



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
SUCCESSION CAUSE NO. E006 OF 2021
IN THE MATTER OF THE ESTATE OF
THE LATE ROBERT OTIENO GUYA (DECEASED)
AND
IN THE MATTER OF APPLICATION BY
WYCLIFFE OMONDI GUYAAPPLICANT/OBJECTOR
VERSUS
SILAS OTIENO OYARO.....1ST RESPONDENT
BETHA AWUOR GUYA.....2ND RESPONDENT
RULING

Before me is an Objection to the making of a Grant of Probate which was based on the alleged written will of the deceased.

1. The Objector, **WYCLIFFE OMONDI GUYA**, is the eldest son of the deceased, **ROBERT OTIENO GUYA**.
2. His objection is based on the following grounds;

- “1. THAT the affidavit in support of the Petition for Probate with Written Will for the Estate of **ROBERT OTIENO GUYA (DECEASED)** is not executed and or signed by the alleged executor.
2. THAT the petitioner failed to acknowledge that the estate of the deceased was partially intestate as required by law.
3. THAT the objector is well acquainted with his father and familiar with the signature of the deceased, and avers that the signature on the purported will does not belong to the deceased.
4. THAT the purported will does not bear the signatures of the two alleged witnesses and or the advocates on the 1st Page, save for the deceased’s alleged signature leading to further questionability of the will.
5. THAT the same is not paged hence the *authenticity of it cannot be verified*.
6. THAT the purported Written Will of the deceased does not disclose all the beneficiaries of the estate as per annexed copy of the area chief’s letter makred “WOG 1”.
7. THAT the distributions of the deceased estate properties in the purported Written Will of the deceased is not equitable as the following beneficiaries were never mentioned and or bequeath anything at all;

Ruphine Auma Guya - daughter

Cynthia Awino Guya - daughter

Faith Lilian Achieng Guya - daughter

8. THAT the Will was written and executed under suspicious circumstances as Bertha Awuor Omanje who assisted the deceased in writing the will got an unduly huge benefit from the said estate having unduly influenced the deceased.

9. THAT the capacity of the deceased at the time of making the will was impaired due to illness leading to him writing the Will in such an inequitable manner considering that he wrote the alleged Will on 18th December 2020 while he was very ill and he died on 25th December 2020.

10. THAT the alleged Executor of the deceased's Written Will is partial in the management by allowing Bertha Awuor Omanje to intermeddle with the deceased's properties by collecting rents from the estate for her selfish gain without consulting with other beneficiaries.

11. THAT some of the properties contained in the Will were not free properties of the deceased.

12. THAT the said executor has not diligently managed the estate as he has not collected an inventory of the estate nor attempted to preserve the same.

13. THAT due to the actions of the purported Executor of the alleged deceased's Written Will and further intermeddling of the estate by the 2nd widow herein, this Honourable Court should find fair and just one representative from both houses entrusted to temporarily oversee the collection and preservation of the estate pending further directions of this Honourable Court or determination of the succession cause."

3. The deceased was taken ill in May 2020, and he was diagnosed with cancer. After the initial treatment at the Aga Khan Hospital, Kisumu, he sought further treatment at the Nairobi Hospital, where he went through some chemotherapy sessions.

4. As the ailment was advanced, the deceased was flown out to India, for specialized treatment. However, the doctors in India found that his condition was so advanced that they could not do much to turn around his fortunes.

5. Upon his return from India, the deceased was first admitted at Nairobi Hospital.

6. The Objector deponed that during the time the deceased was at the Nairobi Hospital, he called a number of family members and had conversations with them.

7. During some of the said conversations, the deceased is said to have expressed his wishes on how he preferred some of his properties to be shared out.

8. As an example, the Objector made reference to a conversation which **AUNTY MARY SIJENYI** had with the deceased. The Objector told this Court that Aunt Sijenyi told him that the deceased had affirmed to her, that the property **L.R. NO. KISUMU/MIGOSI/054** ought to belong to the Objector's mother, **MARREN ATIENO OOKO**.

9. The Objector further deponed that the deceased loved all his children equally, and that he therefore could not have ignored the existence of 3 of the Objector's siblings.

10. He believed that the mental capacity of the deceased was compromised, or that he was unduly influenced when he wrote the purported Will.

11. The Objector said that the undue influence can be discerned from the fact that;

"..... the will was written in a way to benefit only Bertha and her children."

12. Furthermore, the Objector believed that his father was not in a position to make a Will, as he could not remember all the properties cited in the alleged Will.

