



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & M'INOTI, J.J.A)

CIVIL APPEAL NO. 13 OF 2007

IN THE MATTER OF THE ESTATE OF JAMES NGENGI MUIGAI (DECEASED)

BETWEEN

NGENGI MUIGAI ..... 1<sup>ST</sup> EXECUTOR/APPELLANT

JOSEPHAT MATHIA ..... 2<sup>ND</sup> EXECUTOR/APPELLANT

AND

PETER NYOIKE MUIGAI ..... 1<sup>ST</sup> OBJECTOR/RESPONDENT

ELIZABETH MUMBI MUIGAI ..... 2<sup>ND</sup> OBJECTOR/RESPONDENT

EUNICE WANJIKU MUTURI ..... 3<sup>RD</sup> OBJECTOR/RESPONDENT

BEATRICE WAMBUI MUTURI ..... 4<sup>TH</sup> OBJECTOR/RESPONDENT

PETER MUGO MUIGAI ..... 5<sup>TH</sup> OBJECTOR/RESPONDENT

*Consolidated with*

CIVIL APPEAL NO. 56 OF 2007

BETWEEN

EUNICE WANJIKU MUTURI ..... 1<sup>ST</sup> APPELLANT/OBJECTOR

BEATRICE WAMBUI MUTURI ..... 2<sup>ND</sup> APPELLANT/OBJECTOR

AND

NGENGI MUIGAI ..... 1<sup>ST</sup> EXECUTOR/RESPONDENT

JOSEPHAT MATHIA ..... 2<sup>ND</sup> EXECUTOR/RESPONDENT

*(An appeal from part of the Ruling and Orders of the High Court of Kenya at Nairobi (Koome, J) dated 21<sup>st</sup> April, 2005 in Succession Cause No. 523 of 1996)*

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JUDGMENT OF THE COURT

1. This is yet another high profile estate of a deceased Kenyan which has defied closure on account of incessant squabbles between the beneficiaries. James Ngengi Muigai (**the deceased**) died of cardiac arrest at the age of 92 years on 26<sup>th</sup> July, 1995. That is 23 years ago! He left behind a former wife, Elizabeth Mumbi, (married in 1933) with whom he had four children: Daniel Ngengi (born in 1932), Eunice Wanjiku Muturi (1934) (**Eunice**), Beatrice Wambui Thumbi (1936) (**Beatrice**) and Margaret Wanjiru (1940). But they parted ways in 1942 and Mumbi went back to her parents' home where she had two more children: Peter Mugo (**Mugo**) (1943) and Peter Nyoike (**Nyoike**) (1948). Their formal divorce was finalised in 1975 when the decree absolute was issued. The deceased was also survived by his second wife Minnie Ngina, married under Kikuyu customs in 1939 but formalised in church in 1989. They had eight children: Beth Wambui (1939), Pauline Njeri (1942), Ngengi Muigai (1944), Josephat Mathia (1949), Samuel Kungu (1951), Andrew Kibathi (1953), Jane Wangui (1956), and Catherine Wanjiru (1958).

2. Upon the deceased's death, the former wife, Mumbi, and her daughter, Eunice petitioned for grant of letters of administration of the estate on 18<sup>th</sup> March, 1996, contending that he had died intestate. The petition was supported by the other children of Mumbi, two of whom later withdrew. Apparently, however, the deceased had left a written Will appointing the eldest son of the second wife, Ngengi Muigai (**Ngengi**), and Josephat Mathia (**Mathia**) as the executors of the Will. They petitioned for grant of probate on 16<sup>th</sup> May, 1996 and in the absence of any objection, it was issued on 16<sup>th</sup> December, 1997. They sought confirmation of the grant in November 1998 but Mumbi and her children filed an objection in January 1999. They also sought revocation of the grant of probate, asserting that the purported Will was not genuine.

3. By consent of the parties the grant was set aside and it was agreed that the issue of the validity of the Will would be determined by *viva voce* evidence. Somehow, in the course of determining that issue a host of other issues including the actual beneficiaries of the deceased, the identity of the properties left behind, and provision for dependants cropped up. The trial court, **Koome, J.** (as she then was) heard and analysed the evidence of seventeen witnesses who testified on both sides, before identifying the following issues for determination:

*(i) Whether the deceased was possessed with the mental and physical ability or capacity to write the Will on 28<sup>th</sup> April 1994.*

*(ii) Whether the Will was attested to according to the law.*

*(iii) Whether the Will was a forgery or whether the testator was subjected to undue influence.*

*(iv) Whether the Will failed to provide for the deceased's dependants and if so, whether adequate provision for dependants should be made.*

*(v) Whether Elizabeth Mumbi, Peter Mugo and Peter Nyoike who were not mentioned in the deceased's Will are dependants of the deceased, and if so, whether the court should make reasonable provision for them.*

4. The trial court was persuaded in the end, in a judgment delivered on 21<sup>st</sup> day of April, 2005, that the deceased had the mental and physical capacity to make a valid Will and did in fact make one without coercion or undue influence; that the Will was attested to in accordance with the law; that the Will was not a forgery; that Elizabeth Mumbi was a former wife and therefore a proper beneficiary; that Mugo was born in circumstances covered by **section 118** of the **Evidence Act**, in "*Ventre sa mere*" and would therefore be a dependant; and that Nyoike openly used the name of the deceased as his father and would pass as a dependant under Kikuyu customs and **section 29** of the Law of Succession Act.

