



**In re Estate of Nicholas Kipchumba Mberia (Deceased) (Succession Cause 106 of 2010) [2024] KEHC 518 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 518 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 106 OF 2010  
SM MOHOCHI, J  
JANUARY 30, 2024**

**IN THE MATTER OF THE ESTATE OF NICHOLAS KIPCHUMBA MBERIA DECEASED**

**BETWEEN**

**JOHN KIPKORIR MBERIA ..... PETITIONER**

**AND**

**JENIFFER MBERIA ..... OBJECTOR**

**RULING**

1. The deceased, Nicholas Kipchumba Mberia, died on 4<sup>th</sup> November 2008. What is before Court for determination is the 1<sup>st</sup> Objector's Case.
2. Briefly; The Petitioner filed his Petition for Grant of Probate in Nairobi Succession Cause No. 319 of 2010 on 24<sup>th</sup> February, 2010 with annexed will dated 10<sup>th</sup> July, 2008. The Objector too in this instant suit, Nakuru Succession Cause No. 106 Of 2010 filed a Petition for Letters of Administration Intestate respecting the estate of the deceased on 31<sup>st</sup> May 2010.
3. The Letters of Administration were issued on 21<sup>st</sup> July, 2010 to the Objector Jeniffer Chepkurui Mberia, the surviving spouse of the deceased.
4. The Petitioner filed an Affidavit of Protest against Confirmation of the Grant dated 1<sup>st</sup> April, 2011 and filed on 4<sup>th</sup> April, 2011.
5. The Objector filed an Objection to the Making of Grant in Nairobi Succession Cause No. 319 of 2010.
6. By Consent dated 31<sup>st</sup> October, 2011, parties agreed inter alia that: Nairobi Succession Cuse No. 319 of 2010 be consolidated with, Nakuru Succession Cause No. 106 Of 2010. That the Application filed by the Petitioner on 24<sup>th</sup> February, 2010 be treated as Application for Grant of Letters of Probate that the Objection to Making of Grant and answer to Petition filed by the Objector on 3<sup>rd</sup> June, 2011 be treated as objection to the Petition. That Nakuru Succession Cause No. 106 of 2010 filed by the Objector



on 31<sup>st</sup> March, 2010 be treated as a cross application and the Court to hear the 1<sup>st</sup> Objection by the Objector.

7. Emukule J. on 14<sup>th</sup> June, 2012 directed that, there be a stay pending evaluation of the contested Will dated 10<sup>th</sup> July, 2008. The matter proceeded to viva voce hearing. At the end of the oral hearing, the parties were directed to file written submissions. Both parties herein complied.

### **Objector's Case**

8. The Objector testified as OW1 that she was married to the deceased in 1990 and together they had two daughters and the deceased had already been divorced to his first wife and produced a Decree dated 12<sup>th</sup> May, 1983 as O.Ex 1. She stated and submitted that, at the time the deceased executed the Will he was hospitalized and admitted in hospital and thus lacked capacity to accurately describe the properties he was disposing, that the Will excluded most known properties of the deceased and left out some, the Will included assets that were not owned legally by the deceased, that the Will included assets registered and owned by the objector and purchased and developed by the objector. That further, the deceased did not have property in Kapsoya and Kitale.
9. She added that, the deceased failed to make provisions for the children he had with the objector, 2 daughters amounting to discrimination and disinheritance. Finally, that the Petitioner has failed to disclose to Court another pending objection filed in 2018 of the Will, by the children of the deceased's 2<sup>nd</sup> wife who predeceased the deceased.
10. It was the submission of the Objector that, the deceased was aware of all his assets and if the deceased was of proper mental state he would have articulated and described all his properties with ease and would never have included assets he never owned nor disinherited their two daughters.
11. She stated that, her husband owned a motor vehicle registration number KRB 914 and not KRB 194 and that her husband had a Sunny car not his but being used by him which was KAG 345 a Nissan Sunny and not KAG 324S as stated in the Will. That the Will also has an error in the name of the Petitioner of Kimtai instead of Kimutai. That there is no house to be bequeathed in Kericho.
12. Through counsel, she submitted on 3 issues; as to whether the deceased had testamentary capacity to execute the will and relied on the provisions of Section 11 of the *Law of Succession Act* as well as Nyeri Succession Cause No. 1141 of 2011 *in the re-Estate of Murimi Kennedy Njogu (Deceased)* eKLR, and that the deceased Will did not satisfy the conditions highlighted in the said authorities on testamentary capacity.
13. The Objector also submitted that, there was further no medical or scientific proof to ascertain the deceased mental capacity at the time of making the Will.
14. Further that, the Will mentioned properties in paragraph 2(a) whereby the titles or reference numbers were not stated and that two of the properties Title Numbers Nandi/Chepterit/446 is registered in the name of the objector and Nandi/Chepterit/1191 is matrimonial property which was developed by the objector.
15. That the Petitioner, failed to attached supportive documents to the 7 properties to the Chepterit section namely Nandi/Chepterit/ 446, Nandi/Chepterit/440, Nandi/Chepterit/1191, Nandi/Chepterit/ 789, Nandi Chepterit 836 and NandiC/hepterit/350 bequeathed to him to actually belonged to the deceased or which 3 properties were bequeathed to him to rule out disputes thus invalidating the will.



