



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 386 OF 2018**

**IN THE MATTER OF THE ESTATE OF GURDIP KAUR SAGOO**

**RULING**

1. Gurdip Kaur Sagoo (the deceased) died testate on 27.10.15 at the Aga Khan Hospital in Nairobi at the age of 79. In her Will dated 4.11.11, the deceased appointed her daughter Harvinder Kaur Dadhiala (Harvinder) and Mohamed Munir Chaudhri (Mohamed), an advocate of this Court, as the executors of her will. The deceased devised her net intestate estate to Manjit Kaur Sagoo, Avtar Kaur Sagoo and Jashvinder Kaur Sagoo, her daughters in law.

2. A grant of probate of written will was on 17.9.18 issued to Mohamed. By her summons dated 12.11.18, Harvinder sought revocation of the grant issued to Mohamed, on rounds that she was omitted as executor. On 5.2.19, the Court made the following order:

**By consent the grant of probate granted on 17.9.18 be amended to include the name of Harvinder Kaur Dadhiala as co-executor of the will of the estate of *Gurdip Kaur Sagoo*.**

3. Following the said order, a rectified grant of probate of written will was issued to both Mohamed and Harvinder on 5.2.19.

4. Before me for determination is a summons under Section 26 of the Law of Succession Act (LSA) dated 6.12.19, by Harvinder, seeking reasonable provision for herself as a dependant out of the net estate of the deceased. Harvinder averred in her affidavit sworn on 6.12.19 that the deceased in her will made provision for her daughters in law but excluded her, in spite of her being her daughter. According to Harvinder, the estate of the deceased consisted of 1,9490 shares in Nanak Crankshaft Grinders Limited, 3,000 shares in Nanak Crankshaft Grinders (Eldoret) Limited, Land Reference Numbers 209/138/170 and 77788/4 and 16,000 sterling pounds in Barclays Bank PLC, Isle of Man. Harvinder further stated that other than a cash gift of £ 200,000 for her children's education, the deceased made no other gifts to her during her lifetime. She therefore urged the Court to make reasonable provision for her, as the Court deemed fit.

5. In his affidavits sworn on 16.1.2020 and 30.3.21, Mohamed opposed the Application stating that the entire estate of the deceased was a bequest from her late husband Balwant Singh Sagoo (Balwant). The said bequest which was dealt with in Succession Cause No. 15 of 2010 by this Court, was specific in its intention *to wit* that the Applicant had already been bequeathed and sufficiently provided for. The provision made to Harvinder was therefore an advancement within the meaning of Section 28(d) of the Act. Mohamed further averred that to protect the interest of his sons, Balwant provided that upon the demise of his wife the deceased herein, the entire estate should be distributed to his 3 sons. During the succession proceedings relating to the estate of Balwant, Harvinder did not protest the clear terms of the will. All 3 sons predeceased their mother, the deceased herein and in her Will, she honoured the clear intentions of her husband and bequeathed the entire estate.

6. Mohamed further averred that the exclusion of Harvinder was deliberate and accused her of dishonesty and greed. He further contends that she has in the past been involved in trying to skim the estate. She got a letter from the chief dated 25.4.16, alleging that she was the only surviving heir to the estate of the deceased. In HCCC No. 7 of 2018: Talvinder Singh Sagoo v Nanak Crankshaft Grinders Limited & 7 Others, Harvinder supported the plaintiff therein to make an illegitimate claim of Kshs. 42,000,000/= to the detriment of the company in which the estate has shares. The claim was dismissed. Harvinder refused to sign the petition herein as a co-executor until some amounts allegedly owed to herself and husband were paid. After Mohamed obtained the Grant alone, she moved to Court alleging she had been left out.

7. Mohamed further contends that Harvinder has not disclosed to the Court her present, past or future capital or income and her existing and future needs. She has not disclosed that the deceased made advancement to her and the general circumstances of the case including the deceased's ascertainable reasons for not providing for her. She has also as executrix not provided accounts of the estate. To Mohamed therefore, Harvinder's application is intended to frustrate and intimidate the estate to which she is an executor with a view to getting her malicious demands paid. He urged the Court to dismiss the Application with costs.

