



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO 2188 OF 2015

IN THE MATTER OF THE ESTATE OF AHMED MEERA

LEBBE SEYADO SHIAB DEEN (DECEASED)

ZINATH MIYUNGI DEEN.....APPLICANT/OBJECTOR

VERUS

SAIYAD ABBAS AYSHA

RAUFF.....RESPONDENT/CO-EXECUTRIX

JUDGMENT

1. Before the Court for determination is the summons dated **19th September 2017** by which the Applicant/Objector **ZINATH MIYUNGI DEEN** (hereinafter '**the Objector**') seeks orders that the Grant of Probate issued by this court on **30th November 2015** and confirmed on **7th October 2016** be revoked and/or annulled on the following grounds:-

“(i) THAT proceedings to obtain the Grant were defective in substance in that the Will in question is incapable to taking effect.

(ii) THAT the Will in question is incapable of taking effect as the deceased had disposed of some of his assets prior to his death.

(iii) THAT the Executors are unable to have failed to effect distribution”.

2. The summons was supported by the Affidavit of even date sworn by the Applicant.

3. The Application was opposed through the Replying Affidavit dated **23rd November 2017** sworn by **SAIYAD ABBAS AYSHA RAUFF** a co-executrix, (hereinafter '**the Respondent**') of the Estate of the Deceased.

4. The summons was canvassed by way of *vive voce* evidence. The hearing commenced on **28th November 2019** before **Hon Justice Onyiego** who heard the three witnesses for the Applicant. Thereafter the trial Judge was transferred to the **High Court in Mombasa** and this court took over the case, and recorded the evidence of the Respondent.

BACKGROUND

5. This Succession Cause relates to the estate of **AHMED MEERA LEBBE SEYADO SHIAB DEEN** (hereinafter '**the Deceased**') who died in **Nairobi** on **26th October 2014**. The Deceased died testate having left a written Will dated **13th August 1997** as well as a **CODICIL** dated **7th January 2010**.

6. The Deceased was survived by the following persons: -

(i) Zinath Minyungi Deen – Widow

- (ii) Ahmed Saleem Deen – son
- (iii) Zainab Shahab Deen Imbuhira – daughter
- (iv) Sayid Abbas Rauf – niece
- (v) Sahabdeen Mohamed Mubarak – son

7. The assets which were left by the Deceased were listed in the Affidavit dated **1st September 2015** in support of the Petition for Grant of letters of Administration with written Will, as follows –

- (i) LR No. 12596/68 Nairobi
- (ii) Shares in Occidental Investments Limited.
- (iii) 35% Equity in Ascon Limited.
- (iv) Bank Accounts: Credit Bank Ltd and ABC Bank Ltd
- (v) Motor Vehicle, Suzuki KAA xxxT.
- (vi) Proceeds of Guardian Life Policy xxxxxxxx/x/x with Madison Insurance.

8. The only liability of the Deceased was listed as **Kshs 4.5 million** due to **Credit Bank Ltd**.

9. In the written Will dated **13th August 1997** the Deceased appointed three Executors namely **Ali Mohammed Salim, Mrs Zinath Muingi Deen** (his wife) and **Master Ahmed Saleem Deen** (his son). Thereafter vide the Codicil dated **7th January 2010** revoked the appointment of **Ali Mohamed Saleem** and **Zinath Muingi Deen** as Trustee and Executors of the Will dated **13th August 1997** and instead appointed **Ahmed Saleem Deem, Zainab Deen** as executors and **Aysha Abbas** was appointed to be responsible for the interests of the Deceased's beneficiaries in **SRI LANKA**.

10. The three Executors named in this Codicil petitioned the court for Grant of Probate with written Will. The Grant was duly issued on **1st September 2015**. Thereafter a certificate of confirmation of Grant was issued on **7th December 2016**.

11. On **19th September 2017** the Objector who was the widow of the Deceased being dissatisfied with the manner in which the estate was being administered filed the present summons for revocation and/or annulment of Grant.

THE EVIDENCE

12. The Objector **ZINATH MUYUNGI DEEN** relied on her written statement dated **27th April 2018**. She stated that although the Deceased had left a written Will dated **13th August 1997** he had prior to his death, disposed of some of his assets and altered others, thereby indicating by conduct, his intention to amend and/or revoke his written Will. The Objector stated that due to his poor health Deceased never got to amend and/or revoke the said written Will. That as a result the Will written by the Deceased has been left open to misconstruction and misinterpretation by one of the Executors namely **AYSHA RAUFF** (the **Co-Executrix**) who has a clear intention of unjust enrichment from the estate.

