



IN THE HIGH COURT

AT KISUMU

SUCCESSION CAUSE NO. 139 OF 2006

IN THE MATTER OF THE ESTATE OF

SYLVESTER EZRA MARKUS OCHANJI (DECEASED)

AND IN THE MATTER OF

AND APPLICATION BY

BETWEEN

JANE ADHIAMBO MITO OCHANJI.....1ST APPLICANT

BENARD ODHIAMBO OCHANJI.....2ND APPLICANT

CLARY AWUOR OCHANJI.....3RD APPLICANT

MERCY AWINO OCHANJI.....4TH APPLICANT

CATHERINE NGANYI OCHANJI.....5TH APPLICANT

KEVIN ERASTUS OCHANJI.....6TH APPLICANT

BENJAMIN MITO OCHANJI.....7TH APPLICANT

VINCENT OKOTH OCHANJI.....8TH APPLICANT

AND

MARGARET ALOO OCHANJI...PETITIONER/RESPONDENT

RULING

Introduction

1. This matter concerns the estate of **SYLVESTER EZRA MARKUS OCHANJI** (“the deceased”) of Kajulu Sub-location within the then Migori District now Migori County who died on 11th March 2004. As the deceased had left a will, his eldest daughter, Margaret Aloo Ochanji filed the petition for grant of probate at the High Court at Kisii. The petition was accompanied by a consent by the other executors, Judith Akinyi Ochanji and Pamela Auma Ochanji permitting Margaret Ochanji to administer the estate. The petition was advertised in Gazette Notice No. 9156 dated 13th October 2004. Although the notice advertised the proceedings as intestate proceedings, I do not find any prejudice occasioned to the parties. A grant of probate was issued to the petitioner on 17th February 2005. The matter transferred for disposal at the High Court at Kisumu by an order dated 6th March 2006.

The Family

2. Before I deal with the dispute at hand, I will set out certain undisputed matters. The deceased is survived by three widows; Judith Akinyi Ochanji (“Judith”), Pamela Auma Ochanji (“Pamela”) and Jane Mito Ochanji (“Jane”) and the following children from each house.

- Judith – Margaret Aloo Ochanji (“Margaret”)
- Pamela – Cleopas Ochanji Obuolo, John Okoth Ochanji, Charles Omondi Ochanji, Daniel Nyagilo Ochanji, Veronica Adhiambo Ochanji and Paul Ouma Ochanji.
- Jane - Benard Odhiambo Ochanji, Clary Awuor Ochanji, Mercy Awino Ochanji, Catherine Nganyi Ochanji, Kevin Erastus Ochanji, Benjamin Mito Ochanji and Vincent Okoth Ochanji.

The Will

3. The Will subject of these proceedings is dated 29th August 2003. According to the will, the deceased distributed the properties as follows;

- To the wives; Judith, Pamel and Jane, a life interest in Kajulu/Kanyamkago/803 and ¼ acre each from Kajulu/Kanyamkago/878.
- To Judith, 1 acre absolutely from Kajulu/Kanyamkago/878.
- To Cleophas Ochanji Obuolo, John Okoth Ochanji and Peter Omolo Ochanji equal shares of Kajulu/Kanyamkago/878.
- To Kevin Erastus Ochanji, Vincent Okoth Ochanji and Paul Ouma equal shares of Kajulu/Kanyamkago/803.
- To Benard Odhiambo Ochanji, Charles Omondi Ochanji, Benjamin Mito Ochanji and Daniel Nyagilo Ochanji equal shares of Kajulu/Kanyamkago/310.
- To Margaret Aloo Ochanji Opondo and Veronica Adhiambo Ochanji Suna East Wasweta/I/2335.
- To Judith Ochanji life interest in two posho mills and remainder to Cleophas Ochanji.
- To all sons equal shares of all carpentry tools and machinery, welding and other tools of like nature.
- To Margaret Ochanji Opondo all personal household effects in Migori specifically kitchen utensils, cookers, films and electronic equipment.
- To Judith, Pamela and Jane jointly the rest of the personal effects including sewing machines.
- To Judith, Pamela and Jane all monies held in bank accounts at the time of death.
- To Cleophas Ochanji and Benard Ochanji equal shares of the two generators at his home.
- To Cleophas Ochanji and Charles Ochanji absolutely Plot 59A Migori.
- To John Okoth Ochanji and David Nyagilo Ochanji absolutely Plot 59B Migori.
- To Paul Ouma Ochanji and Peter Omolo Ochanji absolutely Plot 73B Migori.
- LR No. 32/573 in Nairobi Golf Course to Margaret Aloo Ochanji.