8. In their affidavit sworn on 30.3.21, Avtar Kaur Sagoo and Jaswinder Kaur Sagoo, the daughters in law of the deceased averred that Harvinder benefitted from the estate of the deceased and from that of her deceased father in the sum of Kshs. 143,299,309/=; that both deceased persons executed a guarantee of £ 200,000 for the purchase of Harvinder's home, Town House No. 21, Jambo Valley Westlands on L. R. No. 7158/10; that the guarantee was realised after Harvinder defaulted in the loan repayment; that on 18.11.11 Harvinder was gifted Kshs. 6,500,000/=; that on 1.11.12, 11.12.12, 13.42.14 and 4.6.15, the deceased gifted Harvinder with £ 200,000, £ 100,000, £ 100,000 and £ 250,000 respectively; that after the demise of the deceased, Harvinder appropriated Indian Rupees 11,828,206; that the gifts to Harvinder were in line with Sikh culture and edicts that a married daughter does not inherit from her parents after their demise but is gifted during their lifetime; that the aforesaid gifts to Harvinder and her exclusion were deliberate and cultural.

9. Avtar and Jaswinder further averred that Harvinder has sufficient income to sustain her livelihood and has stated that she has invested in and loaned money to Nanak Crankshaft Grinders Limited in the sum of Kshs. 16,306,260.63; that her husband also works with the said company. They accused Harvinder of greed and malice and seeking a portion of the estate against the express intention of the deceased.

10. In her rejoinder in her affidavit sworn on 27.4.21, Harvinder denied the allegations by Avtar and Jaswinder. She contends that the term loan together with a further facility of Kshs. 6,000,000/= were fully repaid and the bank guarantee was never realised as alleged; that the loan she took for purchase of her house was repaid by herself and her husband and was not a gift from the deceased; that the Kshs. 6,500,000/= was not a gift but a refund to her for various advances she made to the company; that she did not receive a gift of £ 200,000; that both amounts of £ 100,000, were each used for her daughter's and son's education; that she did not receive £ 250,000 but that the said sum was distributed to various accounts; that out of the said sum, she received £ 100,000 as a refund from the deceased for settling on her behalf, expenses relating to her grandchildren's wedding; that all 4 beneficiaries received an equal sum of Indian Rupees 10,945,470 from the deceased.

11. As regards her past, present and future income, Harvinder further averred that she is a housewife with no income other than her husband's income and some savings; that it is from this income and savings that they were able to service the loan; that her past, present and future income should not disentitle her from inheriting the deceased's property; that her husband working at the company is irrelevant; that no evidence of receiving the sums claimed by Avtar and Jaswinder was produced; that her exclusion from the estate of the deceased on account of culture is contrary to law; that her claim is not malicious as alleged. Harvinder prayed that for the reasons advanced, the orders sought be allowed.

12. Parties filed their written submissions which I have duly considered.

13. Harvinder submitted that Mohamed has no locus in the application for reasonable provision as he is not a beneficiary under the Will. Contesting such application is not one of the functions of an executor. His actions are therefore *ultra vires*.

14. It is necessary at the outset to determine whether Mohamed has the *locus standi* to contest the Application as an executor of the will of the deceased. According to Harvinder, contesting this Application is not one of the duties of an executor set out in the LSA. Section 82 of the LSA provides in part as follows:

**Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—**

**(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;**

15. The foregoing provision makes it clear that it is the personal representative of the deceased and not any other person who has the *locus* to institute or defend suits for or against the estate of the deceased. Accordingly, I find that Mohamed as one of the executors and personal representatives of the deceased has the backing of law to contest the Application by Harvinder. In so finding, I am guided by the holding in Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another [1987] eKLR where the Court of Appeal observed-

**“But an administrator is not entitled to bring an action as an administrator before he has taken out letters of Administration. If he does, the action is incompetent at the date of its inception...”**

16. Harvinder further submitted that the onus of proving that reasonable provision was made to her was on the person opposing the Application and the Mohamed failed to discharge this onus. He only relied on the Harvinder's father's (Balwant) will that bequeathed the entire estate to the deceased and after her death to their 3 sons. To Harvinder, Balwant's will is null and void as it is against the law, morality and public policy and contrary to paragraphs 43 and 44 of the First Schedule of the Law of Succession Act (LSA).

17. Paragraph 43 of the First Schedule of the LSA provides:

**No precise form of words shall be necessary to create a condition in a will, and any expression disclosing such an intention of the testator shall have that effect.**

18. Paragraph 43 grants to a testator the liberty to create a condition in a will and such will shall have that effect if the intention is clear. The condition in the will of Balwant was clear that his bequest to the deceased was for her life and thereafter to their 3 sons.