16. It is the Objector's submission that while the deceased was making the Will, two (2) properties Nandi/Chepterit/446 and Nandi/Chepterit/1191, were not free properties to bequeath to the Petitioner due to the fact that they were purchased with financial contribution of the Objector offending the provisions of Section 23 of the Law of Succession Act as read with Paragraph 8 of the 2<sup>nd</sup> Schedule as well as Section 4 of the Matrimonial Property Act, as well as constitutional right to own property.
17. Further that, the Will bequeaths at paragraph 2(f) a plot and house in Kericho to the Objector and her two daughters. She submitted that the deceased did not own property in Kericho and the Kericho Plot 631/20/1 is registered in the name of the Objector. That if the deceased was of sound mind he would not have called his daughter Jackline Jerotich instead of Jackline Cherotich.
18. The Objector also submitted that the deceased could also not dispose-off motor vehicles registration number KRB 194 Volvo saloon, since from the official search indicates that, the vehicle is registered in the name of Joseph Ngata and the make is Mazda and Volvo. Motor vehicle registration number, KAJ 324J Sunny registered in the name of Bread Ltd and the make is Lorry Truck.
19. In conclusion, the objector submitted that, the Petitioner listed 21 assets but the Will contained 14 assets while the Objector has listed 20 assets and thus there would be need to consolidate the assets of the deceased and ascertained all the beneficiaries of the deceased.

#### **Petitioner's Case.**

20. The Petitioner called one witness, one Wilson Kiplagat Kalya who testified that he was the one who drew up the Will and also who witnessed it. It was the testimony of Mr. Kalya that while the deceased was hospitalized, he was called and met the deceased at a garden. He was instructed to write the Will and that the deceased was of sound mind and understood the instructions given. That the deceased was jolly. He testified that he drafted the Will as per the deceased instructions and the deceased executed the Will. Further that he witnessed the Will together with his secretary.
21. He added that, upon the demise of the deceased, he summoned all the beneficiaries and informed them of the contents and that no beneficiary was left out and any asset left out would be dealt with in intestacy. He stated that the Will does not become invalid because reference numbers were not mentioned or being in hospital was proof of incapacity. That the Objector was catered for and did not know of another wife.
22. Through counsel the Petitioner submitted on the validity of the Will. The Petitioner submitted that the deceased was lucid and understood what he was doing and that no evidence was presented as per the requirements of Section 5(4) of the Law of Succession Act. And that the requirements of Section 11 were met.
23. The Petitioner relied on *in the matter of the Estate of Salome Mukami Kariuki (Deceased)* 2013 eKLR and the provisions of Section 22 of the Law of Succession Act on the validity of the Will. That the testator derives his authority from the Will.
24. It is the Petitioner's submission that, the ruling dated 4<sup>th</sup> April, 2019 was on unrelated matters not before this Court. That Fransica Jepkosgey and Gladys Chemtai should present their case before this Honourable Court for determination.

#### **Analysis and Determination**

25. Having looked at the pleadings filed by the parties, the evidence and the rival submissions lodged by both sides, the issues that emerge for determination all are on the will dated 10<sup>th</sup> July, 2008.



26. On the validity of the will, the same is dependent on two principal factors,
- i. capacity of the testator to make a will at the and
  - ii. requirements for the making of a valid Will and the after compliance of the said requirements.

27. Section 5 of the [Law of Succession Act](#), deals with the capacity to make a will, and of testation and 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.’

28. The essentials of testamentary capacity were laid out in were laid out in *Banks vs. Goodfellow* (1870) LR 5 QB 549, where the Court stated that -

‘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.’

29. In the case of [John Kinuthia Githinji Kiarie vs Githua Kiarie and Others](#) NBI C.A No.99 of 1988 (UR), cited in [re Estate of Catherine Nduku Malinda \(Deceased\)](#) [2020] eKLR where the deceased was seriously ill and executed a Will while in hospital, it was held that:

“in the absence of evidence that the illness had affected her mind so as not to know what she was doing when she signed the Will, the subject Will was valid.”

