



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 667 OF 2014

(CORAM: F.M. GIKONYO J.)

IN THE MATTER OF ESTATE OF AMINA JUMA KASSAM (DECEASED)

GULZAR ABDUL WAIS.....PETITIONER

VERSUS

YASMIN RASHID GANATRA.....1ST PROTESTOR/APPLICANT/DEFENDANT

TARIQ ABDUL RASHID.....2ND PROTESTOR/APPLICANT/DEFENDANT

RIZVAN ABDUL RASHID.....3RD PROTESTOR/APPLICANT/DEFENDANT

NAUSHEEN U. GANATRA.....4TH PROTESTOR/APPLICANT/DEFENDANT

JUDGMENT

Twists and turns

[1] This succession cause has seen innumerable twists and turns; the length of time taken so far; the numerous varied litigation spanning from succession cause to civil suit to constitutional petition; the nature of hotly contested claims, and so forth and so forth. These matters are borne in the account presented as brief facts below.

Brief facts

[2] These proceedings relate to the estate of AMINA JUMA KASSAM (hereafter the deceased) who died on the 16th April 2010. The Deceased, AMINA JUMA KASSAM was the widow of JUMA KASSAM who predeceased her. They had four issues namely;

(a) ABDUL RASHID JUMA- Son- Deceased

(b) ELIAS JUMA- Son- Deceased

(c) RESHIMA JUMA- Daughter-Married

(d) GULZA ABDUL WAIS-Daughter- Married

[3] The Petitioner applied through summons dated 24th January 2016 for confirmation of the grant of probate made to the Applicant on 23rd March 2016.

[4] The application was supported by grounds that;

i. The grant of probate to the estate of Amina Juma Kassam was made on 23rd March 2016.

ii. There was no dependant of the deceased within the meaning of Section 29 of the Law of Succession Act Living and no

application under part II of the act is pending.

iii. The estate of the deceased was wholly vested in the named beneficiaries jointly as per the will.

iv. The said summons was heard and determined and a confirmation of grant issued by court on 23rd January 2017.

[5] In a summons dated 8th February 2017 the protestor sought revocation of the confirmed grant of probate dated 23rd January 2017.

[6] Vide the ruling of the court dated 22nd October 2019, this court set aside the certificate of confirmation of grant dated 24th June 2016.

[7] ABDUL RASHID JUMA pre deceased his mother herein for he died on 18th November 2002. The 1st Protestor/ Applicant/ Defendant herein is the widow of the late ABDUL RASHID JUMA and the 2nd, 3rd, and 4th Protestor/ Applicants/ Defendants are the children of the 1st Protestor/ Applicant/ Defendant and the grand children of the deceased herein.

[8] The 1st and 2nd Protestor/Applicants/Defendants petitioned for letters of administration to the estate of ABDUL RASHID JUMA on 11th October 2007 vide MERU HC. SUCC NO. 556 OF 2007.

[9] On 17th June 2010 the Petitioner herein filed for grant of letters of administration intestate to the deceased's estate in MERU HC. SUCC. CAUSE NO. 290 OF 2010 without the knowledge of the Protestors herein and when they learnt about the filing of the MERU HC. SUCC. NO. 290 OF 2010. They raised an objection thereto.

[10] Due to threats by the Petitioner and her sister to evict the Protestors from both land parcel nos. NTIMA/IGOKI/5685 and NTIMA/IGOKI/1597, they filed summons for restraining orders which were issued upon *inter partes* hearing by Kasango J. on 29/11/2010. The petitioner and the 1st protestor were also appointed as the administratrix of the deceased's estate and the court directed that the hearing of the matter be expedited and fixed a hearing date for the summons for confirmation of grant dated 20/01/2011.

[11] The Petitioner then filed for annulment of the joint grant issued by Kasango J. on the basis that the intestate proceedings were defective as the deceased died testate. After a protracted hearing, Lessit J. (as she then was) decreed on 8/7/2014 that the deceased's will made on the 26th November 2009 was valid, annulled the grant dated 29th November 2010 and directed how the deceased' estate would be distributed.

[12] Being dissatisfied with the decision of Lessit J (as she then was), the protestors appealed to the Court of Appeal at Nyeri in Succession Appeal No. 45 of 2014. Judgment was delivered on 14/10/2015 and in a majority decision (JJA Nambuye and Waki) with (J.A. P.O. Kiage) dissenting, found that the deceased's will was valid and should be put to probate and it would be in the probate proceedings that the protestors would advance their case.

[13] The protestors felt that their constitutional rights had been immensely violated and on advice filed a constitutional reference being Nairobi HC. PETITION NO. 29 OF 2015 which was transferred to MERU High court but was dismissed for want of prosecution.

[14] The Petitioner then filed for grant of probate without involving the protestors herein and without notice to them howsoever. The proceedings were taken out *ex parte*, yet they were dependants before the demise of the deceased herein and still occupy the whole of land parcel no. **NTIMA/IGOKI/5685** and part of **NTIMA/IGOKI/1597**. The grant was confirmed and the protestors consequently filed the summons dated 8th February 2019. This court vide ruling delivered on 22nd October 2019 found that the protestors are dependants of the estate of the deceased.

[15] The deceased upon her demise left the following properties;

a) **Plot no. 209/4300/109 Nairobi (Pangani)** conservatively valued at kshs. 100,000,000/= fully developed one storey commercial plot situated at pangani in Nairobi.

b) **LR No. NTIMA/IGOKI/1597** conservatively valued at Kshs. 50,000,000/=. It is situated within Meru municipality- Gitimbine area fully developed with 5 front shops and 5 rear rooms. There is also a go down occupied by the petitioner. This property brings in rent of not less than Kshs. 200,000/= per month.

c) **LR NO. NTIMA/IGOKI/5685** is conservatively valued at Kshs. 20,000,000/= it is situated within Meru municipality and is fully developed with one storey residential houses.