19. The liberty of a testator to impose conditions in the bequests made in his will is not absolute. Certain conditions may be void. Paragraph 44 makes sets out void conditions in a will as follows:

**Any condition shall be void which—**

- a. requires the performance of an illegal act, or is not legally enforceable; or
- b. is contrary to law, morality or public policy; or
- c. is uncertain, or is too vague to be enforced; or
- d. offends against any law as to accumulations, remoteness, or perpetuities; or
- e. is impossible ab initio, or becomes impossible by the act or default of the testator, or by an act of any court; or
- f. is repugnant to the gift to which it is annexed; or
- g. is in total restraint of the marriage of any person other than a widow; or
- h. is attached to a gift of capital to a widow, in total restraint of her marriage, without providing for any gift over on default; or
- i. forbids dispute of the will, without providing for any gift over on default; or
- j. restrains alienation, voluntary or involuntary, of the subject of the gift:

**Provided that nothing in this subparagraph shall affect or render void any discretionary trust with gift over, or any life estate made determinable on bankruptcy.**

20. It is Harvinder's contention that the condition in Balwant's will is contrary to Paragraph 44(b) and (j) in that it is contrary to law, morality or public policy and restrains alienation, voluntary or involuntary, of the subject of the gift. This contention is because Balwant did not provide for her in his will. In Clause 2 of his will, Balwant stated:

**I DECLARE that during my life, I have already bequeathed and provided for my daughter MRS HARVINDER KAUR DADHALIA and the said daughter shall have no right to claim any benefit either from my estate or that of my wife's estate.**

21. The reason Balwant did not provide for Harvinder in his will is clearly indicated. Accordingly, the Court finds no basis for making a finding that Harvinder's exclusion in Balwant's will is contrary to law, morality or public policy. In any event, Harvinder has not substantiated her contention in this regard. Further, the fact that Balwant gave his estate to the deceased for her life and thereafter to their 3 sons does not in my view restrain alienation, voluntary or involuntary, of the subject of the gift as contemplated in paragraph 44(j) above as alleged by Harvinder.

22. It is interesting to note that Harvinder would at this stage contend that Balwant's will is null and void, yet there is nothing on record to demonstrate that she had challenged the will at the time the same was proved in Court in 2010. This issue was also not raised in her 2 affidavits and is being raised in her submissions. It is trite law that submissions must be anchored on and supported by pleadings and that new issues cannot be raised in submissions. In this regard, I concur with Korir, J. who in the case of Republic vs. Chairman Public Procurement Administrative Review Board & another Ex parte Zapkass Consulting and Training Limited & another [2014], stated:

**"The Applicant, the respondents and the interested party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored."**

23. Further, it would appear that Harvinder was content with the state of affairs and even advanced moneys to the company after the demise of her deceased father. Assailing her father's will at this stage is in my view, an afterthought and lacking in good faith. She cannot now be heard to say that Balwant's will is null and void.

24. The jurisdiction of this Court to deal with an application for reasonable provision by a dependant is stipulated in Part III of the LSA. Section 26 of the Act 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 dependant, 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 dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.**

25. It is common ground that Harvinder is a biological child of the deceased. Although appointed one of the executors of the Will, no provision was made for her therein. A dependant such as Harvinder who has been excluded from the will of a deceased person may move to Court, seeking reasonable provision out of the estate of the deceased. As a child of the deceased, Harvinder is a dependant and need not prove dependency. Section 29(a) of the Act provides:

**For the purposes of this Part, "dependant" means—**

**a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**

26. The freedom of a testator to dispose of his free property by will is stipulated in Section 5 of the LSA. This freedom is however not absolute and is checked by Section 26 of the Act by empowering the Court to interfere with a will for the reasons set out therein.

27. Section 27 of the Act provides:

**In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.**

28. The discretion of the Court in an application for reasonable provision is absolute and unfettered, but must be exercised judicially. The factors to be considered by the Court in the exercise of its discretion are stipulated in Section 28 of the Act, which provides:

**In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—**

**a. the nature and amount of the deceased's property;**

**b. any past, present or future capital or income from any source of the dependant;**

**c. the existing and future means and needs of the dependant;**

**d. whether the deceased had made any advancement or other gift to the dependant during his lifetime;**

**e. the conduct of the dependant in relation to the deceased;**

**f. the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;**

**g. the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant**

The nature and amount of the deceased's property

29. On the nature and amount of the deceased's property Harvinder submitted that the estimated value of the estate is Kshs. 750,000,000/=. Mohamed on the other hand urged the Court to dismiss the Application as no valuation of the estate had been done. In the case of Lita Violet Shepard v Agnes Nyambura Munga [2018] eKLR upon which Mohamed placed reliance, the Court of Appeal stated:

