Modernizing Testamentary Practices: Exploring Electronic Wills in Kenya

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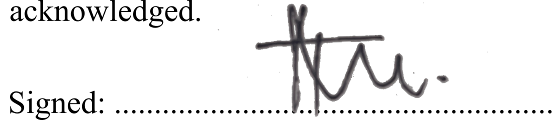
DECLARATION.

I, MUTUA TWILLI MUTUA, 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.



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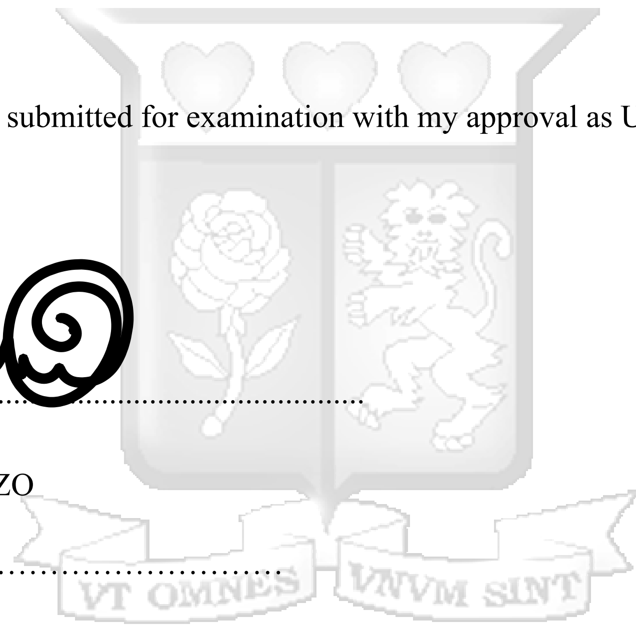

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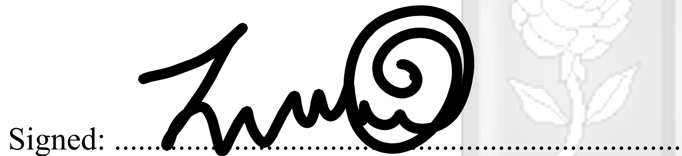

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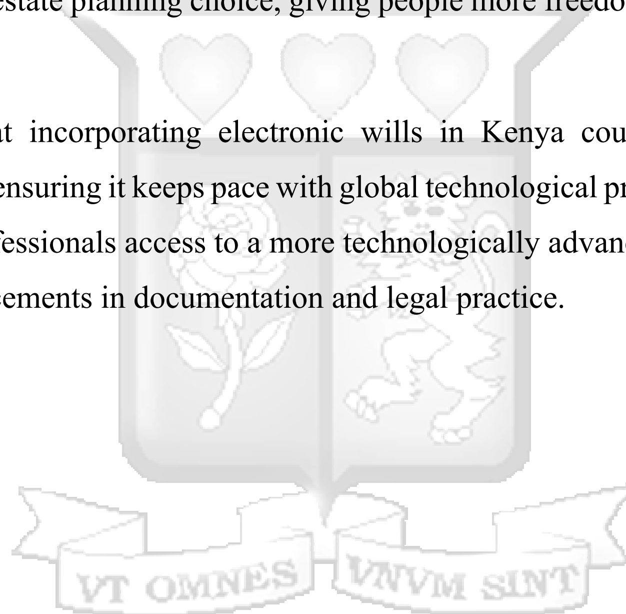
Date:…………19/02/2025………………………

ABSTRACT

The current testamentary framework in Kenya is rooted in traditional will formats, governed primarily by the Law of Succession Act Cap. 160. Under this framework, wills can be either written or oral. While legally recognized, these formats may not fully accommodate recent technological advancements, which have transformed many aspects of personal and legal documentation.

This study explores the potential for integrating electronic wills into Kenya's legal system to align with these advancements, making the will-making process more adaptable and future-ready. Through an analysis of the legal frameworks in, England and Wales as well as United States, Nevada, this study demonstrates how digital testamentary procedures have been effectively implemented in other jurisdictions. These illustrations show how electronic wills can use technology to offer a more contemporary, adaptable estate planning choice, giving people more freedom and security to draft and administer their wills.

The research suggests that incorporating electronic wills in Kenya could enhance the country's testamentary framework, ensuring it keeps pace with global technological progress. This change would give people and legal professionals access to a more technologically advanced estate planning system that reflects recent advancements in documentation and legal practice.



LIST OF ABBREVIATIONS

1.*E-wills- Electronic Wills.*

2. USA- United States of America.

3. AI- Artificial Intelligence.

4. UEWA- Uniform Electronic Wills Act.

5. COVID-19- Coronavirus Disease (2019).

LIST OF LEGAL INSTRUMENTS.

1. *The Constitution of Kenya (2010).*
2. *Law of Succession Act (1981).*
3. *The Evidence Act (1963).*
4. *Wills Act of 1837*

LIST OF CASES

1. *In the matter of Estate of Kevin John Ombajo (Deceased) Succession Cause No. 555 of 2018.*
2. *In The Matter of The Estate of Elizabeth Wanjiku Munge (Deceased) Succession Cause No. 2229 of 2010.*
3. *In the matter of Estate of Murimi Kennedy Njogu(Deceased) Succession Cause No. 11 of 2011.*
4. *In the Matter of the Estate of SMN between RNM and RMN (2017) eKLR.*
5. *Re Estate of John Musambayi Katumanga – deceased [2014] eKLR.*
6. *Banks v Goodfellow (1870), The United Kingdom House of Lords.*
7. *In Harwood v Baker (1840), The United Kingdom House of Lords.*
8. *In the matter of the estate of James Ngengi Muigai (1996) eKLR.*
9. *Elizabeth Kamene Ndolo v George Matata Ndolo (1995) eKLR.*
10. *In The Matter Of The Estate Of James Ngengi Muigai (Deceased)(2005) eKLR.*
11. *In re Estate of Julius Mimano (Deceased) (2019) eKLR.*
12. *Beth Wambui and Another v Gikonyo and others (1988) eKLR.*
13. *In Re Rufus Ngethe Munyua (deceased) Public Trustee v Wambui (1977) eKLR.*
14. *In re: Estate of Javier Castro, The Ohio Probate Court (2013).*
15. *R v Barisa Wayu Mutugunda (2011) eKLR.*
16. *In re: Estate of Javier Castro, The Ohio Probate Court (2013).*
17. *Frizzo v. Frizzo, Supreme Court of Queensland (2011).*
18. *In the Estate of Grant Patrick Carrigan, Supreme Court of Queensland (2018).*

CHAPTER 1: INTRODUCTION

1.1 Background

In an era where technology is used extensively, the traditional will-drafting process is under scrutiny. The historical context of succession in Kenya dates back to the colonial era when English Common law principles were initially adopted. The advent of colonialism saw the introduction of other systems of succession law, some of which were progressively applicable to Africans. The 1981 Law of Succession Act dictates that the form of wills is either oral or written[1] . The paper-based form of wills has been the traditional format applicable from time immemorial.

