



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PROBATE CAUSE NUMBER 394 OF 2020

**BETWEEN:**

**TUPOCHERE MUOCHA (As beneficiary of the Estate of  
FRANCIS MBILIZI-Deceased)**

**1<sup>st</sup> CLAIMANT**

**TITHA MBILIZI (As beneficiary of the Estate of  
FRANCIS MBILIZI-Deceased)**

**2<sup>nd</sup> CLAIMANT**

**DR. YAMIKANI CHIMWAZA (As beneficiary of the Estate  
of FRANCIS MBILIZI-Deceased)**

**3<sup>rd</sup> CLAIMANT**

**AND**

**ROZA MBILIZI**

**DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO,**

Mwangomba, Counsel for the Claimants  
Masumbu, Counsel for the Defendant  
Mankhambera, Official Court Interpreter

### **JUDGMENT**

1. This matter concerns the validity of the will of the deceased in this matter. The claimants are the children of the deceased, Francis Mbilizi. The defendant is the widow of the deceased and step mother to the claimants. The deceased left a will. This is the decision of this Court on the claimants' claim seeking a revocation of the will of the deceased herein, on account of alleged fraud and forgery pertaining to the signing of the said will. The claimants also seek that

this Court orders the defendant to account for how she has dealt with part of the deceased estate herein. The defendant contested the claims.

2. The claimants' claim states as follows:

1. Mr. Francis Mbilizi ("the deceased") was a Malawian who hailed from Katoleza Village, Traditional Authority Mpama in Chiradzulu District. He died on 1<sup>st</sup> August, 2020 at Blantyre Adventist Hospital.
2. On or about 5<sup>th</sup> May, 1982 the deceased married Coretta Chidzero with whom he had three (3) children namely Tupochere Muocha (nee Mbilizi), Titha Mbilizi and Dr. Yamikani Chimwaza (nee Mbilizi).
3. Later the deceased's marriage to Coretta Chidzero broke up and he sometime later married the defendant. Their marriage was officiated at St Michaels and All Angels Church in Blantyre in December, 2018. He had one child with the defendant named Kwayera Mbilizi.
4. In total the deceased is survived by a wife (defendant) and four children named in paragraphs 2 and 3 above all of whom are beneficiaries of his estate.
5. The deceased was buried on 2<sup>nd</sup> August, 2020. After burial the family agreed that any further meetings by family members be pended because both the defendant and Kwayera Mbilizi were unwell.
6. Before a memorial service was held the defendant kept on telling the claimants that a lawyer would come to discuss some documents.
7. On 18<sup>th</sup> September, 2020 the family gathered at the deceased's house. A lawyer from a legal firm styled G.K. Associates also attended the meeting. He pulled a document from an unsealed document and told the gathering that the deceased had left a Will. He read the Will to all those gathered.
8. The claimants were given copies of the Will and upon checking noted that the year when the purported Will was made was corrected with ink without counter signing by the deceased and the witnesses who allegedly witnessed his signature on the Will. This raised questions in the mind of the beneficiaries.

9. On or about 13<sup>th</sup> October, 2020 the 2<sup>nd</sup> and 3<sup>rd</sup> claimant together with Mr. Owen Mbilizi (deceased's brother) met Mr. Gabriel Kambale who had come home to read the Will to convey their concerns on the document.
10. At the meeting Mr. Gabriel Kambale insisted that the deceased signed the Will at his offices on 23<sup>rd</sup> November, 2019.
11. The 2<sup>nd</sup> claimant remembered that on 23<sup>rd</sup> November, 2019 the deceased was not in Blantyre but Mangochi and had a WhatsApp conversation with her.
12. It was also noted that although the Will was allegedly signed at the lawyer's office on 23<sup>rd</sup> November, 2019 the date mentioned was a Saturday and yet Mr. Gabriel Kambale told those present that his office does not open for business on Saturdays.
13. Further, the claimants had in possession a cheque and other documents that the deceased had signed prior to his demise and a comparison of the signature on the cheque, other documents and that on the alleged Will showed that the signatures were different.
14. In order to establish the truth, the claimants got a copy of call log of the deceased's phone number 0999960315 at Airtel Malawi Plc. The call log confirms that the deceased was in Mangochi from 20<sup>th</sup> November, 2019 to 23<sup>rd</sup> November, 2019.
15. Further the claimants engaged an expert to analyse the signature on the cheque and other documents that had been signed by the deceased whilst alive. The report of the expert has confirmed that the signature on the Will is a forgery.
16. In the premises the claimants contend that the purported Will of the deceased dated 23<sup>rd</sup> November, 2019 is a fraud and forgery.

**Particulars of fraud and forgery**

- (i) The deceased was in Mangochi on this date and could not have signed a Will at Counsel's Office in Blantyre.
- (ii) Counsel told the claimants that his office does not open for business on Saturdays and yet the date the Will is alleged to have been signed was Saturday.
- (iii) The signature on the Will is a forgery as confirmed by expert analysis.

17. The purported Will is therefore invalid and ought to be revoked and the estate distributed according to law.

18. Meanwhile before probate is obtained the defendant has been mishandling the estate by among other things taking money from sales at the deceased's fishing business and depositing the same into her personal account number xxxxx domiciled at FDH Bank Plc to the exclusion of other beneficiaries of the deceased's estate. The business in question was a sole proprietorship and belonged to the deceased only.

19. As at 21<sup>st</sup> October, 2020 the defendant had taken the following amounts from the fishing business and deposited into her personal account:

(i)	29/09/20	-	MK 632,200 (not deposited)
(ii)	06/10/20	-	MK 2,100,000
(iii)	8/10/20	-	MK 1,000,000
(iv)	12/10/20	-	MK 3,257,000
(v)	19/10/20	-	MK 1,788,000
(vi)	21/10/20	-	MK 1,020,500
(vii)	26/10/20	-	<u>MK 1,247,000</u>
<b>Total</b>		-	<b><u>MK 11,044,700</u></b>

20. She has also been interfering with running of the fishing business by telling workers not to talk to any of the claimants on anything and should anyone of them do so he would be fired instantly.
21. The claimants also plead that it is just and fair that the defendant be compelled to share all necessary information and records relating to the estate.

22. **WHEREFORE** the claimants claim the following reliefs and orders:

- (i) A declaration that the purported signature of Francis Mbilizi on purported Will dated 23<sup>rd</sup> November, 2018 and 23<sup>rd</sup> November, 2019 is a forgery and therefore invalid.
- (ii) An order revoking the purported Will of Francis Mbilizi dated 23<sup>rd</sup> November, 2018 and 23<sup>rd</sup> November, 2019.
- (iii) An order that since there is no valid Will the Estate of Francis Mbilizi be administered according to law.
- (iv) An order compelling the defendant to give to the claimants and other beneficiaries a full and frank account of all assets left by the deceased including a vehicle that he imported from abroad and had not yet arrived in Malawi as at date of his demise.
- (v) An order compelling the defendant to give to the claimants and other beneficiaries all records or documents left by the deceased in connection with his business and business dealings, assets (land and movable assets) and any other matter about his assets.
- (vi) An order compelling the defendant to account for all money she has obtained from the deceased fishing business known as Kwayera Fisheries and deposited into her personal account no. xxxxx domiciled at FDH Bank and if it be found that any of the money has been misappropriated an order that she refunds the money with compound interest at 2% above base lending rate of National Bank of Malawi Plc.
- (vii) An order that the money from the fishing business deposited into the defendant's personal account be transferred into the deceased's account number xxxxx domiciled at

FDH.

(viii) An order of injunction restraining the defendant whether by herself, servants, agents or whosoever and howsoever from doing anything that has the effect of depriving other beneficiaries of the Estate from getting a fair share of the estate as prescribed by law.

(ix) Costs of this action.

3. On her part, the defendant's defence is as follows:

1. The defendant admits contents of paragraph 1 of the statement of case.
2. The defendant makes no comment to the contents of paragraph 2 of the statement of case.
3. The defendant refers to paragraph 3 and state that the Christian rites of marriage between herself and the late Francis Mbilizi were officiated at St Michael and All Angels CCAP Church in Blantyre in 2018, but prior to that they had cohabited from 1998 and had their customary marriage in 2000. Further that their civil marriage was done at the Registrar General on 31<sup>st</sup> March, 2003. The defendant also admits that the marriage produced one child, Kumtimakwayera Mbilizi.
4. The defendant admits the contents of paragraph 4 and 5 of the Statement of case.
5. The defendant refers to paragraph 6 of the statement of case and aver that she received communication from Mr. Gabriel Kambale on or about 18<sup>th</sup> August, 2020 and he informed her that there were matters to discuss to the family regarding the estate of late Mr. Francis Mbilizi the late Mr. Mbilizi's sister and together agreed that the meeting should be heard on the 18<sup>th</sup> of September, 2020 the day of the late Mr. Mbilizi's memorial service. This information was thereby relayed to the requisite family members.
6. The defendant refers to paragraph 7 of the statement of case and aver that indeed on 18<sup>th</sup> of September, 2020 Mr. Kambale read a will to the family members present. The defendant makes no comment as to whether the will was sealed or not.
7. The defendant refers to paragraph 8,9,10 and 11 of the statement of case and make no comment to the contents therein.

8. The defendant refers to paragraph 12 of the statement of case and avers that she is well versed with her late husband's signature and that it was not always identical but was always similar.
9. The defendant makes no comment to the contents of paragraph 13, 14 and 15 of the statement of case.
10. The defendant refers to paragraph 16 of the statement of case and denies any knowledge of fraud or forgery of the late Mr. Mbilizi's Will.

### **Particulars**

- i. The defendant was not aware of the existence of the will until it was read on the 18<sup>th</sup> September, 2019 in the presence of the claimants and other families present.
  - ii. The defendant was not the one who prepared the will nor did she witness the signing of it and cannot speak to the authenticity of it or the lack thereof.
  - iii. The defendant was in a relationship with the late Frank Mbilizi for over 20 years and knew his signature very well and believes that the signature on the contested Will is indeed his real signature. The defendant also avers that her late husband's signature was not always consistent with every stroke on all documents but that it was very similar.
11. The defendant refers to paragraph 17 of the statement of case and aver that there is no conclusive evidence that the signature on the Will was forged and therefore the claimants cannot out of their own accord declare the Will invalid.
  12. The defendant denies that she had been mishandling the estate as alleged in paragraph 18 of the statement of case and put the claimants to strict proof thereof. The defendant avers that prior to her husband's demise she was jointly responsible for management of the fishing business together with her husband and has merely been continuing to do so.

13. The defendant refers to paragraph 19 of the statement of case and avers that any money, if at all that has been taken from the fishing business has been used for the management of family affairs.

14. The defendant denies instructing the workers to deny access to the business nor has she threatened the workers about job loss or at all as stated in paragraph 20 of the statement of case and puts the claimants to strict proof thereof. The defendant refers to paragraph 21 of the statement of case and aver that she has no qualms about surrendering the documents requested by the claimants and the claimants need only ask.

15. The defendant denies the reliefs sought by the claimants as stated in paragraph 22 of the statement of case and aver that

a. The signature of late Francis Mbilizi on the Will is authentic.

b. The defendant did not prepare nor was she aware of the existence of the contested will and therefore could not have forged it.

c. The defendant had no reason or means to forge her late husband's Will.

d. The defendant is ready and willing to surrender all the necessary documents to the claimants through the court.

16. The defendant also denies the claim [of] costs of this action.

17. Save as herein specifically stated the defendant denies each and every allegation of fact as if the same herein set forth and traversed *seriatum*.

