REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 793 OF 2010

IN THE MATTER OF THE ESTATE OF MM (DECEASED)

H W M……..……APPLICANT

VERSUS

K M…….RESPONDENT

R U L I N G

Introduction:

1. The Applicant in this Summons for Revocation and/or Annulment of Grant brought pursuant to **Sections 76 a, b, c** and **Section 5** of the **Law** of **Succession Act of Kenya and Rules 44** and **73 of Probate** and **Administration Rules** is seeking Annulment or Revocation of the Grant of Probate dated 1st November 2009 and confirmed on the 18th May 2011. The grounds of the application are that the proceedings to obtain the Grant were defective; the Grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case and the Grant was obtained by means of untrue allegation of fact essential in point of law to justify the Grant.

Applicant's Case:

2. The Applicant got married to the deceased in 1993 under Kikuyu Customary Law. She came into the marriage with 3 children of her, own namely:

i. G K born in 1987

ii. E M born in 1989

iii. M G born in 1992

She subsequently got three additional children namely:

i. J M M1 born in1996

ii. D N M born in 2000

iii. P K M born in 2007

She alleges that at the time she got married her own children were babies who were brought up by the

deceased and that she lived with the deceased and took care of him since he was an elderly man.

3. The Applicant contends that she was not aware that the deceased had made a will due to his state of mind and that she and her children were not provided for in the alleged will if it is found to be valid. She lived with the deceased until 1st September 2009 when he died aged 101 years.

4. The Applicant filed Summons for Revocation and/or Annulment of Grant on the 9th May, 2014 contesting the validity of the will dated 3rd February 2009. The application was supported by her Affidavit sworn on the 9th of May 2014. In the Affidavit, the Applicant contends that at the time the will was drawn, the deceased was senile and suffered from memory loss and impaired eyesight and hearing, such that he could not recognize the people around him. In addition, the Applicant asserts that at the time when the deceased purportedly wrote the Will, he was collected from his house by his son on two occasions and taken to the house of J M M2 his nephew who was their neighbor.

5. The Applicant proceeds to assert that the deceased was frail and could not walk or understand what was happening and had spent the night screaming and hallucinating that there were people out to kill him. That prior to writing the alleged Will, the Applicant used to take the deceased to Tigoni Hospital, and the hospital documents and treatment cards were taken away by one of the deceased's son, W. The Applicant alleges that after the execution of the Will, the deceased was brought back home where he told her that he had been made to place a thumb print on some papers and his wish to have the Applicant called, was declined.

6. The Applicant asserts that she has not been adequately provided for in the Will because she was only given one Acre of land and that the other children of the deceased who are dependants and minors have not been provided for in the Will. Further that she came to know of the petition for Confirmation of Grant when she was called by the area D.O to remove a restriction that she had placed on the deceased's land.

7. In a further Affidavit which was sworn on 27th October, 2014 the Applicant contests the allegations of immoral conduct on her part and asserts that the Respondent never visited the deceased and the Applicant when they got married. That he only visited the deceased when he knew that the deceased was ailing and on the verge of death. That the Respondent was not summoned by the deceased as alleged but only went to the deceased with the intention of falsifying a Will. She urged that the deceased lived with her and that she took care of all his needs and always took him to the hospital only to be chased out of the deceased's property.

8. The Applicant denies that the Agricultural Officer demarcated the land as alleged or that the deceased made a Will since the Applicant was always with him. She states that when the Respondent took him away to the house of one J M M2 he had to transport him in a motor vehicle since he could not walk the distance of 200 Meters due to age and illness.

9. The Applicant contends that the alleged Will must have been drawn beforehand because it was typed, whereas in the Applicant's village there are no typing services. Further that there are no signatures on all pages of the said Will which is proof that the deceased never intended the contents in those pages to be carried without alteration. In addition, no thumbprint was placed in any part of the document that is the alleged Will. The Applicant insists that any document purported to be a Will is fake.

10. The Applicant denies all the allegations made by the Respondent, and states that she does not know the plot referred to as Ndeiya/Karai settlement Scheme as it is non-existent. The Applicant argues that it is wrong for the Respondent to push her out of the matrimonial home because the Respondent has inherited ½ acre and 3 other acres of land in Nyahururu belonging to the deceased's estate. The Applicant denies that she has since remarried and asserts that the Respondent's intentions are to disinherit her and her children.

11. The Applicant contends that the Affidavit sworn by John Mugwimi Chigiti is based on falsehoods

since the advocate did not go to the deceased's home and must have prepared an already written and typed document and brought it to fabricate it as the Will of the deceased. In addition she asserts that the Affidavit of Joseph Karuanji Thangu is based on falsehoods too, since the deceased was not his neighbor as his home is more than three kilometers away and the deceased is his uncle.