This traditional format of wills requires that the testator is of sound mind and is not a minor at the time of making the will[2].This testamentary capacity is further brought into light by the case *Banks v Goodfellow*[3] where a threefold test was established. The case highlighted that firstly, the testator should have a sound mind enabling him to understand the general act of making wills and their effects. Secondly, the testator should have sound memory for recollection of the property he seeks to dispose under the will. Lastly, the testator should have sound understanding of the beneficiaries listed in the will and their relationship with him. This testamentary capacity is supplemented by the need for the will to reflect the required form as envisioned by the Succession Act[4]. This is further highlighted by the need to have at least two witnesses to attest to the will. Due to the passage of time and the changing legal landscape, there has been a need to update and modernize the laws governing wills.

Electronic wills herein refer to wills that are electronically executed as well as those admitted to probate solely as electronic documents (fully electronic wills)[5]. However, there lacks a universally accepted definition on electronic wills[6]. Consequently, audio- visual recordings which are defined as recording containing both audio and visual representation used in conveying information may thus be referenced as Electronic Wills. This area of law has yet to be fully traversed within the Kenyan jurisdiction however, reference may be made to the case In The Matter Of The Estate Of Kevin John Ombajo (Deceased)[7] The case serves as a reminder of the intricate legal issues related to audio-visual

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[1] Section 8, Law of Succession Act (1981)
[2] Section 5, Law of Succession Act (1981)
[3] Banks v Goodfellow (1870)
[4] Section 11, Law of Succession Act (1981).
[5] Consultation Paper No. 260 of 2023, Making a Will: A Supplementary Consultation Paper, October 5 2023, 8. 9 < https://www.legislation.gov.uk/uksi/2020/952/article/2%20> on 6 th December 2023.
[6] Consultation Paper No. 260 of 2023, Making a Will: A Supplementary Consultation Paper, October 5 2023, 8. 9 < https://www.legislation.gov.uk/uksi/2020/952/article/2%20> on 6th December 2023.
[7] In re Estate of Kevin John Ombajo (Deceased) (Succession Cause 555 of 2018) [2021] eKLR.

wills in Kenya. The Court invalidated an audio-visual will, affirming that traditional written wills, which must be attested, remain valid unless contested. This ruling emphasizes how important it is to have precise legal guidelines controlling electronic wills.

The research will conduct a comparative study on England and Wales which has made progress in regulating electronic wills through amendments to the venerable Wills Act of 1837. Interestingly, contemplation is underway regarding the permanence of these changes, prompted by a recognition of the escalating technological advancements globally[8]. This consideration reflects a nuanced acknowledgment of the potential merits and adaptability of electronic testamentary instruments in a contemporary legal landscape. On the other hand, states in the United States such as Nevada contemplated the adoption of the electronic wills that resulted in the creation of the Nevada Statute however, its implementation is yet to be done.

This paper seeks to examine the feasibility and potential advantages of adopting electronic wills, with a primary focus on adapting to technological advancements. By exploring electronic alternatives, this study aims to support a testamentary framework that aligns with contemporary technological progress, meeting the evolving needs of society.

1.2 Statement of the problem

The will-drafting procedure in Kenya is still based on traditional techniques that have not kept up with technological developments in a time when technology is pervasive in daily life. The current testamentary practices acknowledge written wills[9] and oral wills[10] as the only form of valid wills in the disposition of property in Kenya. Taking this into consideration, Justice L.A Achode in the case of Kevin John Ombajo (deceased)[11], held that the Kenyan testamentary regime does not acknowledge audio visual wills as valid wills and went ahead to categorize it as an oral will.

However, the potential advantages of contemporary technology, such as increased accessibility and efficiency, are not addressed by these procedures, which were created to ensure the validity and authenticity of wills. It is imperative that testamentary processes be updated to reflect modern socioeconomic and technological realities, as seen by the absence of provisions for electronic wills.

[8] < https://lawcom.gov.uk/project/wills/ > on 6th December 2023.

[9] Section 11, Law of Succession Act (1981).

[10] Section 9, Law of Succession Act (1981).

[11] In re Estate of Kevin John Ombajo (Deceased) (Succession Cause 555 of 2018) [2021] eKLR.

Essentially, the incorporation of electronic wills into Kenyan law is made more difficult by the lack of a set legal definition and rules. Therefore, this study focuses on the investigation of the viability of implementing electronic wills in Kenya in order to improve testamentary efficiency, inclusivity, and accessibility while keeping up with international standards and modern technology developments.

1.3 Statement of objectives

The research paper aims to achieve three main objectives:

i) Examining the Kenya's legal framework regulating wills;
ii) Investigating the place of electronic wills in Kenya;
iii) Examining the lessons that Kenya can borrow from England and Wales as well as the United States on electronic wills.

1.4Research Questions

The research paper aims to answer the following research questions:

1. To what extent does Kenya's legal framework regulate the making of wills?
2. What is the place of electronic wills within Kenya's legal framework for succession?
3. What lessons can Kenya learn from the England and Wales as well as the USA with regards to electronic wills?

1.5 Hypothesis

The Kenya legal framework does not sufficiently address the making of electronic will. This is despite the advancements in technology and the increasing necessity to adopt electronic wills.

1.6 Justification of the Study

This study addresses a crucial research gap by examining the potential benefits and challenges of adopting electronic wills in Kenya, contributing to the evolving knowledge in testamentary practices. It advocates for updating testamentary procedures as an innovative approach to embrace technological advancements, making will-making more efficient and accessible. The study's findings could guide legislative changes and regulatory frameworks toward more effective and economical testamentary processes, with implications for both policy and practice.

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1.7 Theoretical Framework

1.7.1 Legal Modernization Theory

Legal modernization theory posits that legal systems evolve over time to adapt to societal changes and technological advancements[12]. This theory has its origins in the United States whereby Trubenk and Galanter were the foremost scholars in relation to the theory[13]. The theory is linked to the United States Aid schemes which are aimed at developing Third World countries[14]. The proponents believed that legal liberalism as an instrument of modernization could be exported to third world countries. This model assumes that law has an instrumentalist role in the reform of a system in all its spheres. The criticism levelled against this theory is that the model did not reflect the situation as it was in reality

In the context of testamentary practices, this theory suggests that the adoption of electronic wills represents a modernization of legal processes to align with contemporary needs and technological capabilities[15]. By embracing electronic wills, Kenya can enhance the efficiency, accessibility, and inclusivity of its testamentary procedures, thereby promoting social justice and economic empowerment [16].

In summary, legal modernization theory offers a theoretical framework for comprehending Kenya's reasoning for embracing electronic wills. Kenya may modernize its testamentary practices and enhance the effectiveness, accessibility, and inclusivity of its legal system by realizing the need to modify legal procedures to account for technology advancements and learning from the experiences of other jurisdictions.

