



# LEGAL ALERT

## DOES LEAVING OUT DEPENDANTS MAKE A WILL INVALID?

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Disputes over wills are some of the most emotionally charged cases in succession law, especially when certain individuals feel unfairly excluded from a loved one's estate. A common question arises: does leaving out a dependant automatically make a will invalid? Under Kenyan law, a testator has wide discretion to decide who inherits their property, but that discretion is subject to legal limits designed to protect dependants.

### Testamentary Freedom under Kenyan Law

A will is the legal declaration of a person's wishes regarding the disposal of their property upon death. In Kenya, the right of a testator to dispose of their free property as they wish is firmly established in Section 5 of the Law of Succession Act, Cap 160. This section grants any adult of sound mind the liberty to choose who to include or exclude from their will. It is a significant right that reflects the law's respect for individual autonomy, allowing people to make personal decisions about their estate without unnecessary interference.

### The Legal Limits to Testamentary Freedom

While testamentary freedom is a cornerstone of succession law, it is not absolute. The law recognizes that there must be a safety net for those who relied on the deceased in life. Therefore, section 26 of the Law of Succession Act gives the court authority to step in where a will fails to make reasonable provision for the deceased's dependants. This safeguard strikes a deliberate balance that upholds the testator's right to decide how their property is distributed, while ensuring that dependants are not left destitute after the testator's death.

The term "dependants" is defined broadly under Section 29 of the Act. It includes the wife or wives, or former wife or wives, and the children of the deceased, whether or not they were being maintained by the deceased immediately prior to death. It also covers parents, step-parents, grandparents, grandchildren, step-children, children taken into the deceased's family as their own, brothers, sisters, half-brothers, and half-sisters provided they were being maintained by the deceased immediately before death.

### Validity of a Will vs Leaving Out Dependants

The validity of a will depends on whether it meets the formal and substantive requirements set out under the Law of Succession Act. These include compliance with execution formalities, proof that the testator was of sound mind and acted voluntarily, and that the will was not procured through fraud, coercion, or undue influence. A will that meets these requirements will generally be upheld by the court.



Leaving out a dependant does not fall within the legal grounds that invalidate a will. Instead, it triggers a different legal mechanism stipulated under section 26 of the Law of Succession Act which allows the court to alter the distribution of the estate to make reasonable provision for the omitted dependant.

This position was clearly articulated in **Re Estate of Nyaguto Arap Tanui alias Mgaulo Arap Tanui (Deceased) [2022] eKLR**. The court acknowledged the testator's freedom under Section 5 to choose beneficiaries but held that this freedom is tempered by the duty to provide for dependants. Crucially, it found that the appropriate remedy for omission was not to invalidate the will, but to invoke Section 26 to adjust the distribution so as to protect dependants' rights. This illustrates that the court's intervention is guided by fairness and provision

In **Re Estate of Phylis Wasuna Kamau (Deceased) Succession Cause 25 of 2019 [2022] eKLR**, the court confronted an application seeking to declare a will invalid solely because certain dependants had been left out. The court rejected this approach, reaffirming that the omission of a dependant does not undermine the will's validity. Instead, the court treated Section 26 as a safety valve ensuring dependants receive reasonable provision while preserving the integrity of the will as a testamentary document.

The Court of Appeal in **Marete v Marete & 3 others (Civil Appeal E014 of 2023) eKLR** took the analysis further by situating the issue within the broader principle of testamentary autonomy. Citing Erastus **Maina Gikunu & Another v Godfrey Gichuhi Gikunu & Another [2016] eKLR**, it reiterated that Section 5 grants a testator wide discretion over their estate, and this discretion is only curtailed where there is a proven failure to reasonably provide for dependants. Even then, the intervention is corrective rather than destructive; the court does not rewrite the will wholly, nor does it invalidate it; it merely modifies the distribution to satisfy the statutory duty.

### Key Takeaways

The omission of a dependant from a will does not automatically affect the will's validity. However, courts retain the power to adjust the estate distribution to ensure dependants receive reasonable provision.

For testators, this means exercising testamentary freedom with an awareness of the legal duty towards dependants who were reliant on them during their lifetime.

For dependants, it means that being excluded from a will is not necessarily final there are legal avenues to seek provision from the estate.

Should you have any questions on this legal alert, please do not hesitate to contact us,



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