REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 193 OF 2002

IN THE MATTER OF THE ESTATE OF PHILIP NTHENGE MUKONYO (DECEASED)

STEPHEN MUSEMBI NGUI.....1ST PETITIONER

(DECEASED)

THOMAS MUTINDA NGUI.....2ND PETITIONER

JOHN NDONYE MUTUNGI.....3RD PETITIONER

VERSUS

DAVID MUTISO NTHENGE.....OBJECTOR

RULING

Introduction

This succession cause has had a long and chequered history. Philip Nthenge Mukonyo (hereinafter referred to as "the Deceased") died on 11th July 2002. The Deceased is alleged to have prepared a will dated 21st March 1996 and a codicil dated 6th September 1999. The Petitioners, who were appointed the Executors and Trustees in the said will, petitioned for Probate of Written Will by filing the present cause on 16th August 2002. The Objector, who is a son of the deceased, subsequently filed a Notice of Objection dated 23rd October 2002 objecting to the grant of probate. He was also directed by the Court to file a Petition by way of Cross-Application of grant which he did on 21st March 2003.

The Objector thereafter filed several applications which do not appear to have been heard and determined, and it was not until 25 th October 2012 that Makhandia J.(as he then was) directed that the Objector's Objection dated 23rd October 2002 proceeds to hearing, and the Objector testified on that date. The hearing was adjourned, before the Objector could be cross-examined, and directions were taken on 12 th June 2013 before Jaden J. that the cause proceeds from where it stopped. The hearing proceeded before Jaden J. with the Petitioners' case being heard in the absence of the Objector, and judgment was delivered on 24th November 2015, when the Objector's Objection was dismissed.

The Objector thereupon filed an application seeking that the orders made and Judgment delivered on 24th November 2015, and *ex parte* proceedings on 21st July 2014 be set aside . The said orders were granted by this Court on 28th July 2017 subject to conditions *inter alia* that of the Petitioners' Petition for Probate of Written Will dated 16th August 2002, the Objector's Notice of Objection dated 23rd October 2002 and Objector's Petition by way of Cross-Application dated 20th March 2003 shall start *de novo and* be heard together by way of way of oral evidence, and parties file and serve their witness statements and/or affidavits within timelines that were given by the Court.

The hearing accordingly proceeded *de novo*, during which hearing the Objector testified as OW5 and called three additional witnesses, namely Esther Mutile Mutiso (OW1), Simon Muli Nzomo (OW2) and Fransisca Nzembi Mutiso Nthenge (OW3). The 3rd Petitioner testified as PW2, and the Petitioners called two other witnesses namely Justice James Makau (PW1), and Primrose Ngii Nthenge (PW3).

The Objector contends in his Objection and Petition by way of Cross-Application that the will and codicil are invalid and incapable of taking effect; and may not have been signed by the Deceased who could not read and write in English, and as the signatures appended to the will and codicil do not accord with the Deceased's signature as known to him. Further, that the Objector has been completely left out in the sharing of the Deceased's property yet he is his only son and first born child, and the will and codicil alludes to property he was given by the deceased during the Deceased's lifetime which is not the case.

Lastly, that the will and codicil does not disclose all the Deceased's property, and that one of his sisters Rose Kamene to whom provision is

made in the will and codicil, predeceased the deceased yet that fact has not been resolved in any subsequent codicil. Furthermore, that the Petition does not disclose how much money is held in bank, and falsely states that the estate of the Deceased is indebted to an undisclosed creditor in the sum of Kshs. 800,000/-.

The Petitioners in the Answer to the Cross Petition stated that the will and codicil were duly executed by the Deceased in the presence of two witnesses as required by law, and the will provides for the Objector and that even it did not, this cannot be a ground to state that the will is invalid. In addition, the fast that there is provision for one of the Deceased's daughter who has since died does not make the will invalid, and that the Deceased had absolute discretion to exercise his freedom of making a will and distributing his estate the way he wished, since the Objector made no contribution to the Deceased's estate whatsoever.

The Evidence

The gist of the Objector's evidence was that he had a good working relationship with the Deceased, and that the Deceased could not read or write English and could not have made or signed the contested will and codicil. Esther Mutile Mutiso (OW1) who is the deceased sister-in-law, testified that the Deceased and his wife were staying in Kitale by the time she got married to the Deceased brother. She stated that the Deceased is the one who got the Objector his first wife and that when the first wife left, he paid dowry for the second wife too. She stated that the Deceased only knew Kamba and Kiswahili language.

