



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 285 OF 2017

IN THE MATTER OF THE ESTATE OF GURNAM SINGH s/o PRITAM

SINGH alias GURNAM SINGH GHATAHORA (DECEASED)

AMRIT KAUR GHATAHORA.....PETITIONER/APPLICANT

VERSUS

JOGINDER SINGH BHANGRA.....1<sup>ST</sup> RESPONENT/OBJECTOR

AMRIK SINGH HEER.....2<sup>ND</sup> RESPONDENT/OBJECTOR

KIRPAL SINGH.....3<sup>RD</sup> RESPONDENT/OBJECTOR

JUDGMENT

**PLEADINGS**

The deceased died on 28th January 2017 as per the death certificate attached to application /petition for limited grant filed on 6<sup>th</sup> March 2017. The Applicant; Pardeep Singh Ghatahara, biological and legal son of the deceased as confirmed by Local administration letter of 7<sup>th</sup> March 2017 sought limited grant *ad litem* of the estate of the deceased as one of the assets that comprise of the estate of the deceased was on 30<sup>th</sup> January 2017 transferred to Exotic Crafts Ltd. The family of the deceased stood to suffer irreparable loss as the transfer amounted to intermeddling with the deceased's estate.

The Court granted limited grant *ad litem* on 16<sup>th</sup> March 2017.

On 27<sup>th</sup> April, 2017 under certificate of urgency, the Applicant on behalf of himself, widow and family of the deceased who are beneficiaries and dependents of the deceased's estate filed the instant application on the following grounds;

- a. From the deceased's demise on 28<sup>th</sup> January 2017, the deceased's farm; Kwale/Jego/53, the workers have not been paid their salaries for most of 2017 and threatened to down tools. In order to preserve the estate of the deceased, the Applicant borrowed monies, settled the outstanding salaries and the daily running of the farm and has now run out of funds.
- b. The Applicant, widow and family of deceased dependents of the deceased's estate reside on deceased's property L.R.37/578. There are 3<sup>rd</sup> parties alleging to be trustees of the deceased's estate and the beneficiaries and dependents of the deceased's estate are at risk of suffering prejudice in the hands of strangers by possible eviction from their home.
- c. The family of the deceased risk further loss following the irregularity noted in the deceased's property L.R.209/7023 which was transferred on 30<sup>th</sup> January 2017 after the demise of the deceased to 3<sup>rd</sup> parties, which transfer the Applicant instituted suit in ELC Court case number 256 of 2017.

The Applicant sought orders;

- a. That accruing rent income from assets that comprise of the deceased's estate be remitted to authorized persons.

**b. That the Petitioner is empowered to have limited access to deal, manage, collect and expense with respect to the deceased's estate.**

**c. That the Court does issue orders to preserve the estate of the deceased and deter intermeddling so as to safeguard the estate of the deceased as the deceased's family stands to suffer irreparable loss.**

Annexed to the application is Notice of Motion filed on the same date 27<sup>th</sup> April 2017 seeking that the Limited grant of 16<sup>th</sup> March 2017 be extended to grant the Petitioner access to collection of rental income, withdrawal of funds from deceased's account(s) for payment of workers on Kwale/Jego/53 and payment of Land Rates /rents.

The Applicant annexed copies of deceased's Will of 25<sup>th</sup> August, 2016 marked 'A4' and the Will of deceased of 14<sup>th</sup> February 1986 marked 'A5'.

On 11<sup>th</sup> May 2017, Amrit Kaur wife/widow of the deceased filed Petition for grant of Probate on the following grounds;

**a. The deceased left a valid written will dated 14<sup>th</sup> February 1986 and she was appointed one of the executors and the other is Harcharan Singh Matharu.**

**b. It was brought to her attention that another Will of the deceased of 25<sup>th</sup> August, 2016 exists and the same is invalid in law.**

**c. She sought grant of Probate of the deceased's estate as she is the only surviving executor and trustee under the valid Will dated 14<sup>th</sup> February 1986.**

**d. The Applicant annexed the Schedule of Assets that comprise of deceased's estate and the copies of title documents of the said assets and copy of Will of 14<sup>th</sup> February 1986.**

**e. The Applicant undertook to faithfully administer the estate of the deceased as per the law and account to Court as required under the grant of Probate.**

On 20<sup>th</sup> February 2018, Joginder Singh Bhangra, Anril Singh Heer & Kirpal Singh filed Answer to Petition to Amrit Kaur 's petition for grant of probate and stated that the Petitioner was not a fit person to whom grant of probate should issue with regard to the deceased's Will of 25<sup>th</sup> August, 2016.

