ASSESSING TESTAMENTARY FREEDOM VIS-A-VIS THE STRICT COMPLIANCE WITH FORMAL REQUIREMENTS

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Declaration

I, Wendy Cynthia Aoko Lugerah 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: .....

Date: .....

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

Signed: .....

Abstract

Wills are an essential part of society as they determine how one's property is to be administered and distributed. The primary law governing wills and succession matters in Kenya is the Law of Succession Act (Cap 160). It looks at the testamentary capacity of a testator before delving into the intricacies of the forms of wills. It then gives a guideline on the creation of wills, and the formal requirements that are to be met in the event of intestacy.

This research delves on the conflict between testamentary freedom and strict legal requirements that are to be met when validating wills. It examines the history of power distribution in succession law and its role in addressing stringent requirements. By examining the history of power distribution in succession law and observing how jurisdictions like South Africa, Queensland, and California have adopted a more intent-focused approach to estate administration, the study reveals the difficulties arising from strict compliance. The findings indicate that such a strategy effectively mitigates the negative effects of rigorous formality by aligning legal practice with the genuine preferences of testators. While the adoption of this doctrine raises concerns about potential overreliance on informal paperwork and associated legal costs, the overall benefit is in protecting true testamentary intentions.

The study takes a qualitative approach, analysing key statutes and case law to demonstrate the practical implications of these legal criteria. Additionally, it looks into the existing social frameworks that govern the jurisdictions, particularly Kenya and South Africa where customary norms are taken into consideration. Finally, this study proposes a more flexible approach that strikes a balance between the requirement for legal clarity and the respect of individual autonomy in testamentary concerns, proposing modifications that could improve the effectiveness of the dispensing authority in protecting testamentary intent. The findings are intended to add to existing discussions in succession law in Kenya and shape future legal practices and policy.

List of Statutes

Law of Succession Act (Act No. 11 of 2021)
Marriage Act (Act No. 4 of 2014)
Constitution of Kenya (2010)
Wills Act (Act 49 of 1996) (South Africa)
Intestate Succession Act (Act No. 81 of 1987) (South Africa)
Reform of Customary Law of Succession and Regulation of Related Matters Act (Act No. 11of 2009) (South Africa).

List of Cases

Banks v Goodfellow (1870), Court of Queen's Bench
Erastus Maina Gikunu and another v Godfrey Gichuki Gikunu (2015) eKLR
Re Groffman (1969), Queen's Bench
Elizabeth Kamene Ndolo v George Matata Ndolo (1995) eKLR
In the Matter of the Estate of Doris Wanjiku John Mwigaruri alias Doris Wanjiku (Deceased) (2015) eKLR
Van der Merwe v Master of the High Court & Another (2010) Supreme Court of Appeal of South Africa.
Macdonalds and Others v The Master and Others (2002) South African Law Reports 64
Bekker v Naude (2003) The Supreme Court of Appeal South Africa
Van Wetten and Another v Bosch and Others (2003) Supreme Court of Appeal of South Africa.
Smith v Parsons (2010) Supreme Court of Appeal of South Africa.
In the Matter of the Estate of Ellah Warue Nthawa (deceased) Nairobi HCSC No. 971 of 2001
In the Matter of the Estate of Loice Njeri Ngige Eldoret HCP&A No. 113 of 1994

CHAPTER ONE: INTRODUCTION

1.1 Background

A will is an expression of a testator's wishes regarding the disposition of his or her property after death.[1] A testator is the person making the will. According to the Black Law Dictionary, a will is an essential document that expressly directs how an individual desires his or her estate to be distributed upon death.[2]

Testamentary capacity is a vital element in will construction. It refers to the ability of the testator to make a valid will.[3] The test for capacity was laid down in *Banks v Goodfellow* which outlined three requirements that should be met; sound mind, sound memory, and sound understanding.[4] The Kenyan succession act simply outlines 'sound mind' as a requirement for testamentary capacity,[5] but Kenyan courts apply the golden rule as set above as was seen *in Erastus Maina Gikunu and another v Godfrey Gichuki Gikunu and another.* In this case, the judge held that the deceased's omission of his married daughters from the will was not a sign that he was of unsound mind and did not know that he was doing.[6] Testamentary capacity is important as it connotes testamentary freedom. As seen in the Erastus Maina case above, testamentary freedom is an essential element in will making as courts look to decipher the intention of the testator.

Needless to say, even though testamentary freedom is essential in wills, the law limits it in certain ways through strict enforcement of formality requirements. Nonetheless, the stipulated requirements were thought to offer a safe harbour in indicating a testator's purpose before a probate court.[7] The Kenyan law is stringent on the validity of written wills if the testator or somebody else in his/her presence does not affix a mark to it and if it is not attested by at least two competent witnesses.[8] The law is even more rigorous when narrowing down to oral wills as the testator is

[1] Section 3, *Law of Succession Act* (Act No. 11 of 2021).
[2] Black's Law Dictionary, 4 ed.
[3] Cornell Law School –< Testamentary Capacity | Wex | US Law > on 12 December 2024.
[4] *Banks v Goodfellow* (1870), Court of Queen's Bench.
[5] Section 5, *Law of Succession Act* (Act No. 11 of 2021).
[6] *Erastus Maina Gikunu and another v Godfrey Gichuki Gikunu and another* (2015) eKLR.
[7] Langbein J, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' 87 *Columbia Law Review* 1, 1987, 4.
[8] Section 11, *Law of Succession Act* (Act No. 11 of 2021).

anticipated to perish within a period of three months from the making of the will unless he/she was a member of the armed forces or merchant marine during active service for the will to be valid.[9] Hence, if a testator lives past the three month period as set out, their oral will is rendered invalid.

Of importance to this study are written wills. Written wills have been recognised as the main form of wills since the 1940s, whereby all American States required that wills should be in writing.[10] During this period, the formality rules still applied and the testator was required under the Statute of Wills and the Statute of Frauds to affix his signature, or any other person to do it under his authority and in the presence of two witnesses.[11] The rule of strict compliance has its roots in the English Models, the Wills Act of 1837.[12] The Wills Act provided for the requirements of a formal will, the requirements being similar as those set out in the Law of Succession Act. The purpose of maintaining formalities was so as to enforce the testator's will in probate court, and establish the permanent evidence of the substance of his/ her wishes.[13] In the case of *Re Groffman*, the will was considered invalid as the law required both witnesses attesting the will to be together at the same time when the testator was signing the will.[14] The prescribed formalities were considered to create a safe harbour in indicating the intention of a testator before a probate court.[15] Therefore from the decision held by the court, it is evident that there was strict compliance with the rules of formalities when ascertaining the validity of Groffmann's will.

Due to the harshness that this strict compliance with formalities created in the various jurisdictions such as South Australia, a functional rule of substantial compliance was suggested with the key proponent being American legal scholar, Professor J. H. Langbein. The doctrine governed the consequences of failing to comply with whatever formalities the legislature has prescribed in any Wills Act.[16] The aim of the doctrine was to maintain the deceased's testamentary intent, provided that the authenticity of the document is beyond doubt.[17] This approach of having the legitimacy

[9] Section 9(1), *Law of Succession Act* (Act No. 11 of 2021).
[10] Rees J, 'American Wills Statute 1' 46 *Virginia Law Review* 4, 1960, 614.
[11] Rees J, 'American Wills Statute 1', 617.
[12] Langbein J, 'Excusing Harmless Errors in the Execution of Wills', 2.
[13] Langbein J, 'Excusing Harmless Errors in the Execution of Wills', 3.
[14] *Re Groffman* (1969), Queen's Bench.
[15] Langbein J, 'Excusing Harmless Errors in the Execution of Wills',4.
[16] Miller J, 'Substantial Compliance and the Execution of Wills' 36 *The International and Comparative Law Quarterly* 3, 1987, 560.
[17] Miller J, 'Substantial Compliance and the Execution of Wills', 564.

simply being determined by the testator's intent then shifted the burden of proof to the propounders of wills to show that the document was intended to be a will. However, the idea of having the burden of proof being determined through this procedure was rejected by the English Reform Committee. By this time, four Commonwealth jurisdictions had introduced the dispensing power, with it taking various forms.[18] The dispensing power allowed courts to accept an informal or non-compliant will as valid even if it did not meet the formal requirements. States that had already adopted the dispensing power by 1987 included India, Manitoba, Queensland, and South Australia,[19] with South Australia having notable developments by 1975.[20] In the African context, South Africa has taken up the doctrine of dispensing power through a Condonation Principle in their Wills Act, that enables a document to be admitted if the court is satisfied that the document was drafted or executed by a person who has passed away since the drafting or the execution, and the document was intended to be his will or an amendment to his will.[21]

In *Erastus Maina Gikunu and another v Godfrey Gichuhi Gikunu and another*,[22] the court quoted *Elizabeth Kamene Ndolo v George Matata Ndolo*, where it emphasised on the importance of testamentary freedom in disposing of the testator's property as they please.[23] The court held that this freedom is unfettered. However, as seen above, this testamentary freedom is subject to the formalities in the Law of Succession Act. Thus, it is of essence to critique the role of courts in enhancing the preservation of testamentary freedom.

1.2 Statement of Problem

Will formalities in most countries are rigid and often infringe on testamentary freedom, making people's wills inadmissible. This issue arises from expensive legal advice and inadequate legal understanding. Many people are motivated by the desire to protect their loved ones' future but

[18] Miller J, 'Substantial Compliance and the Execution of Wills', 564.
[19] Miller J, 'Substantial Compliance and the Execution of Wills', 566-573.
[20] Langbein J, 'Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion' 38 *Adelaide Law Review* 1, 2017, 1.
[21] Brook J, 'To Dispense or Not to Dispense? A Comparison of Dispensing Powers and Their Judicial Application' *University of Portsmouth* 1, 2019, 5.
[22] *Erastus Maina Gikunu & another v Godfrey Gichuhi Gikunu & another* (2016) eKLR.
[23] *Elizabeth Kamene Ndolo v George Matata Ndolo* (1995) eKLR.

navigate complex rules without legal training. Additional considerations like financial history, social setting, and health should be considered to ensure the will accurately reflects their goals.

This problem is pertinent in Kenya, where the Law of Succession Act enforces strict will formalities that can result in the invalidation of wills for a significant portion of the population due to minor technicalities. In addition to this, there is a lack of understanding of will formation among a vast majority which leads to a number of cases undermining testamentary freedom. From a legal realist standpoint, this rigid adherence to statutory form, without adequate consideration for the lived experiences and contextual factors influencing will-making, can result in outcomes that undermine the very purpose of succession law: to facilitate the orderly and intended transfer of ownership.

This study will thus examine whether the Law of Succession Act (1981) should be amended to recognise dispensation power when assessing the validity of written wills with regard to testamentary intention.

1.3 Research Objectives

1. To explore the historical origin and purpose of the doctrine of dispensing power in succession law.
2. To analyse the legal framework governing succession in Kenya.
3. To evaluate the feasibility of adopting the doctrine of dispensing power in Kenyan succession law by drawing comparative insights from South Africa's experience.

