REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 68 OF 2016

IN THE MATTER OF THE ESTATE OF ESTATE OF JFF (DECEASED)

FGCB

SB

ZK nee R-S

AF nee RS.....CO-EXECUTORS/RESPONDENTS

VERSUS

HSN R

HR

APR.....APPLICANTS

RULING

1. JFF ("the Deceased") died at the advanced age of 83 on 30.12.15 at Diani Hospital, Kwale County. He died testate leaving a Will dated 19.6.15 ("the Will") in which he named FGC B, SB, ZKNR-S and AFNR S, the Respondents herein as executors. A Grant of Probate ("the Grant") was issued to the Respondents on 2.9.16. The Respondents by their summons dated 4.12.16 sought confirmation of the Grant. However, before the Summons was heard, HSN R, HR and APR, the Applicants filed the present Summons dated 31.1.16 ("the Application").

2. In the Application, the Applicants seek the following orders:

> ***1. A declaration that the will dated 19th June 2015, purportedly by the late FJF is void and or invalid on account of lack of testamentary capacity and/or such importunity as to take away the free agency of the testator.***
>
> ***2. In the alternative to prayer 1 above, a declaration do issue that the will dated 19th June 2015 did not make fair, reasonable and/or adequate provision for the applicants and the deceased's net estate, including the assets of the FT, should be distributed equally between the Applicants and the Respondents.***
>
> ***3. An order revoking the grant dated 25th September 2016 issued in respect of the estate.***
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> ***4. Such further or other order as this Honourable Court deems just and expedient to meet the ends of justice.***
>
> ***5. Costs of this application be provided for.***

3. The key grounds upon which the Application is premised are that the Deceased suffered mental health problems, including anxiety disorder during the 5 years prior to his death for which psychiatric medication had been prescribed. Because of his state of mind, the Deceased lacked the testamentary capacity to make the will. Further, the Applicants claim that the making of the will was attended by such importunity as to take away the free agency of the Deceased.

4. The Applicants seek revocation of the Grant on the ground that the Deceased on account of his failing memory and ill health and age lacked the testamentary capacity to execute his Will. Further, that the Applicants have been treated most unfairly and denied their rightful share of the estate. The Applicants prayed that the remedies the manifest injustice by granting the orders sought. The valuation report of SIB,

trust deed, various emails, company and other documents were annexed to the affidavit.

5. The Applicants' case as set out in affidavit and oral evidence of APR, the 3rd Applicant (A) and of his wife AR is that SIB was purchased largely through the efforts of the parties' grandmother Z. SIB which had a main house and 4 cottages was used as a holiday setup for individual family members and groups. The Applicants' parents moved to SIB in 1972 from [particulars withheld] and they built a home there. Thereafter the Deceased and Robert moved in 1976. This is after the family farm in [particulars withheld] was sold. The siblings decided to renovate SIB and develop formal holiday letting business. The capital was provided by all siblings in equal shares except MR-S who made no contribution. Their mother managed the business and built up a clientele while their father did tremendous work of maintenance, building and labour management. No payment of salary or dividends was ever made to them. The parents left Kenya for Europe in 1984 and their home became a rental cottage. A claims that neither his parents nor their children have received any payment for their cottage nor any revenue derived therefrom. F and R ran the business as exclusive shareholders.

6. The Company was incorporated in July 2012 at A insistence. The Deceased has 500 shares, the 1st and 2nd Applicants have 83 shares each, A has 84 shares while MZR S holds 250 shares. In November 2011, SW the manager of SIB left SIB prematurely and A wife A stepped in as interim manager. M and her children reside and work in the United States of America and none of them wanted to come to Kenya to manage SIB. In March 2012 A resigned from a well-paying job in Tanzania to assume management of SIB. He did this to protect and preserve family property and to support the Deceased, his aging uncle and further to secure by way of development, the balance of the underutilised property. Prior to A taking over SIB, all was well with his cousins who appreciated his and A efforts to improve and run the business professionally especially in light of the Deceased's irascibility. This however changed and his cousins began a relentless campaign to obstruct and defame him with endless calls and emails to the Deceased. This caused the Deceased to level accusations against A questioning his motives, integrity and ability as manager. As a result, A resigned after just 4 months. This move cost his family financially, physically and emotionally.

7. A further claims that the Applicants have over the years tried to have the property developed and have introduced property developers who made proposals for the development of the property to secure the same from appropriation but all the proposals were rejected by M and the Deceased. He further claims to have initiated the planting of some 40,000 casuarina trees on 20 acres of SIB.