On 18<sup>th</sup> August 2017, Joginder Singh Bhangra, Anril Singh Heer & Kirpal Singh as Executors and Trustees of the Deceased's estate as named in the Last Will and Testament of Gurnam Singh Dated 25<sup>th</sup> August ,2016 filed application of Objection to making of Grant to the Petition filed by Amrit Kaur on the following grounds;

**a. The deceased left a valid Will dated 25<sup>th</sup> August 2016 appointing them as Executors and Trustees of the deceased's estate.**

**b. The Will dated 25<sup>th</sup> August 2016 revoked all former Wills and testamentary disposition by the deceased.**

**c. The Will of 25<sup>th</sup> August, 2016 has not been revoked by a Court of Law and therefore remains valid.**

**d. The Petition by Amrit Kaur is based on an invalid Will drawn in 1986 and is overtaken by the present Will of 25<sup>th</sup> August 2016.**

**e. The Petition as filed disinherits bona fide beneficiaries named in the last Will and testament of Gurnam Singh.**

On 17<sup>th</sup> October, 2017, Tanvir Singh Panesar, the Applicant and interested party, one of the beneficiaries named in the Last Will and testament of the deceased dated 25<sup>th</sup> August 2016 and grandson to the deceased filed this Notice of Motion. Pardeep Singh Ghatahora, one of the sons of Gurnam Singh s/o Pritam Singh alias Gurnam Singh Ghatahora, and the guardian of the minors Gurnoor Kaur Ghatahora and Jasnoor Kaur Ghatahora beneficiaries named in the last Will and Testament dated 25<sup>th</sup> August 2016 swore a supporting affidavit. The Applicant sought orders;

**a. That Amrit Kaur Ghatahora, widow of the deceased is appointed Administrator of the Estate of The Deceased.**

**b. That the Last Will and Testament of the deceased dated 25<sup>th</sup> August, 2016 be declared invalid**

**c. The estate of the deceased be distributed as per the Last Will and Testament of 14<sup>th</sup> February 1986.**

The Application is grounded on the following facts;

**a. The deceased was unwell and ailing in health and in August 2016, he travelled to India for heart treatment and surgery, bearing in mind his medical condition he lacked capacity to make the last Will and Testament dated 25<sup>th</sup> August, 2016.**

**Annexed and marked A1 are bundle of the deceased's medical documents.**

**b. The deceased was survived by his wife/widow Amrit Kaur Ghatahora , who was his dependent and resides on deceased's suit property L.R. Number 37/578 Lower Hill Nairobi and if she is not provided for; she will be rendered homeless and destitute.**

**c. The deceased held in trust ½ share of the suit property known as Mwina farm for Pritam Kaur, widow of Jaswant Singh and on his demise, the said ½ share of the suit property should rightfully devolve to Pritam Kaur.**

**d. The deceased's last Will and Testament of 14<sup>th</sup> February ,1986 was in cognizance of the rights of the deceased's dependents and interest of Pritam Kaur and the Court should grant the distribution to be as per the last Valid Will of the deceased; the one of 14<sup>th</sup> February 1986.**

**e. The deceased's family members have agreed and consented to the Application and the written and signed consents are annexed and marked as A2.**

On 23<sup>rd</sup> January 2018, Amrik Singh Heer filed Replying Affidavit to the Notice of Motion and stated that the Will of 14<sup>th</sup> February, 1986 was revoked by the deceased when he signed the Will dated 25<sup>th</sup> August 2016. The affidavit of Florence Atieno Obonyo does not disclose that the deceased was incapacitated by illness. If the widow of the deceased is not provided for, she may apply for reasonable provision under Section 26 of Law of Succession Act.

On 23<sup>rd</sup> January 2018, Florence Atieno Obonyo filed an affidavit and she deponed that on 25<sup>th</sup> August 2016 at 8.30 am she was called to the office by Mr. Charles Ojuok, Advocate. Mr. Gurnam Singh Ghatahora, a client was present in the office. Mr Ojuock informed her that he wanted her to witness with him the client, Mr. Gurnam Ghatahora signing his Will. Mr. Charles Ojuock passed the Will to Mr. Gurnam Singh Ghatahora who read through the Will. After reading through the Will, Mr. Gurnam Singh Ghatahora nodded and asked Charles where to sign and went ahead to sign the Will in her presence. She wrote her name, position and signed and Mr. Charles Ojuock also signed and stamped the document.