5. On the basis of those findings, the trial court proceeded to make what it considered a reasonable provision for the dependants left out in the Will and made the following final orders:

*a) The grant of probate of the written Will of the deceased be and is hereby granted to the petitioners and named executors [Ngengi Muigai & Josephat Mathia] in the deceased's Will of 28<sup>th</sup> April 1994.*

*b) The petitioners do make reasonable provision for Elizabeth Mumbi, Peter Mugo and Peter Nyoike by vesting or transmitting properties known as:*

*i) House in Runda Estate LR No. 209/8229;*

*ii) 10 acres of land at Ichaweri Farm in Gatundu LR No. 7785/18.*

*The properties to be held by Elizabeth Mumbi for life and in trust of Peter Mugo and Peter Nyoike in equal shares."*

6. Those are the findings and orders that aggrieved Ngengi and Mathia when they filed **Civil Appeal No. 13 of 2017** on 7<sup>th</sup> February, 2007 blaming the trial court for disregarding evidence and erroneously finding that Mugo and Nyoike were dependants of the deceased and were therefore entitled to the deceased's Runda house and 10 acres in Ichaweri. They sought reversal of that part of the judgment and dismissal of the claims of Mugo and Nyoike. They enjoined Elizabeth Mumbi, Eunice, Beatrice, Mugo and Nyoike as respondents in the appeal, as they had all objected to the grant of probate.

7. Two daughters of Mumbi - **Eunice** and **Beatrice** - were also aggrieved by that part of the judgment that upheld the validity of the Will asserting in their **Civil Appeal No. 56 of 2007**, that there were numerous vitiating factors rendering the Will invalid. They sought the setting aside of the finding on the validity of the deceased's Will and substitution therefor an order declaring the Will invalid.

8. Both appeals were, by consent of the parties made on 21<sup>st</sup> April, 2010, consolidated and heard together under the lead file **CA 13 of 2007** where Ngengi and Mathia are **the appellants** and will henceforth be referred to as such. During the pendency of the appeals, Elizabeth

Mumbi, Eunice and Mugo died. The record shows that there was no formal substitution of Mumbi and therefore the appeal against her abated; that the estate of Mugo was substituted by his legal representative, Mary Wairimu Mugo, who together with two other administrators of the estate, have signed a settlement negotiated between them and the appellants on a 'without prejudice' basis; and that Eunice had lost interest in the appeal after a settlement of Sh. 1.5 million was made to her in accordance with the deceased's Will, before she died and was therefore not substituted.

9. Before us, the representation of the parties by learned counsel was as follows:

- a) The appellants by Mr. Chege Kirundi and Joseph Ndirangu.
- b) Peter Nyoike by Mr. C. N. Njenga.
- c) Beatrice Wambui Thumbi by Mr. Chacha Odera, Albert Kamunde and Ms. Ann Kadima.
- d) Mary Wairimu Mugo by A. G. N. Kamau and Miss Nyabuto.

It was agreed that the appeals be disposed of by way of written submissions and oral highlights, and so they were. Beatrice, Nyoike, and Mary Mugo are the respondents.

10. In their written and oral submissions, the appellants contend that the evidence relied on by the trial court to make a finding that Mugo and Nyoike were the children of the deceased was scanty, unbelievable and fell short of the required standard. Both were born after their mother, Mumbi, and the deceased had physically separated. It was contended that the deceased as a well respected member of society, cultured in Kikuyu customs, had no reasons to segregate Mugo and Nyoike if indeed they were his children. Counsel referred to the affidavit evidence on record sworn by the deceased on 18<sup>th</sup> December, 1973 in support of his divorce petition against Mumbi, swearing that he was not the biological father of Mugo and Nyoike. Counsel also referred to the evidence of Ngengi (PW4) to the effect that all the deceased's children, except Mugo and Nyoike, grew up together and were supported by the deceased. Support for that evidence, according to counsel, was the admission by Mugo and Nyoike in their evidence that they were brought up by their mother; that the deceased never participated in their circumcision ceremonies as custom would require; and that the deceased never supported them financially or otherwise.

11. Responding to those submissions, Mr. Njenga for Nyoike, pointed out that the affidavit of the deceased which was relied on was controverted by the affidavit of Mumbi sworn on 7<sup>th</sup> March, 1974 in the divorce petition asserting that the deceased was the biological father of Mugo and Nyoike. According to counsel, averments were not considered or any finding made in the divorce proceedings on the paternity of the two children and reliance cannot therefore be made on mere pleadings. Counsel cited and relied on **section 118** of the **Evidence Act** which, he submitted, provides conclusive proof of legitimacy of a child born during the subsistence of a valid marriage. In this matter, he pointed out, Mumbi was married on 28<sup>th</sup> August, 1933 and the decree dissolving the marriage was issued on 11<sup>th</sup> July, 1975. According to Mumbi, the deceased continued to meet and support her even after their separation and that is how Nyoike was born on 6<sup>th</sup> January, 1948, within the subsistence of the marriage. No evidence was adduced to prove that she cohabited with any other man. Furthermore, observed counsel, there was consistent evidence of birth certificates of both children bearing the names of the deceased without challenge; Nyoike's baptismal card bearing the deceased's name; Nyoike's sworn evidence that he was close to and met the deceased severally before migrating to live in the United States permanently; and the evidence of his sisters Eunice, Beatrice and Margaret that the deceased treated Nyoike as his son. Counsel dismissed the sole evidence of Ngengi as '*spurious, selfish and frivolous*'.

