



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1663 OF 2018

IN THE MATTER OF THE ESTATE OF ANIL NOORMOHAMED ABDULLA (DECEASED)

RULING

1. This is the Petition for Probate for Proof of Oral Will dated 2.10.2018. The Deceased in this Petition ANIL NOORMOHAMED ABDULLA died on 11th March 2018 at M. P. Shah Hospital Nairobi.
2. In the Affidavit in support of the Petition for Probate for proof of Oral Will, the Petitioners who said they were named executors of the Oral Will stated that they are seeking grant of Probate in the deceased's Oral Will.
3. The Advocate who drafted the Will was directed to file an Affidavit detailing the Circumstances under which the Oral Will was made. The Advocate filed an Affidavit dated 4.6.2019 in which he stated that in January 2018 the deceased who was admitted at MP Shah Hospital instructed him prepare a Will.
4. The Advocate requested Dr. VIJAYA KUMAR N. to furnish him with a report confirming that the deceased was of sound mind and capable of understanding the nature and effect of the Will.
5. The Advocate prepared a draft Will and forwarded it to the deceased for review by Email on 31.1.2018. The Advocate travelled out of the country and returned to the Country on 2.2.2018 and forwarded it to the deceased but there was no response and he went to the Hospital on 26.2.2018.
6. The Advocate further stated in the Affidavit that although the deceased had deteriorated, he was still capable of reviewing the Will and he read through the same. The Advocate further stated that after reading the Will the testator acknowledged by signifying by a nod of approval.
7. I have considered the Affidavits filed in support of the Petition for Probate for proof of Oral Will. I find that the requirements for the making of an oral will are clearly stated in Section 9 of the Law of Succession Act as follows;

(1) No oral will shall be valid unless—

(a) It is made before two or more competent witnesses; and

(b) The testator dies within a period of three months from the date of

Making the will:

Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.

(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by sections 18 and 19.

Section 10 of the Act provides the criteria for proof of oral wills

“If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness”

8. In this case, it was stated that the Advocate prepared a draft will on behalf of the deceased. The deceased perused the document and proposed some changes which were later on made. The issue that this raises is why the deceased never went ahead and executed the written will.

9. At the time of the events in question the deceased was admitted in hospital. This court was not informed the illness that led to his hospitalization at M.P Shah Hospital. The Advocate stated in his Affidavit that the deceased read the draft and nodded in approval. If he was able to read the document, he should have been able to sign the same. The law also allows a testator to ask someone to execute a Will on their behalf. The deceased did exercise this option. The presumption is that he lacked the capacity to make the will.

10. Under the Law of Succession Act, testamentary capacity is provided for under **section 5**. It states that a valid will is made by a person who knows what he is doing. It refers to soundness of mind and the fact that the maker ought to be an adult. Unsoundness of mind could result from mental or physical illness, drunkenness or any other thing that would cause a person not to know what they are doing at the time of making their will. Cockburn CJ in **Banks vs. Good fellow (1870) LR 5 QB 549** said as follows on testamentary capacity:-

“Testamentary capacity means that the testator must have a sound and disposing mind, enabling him to understand the nature of will making, a sound memory enabling him to recollect the property he means to dispose of, and a sound understanding, enabling him to remember the persons who should benefit from his estate and the manner it is to be distributed.”

11. The parties did not address the issue of testamentary capacity of the deceased. The deceased’s actions point a desolate picture of his capacity to make an oral will. There is no evidence that the deceased had testamentary capacity on 26.1.2018 when the final draft was taken to him by the Advocate who made the draft.

12. In the current case, I find that there is no evidence that the deceased had the capacity to make the will as alleged. The Advocate should have sought the Doctor’s opinion at the time of execution since the will was not executed in January 2018 when the instructions were given.

13. In the circumstances, I find that the oral will herein is not valid. I dismiss the Petition for Probate for proof of Oral Will dated 2.10.2018 and I direct that the Estate of the deceased herein devolves in accordance with the Laws governing Intestate Succession.

14. The beneficiaries of the estate are directed to Petition for grant of Letters of Administration within 60 days of this date.

Orders to issue accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 21ST DAY OF JUNE, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.