Simon Muli Nzomo, OW2, was a brother-in-law to the Deceased, and he testified that the Deceased visited the Objector in Machakos and he assisted the Deceased to buy and construct plots in Machakos town. That the Objector was at the time in charge of acquisition, construction development and management of properties since the Deceased resided in Kitale. He also stated that the Deceased could read and write in Kikamba and Kiswahili languages.

OW3, Fransisca Mutiso Nthenge who is the Objector's second wife, testified that the Deceased participated in her marriage to the Objector by paying her bride price. She stated that the Objector and Sammy Mwanthi had bad blood. That her husband's memory was sometime in the year 2012 affected by high blood pressure. She on the other hand stated that there was good relation between her husband and the Deceased, and that the Deceased only spoke Kamba and Swahili.

OW4, Muia Vandika, who was the Deceased's mansion, also testified that the Deceased only spoke Kiswahili and Kamba. He further confirmed that the Objector supervised constructions together with the Deceased. He denied allegations of disagreement between the Deceased and the Objector.

The Objector (OW5) adopted his witness statement dated 19th September 2016 that was filed in Court as his evidence, and testified that the Deceased was his father, and he also gave the details of his sisters and mother. He stated that he studied at Matungulu until class six when he left school. He was shown a letter written by one David Mutiso where he is alleged to have disowned his parents, and he denied that he wrote the said letter and stated that it was not in his handwriting nor signed. Further, that there was no family meeting held to discuss the said letter.

OW5 admitted to not having a good relationship with his brother in-laws- Mwanthi and Ndonye Mutungi, because they did not involve him in the construction activities on his father's plots of land, and would give differing instructions to his. He stated that he used to identify and assist his father buy plots in Machakos, as his father was staying at Kitale for a long time.

Further, that he left Uganda when the Deceased asked him to collect his wife and children and take them to Ukambani since the wife was unfaithful. He passed by his grandfather's place and was told to stay in Machakos to wait for the Deceased. It is at that stage that Stephen, (the Deceased's brother) gave him business capital with which he opened started a butchery and shop. That he later married a second wife and the Deceased paid the dowry for him. He stated that he used to collect rent for the ART building situated opposite Barclays Bank in 1972. He stated that Mwantha and John married his sisters when most of the Deceased's properties had been acquired, and that he was the one managing the said properties. He too confirmed that the Deceased only spoke Kiswahili and Kamba.

The Petitioners' evidence on the other hand was that the Deceased is the one who gave instructions on the will and signed the will, he understood and could read and write in Kikamba and Kiswahili language, and could speak in the English language, and that he had a bad relationship with the Objector.

Justice James Makau (PW1) produced the Deceased's original will dated 21st March 1996 as the Petitioners' Exhibit 1 and the codicil dated 6th September 1999 as the Petitioners' Exhibit 2. His evidence was that the Deceased was previously his client, and instructed him in Kikamba language to prepare the will and codicil, which the Deceased signed in PW1's presence and which PW1 and his Secretary, one Norah. M. Ngewa witnessed.

Further, that the Deceased was mentally sound and knew what he was doing at the time, and that the Deceased was able to communicate in Kikamba, English and Kiswahili which PW1 understood, and that PW1 then wrote the will in English language which is the official Court language.

PW1s evidence was that the Deceased stated in the will that he gave the Objector the assets that the Objector had misappropriated, and that the Objector was therefore not disinherited. He stated that the Deceased and the Objector had a bad relationship due to the misappropriation by the Objector, which he got to know from family meetings which he used to attend.

The 2nd Petitioner herein, Ndonye Mutungi (PW2) who was a son-in-law of the Deceased, stated that the objector misappropriated the Deceased's properties in Uganda and Machakos, and that the Deceased knew Kamba and Swahili and English language. He stated that the Objector's witnesses were not in day–to-day contact with the Deceased.

PW3, a daughter of the Deceased, stated that the Deceased would have understood the will and codicil if it was read to him. Further, that she was shown the will after he died, and that the signature on the will was that of the Deceased's. She also confirmed that the Deceased understood Kikamba and Kiswahili, and that the Objector had a bad relationship with the Deceased and had at one time written to the Deceased and denounced him as his parent. Further, that there were several family meetings to reconcile the Deceased and Objector which were not successful. According to PW3, the Objector was disputing the will because he was not given any of the existing properties of the Deceased.

The Issues and Determination

The Court directed that the Petition, Objection and Cross-Petition be canvassed by way of written submissions. Moses Odawa & Company Advocates, the learned counsel for the Objector filed written submissions dated 26th February 2016. Manthi Masika & Company Advocates, the learned counsel for the Petitioners, also filed written submissions dated 26th September 2017.