12. Learned counsel for Beatrice, M/s Chacha Odera, Albert Kamunde and Ann Kadima did not make submissions on this aspect of the appeal, while M/s A. G. N. Kamau and Nyabuto for Mary Wairimu Mugo emphasized that the physical separation of the deceased and Mumbi was in June 1942 and Mugo was born eight months later on 10<sup>th</sup> February, 1943. That was "*En Ventre Sa Mere*" and therefore a legitimate assertion of legitimacy. Counsel also emphasized that there was a presumption of legitimacy for Nyoike who was born during the subsistence of the marriage as the deceased and Mumbi continued to meet. The presumption had not been rebutted by proof that there was no possibility of access to each other before the marriage was formally dissolved. Several cases were cited: ***Preston-Jones vs Preston Jones [1951] 1 All ER 124***, for the proposition that the court is not entitled to presume that a child born 360 days after the last *coitus* between husband and wife was not the child of the marriage; ***Banbury Peerage case (1812) 57 ER 64***, for the principle that sexual intercourse is presumed to have taken place between husband and wife and a child could have been conceived, until the presumption is rebutted to the satisfaction of the court; and ***Njenga vs Njenga [1985] eKLR*** for the nature of evidence required to rebut conclusive legitimacy under **section 118** of the **Evidence Act** which '*should be strong, clear and conclusive*'.

13. Adverting to the appeal relating to the validity of the Will, leading counsel for Beatrice, Mr. Chacha Odera broke down the 11 grounds of appeal into three thematic areas, namely:

- (a) whether the deceased had the capacity to make the disputed Will.**
- (b) whether the Will dated 28<sup>th</sup> April, 1994 met the statutory threshold of a valid Will.**
- (c) whether the preparation and execution of the Will was procured by undue influence.**

14. It was argued on the first limb that evidence was adduced from four witnesses that the deceased was suffering from such serious physical and mental infirmity that he was incapable of comprehending what he was doing. The witnesses were Eunice (DW3), Beatrice (DW4), Isaac Konyanya Ngugi (DW8) (**Ngugi**), and Dr. David Morton Silverstein (DW 11) (**Dr. Silverstein**). Those witnesses, according to counsel, had discharged the burden imposed upon the person asserting mental infirmity to prove so on a balance of probability, under **section 5** of the **Law of Succession Act (LSA)**, which presumes the sanity of a testator. The cases of ***Banks vs Goodfellow (1870) LR. 5 O. B. 549*** and ***Vaghella vs Vaghella (1999) 2 EA 351*** were cited for the essentials of testamentary capacity while the cases of the ***Estate of Murimi***

***Kennedy Njogu - Deceased [2016] eKLR, Julius Wainaina Mwathi vs Beth Mbene Mwathi & Another [1996] eKLR and Halsbury's Laws of England Vol. 4 Paras. 903 and 904*** were cited to illustrate capacity in testamentary dispositions.

15. On the second limb, that is, statutory threshold, counsel referred to **section 11** of LSA and **Halsbury's Laws of England 3<sup>rd</sup> Edn. Vol. 39 Para. 22**, which set out the requirements of a valid Will including signature and attestation and juxtaposed them with the evidence on record from the advocate who drew up the Will, Mr Mohanlal Parbary (PW1) (**Parbary**) and who, together with Professor Walter Gitau (PW2) (**Prof. Gitau**) attested the signature of the deceased. Counsel submitted that the evidence was incoherent and inconsistent and came nowhere near compliance with **section 11**.

16. Thirdly, it was submitted, the Will was procured by undue influence. That is because of the uncontroverted evidence that the deceased lived in the house of Ngengi due to his age and illness. It is also not contested that Ngengi sought for and instructed the lawyer who drew up the Will and also called the attesting witnesses. In addition, he was a beneficiary of the Will. In counsel's view, the Will was pre-written by Ngengi and was not the last Will of the deceased, and according to him, the preparation, signing and attestation of the Will was not above board. He called for its invalidation.

17. Taking the cue from Beatrice, Nyoike through his counsel Mr. Njenga, submitted that there was no basis for the finding made by the trial court that the Will was properly attested. In his view of the evidence on record, Prof. Gitau never saw the deceased sign the Will, did not ask the deceased to confirm his signature before attesting it, and attested the document before the deceased signed it. **Section 11** was thus not complied with. Counsel emphasized the undue influence was exerted by Ngengi, the biggest beneficiary in the Will, and submitted that the purported Will was either fraudulent or procured by undue influence and therefore invalid.

18. As for the capacity of the deceased to make the Will, it was submitted that the evidence of Prof. Gitau which was relied on to support the deceased's *compos mentis* was discredited evidence. It could not displace the expert opinion of Dr. Silverstein who had attended the deceased for over ten years since 1982 and who had noted serious deterioration of his health shortly before the disputed Will was signed. Although the doctor did not use the word '*dementia*', submitted counsel, he confirmed that he was '*senile*' which was the same state of health. He had no mental capacity. The ***Vaghella case (supra)*** and the ***Mwathi case (supra)*** were relied on.

19. Ms. Nyabuto for Mugo, did not make any written submissions on the issue of validity of the Will, but orally supported Mr. Njenga.

20. In response to the issue of validity, the appellant's counsel submitted that the objections taken by the respondents were not only ill informed but unsupported by the law. He referred to the provisions of **section 11**, LSA on attestation, and asserted that all the requirements therein were complied with. The deceased acknowledged his signature in the presence of Prof. Gitau who was competent to witness it and was believed by the trial court in his testimony. There was no basis for criticizing Prof. Gitau.

21. As for testamentary capacity, counsel submitted that there was a four-prong test that the testator must know in order to evince testamentary intent and capacity:

- a) *the nature of the act of making a will;*
- b) *the natural objects of his bounty;*
- c) *the nature and extent of his property*
- d) *the disposition of the assets called by the Will.*

In counsel's view, there was adequate evidence on record to confirm compliance by the deceased with those tests.

