REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 33 OF 2016

IN THE MATTER OF THE ESTATE OF THE LATE SILVESTER KIMARU TOROREY -ALIAS SILVESTER ARAP

TOROREY ALIAS SILVESTER KIMARU TOROREY (DECEASED)

- BETWEEN -

MARYGORETTI CHERUTO CHEPSEBA.....APPLICANT

-AND-

FRANCIS MICHELLIS RUTTO

MARK KIPLAGAT REY.....EXECUTORS

Coram: Hon. Justice R. Nyakundi

Wambua Kigamwa & CO. Advocates

Birech Ruto & CO. Advocates

Kamau Langat & CO. Advocates

R U L I N G

1. The protestor, MaryGoretti Cheruto Chepseba , has filed a protest dated 7th December, 2021 in which she protests against confirmation of grant. The protest is pursuant to the consent to the mode of distribution filed in court on 29th November, 2021. In her affidavit of protest against the confirmation of grant, she claimed purchasers' interest and exclusion of the properties of the deceased.

2. The specific facts as contained in the affidavit of protest against confirmation of grant sworn on 7th December,2021 by the applicant are that she is the 2nd born daughter of the deceased and that the deceased died partially testate and intestate and that a grant of letters of probate was made to the 2 executors . She further avers that the grant is yet to be confirmed and that she has filed the instant applicant for adequate provision as a dependant.

3. The applicant avers that the deceased left a will which was filed on 22nd June, 2016 and that in the said will the deceased only made a bequest of 2 acres of land to the applicant and that no advancement was made to her by the deceased during his lifetime. According to the applicant, she lived well with the deceased, cared for him and even visited him during his ailing times. It is further deposed that the applicant is currently retired from Judicial Service Commission while all the other dependants are either in gainful employment, business or farming at the deceased's farms to her exclusion.

4. It is further averred that in the petition lodged by the executors, 19 immovable assets were declared, 17 movable assets were declared but some assets were left out being;

-**Nandi/Kipkaren Salient/185** measuring 14.7 or 36.75 acres where the deceased shares is 1/8 th thus 8 acres.

-**Nandi/Kipkaren Salient/593** measuring 1.27 hectares or 3.175 acres.

-**Nandi/ Kipkaren Salient/623** measuring 7.6 hectares or 19 acres

-**Uasin Gishu / Tapsangoi/518** measuring approximately 0.8 hectares or 2acres.

5. According to the applicant, during the lifetime of the deceased she had purchased for valuable consideration the following assets from him;

-**Ndivisi/Muchi/1409** which measures 0.1 hectares or approximately 0.25 acres

-**Trans-Nzoia/Liyavo/329** which measures 2.139 hectares or approximately 5.3475 acres

6. It is deponed that the agreed purchase price for **Trans-Nzoia/Liyalo**/329 was Kshs. 1,250,000 where the applicant transferred Kshs. 800,000 towards part purchase price of the land parcel **Trans-Nzoia/Liyavo/329** on 7th March 2011 from her Barclays bank account No. 0091278170 to the deceased Barclays bank account No. 0031296676. The bank statement in question is annexed to the protest.

7. It is further deponed that on 29th April, 2013, the applicant deposited Kshs 150,000 towards the further purchase of **Trans-Nzoia/Liyavo/329** into the deceased Barclays Bank Account No. 0826145072. A bank statement was annexed.

8. The applicant avers that on 1st August, 2014, she transferred funds from her Barclays bank account No. 0091278170 to the deceased Barclays Bank Account No. 0826145072 in the sum of Kshs 200,000 towards further purchase of **Trans-Nzoia/Liyavo/329** and that further the balance of Kshs. 100,000 was paid to the deceased in cash on a different date.

9. As regards land parcel **Ndivisi /Muchi/1469,** the applicant avers that the purchase price of Kshs 900,000 was wired to the deceased Barclays bank account No. 08266145072 from the applicant's account No. 003826327. A hand written note by the deceased of the bank account details was annexed.