1.8 Literature Review

As alluded to in the background, this research focuses on the integration of electronic wills into the Kenyan legal framework, especially in light of the challenges posed by COVID19. This section aims at reviewing existing literature on the subject, examining how other jurisdictions, notably England and the United States, have embraced electronic wills.

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[12] Teubner, Gunther. "Substantive and Reflexive Elements in Modern Law." 17(2), *Law and Society Review*, 1983, 258.

[13] Caiger A, "Legal Modernization Theory and its Relevance in South Africa," 13 (2) Tydskrif vir Regswetenskap, 1988, 237.

[14] Trubek D. and Galanter M., "Scholars in Self-Estrangement: Some reflections on the crises in law and development studies" *Wisconsin Law Review* 1974, 1062-1102.

[15] Browne, M, The Future of Electronic Wills: Balancing Formality, Privacy, and Testamentary Freedom, 69(6),*Vanderbilt Law Review*, 2016, 1685-1724.

[16] Radin, Margaret Jane, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*, *Princeton University Press*, United States, 2013,

To understand the aim of the research, there is need to delve into the current standing of electronic wills in Kenya. Musyoka Mitchell, in her article titled 'Regulation of Electronic Wills in Kenya: A Case for Reform?' highlights that Kenya lacks a clear regulatory framework for Electronic Wills. The current requirements for wills in Kenya look into the testamentary capacity of the testator and if it is made in the proper form as provided for in the Succession Act. The will ought to be attested by at least two witnesses. The author highlights the need to implement existence of electronic wills in the wake of a digital era. This is further supplemented by the proposal to incorporate the doctrine of equity that equity looks to substance and not form within the succession sphere of law. Failure to adapt to the need of modernizing testamentary practices may result in impeding of testator's intentions.

The increasing prevalence of electronic wills, spurred on by the COVID-19 epidemic, highlights their increasing significance. Despite advancements, as highlighted by Hall P's article, 'Welcoming E-wills into the mainstream: The digital communication of testamentary intent, there are significant hurdles to integrating electronic wills into legal systems. Electronic wills still have difficulties adhering to traditional formalities, according to Hall, even though the "Substantial Compliance" and "Harmless Error" theories as put forward by John H. Langbein,in his article, 'Substantial Compliance with the Wills Act[17]' provide avenues for authenticating wills that are not precisely implemented. This viewpoint is consistent with the worries expressed by Beyer and Hargrove in their article,' Digital Wills; Has the Time Come for Wills to Join the Digital Revolution?' [18], who point out that the successful use of electronic wills in the United States as specified within the Nevada Statute is hampered by issues like the absence of standardized formats and authentication software.

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The article Dispensing with Wills' Act Formalities for Substantively Valid Wills[19] highlights the conflict between rigorous statutory compliance and testators' substantive intent as it examines the development of will formalities under the Wills Act and their application to electronic wills. It criticizes the strict procedures that are typically needed for wills, like many witnesses and signatures, and emphasizes how they can render documents that are truly intended void even when there is no evidence of fraud or undue influence. The essay makes the case that this strictness contrasts with the laxity given to non-probate transfers, which are frequently exempt from such strict regulations. A statutory "dispensation power," which is the suggested remedy, would enable courts to probate

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[17] John H. Langbein, Substantial Compliance with the Wills Act, 88 *Harvard Law Review* 489, 1975.
[18] Beyer G and Hargroe C, 'Digital Wills: Has the Time Come for Wills to join the Digital Revolution?' , 33 *Ohio Nothern University Law Review* 3, 2009.
[19] Johnson R, 'Dispensing with Wills' Act Formalities for Substantively Valid Wills' 10 *University of Richmond*, 1992.

electronic wills and similar instruments in the event that there is unambiguous and compelling proof of the decedent's competence, intent, and lack of misbehaviour.

The paper 'To Dispense or Not to Dispense, That is the Question…[20]' explores changes in testamentary law, emphasizing innovations like as biometric signatures and video-witnessing that strike a compromise between testators' objectives and contemporary technology. Supporters emphasize how important they are in the digital age, while detractors caution about less protections. Dispensing powers that accept non-compliant wills if purpose is evident are modelled by jurisdictions such as Australia. The article, which prioritizes intent above rigorous formalities, also supports conversations on the harmless error theory.

In Consultation Paper No. 231 of 2017[21], the Law Commission of England initially proposed that electronic wills be used; however, due to the idea's novelty, it was rejected. However, the landscape shifted during the COVID-19 pandemic, prompting the widespread use of technology in various aspects of individuals' lives, including the legal domain. As a result, the legal system temporarily incorporated electronically executed wills and wills admitted to probate only as electronic documents. This move was viewed as a trial period, with ongoing consultations to determine whether to make the amendment permanent. The proposed consultations aim to establish statutory provisions specifically tailored for electronic wills, mirroring the functional requirements of traditional paper-based wills. As discussions continue, this paper takes a focused approach similar to that of the Consultation Paper, endorsing the need for new statutory provisions to address electronic wills. The paper seeks to contribute by suggesting potential requirements that could strike a balance between the adoption of electronic wills and ensuring they fulfill the testamentary functions inherent in traditional wills.

Adam J. Hirsch in his article, 'Models of Electronic- will Legislation' critically examines the introduction of electronic wills, also known as e-wills, into the inheritance law framework. The study assesses the benefits and cons of these modern instruments, highlighting how e-wills contravene traditional testamentary norms based on the use of paper and ink. The highlights include an examination of current legal frameworks, such as those in Nevada and Indiana, as well as an analysis of court interpretations in places where electronic wills are not expressly recognized by statute[22].

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[20] Chauhan M, 'To Dispense or Not to Dispense, That is the Question…' 2 *University of Leicester Student Law* Review 9, 2022.
[21] Consultation Paper No. 260 of 2023, Making a Will: A Supplementary Consultation Paper, October 5 2023
[22] Hirsch A, 'Models of Electronic-Will Legislation' 56 *Real Property, Trust and Estate Law Journal* 2, 2021, 164-230.

Hirsch contends that, while e-wills are useful and handy, they frequently fall short of crucial testamentary tasks such as clarity, dependability, and fraud prevention. These weaknesses are supported by empirical evidence indicating widespread public uncertainty about their security and validity. The report concludes with a suggestion for a "postmodern statute," which advocates a compromise that keeps traditional protections for regular use while allowing e-wills only in extreme instances to tackle urgent issues[23]. This complex perspective adds a significant policy-oriented discussion to the ongoing probate law debate over digital adaption.

The article 'What is an electronic will'[24] examines electronic wills by categorizing them into three types: qualified custodian wills, online wills, and offline wills. It examines the historical goals of will formalities (protective, cautionary, and evidentiary), emphasizing the distinct difficulties and dependability of each e-will type. It further looks into formality compliance, noting that while most countries prefer rigorous adherence, doctrines like as considerable compliance and harmless error can be used to legitimize atypical wills. However, issues arise with digital signatures, third-party data ownership, and secure storage, confounding authenticity assessments. It finishes by proposing for flexible, transparent legislation that balances innovation with the evidential requirements of probate law[25].

