In re Estate of Joel Dindi Magero (Deceased) (Succession Cause 15 of 2021) [2025] KEHC 1580 (KLR) (26 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1580 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION CAUSE 15 OF 2021

S MBUNGI, J

FEBRUARY 26, 2025

IN THE MATTER OF THE ESTATE OF JOEL DINDI MAGERO(DECEASED)

BETWEEN

LEONITA ANYANGO DINDI ..... 1ST PETITIONER

JOYCE NAMATSI DINDI ..... 2ND PETITIONER

AND

REV. WILSON DINDI MAGERO ..... OBJECTOR

RULING

1. This cause relates to the estate of Joel Dindi Magero who died on 15th August 1996 having left a Will which is being contested by his eldest son, the objector.

2. The deceased was a polygamous man with 7 wives and 25 children. He left behind two wives being Leoniter Anyango Dindi and Joyce Namatsi Dindi who upon the will being adduced have now applied for the grant of letters of administration with written Will annexed.

3. The petitioners annexed a written Will dated 23rd February 1996 where the deceased had listed his assets and liabilities and the beneficiaries.

4. On 22nd June 2011, the objector filled an affidavit of protest against the confirmation of the grant claiming that the petition was secretly filled and have filled a cross application disapproving the mode of distribution. He seeks that the court disregards the Will and he be appointed a co-administrator and applied for the grant of letters of administration intestate.

5. The objection application was canvassed by way of Viva Voce evidence and the witnesses relied on their written statements. The petitioners had 5 witnesses while the objector had one witness, Margarita Makokha including himself.

Objector's Case

6. PW1 was the objector, he testified that the deceased was his father and that he was married to seven wives and had 25 children 12 sons and 13 daughters 2 of who were deceased but had dependents.

7. He testified that the deceased had parcels of land, commercial buildings, motor vehicles, bank accounts and animals. He produced his affidavit dated 21.01.2022 where he listed the beneficiaries and assets owned by the deceased.

8. He denied having knowledge of a Will by the deceased that had no executor which was dated 27/4/1996. He claimed that the Will listed the witnesses as George Francis and Joel Ojwang.

9. He stated that the land parcel Bukhayo /Buyofu /398 was listed as measuring 24 hectares yet it measured 60.5 acres. On the schedule 1, he highlights plot 1 of Ekisumo market which the deceased claimed was his but there were no documents to proof they belonged to him. On schedule 3 (d) he claimed the shares of the radio was given to the wives and daughter while the sister was not a beneficiary and was living in Bukhayo /Buyofu /398.

10. On the schedule, that the deceased gave 8 of his sons a share of the accounts while he had 12 sons who were never listed.

11. He further claims that the Will date at the beginning was 23/2/1996 while at the conclusion reads 27/4/1996.

12. He further claimed that on page 2 the name of the witness changed from joel to john hence there was a discrepancy with the Will.

13. He stated that he filled his affidavit of protest sworn on 22/6/2011.

14. On cross examination, he acknowledged that the petitioners were the deceased wives however he wanted to be included in the succession process although his father filled the Will. He affirmed that his father was of sound mind before he died however he only came to know about the Will later on and found out that the commercial property at Ekisumo did not belong to his father.

15. In making reference to his affidavit dated 21/01/2021, he claimed that the Will was not valid since it did not have an executor and that the Will referred to a none existing property.

16. He claimed that as a first born, he should be part of the team that administer the estate. He prays that the circumstances of each beneficiary be taken into account since one of the deceased sister was not given any land despite living in the property.

17. He claimed that his late father had been sued for recovery of proceeds from a sugar cane.

18. During re-examination, he confirmed that he was not at his father's funeral and did not know whether the Will was read he claimed that he disputed the Will because of the alterations and the alleged date of the meeting. He equally attached a letter to show that the commercial property at the Ekisumo market never belonged to his father.

Petitioner's Case

19. DW1 was the advocate Julius Onema. He confirmed that the deceased Joel Dindi Magero was his client. That he came to his office in 1996 and asked for him to draft Will. He stated that he informed him of the requirements of a valid Will and asked him to write all his assets and liability plus all his beneficiaries.