The summons for revocation of grant of probate

4. The application for consideration before this court is summons for revocation of grant dated 23rd January 2006 seeking to revoke the grant of probate issued to Margaret Ochanji. The grounds set out in the application are that the will was fabricated in order to defraud the heirs of the shares in the estate. That the will does not satisfy the requirements of a proper written will, was not properly attested and has never been read to all the heirs. The applicants complained that the will does not bequeath all the property of deceased and that other properties of the deceased have been concealed. They contend that the respondent, being a beneficiary of the estate had conflict of interest. That the will is void and for being ambiguous and is made up of uncertainties.

5. The applicants also complain that the administrator has failed to proceed diligently with the administration of the estate and has committed several wrongs to the detriment of the estate. They complain that she has transferred and converted certain properties of the estate to her own use. That she proceeded, without applying for confirmation, to convert the deceased’s moveable properties for her own use to the exclusion of the other beneficiaries. That she had also converted to her own use the deceased’s personal household effects, kitchen utensils, electronic equipment and other moveable properties. Further that the administrator has without approval of the court converted for her own use and benefit the proceeds and rent of two prime properties; LR No. 32/572 (“the Golf Course property”) and LR No. 209/8294/256 (IR 31553) (“the South C Akiba property”). They also request that the accounts of the estate be provided.

6. The summons for revocation was opposed by Margaret, Judith and Pamela who all filed replying affidavits sworn on 31st May 2006.

Interlocutory proceedings

7. On 25th September 2016, Mwera J., ordered that the summons for revocation be heard by taking oral testimony. The hearing commenced on 5th March 2007 before Mugo J., and continued before Mwera J., before the parties indicated that they wanted to pursue amicable settlement. When parties appeared before Ali-Aroni J., on 2nd December 2010, they agreed that the matter should start afresh. No steps were taken to prosecute the matter until a Notice of Withdrawal dated 10th January 2013 was filed in court by the applicants purportedly withdrawing the Summons for Revocation of Grant in its entirety.

8. Thereafter, Margaret, as executor of the deceased’s estate applied for confirmation of the grant by the Summons for Confirmation dated 30th September 2013. Its first came up for hearing before Chemitei J., on 7th August 2013 and after several adjournments, the grant was confirmed on 1st September 2013. Thereafter, a certificate of Confirmation of Grant was issued on 14th October 2013.

9. A year later, the applicants filed a Chamber Summons dated 24th October 2014, seeking orders, *inter alia*, that the Certificate of Confirmation be stayed, that the sale of Plot 59B Migori be stayed and that the Notice of Withdrawal dated 10th January 2013 be set aside and together with all consequential orders. The applicants contended that they were not parties to the consent, that their signatures were

forged and that they did not consent to withdraw the application of revocation as this would result in their disinheritance. After hearing the parties, Chemitei J., allowed the application on 23rd November 2015. The effect of this decision was to reinstate the Summons for Revocation which is presently before the court.

10. I took over the matter, and by agreement of the parties, proceeded to hear the matter from where Mugo J., left the matter. Jane (PW 1), Mercy Awino Ochanji (“Mercy”) (PW 2) testified on behalf of the applicants while Margaret (DW 1) and Killion Obuolo Were (DW 2) testified on the respondent’s behalf. Now proceed to set out and consider the evidence.

The evidence

11. Jane testified that the deceased left behind several properties within Migori Township, his rural home in Osogo and Nairobi. That upon his death she was informed by the firm of *Ogotu Mboya & Company Advocates* based in Kisii that the deceased had left a will with them and they were intent on unveiling its contents to the deceased’s three wives and the petitioner. She complained that she and her children were excluded from the reading of the Will and only came to see its contents much later and it is then that she realised that the Will was void as the signature on its face did not belong to the deceased. According to the objectors the Will was a forgery intended to deny them their rightful inheritance.

12. Jane testified that her three daughters that are Clary Awuor Ochanji, Mercy and Catherine Achieng Ochanji were excluded in the Will whereas her sons were allocated land only and denied income generating assets. The applicants contended that some properties that belonging to the deceased were not included in the Will and that Margaret took advantage of them and transferred the properties in her name. These included property in South C property, SUNA EAST/WASWETA 1/3335 and several motor vehicles. Jane admitted that they received KShs. 2.4 million from the sale of Plot 59A in Migori as a settlement but they felt that it was not enough. According to them they ought to be given the whole of Plot No. 1/3335 and that the South C be divided amongst all the beneficiaries.