1.4 Research Questions

1. What is the historical origin and purpose of the doctrine of dispensing power in succession law?
2. What is the legal framework governing succession in Kenya?
3. How can lessons from South Africa's application of dispensing power inform potential adoption or adaptation in Kenyan succession law?

1.5 Hypothesis

Kenya adopts a strict compliance rule as to formalities of a written will. It therefore subjects property to the rules of intestacy once the requirements are not met. Therefore, there is no exception provided under the law that allows for parties to make applications based on not meeting all the formal requirements. This approach is suitable to the extent that it may prevent fraud. However, it fails to take into consideration the economic status of most citizens when accessing private services such as will writing. In addition to this, the health status of the testator should be taken into consideration. It also fails to consider the lack of legal knowledge in the public domain. Therefore, citizens are barred from exercising their testamentary freedom once their property is subjected to rules of intestacy as a result of lack of compliance with the formalities.

As such, Kenya's approach towards the strict compliance should be mitigated and Section 11 of the Law of Succession Act to be amended to include the doctrine of dispensing power. This is so as to take into consideration the scarcity of legal knowledge across the country, and the economic state that prevents citizens from acquiring legal help when it comes to the creation of wills.

1.6 Justification

This study aims to look at the introduction of the doctrine of dispensing power in Kenya, being a third world state that is yet to develop and implement such concepts into the legal system. There is strict adherence to the rules of formality within the jurisdiction with regard to written wills to the extent that it limits the testamentary freedom of testators especially in impoverished regions. This is due to the fact that the cost of complying with formalities is high as testator's need the guidance of professionals during the process of will-making. In addition to this, legal aid is scarce in certain regions which then makes it impossible for the majority of the populations to be involved in the will making process, leaving the property to be disposed of by way of intestacy rules. Testamentary freedom directly correlates with the intention of the testator. Intestacy rules fail to take into consideration this intention.

The recognition of the testator's intent, which is the primary objective of a will, serves as one of the justifications to employ the dispensing power. The dispensing power allows courts to validate a will even if it does not conform with the various Wills Act formalities, as long as there is clear

and convincing evidence of the testator's intent. It recognizes that strict adherence to formalities can result in severe repercussions.

The study's primary contributions are to draw attention, enhance and add to the body of knowledge that legislators and adjudicators shall undertake in the legislative process of succession laws by amending the Succession Act . The study will assist adjudicators by providing means and the scope by which the doctrine can be interpreted.

1.7 Theoretical Framework

This study touches on legal realism as the theoretical framework governing the discussion. Legal realism is a predominant theory in American jurisprudence.[24] In American legal philosophy, the realist movement was concerned with questioning and re-evaluating established legal principles and procedures.[25] It aimed to examine how the legal system actually works, including judicial decision-making, and to highlight the practical impacts of legal norms and ideas. The primary objective of the movement was to introduce a more scholarly and sociological approach to the study of law, focusing on how law works in practice rather than theory.

Legal realists set out to prove that often the doctrine invoked by courts does not transcribe to the normative standard upon which they can really rely.[26] It was therefore important for judges to rely on doctrines that reflect the actual normative standards. Herman Oliphant prescribes a return to the regime of stare decisis.[27] The doctrine, stare decisis, was relevant as it provided for courts to bind the decisions of courts in instances where the facts were similar. Oliphant was worried that the applied legal doctrines had become too general and abstract, ignoring situation-types. The legal doctrines applied by courts therefore had no effect on judges in later cases, who simply responded to the law as it was, rather than paying attention to the facts of the particular cases.[28]

[24] Fuller L, 'American Legal Realism' 82 *University of Pennsylvania* 5, 1934, 429.
[25] Fuller L, 'American Legal Realism', 430.
[26] Leiter B, 'Legal Realism and Legal Doctrine' 163 *University of Pennsylvania Law Review* 7, 2015, 1976.
[27] Leiter B, 'Legal Realism and Legal Doctrine', 1977.
[28] Leiter B, 'Legal Realism and Legal Doctrine' 1977.

The realists aimed to restate legal doctrines in a way that was more factual specific and descriptive of the relevant grounds.[29] Numerous realists wrote on the legal theory attempting to decipher it from their own perspectives. Leon Green's book on torts 'The Judicial Process in Torts' centred on doctrinal categories such as factual scenarios in which harm would occur under tort law, for instance, surgical operations.[30] It strayed away from the traditional doctrinal categories such as negligence and strict liability. This was a far-fetched approach that indicated how realists sometimes got carried away as there were laws of torts in force and the approach aimed to capture specific factual scenarios. This organisational model mirrored the Legal Realist notion that there were multiple tort laws tailored to diverse scenarios in which damage occurred, rather than universal tort rules. The rules would better represent the fact-specific intuitions about fairness and justice that really drove the judges if they were characterised in ways relevant to these recurrent factual contexts. This approach intended to make governing doctrines more fact-specific and informative of the essential decision-making grounds.

Jerome Frank was the only realist who supported the 'gastrointestinal theory of judicial decision', which defined law as being what the judge ate for breakfast.[31] Frank's view was disputed by Felix Cohen who stated that judges are human but are held to service under a potent system of government controls.[32] This indicates that judges should not determine the notions of justice simply as an expression of their individual personality, but with regard to social determinants. Their views indicate the common view of legal realists that the law should take into consideration the public good in general, therefore taking into account the social welfare of the governed citizens. Despite other realists rejecting Frank's view, they never produced a systematic theory of the social determinants. The context of social determinants therefore varied from one realist to another. For instance, Max Radin referred to standard transactions with regulatory incidents because of experience.[33] He explained predictable ways in which judges respond to differing situations. On the other hand, Professor Douglas Laycock debunked the irreparable injury rule. He emphasised that courts prevent harm when they can, but judicial opinions do not apply the rule even though

[29] Leiter B, 'Legal Realism and Legal Doctrine', 1978.
[30] Leiter B, 'Legal Realism and Legal Doctrine', 1979.
[31] Leiter B, 'Legal Realism and Legal Doctrine', 1979.
[32] Leiter B, 'Legal Realism and Legal Doctrine', 1979.
[33] Leiter B, 'Legal Realism and Legal Doctrine', 1979.

they recite it.[34] Therefore, courts have the ability to reject a plaintiff's choice of remedy based on an intuitive sense of justice.

Max Radin explains realism to be the process by which circumstances surrounding events should be classified to give cases a conceptual tag.[35] This method was designed to capture the fact-specific intuitions about fairness and justice that inspired the courts, coinciding with the Realist objective of reducing current doctrine to the level of normative expectations in the communities where it is binding.

This theory will be useful in this study insofar as it helps provide an analysis of the application of laws during the court process. Other than strictly abiding to what is contained in the statute, the theory takes into consideration the social, cultural, and economic livelihoods of people affected by such laws. Overall, because it emphasises the need of adjusting legal doctrines to the specific factual settings in which conflicts arise, the realist approach can provide a helpful foundation for implementing a dispensing power in succession law.

1.8 Literature Review

Strict adherence to prescribed formalities in succession law has proven to be problematic in the administration of succession laws with regard to testamentary intentions of individuals.
In the United States, John Langbein proposed the harmless error rule to remedy the intent-defeating formalism in the execution of wills.[36] The purpose of the harmless error doctrine was to preserve the intention of the testator. Additionally, he proposed the substantial compliance doctrine where the testamentary intent can be presumed in cases of defective execution.[37] The doctrine holds that a will is valid even if it does not meet all formal execution criteria, provided that the testator's

[34] Leiter B, 'Legal Realism and Legal Doctrine', 1979.
[35] Max Radin, 'Legal Realism' 31 *Columbia Law Review* 5, 1931, 824.
[36] Mann B, 'Formalities and Formalism in the Uniform Probate Code' 142(3) *University of Pennsylvania Law Review*, 1994, 1033.
[37] Miller J, 'Substantial Compliance and the Execution of Wills' 36(3) *The International and Comparative Law Quarterly*, 1987, 565.

intent can be reasonably inferred from the activities taken.[38] The aim is to prevent the invalidation of wills resulting from minor errors or omissions that do not reflect true wishes of the testator. Judges' discretion under the harmless error rule permits them to validate documents as wills despite formal defects, in an attempt to honour the testator's intent. However, this flexibility might result in inconsistent outcomes between jurisdictions. Variability stems from varied judicial interpretations of testamentary intent, varying standards required for compliance, and the impact of case law and local cultural views on formality.[39] As a result, while certain jurisdictions may take a more permissive approach that promotes testamentary flexibility, others may closely stick to formal rules, creating a legal landscape marked by uncertainty surrounding the validity of non-compliant wills.

Similarly, Richard Hedlund advocated for the introduction of an intention based dispensing power in English succession law. The dispensing power allows courts to validate documents that would otherwise fail as wills if they represented the testator's testamentary wishes.[40] He points out how such power has been introduced in jurisdictions such as Australia and New Zealand so as to allow courts to rule based on intent of the testator. In the New South Wales Succession Act 2006, courts can consider documents that purport to state the intention of a deceased person and has not been executed in accordance with the formality requirements.[41] As a result of adopting this intention-based system, the Act also allows courts to consider extrinsic evidence when coming up with a decision. This system seeks to balance the need for legal formalities with the importance of honoring the true wishes of the deceased, thereby avoiding the harsh consequences of strict adherence to formal requirements

The Harshness of Strict Compliance

[38] Mann B, 'Formalities and Formalism in the Uniform Probate Code', 1048.
[39] Mann B, 'Formalities and Formalism in the Uniform Probate Code', 1058.
[40] Hedlund R, 'Introducing a Dispensing Power in English Succession Law' 25 *Trusts and Trustees* 7, 2019, 722.
[41] Hedlund R, 'Introducing a Dispensing Power in English Succession Law', 725.

There is a fear of probating false positives within the laws of succession.[42] This means that during the process of distributing a deceased person's property, some documents that are not meant to be wills may be mistakenly regarded as wills. The requirements for proper will execution are necessary so as to prevent fraud, instil in the testator the seriousness and finality of the will making process, and to improve reliability and recognition of the correct and most recent will.[43] It is for this reason that courts require strict compliance with the Wills Act formalities so as to protect the three functions: preventing fraud, impressing upon the testator the seriousness and finality of the event, and improving reliability and recognition of the correct and most recent will. The question that arises from this is whether this strict compliance can deter the admission of false documents. Legal institutions may accidentally subvert the very wishes they attempt to defend, driven by fears of recognising invalid wills and misinterpretations.[44] Consequentially, Lester proposes three solutions to deal with documents that do not meet all the formalities; lessen the number of required formalities, substantial compliance, and harmless error rule.[45] Substantial compliance is at the discretion of the judge and does not need legislative compliance. On the other hand, the harmless error rule permits courts to apply them if it is contained in a statute.[46] Therefore, the harmless error rule requires legislative implementations jurisdictions.

