In re Estate of Peter Ruhle (Deceased) (Succession Cause 758 of 2014) [2022] KEHC 13191 (KLR) (Family) (28 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13191 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 758 OF 2014

AO MUCHELULE, J

SEPTEMBER 28, 2022

IN THE MATTER OF THE ESTATE OF PETER RUHLE (DECEASED)

BETWEEN

PAULA MARIA RUHLE .... APPLICANT

AND

CHRISTOPHER HANDSCHUH .... RESPONDENT

AND

JOSEPHINE WAMBUI KAMAU .... OBJECTOR

AND

LUCY MUMBI MWANGI .... PROTESTOR

AND

PHILIP JOHN RANSLEY .... EXECUTOR

VIRGINIA WANGUI SHAW .... EXECUTOR

RULING

1. On January 24, 2022 it was agreed by counsel of the respective parties herein that the applications dated February 11, 2016, August 9, 2021, August 25, 2021 and September 21, 2021 be heard together through respective affidavits, written statements and written submissions.

2. This dispute relates to the deceased Peter Ruhle who died on June 12, 2013 at Hardy in Nairobi. He left a written will dated August 21, 2012 in which he appointed Philip John Ransley and Virginia Wangui Shaw as executors and trustees. In the will he bequeathed all his movable and immovable properties in

three different countries to his daughter Paula Maria Ruhle absolutely upon her attaining the age of 25. The deceased had an ex-wife who lived in Germany and Paula Maria Ruhle was their child.

3. On March 31, 2014 the executors Philip John Ransley and Virginia Wangui Shaw petitioned this court for the grant of probate with written will. The grant was issued to them on November 3, 2014. The executors have since renounced their executorship. In the application dated August 9, 2021 Paula Maria Ruhle applied under section 59(5) of the *Law of Succession Act* (Cap 160) to be substituted as the executor of the will of the deceased. Her application was based on the grounds that the executors had renounced their executorship; she was the only beneficiary in the will; the estate risks being wasted; and that there are several people who are laying claim to the estate.

4. The application dated August 25, 2021 is by Christopher Handschuh (the respondent). He sought to be appointed the executor and administrator of the estate of the deceased in place of the executors who had renounced their executorship. The application was made under section 59(5) of the Act. He contested the validity of the deceased's will dated August 21, 2012, saying that the deceased had by a subsequent will dated January 13, 2013 revoked all previous wills and in which he had bequeathed all his property to him. This will had not appointed an executor. He states that he is a residuary legatee of the deceased's last will who is ready to administer the estate, now that there are claims to it and there is risk that the estate may be wasted and vandalised. The respondent's case is that he met the deceased in 2011 when the later brought his motorcycle for repair. A friendship developed. The deceased complained to him that his advocate Mr Ransley was not acting in his best interest. He introduced the deceased to an advocate called M/s Sonal of Raffman Dhanji Elms & Virdee. The advocate and the deceased had various communications over a time. Subsequently, the deceased handed a sealed envelope to him which he was to open only if something happened to the deceased. On June 12, 2013 the deceased's gardener (one Pius) came to inform him that the deceased had died. He went to the deceased's home in Karen and confirmed the death. On this day he opened the envelope only to find the said written will in which the entire estate had been bequeathed to him. On June 13, 2013 he presented the will to M/s Sonal. She pointed out that the witnesses had signed it without giving their details. She asked that he locates the witnesses to swear an affidavit. He traced them to go to the office of the advocate where they each swore an affidavit to the effect that they had witnessed the will.