[16] Because of the nature of the claims herein, and the heated manner parties have litigated these proceedings, I will deliberately set out the evidence as well as the submission by the parties in *ex tenso*.

EVIDENCE.

The Protestor's Case

[17] The protestors called two witnesses who testified on 19th February 2020.

OW1- **Mrs. Yasmin Ganatra Rashid**

[18] She adopted her written statement as her evidence in chief. She testified that she was the wife to the late Rashid Juma. Rashid Juma was a brother to the Petitioner and a son of the late Amina Juma, the testator herein and the late Kassam Juma.

[19] From her statement, in or around 1999, the deceased started constructing the ground floor of the two floor residential premises situated on land parcel no. **NTIMA/IGOKI/5685** and when she was not able to complete the project, requested her now deceased son to assist her complete the same. Upon completion the deceased allowed her son RASHID to build the upper floor of the same building which he did out of his own resources. The 1st protestor produced photographs of the said house and receipts of payments for the construction of the upper floor made by her late husband.

[20] Upon completion of the said premises in the year 2000, the deceased occupied and settled on the ground floor while the family of ABDUL RASHID JUMA settled and occupied the upper floor. Since then they have always occupied and enjoyed the upper floor of the premises on land parcel no. **NTIMA/IGOKI/5685** exclusively to date while the deceased occupied the ground floor. They have always lived in peace.

[21] In the year 2009 the deceased herein started ailing and was taken to hospital in Nairobi and after being discharged from the hospital she went to live in her house at Nairobi. The deceased came back to Meru once and stayed at the petitioners' house at Gitoro within Meru. The deceased was later on taken back to Nairobi and from that point the protestors were unable to gain access to her as the petitioner herein proved crafty and determined to keep away the protestors.

[22] That the Petitioner and her sister started bringing prospective buyers to view the property that is **NTIMA/IGOKI/5685** and other properties and fearing that it would be sold, 1st and 2nd Protestor filed MERU HCCC NO. 7 OF 2010 (YASMIN RASHID GANATRA, TARIQ ABDUL RASHID (legal representatives of ABDUL RASHID JUMA vs AMINA JUMA KASSAM & 2 OTHERS) on 25th January 2010 and got conservatory orders. The deceased was the registered owner of the property and was therefore sued in that capacity. After the death of the deceased on the 16th April 2010 they took out citation against the petitioner and her on June 2010.

[23] Prior to the demise of the deceased herein and even during the life time of the deceased's husband JUMA KASSAM, the protestors have always occupied and enjoyed one rear shop situated on land parcel no. **NTIMA/IGOKI/1597** which they still occupy to date.

[24] The 1st Protestor produced construction receipts to show that her husband was the one who largely constructed their home on **LR. NO. NTIMA/IGOKI/5685**.

[25] The 1st protestor filed cases before different courts of law in pursuit of justice. She explained that each case represented a different issue and that she was only being vigilant.

[26] The protestors produced Copies of the register in respect of **LR. NO. NTIMA/IGOKI/5685** and **LR. NO. NTIMA/NTAKIRA/1597** registered in the name of the deceased.

[27] The Protestors asked the court to note that the deceased's name was entered in the register of **LR NO. NTIMA/NTAKIRA/1597** on 24/04/2010 yet she died on 16/04/2010

[28] On cross examination she testified that she did not have any contract or documentary evidence to prove the stay arrangement she alleged to have made with the late Amina Juma.

[29] She did not have any evidentiary proof that the suit properties earned the rent pleaded in her affidavits and was valued as alleged in the statements.

[30] The witness had filed a case against the late Amina Juma seeking an injunction against selling or letting property LR. NO. NTIMA/IGOKI/5685 and so was not in easy terms with the late.

[31] The witness confessed that she had other properties which were not filed in court.

[32] She confirmed that her husband the late Rashid Juma and his brother the Late Elias Juma had acquired property from their father the late Kassam Juma through a will in 1992.

[33] The court was told that in the will of 1992, the two sons and one daughter who is the deceased herein had benefitted.

[34] It was her case that they were dependants on behalf of the late Rashid Juma.

[35] The witness did not confirm that the receipts alluded to were indeed directed at the construction works on **LR NO. NTIMA/IGOKI/5685**.

OW2- Tariq Abdul Rashid the 2nd Protestor.

[36] He testified that he is the eldest of the three siblings and that the 1st Protestor is his mother. The deceased and the 1st Protestor have lived happily on parcel no. **NTIMA/IGOKI/5685** for over 20 years. It was his testimony that they have never paid rent for the said premises. A position he credits to the fact that the deceased had taken them in as her dependants.

[37] He stated that they had been denied access to the **Nairobi pangani no. 209/4300/109**.

[38] He prayed that they be allocated property from the deceased's estate as prayed.

[39] On cross examination, the witness confirmed that there was no agreement or documentary evidence to prove the circumstances under which or if at all they resided on **LR.NO. NTIMA/IGOKI/5685** for the past 19 years.

[40] He also stated that he had no evidence to prove that the values given for the suit premises derived from a valuer as no report had been filed.