Lester conducted a case-by-case study guided by Langbein's previous research. Her focus was research in Australia as dispensing power was well established in the region. Her findings were that proper application of the harmless error rule distinguished between testator mistake and hesitation in difficult cases.[47] It was necessary to distinguish mistakes in the will and the testator's hesitation to finalise a will in order to avoid cases of fraud.[48] Hence, courts were needed to distinguish between actual faults in the will and cases in which the testator was unclear or hesitant to finalise their will. Making this distinction attempted to prevent situations of fraud by ensuring that only legitimate and intentional wills were recognised and executed. She then suggested that jurisdictions in the United States should adopt the harmless error rule following its success over the past 30 years in South Australia and other Australian States. The harmless error rule was more

[42] Lester S, 'Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule' 42 *Real Property, Probate and Trust Journal* 3, 2007, 578.
[43] Lester S, 'Admitting Defective Wills to Probate, Twenty Years Later', 578.
[44] Lester S, 'Admitting Defective Wills to Probate, Twenty Years Later', 579.
[45] Lester S, 'Admitting Defective Wills to Probate, Twenty Years Later', 579.
[46] Lester S, 'Admitting Defective Wills to Probate, Twenty Years Later', 580.
[47] Lester S, 'Admitting Defective Wills to Probate, Twenty Years Later', 603.
[48] Lester S, 'Admitting Defective Wills to Probate, Twenty Years Later', 603.

convenient than substantial compliance because it can cause similar problems as strict compliance. However, the flip side of the harmless error rule is that the statute becomes too weak and over inclusive as the only requirement is a document. A gap is created between admitting too many false positives and rejecting false negatives (documents intended to be a will).[49] Lester's first reform to this is inclusion of verbally adopted but improperly executed codicils. If the reform fails to significantly increase the number of false positives admitted to probate then it should be expanded to verbally adopted wills.[50] The rationale behind this is that documents that have not been properly executed have been brought forward to show intention, so the same logic should apply to oral wills. Regardless of the gap that the harmless error rule creates, she notes that it is an important development in succession in that it provides a safety valve for applications brought under defective wills.

John Orth is of the same view as Lester. He proposes that reducing the number of required formalities would lessen the number of problem cases, and that the retention of any formal requirement would mean that form could still defeat intention in some circumstances.[51] He also brings up the conflict between strict compliance, substantial compliance, and harmless error rules.[52] Strict compliance mandates that all formalities be met exactly, which can lead to valid wills being denied probate due to minor technical errors, thereby failing to reflect the testator's true intentions. Substantial compliance allows for some leeway, permitting a will to be considered valid if it substantially meets the formal requirements, but this may risk misinterpretation of the deceased's wishes. The harmless error rule offers even more flexibility by allowing courts to overlook certain non-compliances as long as the testator's intent can be substantiated, yet this raises concerns about the judiciary overstepping its bounds by ignoring legal formalities. Overall, the author critiques these evolving standards for their potential to complicate the probate process and inadequately safeguard the true intent of testators.

He proceeds to evaluate the harmless error rule through a case study in Australia. The testator's subsequent revocation of the will was rejected as the previous codicil became effective under the harmless error rule standard.[53] The action by courts to reject his subsequent application was against

[49] Lester S, 'Admitting Defective Wills to Probate, Twenty Years Later', 604.
[50] Lester S, 'Admitting Defective Wills to Probate, Twenty Years Later', 604.
[51] Orth J, 'Wills Act Formalities: How Much Compliance Is Enough?' 43 *Real Property, Trust and Estate Law Journal* 1, 2008, 74.
[52] Orth J, 'Wills Act Formalities', 75.
[53] Orth J, 'Wills Act Formalities', 79.

the testator's intention which the harmless error rule aims to enhance. The intention considered was that of the document and not that of the testator. He then questions the need of a written will if we are to discard the formalities of attestation in wills.[54] He traces back to early common law that did not insist on documents. Like the early common law practices, statutes provide for oral wills, and unexecuted documents are then relied on to prove testamentary disposition.[55] An important highlight he makes is the role of the court in proving this disposition.[56] Without following the formalities of the statutes, courts have the mandate to decide cases based on their merits. They determine whether certain documents qualify as wills without any guidance. This may invalidate wills that would otherwise be valid. Therefore, he concludes that it all goes to the formalities.

I agree with the above scholars that an alternative process should be taken up by courts when assessing the validity of wills. However, Lester's reform to push forward the dispensing power to oral wills seems problematic. She does not provide a time frame for the application of this dispensing power to verbal codicils and wills. This is as seen from the Kenyan law which gives a timeline of three months for the wills to be considered valid. This will subject the wills to instances of fraud, manipulation, and the deceased's wishes may cease to exist as they can be easily forgotten if not reduced into writing. Consequently, Lester's view of oral wills goes against the whole idea of promoting testamentary freedom by introducing a dispensing power.
Orth's work focuses on the issue of the process falling back to formality. However, I do not agree with this as measures can be employed to limit the scope of application of the harmless error rule.

Contribution

This study aims to add to the succession law discussion by suggesting the implementation of a legal framework that outlines the manner in which dispensing power can be used to promote testamentary freedom and create a society in which justice and equity are promoted by taking into consideration the various instances that would result to a will being considered invalid under the formal requirements.

[54] Orth J, 'Wills Act Formalities', 79.
[55] Orth J, 'Wills Act Formalities', 80.
[56] Orth J, 'Wills Act Formalities', 80.

1.9 Methodology

The nature of this study will be based on qualitative research with the main sources of data being primary sources, heavily relying on provisions of the Law of Succession Act (Cap 160). The study will also incorporate secondary sources to draw an analysis such as books, journals, cases, and other credible sources.

The study incorporates primary sources such as Kenya's Law of Succession Act and the Wills Act of South Africa to showcase the different provisions in the rules of succession. This will involve a comparative analysis of the legislations in both countries and highlighting the similarities and differences between the two. This will be in order to show the practicality of adopting the dispensing power into the Kenyan succession law. In conjunction with comparative analysis, the study uses a case analysis to showcase the problems that arise from strict compliance with formal requirements and attempts to remedy this problem. Such cases include the *Re Mills* which indicated a willingness by the court to reach out and acquire powers to enable it to frame probates giving effect to the proved intention of the testator in the case of duly executed instruments. A similar decision by the court can be seen in *Osborne v Smith*. The decision of the court illustrated that the operation of existing rules in regard to wills which do not represent the true intention of the testator can produce frustrating results. The study intends to analyse the origin and the scope of application of dispensing power using historical analysis to show the developments and possible gaps that are present. This will be through an analysis of cases and through secondary sources.

1.10 Chapter Breakdown

Chapter 1 deals with the introduction of the study. It deals with the background of the subject and sets out the research questions and objectives.
Chapter 2 will then deal with the origin and purpose of the dispensing power in succession.

Chapter 3 looks at the Kenyan laws that govern succession and the approach taken by courts in interpretation.

Chapter 4 will then deal with the legal framework governing the dispensing power in South Africa as well as a comparative analysis between Kenya and South Africa's succession law.

Chapter 5 will conclude the discussion and provide a summary of the findings and recommendations.

CHAPTER TWO: ORIGIN AND PURPOSE OF THE DOCTRINE OF DISPENSING POWER IN SUCCESSION

2.1 Introduction

A relatively new development in succession law is the dispensing power, which grants judges the right to accept a document as a will even though it does not meet all formal guidelines.[57] This is also mentioned in Chapter 1, where various jurisdictions have adopted this approach as a means of protecting testamentary intention. Its roots are in the conflict that exists between respecting the deceased's genuine testamentary intent and making sure that formalities are strictly followed in order to ensure legal certainty.[58] As a result, the doctrine of dispensing power aims to avoid the frustrations that are brought about by technical shortcomings.

There will be three sections to this chapter. The first section looks at the doctrine's background; the second, how it has evolved and been applied in various jurisdictions over time; and the third looks into what the propounders of the doctrine sought to accomplish by introducing it.

2.2 Historical Origins of the Dispensing Power

The dispensing power in succession law is an important and evolutionary topic that has gained attention over the years. To understand the importance and use of the doctrine, it is necessary to investigate its historical context, and the multiple factors that have contributed to its development. The dispensing power finds its roots in ancient legal systems. Throughout history, rulers and lawmakers have recognized the need to deviate from strict rules of succession in exceptional

[57] Brook J, 'To Dispense or Not to Dispense? A Comparison of Dispensing Powers and Their Judicial Application', 1.
[58] Hedlund R, 'Introducing a Dispensing Power in English Succession Law', 722.

circumstances. Particularly, the idea of the dispensing power and its variations can be traced back to Western legal tradition, especially Roman law.[59] Throughout history, the doctrine found its way into former British colonies such as Australia, Canada, and the United States.[60]

One significant example of dispensing power in ancient times is the exercise of royal prerogative by kings or emperors. During the medieval period, Julius Caesar consented to the use of homemade wills. However, the utilization of these wills was under strict guidelines and was only permitted to Roman soldiers.[61] This application of men in power recognising their ability to alter rules has led to the establishment of discretionary powers vested in individuals or governing bodies, authorizing them to adapt or dismiss customary rules when necessary. Holographic wills, which included the homemade wills, were wills that were handwritten and unwitnessed.[62] They were fundamentally made without the supervision of a legal representative. The whole idea behind the use of holographic and homemade wills was that they were cost-effective, increased will making, functioned as safety nets for testators who suddenly fall ill.[63] Supporters of this ideology believed that such wills should be promoted as they encapsulate a testator's intention while taking into consideration those unable to hire a lawyer during the will making process.[64] As legal systems modernised, the dispensing power underwent substantial transformation. The emergence of nation-states and the consolidation of legal principles gave rise to the need for more codified and predictable laws of succession. This was evident as its use then spread across the Mediterranean in countries such as France and England in the 15th and 16th centuries where it was implemented and passed to modern law via the Napoleonic Code.[65]

In contemporary jurisprudence, the dispensing power in succession law is primarily vested in legislative bodies and competent legal authorities. The principle guiding this power is that, under exceptional circumstances, adherence to strict rules of succession may produce undesirable

[59] Clowney S, 'In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking' 43 *Real property* 1*, Trust and Estate Law Journal*, 2008, 32.
[60] Horton D, 'Partial harmless error of Wills: Evidence from California' 103 *Iowa Law Review* 5, 2018, 2031.
[61] Clowney S, 'In Their Own Hand', 32.
[62] Clowney S, 'In Their Own Hand', 28.
[63] Clowney S, 'In Their Own Hand', 28
[64] Clowney S, 'In Their Own Hand', 31.
[65] Helmholz R, 'The Transmission of Legal Institutions: English Law, Roman Law and Handwritten Wills' 17 *Stanford Law Review* 6, 1965, 15.

outcomes.[66] These exceptions must be decided on a case-by-case basis, considering the overall best interest of the succession process and societal expectations.

The origin of the dispensing power in succession law, therefore, lies in the established historical necessity for flexibility over rigid rules. This power has evolved over time in response to political, social contexts.[67] The transition from absolute monarchy to contemporary legal systems transferred authority away from royal prerogatives and towards legislative regulations and judicial discretion.

