In re Estate of Abubakar Ireri Karwirua (Deceased) (Succession Cause 229 of 2011) [2022] KEHC 11162 (KLR) (27 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11162 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE 229 OF 2011

LM NJUGUNA, J

JULY 27, 2022

IN THE MATTER OF THE ESTATE OF ABUBAKAR IRERI KARWIRUA (DECEASED)

BETWEEN

KAIMU ABUBAKAR KARWIRUA ..... 1ST PETITIONER

FATUMA MONG'ARE ..... 2ND PETITIONER

SWALEH ABUBAKAR ..... 3RD PETITIONER

AND

HASIA ABUBAKAR ..... PROTESTOR

RULING

1. The matter pending for determination before the court is the affidavit of protest for confirmation of grant in relation to the estate of the deceased herein.

2. The case herein is hinged on the fact that the petitioners allege that the deceased herein died testate while the protestor argues that the deceased died intestate and the alleged will does not fit the essential elements of a valid will. Previously, the wife of the deceased (Halima Muthoni) filed for letters of administration and the same was objected to by one Kaimu Abubakar for the reason that the deceased herein had died testate. Thereafter, Halima Muthoni died and that is when the alleged will was discovered in one of her clothes and as such, the parties herein moved this court to amend the petition for letters of administration for the reason that the deceased had died testate. The protestor on the other hand opposed the amended petition citing reasons amongst others that the alleged will did not meet the essential elements of a valid will.

3. The court directed that the matter be canvassed by way of *viva voce* evidence and thereafter parties to file their submissions. The parties herein adhered to the directions.

4. The petitioners submitted that on September 8, 2001, the deceased called him (Mohammed Alkhamati) at his home and upon reaching, found the three petitioners herein, Halima Muthoni, the protestor and a witness who is the son in law to the deceased herein; that only three of the deceased's children were absent but with apology. They submitted that at the time of writing of the will, the deceased was well aware of what was happening and that after having listed the properties, he instructed on how he wished his estate to devolve. That, the deceased was in charge of his mental faculties at the time of making of the alleged will and the witnesses were only called upon for the purposes of attestation; and as such, the will met the essentials of a valid will in reference to section11 of the LSA. Reliance was placed on *Re Estate of Gatuthu Njuguna (Deceased)* 1998 eKLR. In the end, the petitioners urged this court to find that the deceased left a valid will capable of execution.

5. The protestor on the other hand submitted that the petitioners brought before this court a document that they allege to be the last will of the deceased herein which does not meet the test of a valid will. Reliance was placed on sections 11 and 13 of the *Law of Succession Act*. That on page 10 of the alleged will, the deceased herein together with everyone present in the said meeting signed the alleged will document. Further, the protestor submitted that the alleged will was not properly attested to, as it was never signed by two competent witnesses as is required under section 13 (2) of the LSA. That the invalidity is buttressed by the fact that even the wife of the deceased, had previously proceeded to file for letters of administration intestate for the reason that the deceased never left behind any will. It was the protestor's case that, there are properties left out of the will and the same includes the property where the petitioners currently reside and others currently under their control such as the plot in Dallas and others in Mbeere. The protestor reiterated that the properties that were left out existed even during the writing of the alleged will and thus it remains unclear why the same were never included as part of the estate of the deceased available for distribution. She thus urged this court to find that the will herein is invalid and that the deceased died intestate.

6. The court has considered the viva voce evidence and the submissions by the parties and I form the view that this court has been called upon to determine whether the deceased left a valid will.

7. The provisions of section 5(1) of the *Law of Succession Act* stipulates that any person who is of sound mind and is not a minor may dispose of all/or any of his free property by will. See *In Re Estate of GKK (Deceased)* 2013 eKLR.

8. The validity of a will is dependent upon two principal factors, namely;

   i. The capacity of the testator to make a will at the material time; and

   ii. Adherence with the formal requirements for the making of a will.

9. Capacity to make a will, and testation is covered in section 5 of the *Law of Succession Act*. The relevant provisions thereof state as follows -

> '5
>
> (1) ... any person who of sound mind and not a minor may dispose of his free property by will ...
>
> (2) ...
>
> (3) Any person making 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 from any other cause, as not to know what he is doing.

(4). 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.'

10. The case of *Banks v Goodfellow (1870) LR 5* QB 549, laid out the essentials of testamentary capacity as follows -

> 'A testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made.'

11. Therefore, a will is the means by which a person exercises his or her testamentary freedom to bequeath his or her estate without relying on intestacy rules of probate. What this means is that, there are certain aspects of importance which must exist in the making of a will and unless, one possesses the right age of maturity, and mental capacity he or she will be considered as being incapable of upholding the legality of the will.

