



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

SUCCESSION CAUSE NO. 27 OF 2017

IN THE MATTER OF THE ESTATE OF THE LATE HANSON NICHOLAS CHARLES - (DECEASED)

JANE NABUTUTU NICK.....APPLICANT/PLAINTIFF

VERSES

ROBERT NDIEMA HANSON.....1ST RESPONDENT/DEFENDANT

IRENE CHEBENI HANSON.....2ND RESPONDENT/DEFENDANT

JUDGEMENT

1. The deceased herein died on **25th May 2017** leaving behind three widows including the Plaintiff and several children. The deceased left behind a written will dated **11th July 2014** and the Respondents who are part of his children were chosen to be the trustees or executors of the Will.
2. The Applicant/Plaintiff is the 2nd widow of the deceased. Vide her application dated 28th September 2018 she objected to the said Will on the grounds that it *was drafted suspiciously, the deceased lacked capacity to prepare it; the signatures on the will were suspect and that she was not provided for together with her household*. She prayed that the same be declared a nullity and the estate be distributed as though the will was non-existence.
3. When the matter came up for hearing the court ordered the same to be determined by way of oral evidence and the parties granted leave to file further documents if they so wished. The Applicant was made the Plaintiff and the Respondents the Defendants.
4. The first witness called by the Plaintiff was one **MARTIN. E. PAPA** a document examiner. After giving his credentials he said that he was given a will dated 11th July 2014 and received in court on **24th October 2017**, and another will have dated 11th July 2014 and received in court **1st October 2018** and the national identity card of the deceased. The maker of the two wills was allegedly the deceased. The last document was a letter dated 22nd May 2017 from the law firm of Kidiavai and Company Advocates.
5. After thorough examination of the documents he did not find the signatures agreeing both of the deceased as well as those of Aggrey Kidiavai advocate. He concluded that the signatures were forgeries.
6. On cross examination he said that it was not humanly possible for one to sign similar signatures consistently. He said that handwriting is a subconscious act displayed during writing.
7. When questioned about advocate Kidiavai, he said that he did not conduct him as it was not part of his brief and that he did not need him to produce his report.
8. **PW2 JANE NABUTUTU NICK** the Objector testified that he was the 2nd wife of the deceased and were blessed with 6 children who were all girls. She said that she was present when the will was read and was surprised that the deceased did not cater for her and her children. Her further complaint was that the deceased only provided for the boys and not the girls. She said that she wants the estate to be divided into three, among the widows. She said that she was given photocopies of the Will and not the original.
9. When cross examined she said that Noah one of the deceased son born out of wedlock was essentially her son since she had been taking care of him from the time of his birth. She said that there was no report from a doctor showing the medical conditions of the deceased and neither could she exhibit any drugs used by the deceased in the year 2014.

10. On the will she acknowledged that she was given maize and coffee farm which she is still utilising. She admitted that she did not raise any complain with the police about the will being forged. She said that there were no documents produced in court signed by the deceased after 2014. She also said that they did not have the copies of the will in the house.

11. After the Plaintiff closed her case the Respondents /Defendants called **DW1 AGGREY KIDIAVAI** who was the maker of the will. He told the court that the deceased had been his client for a long time and that he came to his chambers where he verbally instructed him to draft the Will. He did so willingly and he proceeded to sign.

12. He thereafter together with his counterpart **Nyakibia Mburu** Advocate witnessed the will which was signed by the deceased on all the pages. This took place on the 11th day of July 2014. After the exercise the deceased took the will which was single as he insisted so. He said that the deceased was alert and was coherent and his memory was sound.

13. When shown the copy of the second will filed on 1st October 2018, he denied knowledge of it and said that he had seen it for the first time. He said that it was a forgery as the signatures on it were not his and that of Advocate Nyakibia Mburu. He also said that the rubber stamp used was not his.