13. Margaret testified that she and the deceased had a very close relationship as she was his first born and only daughter of his first wife. She testified that the South C property was acquired through a bank loan and the Golf Course property was acquired through mortgage. She told the court that when the deceased retired, he began having problems servicing the loan causing her to step in and assist him in repaying the loan. She produced her father’s letters requesting her to assist in repaying the loan and appreciating her help. Margaret testified that as a result of the help she accorded the deceased, he decided to give her the South C property as a gift. He executed transfers documents in her favour and that is why it was not included in the Will.

14. Margaret testified that the deceased made the Will on 29th August 2003 and by that time although he suffered from diabetes and High Blood Pressure, the illness was under control and his mental capacity was satisfactory. She explained that Clary, Mercy and Catherine were left out of the Will because the deceased was offended by their ungratefulness to him. She told the court in any case when the family negotiated the matter, their interests were taken care of by receiving a share each in Plot 3335 which was initially bequeathed to Margaret and Veronica from the 2nd house and that they received money from the sale of Plots 59A and B. On cross examination, Margaret stated that she disposed of the Golf Course property for KShs. 6.8 million after the grant of probate was confirmed in 2014.

15. Margaret testified that Jane was the deceased favourite wife and they lived happily together in Migori until around 1999 when Jane got into an affair with a High School teacher and moved out of the deceased’s house. As a result, the deceased filed for divorce in ***Migori SRM NO. 45 OF 2002*** but he died before the matter proceeded to hearing. Margaret told the court that despite the affair, the deceased still regarded Jane as his wife.

16. Killion Obuolo Were (DW 2) testified that he attested to the deceased will by appending his signature and at the time he signed the will the deceased was in good health and of a sane mind.

Issues for determination

17. I have considered the respective pleadings, the evidence and submissions of the parties and isolated the following as the issues falling for determination in this matter:

- (a) Whether the deceased’s will was valid.
- (b) Whether land parcel No. 209/8294/256 in South C forms part of the deceased’s estate.
- (c) Whether the objectors were adequately provided for under the will.

Validity of the deceased’s Will

18. The applicants have raised several issues to suggest that the deceased will was a forgery and therefore invalid. They contended that at the time the deceased is said to have written the will, he was suffering from a head injury and he therefore lacked the mental capacity to make the will. They take issue with the fact that the Will was made in favour of the 1st and 2nd house which would *per se* demonstrate that the deceased lacked the requisite capacity to make the Will. They also allege that the fact that the Will was read in their absence only goes to cement their allegations that the will was a forgery. The objectors allege that the deceased loved all his children equally and there is no way he could have left some of them out of the will.

19. Capacity relates to understanding the nature of the Will making process and it matters not whether there is apparent bias in the final disposition made. Although and depending on the facts, the nature of the disposition taken together with all the other evidence may support a case of the testator’s incapacity.

20. The burden of proof in the first instance lies upon the person alleging lack of capacity. 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 (see *In Re Estate Of Gatuthu Njuguna (Deceased)* [1998] eKLR, *James Maina Anyanga v Lorna Yimbiha Ottaro & 4 Others* [2014]eKLR). These cases quote *Halsbury's Laws of England, 4th Edition Vol 17 at page 903-904* which states as follows about mental capacity;

The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity.

21. The applicants did not show, by direct or circumstantial evidence, that on or about 29th August 2003, the deceased lacked capacity to prepare and execute his Will. On the other hand, Margaret testified that although the deceased was suffering from diabetes and High Blood Pressure at the time he made the will, the conditions were well managed and his mental faculties were normal. Killion testified that the deceased is that one who brought the will to him and his wife for attestation and at the time he was mentally stable and healthy. The only evidence of the deceased's illness which could have hindered his mental capacity was when he suffered a head injury but this incident took place after he had written the will.

22. In addition to having testamentary capacity, a testator must know and approve the contents of his will. A testator will be deemed to have known the contents of his will if he is aware of its contents and understands the terms. Approval is seen from the execution of the will. The law on knowledge and approval of a will is found in **section 7** of the **Law of Succession Act ("LSA")** which provides that;

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 adduced by mistake is void.

23. Jane testified that the reading of the deceased will was done in the objector's absence and it bequeathed Margaret most of the properties and it was therefore possible that the deceased did not sign the will. However, these claims are dispelled by the evidence of Killion who stated that the deceased brought the will to them in person and asked him and his wife to attest to it and at the time he was healthy. There is also no evidence of undue influence or coercion on the deceased. I therefore find and hold that the deceased was in good health and he approved the contents of the will as he is the one who took the will to Killion and his wife for attestation. I am therefore unable to agree with the applicants that the deceased was so sick as to lack the testamentary capacity contemplated under **section 5(3)** of the **LSA**. The objectors have failed to lead evidence and prove the lack of capacity of the deceased due to ill health at the making of the Will.