On 14<sup>th</sup> March 2018, Amrik Singh Heer, Kirpal Singh and Joginder Singh Bhangra filed Affidavit in Answer to Cross Petition where they deponed that they relied on the affidavit of Florence Atieno Obonyo. They also deponed that the documents attached are not medical documents but invoices. They reiterated that if the widow was not provided for in the Will of 25<sup>th</sup> August 2016, she had recourse by applying to Court under **Section 26 of Law of Succession Act** for reasonable provision.

On 8<sup>th</sup> June 2018, Pardeep Singh Ghatahora filed Notice of Motion application and sought the following orders;

**a. M/S Archer & Wilcock Advocates are to furnish all records in respect of sale of L.R.209/7023 and registration documents of transfer effected on 30<sup>th</sup> January 2017 to Exotic Crafts Limited & Charge to KCB Kenya Limited.**

**b. M/S Archer & Wilcock Advocates to provide records of Account for deceased's share of proceeds of sale of L.R.209/7023 and accrued interest to the Court.**

**c. M/S Archer & Wilcock Advocates to provide any and all Court orders and records in respect of hand over of possession of property L.R.209/7023 as well as account of all machinery and assets at the time of handing over possession of suit property L.R. 209/7023 belonging to the deceased in the premises to Exotic Crafts Ltd.**

The parties filed written submissions. The Petitioners filed submissions on 12<sup>th</sup> April 2018 and Respondents filed on 14<sup>th</sup> May 2018.

### **ISSUES**

This Court considered the numerous applications filed in Court and affidavits deponed and annexures filed by parties. The key issues the Court is called upon to determine are as follows;

- 1. Is the will of 14<sup>th</sup> February 1986 by, Gurnam Singh Ghatahora valid last will and Testament of the deceased?**
- 2. Is the Will of 25<sup>th</sup> August 2016 by the deceased Gurnam Singh Ghatahora valid Last Will and testament of the deceased?**
- 3. Should the Petition for grant of Probate be granted?**
- 4. Should the Objection to making grant be granted?**
- 5. Should the application of 8<sup>th</sup> June 2018 demanding the law firm to release details, documents, court orders and proceeds of sale and transfer of L.R.209/7023 be granted?"**

### **ANALYSIS & DETERMINATION:**

### **LAW**

Section 5 (1) Law of Succession Act Cap 160 prescribes the testamentary freedom of the testator as follows;

**“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.*”**

Section 5(3) Law of Succession Act Cap 160 prescribes the testator’s Testamentary capacity to draw a valid written Will and 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.*”**

Section 7 Law of Succession Act Cap 160 outlines factors that vitiate validity of the Written Will and 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.*”**

Section 11 of Law of Succession Act Cap 160 describes attestation of a valid contract as follows;

**“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.***

Section 18 & 21 (1) of Law of Succession Act Cap 160 confirm revocation of a Will by another Will and revival is only by re-execution of the Will by testator.

**“21.(1) *No will which has been in any manner wholly revoked shall be revived otherwise than by the re- execution thereof.*”**

Therefore in the instant case; validity of the Will of 14<sup>th</sup> February 1986 is vitiated by the production and annexure of the Will of 25<sup>th</sup> August 2016 which in paragraph 1 stipulates;

**“I revoke all former Wills and other testamentary dispositions heretofore made by me and declare this to be my last Will.”**

By virtue of Section 18 of Law of Succession Act Cap 160, that provides;

**“...no Will or codicil, or any part thereof, shall be revoked otherwise than by another Will or Codicil declaring an intention to revoke it ...”**

The Will of 14<sup>th</sup> February 1986 is therefore revoked by operation of law and existence of another Will.

Is the Will of deceased of 25<sup>th</sup> August 2016 valid?

Validity of Will is based on the following considerations;

- a. Whether the deceased had testamentary (legal) capacity to make the Will of 25<sup>th</sup> August 2016?
- b. Whether the deceased exercised his free Will made the Will voluntarily without any duress, undue influence or mistake
- c. Whether the deceased knew and approved the Will by properly executing the Will.
- d. Whether the deceased’s will was properly attested as required by law.

The Petitioner submitted on legal capacity of the testator and relied on the case of **BANKS vs GOOD FELLOW[1870]** cited with approval in **VAGHELLA vs VAGHELLA** which provides;

***“A testator shall understand the nature of the acts and its effects, shall understand the extent of the property of which he is disposing 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 disposal of it which if the mind had been sound, would not have made.”***

The Petitioner submitted that the deceased’s poor state of mind was/is evident from the medical records presented in Court and he lacked capacity to make the Last Will and Testament. The Petitioner stated that the deceased prior to making the Will was ailing from heart disease and under treatment in August 2016 and he travelled with his son Pradeep Ghatahara to India for treatment / heart surgery.

