



**Strathmore University**

**Law School**

**SUCCESSION IN THE DIGITAL AGE: ANALYSING THE FEASIBILITY OF  
ELECTRONIC WILLS IN KENYA'S SUCCESSION LAW SYSTEM.**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore  
University Law School

By

**CHEGE, SHARON NICOLE WANJIKU**

135562

Prepared under the supervision of

**Sussie Mutahi**

January 2024

Word count (14,492)

## DECLARATION

I, **CHEGE SHARON NICOLE WANJIKU**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: *Sharon Nicole Chege* .....

Date: 12<sup>th</sup> February 2024.

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

Sussie Mutahi

12<sup>th</sup> February 2024

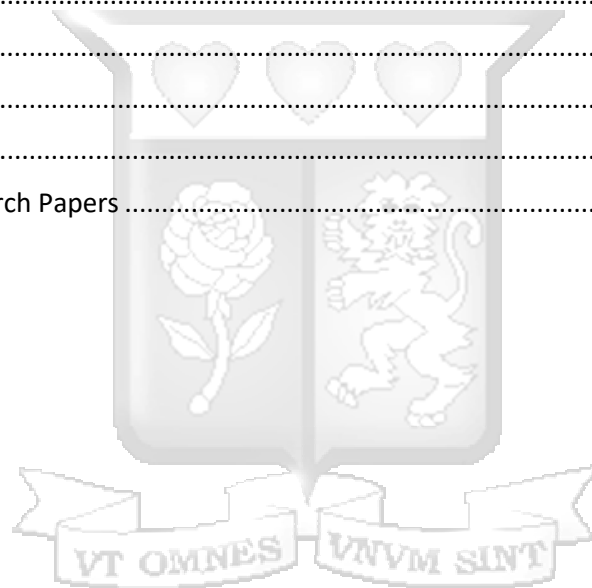


## Table of Contents

|  |      |
|--|------|
| DECLARATION .....  | ii   |
| ACKNOWLEDGEMENTS .....   | vi   |
| LIST OF STATUTES .....   | vii  |
| Kenyan Statutes .....  | vii  |
| Australian Statutes .....  | vii  |
| Indian Statutes .....  | viii |
| LIST OF CASES .....  | ix   |
| Kenyan cases .....   | ix   |
| Australian cases .....   | ix   |
| ABSTRACT .....   | x    |
| CHAPTER ONE: INTRODUCTION .....  | 1    |
| 1.0 BACKGROUND .....   | 1    |
| 1.1 STATEMENT OF PROBLEM .....   | 3    |
| 1.2 RESEARCH OBJECTIVES .....  | 3    |
| 1.3 RESEARCH QUESTIONS .....   | 4    |
| 1.4 HYPOTHESIS .....   | 4    |
| 1.5 JUSTIFICATION .....  | 4    |
| 1.6 THEORETICAL FRAMEWORK .....  | 5    |
| 1.6.1 THE THEORY OF INHERITANCE .....  | 5    |
| 1.6.2 THE TECHNOLOGICAL DETERMINISM THEORY .....                                 | 6    |
| 1.7 LITERATURE REVIEW .....  | 7    |
| 1.8 CONTRIBUTION .....   | 10   |
| 1.9 METHODOLOGY .....  | 11   |
| 1.10 CHAPTER BREAKDOWN .....   | 11   |
| CHAPTER 2: THE EVOLUTION OF KENYA’S SUCCESSION LAW REGIME AND WILL SYSTEMS ..... | 13   |
| 2.1 INTRODUCTION .....   | 13   |
| 2.2 THE LAW OF SUCCESSION PRE-1981 .....   | 13   |

|  |    |
|--|----|
| 2.2.1 THE LAW OF SUCCESSION APPLYING TO AFRICANS .....   | 13 |
| 2.2.2 THE LAW OF SUCCESSION APPLYING TO MUSLIMS.....   | 15 |
| 2.2.3 THE LAW OF SUCCESSION APPLYING TO HINDUS.....  | 16 |
| 2.2.4 THE LAW OF SUCCESSION APPLYING TO EUROPEANS .....  | 16 |
| 2.3 THE LAW OF SUCCESSION POST 1981.....   | 16 |
| 2.3.1 THE LAW OF SUCCESSION ACT, 1981.....   | 16 |
| 2.3.1.1 TESTATE SUCCESSION .....   | 17 |
| 2.3.1.2 INTESTATE SUCCESSION.....  | 18 |
| 2.3.2 AFRICAN CUSTOMARY LAW .....  | 18 |
| 2.3.3 ISLAMIC LAW.....   | 18 |
| 2.4 THE FREEDOM OF DISPOSITION IN KENYA .....  | 19 |
| 2.5 CONCLUSION.....  | 20 |
| CHAPTER 3: ELECTRONIC WILLS IN AUSTRALIA AS A BENCHMARK FOR KENYA.....                                       | 21 |
| 3.1 INTRODUCTION.....  | 21 |
| 3.2 ELECTRONIC WILLS AS RECOGNISED IN AUSTRALIA .....  | 21 |
| 3.3 THE HARMLESS ERROR DOCTRINE.....   | 22 |
| 3.4 CASE LAW WITHIN AUSTRALIA ON THE HARMLESS ERROR RULE IN THE EXECUTION OF WILLS AND ELECTRONIC WILLS..... | 26 |
| 3.4.1 VIDEO RECORDINGS.....  | 26 |
| 3.4.2 DVD RECORDINGS.....  | 27 |
| 3.4.3 TEXT MESSAGES/SMS .....  | 28 |
| 3.4.4 UNPRINTED ELECTRONIC DOCUMENTS.....  | 28 |
| 3.5 CONCLUSION.....  | 28 |
| CHAPTER 4: THE PROPOSED LEGAL FRAMEWORK FOR ELECTRONIC WILLS IN KENYA.....                                   | 30 |
| 4.1 INTRODUCTION.....  | 30 |
| 4.2 WHY KENYA’S SUCCESSION LAW REGIME NEEDS ELECTRONIC WILLS.....  | 30 |
| 4.2.1 EASE OF PROBATE .....  | 30 |
| 4.2.2 EASE IN IDENTIFICATION OF WITNESSES.....   | 31 |
| 4.2.3 DURABILITY AND PRIVACY BENEFITS .....  | 32 |
| 4.2.4 CONVENIENCE FOR THOSE WHO ARE INCAPABLE OF PENNING THEIR WILLS .....                                   | 33 |
| 4.3 SUGGESTED PRINCIPLES FOR ELECTRONIC WILLS IN KENYA .....   | 34 |
| 4.3.1 THE HARMLESS ERROR DOCTRINE.....   | 34 |
| 4.3.2 ELECTRONIC EVIDENCE LAWS.....  | 35 |

|   |    |
|---|----|
| 4.3.3 THE RIGHT TO PRIVACY AND DATA PROTECTION.....                           | 38 |
| 4.4 OTHER PRACTICE GUIDELINES TO BE CONSIDERED.....                           | 38 |
| 4.5 CONCLUSION.....   | 39 |
| CHAPTER 5: CONCLUSION AND AREAS FOR FURTHER STUDY.....                        | 41 |
| 5.1 INTRODUCTION.....   | 41 |
| 5.2 POSSIBLE IMPLEMENTATION CHALLENGES THAT MAY HINDER SUGGESTED REFORMS..... | 42 |
| 5.3 AREAS FOR FURTHER STUDY.....  | 43 |
| BIBLIOGRAPHY.....   | 44 |
| Books.....  | 44 |
| Chapters in books.....  | 44 |
| Thesis.....   | 44 |
| Journal Articles.....   | 44 |
| Other Internet Resources.....   | 45 |
| Reports.....  | 47 |
| Working Papers and Research Papers.....                                       | 47 |



## ACKNOWLEDGEMENTS

I wish to extend my sincere gratitude to all those who have made a significant contribution to the completion of this dissertation.

I would like to thank the Almighty God for giving me the strength and wisdom to undertake this project. I have seen His able hand throughout this project right from the choosing of the topic to the research and the writing.

I appreciate my supervisor, Miss Sussie Mutahi, for taking her time to guide me through this project. Her expertise, dedication, patience, guidance, and insightful feedback have been instrumental in shaping this work.

I express my gratitude to my parents for providing consistent emotional and material support throughout my academic journey. By seeing me through law school and encouraging all my goals, they have tremendously empowered me. I am particularly appreciative to my sister Tracy, who stayed up late with me while working on this project and gave me constructive criticism on my arguments.

Lastly, I am grateful to my friends for their understanding and encouragement as we navigated this journey together. Indeed, their presence during the high and low moments have made this experience one for the books!

## **LIST OF STATUTES**

### **Kenyan Statutes**

*African Wills Act*, Cap 169 (Repealed).

*Constitution of Kenya*, (2010).

*Data Protection Act* (Act No 24 of 2019).

*Evidence Act* (Cap 80).

*Hindu Marriage, Divorce and Succession Ordinance*, Ordinance No 63 of 1946 (Repealed).

*Judicature Act* (Cap 8).

*Judicial Service Act* (Act No. 1 of 2011).

*Kadhi's Court Act* (Cap 11).

*Law of Succession Act* (Act no 10 of 1981).

*Native Christian Marriage Ordinance*, Ordinance No 9 of 1904 (Repealed).

*Native Court Regulations*, No 15 of 1987 (Repealed).

### **Australian Statutes**

COVID-19 Emergency Response Act 2020 (Australian Capital Territory) as amended by the COVID-19 Emergency Response Legislation Amendment Act 2020 (Australian Capital Territory).

Justice Legislation (COVID-19 Emergency Response – Wills and Enduring Document) Regulations 2020 (*Queensland*).

*Succession Act 2006* (*New South Wales*)

*Succession Act*, 1981 (*Queensland*)

*Wills Act*, 1968 (*Australian Capital Territory*).

*Wills Act*, 2000 (*Northern Territory*)

*Wills Act*, 1936 (*South Australia*)

*Wills Act*, 2008 (*Tasmania*)

*Wills Act 1997* (*Victoria*)

*Wills Act*, 1970 (*Western Australia*)

*Wills Act Amendment Act*, No. 2 of 1975 amending *Wills Act* of 1936(*South Australia*).

## **Indian Statutes**

*Hindu Wills Act, Act No 21 of 1870 (Repealed)*

*Indian Succession Act, 1865 (Repealed)*

*Probate and Administration of Estates Act, Act No 5 of 1881 (Repealed)*



## LIST OF CASES

### Kenyan cases

*Chelang'a v Juma*, (2002), 1 KLR 339.

*David Makari Watila v Republic* (2020) eKLR.

*Idris Abdi Abdullahi vs Ahmed Bashane & 2 others* (2018) eKLR.

*In the Matter of the Estate of Kevin John Ombajo (deceased)* (2018) eKLR.

*Mwathi v Mwathi and another* (1995-1998) 1 EA 229.

*Re Estate of Motichand Devji Shah* (1964) KLR.

*Rono v Rono & another*, (2005) 1 EA 363.

*Wanjau Wanyoike and four others v Ernest Wanyoike Njuki Waweru and another* (1980) HCCC No 147 of 1980.

### Australian cases

*Alan Yazbek & another* (2012) Supreme Court of New South Wales.

*Estate of Peter Anthony Pitman (deceased); ex parte Rosemary Machin Pitman* (2018) Supreme Court of Western Australia.

*Estate of Wilden (Deceased)* (2015) Supreme Court of South Australia.

*Gill v Gill* (1909) P 157.

*In the Estate of Buharoff* (1991) New South Wales Supreme Court, (unreported).

*In the Estate of Roger Christopher Currie* (2015) Supreme Court of New South Wales.

*Nichol v Nichol* (2017) Supreme Court of Queensland.

*Rashford v White* (2018) Supreme Court of Queensland.

*Re Basanko* (2020) Supreme Court of Victoria.

*Re Estate of Wai Fun Chan (Deceased)* (2015) Supreme Court of New South Wales.

*Re Groffman* [1969] 2 All Er 108, The High Court of England.

*Re Yu* (2013) Supreme Court of Queensland.

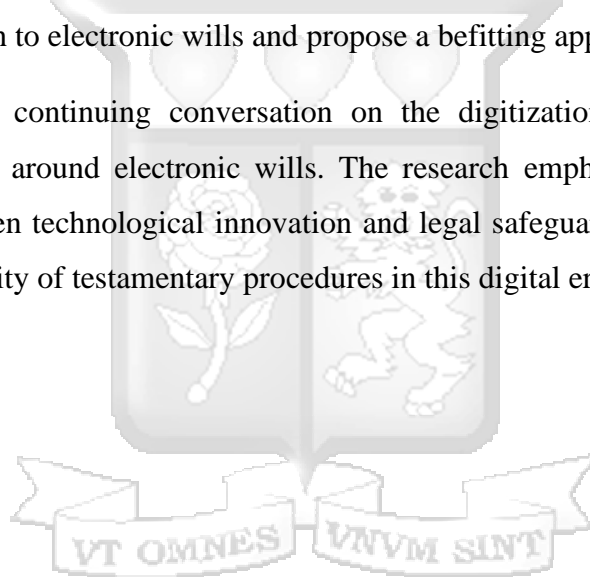
*Shorten v Shorten* [2002] New South Wales Supreme Court.