To sum up, this review of the literature has given a thorough analysis of how electronic wills are now used within legal systems. The discourse has emphasized the progression of ideas and methods related to electronic wills, stressing the difficulties and prospects linked with their implementation. Legal scholars share a range of opinions, including those that address uniformity and streamlined procedures. These perspectives provide insight into the continuing discussions and issues that take place within the legal community. It contributes to the ongoing discourse by not only summarizing existing perspectives but also proposing considerations for the implementation of electronic wills. In addition, it notably highlights that the consideration of electronic wills could incentivize individuals to choose testacy, overcoming the deterrents posed by stringent requirements in traditional wills.

[23] Hirsch A, 'Models of Electronic-Will Legislation' 56 *Real Property, Trust and Estate Law Journal* 2, 2021, 230.
[24] Developments in the Law, 'What Is an 'Electronic Will'?', 131 *Harvard Law Review* 6, 2018, 1792.
[25] Developments in the Law, 'What Is an 'Electronic Will'?', 131 *Harvard Law Review* 6, 2018, 1811.

1.9 Research Methodology

This research is mainly desktop research. This paper's information is based on data collected from multiple sources. It draws information from primary sources like the 2010 Kenyan Constitution. as well as, a number of statutes and case law are used. Additionally, it makes use of secondary sources such as textbooks, media articles, journals, and theses, as well as. The usage of online resources goes hand in hand with this.

1.10 Assumptions

The paper assumes that adoption of electronic wills promotes inclusivity within the testamentary practices especially for the visually impaired persons

1.11 Limitations

One major research constraint is the absence of empirical data on electronic wills in nations like Kenya, where the idea is still relatively new. This limits the depth and validity of conclusions because there aren't enough hard data points or case studies. Research is further complicated by the lack of well-established legal precedents and frameworks, which makes it challenging to draw parallels or offer firm suggestions. Furthermore, understanding and implementing electronic wills becomes more difficult due to the difficulty in fusing technological improvements with legal requirements. Divergences in perspectives among legal experts, professionals, and decision-makers could potentially impact the consistency and dependability of study findings. Lastly, a lack of research time may limit the breadth of study and affect the dependability and consistency of conclusions and suggestions.

1.12 Chapter Breakdown

Chapter one: The first chapter provides an overview of the study paper. It presents the issue and lists the objectives that the article hopes to achieve by the conclusion of the investigation. It offers insight into the literature that will be used in the paper as well as the theory upon which the study is founded. An overview of the chapters the article elaborates on is provided at the end of it.

Chapter two: The present legal framework for wills in Kenya will be examined in this chapter, with particular attention paid to its provisions on electronic wills.

Chapter three: This chapter seeks to analyse the place of electronic wills within the current legal framework on succession matters.

Chapter four: This chapter provides for a comparative analysis on electronic wills drawing from England and Wales as well as the United States.

Chapter five: This chapter concludes the research. It offers recommendations concerning the legal framework regarding laws on electronic wills in Kenya.

CHAPTER TWO: CURRENT LEGAL FRAMEWORK REGULATING THE MAKING OF WILLS IN KENYA

2.1 Introduction

The Law of Succession Act, which governs the drafting, validity, and execution of wills as well as the division of estates, is the primary source of Kenya's wills law. This Act provides individuals with the freedom to dispose of their property as they wish through a will, while outlining specific formal requirements for validity, such as written documentation, signatures, and witnesses. It guarantees that a person's intentions are honoured following death and deals with the appointment of executors to oversee the estate.

This chapter seeks to analyse the current legal framework of will making in Kenya. In addition to that, the chapter, based on legal arguments, shows the effects of the enactment of electronic wills as part of the testamentary practices within Kenya.

2.2 Forms of a will

The Law of Succession Act (Cap. 160), which permits people to freely divide their property through a will, governs testacy in Kenyan law. Any adult of sound mind may exercise testamentary freedom and form a valid will, as stated in Section 5 of the Act. However, in order to safeguard dependents' rights, this flexibility is constrained by statute.

There are two primary types of wills recognized under Kenyan law:

a. Written wills

These refer to wills whereby a legal declaration has been made by a person, of his wishes or intentions regarding the disposition of his property after his death, duly made and signed in accordance with the law and have been reduced to a readable format on paper. They are considered to be valid upon meeting the requirements set out under Section 11 of the Act which include:

a. the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
b. the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;
c. the will is attested by two or more competent witnesses.

b. Oral wills

This refers to wills made by word of mouth by the testators. These wills are recognized as valid pursuant to Section 9 of the Act. They are subject to stricter conditions as opposed to written wills. The conditions include:

a. it is made before two or more competent witnesses; and
b. the testator dies within a period of three months from the date of making the will provided that an oral will made by a member of the armed forces or merchant marine during a period of active services shall be valid if the testator dies within that period notwithstanding that he died more than 3 months after making the will.

2.3 Criteria for Validity of a Will

The creation of a valid will is dependent on two requirements:

1. Capacity requirements
2. Formal requirements

2.3.1 Capacity Requirements

2.3.1.1 Testamentary Capacity

This refers to the general requirement for the validity of a will. It is applicable to both oral wills and written wills. Section 5 of the Act[26], testamentary capacity refers to a person's legal and mental ability to make a valid will. To create a valid will, the testator must be of sound mind and has attained the age of majority. The Act further highlights under section 5(3)[27] creates a rebuttable presumption of soundness of mind at the time of making a will unless it is proven that he is in such a state of mind arising from mental or physical illness, drunkenness or other cause, as not to know what he is doing.

The courts apply a three-fold test for mental capacity, as established in the case Banks v Goodfellow[28]. The test requires the testator to:

1. Have a sound mind to understand the nature of making a will this essentially means the testator must be aware that the will disposes of their assets upon death.

2. Possess a sound memory to recall the extent and nature of their property.

3. Have a sound understanding of the persons who may have claims on their estate.

[26] Section 5, Law of Succession Act (1981).
[27] Section 5(3), Law of Succession Act (1981).
[28] Banks v Goodfellow (1870).

The three-fold test is seen in play within the Kenyan jurisdiction within the case *In re Estate of Kigen Cheboi Kipchorsoi (Deceased) (Succession Cause 141 of 1991) [2023].*

The Act further highlights, that the burden of proof that the testator is not of sound mind lies on the person who alleges. This was further highlighted within the case *in the matter of the estate of James Ngengi Muigai*[29] whereby the contestation of the will was deemed invalid as the objector was not capable of proving that the testator was not of sound mind.

2.3.1.2 Equality of Genders

The Act further highlights that a female person whether married or unmarried has the same capacity to dispose off their property through a will as does a male person[30]. This is in line with the constitutional principles of equality and non-discrimination[31]. It is further encompassed within the Constitution's provisions that provides that everyone is free to own and dispose of their property[32]. This was made reference to in the case *Gulzar Abdul Wais v Yasmin Rashid Ganatra & Another*[33] .