[41] The protestors contend that paragraph 21 of the court of appeal decision by J.A. R.N. Nambuye "**no prejudice will be suffered by the appellants as they will have a chance to raise these two issues and others if any in the intended probate proceedings**" was intended that the petitioner does notify the protestors of the probate proceedings and duly serves them. The same was not done despite numerous proceedings involving the parties herein.

[42] The 1st Protestor testified that they had occupied the upper floor of the house situated on **LR NO. NTIMA/IGOKI/5685** for over 19 years and as dependants of the deceased it is their humble prayer that the protestors get a share of the deceased's estate and specifically **LR NO. NTIMA/IGOKI/5685** and the developments situated thereon as it has been her home for the past twenty-two years. She further prays that the property **LR NO. NTIMA/IGOKI/1597** be equally shared between the dependants of the estate of the deceased herein.

[43] In conclusion the protestors submitted that they have proved that they are entitled to a reasonable provision from the estate of the deceased and prayed that they be given;

(i) The whole of **LR NTIMA/IGOKI/5685**

(ii) Part (one shop that they occupy) of **LR NTIMA/NTAKIRA/1597**.

PETITIONERS CASE

[44] PW1-**Mrs Gulzar Abdul Wais** adopted her written statement dated 4th December 2017 and a bundle of documents of the same date and a further bundle of documents dated 16th March 2017. She testified in support of the will of the deceased herein devolving the entire real estate of the deceased to herself and her sister.

[45] She stated that the deceased Amina Juma had 4 children; 2 male and 2 female children and among the female children was herself and Reshma Juma.

[46] It was her testimony that the late Amina Juma died on 16th April 2016 leaving a valid written will dated 26th November 2009 which was produced in evidence.

[47] She stated that the deceased appointed her and Reshma Juma as the sole executors and beneficiaries under the said will.

[48] She stated that the will devolved the following property; **NAIROBI PROPERTY LR NO. 209/4300/109, LR NO. NTIMA/IGOKI/5685 AND LR NO. NTIMA/IGOKI/1597** jointly and absolutely to herself and her sister Reshma.

[49] That the deceased had the following property that was not included in the will, motor vehicle registration no. KXP 101 M/ benz and bank account no. **006100010258**.

[50] That the protestors had previously filed multiple litigation suits on the issue of succession which had been declined by the courts.

[51] That she and her sister had not been provided with anything in their father's will of 1992 and that is why their mother, deceased herein solely bequeathed the property to them.

[52] Further it was not in contest that in the will of 1992, her father had bequeathed property only to her mother and two brothers.

[53] Further the two brothers, only the wife to the late Rashid Juma had contested Amina Juma's bequeathal in the will.

[54] That there was no dispute or protest or indication by Rashid Juma during his life time that he would be entitled to his mother's property as inherited from his father Kassam Juma.

[55] That the 1st protestor had not disclosed any property that she had acquired through the late Rashid Juma via the will of 1992 yet she was adamant that she ought to have been reasonably provided for in the will.

[56] That the deceased was fair and just in giving out the property as done in the will because the two had already inherited from the will of 1992.

[57] Similarly, she affirmed that the will was the testator's will and ought to be upheld.

[58] That the values pleaded by the protestors relating to the bequest were absurd and unsupported by a valuation report and were as wishful as the property had not been valued in monetary terms.

[59] The late Rashid Juma had never at any time recorded any grievance that he should be entitled to the late Amina Juma's inheritance from Kassam Juma, the protestors were overreaching in their selfish demands.

[60] She would not have any issues with the protestors if they had not inherited from her father the late Kassam Juma and she would be willing then to accommodate them except in this case where they were seeking double inheritance.

[61] On cross examination, she testified to having never lived on parcel no. **NTIMA/IGOKI/5685** and that in fact the protestors have lived there for over 20 years. She stated that the protestors used **LR NO. NTIMA/IGOKI/1597** as a store for their hardware business for over 20 years. It was her testimony that no rent has ever been demanded or paid for the protestors' occupation on both properties during the life time of the deceased and therefore the deceased lived with the protestors as a mother would live with her children.

[62] That Rashid had come to stay on the impugned property as a tenant in the arrangement where he paid rent to the late Amina Juma.

[63] It was also her case that the 1st protestor's husband did not build the first floor of the suit premises on LR. NO NTIMA/IGOKI/5685 as claimed and receipts relied upon were questionable because the protestors had earlier testified in court in Succession Cause No. 290 Of 2010 affirming that they had no evidence and it was an afterthought that they now had fished for evidence.

[64] She testified that she had no issue, claim or dispute from her father's will of 1992 and was fully entitled with her sister Reshma as bequeathed by the deceased herein.

[65] She confirmed that though the court had found the protestors to be dependants as to the whether they were entitled to reasonable provision should be evaluated in light of the wishes of the testator which were not her own wishes.

[66] The Petitioner stated that her reason why the protestors should not be provided for from the estate of the deceased herein was because the sons of the deceased alongside the deceased herein were the beneficiaries of the estate of the husband of the deceased herein. She stated that they were not provided for in the estate of their father because they were not in need.

[67] The Petitioner in support of her case relied on the bundle of documents namely;

a. The last will and testament of AMINA JUMA

i. An order dated 8th September 2014 in HC. SUCC NO. 290 OF 2010 being an order for annulment of the grant made to the petitioner herein on 29th November 2010

ii. A copy of the judgment dated 8th July 2014 in HC. SUCC. NO. 290 OF 2010

iii. A copy of the ruling dated 26th November, 2010 in HC. SUCC. 290 of 2010

iv. A copy of the ruling dated 8th November 2017 in ELC Constitutional Petition No. 29 of 2015.

v. A copy of the judgment of the court of appeal dated 14th October 2015 in Civil Appeal No. 45 of 2014.