*Yazbek v Yazbek* [2012] New South Wales Supreme Court

## ABSTRACT

Technology continues to reshape many aspects of our lives. The legal field is experiencing a noteworthy transformation due to the rise of electronic wills in estate planning all over the world. The creation of laws to govern technological developments is necessitated by the direct impact that they have on a country's citizens. Kenyan laws have appropriately adapted to different types of electronic documents and welcomed several advancements that technology has brought to the legal field. However, the law is yet to provide for the making of electronic wills in Kenya. The goal of this dissertation is to examine the potential benefits of electronic wills in reshaping Kenya's law of Succession and its concomitant ease in proving the validity of wills. The study examines already existing literature on electronic wills from other jurisdictions such as Australia to examine their approach to electronic wills and propose a befitting approach for Kenya.

This study adds to the continuing conversation on the digitization of legal processes by discussing the dynamics around electronic wills. The research emphasises the importance of striking a balance between technological innovation and legal safeguards in order to ensure the accessibility and inclusivity of testamentary procedures in this digital era.



## CHAPTER ONE: INTRODUCTION

### 1.0 BACKGROUND

Kenya's succession laws have come a long way.<sup>1</sup> The Succession Act was passed in 1972 but has undergone various amendments over the years. The Act currently provides for two types of succession, testate and intestate.<sup>2</sup> In testate, the deceased leaves behind a will while in intestate, they do not leave a will or the one they leave behind is declared invalid. Under testate succession, the law recognizes two types of wills that can be executed in Kenya: written and oral wills.<sup>3</sup> In this day and age, there is no need to over-emphasize the need to create a will. One must ensure that upon their demise, their assets are protected and distributed accordingly among their loved ones. With the emergence of new technological advancements and even the recent Covid-19 pandemic which showed the role that technology plays in our lives, there is a need for Kenya's succession laws to consider electronic wills.

An electronic will is a will created using digital means.<sup>4</sup> These are but are not limited to, videos, audio, audio-visuals, etc. These wills further use electronic signatures instead of written signatures. It can also be stored and transmitted online like soft copy documents. Electronic wills are legally recognized in other jurisdictions such as states like Nevada and Florida in the United States, New Zealand, Australia and even in South Africa.<sup>5</sup>

Kenya is a fast-developing country which means that it is in tune with the emerging technological advancements in the legal field. Kenya's Evidence Act saw an amendment created to provide for electronic evidence and electronic records as admissible evidence in Kenyan Courts.<sup>6</sup> The legal space in Kenya has also seen advancements such as websites created to

---

<sup>1</sup> Kameri- Mbote P, 'The Law of Succession in Kenya: Gender Perspectives in Property Management and Control,' International Environmental Law Research Centre, 1995, 2.

<sup>2</sup> Part II and IV, *Law of Succession Act* (Act no 10 of 1981).

<sup>3</sup> Section 9 and 10, *Law of Succession Act* (Act no 10 of 1981).

<sup>4</sup> -< <https://harvardlawreview.org/2018/04/what-is-an-electronic-will/>>- on 10<sup>th</sup> January 2023.

<sup>5</sup> Sizwe S, 'Electronic Wills in South Africa' 7 *Digital Evidence and Electronic Signature Law Review* 67, 2010, 1.

<sup>6</sup> Section 78 A and 106B, *Evidence Act* (Cap 80)

publish legal information such as judgments and rulings.<sup>7</sup> Websites have also been created to cater to legal processes such as searches and other conveyancing procedures.<sup>8</sup> Most recently, Kenya has adopted the idea of virtual court hearings which have contributed greatly to the improvement of access to justice in Kenya.<sup>9</sup> Further, the Judicial Service Act requires the Judiciary and the Judicial Service Commission to apply modern technology in their operations and to have the technical competence to fulfill the requirements of the judicial process.<sup>10</sup> Their operations include the interpretation of the Constitution and statutes as well as other sources of law in Kenya. Therefore, by providing for digital wills, Kenya will have made further progress in its efforts to adopt digital means in the legal field in Kenya.

These sentiments are shared by Justice Lydia Achode in *In the Matter of the Estate of Kevin John Ombajo (deceased)*.<sup>11</sup> Kevin Ombajo, often known as Big Kev, the deceased in this case, named his sister and wife as joint executors in a written will dated February 2015. With time, Big Kev's condition worsened and he was diagnosed with a brain tumour. To rectify several elements in his previous will, he made an audio-visual will in December 2016 that outlined his last preferences for the disposition of his possessions. His carer, who also happened to be his sister, had approached him for treatment and, during that discussion, had named her as a signatory to his bank account. When he passed away seven months later, his wife filed a court case to contest the revocation because the two of them could not agree on which of the two was a legitimate will.

Upon considering the petition, the court concluded that the sole question to be answered is whether the audio-visual recording is the deceased's legitimate will and whether it supersedes the preceding written will.

In her decision, Justice Achode examined how the Law of Succession Act did not recognise audio-visual recordings or any other type of recording in the Kenyan setting. She did, however, draw attention to the fact that the Evidence Act's sections 78A, 106A, and 106B outline the

---

<sup>7</sup> Njuguna J, 'Adopting Information Technology in the Legal Profession in Kenya as a Tool of Access to Justice' *Journal of MCS D*, 2021, 5.

<sup>8</sup> Njuguna J, 'Adopting Information Technology in the Legal Profession in Kenya as a Tool of Access to Justice' 5.

<sup>9</sup> Section 3, *Judicial Service Act* (Act No. 1 of 2011).

<sup>10</sup> Section 4, *Judicial Service Act* (Act No 1 of 2011).

<sup>11</sup> *In the Matter of the Estate of Kevin John Ombajo (deceased)* (2018) eKLR.

requirements for electronic records to be admitted in court. Justice Achode concluded that there was a need for formal recognition of wills created using electronic means.

As it is, when a court comes across an electronic will, there are numerous modifications and considerations that need to be made. This is feasible, but it will require much more smooth execution. As stated earlier, the legal space in Kenya is not new to technological developments. This means that the legal rules established to cater to electronic wills will have a foundation that can be relied on and built upon. Further, the Law of Succession Act and its interpretation by the courts through the years means that the formalities of wills are already established. Digital adaptations of these formalities can be adopted. Kenya's current legal framework can comfortably cater to electronic wills especially in matters of making of wills and attestation of the same. Technology and the needs of the people keep evolving; it is up to the law to catch up.<sup>12</sup>

Consequently, electronic wills would be an excellent addition to Kenya's current legal framework.

## **1.1 STATEMENT OF PROBLEM**

The Law of Succession Act, which is the main Succession Law statute, only provides for oral and written wills.<sup>13</sup> Furthermore, there is yet to be any judicial decision that properly addresses electronic wills despite there being an instance where the court was presented with an audio-visual will. Undoubtedly, the Law of Succession Act must be modified to accommodate the vast majority of Kenyans who are interested in creating a wealth and succession plan and who have embraced technology. There should be rules in place to regulate the creation of electronic wills and assist testators who choose to create only electronic wills, given the significance or effect of a will. This study, therefore, seeks to investigate whether Kenya's Succession Laws should adopt electronic wills.

## **1.2 RESEARCH OBJECTIVES**

1. To examine Kenya's current succession law regime and its legal approach to electronic wills.

---

<sup>12</sup> -<https://www.sanlam.co.za/blog/articles/Pages/wills-why-the-law-has-to-modernise.aspx> - on 6<sup>th</sup> March 2023.

<sup>13</sup> Section 9 and 11, *Law of Succession Act* (Act No 10 of 1981).

2. To study Australia's current approach to electronic wills and determine what Kenya can learn from them.
3. To propose a legal framework for electronic wills in Kenya.

### **1.3 RESEARCH QUESTIONS**

1. What is Kenya's current succession law framework?
2. What is Australia's current legal approach to electronic wills?
3. What should be the legal framework addressing electronic wills in Kenya?

### **1.4 HYPOTHESIS**



Over time, the legal field in Kenya has embraced technology in the mode of running their day-to-day affairs.<sup>14</sup> Recently, there has been an emergence of Kenyans who wish to create their wills using digital means. This has brought about confusion because there is no specific provision in the law for these types of wills. Courts are not sure whether a new legal framework is needed to cater to these wills or whether they should refer to the provisions of the Evidence Act that cater to electronic evidence and electronic records.

My hypothesis, therefore, is that Kenya's current legal framework on Succession Laws should adopt electronic wills as a step towards achieving the freedom of disposition. There is a need to broaden the current legal framework to cater to this new emergence in the Law.

### **1.5 JUSTIFICATION**

My study is important as it addresses an important emerging trend in Family and Succession Law. As seen in the Kevin John Ombajo case (supra), the number of Kenyans attempting to devolve their assets through electronic wills is on the rise. This shows that several Kenyans, especially the younger generation of Kenyans, have embraced technology and are hoping that the same technology is utilized when developing a succession and wealth plan.<sup>15</sup> It is therefore

---

<sup>14</sup> Njuguna J, 'Adopting Information Technology in the Legal Profession in Kenya as a Tool of Access to Justice' 1.

<sup>15</sup> Tindi N and Beverly T, 'Rethinking Succession Practices in Kenya; The Feasibility of Electronic Wills' Legal News and Insights, 22 October 2022

highly detrimental that Kenya's current inheritance laws do not provide a guideline to how electronic wills are made and give a parameter within which such wills can be validated. This study, therefore, aims to serve as a guide to lawmakers as they attempt to make changes to the law that will address this problem. Further, this study will be useful to courts as a guideline on what approach to take when they encounter an electronic will and thus make the process more seamless.

## **1.6 THEORETICAL FRAMEWORK**

### **1.6.1 THE THEORY OF INHERITANCE**

This theory is rooted in Jeremy Bentham's criticism of the jurisprudence of his time and the courts' failure to consider the established ends of the law.<sup>16</sup> Bentham argued that the laws and courts were established to secure the rights and property of a testator but adjudicators gave too much importance to forms of procedure and the provisions of the law as they were most times without interpretation which led to an injustice. He acknowledges that forms and rules are important for the sake of consistency and formality but there was an over focus on the same which led to lawyers and judges committing the grave sin of injustice.<sup>17</sup> Bentham argued that the relevant actors involved should have considered the intended aim of the law which is that the property vests on the intended beneficiaries but they disregarded this and focused more on whether protocol was being followed accordingly. They should have deduced that certain parts of the law were not working well in certain areas and made the necessary changes to the law.

The author argues that many laws today are open to the same sort of criticism; they focus too much on the form and structure of the law such that this overpasses the reason for having the law there in the first place.<sup>18</sup> The underlying principles of the law remain misunderstood and are rarely acted upon. The laws of that time blatantly ignored the inherent right to inherit and instead argued that the descent of property followed what they called the law of gravitation meaning that

---

<https://insights.advocates.ke/rethinking-succession-practices-in-kenya-the-feasibility-of-electronic-wills/> on 22 October 2023.

<sup>16</sup> Morton J, 'The Theory of Inheritance' 8 *Harvard Law Review* 3, 1894, 2.

<sup>17</sup> Morton J, 'The Theory of Inheritance', 2.

<sup>18</sup> Morton J, 'The Theory of Inheritance', 2.

it was at the mercy of the law.<sup>19</sup> The author argues that the underlying principle of laws regulating the inheritance of property should be that the law should conform to the wishes of a will-maker on how they intend to distribute their property.<sup>20</sup>

This theory is befitting to this study as it addresses the core principle of succession laws. This is that the testators' wishes should be given priority and the law should conform to them. This is because, ultimately, the goal of inheritance laws is that property vests to the intended beneficiaries. An over-emphasis on the form of statutes during the process of probate undermines the acknowledged ends of the law. The type of will a testator has made should not be the focus, rather the focus should be on the testamentary intentions. Statutes and other sources of law should be subject to change to conform to the wishes of a will-maker and ultimately achieve the aim of the law.

### **1.6.2 THE TECHNOLOGICAL DETERMINISM THEORY**

This theory establishes the idea that technology is essential in shaping cultural, social, and legal systems.<sup>21</sup> The term was created by Thorstein Veblen who believed that technology would overthrow the working man and a societal change would be experienced.<sup>22</sup> The theory was however more refined by Karl Max who contended that technological advancements would have the most effects on the societal structure and human social interactions.<sup>23</sup> As per the theory, technological innovations encourage transformation in societal forms and standards as well as legal frameworks.

Determinism exists in two forms: soft and hard determinism.<sup>24</sup> Soft determinism argues that technology is one of the forces that drives social and legal changes while hard determinism argues that technology is the only force that drives such changes. The bottom line is that technology is a force to reckon with when it comes to developments in our society and thus

---

<sup>19</sup> Morton J, 'The Theory of Inheritance', 3.

<sup>20</sup> Morton J, 'The Theory of Inheritance', 4.

<sup>21</sup> Adler P, 'Technological Determinism' in Clegg S and Bailey J (eds), *The International Encyclopedia of Organization Studies*, 2ed, Sage Publications, California, 2007, 2.

<sup>22</sup> Finley T, 'A Look Through Technological Determinism, Social Constructivism, Modernity and Social Media,' Scholar Works Arcadia, 2021, 2.

<sup>23</sup> Finley T, 'A Look Through Technological Determinism, Social Constructivism, Modernity and Social Media,' 2.