14. He further denied that he gave out the letter dated 22nd May 2017 produced by the Plaintiff to any party nor did he receive such request. He confirmed that Dennis Wanyama advocate from his firm attended the family meeting when the will was being read. This was after the request from the family members.

15. When cross examined he said that there was no register which the parties signed when the will was being read. He said that the deceased was able to recall all his people.

16. DW2 IRINE HANSON testified that she was the deceased daughter and the Administrator of the estate. She said that the deceased showed her the safe before he died and that that was where the Will was. She did so after his death and because she did not know Kidiavai, she inquired from her mother.

17. One Wanyama advocate was sent by Kidiavai Advocate to attend the family gathering when the Will was being read. There were no photocopies of the Will and it was only one copy. She denied knowledge of the Will filed by the Plaintiff on 1st October 2018 as it was not the one she found in the safe.

18. She denied that the deceased was not sober and suffered from the decease of the mind. She said that all the widows and other beneficiaries have been provided equally.

19. When cross examined she said that the deceased showed her the place where the Will was before he died. She said that there was no written notice to the parties for the reading of the will and neither was there any register signed by the attendees.

20. DW3 ROBERT NDIEMA the other Administrator of the estate adopted the testimony of DW2 above. When cross examined he said that the Will that was read to them was the one filed in court on 24th October 2018 and not the one filed in court on 1st October 2018. He said that the deceased told him of the will after he had made it at the firm of Kidiavai Advocate although he did not know where it was kept.

21. DW4 HELLEN BUTAKI HANSON the 3rd widow of the deceased testified that the Will was read by Irine in the presence of all the family members. She said that the deceased had been well and there was no time he forgot the names of the family members. As widows she said that each one of them was living in their respective houses and owned the coffee farms the deceased left for them. That although it was one parcel they each knew their respective portions.

22. She said that she did not know where the Will was kept neither did she know its contents. She said on cross examination that none of the widows has been given more than the other.

23. DW5 NOAH HANSON said that he was the son to the deceased and her mother was one Jessica although not married to him. He said that the Plaintiff took care of her since he was a baby and that she was counted as her son.

24. When cross examined he said that he was present when the Will was read and that it was in a khaki envelope. He said that he did not know that the deceased had left a Will.

ANALYSIS AND DETERMINATION

25. The parties after trial were ordered to file written submissions and apparently it is only the Plaintiff counsel who has complied. She has argued strongly that the Wills ought to be rejected for the reasons that the same were ambiguous especially clause 5(c) and 7 thereof and were generally forged.

26. She further submitted that the deceased did not have the mental capacity to write the same owing to his advanced age and illness. She said that the deceased did not make any reasonable provisions for his daughters especially from the Plaintiff's house.

27. The first issue that needs to be determined is the authenticity of the two wills. It is apparent that there are two sets of Wills namely that filed by the Defendants on the 24th October 2017 and that filed by the Plaintiff on the 1st October 2018. Advocate Kidiavai testified that he made one copy of the Will under deceased instructions and he went with it.

28. DW2 on her part said that she only found one original Will in the safe when she opened it. It was in a khaki envelope. Kidiavai at the same time told the court that he put the original will in an envelope although he could not recall the colour and handed it over to the deceased.

29. It was generally accepted across the board that the Will read by PW2 in the presence of the family members and Wanyama Advocate was in a Khaki envelope and it was original. There was only one original copy and no photocopies. Where then did the Plaintiff get the copy that she filed in court on 1st October 2018. None of the family members testified of having seen copies when dw2 read the Will. Nor DW2 testified that she gave any of the family members including the Plaintiff a copy of the Will after propounding.

30. From her evidence in court she was not able to explain where she got it or who gave it to her. Kidiavai Advocate denied the same and termed it a forgery. Where did she get it? Kidiavai went ahead to disowned the signatures on it both his and those of his assistant Nyakibia Mburu. He also denied that the rubber stamps used were theirs.

31. It is instructive to note that the document examiner PW1 equally found the signatures to have been forged. He did not however conduct the alleged markers, Advocates, Kidiavai and Nyakibia to get further information.