I have read and carefully considered the pleadings, evidence and submissions made herein. The issues to be decided are firstly, whether the will dated 21st March 1996 and codicil dated 6th September 1999 were made by the Deceased . Secondly, if so whether the said will and codicil are valid. Lastly if the will is valid, who as between the Petitioners and Objector should be granted probate.

The Objector in this regard submitted that the Petitioners have failed to prove that the Deceased knew and approved of the content of the purported will and codicil. Further, that the failure to call Norah Ngewa as a witness and failure to rebut that the Deceased did not know English rendered the will fatally defective. It was submitted that to establish such knowledge and approval, it must be proved that the Deceased knew and approved the contents of the purported will and codicil.

It was further submitted that the Petitioner's witnesses failed to prove that the purported will and codicil was properly executed by the Deceased. In addition, that that failure to engage or avail a certified translator renders any explanation of its preparation and execution untenable. The Objector cited the decisions in **William Muthaa Mweka v. Marina Centre Ndiguri & Another, (2015) e KLR**, **Re Estate of Lucy Wangui Muraguri, (2015) eKLR**, and **Re Estate of Mwangi Wagereka, (2000) eKLR** among others in support foregoing arguments.

The Petitioners on the other hand submitted that the Objector does not challenge the validity of the will, rather he addresses himself to the defects in the will. Further, that the Objector in his evidence accepted that the will had the Deceased's signature and only the codicil had no such signature. It was contended that the Objector's challenge to the will and codicil has no basis for the reason that none of the Objector's eight sisters has challenged the will and codicil, and that the Objector participated in the funeral arrangements and a programme was made where it is shown that the Deceased studied up to standard 3 and worked with the Kenya Army in Ethiopia and Burma and communicated with people of other tribes.

In addition, it was urged that the validity of the will and codicil is not challenged on mental or physical illness, drunkenness or any other cause. It was the Petitioners' argument that the will met the requirements of section 11 of the Law of Succession Act, and they submitted that there is no suspicious circumstances that have been pointed out by the Objector. The Petitioner relied on the decision in **Elizabeth Mamene Ndoo and George Matata Ndolo Civil Appeal No. 128 of 1995** to illustrate the standard of proof of whether or not a will is valid.

It was submitted that the Deceased in his codicil factored in the children of the deceased daughter. It was submitted that the fact that the deceased could not read and write English does not invalidate his will, and that at common law, a testator who gives instructions for the will to be written for him and approves the will when the same is read over to him before execution, whether illiterate or not, he makes a valid will.

The Petitioners further cited the decision in the **Estate of Onesmus Ikiki Waithariwa, HC Succ.Cause No. 194 of 2000** for the position that evidence confirming that the testator signed the will is sufficient. It was also submitted that there is no law requiring that preparatory notes be given in court as evidence. Lastly, the Petitioners also distinguished the decisions relied upon by the Objector as being inapplicable in the present cause.

As regards the first issue on whether the will dated 21st March 1995 and codicil dated 6th September 1999 were made by the Deceased, section 11 of the Law of Succession Act provides that a written will shall be signed by the testator or signed by another person on behalf of the testator at the testator's direction and in his presence, and in the presence of two or more competent witnesses who must attest and sign the will in the presence of the testator.

PWI in this respect testified that he is the one who drafted the will and codicil in English upon instructions from the Deceased, that he then read it to the Deceased, who then signed the will in PW1's and another witness's presence. The Objector did not bring any forensic evidence to show that the signature on the will did not belong to the Deceased or was forged, which signature was also confirmed as the Deceased's usual signature by PW3 who is the Deceased's daughter and Objector's brother.

As regards the fact that the testator did not read or write in English being evidence that he did not write or sign the will, it is stated as follows in **Theobold on Wills, Fourteenth Edition** at page 42:

> **" The mark of the testator is a sufficient signature, whether he can write or not. Signature by initials or by a stamped name is sufficient. Signature in an assumed name is sufficient and so is a phrase descriptive of the testatrix and intended to represent her name such as your loving mother in a holograph will…"**.

Therefore what is essential to the making of a will is that there is a mark on the will made by the testator showing his or her acceptance of the will as his or hers, with an intention of giving it effect as his last will and testament, irrespective of whether the testator is illiterate or not. In

the present cause it has been shown by the Petitioners that the Deceased did indeed sign the will and codicil in the presence of two witnesses. It is thus my finding that the contested will dated 21st March 1996 and codicil dated 6th September 1999 were made by the Deceased.