<sup>24</sup> Adler, 'Technological Determinism' 2.

cannot be ignored. It is up to the key players in society to keep up with technological innovations and develop policies to respond to the innovations.

Supporters of technological determinism highlight some of the ways that technology has shaped important socio-economic occurrences.<sup>25</sup> In its broadest sense, it has influenced many analyses of changes in socio-economic configurations, such as the rise of globalization, the "information society," "post-Fordism," and the shift from feudalism to capitalism, as well as the evolution of the labour force's skill and occupational composition in the 20th century and post-World War II. Some believe that as technology advances, humanity will gradually be freed from the weight of needless suffering and labor-intensive tasks.<sup>26</sup>

This theory applies to this study as its main idea is that when new technologies become available, legal systems may need to change and adapt. The capabilities and consequences of these technologies might have an impact on the law. This is befitting of this study since the study is advocating for the law to acknowledge the impact that technology has on the area of estate planning and succession. After such acknowledgment, then the law should make the necessary changes to address this impact and ensure that documents made using the new technology are recognised and protected under the law.

## 1.7 LITERATURE REVIEW

So far, the discussions related to my study have been general and often veer off to other directions such as the use of electronic signatures in Kenya as per the provisions of the Kenya Information and Communications Act (KICA).<sup>27</sup> Authors such as Tindi and Beverly may have given a good introduction of the problem but they have taken an umbrella approach to the problem by not discussing how the goals set should be met.<sup>28</sup> Further, a full study is yet to be done giving a solution to the problem or giving recommendations to the same. However, it is worth noting that the problem is widely discussed by authors in other jurisdictions, especially

---

<sup>25</sup> Adler, 'Technological Determinism' 3.

<sup>26</sup> Adler, 'Technological Determinism' 3.

<sup>27</sup> Sang B, 'Legal Challenges to the formation and formalities of online contracts in Kenya' *1 African Journal of Commercial Law* 2, 2019, 108.

<sup>28</sup> Tindi N and Beverly T, 'Rethinking Succession Practices in Kenya; The Feasibility of Electronic Wills.'

countries where the use of electronic wills in estate planning is already in full effect.<sup>29</sup> My literature review gives an insight into electronic wills: their historical development, how they are handled in other continents and in Africa as well as their merits and demerits.

The origin of electronic wills can be traced back to the Uniform Electronic Transactions Act of 1999.<sup>30</sup> This Act provided for uniform rules to govern electronic commerce transactions. Hall discusses the origin and development of electronic wills in his study. He states that the aforementioned Act expressly stated that it did not apply to wills, codicils or testamentary trusts.<sup>31</sup> Following this, Nevada enacted the Electronic Wills Statute of 2001.<sup>32</sup> However, the statute faced some roadblocks as the technology needed to keep up with its formal requirements had not been developed. The statute was therefore revised in 2017 and other states enacted similar statutes. The National Conference of Commissions on Uniform State Laws recently adopted the Uniform Electronic Wills Act 2019.<sup>33</sup> Over time, other states adopted either part or the whole of the Act into their state legislation.<sup>34</sup>

Martin discusses the state of electronic wills in other countries. In countries such as Canada, England and Singapore, efforts have been made to recognise electronic wills but this has not yielded any substantial results such as the enactment of legislation.<sup>35</sup> In Australia, all states have passed legislation and regulations that permit remote witnessing in wills but some states still require the use of wet signatures.<sup>36</sup> Further, Australia has yet to pass legislation that caters to electronic wills although Australian courts have set conditions that must be met for electronic wills to be admitted to probate.<sup>37</sup>

Crous discusses the legality of electronic wills in Africa. In Africa, South African Courts may admit an electronic will into probate under certain circumstances. However, electronic wills are generally not valid under the Electronic Communications and Transactions Act or the Wills Act

---

<sup>29</sup> Sizwe S, 'Electronic Wills in South Africa' 1.

<sup>30</sup> Hall P, 'Welcoming E-Wills into the Mainstream: The Digital Communication of Testamentary Intent' 20 *Nevada Law Journal* 1, 2019, 354.

<sup>31</sup> Hall P, 'Welcoming E-Wills into the Mainstream: The Digital Communication of Testamentary Intent' 354.

<sup>32</sup> 'Developments in the Law, What Is an "Electronic Will"?' 131 *Harvard Law Review* 1790, 1807, 2018.

<sup>33</sup> Hall P, 'Welcoming E-Wills into the Mainstream: The Digital Communication of Testamentary Intent' 340.

<sup>34</sup> Kirker C, 'The Development of Electronic Wills' Trust and Will, 12 July 2021 <https://www.kirkerdavis.com/the-development-of-electronic-wills/> on 12 August 2023.

<sup>35</sup> Martin K, 'Technology and Wills – The Dawn of A New Era (COVID-19) Special Edition' STEP, 2020, 40.

<sup>36</sup> Martin K, 'Technology and Wills – The Dawn of A New Era (COVID-19) Special Edition' 47.

<sup>37</sup> Martin K, 'Technology and Wills – The Dawn of a New Era (COVID-19) Special Edition' 15.

of South Africa.<sup>38</sup> Crous further gives reasons why electronic wills are objected to by South African law.<sup>39</sup> Sizwe and Nicholas contribute to the topic by discussing the case of *Macdonald v The Master* where the court admitted into probate an electronically stored document which was a draft will.<sup>40</sup> The court in the case used a liberal approach and declared the will valid even if it was not handwritten by the deceased.

In Kenya, the topic of electronic wills is not widely discussed. Tindi and Beverly discuss electronic wills and highlight the fact that there is currently no legal framework catering to the same.<sup>41</sup> They further discuss the challenges faced by electronic wills such as security concerns and privacy infringements.<sup>42</sup> Finally, the authors propose a digitised form of already existing formal requirements that will be unique to electronic wills such as attestation through an electronic signature and liberalising the written requirement.<sup>43</sup>

Tindi and Beverly attempt to incorporate the formalities outlined in the Succession Act into electronic wills using provisions of the Evidence Act<sup>44</sup>. For electronic will writing, they refer to Section 106B of the Evidence Act which recognizes electronic records produced by a computer as documents. They contend that using evidentiary proof, courts could determine that an electronic document complies with the Law of Succession Act's standards for a valid will and approve the electronic will based on a reasonable permanent record.<sup>45</sup> Regarding electronic will attestation, they argue that parties can attest to the will through electronic signatures.<sup>46</sup> They again refer to Section 106B of the Evidence Act which requires evidence for documents in electronic form to be accompanied by a certificate to show how that document was produced. Additionally, if witnesses' electronic signatures are attached to the document, an electronic signature certificate needs to be provided.<sup>47</sup>

---

<sup>38</sup> Crous N, 'A Comparative Study Of The Legal Status Of Electronic Wills' Unpublished LLM Thesis, North West University, Potchefstroom, 2019, 1.

<sup>39</sup> Crous N, 'A Comparative Study of the Legal Status of Electronic Wills' 2.

<sup>40</sup> Sizwe S, 'Electronic Wills in South Africa' 3.

<sup>41</sup> Tindi N and Beverly T, 'Rethinking Succession Practices in Kenya; The Feasibility of Electronic Wills.'

<sup>42</sup> Tindi N and Beverly T, 'Rethinking Succession Practices in Kenya; The Feasibility of Electronic Wills'.

<sup>43</sup> Tindi N and Beverly T, 'Rethinking Succession Practices in Kenya; The Feasibility of Electronic Wills'

<sup>44</sup> Tindi N and Beverly T, 'Rethinking Succession Practices in Kenya; The Feasibility of Electronic Wills'

<sup>45</sup> Tindi N and Beverly T, 'Rethinking Succession Practices in Kenya; The Feasibility of Electronic Wills'.

<sup>46</sup> Tindi N and Beverly T, 'Rethinking Succession Practices in Kenya; The Feasibility of Electronic Wills'.

<sup>47</sup> Tindi N and Beverly T, 'Rethinking Succession Practices in Kenya; The Feasibility of Electronic Wills'

It is of utmost importance that the benefits and challenges facing electronic wills are considered. Many authors have written on this topic and they share the same views. Millhorn lists some of the benefits of creating an electronic will as that it is easier to store and share.<sup>48</sup> He highlights some important challenges such as the legal uncertainty facing electronic wills in some jurisdictions and the fact that it can prove difficult to make such a will without the assistance and presence of a lawyer.<sup>49</sup> Fletcher contributes to this discussion by discouraging older testators from creating wills electronically as they are more likely to be unduly influenced and the fact that they have more assets at stake.<sup>50</sup> Standley summarises the benefits of electronic wills as convenience, accuracy, security and accessibility.<sup>51</sup>

I intend to contribute to this conversation by proposing a legal framework for electronic wills in Kenya. The legal framework will address some of the challenges discussed by the authors above and find a way to navigate them. More of this will be discussed in my contribution.

## **1.8 CONTRIBUTION.**

The introduction of electronic wills to Kenya's current legal framework is a new territory that has not been navigated before. Authors who have written on this problem before have indeed confirmed that there is a need for these types of wills in Kenya. They have however failed to discuss exactly why these types of wills are needed in Kenya and the approach that Kenya should take to implement a legal framework for them.

The essence of any law made in any country is to ensure that the law caters to all persons and protects all their rights. For this to be achieved, the legal processes and procedures must be curated perfectly to ensure that the satisfaction of each citizen is guaranteed. My study is therefore unique as it attempts to introduce electronic wills from a point of view of the freedom

---

<sup>48</sup> Millhorn E, 'Advantages and disadvantages of electronic wills' Millhorn Elder Law Planning Group, 6 November 2019

<https://www.millhorn.com/advantages-and-disadvantages-of-electronic-wills/> on 6 November 2023.

<sup>49</sup> Millhorn E, 'Advantages and disadvantages of electronic wills'.

<sup>50</sup> Fletcher C, 'The Pros and Cons of Electronic Wills' Forbes, 25 October 2019

<https://www.forbes.com/sites/christinefletcher/2019/10/25/the-pros-and-cons-of-electronic-wills/> on 25 October 2023.

<sup>51</sup> Standley D, 'The Pros and Cons of Creating Electronic Wills: Is it Right for You?' Law District, 27 June 2023

<https://www.lawdistrict.com/articles/the-pros-and-cons-of-creating-electronic-wills-is-it-right-for-you> on 27 June 2023.

of disposition. Further, it aims to use Australia as a guide on how exactly electronic wills should be approached so that this freedom of disposition can be achieved. If adopted, my study will greatly complement the ongoing discussions surrounding electronic wills in Kenya.

## **1.9 METHODOLOGY**

The mode of study for this project shall be qualitative and shall fully rely on desk-based research. I intend to rely on primary sources such as statutes like the Law of Succession Act and the Evidence Act. I shall also refer to case law. I will also rely on secondary sources such as books, journal articles and reports. I intend to take a deductive approach to the problem where I will use established premises to come up with a claim.

For the first and second parts of my study, I will use a doctrinal analysis to discuss the law as it is and show where the gap is. Then I will use a comparative analysis of Kenya and Australia. Here, I will draw lessons from Australia on the approach they take when courts encounter an electronic will. Australia's succession laws are highly advanced and their courts really strive to keep up to date with any social changes that requires the law to be upgraded. So far, their system of law works well for them and I feel that Kenya can learn a lot from them.

Lastly, I will use Australia's main legal doctrine and certain aspects of the current Kenyan legal framework to address certain parts of the problem and show how improvements can be made.

## **1.10 CHAPTER BREAKDOWN**

Chapter one of my project introduced the study and gave a scope for the same. It contains research objectives, questions, study justification, and theoretical framework.

Chapter 2 examined the current legal framework regulating wills in Kenya and ascertained whether it truly guarantees the right to freedom of disposition. It established that there is a need to widen the scope of will-making in Kenya to keep up with emerging trends in society.

Chapter 3 delved into a study of Australia's current legal framework catering to electronic wills and the method used to approach the same. Their main approach is the use of the harmless error doctrine.

Chapter 4 discussed the benefits of electronic wills and proposed a legal framework for the same in Kenya.

Chapter 5 concluded my research by outlining the findings of this study, discussing the possible implementation challenges and highlighting areas for further study.



## **CHAPTER 2: THE EVOLUTION OF KENYA'S SUCCESSION LAW REGIME AND WILL SYSTEMS.**

### **2.1 INTRODUCTION**

This chapter provides an outline to the changes to Kenya's succession laws over time. It examines Kenya's current legal approach to wills and where electronic wills might fit. It discusses the regime in pre-1981 Kenya and post-1981 Kenya. It further discusses the legal tools used to govern estate planning in Kenya and the key actors involved. The chapter further delves into the freedom of disposition which is the main driving force toward will-making and estate planning.

### **2.2 THE LAW OF SUCCESSION PRE-1981**

This period is majorly made up of the pre-colonial and colonial periods in Kenya. The pre-colonial period is the period between the 18<sup>th</sup> and 19<sup>th</sup> centuries and any prior time before British colonial rule was established in Kenya. The colonial period is the period when the British settlers came into Kenya and assumed leadership. This period runs from the early 1890s to 1963 when Kenya was a British Crown Colony and a member of the East Africa Protectorate.

