REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

SUCCESSION CAUSE NO. 651 OF 2013

Consolidated with

SUCCESSION CAUSE NO. 202 OF 2015 IN THE MATTER OF THE ESTATE OF

KERUBO MOGERE (DECEASED)

BETWEEN

JARED MOGERE..APPLICANT

AND

FRANCIS MOGAKA MOGERE.....RESPONDENT/PETITIONER

RULING

1. This cause concerns the estate of Kerubo Mogere ("the deceased") who died on 8th November 2007. The petition for letters of administration intestate was filed by his son Francis Mogaka Mogere ("Mogaka"). The deceased's only asset was a parcel of land; WEST MUGIRANGO/SIAMANI/332 ("Plot 332"). The grant was confirmed on 3rd February 2016 and Plot 332 was to be shared equally between Mogaka and his brother, Daniel Mosomi Mogere ("Mosomi").

2. In due course, Jared Mogere ("Jared") filed a summons for revocation of grant dated 13th June 2016. The basis of his claim was that the grant was obtained fraudulently by making of false statement and concealment of material facts. Jared stated that the deceased had written will in which he had been named executor and which was the subject of ***Kisii High Court Succession Cause No. 202 of 2015***. That case was consolidated with this case for purposes of hearing.

3. The court directed that oral testimony be taken. The matter was first heard by Okwany J., who took the evidence of Jared (PW 1) and Josephine Nyamusi Mogere (PW 2) while I took the evidence of Mogaka (DW 1), Mosomi (DW 2) and Christopher Onyambu (DW 3) testified.

4. Jared (PW 1) testified that the deceased, who was his grandmother, had 9 daughters including his mother, Monica Mogere, who is also deceased. Prior to her death, the deceased instituted; ***Kisii HCCC No. 119 of 2002 (Kerubo Mogere v Francis Mogaka Mogere and Daniel Mosomi Mogere*****)** against Mogaka and Mosomi. In that suit, the deceased she sought to evict them from Plot 332. He recalled that after the deceased's burial on Plot 332, Mogaka and Mosomi, demolished their homes and chased them away. Jared testified that he was not aware of the existence of the will until he went to his lawyer's office.

5. The deceased's daughter, Josephine Nyamusi Mogere (PW 2) told the court that the deceased had 9 daughters and had adopted Mogaka and Mosomi whom she accepted as her brothers. She recalled that during her lifetime, the deceased subdivided Plot 330 into two; Plots 1811 and 1812 which she gave Mogaka and Mosomi respectively. Mosomi gave her notice to vacate and she was advised by the chief to move to Plot 332. She told the court that when the deceased died, Mogaka and Mosomi demolished their houses and chased them away.

6. Mosomi denied Jared's claim that the deceased bequeathed Plot 332 to him. He testified that he took possession of Plot 332 in 1973 after the deceased gave it to him. He testified that he has grown trees, tea bushes and erected his homestead thereon. He told the court that he now occupies Plot 332 with Mosomi. He recalled that when the deceased died, Jared was living in Kitale and failed to disclose the existence of a will.

7. Mogaka testified that the deceased gave Mosomi Plot 333 and told them that they should share Plot 332. She told them to buy land in Kitale for her daughters who were required to move to Kitale upon her death. He told the court that they live on Plot 332 which they were

given and where they grow tea. He testified that the deceased never executed any will.

8. Christopher Onyambu (DW 3) testified that he was 66 years old and a clan elder. He recalled that in 1974, the deceased called him and requested him to assist in her in dividing the land between Mogaka and Mosomi where they currently live.