13. The Objector avers that distribution of the estate of the Deceased may never be concluded as the named Executors are not in a position to jointly and effectively administer the estate. That she is uncomfortable with the current state of affairs and does not want the Respondents who are her children to be involved in endless litigation over the estate.

14. The Objector further deponed that as the wife of the Deceased she assisted in the acquisition of the assets which constitute the estate and thus holds an equal share of said assets and is entitled to inherit from said estate. The Objector complains that she was not adequately provided for in the Will.

15. The Objector states that the Will dated **13th August 2017** and the Codicil dated **7th January 2010** are not a correct, true, just and reasonable reflection of the wishes of the Deceased regarding the disposition of his estate after his death. That she strongly believes that the Deceased fully intended to amend his Will and would have done so but for the fact that he was unwell. That **Occidental Insurance Company** is a family company, which owns most of the assets making up the estate. That her two children **ZAINAB DEEN** and **AHMED SALEEM DEEN** co-own shares in the said company.

16. The Objector states that the property known as **LR NUMBER IR 40841** which is not addressed in the Will belonged to the Deceased and one **NARWAR SINGH BHOGAL**, although the said property was actually acquired by the Deceased through redemption of a mortgage and that the said **NARWAR SINGH BHOGAL** did not participate in the acquisition of said property.

17. The Objector contends that the assets which are purported to be disposed of in the Will and Codicil are **not** the Deceased's assets as they belong to the company **Occidental Ltd** and are therefore incapable of being so disposed. That the Will does not make adequate provision for

herself as the widow, and as such despite assistance from her children, she has been rendered destitute and in want. The Objector finally urges the court to revoke the Will dated **13th August 1997** as well as the codicil dated **7th January 2010** and direct that the Estate of the Deceased be administered as if he had died intestate.

18. **PW 2 AHMED SALIM DEEN** and **PW 3 ZAINAB DEEN** are the son and daughter respectively of the Deceased. The two signed a joint statement dated **27th April 2018** which they both rely on as their evidence in chief. They both contend that the estate cannot be administered according to the Will dated **13th August 1997** or the Codicil dated **7th January 2010** as the same have been overtaken by events.

19. Both **PW 2** and **PW 3** declare that they support this application for revocation/annulment of Grant. They assert that their father intended to further amend his Will and Codicil but did not get round to doing so due to his ill health. Finally, the two confirm that they were co-shareholders with the Deceased in the company known as **Occidental Investments Limited**.

20. **DW 1 SAIYAD ABBAS AYSHA RAUFF** is the Respondent Co-Executrix of the Estate and is a niece to the Deceased. She relied on her statement dated **19th March 2018**. The Respondent claims that the Deceased got married to one **SITHAY SHIAB DEEN** in **SRI LANKA** and that said wife is still alive and living in **SRI LANKA**. That in **1997** the Deceased moved to **Kenya** to work as an expatriate Engineer. That whilst in **Kenya** the Deceased met the Objector who was a widow and who already had a daughter called **Zainab**.

21. The Respondent states that the Deceased fell ill sometime in the year **2010** and that during the period of his illness the Objector deserted the Deceased and moved to her house in **Vihiga County**. That the Respondent then persuaded **Zainab** to move in with the Deceased in Nairobi and provide him with care during his illness.

22. The Respondent confirms that subsequent to the demise of the Deceased she, **Ahmed** and **Zainab** being the Executors named in the Codicil dated **7th January 2010** applied for and obtained Grant of Probate with written Will (copy annexed at **page 9** of the statement). That said Grant was duly confirmed on **7th December 2016** (copy of confirmed Grant is annexed at **Page 19** of statement). That the Objector and her children as (Co-executors) despite being aware of being involved in the petition for Grant of Letter of Administration raised no objection at all to the issue and/or confirmation of the Grant by the court. That neither did the Objector make any application for provision as a dependant of the Deceased.

23. The Respondent asserts that both the Will dated **13th August 1997** and the Codicil dated **7th January 2010** are a true reflection of the wishes of the Deceased regarding the manner in which his estate was to be disposed after his death. She states that she realized that the Objector and her Co-Executors had no intention of honouring the last wishes of the Deceased. The Respondent alleges that the Objector and her children sold a property known as **LR Number 1/854**, without the involvement and/or knowledge of the Respondent and shared the proceeds amongst themselves. That they have been collecting rental income from **LR No. 12596/168** which rental income has not been accounted for to date.