#### **2.2.1 THE LAW OF SUCCESSION APPLYING TO AFRICANS**

Prior to Kenya's law of succession statute taking effect, customary law served as the primary source of law.<sup>52</sup> From this, it meant that there were numerous succession laws due to the existence of several indigenous tribes in Kenya. Despite this, there were observable similarities in the customary practices of each tribe.<sup>53</sup>

One of the similarities is that African Customary Law advocated for inheritance to occur within the family meaning that strangers could not profit from the deceased's estate.<sup>54</sup> During estate planning, the organization of the family life was taken into consideration. Most communities were organized into patrilineal societies where property descended through the male family line.

---

<sup>52</sup> Musyoka W, 'Law of Succession,' 9.

<sup>53</sup> Kameri-Mbote P, 'The Law of Succession in Kenya: Gender Perspectives in Property Management and Control,'4.

<sup>54</sup> Kameri-Mbote P, 'The Law of Succession in Kenya: Gender Perspectives in Property Management and Control,'4.

This included his widow(s), his children, siblings, parents and members of his clan.<sup>55</sup> A fewer number of communities such as the Digo and Duruma adopted the matrilineal system of family organization. This indicated that the woman's mother, her uncles, aunts, and their offspring, as well as her siblings and their offspring, all inherited the property. However, as time went by, the matrilineal family systems were gradually changed to patrilineal ones making inheritance predominantly patrilineal in pre-independence Kenya.<sup>56</sup>

The Agikuyu tribe was the biggest in pre-colonial Kenya and remains so even in modern-day Kenya. Under Kikuyu customary law, wills were made orally by any property owner so long as the person was old and, on their deathbed, meaning that young people could not make wills.<sup>57</sup> Of importance was the fact that the person had to fully understand the full effects of will making hence the person had to be of sound mind for their will to be considered valid.<sup>58</sup> The attestation was also an element of a valid will. The will had to be made in the presence of relatives, close friends and elders and further in the presence of a muramati (the deceased's personal representative who would oversee the distribution of property).<sup>59</sup>

The 1897 Order in Council allowed for the application of African Customary Law on the condition that it was not repugnant to justice.<sup>60</sup> Despite this, the reality was that most Africans had converted to Christianity due to the benefits they got such as free formal education. African Christians were then governed by the Native Court Regulations 1897.<sup>61</sup> The Act provided that African Christians would be governed by the same law that governed succession matters for Native Christians in India.

A major change was seen in 1902 with the enactment of the East Africa Marriage Ordinance. It provided that natives under the ordinance denounce customary law and from then on fully align

---

<sup>55</sup> Kameri-Mbote P, 'The Law of Succession in Kenya: Gender Perspectives in Property Management and Control,' 4.

<sup>56</sup> Cotran E, 'Restatement of African Law,' *Sweet and Maxwell*, London, 1969, 191.

<sup>57</sup> Kameri-Mbote P, 'The Law of Succession in Kenya: Gender Perspectives in Property Management and Control,' 4.

<sup>58</sup> Kameri-Mbote P, 'The Law of Succession in Kenya: Gender Perspectives in Property Management and Control,' 4.

<sup>59</sup> Kameri-Mbote P, 'The Law of Succession in Kenya: Gender Perspectives in Property Management and Control,' 4.

<sup>60</sup> Cotran, E, 'The Development and Reform of the Law in Kenya,' 27 *Journal of African Law* 1, 1983, 42.

<sup>61</sup> *Native Court Regulations*, No 15 of 1987.

themselves with English succession law.<sup>62</sup> This was later repealed in 1904 by the Native Christian Marriage Ordinance which provided that all Africans were to apply African customary succession law.<sup>63</sup> Further changes were made by the African Wills Act 1961 which mandated that Africans make their wills in an English law manner that is in written form.<sup>64</sup> The fact that colonialism had introduced new types of property ownership that African Customary Law did not support served as justification for this action.<sup>65</sup> However, this Act was seen to limit the freedom of disposition of the testator as they could not will property that they could have transferred when they were alive.<sup>66</sup>

### **2.2.2 THE LAW OF SUCCESSION APPLYING TO MUSLIMS**

Over time, Europeans, Indians and Arabs had started exploring Africa and colonialism was beginning to take root. This saw the emergence of religions such as Islam, Hinduism and Christianity in Kenya.<sup>67</sup> Further, Europeans started arriving in pre-colonial Kenya and established permanent settlements in the country.<sup>68</sup> Each new religion and new inhabitants brought with it its succession laws and practices that applied to the believers of that faith. The application of Islamic Law in succession matters can be traced back to the Probate and Administration Act.<sup>69</sup> This was an Indian Act that was applied to Kenya and it used Islamic Law to govern the probate and estate administration of Muslims. More developments were seen in 1907 when Ordinance Number 13 of 1907 established the Kadhi's Courts to determine all matters of marriage, divorce, succession and personal status using Islamic law. Under the Mohammedan Divorce and Succession Ordinance enacted in 1920, Islamic law was used to determine succession matters where the deceased professed such faith and had contracted an Islamic marriage.<sup>70</sup>

---

<sup>62</sup> Musyoka W, 'Law of Succession,' 9.

<sup>63</sup> *Native Christian Marriage Ordinance*, Ordinance No 9 of 1904.

<sup>64</sup> *African Wills Act*, Cap 169.

<sup>65</sup> Philips A, 'Report on Native Tribunals,' *Government Printer*, Nairobi, 1945, 8.

<sup>66</sup> Clause 4, *African Wills Act*, Cap 169.

<sup>67</sup> Berkley Centre for Religion, Peace and World Affairs, *Faith and Development in Focus: Kenya, March 2017*, 31.

<sup>68</sup> Doro M, "Human Souvenirs of another Era: Europeans in Post-Kenyatta Kenya," 26 *Africa Today* 3, 1979, 46.

<sup>69</sup> *Probate and Administration Act*, Act No 5 of 1881 (India).

<sup>70</sup> Musyoka W, 'Law of Succession,' 11.

### **2.2.3 THE LAW OF SUCCESSION APPLYING TO HINDUS**

Those who professed the Hindu faith and lived in Kenya were under the jurisdiction of the Indian Succession Act of 1865 since the colonial government did not provide any legal provision(s) for them to make wills.<sup>71</sup> A change brought about by Order number 22 of 1898 saw the Act replaced by the Hindu Wills Act of 1870 and the Probate and Administration of Estates Act of 1881 which were both Indian Acts.<sup>72</sup> The Hindu Marriage, Divorce and Succession Ordinance passed in 1946 established that the Hindu Customary Law of Succession would apply in succession matters of Hindus who died domiciled in Kenya.<sup>73</sup>

### **2.2.4 THE LAW OF SUCCESSION APPLYING TO EUROPEANS**

The Europeans living in Kenya at the time needed a law that was akin to the succession law in England.<sup>74</sup> Thus, the Indian Succession Act of 1865 was considered as it was an adaptation of English succession laws.<sup>75</sup> The Probate and Administration of Estates Act, 1881 also applied.

## **2.3 THE LAW OF SUCCESSION POST 1981**

### **2.3.1 THE LAW OF SUCCESSION ACT, 1981**

There was a multiplicity of laws governing succession in Kenya. There was therefore a need to consolidate the laws into a harmonized act to deal with matters of succession. The Law of Succession Act 1981(henceforth The Act) was passed to consolidate all the applicable statutes and regulations into one comprehensive statute.<sup>76</sup> It came into force on 1<sup>st</sup> July 1981 and repealed all previous statutes governing the law of succession in Kenya.<sup>77</sup> A uniform law of succession applicable to all Kenyan persons would ensure that the devolution of property in Kenya was

---

<sup>71</sup> Kameri-Mbote P, 'The Law of Succession in Kenya: Gender Perspectives in Property Management and Control,' 11.

<sup>72</sup> *Hindu Wills Act*, Act No 21 of 1870 (India) and *Probate and Administration of Estates Act*, Act No 5 of 1881 (India).

<sup>73</sup> *Hindu Marriage, Divorce and Succession Ordinance*, Ordinance No 63 of 1946.

<sup>74</sup> Musyoka W, 'Law of Succession,' 14.

<sup>75</sup> *Indian Succession Act*, 1865.

<sup>76</sup> Musyoka W, 'Law of Succession,' 17.

<sup>77</sup> Section 99, *Law of Succession Act*, Act No 10 of 1981.

certain and predictable. Intestate Succession, Testamentary Succession, and estate management would all fall within its purview.<sup>78</sup>

The Act applies universally in Kenya except where the act or any other written law prescribes that it should not apply. For example, the Act does not apply to persons who profess the Muslim faith.<sup>79</sup> This is because the Act contains secular principles that contradict Islamic beliefs.<sup>80</sup> The Act provides for two types of succession that is Testate and Intestate.

### 2.3.1.1 TESTATE SUCCESSION

Part II of the Act introduces the concept of wills and will-making. This is regarding capacity, validity, execution and the forms of wills.<sup>81</sup> It outlines that any adult person, male or female, of sound mind can make a will in Kenya.<sup>82</sup> The forms of wills recognized under the Act include oral and written wills and in special circumstances, privileged wills.<sup>83</sup> It also outlines the requirements for these types of wills to be valid. For oral wills, they are valid if they are made in the presence of two competent witnesses and when the testator dies within 3 months of making the will.<sup>84</sup> For written wills, their validity is determined by whether the testator has affixed their mark on the will, whether the testator intended to give effect to the will and whether the will was attested by two or more competent witnesses who must sign the document in the presence of the testator.<sup>85</sup>

Both types of wills are declared invalid if they are caused by fraud, coercion, importunity or mistake.<sup>86</sup> Any factor that takes away the free agency of the testator makes a will invalid.

---

<sup>78</sup> Section 2, *Law of Succession Act*, Act No 10 of 1981.

<sup>79</sup> Section 2, *Law of Succession Act*, Act No 10 of 1981.

<sup>80</sup> Kameri-Mbote P, 'The Law of Succession in Kenya: Gender Perspectives in Property Management and Control,' 12.

<sup>81</sup> Part II, *Law of Succession Act*, Act No 10 of 1981.

<sup>82</sup> Section 5, *Law of Succession Act*, Act No 10 of 1981.

<sup>83</sup> Section 8 and 9, *Law of Succession Act*, Act No 10 of 1981.

<sup>84</sup> Section 9, *Law of Succession Act*, Act No 10 of 1981.

<sup>85</sup> Section 11, *Law of Succession Act*, Act No 10 of 1981.

<sup>86</sup> Section 7, *Law of Succession Act*, Act No 10 of 1981.

### **2.3.1.2 INTESTATE SUCCESSION**

This type of succession is outlined in part V of the Act. This is the type of succession that takes place when the deceased died without making a will or the will made is declared invalid.<sup>87</sup> The rules of intestacy are important as they ensure that the deceased's property is devolved to the right person(s) who are likely to use it to fulfill the best interests of the deceased's heirs and dependents.<sup>88</sup> The rules of intestacy are further divided into those applying to monogamists and polygamists.

### **2.3.2 AFRICAN CUSTOMARY LAW**

Section 3 of the Judicature Act recognizes customary law as a source of law in Kenya.<sup>89</sup> Section 2 of the Law of Succession Act establishes that the Law of Succession Act applies in all succession matters unless the Act itself makes exceptions to this.<sup>90</sup> This was emphasized in the case of *Rono v Rono and another*.<sup>91</sup> The Act does this in Sections 32 and 33 where it states that the law applicable to the excluded property in Section 32 is the customary law of the deceased's community. This is in a case where the deceased died intestate. Further instances where the Act permits the application of African Customary Law include instances where the deceased died before 1981<sup>92</sup> and where the testator expressly states so in their will.<sup>93</sup>

### **2.3.3 ISLAMIC LAW**

Article 66 of the Constitution establishes Kadhi's courts to hear and determine matters of marriage, divorce, personal status or inheritance where the parties profess the Muslim faith<sup>94</sup>. This is seconded by the Kadhi's Courts Act.<sup>95</sup> According to Section 2 of the Law of Succession Act, the provisions of the Act relating to testamentary and intestate succession do not apply to

---

<sup>87</sup> Section 34, *Law of Succession Act*, Act No 10 of 1981.

<sup>88</sup> Musyoka W, 'Law of Succession,' 6.

<sup>89</sup> Section 3, *Judicature Act*, Cap 8.

<sup>90</sup> Section 2, *Law of Succession Act*, Act No 10 of 1981.

<sup>91</sup> *Rono v Rono & another*, (2005) 1 EA 363.

<sup>92</sup> Section 2(2), *Law of Succession Act*, Act No 10 of 1981.

<sup>93</sup> Section 5(1), *Law of Succession Act*, Act No 10 of 1981.

<sup>94</sup> Article 66, *Constitution of Kenya*, (2010).

<sup>95</sup> Section 5, *Kadhi's Court Act*, Cap 11.