2.3.1.3 Free from coercion fraud, importunity or mistake

The Act[34] provides that the will must be made without coercion, fraud, importunity or mistake. The existence of any of these elements in such a way that it takes away the free agency of the testator is considered to be void[35]. This is further evidences in the In re Estate of Julius Mimano (Deceased) case[36]. [2019] eKLR.

2.3.2 Formal Requirements

As the law provides for two types of wills, that is written wills and oral wills, it further caters for formal requirements that cater to each type of will.

2.3.2.1 Oral wills

The validity requirement for oral wills is catered for under section 9 of the Act. It is only valid of it is made before two or more competent witnesses[37]and the testator dies within a period of three months from the date of making the will[38]. However, the three-month time frame does not extent to members

[29] In The Matter Of The Estate Of James Ngengi Muigai (Deceased) (2005) eKLR.
[30] Section 5, Law of Succession Act (1981).
[31] Article 27, Constitution of Kenya (2010).
[32] Article 40, Constitution of Kenya (2010).
[33] (2020) eKLR.
[34] Section 7, Law of Succession Act (1981).
[35]In re Estate of Julius Mimano (Deceased) (2019) eKLR.
[36] In re Estate of Julius Mimano (Deceased) (2019) eKLR.
[37] Beth Wambui and Another v Gikonyo and others (1988) eKLR.
[38] In Re Rufus Ngethe Munyua (deceased) Public Trustee v Wambui 1977 eKLR.

of armed forces or a merchant marine as wills made by them during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of the making of the will[39].

An oral will is further considered to not be valid if it is contrary to any written will of the testator whether the written will was made before or after the date of the oral will, so long as the written will has not been revoked[40].The standard of proof is based on a balance of probabilities[41] In the case of conflict as to what was said by the deceased in making an oral will, the oral wills hall nit be valid except as far as its contents are proved by an independent witness[42].

2.3.2.2 Written wills

The Act provides for the following requirements for the validity of a written will[43]:

a. The testator has signed/ affixed his mark to the will or has directed some other person to sign on his/her behalf in his/her presence.
b. The signature (whether of testator or other person) should appear that it was intended to give effect to the writing as a will. In the case of *Wambui & another versus Gikonyo & others*[44], the Court of Appeal held that “the signature or mark could be placed anywhere including as the last signature after the witnesses’ signatures as the testator need not sign the will since it could be signed on his behalf and still be valid.”
c. A will must be executed in the presence of two competent witnesses, who must also sign the instrument, according to Section 11(c) of the Act[45]. By verifying the testator's intentions and safeguarding against fraud, this procedure guarantees the authenticity of the will. In order to prevent conflicts of interest, witnesses must be impartial and not beneficiaries or beneficiaries' family. Witnesses must sign the will in the testator's presence, even though they are not required to sign it simultaneously or in person. Section 11(c) preserves the legal protections while permitting flexibility in the witnessing procedure, which is helpful in real-world situations

[39] Section 9, Law of Succession Act (1981).
[40] In re Estate of Kevin John Ombajo (Deceased) (2021) eKLR.
[41] Elizabeth Kamene Ndolo v George Matata Ndolo (1995) eKLR.
[42] Section 10, Law of Succession Act (1981).
[43] Section 11, Law of Succession Act (1981).
[44] (1988) eKLR
[45] Section 11, Law of Succession Act (1981).

2.4 Conclusion

In conclusion, the Law of Succession Act balances testamentary independence with dependant protections by establishing a thorough framework for the drafting, validity, and execution of wills in Kenya. It acknowledges both oral and written wills, although written wills are more commonly preferred since they are more dependable and clearer and because they follow certain formal standards such witness attestations and signatures. However, electronic wills are not covered by the current testamentary framework, exposing a legal gap that ignores changing customs and the expanding use of digital technology in contemporary culture.

CHAPTER THREE: THE PLACE OF ELECTRONIC WILLS IN THE CURRENT SUCCESSION REGIME

3.1 Introduction

The advancement of testamentary procedures has propelled electronic wills (e-wills) to the forefront of contemporary estate planning. While traditional paper-based wills are based on rigid procedural formalities, e-wills provide flexibility to accommodate the rising usage of technology. However, the legal frameworks that govern e-wills vary greatly among jurisdictions, making it difficult to harmonize elements such as authenticity, dependability, and testamentary purpose. This section investigates the current legal standards, their application to electronic wills, and the possibility of incorporating ideas such as functional equivalence to align electronic transactions with traditional testamentary processes.

3.2 Definition of Electronic Wills

Electronic wills transcend the traditional "one-size-fits-all" approach by introducing a more flexible framework tailored to diverse needs. These wills are categorized into three distinct types[46] :

a. Offline Electronic Wills:

Offline electronic wills are made directly on an electronic device by the testator, who can "handwrite" the will with a stylus or type it. The testator electronically signs them, either by typing their name or by adding a signature mark inside the document. These wills are not usually printed, witnessed in person, or posted to a digital platform; instead, they are kept locally on the hard disk of the device.

However, the main challenge brought about by offline wills is one of an evidentiary function such as issues of fraud and obsolescence.

b. Online Electronic Wills:

Online electronic wills are created and stored via third-party services, such as social media. Since these wills are kept on the servers of the service provider or in cloud storage, they are governed by the company's policies and data protection legislation. This approach adds dependability by enabling an impartial third party to confirm crucial information, such the document's creation date.

Two key elements influence online electronic wills. First, their generation and storage through third-party services are subject to Terms and Conditions agreements, which can have an impact on the reliability and availability of evidence of their validity. Second, such wills are subject to federal or

[46] Aksoy H, 'Audiovisual Wills: A Contemporary Approach to Testamentary Formalities', Erasmus Law Review 1, 2002,12.

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state data management and retention rules governing online personal information. However, the connection between these laws, traditional will statutes, and developing electronic will legislation is ambiguous, potentially complicating regulation and enforcement.

c. Qualified Custodian Electronic Wills:

These are wills that are generated, executed and securely stored by companies which are governed by particular state laws and regulations. These wills cater for the challenges brought about from offline and online electronic wills and are capable of being standardized in a manner similar to "traditionally" executed wills.

3.3 Challenges in the implementation of Electronic Wills

Firstly, the Evidence Act provides that electronic records to be admissible in court, but it does not specifically address the unique requirements for digital wills[47]. The absence of standardized authentication methods for electronic wills presents implementation challenges. This regulatory gap heightens concerns about forgery, tampering, and identity fraud, as electronic wills are vulnerable to cybersecurity threats and subtle alterations that may be undetectable without advanced forensic tools[48].

Moreover, implementation of electronic wills faces judicial resistance and interpretation[49]. The failure to recognize electronic wills within the Kenyan legal framework has led to judicial resistance in accepting non-traditional will formats. For instance, in the case of in re Estate of Kevin John Ombajo (Deceased)[50], the court invalidated an audio-visual recording intended to amend a previous written will, citing non-compliance with the Act's procedural requirements. This strict adherence to traditional formalities showcases how Kenyan courts prioritize adherence to procedural formalities over substantive testamentary intent. The judiciary's reliance on outdated legislative frameworks creates a gap between technological advancements and legal interpretation, leaving electronic wills open to invalidation.

