REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESION CAUSE 508 OF 2002

IN THE MATTTER OF THE ESTATE OF SAMUEL NDIGA MAINA (DECEASED)

MARY WAMAITHA NDIAGA.....PETITIONER

VERSUS

ANNE WANJIRU NDIAGA.....PROTESTOR

JUDGMENT

This cause relates to the estate of **Samuel Ndiaga Maina (deceased)** who died on 19 June, 2002 at which time he was domiciled in the Republic of Kenya, his last known place of residence being Unjiru sub-Location in Nyeri County.

On 11 December 2002, the petitioner petitioned for grant of letters of administration with a written will annexed; in the affidavit in support of the petition, she identified herself as the second wife of the deceased while she named the protestor as his first wife. She also named the following as the children of her co-wife:

1. Jackson Maina Ndiaga
2. Gitonga Ndiaga
3. Miriam Gathoni
4. Monica Njeri
5. Elizabeth Wangechi

Her own children have been identified as:

1. Samson Mwaniki
2. Lucy Wanjiru Ndiaga
3. Martha Wangari

In the same affidavit she listed a landed property known as Title Number Thegenge/Unjiru/854 which measures approximately 4.8 acres as the only asset comprising the deceased's estate.

Alongside the petition, the petitioner filed a written will which she claimed was executed by the deceased on 7 October 1999 and in which he divided his property between his two wives; according to that will, her bequest is indicated as 3.3 acres of the estate while her co-wife was gifted the remaining 1.5 acres.

As much as she petitioned for grant of letters of administration, the petitioner still cited the protestor to accept or refuse to petition for grant of letters of administration of the deceased's estate. Although the protestor entered appearance in response to the citation, the record shows that the grant of letters of administration with written will annexed was subsequently made to the petitioner on 11 July 2002.

By a summons for confirmation of grant dated 8 September 2004 the petitioner sought to have the grant confirmed and the deceased's estate distributed in terms of the will. Aggrieved by this move, the protestor filed an affidavit of protest against confirmation of grant on 8 April, 2005 protesting that the petitioner was not the deceased's widow and neither was she his dependant. She also swore that none of the

deceased's children had consented to the confirmation of grant. The affidavit was sworn on 22 March 2005.

On the same date she filed the affidavit of protest, the protestor also filed a summons under section 76 of the Law of Succession Act for revocation of grant; the summons was dated 22 March 2005 and was based on the grounds that the petitioner was not the deceased's wife and her children were not the deceased's children. As a matter of fact, the persons she considered as the deceased's children had not consented to the making of grant to the petitioner. She was also emphatic that Title Number Thegenge/Unjiru/854 was not the deceased's property in any event.

The protestor escalated this narrative of lack of the deceased's proprietary interest in Title Number Thegenge/Unjiru/854 in her summons dated 16 September 2005; in this summons which was filed under section 23 of the Law of Succession Act and Rule73 of the Probate and Administration Rules, the protestor sought to have *'the petition for probate of the deceased will struck out'* on the grounds that:

> ***(a) The deceased's alleged will has been adeemed as the deceased's alleged property bequeathed by the will i.e. Title No. Thegenge/Unjiru/854 did not belong to the deceased as at the time of the deceased's death.***
>
> ***(b) The petitioner cannot purport to petition this court for the inheritance and sharing of property which did not belong to the deceased as at the time of the deceased's death.***
>
> In the affidavit in support of the summons, the protestor swore that she was not aware of any will by the deceased and she was not aware that Title No. Thegenge/Unjiru/854 belonged to the deceased. As far as she was aware, so she deposed, this particular property belonged to one Mutaru Maina at the time of the deceased's death.

She was also advised by her learned counsel, which advice she believed to be true, that one could not bequeath property which did not belong to him and to that extent the deceased's will failed and was of no consequence. Accordingly, the petitioner's petition for grant of letters of administration with the will annexed was incompetent, misconceived and ill-advised.

The protestor opposed the summons.

In its ruling delivered in court on 27 July 2006 this Court (Okwengu, J. as she then was) dismissed the protestor's summons and held that the gift had not been adeemed. According to the learned judge, although the property was still registered in the name of Ayub Mutaru Maina the beneficial interest had passed to Samuel Ndiaga Maina at the time of his demise and therefore he could competently dispose of the property.