22. Turning to the allegation of mental affliction, counsel submitted that it was strongly refuted and the trial court was right to hold in favour of testamentary capacity. He cited **Halsbury's Laws of England 4<sup>th</sup> Edn. Vol. 177 at page 903 - 904**, and submitted that although the burden of rebutting the sanity presumed under **section 5** of LSA is not heavy, no cogent evidence was adduced by the respondents to discredit the evidence of the advocate who drew up the Will or disturb the conscience of the trial court as to the deceased's testamentary capacity. Furthermore, it was submitted, there was nothing shown by the respondents to prove any fraud, duress, undue influence or mistake. The allegation that the deceased did not exercise his free will in distributing his estate because he stayed with Ngengi, and that Ngengi was the biggest beneficiary, was just that, mere allegation. The mere fact that it was Ngengi who was sent to look for an advocate cannot also be a source of suspicion because someone had to do it for the deceased. As stated in the case of ***Wingrove vs Wingrove (1885) 1 PD 81***, concluded counsel, the burden of proof always lay on the respondents to prove coercion, misrepresentation or falsification of the Will, but no cogent proof was offered. The trial court had no choice, therefore, but to dismiss the respondents' claims.

23. 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.***

24. In our assessment, three major issues stand out for our consideration in the matter:

*(a) Whether the document dated 28<sup>th</sup> April, 1994 was a valid Will of the deceased.*

*(b) If so, whether Peter Mugo and Peter Nyoike who were not mentioned in the Will are dependants of the deceased.*

*(c) If so, whether the court should make reasonable provision in the estate for them.*

25. As we have seen in the submissions of counsel, there is a four-pronged attack on the validity of the Will. It is claimed that it lacked the statutory requirement of proper attestation; that it was a forgery; that it was obtained by undue influence; and that the deceased had no testamentary capacity due to mental illness. We shall examine those sub-issues seriatim.

26. Firstly, the formal requirements of a valid Will are provided for in **Section 11** of LSA which states:

**11. 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.*** [Emphasis added].

27. The contention by the respondents was that the two attesting witnesses ought to have been present at the same time with the deceased to witness his signature as stated in **Halsbury's Laws of England Vol. 50 paragraph 261** that *'the testator's signature must be made or acknowledged by him in the presence of two or more witnesses present at the same time. In the testator's presence, each witness must attest and sign the will'*. It was also their contention that the evidence on attestation was so *"inconsistent and incoherent"* that in all probability one of the attesting witnesses, Prof. Gitau, never saw the deceased sign the Will, did not ask the deceased to confirm his signature before attesting to it, or attested the document before the deceased signed it.

28. The trial court examined the evidence of the two witnesses on attestation and was satisfied that although the two may not have been present at the same time with the deceased as he signed the Will, the provisions of **section 11 (c)** allowed the witnessing of a Will by the two witnesses at different times provided each signed in the presence of the testator when the testator acknowledges his signature. In view of the statutory provision, the doctrine propounded in Halsbury's Laws was found to be of doubtful application in this country.

29. With respect, we think the trial court was right in making that finding. We have examined the impugned Will which was produced in evidence and it contains three signatures. We have also examined the evidence of the advocate who drew up the document, **Mr. Parbary**, who swore that he was present with the deceased when he signed the Will at the house of Ngengi and the advocate attested it. He testified that the second attesting witness, **Prof. Gitau** was called to the house by Ngengi and when he came he witnessed the signature of the deceased in the presence of the deceased. Mr. Parbary was also present at that time. In cross examination Mr. Parbary stated:

***"We were sitting at a large corridor outside the deceased bedroom. The deceased signed the will in the presence of Prof. Gitau and myself. We waited for him to come. I had reached earlier. The deceased signed the will in my presence, then the Prof. came in and explained to the deceased the contents. I am not sure whether the deceased signed in the presence of the professor. I don't know whether the deceased signed in the presence of the professor"***.

30. Prof. Gitau in his testimony supported that evidence as follows:

***"I recall when I had gone to Mr. Ngengi Muigai's house to witness the signing of the will of his father. I had travelled in my own car. When I arrived I found three people. The deceased Mr. Ngengi Muigai and Mr. Phabhali (sic) Advocate. When I got there I was introduced to Mr. Phabhali (sic) Advocate. Mr. Ngengi announced that I had arrived in connection with the will.***

***The signature in the right is for James Muigai. The other signature is for Mr. Phabhali (sic) Advocate. I was the deceased's physician. The deceased health was normal. The deceased did not have depression or mental disability. He was aware of what he was doing.***

***When I signed the document the deceased was present he was seated just next to me and he saw me sign the documents so was the advocate Mr. Phabhali (sic). The deceased knew he was signing his will. I did not discuss the content of the document."***

He confirmed that he did not see the deceased with his eyes signing the document but, as his friend and doctor, he was familiar with his signature, and anyway the deceased was seated next to him.

In our own assessment of the evidence, the attestation of the Will was in compliance with **section 11** of LSA.

31. Was the signature forged, despite the two witnesses confirming that the deceased signed the impugned document? The complaint was

laid by Eunice and Beatrice that it was and they proceeded to report the matter to the Criminal Investigation Department (CID) for investigation. The onus of proof was therefore on them. The CID investigating officer, who was a forensic document examiner, **Superintendent Antipus Nyanjwa** (PW3) compared known signatures of the deceased with the signature on the impugned Will and formed the view that the deceased had signed the Will. In an attempt to tender further evidence on the matter, the respondents called Chief Inspector John Kariuki (DW10) but they withdrew the witness midway and his evidence was expunged from the record. The trial court made the following finding on the issue of forgery:

***"The will was submitted before the Criminal Investigation Department at the request of the objectors following a criminal complaint. The expert document examiner subjected the documents to examination and compared the alleged forged signature with the deceased known signatures. This evidence of Antipus Nyanjwa was not at all challenged and nor did the objectors produce a witness to give evidence on the deceased's alternative signatures. This witness confirmed that the deceased signature is firm and similar to previous signature. The sum total of the above findings that the deceased signature on the will is similar to the previous known signature of the deceased as stated by the document examiner."***

We find no reason to interfere with that finding.