10. It is further contended that upon receipt of the funds, the deceased formally handed over actual possession of the said properties and that the original title deeds were handed over to the applicant by the 1st petitioner (deceased) after it was confirmed that the applicant was a purchaser for value. The applicant annexed copies of title deeds for the said properties.

11. According to the applicant, the deceased gave her his identity card and KRA pin to facilitate the transfer of the same to her but his ailment and death caused the delay. The said documents were annexed.

12. The applicant averred that her relationship with the deceased being that of a daughter and father, they dealt at a level of trust thus no sale agreement were executed as the conduct of the parties clearly created a trust relationship.

13. The applicant has maintained that land parcel known as **Ndivisi/Muchi/1469** and Trans **Nzoia/Liyalo/329** ought to be liabilities of the estate owed to her as the creditor thus they ought not to be reckoned in the consideration of any shares as heir in the estate of the deceased.

14. The applicant contends that from the WILL she was not adequately provided for as a dependant and that from the intestate property of the deceased which comprised of **Nandi/Kipkaren Salient/185, 593and 623** with **Uasin Gishu /Tapsagoi/518** where the applicant alleges that she has not been given any provision by the executors.

15. In a nutshell, the applicant has alleged that the proposed mode of distribution as per the consent filed in court on 29th November 2021,amounts to unfair distribution of the estate and is discriminatory and unconstitutional.

16. The applicant has urged the court to reject the proposed mode of distribution and distribute the estate in an equitable manner pursuant to the protest herein.

DETERMINATION

17. The main issue for determination from the application before me in my view is whether the protestor has established her claim against the estate of the deceased.

18. **In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR** the court stated as follows;

> "The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which *prima facie* valid should be determined before confirmation."

19. The protestor herein has alleged that the properties known as **Trans-Nzoia/Liyavo/329** and **Ndivisi /Muchi/1469** are not available for distribution as she bought the same. She has attached bank statements to support her position that she wired money to the deceased accounts in purchase for the same. *Rule 41(3)* of the *Probate and Administration Rules* provides for persons beneficially interested. It provides;

"Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant."

20.In applying the above provision to the instant case, this court is called in to consider the protestor as a creditor. How will the court determine from the annexed bank statements that the said transactions were for purchase of land and specifically Trans-Nzoia/Liyavo/329 and **Ndivisi /Muchi/1469 from the deceased by the protestor? Can the court just take this allegation as the gospel truth in the absence of a sale agreement or a witness to confirm the same.**

21. The protestor has maintained that that her relationship with the deceased being that of a daughter and father, they dealt at a level of trust thus no sale agreement were executed as the conduct of the parties clearly created a trust relationship.

22. It is a settled principle of law that **"HE WHO ALLEGES MUST PROVE". Has the protestor proved that she indeed purchased land from the deceased? Although the court appreciates that the protestor must have dealt with the deceased at a level of trust, how then did neither of them inform any family member about the said transaction?**

23. In the absence of any evidence as to the alleged purchase of land parcels by the protestor from the deceased, the court is thus unable to determine as to the true ownership so as to remove the said parcels of land from the list of assets available for distribution. *Section 26* of the *Land Registration Act, No. 3 of 2012*, provides:

"(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

24. A reading of this provision of the law infers that any such property that is registered in the name of the deceased forms part of the deceased estate.

25. Would it then be said that the said parcels were gifts donated to the protestor by the deceased. The Law of Succession contemplates that in gift *inter vivos*, the gift must go into immediate and absolute effect in that it should be delivered to the beneficiary. This court has held that it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the done.See the case of **In re Estate of Godana Songoro Guyo (Deceased)[2020] eKLR.** It has also been held that gift *inter vivos* must be established by evidence **In re Estate of The Late Gedion Manthi Nzioka (Deceased)[2015] eKLR** the court held:

For gifts inter vivos , the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard Halsburys Laws of England 4thEdition Volume 20(1) at paragraph 32 to 51.

In Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

"Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the done a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do."

