



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 346 OF 2013

IN THE MATTER OF THE ESTATE OF ABDULKARIM CHATUR POPAT

also known as ABDUL KARIM CHATURBHAI

ALNASHIR ABDULKARIM CHATUR POPAT.....APPLICANT

VERSUS

ADIL ABDULKARIM CHATUR POPAT.....1ST RESPONDENT

GULZAR ABDULKARIM CHATUR POPAT.....2ND RESPONDENT

KARIM SAIFUDDIN ANJARWALLA.....3RD RESPONDENT

AZIM ABDULKARIM CHATUR POPAT..... 4TH RESPONDENT

RULING

1. Abdulkarim Chatur Popat also known as Abdulkarim Chaturbhai a wealthy Kenyan businessman died on 2.3.13 at the Aga Khan Hospital in Nairobi at the age of 87. He is survived by his widow Gulzar Abdulkarim Chatur Popat (Gulzar) and his 3 sons Azim Abdulkarim Chatur Popat (Azim), Adil Abdulkarim Chatur Popat (Adil) and Alnashir Abdulkarim Chatur Popat (Alnashir). A grant of probate of probate (Grant) was on 29.1.14, issued to Gulzar, Adil, Azim and Karim Anjarwalla (Karim), the executors appointed by the deceased, in his written will dated 15.5.08 (the Will). The Grant was confirmed on 20.11.14. The deceased in his Will made provision for his wife, sons, grandchildren, sister and charitable institutions, but excluded Alnashir.

2. Pursuant to an application by Alnashir dated 20.8.18, this Court by its ruling of 14.6.19 set aside the order of 20.11.14 confirming the Grant and further cancelled the certificate of confirmation of grant issued on 2.12.14. The Court further directed that the summons for confirmation of grant dated 22.10.14 be reheard after service of the same upon Alnashir.

3. It is this summons for confirmation of grant that is before me for determination. The Executors sought that the estate be distributed in accordance with the Will of the deceased. In response to the summons for confirmation, Alnashir filed an affidavit of protest dated 24.2.2020. His grounds are that no bequest was made to him in the Will and that as a dependant, he is entitled to a reasonable provision from the estate. During his lifetime, the deceased gifted his sons with a portion of his shares in Simba Colt Motors. According to Alnashir, after the bequests to other beneficiaries, it is only mete and fair that the estate of the deceased is shared equally amongst the deceased's 3 sons. Alnashir further contends that the current values of the assets of the estate were not provided, nor were title documents in respect of the assets. Details of the house on L. R. No. 214/751 or of the residuary estate were also not provided. The executors also failed to provide a full and accurate account of their dealings with the estate as directed by the Court on 14.6.19. In the absence of a valuation of the assets of the estate, it would not be possible for the Court to ascertain what amounts to reasonable provision to be granted to him.

4. Also before me for determination is a summons by dependant under Section 26 of the Law of Succession Act (LSA) dated 25.10.19, by Alnashir. He seeks in the main, an order that the executors provide within 14 days, a full, accurate and current inventory of the assets of the residuary estate, complete with their respective values. He also seeks an order for reasonable provision for himself as a dependant of the deceased, from the estate.

5. Alnashir's grounds are that as a son of the deceased, he is rightfully entitled to a reasonable bequest out of the estate of the deceased under Section 26 of the LSA. The deceased however, excluded Alnashir in the Will but made provision for his wife and other sons. He also made provision for 5 grandchildren, one Noorbegum Sadruddin Hasham and charitable organisations.

6. Alnashir further stated that the executors have failed to comply with this Court's order of 14.6.19 to produce the estate's accounts. He contended that what was filed on 14.8.19 was incomplete. Pursuant to Section 28 of the LSA and Rule 45 (2)(f) of the Probate and

Administration Rules, production of accounts is critical in establishing the nature and amount of the estate which will in turn assist the Court arrive at a reasonable provision to be made to him. He urged the Court to grant the orders sought so as to safeguard and enforce his constitutional right to the property he is entitled to as a dependant of the deceased.

