



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**SUCCESSION CAUSE NO. 431 OF 2014**

**IN THE MATTER OF THE ESTATE OF ANTHONY PAUL PAPE (DECEASED)**

**JOSIAH KARANJA NJENGA**

**VICTORIA PAPE a.k.a VICTORIA KATHLEEN WILLS.....PETITIONERS**

**VERSUS**

**CHRISTOPHER NEIL PAPE**

**DIANA LEIGH PAPE.....OBJECTORS/RESPONDENTS**

**RULING**

1. Anthony Paul Pape (the Deceased) died on 29.8.14 at Mombasa Hospital. A Petition for a Grant of Letters of Administration intestate was filed on 8.10.14 by Josiah Karanja Njenga and Victoria Pape a.k.a Victoria Kathleen Wills, the Petitioners. In their Affidavit in support of the Petition sworn on 8.10.14, the Petitioners averred that the Deceased left a valid will dated 15.7.14 (the Will) and a Memorandum thereto dated 16.7.14.

2. The Petitioners also filed an Application dated 9.10.14 seeking *inter alia* to be allowed to open a joint bank account for ease of collection of funds for management of the estate of the Deceased and for family upkeep and payment of workers' dues and other costs. They also sought the release of Kshs. 3,000,000/= from the Deceased's bank account with Kenya Commercial Bank to pay pending workers' dues and wages

3. On 28.10.14 Christopher Neil Pape, son of the Deceased and Diana Leigh Pape, daughter of the Deceased, the Objectors/Respondents filed a Notice of Objection to the making of grant on the following grounds that:-

1. The Will is invalid having been procured under suspicious circumstances.

2. The Deceased was hospitalised at the Aga Khan University Hospital in Nairobi from 14.7.14 to 25.7.14 and could not have signed the purported Will in Mombasa on 16.7.14 in the presence of the named witnesses thus rendering the Will invalid.

3. In light of the above and with respect to the Deceased's state of health, the Deceased could not have known of or approved the contents of the purported Will or executed the same. The signature on the Will is either forged or obtained under undue influence.

4. On 6.11.14, the Objectors/Respondents filed an Answer to the Petition for the Grant and a Petition by way of Cross-Application both dated 27.10.14.

5. By an application dated 14.4.15, Nzingo Maurer also known as Zena a beneficiary named in the Will, (the Beneficiary) sought an order that the Petitioners be issued with a limited grant of letters of administration. In the alternative that she and Fatuma Ngumbao be issued with a limited grant to run the affairs of the Deceased including payment of rates, insurance, maintenance school fees for the Beneficiary and the 4 children and workers' accrued salaries. To achieve the foregoing, she sought release of Kshs. 3,000,000/= from the account of the Deceased with Kenya Commercial Bank. She also sought the preservation of motor vehicle KBY 982 D at the premises of the Deceased.

6. By a consent order recorded on 11.11.15, the 1<sup>st</sup> Petitioner, the 1<sup>st</sup> Objector were and the Beneficiary were appointed administrators with powers limited to payment of expenses necessary for the preservation of the estate, which were agreed upon by a consent recorded on 22.9.15. On 8.12.15, yet another consent was recorded to the effect that the sum of Kshs. 3,000,000/= was to be deposited in a joint account and relevant supporting documentation was to be provided before expenses were paid out.