32. Was undue influence exerted on the deceased by his son, Ngengi, who was staying with him in his last days as a sickly old man? The trial court dealt with the issue as follows:

***"Counsel for the objectors referred to the Text book 'Theobald On Wills' 4<sup>th</sup> Edition by J. B. Clark, Page 39 which describes undue influence as:***

***"In a probate court undue influence means coercion, i.e. the testator is coerced into making a will (or part of a will) which he does not want to make. Undue influence takes many forms. At one extreme there may be violence to, or imprisonment of, the testator. At the other, the pressure exerted by talking insistently to a weak and feeble testator in the last days of his life may so fatigue his brain that he may be induced ..., to give way to the pressure. Persuasion or advice is legitimate but coercion is not; 'a testator may be led but not driven.'***

***According to this same author the legal burden of proof of undue influence or fraud always lies on the person alleging it. Although the objectors did not lead evidence to show that the deceased was subjected to undue influence and by who, the submissions especially by Mrs. Thongori were quite clear that the deceased was driven to write a will. I am not satisfied that they have discharged this responsibility of proving this aspect for the following reasons:***

***1) The deceased had donated a power of Attorney to Ngengi that enabled him to 'Be my lawful Attorney and Agent, with full powers and authority for me and in my name...' during the deceased (sic) life time.***

***2) Ngengi requested a respected citizen a family priest the Rt. Rev. Gatui to convince the deceased to write a Will.***

***3) Mr. Parbary said that he visited the deceased about three times to discuss the draft Will with the deceased before it was finally approved and signed.***

***4) The deceased requested that Professor Gitau be present when the Will was signed;***

***and lastly, I have also taken note that Ngengi was the deceased's eldest surviving son and since the deceased was elderly and ailing there is nothing strange that he stayed with his son. This is usually the case for many elderly Africans. In view of the above I am not satisfied that the deceased was 'driven' but 'led' into signing the Will. Moreover, if one wants to use coercive methods, in my humble view they do not use the services of a priest and the head of a church."***

33. We have examined the evidence on record in respect of this issue. **Section 5 (1) of LSA** underscores testamentary freedom by declaring that *"...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 freedom is, however, not absolute since, amongst other things, the Will may be declared void if the making of it was caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake. See **sections 5 (3), (4) and 7, LSA**. The respondents here sought to impeach the Will on account of undue influence which is some form of coercion. In the case of ***Mwathi vs Mwathi [1996] eKLR***, the Court held that:

***"Undue influence occurs when a testator is coerced into making a Will or some part of it that he does not want to make. Undue influence is proved if it can be shown that the testator was induced or coerced into making dispositions that he did not really intend to make."***

34. The evidence came from Eunice and Beatrice who visited the deceased at Ngengi's house and formed the impression that the deceased was kept under virtual captivity in a dungeon at Ngengi's compound and was under Ngengi's control and mercy. There was also the house-help, **Ngugi** (DW8) who was called to show how helpless the deceased was at the time. The appellants' witnesses, however, particularly Mr. Parbary and Prof. Gitau drew a totally different picture of a man who was being properly cared for by his son, Ngengi and his family. Ngengi himself testified that the residence was a spacious guest house opening into a garden. Dr. Silverstein, who testified for the respondents, was also asked the question on the state of the residence in which the deceased was living in his last days and he quickly responded that *"it was a pleasant house"*.

35. We agree with the trial court that there was nothing unusual for an African 1<sup>st</sup> born son to take into residence and care for his aging father. It is not only good manners but also accords with custom. In communities where the concept of extended family does not exist, the

old are simply left alone to die in misery or are abandoned in institutionalized old peoples' homes. There is no evidence that other members of the deceased's family sought to but were prevented from visiting the deceased in Ngengi's house as often as they chose to. On the contrary, there is evidence from some of the respondents themselves that they visited the deceased in Ngengi's house. Other people, including church members, also visited over the three years the deceased stayed at Ngengi's residence. In our view, the allegation of undue influence is borne out of mere suspicion and there was no cogent evidence to establish it. The claim is rejected.

36. Lastly, on the first issue, we advert to the deceased's mental and physical capacity to make the Will, which was hotly contested. Once again, the whistle blowers were Eunice and Beatrice. As soon as the Will was read, they announced that they would challenge it as they believed it was false. They proceeded to invoke criminal as well as civil processes to impeach the Will. It was a short 14-paragraph document which distributed the estate to all the children of the deceased, including married daughters. But there was no mention of the former wife, Mumbi, or her two other children, Mugo and Nyoike. The Will also made provision for the remainder of the undistributed estate to be held in trust *"for the welfare and education of all male issues of any of my sons whose parents may need assistance for maintenance and education for a period of 18 years"*. After that the remaining estate would be given out for *"charitable purposes in Kenya"* to be decided on by the trustees.

37. In her testimony, Eunice visited the deceased at Ngengi's house in June 1993 and found him in a bad state of health. She knew he had a heart problem and was being treated at Nairobi Hospital. She found his other wife and a house-help who was cooking for them but the deceased could not even recognize her and he started crying when she stretched her hand to greet him. According to Eunice, the deceased was not in any position to write a Will about a year later in April 1994 as purported. Beatrice on her part testified that she visited the deceased together with her children in April 1994. According to her, the deceased could not recognize them, his hands were weak, and it was not possible therefore for him to have written the Will. In support of their evidence, they called the house-help, Ngugi, who had cooked for the deceased at his Ichaweri home but moved to stay with him at Ngengi's house in 1993. According to the house-help, the deceased *"used to go to town for his business and later just used to spend time at home reading newspapers"*. However, *"around the end of 1994"* the deceased suffered incontinence and stopped reading or writing. He became totally reliant on the house-help for feeding, washing and mobility until he died in 1995. He further testified that the deceased became periodically forgetful in 1994 but had moments of lucid memory.