Nevertheless, the exercise of the dispensing power remains subject to legal constraints and principles of fairness and equality. [68] Such constraints aim to prevent its abuse, ensuring that the power is used sparingly and with due regard for the overall integrity and stability of the succession process.

In conclusion, the origin of the dispensing power in succession law can be traced back to ancient legal systems and the need for flexibility in exceptional cases. As legal systems evolved, the dispensing power became more structured and codified, gradually shifting to legislative and judicial bodies. However, despite these changes, the exercise of dispensing power remains subject to legal constraints, ensuring fairness and avoiding abuse.

2.2 Development of the Doctrine

Towards the end of the 20th century, Australian courts adopted the doctrine of dispensing power under their Wills Act, allowing defective documents to be presented to court, provided that the claims were backed up with compelling evidence.[69] In 1975, South Australia adopted the harmless error rule.[70] The state amended Section 12(2) of its Wills Act 193, paving the way for the application of the doctrine of dispensing power in succession to common law countries.[71] The

[66] British Columbia Law Institute, '*Wills Estate and Succession Report: A Modern Legal Framework*', June 2006, 22.
[67] Gray T, 'Succession Law: Reflections and Directions' 40 *Adelaide Law Review* 1, 2019, 332.
[68] Schoeman-Malan L, Anton Van der Linde, Du Toit F, and Faber J, 'Section 2(3) of the Wills Act 7 of 1953: A Retrospective and Critical Appraisal of Some Unresolved Issues' 1 *Sabinet African Journals*, 2014, 95.
[69] Horton D, 'Wills Without Signatures' 19 *Boston University Law Review*, 1631.
[70] Horton D, 'Partial Harmless Error for Wills: Evidence from California', 2027.
[71] Langbein J, 'Absorbing South Australia's Wills Act Dispensing Power in the United States', 1.

doctrine of substantial compliance was adopted in Queensland and interpreted to mean 'close to impeccable', invalidating wills in scenarios where the executor made a harmless mistake.[72]

However, the legislation of both states aimed at producing the same result. Particularly, the South Australian courts embraced the doctrine and was applied to a number of cases. [73]The legal developments in South Australia have been closely observed by legal reform communities in Australia and overseas.[74] This region's laws and court rulings appear to be modelled after those of other Australian states. Similar measures have been proposed by law reform commissions in Australia's major states; one state has even passed legislation that is an exact replica of South Australia's legislation. Beyond Australia, particularly in North America, South Australian legal principles have left a lasting impact. A version of the South Australian Act was endorsed by British Columbia's law reform commission, and Manitoba adopted a version akin to it in 1983, indicating the increasing impact of South Australian legal frameworks in the area.

The application of this doctrine in succession law broadened and was embraced in the United States in states such as California and Louisiana, where it was adopted as a statute loosely based on the Napoleonic Code.[75] Its introduction in the United States was necessitated by the need to increase the number of people who died with a valid will.[76] Here, it was renamed and adopted as 'harmless error', and the testator's signature is no longer considered to be indispensable.[77] In States like Pennsylvania and Michigan, it was adopted under the Uniform Probate Code. The adoption of this doctrine in the United States attempted to emulate its application in South Australia. Scholars that gained interest concerning the topic studied the development and recommended comparable legislation as to the same.[78] However, their approach included a departure from that taken in South Australia. The American drafters expanded the scope of this authority to include revocation procedures in addition to cases of execution defection.[79] They then decided to use a

[72] Langbein J, 'Excusing Harmless Errors in The Execution of Wills', 1.
[73] Langbein J, 'Excusing Harmless Errors in The Execution of Wills', 13.
[74] Langbein J, 'Excusing Harmless Errors in The Execution of Wills', 2.
[75] Hancock M, 'Equitable Conversion and the Land Taboo in Conflict of Laws' 17 *Stanford Law Review 1095*, 1965, 1100.
[76] Clowney S, 'In Their Own Hand', 29
[77] Horton D, 'Wills Without Signatures', 1631.
[78] Langbein J, 'Absorbing South Australia's Wills Act Dispensing Power in the United States', 5.
[79] Langbein J, 'Absorbing South Australia's Wills Act Dispensing Power in The United States', 5.

standard of proof that was distinct from Australia's. Since the standard of proof ought to be higher than the preponderance of the evidence, the threshold of proof proposed was beyond a reasonable doubt as the standard of proof should be higher than preponderance of evidence.[80]

With time, the departure from strict compliance with formalities started to gain traction following John H. Langbein's critique of formalism in wills adjudication.[81] His departure from the strict observance of formalities in the administration of wills signifies a dramatic change in the legal landscape. In his article published in the Harvard Law Review, Langbein criticised formalism, posing a challenge to the conventional wisdom regarding succession matters. He maintained that substantial compliance ought to be considered adequate in place of strict adherence to formal requirements.[82] He then abandoned this view after studying Australian cases and opted for the harmless error rule instead of substantial compliance.[83]

2.3 The Purpose of the Dispensing Power

The strict application of common law principles to the execution of wills gave rise to the doctrine of dispensing power. Even in situations where the testator's intentions were evident, these stringent formalities frequently resulted in the invalidation of wills because of small technical deficiencies. In order to lessen the severity that resulted from strict adherence to the formal requirements, the doctrine and its various manifestations have therefore been applied over time in various courts.[84] This would be done through employing a rebuttable presumption to allow the proponents of a defective will to prove that the will in question expressed the testator's intention. The doctrine serves as a type of legal remedy in situations where the law appears to be unjust or inflexible, much like equity does for common law.

[80] Langbein J, 'Absorbing South Australia's Wills Act Dispensing Power in The United States', 5.
[81] Mann B, 'Formalities and Formalism in the Uniform Probate Code', 1033.
[82] Orth J, 'Wills Act Formalities: How Much Compliance Is Enough', 75.
[83] Orth J, 'Wills Act Formalities', 75.
[84] Langbein J, 'Excusing Harmless Errors in The Execution of Wills', 4.

The criticisms of the doctrine revolve around the need of revising the law of succession in relation to the format of a will have only recently become apparent.[85] The Under the Uniform Probate Code (UPC), the harmless error provision was added to address defective attestation on the grounds of not enough witnesses or no witnesses, and to address additions or amends to a will.[86]

An intention-based dispensing power was adopted in Queensland, Australia, in response to a significant increase in the quantity of informal will applications filed with the courts.[87] This trend made it apparent that a flexible and more adaptable legal framework was required to deal with the changing nature of testamentary intentions. The legal system faced difficulties when people tried to express their testamentary wishes in unconventional ways through informal wills, which were frequently handwritten or lacked the formalities of traditional wills. The shift to intention-based dispensing power reflected the understanding that it is crucial to honour the genuine intentions of the departed, even in cases where the will-making procedures may not have been complied with accurately. Increasing numbers of individuals created at-home or handmade wills as a result of the dread of prolonged, costly legal proceedings. Home-made wills are templates or outlines that one fills in their details after receiving the document from a company. They involve taking one's own time to fill out their information and to sign the will.[88] Therefore, the adoption of an intention-based dispensing power in Queensland was initially intended to reduce the likelihood of lengthy litigation while simultaneously enhancing the cost-effectiveness of will-making processes.[89]

Consequently, it was anticipated that the implementation of an intention-based dispensing power in Queensland would significantly enhance access to estate planning and will-making services. The Queensland legal system sought to popularise will creation by simplifying the customary

[85] Zalucki M, 'Wills Formalities Versus Testator's Intention: Functional Model of Effective Testation of Informal Wills' *Nomos Verlagsgesellschaft Mbh & Co*, 2021, 23.

[86] Santaella Legal Group, APC, 'The Harmless error statute Is a Saving Grace for Those Without a Proper Will', 20 September 2022 - <https://www.santaellalaw.com/blog/2022/september/the-harmless-error-statute-is-a-saving-grace-for on 12 December 2024.

[87] Purser K and Cockburn T, 'Wills Formalities In The Twenty-First Century- Promoting Testamentary Intention In The Face of Societal Change and Advancements in Technology: An Australian Response to Professor Crawford By Kelly Purser and Tina Cockburn' *Wisconsin Law Review*, 22 November 2019 - < https://wlr.law.wisc.edu/an-australian-response-to-professor-crawford/> accessed on 12 December 2024.

[88] Foster C,'What Is A DIY Will and What Does It Include?' - <https://www.lexology.com/library/detail.aspx?g=11080069-88a9-4389-887c-7ed25313520c> on 20 October 2021.

[89] Purser K and Cockburn T, 'Wills Formalities In The Twenty-First Century- Promoting Testamentary Intention In The Face of Societal Change and Advancements in Technology' Review, 22 November 2019 - < https://wlr.law.wisc.edu/an-australian-response-to-professor-crawford/> accessed on 12 December 2024.

formalities and requirements, making the process more approachable for a broader spectrum of people. This step was in line with the growing realisation that end-of-life planning should be accessible to all people, irrespective of their financial situation.

The doctrine can also be perceived to serve as a presumption in law. A presumption is a legal inference or assumption that a fact exists based on the known or proven existence of some other fact or group of facts.[90] In this case, it would be a presumption of fact as a presumption of fact is set in place to analyse the rationale used rather than looking at the law itself.[91] It is the process of determining one fact from the existence of another without the assistance of any legal rule. The purpose of applying the doctrine in line with the functions of presumptions will then be to focus on the evidentiary rules that apply, while also focusing on the burden of proof.[92] Therefore, in terms of litigation, they will help in keeping the cost of litigation in check.[93] Court cases can be costly and time-consuming for parties involved in legal conflicts involving private matters, such as property rights or contracts. On the one hand, since litigation expenses don't directly help to resolve the underlying problem, they are perceived as a loss. Antonio E. Bernado, Eric Talley and Ivo Welch in their article discuss how presumptions apply in other areas of law besides commercial law, and imply that they perform a similar function, that of decreasing the cost of litigation and to save on time used in court proceedings.[94]

2.4 Conclusion

From observance, the doctrine attempts to provide a legal remedy to meet the intention of the testator, and to ensure that property is allocated according to their wishes. In the event that the testator does not leave relatives such as a surviving spouse, it then provides a legal recourse by ensuring that the property is not bequeathed to the State but rather to their people of choice. In the case of defective wills in succession law, the presumption will then be that the document contains

[90] Black's Law Dictionary, 2nd ed.
[91] Kaiser D, 'Presumptions of Law and of Fact' 38 *Marquette Law Review* 4, 1955, 254.
[92] Bernado A, Talley E, and Welch I, 'A Theory of Legal Presumptions' 16 *Journal of Law, Economics, & Organization* 1, 2000, 2.
[93] Bernado A *et al*, 'A Theory of Legal Presumptions', 2.
[94] Bernado A *et al*, 'A Theory of Legal Presumptions', 42.

information on how the testator wanted their property to be distributed, and the burden of proof will be on the person presenting the will.