8. On the Deceased's diminished testamentary capacity, A asserts that he was a notoriously difficult person given to frequent outbursts of rage and as he aged, he had failing memory. He was confused and compulsively took notes following and during every meeting which he referred to, to follow conversations. He was on psychiatric medication *escitalopram*, which he frequently forgot to take. The drug is prescribed for treating depression or generalised anxiety disorder. A claims that the R-S manipulated the situation to their benefit and to the disadvantage of the Applicants. He further claims that he was the executor of the Deceased's will but he was replaced with the 3rd and 4th Respondents. By the time the Deceased made his final will, he was confused and vulnerable, a fact known to family and friends.

9. A claims that the Will was crafted to ensure that the R-S have majority shareholding in the Company and SIB. The R-S are aware of the longstanding intention by both the Deceased and R to bequeath family wealth in equal proportion between them (R-S) and the Applicants. An email by M husband D of 27.4.12 to the 2nd Applicant and another from M to A of 26.7.12 show this intention. According to A, R and the Deceased lived free of expense at SIB for nearly 40 years and accumulated a cash estate in the form of an overseas Trust of about US$ 1 million and shares and cash in Kenya in excess of Kshs. 100,000,000/=. The R-S daughters stand to receive a nominal 70% of the overseas Trust and all liquid assets in Kenya. This ignores the original investment and work by the Applicants' parents and all the efforts by the 2nd and 3rd Applicants. In addition, the R-S girls will get 55% of the Company and SIB while the Applicants will get 45%. This is all as a result of manipulation of the Deceased by M and her daughters. J and A made frequent visits to Kenya between 2012 and 2015. A avers that at the time the Will was made, the Respondents were staying with the Deceased and they manipulated, induced or coerced him to make the dispositions he did not intend to make and could not take remedial action as he could not remember having done so.

10. A further avers that as executor of R estate and until 2012 of the Deceased's estate as well. As such, he was privy to the fact that each would inherit the bulk of the other's estate and on the second death the whole part would be split equally between surviving nephews and nieces. R died in December 2006 and the Deceased inherited his entire share portfolio and his share of SIB. The provision made to the Applicants was not commensurate to their input towards the development of SIB. In particular, A avers that R and the Deceased absorbed the Applicants' parents' cottage at SIB. The cottage netted Kshs. 2,517,042/= in 2014 and Kshs. 2,936,549/= in 2015 and no payment was ever made to the Applicants or their parents. The provision did not take into account the sacrifices made by A or funds given to the R-S to purchase a home in Florida and for frequent travel between Kenya and the USA. The R-S have been given a larger amount out of the FT and the entire stock portfolio. His further claim is that the Deceased's wealth was created substantially because for 40 years he benefitted from subsidized living at SIB where the business the Applicants' mother had helped fund and developed paid for his staff, utilities, etc,

11. A further averment is that prior to the Grant, the R-S removed and shipped to USA the entire contents of the main house at SIB which comprised collective pieces belonging to R, the Applicants' mother and the Company. They sold both his cars to fund the cost of shipping for an alleged amount of US$ 32,000. A avers further that one of the vehicles, a land cruiser was sold for US$ 20,000. The Deceased in his letter of wishes of 2009 stated that he and R wanted family property to be divided equally. A asserts that he recently established that the Deceased had fixed account with Stanbic Bank with a credit balance of Kshs. 105,000,000/= as at November 2016 which was omitted in the probate documents. A asserted that in the Deceased's will of 2009, he was one of the executors. He was removed in the 2013 will and F and his wife S, Z and A were appointed executors after the Deceased was coerced to do so. The Applicants did not attend the Deceased's funeral.

12. AR,A wife testified that she worked at SIB and assisted the Deceased with emails NSSF, NHIF and also helped him understand his medication. She stated the Deceased suffered mental health problems, failing memory and could not have been in a state of mind to write the Will. She stated that the Deceased was a complicated and fragile man. She acknowledged that mental health problems are subject to medical diagnosis. She did not have a medical report on Deceased's mental condition. She took the Deceased to Diani Hospital but never to a psychiatrist. She is familiar with depression as her mother also suffers from it and she has been her mother's care giver for over 30 years. She herself does not suffer from depression. A denied that the relationship between the Deceased was strained. She stated that neither she nor A attended the Deceased's funeral and that failure to attend funeral is not indicative of lack of affection for the Deceased. She even wrote a tribute that was read out and also asked her children to write something.