It is challenging to successfully implement and govern electronic wills due to the quick evolution and frequent changes in technical tools. This is known as the "challenge in the dynamism of technology." Systems and tools used today may soon become old due to technological advancements, resulting in problems like outdated software, compatibility concerns, and interoperability issues. There may be

[47] Section 106B, Evidence Act

[48] Beyer G and Hargroe C, 'Digital Wills: Has the Time Come for Wills to join the Digital Revolution?', 33 *Ohio Northern University Law Review 3*, 2009, 890

[49] Beyer G and Hargroe C, 'Digital Wills: Has the Time Come for Wills to join the Digital Revolution?', *33 Ohio Northern University Law Review 3*, 2009, 891.

[50] In re Estate of Kevin John Ombajo (Deceased) (Succession Cause 555 of 2018) [2021] eKLR.

regulatory gaps if new technologies like blockchain, AI, and biometrics develop more quickly than existing regulations can keep up. Furthermore, the security and integrity of electronic wills are at risk from changing cyberthreats, and the problem is made worse by the expense of regular system upgrades and the exclusion of underprivileged groups brought on by the digital divide. Adopting adaptable legislative frameworks, making investments in systems that are future-proof, educating professionals, encouraging digital literacy, and making sure regular updates to laws and technologies to maintain security, accessibility, and reliability.

One of the biggest obstacles to the adoption of electronic wills is the cost of essential technology[51]. A significant investment in infrastructure, including servers, cloud storage, encryption software, and cybersecurity safeguards, is necessary to set up secure systems. Costs are further increased by the need for regular updates to protect against cyberattacks and guarantee system dependability. These costs may be unaffordable for both public and commercial entities, which would restrict the number of publicly accessible platforms.

3.4 Gaps in the Implementation of Electronic Wills

Despite the existence of the Evidence Act and succession laws, there is lack of a legislative recognition and framework catering to the electronic wills. The Law of Succession Act [52] , places more emphasis on customary procedures like witnessed and paper wills as opposed to electronic wills. The legal standing and enforceability of digital testamentary instruments are unclear due to the absence of clear requirements. Both testators and courts are hampered by the lack of legislative recognition, which leaves digital wills open to judicial interpretation. A more flexible legal framework is also required to accommodate modern testamentary formats, such as digital and audio-visual wills, as the Act's rigidity was shown in cases like Re Estate of Ombajo (Deceased) [53] , where an audio-visual will was rejected as an oral will.

3.5 Opportunities for Testamentary Modernization

Firstly, the legal system in Kenya does not yet cover electronic wills. Nonetheless, the Evidence Act offers guidelines on the admissibility of digital evidence, stressing that the integrity of the electronic equipment, the dependability of storage, and accurate identification of its creator are necessary for its probative value. The Act establishes criteria for admitting electronic records as evidence and defines

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[51] Beyer G and Hargroe C, 'Digital Wills: Has the Time Come for Wills to join the Digital Revolution?' , 33 Ohio Nothern University Law Review 3, 2009, 892.

[52] Law of Succession Act, 1981.

[53] In re Estate of Kevin John Ombajo (Deceased) (Succession Cause 555 of 2018) [2021] eKLR.

a "document" to include information that has been saved electronically[54]. These include: a particular computer must process and store the data[55]; the computer must have been in operation to prevent tampering[56]; and the data must be routinely fed into the system as part of its regular use[57]. A Certificate of Electronic Record is necessary to authenticate such evidence, and the result must precisely match the original input[58]. The principle was upheld in the *R v Barisa Wayu Mutugunda case*[59], where adherence to these requirements was pivotal for admissibility. The necessity for legislative reform to accommodate the changing role of electronic wills within succession law is highlighted by this legal contradiction. The approach taken with regards to admissibility of digital evidence provides an opportunity to extend the provisions of technology within the legal purview of electronic wills.

By placing more emphasis on testamentary purpose than strict procedural formalities, the development of doctrines like Substantial Compliance and Harmless Error presents a significant opportunity for the use of electronic wills[60]. These theories acknowledge that when the testator's intent is evident, little departures from the law—such as the absence of conventional witnesses or unusual formats—should not render a will void[61]. The flexibility of these principles is demonstrated by cases Javier Castro[62], where a will typed on a tablet without the required witnesses was upheld. These precedents open the door for incorporating new technology, guaranteeing inclusivity, and respecting purpose by concentrating on the substance of a testator's desires rather than antiquated formalities.

3.5 Comparing Oral, Written and Electronic Wills within the Kenyan Jurisdiction

Both written and oral wills are accepted in Kenya, although each has its own set of rules. Usually made when the testator is about to die, oral wills need to be witnessed by two people and carried out within three months in order to be deemed legally binding[63]. Oral wills, however, are more likely to be contested because of their informal character and the rigorous procedures needed to validate them. Written wills, on the other hand, provide clearer documentation and lower the possibility of fraud

[54] Section 106B, Evidence Act, CAP (1963).
[55] Section 106B (2), Evidence Act (1963).
[56] Section 106B (2), Evidence Act (1963).
[57] Section 106B (2), Evidence Act (1963).
[58] Section 106B (4), Evidence Act (1963).
[59] (2011) eKLR.
[60] Langbein J.H, Substantial Compliance with the Wills Act, 88 *Harvard Law Review* 489, 1975, 514.
[61] Langbein J.H, Substantial Compliance with the Wills Act, 88 *Harvard Law Review* 489, 1975, 514.
[62] In re: Estate of Javier Castro, The Ohio Probate Court (2013).
[63] Section 9, Law of Succession Act (1981).

because they need to be witnessed by two people and signed by the testator[64]. Written wills are safer, although they can still be challenged, particularly if formalities are not observed.

Wills in electronic format, otherwise known as e-wills, have not been adopted in the Kenyan legal framework. Kenyan Evidence Act recognises use of secondary documents however, e-wills have issues in terms of their legitimacy, security and adherence to prescribed rules[65]. But they provide convenience and ease which makes their future potential. E-wills are capable of enabling virtual signing and reducing complexities in making a will, but the fact that there is no legislative support makes them hollow. Changing this deficiency through policy reforms would allow for emergence of e-wills, which would enhance estate planning through efficiency and wide coverage in the Kenyan legal system.

To conclude, e-wills are still the subject of future discussion in Kenya because they have not been recognized whereas oral and written wills are practised currently although they do have pros and cons as with other newly developed systems.

3.6 Conclusion.

To summarize, although in Kenya oral and written wills are still in existence, but which each has its conditions and limitations, the idea of electronic wills (e-wills) has not been addressed in the laws of the country. In Kenya of the future, e-wills promise amazing opportunities for managing one's estate, although they are illegal as of now. On the other hand, their use raises problems because there are no clear provisions in the law, there are security concerns, and there is a need for adequate verification systems. National legislation reform is paramount to help in making the future of Kenya a country where e-wills are employed in the estate of the deceased while at the same time upholding the principles of intending testator of e-wills, security and accessibility.