9. The issue for consideration is whether Jared has proved the grounds for revoking the grant of representation issued to Mogaka under **section 76** of the ***Law of Succession Act (Chapter 160 Laws of Kenya)*** ("the ***LSA***"). **Section 76 (b)** of the ***LSA*** provides that a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion, *"(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."*

10. When Mogaka applied for confirmation of grant he disclosed that himself and his brother, Mosomi were the only beneficiaries of the deceased. Both Mogaka and Mosomi did not dispute the fact that the deceased had daughters who were not disclosed in the application for grant of letters of administration. Further, Mogaka did not disclose that the deceased had sued them regarding Plot 332. The Plaint filed by the deceased in ***Kisii High Court Civil Suit No. 119 of 2002*** reads, in part, as follows:

> *[2] That the Defendants are sons of the Plaintiff…*
>
> *[3] That at all material times and prior to the wrongful acts complained of in this suit the Plaintiff was the registered proprietor of land then known as Title Nos. West Mugirango/Siamani/330, 332 and 333 situate within Nyamira Township of the County Council of Nyamira.*
>
> *[4] That the Plaintiff will aver that in consideration of love and affection the Plaintiff subdivided the said Title No. West Mugirango/Siamani/330 into roughly 2 portions and caused registration of the same as Title Nos. West Mugirango/Siamani/1811 and 1812 and transferred the said portions unto each defendant respectively. The said Plaintiff also transferred Title No. West Mugirango/ Siamani/333 unto the 1st Defendant and thus achieved a rough equity between the 2nd Defendant.*
>
> *[5] The Plaintiff avers that she retained Title No. West Mugirango/Siamani/332 (the suit land) and is the absolute proprietor thereof. On the said land the Proprietor has carried out improvements by planting tea among other permanent improvements.*
>
> *[6] In or about 1999/2000 the Defendants wrongfully without colour of right interfered with the Plaintiff's lawful possession and ownership of the suit land and the Plaintiff has suffered loss and damages.*

11. What emerges from the deceased's own words contained in her plaint before this court is that it is not true that Mogaka lived on Plot 332 since 1973. There was clearly a dispute concerning Plot 332 between the deceased and her sons. I will return to this issue whether I should revoke or annul the grant of representation issued to Mogaka after considering the validity or otherwise of the will.

12. Mogaka, in his replying affidavit sworn on 8th July 2016, deposed that in 2006, the deceased was senile and immobile that she could not have been in a position to make a will. **Section 5** of the ***LSA*** dealing with capacity of the maker of the will states as follows:

> *5(1) Subject to the provisions of this Part and Part III, any person who is sound of 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 was 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.*

13. There is a rebuttable presumption that a person making a will is of sound mind and that the will has been duly executed and the burden of proof thus lies upon the person alleging lack of capacity. Githinji J., in ***Re Estate of Gatuthu Njuguna (Deceased)*** **NRB HC P&A No. 172 of 1988 [1998] eKLR** adopted the following statement of principal in ***Halsbury's Laws of England, 4th Edition Vol 17 at page 903-904***:

> *[W]here any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity."*

14. PW 2 testified that although the deceased was old, she used to bring her to Court and had for a fact accompanied her to the lawyer's office to make her will. On the other hand, the petitioner did not provide any evidence that the deceased lacked capacity to make her will. I

find and hold that the Mogaka had not furnished any evidence to demonstrate that that the deceased lacked mental capacity to understand and execute her will.

15. Of course, the court must consider whether in fact that document executed by the deceased is a will. The document so executed must be proved as a valid testamentary disposition of the testator in that it must meet the formal requirements for the validity of a will are set out in **section 11** of the ***LSA*** which states as follows:-

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 which 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 of or by the direction of the testator, … 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.*

16. A perusal of the will presented to court shows that it was executed by the deceased's left thumb print and attested by Jelia Obonyo Moseti and Silvanus Ongango. Their signatures witnessed by Vincent Obondi Nyakundi, Advocate. Neither Mogaka nor Mosomi suggested that the will did not meet these formal requirements. In short they did not surmount the burden of showing that the will did not meet the formal requirements.