26. From the foregoing, I find that the transaction between the protestor and the deceased does not then qualify to be gift inter vivos as stipulated under the Law of Succession Act as the established conditions have not been met. Therefore, in the absence of any concreate evidence as to the sale transaction or gift *inter vivos I find that* the properties in question being **Trans-Nzoia/Liyavo/329** and **Ndivisi /Muchi/1469** still remains part of the estate of the deceased and as per the proposed mode of distribution filed in court, the protestor was provided for and is to get the said parcels of land from the estate.

27. The other issue that the protestor has raised is that she was not adequately provided for as a dependant in the will and also from the intestate property of the deceased which comprised of **Nandi/Kipkaren Salient/185, 593** and **623** with **Uasin Gishu /Tapsagoi/518** she has not been given any provision by the executors. According to the protestor, some beneficiaries received a greater share of the estate of the deceased.

28. As regards the allegation that the will did not provide for her adequately, it would appear that the protestor is challenging the validity of the will dated 28th July 2015.

29. Section 5 (1) of the Law of Succession further provides.

> **"Subject to the provisions of this part and part III, any person who is of sound mind and not a minor may dispose of all or any of his property by Will, and may thereby make disposition by reference to any secular or religious law that he chooses".**

30. Section 5 (3) states:

> **"a person making a Will or purporting to make a Will shall be deemed to be of sound mind for the purpose of this Section unless he is, at the time of executing the Will, in such a state of mind, whether arising from mental or physical illness, drunkenness or any other cause, as not to know what he is doing".**

31. Section 5 (4) provides;

" the burden of proof that a testator was, at the time he made any Will not of sound mind, shall be upon the person who so alleges."

32. A reading of the above provision of the law reveals that a testator has freedom to dispose of his property as he deems fit and this freedom can only be challenged where it is established the testator was not of sound mind at the time of making a Will.

33. In **Elizabeth Kamene Ndolo vs George Matata Ndolo (1996) eKLR,** the court stated that:

> **"This court must however recognize and accept the position that under the provisions of Section 5 of the Act, every Kenyan adult has unfettered testamentary freedom to dispose off his or her property by Will in a manner he or she sees fit".**

34. The court while dealing with an issue similar to the issue at hand in the case of ***Curryian Okumu vs. Perez Okumu & 2 others*** **[2016] eKLR** was of the view that -

> **'The legal position is clear however that failure to provide for a beneficiary in a Will does not invalidate a Will. Section 5(1) of the Act gives a testator testamentary freedom as follows:**
>
> **"Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses …"**
>
> **… This freedom of a testator to dispose of his free property by will is however is not absolute. The Court can after the death of the testator alter the terms of a will following an application under Section 26 of the Act. Section 26 provides:**
>
> > **"Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependent, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependent, order that such reasonable provision as the court thinks fit shall be made for that dependent out of the deceased's net estate."'**

35. In the instant case, the protestor has not lead evidence to show that the deceased was not in the capacity as required by law to dispose his property. It has not been shown that he was not of sound mind, or there was undue influence or even that he did not know what property he was bequeathing and to whom. The fact that the will made a larger provision to some beneficiaries as compared to others does not invalidate the will. It therefore follows that this court cannot interfere with the Will dated 28th July 2015.

36. The probate jurisdiction of this court looks to the due and proper administration of a particular deceased estate, having regard to any duly express testamentary intentions of the deceased and the respective interest of the beneficiaries entitled to a share to the estate.

37. By definition of a will a model of devolving the estate to the beneficiaries the person whose state of mind is central to this inquiry is a person who owned property during his lifetime and by reason of his death he has expressed his intentions on distribution of that estate. It is upon the court to exercise wisdom including restraint from intermeddling with the views attributed to the deceased in adjudication of any dispute about the administration of his/her estate.

