REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

SUCCESSION CAUSE NO 10 OF 2018

(*Formerly Nanyuki CM Succession Cause No 122 of 2017*)

(IN THE MATTER OF THE ESTATE OF DEREK HOLMES – DECEASED)

BETWEEN

ADRIAN RALPH HOLMES.................APPLICANT

AND

HAZEL HOLMES........EXECUTOR/RESPONDENT

R U L I N G

1. The Deceased in this cause, **DEREK HOLMES**, died on 02/05/2017. He was survived by his wife **HEZEL HOLMES**, two sons (**EDWIN MALCOLM HOLMES** (Edwin) and **ADRIAN RALPH HOLMES** (Adrian)), and **CELIA JANET HOLMES** (Celia).

2. By a petition dated 20/08/2017 (filed in court on 20/12/2017) the widow (hereinafter called the ***Executor***) applied for a ***grant of probate*** of the Deceased's Written Will dated 29/07/2002 (which was annexed to the petition). The Will named the widow as the "***Primary Executor"*** provided that she outlived the Deceased by 30 days.

3. All the three children of the Deceased and the Executor (already named above) consented in writing to a grant of "letters of administration" of the estate being made to the Executor. This was of course a mis-description of the necessary grant in this case, which ought to have been a **grant of probate of written will**.

4. In due course a grant was indeed issued, but the error persisted and instead of a grant of probate of written will, a **grant of letters of administration with written will annexed** was made and issued on 22/05/2018. That grant has not been confirmed.

5. Subsequently, on 21/11/2018, Adrian (hereinafter called the **Applicant**) applied by **summons dated 15/11/2018** for revocation of the aforesaid grant "and any other grant that may have been subsequently issued upon the basis of the Deceased's will dated 29/07/2002." The specific grounds for the application that emerge from the supporting affidavit annexed to the summons and a further affidavit of the Applicant filed on 07/12/2018 are as follows:-

1. That the Deceased's will is invalid on account of the two attesting witnesses being anonymous and unknown, and hence whose competency cannot be ascertained.

2. That the will is ambiguous "to the extent of the manner in which the Deceased's estate should be distributed".

3. That the grant is thus defective in form and substance.

4. That on the face of it the grant is defective in form and substance.

5. That evidence available shows that the Deceased's purported will was not final and that he intended to re-write it.

6. That one **Iain Illingworth** could not have been a witness to the Deceased's will contrary to the Executor's assertions in her replying affidavit.

7. That in any event the Executor has not laid out any basis or evidence for the claim that one **William Armstrong** was the other witness to the Deceased's will.

8. That in any case, the Executor should not be permitted to “introduce extraneous materials purportedly to unmask the identity of the anonymous witnesses.”

9. That the Executor intends to disinherit the Applicant.

6. The Executor has opposed the application by her replying affidavit sworn and filed on 27/11/2018, and her supplementary replying affidavit sworn on 16th and filed on 17th January, 2019. The grounds of opposition emerging from the two affidavits are:-

1. That the application is frivolous and vexatious because –

a) The Applicant was at all material times privy to the contents and effect of the Deceased’s will, the Deceased having disclosed the same to him and his two siblings in January, 2005.

b) That the Deceased informed the Executor that he had asked his friends, **William Armstrong** and **Iain Illingworth** to witness his will, and the two were persons well known to the Applicant, one of whom, Iain Illingworth, had been the Applicant’s tenant.

c) That regarding the other witness, William Armstrong, his known signature was similar to the signature on the will.

2. That there is no ambiguity in the will which is written in plain English and is “very clear”.

3. That the application is an afterthought, the Applicant having consented to the filing of this succession cause, and is intended only to prolong the matter of the Deceased’s estate to teach the Executor a lesson.

4. That the want of form in the grant issued to the Executor, being merely an error committed by court itself, can easily be rectified by the same court in exercise of its inherent jurisdiction, by issuance of the proper grant.

5. That the Executor has no intention whatsoever of disinheriting the Applicant.

7. The parties put in written submissions and fully relied on them without any highlighting. The Applicant’s submissions were filed on 14/02/2019 while those of the Executor were filed on 22/02/2019. I have considered those submissions, including the two cases cited for the Executor.

8. There has been some delay in the preparation of this ruling occasioned by the Court’s last Easter Recess as well as other official duties of the Court. The delay is regretted.