7. Alnashir appears to blame his brother Adil for his predicament. Alnashir and Adil worked in their father's company Simba Colt Motors Limited (SCM) as managing director and deputy managing director respectively. Thereafter Adil became the finance director. Over time, the relationship between the 2 brothers soured leading to the ultimate departure of Alnashir from SCM in November 2006. Alnashir averred that the deceased gave him 10% of the shares in SCM while his brothers were given 7% each. Thereafter Alnashir sold to his father the said shares together with shares he had purchased Simba Motors Limited for the sum of Kshs. 850,004,900/= based on valuation. With this sum, he acquired 14% shareholding in Imperial Bank (now in receivership) for the sum of Kshs. 280,000,000/=.

8. Adil and Karim opposed Alnashir's application in a replying affidavit sworn on 24.2.2020 by Adil. They accused Alnashir of seeking to delay the matter as the Court found that the inventory of the estate had been filed as ordered and the Court directed that the summons for confirmation of grant proceed to hearing. Adil stated that Alnashir's right to seek reasonable provision is not tantamount to entitlement to a bequest. Being a son of the deceased, he need not prove that he is a dependant. He must however demonstrate that he is entitled to such reasonable provision. Adil further averred that Alnashir has always been gainfully employed since leaving university and is a man of considerable means; that prior to the making of the deceased's Will in 2008, Alnashir received Kshs. 850,000,000/= in 2007 from the deceased as proceeds of sale of shares; that from 2007, he owned 14% of Imperial Bank in addition to another 2.4% he initially owned; he was also chairman of the bank for many years; that Alnashir earned dividends amounting to more than 200,000,000/= between 2008 and 2013; that he is also associated with and has direct shareholding in numerous companies.

9. Adil further averred that Alnashir and the deceased were not in good terms prior to his death. To Adil therefore, Alnashir is not entitled to any reasonable provisions.

10. Parties filed their written submissions which were highlighted at the hearing. Alnashir was represented by Mr. Noroge Regeru. Adil and Karim were represented by Mr. Mohamed Karega, while Gulzar was represented by Mr. Kago, who associated with the submissions filed by Mr. Karega..

11. Due to the covid-19 pandemic, physical Court attendance has been suspended since March 2020. The Court therefore dispensed with the attendance of the beneficiaries at the hearing, as is the practice.

12. In his submissions on the summons by dependant, Alnashir raised the following 3 issues for determination which the Court has adopts:

- i) Whether the executors should produce to this Court full and accurate inventory of assets and liabilities of the estate, respective values and their dealings therewith up to the date of the account.
- ii) Whether reasonable provision should be made by the Court to Alnashir.
- iii) What orders should be made on the reasonable provision.

Whether the executors should produce to this Court full and accurate inventory of assets and liabilities of the estate, respective values and their dealings therewith up to the date of the account.

13. Alnashir contends that prayer for production of accounts was necessitated by the non-compliance by the executors of this Court's orders of 14.6.19 requiring that they produce accounts within 60 days. According to Alnashir, the inventory filed by the executors on 14.8.19 was inadequate as it did not have title documents of the assets, details of the Muthaiga house, values of the residuary estate as per paragraph 12 of the Will and an accurate account of the executors' dealings with the estate. Further, the inventory was not as at 14.8.19, the date of the account, hence the application by Alnashir for a current inventory. It is only through a full accurate and current account and inventory of the estate, that it can be ascertained whether the estate has been mismanaged or wasted. The Court did note on 23.9.19 that the Executors had filed an inventory of the estate as directed by the order of 14.6.19.

14. Alnashir urged the Court to order a valuation of the estate. Relying on the case of Lita Violet Shepard v Agnes Nyambura Munga [2018] eKLR Alnashir argued that the value of the estate is the first consideration in making an order under Section 26 of the Act. The Court of Appeal stated:

As can be seen above the nature and extent, that is the value, of the deceased's property is the first consideration. In fact, in the ruling by Musyoka J, he notes that the value of the estate is the most significant factor to consider. 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.

15. In that case, Hon. Kimaru, J had made provision for the applicant therein in the sum of Kshs. 50,000,000/= without a valuation of the estate being done, to determine the net worth of the estate and the liabilities against it. The Court of Appeal noting this, stated:

Therefore, we are of the view that there was no sufficient material before the trial court to make the determination that the respondent was entitled to KShs.50,000,000/=. It is not clear how the learned Judge arrived at this figure and why it was awarded to the respondent.