CHAPTER THREE: LAWS GOVERNING SUCCESSION IN KENYA AND HOW KENYAN COURTS HAVE INTERPRETED THE LAW OF SUCCESSION ACT WITH REGARD TO THE FORMAL REQUIREMENTS

3.1 Introduction

Having looked at the origin and purpose of the doctrine and how it was applied in the various jurisdictions in Chapter 2, it is essential to understand how succession laws function within Kenya as the case study of this discussion. In Kenya the regulation of wills is governed by diverse laws which seek to regulate the transfer and administration of a deceased person's property. These regulations are essential in maintaining a systematic distribution of estates and resolving disputes among dependants. The laws that discuss succession in Kenya include the Constitution of Kenya (2010), Law of Succession Act (Cap 160), Marriage Act (Cap 150), Children Act (Cap 141), Matrimonial Property Act (Cap 152), Trustee Act (Cap 167), Community Land Act (Cap 287), and the Judicature Act (Cap 8).

Kenyan courts majorly rely on the Law of Succession Act when disposing off a testator's estate, specifically the formal requirements provided in the Act in cases of written wills.[95] Courts uphold the requirements set out in this provision, and the requirements are: that a written will is legitimate if the testator signs or affixes their mark, it is arranged in a manner in which it appears to be a will, and two or more competent witnesses swear to its authenticity. Each witness must have witnessed the testator sign or obtained personal confirmation of their signature or mark. Multiple witnesses may be present, and no specific type of attestation is required.

This chapter begins by looking into the existing legal framework governing succession. It will then proceed to look at decided Kenyan cases and the security brought about by the formal requirements and proceeds to analyse cases where injustice was occasioned by non-compliance with the formal requirements.

3.2 Laws Governing Succession in Kenya

[95] Section 11, *Law of Succession Act* (Act No. 11 of 2021).

Following the introductory overview, this section now turns to an examination of the various laws that govern succession in Kenya, highlighting their individual roles and their relationship to the primary Law of Succession Act.

The Law of Succession Act (Cap 160) was enacted in 1981. It serves as the primary legal framework for succession in Kenya, with additional legislative provisions and customary norms supplementing it.[96] The legislation differentiates the types of succession recognised within the jurisdiction as testate and intestate.[97] It further provides for the forms of wills as written wills and oral wills.[98] A further sub-categorisation under oral wills is privileged wills which are made by members of the armed forces or merchant marines while in service.[99]

In addition to providing for the different types of succession and the forms of wills, the legislation caters to dependants of the deceased by clearly outlining who is a dependant,[100] and providing a comprehensive guideline on how the deceased's estate is to be distributed even in the event of intestacy.[101] Throughout the Act, a gender-neutral approach is adopted as widowers have a claim on the estate regardless of prior maintenance from their spouse.[102] This enables equality in distribution of properties as both spouses are factored in on matters of inheritance. The Act further factors in customary marriages as it takes into consideration polygamous marriages.[103] This is evident as it mentions wife or wives, an element present in Islamic and customary marriages. This will also reflect under the Marriage Act overview. The legislation is detailed as it also outlines the administration of the estate, either as probate or through letters of administration in cases of invalidity of wills.

The Constitution of Kenya (2010) being the grundnorm provides for an overview framework of how legislations ought to be, and the principles that should be reflected within them. In the case of succession, it touches on equality and non-discrimination providing a gender-neutral approach

[96] Section 33, *Law of Succession Act* (Act No. 11 of 2021).
[97] Section 2, *Law of Succession Act* (Act No. 11 of 2021).
[98] Section 8, *Law of Succession Act* (Act No. 11 of 2021).
[99] Section 9, *Law of Succession Act* (Act No. 11 of 2021).
[100] Section 29, *Law of Succession Act* (Act No. 11 of 2021).
[101] Section 26, *Law of Succession Act* (Act No. 11 of 2021).
[102] Section 29, *Law of Succession Act* (Act No. 11 of 2021).
[103] Section 29, *Law of Succession Act* (Act No. 11 of 2021).

when it comes to succession matters.[104] The constitution also outlines the right to own property that every citizen enjoys, further strengthening the fact that dependants are allowed to inherit the estate on a neutral basis.[105] In addition to this, it looks at the best interests of the child, enhancing their inheritance rights.[106]

The Marriage Act (Cap 150) is essential in succession as it establishes the kinds of marriage that are recognised within the jurisdiction.[107] The kinds of marriages mentioned under the Act are Christian, Civil, Islamic, Hindu and Customary marriages. This implicates succession as through registration conducted as per Part IX of Act, the legally recognized spouse or spouses are entitled to inheritance. The Act is essential as it establishes the different kinds of marriage and facilitates the transfer of property by giving recognition to the spouse(s).

The Children Act (Cap 141) is essential in succession matters as it caters towards the protection and welfare of children, ensuring that they have succession rights regardless of the parents' marital status.[108] This is also enshrined under the Law of Succession Act which was amended to cater to adopted children, and children born out of wedlock.[109] With regard to succession, it ensures that all the children related to the deceased, whether legitimate or illegitimate, have their rights protected.

The Matrimonial Property Act (Cap 152) defines what matrimonial property is; property that is acquired during marriage.[110] This is essential as in the event of death, there is fair determination of what constitutes personal and jointly owned property. Therefore, the Act ensures that the surviving spouse's rights to the matrimonial property are safeguarded by ensuring that disputes over ownership of property are resolved before determining inheritance matters.[111]

[104] Article 27, *Constitution of Kenya* (2010).
[105] Article 40, *Constitution of Kenya* (2010).
[106] Article 53, *Constitution of Kenya* (2010).
[107] Section 6, *Marriage Act* (Act No. 4 of 2014).
[108] Section 17, *Children Act* (Act No. 29 of 2022).
[109] Section 2, *Law of Succession Act* (Act No. 11 of 2021).
[110] Section 6, *Matrimonial Property Act* (Act No. 49 of 2013).
[111] Section 9, *Matrimonial Property Act* (Act No. 49 of 2013).

The Trustee Act (Cap 167) complements the Law of Succession Act by outlining the powers and duties of trustees when managing and administering trust property.[112] The Act requires that they act in the best interests of beneficiaries by safeguarding the assets and ensuring proper distribution.

The Community Land Act (Cap 287) is essential to succession law as it reflects the application of customary laws in Kenya. It defines what community land is as land declared as such under Article 63(2) of the Constitution, and land converted into community land under any law.[113] The Act complements the Law of Succession Act by ensuring that the deceased's share in community land is passed to the beneficiary either through customary law or as provided under the Law of Succession Act.[114]

The Judicature Act (Cap 8) supplements succession law by recognizing customary laws in civil matters.[115] This enhances the administration of an estate using customary laws in cases of intestacy, which is also captured under the Law of Succession Act as mentioned previously mentioned.

3.3 Application of Section 11 of the Kenyan Law of Succession Act

Having discussed the laws governing succession, this section will look into how the law has been applied in Kenyan courts, specifically Section 11 of the Law of Succession Act which highlights the formal requirements that should be met to render a will valid.

In *The Matter of the Estate of Ngengi Muigai*, the court addressed James Ngengi Muigai's inheritance, a dispute over his will and the claims of numerous beneficiaries. It addresses concerns such as the legality of the will, the deceased's mental capacity, claims of undue influence, and certain individuals' reliance on the deceased.[116]

[112] Section 25, *Trustees Act*
[113] Section 2, *Community Land Act* (Act No. 27 of 2016).
[114] Section 31, *Community Land Act* (Act No. 27 of 2016).
[115] Section 3, *Judicature Act* (Act No. 16 of 1967).
[116] *Ngengi Muigai & another v Peter Nyoike Muigai & 4 others* (2018) eKLR

There was contention as to whether the will in question met the formalities provided by law. The court addressed the contention regarding section 11 of the Law of Succession Act by examining whether the will satisfied the formal requirements of proper attestation, as well as evidence related to the deceased's mental capacity and whether the will was obtained under duress.

In acknowledging the terms set out in Section 11 of the Law of Succession Act, the court determined that the Act permits the witnessing of a will by two witnesses at different times, as long as each witness signs in the presence of the testator and acknowledges his signature. The court reviewed testimonies from the two witnesses to the Will, who confirmed their presence during its signing. Their testimonies were corroborated by the advocate who drafted the will. Despite claims from the appellants regarding inconsistencies in the witnessing process, the court found credible evidence that the witnesses did comply with the requirements of being present with the deceased when he acknowledged his signature. The second witness was summoned to the house and witnessed the signature in front of the deceased. Ultimately, the court ruled that the trial court had acted correctly in affirming the Will's validity and the manner of its execution. This conclusion was backed by the absence of credible evidence contesting the Will's legitimacy, and thus, all findings were upheld, leading to the dismissal of the objections to the Will and the affirmation of the disputed grant of probate.

The case above has been cited in other cases such as *In re Estate of Josephat Njoka Mbiriai (Deceased)* to support the argument regarding validity of the will, particularly with regard to witnesses.[117] The petitioner and the interested parties used this case to emphasize that anyone can attest to a will as long as they are of sound mind and of full age, meaning witnesses do not necessarily need to be close acquaintances of the deceased. This was relevant in addressing the objection concerning the attestation of the will, indicating that the essential legal requirements for witnessing a will were met despite the objectors' claims.

In *The Matter of the Estate of Wilfred Geroge Makunda Ottaro*, the deceased's will, dated June 27, 2001, was challenged by family members who claimed he lacked capacity, was improperly influenced, and did not make reasonable provisions.[118] There was also contention as to the

[117] *In Re Estate of Josephat Njoka Mbiriai (Deceased) (Succession Cause 200 & 315 of 2010 (Consolidated))* (2022) eKLR.

[118] *James Maina Anyanga v Lorna Yimbiha Ottaro & 4 others* (2014) eKLR.

execution of the will. The court determined that the deceased had the capacity to form the will, that it was properly executed, and that reasonable stipulations were included. The Executor was confirmed, and instructions were made for an equitable distribution among the deceased's children. With regard to the execution of the will, the testator must sign a will as his final will and testament, even if it was typed by someone else. Despite appearing to be dragged, the deceased's son confirmed that the signature on the typed will was his. The evidence presented indicated that the will was typed and signed by the deceased, and the alterations made were attended to by the deceased in the presence of witnesses, who confirmed this process and denied any alterations made after the signing. A handwritten copy of the will was also presented, and changes were made in front of witnesses. The changes pertained names of cars and not persons to whom the same were to be bequeathed. The court found that the will dated June 27 2001, was legally executed and followed the formal requirements of Section 11 of the Law of Succession Act. This led the court to conclude that the will met the formal requirements laid out in the Act.

In *The Matter of the Estate of Wilson Waithanje Thuku Alias Waithanje Thuku*, the court revoked the grant of probate obtained fraudulently by Fredrick Thuku Waithanje.[119] The court found the will annexed to the grant of probate was invalid as it failed to meet the formal requirements of attestation under Section 11 of the Law of Succession Act. The court deemed the will invalid due to defective attestation. The court ruled in favour of the applicant, revoked the award and declared the will null and void. The proceedings were declared faulty because the Respondent failed to provide sufficient notice to the beneficiaries.