Muslims. The estate of a Muslim is subjected exclusively to Islamic Law.<sup>96</sup> However, the procedural aspects of the Act still apply as long as they are not inconsistent with Islamic Law. This was established by Etyang' J in *Chelang'a v Juma*.<sup>97</sup>

## 2.4 THE FREEDOM OF DISPOSITION IN KENYA

The freedom of disposition can be traced back to the bundle of sticks which are a bunch of property rights inherent to the property owner.<sup>98</sup> One of the bundles is that a property owner has the right/ freedom to disposition/transfer.<sup>99</sup>

It is established by Section 5 of the Law of Succession Act. It states that '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.'<sup>100</sup> This kind of freedom allows a testator to devolve their property as they wish but this is limited by the law and other legal procedures.<sup>101</sup> However, these limitations apply when the testator in making the will excludes some of his beneficiaries who qualify to inherit from them under the law. The same does not apply to the type of will a testator can make.

Testamentary intent is also closely linked to freedom of disposition. Testamentary intent can be described as the subjective intention of the testator for a document they have created to be a will at the time of execution and their wishes carried out as per the provisions of the document.<sup>102</sup> Musyoka, when discussing the nature and functions of wills, refers to the case of *Lemage vs Good Ban (1865)* to define testamentary intentions as the foundation of a will, provided that it is expressed in writing and properly performed in accordance with statute.<sup>103</sup> During the process of

---

<sup>96</sup> Section 2, Law of Succession Act, Act No 10 of 1981.

<sup>97</sup> *Chelang'a v Juma*, (2002), 1 KLR 339.

<sup>98</sup> Okoth HWO, 'Teaching Manuals on the Law of Property', University of Nairobi, Nairobi, 1982, 83-84.

<sup>99</sup> Kariuki F, Ouma S and Ng'etich R, 'Property Law', Strathmore University Press, Nairobi, 2016, 9.

<sup>100</sup> Section 5, *Law of Succession Act*, Act No 10 of 1981.

<sup>101</sup> Silvana S, 'Wills in Kenya' -< [<sup>102</sup> Olson R, 'Executing a valid will – Part 1 Testamentary Intent,' Idaho Law Blog, \[<sup>103</sup> Musyoka W, 'Law of Succession', 31.\]\(https://www.racinelaw.net/blog/executing-valid-will-part-1-testamentary-intent/#:~:text=Testamentary%20Intent%20in%20simple%20terms,said%20to%20have%20testamentary%20character.> On 19 October 2023.</p></div><div data-bbox=\)](https://swkadvocates.com/2021/04/12/wills-in-kenya/#:~:text=Testamentary%20freedom%20allows%20for%20one.that%20part%20of%20your%20will.>- on April 12, 2023.</p></div><div data-bbox=)

probate, courts should strive to look into the intentions of the testator and do as much as possible to ensure that those intentions are fulfilled.

## **2.5 CONCLUSION**

From the discussion above, it is evident that Kenya's current Succession Law regime does not cater to electronic wills. The statutes and other sources of law in Kenya do not currently recognize them as a form of wills. It is important for Kenya to come up with a legal framework to provide for such wills so that those who intend to devolve their property through electronic means are not limited by the law.



## **CHAPTER 3: ELECTRONIC WILLS IN AUSTRALIA AS A BENCHMARK FOR KENYA**

### **3.1 INTRODUCTION**

Courts in countries such as the United States, Australia, and South Africa have attempted to come up with laws to govern the execution of electronic wills. This is because electronic wills are the latest emerging trend in Succession Law even in these countries.<sup>104</sup> This chapter will discuss the steps taken by Australian courts and succession laws, in general, to cater to electronic wills. The chapter will briefly explain why Australia is a suitable country of choice for benchmarking by highlighting the similarity between its justice system and Kenya's justice system. The chapter will outline the developments made in the law in two major Australian states: Queensland and Southern Australia while highlighting the similarities and differences between the two. Lastly, the chapter will delve into case law within Australia that speaks on how Australian courts have handled electronic wills.

### **3.2 ELECTRONIC WILLS AS RECOGNISED IN AUSTRALIA**

Australia is one of the largest countries in the world. It is comprised of six states and ten territories.<sup>105</sup> Some of its major states include Victoria, New South Wales, Southern Australia and Queensland. Like Kenya, Australia was colonized by the British. Therefore, their government system is similar to both countries. This includes a bicameral legislature and a common-law judiciary system. Their highest court is the High Court of Australia which performs the same duties as Kenya's Supreme Court: it has jurisdiction to hear and determine all original and appellate matters from subordinate courts.<sup>106</sup>

In Australia, a 2015 study showed that a will is present in about 60% of adult Australians. In addition, 54% of people who don't have a will plan to create one. Age and asset accumulation increase the likelihood of having a will; 93% of Australians over 70 have one.<sup>107</sup> In recent years,

---

<sup>104</sup> Gray T, 'Succession Law: Reflections and Directions,' 40 *Adelaide Law Review* 1, 2019, 339.

<sup>105</sup> Veevers J, Lange R, Rickard J, 'Australia,' *Britannica*, 18 December 2023 -< <https://www.britannica.com/place/Australia> >- on 18 December 2023.

<sup>106</sup> [https://www.hcourt.gov.au/assets/education/to\\_be\\_called\\_the\\_high\\_court\\_of\\_australia.pdf](https://www.hcourt.gov.au/assets/education/to_be_called_the_high_court_of_australia.pdf) on 4th December 2023.

<sup>107</sup> Tilse C et al, 'Having the Last Word? Will Making and Contestation in Australia,' 8.

testators have become more tech-savvy meaning that courts have been faced with matters of freedom of disposition expressed in non-traditional forms and methods of will-making.<sup>108</sup> The decisions made by the courts in such instances have shown that the courts have been accepting of the new developments and made efforts towards developing the law to be accommodative towards this.

In Australia, for a document to be admitted to probate, it must fulfill four conditions.<sup>109</sup> The first is that it must be a document which is any paper or material on which there are writings or printed words or a disc, tape, or other material where sounds, images, writings, or messages can be reproduced.<sup>110</sup> The second condition is that the document must purport to contain the testamentary intentions of the deceased that is, what the testator wants to happen to their property after their death.<sup>111</sup> The third condition is that on a balance of probabilities, the evidence must establish that the deceased intended for the document to be their final will; clarity and finality must be shown.<sup>112</sup> The final condition is that the party seeking to prove the will must show that the deceased had testamentary capacity at the time of making the will; this is the ordinary presumption until proven otherwise.<sup>113</sup>

This research will focus on laws created to address electronic and other informal wills in Australia.

### **3.3 THE HARMLESS ERROR DOCTRINE**

Succession, particularly will-making, is governed by the Wills/Succession Acts of the various Australian States. The law has coined a unique way of addressing electronic wills in Australia. Their legislation establishes a harmless-error rule for electronic wills whereby a probate court can give effect to an e-will if the court concludes that it is genuine, free from fraud, and for performative purposes.<sup>114</sup> Further, the dispensing power goes beyond protecting written

---

<sup>108</sup> Gray T, 'Succession Law: Reflections and Directions,' 339.

<sup>109</sup> Martin K, 'Technology and Wills – The Dawn of A New Era (COVID-19) Special Edition' 15.

<sup>110</sup> Section 3(1) of the Succession Act 2006 (*New South Wales*)

<sup>111</sup> *Yazbek v Yazbek* [2012] New South Wales Supreme Court.

<sup>112</sup> *In the Estate of Buharoff* (1991) New South Wales Supreme Court, (unreported).

<sup>113</sup> *Shorten v Shorten* [2002] New South Wales Supreme Court.

<sup>114</sup> Hirsch A and Kelety J, 'Electronic-Wills Legislation: The Uniform Act versus Australian and Canadian Alternatives,' 34 *Probate & Property* 5, 2020, 10.

electronic wills to audio and video wills recorded on an electronic device.<sup>115</sup> This doctrine is included as a clause in all Succession Acts in Australia<sup>116</sup>. The application of the doctrine varies from state and is applied at the courts' discretion.

The harmless-error rule was originally coined to do away with the traditional rule of strict compliance with the requirements of the Wills Act formality.<sup>117</sup> The Wills Act of 1837 only recognized testate succession with the will being in written form, attested by two witnesses and signed by the testator.<sup>118</sup> The testator was encouraged to have witnesses who were uninterested parties who did not stand to benefit from the will. The purpose of these strict requirements was to ensure that the testamentary intent of the testator was well implemented when they were no longer alive.<sup>119</sup> The writing requirement was to establish the permanency of the document as a form of evidence while the signature and attestation were to show genuineness.<sup>120</sup>

The formal requirements of the Wills Act were so strictly enforced that a will was declared invalid for a common genuine execution and testation mistake. In *Re Groffman*, the testator signed his will while one witness was in the dining room with him and the other in the living room. The will was declared invalid since the provisions of the Act expressly state that the testator must sign the will in the presence of 2 witnesses present at the same time.<sup>121</sup> Despite declaring the will invalid, the presiding judge stated that he was satisfied that the document was intended by the testator to be executed as his will and that it contained his true testamentary intentions.<sup>122</sup>

---

<sup>115</sup> Hirsch A and Kelety J, 'Electronic-Wills Legislation: The Uniform Act versus Australian and Canadian Alternatives,' 10.

<sup>116</sup> Section 8, *Succession Act* 2006 (New South Wales); Section 9, *Wills Act* 1997 (Victoria); Section 10, *Wills Act*, 2008 (Tasmania); Section 32, *Wills Act*, 1970 (Western Australia); Section 10, *Wills Act*, 2000 (Northern Territory); Section 18, *Succession Act*, 1981 (Queensland); Section 12, *Wills Act*, 1936 (South Australia); and Section 11A, *Wills Act*, 1968 (Australian Capital Territory).

<sup>117</sup> Langbein J, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' 87 *Columbia Law Review Association* 1, 1987, 2.

<sup>118</sup> Langbein J, 'Crumbling of the Wills Act: Australians Point the Way,' 65 *American Bar Association Journal*, 1979. 1192.

<sup>119</sup> Langbein J, 'Crumbling of the Wills Act: Australians Point the Way,' 1194.

<sup>120</sup> Langbein J, 'Crumbling of the Wills Act: Australians Point the Way,' 1194.

<sup>121</sup> *Re Groffman* [1969] 2 All Er 108, The High Court of England.

<sup>122</sup> *Re Groffman* [1969] 2 All Er 108, The High Court of England.

This strict compliance with the formal requirements of the Wills Act defeated the purpose of making a will by making the process unnecessarily complicated. The statutes of the state of Queensland use the words substantial compliance in matters concerning electronic wills. The substantial compliance doctrine is the brainchild of the Queensland Law Reform Commission. Most of its recommendations were indoctrinated in the Queensland Succession Act of 1982<sup>123</sup> including Section 9(a). It establishes that if the court is convinced that a testamentary instrument accurately reflects the testator's intentions, it may admit to probate a document executed in significant accordance with the requirements of the Wills Act.<sup>124</sup>

However, despite this doctrine being clearly established by Queensland Succession Law, the courts have failed to implement it accordingly. The courts have interpreted substantial<sup>125</sup> to mean almost perfect and continued to invalidate the wills in which the testator made a harmless error.

The COVID-19 pandemic was an occurrence that forced the world to embrace technology. Queensland Legislation was able to respond to the need to make wills during the COVID-19 pandemic. The pandemic made it nearly impossible for face-to-face interactions, prompting several adjustments so that day-to-day activities could occur. Normally, the execution of a will requires the presence and signatures of at least two witnesses. During the pandemic, this was not possible as there was the presence of social distancing restrictions. Therefore, on 14 May 2020, the *Justice Legislation (Covid-19 Emergency Response – Documents and Oaths) Regulations 2020 under the Covid-19 Emergency Response Act 2020*, was made by the Queensland Governor in Council enabling documents to be witnessed via an audio-visual link, provided one of the witnesses is a ‘special witness.’<sup>126</sup> A special witness includes a legal practitioner, a justice of the peace, a commissioner for declarations, and a notary public.<sup>127</sup> The special witness must sign a certificate addressing the matters set out in the Regulations and the

---

<sup>123</sup> Langbein J, Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law, 41.

<sup>124</sup> Section 9(a), Succession Act 1981 (*Queensland*).

<sup>125</sup> Langbein J, Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law 1.

<sup>126</sup> Allsopp P, -< <https://www.lexisnexis.com.au/en/COVID19/blogs-and-articles/electronic-signing-and-remote-witnessing-of-wills-in-australia-during-covid-19> >- on 12th June 2023.

<sup>127</sup> Justice Legislation (COVID-19 Emergency Response – Wills and Enduring Document) Regulations 2020 (*Queensland*).

certificate must be kept with the signed document; this still must be a wet signature.<sup>128</sup> The Regulations apply to documents signed between 15 May 2020 and 31<sup>st</sup> December 2020.<sup>129</sup>

The Supreme Court of Queensland took a step further and published *Practice Direction Number 10 of 2020*, giving the Registrar of the Court dispensing powers under the Succession Act 1981. However, the witness to a valid will must be physically present in front of the registrar when they sign their will.<sup>130</sup> This direction applies to wills executed between 1st March 2020 and 30<sup>th</sup> September 2020.

