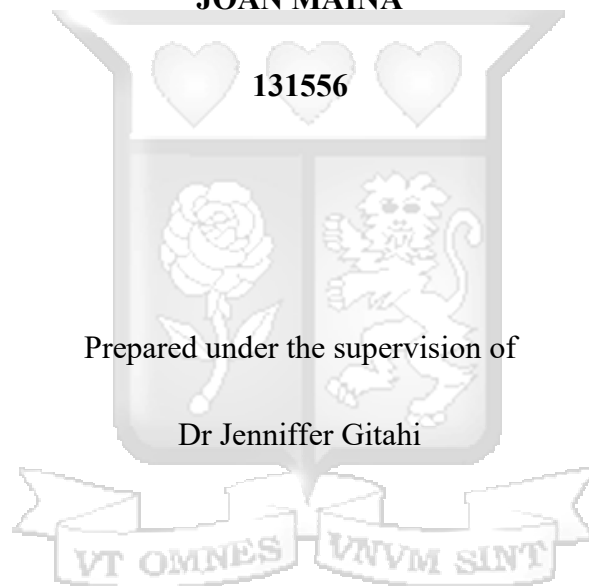


WRITTEN WILLS: INTRODUCING JUDICIAL DISPENSING POWER IN KENYA

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

By

JOAN MAINA



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Declaration

I, **JOAN MAINA** 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: **J.M**

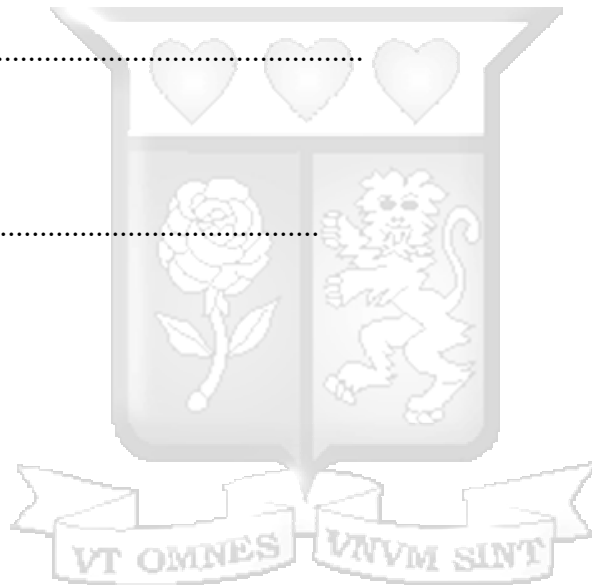
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This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

Dr Jenniffer Gitahi

Date:





ABSTRACT

This research examines the need for introducing a judicial dispensing power in Kenya's succession law to address the rigid formalities that often invalidate written wills due to minor technical defects. The study aims to assess the challenges posed by Kenya's strict compliance with will execution requirements under the Law of Succession Act, which frequently frustrates testamentary intention, and explores the potential adoption of a judicial dispensing power to mitigate these issues. The central research question investigates how Kenya can reform its succession law to balance procedural safeguards with the validation of wills reflecting genuine testator intent. Guided by John H. Langbein's substantial compliance theory, the research critiques the strict compliance approach, advocating for judicial discretion to validate defective wills where intent is clear.

A desktop doctrinal methodology is employed, analyzing primary legal sources from Kenya and comparative jurisdiction with South Africa, alongside secondary literature. Key findings reveal that Kenya's rigid adherence to formalities leads to unjust outcomes, increased litigation, and gender disparities, particularly disadvantaged marginalized groups. In contrast, jurisdictions with dispensing powers, such as South Africa, demonstrate how judicial discretion can uphold testamentary freedom while minimizing fraud risks.



Keywords: *Judicial dispensing power, Written wills, Testamentary freedom, Substantial compliance theory, Testamentary intent, Kenya, South Africa.*



LIST OF LEGAL INSTRUMENTS

The Law of Succession Act (Cap 160)

The Constitution of Kenya

The Electronic Communications and Transactions Act 2002.

South Africa's Wills Act 7 of 1953

The Succession Act (New South Wales 2006)





LIST OF CASES

Lemage v. Goodban (1865)

In the case of Isaac Kamande Gitundu v Jane Nyambura Waweru [2015] eKLR.

In re Estate of the Late Samson Kipketer Chemirmir (Deceased) [2019] eKLR

In Re The Estate of Kamuyu Nganga Waweru (2008) eKLR.

Rahab Nyakangu Waithanji v Fredrick Thuku Waithanje [2019] eKLR.

Makacha v Ndakaka [2024] eKLR.

In re Estate of the Late Samson Kipketer Chemirmir (Deceased) [2019] eKLR.

In re Estate of Salome Wangari Ngungi (Deceased) [2017] eKLR.

In re Estate of Jemimah Nyambura Gakuya (Deceased) [2024] eKLR.

In re Estate of Johana Keya Kikuyu (Deceased) [2020] eKLR.

In re Estate of Musyoki

In re Estate of Zipporah Njeri,

In re Estate of Kariuki Ngonyu (Deceased) [2019] eKLR.

Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat [2015] eKLR.

Jemmot v Steytler (1906).

De Reszke v Maras (2006), the Supreme Court of Appeal, South Africa.

Makhamba v Mandla and Others (2024) Free State High Court, Bloemfontein.

Van der Merwe v Master of the High Court (2010).

Perumal v Janse van Rensburg No and Others (2025), North Gauteng High Court South Africa

Bekker v Naude (2003), Supreme Court of Appeal of South Africa.

Freedom Under Law v Judicial Service Commission and Another [2023], Supreme Court of Appeal of South Africa.

Economic Freedom Fighters v Speaker of the National Assembly [2016], Constitutional Court of South Africa.

Cape Bar Council v Judicial Service Commission (2012).



CHAPTER 1

INTRODUCTION

1.1 Background

The right to dispose of one's property upon death, commonly known as testamentary freedom, is a fundamental aspect of private property ownership and autonomy.¹ Testamentary freedom allows individuals to determine how their estate should be distributed after their demise.² Throughout history, testamentary freedom has evolved; shaped by legal, social, and economic developments. While many jurisdictions uphold this principle, it is often constrained by formal legal requirements that govern the execution and validity of wills.

In Kenya, testamentary freedom is enshrined in the Law of Succession Act, which permits individuals to distribute their estates as they see fit.³ However, this freedom is subject to rigid statutory formalities, particularly those outlined in Section 11 of the Act, which dictate the requirements for a valid written will. Although these formalities promote integrity and certainty in succession law, their strict application often leads to the invalidation of wills due to minor technical defects. This creates legal rigidity that frustrates the testator's true intention often resulting in unjust outcomes.

The concept of testamentary freedom can be traced back to Roman law, where individuals had a recognized right to distribute their estates, subject to obligations to certain family members.⁴ This principle was later reinforced in English common law, which significantly influenced the development of succession law in Kenya. In early English law, testamentary freedom was initially limited, particularly concerning land ownership, as estates were often subject to customary and feudal obligations.⁵ Over time, legislative reforms such as the Statute of Wills 1540 and the Wills Act 1837 expanded individuals' rights to distribute their property as they wished. When Kenya inherited English legal traditions during colonial rule, the English law of succession principles were incorporated into its legal framework.

¹ Musyoka W, *The Law of Succession*, LawAfrica, Nairobi, 2010, 45.

² Musyoka W, *The Law of Succession*, 45.

³ Section 5, *Law of Succession Act* (Act No 11 of 2021).

⁴ Eva J, 'The Roman Law of Succession: testamentary freedom and its limitations' in Paul J, Clifford A and Kaius T (eds), *The Oxford Handbook of Roman Law and Society*, Oxford University Press, London 2016, 498–500.

⁵ Eva J, 'The Roman Law of Succession: testamentary freedom and Its limitations' 498-500.

The Kenyan legal system imposes strict procedural requirements on the execution of written wills. Section 11 of the Law of Succession Act stipulates that a valid will must be signed by the testator (or another person in their presence and at their direction) and witnessed by at least two competent witnesses, who must also sign the will in the testator's presence. These requirements were designed to uphold integrity and legal certainty in succession law. However, in practice, they often result in the invalidation of wills due to minor technical defects. A will that accurately reflects the testator's wishes but fails to meet the strict witnessing requirements, for instance, is deemed invalid, leading to unintended consequences such as intestacy, family disputes, and prolonged litigation.

The strict application of the law of succession in Kenya has led to numerous instances where courts have declared wills invalid despite clear evidence of the testator's intentions.⁶ Procedural compliance is prioritized over substantive justice, raising concerns about whether the law truly upholds testamentary freedom. The invalidation of wills due to missing signatures, improperly attested witnesses, or minor clerical errors frustrates the deceased's intentions and creates legal uncertainty.⁷

In some cases, this has resulted in estates being distributed contrary to the testator's wishes, leading to increased litigation and family conflicts. In contrast, several jurisdictions have introduced judicial dispensing powers, allowing courts to recognize and validate wills that clearly express the testator's intentions despite failing to meet formal requirements. In South Africa, Section 2(3) of the Wills Act 7 of 1953 which grants courts the authority to accept a defective will as valid if it is satisfied that the document represents the deceased's final wishes.⁸ Similarly, in Australia, Section 8 of the Succession Act 2006 (New South Wales) empowers courts to validate informal wills where there is sufficient evidence of the testator's intentions.⁹ These legal provisions acknowledge that while formal requirements serve an important purpose, rigid adherence to them should not override the fundamental principle of testamentary freedom.

