REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 386 OF 2015

IN THE MATTER OF THE ESTATE OF SHADRACK MAGOSEWE DOMOI (DCD)

PETER JUNGULU ALIAS PETER CHUNGULI.....1ST EXECUTOR/RESPONDENT

AND

THOMAS ILAHALWA MAGOTSWE.....1ST OBJECTOR/APPLICANT

REBECCA MUSIMBI KOECH.....2ND OBJECTOR/APPLICANT

BERRYS MARAGA MAGOTSWE.....3RD OBJECTOR/APPLICANT

MARGARET AUMA MAGOTSWE.....4TH OBJECTOR/APPLICANT

GLADYS INZERA MAGOTSWE.....5TH OBJECTOR/APPLICANT

RULING

The Petitioner (**PETER JUNGULU ALIAS PETER CHUNGULU)** had moved this court by way of deposit of a will (testate) Succession as executor of the will of the late **SHADRACK MAGOSWE DOMOI ALIAS SHADRACK MOAGOSWE DOMOI (Deceased)**. Subsequently, a made the grant and proceeded to enforce the grant by issuing a confirmed grant in terms of the will proved on probate. The applicants **(REBECCA MUSIMBI KOECH, BERRYS MARAGA MAGOTSWE, MARGARET AUMA MAGOTSWE and GLADYS INZERA MAGOTSWE)** filed a Notice of preliminary objection on 27th November 2019 on the following grounds;

1. By an act of litigation in **Eldoret high Court Civil Case No. 264 of 2000 - Shadrack Magotwe Domoi v Thomas Ilahalwa Magotswe & 4 others** the deceased disinherited the objectors of their entitlement to share in his parcel of land **L.R NANDI /KOIBARAK "A" AJUDICATION SECTION** sub-divided as;

   a) **Plot no. 819 approximately measuring 1.02 Ha.**

   b) **Plot No. 954 approximately measuring 1.08 Ha.**

   c) **Plot no. 1093 approximately measuring 0.26 Ha.**

   d) **Plot No. 1094 approximately measuring 0.74 Ha.**

   e) **Plot No. 1095 approximately measuring 0.3 Ha.**

2. That smelling death, the deceased prepared a will and appointed one **Peter Njuguna Alias Peter Chunguli** as executor of his will and testament.

3. That it is the objectors' intransigency and lack of submission to family authority that led to their being disinherited.

4. That the will was valid and executed before **M/S S.K Kitur advocate** and witnessed accordingly in accordance with the law. In this regard, the executor, administrator is willing to prove the authenticity of the usual guarantee for costs by the objectors being posted.

5. The application dated 10th day of July 2019 is bad in law and lacks merit and should fail with costs.

In their written submissions the applicants cited **sections 5 to 11 of the Law of Succession** and submitted that the evidence by the objectors paints the deceased as incapable of making the will. evidence on record suggests the deceased was 99 years of age and unable to make the will. no attempt was made to adduce evidence on the status of the deceased at the time of making the will. To prove this, it is contended that medical evidence was required, and in the absence of the same, the objectors are duty bound to offer evidence of the witnesses who knew the testator well or by circumstantial evidence showing to the balance of probabilities that the testator's capacity to make the will was questionable. The burden of proof lay with the objectors.

As regards capacity the petitioner refers to **Section 5(1) of the Law of Succession Act Provides;**

> **"Sec. 5 (1) Subject to the provisions of this Part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.**
>
> **(2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.**
>
> **(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."**

As regards validity of a will, the petitioner invokes **Section 11 of the Law of Succession Act Cap 160 Laws of Kenya provides;**

> **"S. 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.**

The contention here is that the burden of proving incapacity of the deceased to make a will rests with the objectors.

The applicants also made reference to **section76 of the Succession Act** on objection proceedings and submitted that the **Notice of Motion** filed is not recognized by the **Law of Succession Act** as the method of objection proceedings entails the filing of summons to revoke or annul a grant based on the terms mentioned in section 76. The applicants referred the court to the decision in **Estate of Agnes Ogolas Akoth [2016] eKLR** to buttress their submissions on the preliminary objection.

The respondent in the written submissions points out that in reference to the 1st objection the deceased **(SHADRACK MAGOTSWE DOMOI)** in **Eldoret HCCC No.264 of 2000** had intended to disinherit the applicants together with **Elizabeth Auma** the alleged beneficiary of the parcel of Land known as **L.R NANDI/KOIBARAK** A according to the disputed will. this was after it had been divided into **plots no. 819,954,1093,1094 and 1095**.That, if it is disinheritance, then even the purported beneficiary of plot 819 indicated in the disputed will was also disinherited by the judgment.

Further, that in response to the 2nd objection the deceased filed a high court case in the year 2000, and a judgment was delivered on **2nd March 2015**, two years after the demise of the deceased. It is argued that there is thus no way in which the deceased could have willed away a property which was still a subject before court. It is pointed out that the will is alleged to have been made on **3rd October 2011.** According to the objectors who are the children of the deceased, the deceased was so sick, too old and senile to make a valid will.

It is also submitted that the deceased could not will away a property to a person he had taken to court to disinherit unless he withdrew the case against the person (this never happened), and was a well calculated move to disinherit the objectors upon the demise of their father.

The contention is that the deceased did not leave a valid will and therefore died intestate, and the question posed is, if there was a valid will, then why did **Elizabeth Auma file Succession Case No. 285 of 2013 at Eldoret High Court** to the extent that the deceased died intestate?

The preliminary objection is described as lacking no merit and ought to be dismissed with costs.

ISSUES FOR DETERMINATION

a) Whether the application dated 10th July 2019 is bad in law

The application dated 10th July 2019seeks orders that the orders issued on 21st April 2016 be set aside and that it be declared that the deceased died intestate. The application is grounded based on the grounds that the petitioner misled the court that there was a written will and that the applicants are not aware of any such will. It is claimed that the applicant was senile and could not have written the will.

A Preliminary Objection was defined in the case of ***Mukisa Biscuit Company – vs- Westend Distributors Limited (1969) EA 696 at page 701*** *as;*

> ***"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. <u>It cannot be raised in any fact has to be ascertained or if what is sought is the exercise of judicial discretion.</u> The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confuse the issues. This improper practice should stop".***

I have considered the preliminary objection and in my view it does not raise pure points of law. It is full of factual points and issues that need to be determined by production of evidence. Consequently, it is dismissed with costs to the applicant/objectors.

E-delivered and dated this 22nd day of September 2020 at Eldoret

H. A. OMONDI

JUDGE