The Petitioner stated that the Deceased in the said Will made material errors which illustrate his incapacity to understand the nature of the act and extent of his property as follows;

**a. The deceased made reference in paragraph 4 (iv) of the Will; of bequeathing  $\frac{3}{14}$ ths of his estate “to my daughter Narinder Kaur’s 3 daughters in equal shares.”**

**The 3 children of Narinder Kaur are 2 daughters and 1 son.**

**b. The deceased held in trust  $\frac{1}{2}$  share of Mwina Farm for Pritam Kaur, widow of Jaswant Singh as joint /co -owner of the property. Due to his incapacity, he did not comprehend and appreciate his obligation as trustee and he bequeathed the said property illegally as due to his incapacity he did not fathom the consequence of his action of depriving Pritam Kaur her share of the property.**

**c. The deceased failed to provide for his wife/widow who was dependent on him and resided on L.R. 37/578 Lower Hill Nairobi.**

The Respondents submitted that the fact the deceased was receiving medical care did not mean that he lacked the requisite testamentary capacity to draw this Will. The Respondents stated that the Petitioner produced Invoices and not medical report which were not certified or notarized of the deceased’s condition. It is not enough to show that the deceased was receiving medical treatment but the petitioner ought to prove that the testator did not know what he was doing.

**In SIMON VS BAYFORD C.A CHANCERY DIVISION [2014] EWCA CIV 280; the Petitioner relied on the following excerpt;**

***“The basic legal requirement for validity are that people are mentally capable of understanding what they are doing when they make their Will and that what is in the Will truly reflects what they freely wish to be done with their estate on their death.”***

This Court found relevance in the following parts of the same case; In **SIMON VS BAYFORD C.A CHANCERY DIVISION [2014] EWCA CIV 280** pg12 describes testamentary capacity thus;

***“If there is evidence of actual understanding, then that would prove the requisite capacity, but there will often be no such evidence, and the Court must then look at all the evidence to see what inferences can properly be drawn as to capacity. Such evidence may relate to the execution of the Will but it may also relate to prior or subsequent events. It would be absurd for the law to insist in every case on proof of actual understanding at the time of execution.”***

**In HAYWOOD VS BAKER (1840) 3 MOO PC 282, PRIVY COUNCIL held;**

***“In order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his Will giving whole of his property to one object of his regard; but he must have also the capacity to comprehend the extent of his property ...”***

On the burden of proof of who should prove the deceased’s legal capacity in **RE ESTATE OF GATUTHU NJUGUNA ( DECEASED) [1998] EKL**R which included quote from Halsburys Law of England 4<sup>th</sup> Edition Vol 17 and was cited in **JAMES MAINA ANYANGA vs LORNA YIMBIHA OTTARO & 4 OTHERS [2014]** as follows;

***“Where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator’s capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. 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.”***

In the instant case, the deceased drew a new Will on 25<sup>th</sup> August 2016 and 2 days later on 27<sup>th</sup> August 2016, he travelled to India and was admitted in **Asian Heart Institute & Research Centre** as confirmed by the medical records submitted in court. The record lists **bed charges, dietary food items and hospital services** listed in **Patient Credit Bill (Summary)** annexed to Notice of Motion of 17<sup>th</sup> October,

2017. He was admitted from 27<sup>th</sup> August 2016 and discharged on 1<sup>st</sup> September 2016. On 31<sup>st</sup> August 2016 he underwent heart surgery as evidenced by entry of Dr. Tilak Suvarna who attended to the deceased and consumables listed as surgery equipment; that relate to surgery in the Heart Institute. Although the actual medical records of the deceased's prognosis, his status and progress were not availed, the circumstantial evidence from the medical documents attached indicate that the deceased was critically ill from heart ailment so as to proceed to India 2 days and almost immediately undergo surgery after signing the Will. The totality of the evidence from the pleadings as to affidavits deponed by family members, medical records that confirm the deceased's admission, surgery and medication of deceased shortly after he signed the will; he was very sick before he travelled to India and sought treatment; inform of surgery and these circumstances before and after surgery depict ill health that the court doubts that he had the requisite testamentary capacity to make the Will of 25<sup>th</sup> August, 2016.