[68] The Petitioner concluded by praying that the protest be dismissed and the summons of confirmation of grant dated 24th June 2016 be allowed as prayed.

ANALYSIS AND DETERMINATION

[69] At the end of the oral hearing, the parties were directed to file written submissions. Both Parties filed their written submissions which I have duly considered.

[70] I have looked at the pleadings, the recorded and oral evidence by both sides and the written submissions by both the protestors and the petitioners. The issues that emerge for determination are;

a) Validity of will

b) Whether the improvements are a basis for entitlement in the estate

c) Whether the court should make a reasonable provision for the protestors in the will,

Validity of will

[71] Pursuant to the decision of the Court of Appeal in succession cause no. 45 of 2014, I should deal with the validity of will first.

[72] 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.

[73] Capacity to make 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 is sound of 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.’

[74] The case of *Banks vs. 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.’

[75] In this case, the testamentary capacity of the testator was not litigated. Although it was alleged that she was ill, her soundness of mind for the purpose of making the will herein was not in question.

[76] 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.’

[77] Section 7 covers other circumstances of the making of the will, e.g. fraud or coercion etc. which detract from or undermine its validity despite the testator’s testamentary capacity to make a will. Although it was claimed that the petitioners hid the deceased and denied the protestors any access to the deceased, none of the elements stated in section 7 was alleged or proved, say, fraud, coercion or any importunity which takes away the free agency of the testator, or inducement by mistake, was alleged or proved.

[78] The presumption of soundness of mind was not negated in this case.

[79] 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.’

[80] No challenge of the will on the front of non-adherence with the legal requirements of section 11 of the Law of Succession Act was taken up by the protestors, except, it was stated but without proof that the petitioner hid the deceased and denied the protestors access to the deceased.

[81] The will does conform to the legal requirements.

[82] In sum, I find the will is valid. I will now delve into the other issues.

Alleged improvements as a basis for entitlement

[83] The protestor alleged that, during the lifetime of the deceased, her late husband carried out improvements of the house in LR. NO. **NTIMA/IGOKI/5685** - the estate property. According to her, these improvements give her a stake and entitlement in the estate property. The protestors' evidence is that they have occupied the land known as **NTIMA/IGOKI/5685** and that the deceased during her lifetime had allowed them to live there. According to the protestors' evidence, one of the major arguments is that they have interest in the **NTIMA/IGOKI/ 5685** property on the basis of the developments made by her late husband thereto.

[84] Is the alleged contribution a basis for inheritance? It is my considered view that such development of the estate property does not confer the right of inheritance or vest in the developer the status of a beneficiary in the estate of the deceased under the law of succession. The best it could be is a claim against the estate for; (i) the value of the improvements; or (ii) for completion of a gift *inter vivos*. Such claims constitute cause of action quite separate from succession proceedings. But, I will consider at a later stage whether the development herein supports a gift *inter vivos*.

Reasonable provision

[85] 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.

[86] The Protestors are the daughter in law and grandchildren of the deceased. Such are competent to apply in Court for reasonable provision out of the estate of the deceased. See also this court's findings vide its ruling delivered on 22nd October 2019. However, of specific and greater value is that whether the application will succeed is a different thing altogether. The court will therefore determine whether a case for reasonable provision for the protestors has been made.

[87] According to 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.

[88] The discretion of the Court to order for reasonable provision is unfettered, but must be exercised judicially; on consideration of the facts of the case and defined factors and principles of law. 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

[89] The protestors submitted that the deceased had the following properties;

- (i) **PLOT NO. 209/4300/109, Nairobi (Pangani)** conservatively valued at Kshs. **100,000,000/=** it is a fully developed one storeyed commercial plot situated at Pangani Nairobi.
- (ii) **LR NO. NTIMA/IGOKI/5685** is conservatively valued at **Kshs 20,000,000/=** it is situated in Tuntu Area within Meru Municipality and is fully developed with one storey residential houses.

[90] According to the protestors, the above parcels form the free property of the deceased herein.

(iii) Land parcel NO. NTIMA/NTAKIRA/1597 is the only property the deceased got from her late husband's estate to have life interest.

[91] The Petitioner submitted that the deceased's property proffer special circumstances in that the bequest constitute the entire property the testator herein inherited from her father who had equally bequeathed property to the 1st Protestor's husband from which the protestors fully inherited.

[92] The Petitioner submitted that the valuation so to speak are unscientific, misleading it would be unwise to go by them without substantiation.

[93] They cited the case of *Lita Violet Shepard v Agnes Nyambura Munga [2018] eKLR* where 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.

[94] 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 present case, the value of the estate was indicated by the protestors in their protest as Kshs. 170,000,000/=. However, the figures stated are not based on professional valuation. That notwithstanding, under section 27 of the Law of Succession Act, *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.* But, this is dependent upon court's determination of all the relevant factors. I refuse therefore to dismiss the application for reasonable provision by the protestors. What are the other factors?

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

[95] 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.

[96] The Protestors submitted that the 1st Protestor is a business woman within Meru town. From this business she supports her children as much as she can.

[97] The protestors stated that they were housed by the deceased in the premises on land parcel no. NTIMA/IGOKI/5685 for the better part of the past two decades and even now continues to live in the same house where the deceased left them. They insist that they have no other home they know of. The need for a home and shelter is a continuing one and that they have no means to acquire a similar home.