38. The most crucial witness for the respondents was **Dr. Silverstein**, a cardiologist who has practiced internal medicine in Kenya since 1974. He was asked by Eunice and Beatrice to prepare a medical report on the deceased since he had treated him periodically for his heart problem since 1982. The only period he did not see the deceased was between June 1993 and July 1994 when the deceased was in the hands of other doctors. He did not examine the deceased for purposes of the report but relied on the record of the patient's treatment notes which he had in his clinic. In those notes, however, there was no reference to the deceased's mental state as having "dementia". It was in his oral evidence that he made the categorical statement that the deceased had suffered dementia since 1992. In his view, it was Alzheimer's disease and the deceased *"had no ability to make a judgment and execute a valid Will."*

39. We may listen to the doctor partly summarizing the deceased in his oral testimony:

***"When I met the deceased in 1982 he was a very sharp man with a great sense of humour. He was able to joke which is a sophisticated form of reasoning. By June 1993, he had deteriorated rapidly in his cognitive functions. He could not joke with the same certainty as before. Between June 1993 and July 1994 he had deteriorated rapidly both in mind and body. He was more confused and more (sic) problems with incontinence. Dementia is a clinical diagnosis. There is no test like a scan it requires the doctor to sit with a patient over a long time to come up with a diagnosis. It cannot be done after a visit. We had a very sharp man, a delightful person to have in the office very easy to talk to. This was the person I had in 1982 who deteriorated a lot by 1993. It is possible the patient could remember 26 species of trees by their botanical name. In dementia you primarily lose recent memory. Things that you learnt or happened long ago is (sic) left it is the last memory you lose. It is possible he could also remember the names of 15 of his classmates. The deceased was very sharp it is consistent with dementia that would be the last memory to lose. Dementia is a rare condition upto the age of 65 years. At the age of 85, 30% of the people are demented."***

40. Dr. Silverstein's written report was submitted to **Prof. David Ndeti** (PW5) of Nairobi University who is a professional psychiatrist and whose field of study entitles him to speak with authority on mental capacity. He criticised the diagnosis of dementia arrived at by Dr. Silverstein for the reason that the doctor did not follow standard procedures for making such diagnosis. According to Prof. Ndeti, dementia is loss of brain cells and the diagnosis of it is a process. There must be a record of history from the persons who have lived with the patient for at least three years and then an oral examination of the patient before carrying out a mini mental examination focused on whether, of all possible physiological conditions, dementia was one. According to him, there are many other physical conditions that are not diseases of the mind but outwardly mimic dementia. A full neurological examination of the nerves and a review of the kind of medication the patient was taking is also necessary. He also testified that the sickness was not age related because 30 - 40 year-olds can have it while a person aged 100 years could be very sharp mentally. He added that dementia can be reversed with the use of vitamins.

41. When Prof. Ndeti's evidence was put to Dr. Silverstein, he readily accepted the criticism stating thus:

***"Prof. Ndeti is right that I did not do a test for dementia. I diagnosed dementia after confirming the deceased deteriorate rapidly even if there was an occasional recovery, he would be on the downward trend his ability to reason, remember, speak and understanding"***.

42. In its assessment of the evidence, the trial court came to the following conclusion on the issue:

***"I have carefully considered the evidence by the objectors and especially by Dr. Silverstein. It is clear from his testimony that the deceased was dementing (sic) and he had diagnosed this problem in the course of his treatment of the deceased over the years. What concerns me in his evidence, is that, he did not specifically detail the diagnosis in his notes, although he said that the diagnosis of dementia would stigmatize the patient, I find that he used rather bold language in his notes to describe the deceased's other problems and I doubt that Dr. Silverstein would have had difficulties to mention dementia if that was the deceased's problem that he was attending to. Furthermore I have also noted the following:***

a) Dr. Silverstein did not specifically see the deceased between June 1993 to October 1994.

b) He stated that a dementing patient may have lucid moments when he can make rational decisions.

c) He did not carry out specific clinical tests of the deceased such as Professor Ndeti said in his commentary that for one to diagnose dementia the following tests should be carried out.

1. Collateral information from a relative who lived with the patient.

2. The mental state examination (MSE).

3. Mini mental state examination in suspected dementia.

4. Neurological examination finding.

5. Radiological examination.

6. Laboratory work up.

*Dr. Silverstein admitted that he did not carry out these tests but from the history of his long treatment of the deceased he did not have to carry out these tests as the deceased would present himself with physical conditions such as confusion, incontinence and disorientation. However, he said these could have been symptoms of other conditions. ....In view of this evidence the objectors submitted that the burden of proof that the Testator had the capacity to execute the Will shifted to the petitioner.... According to Professor Gitau and Mr. Parbary who attested the deceased signature, the deceased looked normal. He was physically incapacitated due to joint pains and hypertension. The other objectors did not see the testator on this day when he signed the Will. Perhaps Mr. Konyanya (sic), his cook could not specifically reveal this day, in any event this witness has no medical training. I have no reason to doubt the testimony of Professor Gitau and Mr. Parbary, even though the evidence of Mr. Parbary has been dismissed by the counsel as inconsistent. I am of the humble view that such inconsistencies to the mistake of whether the deceased was in the house of Ngengi at Lavington or Runda are not so material considering that these events took place 10 years ago. Similarly I am not able to make out why Professor Gitau would lie and mislead this court about the testator's mental ability to make a testamentary disposition. His evidence was also criticized by the objectors because he did not produce medical notes and reports to support his evidence that he was treating the deceased. With tremendous respect, this witness was summoned by the objectors, I am not aware whether they served him with a notice to produce the records. He stated that he kept a patient's card. I think professor Gitau did not have anything to lose or benefit by telling this court the state (sic) about the deceased mental capacity and ability to execute the Will."*

43. At the end of the day, therefore, the evidence on mental capacity rests on the credibility of the witnesses because none of the testifying witnesses examined the deceased for that purpose. On that credibility, the trial court was the better judge and we defer to its assessment.

