In re Estate of M'rukaria M'turuchiu (Deceased) (Succession Cause 14 of 2023) [2025] KEHC 12446 (KLR) (4 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12446 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

SUCCESSION CAUSE 14 OF 2023

HM NYAGA, J

SEPTEMBER 4, 2025

IN THE MATTER OF THE ESTATE OF M'RUKARIA M'TURUCHIU- DECEASED

BETWEEN

DANIEL MURIUKI .... PETITIONER

AND

JULIUS MWENDA RUKARIA .... OBJECTOR

RULING

1. What is before me to determine in this ruling is the validity of the "undated" written will executed by the deceased.

2. On 20th February, 2025 the court directed that the said issue be canvassed by written submissions, which both parties have duly filed.

3. The objector submitted that the will in question is a forgery for reasons that; the testator did not sign and the thumb print appearing therein is unverifiable since no reasons has been advanced as to why the testator thumb printed instead of signing yet the testator was a retired literate government officer working with the Ministry of Health a fact known by all family members; the provided identity card is a forged document as the ID number appearing on the will is XXXXXXX yet the actual identity card number is XXXXXXX; the will is undated and forged to validate the fraud perpetrated against him; the testator's first born son has been disinherited without any justifiable reasons as required under the law.

4. In buttressing his submissions, the Objector relied on the cases of In re Estate of John Nikolai Bwire Osogo Deceased [2019] eKLR where the court found that the will was invalid as it was undated ,full of cancellation and lacked clarity in the manner of distribution of the estate and the case of Rahab Nyakangu Waithanji v Fredrick Thuku Waithanje [2019] eKLR where the court held that a valid will must be duly executed by the testator and attested by two competent witnesses.

5. The petitioner on his part submitted that the annexed will to the application and marked as JMR2 omitted the page that contains the date of the will which is captured in the entire will of the deceased filed alongside with the main petition on 27th July,2022 and the petitioner's bundle of documents filed on the same date.

6. According to the Petitioner, the will is valid and meets the requirements of Section 11 of the *Law of Succession Act* for reasons that the testator signed on every page of the will dated 8th February, 2019 and the same was attested by his counsel Kiautha Arithi; that the testator's signature on all the pages of the will are at the bottom of every page save for the last page where the signature is next and adjacent to his name which is clear that the same were desired to and did in fact give effect to the will; & that at the last page of the will the testators signature was attested to by Peter Rutere (now deceased) of ID No.XXXXXXX and Julius Mugambi Mwirichia of ID No. XXXXXXX and there is a declaration to that effect.

7. In buttressing his submissions, the petitioner relied on the case of Karanja & Anor v Karanja Njuguna & Anor [2002]2 KLR P 22, for the proposition that it is the duty of the petitioner to prove the validity of will whereas the burden of proof that the Wills and codicils are void is on the Objector.

8. The petitioner submitted that he has discharged his burden while the objector has failed to discharged his and urged the court to find the will in issue valid and to allow him proceed and have the confirmed grant allowed as per the summons dated 4th September, 2024.

9. Section 5 of the Law of succession does provide as follows;

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

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

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

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

10. The Court in Elizabeth Kamene Ndolo V George Matata Ndolo, [1996] eKLR emphasized that the testamentary freedom to dispose of one's property by will in any manner one sees fit is unfettered as long as the testator is an adult of sound mind. A written will made in accordance with the law cannot be questioned. It can only be altered or revoked by another will made by the testator himself, if he is competent in terms of soundness of mind to do so.

11. Section 7 of the *Law of Succession Act* provides that a testator must exercise his free Will in the distribution of his estate and the absence of such free will invalidate a Will;

    "7. A will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void."

12. Section 11 of the *Law of Succession Act* sets out the requirements for the validity of a written will as follows:

> “ No written will shall be valid unless—
>
> a. the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
>
> b. the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;
>
> c. the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

13. The Objector has submitted that the will is invalid as it did not provide for the deceased’s first-born son. This is not a ground for invalidating the will as this court is empowered under Section 26 of the *Law of Succession Act* to make reasonable provision for any dependant left out. I am persuaded by the decision of the court in In re Estate of Lusila Wairu Waweru (Deceased) [2020] eKLR where it was held as follows;

> “ A testator has power to dispose of her property as she pleases and the court is bound to respect those wishes as long, they are not repugnant to the Law and she does not leave out some dependants and beneficiaries. Failure to make provision for a dependant by a deceased person in her will does not invalidate the Will as the Court is empowered under Section 26 of the *Law of Succession Act* as demonstrated above to make reasonable provision for the dependant. Section 28 sets out the parameters that this Court should consider when making such provisions.”