13. The Respondents deny that the Deceased was coerced to alter his Will and asserts that the Deceased could not be manipulated on anything. The 3rd Respondent's (Z) evidence is contained in her Replying Affidavit sworn on 4.3.17 as well as her oral testimony. Z asserts that none of her family members were in Kenya when the Deceased revised his Will as alleged. Soon after the death of the Deceased, the 2nd and 3rd Applicants came to SIB frantically asking to see the will as the 3rd Applicant stated that he had been left out of the Will. During family meetings on 10.1.16 and 11.1.16 the Will was circulated to those present including the 2nd and 3rd Applicants. They declined an invitation to stay on for the Deceased's ash and memorial service. They stated that it would be hypocritical for them to attend as they hated the Deceased. The Respondents applied for Grant of Probate on 26.2.16 which application was gazetted on 21.7.16. As no objection was raised, the Grant was issued on 2.9.16. The Respondents on 7.12.16 applied for confirmation of the Grant. After the application was set down for hearing, they Respondents were served with the present Application. It has taken over 1 year for the Applicants to opine that their bequest is inadequate.

14. Z further avers that the Applicants are not dependants within the meaning of Section 29 of the Law of Succession At. The Application cannot stand and ought to be dismissed *in limine*. Z finds it inconceivable that the Applicants would consider the 40% share of the Deceased's real property bequeathed to them inadequate. To the Respondents, the Application is an afterthought and an intricate scheme for the Applicants to enrich themselves. The Application is also an attempt to use the Court to interfere, infringe and curtail the Deceased's testamentary freedom.

15. Z further avers that the Deceased was more forgetful with age and was sometimes rude and difficult. She however denies that he was incognisant or without complete control of his faculties. The allegations by the Applicants to the contrary are therefore false. Following the demise of his brother R in 2006, the Deceased started taking *citalopram* a mild anti-depressant intermittently and not *escitalopram.* Taking anti-depressants is not and has never been indicative of mental incapacity. She further avers that Anthony's wife suffers from depression and blogs about it yet she is not regarded as mentally unsound. The Applicants to suit their purposes wish to label the Deceased's depression as ill mental health. Z further asserts that it is foolhardy for the Applicants to uphold the 2013 will and challenge the 2015 Will for reason of mental incapacity and yet maintain that the Deceased had a psychotic disorder since 2010. She further asserts that the only difference between the 2013 will and the 2015 Will is the addition of their mother as a beneficiary, bequests of motor vehicles Kxx xxx and Kxx xxxx and a balance scale to the Company. The Deceased did not disenfranchise the Applicants or drop Anthony as an executor as alleged.

16. According to the Respondents, Anthony and the Deceased had a strained relationship from as far back as 2009 born out of SIB. Their monumental altercation in 2012 altered their relationship and culminated in the Deceased dropping Antony as executor when he revised his will in 2013. She alleged that A has always viewed SIB as a gold mine and has relentlessly floated all manner of grand development plans to cash in on SIB much to the Deceased's chagrin.

17. The Respondents claim that SIB had an established clientele going back in the 1940s and the Applicants cannot therefore attribute the same to their parents. All siblings apart from Z mother contributed to the running of the business. The cottage built by the Applicants' parents has since 1985 when they left been maintained and upgraded by the business. The net income from the business was ploughed back into the business. It is therefore unfair for the Applicants to suggest that their family has been intentionally excluded from the business profits. Z further averred that Anthony offered to manage SIB in spite of having a highly paying job and his volatile relationship with the Deceased. It turned out that he chose to manage SIB solely for the Applicants' interest and this became a bone of contention between him and the Deceased.

18. On FT, Z asserted that the Court lacks jurisdiction to entertain any matter touching on the Deceased's personal property in Jersey, Channel Islands, Britain. On the company, shareholding, Z asserts that her mother is not part of the prospective distribution of the Deceased's Will. She owns 25% of the land in her own right. The correct representation of SIB and the Company is the R-S children's shares are 300 while those of the R children are 450 shares. The Deceased had testamentary freedom to will away his property as he pleased and it is not for the Court to adjust the bequests at the bidding of any applicant. Inheritance is a privilege, a gift of love and not a right to be enforced.

19. The Respondents deny that they have intermeddled with the estate and claim that the Deceased directed that his heavy furniture and personal effects be shipped to the USA because he had bequeathed them to their mother. The 2nd & 3rd Applicants participated in the process.

20. The Respondents prayed that the Application be struck out or dismissed as it bad in law and offends the explicit provisions of the law of Succession Act. The wills, various emails, gazette notice, Grant and company and other documents were annexed to the Affidavit.