20. He testified that the deceased compiled the list and on 27/4/ 1996 he came to the office with two of his witnesses and he prepared a Will, the two witnesses signed and he attested it and stamped an impression.

21. He avers that he attached a copy of the deceased sketch of his two parcels of land Bukhayo/ Bunyofu/398 and Bukhayo/Buyofu/1071.

22. He confirmed that the deceased was of sound mind and was not coerced at the time of making of the Will. He produced the Will as Dexh 1.

23. On cross examination, he confirmed that the deceased issued him with a list of his assets as well as his dependents although there was no name of an executor in the Will. He confirmed that he was left in custody of the will and when the testator died his beneficiaries came for the documents and the titles and the sketch map with alterations that had been counter signed.

24. During re-examination, he confirmed that he drafted the Will in accordance with the deceased wishes although he did not appoint an executor.

25. DW2 was Joyce Namatsi, the deceased 3rd wife. She relied on her statement as her evidence-in-chief. She stated that the deceased informed them that he had left as Will and they agreed as the houses to respect the wishes of the deceased. She confirmed that at the time of his death, the deceased was of sound mind and good health.

26. She stated that Margarita Kaduma was the deceased niece although she was not a child of the deceased, she lived in one of the deceased land at Lukhayo.

27. She claimed that she was not aware if the deceased had given Margret any parcel of land since at the time of his demise, she was married and had children.

28. During cross examination, she claimed that the deceased never informed them about the Will and they knew of it after his demise and that the deceased had 25 children. 12 boys and 13 girls. She stated that Margaret lived on the parcel of land after she had disagreed with her husband although she did not own the land.

29. DW3 was Leonida Anyango Odinga. She testified that she was the deceased 4th wife. She adopted her statement as evidence in chief. She testified that Margaret was the deceased niece and did not own the land and prayed that the court adopts the Will according to the deceased wishes.

30. During cross examination, she stated that the deceased had already made his wishes how his properties were to be divided although the document was never read to them.

31. Pw2 was Margarita Kadima. she testified that Joel Dindi was her elder brother. She claimed that the deceased had many parcels of land and he gave her one of his land and when he died, he left her living on that land.

32. On cross examination, she claimed that the deceased was her brother and that he bought her the land she stayed. she testified the deceased had a Will and before he died, she had a parcel of land Malachi 2259. She claimed that she got the land in 1994 and it was in her name and the Will was drafted in 1996.

33. During re-examination, she testified that the land parcel 2259 belonged to her father and that she stayed in the land the deceased bought for her.

34. DW4 was Wycliffe Ouma. He adopted his statement as his evidence-in-chief. He testified that the deceased was his father and the objector his older brother. He prayed that the court adopts the will his

father had left since he was of sound mind when he was drafting it and had two witnesses. He prays that his objection be dismissed with costs.

35. During cross examination, he confirmed that his father had two wives and he had written a will for all his dependents and that PW2 was is father's sister and that his father did not share his estate equally among his 25 children and was not in a position to tell why he decided not to have his children have equal shares.

36. He denied the allegations by his brother that the document was forged.

37. During cross examination, he observed that no document was produced to prove any forgery.

38. DW5 testified that the deceased was his father and the petitioners his wives. He testified that the deceased left a will and he prayed that the will be adopted by the court as all the sons had been considered. He stated that his father was of sound mind when he wrote the will. He stated that DW2 was his father's sister and she had no cause to object since she had her own land parcel 2259.

39. During cross examination, he confirmed that his mother and father separated but had been given a share of the estate and that his father had 25 children 12 sons and 13 daughters although no one of the daughters was given a share of the estate.

40. During re-examination, he stated he didn't know why the daughters were not given a share in the will claiming that the Will was a valid document

Petitioner's Submissions

41. The petitioner filed his submission dated 13th December 2024. He raised one issue for determination that being whether the deceased left a valid Will.

42. According to the petitioners, all the 5 witnesses that they called testified that the deceased was of sound mind and left a valid Will.