Unlike these jurisdictions, Kenyan courts lack the discretion to validate defective wills, regardless of whether they reflect the testator's intentions. The absence of a judicial dispensing power in Kenya has significant implications. First, it results in injustice by frustrating the wishes of the

⁶ Musyoka W, *The Law of Succession*, 87.

⁷ Cotran E, *The Law of Succession in Kenya: Cases and Commentaries*, 112.

⁸ Section 2(3), *Wills Act* (Act No 7 of 1953).

⁹ Section 8, *Succession Act* (New South Wales 2006).

deceased. The invalidation of wills due to minor procedural errors means that estates may be distributed in ways that contradict the testator's true intentions. Second, it increases succession disputes and litigation. When wills are declared invalid, disagreements among beneficiaries often arise, leading to costly and time-consuming court battles. Third, it raises the risk of intestacy, where the estate is distributed according to intestacy laws rather than the deceased's express wishes. This can lead to situations where unintended beneficiaries inherit the estate, particularly if the testator had deliberately sought to exclude certain individuals. Lastly, the lack of judicial discretion reflects the rigidity of Kenya's succession law, which fails to adapt to evolving legal trends and best practices.

The need for reform in Kenya's succession law is evident. Introducing judicial dispensing power would enhance the flexibility of the legal system, allowing courts to validate wills that substantially comply with legal requirements while still safeguarding the integrity and certainty of succession law. Such a reform would align Kenyan law with global best practices, ensuring that procedural technicalities do not defeat substantive justice. However, any introduction of dispensing powers must be carefully structured to prevent abuse and provide clear guidelines on when and how courts may exercise this discretion.

A legal framework for judicial dispensing powers in Kenya could draw insights from jurisdictions like South Africa and Australia, incorporating clear criteria for courts to assess whether a defective will genuinely represents the testator's intentions. By doing so, Kenya's succession law would better reflect the fundamental principles of testamentary freedom, legal certainty, and equitable justice. This study examines whether this reform is possible by comparing laws from other countries and seeing if they can work in Kenya. By studying good practices from around the world and past court cases, the research aims to find a fair solution that also prevents misuse.

1.2 Statement of the Problem

In Kenya, the validity of written wills is strictly governed by Section 11 of the Law of Succession Act, which mandates rigid compliance with execution and attestation formalities. As a result, minor technical defects, such as missing signatures or improper witnessing, often lead to the invalidation of wills, thereby frustrating the testator's genuine intentions. Unlike jurisdictions such as South Africa, where courts have been granted judicial dispensing powers to validate defective

wills that reflect the deceased's true wishes, Kenyan courts lack such remedial authority. This legal rigidity not only risks unjust outcomes but also undermines testamentary freedom and contributes to prolonged litigation. The absence of a judicial dispensing power raises critical concerns regarding the adaptability of Kenya's succession law and its ability to balance formal legal requirements with equitable justice.

1.3 Research Objectives

1. To access the origin, meaning, and aims of the doctrine of a judicial dispensing power in the law of succession.
2. To demonstrate the challenges and the need for a judicial dispensing power in assessing the validity of written wills in Kenya.
3. To access the legal framework governing dispensing power in South Africa with a view of drawing lessons for the Kenyan jurisdiction.
4. To suggest practical approaches that Kenya can adopt for the application of dispensing power in the validity of written wills.

1.4. Research Questions

1. What is the origin, meaning, and aims of the doctrine of judicial dispensing power in the law of succession?
2. What challenges arise in assessing the validity of written wills in Kenya, and how do these challenges demonstrate the need for a judicial dispensing power?
3. What are the best practices in South Africa's legal framework governing judicial dispensing power, and what lessons can be drawn from it for potential application in the Kenyan jurisdiction?
4. What practical approaches can Kenya adopt for the application of judicial dispensing power in determining the validity of written wills?

1.5 Hypothesis

This research proceeds on the assumption that the lack of a judicial dispensing power in Kenya's succession law leads to unjust outcomes, as strict adherence to formal will validation requirements for validity may overlook genuine testamentary intentions. Therefore, introducing a dispensing power will help to protect testators.

1.6 Justification for the Study

The justification of the proposed study lies in the need to address the weakness in Kenya's succession law, derived from the rigid formal requirements that lead to the unjust invalidation of wills. Existing literature has not sufficiently explored the impact of the absence of a judicial dispensing powers on testamentary freedom. The proposed research hopes to contribute to bridging this gap by advocating for a more flexible legal approach that balances procedural safeguards with the testator's intent.

1.7 Theoretical Framework

The analysis of the research problem will be guided by the substantial compliance theory advanced by John H. Langbein.¹⁰ This theory provides a mechanism for interpreting the validity of wills beyond rigid adherence to formal legal requirements. The substantial compliance theory posits that a will should not be invalidated solely as a result of minor technical defects if there is clear and convincing evidence that the document accurately reflects the testator's intentions.¹¹ Langbein argues that the purpose of execution formalities is to ensure authenticity, prevent fraud, and provide clarity in succession matters.¹² However, strict adherence to these formalities, without considering the substance of the will, often frustrates the very goal of testamentary freedom.

Langbein's perspective is supported by jurisdictions that have adopted the dispensing power and allow courts to recognize wills that substantially comply with legal formalities even if they are technically defective. Countries such as South Africa and Australia have implemented legal frameworks that enable courts to validate informal wills when the testator's intent is sufficiently established. These jurisdictions acknowledge that while formal requirements serve an important function, they should not be applied in a manner that defeats substantive justice.

In contrast, the strict compliance approach mandates that wills must strictly adhere to execution formalities¹³ under Section 11 of the Law of Succession Act.¹⁴ Vincent Orth, a proponent of strict

¹⁰ Langbein J, 'Substantial Compliance with the Wills Act' 88 *Harvard Law Review* 3, 1975, 489.

¹¹ Langbein J, 'Substantial Compliance with the Wills Act' 489.

¹² Langbein J, 'Substantial Compliance with the Wills Act' 489.

¹³ Orth V, 'Wills Act Formalities: How Much Compliance Is Enough?' 43 *Real Property, Trust and Estate Law Journal* 1, 2008, 73–113.

¹⁴ Section 11, *Law of Succession Act* (Act No 11 of 2021).

compliance, argues that execution formalities are essential safeguards against fraud, undue influence, and ambiguities in succession matters. According to this approach, any deviation from formal requirements introduces uncertainty and risks undermining the integrity of testamentary instruments.¹⁵ Proponents of strict compliance maintain that relaxing formalities could lead to increased disputes over wills, making probate litigation more complex and contentious. Langbein's substantial compliance theory challenges Orth's strict compliance model by advocating for a more flexible interpretation of execution formalities. It suggests that courts should have the discretion to assess whether a will substantially meets legal requirements and whether its rejection would unjustly frustrate the testator's intent.¹⁶ This research will apply Langbein's theory to analyze how the introduction of judicial dispensing powers in Kenya could mitigate the adverse effects of rigid will execution drafting. By adopting a legal framework that prioritizes substantive justice over procedural technicalities, Kenya can align its succession law with global best practices and uphold the fundamental principle of testamentary freedom.

1.8 LITERATURE REVIEW

1.8.1 Theoretical Foundations of Testamentary Formalities

The legal requirements for documenting wills, which include written documentation alongside witness verification and testator signatures, come from centuries of legal practice to protect the recognition of intent while establishing procedural safeguards. According to Langbein, the main functions of testamentary formalities include evidence generation while protecting both caution and security.¹⁷ The evidentiary purpose creates an accurate documentation of testators' intentions because proof of their original wishes becomes impossible after their death. A formal will execution process involving witness signatures and signature-making ceremonies acts as a precaution that prevents unstable or forced wills by providing solemnity to the will-writing act. Testamentary formalities serve a protective function by creating procedural delays that stop fraudulent activities as well as undue influence attempts.¹⁸

According to Braun, testamentary formalities fulfill a channeling function because they

¹⁵Orth V, 'Wills Act Formalities: How Much Compliance Is Enough?' 43.

¹⁶Langbein J, 'Substantial Compliance with the Wills Act' 513-514.

¹⁷Langbein J, 'Substantial Compliance with the Wills Act' 513-514.

¹⁸ Langbein J, 'Substantial Compliance with the Wills Act' 492.

standardize the way people create wills.¹⁹ The judicial system benefits through predictable outcomes due to precise requirements, which appear in legal instruments like Kenya's Law of Succession Act for written wills with witness agreements. And therefore Braun states that this channeling function not only facilitates consistency in testamentary documents but also aids the courts in easily identifying, interpreting, and enforcing the testator's intent, thereby minimizing ambiguity and reducing the risk of fraudulent claims.

The mandatory compliance doctrines receive criticism from Miller because they lack flexibility when facing contemporary social practices.²⁰ The procedures required to validate oral and digital wills typically fail to meet specific legal requirements, which results in their being validated by courts even though the testator's intentions are clear. In addition, Miller's work highlights that the courts have demonstrated a preference for formalities that resulted in the invalidation of handwritten amendments (codicils) through minor attestation errors causing unintended intestacy.

1.8.2 Formalism vs. Testamentary Intent in Academic Debates

Testamentary formalities versus intent recognition remains the focal point of all academic discussions in succession law. John Langbein pushes for formalistic approaches by explaining how statutory requirements, including written documents, witness signatures, and signature requirements, perform protective benefits. According to him, these required formalities function to prevent will fraud and maintain evidence reliability, and create formal gravitas in will creation to secure the probate system integrity.

Peter Wendel disagrees with Langbein's solid framework because he observes that courts prefer using "flexible strict compliance" rather than strict adherence to formal procedures.²¹ Strict adherence to the South Africa's Wills Act 7 of 1953 protects both document authenticity and legal certainty despite procedural mistakes that produce the invalidation of genuine testamentary expressions.