[98] The Petitioner submitted that it is not in dispute that the Protestors already have property inherited from the late Rashid Juma and income and are only claiming for more. That it is not in dispute that the Protestors have not filed in court a well particularized valuation report for the alleged values of the suit properties *vis a vis* the inheritance they obtained from Kassam Juma through Rashid Juma which was not disclosed.

[99] The Petitioner further submitted that the only property she has with her sister Reshma is what was bequeathed to them by the testator herein.

[100] The property the Protestors already inherited from Kassam Juma through the late Rashid Juma which they never laid before court has, can and will accommodate their present and future needs as they never testified or produced any evidence to indicate any specific circumstances of in surmounting needs to justify reasonable provision. She relied in the case of *John Gitata Mwangi & 3 Others V Jonathan Njuguna Mwangi & 4 others [1999] Eklr*

[101] It is true that the protestors did not provide information required under Rule 45(2)(g) and (h) of the Probate and Administration Rules in the supporting affidavit or at all, 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. This requirement serves a noble purpose; to enable the court discern the need of the applicant in determining whether or not to make reasonable provision, and in what proportion, for the applicant.

[102] I note however that the 1st protestor and her children were beneficiaries of the land inherited by the late husband of the 1st protestor, who is also the father of the other protestors. Such past properties or income therefrom is relevant disclosure in an application of reasonable provision by the applicant. They did not disclose this fact. I do note also that the Protestors submitted that the 1st Protestor is a business woman within Meru town and from this business she supports her children as much as she can. No much or useful information was given of the business. Contrary to the averments by the 1st protestor, such non-disclosure of such relevant factors tinctures the intention and hands of the applicants.

The situation and circumstances of the deceased's other dependants and the beneficiaries under any will.

[103] It bears repeating that, Abdul Rashid Juma Kassam (deceased), the husband to the 1st protestor and the father of the 2nd, 3rd and 4th protestors inherited, alongside his brother, Elias Juma Kassam, what is referenced as PLOT NO. KINORU/ 2345 in equal shares. No reliable information was given of the value of the property and its use. Properties in Meru in the location of this property is quite pricy.

[104] The Petitioner submitted that the estate of the late Elias Juma is content with the bequest from Kassam Juma and have not laid any claim as they are settled and the protestors who have not claimed that the bequest from Kassam Juma was inadequate have rattled the peaceful inheritance by the Petitioner and her sister through multiple court actions.

[105] She further submitted that while the Petitioner and her sister are not beneficiaries under any other will, the Protestors are beneficiaries under the will by Kassam Juma of 1992 and this is not in dispute.

[106] The truth which has not been denied is that no bequest was made to any of the daughters herein in the will of their late father. Only the husband of the 1st protestor and his brother benefitted. The protestors are beneficiaries of the estate of their late father. The 1st protestor is the administratrix of the estate of her late husband thereof.

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

[107] The protestors submitted that the deceased in this matter had made no previous advancement or provision for the protestors in this matter during her life time and it is on this basis and the reason that the protestors herein were depending on the deceased herein for shelter, a basic need, which has formed the present protest.

[108] The protestors further submitted that the deceased did not provide for his late son in the will. This was in spite of the fact that she knew that the Protestors have always lived on the 1st floor of the premises on **LR NO. NTIMA/IGOKI/5685** and this is the place they have called home to date. That also they built this property on the deceased land. They therefore are not claiming this part of the property as proprietors but as dependants. The deceased allowed them to use part of the premises on **LR NO. NTIMA.NTAKIRA/1597** as a shop. They are still using the rear shop for their livelihood.

[109] The Petitioner submitted that the deceased never advanced any property or gift the Protestors clearly because they had already inherited from Kassam Juma through Rashid Juma.

[110] She submitted that although they claimed, the protestors never proved that they had agreed with the deceased that they would permanently live on or acquire property **LR. NO. NTIMA/IGAKI/5685**.

[111] That the 1st Protestor's husband did not build the floor of the suit premises on **LR. NO. NTIMA/IGOKI/5685** as claimed and the receipts relied upon were questionable because the protestors had earlier testified in court in Succession 290 of 2010 affirming that they had no evidence and it was an afterthought that they now fished for evidence.

[112] The Protestors herein admitted to having received a share of inheritance from the estate of the deceased's husband although no much detail was provided. The daughters who are now the Petitioners herein were excluded in that inheritance and for that reason the deceased herein decided to alleviate the said discrimination by bequeathing them.

[113] The petitioner urged that it is not in dispute that in the will of 1992 wished by Kassma Juma, the testator herein inherited property alongside her two brother; the 1st protestor's husband and the late Elias Juma. The late Elias Juma never sought to be provided for by the testator and the late Rashid Juma also never indicted in his life time that he would want an additional share from her mother's property.

[114] The petitioner took the view that the Protestors as daughter in law and her children are not genuine in seeking to inherit from the late Amina Juma out of the bequest the said Amina Juma obtained from her father Kassam Juma who had equally bequeathed property to his sons, including the 1st Protestor's husband, leaving out the Petitioner and her sister.

[115] It is now ripe to determine the question whether the deceased made a gift inter vivos to the protestors. The evidence adduced before court is that, whereas the protestors lived with the deceased, the relationship between them was quite strained resulting *inter alia* into court cases between the deceased and 1st protestor. The protestors had filed a case against the testator seeking an injunction to prevent her from selling or letting **LR.NO. NTIMA/IGOKI/5685**. This fact is not denied and is supported by ample evidence. It therefore defeats logic for the protestors to argue that, in spite of such evident strained relationship, they enjoyed a cordial relationship with the deceased.