30. 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."

31. Having listed the above authorities, I will examine the validity or lack thereof of the Will and its effect on the estate of the deceased. From the above there are 5 main requirements to the formation of a valid Will:-
  - a. There must be testamentary intent;
  - b. The testator must have had testamentary capacity;
  - c. The Will must have been executed without undue influence;
  - d. The Will must have been duly executed;
  - e. The Will must be Witnessed by 2 or more witnesses.
32. On the issue of capacity, the Objector raised the issue that the deceased lacked testamentary capacity. Under the provisions of Section 5(3) & (4) of the Law of Succession Act, the testator is deemed to be of sound mind and it therefore is upon the Objector to establish any mental incapacity. Establishment of mental incapacity is proven by a medical report or scientific proof to the effect. Alternatively, a Witness or two to give an account of the well-being of the deceased prior to and after making and execution of the Will. The Objector alluded to the deceased being of unsound mind. Proof of the same was however not advanced.
33. The Objector intimated that proof of soundness of mind was not established by the Petitioner by medical or scientific evidence. It is trite law that he who alleges must prove. The burden does not shift to the Petitioner by just alleging that the deceased was lacking capacity at the time of making the Will. Section 5(4) lays the burden on the Objector.
34. In re Estate of Gatuthu Njuguna (Deceased) [1998] eKLR, the Court held:-

“As regards the testator's mental and physical capacity to make the will, the law presumes that 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..”
35. In the absence of proof of medical evidence, the deceased must therefore be deemed to have been of sound mind at the time he is alleged to have made the Will.
36. It was also argued by the Objector, that the deceased was too unwell to make the impugned Will. The Petitioner did not deny that the deceased was unwell or to being admitted in hospital at the time of making the Will but denied that he was of unsound mind. The Petitioner's witness one Mr. Kalya stated that he met the deceased in the hospital garden in a jolly mood.
37. In the case of John Kinuthia Gitbinji Kiarie vs Githua Kiarie and Others NBI C.A No.99 of 1988 (UR), the deceased was hospitalized as was seriously ill. The Will was executed while she was in hospital and the same was challenged. The Court in that regard held that in the absence of evidence that her sickness and hospitalization had affected the mind of the testatrix so as not to know what she was doing when she signed the Will, the subject Will was valid.



38. The burden of proof lay with the objector to demonstrate to Court that the deceased was too unwell to know what he was doing. It was her contention that the soundness of mind of the deceased was affected by illness or the deceased was too ill to comprehend what he was doing. The objector failed to discharge their burden with respect to the deceased's testamentary capacity as result of illness.
39. Secondly; there is the aspect of testamentary freedom. The Court of Appeal in *John Gitata Mwangi & 3 Others vs. Jonathan Njuguna Mwangi & 4 Others* CA No. 213 of 1997 [1999] eKLR, declined to interfere with the testamentary freedom of a testator unless there was sufficient demonstration to show that no reasonable provision was made for an Applicant in the deceased's Will.
40. She also alluded to the deceased bequeathed third party assets which was an allusion of incapacity. That a learned man who was a Provisional Commissioner would not have forgotten the assets he had or given out what was not rightfully his.
41. It was her contention that the Kericho property which was bequeathed to her and her daughters does not belong to the deceased and that it was registered in her name to which disinherited her children. On perusal of the pleadings, the Court has not seen an official search or a copy of the title to suggest that indeed the Kericho property does indeed belong to her solely. If there are such documents the Court has not been afforded the opportunity to interrogate them and as such from the face of the Will the deceased had provided for the Objector and her daughters.
42. The Objector argues that the Will has not included some of the properties of the deceased and a learned man of his caliber ought to have remembered all his assets and liabilities at the point of making the Will. Whereas the Will distributed most of the deceased's properties, a few properties were not included in the Will as clearly demonstrated in the pleadings filed by both parties. That does not however invalidate the Will since properties that were not included in the Will can be distributed in accordance with Section 38 of the *Law of Succession Act*.
43. On the aspect of the requirements under Section 11 and on examining the impugned Will; on the face of the Will, it contains the name of the deceased, the signature of the deceased, which was questioned by the Objector but a handwriting expert was not called to interrogate the signature or another specimen. The deceased has stated property to be bequeathed and whom, the signature has been witnessed by two people, namely: Wilson Kiplagat Kalya, an advocate and Doris Anyango Oswago a secretary in the said advocate's firm. The advocate Mr. Kalya testified to having known the deceased for five years prior to his death and further being present together with his secretary when the deceased executed the said Will and together with his secretary Witnessed the said Will.
44. On the issue of validity of the Will and based on the required legal standards, the Will on the face of it has met the requirements of validity as stipulated under the Law. Be it as it may, there are discrepancies which have been raised and the Court has taken judicial notice of them.
45. The Objector has since stated that the Will disinherits her daughters since there is no provision for them in the will. The deceased has bequeathed most of his properties to the children of the 1<sup>st</sup> marriage and the Objector and her children have been bequeathed the Kericho property which the Objector says does not belong to the deceased. The Objector stated that, the deceased had no property in Kericho and the property listed by the Petitioner Kericho Plot 631/20/1 is registered in her name.
46. It is to be noted that, there is no legal provision barring a testator from disposing of his wealth in a manner he/she deems fit and the Court cannot dictate the terms of a Will.