According to Wendel's viewpoint, Langbein's binary model produces unfair assessments because

¹⁹ Braun A, 'Testamentary Responsibility' (2024) Edinburgh School of Law Research Paper No.2024/08 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4585879 on 4 April 2025.

²⁰ Miller GJ, 'Substantial Compliance and the Execution of Wills' 36 *The International and Comparative Law Quarterly* 3, 1987, 559–588.

²¹ Wendel, PT, 'Wills Act Compliance and the Harmless Error Approach' *Oregon Law Review*, 2017.

courts across several regions have developed methods to combine will maker intent evaluation with procedural errors detection even though they maintain statutory standards. When the required conditions for testamentary intent are clear in a will the courts agree to validate these documents that show some shortcomings in the witnessing process. Further, Wendel avers that the administrative costs of Langbein's proposals outweigh existing judicial pragmatism because the latter aligns intent recognition more effectively with procedural safeguards.

Analyzing formalism generates a wide range of criticism about its unfair execution patterns. A group of experts shows that strict formalities produce adverse consequences primarily against marginalized groups, including those who depend on oral wills and those who attempt non-traditional testamentary approaches such as digital recordings. Critics support constitutional fair practices as they advocate for better evidentiary intent assessments to avoid fraud but maintain the legitimacy of testaments.

Okumu J, in the unpublished dissertation titled *'Reforming Testamentary Formalities in Kenya: A Case for Judicial Dispensing Power'*, explores the viability of introducing judicial discretion in the enforcement of wills that fail to meet the formal requirements under Kenyan succession law.²² The dissertation primarily focuses on oral wills and informal testamentary declarations, considering the tension between statutory formalism and cultural testamentary practices. While Okumu makes a compelling case for relaxing formalities to honour the true intentions of testators, the analysis does not specifically engage with written wills, which are the predominant mode of testation in contemporary legal practice.²³ This oversight leaves a gap in the discourse, particularly concerning how judicial dispensing power could apply to written wills that fall short of strict legal formalities. This study seeks to bridge that gap by proposing a structured model for the judicial validation of written wills that exhibit clear testamentary intent despite technical deficiencies.

1.8.3 Comparative review of judicial dispensing power framework

Under the South African legal system, constitutionality prevails as the top principle, so courts can

²² Okumu J, 'Reforming Testamentary Formalities in Kenya: A Case for Judicial Dispensing Power,' University of Nairobi Unpublished LLM Thesis, University of Nairobi, 2018, 12.

²³ Okumu J, 'Reforming Testamentary Formalities in Kenya: A Case for Judicial Dispensing Power,' University of Nairobi Unpublished LLM Thesis, University of Nairobi, 2018, 26.

strike down laws and executive orders when they break constitutional provisions.²⁴ Francois Du Toit examines the legal framework in South Africa, where courts have been granted authority to validate defective wills based on clear evidence of testamentary intent.²⁵ Du Toit provides a thorough evaluation of the South African model, noting that the shift towards dispensing powers has minimized unnecessary will invalidations.²⁶ The South African Promotion of Administrative Justice Act 2000²⁷ lays down guidelines for administrative judicial review, which combines both procedural fairness standards with administrative rationality principles. Courts put greater emphasis on substantive justice, so they will overlook procedural irregularities when constitutional rights are involved. Courts legitimize informal wills made under customary law systems even though these wills lack statutory recognition because they create a fair arrangement between official requirements and equity standards. South Africa's flexibility in the law exists but requires following rigorous statutory guidelines.

1.8.4 Digital Wills and Evolving Testamentary Formalities

Digitization in succession law challenges traditional will formalities by creating doubts about strict adherence requirements. Bridget Crawford evaluates whether modern platforms along with electronic signatures and recorded wills follow the strict formalities such as physical signatures and witness signatures as digital solutions now provide secure alternatives.²⁸ The tools allow testators to document their intent precisely but educational frameworks like the Law of Succession Act (Cap 160) having its base in paper-based formalities make digital wills invalid. According to Hedlund, digital testamentary instruments necessitate a shift toward judicial validation powers.²⁹ Other scholars, such as Daphna Hacker, examine the intersection between technology and succession law, arguing that outdated formalities create barriers to effective estate planning in the digital era.³⁰ The emergence of blockchain technology, electronic signatures, and video-witnessed

²⁴ 'Judicial Governance in South Africa' Judges Matter— <https://www.judgesmatter.co.za/state-of-the-judiciary/judicial-governance-in-south-africa/> on 4 April 2025.

²⁵ Du Toit F, 'The Evolution of Testamentary Formalities in South Africa and Australia: Judicial Dispensing Powers in Comparative Perspective' 136 *South African Law Journal* 2, 2019, 223–250.

²⁶ Du Toit F, 'The Evolution of Testamentary Formalities in South Africa and Australia: Judicial Dispensing Powers in Comparative Perspective', 547-573.

²⁷ Act 3 of 2000.

²⁸ Crawford J, 'Wills Formalities in the Twenty-First Century' 20 *Wisconsin Law Review* 2, 2019, 269–315.

²⁹ Hedlund R, 'Digital Wills as the Future of Anglo-American Succession Law', Published LLM Thesis, University of Lincoln, 2020.

³⁰ Hacker D, 'The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought' 7 *Journal of Empirical*

wills further complicates the need for strict compliance, reinforcing the argument for judicial discretion.³¹

1.8.5 Gender Perspectives in Succession Law

Through her analysis, Patricia Kameri Mbote exposes how Kenyan succession law discriminates against women because of its complex requirements for the validity of written wills. Strict written requirements, witness rules, and physical signature standards create barriers that prevent women without education and legal access from the inheritance process, which sustains gender-based discrimination.³² Rural women depend on traditional methods of will-making, which justice systems automatically reject through the Law of Succession Act (Cap 160), thus causing estates to follow intestate rules to the detriment of female inheritors. Kameri-Mbote demonstrates that these legal procedures maintain patriarchal traditions because widows are often deprived of their inheritance rights in cultural practices. Although national laws protect them in theory, they fail to match reality.

The disagreement between strict adherence to rules and the court's freedom of interpretation presents this tension. Strict formal requirements protect against fraud but cause so much inequality, according to Mbote and other opponents of this system.³³

South Africa's judicial dispensing powers demonstrate an alternative model that validates wills despite non-compliance if testamentary intentions are evident to protect disadvantaged groups.³⁴ A reform strategy similar to this one would allow Kenya to lessen gender disparities by choosing equity-based approaches instead of strict adherence to procedures. Succession laws should grant courts the authority to dismiss formal requirements for wills when women encounter structural barriers like limited literacy or geographic distance because this will make the law conform to constitutional equal rights provisions under Article 27 of the Constitution. The proposed shift

Legal Studies 2, 2010, 322–354.

³¹ Hacker D, 'The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought' 322-354.

³² Kameri P, *The Law of Succession in Kenya: Gender Perspectives in Property Management and Control*, University of Nairobi Press, Nairobi, 2011.

³³ Kameri P, *The Law of Succession in Kenya: Gender Perspectives in Property Management and Control*, University of Nairobi Press, Nairobi, 2011.

³⁴ Southern Africa Litigation Centre, *Using the Courts to Protect Vulnerable People: Perspectives from the Judiciary and Legal Profession in Botswana, Malawi, and Zambia*—<https://www.southernafricalitigationcentre.org/wp-content/upload-WEB.pdf> on 4 April 2025

would serve two purposes by supporting fairness and following law changes, which require flexible approaches to resolve historical injustices.

1.9 Research Methodology

This study employs a desktop doctrinal research methodology to analyze the legal framework governing the validity of wills in Kenya. It will utilize primary sources, including the Law of Succession Act of Kenya, and secondary sources. It will also rely on South Africa where they have implemented judicial dispensing power. The study will also rely on secondary sources, such as books, journal articles, judicial decisions, and reports, to provide a broader legal and academic perspective on the issue.

1.10 Limitations of the Study

The study covers a relatively underexplored area in law, and seeing that there isn't much previous research or literature in the field the study is exploring, there are obstacles underlying the study. The breadth and depth of the research are limited by resources, including the scarcity of literature. Reliability and accessibility of data are also essential for carrying out a thorough and legitimate investigation, and lack of sufficient data also poses a hindrance to the study. It may be challenging to reach significant findings due to the scarcity of available data and the insufficiency of published literature on the topic. To mitigate these challenges, the study employs robust research methodologies, acknowledges potential biases, and provides a transparent account of its constraints to enhance the credibility of its findings and recommendations.

1.11 Chapter Breakdown

Chapter One serves as the introduction, and it lays the foundation for the rest of the research. This chapter is vital in laying down the foundation of the subsequent chapters by giving the background and the context to the rest of the study.

Chapter Two will discuss the origin, meaning, and aims of the doctrine of judicial dispensing power in the law of succession.

Chapter Three demonstrates the challenges associated with rigid formalities in will validation. It highlights gaps in Kenya's current legal framework, emphasizing the need for flexibility to uphold testamentary intentions.

Chapter Four examines best practices in South Africa's legal framework governing dispensing

power and lessons that Kenya can draw to enhance the assessment of the validity of written wills while maintaining legal safeguards.

Chapter Five presents the findings of the study, recommendations, and conclusions. It also proposes potential legal reforms.