**However, Kimaru, J in rendering his decision did not consider this critical factor at all. There was no valuation of the estate by a qualified valuer. The learned Judge did not determine the net worth and did not consider the liabilities against the estate as he ought to have done.**

30. The nature and amount of the deceased's property is a key factor in making a determination as to whether reasonable provision ought to be made to a dependant and the quantum of such provision. In the Lita Violet Shepard case (supra), the Court of Appeal faulted Kimaru, J. for awarding a dependant, the sum of Kshs. 50,000,000/= as reasonable provision when no valuation of the estate had been done. In the present case, the value of the estate was indicated in the petition for grant as Kshs. 750,000,000/=. This is no mean estate and the adequacy thereof is not in doubt, should the Court order that reasonable provision be made for Harvinder. The fact that valuation of the estate has not been done cannot therefore be a ground for dismissal of the Application.

Any past, present or future capital or income from any source of the dependant and the existing and future means and needs of the dependant

31. Under Rule 45(2)(g) and (h) of the Probate and Administration Rules, an applicant for reasonable provision is required to provide information in his supporting affidavit, of any past, present or future capital or income of the applicant derived or expected to be derived from any source as well as the applicant's existing and future means and needs.

32. Although the onus to give satisfactory evidence as to her past, present or future capital or income as well as existing and future needs rested on her, Harvinder failed to discharge the same. Other than stating that she was a housewife who was dependent on her husband and past savings, Harvinder did not give details of the source of her savings. She also made no effort to lay before the Court, particulars of her existing and future needs. Further her averment that she advanced to the company the sum of Kshs. Kshs. 6,500,000/= and to the deceased the sum of £100,000, belies her claim that she is a mere housewife with no income.

33. In order for this Court to make an informed decision in the present Application for reasonable provision, Harvinder was required to place before the Court, which she did not, cogent evidence of her past, present or future capital or income and her existing and future needs for consideration. This was the holding in the case of John Gitata Mwangi & 3 others v Jonathan Njuguna Mwangi & 4 others [1999] eKLR, where the Court of Appeal stated:

**In order that the court may be enabled to come to a proper conclusion as to what order it should make, a dependant has the duty to give satisfactory evidence as to his past, present or future capital or income and his existing and future needs.**

**Without this, the court will not be able to make any sensible order.**

Whether the deceased had made any advancement or other gift to the dependant during his lifetime

34. Balwant in his will stated that he had **“already bequeathed and provided for my daughter”**. Harvinder has conceded that the deceased herein also advanced to her the sum of £ 200,000 but says that the same was for her children’s education. Regardless of the purpose for which Harvinder used the money, the fact remains that the deceased did make an advancement of £ 200,000 to her. This coupled with the express provisions of Balwant’s will are to my mind the reason no provision was made to Harvinder by the deceased in her will.

The conduct of the dependant in relation to the deceased the general circumstances of the case, including, so far as can be ascertained, the testator’s reasons for not making provision for the dependant

35. It was submitted for Harvinder that she enjoyed a good and close relationship with both her father Balwant and her mother, the deceased herein. The deceased appointed Harvinder, executor of her will. Had the relationship with her parents been anything but cordial, the deceased would certainly not have appointed her executor of her will.

36. The reason for Balwant not making provision for Harvinder can be ascertained as it is stated clearly in his will in Clause 2 of his will. The bequest to the deceased by Balwant, was for her life and thereafter to their 3 sons. The record shows that the 3 sons predeceased the deceased. To my mind, the condition in Balwant’s bequest to the deceased, appears to be the reason why she bequeathed her entire estate, which is what she got from Balwant, to her deceased’s sons’ widows in fulfilment of the said condition.