43. Dw1 was the advocate who drafted the Will. They aver that they informed the deceased on the requirements of a valid Will and after fulfilling the same, drafted the Will dated 27/4/1996 in the presence of two witnesses George Francis Dindi Wamura and John Ojwang Magero which was executed and stamped.

44. Dw2, the deceased wife Joyce Namatsi equally attested that the deceased died having written a valid Will while he was of sound mind and good health and the same was supported by the evidence of DW3 her co-wife who admitted that the deceased died leaving a valid Will that supported all the beneficiaries. The same was reiterated by the deceased two sons DW4 and DW5.

45. On the validity of the deceased Will, they relied on section 5 of the *Law of Succession Act* of the free Will of the deceased with sound mind to dispose off his property.

46. They affirmed that according to their witness evidence, the deceased was a man of sound mind and good physical health and disposed off the property after confirming that all the requirements needed to dispose his land as he willed was met.

47. They relied on section 11 of what would constitute a valid Will and opined that the same had been met by the deceased in the presence of two witnesses and an advocate and was attested to by the witnesses.

48. They submitted that the Will cannot be held to be invalid since the deceased did not appoint an executor as opined by the objector and quoted section 6 of the *Law of succession Act* where the testator may or may not appoint an executor.

49. They finally submit that the court find that the will dated 27/4/1996 is valid and the court to allow the same proceed for administration with will annexed.

Objectors's Submissions.

50. The objector filled his submission dated 16th December 2024. where they claimed that the will submitted was altered and forged.

51. The objector questioned various aspect of the will and the evidence of the advocate who prepared the document.

52. According to him, the drafter of the Will did not produce evidence of preparation before making the Will. They further hold that the Will contained properties that did not belong to the deceased such as the commercial property, plot No 1 Ekisumo Market that was never owned by the deceased yet he distributed it to the objector and will interfere with his share of the estate. He further opined that the money in the bank was left to 8 of his sons while the deceased had 12 sons.

53. He questioned the validity of the 2 witnesses who attested the Will by holding that the name of one of the witnesses was not clear and it was erased without counter signing it.

54. He further faulted the acreage of parcel of land No. BUKHAYO/BUYOFU/398 that was stated in the Will by claiming that they do not tally by what was on the ground.

55. They pray that the court set aside the purported Will and he be made a co-administrator to the estate and that the parties file a confirmation of the grant.

Analysis And Determination

56. I have looked at the pleadings, the recorded evidence and the written submissions lodged by both sides. The issues that emerge for determination revolve around validity of the will on record as well as the equity of distribution of the deceased properties.

57. I will first deal with the issue of the validity of the alleged will. The validity of a will is dependent on two principal factors, namely the capacity of the testator to make a will at the material time and compliance with the formal requirements for the making of a will.

58. The burden of proof whether the will was invalid or not squarely lies on the objector *Evidence Act* section 107-109 states:-

107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

59. In the case of Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR it was held that: "As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue.

60. Section 5 of the *Law of Succession Act*, deals with capacity to make a will, and of testation. The relevant provisions state as follows

'5

(1). ... any person who is sound of mind and not a minor may dispose of his free property by will ...

(2) ...

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

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

61. In this case the issue of testamentary capacity was not raised. All the petitioners witness testified that the deceased was of sound mind and good health when he made the will.

62. The same was admitted by the objector during cross examination hence his mental capacity was not in question.

63. The objector's contention is that his father left him the commercial property at Ekisumo Market which was not his to will away and so he would be disadvantaged among the deceased sons. He equally objected to Dw2 his father's sister who was only willed a radio despite her living in the parcel Bukhayo / Buyofu /398 for the longest time.

64. He was of the opinion that his father ought to have given his sister the land parcel since she had resided in the land parcel and not his two wives.

65. The objector was of the view that the will made by the deceased was invalid since it did not have an executor to administer the estate.

66. In opposing the application, the petitioners held that the deceased was of sound mind and good health and had the capacity to will away his properties as he deemed and since the Will was valid and well attested by two witnesses, and the court should respect the wishes of the deceased and appoint them as administrators of his estate for the benefit of the other beneficiaries.