Like Queensland courts, South Australian courts also apply the harmless error doctrine in the execution of wills. However, unlike Queensland, South Australia has been less stringent in its approach which has contributed to the success of the doctrine in the courts. South Australian legislation uses the term ‘dispensing power’.<sup>131</sup> The courts have greatly embraced the doctrine and the harsh requirements of the Wills Act are a thing of the past.<sup>132</sup> This has greatly impressed law reformers both in other Australian states and in other countries worldwide.<sup>133</sup>

The harmless error rule and dispensing power can be traced back to Section 12(2) of the local Wills Act.<sup>134</sup> This was an addition made to the statute after a recommendation by the Law Reform Committee of South Australia. The Committee had been formed to look into the rising cases of net intestate estates and they recommended that the number could be reduced if the courts were mandated to excuse wills that had ‘technical’ execution defects.<sup>135</sup> Under Section 12(2), a document claiming to be a deceased person's testamentary intentions will be considered to be that person's will even if it hasn't been executed according to this Act's requirements if the

---

<sup>128</sup> Martin K, ‘Technology and Wills – The Dawn of A New Era (COVID-19) Special Edition’ 47.

<sup>129</sup> Allsopp P, -< <https://www.lexisnexis.com.au/en/COVID19/blogs-and-articles/electronic-signing-and-remote-witnessing-of-wills-in-australia-during-covid-19> >- on 12th June 2023.

<sup>130</sup> Allsopp P, -< <https://www.lexisnexis.com.au/en/COVID19/blogs-and-articles/electronic-signing-and-remote-witnessing-of-wills-in-australia-during-covid-19> >- on 12th June 2023.

<sup>131</sup> Langbein J, Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law’ 1.

<sup>132</sup> Langbein J, Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law,’ 1.

<sup>133</sup> Langbein J, Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law’, 2.

<sup>134</sup> Langbein J, Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law,’ 9.

<sup>135</sup> Twenty-Eighth Report of the Law Reform Committee of South Australia to the Attorney-General: Relating to the Reform of the Law on Intestacy and Wills, 1974, 5.

Supreme Court—the court of first instance in probate matters—satisfies that there can be no reasonable doubt that the deceased intended the document to constitute his will upon receiving an application for the document to be admitted to probate as the last will of the deceased.<sup>136</sup>

South Australian legislation, unlike Queensland, maintained that attestation and signing of wills still had to be done in person. Meetings that are required to be held in person may occur through audio-visual means.<sup>137</sup> Section 17 of the *COVID-19 Emergency Response Regulations* establishes that a person who is a witness during the signing, execution, certification or stamping of a document must be physically present.<sup>138</sup> However, under the harmless error rule and the rules set for digital wills, wills attested in such a manner can still be validated as long as they show the testator's testamentary intentions.

### **3.4 CASE LAW WITHIN AUSTRALIA ON THE HARMLESS ERROR RULE IN THE EXECUTION OF WILLS AND ELECTRONIC WILLS.**

Several cases have been decided not only in Queensland and South Australia but in other Australian jurisdictions where electronic wills in different forms have been admitted to probate because they fulfilled the four major conditions. This is possible due to the dispensing power and harmless error rule in Australia's Succession Law. They are important as they will show the evolution of Australia's succession law and its ability to respond to emerging trends.

#### **3.4.1 VIDEO RECORDINGS**

In the Queensland case of *Rashford v White*, the deceased made a video recording where he jokingly expressed how he wished his estate to be divided upon his demise. The recording was admitted to probate because it constituted a document, despite the language being jovial, it was purported to state the deceased's testamentary intentions, the deceased intended it to be his last will and that the deceased had testamentary capacity on the day the recording was made.<sup>139</sup>

---

<sup>136</sup> Section 12(2), *Wills Act Amendment Act*, No. 2 of 1975 amending Wills Act of 1936 (South Australia).

<sup>137</sup> Martin K, 'Technology and Wills – The Dawn of a New Era (COVID-19) Special Edition' 50.

<sup>138</sup> COVID-19 Emergency Response Act 2020 (Australian Capital Territory) as amended by the COVID-19 Emergency Response Legislation Amendment Act 2020 (Australian Capital Territory).

<sup>139</sup> *Rashford v White* (2018) Supreme Court of Queensland.

It is extremely crucial that all the four conditions be met conjunctively. In *Re Besanko*, the Victorian Supreme Court rejected a video recording on the grounds that there was insufficient evidence to support the claim that the deceased had testamentary capacity at the time the video was created or that they wanted it to be their final will and testament.<sup>140</sup> This is even though the recording had fulfilled the other two conditions.

In the *Estate of Peter Anthony Pitman (deceased); ex parte Rosemary Machin Pitman*, the Western Australian Supreme Court refused to admit a video recording saved on a thumb drive because it was not sufficiently proved that the deceased intended it to be his last will.<sup>141</sup> The other three conditions had been met in this case.

Consequently, all requirements must be satisfied simultaneously; it is not a question of either/or.

### 3.4.2 DVD RECORDINGS

In *Re Estate of Wai Fun Chan (Deceased)*, an 85-year-old lady altered the terms of her will via a DVD Recording, and the recording was admitted to probate.<sup>142</sup> The Supreme Court of New South Wales held that the recording was a valid will because it constituted a document, the deceased spoke in short and well-considered statements expressing her intent to alter the will and it was proved beyond reasonable doubt that the deceased intended the recording to be her last will and she had the capacity to do so.<sup>143</sup> The presiding judge also commented on the fact that the beneficiaries attested the will and said that the witnesses actively assisted in the making of the will and were not mere onlookers.<sup>144</sup>

In *the Estate of Wilden (Deceased)*, a DVD containing a video recording of the deceased was admitted to probate.<sup>145</sup>

---

<sup>140</sup> *Re Basanko* (2020) Supreme Court of Victoria.

<sup>141</sup> *Estate of Peter Anthony Pitman (deceased); ex parte Rosemary Machin Pitman* (2018) Supreme Court of Western Australia.

<sup>142</sup> *Re Estate of Wai Fun Chan (Deceased)* (2015) Supreme Court of New South Wales.

<sup>143</sup> *Re Estate of Wai Fun Chan (Deceased)* (2015) Supreme Court of New South Wales.

<sup>144</sup> *Re Estate of Wai Fun Chan (Deceased)* (2015) Supreme Court of New South Wales.

<sup>145</sup> *Estate of Wilden (Deceased)* (2015) Supreme Court of South Australia.

### 3.4.3 TEXT MESSAGES/SMS

In *Nichol v Nichol*, the deceased's phone contained a text message that he had typed out but not sent before he took his life.<sup>146</sup> The court admitted the text message into probate because it satisfied the definition of a document, forensic evidence showed that it had been created on the day of his death, and there was no evidence to suggest that the testator lacked testamentary capacity and most importantly the fact that he failed to send the text to his brother showed that he did not intend to alert him of his suicide plans and not that he did not intend for the message to be his will.<sup>147</sup>

### 3.4.4 UNPRINTED ELECTRONIC DOCUMENTS.

In *Re Yu*, the deceased was contemplating his imminent death and he created a document on a word processing program on his computer.<sup>148</sup> The document did not appear to have been printed. The court admitted the document into probate because it fit the definition of a document, the deceased had typed his name at the end of the document as his signature, the document clearly stated that it was his last will and it formally recognised him, an executor of his estate who had the authority to handle the deceased's affairs and it purported to dispose of all his property.<sup>149</sup>

More electronic word processor documents labelled 'my\_will.doc' and 'Will.doc' were admitted into probate in the cases of *In the Estate of Roger Christopher Currie*<sup>150</sup> and *Alan Yazbek & another* respectively.<sup>151</sup>

### 3.5 CONCLUSION

In this new digital age era, one can say that Australia has done a fantastic job responding to the rising need for electronic wills. Other jurisdictions have merely stated that they are looking into the topic of electronic wills but only a few have amended their succession laws to accommodate

---

<sup>146</sup> *Nichol v Nichol* (2017) Supreme Court of Queensland.

<sup>147</sup> *Nichol v Nichol* (2017) Supreme Court of Queensland.

<sup>148</sup> *Re Yu* (2013) Supreme Court of Queensland.

<sup>149</sup> *Re Yu* (2013) Supreme Court of Queensland.

<sup>150</sup> *In the Estate of Roger Christopher Currie* (2015) Supreme Court of New South Wales.

<sup>151</sup> *Alan Yazbek & another* (2012) Supreme Court of New South Wales.

electronic wills. Australia has been a pioneer in this and has set an example for other countries. Kenya can be the next country to follow Australia's great example.



## **CHAPTER 4: THE PROPOSED LEGAL FRAMEWORK FOR ELECTRONIC WILLS IN KENYA**

### **4.1 INTRODUCTION**

This chapter will highlight the benefits that will be brought about by the introduction of electronic wills to Kenya's Succession Law regime. It will further propose some guiding principles for electronic wills in Kenya. The chapter will focus on the laws governing electronic wills in Australia and how they can be applied in Kenya. The chapter will also discuss the Kenyan laws governing and protecting other electronically made documents.

### **4.2 WHY KENYA'S SUCCESSION LAW REGIME NEEDS ELECTRONIC WILLS**

#### **4.2.1 EASE OF PROBATE**

Probate and administration in Kenya is governed by the Law of Succession Act and the Probate and Administration Rules. Section 51 of the Act establishes that when applying for a grant, one has to provide the following information: the full name of the deceased, the date and place of their death, their last known domicile, the relationship (if any) of the applicant to the deceased, whether or not the deceased left a valid will and the present addresses of any executors appointed by the will.<sup>152</sup> Where the deceased left a written will, the original should be annexed to the application or where the original will was destroyed or lost, then an authenticated copy may be annexed to the application or the names and addresses of all persons who can attest to the contents of the will. In the event that the deceased left an oral will, all claimed witnesses' names and addresses must be included in the application.<sup>153</sup>

From the above, a will is an important part of the probate and administration process. There are various circumstances under which a will can be invalidated by the probate court. Wills resulting from coercion, importunity, mistake or fraud are void since they take away the free agency of the testator<sup>154</sup>. In *Mwathi v Mwathi and another*, Bosire J opined that it was not sufficiently demonstrated that the purported will was dictated and carried out by the deceased voluntarily and knowingly. The respondent who was the brother of the deceased did not present any evidence to

---

<sup>152</sup> Section 51(2), *Law of Succession Act*, Act No 10 of 1981.

<sup>153</sup> Section 51(3), *Law of Succession Act*, Act No 10 of 1981.

<sup>154</sup> Section 7, *Law of Succession Act*, Act No 10 of 1981.

rule out the notion that he had improperly persuaded the deceased to leave him his possessions.<sup>155</sup> The will was declared void due to the presence of coercion or undue influence.

With oral and written wills, it may prove difficult to prove otherwise when a will is challenged in court on the grounds of mistake, coercion, fraud, importunity or mental incapacity. With electronic wills, this can be materialised because the testator can make the will on camera where their body language can be studied and signs of coercion, impaired mental capacity and other grounds for invalidity can be detected.

Lastly, the ease with which one can prove an electronic will will encourage more people to make wills. Further, the fact that one can make the will on their mobile phone, or any other electronic device makes the situation more ideal in this digital era. This will reduce the number of intestate estates in Kenya because wills will be easier to prove, and more Kenyans will be motivated to make wills.

#### **4.2.2 EASE IN IDENTIFICATION OF WITNESSES**

Electronic wills also guarantee ease when identifying those who witnessed and executed the will. The general rule governing the witnessing of wills is that the will must be made in the presence of two or more competent witnesses. Witnesses are a crucial part of the will-making process as they provide evidence of the testator's true actions after the testator is deceased.<sup>156</sup> During the process, there may be witnesses who may want to dishonestly benefit from the will and intentionally mislead or influence the testator when making the will. For example, in the *Mwathi* case,<sup>157</sup> The deceased's brother and his spouse witnessed the will, and they profited from it at the expense of the deceased's sisters. The deceased's brother and his wife claimed that there were other witnesses among them but the same could not be confirmed and the will was declared void.

With electronic wills, it is easy to identify the witnesses and executors of the will. The witnessing and attestation can be done via video where the exercise can be monitored. The same video evidence can be used in case of a dispute as to the witnessing and execution of the will.

---

<sup>155</sup> *Mwathi v Mwathi and another* (1995-1998) 1 EA 229.

<sup>156</sup> Musyoka W, 'Law of Succession' 64.

<sup>157</sup> *Mwathi v Mwathi and another* (1995-1998) 1 EA 229.

Further, witnessing via video also gives a glimpse into how the attestation is done to ensure that the attestation formality is met.

### 4.2.3 DURABILITY AND PRIVACY BENEFITS

Electronically made documents generally last longer than documents that exist in paper form.<sup>158</sup> Paper can be easily destroyed, lost or misplaced. Further, it can be easily accessed by anyone who intends to destroy, misplace or lose it. With electronic documents, such matters are the least of the user's concerns. Electronic documents have many protection and privacy avenues. One can protect their document(s) through a password that is only known to them meaning that others cannot access it unless they share their password. Further, when sharing a document with another individual, some options grant the user the option to protect the document with a password that only they and the other person know meaning that when another party comes across the document, they cannot see the contents of the document.<sup>159</sup>

Some electronic features of shared documents such as Google Docs allow the user to see who made certain changes to a document and the change(s) they made. The owner of the document can also control who has editing and viewing permissions.<sup>160</sup>

One also has the option to create a backup for their file in case the original one is misplaced or lost. Further, one can make several copies of the same document even on other devices. When a document in an electronic device is deleted, it automatically moves to the Recycle Bin where it can be easily retrieved. The document can stay in one's storage for an infinite amount of time. Electronic wills are better than paper wills in this aspect such that they can be password-protected and easily retrieved when lost or deleted.<sup>161</sup>

In common law, a will must be destroyed by a testator or by someone in his presence and by his direction for it to be legally revoked. In *Gill v Gill*, the testator's wife tore up his will during a

---

<sup>158</sup> Prescott L, Anderson S, 'Preservation of Electronic Legal Materials' (Report No 4/2018) Washington, DC, United States, Georgetown University Law Library, 2018.