Undeterred, by yet another summons dated 7 October 2008 and filed on 21 November 2008, the protestor sought to have the will nullified or revoked and the deceased's estate distributed as an intestate estate. The summons was based on sections 7, 26, 27, 28 and 29 of the Act and Rule 73 of the Rules. This time round, the protestor alleged that the will sought to be enforced was fraudulent; that the deceased did not have the mental capacity to make it as at the time he is alleged to have made it; that the will does not make reasonable provision for all the dependants of the deceased; that the will was made through undue influence of some family members; and that the will was, in any case, unreasonable and unfair to some dependants and beneficiaries.

The record shows that on 11 May 2009, the court directed that this latest summons be heard together with the summons for confirmation of grant and the protest.

Thus, upon dismissal of the protestor's summons to strike out the petition, all that remained for disposal was the petitioner's summons for confirmation of grant, the protestor's protest; her summons for revocation of grant; and the summons for nullification of the will.

As early as 28 June 2007 this honourable court had issued directions to the effect that the summons for confirmation of grant and the protest would be heard together by way of oral evidence.

The hearing took off in earnest on 12 November 2018; in her testimony the protestor said that she married the deceased in 1962 when they settled on the deceased's brother's land, Title Number Thegenge/Unjiru/854. It is this deceased's brother who has previously been identified in this judgment as Mutaru Maina or Ayub Mutaru Maina. It was her evidence that she was not aware that the petitioner had petitioned for grant of letters of administration to administer the deceased's estate. She disputed the signature on the will was her husband's. She further reiterated that her deceased husband owned nothing and did not leave any estate.

The protestor also denied that the petitioner was the deceased's wife and that she had only heard about her. As a matter of fact, she had not seen her before. Upon cross examination, she testified that she did not know whether parcels Thegenge/Unjiru/854 and 855 belonged to Mutaru Maina or whether Thegenge/Unjiru/854 was, at some stage, given to her late husband. She was not even aware that Title Number Thegenge/Unjiru/854 was the bequest in the will in issue. She denied of any knowledge of a suit between her and the petitioner and out of which a court order had been issued to allow the petitioner participate in the burial of the deceased. Further, the protestor was also not aware that her late husband was a beneficiary of the estate of Mutaru Maina in this court's Succession Cause No. 235 of 1999 and it is in that cause that Title Number Thegenge/Unjiru/854 devolved upon him. She testified that she was only in court '*so that the Will could be read to her for the third time'*.

The protestor's son, Jackson Maina Nderitu testified in support of her mother's case and told the court that he knew the petitioner as she had lived with the deceased at some point though she was never the deceased's wife. He lived with his mother on Title Number Thegenge/Unjiru/854 and he was aware that prior to his death there were differences between the deceased and his (the witness') step-brothers. He testified that he was also aware of the will but that the signature on the will purported to be his father's was not his. He knew the witnesses who witnessed the execution of the will as the deceased's relatives but he was also aware that they had died.

Upon cross examination, he acknowledged that he was aware of the will by the deceased and that it was read in the petitioner's advocate's office in the presence of the protestor and his sister but that he himself was not present. He only saw a copy of the will in his mother's advocate's office. He admitted that there were problems during the burial of the deceased but that they had no problems with the petitioner participating in his burial apparently after she obtained a court order in Nyeri Chief Magistrates Court Civil Case No. 383 of 2002.

No evidence was called on behalf of the petitioner.

In his submissions, Mr. Keyonzo, the learned counsel for the protestor submitted that the Will fell foul of Section 11 (c) of the Law of Succession Act, and was thus not valid. The attesting witnesses, thumb-printed the will when, according to the learned counsel, they ought to have signed it. Again, the said witnesses were never called to testify in court and neither did the advocate who drew the Will. It was also his argument that in the absence of any evidence from the petitioner on the validity of the Will, the same ought to be nullified.

Mr. Ndirangu, the learned counsel for the petitioner, on the other hand, contended that the Will was properly attested except that the attesting witnesses could not be called since they were both deceased. He argued that the objector did not produce any evidence to prove mental incapacity of the testator. He urged this honourable court to find the Will valid.