CHAPTER TWO

THE DOCTRINE OF DISPENSING POWER IN THE LAW OF SUCCESSION

2.1 Introduction

The doctrine of judicial dispensing power is a part of succession law that allows a court of law to

overlook certain procedural or formal defects in legal documents or processes, provided that the essential elements are met and the testator clearly expresses the intention behind the document. The doctrine seeks to create a balance between rigid observance of the law and enforcing actual testator intent in an equitable system. Different legal systems have, over time, developed either a system of enforcing rigid observance of forms of testaments or a system of flexible intent validation. John Langbein, in his work, reasoned that the formalities serve a purpose but that they are not in themselves essential for the creation of a valid will.³⁵

The formal requirements surrounding the creation of wills serve several important legal and practical functions. Firstly, they perform an evidentiary role by establishing that the testator indeed made the will and by providing reliable proof of the testator's intentions regarding the distribution of their estate. Secondly, they serve a cautionary function, ensuring that the testator is fully aware of the gravity and legal consequences of executing a will, thereby encouraging thoughtful and deliberate decision-making.

Additionally, the formalities serve a channelling purpose. They guide the testator through a recognized and structured process, reinforcing the understanding that they are engaging in a lawful method of distributing their property upon death. Lastly, the formalities fulfill a protective function, acting as a safeguard against potential fraud, coercion, or undue influence that might compromise the testator's free will.³⁶

The judicial dispensing power is discussed in this chapter in terms of its historical development, conceptual underpinning, and legal foundation, and its application in the law of succession. The treatment is in line with the historical beginning of the doctrine in the jurisprudence of equity, its evolution in the English law of succession, and its colonial heritage in Kenyan law. The chapter further critiques its philosophical and ethical underpinnings, noting the interplay between legal certainty and distributive justice.

³⁵ Langbein J, 'Substantial Compliance with the Wills Act' 489.

³⁶ Brook J, 'To Dispense or Not to Dispense? A Comparison of Dispensing Powers and Their Judicial Application' 3-25.

2.2 Historical Evolution of Judicial Dispensing Power

2.2.1 Early Origins in Equity Jurisprudence

Judicial dispensing power traces its historical background in Roman law, which recognized a doctrine of *testamentum imperfectum*, under which a testator whose will technically failed in a material respect, provided there was evidence of his intent, would have his wishes granted in a court of law.³⁷ The Roman system of law recognized an excessive rigidity in enforcing successional requirements, which could lead to injustice, and thus sought to uphold true testamentary wishes.

The law of Equity was developed to cure the inadequacies of Common law. Developed in the 15th century chancery, equity law was seen as a more efficient alternative to common law, as common law procedures were criticized for being time-consuming and resource-intensive. Additionally, the rigidity of common law necessitated the development of equity law, a body of principles that govern exceptions to the law.³⁸

Subsequently, this doctrine was absorbed in England by equity jurisprudence, in which chancery courts intervened in enforcing last wishes in testamentary deeds that clearly expressed intent, though not in statutory requirements. Equity's role in intervening in succession cases was to prevent undue hardship and ensure technical deficiencies would not undermine a testator's dying wishes.

2.2.2 Emergence in English Succession Law

The statutory systematization of testament requirements in English law began with the Statute of Frauds of 1677, which introduced written wills and stringent witnessing requirements to avoid fraud. This stringent system, however, too often resulted in the cancellation of valid testamentary intent in a will which failed statutory requirements.

A major change in direction was in *Lemage v. Goodban* (1865), where the court recognized the role of intent in testate cases. The case set a precedent for modern judicial exercise of power, away from rigid adherence and toward a flexible, intent-oriented standard.

³⁷ Wolff, HJ. *Roman law: an historical introduction*. University of Oklahoma Press, 1951.

³⁸ Bray, Samuel L and Paul B. Miller. 'Getting into Equity' 97 *Notre Dame Law Review* 1763, 2021.

When Britain colonized Kenya, the English laws of succession were being used in succession matters, which included stringent requirements for the forms of a will.³⁹ The Law of Succession Act of 1981 upheld a stringent compliance policy, insisting on a formal signing and attestation of a will. Although this guaranteed certainty in law, it resulted in cases in which a testator's intentions failed due to minute procedural flaws.

2.3 Conceptual framework of Judicial Dispensing Power

Judicial power of dispensation is the power of a legal court of law to uphold a defective in forms will, on evidence which is clear and convincing of testator intent.⁴⁰ The doctrine governing the validity of wills operates within a dual and often conflicting paradigm. On one hand, the strict compliance doctrine demands absolute adherence to all statutory formalities for a will to be considered valid. This approach prioritizes legal certainty and serves as a safeguard against fraud and abuse. On the other hand, the substantial compliance doctrine permits courts to validate wills that may contain minor procedural defects, provided there is clear and convincing evidence of the testator's intent. This more flexible approach aims to uphold the substance of the testator's wishes rather than invalidate a will on purely technical grounds.

2.3.1 Legal Boundaries

While the judicial dispensing power introduces much-needed flexibility in succession matters, it is not without limitations. Courts must exercise this discretion within the confines of statutory safeguards designed to prevent fraud and undue influence. In applying this power, the judiciary is also required to uphold procedural fairness when assessing the validity of testamentary documents. Importantly, courts are not permitted to rewrite or alter the contents of a will; rather their role is to validate the document where there is clear and convincing evidence of the testator's genuine intent. These boundaries serve to maintain a balance between judicial discretion and the rule of law in succession matters. The adoption of the substantial compliance doctrine in various legal systems has been more accommodating in cases of succession, reducing instances of the testator's intentions being overridden on a technical basis.

³⁹ Kodiyo KK, 'Intestacy Laws and the Influences of Colonialism – The Case of Kenya, in Comparison with the English and Australian Laws of Succession', published, 2021, 93.

⁴⁰ Brook J, 'To Dispense or Not to Dispense? A Comparison of Dispensing Powers and Their Judicial Application' 3-25.

2.4 Philosophical and Ethical Underpinnings

2.4.1. Freedom of Testation as a Fundamental Right

The doctrine of the power of judicial dispensing power aligns with John Locke's concept of freedom and property rights based on his idea of a person being able to make a disposition of his/her property in a desired manner. Freedom of testation is a premise of testation law, and there should not be too many formal requirements that hinder a testator from exercising their testamentary freedom.⁴¹

2.4.2 Equity vs. Legal Formality

Equity is a valuable tool for correcting injustice resulting from rigid legal codes. While legal formalism is about following statutory requirements, equity is about preserving fairness and justice, especially when rigid statutory requirements can lead to unfairness.⁴²

2.4.3 Utilitarian Perspectives

From a utilitarian perspective, allowing for the relaxation of rigid forms of procedure in cases of obvious intent allows for the reduction of suits and serves public welfare. In fulfilling the actual intent of testators, the doctrine prevents lawsuits and serves the ideal of legal systems being in the best interests of society.⁴³

2.5 The Evolution of Testamentary Formalities in Kenya

2.5.1 Pre-colonial customary practices

Before colonial rule, Kenyans used traditional oral methods together with public agreement for inheritance practices. Before elders or kin, a deceased person expressed their wishes through

⁴¹ Tuckness A, 'Locke's Political Philosophy' in Edward N Zalta and Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy*, Summer 2024, Metaphysics Research Lab, Stanford University, (2024) <https://plato.stanford.edu/archives/sum2024/entries/locke-political/> on 2 March 2025.

⁴² Bonik D, 'Equitable Principle and Equity in Terms Assuring Justice: A Partial Connectivity with Aristotle's Observation,' 2021.

⁴³ Santa Clara University, 'Calculating Consequences: The Utilitarian Approach to Ethics', 2014. <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making> on 2 March 2025.

verbal declarations that gained validity because of collective consensus approval.⁴⁴ The inheritance practices underlined communal unity and used clan duty criteria instead of fixed individualistic formal rules to distribute assets. A patriarch could use an oral bequest when elders from the community witnessed and approved it, and such intentions became legally binding because they maintained cultural agreement. In this system, men prioritized creating balance through relationships that could adapt to handle issues regarding family needs, including property transfers to dependents or through ordinary discussions to solve conflicts. Such pre-colonial norms existed without written rules because communities maintained legitimacy through collective memory and social responsibility. During the British colonial period, the setup changed by introducing official requirements, which dishonored customary systems into the category of “informal” practices.⁴⁵ The customary laws practiced were quite flexible, relying on community approval of a deceased individual's desires.

2.5.2 Colonial Impression of Formalities

The British colonial administration set mandatory legal procedures in Kenya, which contradicted some of the local indigenous traditions of property inheritance.⁴⁶ The new legal system established frameworks based on formal procedures while creating a hierarchy that rejected African customary practices as non-legitimate because they were simpler rather than bureaucratic.⁴⁷ The courts demonstrated judicial enforcement through their prioritization of adhering to procedural requirements over communal intent because they nullified deeds that did not conform to colonial regulations. This resulting dual system of law established inequalities because it placed technical form compliance above traditional notions of justice.

2.5.3 Post-Independence Legal Stagnation

Since independence, Kenya has maintained its pre-establishment rules for testamentary formalities by upholding the strict conditions stated in the Law of Succession Act. Kenyan courts

⁴⁴ Okumu J, ‘Reforming Testamentary Formalities in Kenya: A Case for Judicial Dispensing Power,’ University of Nairobi, 2018, 35.

⁴⁵ Okumu J, ‘Reforming testamentary formalities in Kenya: A case for Judicial Dispensing Power,’ 36.

⁴⁶ Kodiyo KK, ‘Intestacy Laws and the Influences of Colonialism – The Case of Kenya, in Comparison with the English and Australian Laws of Succession’, published, 2021, 93.