47. Further, the Court in this regard associates with the decision in the case of *John Wagura Ikiki & 7 others vs. Lee Gachigia Muthoga* [2019] eKLR where the Court expressed itself as follows:

“Having found that the will was valid, it therefore follows that the deceased had the freedom to dispose of all his earthly possessions as he deemed fit. It was within this very exercise of testamentary freedom that the deceased elected to leave out his sons, John Wagura and Joseph Ndungu Ikiki, and in the same breath, bequeathed the lion's share of his estate to his 3<sup>rd</sup> wife for reasons that were personal to himself. He was under no obligation to give any reasons for so doing. This is indeed the objective of testamentary freedom.”

48. A valid Will cannot fail on the grounds that, it does not include some beneficiaries or some properties that do not form part of the deceased's free property.

49. The Will also has discrepancies on the list of properties allegedly owned by the deceased. There is the question of ownership of certain immovable properties listed, thus; plots Nandi/Chepterit/446, Nandi/Chepterit/1191, Kitale Municipality Block/16/188, Nandi Lesso Settlement/642 and the Kericho plot 631/20/1. The Objector claims that these properties were not owned by the deceased and could not be given freely. There are copies of official searches in the proceedings to suggest that these properties might be owned by third parties.

50. On the ownership of the two vehicles listed in the Will registration numbers KRB 194 and KAG 324S. the Objector produced Copies of motor vehicle search records as “Objector's Exhibit 2 and 3” both dated 26<sup>th</sup> May, 2011. Both vehicles are registered in the names of third parties. It is not uncommon for parties to buy properties and one party dying before the transfer is effected. The Objector alluded to the deceased driving the Nissan Sunny KRB 914 which did not belong to him.

51. The discrepancies of the registration numbers and names of the children of the deceased is also questionable and raises doubts as to the state of mind of the deceased at the time of making the Will or the authenticity of the Will. This thus means the Court cannot with great conscience allow the Petitioner to proceed and file for Grant of Probate with the Will at this point.

52. Court has considered the evidence laid before it and the pleadings on record. In this regard and it is of the view that the issues being determined herein cannot be conveniently determined in these proceedings at this point, since there is a third Objection to the making of Grant of Probate dated 10<sup>th</sup> May, 2023 and filed by Fransica Jepkoskey Mberia and Gladys' Chemutai who are alleging to be the children of the deceased from his first wife. A death Certificate dated 31<sup>st</sup> May, 2014 for one Maria Mberia has been attached to the said Objection.

53. At the time directions were being given on how to proceed with the Objection, the 3<sup>rd</sup> Objector's application was not on record and being a Court of Justice, everyone deserves to have their issue ventilated judiciously. Further any doubts have to be cleared before any decision is rendered.

54. As stated earlier, on the face of the Will, the Will appears to have met the requirements under Section 11 of the *Law of Succession Act*, it will however be premature to decide on the validity of the Will or the fate of the beneficiaries left out in the Will. I therefore direct that:

- a. That Parties do file their responses to the Objection filed on 11<sup>th</sup> July, 2023 within 14 days and thereafter parties file and exchange submissions to the 2<sup>nd</sup> and 3<sup>rd</sup> Objector Applications within 30 days from this decision;
- b. The status quo be maintained;



- c. The Petitioner shall file copies Ownership Documents of the listed properties in his Affidavit in support of the Application for Grant of Probate; and
- d. That there shall be no order as to costs.

**DATED, DELIVERED AND SIGNED AT NAKURU THIS 30<sup>TH</sup> DAY OF JANUARY, 2024**

**MOHOCHI S. M.**

**JUDGE**