On the face of it, the protestor's protest, her summons for revocation of grant and that of nullification of the will, appear to question the validity of the deceased's Will. And if that is a legitimate question, the primary issue of concern for determination in her two applications and the protest would be whether the will is indeed valid. No doubt, the outcome of the petitioner's summons for confirmation of grant would depend on the answer to this question; if the will is valid the grant would be confirmed and the Will ought to be given effect but if it is not, the administration and the consequent distribution of deceased's estate would be subject to intestacy provisions of the Law of Succession Act.

But having read the protestor's pleadings and affidavits since the inception of this petition and after having heard the protestor herself, there is what I consider a predicate question which is, should the validity of the will have been questioned at all. To put it straight, is the question on the validity of the will made in good faith?

This question is pertinent because the protestor has all along insisted that Title Number Thegenge/Unjiru/854 which the deceased bequeathed to her and her co-wife is not the deceased's property and he could not therefore will it away. If she was convinced, as she was, that this property belonged to the late Mutaru Maina and not the deceased, why would she be concerned with the deceased's disposition of the property when she has not demonstrated that she is either Mutaru Maina's representative or has some interest in his estate?

As noted, this court ruled that Title Number Thegenge/Unjiru/854 was vested in the deceased at the time material to this cause and thus he could dispose of it as he wished including bequeathing it. If the protestor had any reason to believe that the court had misdirected itself in coming to this conclusion the appropriate course ought to have been to appeal against the decision. But this is not what she did; even after the court's decision, she insisted, during the hearing, that the property belonged to her husband's brother. She went as far as saying that the deceased died without anything and thereby implying that he had nothing that he could possibly bequeath.

The second reason I am inclined to question the protestor's sincerity in in questioning the validity of deceased's will is that it is only after the court ruled that the will had not been adeemed and, to that extent, was a valid will that the protestor filed what she described as 'summons general for revocation/annulment of the will'. The summons was filed on 21 November 2008 more than two years after the court had delivered its ruling, more particularly on 27 July 2006. Having entered appearance to a citation on 24 July 2003 the applicant was also aware of the petition and the will at least five years before she filed her application to 'nullify or revoke' the will. Her own son testified that the will was read to her and one of her daughters in the petitioner's advocates' office much earlier.

I would suppose that if the protestor had any grounds to challenge the will, then she ought to have filed the necessary objection to the grant of letters of administration with the will annexed at the earliest opportunity possible and, in any event, as soon as she was served with the citation to accept or refuse the grant of letters of administration.

In my humble view, it smacks of bad faith for the protestor to question the will more than two years after her application to have the petition struck out on the ground that it had been adeemed had been dismissed and more than six years after she was aware of the petition for grant of letters of administration. One would want to ask, and legitimately so, that if the protestor was aware that apart from being adeemed, the will could also be invalidated on any of the other grounds she raised in her summons for revocation or annulment of the will dated 7 October 2008 why didn't she question the will on those grounds in her previous application in which sought to have the petition struck out on the ground of ademption? Why did she have to wait for another two years to come up with an application based on grounds that could have properly been determined in the earlier application? In the absence of any explanation from the protestor's side, it is reasonable to assume that the answer to these questions is simply that the protestor does not have anything in particular against the deceased's will and her rather belated attempt to question it is mala fides. Perhaps this explains why, in her own words, she was in court '*so that the will could be read to her for the third time'*.

But let us for a moment give the protestor the benefit of the doubt and assume that this court can interrogate the validity or lack thereof of the will in question. The starting point for such an interrogation would, in my humble view, be section 5 of the Law of Succession Act which spells out the basic requirements of what constitutes a testator's legal capacity to make a will; this section reads as follows:

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

Thus, an adult who, no doubt the deceased was, is capable of making a will to dispose of his property as long as he is of sound mind and he knows what he is doing. Based on the provisions of subsection (3), whenever a will is lodged in court for probate or for grant of letters of administration with the will annexed, the court is entitled to assume that the testator was such a person of sound mind and knowledge. This may explain why subsection (4) places the burden on the person disputing the state of mind of the testator at the time of making the will to prove that the testator was of unsound mind and, accordingly, he may not have been aware of what he was doing.

These points were taken in **Banks versus Goodfellow (1861-73) ALL ER Rep 47** where the questions of the effect of a testator's partial or complete mental illness on his capacity to make a will were discussed.