16. It is clear from the foregoing case that a valuation of the estate to determine its actual net worth becomes necessary once a finding is made that reasonable provision ought to be made to a dependant so as to arrive at the quantum and nature of such provision. This Court is yet

to make a decision as to whether or not to grant the order for reasonable provision to Alnashir. Accordingly, my finding is that the prayer for valuation of the estate is premature.

Whether reasonable provision should be made by the Court to Alnashir.

17. This issue as to whether reasonable provision should be made by the Court to Alnashir is the crux of the Summons herein. The jurisdiction of this Court to deal with an application for reasonable provision by a dependant is stipulated in Part III of the Law of Succession Act. 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.

18. A dependant for whom reasonable provision has not been made by a testator, may move to Court, as Alnashir has done, seeking reasonable provision out of the estate of the deceased. As a son of the deceased, Alnashir is a dependant and need not prove dependency. Section 29(a) of the Act provides:

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

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

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

20. 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.

21. The discretion of the Court in an application for reasonable provision is absolute and unfettered. 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

22. On the nature and amount of the deceased's property Alnashir submitted that the Court ought to make an order directing that a valuation be done to ascertain the amount of the deceased's property and value of his net estate. Adil on the other hand, is of the view that prior to the making of an order for valuation of the estate, a determination ought to be made as to whether the Alnashir is entitled to reasonable provision.

23. In the case of Briouan Kadima v Jackson William Musera & another [2017] eKLR, when dealing with an application for reasonable provision, Muriithi, J. stated:

23. As Account has not been given the exact wealth of the estate and its administration or distribution so far is not possible to determine. The application for provision for dependency is not well supported with facts as to the size of the Estate and the probable distribution in order to ascertain whether there is adequate provision for the applicant. Such a provision may only be determined with the full facts as to the nature and size of the estate.

24. The Court must, therefore, determine the exact nature and extent of the Estate before considering its succession in accordance with the law on intestacy and the alleged inadequacy thereof in making reasonable provision for the applicant.

25. Accordingly, the Court will defer the consideration adequate provision to enable the compliance by the Administrators with the personal representatives duty to account under section 83 (e) of the Law of Succession Act which provides as follows...

26. While the applicant is as a child of the deceased a dependant within the meaning of the section 29 of the Law of Succession Act and by virtue of such status entitled to bring a section 26 application for reasonable provision for a dependant, there is no evidence of the size of the Estate to enable the court assess what would be reasonable provision for the applicant. The application is premature when brought before the size of the estate is determined, especially in the case of intestacy and where, as here, the assets comprising the estate are in dispute

24. The applicant in the cited case was a child of the deceased and was entitled under intestacy to reasonable provision from the estate. It is clear that, Muriithi, J. was unable to make a determination as to the reasonable provision to make to the applicant therein before ascertaining the adequacy of the estate. He therefore deferred the matter until the administrators therein produced accurate accounts in compliance with Section 83(e) of the Act. The learned Judge did not actually order a valuation of the estate.

25. In the present case, although valuation of the estate of the deceased has not been done, it is not in doubt that the estate is vast. In the Application for the grant of probate, the executors indicated that the value of the estate in 2013 was Kshs. 3,883,894,489.35. The adequacy of the estate is not in doubt, should the Court order that reasonable provision be made to the Alnashir.

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

26. 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 his existing and future means and needs.

27. Alnashir submitted that contrary to the Adil's allegations in their replying affidavit, he is not a shareholder in any the companies listed therein. He also contended that there is no evidence that he is a wealthy man. Moreover, even if it were proved that he was excluded because he was a wealthy man, the same would have to apply to all beneficiaries. To support his argument, Alnashir cited the case of In Re Estate of Grace Nguhi Michobo (Decesead)[2004] eKLR where the Court stated:

If Phylis were to be excluded merely because she has her own property, the same case would have to apply to all the beneficiaries. Their independent wealth would be investigated and the distribution is done according to their other wealth acquired independently.