67. It is important to note that the law recognizes a testator's freedom and power to distribute his property as he or she deems fit. Section 5 of the *Law of Succession Act* as stated above grants any adult of sound mind power to dispose any or all of his or her free property by will.

68. A court of law is only allowed to interfere with the said testamentary freedom, if a testator fails to make reasonable provision for his or her dependents in accordance with the *Law of Succession Act*.

69. This limitation of a testator's testamentary freedom was also discussed by this Court in Kamene Ndolo v George Matata Ndolo [1996] eKLR. The Court had this to say:

> " This Court must, however, recognize and accept the position that under the provisions of Section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependents is expressly recognized by Section 26 of the Act..."

70. The testator in this case had the testamentary freedom to will away his asset as he deemed fit. He would however have to consider his dependents during his life time.

71. On the claim of dependents according to section 26 on the definition of dependent, it was up to the objector to prove that the deceased sister depended on her brother, the deceased during his lifetime.

72. He however has not presented any evidence section 107 & 108 of the *Evidence Act* is very clear on the claim of person who alleges, he must prove and in the absence of such evidence then the court cannot rule in his favor.

73. In re Estate of Samuel Ngugi' Mbugua (Deceased) [2017] eKLR, the court was of the view that;

> 'The allegation that the said signature was not that of the deceased amounts to a claim that the signature was forged or that fraud was exercised in the procurement of the alleged will. That is to say that someone other than the deceased had affixed that mark on the will with the intent of passing the same as the signature of the deceased. Forgery is a criminal offence. The applicant is in fact imputing criminal conduct on either the person propounding the will or those who were involved in the operation that is purported to have been its execution. The burden of proving forgery lies with the person alleging it. In Elizabeth Kamene Ndolo vs George Matata Ndolo Nairobi Court of Appeal civil appeal number 128 of 1995 it was stated that the charge of forgery or fraud is a serious one, and the standard of proof required of the alleger is higher than that required in ordinary civil cases.'

74. The objectors further opine that the will presented before court was invalid and that it was a forged since one of the names did not match and it ought to be discarded.

75. Section 11 of the *Law of Succession Act* provides for the formal requisites of a valid will and states that, 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."

76. Questions were raised about the manner of execution and attestation of the document. I have carefully scrutinized the will in question, and I am satisfied that it was properly signed by the purported testatrix and the two attesting witnesses and the date on which it was made is very clear that it was on 27th April, 1996 but not on 23rd February, 1996. On 23rd February, 1996 its when a sketch of how the deceased wanted his two portions of land Bukhayo/Buyofu 398 and Bukhayo/Buyofu 1071 was done. The issue of acreage raised by the objector is baseless for when you convert 24 hectares the size of Bukhayo/ Buyofu 398 into acres it gives approximately 60 acres.

77. If there were doubts at the authenticity of the signatures, the objectors ought to have subjected them to examination and testing by document examiners and handwriting experts.

78. The objector in the absence of a handwriting expert should have placed before court samples of the deceased known signatures for the court to compare with the deceased signature on the will though he acknowledged that the signature on the will belonged to his father when he was being cross-examined.

79. The law was stated by the Court of Appeal in Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR thus:

> "We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases."

80. In re Estate of Kimani Kahehu (Deceased) [2018] eKLR W. Musyoka, J explained as follows:

> "10. It is the applicant who alleges that the will was a forgery. The burden is on him to establish that fact to the required standard. Forgery is a criminal act, and facts to establish it must make out a case beyond balance of probability and towards proof beyond reasonable doubt. See the decision of the Court of Appeal in Elizabeth Kamene Ndolo vs. George Matata Ndolo Nairobi Court of Appeal civil appeal number 128 of 1995. A charge of forgery would be that the signature on the document was not that of the deceased. To establish forgery, it is usually necessary to subject the impugned document to testing of the impugned signature or signatures by a document or handwriting expert. That was not done in this case. No material was placed before me by way of evidence that the signature on the document purported to be that of the deceased was forged."

81. Whether the witnesses were present at the same time, again, the objectors did not place before me any evidence to suggest that the witnesses were not present at the same time when the said document was signed by the deceased.