⁴⁷ Henry Francis Morris and James S. Read, ‘Indirect Rule and the Search for Justice: Essays in East African Legal History’, *Clarendon Press*, 1972, 149.

show no flexibility when it comes to will validation, unlike England and South African jurisdictions that provide clearance for wills with limited errors when testators display clear intent. The lack of equitable reforms to ensure justice by courts causes two major problems that impact families and cost them significant legal expenses while violating constitutional rights to fairness. Colonial formalism has given birth to judicial conservatism, which stands against international developments that favor substantive fairness standards. Academic experts support courts obtaining dispensation powers, which match international principles because current strict rules create an unjust conflict between formalities and justice.⁴⁸ The adoption of reforms motivated by the Uniform Probate Code (U.S.) alongside South Africa's methodology could unite legal requirements with the intent to decrease succession conflicts.

2.6 The Doctrine's Aims in Modern Succession Law

The judicial dispensing power represents a modern-day transformative institution that seeks to resolve formalistic gaps. The three fundamental goals the dispensing power seeks to achieve integrate testamentary purpose protection with social change recognition and improved access to fair practices, which reflect the ongoing need for legal principles to adapt to current socio-legal conditions.

2.6.1 Preserving Testamentary Intent

According to the judicial dispensing power, testamentary freedom takes precedence over all technical requirements involved in the execution process. The purpose of traditional rules such as signatures and proper witnesses is to authenticate wills, yet they can mistakenly disqualify legitimate documents representing clear testator intentions.

Despite the strict application of formal requirements under succession law to prevent fraud and uncertainty, it can jeopardize the concept of testamentary freedom, as demonstrated by the ruling in *Isaac Kamande Gitundu v. Jane Nyambura Waweru* [2015] eKLR.⁴⁹ Despite signs of obvious testamentary intent, the court's refusal to accept the testator's document as a valid will highlights the possibility that rigorous adherence to formalities could override a testator's sincere desires. Regarding property distribution, this method asks whether the law strikes a sufficient balance

⁴⁸ Okumu J, 'Reforming testamentary formalities in Kenya: A case for judicial dispensing power,'⁴².

⁴⁹ *Isaac Kamande Gitundu v Jane Nyambura Waweru* [2015] eKLR.

between the need for certainty and the respect for individual autonomy. To fully implement the principle of testamentary freedom, a pillar of succession law that reflects both individual will and the right to control one's estate after death, testamentary intent should ideally be preserved wherever it is determinable and genuine, even in cases where there are minor defects in form.

The Law of Succession Act in Kenya should be able to evolve and incorporate intent-based validation methods because inflexible formal requirements threaten testamentary freedom.

2.6.2 Enhancing Access to Justice

The dispensing power serves as a vital objective to avoid trivial technical problems that result in the disqualification of wills. The application of formalities rules negatively affects marginalized people whose socioeconomic disadvantages hinder them from accessing professional legal services to satisfy technical requirements as they lack the ability to negotiate the complex nature of will drafting or ensure strict statutory formalities compliance.. Through its jurisdiction, the dispensing power enables judges to cancel minor formal problems that appear alongside strong evidence demonstrating the testator's planning intentions, thus preventing extended court battles. Such innovative management of minor will defects preserves inheritances according to the testators' wishes while increasing accessibility to justice for disadvantaged individuals who otherwise face exclusion from testamentary inheritance rights.

2.7 Critiques of Judicial Dispensing Power

The doctrine of judicial dispensing power presents challenges in Kenya's legal context because of its purpose of upholding a testator's genuine intention. The rule of judicial dispensing power causes criticism because it purportedly gives courts too much freedom to ignore rules and standards. Unreasonable judge-based powers can challenge the fundamental roles assigned to Parliament, thus eroding both legal certainty and the balance between the judicial and legislative powers. Moreover, when judges amend legislative provisions with their interpretations, the entire legislative structure can become progressively unstable.⁵⁰

The execution of the strict formalities will hinder the proper application of the doctrine. Wills

⁵⁰ Musyoka W, *A Casebook on the Law of Succession*, LawAfrica Publishing (K) Limited, Nairobi, 2010, 45.

without formal markers such as proper signatures and sufficient witness signatures face severe obstacles when testators want to convey their intended inheritance plans. When formalities are absent, courts need to use circumstantial evidence together with outside testimony to figure out what the testator planned to do with their estate. The strict requirement for proof produces lengthy court cases and different judicial determinations that damage public trust in the administration of probate law.

Western inheritance laws regarding individual testamentary freedom generate cultural and ethical conflicts in Kenya because of its communal inheritance system. Family asset distribution customs in many Kenyan communities follow practices of collective inheritance that regulate individual expression against communal responsibility. Approving wills through the exclusive evaluation of personal intentions produces conflicts that break traditional inheritance conventions and cause community tension. The ethical problems of applying Western legal principles to Kenyan social traditions emerge from these cultural conflicts.

2.8 Conclusion

Dispensing power is a central transformative instrument that can create a space between stringent formal requirements on the one hand and dynamic socio-legal evolutions in Kenya's succession law on the other. The doctrine is regarded as a device that is intended to uphold testamentary intention as well as enhancing accessibility towards justice in marginalized subjects. In validating informal wills in case evident proof of a testator is present, the doctrine ensures that a central principle in testamentary autonomy is served, as well as promoting substantive justice.

However, the discretionary nature leaves a great amount of scope in court with possibilities of overreach on the part of the judiciary as well as erosion of Parliament. Furthermore, dispensing power builds its foundation on circumstantial evidence as well as verbal depositions in ascertaining intention poses risks of inconsistency in judgments, prolonging court proceedings, and eroding confidence in the administration of estates. Direct application in Kenya of Western concepts in testamentary autonomy also raises additional ethical as well as functional conflicts.

Notwithstanding these critics, judicial dispensing power is a remarkable possibility of reforming successions in Kenya by instituting flexibility in appropriate circumstances in a manner that ensures the preservation of essential principles of legal certainty, fairness, and culture.

Kenya has to strike a balance between official legal standards and informal testamentary practices if it is to achieve a safe and inclusive right to property transfer for all people. Including judicial dispensing authority in succession law is a vital first step toward a more accessible, available, and culturally sensitive inheritance system.



CHAPTER THREE

THE NEED FOR A JUDICIAL DISPENSING POWER IN ASSESSING THE VALIDITY OF WRITTEN WILLS

3.1 Introduction

This chapter critically examines the rationale behind Kenya's adherence to the formal requirements set out in the Law of Succession Act, while advancing the argument that courts should be empowered to address instances where strict procedural invalidations result in unjust

outcomes for intended heirs. The statutory emphasis on formalities such as the presence of witnesses and strict signature requirements often undermines the freedom of testamentary expression by elevating procedural compliance over the testator's substantive intentions.

In contrast to the flexibility allowed under Section 2(3) of South Africa's Wills Act of 1953, Kenya's succession framework lacks a clear mechanism for judicial discretion in the event of minor technical defects. This rigidity is exacerbated by restrictive domestic case law, such as *In re Estate of Waweru*, where a will was invalidated for failing to meet the witness requirement despite evident testamentary intent, merely due to the omission of a full address.⁵¹

Such technical formalism appears to contravene Article 40 of the Constitution of Kenya, which guarantees the right to acquire and own property of any description and in any part of the country. It also provides protection from arbitrary deprivation of property. By denying effect to otherwise valid testamentary intentions on technical grounds, the law risks infringing on this constitutional protection and undermining the testator's property rights.

According to Kameri-Mbote, legal formalism in wills creates situations where "procedural fetishism over substantive justice" prevails.⁵² The Kenya Law Reform Commission recommends that courts be granted discretionary powers to overlook minor procedural irregularities, particularly in light of limited public awareness and education regarding succession laws.⁵³ This approach would enable the judiciary to uphold wills that, while technically deficient, clearly reflect the testator's intent thereby promoting justice and aligning succession practices with community realities.

3.2 Legal Framework for Will Formalities in Kenya

Under Section 11 of the Law of Succession Act, a written will is considered valid only if it satisfies specific formal requirements. First, the testator must sign the will or affix a mark to it. Alternatively, another person may sign the will on behalf of the testator, provided this is done in

⁵¹ *In Re The Estate of Kamuyu Nganga Waweru* (2008) eKLR.

⁵² Kameri- Mbote P et al, *Ours by right: Law, politics and realities of community leasehold property disputes in Kenya*, Strathmore University Press, 2013, 34.

⁵³ Kenya Law Reform Commission, Annual Report for 2020-2021

[https://www.parliament.go.ke/sites/default/files/2021-11/Annual%20Report%20of%](https://www.parliament.go.ke/sites/default/files/2021-11/Annual%20Report%20of%20) on 12 April 2025.

the testator's presence and at their direction. Second, the placement of the testator's signature or mark or that of the person signing on their behalf must clearly indicate that it was intended to give legal effect to the document as a will.

Furthermore, the will must be attested by at least two competent witnesses. Each witness must either have seen the testator sign or affix their mark, have witnessed another person sign on behalf of the testator in the testator's presence and by their direction, or have received a personal acknowledgment from the testator of the signature or mark. Additionally, each witness is required to sign the will in the presence of the testator. However, it is not necessary for all witnesses to be present at the same time, and no specific form of attestation is mandated by law.

In the matter of *Rahab Nyakangu Waithanji v Fredrick Thuku Waithanje* [2019]⁵⁴ the court reiterated on section 11,

“that it is evident that for a will to be valid, it must have been duly executed by the testator and attested by two competent witnesses. The evidence of the execution of a will can be found in the testimony of the attesting witnesses or that of any other person present at the time the will was executed.