4. This Court therefore has to determine whether the Will of the deceased herein is valid or not. And whether the claimants are entitled to the reliefs sought.

5. The standard of proof in these civil matters is on a balance of probabilities as rightly noted by the parties in this matter. And, the burden of proof lies on he who asserts the affirmative, in this case the claimants. See *Nkuluzado v*



*Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.

6. The claimants gave evidence to prove their claim and had three additional witnesses. The defendant also testified and had four witnesses. Both parties made submissions herein.
7. From the statement of case it is agreed that the deceased is survived by the defendant and her child Kwayera Mbilizi as well as the claimants. Beyond that the facts are disputed.
8. Having considered the evidence of the parties on the contested facts the following facts are established.
9. The deceased left a Will whose validity is being contested in this matter. That Will is dated 23<sup>rd</sup> November, 2019 according to the date on the face of the Will. In the body of the Will, in paragraph 1, the typed date indicated is 23<sup>rd</sup> November 2018 but the 8 is crossed out in ink and indicated in ink as 9 so that it reads 2019.
10. From the entirety of the evidence of both parties, it is clear that the Will herein was not signed on the 23<sup>rd</sup> November, 2019. That is as explained by the defence witness Counsel Gabriel Kambale who prepared the Will herein. This is consistent with the evidence of the claimants that in fact 23<sup>rd</sup> November, 2019 was a Saturday a day on which according to Counsel Kambale's own indication to the claimants, his office does not open for business. On the same day of 23<sup>rd</sup> November, 2019, the call logs from the Airtel phone number used by the deceased show that he was in Mangochi and obviously could not sign his Will on 23<sup>rd</sup> November, 2019.
11. The explanation of Counsel Kambale for the scenario at hand is that he had in fact finalized preparation of the Will herein in November 2018 and that it was in fact signed and witnessed in the week after 24<sup>th</sup> November 2018. Counsel Kambale does not know the exact date when the Will was signed. He explained that for some reason connected to the transfer of a property in the said Will to Kwayera Mbilizi, which could not be concluded before finalization of the Will in November, 2018 as there was an overdraft on the property, the deceased instructed him that the Will be post-dated to 23<sup>rd</sup> November, 2019 to allow the deceased pay off the overdraft. During cross-examination, Counsel Kambale stated that the alteration of the date of the Will in ink from November, 2018 to November, 2019 was made by the deceased himself. The alteration is not signed for by anyone. Counsel Kambale then indicated that by the 2019 date the deceased still needed the overdraft and was content to leave the Will in place to include the property in question in favour of Kwayela Mbilizi.

12. Neither the overdraft documents alluded to were adduced by Counsel Kambale in evidence nor was evidence of the instruction to post-date the Will. Counsel Kambale however exhibited copies the emails showing instructions from the deceased to him on the drafting of the Will resting with an email of 24<sup>th</sup> November 2018. These copies of emails were questioned by the claimants, in particular Mrs Muocha, in view of the missing of some characteristics on the emails that ought to be auto generated according to the claimants. Counsel Kambale insisted that the Will is genuine and he asserted that he knows forgery is a crime for which he could be disbarred from practice. The defendant also brought in a witness from the internet service provider who spoke to the authenticity of the emails in question.
13. The evidence also established that the deceased had several variations of his signature. The claimants brought a handwriting expert, Deputy Commissioner of Police Chiumbudzo, who explained in detail why he concluded that the signature on the Will of the deceased was a forgery in view of the specimen signatures he was presented by the claimants, namely, signatures of the deceased on a cheque and on a land transfer document. However, on being presented with further documents signed by the deceased, including his passport, the handwriting expert conceded that the deceased had several variations of his signature given that the passport signature had different characteristics from the specimen signatures used as controls by the handwriting expert.
14. On the issue of the defendant dealing with cash from the deceased's fishing business, the evidence established that the deceased had registered a sole proprietorship in 2009 under the style Kwayera Investments. Two boats were operated under this business of the deceased and registered in the name of the deceased. The defendant asserted and attempted to show that this business was one which she co-owned with the deceased. However, the defendant had no evidence to back up her assertions.
15. In his Will, the deceased disposed of his assets accordingly, including his shares in Kwayera Fisheries fishing business. Without obtaining letters of administration, the defendant took out the money in dispute from the sole business of the deceased and deposited the same in her daughter's account. The claimants obtained an injunction to restrain the defendant from meddling in the fishing business and the defendant deposited back the money she took out of the deceased's business. As at 21<sup>st</sup> October, 2020, the defendant had, by her own concession, withdrawn from the deceased's fisheries business up to around K11 000 000. The evidence shows that K7 000 000 was deposited back after the injunction herein. The defendant produced copies of deposits done to Malawi Revenue Authority Accounts at FDH Bank that she used

around K4 000 000 to pay tax obligations on the deceased's behalf for some capital gains tax. The payment was made in October 2020.

16. This Court has considered the submissions of the parties on the question of the validity of the Will herein.

17. The claimants correctly contended that the making of wills is governed by Section 6 of the Deceased Estates (Wills, Inheritance and Protection) Act which states that:

(1) Every Will shall be made in writing and shall be signed by the testator in the presence of at least two competent witnesses who shall also sign the Will in the presence of the testator and in the presence of each other as witnesses to the signature of the testator.

(2) Any person who is of sound mind and is not a minor shall be a competent witness for the purposes of this section.

18. The claimants asserted that in terms of Section 6 of the Act a will is "made" "in writing". The word "made" is straightforward and requires no definition.

19. They observed that the first paragraph to the Will which is in contention in this matter states that:

I, **FRANCIS MBILIZI** of Post Office Box 30004, Blantyre in the Republic of Malawi, being of sound and disposing memory, do hereby **make**, publish and declare this to be my last Will and Testament which I **make, this 23<sup>rd</sup> day of November, 2019** and do hereby revoke all former wills and codicils and testamentary disposition heretofore made by me (claimants' emphasis).

20. They further observed that this Will states that it was made by late Francis Mbilizi on 23<sup>rd</sup> November, 2019.

21. The claimants then contended that discrepancy on date of the Will is very significant in determining validity of a Will. And that where there is a discrepancy on date when the testator allegedly signed a purported Will the Court has to consider whether on the balance of probabilities the deceased may have signed the Will on the alleged date.

22. They noted that Justice Dr. Kapindu was faced with a similar situation in *Liwonde and others v Kalua and another* Probate Cause number 23 of 2020 (High Court) (unreported). And that at paragraph 27 of his judgment the learned Judge said that:

In the present case, there were two Witnesses to the signature of the purported Will by the testator, namely his brother, Mr. Wellington Liwonde, 2<sup>nd</sup> claimant herein and purported, Village Headman Chidzalo who signed the Will on 2<sup>nd</sup> November, 2010 a day before the testator himself the late Reuben Chidzalo signed it on 3<sup>rd</sup>

November, 2010. This therefore, raises very significant doubt that the testator signed the Will in the presence of Village Headman Chidzalo and Mr. Wellington Liwonde signed the Will in the presence of each other and in the presence of the testator. On the balance of probabilities, it is my finding that on the basis of the discrepancy as to dates, it is unsafe to uphold the validity of the purported Will herein. I therefore, hold that the purported Will was invalid. Simply put, the deceased died without leaving a valid Will. In legal practice he died intestate and, therefore, the rules of intestacy are to apply in the distribution of his estate.

23. The claimants noted that the date of the Will is 23<sup>rd</sup> November, 2019. And that this is the evidence before this Court. They asserted that there is no evidence proving a contrary date. They pointed out that Mr. Kambale who says had instructions to draft the Will confirmed that everyone reading the Will would conclude that the Will was made on 23<sup>rd</sup> November, 2019.
24. The claimants then contended that the assertion by the defendant that the Will was “fast tracked” or “postdated” from 2018 to 2019 does not hold at all. They insisted that the Will states that 23<sup>rd</sup> November, 2019 is the date it was made.
25. They then alluded to section 6 of the Deceased Estates (Wills, Inheritance and Protection) Act and noted that it talks about making a Will. And they submitted that, therefore, the date of the Will is the reference point on when the Will was made. Further, that in this case the Will states that the testator made it on 23<sup>rd</sup> November, 2019.
26. The claimants then submitted that the Malawi Supreme Court of Appeal has held that a document speaks for itself. And that in the case of *Malunga v Fintec Consultants and another* [2007] MLR 263 at p. 266 the Court said:

Mkandawire J, in the case of *Kamwendo v Bata Shoe Company Limited* civil cause no. 2380 of 2003 is quoted as saying:

Rules on documentary evidence are very clear that a document speaks for itself. One cannot introduce parol evidence to contradict a document.

27. The claimants submitted that this is the correct position of the law. And that the said decision, being a decision of a higher court, it is binding on this Court.
28. The claimants asserted that it follows that the Will as presented and read by Mr. Kambale should be allowed to speak for itself. And that what it is, is what it says. Further, that therefore, the extraneous explanations by Mr. Kambale on the date of 23<sup>rd</sup> November, 2019 cannot be allowed at all. They insisted that the Will does not state that it was fast tracked or postdated or indeed that it was agreed that the date be 23<sup>rd</sup> November, 2019.
29. They reiterated that the Will states that Mr. Francis Mbilizi made it on 23<sup>rd</sup> November, 2019. They then observed that Mr. Kambale and his two office

colleagues state that Mr. Mbilizi signed the Will at their office. They posited that this would be the process for making the Will because you cannot make a Will without a signature. And that, in essence, the Will is made if signed as prescribed under Section 6 of the Deceased Estates (Wills, Inheritance and Protection) Act.

30. The claimants then observed that evidence has been adduced to prove that on 23<sup>rd</sup> November, 2019 Mr. Mbilizi was actually in Mangochi. And that this fact has not been contradicted by the defendant. Further, that, in fact, even in her defence she has not even commented on this aspect of the claimants' case. They observed that the call log tendered in evidence by Mr. Lusewa of Airtel Plc is clear on the point.
31. They then indicated that, now the question is, if Mr. Mbilizi was in Mangochi on 23<sup>rd</sup> November, 2019 could he have indeed gone to Mr. Kambale's office and sign the Will in Blantyre? They answered the question by positing that the evidence shows that Mr. Mbilizi was in Mangochi from 7:22:09 p.m. on 20<sup>th</sup> November, 2019 to 10:38:41 a.m. on 24<sup>th</sup> November, 2019. And that it is clear that he did not appear at Mr. Kambale's office on 23<sup>rd</sup> November, 2019 to sign the Will.
32. They therefore, submitted that on the balance of probability the deceased did not sign the Will on 23<sup>rd</sup> November, 2019 as alleged.
33. The claimants then noted that the position of the defendant is that if the alteration on the date is held to be invalid, the date of the Will shall be 23<sup>rd</sup> November, 2018 as originally typed. They noted that the defendant had submitted as follows in her skeletal arguments at paragraph 4.3.1 (page 190 of the bundle):

4.3.1 The alteration of the date if made before the execution was a lawful alteration and if made after the execution is rendered ineffective and thereby indicates that the date of will is 23<sup>rd</sup> November, 2018 and not 23<sup>rd</sup> November, 2019. This alteration bears very little effect to the substance of the Will.

34. The claimants observed that there are significant problems with this argument. They noted that the validity of the alteration is not in issue in this matter. And that, indeed none of the parties is arguing that the alteration is not valid. They observed that the alteration should be valid at least going by the evidence of Mr. Kambale. They pointed out that the defendant or indeed Mr. Kambale has not adduced any evidence to show that the alteration was made after execution to render it invalid.
35. The claimants then observed that, during cross-examination, on the very first question Mr. Kambale confirmed that going by the date of emails on page 145

- of the trial bundle show that the deceased communicated to him on 24<sup>th</sup> November, 2018 that the Will be finalized, there is no way that the Will could have been made on 23<sup>rd</sup> November, 2018.
36. The claimants submitted that the suggestion by the defendant that the Will could have been made on 23<sup>rd</sup> November, 2018 is not supported by evidence adduced in this Court. And that if we take out both dates then we have no Will.
  37. In response the defendant submitted as follows. The defendant also referred to section 6 of the Deceased Estates (Wills, Inheritance and Protection) Act on the formal requirements for the making a will. She then asserted that the formal requirements do not require that a will be dated. She added that a will which has no date or has a wrong date is valid.
  38. The defendant then observed that the requirement that the witnesses to a will sign in each other's presence as well as the presence of the testator was upheld in the case of *Liwonde and Others v Kalua and Another* Probate Cause No. 23 of 2020 (High Court) (unreported). And that, in the said case, Kapindu J. held that the fact that the witness had signed the Will on a different day than the testator rendered the Will invalid because it did not satisfy section 6(1) of the Deceased Estate (Wills, Inheritance and Protection) Act.
  39. The defendant pointed out that, further, in the South African case of *Adbulhey Ebhrahim Karani v Mohomedali Ahmed Karani and others* case number 02266/2014 it was stated that the rationale for the two witnesses to sign in the presence of each other and the presence of the testator is to prevent fraud, forgery and misrepresentation.
  40. The defendant then submitted that, in the present case, two people witnessed the said will in the presence of each other as well as Mr. Mbilizi. And that therefore, the requirements for making a valid will as required by Deceased Estates (Wills, Inheritance and Protection) Act were met. And that the Will was validly made and executed.
  41. The defendant then submitted on the basis for challenging a will starting with the issue of fraud. She submitted that according to the English Private Law Volume 1, Oxford English Law (Ed Prof. Peter Birks) Oxford University Press, 2000 on page 538, fraud when it comes to making of wills, and as distinguished from undue influence, occurs where the testator is misled into making provisions in the Will.
  42. She noted that in case of *Trustee for the Salvation Army (NSW) Property Trust & Anor v Beeker & Anor* [2007] NSWCA 136 while further distinguishing undue influence from fraud, it was stated that;

Fraud embraces a wide category of conduct affecting testamentary disposition. Relevantly, as regards the present case, in *The Public Trustee v Mullane* (Unreported, Supreme Court of New South Wales, 12 June 1992), Powell J (at 15) gave the following example of fraud capable of invalidating a Will.

“wilful false statements, or the suppression of material facts, intended, either, to gain for oneself benefits under a will, or to prevent benefits being received by a natural object of the testator’s bounty.”

43. She noted further that in the same case of *Trustee for the Salvation Army (SNW) Property trust & Anor v Becker & Anor* it was also stated that:

In *White v White & Cato* (1862) 2 Sw & Tr 504, Sir Cresswell distinguished between undue influence and fraud. He observed that there had been a plea of undue influence in the case but no clear plea of fraud. He is reported, at 506, as having said to counsel:

“If you intend to charge the plaintiff with having obtained the execution of this will by instilling into the mind of the deceased false and delusive notions respecting the conduct of the defendant, this is tantamount to a charge of fraud, and you should have placed on record pleas charging her with having obtained it by fraud.”

44. The defendant pointed out that in the English case of *Wintle v Nye* [1959] P 1 ALL ER 552 although fraud was not pleaded, it was discussed that where there is suspicions of fraud, the suspicion must be interrogated and the party propounding that the Will is authentic must remove the said suspicion.
45. The defendant then stated that in the said case of *Wintle v Nye* the lawyer who drafted the Will was the principal beneficiary of the testatrix’s estate. The evidence showed that testatrix was not very educated and for most of her life, she had relied on the solicitor to make business decisions. It was held that the circumstances were suspicious and the gift failed as a result.
46. The defendant submitted that, therefore, where a will is contested on the grounds of fraud, essentially what is being challenged is the testamentary capacity of the testator i.e. that the testator was deceived into making the provisions under the contested will that he would not have ordinarily made. And that, therefore, where fraud is alleged it must be shown that the intention to make a will has been vitiated in some way.
47. The defendant then observed that Lewis Chezani Bande in his book “The Law of Inheritance & Administration of Deceased Estates in Malawi” (2021 African Sun Media at pp134- 135 also deals with the issue of fraud as follows:

Besides undue influence, fraud may also vitiate the testator’s free-will. Not infrequently, the validity of a will may be contested on the ground that it was the

result of fraud perpetrated on the testator. A testator will be said to have lacked free will where he or she has been prompted to make the Will or (fail to make) certain dispositions therein because of the third part's fraud. The fraudster may be the testator's close family, friends, confidantes, professionals (for instance, Lawyers) or even total strangers.

48. She indicated further that, at page 135, Bande goes further and observes that:

However, fraud generally involves deceptive conduct. It generally involves false representation of a breach of legal or equitable duty, trust or confidence and are injurious to another and through which undue and unconscionable advantage is taken of another. Fraud may come in different forms. It may relate to the nature of document being executed where, for instance, the fraudster misrepresents documents to the testator as medical forms when in fact they are draft will. In that case the testator signs what in effect is his Will when he thinks they are medical forms. The fraudster may also misrepresent or fail to explain accurately the true nature and legal effect of a Will .....fraud may take the form of outright lies. Let us say the testator who is sick is told lies that one of the potential beneficiaries has been celebrating that the testator will die soon.

49. The defendant then submitted that the particulars of fraud as indicated in the claimants' statement of case do not support allegations of fraud in will making. She asserted that no evidence was adduced to suggest that Mr. Kambale duped the deceased into making the Will. She stated that Mr Kambale did not unduly influence the deceased. Further, that Mr Kambale did not benefit from the Will. Similarly, that there was no evidence showing her wrong doing in so far as will making was concerned.

50. The defendant next submitted on alteration of wills. She referred to section 9 (3) of the Deceased Estate (Wills, Inheritance and Protection) Act which provides that:

No obliteration, interlineations or other alteration made in a will after its execution has any effect unless such alteration is signed and attested as a Will is required to be signed and attested under section 6, or is referred to in a memorandum written at the end or some other part of the Will and so signed and attested before.

51. She submitted that, therefore, alterations such changing the date on the Will either before or after execution of the Will would have to be interrogated in line with section 9 (3) of the Deceased Estate (Wills, Inheritance and Protection) Act. She asserted that the evidence for Mr. Kambale was uncontroverted that the alteration took place before execution of the Will and reasons for the alteration were given.



52. The defendant made further elaborate arguments on fraud and alteration of the Will as follows. She asserted that the claimant's allegation of fraud as per *Trustees for the Salvation Army (NSW) Property Trust & Anor v Becker & Anor* and *Wintle v Nye* implies that there was deceit on the part of counsel Kambale in the preparation of the Will and that the contents of the Will arouse suspicion on the bequeathals. She noted that the claimants have however not indicated how counsel Kambale stood to benefit from it. And that they have also not shown how counsel Kambale deceived and misled Mr. Mbilizi into making bequeathals to members of his own family. She asserted that the allegation of fraud is therefore wanting and misguided.
53. The defendant claimed that the claimants' aversions of fraud therefore infer that Mr. Mbilizi was misled when preparing the Will and at the same time aver that the Will is a fabrication. She noted that the contradiction therein indicates that the claimants are unsure of their basis for challenging the Will.
54. The defendant indicated that the alteration of the date, if made before the execution of the Will, was a lawful alteration and if made after the execution is rendered ineffective and thereby indicates that the date of the Will is 23<sup>rd</sup> November, 2018 and not 23<sup>rd</sup> November, 2019.
55. She then noted that, for purposes of the case, the claim by the claimants in relation to the Will is contained in paragraphs 7 to 17 of the statement of case. And that the fraud and forgery is particularized as follows: the deceased was in Mangochi on this date and could not have signed the Will at counsel's office in Blantyre. And that counsel told the claimants that his office does not open for business on Saturdays and yet the date the Will is alleged to have been signed was a Saturday and the signature on the Will is a forgery as confirmed by the expert witness.
56. The defendant then submitted on the date when the Will was signed and the legal significance of a date to the validity of a will.
57. She asserted that there is a factual dispute as to when the Will was signed. And that the claimants' concerns arise from the fact that the claimants allege that when they met Mr. Kambale, he indicated that the Will was signed on 23<sup>rd</sup> November 2019. Further, that that day was a Saturday and Mr. Kambale told the claimants, he does not open his office on Saturday. And further, that telephone records indicated that the deceased was in Mangochi on 23<sup>rd</sup> November 2019.
58. Her submission was that, if indeed Mr. Kambale said what is alleged he said by the claimants that might have arisen from a memory lapse. And that the totality of the evidence does not support such an assertion though.
59. The defendant submitted as such because she stated that the evidence that Mr. Kambale presented in court does not even support such a version of events.

She contended that, in the first place, Mr. Kambale denies that the Will was signed on 23<sup>rd</sup> November 2019. She pointed out that the emails presented and tendered in court by Mr. Kambale actually show that the conversations with the deceased took place in November 2018 and not November 2019. And that, as a matter of fact, the evidence shows the last conversation from the deceased was on "Saturday 24<sup>th</sup> November 2018 at 7.04 am" where he stated "GK, this is fine, please let us finalise." She noted that the emails were validated by Mr. Salima from the internet service provider and he was casually cross examined on his testimony. And that his testimony was not discredited.

60. The defendant asserted that it would be absurd, that with such instructions, the deceased dragged the matter, for another one year, to 23<sup>rd</sup> November 2019 before signing his will. She pointed out that Mr. Kambale's version that the Will he prepared bore the date 23<sup>rd</sup> November 2018 because that is the day he finalized it is entirely supported by the emails that he tendered in evidence. Further, that his version that the Will was signed in the week following 24<sup>th</sup> November 2018 is credible and should be believed. And also that Mr. Kambale's explanation about why the deceased changed the date on the Will to 23<sup>rd</sup> November 2019 is equally credible.
61. The defendant stated that, in any case, the claimants seem obsessed with the suggestion that the Will was altered to a date, 23<sup>rd</sup> November 2019. She asserted that there is no suggestion whatsoever, why and how, 23<sup>rd</sup> November 2019 would have been a better day for the fraud/and or the forgery of the Will. She asked: Why would Mr. Kambale or any alleged forger have to change the date to 23<sup>rd</sup> November 2019? What was wrong with leaving the date as 23<sup>rd</sup> November 2018? She asserted that the insistence by the claimants that the Will was signed on 23<sup>rd</sup> November 2019 lacks any factual basis or background.
62. The defendant then claimed that there is no evidence preferred to suggest that the deceased was incapable of executing the Will in November 2018 to justify the alteration to 23<sup>rd</sup> November 2019. Further, that there is no suggestion or evidence that the deceased was outside the country in November 2018 to be incapable of signing a Will in Malawi or indeed incapable of signing on account of poor health. It is her submission, therefore, that the claimants have not shown or presented any evidence to show why "the alleged fraud and forgery" necessitated the alteration of the Will to 23<sup>rd</sup> November 2019. And that, if anything, Mr. Kambale's version is believable and credible and should be accepted.
63. The defendant then submitted that Mr. Kambale's version as to why this was done is unchallenged and makes sense. She pointed out that the deceased did not want to "pass property" to his daughter which property was encumbered

to the Bank. And that this is a credible explanation to the alteration. The crucial period, in her view, is November 2018. She pointed out further that the evidence shows clear correspondence between Mr. Kambale and the deceased culminating in an email instructing Mr. Kambale to finalise the Will. She asserted that it is not clear how and why signing the Will on 23<sup>rd</sup> November 2019 as asserted would have made the alleged fraud and forgery more authentic and credible. She noted that no defence witness made such an assertion that the Will was executed on 23<sup>rd</sup> November 2019. According to the defendant, the fact of the matter is that the deceased was alive, in Malawi in November 2018 and not incapable of signing a Will. And that all evidence supports that conclusion.