7. The Beneficiary filed Grounds of Opposition dated 8.3.16. She denied that the Will was made in suspicious circumstances. She claimed that prior to making the Will, the Deceased had made a previous will dated 28.6.13 and both wills were similar in content. According to the Beneficiary, the Will cannot be invalidated by the fact that the Deceased was in Nairobi when the Will was executed and the witnesses could have travelled there. No evidence has been produced to show that the Deceased was lacking mental capacity to make the Will on account of his illness. The Objection is an attempt to disinherit the Beneficiary and to go against the wishes of the Deceased
8. The Objection was heard by way of *viva voce* evidence. The Objectors called 3 witnesses. Roberto Massimo Petrozzi (Roberto), a medical practitioner informed the Court that he knew the Deceased having met him many years ago. He also knew the Objectors/Respondents who he met at the home of the Deceased in 2013 and several times thereafter. He described the relationship between the Deceased and his children was very cordial and warm. Roberto got to know the Deceased better 4 years prior to his demise when he began to manage his house in Vipingo.
9. The Deceased had advanced bladder cancer which had a toxic effect on other systems of the body and ultimately had cardio respiratory failure which caused his death. The Deceased only shared with Roberto of his condition after being forced to do so by his partner, the Beneficiary in July 2012. On the advice of Roberto the Deceased got specialised treatment at Aga Khan Hospital Nairobi. He had surgery in 2012 and was treated from time to time thereafter. His last admission was from 14.7.14 to 25.7.14. Roberto's involvement in the treatment of the Deceased was supportive. He visited him 4 times during his last hospitalisation. The Beneficiary was always with the Deceased but his children were not there beside him. Mr. Isherwood also visited the Deceased in hospital.
10. Roberto stated that he knows Lawrence Mwangi Wamugu having met him over 30 years ago as he was a medical representative for Glaxo. He met him at the Deceased's funeral and was introduced to his son Willy Mugo Mwangi. Roberto did not meet Lawrence in Nairobi nor did he see him in hospital on 15.7.14. He stated that the Deceased could not have signed the Memorandum to the Will on 16.7.14 at Vipingo as he was in hospital. The signature in the Will is different from what Roberto knew but then when a person is ill the signature may be different.
11. It was Roberto's testimony that when the Deceased checked into hospital on 14.7.14, there was no impairment to his mind. Roberto further stated that he was introduced to the Beneficiary by the Deceased as his partner. The Beneficiary was not his wife as they were not legally married. For the 4 years the Deceased and Roberto were friends, the Beneficiary was always with the Deceased. The Beneficiary knew a lot about the Deceased and she was the one who told Roberto that the Deceased was ill and had blood in his urine. The disease affected the Deceased's legs and not his mental capacity.
12. Lawrence Willie Mwangi Wamugu (Lawrence) was the attesting witness of the Will. He stated that he is a realtor but used to be a medical representative with Glaxo Smithkline Becher. He knew the Deceased from 1992 till the time of his demise. The Deceased had 3 wills. The first one was drawn in 2012. In July 2013, he took a will to the Deceased to sign. This is the will of 28.6.13. The executors were Josiah Njenga and Ananiah Kiragu. He wanted to replace one Kiragu as executor with his sister. In the Will dated 15.7.14 the executors are Josiah Njenga and Victoria Pape. He stated that the Deceased contacted him to go to Vipingo to witness the Will. He cannot however remember the date. He went there with his son Willie Mugo Mwangi. He saw the Deceased sign the Will and he also signed it in the presence of the Deceased. He delivered the Will to Mr. Mulwa, advocate. He did not visit the Deceased during his hospitalisation. He stated that it is possible that the date the Will was signed is not the date of the Will. It is possible that he signed the Will before 15.7.14.
13. Lawrence further stated that the Deceased would send him with documents, cash and cheques to Mr. Mulwa who would in turn give him documents and receipts to take to the Deceased. He took the previous will to Mr. Mulwa and picked up the amended will and delivered it to the Deceased. Lawrence stated that he took the signed Will to Mr. Mulwa together with payment of fees and a receipt dated 15.7.14 was issued. According to Lawrence, the Deceased signed the Will a day before he and the Beneficiary travelled to Nairobi.
14. Dr. Majid Mbarak Warshow, (Dr. Majid) is a consultant physician, cardiologist and an intensive care specialist. He testified that the Deceased was referred to him by Dr. Said Naji a urologist. The Deceased had metastatic cancer of the urinary bladder and complained of numbness in his legs. After evaluating him it was found that the tumour had spread and recommended chemotherapy. The Deceased's speech was normal but his limbs had lost sensation. He took care of the Deceased from 14.7.14 until the morning of 25.7.14. The discharge summary was filled by Dr. Rajiv on behalf of Dr. Majid.
15. Emmanuel Karisa Kenga a forensic document examiner testified that he was given copies of 2 wills dated 28.6.13 and 16.7.14 by the Deceased. His brief was to compare the signatures in both wills. Upon examination of the signatures in the 2 wills, the witness formed the opinion that the same were made by different authors and his report to that effect was produced. Although he did not get the originals of the wills, the signatures in the copies were clear and legible and suitable for comparison.
16. On 19.1.18 the Beneficiary filed an application dated 18.1.18 was filed by seeking withdrawal of the sum of Kshs. 2,000,000/= from the account of the Deceased to take care of workers' dues, utility bills and other miscellaneous expenses. The Application was opposed by the Objectors/Respondents for seeking orders similar to those of the previous applications. The Court directed that that Objection be disposed of first.
17. The Beneficiary did not testify nor did she call any witnesses. No witness was called for the Petitioners, save for Mr Mulwa, counsel for the Petitioners and who drew the Will. Mr. Mulwa informed the Court that he got to know the Deceased through an email he sent to him on 2.5.13 instructing him to make changes to a will he had made dated 29.6.09. The Deceased directed that Plot No. 840 which he was in process of selling be included in the will. His intention was that should he die before completion the balance of the land should go to Zena. The balance of Plot No. 841 which he was in the process of subdividing and selling would go to Zena. 25% of the cash in the bank accounts would go to his children Chris and Diana while the balance would go to Zena. The revised will was sent to the Deceased on email on 28.6.13. The Deceased printed the will and signed the same in the presence of Willy Mugo Mwangi and Ian Isherwood and sent it back to Mr. Mulwa's office. The named executors were Josiah Karanja Njenga and Ananias Nyamu.
18. A year later, Mr. Mulwa received further instructions from the Deceased to change the executors in the will of 28.6.13. He sought to