82. On the claim that the name that one of the witness name was cancelled from Joel to John does not invalidate the will. It was simple mistake that cannot invalidate the will. Making mere allegations that there was alteration without an effort to demonstrate what is alleged is not enough.

83. The alteration of the name did not go into the substance of the will and hence cannot invalidate the whole will especially where the signature of the testator is clear in the document (Will) See In the Estate of JPN VG (Deceased) [2021] eKLR.

84. It is my considered view that the objector has not provided this court with any evidence that the will was forged as alledged.

85. On the issue that the Will did not have an executor, the general practice is that a will should have an executor, personal representative to administer an estate. Lack of an executor in a will is, bad practice however it does not invalidate the will. Section 6 of the Succession Act states: A person may, by will, appoint an executor or executors.

86. Therefore appointment of an executor of a will is optional and not mandatory.

87. The objector claim was that his father allocated him the commercial plot No. 1 Ekisumo Market and that the asset as not part of his estate and that would mean he would be disadvantaged. On whether the plot did not belong to the Deceased to me its neither here nor there, it was the practice and even today parents can acquire property and register in the names of their children especially those old days parents would register most of their property in the names of their first sons name. In absence of hard evidence show that its objector who bought or acquired the plot independently of his father , the court is inclined to find that the property belonged to the deceased that's why he included it as part of properties in the wealth. Secondly the deceased was an educated man by the then standards he was a high court assessor fairly versed with ownership of property matters.

88. On the aspect that he is disadvantaged by the Act of the Deceased allocating Plot No 1. Ekisumo market I say no because on looking at the will the objector was allocated 7.5 Acres of Land Parcel No. Bukhayo/ Buyofu /398 and the deceased was very clear in distributing his estate he took into account the ages of his children, the young ones were to get more share than the older ones because the older ones had benefited from some of the other properties more that the young ones.

89. From the distribution of the estate the deceased equitably provided for his sons therefore objector cannot claim that he will be disadvantaged, it is only the daughters and some wives who were not provided for but they never raised any issue with the Will.

90. The objector further claimed that the deceased did not give his sister, Margaret Makokha Dw2 the parcel of land which she had resided in and only gave her a radio which was not fair and for that reason, the will should be declared null and void.

91. The court in Curryian Okumu vs. Perez Okumu & 2 others [2016] eKLR was of the view that -

> 'The legal position is clear however that failure to provide for a beneficiary in a Will does not invalidate a Will. Section 5(1) of the Act gives a testator testamentary freedom as follows:
>
> > " Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses ..."

92. The freedom of a testator to dispose of his free property by will is however is not absolute. The Court can after the death of the testator alter the terms of a will following an application under Section 26 of the Act. Section 26 provides:

> " Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependent, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependent, order that such reasonable provision as the court thinks fit shall be made for that dependent out of the deceased's net estate."'

93. The objector had to prove to court that Dw2 was a dependent of the deceased and that the deceased had the responsibility to take care of her and provide or her welfare.

94. The deceased had freedom to dispose of his estate in a manner that was suitable to him. The freedom is the essence of testate succession, and the fact that the will did not provide for some beneficiaries does not, and cannot, invalidate the will. The remedy available to the applicant is to move to court appropriately under the provisions of section 26 of the *Law of Succession Act*, seeking for a reasonable provision out of the estate.

95. In the upshot, the final orders to be made in this matter are as follows -

    a. That I hereby declare that the will of the deceased on record, executed on 23rd February 1996, is genuine and valid and cause shall proceed as petition for letters of administration with will Annexed.

    b. That any dependent of the deceased who deems not adequately provided for shall move to contest under section 26 of the *Law of succession Act*.

    c. This being a family matter, each party shall bear its own costs.

    d. It is so ordered.

    e. Right of Appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF FEBRUARY, 2025.

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Elizabeth Angong'a.

Mr. Shihemi for the petitioner present online.

Mr. Munyendo for the Objectors present online.

Mr. Shihemi, I seek for a date for further directions.

Mr. Munyendo, it is ok.

Court, Mention on 5.6.2025 for further directions.