21. Chitranjan Bhanuprasad Gor is an advocate of the High Court of Kenya practising in Mombasa since 1959. His testimony is that in May 2009, the Deceased instructed him to prepare his will which he did. The Deceased signed the will on 18.5.09 in the presence of Mr. Gor and Ms. Carol Murithi as attesting witnesses. On 1.3.13, the Deceased called on Mr. Gor with the 2009 will with notes attached and instructed him to draw another will incorporating the changes he had made to the will. Mr. Gor drew another will as instructed which was signed on 1.3.13 in the presence of Mr. Gor and Ms. Hamida Bayan as attesting witnesses. In the same month, the Deceased called on Mr. Gor and instructed make further changes to the will which he did. The changes were to the effect that no heir would sell their interest in any inherited land without first offering for sale to the other heirs at its market value. The other amendment was that all expenses for transporting personal property inherited by his heirs would be paid from the estate. He signed this new will on 20.3.13 in the presence of Mr. Gor and Hamida Bayan.

22. In June 2015, the Deceased called on Mr. Gor with his will dated 20.3.13. On the Deceased's instructions, he made amendments to the will to the effect that JMM and RKM were each to be given Kshs. 75,000/= instead of Kshs. 50,000/=. Other changes were to the effect that he bequeathed all the contents of his house and personal effects and vehicles Kxx xxxx and Kxx xxxx to MR-S and if she predeceased him to her daughters Z, J and A in equal shares. His other vehicle Kxx xxxx and balance scale he gave to SIB. The Deceased signed the will on 19.6.15 in the presence of Mr. Gor and Hamida Bayan as attesting witnesses. The Deceased was very detailed and meticulous in his instructions and all wills were prepared in accordance with those instructions. The latest will is of 19.6.15. The Deceased went to his office 4 or 5 times in a year and always went alone. DW2 did not think Deceased was taking any depression medication. The Deceased struck DW2

as a person in control of his faculties. If he had any reason to doubt of the Deceased's mental state he would not have taken instructions.

23. PRA a 91 year old retired nurse and a resident of Karen, Nairobi testified that she knew the Deceased, R, N and M well. The Deceased was her very good friend and was like a younger brother to her. She took care of the Deceased lots of times when he was not well. She also stayed with the Deceased at SIB. In 2014 she took him to Karen Hospital and he gave Dr. Anthony Gikonyo his history without any help from her. He had surgery on his leg to clear a blocked vein. According to her, the Deceased had no mental problems though he was grumpy, impatient and was not in good health. He was with her a lot and it is not true that he was forgetful and could not remember anything. Had he been mentally unstable he would not have been given his firearm licence. The young men wanted to sell off some of the land to develop a place like Vipingo. The Deceased and R wanted peace and quiet and did not want vast developments. With travel advisories and Al Shabaab, it was the wrong time to borrow money to build.

24. Parties filed their written submissions as directed by the Court which I have given due consideration. The issues that fall for determination are:

a) Whether the Application challenging the Will of the Deceased is competent

b) Whether the deceased had testamentary capacity to make the Will

c) Whether the Applicants are entitled to make an application for reasonable provision

d) Whether the Will made a fair, reasonable or adequate provision for the Applicants

e) Whether the Grant should be revoked

f) Whether this Court has jurisdiction over the FT.

g) Costs

Whether the Application challenging the Will of the Deceased is competent

25. It was submitted for the Respondents that the Application was filed out of time without leave of Court. The Petition for Grant was gazetted on 21.7.16 but the Applicants failed to file any objection within the 30 days required by law.

26. Section 67(1) of the Law of Succession Act provides:

> ***"No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired."***

Section 67(1) of the Act provides:

> ***"Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow."***

27. The foregoing provisions require publication of an application for a grant of representation inviting objections within a period of not less than 30 days. Where a party wishes to lodge an objection to the making of a grant to an applicant, such party must do so within the period contained in the published notice or such longer period as the Court may allow. In the instant case, the gazette notice was published on 22.7.16. The notice stated that the Court would issue the grant unless cause be shown to the contrary within 30 days of the date of publication of the notice. The latest date by which an objection to the making of the grant ought to have been made was 22.8.16. Any objection made thereafter would only be made by leave of the Court. It has been argued that no such leave was obtained to file the Application herein. I have carefully looked at the Application. The same is not an objection to the issuance of the Grant as envisaged in Sections 67 and 68 of the Act. The Grant was issued on 2.9.16 while the Application was filed on 1.2.17. It is in fact an application inter alia for revocation of the Grant. The validity of the Will in one of the stated grounds for revocation. In any event, once a grant is issued, an objection to its issuance cannot lie in law. In the circumstances, I do find that the Application before me is competent.