replace Ananias Nyamu with his sister Victoria Pape. This was done and the Will was emailed to the Deceased. The signed but undated Will was returned to Mr. Mulwa's office by Lawrence Mwangi on 15.7.14. Mr. Mulwa inserted 15.7.14 as the date of the Will and filed it. Mr. Mulwa acted for the Deceased in other matters and knew his signature. He did not know when will was signed. After the Deceased's funeral, Mr. Mulwa met the family and Josiah Njenga produced the Will that had been given to him by the Deceased and read it to all. It was agreed that Mr. Mulwa files an application for probate. Mr. Mulwa met Zena after he filed for probate as she wanted money for upkeep.

19. The parties put in written submissions in further support of their respective positions in the case. I have considered the objection, the witness testimonies and the documentary evidence produced in these proceedings and I find the following to be the issues for determination-

- a) Whether the deceased had the mental capacity to make a will.
- b) Whether the Will was executed in circumstances that were suspicious.
- c) Whether the Will is valid.

Whether the deceased had the mental capacity to make a will

20. Section 5(3) of the Act provides:

***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.***

21. There is a rebuttable presumption that a person who makes a will is of sound mind. The law however takes into account the fact that a testator may, owing to mental or physical illness, be in such a state of mind as not to know what he is doing.

22. The Objectors/Respondents have stated that owing to the Deceased's state of health, he could not have known of or approved the contents of the purported Will or executed the same. This is disputed by the Petitioners and the Beneficiary. In his testimony, Roberto a medical practitioner and friend of the Deceased stated that the Deceased had advanced bladder cancer which ultimately led to cardio respiratory failure that caused his death. Notably, Roberto was clear that when the Deceased was admitted in hospital on 14.7.14, there was no impairment to his mind. The disease affected the Deceased's legs but not his mental capacity. Dr. Majid, testified that the Deceased had metastatic cancer of the urinary bladder and numbness in his legs. Dr. Majid took care of the Deceased from 14.7.14 until the morning of 25.7.14. He stated that the Deceased's speech was normal but his limbs had lost sensation.

23. From the material placed before the Court, I am not persuaded that there is anything to suggest that the illness of the Deceased though serious had placed him in such a state of mind as to not know what he was doing.

Whether the will was executed in circumstances that are suspicious

24. It is the Objectors' case that the Will is not valid as the same was executed in circumstances that are suspicious. The burden of proof lies on the Objectors. This was the holding of Cotran, J. in Wanjau Wanyoike and four others vs. Ernest Wanyoike Njuki Waweru and another HCCC No. 147 of 1980 where he stated:

***The burden of proving that suspicious circumstances exist lies on the person challenging the validity of the will. Where it is proved that there are circumstances exciting the suspicion of the court ... the burden of removing the suspicion lies on the person propounding the will.***

25. The Objectors claim that the Will was executed in suspicious circumstances principally because the Deceased was at the Aga Khan Hospital in Nairobi on 15.7.14 the date the Will was allegedly signed in Vipingo, Kilifi. The Beneficiary contends that the validity of a written will is not determined by the date of execution. To the Beneficiary, the issue of the date of the Will was explained by Mr. Mulwa advocate, who inadvertently inserted the wrong date. His mistake should not be visited upon innocent beneficiaries of the Will. For the Petitioners, it was submitted that the Objectors have failed in their quest to challenge the validity of the Will. They relied on the testimony of Mr. Mulwa who testified that after sending the Will to the Deceased for execution, the same was returned to him undated. He therefore dated it 15.7.14 which is the date he received it. They insist that the Will is valid as in any case the contents thereof remained the same as the 2013 will save for the replacement of one of the executors with the Deceased's sister Victoria Pape.