14. The objector has also contested the will on the basis that it is undated.I have considered the petitioner’s submissions on this issue. The will annexed by the objector in his application is the same as the one filed by the petitioner with the petition except that some pages are missing. The correct will therefore is the one filed with the petition and it is dated 8th February, 2019.

15. The objector also claims that the will is a forgery because it bears the thumbprint of the deceased, yet he was literate and would have been expected to sign it. It is my considered view that the mere fact that a person, who is literate, thumbprints a document rather than putting down his signature in writing, is not a ground for invalidating a will. Additionally, it is trite law that he who alleges must prove. The Applicant has not tendered any cogent documentary evidence to prove fraud and this ground is unmerited. The standard of proof in allegations of forgery was addressed by the court in Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another [2016] eKLR where the court observed as follows;

> “ It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the

allegations. In the Case Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In Belmont Finance Corporation Ltd. v. Williams Furniture Ltd [27] Buckley L.J. said:"An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."

16. In the Matter of the Estate of James Ngengi Muigai, HCSC No.523 of 1990 it was held that the law allows the Will to be witnessed by two or more witnesses at different times, but each should sign in the presence of the testator.

17. The provisions of Section 11(c) of the Act are couched in mandatory terms.

18. I have looked at the impugned will in light of the provisions of Section 11 of the *Law of Succession Act* cited above. From the said section, it is evident that for a will to be valid, it must have been duly executed by the testator and attested by two competent witnesses.

19. The will herein contains the name of the deceased, and directly below it appears his signature, indicating the testator's intention to give effect to the will; it also contains two witnesses i.e. Peter Rutere & Julius Mugambi Mwirichia, but only Julius Mugambi signed the will. There is a thumb print which is in dispute.

20. Even though the petitioner purports that the said Peter Rutere thumb printed it, on the face of it, the alleged thumb print is not in his allocated section but in the Testator' s section. Is that a reason to hold the will invalid? I don't think so. The said witness can be availed to confirm if the thumbprint is his or not.

21. In the premise therefore, I find that the disputed will, on the face of it, meets the formal requirements as to attestation, as stipulated under section 11(c) of the *Law of Succession Act*.

22. That said, I have to point out that the manner in which the will was brought to the court. The court is only seized of the photocopy, and that may be the reason for the objection to it.

23. A written will is a special document. It is for that reason the Probate & Administration Rules provide on what is to be done in case there is a Will. Rule 7 (5) provides as follows: -

    (5) Where the grant sought is one of probate of a written will or of letters of administration with the written will annexed there shall be lodged in the registry on the filing of the petition the original of the will or, if the will is alleged to have been lost or destroyed otherwise than by way of revocation or for any other reason cannot be produced, then a copy authenticated by a competent court or otherwise to the satisfaction of the court.

24. Part X of the Probation and Administration Rules then provide for the manner in which a probate cause is to proceed. Rules 50 to 52 then provide as follows.

> “ 50. Wills registers
>
> At every registry there shall be maintained a register called the wills register for that registry in which the following information shall be recorded relating to every will of a deceased person in regard to which an application is made—
>
> (a) the name of the testator;
>
> (b) the cause number;
>
> c) the serial number assigned to the will;
>
> (d) the date of filing of the will and of the issue of any grant;
>
> (e) where a grant has been confirmed, the date of confirmation.
>
> 51. Retention of original wills of deceased
>
> All original wills, or court authenticated copies thereof, of which probate or letters of administration with the will annexed have been granted by or applied for in any registry, shall be retained by and preserved among the records of that registry unless removed therefrom pursuant to regulations made under these Rules.
>
> 52. Marking of wills and furnishing of translations
>
> (1) A photocopy of every will in respect of which an application for a grant is made shall be marked by the signature of the applicant and shall also be exhibited in any affidavit or declaration which may be required under these Rules as to the validity, terms, physical condition or date of execution of the will.”

25. From the above it is clear that in a cause where a will is involved, the Will ought to dealt with as provided. That “Will” has to be in reference to the original “Will” or a counterpart of the Will as envisaged under section 65 of the *Evidence Act*.

26. Evidently, the filing of the cause did not abide by the said rules. I have also looked at the court register of Wills. The will in question was not registered.

27. Therefore, the Petitioner has the duty to avail the original will in court as required.

28. While I find no reason to invalidate the will at this stage, I direct that the petitioner presents the original will in court, within such time as the court will give shortly. Thereafter the cause will proceed as is provided by the law, including the other prayers sought by the objector.

29. The application is disallowed, but there shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF SEPTEMBER, 2025.

H. M. NYAGA

JUDGE