

The Limits of Testamentary Autonomy in Kenya: A Critical Analysis of No-Contest Clauses with Reference to Article Seven of Nderitu Gachagua's Will

Testamentary freedom is a central principle of succession law, allowing individuals to determine the distribution of their estate upon death. Section 5 of the Law of Succession Act (LSA) affirms that any adult of sound mind may dispose of all or part of their free property by will. This provision recognizes the autonomy of a testator to determine how their estate should devolve upon death. However, this freedom is not unfettered. Courts retain the authority to intervene where the exercise of testamentary power conflicts with legal obligations or fundamental principles of justice.

The will of Nderitu Gachagua is often cited for its strict distribution framework and its inclusion of a clause, particularly Article Seven, discouraging beneficiaries from challenging the mode of distribution. It threatens to disinherit those who attempt to challenge the will reflecting a testator's deliberate attempt to exercise extensive control over the allocation of his estate after death.

This article argues that although Kenyan law upholds testamentary autonomy, no-contest clauses cannot override statutory protections, constitutional guarantees particularly the right of access to justice, or the supervisory jurisdiction of the courts. As such, their legal effect remains limited, and they cannot insulate a will from scrutiny where issues of fairness and legality arise.

Judicial pronouncements have consistently affirmed this position. In ***Erastus Maina Gikunu & Another v Godfrey Gichuhi Gikunu & Another* [2016] eKLR**, the court emphasized that testamentary freedom must be exercised in a manner that makes reasonable provision for dependants. Similarly, in ***Kamene Ndolo v George Matata Ndolo* [1996] eKLR**, the court held that although a testator is free to dispose of their property, such freedom must be exercised responsibly and with due regard to those who depended on the deceased during their lifetime. While Section 5 of the Law of Succession grants broad discretion, several legal constraints significantly limit testamentary freedom in Kenya. These limitations ensure that a will does not operate in a manner that is unjust, unlawful, or contrary to public policy.

Testamentary freedom in Kenya is therefore a qualified right, subject to the following limitations;

i. Reasonable Provision for Dependants (Section 26 LS A)

The most significant limitation arises under section 26 of the Law of Succession Act, which empowers the court to intervene where a testator fails to make reasonable provision for their dependants. Section 29 defines dependants to include spouses, children (whether or not

maintained immediately prior to death), and in certain cases, other persons who were being maintained by the deceased.

Where a will inadequately provide for such persons, the court may vary its terms to ensure fairness. This provision effectively qualifies testamentary freedom by imposing a legal duty on the testator, thereby preventing disinheritance that would result in hardship or injustice.

ii. Judicial Powers and Supervisory Jurisdiction (Section 47 LSA)

Section 47 of the LSA grants the High Court wide jurisdiction in succession matters, including the power to entertain any application and determine any dispute under the Act. This provision ensures that no will can exclude the court's supervisory role. Even where a testator attempts to impose strict or final distribution terms, the court retains ultimate authority to review and, where necessary, alter such provisions and thus testamentary freedom operates within a framework of judicial control, preventing abuse or unjust outcomes.

iii. Constitutional Constraints: Access to Justice (Article 48)

The Constitution of Kenya (2010) introduces an additional layer of limitation by guaranteeing access to justice under Article 48. Any clause in a will that attempts to deter or prevent beneficiaries from approaching the court, such as a no-contest clause, must be evaluated against this constitutional right. A provision that effectively penalizes individuals for seeking judicial redress may be deemed inconsistent with constitutional principles.

Accordingly, testamentary freedom cannot be exercised in a manner that undermines fundamental rights.

iv. Public Policy and Illegality

Courts will not enforce provisions in a will that are illegal, uncertain, or contrary to public policy. A testator cannot, for example, impose conditions that are discriminatory, immoral, or designed to defeat statutory protections.

Where such provisions exist, courts may either sever the offending clause or interpret the will in a manner that preserves legality.

No-Contest Clauses in Wills

Article Seven of Nderitu Gachagua's will provides that any beneficiary who challenges the mode of distribution shall be automatically disqualified from inheriting any part of the estate. This is a classic no-contest or forfeiture clause intended to deter disputes and preserve the testator's distribution scheme. While such clauses may serve a practical purpose in discouraging frivolous litigation, their legal effect is limited. They cannot override statutory rights discussed above or prevent beneficiaries from invoking the court's jurisdiction.

In *Re Estate of G.K.K (Deceased)* [2013] KEHC 7002 (KLR), the court held that beneficiaries cannot be barred from seeking judicial intervention where it is necessary and just to do so. This

decision underscores the principle that judicial oversight prevails over any restrictive testamentary provision.

Accordingly, a no-contest clause will not be enforced where it conflicts with law of succession and/or constitutional guarantees. At most, such clauses may influence the court's perception of a dispute, but they cannot extinguish the right to challenge a will or even the mode of distribution as put in Nderitu Gachagua's will.

Construction of Wills

Our courts do not rewrite the wishes of the testator. The First Schedule to the Law of Succession Act provides guiding principles for the interpretation of wills. Courts aim to give effect to the testator's intention, as expressed in the will. However, this intention is not absolute. It must be interpreted in a manner that is:

- i. Consistent with statutory provisions,
- ii. Reasonable, and
- iii. Not contrary to public policy or justice.

Where ambiguity arises, courts adopt a construction that upholds validity rather than invalidity. Importantly, any clause that attempts to oust the jurisdiction of the court or defeat statutory rights will be read down or disregarded. Thus, in construing wills, courts strike a balance between respecting the wishes of the testator and upholding the rule of law.

Conclusion

The will of Nderitu Gachagua illustrates the tension between testamentary autonomy and legal control in our succession law. While the law permits individuals to determine the distribution of their estates, this freedom is subject to important limitations designed to ensure fairness, protect dependants, and preserve access to justice. Testamentary freedom in Kenya is therefore a qualified right, subject to statutory duties, judicial oversight, and constitutional safeguards. Courts will uphold a testator's intentions only to the extent that they comply with these legal standards.

Ultimately, Kenyan law affirms that testamentary freedom is a qualified right one that must yield where it conflicts with fundamental principles of justice. The courts remain the final arbiters in succession disputes, ensuring that no will, however carefully drafted, is immune from scrutiny. In this respect, the law draws a clear and necessary boundary: testamentary intention is respected, but never at the expense of fairness, legality, and the rule of law.