24. The applicant also pointed to certain errors in the Will to support their argument that it was invalid. The applicants pointed to the reference at paragraphs 8 and 19 of the Will where Daniel Nyagilo Ochanji was referred to David Nyagilo Ochanji. They also pointed to land parcel SUNA EAST/WASWETA I/2335 which did not exist in fact.

25. I do not think that the mistakes or misdescriptions in any way invalidate the will. There is no doubt that reference to Daniel as David is not in reference to any other person other than the deceased's son Daniel Nyagilo Ochanji. There is also no doubt, as it emerged from the evidence, that the Plot 2335 was in fact in reference to SUNA EAST/WASWETA I/3335 which the applicants laid claim to.

Property in South C

26. The next issue for determination is whether the South C property forms part of the deceased estate and is available for distribution. Margaret contends that the property was given to her as a gift by the deceased whereas the applicants claim that the property forms part of the estate.

27. For gifts *inter vivos* to be valid, the requirements of law are that the said gift may be granted by deed. Gifts of land must be by way of an instrument in writing. Gifts *inter vivos* must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee.

28. Margaret testified that the deceased signed transfer documents with an intention to transferring the property to her. However, at the time of registration he realized that he had signed the wrong transfer forms as the property fell under the **Registration of Titles Act (Repealed)** regime as opposed to **Registration of Lands Act (Repealed)**. After the deceased death Margaret accessed the deceased's safe deposit box at Kenya Commercial Bank, Migori Branch and there she found the Certificate of Title for the South C property and a transfer of title executed by the deceased in her favour and witnessed by Morris J. Kisia, Advocate. This transfer was signed 18th November 2003. At the time the deceased made the transfer he was still in good health and was not contemplating death.

29. I find and hold that the deceased had signed the transfer document and had them attested to by an advocate. This clearly indicates that he intended to pass the land to Margaret and that is why the property was not included in the will. I therefore find and hold that the deceased gave Margaret the South C property by way of an *inter vivos* gift and the property does not form part of the deceased's estate.

The Third House

30. The applicants claim that their house was not adequately provided for under the Will. They contended that the Will favored Margaret and the 2nd House as it left the daughters from that house; Catherine, Clarice and Mercy out of the Will. Jane testified that although her sons were included in the Will they were not given any income generating assets. Margaret on the other hand told the court that it is true that the three

daughters were left out of the will but it is because the deceased felt disappointed in them for grounding the business he opened for them and for their lack of respect for him. She also pointed to the fact that the deceased had commenced the process of divorcing Jane by the time he wrote the will.

31. It is now well established that the deceased has testamentary freedom recognised in in **section 5** of the **LSA** which, in pertinent part, provides 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.

32. The fact that a testator has failed to include members of his family in the will or has favoured others is not, of itself, a ground for invalidating the will. Such family members have the option of making an application of reasonable provisions under **Part III** of the **LSA**. The applicants did not make any application for reasonable provision.

33. That said, I find that the applicants understood that the 3rd house had not been favoured by the deceased. After the grant was initially confirmed, Plot No. 59A and 59B which were bequeathed to the 2nd house, were sold and the 3rd house received and accepted no less than Kshs. 4 million by way of settlement. Margaret also testified that she was willing to relinquish her share in SUNA EAST/WASWETA/3335 to be shared among the three daughters who were left out in the will and there is evidence that Jane has already settled on the land.

34. I find and hold that the applicants having accepted the settlement aforesaid knew that the deceased had made a will that gave the 3rd house considerably less than that other houses. At the end of the day, the tenor of the applicant's claim is that they were not adequately provided for in the will. This fact does not invalidate the will and in the absence of an application for reasonable provision, this court cannot interfere with the deceased's testamentary freedom.

Conclusions and Disposition

35. Having come to the conclusion that the deceased will was valid, I dismiss the summons for revocation of grant dated 23rd January 2006. Consequently, I confirm that grant of probate dated 17th February 2005 in terms of the deceased's will.

36. As this is a family matter there shall be no order as to costs.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KISUMU this 31st day of May, 2018

F. A. OCHIENG

JUDGE

Mr Odeny instructed by Bruce Odeny and Company Advocates for the applicants.

Mr M. Orengo, Advocate instructed by the respondent.