44. In the recent case of Rosemary B. Koinange (suing as legal representative of the Late Dr. Wilfred Koinange and also in her own personal capacity) & 5 Others vs Isabella Wanjiku Karanja & 2 Others [2017] eKLR, this Court examined the issue of mental capacity and stated as follows:

*"The essentials of testamentary capacity were laid out in the case of Banks vs Goodfellow [1870] LR 5 QB 549 as cited with approval in the Tanzanian Court of Appeal case of Vaghella vs Vaghella [1999] 2 EA 351 thus:*

*'a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made.'*

**Construing the issue of capacity, Githinji, J. in the case of In Re Estate of Gatuthu Njuguna (Deceased) [1998] eKLR stated:**

*'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 testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that, if the objector produces evidence which raises suspicion of the testators' capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof and the burden then shifts to the person setting up the will to satisfy the court that the testator had the necessary capacity.'*

45. In that case, unlike the case before us, the deceased was specifically examined by the relevant specialists/consultants and it was common ground that:

*"the deceased died of complications arising out of Alzheimer's disease. The deceased's death certificate indicates as much. From the proceedings, it was apparent that the deceased had been diagnosed as far back as 1993 with symptoms of the disease. Alzheimer's disease, according to Dr. S. M. G. Mwinzi, a Consultant Neurologist who saw the deceased in January 1998 and later on 21<sup>st</sup> May 2001 is 'a chronic progressive degenerative disorder of the brain that is incurable. It has totally impaired all the aspects of his (the deceased's) cognitive function namely speech/language, memory, orientation, personality, judgement and abstract thought. This process of decline of cognitive function has been going for several years now and must adversely affected or influenced many of the decisions he has made in the last nine to ten years.'*

46. In this matter, the deceased's cause of death says nothing about Alzheimer's and there was no proper diagnosis made in his lifetime that he had the disease. The burden of proof reposed on the respondents to rebut the presumption that the testator was of sound mind when he signed the Will dated 28<sup>th</sup> April 1994 was not discharged, and we so find. Even if the evidence of the respondents can be said to have 'raised suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity', we find that the appellants' witnesses who were believed as credible by the trial court answered the evidence sufficiently. In the result, we answer the first issue in the affirmative.

47. The second issue is on the paternity of Mugo and Nyoike who, as observed earlier, were left out in the Will. We shall start with Mugo. It is common ground that the deceased and Mumbi parted company in June 1942 and she went to live with her parents. It is also common ground that Mugo was born on 10<sup>th</sup> February, 1943. Furthermore, there is no evidence that Mumbi remarried after leaving the deceased. Simple math will show that Mugo was born within 8 months or about 240 days after the departure of Mumbi. There is no scientific proof that Mugo was the biological child of the deceased. The only evidence is a denial contained in an affidavit supporting a divorce petition by the deceased that he was not the father. There is also a replying affidavit from Mumbi asserting that the deceased was the biological father. No hearing of the divorce petition took place and therefore the stalemate on paternity was not resolved in those proceedings. That is why Mugo's lawyers invoked the presumption of law contained in **section 118** of the *Evidence Act*.

48. The section states as follows:

***"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten"*** [Emphasis added].

49. Counsel for Mugo argued, and persuaded the trial court to agree, that Mugo was born *"En Ventre Sa Mere."* That is old French for 'in his mother's womb' in English. It refers to an unborn child, and is usually used in reference to that child's rights. For example, for the purpose of inheritance, a child is treated as having been in existence at the time of the decedent's death if the child is *"en ventre sa mere"* at the time of the deceased's death and is subsequently born alive. And so it was with Mugo. Unless there was credible evidence, which there was not, that the deceased never had intercourse with Mumbi before she left, the presumption of legitimacy must hold. In the case of *Njenga vs Njenga [1985] eKLR*. Madan, JA (as he then was) cited with approval the English case of *Gordon vs Gordon and Granville Gordon [1903] 141* stating:

***"The law says what has to be proved is that the husband did not have intercourse which might have led to the birth of the child. It does not allow the fact that another person had intercourse with the wife to be a material consideration. That is, I think, a proposition of the utmost importance in such cases as this. It was recognized in the opinion of the judges in Banbury Peerage Case (1812) 57 ER***

***64. In Cope v Cope, Alderson B, said: 'If once you are satisfied that the husband had sexual intercourse with his wife, the presumption of legitimacy is not to be rebutted by its being shown that other men also had sexual intercourse with the woman. The law will not, under such circumstances, allow a balance (underlining mine) of the evidence as to who is the most likely to have been the father'."***

50. Madan, JA added, and Nyarangi & Platt, JJA agreed, that:

***"And it was said as far back as the year 1811, in the Banbury Peerage case (supra), it still reads heartening:***

***"That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until the presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such child'."***

51. It is our finding in terms of the conclusive presumption of legitimacy referred to in the first part of **section 118**, which was not rebutted, that Mugo, having been born within 280 days of the separation of his parents, was the child of the deceased. The trial court was right in so holding.

52. As for Nyoike, the first part of **section 118** cannot apply as it was in evidence that he was born in 1948, long after the 280 days of separation. His only contention was that the formal marriage between the deceased and Mumbi was not finalised until 11<sup>th</sup> July, 1975 when the decree nisi for divorce was made absolute. There was no scientific evidence of paternity and the evidence extracted from both parents was unhelpful as it simply amounted to an affirmation by one and a denial by the other.