On the second issue as to whether the said will and codicil are valid, in addition to being made in the proper form, section 5 of the Law of Succession Act also requires a person making a will to be of sufficient age and of sound mind for the will to be valid. Section 5 provides as follows:

> **"(1) Subject to the provisions of this Part and Part III, every 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."**

The essentials of testamentary capacity were also laid out in the case of **Banks vs. Goodfellow [1870] LR 5 QB 549** as cited with approval in the case of **Vaghella vs. Vaghella (1999) 2 EA 351:**

> **"a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made."**

As shown in section 5(3) and 5(4) of the Law of Succession Act, there is a rebuttable presumption that a testator knew and approved of the contents of a will at the time of execution, and the evidential burden of proof then shifts to the person opposing the will to rebut this presumption. It was held in **Re Estate Of Gatuthu Njuguna (Deceased), [1998] eKLR** that the burden of proof in the first instance lies upon the person alleging lack of capacity, and once it is established to the satisfaction of the court that in fact the testator was not of sound mind then the onus is shifted to the person propounding the will to prove the existence of mental capacity.

The main argument and evidence by the Objector in this respect was that the Deceased did not know how to write or read English, and therefore had no knowledge of, and was incapable of approving the contested will and codicil. The requirements of knowledge and approval of the contents of a will by the testator are set out in **Theobold on Wills, Fourteenth Edition** at pages 33 -34 as follows:

> **"A testator must know and approve of the contents of his will. This is because a will must be the result of a testator's own intelligence and volition, though its contents need not originate from the testator provided he understands and approves them. But a will is invalid if its contents originate from another person and the testator executes it in ignorance of its contents"**

PW1 in this respect did explain in his evidence that he drafted the will and codicil in the English language after instructions were communicated to him by the Deceased in Kamba language which PW1 understood. The contents of the will thus originated from the Deceased, who also executed the will after the contents were explained to him.

The Objector did not bring any evidence of the inability or mental illness on the part of the Deceased that would affect his understanding of the contents of the will in Kamba language, or of the effect of executing the said will. The Deceased in my view was thus of sound mind at the time of making the will and clearly knew and understood the nature of the business he was engaged in when making his will and providing for his dependants.

The fact that the Deceased did not provide for the Objector in the will and codicil to the Objector's expectations or satisfaction, does not cast any doubt to his capacity. It is also noteworthy in this regard that section 5(1) of the Law of Succession provides for testamentary freedom and allows any person with capacity to make any disposition of his or her free property in any manner he or she wishes. The Objector is however still at liberty to request for reasonable provision to be made for him out of the estate of the Deceased pursuant to section 26 of the Law of Succession Act.

On the last issue as to the grant of probate, the same can only be made under section 53(a) of the Law of Succession Act in respect of an estate of the testate, where it is proved the Deceased has left a valid will. The Deceased's will and codicil have been found by this Court to have been properly executed and attested, and to have been validly made by the Deceased. They are therefore hereby admitted to probate.

In addition, under section 60 of the Law of Succession Act, a grant can only be sought by and issued to an executor appointed under a will. In the present succession cause the will dated 21st March 1996 appointed Stephen Musembi Ngui, Thomas Mutinda Ngui and John Ndonge Mutungi to be the executors of the will. It however came out during the hearing that one of the executors may since have died. A reading of sections 60 to 63 of the Law of Succession Act is however clear that the death of an executor before receiving a grant of probate of the will, does not prevent other executors or qualified persons from thereafter proving the will and receiving a grant.

One last observation I need to make is as regards the evidence brought by the Objector that there may have been properties of the Deceased that were either not included in the will and codicil, or were acquired after such will and codicil had been executed. It must in this respect be emphasized that the grant of probate will only be made with respect to the property that the will and codicil provides for, and where the will or codicil did not dispose of all of the Deceased's properties, then the Petitioners and Objectors will have to proceed by way of intestacy with respect to any outstanding properties by way of a separate application or proceedings.

Arising from the foregoing findings, I accordingly order as follows:

1. The Objection and Petition by way of Cross-Application by the Objector are hereby dismissed.

2. The grant of probate of the written will of the Deceased Philip Nthenge Mukonyo dated 21st March 1996 and codicil dated 6th September 1999 be and is hereby granted to the surviving Petitioners who are named as executors in the Deceased's will of 21st March 1996, and with respect to the properties provided for in the said will and codicil.

3. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 28th day of March 2018.

P. NYAMWEYA

JUDGE