9. To my mind the main issue raised in this application is whether the Deceased’s will dated 29/07/2002 is valid notwithstanding the fact that the identities of the two attesting witnesses are not disclosed. This is a legal issue.

10. Section 11 of the ***Law of Succession Act, Cap 160*** makes provision with regard to written wills. That section states at paragraph (c) thereof –

“11. No written will shall be valid unless –

(a) ……..

(b) ……..

(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 of 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 or mark 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.”

11. The question naturally arises, that if the identities of the attesting witnesses are not disclosed, how would anyone know if indeed they were competent as required by law?

12. “**Competent witness**” is defined in **section 3** of the **Act** to mean -

“***a person of sound mind and full age.”***

So, unless the identities of the attesting witnesses are disclosed, how would anyone know if they, or any of them, were of sound mind and full age, and challenge their competency if necessary to do so? It would be a simple and logical thing for an attesting witness to write his full name (and his address) below his signature in order to fully disclose his identity; why did the witnesses in this case not do so?

13. I do not subscribe to the notion that the law needed to provide in terms for disclosure of the witnesses' identities. It is a matter of necessary and logical inference, since the law demands that the witnesses be competent - **that is, be of sound mind and of full age**. It falls to reason that the identities of the witnesses ought to be disclosed in the will so that their competency can be challenged if necessary! Otherwise, how would the competency of an anonymous witness be known or challenged?

14. I suppose in appropriate circumstances evidence may be led as to the identities of attesting witnesses. The best of such evidence would be where the witnesses who were not identified in the will take the stand and testify under oath that they were indeed the attesting witnesses and are subjected to cross-examination. In the instant case however, the two attesting witnesses are said to have pre-deceased the Deceased in this case, and thus cannot be called to testify.

15. To my mind, any other kind of evidence beyond the direct testimony of the attesting witness, would be to stretch things a little too far, especially considering that it would have been so easy for the witness to put down his full name and address below his signature. But I hasten to add that each case must depend on its own particular circumstances.

16. In the present case the Executor has attempted to show that the signature of one of the attesting witnesses was similar to the known signature of a friend and business partner of the Deceased who was also a tenant of the Applicant, and a family friend as well. But this is an area for expert evidence, say that of a handwriting expert. It is also to be noted that the Executor did not lay any basis for assuming that the other signature was of another friend of the Deceased well known to his family, beyond the claim that the Deceased had told her that the two gentlemen would attest his will.

17. The circumstances of the present case are distinguishable from the circumstances of the one case on the point cited for the Executor – the case of ***Curryian Okumu Vs. Perez Okumu and Others, Mombasa HC Succession Cause No 46 of 2014 (In re Estate of Clement Otieno Okumu, Deceased)***. In that case the attesting witnesses were apparently known, available and could have been called to testify.

18. It is for all the reasons discussed above that I hold that the Deceased's will dated 29/07/2002 is invalid for failure to disclose the identities of the two attesting witnesses, and lack of any proper evidence that would lead to such identities.

19. Having so held, I need not discuss the other issues raised in any depth, save to state that it is not clear from the body of the will how the Deceased intended his estate should be distributed by his Trustees (primary or secondary). The will seems to suggest that the properties compromising the estate would ultimately go to the three children, or their issues after them, but it is not provided in what proportions or which properties would go to whom. Those were some of the matters the Deceased had engaged his children in discussion by e-mail, but the issues had not been resolved by the time he died. Had they been resolved, it is clear that the Deceased intended to write another will incorporating family agreements regarding those issues.

20. The will he left behind, if it had been otherwise valid, would be difficult to effectuate. On the one hand the Deceased appears to imply that each child (or their children) was entitled to a share of the estate, though he does not state in what proportions. On the other hand the Deceased appears to have given the Trustee or Trustees full discretion regarding the manner and timing of distribution.

21. I would therefore hold that the will is invalid for ambiguity.

22. Having thus held the Deceased's will to be invalid for the two main reasons stated above, I will allow the application at hand and revoke the grant made to the Executor, which in any case had been made by a court which clearly had no jurisdiction, the ***Chief Magistrate's Court*** having jurisdiction in respect to estates whose value does not exceed her civil pecuniary jurisdiction (which is KShs 20 million). The estate in this case is stated to be worth over KShs 800 million.

23. I invite the learned counsels to suggest the best way forward in view of the advanced age of the Executor.

24. Parties shall bear their own costs of the application. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 26TH DAY OF JUNE 2019

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 27TH DAY OF JUNE 2019