[116] The protestors based their claim of entitlement in the estate of the deceased on dependency; she permitted them to live in and allowed improvements of 1st floor of **LR.NO. NTIMA/IGOKI/5685**-one of the estate properties- by the 1st protestor's late husband. These claims seem to be of incomplete gift *inter vivos*.

[117] Of incomplete gift *inter vivos*, *Halsbury's Laws of England, 4th Edition Volume 20(1) at paragraph 67* states as follows:

“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 donee 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.”

[118] See also *Halsbury's Laws of England (ibid)*, para 70: -

The subsequent acts of the donor may give the intended donee a right to enforce an incomplete gift. Thus, if a donor puts the donee into possession of a piece of land and tells him that he has given it to him so that he may build a house on it, and the donee

accordingly, and with the donor's assent, expends money in building a house, the donee can call on the donor or his representatives to complete the gift.

[119] Other examples include; where the donor appoints donee as executor is confirmation of the imperfect gift.

[120] Note however that; the intention to make a gift must continue unchanged until the death of the testator.

[121] There was no such succinct evidence to prove that there were improvements done by her late husband on **LR.NO. NTIMA/IGOKI/5685** or that they were done on the basis of a gift of the premises. The receipts produced; some bear the name of the late husband of the 1st protestor and others the name of the late husband of the testator herein. There is no cogent and pointed evidence that the items purchased were used or applied upon improvements on the estate property. What is provided is merely the word of the 1st protestor but devoid of any nexus of the items to the improvement on the estate property. The protestors evidence that her late husband was called upon to assist her mother complete the premises could simply have been a case of a son helping her mother rather than proof of a gift. I note, however, that the protestors lived in the 1st floor of **LR.NO. NTIMA/IGOKI/5685** during the lifetime of the deceased. Nonetheless, the petitioner's submission that, the deceased allowed them to live in the said premises as family members, but not with the intention of making a gift to them makes perfect sense within the facts of this case. The impression created by the evidence is that their stay on the 1st floor of the premises on **LR.NO. NTIMA/IGOKI/5685** may have been at first consensual as family members, but only to become forceful and by domination by the 1st protestor and her children over the deceased. The evidence adduced and the conduct of the deceased in intending to let or sell **LR.NO. NTIMA/IGOKI/5685** is not in tandem with an intention to make a gift to the protestors. Note however that; the intention to make a gift must continue unchanged until the death of the testator.

[122] In addition, it appears the testator intended to make bequests to her two daughters who were not provided for in the estate of the deceased. Such is a noble intention to resolve an imbalance or deprivation of right of the daughters in the estate of their late father.

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

[123] There are two senses in which circumstances of the case, prevailing at the time may be considered so as to disentitle the beneficiaries of entitlement to the Will by a Testator.

[124] The principle underlying this was stated in the persuasive precedent in *Hughes v National Trustees Executors & Agency Co. Australasca Ltd [1979] 143 (CLR 134)* Gibbs J remarked:

"The question whether conduct is sufficient to disentitle an applicant to relief must depend not only on the nature of the conduct itself, but also to some extent, on the strength of his or her need or claim to the provision from the Estate of the deceased. The stronger the applicant's case, for relief, the more reprehensible must have been his conduct to disentitle him to the benefit of any provision."

[125] In *Re K [1921] St R. QD 177 Re Osbourne [1928] St RQD 129* at 131:

"The onus of proof of disentitling conduct lies on those who resist the application by alleging disentitling conduct, where an allegation of disentitling conduct is made, the Court considers whether, on the balance of probabilities, it has been proven." What should a Court make of a Testator's decision in the Will disentitles? Some of his or her direct bloodline dependents? The deliberate choice of the wording Testamentary Freedom in the making of Wills is a concept tied with certain rights in relation to property.

[126] "Testamentary Freedom is best summarized as a power with respect to property effective at death." However, notwithstanding the testamentary freedom, the court, when properly moved may make an order for reasonable provision for a dependant whom no provision has been made in the Will. By making reasonable provision, the court does not however invalidate the will. See *James Maina Anyanga vs. Lorna Yimbiha Ottaro & 4 Others [2014] eKLR:*

"Failure to make provision for a dependant by a deceased person in his will does not invalidate the will as the court is empowered under Section 26 of the Law of Succession Act to make reasonable provision for the dependant."

[127] See also the case of *Elizabeth Kamene Ndolo vs. George Matata Ndolo [1996] eKLR:*

"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."

[128] The Protestors submitted that the deceased herein has lived with them for over nineteen years in harmony and peace. They denied the allegations put forward by the Petitioner. That if at all there were wrangles the deceased had two homes and she would have moved out or evicted the Protestors. They insisted they had a cordial relationship with the deceased.

[129] The Petitioner submitted that the protestor did not take care of the deceased when she was ill and that is why the petitioner and her

sister had to transfer the deceased from Meru to Nairobi so that she would be cared for.

[130] She submitted that it is not in dispute that the protestors had filed a case against the testator seeking an injunction to prevent her from selling or letting **LR.NO. MTIMA/IGOKI/5685** and this justifies the bad blood and disagreements between them.

[131] That without prejudice to the sour relationship between the testator and the Protestors, the reason why the testator did not provide for the protestors is that the Protestors had already inherited from the will of 1992 in which part of the estate therein is what was bequeathed to the testator and two brothers and which forms the dispute herein.

[132] That there was nothing repugnant to the law in the bequests made by the deceased as she catered for the petitioner and her sister who without the will would be left with nothing because of the acrimonious fall out demonstrated by the protestors.