38. The analogy to be drawn from the protestor's affidavit are sometimes what one can refer or spoken of as suspicious circumstances in the making of the will by the testator. This rule was expounded into in the case of Tobin –v- Ezekiel (2012)NSWCA285; 83 NSWLR 757

> **"… The suspicious circumstances rule does not operate at large. It operates to displace presumptions of fact in favour of those propounding [a] will. For that reason it is necessary to identify the presumption or presumptions to which particular circumstances are said to be relevant. With respect to the presumption as to knowledge and approval, those circumstances**

must be capable of throwing light on whether the testator knew and approved of the contents of the will. If they give rise to a doubt as to knowledge and approval, those propounding the will must dispel that doubt by proving affirmatively that the testator appreciated the effect of what he or she was doing. They do not have to go further and disprove any suspicion of undue influence or fraud. Approval in this context does not include that in addition to knowing what he or she was doing, the testator executed the will in the absence of coercion and fraud. The proponents having a affirmatively established knowledge and approval, the onus of proving undue influence or fraud is on those alleging it.…"

In the context of this case the test is as laid down in ***GE Dal Pont and KF Mackie, Law of Succession (LexisNexis Butterworths, 2nd ed, 2017), paragraph[2.29]):***
"The presumption relating to knowledge and approval arising from a capable testator's execution of a will does not apply if the circumstances surrounding its execution combine to excite the Court's suspicion. While suspicion here not infrequently stems from a third party's (alleged) wrongdoing, this is not essential; it is 'simply a question of circumstances giving rise to a suspicion that the testator may not have known of and approved the contents of his will. If suspicious circumstances exist, probate cannot be granted unless the suspicion is removed, by affirmative proof of the testator's knowledge and approval. To this end, the effect of the suspicious circumstances doctrine is, it is said, 'relatively narrow'; it does not apply, 'at large', it being essential to 'identify the presumption to which particular circumstances are said to be relevant".

39. By reasons of the matters herein before complained of by the protestor there is nothing to show that the intentions of the testator during the making of the will was not crystal clear to call for the jurisdiction of this court to review or enter into the realm of challenging its contents. In general the reading of the will presents no circumstances exciting suspicion that the testamentary instrument was not a case of conscience propounded as the last will of the testator. For this court to displace a prima facie case of a will made with capacity and due execution by the testator within the bounds of the law would be to render such a legal device on distribution of the estate nugatory. Although the protestor expressed herself in various forms embracing the language of discrimination under Article 27 of the Constitution so far the material is not sufficient to interfere or vary the will.

40. The locus classicus test as to the exercise of the deceased testamentary capacity has not been challenged in the averments in the protestor's affidavit. Although made in the light of matters arising on existence of land sale transactions nothing could have precluded the testator to comfortably confer such rights in the testamentary instrument. To speak of there being an oversight as to the testator not able to address the rights of the protestor is by itself to question the last will of a free and capable testator. This observations remain relevant to the extent that the allegations by the protestor do not vitiate the free will of the testator.

41. As regards the provision to the protestor as per the consent to the mode of distribution filed in court on 29th November 2021, a careful examination of the same reveals that it does not change the terms of the Will in any way. I therefore find the protestor has failed to demonstrate to the court that the same should be interfered with.

42. The position taken by this court of probate generally speaking the law permit a person full of age and capacity to dispose of his/her property by gift or otherwise in such a manner as he/she may choose. It is not sufficient to prove only that as a dependent under Section 29 (A) of the Laws of Succession the testator's conduct was discriminatory because he/she has not made adequate entitlement provisions.

43. In the end, I find that the protest dated 7th December 2021 lacks merit and the same is accordingly dismissed with no orders as to costs.

44. In this case after a very deliberate and dispassionate consideration of the affidavit evidence and the consent as to the mode of distribution dated 29th November 2011, further appraised in conjunction with Section 5 and first schedule of the Law of Succession Act, the legal position is clear that the beneficiaries have no locus standi to vary, review, substitute or change the character, texture, content, structure of the testamentary instrument of the testator in contravention of the statute.

45. In the upshot I am of the considered view in this matter to issue the following declarations.

(a) That the last will of the testator Silvestor Kimaru Tororey executed on 28th July 2015 is valid, authentic, genuine, legal device to sufficiently form the framework for distribution of the testate estate. That the executor of the said will shall move to distribute the estate in confirmed with the will and thereafter in consonant with Section 83 of the Law of Succession Act furnish the court with the probate account. To that extent the probate grant be issued by the court forthwith. The costs of this proceedings be in the cause.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 17th DAY OF FEBRUARY, 2022

.....

R. NYAKUNDI

JUDGE