53. It seems to us that the only reason why the trial court found in favour of paternity appears to have been the perception that African men of old never denied paternity of children. In its brief summation, the court stated thus:

***"Although the paternity of Mugo and Nyoike are highly contested at least the legal position of Mugo could be covered by the provisions of Section 118 of the Evidence Act. I do not wish to dwell with this controversy save to say that both of these gentlemen have used the name of the deceased and passed out (sic) as deceased (sic) children. I am intrigued by the fact that the deceased who belonged to the High Eclair (sic) of the Society during the yester-years of male chauvinism when men took pride particularly in their male children could disown two of his sons and fail to participate at all the activities of their lives."***

With respect, we can find no factual or legal basis for such summation. Custom is a matter of fact but there is no proof of it on record. In our finding, there was no cogent evidence to support the claim that Nyoike was the child of the deceased.

54. The final issue is provision for dependency. As stated earlier, **section 5 (1)** of LSA, gives considerable freedom to any person to dispose of all or any of his property in a manner he deems fit and to change his mind at any time before his death as to how he intends that his property should be disposed of. That freedom however is checked by **section 26** of LSA which ensures that some beneficiaries of the estate referred to as "dependants" who are not adequately provided for by Will or intestacy are catered for. The meaning of such persons is in **section 29** as follows:

***"(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;***

***(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and***

***(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.***  
[Emphasis added].

55. So that, a child as defined under **section 3 (2)** of LSA, that is to say, a biological child as well as any child whom a man **"has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility"** shall be an automatic dependant under **section 29 (a)**. Mugo, whom we have found to have been a biological son, although the deceased had not expressly recognized him as such, would be entitled to automatic provision of reasonable dependency provision. Nyoike, on the other hand, would also be entitled to reasonable dependency provision if he could prove that the deceased had taken him into the family as his own child and was maintaining him immediately prior to his death. That is **section 29 (b)** above.

56. We have examined the record for such evidence but it is hardly traceable. Nyoike himself admitted that he was brought up by his mother in Dagoretti and he could not remember seeing the deceased coming to visit them there. He also confirmed that he was never assisted by the deceased in his lifetime even when he was getting married in 1972 and never joined him at his Gatundu residence. He referred to only two incidents in his youth, one in 1952/53 when he visited Ichaweri but was badly treated and vowed never to return, then in 1961 when Mzee Jomo Kenyatta was released from prison and there was a celebration. It was also his sole evidence that much later as an adult in business he met the deceased casually and exchanged pleasantries on several occasions. The deceased also visited his businesses in Dagoretti and Nyahururu. But there is no other support, documentary or otherwise, for all these assertions.

57. That the birth certificate exhibited by Nyoike in his evidence had the deceased's name was of no moment since **section 12** of the **Births and Deaths Registration Act** provides that:

***"No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom".***

It would appear from the evidence that the birth certificate of Nyoike was issued on 24<sup>th</sup> February, 1993. That was long after his birth in 1948 and long after formalization of the divorce in 1975. Nyoike admitted that he is the one who supplied the information to the Registrar.

Ultimately, Nyoike migrated to the United States, without involving the deceased in his plans, where he resides permanently. He never even attended his funeral. The bottom line is that there was no evidence that Nyoike was financially or otherwise supported by the deceased immediately before his death to warrant a positive finding on dependency.

58. In the case of ***E. M. M. vs I. G. M. & Another [2014] eKLR***, this Court referred to the case of ***Kimani Mathenge Muriuki & 2 Others vs Patricia M. Muriuki & Another HC Succession Cause No. 976 of 1994***, where Githinji, J, in dismissing an application for provision of a dependant, delivered himself as follows:

***"As for Lucina Muthayo Wanjeri, she was born after her mother left the deceased. It is the burden of the mother to prove on a balance of probabilities that the deceased was the father of the child. Her mother merely said that the deceased was the father without providing concrete evidence. The respondents dispute that she is a child of the deceased. Her certificate of birth shows that her mother did not give the name of the deceased as her father. It would appear she was not named after the mother of the deceased...There is evidence that Lucina did not live with the deceased though it is accepted that she used to visit the deceased occasionally. There is no concrete evidence of direct assistance by the deceased. It is true that she accompanied the deceased abroad once and deceased referred to her as his daughter in the affidavit to support application for passport. It is also true that she was named in the funeral programme as a child of the deceased. But the deceased was dead and had no control of the events after his death. I do not think the mere occasional references of Lucina as his child in a few documents without concrete evidence that deceased was the natural father of the child; that they lived together as father and child; that she was absorbed in the family of the deceased or that the deceased voluntarily assumed permanent responsibility over her, is sufficient to show that she was a dependant of the deceased in such sensitive matters as inheritance. I conclude therefore that it has not been proved***

*that Lucina is a dependant."*

59. With respect, we think Nyoike's case falls into this category. In the result we find and hold that he is not entitled to any provision for dependency from the estate of the deceased. Consequently, we order that the orders granted by the trial court in his favour be and are hereby set aside in entirety. In consequence of that finding, and the fact that the life interest of Elizabeth Mumbi was spent, we order that the acreage of the Ichaweri Farm in Gatundu LR No. 7785/18, shall vest in Peter Mugo only but shall be reduced from 10 to 5 acres. The order for the Runda house to vest in Peter Mugo shall remain. It follows that the appeal filed by the appellants, namely **No. 13 of 2007**, succeeds to that extent only.

60. The appeal filed by the respondents, **No. 56 of 2007**, fails and is hereby dismissed. As this is a family matter, each party shall bear their own costs.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of June, 2018.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**