of capacity is one of degree, the testators mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition."

So that, even where a testator or contracting party has a history of mental illness, evidence is necessary to show that the contract was or was not entered into, or a Will made, during a lucid interval. As explained in **William's Law Relating to Wills**, 4th Edition by **C. H. Sherin & Barlow**:-

"Lucid Interval – when a testator is shown to have been insane prior to the date of the will, it must be shown that the will was made during a lucid interval. Even a person of unsound mind so found could make a will during a lucid interval. To establish the existence of a lucid interval it is not necessary to prove complete mental recovery. It is sufficient if it is shown that the testator understands that he is making a testamentary disposition and what is required of him in making the disposition and that any delusion from which he is still suffering does not affect such disposition".

No evidence was led on that aspect of the matter and, therefore, any decision made on it would be speculative at best. This is exemplified by the finding by the trial court that all the properties distributed by *Maina* to his children in his lifetime were properly so distributed. It is apparent that the issue of mental incapacity did not come into play in respect of those properties.

Having so found on the main issue, it follows that the decision of the trial court in respect of the property **LR. No.209/1645, Pangani** is also for setting aside.

Final orders.

- i. The appeal is allowed.**

ii. The order of the trial court that the following properties be solely inherited by the appellant is hereby upheld:

- LR. No. Location 14/Gakurwe/1265.
- *LR. No. Location 14/Gakurwe/811.*
- *Plot No.12 Ongata Rongai.*
- *Plot No.1079 Kitharene Adjudication Section Tigania-Igembe District.*
- *Any property that was transferred to Esther Wanjiku Maina.*

iii. The order of the trial court that the two properties *LR. No.209/1645, Pangani* and *Location 14/Gakurwe/1269* be included in the list of properties under the estate of Maina Kabutha is hereby set aside. We declare that the properties shall be solely inherited by the appellant.

iv. Save for the properties transferred to the children as gifts *inter vivos* and the properties now declared as devolving to the appellant, the rest of the estate of Maina Kabutha shall be distributed as decided by the trial court.

v. As this is a family matter, each party shall bear its own costs of the appeal.

Orders accordingly.

Dated. And delivered at Nairobi this 26th day of August, 2019

P.N. WAKI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

J. OTIENO ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR