

Persons capable of making wills

The law of succession in Kenya places certain barriers to certain persons when it comes to making wills. Generally, any other person that meets the threshold of will making can therefore make a valid will. For a will to be valid, the following conditions must be met:

- The maker must be an adult
- The maker must be of sound mind
- The maker must do it out of freewill, that is to say, without coercion or duress

a) The maker must be an adult

An adult in Kenya can also be referred to as a person of the age of majority. You become an adult under Kenyan law if you are 18 years old or above.

Minors do not have capacity to make a will under Kenyan law. However, a minor may conduct estate planning and or will making with the option of executing the will at the attainment of the age of majority. On the other hand, will making allows minors to be gifted from the estate of the will maker. Where the drafter of the will thinks that the minors do not have capacity to manage their gifts, they can propose a guardian or create a trust for the purpose of managing the gifts for the minors until they attain the age that the drafter of the will contemplated to be sufficient to manage the gifts in question.

b) The maker must be of sound mind

As a general rule, a person of unsound mind is incapacitated from making a will. That, however, doesn't imply that such persons must then die intestate. If a person of unsound mind had made the will prior to their current mental status, then such a will pass validity test in regard to capacity. Also where the

maker of the will did so when in their lucid moments, such a will, for as long as it is confirmed that they understood what they were engaging in, will pass validity test in regard to testamentary capacity.

The position of a person of unsound mind and whether they can make a valid will is based upon some fundamental tests in law. We must remember that the mental incapacity is not enough if the following tests have been accomplished by the testator who is of unsound mind.

The maker of the will or the testator must have a sound and disposing mind and memory to be able to do the following:

- To be capable of making their will with an understanding of the nature of the business in which they are engaged,
- A recollection of the property they mean to dispose of,
- To be able to recall the persons who are the beneficiaries of the testator's gifts and the manner it is to be distributed between them.

In Kenya, the burden of proving that the testator lacked testamentary capacity lies on the person alleging that he lacked that capacity. This may vary with other jurisdictions within the common law which will put the burden of proving testamentary capacity on the executor of the will. We therefore presume in Kenya that a person making a will is of sound mind until the contrary is proven.

c) The maker must do it out of freewill

A will is valid if its contents of attestation have not be obtained by way of coercion, undue influence or duress. The testator's signature and the contents of the will must not be out of the aforementioned influences. However, it is hard to prove that a will was obtained in the said manner and the burden of proving such allegations lie on whoever is making such claims. To prove that a will was made under duress or undue influence, one will need strong evidence to contest the Will. Once the evidence is sufficient, the

will can be contested but only under the courts of law.

A will is considered to have been made under duress where the maker also known as the testator was coerced or heavily persuaded by someone, in most cases a beneficiary, into writing or amending a will in a way that is beneficial to them.