<sup>159</sup> Prescott L, Anderson S, 'Preservation of Electronic Legal Materials' (Report No 4/2018) Washington, DC, United States, Georgetown University Law Library, 2018.

<sup>160</sup> <https://www.google.com/docs/about/> on 11<sup>th</sup> January 2024.

<sup>161</sup> Prescott L, Anderson S, 'Preservation of Electronic Legal Materials' (Report No 4/2018) Washington, DC, United States, Georgetown University Law Library, 2018.

fight.<sup>162</sup> The court held that there was no revocation as the testator did not destroy the will or direct so. However, in an instance where a paper will has already been destroyed, there is a high possibility that no other copies are available, and the testator may have to draw up another one; that is if they are not already deceased. With electronic wills, there are likely to be more copies of the will in the testator's device thus dispelling the need to draft a new one.

In *Re Estate of Motichand Devji Shah*, the Nairobi High Court admitted a copy of the original will into probate and gave the will executors a limited grant while awaiting the production of the original will, whose location was unknown.<sup>163</sup> This is in line with the provisions of the Law of Succession Act.<sup>164</sup> In the case of a probate grant, a limited grant does not confer or legitimise the personal representative's authority to act on behalf of the full estate until the administration is completed.<sup>165</sup> The administration may never be completed until the original will or a copy is found which may not happen in some instances. This may compel the court to rule that the deceased died intestate. With electronic wills, the safety of the will is almost always guaranteed, and one seldom has to worry about the will getting lost.

#### **4.2.4 CONVENIENCE FOR THOSE WHO ARE INCAPABLE OF PENNING THEIR WILLS**

One of the most admirable features of electronic wills is that they provide convenience to the user. This is especially where they find difficulty in or are unable to do something crucial to the will making process. Some of the persons who can benefit from electronic wills include the illiterate who are unable to write or spell correctly as well as the sick who are physically unable to write a will.

For the illiterate, they have the option of creating a video or audio recording and if it meets the relevant criteria then it can be admitted into probate as a valid will. Those who have limited reading and writing skills can type out their wills and utilise features such as autocorrect and spelling and grammar checkers to ensure their will is well written or typed. The technology used

---

<sup>162</sup> *Gill v Gill* (1909) P 157.

<sup>163</sup> *Re Estate of Motichand Devji Shah* (1964) KLR.

<sup>164</sup> Paragraph 1, Fifth Schedule, *Law of Succession Act*, Act No 10 of 1981.

<sup>165</sup> Walubengo N, 'Understanding Limited Grants and Their Applicability' Legal News and Insights, 23 November 2022

<https://insights.advocates.ke/understanding-limited-grants-and-their-applicability/> on 23 November 2022.

to facilitate the making of electronic wills will be user-friendly to ensure that even those who are not tech-savvy can still navigate it.

Those who are unable to write a will due to disease or infirmity are granted the opportunity to make audio-visual wills. This means that ill persons who are unable to pen wills do not have to call in other persons to write their wills for them. This is usually an avenue for fraud and/or forgery as the third party instructed to draw up the will may include or omit certain things not known or approved by the testator. In *Wanjau Wanyoike and four others v Ernest Wanyoike Njuki Waweru and another*, the deceased made a codicil to his will which altered the contents of his first will.<sup>166</sup> The first respondent who was the grandson of the deceased noted down the terms of the codicil as the deceased allegedly dictated them to him. Evidence showed that at the time, the deceased was old, seriously ill, bedridden and paralysed and was not in a physical and mental condition to do any strenuous activity. This raised the suspicion that the deceased did not know or approve the contents of the codicil which left a substantial part of his assets to the drafter of the codicil and the will was voided.

Instances such as the one discussed above can be avoided if those limited by illness have the option of making a will without writing it or merely leaving behind an oral will. It is important that they leave a concrete document as their will which can be referred to even after their demise. This can be achieved through the various forms of electronic wills.

#### **4.3 SUGGESTED PRINCIPLES FOR ELECTRONIC WILLS IN KENYA**

The legal framework for electronic wills should amalgamate Australia's harmless error doctrine and Kenya's electronic evidence laws. Other laws such as data protection and privacy laws should also apply.

##### **4.3.1 THE HARMLESS ERROR DOCTRINE**

Australia's succession law regime applies the harmless error doctrine to approach electronic wills. Under this doctrine, electronic wills are admitted to probate if the court is satisfied that it is genuine, free from fraud and reflects the genuine testamentary wishes of the testator. The probate

---

<sup>166</sup> *Wanjau Wanyoike and four others v Ernest Wanyoike Njuki Waweru and another* (1980) HCCC No 147 of 1980.

court thus overlooks genuine and common mistakes the testator may have made during execution. Under the dispensing power and the harmless error rule, written electronic wills, video and audio wills recorded on an electronic device are protected.<sup>167</sup>

Adopting such a rule in Kenya should be the first step in the development of a legal framework catering to electronic wills in Kenya. Under the doctrine, it would mean that the rules governing will execution in Kenya can be slightly adjusted to accommodate the intentions of the testator. This means that the court will still admit a document purported to be a will into probate even if it is not in the traditional written or oral form. For example, in the Big Kev case (supra), if the court was satisfied that the audio-visual document was free from fraud, contained the testator's true testamentary intentions and that the deceased had the testamentary capacity to execute the will, then it would have been admitted to probate under the harmless error rule. The court would have overlooked the fact that it was not in oral or written form or the fact that there was only one witness instead of two. The harmless error rule should not only apply to the making of wills but also to actions such as alteration and revocation of previously made wills as is done in Australia.<sup>168</sup>

#### **4.3.2 ELECTRONIC EVIDENCE LAWS**

Kenya's Evidence Act sets out rules for approaching evidence in electronic form. Such evidence can be in the form of electronically recorded statements made by a deceased person,<sup>169</sup> electronic messages and digital material, electronic records and the electronic signatures in them.<sup>170</sup> To deter incidents of fraud, the Act sets a very high standard of burden of proof on whoever is submitting such material as evidence. Conditions for the admissibility of electronic records are adequately discussed in Sections 78A and 106B of the Evidence Act.

Section 78 of the Evidence Act sets out the conditions for the admissibility of electronic and digital evidence. Electronic messages and digital material are admissible as evidence provided

---

<sup>167</sup> Hirsch A and Kelety J, 'Electronic-Wills Legislation: The Uniform Act versus Australian and Canadian Alternatives,' 10.

<sup>168</sup> Langbein J, Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' 2.

<sup>169</sup> Section 33, *Evidence Act*, (Cap 80)

<sup>170</sup> Section 78A, *Evidence Act* (Cap 80).

that it remains in its original form.<sup>171</sup> The weight of the evidence is determined by the reliability in the manner it was generated, stored or communicated, the integrity with which it was maintained and how the source of the evidence was determined.<sup>172</sup>

Section 106B is concerned with the admissibility of electronic records as evidence. An electronic record that is printed on paper, saved, recorded, or replicated on computer-produced media is deemed a document without additional evidence of the original's development.<sup>173</sup> Further conditions for computer output are that the computer should have produced information in the output at the time the person had lawful control over the device and that the device was working properly.<sup>174</sup>

Under the provisions of Section 106, a certificate accomplishing any of the following may be used in any proceedings where it is sought to make a statement in evidence. The statement should identify the electronic record and how it was produced, the particulars of the device used in the production of the evidence, or the certificate may be signed by a person responsible for the operation of the management of the device.<sup>175</sup>

In *David Makari Watila v Republic*, the appellate court merited an appeal made by the accused after he was convicted by the trial court using wrongly admitted CCTV footage.<sup>176</sup> The court ruled that the electronic records were incorrectly admitted since they did not meet the conditions set out by Section 106. The evidence produced was not accompanied by a certificate showing how the footage was produced and neither was it presented in court by the person responsible for the operation of the device. The appellate court also found that the trial court had relied overly on the wrongly admitted evidence. The court thus merited the appeal, set aside the sentence, and set the accused at liberty.<sup>177</sup>

---

<sup>171</sup> Section 78A (2), *Evidence Act* (Cap 80).

<sup>172</sup> Section 78A (3), *Evidence Act* (Cap 80).

<sup>173</sup> Section 106 B (1), *Evidence Act*, (Cap 80).

<sup>174</sup> Section 106 B (2), *Evidence Act*, (Cap 80).

<sup>175</sup> Section 106 B (4), *Evidence Act*, (Cap 80).

<sup>176</sup> *David Makari Watila v Republic* (2020) eKLR.

<sup>177</sup> *David Makari Watila v Republic* (2020) eKLR.

In *Idris Abdi Abdullahi vs Ahmed Bashane & 2 others*, the court held that Section 78A and 106B should be read and applied conjunctively.<sup>178</sup> This is especially where the document provides both electronic and digital evidence as is the case with audio and video recordings. According to the court in this case, the electronic record should be produced together with a certificate as provided for by Section 106B and should meet the criteria for information and/or proof in terms of validity and authenticity. Information compliant with Section 78A (3) shall be included in the certificate. To facilitate the electronic record's admission as evidence, the certificate must include all pertinent details about the electronic record's creation, delivery, and receipt by the parties and the court. The contents of the certificate would be provided to shed light on the validity of the process, the provenance of the material, and the assistance and satisfaction of the court.<sup>179</sup>

Electronic signatures are mostly used to execute electronic documents and electronic wills are not an exemption. The Act requires proof that the electronic signature appended to any electronic document belongs to the one who allegedly signed it.<sup>180</sup> The court may require the person to produce an electronic signature certificate or any other person to follow the instructions on the electronic signature certificate and confirm the authenticity of the electronic signature that is said to be attached to that individual.<sup>181</sup>

If not properly regulated, electronic documents have a high potential of being manipulated and wrongfully altered such that they contain highly inaccurate information. On the other hand, if efforts are made to combat all loopholes that can be used to manipulate electronic records, then the documents can be highly accurate. Due to this, Kenya's legislation on electronic evidence does not take any chances when it comes to authenticating such records. This is a good foundation for electronic wills since they are already exposed to highly set standards when it comes to authenticating them. Any person who intends to make such a will must live up to the admissibility standards to ensure that the document they make cannot be unlawfully altered even after their demise.

---

<sup>178</sup> *Idris Abdi Abdullahi vs Ahmed Bashane & 2 others* (2018) eKLR.

<sup>179</sup> *Idris Abdi Abdullahi vs Ahmed Bashane & 2 others* (2018) eKLR.

<sup>180</sup> Section 106 C, *Evidence Act*, (Cap 80).

<sup>181</sup> Section 106 D, *Evidence Act*, (Cap 80).

### **4.3.3 THE RIGHT TO PRIVACY AND DATA PROTECTION**

In Kenya, each person is guaranteed the right to privacy and confidentiality which includes the right to not reveal information related to their private or family affairs or their private communications.<sup>182</sup> Further, information related to family matters amounts to sensitive personal data and can only be collected where a valid explanation is provided.<sup>183</sup>

During will-making, there is a high possibility that private information related to the family will be mentioned in the will. It is therefore crucial that information stored in electronic wills is protected under privacy and data protection laws. This will ensure that the documents are protected from unauthorized access and that those who attempt to tamper with them are held liable. This is also a step to combat incidences of fraud which can arise when the document is tampered with. The protection should apply uniformly to all forms of electronic wills whether audio-visual recordings, text messages or other electronic documents.

### **4.4 OTHER PRACTICE GUIDELINES TO BE CONSIDERED**

Kenyan laws such as the Evidence Act outline procedures for authenticating the production of an electronic document and verifying electronic signatures.<sup>184</sup> This is a good head start to the practice guidelines needed to facilitate the making of electronic wills in Kenya. An important suggestion that should be considered is developing an electronic will policy together with other relevant policies such as a policy on the attestation of an electronic will.<sup>185</sup> Such a policy will serve as a general guide to how the wills should be handled. For example, a policy on the attestation of an electronic may contain guidelines on who qualifies to be a witness as well as remote witnessing guidelines.<sup>186</sup> Other guidelines for execution can also be developed. In Australia, the requirements for online witnessing as per the Wills Act 1997 are as follows: the participants may be present via audio-visual link as long as they are physically present in

---

<sup>182</sup> Article 31, *Constitution of Kenya* (2010).

<sup>183</sup> Section 2 and 25, *Data Protection Act* (Act No 24 of 2019).

<sup>184</sup> Section 78A and 106B/C, *Evidence Act* (Cap 80).

<sup>185</sup> Martin K, 'Technology and Wills – The Dawn of A New Era (COVID-19) Special Edition', 57.

<sup>186</sup> Martin K, 'Technology and Wills – The Dawn of A New Era (COVID-19) Special Edition' 60.