Whether the deceased had testamentary capacity to make the Will

28. It is the Applicants' case that by the time the Deceased made his final Will, he was easily confused and vulnerable. They described the Deceased as notoriously difficult and given to frequent outbursts of rage and as he aged, this was further worsened by confusion caused by a failing memory. Evidence of this confusion was his compulsive making of notes following and during conversations. It was submitted that the Deceased himself admitted that he had a bad memory. The Applicants further argue that the Deceased had for his last 5 years been on a drug known as escitalopram which is prescribed for depression and anxiety disorder and a litany of other mental conditions listed by the Applicants. It is the aforesaid condition of the deceased that the 3rd and 4th Respondents exploited to rob the Deceased of his testamentary capacity rendering him unaware of what he was doing at the time he made his Will on 19.6.15.

29. Under Section 5 of the Act every person who makes a will is deemed to be of sound mind and any person who alleges otherwise has the onus to prove the allegations.

"(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."

30. It is the Applicants case that the Deceased was not of sound mind when he made the Will. He was confused and compulsively took notes following and during every meeting which he referred to, to follow conversations. Mr. Gor who drew all the Deceased's wills described the Deceased as detailed and meticulous in his instructions and a person in control of his faculties. If he had any reason to doubt of the Deceased's mental state he would not have taken instructions. He stated that in March 2013, the Deceased called on him with the will with notes containing amendments which he wanted made to the Will. There is a common saying that the ***"faintest pencil is better than the sharpest memory".*** The Deceased appears to me as a person who, mindful of his forgetfulness was careful to put things down in writing to serve as reminders; a practice many of us should adopt! No expert witness was called to confirm that what the Applicants describe as compulsive taking of notes following and during every meeting to follow conversations renders the Deceased a person of unsound mind.

31. Further the Applicants claim that the Deceased was on psychiatric medication *escitalopram* a drug prescribed for treating depression or generalised anxiety disorder and a host of other mental conditions. This is denied by the Respondents who claim that the Deceased was on *citalopram* a mild anti-depressant intermittently. Again no expert witness was called to enlighten the Court on the 2 drugs and their purpose. In order to persuade the Court, the Applicants ought to have called an expert or the psychiatrist who prescribed the medication or at the very least the last doctor who attended to the Deceased prior to his demise to tell the Court the judgement of the Deceased was impaired due to his mental condition. As it is even the name of the psychiatrist who prescribed *escitalopram* was not disclosed. This omission was critical as indicated in Erastus Maina Gikunu v Godfrey Gichuhi Gikunu & another [2016] eKLR where the Court of Appeal noted:

"It must be remembered that not even severe physical illness can automatically deprive a person of a testamentary capacity. Only physical illness that renders a testator incapable of knowing what he is doing will take away the capacity. It is for this reason that the courts insist on the person alleging lack of capacity due to illness to prove that the illness impaired the judgement and understanding of the testator."

32. In the circumstances I draw the conclusion that the Deceased though aged and forgetful, cannot be said to have lacked testamentary capacity at the time he made his Will. There exists in my mind no doubt or dispute of insanity on the part of the Deceased to shift the burden of proof to the Respondents (see In Re Estate of Gatuthu Njuguna (Deceased) [1998] eKLR). Under Section 5(4) of the Act, the burden of proof squarely lay upon the Applicants but they failed to discharge the burden.

33. It is the Applicants' case that the R-S who made frequent visits to Kenya between 2012 and 2015 manipulated the Deceased's age, failing memory, confusion and psychiatric to and induced or coerced him to make the dispositions he did not intend to make and could not take remedial action as he could not remember having done so. As a result of their manipulation, the Will was crafted to ensure that the R-S have majority shareholding in the Company and SIB. The R-S are aware of the longstanding intention by both the Deceased and R to b family wealth in equal proportion between them (R-S) and the Applicants. He further claims that he was the executor of the Deceased's will but he was replaced with the 3rd and 4th Respondents.

34. Under the Act a will is void if the making of it is caused by undue influence. Section 7 of the Act provides:

"A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void."

In James Maina Anyanga v Lorna Yimbiha Ottaro & 4 others [2014] eKLR, Emukule, J had this to say:

"Undue influence connotes an element of coercion or force, that the deceased did not exercise his free will in writing his will and was pressured by other forces. Such external pressure must be forceful and intended to coerce him into acting out of fear or involuntarily. The onus is on the person who alleges the existence of undue influence to prove the same."