64. She then asserted that the evidence of the claimants concerning the whereabouts of the deceased on 23<sup>rd</sup> November 2019 was, consequently, irrelevant and that the relevant evidence from Airtel should have been for the period between 14<sup>th</sup> November and 30<sup>th</sup> November 2018 when Mr. Kambale says the Will was executed.
65. The defendant asserted that this was the period during which according to Mr. Kambale the Will was executed by the deceased and that no adverse evidence was brought to counter his evidence. She noted that, as a matter of fact, the claimants continued to make reference to 23<sup>rd</sup> November 2019 as the date of signing of the Will and that no witness for the defence made such an assertion; that is that the Will was signed on 23<sup>rd</sup> November 2019. She indicated that most importantly, however, the law is that the date of the will is insignificant. She insisted that the date does not matter and does not invalidate a will. Further, that it is inconsequential. And that a will need not have a date and even a wrong date does not invalidate a will.
66. The defendant asserted that Mr. Lewis Bande in his book, *The Law of Inheritance & Administration of Deceased Estates in Malawi* (supra) at page 165 thus observes:

It is not one of formal requirements for making a Will that it must be dated. This is also the case under the Wills Act of 1837 and it has therefore, been held in England that lack or the inclusion of a wrong date does not invalidate a Will.

67. She added that the issue was exhaustively discussed in the case of *Corbett v Newey* [1998] Ch 57. She asserted that the question whether the Will was signed in November 2018 or 23<sup>rd</sup> November 2019 or any date does not render the Will invalid and that it is inconsequential.
68. The defendant then submitted that the particulars of fraud as set out by the claimants do not support “fraud in the making of Wills.” She stated that she

had referred to a number of case authorities on this point including the extracts from Dr Lewis Chezan Bande's book to explain fraud in making of Wills.

69. She pointed out that, according to the English Private Law Volume 1 Oxford English law (Ed. Prof. Peter Birks) Oxford University Press 2000 on page 358, fraud when it comes to making of wills and as distinguished from undue influence occurs when the testator is misled into making provisions in the Will.

70. She reiterated that in case of *Trustee for the Salvation Army (NSW) Property Trust & Anor v Becker & Anor* [2007] NSWCA 136 while further distinguishing undue influence from fraud, it was stated that:

Fraud embraces a wide category of conduct affecting testamentary disposition. Relevantly, as regards the present case, in the *Public Trustee v Mullane* (Unreported, Supreme Court of New South Wales 12<sup>th</sup> June 1992, Powell J (at 15) gave the following example of fraud capable of invalidating a Will: 'wilfully false statements or the suppression of material facts, intended either to gain for oneself benefits under a will or to prevent benefits being received by a natural object of the testator's bounty'.

71. She asserted that she had read the particulars of fraud as against herself. And none of them suggest that she "wilfully made false statements or suppressed material facts intended to gain for herself benefits under the Will". And that, similarly, none of the particulars of fraud suggest that Mr. Kambale wilfully made false statements or suppressed material facts to gain benefits under the Will. She noted that, as a matter of fact, Mr. Kambale did not benefit anything under the Will. And that as for her, her uncontroverted evidence was that she was not even aware of the Will until Mr. Kambale brought the matter up with her.

72. She then contended that none of the particulars of fraud alleged by the claimants even go near the requirements and/or elements of fraud in will making.

73. She observed that in *Wintle v Nye* [1959] P 1 All ER 552, a lawyer who drafted a will was the principal beneficiary of the testatrix's estate. And that the evidence showed that the testatrix was not very educated and, for most of her life, she had relied on the solicitor to make business decisions. And that it was held and that the circumstances were suspicious and the gift failed as a result. She submitted, therefore, that where a Will is contested on the grounds of fraud, essentially what is being challenged is the testamentary capacity of the testator i.e that the testator was deceived into making the provisions under the contested will that he would not have ordinarily made.

74. She reiterated that the particulars of fraud as pleaded cannot stand as regards the making of wills. And that none of the particulars of alleged fraud support allegations of fraud in making of wills.
75. She then submitted on the emails exchanged between Mr. Kambale and Mr. Mbilizi as an instrument of fraud to will making. She noted that the statement of case, does not make any allegation that the emails exchanged between Mr. Kambale and Mr. Mbilizi carrying instructions on the Will were meant to facilitate fraud. And that the particulars of fraud do not allege that Mr. Kambale created the emails fraudulently to personally benefit from the Will or to ensure that a beneficiary could not inherit their lawful part of their estate. And that, in short, there is nothing in the statement of case relating to the emails exchanged being a basis for vitiating the Will on account of fraud.
76. The defendant observed that this matter proceeded to court and there was no attempt by the claimants to include on the particulars of fraud, the creation and/or production of fake emails as a fraudulent enterprise by Mr. Kambale. And that, in any case, Mr. Kambale is not a party to these proceedings and it would be improper to make adverse findings against him to the detriment of the defendant. She cited *Corbett v Newey Case* in that regard.
77. The defendant submitted that, in short, the claimants did not raise this issue in their statement of case. And that the claimants are bound by their pleadings. She observed that the first time adverse allegations are made about the emails are in the evidence of Mrs Muocha. She insisted that the allegations made by Mrs Muocha cannot stand as they do not appear anywhere in the statement of case. And that it does not matter that Mrs Muocha was cross examined on her allegations related to the emails when she testified.
78. The defendant noted that the Supreme Court of Appeal in *Gurmair Garments (EP2) Ltd (In Liquidation) and Crown Fashions Limited v Ismail Properties Ltd* [2007] MLR 127 at 129-130 summarised the legal position as follows:

Answering a question during cross examination Mr. Masumbu stated that the type of winding up which the 1<sup>st</sup> appellant underwent was a creditors voluntary winding up. He was then asked if there was a resolution authorizing him to commence proceedings to which he answered in the negative. The learned judge took the view that Liquidator in the present case, required the approval of the resolution of the company in order to commence the legal action. He came to the conclusion that Mr. Masumbu did not have the required approval and therefore, lacked authority to commence the proceedings in the High Court. The problem here is that the Respondents did not plead that the Liquidator lacked the necessary authority to commence the action. The appellants are saying that the Liquidator's lack of authority to commence action was not raised in the pleadings of the parties.

79. She noted further that at page 130, the Supreme Court of Appeal concluded:

We entirely agree with learned counsel for the appellants that the decision of the Court must be based on issues raised by the parties in their pleadings. Therefore, since the issue of the liquidator's authority to commence court proceedings was not an issue in the pleadings, it was not fair for the learned Judge to consider and decide it in favour of the Respondents. It did not "matter that Mr. Masumbu was asked [about] such authority during cross examination ...

80. She then submitted that, in any case, even if the emails were held to be fraudulent, they would not support fraud related to making of wills. She stated that this is because the emails do not suggest Mr. Kambale's quest to benefit from the estate of the deceased. And that the emails do not even suggest that Mr. Kambale intended to mislead the deceased about his testamentary powers in relation to any of the beneficiaries.

81. She reiterated that there is nothing in the emails showing that Mr. Kambale influenced the deceased so as to benefit Mr. Kambale personally in any case, and that the evidence from the internet service provider on the authenticity of emails was not tested. And that internet service provider witness' testimony went in unchallenged. That he was hardly cross examined apart from being asked that he did not bring any data to Court. She asserted that his testimony however, was beyond data. And that he testified about how and why he concluded that the emails in issue emanated from Francis Mbilizi to Mr. Kambale. And that his evidence was not contradicted in this regard. The defendant observed that Mrs Muocha does not work for any email service provider. And that she did not come as an expert on email generation. And that at the most, she raised personal observations about emails.

82. The defendant asserted that the evidence of Mr. Kambale and the two witnesses to the Will who are his workmates, was that the Will was signed by Mr. Mbilizi in Mr. Kambale's office. And that the two witnesses saw Mr. Mbilizi sign the Will and in the presence of each of each other. She asserted that there is no doubt, that section 6 of the Deceased Estates (Wills, Inheritance and Protection) Act was complied with to the letter.

83. She then asserted that the two witnesses to the Will were not discredited during cross-examination. And that they knew Mr. Mbilizi as a client. And that the deceased had been to GK Associates of Mr Kambale a number of times before the signing of the Will. And that they were invited to Mr. Kambale's office and they simultaneously saw Mr. Mbilizi sign. She noted that this was the uncontroverted evidence.

84. She noted that the witnesses to the Will indicated that they did not see the alteration on the date of the Will as they were only asked to witness the Will on the last page.
85. The defendant then submitted on the timing of the alteration on the Will herein. She asserted that the evidence of Mr. Kambale is crucial on this point. And that Mr Kambale stated that upon completion of the Will, the deceased noted that he still had a loan with National Bank of Malawi secured by one of the properties in the Will. And that the deceased expected to clear the loan secured by the property within one year. And that the deceased therefore, decided to alter the date of the Will to read "23<sup>rd</sup> November 2019." She contended that it is clear that the date of the Will was consequently, altered before signing of the Will by the deceased and the two witnesses. And that this evidence was uncontroverted.
86. The defendant noted that Parry and Clark, The law of Succession, 7<sup>th</sup> Edition, Sweet Maxwell (1977) have also discussed the issue of alterations at page 56 to 57 as follows:

There is a rebuttable presumption that an unattested alteration was made after execution of the Will. This presumption may be rebutted by any reasonable evidence either from the Will itself or extrinsic evidence. The presumption has been rebutted by the evidence from the Will itself where the alterations were made to supply blanks left in the Will by the drafts man..... Extrinsic evidence rebutting the presumption may take different forms, for instance, the evidence of the draftsman of the Will or declarations by the testator showing that he made the alterations before executing the Will.

87. The defendant asserted that we had Mr. Kambale the draftsman giving evidence which was uncontroverted. And that his evidence covered the reasons for the alteration of the date.
88. The defendant then submitted on the effect of the alteration made on the date of the Will herein. She noted that section 9 (3) of the Deceased Estates (Wills, Inheritance and Protection) Act states that:

No obliteration, interlineations or other alteration made in the Will after its execution has any effect unless such alteration is signed and attested as a Will required to be signed and attestation under section 6, or is referred to a memorandum written at the end or some other part of the Will and so signed and attested before execution, after execution.

89. She then noted that Rule 14 of the Probate (Non-contentious) Rules provides that:

(1) where there appears in a Will any obliteration, interlineation or other alteration which is not authenticated by the signature of the attesting witnesses or by the re-execution of the Will or by the execution of a codicil, the Judge may require evidence to show whether the alteration was present at the time the Will was executed and shall give directions as to the form in which the Will shall be proved.

(2) .....