24. The Respondent asserts that the Objector is neither a beneficiary, a dependant nor an executor of the estate of the Deceased. She asserts that the present application is unfounded and baseless as both the Will and Codicil left by the Deceased are valid and enforceable. That the Codicil dated **7th January 2010** clearly acknowledged that some of the assets of the Deceased had been disposed after the Will dated **13th August 1997** was written. That the said Codicil is testament to the fact that the Objector was **not** in good terms with the Deceased at the time of his death.

25. The Respondent categorically denies that she has any intention of unjustly enriching herself from the estate of the Deceased. She insists that her only intention is to ensure that the estate of the Deceased is distributed in accordance with his wishes, which are clearly set out in the Will and Codicil. Finally, the Respondent contends that the present application is a mere afterthought filed because the Objector is aware that her children (the Co-executors) have been mismanaging the estate of the Deceased.

26. Upon conclusion of oral evidence parties were invited to file their written submissions. The Objector filed the written submission dated **6th July 2021** whilst the Respondent relied upon her written submissions dated **24th August 2021**.

Analysis and Determination

27. I have carefully considered the material placed before the court, the evidence adduced before the court as well as the written submissions filed by the all parties. The **Evidence Act**, places the burden of proof of any fact on the person who wishes to rely on the same **Section 107 of the Evidence Act Cap 80, Law of Kenya provides** as follows: -

“Burden of Proof

(1) Whoever desires any court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”

28. The questions for determination in this cause are -

(a) Whether the Will and Codicil are valid.

(b) Whether the Grant of Probate with written Will issued by this court ought to be revoked.

29. The circumstances under which a Grant may be revoked are set in **section 76** of the **Law of Succession Act, Cap 160, Laws of Kenya** as follows –

“(a) **that the proceedings to obtain the grant were defective in substance;**

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from then date thereof, or such longer period as the court order or allow;

(ii) to proceed diligently with the administration of the estate;

or

(iii) to produce to the court, within the time prescribed, any inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and in-operative through subsequent circumstances”.

(a) VALIDITY OF WILL

30. It is common ground that prior to his death the Deceased executed a written Will dated **13th August 1997**. Thereafter the Deceased executed a Codicil to the Will dated **7th January 2010**. I have perused the copy of the Will dated **13th August 1997**. The same is duly signed by the Testator (Deceased) on every page. It is witnessed by two persons, one of whom is an advocate. Similarly, the Codicil dated **7th January 2010** bears the signature of the Deceased on each page and the same is signed by two witnesses including a former **High Commissioner** of **SRI LANKA** to **Kenya**.

31. There has been no allegation much less proof that the signatures appearing on the Will and Codicil did not belong to the Deceased. Nor, has there been any allegation that the Deceased lacked the mental capacity to make a Will detailing how his estate should be dealt with after his demise.

32. The Objector and her witnesses allege that the Will and Codicil do not reflect the wishes of the Deceased. They further claim that the Deceased intended to make and/or alter the Will and indeed would have done so except for his illness. Firstly, there is no way the Objector can state what the Deceased ‘**intended**’ to do regarding his estate. The manifestation of the Deceased’s wishes are contained in the Will and Codicil. The Codicil was made in **January 2010**. The Deceased fell ill sometime in the year **2010** and he did not die until **October 2014**. If indeed the Deceased had the intention to alter and/or revoke his Will, then he had ample time to have done so before his demise. The court cannot rely on vague assertions regarding the ‘**intentions**’ of the Deceased.

33. Furthermore, if the Objector was persuaded that the written Will and Codicil did not reflect the true wishes of the Deceased then she ought to have raised her objection at the outset in the year **2015** when the Grant of Probate was first applied for. Indeed the objectors own children were named as Co-Executors of the Will at that time. Instead the Objector waits until the Grant has been confirmed and then comes to court to seek its revocation. This is clearly an afterthought.

34. I find that the Written Will dated **13th August 1997** and the Codicil dated **7th January 2010** cannot be impeached. They are a true reflection of the wishes of the Deceased concerning his estate. They are valid and enforceable.

(b) REVOCAION OF GRANT

35. The Objector suggests that the Will has been overtaken by events and is inoperative due to the fact that the Deceased sold off some of the assets listed in said Will prior to his death. The Objector cites this as proof of the intention of the Deceased to amend his Will. The objector asserts that since the Will was not amended the estate ought to be administered as though the Deceased had died intestate.

36. The Objector has not in any way challenged the validity of the Will or the Codicil. I carefully perused the Will dated **13th August 1997**. Reference is made at **paragraph 3 (b)** house in **BIAFRA** described as **L.R. No. 209/7259 House No. 6491B** which house is registered in the joint names of the Deceased and one **MARY WANGUI NDERITU**.