28. The evidence before the Court is that the parties herein are fairly wealthy and that is perhaps why Alnashir argues that if he was excluded from the Will of the deceased because he was a wealthy man, then the same would have to apply to his brothers. This argument in my view however, misses the point. Alnashir is the party seeking reasonable provision. In order for the Court to consider his application and to make orders in his favour, he was under an obligation to provide to the Court all the requisite information as to any past, present or future capital or income derived or expected to be derived from any source. This information which would have informed the Court's decision, was however not forthcoming.

29. Further, it was a requirement that Alnashir's existing and future needs be laid before the Court for consideration. In the case of John Gitata Mwangi & 3 others v Jonathan Njuguna Mwangi & 4 others [1999] eKLR, the Court of Appeal stated:

In order that the court may be enabled to come to a proper conclusion as to what order it should make, a dependant has the duty to give satisfactory evidence as to his past, present or future capital or income and his existing and future needs. Without this, the court will not be able to make any sensible order.

30. Although the onus to give satisfactory evidence as to his past, present or future capital or income as well as existing and future needs rested on him, Alnashir failed to discharge the same. Other than disclosing that he had been given shares in the Simba companies by the deceased, which he later resold to the deceased for 850,000,000/= to inter alia purchase shares in Imperial Bank, Alnashir made no other disclosure as required under Rule 45 of the P&A Rules. Further, although he denied being a director or that he had any interest in any of the companies listed in Adil's affidavit, he did not reveal the directorships he has held or continues to hold, as stated in his affidavit. It is also noted that Alnashir was unwilling to disclose his financial status, but readily told the Court that Adil has been repeatedly profiled in local and international press as one of Kenya's richest individuals with wealth in excess of USD 50 million. He also told the Court that Azim runs a hotel that was marketed in January 2019 at a value of USD 86.212 million. This is curious because neither Adil nor Azim is seeking reasonable provision from the estate. It was information about his financial status and needs that Alnashir ought to have revealed to the Court, in furtherance of his application. In light of Alnashir's withholding of this information, which would have assisted the Court to come to a proper conclusion, the Court is unable to make any sensible order in respect of his application for reasonable provision.

31. Alnashir further contended that his inheritance under the Will is his right and is not pegged on his financial status. He relied on the case of In re Estate of M' Ikiara Kangetu (Deceased)[2019] eKLR where the Court stated:

I also note one interesting argument; that the sisters are well off and should accommodate the needy sons. I say only; that inheritance is a right of each rightful beneficiary of the estate and is not dependent upon the financial status or fortunes of the beneficiary.

32. The deceased in the Kangetu case died intestate, unlike the deceased in the present case. Under intestacy, the law is that all children are equally entitled to the estate of a deceased person. Not so in testate succession. A testator may choose to make equal or unequal or no bequests to his beneficiaries. It is his sole prerogative. All that the law requires is that none is left destitute.

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

33. In considering whether the order sought by Alnashir should be made, the Court is also required to have regard to whether the deceased made any advancement or other gift to him during his lifetime. It was submitted for Alnashir that although the deceased during his lifetime gifted him 10% of the shares in the Simba companies he also gifted Azim and Adil got 7% shares each. As such, he gained no advantage over his brothers as to now disentitle him from a bequest in the estate.

34. The Court notes that there was indeed an advancement given to Alnashir but the same applied to Azim and Adil. Why then did the deceased exclude Alnashir from his Will? Could the fact that Alnashir later sold the very shares displease the deceased. Could it be that the deceased felt that Alnashir did not value the gift of the shares and treated it with contempt? One can only speculate. The advancement made to Alnashir by the deceased during his lifetime may or may not have been a consideration for excluding Alnashir when the deceased made his Will.

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

35. Adil has stated that prior to Alnashir's exit from the Simba companies, his relationship with the deceased was dysfunctional and that the two rarely spoke in the 5 years preceding the demise of the deceased. So strained was the relationship that the deceased was not invited to Alnashir's son Aly's wedding, which caused the deceased stress.