Respondent's Case:

12. The Respondent states that the deceased died on 1st November 2009 having made a will dated 3rd February 2009. K M who is the Petitioner and the Executor in the deceased's written Will filed a petition dated 23th April 2010 seeking a Grant of Representation.

13. A Grant of probate of written will was issued on 6th October 2010. Summons for Confirmation of Grant was filed on the 10th April 2011 in which the Respondent and all the parties concerned were summoned to court on the 19th April 2011. The Grant was confirmed and a Certificate of Confirmation of Grant issued on 18th May 2011.

14. The Respondent sought to rectify the Grant on 30th May 2012, to have the name of the deceased changed from M M to M M 'B' because the Respondent wanted to transfer to himself by way of transmission land **Title No. NDEIYA/MAKUTANO/[particulars withheld]**, one of the properties of the deceased bearing the name M M 'B'.

15. The Respondent has filed a Replying Affidavit on 25th July 2014 and contends that the deceased was not senile at the time of making the Will, nor did he lack the capacity to make the Will. He tells a very different version of events. In his account, the deceased summoned the Respondent together with his siblings and elders and expressed his wish to make a Will because the Applicant was not ready to respect his wishes as to how he wanted his property shared.

16. Having considered the grounds of the application, the reply thereto and the submissions presented before the court by the parties, I find that the issue arising for determination is whether the will said to have been made by the deceased on 3rd February 2009 is valid or there are sufficient grounds to annul it and revoke the grant under Section 76.

Analysis:

17. The starting point is that whoever desires any court to give judgment as to any legal right or liability, depending on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person.

18. There are several decisions among them ***Lewis Waruiro vs Moses Muriuki Muchiri (2012) CA 106*** which held that:

> **"All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in Rhesa Shipping Co SA vs Edmunds remarked-: 'no Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence orotherwise, deciding on the burden of proof is the only just course to take.'**

The legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah J in ***Britestone Pte Ltd vs Smith & Associates Far East Ltd (2007) 4 SLR 855*** as follows:

> **"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."**

19. It is therefore a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is on the balance of probabilities. In the case of ***Miller vs Minister of Pensions (1947) 2 All ER 372***, Lord Denning said the following about the standard of proof in civil cases:

> **"The…….. (Standard of proof)….. Well settled. It must carry a reasonable degree of probability…….if the evidence is such that the tribunal can say: 'we think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not."**

It is a fundamental principle of law that a litigant bears the burden or onus of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court a fact can be said to exist or not exist.

20. With the above observation in mind, it is prudent to remind ourselves that there is a rebuttable presumption under **section 5 (3)** of the **Law of Succession Act** that a person making a will is of sound mind and that the will ought to be executed. The burden of proof in the first instance lies upon the person alleging lack of capacity to so prove. This is stipulated under **section 5(4)** of the **Law of Succession Act.** It states that:

> **"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."**

In this case the burden of proof therefore lies with the Applicant.

21. Two witnesses have provided oral evidence vide Witness Affidavits dated 27th October 2014, on behalf of the Applicant to prove the mental incapacity of the deceased at the time the Will was drawn, executed and attested. Joseph Kirai who is the second witness, in his Affidavit, refers to the deceased as being very unwell and having memory loss close to senility and the second witness remembers the deceased repeating himself.

22. The third witness by the name of Francis Njoroge Muiruri in his Affidavit describes the deceased as a person who suffered from hallucinations. The witness illustrates how he was woken one evening by the deceased's screams and when he went to find out what was happening, the deceased said that someone was assaulting him. He could however not identify who it was and since he was senile they concluded that he was hallucinating due to old age. The third witness, describes the deceased as a person who was senile, could not comprehend most things, was forgetful and would keep repeating things by the year 2009 when the alleged Will was drawn, executed and attested.

23. The witnesses gave the same description of the deceased in their testimony on 17th March 2015 and 14th July 2015 respectively, concerning his mental incapacity.

24. The witnesses who testified on behalf of the Respondent on the other hand, told the court that the deceased was not senile at the time of making the will nor did he lack the mental capacity to do so. These witnesses included Joseph Karuanji Thangu, John Mugwimi Chigiti and the Respondent himself.

25. They testified that the deceased had in his lifetime taken steps to share out his property by inviting elders and an agricultural officer to demarcate the subdivisions of his property as he desired to bequeath his family. The deceased physically toured the resultant portions in the presence of the elders and intended beneficiaries and showed each person his portion. It is upon noticing that the deceased was adamant about his decision to distribute the property that the Applicant, while the deceased was still alive, placed a caution on Land **Title Number Ndeiya/ Makutano/[particulars withheld].**

26. The Respondent states that out of caution, a video recording was made of the event where the deceased made and executed his Will. The video was not however viewed by the court. The Respondent asserts that the deceased made and executed his Will by placing his thumb print on it in his own house in

the presence of an advocate and three more witnesses as disclosed in the Will and that the Applicant refused to participate and/or witness the making of the deceased's Will.