[133] The 1st Protestor was involved in legal battles with her mother in law. This must have informed her decision to exclude her from the inheritance. I am convinced by the evidence produced in this Court that the relationship between the 1st Protestor and the deceased was a strained one.

The general circumstances of the case, including so far as can be ascertained, the testators reason for not making the provision for the dependant.

[134] Toward this requirement, the Protestors submitted that they have lived with the deceased on the premises referenced as **NTIMA/IGOKI/5685** for over nineteen years. They argued that, during that time the Petitioner herein who lives in Meru never visited her mother or even stayed in the premises for a single day. They did not stop there. It was their case that no convincing reason has been given as to why there was no provision for the protestors in this matter. And, that the reason fronted that the protestors had already benefitted from their father's share in the estate of their deceased father holds no strength, the present succession cause relates to the estate of Amina Juma Kassam and not Juma Kassam.

[135] That prior to the death of the deceased the 2nd, 3rd, and 4th Protestors were being maintained by the deceased and are therefore dependants as defined by Section 29(b) of the Law of Succession Act.

[136] Therefore, they submitted that they were not provided for by the deceased and her will should therefore be interfered with to provide for the protestors as stipulated under section 26 of the Law of Succession Act. They relied in **Succession Cause No. 846 of 2011 Re Estate of Magayu (Deceased) [2018] eKLR.**

[137] They cited section 47 of the Law of Succession and Rule 73 of the Probate and Administration Rules that this court has jurisdiction over this matter.

[138] The protestors submitted that they should be left on the land where they occupy as they have been using the same land even before the demise of the deceased. The petitioner and her sister have never been on the land and have always occupied the land and premises in Nairobi. They cited **Succession 669 Of 1987 In The Matter Of the Estate of Muhuri Wathungu- Deceased.**

[139] The protestors urged that, in the estate of the late Juma Kassam the Petitioners did not object to confirmation of grant on 15th June 2000, when they were not given any property. Therefore, they cannot at this point allege they were not provided for by their late father hence they are the only ones entitled to their late mother's estate. That the property **PLOT KINORU 2345** is worth very little compared to the other properties in question.

[140] They took the view that Amina Juma Kassam was given **PARCEL NO. NTIMA/NTAKIRA/1597** and given a lifetime interest. They relied in Section 35(2) of the Law of Succession Act that the intention of a surviving spouse being a life interest over the estate of a deceased is to ensure that after the death of the surviving spouse, the children are still left with a share of the estate of the deceased. Therefore, the deceased herein was only entitled to a life time interest over the said property. That section 35(2) prohibited the deceased herein from bequeathing this property through a will.

[141] According to the protestors, the **Property NTIMA/IGOKI/5685** solely belonged to the deceased herein and did not form part of the estate of her late husband. Therefore, the 1st Protestor's late husband is entitled to the estate of his mother.

[142] The Petitioner was of a different opinion. She submitted that the Protestors have not pleaded or proved the extent to which they specifically claim reasonable provision and the manner and extent the bequest they obtained from Kassam Juma is inadequate for inheritance vis a vis the deceased's property. Their protest therefore is not supported by evidence. She cited Section 107(1) and 109 of the Evidence Act.

[143] The Petitioner submitted that the factors a court must consider in exercising the discretion for reasonable provision to the dependants do not support the protestors at all. She relied on Section 28 of the Law of Succession Act.

[144] The Petitioner submitted that the construction of the intention of the testator herein in the will dated 26th November 2009 herein is crucial and devoid of illegality.

[145] That in deviating from the testator's intention under the will, the court will be making another will in this case which should be avoided. She relied in the case of **in re estate of Samuel ngugi mbugua(deceased) [2018] eklr.**

[146] That the conscience of the testator herein was clear as a follower of the Muslim religion referring to Allah Mohammad and wrote the

will in love.

[147] The petitioner calls upon the court to read the will as a whole and establish the intention of the testator therein in light of the circumstances to establish that the testator rightfully and deservingly failed to provide for the protestors in the terms set out in the will.

[148] That the testator had a clear mind of the bequest to the two daughters who she specified with precision and her wishes ought to be respected. She relied in the case *of Lita Violet Shepard V Agnes Naymbura Munga*[2018] Eklr

[149] In the estimation of the petitioner, the court ought not only provide for the protestors on the basis that they are the testators dependants, but, rather analyze the conduct and intent of the deceased in the first having the knowledge that the protestors had already inherited from her son Rashid Juma and therefore constituting a single project of harmonious and integral transaction which provided for both sides of the coin- reflection of what the deceased intended. She relied in the case of *In Re Estate Of Catherine Nduku Malind(Deceased) [2020] eKLR*

Conclusion and orders

[150] In my view, this ground; *the general circumstances of the case, including so far as can be ascertained, the testators reason for not making the provision for the dependant*; is reminiscent of court's overall impression of the case, conclusions and determinations.

[151] I have considered all the arguments presented before the court and I have made specific finding in each of the grounds submitted upon. I agree with the Petitioner that the values of the properties stated by the protestors are not founded on any professional or ascertained and acceptable standard. There was no valuation report that has been tabled before this court. This notwithstanding, exercise of court's discretion in making its determinations in this case is to be informed by a variety of factors I have stated above.

[152] At the time of his death, the properties attributable to the deceased were:

(i) **PLOT NO. 209/4300/109, Nairobi (Pangani)**

(ii) **LR NO. NTIMA/IGOKI/5685**

(iii) **Land parcel NO. NTIMA/NTAKIRA/1597**

[153] The deceased in her will made bequests out of all her properties to the beneficiaries listed in her will excluding the Protestors herein.