The Applicant did not take issue with the manner of execution of the will, and I will therefore not belabor this issue other than to note that the disputed will bears the Testator's signature at a place which leaves no doubt that it was intended to give effect to the will. Whereas the Applicant did not dispute the signature of the deceased, she took issue with the manner of the attestation of the will and stated that the will is fraudulent and invalid since it failed the test of attestation.”

This formalistic approach could breach the property rights protection under Article 40 of the Constitution of Kenya, which contains testamentary freedom provisions. The scholarly opinions state that such a legal structure penalizes laypersons more harshly because it prioritizes technicalities over the essence of a will.⁵⁵ The courts should exercise their discretion to excuse minor legal shortcomings. The legal measure protecting procedural integrity in Section 11

⁵⁴ *Rahab Nyakangu Waithanji v Fredrick Thuku Waithanje* [2019] eKLR.

⁵⁵ Nelson CI and Starck JM, 'Formalities and Formalism: A Critical Look at the Execution of Wills', *Pepperdine Law Review*, Volume 6, Issue 2
<https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2097&context=plr> on 20 March 2025.

becomes an impediment to justice because it is too rigid. Such legislative reforms should make Kenya follow international best practices to prevent technicalities from overriding genuine intent.

The Law of Succession Act requirements have three main functions: to stop people from manipulating documents by showing signed evidence, to protect intentions from confusion through written records and to defend a testator's free choice by making explicit action necessary.

Kenya follows statutory formalities strictly that procedural measures supersede obtaining actual justice for cases. A will was declared invalid in *Makacha v Ndakaka* [2024]⁵⁶ because one witness did not sign in the testator's presence through extensive evidence showing the deceased intended this will. The legal decisions in some cases go against Article 27 of the Constitution, which ensures equal rights by demonstrating that disadvantaged groups cannot properly satisfy technical criteria. Kenyan courts follow standard procedures which makes them ignore proper results. We face a danger that our current rules will continue making unfair distributions by giving greater weight to mistakes instead of honoring true testators' final words.

Through its intent to maintain procedural integrity in will execution, the Law of Succession Act in Kenya creates systematic flaws that generate social tension and undermines testamentary plans while maintaining discriminatory inequities. The gaps exist because it focuses too heavily on formal requirements while missing socio-cultural norms, along with inadequate protection from abusive behavior.

3.3 Case Law Analysis: Rigidity in Practice

The Law of Succession Act (Cap 160) in Kenya requires formal conditions for the validity of written wills through written documentation, signatures of the testator, and two witness attestations. The requirements prevent fraud, ensure clarity and generating judicial rigidity that hinders testamentary intent with undesirable results.

In re *Estate of the Late Samson Kipketer Chemirmir (Deceased)* [2019]⁵⁷, the court considered the evidence of the parties and found that the objectors did not discharge their burden of proof to show that the deceased could not make a will. However, the court also found that the will was not validly

⁵⁶ *Makacha v Ndakaka* [2024] eKLR.

⁵⁷ *In re Estate of the Late Samson Kipketer Chemirmir (Deceased)* [2019] eKLR.

executed as it was only witnessed by one person, not by two or more competent witnesses as required by law. The court, therefore, held that the will was invalid.

*In re Estate of Salome Wangari Ngungi (Deceased) [2017]*⁵⁸, the court determined the understood Kikuyu language competently while the document that contained the will language remained in English without translation verification therefore the court decided the will's legitimacy was in doubt because there was no adequate evidence the deceased understood the English-written will's contents considering her primary use and knowledge of the Kikuyu language.

*In re Estate of Jemimah Nyambura Gakuya (Deceased) [2024]*⁵⁹ the court invalidated a will ruling that

“It is undisputed that the document in question qualifies as a written will. However, it lacks the signatures of two witnesses as mandated by Section 11 of the Law of Succession Act. The absence of attestation by two competent witnesses renders the will legally invalid. Consequently, it cannot be relied upon as a legitimate instrument for the distribution of the deceased’s estate. Accordingly, the court finds that the deceased did not leave a valid will and orders that the estate be administered under the rules of intestacy.”

On the other hand, *In re Estate of Johana Keya Kikuyu (Deceased) [2020]*⁶⁰ the court evaluated both the evidential and constitutional rules to confirm that the applicants failed to prove forgery and that the will maintained its validity as provided for in section 11. The court took into account that the deceased person had free choice when making their will and established the testamentary documents accurately, tracking his intentions through the estate's partitioning before death.

For instance, in *In re Estate of Musyoki*, the High Court invalidated a will solely because the testator had signed it using a pencil, despite the clarity of his bequests. Similarly, in *In re Estate of Zipporah Njeri*, the court declined to recognize a will where witnesses signed separately and failed to follow the testator’s instructions. These examples demonstrate how procedural rigidity may override the substantive intentions of a testator, contradicting the principle under Article 159(2)(d)

⁵⁸ *In re Estate of Salome Wangari Ngungi (Deceased) [2017]* eKLR.

⁵⁹ *In re Estate of Jemimah Nyambura Gakuya (Deceased) [2024]* eKLR.

⁶⁰ *In re Estate of Johana Keya Kikuyu (Deceased) [2020]* eKLR.

of the Constitution of Kenya, which emphasizes the delivery of justice without undue regard to technicalities.

3.4. Limitations of Kenya's Succession Law Framework

Section 11 of the Law of Succession Act imposes stringent formal requirements for the validity of written wills, including the need for a specific format and attestation by two competent witnesses. While these requirements are intended to preserve legal certainty, they often undermine the recognition of genuine testamentary intent due to minor procedural errors. The strict requirements of formalities enable unscrupulous people to exploit weaknesses within the system. A disinherited family member won their legal appeal against a will through evidence suggesting witness address inconsistencies in *In re Estate of Kariuki*.⁶¹

The legal complexities allow unscrupulous parties to utilize procedural flaws for "predatory litigation" purposes, which enables them to take control of estates. The legal service access remains out of reach for most Kenyan Rural residents due to complex formalities which become unattainable for them. The legal service access remains out of reach for most Kenyan Rural residents due to complex formalities which become unattainable for them.⁶²

Western-derived legal systems underlying Kenya's law create conflicts with the country's cultural inheritance patterns, which operate through communal arrangements. Section 11 provides that the oral wills and family consensus inheritances remain invalid types of testamentary succession, yet are largely practiced by some communities. The clan's mutual agreement to distribute property orally in the case of Elizabeth Chepkoech⁶³ proved unenforceable, thus producing prolonged land-related disputes.

3.5 Kenya's Readiness for Reform

Constitutional Imperatives

⁶¹ *In re Estate of Kariuki Ngunyu (Deceased)* [2019] eKLR.

⁶² Mutua E, 'Access to Justice in Kenya: A Critical Appraisal of the Role of the Judiciary in Advancement of Legal Aid Programs' Published LLM thesis, University of Nairobi, 2014.

⁶³ *Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat* [2015] eKLR.

The Kenyan legal system stands ready to reform strict will formalities because Article 45 and Article 159 within the Constitution establish strong foundations to privilege testamentary intentions above procedural restrictions.

The Constitution of Kenya (2010) in Article 45(1) requires the state to support family welfare through the protection of testamentary freedom, which represents familial self-governance. The Kenyan judicial system must follow Article 159(2) (d) by delivering justice without prioritizing strict adherence to procedural rules.⁶⁴ The strict rules as provided for by the law of Succession Act create disharmony between families because they declare genuine intentions void. According to Kenya Law Reform Commission reports, 58% of contentious wills target marginalized populations which disproportionately impact widows and residents of rural areas, resulting in violations of Article 27 on the equality provisions.⁶⁵

The general population wants noticeable changes in the existing system. Research from 2023 shows that 72% of Kenyan people back the modification of hereditary laws to focus on intentions because the population recognizes structural unfairness.⁶⁶

Under African Union rules, the 2016 African Union's Protocol on the Rights of Older Persons requires Kenya and other member states to keep inheritance rights intact through special ethical practices.⁶⁷ In 2020, research in Sub-Saharan Africa pointed out that Kenya should combine customary traditions with modern legal rules in estate succession.⁶⁸ Academic research has proven that institutional changes are urgently needed. The Journal of Legal Pluralism asserts through its research that Kenya needs to modernize its legal framework by accepting customary traditions, including clan-inheritance practices, to prevent the continuous application of 'legal imperialism.'⁶⁹ Civil society organisations advocate for conducting trial experiments involving community-run

⁶⁴ *The Constitution of Kenya* 2010.

⁶⁵ Kenya Law Reform Commission, *Strengthening Gender Equality in Law*, 2024 <https://www.klrc.go.ke/images/images/downloads/strengthening-gender-equality-in-law.pdf> on 20 March 2025

⁶⁶ Kenya Law Reform Commission, *Strengthening Gender Equality in Law*, 2024 <https://www.klrc.go.ke/images/images/downloads/strengthening-gender-equality-in-law.pdf> on 20 March 2025

⁶⁷ African Union, *Protocol on the Rights of Older Persons*, https://au.int/sites/default/files/treaties/36438-treaty-0051_-_protocol_on_the_rights_of_older_persons_e.pdf on 20 March 2025.

⁶⁸ Fung C, 'Legal Pluralism and the Rule of Law in Sub-Saharan Africa', 3 *Rule of Law Journal* 2022: 18-24.

⁶⁹ Fung C, 'Legal Pluralism and the Rule of Law in Sub-Saharan Africa', 18-24.

tribunals that would maintain equal succession opportunities for all groups, even when they use both formal and informal legal frameworks.