27. The Respondent also states that the deceased provided for the two minors that the Applicant says he did not provide for, although they were not his biological children, since he had adopted them into the family. Further that the Applicant holds and has a life interest in the plot known as Ndeiya/Karai Settlement Scheme besides the one acre in Ndeiya/Makutano/[particulars withheld].

28. The Respondent contends that the Applicant has since the deceased's death conceived and given birth to two other children and has refused to move to the property at Karai to advance the interests of two children who are not recognized as the deceased's children.

29. The court observes that in a second Affidavit sworn by Joseph Karuanji Thangu on 23rd July 2014 and filed on the 25th July 2014, the deponent deposes that he was the deceased's neighbor and very close friend. That he witnessed the deceased signing his Will in his presence and that of the advocate and two other witnesses K M and J M respectively. He averred that the deceased, had called him and other elders in 2004 to witness the sharing of his property amongst his family.

30. To Joseph Karuanji's recollection the Applicant was present in the meeting and asked the deceased whether beneficiaries were free to sell their portions to which the deceased responded that no property was to be sold in his lifetime. The deceased instructed Joseph Karuanji and one Kegacho who was a teacher to get a measuring tape and divide the land as he directed.

31. From the evidence Joseph Karuanji avers that there was an agricultural officer who advised them on matters of measurement of the land before they proceeded to capture the measurements on the ground themselves. At that point the Applicant protested and asked them to stop the exercise, but the deceased instructed them to proceed with the exercise. The witness states that thereafter the deceased physically toured the land with his family and symbolically scooped soil from the different portions and placed it in the hands of the respective family member who was to get the relevant portion.

32. The witnesses testified that the Applicant refused to accompany the deceased on the tour and later on the Applicant placed a caution on the land. The deceased approached the authorities to have the Applicant remove the caution without success and opted to write a Will when it became clear that the Applicant was not ready to respect his wishes. Owing to the bad blood between the Applicant and the deceased's wider family, the deceased wanted the Applicant to move and live on the property at Karai Settlement Scheme. They denied that the deceased suffered hallucinations or was senile prior to his death.

33. A 3rd Affidavit filed on the 28th of July 2014 sworn by John Mugwimi Chigiti in support of the Respondent. He was the Advocate who was contacted by J N M a son of the deceased with instructions that the deceased wished to write his Will. On arrival at the homestead, he met the deceased and his family including the Applicant although in his account the Applicant left afterwards.

34. The advocate sat down with the deceased and asked him a few questions in Kikuyu language to ascertain his state of mind. The deceased proceeded to outline the extent of his property and how he wanted it distributed for the benefit of his children both sons and daughters and the two minor children of the Applicant. He explained that he had adopted the two minor children of the Applicant as his own although not his biological children. The advocate captured the deceased's wishes in the Will and read them over to the deceased in Kikuyu language whereupon the deceased placed his thumbprint on the Will in the presence of three elderly men.

35. The foregoing being the evidence on record the validity of the will itself should be tested on the basis of the provisions of **section 11** of the **Law of Succession**. A will must be signed by the maker. The signature of the maker must be witnessed by or acknowledged by two or more witnesses, who must append their signatures to the document to authenticate that of the maker of the document.

36. The document dated 3rd February, 2009 bears a thumb print which is said to belong to the maker thereof. This would amount to a signature so long as the maker of the document intended it to be his signature. There is evidence that it was witnessed by three witnesses who saw the deceased signing the will. **Section 11** of the **Law of Succession Act** provides for the formal requirements of a valid will as follows:

> **"No written 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 acknowledgment 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."**

Under the foregoing provisions of the law there are four main requirements to the making of a valid will:-

> i. The will must have been executed with the testamentary intent.
>
> ii. The testator must have had the testamentary capacity.
>
> iii. The will must have been executed free of fraud, duress, undue
>
> influence or mistake.
>
> iv. The will must have been duly executed.

38. Testamentary intent involves the testator having subjectively intended that the document in question constitute his or her will at the time it was executed. The essentials of dispositions were laid out in the case of ***Vaghella vs Vaghella (1999) 2 EA 351*** as follows:

> **" 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 pervert 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."**

39. The Will is contended on grounds of mental incapacity on the part of the deceased at the time of making the will, however, these testimonies are not sufficient proof of mental incapacity. Mental incapacity being a medical condition the report and testimony of a doctor who attended to the deceased for mental incapacity before his death would have been important evidence. Since no proof of mental incapacity has been provided, the deceased is presumed to have been of sound mind at the time of making the Will.