[154] The evidence adduced before court is that, whereas the protestors lived with the deceased, the relationship between them was quite strained resulting *inter alia* into court cases between the deceased and 1st protestor. The protestors had filed a case against the testator seeking an injunction to prevent her from selling or letting **LR.NO. NTIMA/IGOKI/5685**. This fact is not denied and is supported by ample evidence. It therefore defeats logic for the protestors to argue that, in spite of such evident strained relationship, they enjoyed a cordial relationship with the deceased.

[155] The protestors based their claim of entitlement in the estate of the deceased on dependency; she permitted them to live in and allowed improvements of 1st floor of **LR.NO. NTIMA/IGOKI/5685**-one of the estate properties- by the 1st protestor's late husband. These claims seem to be of incomplete gift *inter vivos*.

[156] Of incomplete gift *inter vivos*, 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 donee a right to enforce the promise. For a gift 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. Thus, if a donor puts the donee into possession of a piece of land and tells him that he has given it to him so that he may build a house on it, and the donee accordingly, and with the donor's assent, expends money in building a house, the donee can call on the donor or his representatives to complete the gift.

[157] Note however that; the intention to make a gift must continue unchanged until the death of the testator.

[158] There was no such succinct evidence to prove that there were improvements done by her late husband on **LR.NO. NTIMA/IGOKI/5685** or that they were done on the basis of a gift of the premises. The receipts produced; some bear the name of the late husband of the 1st protestor and others the name of the late husband of the testator herein. There is no cogent and pointed evidence that the items purchased were used or applied upon improvements on the estate property. What is provided is merely the word of the 1st protestor but devoid of any nexus of the items to the improvement on the estate property. The protestors evidence that her late husband was called upon to assist her mother complete the premises could simply have been a case of a son helping her mother rather than proof of a gift.

[159] Although the protestors lived in the 1st floor of **LR.NO. NTIMA/IGOKI/5685** during the lifetime of the deceased, the petitioner's submission that, the deceased allowed them to live in the said premises as family members, but not with the intention of making a gift to them makes perfect sense within the facts of this case. The impression created by the evidence is that their stay on the 1st floor of the premises on **LR.NO. NTIMA/IGOKI/5685** may have been at first consensual as family members, but only to become forceful and by domination by the 1st protestor and her children over the deceased. The evidence adduced and the conduct of the deceased in intending to let or sell **LR.NO. NTIMA/IGOKI/5685** is not in tandem with an intention to make a gift to the protestors. Note however that; the intention to make a gift must continue unchanged until the death of the testator.

[160] In addition, it appears the testator intended to make bequests to her two daughters who were not provided for in the estate of the deceased. Such is a noble intention to resolve an imbalance or deprivation of right of the daughters in the estate of their late father. It is surprising that the protestors did not provide the court with such details of the past or present property endowed upon them or any income from such properties in order to assist the court make an informed decision on reasonable provision.

[161] I do note that the 1st protestor testified that she is a business woman and has supported her children using her business income.

In the interest of justice...

[162] In light of all the foregoing, it is easy to act impulsively and deny the protestors any provision in the estate property. At the risk of looking abrupt in winding up, I choose to act in the best interest of justice in this case which has presented rather difficult scenario. I have noted that the protestors lived in the 1st floor of **LR.NO. NTIMA/IGOKI/5685** during the lifetime of the deceased. This reality impels the court to make a conscientious decision; I will make provision for the protestors to own and occupy only the first floor of **LR.NO. MTIMA/IGOKI/5685** as their home and shelter. To legally realize this provision, the property shall be converted into a sectional property to provide for ownership of the units and common areas in accordance with the Sectional Properties Act. The protestors shall own only the 1st floor. The other units shall be owned by the two sisters in accordance with the will.

[163] Accordingly, the court will interfere with the deceased's freedom to dispose of her property through a will; and the will shall be varied to make reasonable provision for the protestors herein as specifically decreed above. All the other properties shall be shared as per the will; equally between the petitioner and her sister.

[164] Requiring response before I close; specific submissions were made in respect of **LR NTIMA/NTAKIRA/1597**, that this property was bequeathed to the deceased to hold a life interest. Section 35 of the Law of Succession Act, in so far as it reduced the right of widows to life interest terminable upon re-marrying is unconstitutional. As such, no relief that can be found on the argument.

[165] From the evidence coming through, I do note that it was stated that the deceased had the following property that was not included in the will; i) motor vehicle registration no. KXP 101 Mercedes Benz; and ii) bank account no. **006100010258**. These properties should be shared in accordance with the rules on intestacy. I direct the properties to be shared equally amongst all the children of the deceased,

[166] In the upshot, the estate of the deceased shall devolve upon the beneficiaries; i) real properties, in accordance with the will except with the variation I have ordered in respect of the 1st floor of the premises resting upon **LR.NO. NTIMA/IGOKI/5685**; to hold in common, and ii) the motor vehicle registration no. KXP 101 Mercedes Benz and bank account no. **006100010258**, equally among all the children of the deceased. Due to the latter aspect, I issue letters of administration with will annexed to the executors of the will and confirm them in the terms set out above.

[167] This being a family matter, each party shall bear own costs.

Dated, signed and delivered at Narok through Teams Application, this 28th day of July, 2021.

F. M. GIKONYO

JUDGE

In the presence of:

1. Mapesa for Petitioners
2. Kiautha for Protestors – M/s Muriithi holding brief for Kiruai Advocates.
3. Mr. Kasaso – CA

F. M. GIKONYO

JUDGE