This position is reinforced by the case of **In the Matter of the Estate of G.K.K.( Deceased) Succession Cause 1298 of 2011** where the deceased was ailing and was taken to London for specialized treatment and wrote the 2<sup>nd</sup> Will. J Lenaola (as he then was) found that the 1<sup>st</sup> Will and Codicil were not properly executed though the deceased had testamentary capacity. In the 2<sup>nd</sup> Will drawn in London when the deceased was there for special treatment the Court said thus;

***On both occasions, the deceased was used as a pawn, in a game of chess, where each side of the family was playing against each other. In the end his free will was lacking and his actions can only be taken upon undue influence....In the end I am satisfied that the London Will cannot be expression of the deceased's intentions.***

In the instant case, this Court observed from the pleadings by Respondents that there is silence as to how the deceased visited advocates of the Executors and Trustees of the Deceased to draw the Will of 25<sup>th</sup> August 2016, what was the relationship of the Executors and Trustees of the deceased's Will as the Petitioners refer to them as strangers? Are they extended family members, friends, business partners of the deceased? It is not clear. Yet the deceased drew the Will of 25<sup>th</sup> August 2016 with advocates of Executors and Trustees, it was witnessed by advocate and clerk from the same firm, the affidavit of Florence Achieng confirms witnessing of the deceased reading and signing the Will but there is no evidence of who and how the Will was prepared for only the deceased to read and sign. Finally, the Applicant attached copy of the said Will but no evidence was tendered to show that Will was read to the family of the deceased and they were issued with copies of the same. Can this Court satisfy itself from these facts that the Will of 25<sup>th</sup> August 2016 was drawn by the deceased on his own free Will as provided by **Section 5(1) Law of Succession Act**? And his capacity was not affected by Physical ill-health and yet two (2) days later he was in India admitted and had surgery? Due to his illness at this time he was not under undue influence or coercion or mistake? I am afraid not.

Finally, I have taken the liberty to outline both Wills, the necessary parts as follows;

**“14th February, 1986**

**1. I appoint my wife AMRIT KAUR of Post Office Box Number 47912 Nairobi aforesaid and HARCHARAN SINGH MATHARU of Post Office Box Number 78072 Nairobi aforesaid to be my executors and trustees of this my WILL.**

**2. I devise give and bequeath all my real and personal estate wheresoever acquired and situated unto my wife AMRIT KAUR and declare that she be my sole beneficiary.**

**3. However notwithstanding the contents of Clause (2) herein I declare that in the event of my demise my right title and share in my property in Mombasa known as “Mwina Farm” be divided equally between my said wife AMRIT KAUR and my sister-in-law PRITAM KAUR w/o late Jaswant Singh (Deceased).**

**4. I further declare that in the event of my demise my appointment as the Co-Administrator in the Probate and Administration Cause No. 39 of 1981 together with my aforesaid sister-in-law PRITAM KAUR wife of Jaswant Singh (Deceased) may be considered as revoked and in that event my said Trustee HARCHARAN SINGH MATHARU hereinbefore mentioned be substituted or joined in as the Co-administrator along with my said sister-in-law PRITAM KAUR wife of Jaswant Singh (Deceased).**

**BUT my wife mentioned herein the said AMRIT KAUR is not to substitute for me in the management of the said Estate of the late Jaswant Singh (Deceased).**

**IN WITNESS WHEREOF I have hereunto set my hand this 14TH day of FEBRUARY One Thousand Nine Hundred and Eighty-Six.”**

**“25TH AUGUST, 2016**

**2) I APPOINT AMRIK SINGH HEER, KIRPAL SINGH and DR BHANGRY (hereinafter called “my Trustees”) to be the Executors and Trustees of this my Will.**

**3) I DEVISE AND BEQUEATH the residue of my estate both movable and immovable of whatever kind and wherever situate unto my Trustees UPON TRUST to sell, call in and convert the same into money with power to postpone the sale, calling in and conversion thereof so long as my Trustees in their absolute discretion shall think fit without being liable for loss.**

**4) MY Trustees shall hold the net proceeds of the said sale, calling in and conversation and my ready money UPON TRUST:-**

- a. To pay there out all my just debts funeral and testamentary expenses and death duties.  
b. To hold the residue of my estate after such payments out as aforesaid as follows:-

- (i) One-fourteenth ( $\frac{1}{14}$ th) to my son Jaswinder's son.  
(ii) Two-fourteenths ( $\frac{2}{14}$ ths) to my son Parminder's son and daughter in equal shares.  
(iii) Two-fourteenths ( $\frac{2}{14}$ ths) to my son Pardeep's Two (2) daughters in equal shares.  
(iv) Three-fourteenths ( $\frac{3}{14}$ ths) to my daughter Narinder Kaur's Three (3) daughters in equal shares.  
(v) Three-fourteenths ( $\frac{3}{14}$ ths) to the grandchildren of my brother Jaswant Singh in equal shares.  
(vi) Three-fourteenths ( $\frac{3}{14}$ ths) to my friend Shakher Singh's Three (3) daughters in equal shares.