The court established the will's invalidity based on Section 11's attestation requirements, after reviewing the testimonies of the alleged attesting witnesses. One of the witnesses, Ngugi Ruitimi Mwae, testified that he was not present when the deceased signed the will and did not see it. Because the second attesting witness was not invited to testify and the advocate who produced the will did not testify, the court determined that the will did not meet the formal standards of attestation, rendering it invalid.

[119] *Rahab Nyakangu Waithanji v Fredrick Thuku Waithanje* (2019) eKLR

Section 11 of the Law of Succession Act contributes to the legal validity of a will by outlining the formal conditions that must be met for a will to be accepted as genuine. These criteria, which include the testator's signature, witness attestation, and proper execution, guarantee that the will faithfully reflects the testator's intentions while also protecting against fraud or coercion. Following the provisions of Section 11, the court can establish the validity and legality of the will, honouring the testator's preferences and ensuring an equal distribution of assets.

3.4 Conclusion

Kenya's succession laws establish a comprehensive framework for estate transfer that ensures equal distribution and protects beneficiaries' rights. The Law of Succession Act being the governing framework establishes standards for succession kinds, will forms, and validity criteria. Other laws, such as Kenya's Constitution (2010), the Marriage Act, the Children Act, etc. promote equality, nondiscrimination, and the best interests of dependents. Judicial interpretation emphasizes the significance of legal requirements in will execution in preventing fraud, protecting vulnerable beneficiaries, and preserving testator intent. Thus, precedent underscores the necessity of adhering to formalities when assessing the validity of wills.

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CHAPTER FOUR: THE LEGAL FRAMEWORK GOVERNING THE DISPENSING POWER IN SOUTH AFRICA AND A COMPARATIVE ANALYSIS TO KENYAN LEGISLATION

4.1 Introduction

The succession laws in Kenya and South Africa have similarities and differences in terms of their legal frameworks and cultural influences. The laws governing succession in Kenya have been discussed in Chapter 3 of this study with the primary legislation being the Law of Succession Act of 1981. The Act provides guidelines for the distribution of property upon death, intestate succession, testamentary succession, and the appointment of administrators and executors. On the other hand, succession law in South Africa is primarily governed by two acts, the Wills Act of 1953, and the Intestate Succession Act of 1987.

Kenya and South Africa have succession rules that are both comparable and distinct, shaped by their respective historical, cultural, and legal contexts. In Kenya, succession rules are shaped primarily by a combination of customary traditions and colonial-era systems of law.[120] South Africa succession law is shaped by Roman-Dutch succession law as well as English law.[121]

A novel method of understanding wills in South African law is based on a processual act-based approach, in which parties carry out particular actions with particular intentions in order to create a will.[122] This method presents an intent doctrine in which the testator's intention is understood as a multifaceted, complex idea that takes into account various forms. It contradicts the commonly held opinion that a will results from adhering to certain rules. As this power presents itself in different forms such as 'dispensing power', 'harmless error rule', and 'substantial compliance', it is referred to as 'condonation power' within the jurisdiction.[123] Nevertheless, it accomplishes the same goal by functioning as an enforceable remedy when formal requirements are not satisfied.

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[120] Mbote P, 'The Law of Succession in Kenya: Gender Perspectives in Property Management and Control' *International Environmental Law Research Centre*, 1995, 8.
[121] Du Toit F, 'Roman-Dutch Law in Modern South African Succession Law' University of Western Cape, 2014, 278 -< https://repository.uwc.ac.za/xmlui/handle/10566/1316 >
[122] Faber J, 'Uncertainty About the Condonation of Formally Non-Compliant Wills, and The Rectification of Cross-Signed Mirror Wills: Is an Act-Based Model the Solution' 25 *Potchefstroom Electronic Law Journal*, 2022, 2.
[123] Du Toit F, 'Testamentary Rescue: An Analysis of the Intention Requirement in Australia and South Africa' 23 *Australian Property Law Journal*, 2014, 1.

This chapter aims to provide a comparative analysis between the two countries to weigh in the applicability of the introduction of one of the other's practices, with both countries characterised by their adherence to common law principles. The findings from Chapter three will be applicable in drawing a conclusion in this chapter. The chapter will be divided into three sections. The first part is concerned with defining the scope of dispensing power. This entails an examination of the conditions in which the dispensation of the usual formal requirements for wills may be claimed. It will dive into the specific occurrences and conditions that result in the use of this power, highlighting instances where the courts may break from established formalities to uphold the testator's real intentions. The second section of the examination goes into the courts' authority over dispensing power. This entails an analysis of the judiciary's involvement in deciding issues concerning the dispensation of legal requirements for wills. The third section will include the similar features between the two jurisdictions. The final section acts as a conclusion, synthesising the important findings and insights acquired from the preceding analysis.

4.2 Scope of The Dispensing Power in South Africa

To better understand a key distinction between the two jurisdictions, the following section will delve into the specifics of South Africa's dispensing power, examining its scope and the circumstances under which it is invoked. For a will to be valid, it must comply with the requirements set out in Section 2(1) of the Wills Act.[124] Where it fails to meet these requirements, it becomes invalid and becomes subject to the rules of intestacy.[125] However, the law provided a legal remedy referred to as the 'condonation power' that caters to wills that are legally invalid. In response to its observations of the legal landscape and the practicalities encountered by courts, the South African Law Commission made a significant recommendation in 1991 to empower the judiciary with the authority to recognise a document as a person's last will and testament even in cases where formal will requirements were not met.[126] This suggestion arose in response to the realisation that rigorous attention to procedural requirements could potentially hinder testators'

[124] South African Law of Succession - < https://lawguide.co.za/south-african-law-of-succession/
[125] Intestate Succession Act of South Africa (Act No. 81 of 1987).
[126] Zalucki M, 'Wills Formalities Versus Testator's Intention', 61.

genuine intentions. Following that, in 1992, the South African legislature took a significant step forward by adding its version of the substantial compliance principle into the South African Wills Act of 1953. This inclusion took the form of a provision of the power in legislation. The power is contained under Section 2(3) of the Wills Act as a rescue provision and it grants courts the power to recognise and accept a document as a valid will where it does not comply with all the formalities.[127] It finds legal basis in common law, with South Africa being a Commonwealth country.[128] A significant occurrence happened in 2010 in the case of *Van der Merwe v Master of the High Court & Another* where the court recognised the validity of an informal will, reflecting a shift away from stringent formalities in favour of protecting testators' true intentions.[129] Prior to this, courts opted to admit a form of electronic will. In the case of Macdonald in 2002, a unique testamentary circumstance arose when a deceased person, just before taking himself as he left a message stating that his will could be found on his office computer.[130] This scenario posed a modern challenge by requiring the legal system to negotiate the complexities of electronic documents in the setting of testamentary dispositions. Following careful deliberation, the High Court concluded that the security mechanisms surrounding the computer file remained intact, safeguarding the integrity of the testamentary document. Despite the lack of an executed hard-copy version, the court was convinced that the electronic file accurately reflected the deceased's genuine testamentary intentions.

4.3 Authority Exercising the Dispensing Power

With a better understanding of the criteria under which South African courts can waive the formal requirements of a will, the following section looks into the specific authority accorded to the judiciary in exercising this power.

This power is exercised with regard to documents that have either been drafted or executed.[131] In cases where a document or an amendment to a document, intended as a will by an individual who

[127] Section 2(3) Wills Act South Africa (Act No.7 of 1953).
[128] Du Toit F, 'Testamentary Rescue', 3.
[129] *Van der Merwe v Master of the High Court & Another* (2010) Supreme Court of Appeal of South Africa.
[130] *Macdonalds and Others v The Master and Others* (2002) South African Law Reports 64.
[131] Du Toit F, 'Testamentary Rescue', 3.

has since passed away, does not fully comply with the formalities prescribed for wills in subsection (1) of the statute, the court is granted discretionary power.[132] The court is only going to step in if it is convinced that the contested document was actually meant to be the testator's will or an amendment to their pre-existing will.

Another analysis of case law and the judges' discretion when handling succession matters is evident in instances where the document in question was drafted by a third party. In *Bekker v Naude*, the court focused on the doctrine resolving problems relating to the condonability of documents written by a third party.[133] What was in contention in this case was the fact that that a testator needs to execute a document so as to convey his intention behind a will. Therefore, it broadens the interpretation of Section 2(3) to stipulate that an unexecuted will drafted by a third party cannot be subject to condonation under the conditions outlined in the section.[134] This interpretation highlights the importance of the testator's direct involvement in the formalisation of their testamentary intentions. Moreover, it brings to light the importance of the act of execution as an essential component in the legal recognition of a will.

Expounding on the testator's intention, the court looks at what is contained in a document when exercising this power. A significant divergence from a narrow interpretation of Section 2(3) of the applicable wills legislation is introduced by the reference to the Van Wetten decision.[135] In this case, the ruling indicates a wider application of the power of condonation, in contrast to the limiting perception that it is only applicable to wills that are officially non-compliant. It implies that this authority encompasses not just informal documents that represent acts of testation but also writings that look like wills but were not written in compliance with official regulations. A similar decision was upheld in *Smith v Parsons* whereby the court admitted a suicide note as an amendment to an existing will.[136] When confronted with a document or revision to a document that does not strictly follow to required formalities, the court has the discretionary ability to intervene. This intervention

[132] Section 2(3), *Wills Act South Africa* (Act No.7 of 1953).
[133] *Bekker v Naude* (2003) The Supreme Court of Appeal South Africa.
[134] Faber J, 'Uncertainty About the Condonation of Formally Non-Compliant Wills, and The Rectification of Cross-Signed Mirror Wills', 8.
[135] *Van Wetten and Another v Bosch and Others* (2003) Supreme Court of Appeal of South Africa.
[136] *Smith v Parsons* (2010) Supreme Court of Appeal of South Africa.

is conditional on the court finding that the disputed document accurately reflects the testator's intentions regarding their estate.

4.4 Relevant Features in Both Jurisdictions

While the dispensing power is a key deviation, Kenya's and South Africa's succession laws share significant features. The following section will cover these fundamental shared aspects.

4.4.1 Testate Succession

Like any other system of succession law, the Kenyan and South African rules have specific procedures that are followed when construing a will. The Kenyan succession laws acknowledge two kinds: oral and written wills.[137] Both types of wills require the formality of two or more competent witnesses being present at the time of making the will. Additionally, for oral wills to be considered valid, the testator should die within a period of three months from the date of making the will.[138] For written wills, the additional formal requirements are that the testator should sign or affix his mark to the will or the will to be signed by under their direction by another person and in their presence, and that the signature or mark is placed in a manner that appears to give effect to the will.[139] Where the testator is blind or illiterate, or where a will is signed by another person by the direction of the testator, or where it appears to be written in a language with which the testator is not familiar, evidence is required before the will is admitted to probate.[140]

South Africa requires valid wills to be in writing and the formal requirements are identical to those of Kenya's Succession Act. The wills should be signed by either the testator or another person in the presence of the testator, two competent witnesses should be present during the making of the will, and where there is more than one page each page to contain the signature of the testator or the other person.[141]

[137] Section 8, *Law of Succession Act* (Act No. 11 of 2021).
[138] Section 9, *Law of Succession Act* (Act No. 11 of 2021).
[139] Section 11, *Law of Succession Act* (Act No. 11 of 2021).
[140] Rule 54(3), *The Probate and Administration Rules* (1980).
[141] Section 2, *Wills Act* (Act 49 of 1996) (South Africa).