(3) Where there is doubt as to the date on which a Will was executed, the Judge may require such evidence as he thinks necessary to establish the date.

90. The defendant recalled that during cross-examination, Mr. Kambale was asked whether he was aware of Rule 14 of the Probate (Non contentious) Rules. She noted that, strangely, during submissions the claimants do not make reference to Rule 14 of the Rules. In her view, this is because Rule 14 of the Rules defeats the claimant's submissions and runs counter to the cases they intend to rely on to prove their case on this point.

91. She noted that the claimants have relied on the case of *Malunga v Fintec Consultants and Another* [2007] MLR Com. 263 for the proposition that a document speaks for itself. She noted that the position of the law stated in the *Malunga case* represents the general law relating to parol evidence in the construction of documents.

92. She noted that wills are however, a special kind of document. And that as acknowledged by Israel Supreme Court in *The Estate of Nissim Elbaz v Paz* (taken from D. Hacker. "Soul less Wills" (2010) 35 (4) Law and Social Inquiry 957 at p 958:

The Will is a unique document. It is a legal document but this document does not lack soul. It is like a final personal letter; an expression of wishes, love, feelings and even a settling of accounts which comes from the depths of a person's heart as he reflects on his death and what will happen after he has passes away...

93. She added that this also acknowledged by Karen Sheddon, Speaking for the Dead at p 684 that 'a Will is arguably the most important legal document an individual ever executes... This personal document is ostensibly the individual's (the testator's document...'.

94. The defendant then observed that the construction of wills is catered for by special rules in Malawi, the Probate (Non contentious) Rules. And that Rule 14 deals with alteration of wills. She reiterated that Rule 14(1) provides that the Judge is at liberty to hear "evidence to show whether the alteration was



- present at the time when the will was executed". She observed that Mr. Kambale's evidence dealt with this aspect and was uncontroverted.
95. The defendant pointed out that, Rule 14(3) provides that where there is doubt as to the date on which a will was executed, the Judge may require evidence to establish the date. And that, in the instant case, there was clearly dispute as to the date when the Will was executed. She noted that she had already submitted that the date of the Will is inconsequential. And that although the issue of the date of the Will took centre stage of the claimants' case the same is immaterial. She reiterated that the inclusion of a date or even a wrong date does not affect the validity of the Will. And that even an undated will is valid.
96. The defendant observed that apart from allowing witnesses to give evidence to deal with the doubt relating to the date, the Court also asked Mr. Kambale when the Will was executed. And that Mr Kambale explained that it was the week following 24<sup>th</sup> November 2018. She noted that this evidence was amply supported by the emails exchanged between Mr. Kambale and the deceased, and that this evidence was uncontroverted.
97. The defendant asserted that the evidence by Mr Kambale to clear the dispute as to the date of execution of the Will is allowable under Rule 14. And that this Court is allowed to admit such evidence about the date of execution.
98. The defendant then contended that the submissions by the claimants based on *Malunga v Fintec Consultants and Another* and *Kamwendo v Bata Shoe Company* do not apply to construction of wills. And that Rule 14 is applicable and it allows a Judge to admit extrinsic evidence to establish the date of execution. She reiterated that at law, however, the date of execution is a very small issue. And that it does not affect the validity of the Will.
99. The defendant asserted that Rule 14 also allows extrinsic evidence to deal with issues of "alterations." She concluded by indicating that it is not surprising that although the claimants raised Rule 14 in the cross examination of Mr. Kambale, they did not raise it even once in their submissions. And that it does not support their case and was consequently abandoned in their submissions.
100. The claimants then replied as follows. They noted that the defendant alleges that the date on the will was "altered upon the instructions of the deceased". They then submitted that no evidence was adduced to support this assertion. They observed that the evidence of Mr. Kambale is that instructions were given through email. And that there is nowhere in the emails where instructions are given to alter the date or indeed postdate the Will. They added that the assertion contradicts what Mr. Kambale stated in cross examination that the alteration was done by late Mr. Mbilizi. They contended that if the deceased gave him instructions to alter the date as alleged it means the alteration was done by someone else and not the deceased himself. And that

all these contradictions put together should tip the balance of probability in favor of the claimants.

101. The claimants then submitted that, regarding the date of the Will, we are in this case dealing with a Will that is dated and nobody has made a suggestion that the date is wrong or invalid. They submitted further, that the position of Mr. Kambale is that the date on the Will is the correct date. And that, therefore, the submission that “formal requirements do not require that a Will be dated (and) a Will which has no date or has a wrong date is valid” is not relevant to the case before this Court.
102. The claimants then asserted that the pleading of fraud in their statement of case should be understood in the context of given particulars. They noted that what is fraud at law becomes a relevant question to understand the pleading. They observed that Jowitt’s Dictionary of English Law (2<sup>nd</sup> Edition) defines fraud as “false misrepresentation of fact made knowingly, or without belief in its truth, or recklessly, not caring whether it is true or false”. See *Derry v Peek* (1899) 14 App 337.
103. They pointed out that they are saying that on 23<sup>rd</sup> November, 2019 the deceased was in Mangochi. However, that someone has misrepresented that on that date the deceased was in Blantyre and signed the Will in contention in this matter. And that this squarely fits the definition of fraud. They asserted that it is not the law that fraud will only exist where the person perpetrating the fraud benefits from the fraudulent activity. And that, therefore, whether Mr. Kambale benefited or not is immaterial. They insisted that what they are saying is that looking at the totality of evidence in this matter there was fraud involved.
104. The claimants further submitted that, if someone presents a will with a forged signature as contended by the claimants that would be fraud. They noted that it is “deceptive conduct” to borrow the description of Lewis Chezani Bande in “The Law of Inheritance and Administration of Deceased Estates in Malawi” 2021 at p. 135.
105. The claimants also asserted that the submission made by the defendant that the evidence of Mr. Kambale was uncontroversial that the alteration took place before execution of the Will is not supported by evidence in this matter. They observed that at no point in his evidence did Mr. Kambale state that that alteration took place before execution of the Will. And that there is no such evidence in his witness statement as well as oral evidence in cross-examination and re-examination.
106. They then asserted that the submission made by the defendant at that if date of the Will is not 23<sup>rd</sup> November, 2019 it would mean that instead the date would be 23<sup>rd</sup> November, 2018 has no merit at all. They pointed out that,

the Court will recall that in cross-examination Mr. Kambale conceded that the Will could not have been concluded and signed on 23<sup>rd</sup> November, 2018.

107. The claimants noted that the defendant suggests that what Mr. Kambale told the claimants that the Will was signed on 23<sup>rd</sup> November, 2019 was a result of memory lapse. They submitted that this suggestion is not supported by evidence in this matter. And that there was no memory lapse. And that after all the date is documented as appearing in the Will itself.
108. They then noted that if the emails tendered in evidence by Mr. Kambale, which he states was the mode through which instructions were given, are anything to go; it is important to emphasize that these emails do not give Mr. Kambale instructions to postdate the Will as alleged. And that if the deceased indeed on 24<sup>th</sup> November, 2018 at 7:04 a.m. stated "GK, this is fine, please let us finalise" it would mean that he wanted to have an effective Will in place immediately. They asked this Court to imagine if the deceased died before the so called postdated date and that then the deceased could not have had a Will left. And that, therefore, the suggestion that the Will was postdated or fast tracked is absurd on the facts of this matter.
109. The claimants indicated that it is not for them to speak for whoever committed the fraud on why they did what they did and in the manner that they did. And that if they are to respond to the question on what could have been wrong with leaving the date as 23<sup>rd</sup> November, 2018; what could have been wrong is that the Will was never concluded and signed on 23<sup>rd</sup> November, 2018 as confirmed by Mr. Kambale during cross examination.
110. The claimants then argued that submissions of the defendant seeking to justify the so-called postdating of the Will has no merit at all. And that as stated above there is no evidence that the deceased gave Mr. Kambale instructions to postdate the Will. They observed that, of course Mr. Kambale has contradicted himself because he also stated in cross examination that the alteration was done by the deceased. And that in another breath he states that he had instructions to alter the Will. The claimants asserted that, clearly, Mr. Kambale's evidence is not credible on this point and should not be believed. They also observed that, if the emails are anything to go by the deceased wanted the Will finalized. And that this means that he wanted to have the Will in place immediately. Therefore, that postdating the Will would have meant that this intention could not have been achieved. And that this makes it absolutely doubtful that the deceased could have intended that his Will be postdated.
111. The claimants also submitted that the idea that a crucial legal document like a Will can be postdated is completely alien to the law and practice in Malawi.

112. They then observed that the Will speaks for itself. And that it states that it was made on 23<sup>rd</sup> November, 2019. And that, therefore, the evidence of the deceased mobile phone service provider on whereabouts of the deceased on that date is not irrelevant. They added that there is no need for the claimants to bring any other evidence to prove that the Will was made on 23<sup>rd</sup> November, 2019. And that the Will is speaking for itself. They reiterated that the Will is not stating that the date is postdated or fast tracked as alleged by Mr. Kambale. However, that it states that it is made on 23<sup>rd</sup> November, 2019.
113. The claimants then conceded that it is correct that there are authorities that state that it is not a requirement that a Will be dated. However, they observed that in the present case the dispute is not that the Will is not dated. Rather, that the alleged maker of the Will in this matter indicated a date when the Will was made. They asserted that the date is very critical as it aids the Court to determine whether the Will is valid or not. And that the date as indicated is part of the Will. And that it cannot be ignored. They insisted that the date should be fully taken into account together with all other evidence presented by the claimants in determining whether the Will is valid.
114. The claimants then asserted that the issue of veracity of the emails exhibited by Mr Kambale signifying his instructions from the deceased herein is linked to the fraud pleaded by the claimants. And that although Mrs. Muocha did not come as an expert she demonstrated that she has IT knowledge and knows how emails work.
115. The claimants repeated that although Mr. Kambale gave evidence attempting to justify that the date of the Will was altered on instructions of the deceased, there is nothing in his evidence suggesting that the Will was altered before execution.
116. The claimants then asserted that Rule 14 and indeed entire Probate (Non-contentious) Rules apply where there is an application for the grant of probate. They observed that that is not what is happening in this matter. And that it is for this reason that they did not dwell on these Rules in their submissions.
117. They argued that Rule 14 does not defeat their case. And that Rule 14 applies in an application for probate. The claimants observed that the procedure on how the Judge would proceed when there is any alteration is prescribed in Rule 14 (3). And that under this rule the Judge asks or requires that evidence be adduced and directs the manner on how the Will be proved. Further, that the process is Judge driven. They noted that this Court has not invoked such procedure in this matter understandably so because in this matter this Court is not dealing with an application for probate.