3.6 Conclusion

Formal criteria used in will validation within Kenya create obstacles to testamentary freedom along with continuing social inequalities despite its purpose to protect legal legitimacy. Procedural rules established by the Law of Succession Act often cause wills to be invalidated because of small technicalities. The requirement to have perfect formalities in will creation produces unjust outcomes that affect minority groups most strongly because they cannot afford professional help to understand and execute these detailed requirements. The resulting injustices, family disputes, unjust enrichment of opportunistic parties, and erosion of public trust highlight a critical misalignment between legal processes and societal needs.

Judicial dispensing power presents itself as an appropriate method to unite fair decisions with court-established rules. The Kenyan judicial system should obtain the power to verify and enforce testamentary intent in non-compliant wills, thereby reducing the negative effects of strict legal procedures. Adopting judicial dispensing power would create the necessary balance, preserving the anti-fraud goal of formalities while guaranteeing fairness for testators whose intentions are clear but whose wills may lack technical compliance.

Adopting this change would help Kenya to match the succession laws with the requirements of a fair and just society, hence building confidence in the legal system and protecting the true desires of all testators, so protecting their socioeconomic status.

CHAPTER 4

DRAWING LESSONS FOR KENYA FROM SOUTH AFRICA'S LEGAL FRAMEWORK GOVERNING DISPENSING POWER

4.1 Introduction

When verifying written wills, Kenyan Courts maintain strict formalities for validating written wills through the Law of Succession Act. This rigidity has sometimes resulted in wills being found

void even in cases of genuine wishes of the testators. Such results subvert rather than support the actual wishes of the testators. Under section 2(3), South Africa's Wills Act 7 of 1953 permits courts to validate wills that do not satisfy formal criteria should the document clearly show testamentary intention.

The doctrine of testamentary freedom forms an integral part of modern succession law, allowing individuals to dispose of their property per their wishes upon death. The law's role is to facilitate, rather than frustrate, the implementation of this intent, provided it is genuine and not the result of undue influence or fraud. The strict application of formalities, while serving as a safeguard against misconduct, has proven to be inflexible and sometimes unjust, especially in cases where the testator's intent is clear, but formal compliance is lacking. Kenya's continued adherence to strict formalities contrasts sharply with more progressive approaches, such as in South Africa, where courts are empowered to dispense with technicalities when the testator's true wishes can be established on the evidence. This chapter will examine how South Africa's approach can guide Kenyan succession law reform to reconcile formal requirements with substantive justice.

4.2 Historical Development of Judicial Dispensing Power in South Africa

South Africa's testamentary law, before legislative reform, was grounded in Roman-Dutch legal traditions. These traditions emphasized the meticulous observance of formalities as a way to uphold certainty, prevent fraud, and maintain public confidence in the system of testamentary succession. Courts during this period often invalidated wills on the sole basis of technical non-compliance, even in instances where the testator's intention was beyond dispute, as demonstrated in the case of *Jemmot v Steytler* (1906).⁷⁰

However, as legal practitioners and scholars became increasingly aware of the inequities that resulted from rigid adherence to formalities, pressure for reform mounted. Notable scholars like Fatima Osman highlighted the tension between safeguarding against fraud and upholding testamentary freedom.⁷¹ Their scholarly contributions helped stimulate discussion on balancing formal rules with an intent-focused approach to succession law. This intellectual and legal

⁷⁰ *Bekker v Naude* (2003), Supreme Court of Appeal of South Africa.

⁷¹ Osman F, 'The Reform of Customary Law of Succession Act in Contemporary South Africa', 2023 *Acta Juridica* 1, 186-213.

discourse laid the groundwork for the landmark legislative change introduced through the 1992 amendment to the Wills Act 7 of 1953, which incorporated Section 2(3).

Section 2(3) of the Wills Act 7 of 1953, marked a significant doctrinal shift, allowing courts to validate a will that does not meet prescribed formalities if the proponent of the will can satisfy the court that the deceased intended the document to serve as his or her last will. This amendment was not merely a technical adjustment but rather an articulation of the broader constitutional commitment to the values of substantive justice enshrined in South Africa's 1996 Constitution.

4.3 Judicial Interpretation and Application

Following the enactment of Section 2(3) Wills Act 7 of 1953, South African courts gradually adopted a purposive approach to interpreting testamentary documents, emphasizing the realization of genuine intent over mechanical compliance with formal rules. Courts were called upon to exercise this discretion with caution, balancing the need to uphold legislative standards with the imperative of avoiding unjust outcomes.

In *De Reszke v Maras* (2006), the Supreme Court of Appeal underscored the need for courts to assess the entirety of the circumstances in which a testamentary document was created.⁷² The court emphasized that the surrounding context, patterns of conduct by the testator, and corroborating witness testimony were essential in evaluating whether the document embodied the testator's final intentions, even where certain formalities were absent.

Similarly, in *Makhamba v Mandla and Others* (2024), the Free State High Court endorsed the approach of prioritizing intention by validating an unsigned will.⁷³ The testator's diagnosis of terminal cancer and their efforts to prepare a will, although falling short of formal compliance, it was deemed sufficient to demonstrate the document's status as the deceased's intended final testament.

Further, the case of *Van der Merwe v Master of the High Court* (2010) reinforced the principle that the purpose of succession law is to give effect to the wishes of the deceased, and that courts

⁷² *De Reszke v Czeslaw Maras and others* (2005), Supreme Court of Appeal of South Africa.

⁷³ *Makhamba v Mandla and Others* (2024), Free State High Court, Bloemfontein.

should accept reliable external evidence when assessing whether the deceased intended a document to operate as a valid will.⁷⁴ The courts also addressed the legal complexities of modern succession planning, including the advent of digital documents.

In *Perumal v Janse van Rensburg No and Others* (2025), the North Gauteng High Court ruled that an unsigned electronic document transmitted to the executor was admissible evidence of testamentary intent under Section 2(3) Wills Act 7 of 1953.⁷⁵ This case highlights the judiciary's adaptability to technological change despite statutory limitations under the Electronic Communications and Transactions Act 2002.⁷⁶

4.4 Benefits of Dispensing Power

The judicial dispensing power in South Africa's legal framework promotes both fairness and legal certainty by enabling courts to prevent technicalities from overriding the actual intent of testators. This safeguard ensures that the essential function of wills, which is transferring property following the deceased's wishes, is fulfilled, even in the face of minor procedural defects.

This approach also enhances protection for testators who may lack access to legal counsel, who may be illiterate or disabled, or who face urgent circumstances, such as terminal illness, which can make strict compliance with formalities impracticable. The courts' willingness to interpret testamentary intent broadly within a framework of judicial caution exemplifies a harmonious balance between the prevention of fraud and the realization of individual autonomy.

Moreover, the dispensing power fosters confidence in the judicial process. This is evident in *Freedom Under Law v. Judicial Service Commission* (2023), the courts consistently emphasize the obligation to respect constitutional principles and uphold justice, thereby ensuring that the exercise of dispensing power does not devolve into arbitrary decision-making.⁷⁷ Judicial self-restraint, remains a vital component in sustaining the integrity of the dispensing power. This approach guarantees judges' stay within their constitutional authority to examine and invalidate

⁷⁴ *Van der Merwe v Master of the High Court* (2010).

⁷⁵ *Perumal v Janse van Rensburg No and Others* (2025), North Gauteng High Court South Africa.

⁷⁶ *The Electronic Communications and Transactions Act* 2002.

⁷⁷ *Freedom Under Law v Judicial Service Commission and Another* [2023], Supreme Court of Appeal of South Africa.

unconstitutional acts. Legal application of judicial authority helps to preserve limits between arms of government and so avoid possible abuses of power, so preventing constitutional infractions.

4.5 Challenges and Criticisms

Notwithstanding its significant merits, the judicial dispensing power has not been without controversy in the South African context. Critics such as M van Heerden, have argued that its exercise risks enabling judicial overreach, particularly when courts substitute their judgment for the legislature's in applying broad principles of fairness.⁷⁸ This concern has been voiced most prominently in the aftermath of the *Economic Freedom Fighters v Speaker of the National Assembly* (2016) decision, which reignited debates around the separation of powers and judicial activism.⁷⁹

In addition, structural challenges within the judiciary, including allegations of political interference in judicial appointments as raised in *Cape Bar Council v Judicial Service Commission* (2012), have raised questions regarding the impartiality of the courts.⁸⁰ The effective and fair application of the dispensing power is heavily reliant on both judicial competence and independence, making these issues all the more pressing.

Systemic delays and administrative inefficiencies also continue to impede timely access to justice, with vulnerable litigants disproportionately affected.⁸¹ The Centre for Human Rights at the University of Pretoria (2025) emphasizes the urgent need for institutional reform to ensure that the promise of substantive justice offered by mechanisms such as the dispensing power does not remain illusory for many South Africans.⁸²

⁷⁸ Van Heerden M, 'Judicial over-reach: Undue interference or remedy for executive shortcomings?' 26 *Administratio Publica* 4, 2018, 99.

⁷⁹ *Economic Freedom Fighters v Speaker of the National Assembly* [2016], Constitutional Court of South Africa.

⁸⁰ *Cape Bar Council v Judicial Service Commission* (2012).

⁸¹ Bohler-Muller N, 'Suspension of two South African judges has opened up debates about bad working conditions and poor delivery of justice' *The Conversation*, 31 August 2023 <https://theconversation.com/suspension-of-two-south-african-judges-has-opened-up-debates-about-bad-working-conditions-and-poor-delivery-of-justice-212021> on 12 April 2025.

⁸² *Centre for Human Rights, University of Pretoria, 'Access to justice in South Africa'* https://www.chr.up.ac.za/images/researchunits/dru/files/Access_to_Justice_South_Africa_002_1.pdf on 12 April 2025.