17. The issue that ties up the will and the suit filed by the deceased is that prior to her death, the deceased had given her sons; Mogaka and Mosomi, part of her property and left Plot 332 for herself. From the totality of the evidence, it is also not in dispute that prior to her death, the deceased lived with her daughters and grandchildren on Plot 332 and that is why she filed suit against her sons to prevent them from evicting her. Mosomi admitted in cross examination that the homes of the deceased's daughters and grandchildren on Plot 332 were demolished. In her will, the deceased distributed her only property to her daughter and grandchildren living on the land. The will is therefore consistent with the deceased's intent to bequeath Plot 332 to her daughters and her grandchildren which intent is fortified by the suit she filed against Mogaka and Mosomi.

18. Even assuming I was wrong on the issue of the will and accepting that the deceased died intestate, the distribution of the deceased's estate is to be distributed in accordance with **section 38** of the ***LSA.*** which provides that where an intestate has left a surviving child or children, but no spouse, the net estate shall subject to the provisions of **sections 41** and **42**, devolve upon the surviving child if there be only one or equally divided among the surviving children including the deceased daughters.

19. Whether the deceased daughters, married or unmarried are entitled to inherit her property is beyond dispute. This equality principle was enunciated by the Court of Appeal in ***Rono v Rono & Another*** **[2008] 1 KLR (G&F) 803** and affirmed in subsequent cases by various court. Further, **Article 27** of the Constitution does not admit any form of discrimination on the basis of sex or marital status. Thus the deceased's daughters; married or unmarried would be entitled to a share of the estate.

20. Under **section 42** of the ***LSA*** previous benefits for the beneficiaries ought to be brought into account in distributing the estate. In this case, Mogaka alluded to the fact that the deceased arranged for the daughters to be bought for land in Kitale. This bland statement was not supported by any other evidence and was in fact inconsistent with the fact that the deceased chose to keep Plot 332 for herself, her daughters and their children. That she sued Mogaka and Mosomi for the land during her lifetime consecrates her intent on this issue. On the other hand, it has been established that the deceased gave her sons land before she died and she decided to keep the remaining parcel for herself and her daughters. The deceased's daughters would therefore be entitled to benefit from the property the deceased left for herself.

21. Finally, the position of the deceased's grandchildren is straightforward and is the subject of **section 41** of the ***LSA***. Although they are not direct beneficiaries, they are entitled to take the shares of their parents. In ***Re Veronica Njoki Wakagoto*** **NRB Succession Cause No. 1974 of 2008[2013]eKLR**, Musyoka J., had this to say.

> *Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.*

22. A grandchild will therefore take the share due to his or her deceased parent in the estate under the principle of representation stated in **section 41** of the ***LSA***. On this issue the Court of Appeal in ***Christine Wangari Gachigi v Elizabeth Wanjira Evans and 11 Others*** **NKU CA Civil Appeal No. 221 of 2007 [2014]eKLR** stated as follows:

> *Although Sections 35 and 38 of the Laws of Succession Act is silent on the fate of surviving grandchildren whose parents' pre-deceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law on this is section 41. If a child of the intestate has pre-deceased the intestate then that child's issue alive or en ventre sa mere or that date of the intestate's death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate takes between them the share their parents would have taken had the parent been alive at the intestate's death.*

23. Since the deceased prepared a valid will, the grant of letters of administration issued to Mogaka must now be revoked. I therefore grant the following orders:

(a) The grant of letters of administration intestate issued to Francis Mogaka Mogere and confirmed on 3rd February 2016 with respect to the estate of Kerubo Mogere (Deceased) in ***Kisii HC Succession Cause No. 651 of 2013*** be and is hereby revoked and the petition filed therein is now dismissed.

(b) As ordered by Karanjah J., on 7th March 2017, Jared Mogere shall now comply with the procedures for obtaining the grant of probate in **Kisii HC Succession Cause No. 202 of 2015**.

(c) This being a family matter there will be no order as to costs.

DATED and DELIVERED at KISII this 20th day of FEBRUARY 2019.

D. S. MAJANJA

JUDGE

Mr Gichana instructed by Bosire Gichana and Company Advocates for the applicant.

Mr G. J. M, Masese, Advocate for the respondent.