37. In the Codicil dated **7th January 2010** at **paragraph (2)** the Deceased writes -

“2. As regards paragraph 3(b) of my said Will I delete the said paragraph as I have sold my share of the house to MARY WANGUI NDERITU and given the proceeds to the Muslim Welfare Association of Biafra Estate Madrassa Committee hence I have fulfilled my wish to paragraph 5 of my said Will which paragraph should accordingly be deleted” (own emphasis)

38. Therefore through the Codicil the Deceased has clearly indicated the fact that he has sold one of the assets which was listed in his Will and has made the necessary amendments to his Will.

39. Similarly, vide **paragraphs (5) (6)** of the Written Will the Deceased makes the following bequests –

“5. All my rights and interest in the house in Biafra, L.R. No. 209/7259, House No. E/49/B, will go to the Muslim Welfare Association, of Biafra estate, Madrassa committee for the purpose of revenue to the Madrassa, but not for sale.

6. My house in Biafra, estate, L.R. No. 209/7259, Block E48/D which I had purchased for Mr Ali Mohamed Salim, should be transferred to him on receipt of the market value of the property less 10% or Kshs 1,065,000/- whichever is more. The proceeds should be transferred to the persons named in the paragraph 4 above in the manner specified. This transaction should be completed within 5 years from 1.1.1998. In the meantime Mr Ali Mohamed Saleem will occupy the house as a tenant and will pay monthly rent of Kshs 4,500/-.”

40. At **paragraph (5)** of the Codicil, it is stated –

“5. I declare that the matters detailed at paragraph 5 and 6 of my said Will have been fulfilled and hence the said paragraphs shall be deemed deleted from my said Will”.

41. It is evident from the Codicil that the Deceased was fully aware that certain properties mentioned in his Will had been disposed. Having disposed of the properties mentioned in his Will the Deceased in his Codicil identified the properties which had been disposed and made the necessary amendment and adjustments/alterations to his Will to accommodate the changed circumstances regarding his properties.

42. In the case of **JAMES MAINA ANYANGA – VS – LORNA YIMBIHA OTTARO & 4 OTHERS [2014]eKLR**, the court stated that –

“A testator has power to dispose of his property as he pleases and the court is bound to respect those wishes as long as they are not repugnant to the law and he does not leave out some dependants and beneficiaries”

43. Therefore a Deceased person is at liberty to dispose of any of his properties as he wishes during his lifetime. Such action will not invalidate the Will, more so, where as in this case the Deceased wrote a Codicil to his Will detailing and incorporating amendments in respect as the properties he had already disposed. This is not valid grounds for revocation or annulment of the Grant. Disposal by the Deceased of property during the lifetime does not make a Will invalid or incapable of being executed.

44. The Deceased did not as implied by the Objector dispose of all his property during his lifetime rendering the Will totally inoperative as only the following properties were disposed being -

(i) L.R. No 209/7259 House No. 449/B Biafra Estate.

(ii) L.R. No. 209/7259 Block 648/D, Biafra Estate

Their disposal did not invalidate the Will or render the same inoperable.

45. Finally, the Objector complains that as the widow she has not been provided for in the Will rendering her financially destitute but for the aid she receives from her children.

46. Whereas the Objector claims to be the **“wife”** of the Deceased the Respondent insists that the couple separated when the Deceased fell ill and were not together when the Deceased eventually passed away. Under cross-examination, the Objector conceded that she was given a house in **Vihiga** so she cannot claim to have been left totally destitute.

47. Moreover, in the Codicil dated **7th January 2010** the Deceased refers to the Objector as his **‘ex-wife’** and states **paragraph (10)** that

“10. My ex-wife who deserted me at the height of my sickness on 4th April 2009, shall not be given any of my assets. However, she has been adequately provided for by her properties which I bought and developed for her in Vihiga which she may keep but none of her family members shall receive any payment or assets from my estate. These family members include her brothers, sisters and their offspring”.

48. The Deceased has made clear the reason why he disowned the Objector. However, it is indicated that she is entitled to keep the properties which the Deceased purchased and developed for her in **Vihiga**. The Objector has not denied that the Deceased purchased and developed the stated properties for her. Therefore, the claim by the Objector that she has been left destitute cannot be true.

49. Based upon the foregoing, I find no merit in summons seeking revocation of Grant. The same is dismissed with entirety. Each party shall bear its own costs.

DATED IN NAIROBI THIS 29TH DAY OF OCTOBER 2021.

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MAUREEN A. ODERO

JUDGE