[64] Section 11, Law of Succession Act (1981).
[65] Beyer G and Hargroe C, 'Digital Wills: Has the Time Come for Wills to join the Digital Revolution?' , 33 Ohio Nothern University Law Review 3, 2009, 890-893.

CHAPTER FOUR: COMPARATIVE ANALYSIS: ENGLAND, WALES AND THE UNITED STATES OF AMERICA (USA)

4.1 Introduction

The adoption of electronic wills in England and Wales, and United States with particular attention to Nevada is examined in this chapter. By contrasting these jurisdictions, the analysis reveals areas of convergence and divergence in the legal, procedural, and technological frameworks influencing electronic wills. Additionally, it assesses how these frameworks handle testamentary practices' flexibility. The aim of the comparative approach is to highlight lessons Kenya can learn from different legal frameworks regarding the potential advantages and challenges of incorporating electronic wills.

4.2 England and Wales

The Wills Act of 1837 is the operative statute in England and Wales with regards to testamentary practices. The Act[66] mandates that wills must be in writing, signed by the testator and witnessed by two individuals. During the consultations held in 2017[67], the Law Commission of England made proposals on the inclusion of electronic wills. Electronic wills were considered unusual at the time, despite the potential advantages being acknowledged, such as improved security, greater accessibility, and better loss protection through digital storage[68]. The hazards of fraud, undue influence, and technological obsolescence were among the main concerns, as was adherence to the procedures specified in the Wills Act 1837[69].

However, COVID -19 brought about the re-consultation of the wills. The Law Commission analysed these practices, emphasizing the need to preserve the evidential, cautionary, and protective roles of wills, which are vital for safeguarding against fraud and undue influence[70]. The temporary provisions of the Wills Act 1837 represented the first major step in incorporating digital techniques into testamentary procedures. Although remote witnessing by video conferencing was made possible by temporary COVID-19 provisions and was extended until January 2024, these techniques were considered a last choice because of the logistical challenges[71] .

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[66] Wills Act of 1837.
[67] Consultation Paper No. 260 of 2023, Making a Will: A Supplementary Consultation Paper, October 5 2023.
[68] -< https://hullandhull.com/2024/01/uk-law-commission-re-examines-the-viability-of-electronic-wills/ >_ on 24 November 2024.
[69] Wills Act of 1837.
[70] -< https://www.burges-salmon.com/news-and-insight/legal-updates/private-client/are-electronic-wills-the-future >- on 24 November 2024.
[71] -< https://www.burges-salmon.com/news-and-insight/legal-updates/private-client/are-electronic-wills-the-future >- on 24 November 2024.

The recognition of witnessing via video conference was pursuant to the fulfilment of was pursuant to the fulfilment of the following conditions[72]:

1. The will must be signed in real time during the video conference by the testator and two witnesses whereby they can clearly see the testator.
2. Thereafter the Will is sent to the witnesses
3. A videocall is also held for the witnesses to sign in the presence of the testator.

The will itself must still be in tangible form, even though these clauses show a partial shift toward electronic procedures. Since video conferencing integrates digital contact with physical papers, it is viewed as a hybrid paradigm rather than a totally electronic procedure.

The Law Commission via the Supplementary Consultation paper noted that the inclusion of electronic wills poses greater benefits that include that they will provide a more secure stance as to loss as compared to paper trails, that they will provide a built-in audit trails and will provide accurate dates and times of execution of the will in instances whereby multiple wills exist[73]. Despite their promise, e-wills face significant obstacles. Concerns regarding the increased likelihood of fraud, improper influence, and cybersecurity vulnerabilities are voiced by the Law Commission and legal professionals[74].

In order to comply with the protective purposes of the Wills Act 1837 and address issues such as fraud, undue influence, and technological obsolescence, the Law Commission suggests custom requirements for electronic wills, such as required registration, sophisticated electronic signatures, and the use of ledger technology[75]. Along with public discussions, it is also evaluating whether these requirements ought to be included in new or secondary laws[76].

4.3 United States of America (USA)

Nevada was the first state to enact legislation for electronic wills (e-wills) with its 2001 Electronic Wills Act, which was updated in 2017[77]. Nevada's 2001 electronic will statute was rarely applied in practice due to its stringent requirements for authentication. One of the primary issues is that it

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[72] -< https://www.burges-salmon.com/news-and-insight/legal-updates/private-client/are-electronic-wills-the-future >- on 24 November 2024.

[73] Consultation Paper No. 260 of 2023, Making a Will: A Supplementary Consultation Paper, October 5 2023.

[74] -< https://www.burges-salmon.com/news-and-insight/legal-updates/private-client/are-electronic-wills-the-future >- on 24 November 2024.

[75] -<https://hullandhull.com/2024/01/uk-law-commission-re-examines-the-viability-of-electronic-wills/> on 24 November 2024.

[76] -<https://www.thegazette.co.uk/wills-and-probate/content/103428 >- on 24 November 2024.

[77] -< https://www.nolo.com/legal-encyclopedia/what-is-an-electronic-will.html >- on 24 November 2024.

mandated advanced biometric identifiers, such as fingerprints, retinal scans, facial recognition, or voice authentication, making it overly restrictive and impractical for testators to execute valid electronic wills[78].

Taking note of the restrictive measures, Nevada amended its e-wills legislation in 2017 to make it more accessible and adaptable. According to this amendment, e-wills are electronic papers that have been authenticated by testators using electronic notaries, unique IDs, or witness e-signatures. This modernization reflects the state's response to technological advancements.

Reliance on the harmless error doctrine has met criticisms from US scholars citing that the doctrine requires a case to case application which has proved to be burdensome on the courts, they further put forward that it is applicable to written documents and not oral wills[79]. The Uniform Electronic Wills Act (UEWA) of 2019, which created nationwide standards, including Qualified Custodian wills for safe storage, was influenced by and preceded Nevada's structure.

The fact that there are not any case law on e-wills in the US emphasizes how new this field of law is[80]. Despite the fact that Nevada's unambiguous statutes reduce the need for judicial interpretation, numerous questions remain unsolved due to the lack of notable court cases or precedents. In Re Estate of Horton[81], a well-known case outside of Nevada, concerned an electronic letter discovered on a deceased person's phone. The Michigan Court of Appeals in re Estate of Horton proved that courts can accept e-wills based on the harmless error doctrine. The Michigan Court of Appeals probated an electronic and entirely typed document stored on the Evernote App. In this case, the testator had left an undated handwritten note stating that his final note and farewell was on his phone's Evernote App under the name 'Last Note[82]. These cases are still uncommon, though, which is indicative of how little e-wills have been studied in US courts.