13. He therefore believes that Bertha, who never left the deceased alone, at the material time, was instrumental in arranging for the deceased to write the will. The Objector's view was that it was in that process, that Bertha influenced the deceased, unduly.

14. The other issue raised by the Objector was about the signature on the Will. He said that he was well acquainted with his father's handwriting and signature. And, in his assessment of the signature on the Will, the Objector was convinced that it was not the signature of the deceased.

15. In answer to the Objection, the Executor, **SILAS OTIENO OYARO**, filed a Replying Affidavit. He said that he first became aware of his appointment as the executor when Ms Betty Asunah Advocate read out the contents of the Will, in the presence of representatives of the 2 house-holds belonging to the deceased.

16. The Executor filed the affidavits of **YONAH ORAWO AUMA** and **BENARD ODHIAMBO ODHONG**, in which they deponed that they were present when the deceased executed the Will which is now challenged by the Objector.

17. The 2 witnesses also signed the Will.

18. Secondly, the witnesses deponed that when he was signing the Will, the deceased was mentally alert; and that he engaged them in conversation.

19. On his part, the executor also stated that he was only aware of the assets cited in the Will. Therefore, in his view, if the Objector was aware of any other assets, he ought to disclose the same, so that such other assets can then be handled in accordance with the provisions of the **Law of Succession Act** which govern properties that had not been mentioned in a Will.

20. The 2nd Respondent, **BERTHA AWUOR GUYA** swore a Replying Affidavit. She categorically denied having had anything to do with the writing of the Will. She also denied having influenced the testator in any manner.

21. The 2nd Respondent said that she first learnt about the Will after the testator had passed away.

22. As regards the signature on the Will, the 2nd Respondent said that it was that of the late husband. She also said that if there was any doubt about the signature in issue, the same can be subjected to forensic investigation by a handwriting expert.

23. The 2nd Respondent attributed the insinuations and allegations of the Objector to the fact that the first family did not see eye to eye with her.

24. On the question regarding the omission of the 3 daughters of **MARREN ATIENO OYOO GUYA** from the Will, the 2nd Respondent pointed out that her own 3 daughters were similarly omitted from the Will.

25. In relation to her 3 daughters, the 2nd Respondent said that she would file an application for reasonable provisions to be made for them by the Court.

26. I have given due consideration to the affidavits filed herein, as well as the submissions on record.

Mental Capacity

27. Pursuant to **Section 5 (1)** of the **Law of Succession Act**;

“.... any person who is of sound mind and not a minor may dispose of all or any of his free property by will.”

28. The Objector has submitted that because the testator had been in hospital at the time when the Will was made; and considering that prior to his hospitalization in Kisumu, he had been in hospital in Nairobi and India, he was not in a proper state of mind.

29. In support of his case, the Objector cited the decision in **HARWOOD Vs BAKER (1840) 3 MOOPC 282**. As noted by the Objector, the deceased in that case wrote his Will on his deathbed, and;

“At that point the deceased was suffering from a disease which affected his brain.”

30. In those circumstances, the Court held that he lacked the requisite testamentary capacity.

31. In contrast, there was no evidence produced by the Objector to show that the deceased either had a disease which affected his mind or that he was otherwise of an unsound mind.

32. The fact that the deceased omitted 3 of his daughters from the Will is not evidence of mental incapacity. Indeed, the deceased left out the 3 daughters of the 1st house, and 3 daughters of the 2nd house. Therefore, it would appear to have been a decision that was driven by considerations other than lack of mental capacity.

33. Pursuant to **Section 5 (4)** of the **Law of Succession Act**; the burden of proof vested upon the Objector, to prove that at the time the deceased made the Will, he was not of sound mind.

34. I find that the Objector failed to discharge the onus of proving the alleged incapacity of the deceased.

35. The assertions of the Objector did not disturb the conscience of the Court as to whether or not the deceased had the requisite capacity to write his Will.

36. In the absence of evidence to prove the alleged lack of capacity, the Court derived guidance from **Section 5 (3)** of the **Law of Succession Act**, which stipulates as follows;

“Any person making or purporting to make a will shall be deemed to be of sound mind for the purposes 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.*”

Signature of Deceased

37. The Objector asserted that the signature on the Will was not that of the deceased.

38. On the other hand, the 2nd Respondent asserted that the signature was that of the deceased.

39. Apart from those assertions, which were made by persons who were not present when the Will was being signed, I have the evidence of 2 persons who were witnesses when the Will was being signed.