35. Mr. Gor informed the Court that the Deceased struck him as a man fully in charge of his faculties who was detailed and meticulous in his instructions. He also stated that the Deceased was always alone when he went to see him. Z asserted that the Deceased could not be manipulated. A testimony was the Deceased rebuffed all proposals A presented to him to redevelop SIB into a great property development. This to my mind paints a picture of a man who could not be influenced to do anything he did not believe in. I am therefore not persuaded that the Deceased was coerced or forced to make a disposition that he did not wish to. The mere allegation of undue influence by the Applicants without concrete evidence is not adequate. There must be positive proof. On the whole therefore I am also not persuaded that there was such importunity as to take away his free agency. The burden of proof was on the Applicants who failed to discharge the same. In any event, any challenge to the Will may only be made by a qualified dependant under Section 29 of the Act who has been left destitute. The Applicants fall into neither category.

36. Whether the Applicants are entitled to make an application for reasonable provision

Under the Act, an application for reasonable and/or adequate provision may be made by a dependant. Section 26 of the Act provides:

"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".

37. Section 29 of the Act defines dependant as follows:

"29. For the purposes of this Part, "dependant" means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

38. It is not disputed that the Deceased was unmarried and childless and that he was survived by his sister, his nephews and nieces. The Applicants are nephews and niece of the deceased. A reading of the foregoing provision does not reveal that nieces and nephews are dependants for the purposes of Section 26 of the Act. Even if they were dependants, it is doubtful that they would be entitled to make an application for reasonable provision. Under Section 29 of the Act, only a wife or a child of a deceased person need not prove dependency. All other dependants must show that they were maintained by the deceased person immediately prior to his demise. There is no evidence that the Applicants were maintained by the Deceased immediately prior to his demise or at all. In the circumstances, this Court finds that the Applicants are devoid of *locus standi* to apply for reasonable provision under Section 26 of the Act.

Whether the Will made a fair, reasonable or adequate provision for the Applicants

39. The Applicants submit that the Will is unfair, discriminatory and unconscionable against them. The provision made to the Applicants thereunder is not commensurate to their contribution towards the development of SIB. Their contribution included sweat equity, sacrifices by A who had to resign from a well-paying job to manage SIB the direct consequence of which was disruption of his career, and loss of earnings. There was also loss of rental income in respect of the house that their parents built on SIB. They also take issue with the fact that the R-S got substantial gifts during the Deceased's lifetime. Further, the R-S were detached from SIB. According to the Applicants, they are by virtue of their contribution, more deserving of the estate than the R-S.

40. The Applicants relied on the case of Julius Kinyua Chabari & another v Mary Mukwamugo Njagi & 4 others [2016] eKLR where Mabeya, J found that by virtue of Article 27 of the Constitution, a discriminatory and unconscionable testamentary disposition cannot stand unless a testator gives reasons why he has excluded some beneficiaries while favouring others. The foregoing authority in my view is not applicable herein for reason that the deceased therein had failed to provide for his daughters. In the present case, the claim is made by half-nephews and half-niece of the deceased against a sister and nieces of the deceased. In Beth Wambui & another v Gathoni Gikonyo & 3 others [1988] eKLR, Gachuhi, JA noted:

"On the question of preference, it is a well known fact parents give to their children according to their intimate relationship. Some children carry more burden of their parents than others. If a parent wishes to reward his or her child for such services through love and affection other children or members of the family have no right to question the deceased's right."

Likewise, in the present cause, the Applicants cannot be heard to question the Deceased's right to exercise his free agency to give his nieces 60% and the Applicants 40% of the residue of his Kenyan Estate. This was his preference. His reason for doing so can only be the subject of speculation but not of challenge.

41. In Kamene Ndolo v George Matata Ndolo [1996] eKLR the Court of Appeal had this to say:

"This court must, however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is expressly recognized by section 26 of the Act…"

42. Whereas Section 26 of the Act places limitations on the testamentary freedom given to a testator by section 5, the Court may only intervene to make provision for the dependants recognised under Section 29 of the Act for whom the testator was responsible during his or her lifetime.

43. The Applicants pray that the estate of the Deceased be distributed equally between the Applicants and the Respondents. The Deceased has the liberty to determine the fate of his property upon death. Redistributing the estate of the Deceased as requested by the Applicants would be tantamount to rewriting the Will of the Deceased. The wishes of the dead must be respected and honoured by the living and the Court must not freely readjust them. This was the holding in In the Matter of the Estate of Late Sospeter Kimani Waithaka Cause No. 341 of 1998 as cited in In re Estate of Jaswinder Singh Saimbi (Deceased) [2017] eKLR where the Court stated:

"The Will of the departed must be honoured as much as it is reasonably possible. Readjustments of the wishes of the dead, by the living, must be spared for only eccentric and unreasonably harmful testators and weird Wills. But in matters of normal preferences for certain beneficiaries or dependants, maybe for their special goodness to the testator, the Court should not freely intervene to alter them."