**8) IN their absolute discretion my Trustees may appropriate any part of my movable or immovable property in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any pecuniary legacy or share of residue bequeathed by this my Will or any codicil thereto or of any other interest or share in my property whether settled or not and no beneficiary hereunder shall be required to consent to any appropriation so made."**

A cursory glance at both Wills shows that the deceased was particular in the 1<sup>st</sup> Will of the trustee obligation he had with regard to the estate of his late brother and sister in law; Jaswinder and Pritam Kaur.

It is strange in the recent Will that the deceased forgot/abandoned/ignored the trustee role he had with regard to Jaswinder's estate. There is no mention as to what happens upon his demise as to the trusteeship.

Secondly, in the 1<sup>st</sup> Will now revoked he appointed his wife/widow Amrit Kaur as Executor and sole beneficiary, in the recent Will he omitted his wife and children altogether and bequeaths the estate to grandchildren ( while his children are alive and well), Friend's grandchildren and Brother's grandchildren. There is no evidence of family feud or dispute, infact Pradeep took his late father to India for treatment.

The children and grandchildren of the deceased have attached to their applications signed written and some notarized affidavits of consents to appointment of mother/grandmother as Executor.

Finally, the deceased even mistook his own grandchildren, instead of Narinder's 2 daughters and 1 son bequeathed property it is written 3 daughters.

Clearly, these are not typos or clerical errors but grave errors with far reaching consequences. I am satisfied the deceased signed the Will of 25<sup>th</sup> August 2016, when he was desperate and vulnerable due to physical illness, ailment of the heart and signed the Will lacking requisite testamentary capacity.

The Will of 25<sup>th</sup> August 2016 cannot be an expression of the deceased's free Will to dispose of his estate although it was properly attested, the deceased's testamentary capacity was vitiated by physical ill health that made him vulnerable. The Will of 25<sup>th</sup> august 2016 is invalidated.

Since the Will of 14<sup>th</sup> February 1986 was invalidated by **Section 18 Law of Succession Act** by the will of 25<sup>th</sup> August 2016. Now that the Will of 25<sup>th</sup> August 2016 is invalid, this court cannot revert to the Will of 14<sup>th</sup> February 1986 which was invalid and can only be valid by virtue of **Section 21 of Law of Succession Act Cap 160**. Therefore the estate will be administered by intestacy law.

With regard to the application filed on 8<sup>th</sup> June 2018, The application is premature; as the responsibility to gather and collect assets that comprise of the deceased's estate is by the appointed personal representative, Executor, Administrator or Public Trustee. The parties are not there yet no one has obtained full grant.

Secondly, the law firm/Advocates act on instructions from their clients and are not party to the suit. The orders if merited should be to Executors, Trustees or Purchasers.

#### **DISPOSITION**

- 1. The will of 14th February 1986 by, Gurnam Singh Ghatahora is not valid;**
- 2. The Will of 25th August 2016 by the deceased Gurnam Singh Ghatahora is not valid;**
- 3. The Petition for grant of Probate is not granted;**

**4. The Objection to making grant is not granted;**

**5. The application demanding the law firm to release details, documents, court orders and proceeds of sale and transfer of L.R.209/7023 is not granted;**

**6. Having invalidated both Wills, the estate of the deceased shall be distributed under intestacy laws; a grant for letters of administration intestate shall be obtained pursuant to Section 66 & 67 of Law of Succession Act;**

**7. Any/Every Claim to the deceased's estate shall be lodged in Court for hearing and determination anytime before confirmation of grant.**

**8. Each party has right to appeal.**

**DATED, SIGNED AND DELIVERED THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2018.**

**M. W. MUIGAI**

**JUDGE- FAMILY DIVISION HIGH COURT**

**IN THE PRESENCE OF;**

**MR. RAYANI FOR CROSS-PETITIONER**

**MR. SHABANA FOR THE BENEFICIARIES**

**PATRICK KINUTHIA COURT CLERK**