4.4.2 Intestate Succession

Moving on from the requirements for valid wills, both Kenya and South Africa's legal frameworks have defined standards for regulating property distribution in the absence of a valid will, which will be discussed in the following part on intestate succession.

The absence of a valid will in both Kenya and South Africa opens an established framework guided by various rules of succession. Recipients' roles are given based on their relationship to the deceased. Therefore, there is a hierarchy that is followed when distributing the assets of the deceased. This legal structure acts as a compass, guiding the division of the deceased's estate through set rules. In the event of intestacy, spouses play a major part as the deceased's closest companions. Spousal inheritance rights are recognised in both Kenyan and South African law. The surviving spouse is entitled to a substantial portion of the estate, which provides financial support and ensures their well-being after the death of their partner.

The Kenyan legislation makes reference to the surviving spouse being entitled to 'a life interest in the whole residue of the net intestate estate' where there are surviving children.[142] The result of this would then be that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse.[143] South African legislation points out that the surviving spouse is entitled to a significant portion of the intestate estate, as well as inheriting a descendant's share of the intestate estate where the descendant is a child.[144] This recognition of the importance of spousal rights is a common thread that runs through both countries' intestacy legislation.

In the event that there is no surviving spouse, both laws acknowledge the children as next in hierarchy. The surviving child or children will then be entitled to the net intestate estate fully, or equally where there is more than one child.[145] *In the Matter of the Estate of Ellah Warue Nthawa (deceased)*, two sons and a daughter survived the deceased. It was proposed that the majority of the properties be divided equally between the two sons, with the female survivor getting a small

[142] Section 35, *Law of Succession Act* (Act No. 11 of 2021).
[143] *In the Matter of the Estate of Doris Wanjiku John Mwigaruri alias Doris Wanjiku (Deceased)* (2015) eKLR.
[144] Section 1, *Intestate Succession Act* (Act No. 81 of 1987) (South Africa).
[145] Section 38, *Law of Succession Act* (Act No. 11 of 2021).

portion.[146] The money in the bank was to be shared by the sons equally to the exclusion of the daughter. The court rejected the proposal on the basis that section 38 envisages the equal division of the estate amongst all the children. However, the administration of the estate is subject to the age of the child. In the event that it is a minor, the property will be held in trust for them.[147] Upon attaining the age of 18, the administrator's trusteeship will be terminated, and the property reverts to the child or children.[148] Likewise, a descendant inherits the intestate estate where there is no surviving spouse under South African law.[149]

When the individual passes without a surviving spouse or children, the appropriate distribution of their inheritance follows a pre-set hierarchy, in accordance with the laws of the jurisdictions involved. [150] In the absence of a spouse or children, the fortune is originally given to the deceased's parents. If the intestate's parents have died, the siblings are the next in line to inherit. In the event that the parents and full siblings are not present, half-siblings are entitled to the estate. If no immediate family members survive, the inheritance is extended to relatives closest in degree to the deceased.

This recognition of the importance of spousal rights is a common thread that runs through both countries' intestacy legislation.

4.4.3 Universal Application and Recognition of Customs

Beyond the hierarchy of distribution in cases of intestacy, both Kenyan and South African succession laws address the critical issue of universality and recognition of varying cultural norms, which will be looked into in this section. Through their various succession laws, Kenya and South Africa demonstrate a bold commitment to treating all citizens equally, regardless of ethnicity or cultural norms.

[146] *In the Matter of the Estate of Ellah Warue Nthawa (deceased)* Nairobi HCSC No. 971 of 2001
[147] Section 41, *Law of Succession Act* (Act No. 11 of 2021).
[148] *In the Matter of the Estate of Loice Njeri Ngige* Eldoret HCP&A No. 113 of 1994
[149] Section 1, *Intestate Succession Act* (Act No. 81 of 1987) (South Africa).
[150] Section 39, *Law of Succession Act* (Act No. 11 of 2021) and Section 1, *Intestate Succession Act* (Act No. 81 of 1987) (South Africa).

Under the Kenyan law, there is explicit exclusion from the application of testamentary or intestate succession of individuals who, at the time of their demise, adhere to the Muslim faith.[151] The Kadhis' courts are also empowered to exercise jurisdiction for the determination of questions relating to inheritance in accordance with Islamic law.[152] This is an indication of the application of the succession rules in a manner that caters to the various cultural norms by accommodating the Islamic religion. The Act ensures that the Islamic laws are not violated in the process of administering an estate.[153] In addition to this, the Kenyan Succession Act caters to the application of customary law in cases of intestacy that involve agricultural land and crops, and livestock.[154] Additionally, by making reference to the provisions of the Marriage Act, the Law of Succession ensures that all the spouses in the various kinds of marriage fall within the ambit of succession rules, further cementing the fact that it applies uniformly to all citizens regardless of the customs. Similarly, the South African law considers the principles and practices of customary law when determining whether a probable successor is a descendant of the deceased, and whether they are entitled to receive inheritance.[155]

Both jurisdictions recognise customary marriages and the rights of all the spouses within the customary marriages. The Kenyan Succession defines a spouse as a husband, or a wife or wives recognised under the Marriage Act.[156] The Marriage Act then proceeds to outline the kinds of marriages recognised in the jurisdiction and lists customary marriages relating to any of the communities as one of them.[157] Marriages celebrated under customary law are presumed to be polygamous or potentially polygamous.[158] This indicates that under the law, the wives under polygamous marriages will also be entitled to resume a share of the deceased's estate. On the other hand, South African law also recognises customary marriages and aims to ensure that spouses under customary marriages are provided with equal status and capacity.[159] The idea of equality is

[151] Section 2(3), *Law of Succession Act* (Act No. 11 of 2021).
[152] Section 48, *Law of Succession Act* (Act No. 11 of 2021).
[153] Section 2(4), *Law of Succession Act* (Act No. 11 of 2021).
[154] Section 32, *Law of Succession Act* (Act No. 11 of 2021).
[155] Section 1, *Reform of Customary Law of Succession and Regulation of Related Matters Act* (Act No. 11of 2009).
[156] Section 3, *Law of Succession Act* (Act No. 11 of 2021).
[157] Section 6, *Marriage Act* (Act No. 4 of 2014).
[158] Section 6, *Marriage Act* (Act No. 4 of 2014).
[159] Section 2, *Recognition of Customary Marriages Act* (Act No. 120 of 1998).

further supported in the Bill of Rights which aims to ensure the equality of people before the law and prevent discrimination.[160]

The inheritance laws of Kenya and South Africa level the playing field, ensuring that everyone gets a fair share. They both set out specific procedures that are to be followed once intestacy arises. This not only facilitates and encourages consistency in legal problems, but also increases the overall perception of fairness and equality for all citizens, regardless of heritage. This approach is an excellent example for other countries striving to establish a legal system focused on inclusion and equality.

4.4.4 The Need for Competent Witnesses

While both systems recognise the presence of two or more competent witnesses during the making of the will, they differ in some respects. Kenyan law does not require the witnesses to be in the same room at the same time.[161] The are only required to witnesses the signing of the will by the testator or the other person and add their signatures or marks to the document. On the other hand, the South African law requires that the witnesses attest and sign the will in the presence of the testator and of each other, or in the presence of the other person.[162] The difference is therefore the witnesses being present at the same time.

4.5 Conclusion

From the above finding, South African study, the law tends to focus more on the intention regarding the document rather than the format used when administering wills. As seen above, this power is also extended to documents that do not necessarily take the formal form of wills. When administering the provisions of a will, the legal framework governing wills tends to put a greater priority on determining the testator's intention behind a document rather than strictly following the prescribed requirements. The primary consideration is recognising and carrying out the testator's wishes as described in the document. It is important to remember, however, that in order for this

[160] Section 9*, Constitution of the Republic of South Africa (1996).*
[161] Section 11 (c), *Law of Succession Act* (Act No. 11 of 2021).
[162] Section 2, *Wills Act* (Act 49 of 1996) (South Africa).

legal power to be exercised, a document must exist.[163] The existence of a tangible or digital record is required for a testamentary disposition to be legally recognised. This acceptance extends beyond traditional formal wills, as seen by the developing legal landscape, which accepts a range of document types.

In addition to the findings, courts look at the authenticity requirement when dispensing their power where the will is found to be invalid. This looks at the true intention of the testator in two ways: the deceased drafted or executed a document, and that the document in question is what the deceased intended should form part of their will.[164] In a nutshell the authenticity requirement in South African courts emphasises a commitment to ensuring that the legal procedure remains aligned with the testator's true intentions, embracing both the act of making the document and the content included therein. This nuanced approach reflects a greater recognition within the legal system of the necessity of honouring individuals' real preferences in areas of testamentary disposition.

Estate administration relies heavily on succession laws, which strike a balance between legal traditions and cultural norms. South Africa and Kenya have created frameworks that blend universal principles with their respective historical and societal situations. South Africa's dispensing authority protects testators' real intentions even when legal conditions are not completed, whereas Kenya's succession law incorporates colonial legacies and customary traditions in cases of intestacy. A comparative examination indicates comparable values of fairness, inclusion, and respect for customary norms, but significant procedural and cultural nuances.

Ultimately, based on this comparative analysis, it is unequivocally clear that, while Kenya and South Africa's succession laws share fundamental common law principles, South Africa's proactive incorporation of a robust "dispensing power" provides a demonstrably more flexible and ultimately just approach to testamentary validity. Kenya's stringent adherence to formal will standards, as discussed in Chapter 3, increases the possibility of testator intent being excluded owing to small technical errors, thus leading to unexpected intestacy and familial disputes.

[163] Zalucki M, 'Wills Formalities Versus Testator's Intention', 61.
[164] DuToit F, 'Remedying Formal Irregularities in Wills: A Comparative Analysis of Testamentary Rescue in Canada and South Africa' 20 *Oxford University Commonwealth Law Journal* 1, 2020,148.

As a result, Kenya should assertively implement a legal provision similar to Section 2(3) of South Africa's Wills Act. This adoption should be carefully adjusted to the Kenyan legal situation, but it must expressly provide Kenyan courts the discretion to recognise a document as a valid will, or a modification to one, even if it does not entirely meet with all of the necessary formalities. This jurisdiction is reliant on the court being clearly satisfied that the deceased intended the document to constitute their final testamentary disposition.

Specific lessons that Kenya should learn from the South African courts are as follows. The first should be on testamentary intent and this is through shifting towards determining and enforcing the testator's true intentions rather than meticulously adhering to form over content. The second is on judicial discretion within clear parameters. While allowing discretion, the statute should provide clear, but not unduly restrictive, limits on when this power can be employed. This could include elements like the extent of compliance, the clarity of testamentary intent in the document, and the lack of fraud or undue influence. The South African case law, such as *Van der Merwe v Master of the High Court*, provides important precedence for how this discretion is exercised.