Australia, the presence of a special witness such as a legal practitioner or a notary public and the remote execution procedure must be done within the day.<sup>187</sup>

Guided by the provisions of the right to privacy and confidentiality, there should be a guide on how this can be achieved. For example, it may be suggested that the testator have the appropriate devices and tools and be in a private room or area where they cannot be overheard. If the testator is using a shared computer, they should be able to clear their history after the exercise.<sup>188</sup>

In common practice, once a testator makes a will, the custodian is usually their lawyer. Other times, it can be in the custody of their immediate family. For electronic wills, a safe custody system should be developed to ensure the will is in safe hands. Some of the factors that can be considered include how to appoint a person as a custodian, whether the custodian is a relative of the testator or stands to benefit from the will, and whether the appointed custodian is willing to act in that capacity.<sup>189</sup>

Lastly, as with other electronic documents, it is important to select proper software that is well suited to complete the task. Some of the factors to consider when choosing the software can be whether it is user-friendly and can be used by even those who are not tech-savvy, whether it is secure and hack-proof and can withstand other cyber-security threats and whether the software guarantees the user their privacy in line with privacy and data protection laws.<sup>190</sup>

#### **4.5 CONCLUSION**

It is evident that Kenya is already in tune with emerging technological developments especially in the legal field. By developing a legal framework for electronic wills in Kenya, it means that we will only be building on what already exists. Furthermore, there are already existing Kenyan laws that will further regulate and protect electronic wills in addition to Australian laws. Lastly, it is important to evaluate the benefits that electronic wills will bring along and the different parties that will benefit from the addition.

---

<sup>187</sup> <https://www.justice.vic.gov.au/justice-system/legal-assistance/wills-online-witnessing#what-is-a-will> on 4<sup>th</sup> December 2023.

<sup>188</sup> Martin K, 'Technology and Wills – The Dawn of A New Era (COVID-19) Special Edition' 59.

<sup>189</sup> Martin K, 'Technology and Wills – The Dawn of A New Era (COVID-19) Special Edition' 59.

<sup>190</sup> Martin K, 'Technology and Wills – The Dawn of A New Era (COVID-19) Special Edition' 58.

From the discussion above, electronic wills should reflect in our law as an addition to the already existing forms of wills. The Law of Succession Act and other relevant statutes should therefore be amended to reflect the same. The recommendations discussed in this chapter should be included in the amendments.



## **CHAPTER 5: CONCLUSION AND AREAS FOR FURTHER STUDY**

### **5.1 INTRODUCTION**

This study aims to make a case for the legal recognition of electronic wills in Kenya. The study has highlighted the changes brought about by technological advancements in Kenya's legal sector and found it fit to argue for the addition of electronic wills to Kenya's Succession Law regime.

The research starts off by introducing the research problem by pointing out that Kenya's succession laws do not provide for electronic wills. This is even though there are emerging cases of such wills being presented in courts for determination of validity. The lack of such legislation leaves the courts in a dilemma when such wills are presented before them. It further compels them to apply existing Kenyan Laws that regulate other electronic documents, leaving certain legal gaps. The study then delves into Kenya's Succession Law regime pre- and post-1981. 1981 was the year that the Law of Succession Act was enacted. It outlines the forms of wills recognised in the Act. It further discusses the forms of wills recognised in Kenya. Finally, it discusses the freedom of disposition, the main driving force behind will-making. The chapter concludes that the freedom of disposition cannot be fully achieved if the law does not address emerging forms of wills.

Chapter 3 of this study examines Australia's system of succession law in order to draw lessons from their approach to electronic wills. It discusses their main approach which is the harmless error doctrine. The doctrine was coined to do away with the strict compliance with the formal requirements of the Wills Act. According to the doctrine, documents that convey the testamentary intentions of the deceased and are proven to be his final will and testament are admissible in probate. The chapter also discusses the developments in Australia made during the COVID-19 pandemic to streamline will-making when direct human contact was limited. The chapter finally discusses case law within Australia that demonstrates the flexibility of Australian courts in dealing with electronic wills and their ability to respond to emerging trends, a perfect benchmark for Kenya.

After the discussion on electronic wills in Australia, the study proceeds to propose a legal framework for electronic wills in Kenya. It discusses the benefits to be enjoyed from the popularisation of electronic wills in Kenya. It analyses how Kenyan laws that currently protect and control electronic documents can be used in conjunction with succession laws from Australia. These laws include electronic evidence laws together with privacy and data protection laws. The chapter then suggests more guidelines that should be considered to make the process as seamless as possible.

The remaining part of this study discusses the practical challenges that the recommendations set out in the previous chapter may face during implementation. It also recommends areas for further study.

## **5.2 POSSIBLE IMPLEMENTATION CHALLENGES THAT MAY HINDER SUGGESTED REFORMS**

The proposed guidelines discussed in this study may encounter some roadblocks against their adoption into Kenya's legal system. First, implementing such a system in Kenya requires a lot of resources. Resources may be in terms of finances and qualified personnel.

Kenya is currently facing financial challenges and is paying off debts owed to the World Bank and other institutions. The country is presently struggling with a tight budget, which makes it difficult to fund important proposed initiatives and projects. The implementation of the project requires a great deal of financial resources to cater to matters, which include new software and technology, digital platforms and tools to facilitate the creation of electronic wills and training professionals. The country will face a significant challenge in securing capital to invest in the technology needed.

Another roadblock that may be encountered is the shortage of professionals who can successfully handle electronic wills. These are especially advocates and judges who help testators construct their wills and admit them into probate respectively. This affects the overall ability of the legal workforce to handle electronic wills since they are not well-versed with the requirements and processes. Furthermore, due to the financial constraints discussed above, there may be limited training resources which will impede our workforce's capacity to upgrade their skills and adjust to shifting needs.

Lastly, people without access to digital technology or who cannot afford it may become marginalised as a result of the shift to electronic wills. This problem brings up issues of potential exclusion of specific socio-economic groups and equitable access to legal resources. Given the wide range of socio-economic origins among people, it is imperative that the implementation of electronic wills be approached with a commitment to inclusivity. To address this, it is important to make sure that people who cannot afford or do not have access to electronic platforms may still create and store wills using the conventional paper-based method.

### **5.3 AREAS FOR FURTHER STUDY**

This study has limited its focus to making a case for electronic wills in Kenya. It has examined Kenya's estate planning regime and has drawn lessons from Australia to see how the same can be developed and improved.

Future researchers on this topic could explore the legal framework governing electronic wills in different jurisdictions especially in African countries. More research can also be done on the convenience, simplicity, and efficiency of people's electronic will creation experiences.

Lastly, future researchers can examine how successful the current electronic will security measures are. More research can be done on how to make electronic wills more secure by investigating developments in biometric technologies and encryption techniques. This may serve as a security measure against forgery, photoshop and malware attacks.

## **BIBLIOGRAPHY**

### **Books.**

Cotran E, 'Restatement of African Law,' *Sweet and Maxwell*, London, 1969.

Kameri-Mbote P, 'The Law of Succession in Kenya: Gender perspectives in Property Management and Control' International Environmental Law Research Centre, Nairobi, 1995.

Kariuki F, Ouma S and Ng'etich R, 'Property law', Strathmore University Press, Nairobi, 2016.

Musyoka W, 'Law of Succession', LawAfrica Publishing, Nairobi, 2018.

Okoth HWO, 'Teaching Manuals on the Law of Property', University of Nairobi, Nairobi, 1982.

### **Chapters in books.**

Adler P, 'Technological Determinism' in Clegg S and Bailey J (eds), *The International Encyclopedia of Organization Studies*, 2ed, Sage Publications, California, 2007, 2-5.

### **Thesis.**

Crous N, 'A Comparative Study Of The Legal Status Of Electronic Wills' Unpublished LLM Thesis, North West University, Potchefstroom, 2019.

### **Journal Articles.**

Cotran, E, 'The Development and Reform of the Law in Kenya,' 27 *Journal of African Law* 1, 1983.

Doro M, "Human Souvenirs of another Era: Europeans in Post-Kenyatta Kenya," 26 *Africa Today* 3, 1979.

Finley T, 'A Look Through Technological Determinism, Social Constructivism, Modernity and Social Media,' Scholar Works Arcadia, 2021.

Gray T, 'Succession Law: Reflections and Directions,' 40 *Adelaide Law Review* 1, 2019.

Hall P, 'Welcoming E-Wills into the Mainstream: The Digital Communication of Testamentary Intent' 20 *Nevada Law Journal* 1, 2019.

Hirsch A and Kelety J, 'Electronic-Wills Legislation: The Uniform Act versus Australian and Canadian Alternatives,' 34 *Probate & Property* 5, 2020.

Langbein J, 'Crumbling of the Wills Act: Australians Point the Way,' 65 *American Bar Association Journal*, 1979. 1192.

Langbein J, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' 87 *Columbia Law Review Association* 1, 1987.

Morton J, 'The Theory of Inheritance' 8 *Harvard Law Review* 3, 1894.

Njuguna J, 'Adopting Information Technology in the Legal Profession in Kenya as a Tool of Access to Justice' *Journal of MCSD*, 2021.

Sang B, 'Legal Challenges to the formation and formalities of online contracts in Kenya' *African Journal of Commercial Law* 2, 2019.

Sizwe S, 'Electronic Wills in South Africa' 7 *Digital Evidence and Electronic Signature Law Review* 67, 2010.

Tilse C, Wilson J, White B, Rosenman L, and Feeney R, 'Having the Last Word? Will Making and Contestation in Australia,' *SSRN Electronic Journal*, 2015.

### **Other Internet Resources**

Allsopp P, -< <https://www.lexisnexis.com.au/en/COVID19/blogs-and-articles/electronic-signing-and-remote-witnessing-of-wills-in-australia-during-covid-19> >- on 12th June 2023.

Fletcher C, 'The Pros and Cons of Electronic Wills' *Forbes*, 25 October 2019  
<https://www.forbes.com/sites/christinefletcher/2019/10/25/the-pros-and-cons-of-electronic-wills/>  
on 25 October 2023.

Kirker C, 'The Development of Electronic Wills' *Trust and Will*, 12 July 2021  
<https://www.kirkerdavis.com/the-development-of-electronic-wills/> on 12 July 2023.

Millhorn E, 'Advantages and disadvantages of electronic wills' *Millhorn Elder Law Planning Group*, 6 November 2019  
<https://www.millhorn.com/advantages-and-disadvantages-of-electronic-wills/> on 6 November 2023.

Olson R, 'Executing a valid will – Part 1 Testamentary Intent,' *Idaho Law Blog*,  
<https://www.racinelaw.net/blog/executing-valid-will-part-1-testamentary->

[intent/#:~:text=Testamentary%20Intent%20in%20simple%20terms,said%20to%20have%20testamentary%20character](#). On 19 October 2023.

Silvana S, 'Wills in Kenya' -< <https://swkadvocates.com/2021/04/12/wills-in-kenya/#:~:text=Testamentary%20freedom%20allows%20for%20one,that%20part%20of%20your%20will.>>- on April 12, 2023.

Standley D, 'The Pros and Cons of Creating Electronic Wills: Is it Right for You?' Law District, 27 June 2023

<https://www.lawdistrict.com/articles/the-pros-and-cons-of-creating-electronic-wills-is-it-right-for-you> on 27 June 2023.

Tindi N and Beverly T, 'Rethinking Succession Practices in Kenya; The Feasibility of Electronic Wills' Legal News and Insights, 22 October 2022

<https://insights.advocates.ke/rethinking-succession-practices-in-kenya-the-feasibility-of-electronic-wills/> on 22 October 2023.

Veevers J, Lange R, Rickard J, 'Australia,' Brittanica, 18 December 2023 -< <https://www.britannica.com/place/Australia> >- on 18 December 2023.

<https://www.hcourt.gov.au/assets/education/to-be-called-the-high-court-of-australia.pdf> on 4<sup>th</sup> December 2023.

Walubengo N, 'Understanding Limited Grants and Their Applicability' Legal News and Insights, 23 November 2022

<https://insights.advocates.ke/understanding-limited-grants-and-their-applicability/> on 23 November 2022.

<https://www.justice.vic.gov.au/justice-system/legal-assistance/wills-online-witnessing#what-is-a-will> on 4<sup>th</sup> December 2023.

<https://www.google.com/docs/about/> on 16 January 2024.

-< <https://harvardlawreview.org/2018/04/what-is-an-electronic-will/>>- on 10<sup>th</sup> January 2023.

-<https://www.sanlam.co.za/blog/articles/Pages/wills-why-the-law-has-to-modernise.aspx>- on 6<sup>th</sup> March 2023.

## **Reports**

Berkley Centre for Religion, Peace and World Affairs, *Faith and Development in Focus: Kenya, March 2017.*

Philips A, 'Report on Native Tribunals,' *Government Printer*, Nairobi, 1945.

Prescott L, Anderson S, 'Preservation of Electronic Legal Materials' (Report No 4/2018) Washington, DC, United States, Georgetown University Law Library, 2018.

Twenty-Eighth Report of the Law Reform Committee of South Australia to the Attorney-General: Relating to the Reform of the Law on Intestacy and Wills, 1974.

## **Working Papers and Research Papers**

Martin K, 'Technology and Wills – The Dawn of A New Era (COVID-19) Special Edition' STEP, 2020.