44. The foregoing demonstrates that the Court will only intervene where a qualified dependant under Section 29 of the Act satisfies the Court that he has been unreasonably excluded or deprived of reasonable provision. The Applicants were given 40% of the residue of the estate while the 3rd and 4th Respondents and their sister were given 60% which to my mind reflected the Deceased's normal preference for the 3rd and 4th Respondents and their sister. The bequest to the Applicants of 40% of the residue of the estate of the Deceased is by no means unreasonable. The Applicants should be grateful they were considered at all. In the circumstances, this Court finds no justifiable reason to interfere with or disturb the wishes of the Deceased.

45. Were this Court to find that the Will is void for want of free agency on the part of the deceased then the provisions of intestacy under the Act would take effect. Section 39 provides for the distribution of the estate of an intestate such as the Deceased who has left no surviving spouse or children thus:

"39. Where intestate has left no surviving spouse or children

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares."

46. The Deceased was survived by his sister, her daughters and the Applicants. A averred as follows in his Affidavit in support of the Application at paragraph 2:

"FJF, who passed away on 30th December 2015 at the advanced age of 83 years was my uncle in that he was a half brother of my late mother NMR."

According to Section 39(1)(c) only the deceased's surviving sister MR-S is entitled to the estate of the Deceased under intestacy. She has priority over the Applicants' who are children of the Deceased's half-sister. The Deceased had a brother R and half-sister N, the Applicants' mother who both predeceased him. Had all his siblings survived him, only M and R would have been entitled to his estate. Under Section 39(1)(d) N the Deceased's half-sister and the Applicants' mother would only be entitled if M and her children were not alive. It follows then that the Applicants being children of the Deceased's half-sister are not entitled to the estate of the Deceased under intestacy.

47. The Applicants' contend that the provision made for them by the Deceased was not commensurate to their sacrifice and input towards the development of SIB. This in my view is a misapprehension of the very nature of a bequest. A bequest is not earned. It is a gift. Webster's dictionary defines "bequest" as:

"the act of giving or leaving something by will"

Bequest is also defined as

"something given or left by will"

The key word in the definition is "giving". It is "giving" according to the wishes of a testator. It is not payment or compensation, reimbursement or recompense. Section 3 of the Act contains definition of several kinds of bequests as testamentary gifts as follows:

"general residuary bequest" means a testamentary gift of all the property of the testator not otherwise disposed of;

"limited residuary bequest" means a testamentary gift which, but for some specific limitation therein expressed or implied, would constitute a general residuary bequest;

"particular residual bequest" means a testamentary gift of all of a particular property not otherwise disposed of;

48. In view of the foregoing, the Applicants expectation for compensation by the Deceased for what they refer to as their sacrifice and contribution towards SIB is clearly misplaced. Indeed this Court has formed the opinion that the only reason the Applicants have challenged the Will of the Deceased is that they perceive themselves as equally if not more entitled to and deserving of the estate of the Deceased than

their half cousins. It is unfortunate that the Applicants have despised the generous bequest made to them by a half-uncle who was under no legal obligation to consider them. The Applicants should count their lucky stars that the Deceased made a Will and made provision for them. Had he died intestate, they would have walked away empty handed.

The Whether the Grant should be revoked

49. The law relating to revocation of grants is found in Section 76 of the Law of Succession Act which provides:

> ***" 76 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—***
>
> ***(a) that the proceedings to obtain the grant were defective in substance;***
>
> ***(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.***
>
> ***(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***
>
> ***(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—***
>
> ***(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or***
>
> ***(ii) to proceed diligently with the administration of the estate; or***
>
> ***(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or***
>
> ***(e) that the grant has become useless and inoperative through subsequent circumstances***.

50. A grant whether confirmed or not can be revoked on the grounds stipulated in the foregoing provision. The Applicants' submission is that a grant can be revoked post confirmation as was affirmed in Erastus Muriungi Ngaruthi (Deceased) [2015] eKLR. In that case, I note that the grant therein was revoked for want of territorial and pecuniary jurisdiction and further that the same was obtained secretly. In the present case, the Applicants have not demonstrated that the proceedings to obtain the grant were defective in substance or 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. The Applicants have further not established that that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant or that the grant has become useless and inoperative through subsequent circumstances. In short, none of the statutory grounds stipulated in Section 76 of the Act have been proved which would warrant the revocation of the Grant.