12. What comes out from the above is that, a testator has a testamentary freedom and that, so long as he is of sound mind, he can bequeath his/her estate or part thereof to any person that he wishes. Where a person challenges a will based on lack of capacity, such a person has the burden of proving the said lack of capacity. [See in *Re Estate of Gatuthu Njuguna (Deceased)* [19998] eKLR where the court quoted an excerpt from *Halsbury's Laws of England*, 4th Edition Vol 17 at page 903-904).

13. In this case, the protestor alleged that the deceased was not in the right mental state to make the alleged will given that he was suffering from cancer and that he was in lots of pain. In my view, the protestor was obligated to prove to this court that the alleged situation affected the deceased to an extent that he never appreciated his actions during the time of the making of the alleged will. I find that the burden of proof was on the protestor to prove that the deceased had no capacity to make a valid will.

14. The other provision related to testamentary capacity is section 7 which states;

> 'A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void.'

15. The formal requirements of validity of a will are contained in section 11 of the *Law of Succession Act*. It states -

'11. No written will shall be valid unless-

(a) The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign

the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.'

16. What section 11 emphasizes explicitly are the formal and procedural requirements of making a will. The will must be in writing and signed at the end of it by the testator and at least two witnesses. Such a solemn instrument is expected to be signed in the presence of the two appointed witnesses. The court is also required to look out for any suspicious circumstances that may have played a role in executing the will to ensure that the same was founded on freewill without any undue influence, coercion or duress.

17. The task of dutifully laying evidence seeking to foster the invalidity and due execution of the challenged will falls squarely upon the protestor. The court does not, and cannot set aside the will unless it's able to ascertain that the presumption in favour of due execution has been rebutted. The kernel of the protestor's attack throughout this trial has been that the will does not conform with section 11 on the formal requirements of a valid will.

18. A cursory look at the alleged will reveals that it is more or less minutes of a meeting. For purposes of inquiry on this aspect to determine the authenticity, can it authoritatively be held that the said document is a will or minutes of a family meeting as alleged by the protestor?

19. The alleged will in its form contains the names of the family members who were in attendance at the said meeting. The law requires that the will must be signed at the end of it by the testator and at least two witnesses. In this case, what the document exhibits is a list of the attendees at the meeting and further, a list of those who were absent with apology. It is not clear who the witnesses to the alleged will are. In the same breadth, the body of the alleged will has some canceled parts and are not countersigned. The signatures of the alleged witnesses were not inscribed in the margin or on some other part of the will as per section 20 of the LSA. [See *Re Morris (Deceased)* (1970) 1 All ER 1057].

20. Thus, this basically leads me to hold that the petitioners herein have failed to discharge the burden of proof that indeed the document herein alleged to be the last wishes of the deceased has met the legal threshold of a valid will as required under the *Law of Succession Act*. [See section 109 of the *Evidence Act*) that places the burden of proof on the petitioners. The proviso states that;

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person]."

21. The making of a valid will is one of the best instruments that can ensure that the property of the testator will be distributed according to his or her wishes upon death.

22. Generally speaking, the courts will be slow to interfere with a will, having regard to the fact that the testator intended the beneficiaries to be bound by the contents in the last will and testamentary. But in the case herein, I am of the view that what emerges from the evidence adduced herein is that the deceased only held a family meeting and the same was minuted by the petitioners; the said minutes can then not be recognized as the last will of the deceased herein.

23. I am guided by the case of *Maurine Dommy academia eau/ 35425630*/construction of wills on the construction of wills and the same states as ;

> " The duty of the court is to interpret the words as used by the testator in the Will regardless of whether they produce an unfair result, provided that was the intention of the testator. Even where a provision for his lawful dependants. It is not for the court in interpreting the will to seek to make provision for these survivors. The court interprets the will as it stands and promises that the survivors are not provided for."

24. The principle in *Re Potters' Will Trust* {1944} CL 70 embodied this legal position that:

> " It is fundamental rule in interpretation of wills, that effect must be given, so far as possible, to the words which the testator has used. It is equally fundamental that apparent inconsistencies must, so far as possible, be reconciled and that it is only when reconciliation is impossible that a recalcitrant provision must be rejected."

25. In view of the foregoing, the court finds and hold that the deceased died intestate as the document said to have been his last will has not met the threshold of a valid will.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JULY, 2022.

L. NJUGUNA

JUDGE

.....for the Petitioners

.....for the Protestor