36. On his part, Alnashir stated that he had disagreed with his father. While acknowledging the strained relationship between him and the deceased, Alnashir blamed Adil's demand for preferential treatment, as the cause of the disharmony in the family. Alnashir accused Adil of influencing and manipulating the deceased which led their other brother, Azim to leave the country to work in the UK and later Canada, to avoid conflict. Adil should therefore not be allowed to benefit from the disharmony for which he was responsible.

37. There is on record, an emotional and bitter letter dated 13.2.09 from Alnashir to the deceased in which he *inter alia* accused the deceased and Gulzar of playing favourites with Adil, to his disadvantage, way back from their childhood. Alnashir also accused his father of not caring for him and denying him the fatherly love and guidance that he so desperately needed, but giving the same to Adil; that when he went to work for the deceased after graduation, he was sent to the stores department yet when Adil graduated, he did not have to start at the bottom and was given better terms than Alnashir; that the deceased quickly accepted his decision to leave SCM after 31 years of service and thereafter made life very difficult for Alnashir and his family and even called him names.

38. From the said letter, it is clear that the relationship between Alnashir and the deceased was less than cordial. This letter was written 4 years before the demise of the deceased. There is nothing on record to show whether the deceased responded to the same. Notably the letter was written almost a year after the deceased had made his will on 15.5.08. It would appear that the letter did nothing to assuage the acrimonious relationship between Alnashir and his father. The fact that the deceased did not make any changes to his Will to provide for Alnashir, is indicative of a man whose mind was firmly made up. Given the foregoing circumstances, should this Court interfere with the testamentary freedom of the deceased and make provision for Alnashir as he has prayed. Put differently, has Alnashir placed before the Court material that is sufficient to persuade the Court to go against the wishes of the deceased and make reasonable provision for him out of the estate?

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

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

40. What I understand the Court of Appeal to be saying in the Ndolo case, is that a testator's unfettered testamentary freedom given under Section 5 of the Act may only be interfered with, if his will does not provide for those for whom he was responsible during his lifetime. The Court went on to say as follows, regarding Section 26 of the Act:

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

41. From the Ndolo case, it is quite evident that the Court will only step in to tinker with the will of a testator if it disinherits a dependant who was dependent on him during his lifetime or leaves a dependant without reasonable provision for their maintenance. A testator's failure to provide for a dependant who was dependent on him, thereby rendering him destitute is clearly what Section 26 of the Act sought to cure.

42. Similarly, in the Samuel Ngugi Mbugua case, the Court interfered with the will of the deceased to provide for a spouse who depended on the deceased during his lifetime. The Court said:

The above passage solidifies my position that the deceased's wishes ought to be varied to provide maintenance for a spouse that depended on him in his lifetime.

43. From the binding case law cited and the factors stipulated in Section 28 and Rule 45 of the P & A Rules, there is no doubt in my mind that the Court will only interfere with the testamentary freedom of a testator and provide for a dependant not adequately provided for, for 2 reasons. First, that the dependant was dependent on the deceased during his lifetime and secondly that the dependant had been rendered destitute. Section 26 of the Act is thus designed to come to the aid of such dependant. This is why the Court's power to tinker with the wishes of the deceased is limited to making ***reasonable provision*** to an excluded beneficiary and not to give a share that is equal to the other beneficiaries of the estate as of right. As such, a dependant appeals to the discretion of the Court by demonstrating the need for reasonable provision. Notably, Alnashir has approached the Court with a sense of entitlement as a child of the deceased, seeking a share of the estate. Were the intention of Parliament to give a share to every excluded dependant with a view to equalise beneficiaries, the provisions of Section 28 of the Act and Rule 45 of the P & A Rules, as well as the discretion of the Court would have been unnecessary.

44. It is common ground that Alnashir is neither destitute nor was he dependent on the deceased during his lifetime. His own averment is that he is a 68 year old business man who has worked since 1976 and has at various times been a director in various companies. He stated that he and his brothers are wealthy. Indeed, in his very eloquent submissions on behalf of Alnashir, Mr. Regeru repeatedly stated that the issue herein was not one of bread and butter.