118. The claimants argued further, and without prejudice to the foregoing, that Rule 14 deals with authentication of alterations. They noted that this case is about validity of the entire Will. And that it is not about alterations. They noted that Mr. Kambale states that the date as altered is valid. And that the question, *inter alia*, is whether the deceased could have signed the Will at Mr. Kambale's office on the date stated in the Will.
119. The claimants indicated that they flagged Rule 14 during cross-examination to appreciate whether Mr. Kambale was aware of what it prescribes. And they noted that as it turned out Mr. Kambale did not know this Rule.
120. The claimants reiterated that the law laid down by the Malawi Supreme Court of appeal in *Malunga v Fintec Consultants* [2007] MLR 263 is binding on this Court. They reiterated that the Will presented by Mr. Kambale speaks for itself. And that it boldly speaks that it was made on 23<sup>rd</sup> November, 2019. They asserted that Mr. Kambale's oral evidence cannot amend it to read that the date was postdated or fast tracked as he attempted to explain.
121. The claimants insisted that case law from Israel cited by the defendant cannot override this clear precedent of the Malawi Supreme Court of Appeal. They added that the binding authority of *Malunga v Fintec Consultants* has not given any exceptions. And that it follows in their well-considered submission that the principle laid down by the Supreme Court of Appeal is applicable to Wills.
122. The claimants then observed that having a Will speaking for itself that it was made on 23<sup>rd</sup> November, 2019 cannot be inconsequential. And that the date in this case is very significant and cannot be ignored because it is the date on which the Will itself states that it was made and on this date on which the deceased supposedly signed the Will at Mr. Kambale's office in Blantyre the deceased was in Mangochi. They insisted that this Court cannot and should not ignore this.
123. This Court has considered the respective arguments of the parties. The first issue is whether the date of the will is significant in this matter. As correctly submitted by both parties, dating a will is not stated as a formal requirement on the making of a will under the Deceased Estates (Wills, Inheritance and Protection) Act. It has been persuasively held that a will shall be valid even when it is not dated. This is because a will operates from the date of the death of the one making it. See section 13 (1) of the Deceased Estates (Wills, Inheritance and Protection) Act which provides that every will shall be construed with reference to the estate comprised therein, so as to take effect as if made immediately before the death of testator. Also see *Corbett v*

*Newey* [1998] Ch. 57. But a will has to be dated for no other reason than to indicate whether it supersedes an earlier will.

124. However, as correctly submitted by the claimants, in the circumstances of the present matter the date of the Will of the deceased is a significant factor in determining the dispute at hand. Contrary to the defendant's submission, the date of the Will cannot therefore be inconsequential in the present matter. The whole dispute in this matter has arisen because of the vagueness about the actual date of the Will. In any event, the Probate (Non-contentious) Rules provide for how to deal with a dispute pertaining to the date of a will. This illustrates that while dating a will is not a formal requirement on will making, the date of a will itself may be significant hence the provision of rules in relation to the ascertaining of the same.
125. The next issue for consideration is whether this Court is bound to consider only the Will and not extraneous evidence as it teases out the issues surrounding the vagueness of the date on which the Will herein was signed.
126. Whilst this Court agrees with the claimant that a document must speak for itself as decided authoritatively by the Supreme Court of Appeal in the case of *Malunga v Fintec Consultants* [2007] MLR 263, this Court is persuaded by the defendant's contention that the position enunciated in that case is a general position of law. And that this general position of law is altered when it comes to wills in so far as an alteration on a will is concerned, which in the present matter has a bearing on the ascertaining of the date of the Will in issue. This is where Rule 14 of the Probate (Non-contentious) Rules come into play.
127. As correctly submitted by the defendant, where there are alterations to a Will this Court is entitled to receive evidence on the same, extraneous to the Will. In that connection, this Court is not persuaded by the claimants' contention that the Probate (Non-contentious) Rules only apply on proof of a will with a view to obtaining probate. Obtaining of probate is about proof of validity of a will. The same question of validity of the Will has arisen in the present matter. This Court is of the view that the Probate (Non-contentious) Rules ought to apply in the present case which is not necessarily about obtaining probate but where the question of the validity of the Will is in issue on account of an alteration to the said Will. This Court is therefore entitled to receive the evidence on the alteration of the Will herein on the strength of Rule 14 Probate (Non-contentious) Rules.
128. The entirety of the evidence as received in this matter shows that the Will herein was made in November 2018, on an unknown date in the week after 24<sup>th</sup> November, 2018, but was never immediately put into effect and on the deceased's instructions was not to take effect until 23<sup>rd</sup> November 2019.

In the words of the drafting Counsel, the Will was ‘postdated’ by an alteration on the date of the Will which was effected at the behest of the deceased before execution of the Will. This is per the uncontradicted evidence of the drafting Counsel as submitted by the defendant. The reasons for this postdating are as stated by Counsel Kambale. As earlier indicated, on finding of established facts, this is consistent with the evidence of both parties in this matter which shows that on 23<sup>rd</sup> November 2019 the deceased never signed the Will herein. He had signed his Will on an unknown date sometime in November, 2018. It is significant to note that this phenomenon of ‘postdating’ of the Will is not reflected in the Will itself. This Court will deal with this aspect shortly in this decision.

129. The next issue for consideration is whether the circumstances of the present matter admit of the particulars of fraud as made by the claimants herein the Will having been presented as having been made on 23<sup>rd</sup> November 2019 when in fact that was not the case.
130. This Court notes that the claimants correctly observed that Jowitt’s Dictionary of English Law (2<sup>nd</sup> Edition) defines fraud as “false misrepresentation of fact made knowingly, or without belief in its truth, or recklessly, not caring whether it is true or false”. See *Derry v Peek* (1899) 14 App 337. The question is whether this legal definition of fraud is limited when it comes to fraud pertaining to wills, as submitted by the defendant.
131. It appears to this Court at a first glance that, fraud in relation to the making of wills is more limited than the general definition indicated by the claimants. Fraud essentially vitiates a testator’s knowledge and approval, where it has induced him or her to make a will in a particular manner. This is as submitted by the defendant. See *Wintle v Nye* [1959] P 1 All ER 552.
132. However, it has been persuasively observed by G.E Dal Pont and Ken Mackie learned authors of Law of Succession (2017), Second Edition at 72, that fraud can take many forms and that it can embrace a wide category of conduct affecting testamentary dispositions. For instance, that a will was fabricated by another or otherwise that the conduct of the beneficiaries amounted to fraud. They observe that forgery is another form of fraud but this is an aspect that will be dealt with later.
133. What is key however is that, as submitted by the claimant and contrary to the defendant’s submission, fraud can take many forms and that it can embrace a wide category of conduct affecting testamentary dispositions. For instance, there could be fraud if the date of the will has been added or altered by someone else at a later date than when the testator signed on the will with the effect that the last will of a testator is made to appear not as the last will of the said testator.

134. As such, this Court does not agree with the submission by the defendant, that the allegations of fraud in the claimants' statement of case in this matter do not allege that the fraud in question affected testamentary dispositions herein and that therefore the statement of case falls short of alleging fraud on making of wills. The allegation of fraud in this matter has therefore been properly made in the claimants' statement of case and concern the alteration of the date of the Will. That impugned alteration has been explained on the evidence received and has been dealt with under Rule 14 Probate (Non-contentious) Rules. The allegation of fraud, though properly made in the statement of case, has therefore not been proved on the evidence on a balance of probabilities to invalidate the Will herein.
135. The last point for consideration is the issue: what is the effect of postdating the will herein. The fact that the Will herein was postdated is sufficiently established by the evidence of drafting Counsel Kambale taken alongside all the evidence in this matter. This Court has no reason to doubt the narrative given by Counsel Kambale in that regard. Contrary to the assertions by the claimants, Counsel Kambale produced emails that explain in detail how the instructions on the contents of the Will were given up until the final email of 24<sup>th</sup> November, 2018 giving a go ahead to Counsel Kambale to finalize the Will. There was a spirited effort to discredit the emails giving the instructions to Counsel Kambale but on the whole of the evidence this Court is satisfied that the said emails are reliable. This is because the emails tell a consistent story on how the deceased instructed Counsel Kambale on his final wishes as to disposal of his property. This Court therefore agrees with the defendant's submission that there is no basis for finding that the emails between the deceased and Counsel Kambale should be faulted.
136. Whilst the claimants submitted that the postdating of the Will herein is alien to the practice of law, it appears that the deceased had the requisite intention to make the Will herein and it would be unjust for this Court to invalidate the said Will when there is no authority supporting the invalidation of a postdated Will that is properly executed. This Court is duty bound by section 11 of the Deceased Estates (Wills, Inheritance and Protection) Act to ensure that the intention of the testator is given effect to, so far as such intention can be ascertained from the wording of the Will. Of course, it has to be conceded that had the deceased died before 23<sup>rd</sup> November, 2019 he would have died without a will on account of the postdating of his Will. What happened in this matter is not meticulous and ought to be discouraged as it is a cause of much heartache to the beneficiaries who are left with much suspicion which inevitably prompts them to go in search of answers.



137. This Court next considers the parties' arguments on the question of forgery of the signature of the deceased on the Will in issue herein. The claimants submitted on the issue of signature on the Will. They noted that they called Mr. Tiyeso Chiumbudzo, a senior Police Officer and a signature expert to present his report. They took the view that he was extensively cross-examined and explained why he believes that the signature on the Will is a forgery.

138. The claimants then pointed out that the defendant had also indicated in paragraph 25 of her pre-trial check list that she was going to parade a graphologist from Malawi Police Service as one of her witnesses. But that this never happened. They noted that no explanation has been given by the defendant on why she did not parade this witness. They added that, if truth be told, this witness was very critical to the issue of the disputed signature in this matter. They noted further that the graphologist's evidence and that of Mr. Chiumbudzo, Deputy Commissioner of Police could have helped this Court to draw conclusions on the authenticity of the disputed signature.

139. The claimants then noted that failure to call a material witness has legal consequences. And that when dealing with a similar situation in the case of *Maonga and Others v Blantyre Print and Publishing Co. Ltd* [1991] 14 MLR 240 at 249 Unyolo J. (as he was then) said:

In a situation such as this it has been held, quite correctly in my view, that if a witness who is available is not called it may be presumed that his evidence would be contrary to the case of the party who failed to call him. See *Kamlangila v Kamlangila* [1966-68] 4 ALR (Mal) 301.

140. The claimants then observed that Banda J. (as he was then), put it in this way in *Leyland Motors Corporation Malawi Ltd v Mahomed* Civil Cause no. 240 of 1983 (unreported):

Failure to call a material witness to testify on a material point may damage the case of the party who fails to do so as such failure may be construed that the story is fictitious.

141. And that in *Attorney General v Chirambo* civil cause no. 444 of 1985 (unreported) Makuta CJ, (as he was then) put it thus:

Such failure (that is to call a material witness) may raise suspicion and although suspicion is not enough proof of guilt but it has the effect of reducing the weight of the evidence of a party.

142. The claimants then submitted that the presumption to be had from failure by the defendant to bring the graphologist from Malawi Police is that the evidence that this witness could have given could have been contrary to her argument that the signature is that of late Mr. Francis Mbilizi. And that this is why she has not called this witness.
143. The claimants contended that the evidence of Mr. Chiumbudzo is exhaustive on the issue of whether the signature on the Will is a forgery. They noted that he had done a comprehensive analysis on the signature on the Will and other specimen that he was given. And that his conclusion after such analysis is that the signature on the Will is a forgery.
144. They reiterated that Mr Chiumbudzo was extensively cross-examined by defence counsel. And that he remained resolute in his evidence and did not flinch. And that he came out as a truthful witness. They submitted that after the scrutiny both the witness and his evidence remain credible. The claimants then asserted that there is nothing to doubt his conclusion that the signature on the Will is a forgery. And they prayed that on the basis of this evidence alone this Court should hold as such.
145. On her part, the defendant submitted as follows on the issue of forgery. She submitted that the burden of proof rests on the claimants, in order to prove the allegations of forgery. And that according to the Kenyan case of *In re Estate of Pradeep Behal (Deceased)* [2019] eKLR, it was stated that the evidence of a document examiner is essential to prove allegations of forgery. She noted that the court further stated that the courts are guided by several principles when relying on evidence of handwriting experts.
146. The defendant observed that, in *Christopher Ndaru Kagina v Esther Mbandi Kagina & Another* [2016] eKLR the court stated that the fundamental characteristic of expert evidence is that it is opinion evidence. And that to be practically of assistance to a court, however, expert evidence must also provide as much detail as is necessary to allow the court to determine whether the expert's opinions are well founded.
147. The defendant observed further that *In re Estate of Pradeep Behal (Deceased)* case, while applying the law stated in the case of *Namaina v Republic* [1978] KLR 11, the court stated that such an expert is not able to say definitely that anybody wrote a particular thing. And that the reasoning is based upon the knowledge that handwritings can very easily be forged. Further, that moreover a person may not write in the same style all the time. The defendant asserted that the expert is therefore faced with trying to analyze forged writing as well as disguised writing.
148. She submitted that in cases where there is a problem about the writing it is the duty of the court to satisfy itself after examination whether the expert's

opinion can be accepted and cannot blindly accept such opinion. And that in these areas of conflict, it is prudent to look for other evidence so that forgery can be excluded on the one hand, and mistaken identification excluded on the other.