32. Although he argued that it was not part of his brief to conduct them there was nothing easier to have sought some explanation from them seeing that they were the alleged markers. It would have been necessary to make an attempt so that they would have indicated their reluctance to cooperate with him if any.

33. In the absence of such contrary opinion, this court will take it that the original Will filed by the defendants on the 24th October 2017 was the proper one for all intent and purposes. This is also buttressed by the fact that the Plaintiff on her part has failed to produce the original of the Will she is claiming to be a forgery nor an explanation of where she obtained the photocopy from.

34. The other issue related to this is the report by the document examiner which he found both wills to have been forged. He said that according to his analysis the signatures on the wills of both the testator and the witnesses were forged. He said however that the signatures would vary because no known person can sign a similar signature. This was because a signature was based on one's subconscious mind.

35. He also said that the age of a person can play a big roll. He said the pictorial habits of the signatures he examined were not similar.

36. This position in the view of this court was half-truth for the simple reason that the Wills the witness was called to examine were generally varying. He did not first of all examined the original Will but instead used photocopies. Secondly the maker of the same disowned the photocopy one produced and relied on by the Plaintiff whereas he admitted the original one he made.

37. Mr Kidiavai disowned the photocopy one especially the signatures thereon. He however admitted the original. In a sense PW1 examination of the photocopy and that relied on by the Plaintiff was in all fours with the Kidiavai evidence that it was a forgery.

38. Could there have been tampering of the will? It was stated that PW2 only got to know that the Will existed when the deceased told her about a week before he died to check the safe after his death. She said that she did so and found the Will and since she did not know the firm of Kidiavai Advocates she inquired from her mother.

39. Thereafter there was family meeting where the will was propounded in the presence of all the family members. Efforts were made by the Counsel for the Plaintiff in her cross examination concerning the Wills storage but it appears that the same was stored by the deceased properly and without the knowledge of the family members from the day it was prepared.

40. On the face of it there was nothing to exhibit any alterations or tampering by anyone. The maker of the same, DW1 confirm that it was the same Will that he had prepared and handed over to the deceased. Consequently, this court does not find any reason to suggest that it was poorly stored or tampered with before it was produced in court. At the same time since the court was not shown the original Will of the photocopy produced by the Plaintiff and filed in court on 1st October 2018, this court reaches an irresistible conclusion that the said Will was valid for all intent and purposes.

41. Was the Will prepared as per the provisions of the Succession Act? The Act under Section 11 provides that there must be two witnesses to a Will. It provides that;

“ 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) he 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.”

42. In this case Mr Kidiavai advocate and Nyakibia Mburu advocates witnessed the deceased sign the Will. They on their part appended their signatures and stamps to the same. It is therefore not true to suggest that the same was not properly executed.

43. There was no evidence as questioned by the Plaintiff that the deceased was incapacitated and could not make the Will. She did not produce any medical proof that he was in such a state that he could not recall the members of his family. Such weighty evidence must be backed up by solid medical evidence noting that the deceased was diabetic and was aged around 74 years. To suggest that he was shaking and unable to write without any evidence is preposterous.

44. The lack of notice to the parties and the register of the attendees when the will was being propounded was exaggerated by the Plaintiff. This may not carry much weight as none of them denied that they were not present during the occasion. At any rate the Counsel from the firm of Kidiavai, Wanyama, was present and ready to answer any legal issue that may have arisen. None of the parties have suggested that they suffered any prejudice because they did not receive any notice or sign the attendant register for that matter.

45. The other issue raised by the plaintiff is the ambiguity of clause 5(c) and 7 of the impugned will. Clause 5(c) states as follows;

“I devise and bequeath my farm property known as CAVENDALE COFFEE FARM, freehold title numbers SABOTI /SIKHENDU BLOCK 6/KAUKA/3 AND SABOTI/SIKHENDU BLOCK6/KAUKA /21 in equal shares containing all developments like houses, out house, stores, dam water supply etc. The whole comprising about 46 acres to my sons and grandson namely; ROBERT NDIEMA HANSON, NOEL NOAH HANSON, THOMAS NDIWA HANSON, WILLIAM NGEYWA HANSON, ERNEST NGEYWA HANSON AND VICTOR SINDET HANSON,”.