It was acknowledged that the disposition of one's property by way of a will will generally be influenced by instincts, affections and common sentiments of mankind. As such it is the exercise of a power involving a moral responsibility so grave that the possession of the intellectual and moral faculties common to human nature should be insisted upon as an indispensable condition (to any will). Reason, it is essential to the exercise of such powers that the testator understands, among other things, the nature and effects of his acts; the extent of the property which he is disposing; the claims to which he ought to give effect and, to this extent, no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties. On the whole, no insane delusion should influence his will on disposing of his property, and bring about a disposal of it which would not have otherwise been made. (See pages 55 and 56).

It follows that "***if the human instincts and affections or the moral sense is perverted by a mental disease…if reason and judgment are lost and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions and to lead to a testamentary disposition due only to its baneful influence, in such case it is obvious that the condition of testamentary power fails, and a will made under such circumstances ought not to stand".*** (page 56).

On the other hand the court endorsed the notion that a degree or form of unsoundness of mind which neither disturbs the exercise of the faculties necessary for making a testamentary disposition nor is incapable of influencing the result ought not to take away the power of making a will or place a person so circumstanced in a less advantageous position than others with regard to his rights. It was noted that, in considering whether or not to give effect to a testamentary disposition, it must always be borne in mind that the absolute and uncontrolled power of testamentary disposition conceded by law is founded on the assumption that a rational will is a better disposition than any that can be made by the law itself. Thus, though a mental disease may exist but it presents itself in such a degree and form as not to interfere with the capacity to make a rational disposition of property, the testator's right to dispose of his property should not be taken away.

As noted, there is a legal presumption under the law that the testator is of sound mind; thus, capacity is presumed in cases where a duly executed will is put forward, if, on the face of it is rational. This, however, is a rebuttable presumption and where a real doubt is raised about capacity, then the burden shifts to the propounder to prove, on the balance of probabilities, that the maker of the will indeed had capacity. (see **Re Key deceased [2010] EWHC 408 (Ch), [2010] WTLR 623)**

If the fact that a testator has been a subject to any insane delusion is established, a will must be regarded with great distrust and every presumption should in the first instance be made against it.

Turning back to the present case, there was nothing from the protestor to suggest that the deceased had no capacity to make a will; the presumption of capacity was not at all rebutted and therefore it was unnecessary to call upon the propounder to prove capacity.

There was a question about whether the will met the formal requirements of making a will; this aspect of a valid will is covered in section 11 of the Act; it 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 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.

On the face of it, the will before court satisfied all these requirements and, no doubt, the grant was made to the petitioner on the presumption that the deceased not only had the capacity to make the testamentary disposition but also that it was consistent with section 11 of the Act. The court was so entitled to assume under **section 16 o**f the Act which states as follows:

16. Notwithstanding the provisions of this Part, every will, whether of movable or immovable property, and whether executed before or after the commencement of this Act, shall be treated as properly executed if its execution conformed, either at the time of execution or at the time of the testator's death, to the law in force

(a) in the state where it was executed; or

(b) in the state where the property is situated; or

(c) in the state where, at the time of its execution or the testator's death, he was domiciled; or

(d) in a state of which the testator was a national either at the time of its execution or on his death.

Once the court has made a grant and thereby having treated the will as properly executed the burden shifted to the protestor to provide evidence that, on the contrary, the will was not properly executed. And it is then that the petitioner would have been called to counter the protestor's evidence and propound the will. This position was adopted in the matter of the **estate of Gathuthu Njuguna (deceased)** in **Nairobi High Court Succession Cause No. 172 of 1988** where Khamoni, J. as he then was stated this:

On a point of procedure, Shields J had directed that it is the executor who was to propound the will he is the one who had the right to begin. Consequently, the executor gave evidence. He called one witness and he was to call the others before Shields, J. left. However, when the hearing resumed before me, I directed the objector to start. The reason is that Grant of probate of the will had been given on 14.7.88 meaning that the will had been proved as a valid will but the applicant was seeking a revocation of the grant of probate. There is a presumption of due execution and capacity to make a will and the statutory burden as regards capacity is on the applicant-S.5(4) of the Law of Succession Act. It is my view that the executor would only have been required to propound the will and to begin had the proceeding been an objection to the making of the grant under rule 17 of the Probate and Rules(sic).