By firmly embracing a carefully structured dispensing power, Kenya could modernise its succession rules, eliminate instances of unfair outcomes based on technicalities, and better serve individuals' fundamental right to direct the devolution of their own property. This is more than just an incremental improvement; it is a critical step towards Kenya's more equitable and intention-driven succession system.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The paper discusses the challenges posed by strict compliance with formal requirements in succession law, particularly in relation to testamentary freedom. It explores the impact of formalities on the validity of wills and the disposition of a testator's estate. Additionally, the paper delves into the concept of dispensing power as a potential solution to the limitations imposed by formalities, allowing courts to validate wills based on the testator's intent, even if they do not meet all formal requirements. Through a comparative analysis of the legal framework governing dispensing power in South Africa, the paper has examined the potential and implications of adopting such a doctrine within the Kenyan jurisdiction. Anchored in legal realism and employing a qualitative methodology, this study aims to contribute to a more nuanced understanding of succession law and propose practical solutions for reform in Kenya.

5.2 Conclusion

The paper suggests that strict adherence to formal requirements in succession law can have significant negative implications on the testamentary freedom of testators. The possibility of lawful testamentary intentions being frustrated by small technicalities warrants a review of the current legal framework. Therefore, the introduction of the doctrine of dispensing power in Kenya, drawing valuable lessons from its application in South Africa, is proposed as a viable and equitable solution to address this critical issue.

The doctrine of dispensing power, as discussed, would empower courts to validate a will when it fails to strictly adhere to the formalities, provided that there is clear and convincing evidence of the testator's intent. This approach aims to prioritize the testator's intention, which is considered the fundamental objective of a will. By doing so, the dispensing power provides a mechanism for testators to dispose of their property according to their wishes, even in cases where the formal requirements may not have been fully met.

However, the paper also emphasizes the need for careful implementation of the dispensing power. This caution is warranted to prevent potential abuses such as fraud and manipulation, and to ensure that the genuine wishes of the deceased are respected. It highlights the importance of striking a balance between honouring the testator's intent and maintaining safeguards to prevent misuse of the dispensing power. To prevent the abuse of dispensing power in authenticating informal wills, Kenya requires a multifaceted approach. The propounder must present clear evidence of the deceased's testamentary wishes, with oral testimony being treated with caution. Judicial monitoring and specialised training are therefore essential for continuous implementation. A subsidiary legislation should be established so as to set out rules for authenticating documents that clearly state testamentary intent, and a voluntary registration system could improve openness. In addition to this, reasonable claim time restrictions, easy access to legal advice, and public information campaigns can all help to reduce reliance on dispensing authority.

The overall implication of the paper is that the doctrine of dispensing power, if implemented appropriately, could be a valuable tool in addressing the limitations imposed by strict formal requirements in succession law. It provides a comprehensive comparative analysis of the legal frameworks governing testamentary formalities and dispensing power, or the lack thereof. The study strategically emphasizes South Africa’s implementation of the doctrine due to the significant similarities in the legal systems of both Kenya and South Africa, making its experience particularly relevant.

Existing scholarly work addresses succession law in each jurisdiction individually, whereas this study provides an in-depth examination of this doctrine while trying to strike a comparison with how it has been applied across the jurisdictions. The study moves beyond theoretical arguments and offers solutions on an evinced basis, drawing guidance from the current existing social-economic realities.

This conclusion is not only relevant for legal scholars but also provides practical insights for legislators and adjudicators involved in the legislative process of succession laws. It encourages a more nuanced approach to the interpretation and application of succession laws, taking into account the unique circumstances and challenges faced by individuals, particularly in

impoverished regions. In addition to this, it offers insights on Kenya, a jurisdiction that has received limited scholarly attention with regard to this exact field.

5.3 Recommendations

The paper provides valuable insights into the dispensing power in succession law. Based on the information exerted, some recommendations can be inferred:

1. Legislative Enactment of a Dispensing Power

   Amend the Law of Succession Act (Cap 160) to explicitly include a dispensing power, giving courts the authority to validate a will or testamentary document that does not strictly adhere to formal requirements, as long as there is clear and convincing evidence of the testator's genuine testamentary intention.

2. Case-by-Case Consideration

   The dispensing power should be exercised on a case-by-case basis, taking into account the overall best interest of the succession process and societal expectations. Courts should take into consideration socio-economic challenges facing Kenyan citizens, which may hinder strict compliance with formal will requirements.

3. Thorough Examination of Conditions

   There should be a thorough examination of the conditions in which the dispensation of the usual formal requirements for wills may be claimed, highlighting instances where the courts may break from established formalities to uphold the testator's real intentions. For instance, courts could draw inference from the socio-economic challenges facing the citizens of Kenya when determining when to exercise their discretion.

4. Legal Constraints and Fairness

   The exercise of the dispensing power should be subject to clearly defined legal constraints and principles of fairness and equality to prevent its abuse and ensure consistency in its application. This can also be made possible by establishing subsidiary legislation with specific rules for authenticating documents.

5. Understanding Testator's Intent

   The dispensing power should be aimed at understanding the multifaceted and complex idea of the testator's intention, contradicting the commonly held opinion that a will results from adhering to certain rules.

6. Judicial Involvement

   There should be a more in-depth analysis of the judiciary's involvement in deciding issues concerning the dispensation of legal requirements for wills. Through capacity building, it will be possible for the judiciary to establish and strengthen means of when to exercise the power.

To prevent the abuse of dispensing power in authenticating informal wills, Kenya requires a multifaceted approach. The propounder must present clear evidence of the deceased's testamentary wishes, with oral testimony being treated with caution. Judicial monitoring and specialised training are therefore essential for continuous implementation. A subsidiary legislation should be established so as to set out rules for authenticating documents that clearly state testamentary intent, and a voluntary registration system could improve openness. In addition to this, reasonable claim time restrictions, easy access to legal advice, and public information campaigns can all help to reduce reliance on dispensing authority.

These recommendations emphasize the need for a balanced approach to the dispensing power, ensuring that it serves the best interests of the succession process while upholding legal constraints and fairness.

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BIBLIOGRAPHY

Journal Articles

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

Rees J, 'American Wills Statute 1' 46 *Virginia Law Review* 4, 1960.

Miller J, 'Substantial Compliance and the Execution of Wills' 36 *The International and Comparative Law Quarterly* 3, 1987.

Langbein J, 'Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion' 38 *Adelaide Law Review* 1.

Fuller L, 'American Legal Realism' 82 *University of Pennsylvania* 5, 1934.

Leiter B, 'Legal Realism and Legal Doctrine' 163 *University of Pennsylvania Law Review* 7, 2015.

Max Radin, 'Legal Realism' 31 *Columbia Law Review* 5, 1931.

Mann B, 'Formalities and Formalism in the Uniform Probate Code' 142(3) *University of Pennsylvania Law Review*, 1994.

Miller J, 'Substantial Compliance and the Execution of Wills' 36(3) *The International and Comparative Law Quarterly*, 1987.

Lester S, 'Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule' 42 *Real Property, Probate and Trust Journal* 3, 2007.

Orth J, 'Wills Act Formalities: How Much Compliance Is Enough?' 43 *Real Property, Trust and Estate Law Journal* 1, 2008.

Hedlund R, 'Introducing a Dispensing Power in English Succession Law' 25 *Oxford University Press* 7.

Clowney S, 'In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking' 43 *Real property, Trust and Estate Law Journal* 1, 2008.

Horton D, 'Partial Harmless Error of Wills: Evidence from California' 103 *Iowa Law Review* 5, 2018.

Helmholz R, 'The Transmission of Legal Institutions: English Law, Roman Law and Handwritten Wills' 17 *Stanford Law Review* 6, 1965.

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

Schoeman-Malan L, Anton Van der Linde, Du Toit F, and Faber J, 'Section 2(3) of the Wills Act 7 of 1953: A Retrospective and Critical Appraisal of Some Unresolved Issues' 1 *Sabinet African Journals,* 2014.

Horton D, 'Wills Without Signatures' 19 *Boston University Law Review,* 2019.

Horton D, 'Partial Harmless Error for Wills: Evidence from California' 103 *Iowa Law Review* 5, 2018.

Kaiser D, 'Presumptions of Law and of Fact' 38 *Marquette Law Review* 4, 1955.

Bernado A, Talley E, and Welch I, 'A Theory of Legal Presumptions' 16 *Journal of Law, Economics, & Organization* 1, 2000.

DuToit F, 'Remedying Formal Irregularities in Wills: A Comparative Analysis of Testamentary Rescue in Canada and South Africa' 20 *Oxford University Commonwealth Law Journal* 1, 2020.

Hancock M, 'Equitable Conversion and the Land Taboo in Conflict of Laws' 17 *Stanford Law Review 1095*, 1965.

Purser K and Cockburn T, 'Wills Formalities In The Twenty-First Century- Promoting Testamentary Intention In The Face of Societal Change and Advancements in Technology: An Australian Response to Professor Crawford By Kelly Purser and Tina Cockburn' *Wisconsin Law Review*, 22 November 2019 - < https://wlr.law.wisc.edu/an-australian-response-to-professor-crawford/>.

Faber J, 'Uncertainty About the Condonation of Formally Non-Compliant Wills, and The Rectification of Cross-Signed Mirror Wills: Is an Act-Based Model the Solution' 25 *Potchefstroom Electronic Law Journal*, 2022.

Du Toit F, 'Testamentary Rescue: An Analysis of the Intention Requirement in Australia and South Africa' 23 *Australian Property Law Journal*, 2014.

Books

Zalucki M, 'Wills Formalities Versus Testator's Intention: Functional Model of Effective Testation of Informal Wills' *Nomos Verlagsgesellschaft Mbh & Co*, 2021.

Mbote P, 'The Law of Succession in Kenya: Gender Perspectives in Property Management and Control' *International Environmental Law Research Centre*, 1995.

Reports

British Columbia Law Institute, 'Wills Estate and Succession Report: A Modern Legal Framework', June 2006.

Working Papers and Research Papers

Brook J, 'To Dispense or Not to Dispense? A Comparison of Dispensing Powers and Their Judicial Application' *University of Portsmouth* 1, 2019.

Du Toit F, 'Roman-Dutch Law in Modern South African Succession Law' University of Western Cape, 2014, 278 -< https://repository.uwc.ac.za/xmlui/handle/10566/1316 >.

Other Internet Resources

South African Law of Succession - < https://lawguide.co.za/south-african-law-of-succession/
Cornell Law School –< Testamentary Capacity | Wex | US Law >.

Santaella Legal Group, APC, 'The Harmless error statute Is a Saving Grace for Those Without a Proper Will', 20 September 2022 - <https://www.santaellalaw.com/blog/2022/september/the-harmless-error-statute-is-a-saving-grace-for.

Foster C,'What Is A DIY Will and What Does It Include?' - <https://www.lexology.com/library/detail.aspx?g=11080069-88a9-4389-887c-7ed25313520c> on 20 October 2021.
South African Law of Succession - < https://lawguide.co.za/south-african-law-of-succession/