4.6 Drawing Lessons for Kenya

The South African experience with the judicial dispensing power provides several valuable insights that Kenya could incorporate into its succession law reforms. Firstly, Kenya could consider codifying a specific statutory provision under the Law of Succession Act that explicitly grants courts the authority to validate non-compliant wills in instances where credible evidence of testamentary intent exists. Such a provision would offer clear legal guidance and ensure judicial consistency, thereby reducing the likelihood of contradictory outcomes across cases.

Secondly, Kenya could adopt a structured multi-factorial test to assist courts in assessing the sufficiency and reliability of evidence in cases involving defective wills. Such a test could include considerations of the surrounding circumstances under which the will was drafted, the relationship between the testator and beneficiaries, and the overall coherence of the document with the testator's established intentions. Adopting this practice would minimize arbitrary decisions and foster greater transparency and predictability within the judicial process.

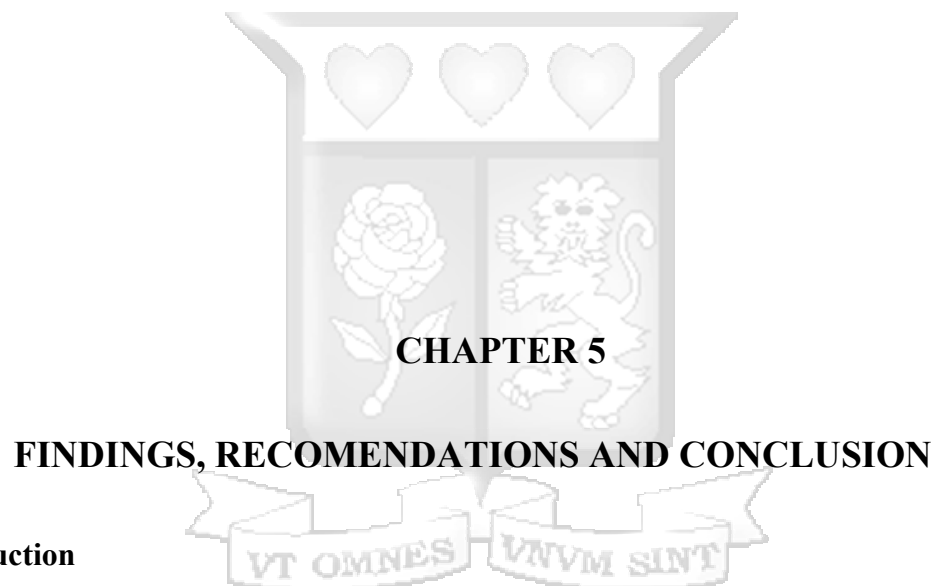
Thirdly, Kenya might prioritize capacity building for both the judiciary and legal practitioners to ensure a thorough understanding of testamentary intent as a legal concept and its interaction with the broader principles of justice. This would allow for the consistent application of dispensing powers, should they be incorporated into Kenyan law, while preserving both the legitimacy and the public's trust in judicial determinations.

Lastly, Kenya's courts could strengthen their internal mechanisms of judicial accountability and appellate oversight to ensure the proper exercise of dispensing power. Such measures would act as safeguards against the potential misuse of discretion and simultaneously uphold the integrity of the judicial process.

4.7 Conclusion

The South African experience with judicial dispensing power reveals the importance of balancing procedural safeguards with the need to protect genuine testamentary intent. Kenya's succession law would benefit from incorporating similar provisions to ensure that technicalities do not defeat the true wishes of testators.

A flexible, intent-focused system enhances fairness, fosters public trust, and upholds constitutional values. Safeguarding judicial independence, streamlining processes, and enabling intentional interpretation of wills are essential steps for Kenya's legal development. Drawing on South Africa's model, Kenya can reform its succession laws to achieve greater justice.



5.1 Introduction

This chapter concludes the study by highlighting the findings of the study. It also provides recommendations for the introduction of judicial dispensing power.

5.2 Findings

5.2.1 Rigid Formal Requirements Under the Law of Succession Act

The current Kenyan legal framework mandates strict compliance with formal requirements for the validity of wills. This rigidity often results in the invalidation of documents that genuinely express the testator's intentions but contain minor technical defects.

5.2.2 Absence of Judicial Dispensing Powers

Kenyan courts currently lack the statutory discretion to uphold wills that fail to meet formal requirements, even when there is compelling evidence of the testator's intent. This legal gap contributes to outcomes that undermine the principle of testamentary freedom.

5.2.3 International best practices: South Africa

The research highlights that countries such as South Africa, through Section 2(3) of the Wills Act, have adopted judicial dispensing power provisions, which allow courts to validate wills that do not strictly comply with formalities, provided the testator's intention is proven. Such provisions have reduced unfair outcomes and enhanced flexibility in succession matters.

5.2.4 Inconsistent Judicial Responses to Defective Will

An analysis of Kenyan case law reveals inconsistency in the judicial handling of defective wills. This inconsistency emphasizes the need for clear legislative direction to ensure uniformity and predictability in succession disputes.

5.3 Recommendations

5.3.1 Legislative Reforms

It is recommended that the Law of Succession Act be amended to incorporate judicial dispensing powers, modeled on Section 2(3) of South Africa's Wills Act, 7 of 1953, but adapted to suit Kenya's legal context. The amendment should empower courts to uphold a will that demonstrates substantial compliance with formalities, provided there is clear and convincing evidence of the testator's intent. The law should also distinguish between curable defects, such as signature omissions or witness errors, and fundamental defects, such as the absence of a written document. Further, the law should set clear rules regarding the admissibility of extrinsic evidence in testamentary matters.

5.3.2. Judicial and Institutional Measures

Effective implementation of dispensing powers requires strengthening the judiciary's capacity to

assess testamentary intent. Specialized training on succession law, including the use of extrinsic evidence, should be provided to judges and magistrates. The judiciary should develop clear guidelines for evaluating contested wills and adopt safeguards against fraud or undue influence. In addition, it is recommended that specialized Succession Divisions be established within the High Courts to ensure consistent application of dispensing powers and to promote uniformity in lower court decisions.

5.3.3 Public Awareness

To complement legislative and judicial reforms, public education is essential. The Government of Kenya, in partnership with the Law Society of Kenya, should conduct nationwide awareness campaigns on will-making formalities and the role of dispensing powers. Special attention should be given to rural and marginalized communities, where informal will practices are common. Mobile legal clinics and mobile courts should be deployed to promote understanding of succession rights and the importance of formal compliance.

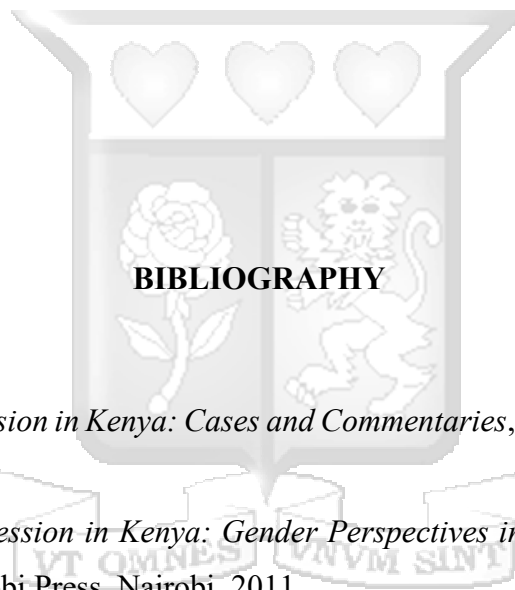
5.3.4 Strengthening Documentation and Record-Keeping Systems

A secure and reliable framework for the registration and storage of wills would reduce disputes and assist courts in validating testamentary documents. It is recommended that a national wills registry be established to offer testators a centralized and secure option for lodging wills. The framework should also consider the future recognition of electronic wills, supported by appropriate authentication safeguards, to enhance accessibility and ensure the preservation of testamentary intent.

5.4 Conclusion

The findings of this study demonstrate that the current succession framework in Kenya is limited by its rigid adherence to formalities, which often compromises the enforcement of genuine testamentary intent. The absence of judicial dispensing powers, inconsistent judicial responses, and the lack of public awareness further magnify the problem. Comparative experiences from other jurisdictions, particularly South Africa, illustrate the benefits of a more flexible approach that empowers courts to validate wills based on clear and convincing evidence of intent, even where formal defects exist.

Accordingly, this paper recommends legislative reform to introduce dispensing powers, institutional measures to support consistent judicial application, public awareness campaigns to promote compliance, and the establishment of a secure framework for will registration. Together, these reforms would strengthen Kenya's succession system by promoting both legal certainty and the faithful enforcement of testamentary wishes.



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Report on the Use of AI Tools in LL.B Dissertation Writing

Introduction

The use of Artificial Intelligence (AI) tools in my dissertation writing is briefly described in this report, along with the ways in which these tools have aided and enhanced my research and writing process.

Utilizing Grok

I summarized a lot of information, brainstormed, and offered suggestions for better idea organisation using Grok. This made my drafting process go more quickly while maintaining the final product's foundation in critical analysis and independent research.

Utilizing Elicit AI

In order to find relevant academic papers and scholarly works, I also used Elicit AI, an AI-powered research tool that is comparable to Google Scholar. This made sure that my dissertation was based on reliable and current sources and greatly aided in the development of my literature review.

Utilizing Deepseek

Additionally, I used DeepSeek AI to polish and enhance the readability of my writing. The tool was especially helpful for condensing lengthy sentences, getting rid of repetitive wording, and improving the text's clarity. In order to obtain relevant knowledge for my dissertation, I also used DeepSeek to help deconstruct and explain documents that contained a lot of complex information.