This statement in my, humble view, represents the proper position of the law. It is not only consistent with sections 5 and 16 of the Act but also, in the absence of evidence that the will is deficient or vitiated on any of the grounds known in law, it would be illogical for the court to require of an administrator or an executor to propound a will the basis upon which the court itself has already made a grant or probate. Where a grant has been made it stands to reason that the petitioner will only be called upon to propound the will once a prima facie case upon which the court can nullify or revoke the grant, if the evidence presented is not controverted, has been made out.

The protestor in the present case did not provide evidence that the will fell short of the formal requirements of section 11. His learned counsel urged that the attesting witnesses made thumb prints rather than sign the will. I doubt there is any force in this argument because although subsection (4) says that the will shall be signed by the attesting witness it goes further to say and no particular form of attestation shall be necessary. In any event if the testator himself is free to simply place a mark on the will to signify his endorsement of the will as his own disposition, or better still, somebody else can place such a mark or sign on his behalf, it would be illogical to insist upon a signature as the only means through which the attesting witnesses can attest the testator's endorsement of his will.

There was also the argument that neither the petitioner nor the attesting witnesses testified. It is true that the petitioner and the attesting witnesses never testified; neither did the advocate who drew the will.

I agree that all these witnesses are necessary whenever the propounder of the will is required to propound it; however, it is still incumbent upon any applicant challenging the will to prove his or her case on a balance of probabilities. Failure to call the propounder of the will or the advocate who drew it or the attesting witnesses does not, by itself, necessarily imply that no testamentary disposition was made or that if it was made it does not comply with the law. The burden still falls upon the applicant to prove what, in his or her view, are the shortcomings of the will and for that reason persuade the court that will should not be given effect.

In my humble opinion, the protestor has not discharged this burden. Looking at her case in its entirety, it is clear that she does not have any particular grievance against the will; rather, she has been shifting from one position to the other. She started from the position that the deceased could not have made any will because he did not have any bounty to bequeath. She was overruled by this honourable court. She then challenged the will on the grounds that the testator did not have capacity to make the will and that the petitioner was not his wife in any event. No evidence was proffered to demonstrate that the deceased was incapacitated in any way as not to make the testamentary disposition at the time he made it. As to the argument that the petitioner was not the deceased's wife, the protestor herself had sworn in her affidavit of 7 October 2008 and filed in this cause on 21 November 2008 as follows:

10. (a)

(b) A few years before his death my husband's step brother had brought several women (in fact 9 women) as second wives for the deceased who never stayed with the deceased and the petitioner is just one of them.

(c) the petitioner had stayed a few years with the deceased before the deceased died and had come with some children and it is inconceivable the deceased would will away a chunk of his only parcel of land to the petitioner and the petitioner's children without naming who these children were if he knew them.

It is apparent from this deposition that the protestor was all along aware that the petitioner had been living with the deceased prior to his death; yet in her testimony in court she denied knowing the petitioner or that she (the petitioner) lived with the deceased in any capacity. In the context of the protestor's challenge of the will, it is obvious from this deposition that the protestor could not challenge the will on the ground that the petitioner was a stranger to the deceased or that she was not his dependant.

Finally, the argument that the protestor was not sufficiently provided for in the will cannot be a ground for revocation of the will; in any case if there is any substance in this argument, all that the protestor should have done is to invoke section 26 of the Act and ask for what she deems to be a reasonable provision of the deceased's estate; this section states as follows:

> ***26. 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.***

As far as the protestor's argument is concerned, the essence of this section is that lack of adequate provision cannot be a ground for revocation or nullification of a grant with the will annexed.

In the final analysis I do not find any merit in the protestor's summons dated 7 October 2008 or her affidavit of protest sworn on 22 March 2005 and filed in court on 8 April 2005. Similarly, there is no merit in the summons for revocation of grant dated 22 March 2005. They are all dismissed.

In the same breath I allow the summons for confirmation of grant dated 8 September 2004; accordingly, the deceased's estate shall be distributed in accordance with his will made on 7 October 1999 and filed in this court on 17 December 2002. Parties will bear their respective costs.

It is so ordered

Dated, signed and delivered in open court this 29th day of November, 2019.

Ngaah Jairus

JUDGE