149. The defendant then asserted that the evidence by Deputy Commissioner Chiumbudzo was far from convincing. And that he even conceded that if he was aware of the deceased's signature on the official document, the passport, he would have called for more documents to analyse before concluding. And further, that he also did not give a satisfactory reason why the signature on the cheque was deemed to be the deceased's official signature.
150. The defendant also implored this Court that in considering the expert's evidence it should consider Mr. Kambale's evidence relating to the Will making process. She asserted that the emails in this matter are very crucial and will dispel all issues pertaining to alleged forgery.
151. The defendant observed that the claimants' allegation of forgery implies that the deceased had no knowledge of the existence of the Will or that he never authorized the contents therein by signing it. She asserted that, in the present case, not only was counsel Kambale given clear instructions to prepare the Will by Mr. Mbilizi in 2018, Mr. Mbilizi clearly instructed Counsel Kambale on which exact properties were to be disposed and to whom as evidenced by the emails exchanged. She asserted further that, therefore, not only was Mr. Mbilizi aware of the Will, he authorized the same by giving counsel Kambale the instructions to prepare the Will and even more so when he signed in the presence of the two witnesses.
152. The defendant noted that Counsel Kambale was evidently the late Frank Mbilizi's lawyer having made several transactions on his behalf as evidenced by his witness statement.
153. The defendant submitted that the expert evidence presented by the claimants should be collectively considered along with all other available evidence. And that as stated in the *Adbulhey Ebrahim Karani v Mohomedali Ahmed Karani and others* case number 02266/2014 the requirement for the two witnesses to sign in the presence of each other and the presence of the testator is to prevent fraud, forgery and misrepresentation. And that it thereby reinforces that eyewitness evidence of attesting witnesses is superior to that of handwriting experts, which really is only opinion evidence.
154. The defendant then submitted on the particulars of forgery as pleaded in the statement of case. She indicated that the genesis of the allegations of forgery are apparently a cheque that the claimants saw. And that they thought that the signature on the cheque was different from the signatures that the deceased had signed on other documents.

155. She submitted that this the easiest part of the case because both parties, by their documents tendered in evidence, agreed that the deceased did not have a consistent signature.
156. The defendant observed that Mrs. Muocha in her evidence said she submitted a number of documents to the handwriting expert namely the cheque on page 28 (Trial Bundle), Transfer of Land from the deceased to Thokozani Deborah Mbilizi on (page 29 Trial Bundle), Transfer of Land from the deceased to Francis Chimwaza on (page 43, Trial Bundle) and The Will on (page 49 Trial Bundle).
157. The defendant noted that, during cross-examination, Mrs Muocha conceded that the deceased's signatures even on the four documents submitted for analysis were not consistent. And that this was obvious to a lay person without any training in forensics or handwriting analysis.
158. The defendant observed that the inconsistencies and discrepancies were even more glaring when the witness was shown more documents signed by the deceased. She noted that Mrs Muocha conceded that none of the signatures were "consistent" and that some of them were significantly different. She observed that Mrs Muocha said however, that she could not disown the documents and confirmed that they were genuine documents which were signed by the deceased.
159. The defendant then asked this Court to follow the approach in the Kenyan cases that she cited when this Court deals with the question of fraud. She also submitted that the other evidence that the court should consider are the emails exchanged between Mr. Kambale and the deceased before 24<sup>th</sup> November 2018. She asserted that such evidence clearly points to the wishes of the deceased and curtails any suggestions of forgery on the Will.
160. The defendant then asserted that the evidence by Mr. Chiumbudzo was clearly shaky. And that it was obvious that his analysis was troubled. She observed that Mr. Chiumbudzo could not clearly explain why the signature on the cheque was taken as the "control" specimen. And that, as a matter of fact, he conceded that even on the documents that were submitted for analysis, the deceased did not exhibit any consistency with his signature.
161. She observed that, on being shown the deceased's signature on the passport, amongst other documents, Mr Chiumbudzo conceded that if he was aware of the obvious inconsistencies on the other document, he would have asked for more signatures for a more comprehensive analysis. It was the defendant's view, that his conclusions were consequently not well grounded. She added that the expert did not have enough specimen signatures to carry out a conclusive analysis. And that there was no evidence that the signature

on the cheque was the most consistent signature for the deceased to be used for making allegations of forgery.

162. The defendant then submitted that this Court must therefore rely “on other evidence” to discount the allegations of forgery such evidence as the emails tendered by Mr. Kambale in his evidence.
163. In reply, the claimants observed that that foreign cases from Kenya relied upon by the defendant are distinguishable and in any case not binding on this Court.
164. The claimants then asserted that the issue of veracity of the emails exhibited by Mr Kambale signifying his instructions from the deceased herein is linked to the fraud and forgery pleaded by the claimants. And that although Mrs. Muocha did not come as an expert she demonstrated that she has IT knowledge and knows how emails work.
165. They submitted that there was nothing wrong with Mr. Chiumbudzo relying on the signature on the deceased’s cheque in doing his analysis. And that this Court will note that even the defendant has not disputed that the signature on the cheque is that of the deceased. And that it follows that this signature was a true signature of the deceased and there was nothing wrong in using this signature and that on the other documents that were given to Mr Chiumbudzo to analyze the signature on the Will. And that his work cannot be impeached on this basis.
166. The claimants asserted that, in respect of the evidence of Mrs. Muocha, it must be emphasized that she did indeed state that the signature of the deceased on the various documents tendered in evidence in this matter had some slight differences and could be attributed to the deceased but she maintained that the one on the Will was completely different from the rest and had no similarities with the rest of the signatures and is not a signature of the deceased. The claimants asserted further that the same conclusion is made by Mr. Chiumbudzo. They noted that he pointed out that indeed there were some variations in signatures shown to him. And that he was able to ably point out the differences and explain them.
167. They then observed that the defendant has been very selective in capturing in her submissions what Mr. Chiumbudzo stated in his evidence during cross examination. And that at the end of the day Mr. Chiumbudzo was emphatic that the signature on the Will is a forgery.
168. The claimants then pointed out that there is no contrary evidence to that given by Mr. Chiumbudzo in so far as the analysis of the signatures is concerned. And that as indicated earlier in their submissions, the defendant did state in her pre-trial check list that she would bring her own signature expert but did not bring this witness.

169. The claimants noted that the defendant's evidence is just general. And that the defendant and Mr. Kambale are just stating that the signature of the deceased was not always the same but was similar. Further, that both the defendant and Counsel Kambale have avoided to zero in on the specifics. And that they have not touched on the specifics of the signature on the Will whereas Mr. Chiumbudzo has. They noted that Mr Chiumbudzo has ably pointed out discrepancies on the Will vis-a-vis all other signatures referred to him by defence counsel and maintained his conclusion that the signature on the Will is a forgery.
170. They then insisted that the evidence of Mr. Chiumbudzo is credible and that this Court should be guided by this evidence on this point. They asserted that on the signature, evidence is clear that the signature on the Will is not the signature of the deceased. And that the defendant is trying to hide behind the veil "the deceased did not have a consistent signature".
171. The claimants asserted that the signatures on all other documents presented in this Court are not in dispute. And that the signature in dispute is the one on the Will. They indicated that none of the claimants' witnesses has accepted that the signature on the Will is a signature of the deceased. And that Mr. Chiumbudzo and Mrs. Muocha consistently state that that signature cannot be attributed to the deceased.
172. The claimants insisted that although their witnesses stated that there were some variations in the other signatures of the deceased which defence counsel showed them and stated that those other signatures had some features of the deceased's signature but those witnesses insisted that the signature on the Will could not be the deceased's signature because it had no similarities to the other signatures of the deceased shown to them by defence counsel.
173. The claimants then submitted that, during cross examination, Mr. Chiumbudzo did a comparison between the other signatures shown to him by defence counsel with the one on the Will and insisted that the one on the Will is a forgery. They pointed out that Mr Chiumbudzo gave clear and good reasons for maintaining this position notwithstanding being shown the other signatures. They added that this Court will note that Mr. Chiumbudzo dealt with specifics of the signature on the Will vis-à-vis the other signatures. And that there is no reason why his analysis and evidence in cross-examination should not be believed in favor of a general statement by defendant's witnesses saying the deceased's signatures were inconsistent.
174. The claimants then argued that, regarding use of the signature on the cheque as a "control", the defendants never disputed that the cheque was signed by the deceased. They added that the defendant has not cited any legal authority for the suggestion that a "control" can only be a signature on an

official document. And that, in fact, there is no such authority. They asserted that an expert can work on any specimen that he is given.

175. The claimants then contended that, if the defendant wanted to use the passport which was in her custody as a control she was free to engage an expert to do analysis using the passport as a control and come up with a report. They noted that, however, as it turned out, having told the court that she is bringing a handwriting expert as a witness, the defendant did not bring this witness and has not even explained why this witness was not brought to court. The claimants asserted that the only reason why the defendant did not bring this witness is because she knew that the evidence of this expert or witness could have been adverse to her assertion that the Will was signed by the deceased. On that point, the claimants referred to *Maonga and Others v Blantyre Print and Publishing Co. Ltd* 14MLR 240 at p. 249).

176. Lastly, but not least, the claimants submitted that it is not correct that Mr. Chiumbudzo did not have enough specimens for him to do a conclusive analysis. And that the defendant has not defined what would have been “enough” for the exercise. They submitted that 3 specimens which Mr. Chiumbudzo used (plus the Will) is more than enough.

177. This Court observes that as correctly noted by the claimants, failure to call a material witness has legal consequences. And that as held in *Maonga and Others v Blantyre Print and Publishing Co. Ltd* [1991] 14 MLR 240, and the other authorities on the subject, such a failure results in adverse inferences against the one who has failed to call such a witness. It is however significant to note that what is key is that the witness must be material. This Court is not persuaded that with regard to the signing of the Will herein the failure to call a signature expert by the defendant is really a factor that must lead to an adverse inference against the defendant. The signature expert or other expert intended to be called and eventually not called by the defendant are secondary witnesses. An adverse inference cannot be had herein because the material witnesses to the signature on the Will herein were actually called by the defendant and these are the two witnesses to the Will. As correctly submitted by the defendant, those two witnesses to the Will provided direct evidence in this matter and were never impeached. They testified that that they saw the deceased sign the Will and they signed too. Additionally, counsel who drafted the Will was called to testify.