45. The wishes of the deceased were clearly spelt out in his Will. It is not for the Court to rewrite the Will of the deceased or make a new will for him or indeed alter his express wishes. The will of a deceased person constitutes hallowed ground that should not be trodden upon. In this regard, I follow W.M. Musyoka, now a Judge of this Court, who in his book, Law of Succession, published by lawAfrica stated at page 311:

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

46. It is noted that the deceased, in exercise of his freedom to do as he pleased with his property, did give to his sons, part of his shares in SCM and indeed gave to Alnashir more shares than to his 2 brothers. If it is accepted that he had the freedom to give these shares to his sons *inter vivos*, why should there be difficulty accepting his testamentary freedom to deal with his estate as he chose to? Alnashir has suggested that the deceased was influenced by Adil to exclude him from his Will. I am not persuaded that a man who was able to create such a vast empire could be manipulated by any person to act against his better judgment, least of all by his youngest son. Moreover, if one were to go by Alnashir's accusations in his letter to his father, it would seem that the deceased and Gulzar treated Adil with favouritism right from the time the children were young. It therefore appears improbable that Adil was the cause of the sole cause of the disharmony in the family.

47. This is not a case where the validity of the will of the deceased is in question. Indeed, Alnashir in paragraph 3 of his affidavit of protest averred that ***"my Father left behind a valid Will dated 15th May, 2008..."*** For reasons which, the deceased appears to have taken to the grave with him, he chose in his Will, to make provision for Gulzar, Adil, Azim and others, to the exclusion of Alnashir. In cases of normal preferences of certain beneficiaries over others as in the present case, the Court should be extraordinarily slow in interfering with the valid will of a deceased person. In re Estate of Lihasi Bidali (Deceased) [2019] eKLR, Musyoka, J stated:

The court determines validity of a will, and construes it, and does not rewrite or recreate it. It upholds it so long as there is evidence that it was made in proper form by a person who had the requisite capacity, and his intentions and wishes can be ascertained from the body of the testament. The court in In the Matter of the Estate of Late Sospeter Kimani Waitthaka Succession Cause 341 of 1998 stated that -

'The Will of the departed must be honored as much as it is reasonably possible. Readjustments of the wishes of the dead, by the living, must be spared for only eccentric and unreasonably harmful testators and weird Wills. But in matters of normal preferences for certain beneficiaries or dependents, maybe for their special goodness to the testator, the Court should not freely intervene to alter them.'

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

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

49. The Court's jurisdiction to interfere with the valid will of a testator should be cautiously and sparingly exercised. The Will of the deceased remains unchallenged to date. After having carefully considered the matter herein, and the fact that the deceased made his Will freely and had the requisite mental capacity to do so, and further that Alnashir was not dependent on the deceased during his lifetime and is not destitute, I am persuaded to honour the wishes of the deceased as expressed in his Will. It is not for the Court to step into the shoes of the deceased and substitute for his Will, what the Court or Alnashir think the deceased ought to have done. I therefore decline to interfere with, rewrite or recreate the Will. Accordingly, the summons for reasonable provision by Alnashir must fail.

50. I now turn to Alnashir's affidavit of protest in respect of the summons for confirmation of grant dated 22.10.14. Alnashir submitted that protests are filed when there is disagreement as to the mode of distribution of an estate of a deceased. He contended that his protest to the summons for confirmation is merited as no provision was made for him in the Will and he stands to be disinherited. He is entitled to a bequest equal to his siblings. He further submitted that as a dependant of the deceased, he is entitled to a reasonable provision from the estate of the deceased. It is noted that the affidavit of protest is anchored on the fact Alnashir was excluded and not provided for by the deceased in

his Will. Given the Court's finding on the matter, it follows that the affidavit of protest is not sufficient challenge to the summons for confirmation of grant.

51. In the end, I make the following orders:

- i) The summons by dependant dated 25.10.19 lacks merit and is hereby dismissed.
- ii) The summons for confirmation of grant dated 22.10.14 is hereby allowed as prayed.
- iii) This being a family matter, each party shall bear own costs.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 18TH DAY OF SEPTEMBER 2020

M. THANDE

JUDGE

In the presence of: -

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

..... **for the 1st & 3rd Respondents**

..... **for the 2nd Respondent**

..... **for the 4th Respondent**

..... **Court Assistant**