40. Further the document made on 3rd February 2009 bears the names that are described in it as witnesses. Their names appear just after that of the writer. This satisfies the requirements of **section 11 (c)** of the **Law of Succession Act**, which requires that the will be signed by the maker in the presence of two or more witnesses, to acknowledge his signature on the document, and they should append their signatures

to the document to authenticate the signatures of the maker. The witnesses did affix their signatures to the document making it a valid testamentary instrument, having been attested.

41. On whether or not the Applicant has provided other grounds sufficient to warrant the revocation of the grant under section 76 Section, the said section states that:

> **"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion-**
>
> **a. That the proceedings to obtain the grant were defective in substance;**
>
> **b. That the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case;**
>
> **c. That the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently;"**

42. The above provision was judicially construed by the Court of Appeal in the case of ***Matheka and Another vs Matheka (2005) 2 KLR 455***. The court laid down the following guiding principles:

> i. A grant may be revoked either by application by an interested party or by the court on its own motion.
>
> ii. Even when the revocation is by the court upon its own motion, there

must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.

43. The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds. A close look at **section 76** shows that the grounds can be divided into the following categories: -

> i. the propriety of the process of making a grant;
>
> ii. mal-administration or;
>
> iii. the grant has become inoperative due to subsequent circumstances.

44. It is trite law that if a grant was obtained fraudulently, making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled.

45. The provisions of section 76 cited above were construed by the court of appeal which laid down the following guiding principles; namely; A grant may be revoked either by application by an interested party or by the court on its own motion and even when the revocation is by the court upon its own motion; there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the

administration of the estate.

46. The expression “defective in substance” can be construed to mean that the defect was of such a nature as to substantially affect the regularity and correctness of the previous proceedings. I have examined the process through which the grant was obtained and I find that it cannot be said to have been defective in substance.

47. A grant can also be revoked on account of false statements and concealment of vital matters or on grounds that the Applicant deceived the court as was held in ***Samuel Wafula vs Hudson Simiyu Wafula (1993) Ca 161***. There is no evidence that there was deliberate non-disclosure of relevant materials or that there was deliberate omission of any relevant information. Koome J summarized the grounds for revocation of a grant under section 76 as follows:

> **“When the procedure followed in obtaining the grant is defective in substance, when the grant is obtained fraudulently by making a false statement, making an untrue allegation of fact essential in point of law to justify the grant and or when the person who has the grant has failed to proceed diligently with the administration of the estate.”**

48. A grant, whether confirmed or not, can be revoked on the grounds enumerated under section 76 of the Act I find that none of these have been proved in this case. The Applicant has not established sufficient grounds for the court to annul or revoke the grant as provided under section 76 of the Act.

49. Section 29 of the Law of Succession Act on the other hand defines dependant as:

> **“(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**
>
> **(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death.”**

Section 3(2) of the Law of Succession Act defines a child or children as:

> ‘“**child"** or **"children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.’**

50. Children are therefore classified as dependants of the deceased whether they are biologically related to the deceased, or the deceased had taken them into his family as his own or those over whom the deceased had voluntarily assumed parental responsibility. The Applicant complains that some of the dependants of the deceased who are his children have not been provided for in the Will. From the evidence the deceased did provide for two children of the Applicant J M M1 and D N M, over whom he had taken parental responsibility .

51. The court notes however that from the record the children mentioned by the Applicant in the Submissions filed on 9th December 2016 are different from those listed in the Affidavit in Support of Summons for Confirmation of Grant for Letters of Administration Intestate filed on the 19th of April 2011. It must be remembered that a will is about the testamentary intent of the deceased and not the wishes of the living as to how the deceased should have distributed his property.

52. There is nothing in the cause before me to show that the deceased did not intend the said document to be his will at the time it was executed. In addition to testamentary intent, the testator did have the testamentary capacity at the time the will was executed, considered against the four-pronged test. The

testator:

a. Knew the nature of the act of making a will.

b. Knew the natural objects of his bounty.

c. Knew the nature and extent of his property.

d. Understood the disposition of the assets called for by the will.

Disposition:

Upon evaluating the law, the authorities and the facts of this case, I find that the Applicant has not sufficiently demonstrated any valid grounds to challenge the validity of the will. Accordingly, I find that the deceased's Will is valid in the context of Section 11 Law of Succession Act. The Applicant has also not provided sufficient grounds to warrant the revocation of the confirmed grant under **section 76** of the **Law of Succession Act**. For the foregoing reasons the summons for revocation and/or annulment of grant dated 30th June, 2012 is dismissed with no orders as to costs.

SIGNED, DATED and **DELIVERED** in open court this **25th day** of **April, 2017**

……..

L.ACHODE

JUDGE