178. This Court would like to agree with the approach suggested by the defendant on dealing with allegations of forgery of a will as is stated in the Kenyan cases cited. Those cases are said to be distinguishable by the claimants but no basis for distinguishing them has been stated. It is true, as stated by the claimants, that those cases are not binding on this Court.

However, this Court finds those cases persuasive on the subject. As correctly submitted by the defendant, and as is usually the case in judicial adjudication, this Court is bound to consider all the evidence in the matter alongside the expert opinion evidence. This will help the Court to exclude forgeries while at the same time avert the throwing out a will where the signature is really that of the testator.

179. This Court observes that, as submitted by the defendant, it has already found that the emails that passed between Counsel Kambale and the deceased told a seamless story on the instructions for the drafting of the Will. Counsel Kambale did many transactions for the deceased. This Court has no reason to doubt that the Will herein was drafted on the deceased's instructions. Witnesses to the signing of the Will by the deceased also testified to seeing the deceased signing the Will.
180. Given the foregoing background, and considering that there were many documents that were signed by the deceased which displayed many variations in the signature of the deceased, this Court does not agree with the opinion of the handwriting expert Deputy Commissioner Chiumbudzo that the signature on the Will herein is a forgery. The totality of the evidence weighs against the expert opinion given on the forgery of the signature. The insistence by the claimants that the signature on the Will is a forgery despite it being similar to the various varied signatures of the deceased cannot hold.
181. In the final analysis, this Court finds that the claimants have not proved the allegation of forgery to the requisite standard earlier stated.
182. The next issue for consideration is whether the defendant meddled in the deceased estate, in particular the deceased's fishing business, without having first obtained letters of administration or probate of the Will.
183. The claimants submitted that it is clear from evidence of Mrs. Muocha that the defendant has been handling money from the Estate as if it is her money. They noted that, in her defence, she claimed to have used some of the money on family affairs. And that, later, she changed to say that she had used the money to pay for the deceased's tax liabilities to Malawi Revenue Authority. The claimants indicated that the question that has to be answered is whether the defendant had legal authority to do what she alleges to have done.
184. They submitted that the starting point should be Section 69 (1)(a) of the Deceased Estates (Wills, Inheritance and Protection) Act which states that the duties of every administrator or executor where applicable shall be to pay debts and funeral expenses of the deceased and to pay estate duty if estate duty is payable.



185. The claimants observed that only a duly appointed administrator or executor has authority to pay the deceased's debts from the estate. And that, therefore, in this case the defendant had no authority to spend money from the estate in the manner alleged by the defendant. See in the matter of *Mpango and another v Tembenu Masumbu and Company and another* [2010] MLR 184.
186. The claimants asserted that, worse still, the alleged payments are not fully explained. And that full details of the transactions in respect of which the alleged tax was paid to Malawi Revenue Authority have not been given notwithstanding a request for the same by the claimants. They asserted further that, the fact that the defendant has not responded to the request is telling a story. And that it is clear from this silence that she has not been telling the truth.
187. The claimants noted that even in her evidence the defendant has not even bothered to explain how she has used this money and documents to prove that there are land transactions done by the deceased in respect of which capital gains tax become payable. They prayed that this Court should order a refund of the money that the defendant paid out of the estate (by her own admission in cross-examination – the sum of MK4,030,819.17) with compound interest at 2% above base lending rate of National Bank of Malawi Plc from the date the money was paid to date of refund.
188. The claimants contended that the defendant is not contesting the prayer in paragraph 22(iv) of the statement of case. And they prayed that the same be granted.
189. The claimants also sought that orders in paragraph 22(vi) (vii) and (viii) should also be granted.
190. In her response, the defendant submitted on money collected by her from the fishing business after the demise of the deceased. And she submitted that the evidence clearly shows she refunded the money. And that the money was deposited in the deceased's account save for an amount which was used to clear outstanding tax obligations at the Malawi Revenue Authority.
191. The defendant indicated that her evidence shows that there was agreement to run the fishing business between herself and the claimants. And that this was after the Will was read to the family. She added that they even agreed to open a separate account.
192. She then indicated that money was in the interim, being deposited in her account to cater for business expenses and transactions related to the boat. She noted that if this money was put in the deceased's account, it would be inaccessible as the account was frozen.

193. The defendant then submitted that the circumstances in which she, as a widow who had been carrying on the fishing business with her late husband, dealt with the money post the reading of the Will do not support a claim for compound interest. She submitted that such a claim must be dismissed.
194. The defendant then submitted on the full details of payments to Malawi Revenue Authority. She indicated that these were submitted and are on record. She added that the payments related to capital gains tax on transfer of properties to Kumtimakwayera, the sister.
195. She then submitted that Malawi Revenue Authority carried out an audit and found that the amounts (assessed) were due and payable by Kwayera Fisheries. She indicated that she could not ignore a tax obligation on the fishing business.
196. In reply, the claimants submitted that on money from the deceased's business deposited into her account, they note that having during cross examination the defendant tried to disown the account by stating that the money was deposited into her daughter's account the defendant now accepted in her submissions that the money was deposited into her account. This Court notes that submissions are not evidence. The record will properly guide on this aspect.
197. The claimants also noted that the defendant states in her submissions that the money was deposited into this account to cater for business expenses and transaction relating to the boat. They however pointed out that the defendant has not adduced any evidence proving that the money was used to cater for expenses of the fishing business. They pointed out further that, to the contrary, what she stated in paragraph 13 of her defence is that the money was used for management of family affairs. They observed that it can be seen here that the defendant is not a truthful witness and that all her evidence is wanting.
198. The claimants then asserted that the circumstances in this matter warrant a claim for refund with compound interest. They asserted further that circumstances in which compound interest is awarded are well settled. And that compound interest would be ordered where a person is in a position of trust and that the defendant in this matter became a *trustee de son tort* from the moment she started meddling with the deceased's estate without authority of the court and mismanaged money in her hands as such trustee. See *Mpango and Another v Tembenu Masumbu & Company and Another* [2010] MLR 184. See also Supreme Court of Appeal decision in *Kankhwangwa and Others v Liquidator Import and Export (Malawi) Ltd* [2008] MLR 26 at pages 32 to 33.
199. On payments allegedly made to Malawi Revenue Authority, the claimants submitted that it is not true that full details were given by the

defendant. They noted that by a letter exhibit TM8 (page 76 of trial bundle) they asked the defendant to give full details on transactions relating to the payments and no response was given. And that, in fact, the defendant has not even had the courtesy of responding to this letter.

200. The claimants noted that, in one breadth the defendant states in her submissions that the payments were related to capital gains tax on transfer of properties to Kumtimakwayera, the sister. They however noted that the documents from Malawi Revenue Authority given by the defendant do not anywhere mention that a transfer of properties was done to Kumtimakwayera and that capital gains tax was supposed to be paid by the deceased. The claimants indicated that there are more questions; who owned these properties? what is the connection between these properties and the estate? Is the estate supposed to pay this tax? Why?.
201. The claimants observed that, in another breath the defendant states that Malawi Revenue Authority carried out an audit and found that the amounts were due and payable by Kwayera Fisheries. They then observed that the documents submitted by the defendant in her evidence do not anywhere show that there was a tax audit on Kwayera Fisheries and Malawi Revenue Authority raised an assessment against the business.
202. The claimants asserted that, in fact, in a response to their query the defendant through her counsel only alleged that the payments were for capital gains tax which fact is nevertheless disputed because there is no evidence that the deceased or his estate was supposed to pay any capital gains tax for any transaction related to the estate.
203. The claimants then indicated that the Court will see that even on issue of payments to Malawi Revenue Authority the defendant is contradicting herself. And that this buttresses their position that the defendant is not a credible witness.
204. This Court having looked at the evidence, observes that the defendant has produced evidence which shows that the sum of about K4 000 000 was deposited in Malawi Revenue Authority Accounts. This is notwithstanding the defendant's failure to give detailed explanations on the claimants' inquiry on the nature of tax obligations that led to the K4 000 000 assessment and the apparent contradictions between her evidence and submissions by her counsel on this aspect. The evidence of the defendant in the form of a copy of an email from the Malawi Revenue Authority shows that the deceased owed around K4 000 000 to the Malawi Revenue Authority. That is the tax obligation in relation to which the defendant used the sum of around K4 000 000 from the deceased estate.

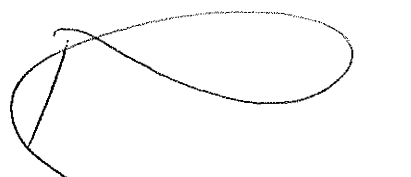
205. As correctly submitted by the claimants, compound interest would be ordered where a person in a position of trust started meddling with the deceased's estate without authority of the court. See *Mpango and Another v Tembenu Masumbu & Company and Another* [2010] MLR 184.
206. However, in the circumstances of this case, this Court is of the view that although the defendant ought to have indeed obtained authority to deal with the deceased estate funds in the sum of K4 000 000 she did not mismanage that sum but rather paid it to fulfil the deceased's tax obligations. That is the sum in contention given that the K7 000 000 was refunded by the defendant. In that connection, this Court does not think it just to order the defendant to pay back the sum of K4 000 000 to the deceased estate with interest or at all. This must be a matter that executors of the Will of the deceased will have to take into account when administering the estate of the deceased.
207. In the foregoing circumstances, this Court finds that the claimants' claim that the deceased's Will herein is invalid on account of fraud and forgery fails. This Court declines to make a declaration that the purported signature of Francis Mbilizi on purported Will dated 23<sup>rd</sup> November, 2018 and 23<sup>rd</sup> November, 2019 is a forgery and therefore invalid. This Court therefore declines to make an order revoking the Will of Francis Mbilizi dated 23<sup>rd</sup> November, 2018 and 23<sup>rd</sup> November, 2019. This Court also declines to make an order that since there is no valid Will the Estate of Francis Mbilizi be administered according to law.
208. However, given that the deceased's documents are at the home of the defendant as conceded in her case, an order is made compelling the defendant to give to the claimants and other beneficiaries a full and frank account of all assets left by the deceased including a vehicle that he imported from abroad and had not yet arrived in Malawi as at date of his demise.
209. This Court further makes an order compelling the defendant to give to the claimants and other beneficiaries copies of all records or documents left by the deceased in connection with his business and business dealings, assets (land and movable assets) and any other matter about his assets.
210. In view of the findings of this Court in this matter, this Court however declines to make an order compelling the defendant to account for all money she has obtained from the deceased fishing business known as Kwayera Fisheries and deposited into her personal account no. xxxxx domiciled at FDH Bank and if it be found that any of the money has been misappropriated an order that she refunds the money with compound interest at 2% above base lending rate of National Bank of Malawi Plc. That is not necessary since the sums in issue

are already accounted for. This Court also declines to make an order that the money from the fishing business deposited into the defendant's personal account be transferred into the deceased's account number xxxxx domiciled at FDH.

211. This Court already granted an order of injunction restraining the defendant whether by herself, servants, agents or whosoever and howsoever from doing anything that has the effect of depriving other beneficiaries of the Estate from getting a fair share of the estate as prescribed by law. That order is continued until the estate is administered according to the deceased's Will.

212. On the question of costs, this Court observes that these are in the discretion of this Court. This Court is of the view that costs of this action be borne by the deceased estate considering the manner in which the deceased and his drafting counsel framed the Will herein, by altering its date and thereby postdating it, which prompted the claimants to seek answers from the defendant on the same. Such costs shall be assessed by the Registrar before any payment is made.

Made at Blantyre this 10<sup>th</sup> November, 2021.



M.A. Tembo  
**JUDGE**