5. The witnesses are Celestine Wathome Wasua and Mutua Delesi, each of whom was deceased's employee. It is notable that on September 5, 2018 each wrote a statement that was filed on September 13, 2018 to state that the respondent had made each to sign a blank paper which they learnt later that it was a will. They also each swore an affidavit on July 17, 2015 to state the same. M/s Sonal Raval is an advocate of the High Court of Kenya. She stated that she worked briefly at Raffman Dhanji Elms & Virdee Advocates, and that while there she met the deceased in relation to his estate. Upon his death, the respondent came to her with a written will saying the deceased had bequeathed everything to him. She had a lot of reservation about this Will as the deceased had mentioned to her that he had a young daughter in Germany whom he wanted to provide for. She looked at the will that the respondent had. The witnesses had signed without providing their details. She advised that to verify the attestation an affidavit would be required. The respondent wanted the firm to petition for probate. The firm declined to petition.

6. There is the originating summons dated June 19, 2014 in HCCC No 5 of 2014 (OS) In the Matter of the Estate of Peter Ruhle (deceased) by the executors against the respondent who was said to be intermeddling in the deceased's estate. The dispute was heard by Justice W Musyoka. A ruling was delivered on January 30, 2015 finding that the respondent had intermeddled with the deceased's estate by among other things, collecting rental income and selling his vehicles and motor cycles. He was permanently restrained from intermeddling with the estate, and ordered to refund the rent and

proceeds of the sale. It is notable that in those proceedings the respondent had two positions. One, that all that he had done was with the aim of saving and preserving the estate for the benefit of the deceased's daughter and to hand it over to her when she turned 25 years of age. The second position was that, he had a written will dated January 13, 2013 in which the entire estate had been bequeathed to him and that the will superseded the one made on August 21, 2012. The court did not accept his defence, and noted, among other things, that he did not have a grant to follow the alleged will of January 13, 2013. The respondent did not appeal the decision.

7. Regarding the question whether or not the deceased wrote the will on January 13, 2013 that superseded the will dated August 21, 2012 and bequeathed his entire estate to the respondent, it is clear from the foregoing evidence that M/s Sonal Raval of Raffman Dhanji Elms & Virdee Advocates that had allegedly drawn the will denied having drawn any will for the deceased. Secondly, Celestine Wathome Wasua and Mutua Delesi who allegedly witnessed the will have denied the same. Thirdly, the respondent informed the court in the above originating summons that he was dealing with the deceased's estate with the sole purpose of preserving and protecting it for the deceased's daughter until she was 25 years. He cannot at the same time be said to have been bequeathed the estate. The said will had no executor, and the witnesses could not be identified from the signatures that had no particulars. In all, the deceased did not make the alleged will of January 13, 2013. The only will he made was the one dated August 21, 2012.

8. In the application dated February 11, 2016 by the objector Josephine Wambui Kamau she questioned the validity of the will dated August 21, 2013 on the basis that it was not duly executed. That is not true because the deceased signed the will which was witnessed by Joyce Wanjiku Gakure and Esther W Ngugi, and their contact was given. The objector then sought the revocation of the grant issued to the executors and the nullification of the will. The reasons were that the deceased was marred to her under Kikuyu customary law following his visit to her parents three times and the payment of Kshs.80,000/ = in dowry. She had a daughter Lina Waithera from a previous marriage whom he took in and became responsible as a father. The objector further alleged that that the deceased was on intravenous drugs and that –

> "based on that condition, I verily believe both wills do not meet the legal requirements and were obtained when the late Peter Ruhle was very sick or through fraud, coercion or importunity."

She went on to narrate the many transactions, including land and money, he was involved in before his death on June 12, 2013. He transferred land. She alleged to have conceived by him in March 2012. He was paying her daughter's school fees in 2013. She left the deceased's house in April 2013 when he became hostile. When she was away he kept sending her text messages pleading with her to return. All these actions, taken together, show that the deceased was in charge of his faculties, and was not under any influence. He knew he had a daughter in Germany and it is to her that he was bequeathing his estate.

9. Under section 5(4) of the Act, 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. I find that there was no evidence that showed that the objector discharged the burden.

10. Further, there was no evidence of fraud, coercion or importunity the objector gave of the deceased at the time he made the will.