37. Under Section 5 of the LSA, every person who is of sound mind and not a minor, has the freedom to dispose of all or any of his free property by will. That there are limitations to a testator’s testamentary freedom however, is not in doubt. In the case of Ngetich, In re estate of [2003] eKLR, Nambuye, J (as she then was) stated:

**Section 26 of the Act (cap 160) Laws of Kenya stipulates that a will is not absolute where there is contention the Court can interfere and make provision for a dependant let out of inheritance. In exercising those powers given under section 26 of the Act the Court has to bear in mind the provision of section 28 of the Act**

38. And in the case of Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR, while considering the limitations to a testator’s testamentary freedom, the Court of Appeal had this to say:

**This court must, however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime.** (emphasis added)

39. According to the Court of Appeal, a testator’s unfettered testamentary freedom given under Section 5 of the Act may only be interfered with, if his will does not provide for those for whom he was responsible during his lifetime. The Court went on to say as follows, regarding Section 26 of the Act:

**This section clearly puts limitations on the testamentary freedom given by section 5. So that if a man by his will disinherits his wife who was dependant on him during his lifetime, the court will interfere with his freedom to dispose of his property by making reasonable provision for the disinherited wife...While the deceased was entitled to dispose of his property as he pleased, he was not entitled to leave his first two wives Alice and Rose without any reasonable provision for their maintenance.** (emphasis added).

40. From the holding in the Ndolo case, it is clear that where a dependant is left without reasonable provision for their maintenance and is rendered destitute, the Court will step in to make reasonable provision for such dependant. A testator’s failure to provide for a dependant thereby rendering him destitute is clearly what Section 26 of the Act sought to cure. It is instructive that the Court’s power to tinker with the wishes of the deceased is limited to making **reasonable provision** to an excluded beneficiary and not to give a share that is equal to the other beneficiaries of the estate as of right. As such, a dependant appeals to the discretion of the Court by demonstrating the need for reasonable provision. Thus, being a child of the deceased alone is not enough for the Court to exercise its discretion in favour of Harvinder. The provisions of Section 28 of the Act and Rule 45 of the P & A Rules make it clear that the intention of Parliament was not to give a share or equal share to every excluded dependant. Had this been so, the Court would have been stripped of discretion and the law regarding provision for an excluded dependent would have been couched in mandatory terms.

41. The wishes of Balwant in his will are clear and unequivocal. His wife, the deceased herein followed the provisions of her husband’s will by making provision to her daughter’s in law, following the demise of her sons. With such express wishes, it is not the place of the Court to rewrite the Will of the deceased or make a new will for her or indeed alter the express wishes of Balwant in his will. The will of a deceased person constitutes hallowed ground that should not be trodden upon. In this regard, I follow W.M. Musyoka, now a Judge of this Court, who in his book, Law of Succession, published by lawAfrica stated at page 311:

**It is not for the court to step into the shoes of the testator and substitute for the will with what it thinks the testator should have done.**

42. And in the John Gitata Mwangi case (supra), the Court of Appeal stated that the circumstances under which a Court can interfere with the freedom of testamentary disposition are well set out in the case of Re Inns, Inns v. Wallace & Others (1947) 2 All E.R. 656, where Wynn-Parry, J. (as he then was) said at page 311:

**The Act is not designed to bring about any such compulsion. It proceeds on the postulate that a testator should continue to have freedom of testamentary disposition, provided that his disposition as regards dependants should be capable, having regard to all the circumstances, of being regarded by the Court as reasonable. From this it follows that the jurisdiction is essentially a limited jurisdiction ..... The previous decisions clearly establish that the jurisdiction is one which should be cautiously if not sparingly used.**

43. The Court's jurisdiction to interfere with the valid will of a testator should be cautiously and sparingly exercised. Indeed, a testator must be allowed to exercise his unfettered testamentary freedom provided that his disposition as regards dependants is in the eyes of the Court, reasonable, taking into account all circumstances. Having carefully considered the circumstances surrounding the will of the deceased and that of Balwant, the exclusion of Harvinder from both wills is not in my view, unreasonable.

44. The case of In re Estate of Ezekiel Mabeya Kegoro (Deceased) [2019] eKLR cited by Harvinder is distinguished for the reason that in that case, the deceased in his will had excluded his daughters and the reason for doing so was neither stated nor apparent, unlike the present case where the reason for exclusion of Harvinder is evident. Further, there was no evidence unlike in the present case, that any advancement had been made to the excluded daughters.

45. That Harvinder received advancement from the deceased during her lifetime, is not disputed. It is also not disputed that Harvinder is not destitute. I am therefore not persuaded that a case has been made out for the Court to step into the shoes of the deceased and substitute for her will, what the Court or Harvinder think the deceased ought to have done. The balance therefore tilts in favour of honouring the wishes of the deceased as expressed in her Will. Accordingly, the summons for reasonable provision dated 6.12.19 lacks merit and the same is hereby dismissed. This being a family matter, each party shall bear own costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 21<sup>ST</sup> DAY OF MAY 2021**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

..... **for the Respondents**

..... **Court Assistant**