40. Pursuant to **Section 11 (c)** of the **Law of Succession Act**, the Will should be attested by 2 or more competent witnesses. Each of the said witnesses should have seen the testator sign the Will; and each of them should also sign the said Will in the presence of the testator.

41. In this case, the 2 witnesses deposed that they were both present when the testator signed the Will. Both of them saw the deceased sign the Will, and then each of them signed *“as witnesses to his signature on the Will.”*

42. I find no reason at all to doubt the evidence tendered by the 2 witnesses, Yonah Orawo Auma and Benard Odhiambo Odhong.

43. The Objector had not raised questions about the identity of the advocate who prepared the Will, or about the specific place at which the Will was executed.

44. Therefore, when the Objector submits that the failure by the witnesses, to mention the lawyer who prepared the Will was now an issue, I find that that contention lacks foundation. The Respondents were required to answer to the matters raised in the substantive objection. If something was not put forward as a ground upon which the objection was based, the Respondents should not be expected to answer to it.

45. The Objector submitted that the Respondents ought to have provided evidence from handwriting experts, to prove that the signature on the Will was made by the deceased. In that respect, the Objector is wrong.

46. Pursuant to **Section 107** of the **Evidence Act**;

Whosoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.”

47. It is the Objector who has put forward the assertion that the Will herein is invalid. Therefore, the success or failure of his case is dependent upon the evidence which he produces before the Court. It is he who must prove the existence of the facts whose existence he had asserted.

48. In the case of **KIPKEBE LIMITED Vs PETERSON ONDIEKI HCCA NO. 80 OF 2015** the Court held as follows;

“The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove.

It is the plaintiff to prove her case on a balance of probability, and the fact that the Defendant does not adduce any evidence is immaterial.”

49. The said legal position is anchored on the provisions of **Section 108** of the **Evidence Act**, which stipulates that the Burden of Proof in a suit or proceeding, lies on that person who would fail if no evidence at all were given on either side.

50. In this case there is a Will which was produced in Court. If the Objector did not adduce evidence to prove that the Will was invalid, as asserted by him, his objection would be dismissed.

Suspicious circumstances

51. In his submissions the Objector said that because the deceased was ill at the time when the Will was written; and as the 2nd Respondent was the sole care giver; she was the only person who could have provided the assistance which the deceased required to write the said Will.

52. And because the 2nd Respondent got the biggest share of the estate, it is the Objector’s case that the 2nd Respondent must have influenced the writing of the Will.

53. The Objector also pointed out that suspicion arose about the role played by the 2nd Respondent when it is borne in mind that the lawyer who drew up the Will was paid, yet the deceased never left the hospital.

54. The Objector said that there ought to have been an explanation about how the deceased got the particulars of the properties which he cited in the Will. In the opinion of the Objector, it is most probably the 2nd Respondent who provided the said particulars, as she lived in the same house with the deceased, and she therefore had access to the title documents.

55. The Objector submitted that;

“... the close relationship between a beneficiary of the will and the deceased and the circumstances surrounding the writing of the Will, lead to suspicious circumstances where the said person also gets a large benefit from the estate.”

56. I find that the 2nd Respondent related very closely with the deceased. She confirmed that she was solely responsible for nursing the deceased when he was ailing.

57. In **JULIUS WAINAINA MWATHI Vs BETH MBENE MWATHI & ANOTHER, CIVIL APPEAL NO. 123 OF 1992**, the Court of Appeal quoted with approval, the following words of Sir. J.P. Wilde in **ATTER V ATKINSON (1869) 1 P & D 665**;

“The proposition, however, is undoubted that if you have to deal with a will in which the person who made it himself takes a large benefit, you ought to be well satisfied, from evidence calculated to exclude all doubt, that the testator not only signed it, but he knew and approved its contents.”

58. In that case, the Court of Appeal went on to pronounce itself thus;

“On the evidence, we are satisfied that the appellant did not discharge the onus of showing that he did not procure the execution of the alleged Will by unfair means, and the Judge was perfectly right to revoke the grant made in his favour and declare the Will invalid.”

59. In this case, the Objector has not led evidence to show that the 2nd Respondent either made the will or procured its execution.

60. The 2nd Respondent deponed that she first became aware of the Will after the demise of her husband.

61. In **RE: ESTATE OF GKK, SUCCESSION CAUSE NO. 1298 OF 2011**, it was held that not all influences were unlawful. In the event that the Will was the offspring of the testator's own volition, the said Will would be valid. In that case the discussion was about the question of the kind and extent of influence which would be construed as negating the free will of the testator, and imposing upon him the view of the other person.