26. The Objectors' witnesses Roberto and Dr. Majid confirmed in their testimony that the Deceased was in hospital from 14.7.14 to 25.7.14. This fact is not disputed. The Will is alleged to have been signed in Vipingo in Kilifi County on 15.7.14 and witnessed by Lawrence and his son. On this date however, the Deceased was hospitalised over 500 kilometres away at the Aga Khan Hospital in Nairobi County. Lawrence Mwangi said he took the Will to the Deceased for signature. He does not recall the date he did so nor does he remember the date the Deceased signed the Will with him and his son as attesting witnesses. Mr. Mulwa readily admitted that he did not know when the Will was signed by the Deceased. He stated that the Will was returned to his office by Lawrence Mwangi signed but undated. He then proceeded to date it 15.7.14, the date he received it. This excites the suspicion of the Court.

27. Further, throughout the hearing, the original Will was not produced in Court. What is on record is an unauthenticated copy of the same. Section 51(3) of the Act provides:

***(3) Where it is alleged in an application that the deceased left a valid will—***

***(a) if it was written, the original will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either—***

***(i) an authenticated copy thereof shall be so annexed; or***

***(ii) the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;***

28. I have looked at the Petition filed herein. Neither the original Will nor an authenticated copy thereof was annexed to the Petition as required by Section 51(3). The Petitioners did not also state in the Petition the names and addresses of the persons able to prove the contents of the alleged Will as required by law. Given that the Petitioners chose not to testify in Court, it behoved Mr. Mulwa to explain to the Court what became of the original Will. This he did not however do. It is therefore not known who has the custody, power or control of the original Will and why the same could not be produced in Court. This raises the suspicion of the Court.

29. Emmanuel Karisa Kenga the forensic document examiner was given copies of the 2 wills dated 28.6.13 and 15.7.14. The record shows that in spite of repeated requests by the Objectors' advocates to the Petitioners' advocates to avail the originals, this was not done. The document examiner testified that upon examination of the copies of the 2 wills, he formed the opinion that the same were made by different authors. Roberto in his testimony stated that the signature in the Will is different from what he knew but added that when a person is ill the signature may be different. I have also looked at the copies of the 2 wills and I do note that on the face of it the signatures in both wills indeed appear different. Further, in the will of 28.6.13 the Deceased had signed all pages. However in the Will of 15.7.14, he only signed the execution page. This too raises questions in the mind of the Court.

30. The Court has considered the foregoing factors and all of them considered together are such as to excite the vigilance and suspicion of the Court. They call into question the validity of the Will dated 15.7.14 and whether indeed the Deceased signed the same.

#### Whether the Will is valid

31. Section 11 of the Act provides:

##### ***11. Written wills***

***No written will shall be valid unless—***

***(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;***

***(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;***

***(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.***

32. The Court takes cognisance of the fact the Will contains a signature that is purportedly that of the Deceased and that of 2 attesting witnesses. The purported signature of the Deceased is so placed that it appears that it was intended thereby to give effect to the writing as a will. However the suspicious circumstances attendant upon the execution of the said Will have led the Court to the conclusion that the Deceased could not have signed the Will dated 15.7.14.

33. Provisions relating to evidence as to due execution of a written will are contained in Rule 54 of the Probate and Administration Rules which *inter alia* provides:

***(4) If the court, after considering the evidence—***

***(a) is satisfied that a written will was not duly executed, it shall refuse probate and shall mark the will accordingly;***

***(b) is doubtful whether the will was duly executed, it shall make an order for hearing and give such directions in regard thereto as it deems fit.***

34. In the result and having considered the evidence and having taken into account all factors herein the Court is not satisfied that the Will dated 15.7.14 was executed by the Deceased. My finding is that the said Will is void and accordingly, probate is hereby refused. Directions in respect of the Petition by way Cross-Application for Letters of Administration shall be given on 30.10.18.

**DATED, SIGNED and DELIVERED in MOMBASA this 28<sup>th</sup> day of September 2018**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

.....**for the Petitioners**

.....**for the Objectors/Respondents**

.....**Court Assistant**