Whether this Court has jurisdiction over the FT

51. The Applicants seek that the "deceased's net estate, including the assets of the FT, should be distributed equally between the Applicants and the Respondents. It is the Applicants' case that the funds in the FT are part of the Deceased's movable property and should be governed by the laws of Kenya. For the Respondents, it was submitted that the Trust was administered in Jersey by Trustees in London and the applicable law is that of Jersey. Clause 1 of the Trust Deed ousts the jurisdiction of this Court. It was further contended that the Will states that it relates to his Kenyan estate and nothing in the will alludes to FT. Further that in his letter of wishes of December 2013, the Deceased expressed himself on how his portfolio in the FT should be administered upon his demise. The letter of wishes and the Will and are separate, distinct and autonomous and relate to different assets of the Deceased in different jurisdictions.

52. Section 4(1) of the Act provides:

> ***"(1) Except as otherwise expressly provided in this Act or by any other written law –***
>
> ***(a) succession to immovable property in Kenya of a deceased person shall be regulated by the law of Kenya, whatever the domicile of that person at the time of his death;***
>
> ***(b) succession to the movable property of a deceased person shall be regulated by the law of the country of the domicile of that person at the time of his death."***

53. That moveable property of a deceased person is governed by the law of the domicile of that person was well articulated by Musyoka, J in the case of In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR as follows:

> ***"Section 4 relates to domicil as a determinant of the applicability of the provisions of the Law of Succession Act, and of the Kenyan law generally, to certain classes of property. For immovable property, the question of the domicil of the deceased at the point of his death would be irrelevant, for the law of Kenya would apply in the circumstances. For movable property, the***

applicable law would be law of the dead person's domicil at the time of death."

54. The exhibited Trust Deed dated 12.2.86 clearly states that the law applicable to the FT is the law of Jersey. Clause 1 provides:

> ***"The law to the jurisdiction of which the rights of all parties and the construction and effect of each and every provision of this Declaration shall be subject and by which such rights construction and effect shall be construed and regulated which shall be the law of the Island of Jersey…"***

55. The Deceased was emphatic that his Will only made provision for his Kenyan Estate. He stated as follows:

> ***"I FRANCIS JOHN FOSTER … HEREBY REVOKE all former Wills and testamentary dispositions heretofore made by me so far as the same relate to my Kenya Estate (hereinafter defined) AND DECLARE this to be my last Will in relation to my Kenya Estate."***

The Deceased in Clause 10 of the Will proceeds to define his Kenya Estate as follows:

> ***"The term Kenya Estate hereinbefore mentioned shall mean and include all my properties real and personal moveable and immoveable situated in the Republic of Kenya. In respect of which I have testamentary power at the time of my death."***

It is quite evident from the foregoing that the Will refers to the Deceased's properties real and personal, moveable and immoveable situated in the Republic of Kenya of which he made specific bequests. It would appear therefore that the Deceased had no intention of making any provision in the Will in respect of his estate outside the Republic of Kenya. He even went to the extent of defining his "Kenyan Estate". In any event, the matter before this Court relates to the validity or otherwise of the Will of the Deceased. There is no mention of the FT in the Will. In the circumstances, I do find that the FT and indeed any other assets not comprised in his Kenyan Estate are outside the purview of his Will under consideration and therefore not material to the present proceedings.

Costs

56. The Respondents argue that costs herein should be awarded to them if the Application is dismissed. The Respondents relied on Section 27 of the Civil Procedure Act to buttress their submissions on costs. Under Rule 63 of the Probate and Administration Rules, Section 27 of the Civil Procedure Act is not one of the provisions applicable in proceedings under the Law of Succession Act and the Probate and Administration Rules.

57. Costs follow the event and the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs (see Orix Oil (Kenya) Limited v Paul Kabeu & 2 others [2014] eKLR). Further costs are for compensating or reimbursing the successful party for the trouble taken and amounts expended in prosecuting or defending the case (see Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR and Little Africa Kenya Limited v Andrew Mwiti Jason [2014] eKLR).

58. The award of costs in probate proceedings is discretionary. Rule 69 of the Probate and Administration Rules provides:

> ***"The costs of all proceedings under these Rules shall be in the discretion of the court."***

In succession matters this Court in exercise of its discretion does not award costs principally because succession proceedings involve family members. The present case is no exception.

59. Having considered the matter herein and the relevant law I do find that the Applicants have not made out a case to warrant the grant of the orders sought. Accordingly the Summons dated 31.1.17 lacks merit and the same is hereby dismissed. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 9TH DAY OF FEBRUARY 2018

.....

M. THANDE

JUDGE

In the presence of: -

…… for the Applicants

…… for the Respondents

…… for the Respondents

…….…….. Court Assistant