Notwithstanding the paucity of case law, Nevada's strategy has impacted international debates on e-wills and served as a model for other jurisdictions. Nevada created protections against tampering and guaranteed the long-term preservation of e-wills by incorporating the idea of qualified custodians[83]. Because of these characteristics, Nevada is now a pioneer in the field, establishing a benchmark for

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[78] Hall P, 'Welcoming E-Wills into the Mainstream: The Digital Communication of Testamentay Intent', 20 *Nevada Law Journal* 339, 2019, 353.
[79] Aksoy H, 'Audiovisual Wills: A Contemporary Approach to Testamentary Formalities', *Erasmsus Law Review* 1, 2002, 6.
[80] Aksoy H, 'Audiovisual Wills: A Contemporary Approach to Testamentary Formalities', Erasmsus Law Review 1, 2002, 6.
[81] In Re Estate of Horton, Michigan Court of Appeals (2018).
[82] In Re Estate of Horton, Michigan Court of Appeals (2018).
[83] -< https://law.justia.com/codes/nevada/chapter-133/statute-133-320/ >- on 12th December 2024.

other states thinking about enacting comparable laws. A step in recognizing electronic attestation of wills has taken place in accordance with the Uniform Electronic Wills Act (UEWA). This has ushered in contemplation of digitalizing wills in the long run.

4.4 Lessons Kenya can draw from England and Wales

Kenya can learn a lot from England's and Wales' experiences updating their wills, especially with regard to the eventual integration of electronic wills. The potential for integrating technology into testamentary procedures was highlighted by the COVID-19 pandemic, which led to amendments in England and Wales, including temporary rules permitting video conferencing for will witnessing[84]. These policies, however, continued to take a hybrid approach, requiring both digital witnesses and physical wills, and they placed a strong emphasis on the cautious deployment of electronic procedures to prevent fraud and undue influence. Kenya can implement such gradual changes, beginning with hybrid models, while resolving practical issues and maintaining crucial protective functions like cautionary and evidentiary protections. The importance of electronic wills is highlighted by the Law Commission's emphasis on their advantages, which include improved security, audit trails, and loss prevention[85].

The United States' approach to electronic wills, especially Nevada's innovative initiatives and the Uniform Electronic Wills Act (UEWA), offers Kenya important insights. Nevada's experience emphasizes the necessity of striking a compromise between security and accessibility, as the state's original 2001 statute demanding sophisticated biometric identification turned out to be unworkable[86]. The significance of flexibility was highlighted by the 2017 changes, which streamlined the procedure with electronic notarization, unique IDs, and witness e-signatures. Kenya might follow Nevada's example of "qualified custodians" to protect e-wills from manipulation and guarantee their long-term preservation[87]. Furthermore, instances such as In Re Estate of Horton[88], in which an electronic document was recognized by the harmless error doctrine, highlight the significance of judicial discretion in maintaining testamentary intent. Kenya may embrace technology and establish clear, useful standards that answer fraud, undue influence and cybersecurity risks.

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[84] Consultation Paper No. 260 of 2023, Making a Will: A Supplementary Consultation Paper, October 5 2023.

[85] -<https://hullandhull.com/2024/01/uk-law-commission-re-examines-the-viability-of-electronic-wills/ >- on 24 November 2024

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[87] -<https://law.justia.com/codes/nevada/chapter-133/statute-133-320/ >- on 12th December 2024.

[88] In Re Estate of Horton, Michigan Court of Appeals (2018).

4.5 Conclusion

In conclusion, the comparative examination of electronic wills in Nevada, England, and Wales highlights the revolutionary possibilities of adopting digital testamentary procedures. Although Nevada's early adoption shows that entirely electronic wills are feasible, England and Wales' cautious approach highlights how crucial it is to strike a balance between innovation and preserving established legal standards. Both jurisdictions offer important insights for combating fraud, guaranteeing accessibility, and promoting inclusivity. Adopting best practices from these systems can help Kenya modernize its testamentary laws while preserving the process's dependability and integrity as electronic wills continue to advance.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This research paper aims to evaluate the feasibility of implementing electronic wills within Kenya's legal framework by examining practices and experiences from the United States as well as England and Wales. The study looks into how existing Kenyan laws can support electronic wills while assuring legitimacy, dependability, and adherence to succession principles. Drawing on desktop research and comparative study methodology, the study aims to identify obstacles and offer reforms for incorporating electronic wills into Kenya's testamentary law, aligning legal processes with technology improvements.

The first chapter set to introduce the research problem, presented the research questions that would be answered and the hypothesis upon which the research would be based on. The second chapter delved into discussing the current legal framework in relation to testamentary practices in Kenya. Chapter three discussed how electronic wills could be integrated into the current succession law regime. Chapter four constituted a comparative study on England and Wales as well as the United States.

The chapter concludes this research by expounding on the conclusions arrived at during the study and offering recommendations that may help remedy the problem.

5.2 Conclusion

The lack of a regulatory framework for electronic wills in Kenya leaves a crucial gap in ensuring the effective enforcement of testators' wishes. Digital wills indicate a shift in testamentary practice, fuelled by technology's pervasive presence in everyday life. However, without legal recognition, the legitimacy and enforceability of such wills are unknown, undermining succession law's basic objective of honouring the deceased's desire.

Failure to modify Kenyan succession rules risks rendering them obsolete in light of modern reality. Testators, who are increasingly reliant on digital means, confront challenges in articulating their ultimate wishes, potentially resulting to disagreements or unfulfilled goals. This divergence emphasizes the importance of reforms, as the lack of legally enforceable electronic wills impedes the smooth transfer of estates.

Drawing on Nevada's experience and the Uniform Electronic Wills Act as well as England and Wales experience, Kenya may put in place strong mechanisms to authenticate and secure digital wills, addressing concerns about fraud and technological obsolescence. Comprehensive amendments will

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not only modernize Kenyan law, but would also preserve its fundamental goal of respecting the testator's desires and upholding their legacy.

5.2 Recommendations

5.2.1 Incorporation of Electronic Wills within the Kenyan Legal Framework

Kenyan succession laws should be amended by parliament in order to formally accept electronic wills and bring them into line with global trends.

5.2.2 Regulation of Authentication and Preservation

The new or amended legislation should provide precise, unambiguous guidelines for the preparation, authentication, and preservation of electronic wills in order alleviate worries about fraud and tampering. Based on the Uniform Electronic Wills Act and borrowing best practices from states like Nevada and England, these rules might permit the use of electronic notaries, witness e-signatures, or electronic signatures.

5.2.3 Certified Custodians for Digital Wills

Establishing a certified custodian position in charge of safely keeping and guaranteeing the integrity of electronic wills ought to be a major component of the reform. To preserve accessibility and safeguard the legitimacy of digital testamentary papers, these custodians would act as reliable organizations.

5.2.4 Innovative Legal Interpretation

When reading current will legislation, the judiciary should take a creative approach, particularly in cases where the testator's intentions are obvious but certain formalities have not been properly adhered to. The harmless error doctrine, which permits a will to be deemed legitimate even in the absence of all formal criteria as long as the testator's intentions are clearly stated, should be taken into consideration by courts.

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