46. Clause 7 states as follows;

“Allocation of coffee plots to my three aforementioned wives and my two stepsons EDWARD KIRUI and KEVIN SIYA. I have already allocated plots of coffee and farm to the above as well as my sons and grandson VICTOR SINDET HANSON being the son of my late son CHARLES KIMTAI BUTAKI HANSON. Should any of my wives predecease her sons then her allocation of coffee should be passed on their sons or their male issue.”

47. It is evident that the deceased's Parcel of Land has substantial coffee plants which the parties all along have acknowledged that it was communally farmed by the deceased and themselves. This must be the **Cavandale coffee farm** indicated in the will.

48. The people who ought to farm and managed are well indicated in the Will and are the male children of the deceased. The instructions therein are very clear, namely that it was to be done jointly. It is not indicated that the same was to be divided or even sold. The male people mentioned are his children as well as the step children and grandsons.

49. In my view, the deceased was very clear that it was to be corporately managed and should one passes on then a male son should inherit. The court does not find anything ambiguous at all. None of the parties mentioned therein have suggested that they are unable to comprehend the tenor and the spirit of the will.

50. There is also sufficient evidence that the deceased had settled each of his wives in their respective house with some portion where they farmed coffee and maize. This was admitted by the Plaintiff.

51. The Plaintiff's argument also was that her children who were girls were discriminated against. The court has perused the Will and it is evident that the deceased was cognizant of this. In fact, DW6 Noah, who for all intent and purposes the Plaintiff's son was provided for by the deceased just like the sons from the other two houses.

52. The deceased left behind 14 girls and it is clear that none except **NELLY TENGAN HANSON**, whom I presumed must be the younger one was provided. None of the daughters was provided for directly and none has lodged such objection. The deceased clearly said that they were free to come and settled with their mothers provided they do not come with their spouses.

53. Reading paragraph 7 cited above the Plaintiff has been provided for just like all the rest of the widows who have been given a life interest in the estate.

54. The court finds that the deceased it appears did not want the estate to be fragmented but to be communally managed and worked especially the coffee farming. The court does not therefore agree that the daughters have been discriminated in the will.

55. The Plaintiff contrary to her evidence has not been prejudiced by the contents of the will. She enjoys her status just like her co-widows as provided therein.

56. Section 11 of the Succession Act permits a person to deal with his estate as he deems fit provided that there is fairness and equity. In this instance the sum total of the courts finding is that the deceased did his Will as per the law established. The Will filed on 24th October 2017 and prepared by Kidiavai Advocate was valid. The Will was perfectly executed. The Will filed by the Plaintiff which was a photocopy filed by the Plaintiff in her supporting affidavit to the application on 1st October 2018 was invalid null and void.

57. It must also be remembered that the expert evidence like in this case, PW1, is merely persuasive and not binding. The said PW1 in my view was right in finding that the copy of the Will filed by the Plaintiff was a forgery a fact supported by Kidiavai Advocate DW1. The computer letters characteristics, the typing character of the two rival documents even from a naked eye are worlds apart. They are completely different.

58. Mr Kidiavai denounced the signatures, as well as the rubber stamps as they do not belong to him or Advocate Nyakibia.

59. For the foregoing reasons the application by the Plaintiff dated 28th September 2018 is hereby dismissed with no orders as to costs.

Dated, Signed and delivered at Kitale this 28th October 2020.

H .K .CHEMITEI

JUDGE

28/10/2020

In the presence of:-

Mr Teti for Respondent

Temba holding brief for Mengich for Applicant

Court Assistant – Kirong

Judgement read in open court.