11. It was alleged that the will was invalid because the deceased left out some of his properties. However, in the will the deceased made reference to his –

> " immovable and movable properties in three different countries……"

He did not particularise any but was willing to his daughter all his movable and immovable property in the three countries. No property, I find, was excluded.

12. Regarding the alleged kikuyu customary law, the evidence was that the deceased lived with the objector between September 2011 and April 2013. This was a period of under two years. He met her parents three times. He paid Kshs 80,000/= to her uncle who passed it to her father being dowry deposit. She asked him that they undergo kikuyu marriage formalities. He declined saying, being a simple man he did not want the ceremonies or a big function. It follows that the Kikuyu ceremonies, including "ngurario" (slaughtering of a lamb) and dowry negotiations and payment (ruracio) were not undertaken. He did not want to go through these ceremonies. These ingredients were essential in the making of Kikuyu customary marriage. Without them there was no such marriage (*Mary Wanjiku Githatu v Esther Wanjiru Kiarie*, Court of Appeal at Eldoret No 20 of 2009).

13. More important the fact that the deceased was living with the objector and made the will without reference to her would show that he did not regard her as his wife.

14. Lastly, the fact that a will does not make reference to all the property of the deceased does not invalidate it. It just means that such property will be dealt with in intestate petition.

15. In all, I find that the deceased was not married to the objector and had not adopted, as it were, her child LW. In reaching this conclusion, I have considered the affidavits of Michael Mwathi Ngethe, Mary Waithera Kamau, Paul Matheri and Benson Kamau Matheri who stated that a customary marriage existed between the deceased and the objector, the affidavit by the respondent who stated that the deceased never mentioned the objector to him and neither were the two cohabiting, and the affidavit of the deceased's employee Josphat Mbuvi who stated that the objector worked for the deceased for three months as a cleaner at his home, but that the two did not live together as husband and wife.

16. Then there is the application dated September 21, 2021 by the protester Lucy Mumbo Mwangi that sought the revocation of the grant to the executors on the ground that she was married to the deceased under kikuyu customary law in 2009 and came with her two children Jeff Mwangi and Joshua Mwangi and she stayed with him until his death when she was chased away. She got her bishop (Joel Kimani Mwangi) to state that the deceased and her would regularly attend his church as a couple, and that he would occasionally visit their house at Karen. According to him, the objector was the deceased's house help who would serve them when they visited. The protester further got Edith Nyambura Paschen who stated that she and her German husband were friends as the couple whom they knew to be married under kikuyu customary law. She stated that she knew the objector as a house-help. She stated that the deceased would tell them that the applicant was not entitled to his estate as she had been well taken care of in Germany.

17. The respondent disputed that the deceased was ever married to the protester. The applicant opposed the application on the basis that the Kikuyu customary law marriage had not been substantiated. The protestor's objection to the will was that it had not provided for her and her children.

18. A will does not become invalid because the testator did not provide for a member of his family. Such member can seek provision under sections 26, 7, 28 and 29 of the Act.

19. Regarding the said marriage, there was a mere statement that the deceased and the protestor were married under Kikuyu customary law. It was not deponed and proved that the family of the deceased and the family of the protester met, there was '*ngurario*' or that there was *ruracio*'. It is also interesting that the objector and the protester each claims to have been married by, and lived with, the deceased in the same house and at the same time, and yet the other appears to be saying she did not know the other to be so married. In conclusion, I find that neither the objector nor the protestor was married to the deceased as alleged, or at all.

20. I go back to the application by the applicant. I find she was the deceased's only child. She was the only beneficiary of the deceased's will dated August 21, 2021 which was valid. Now that the executors have each renounced executorship, I allow her application to substitute them as the executor. The grant that was issued to them on November 17, 2014 is revoked on the ground that it has become useless and inoperative under section 76(e) of the Act. A fresh grant shall be issued and confirmed to the applicant. This is because the matter has been in court for a long time, she is the only beneficiary to the estate and all other claims to it have been dismissed in this ruling.

21. Each party shall pay own costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2022.

A.O. MUCHELULE

JUDGE