62. In the case **WINGROVE Vs WINGROVE (1885) 11 P.D. 81**, (which the Court of Appeal mentioned in the case of **RE: ESTATE OF G.K.K. SUCCESSION CAUSE NO. 1298 OF 2011**, the Court held as follows;

“To be undue influence in the eyes of the law, there must be – to sum it up in a word – coercion. It must not be a case in which a person has been induced by means such as I have suggested to you, to come to a conclusion that he or she make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.”

63. I reckon that if a person was unwell and his or her spouse provided extra tender loving care, that could possibly influence the said person to consider reciprocating when the person was writing his or her Will.

64. On the other hand, if the person was treated in a manner that can be construed as shabby or uncaring, it is possible that the person may be influenced by such action when making provision in his or her Will.

65. In **MWATHI Vs MWATHI (1995-1998) 1 E.A. 229** the Court held as follows;

“Undue influence occurs when a testator is coerced into making a Will or some part of it, that he does not want to make.

Undue influence is proved if it can be shown that the testator was induced or coerced into making dispositions that he did not really intend to make.”

66. Every person has the right to decide how he or she wishes to dispose of their property. Therefore, even after the person has made known that he has the intention to dispose of his or her property by giving it to a particular person, there is no legal impediment if he or she chooses to change his or her mind. As Lenaola J. (as he then was) held in the case of **RE: ESTATE OF G.K.K. SUCCESSION CAUSE NO. 1298 OF 2011**;

“My finding, in any event, is that under Section 5 (1) of the Law of Succession Act, any person may dispose of all or any of his property in a manner he deems fit, and a testator may change his mind at any time before his death, as to how he intends that his property should be disposed of.”

67. Therefore, even assuming that the Objector's aunt had been told by the deceased, that a particular property would go to the Objector's mother, there was no legal bar, to having the deceased change his mind.

68. I find that the Objector failed to prove that the deceased was coerced into making such disposition as did not really intend to make.

The Whole Estate or Part thereof

69. The Objector suggested that the Will did not have a list of all the assets.

70. By dint of the provisions of **Section 5 (1)** of the **Law of Succession Act**, any person who is of sound mind, and who is not a minor;

“may dispose of all or any of his *free property by will*”

71. Therefore, even if it were proved that some properties belonging to the deceased were not listed in the Will, that cannot render the said Will invalid.

72. However, the Objector has not yet provided any information concerning properties which belong to the deceased, but which were omitted from the Will. Therefore, there is ground upon which the Court can hold that some assets belonging to the deceased had not been incorporated into the Will.

Some Beneficiaries were not provided for

73. The Will has omitted the 3 daughters from the First House; and the 3 daughters from the 2nd House.

74. In my understanding, the failure to include any one or more dependants in the Will does not invalidate it.

75. **Section 26** of the **Law of Succession Act**, provides the Court with the discretion to make such reasonable provision for the dependant who had been left out of the Will. An application may be brought to the Court, by or on behalf of the dependant who had been left out of the Will. Therefore, the remedy is not through the invalidation of the Will, but through an application seeking a reasonable provision.

Attestation

76. The Will which was presented in Court has 2 pages. On the first page there is one signature, which would appear to be the one by the deceased. I say so because it appears to resemble the signature on the second page, which was appended against the name of the deceased.

77. The two witnesses, Yonah Orawo Auma and Benard Odhiambo Odhong, have signed on the second page.

78. The witnesses did not sign against the signature of the deceased, on the first page.

79. In the circumstances, it appears that there is insufficiency on the attestation. I find that there is therefore some doubt about the due execution of the Will.

80. Pursuant to **Rule 54 (1)** of the **Probate and Administration Rules** I am enjoined to direct the 2 witnesses to file their respective affidavits detailing the circumstances in which they attested the execution of the Will.

81. The affidavits will specify the place and time where they appended their signatures to the Will. They will also give the particulars of the persons who were present at the said time.

82. The affidavits will explain why each of them only signed the second page; and why they did not sign the first page.

83. The affidavits shall be filed and served within the next 7 days.

84. Thereafter, the 2 witnesses will present themselves before the Court, on a date to be specified, when they will be available for cross-examination by the Objector.

85. Upon the conclusion of the process of cross-examination, if any, the Court will make its final orders, regarding whether or not to admit the Will to proof.

86. It is so ordered.

DATED, SIGNED AT DELIVERED AT KISUMU THIS 22ND DAY OF NOVEMBER, 2021

FRED A. OCHIENG

JUDGE