



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO. 2413 OF 2011**  
**IN THE MATTER OF THE ESTATE OF M K K - (DECEASED)**

**RULING**

1. For determination is the summons dated 4<sup>th</sup> June 2015. It is brought at the instance of the one of the widows of the deceased, who is named in the will as one of the two executors, seeking the invalidation of the will dated 21<sup>st</sup> July 2010 and for the estate of the deceased to be disposed of in accordance with the law governing intestacy.
2. The application is premised on the grounds that the deceased died nineteen (19) days after making the will and that he had no capacity to make the will due to illness which had irreparably destroyed his state of mind.
3. A petition for grant of probate was filed by M W M and F K K on 7<sup>th</sup> November, 2011. The matter was gazetted on 17<sup>th</sup> February 2012, and an objection was filed by one M N K on 13<sup>th</sup> August 2012. Directions were given on the disposal of the objection proceedings, to the effect that the matter be determined on the basis of affidavit evidence and written submissions. Only the objector filed affidavit evidence. The court ruled on the objection on the 11<sup>th</sup> October 2013, dismissing the same on the basis that it was not properly filed, as the relevant documents which constitute the objection had not been filed as provided for under rule 17 of Probate and Administration Rules.
4. On 24<sup>th</sup> February, 2014 a summons for revocation of grant was filed by M N K, on grounds that the grant on record had been obtained fraudulently by use of a questionable will, false statements and concealment from the court of material facts.
5. Before the summons for revocation could be heard and determined, the parties on 10<sup>th</sup> October 2014 filed a consent in the following terms:-

“By Consent of the parties herein, it is agreed as follows that:-

- a. The Applicant filed summons for revocation of grant, revoking or annulling grant of probate of last will of M K K made to M W Mand F K on the 11<sup>th</sup> October 2013, be adopted as an order of the court except for prayer (e) therein (prayer (e)) that for proper and just administration of the deceased estate all beneficiaries should be included and be allowed to participate in the administration of the estate.

- b. The last will of M K K be invalidated for not providing for all the beneficiaries of the deceased.
- c. The parties have further agreed to file for letters of administration intestate of the estate of the deceased wherein the applicant and her four children of the deceased will be listed as part of the beneficiaries of the deceased estate.”
6. On 17<sup>th</sup> April, 2015, M N K further filed an application for summons for confirmation of grant within 6 months and rectification of grant under section 74 of the Law of Succession Act, Cap 160, Laws of Kenya. The application came to court for hearing on the 6<sup>th</sup> May, 2015 and was allowed. However on the 7<sup>th</sup> May 2015, the court *suo moto* revoked the grant issued on 3<sup>rd</sup> February 2015 on the basis that the orders given on 6<sup>th</sup> May 2015 were made on misrepresentation to court by parties as the consent order was never adopted by court as order of the court. The court further declined to sign the grant of letters of administration intestate as the grant of probate made on 11<sup>th</sup> of October 2013 had not been revoked.
7. On 25<sup>th</sup> May 2015, an application was made to court requesting the court to adopt the consent filed in court on 10<sup>th</sup> October 2014 as an order of the court, but court declined on the ground that parties cannot invalidate a will by consent. It was the said order of 25<sup>th</sup> May 2015 that prompted the filing of the application dated 4<sup>th</sup> June 2015, which is the basis for the instant ruling.
8. The application was heard on 8<sup>th</sup> July 2015, when the applicant testified, stating that the deceased was mentally disturbed towards the end of his life due to illness. She told court that the deceased had brain atrophy and tuberculosis. The will was thumb printed in as much as the deceased was a teacher. The applicant was present when the will was made and executed. She said that she, and one F K, were made executors to the estate.
9. The issues that are for determination are whether the deceased had capacity to make the will in question, whether the will was properly executed, whether reasonable provision should be made under section 26 of the Law of Succession Act, and whether the grant of probate should be revoked and the estate be distributed intestate.
10. The law on capacity to make a will is set out in section 5(3) of the Law of Succession Act. As worded Section 5 (3) creates a rebuttable presumption that a person making a will is of sound mind and that the will has been duly executed. Section 5(3) provides that -

*“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.”*

11. The essentials for testamentary capacity were laid out in the case of ***Banks vs. Goodfellow [1870] LR 5 QB 549*** in the following terms -

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

12. The burden of proof, that the maker of the will was of the requisite testamentary capacity lies with the person alleging lack of capacity according to section 5(4) of the Law of Succession Act.
13. In her oral testimony the applicant alleged that she accompanied the deceased to the office of the advocate where the will was made. In the will she has been named as one of the executors. The reasons she advances to invalidate the will are that the deceased lacked capacity due to brain atrophy and the fact that he was so ill that he was unable to sign as he used his thumb print to

execute the will.

14. Section 11 of the Law of Succession Act, provides for the formal requirements of a valid will. It states -

**“11. 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.”**

15. From the above it is required that the testator must append his signature on the will with an intention of giving it effect as his last will and testament. The fact that the same was typed by another person, acting on the instruction of the deceased, does not invalidate the will as long as he signed the same acknowledging the typed will as containing his wishes. The deceased is said to have placed his mark on the typed document in the presence of two witnesses and the executor. There was no evidence that the signature of the deceased on the typed will had been forged. The applicant confirmed to court that she was present when the deceased executed the will. She saw him append the mark by use of his thumb print.

16. In as much as the applicant alleges that the will should be invalidated on these grounds, from the history of the matter the applicant, who is the named executor in the will, did not challenge the validity of the will due to the reasons that she is now advancing; in fact she petitioned the court for probate founded on the said will. The objections on record were made by another person, M N, on the grounds that she and her children had not been adequately provided for.

17. I am not satisfied from the material placed before me by the applicant that the will before me was executed by a person who did not have the requisite testamentary capacity. The mere fact that a person, who is literate, thumbprints a document rather than putting down his signature in writing, is not sufficient proof that he lacked mental capacity. No medical evidence of any nature was placed before me as proof that the deceased was in such a state of ill-health as to be unaware of his environment or to understand what he was doing.

18. From the evidence on record, I do hold that there was a valid will before me that was duly executed by a person of sound mind in proper form.

19. It has been argued that the will does not provide for certain dependants of the deceased. The law on dependency is section 26 of the Law of Succession Act, which enables a person who is not adequately provided for to move the court so that the court can make provision for such person out of the estate of the deceased.

20. The side of the deceased's family alleged to have been excluded is that of the wife alleged to have been married under customary law.

21. Such a family is protected under section 3(5) of the Law of Succession Act, which provides as follows –

*“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”*

22. The position regarding the legitimacy of the second family as members of the family of the deceased has not been challenged by the executors of the will of the deceased. Indeed, from what is before me, the said executors recognize the said family and accept that there is need for them to be provided for under section 26. The said persons are therefore dependants within the meaning of section 29 of the Act.

23. Failure to make provision for a dependant by a testator in his will does not invalidate the will. The remedy for such a person is to seek provision under section 26, as the court is empowered under that provision to make reasonable provision for the dependant.

24. In exercise of its discretion under section 26, Section 28 provides that the court should have regard to-

- a. **the nature and amount of the deceased’s property;**
- b. **any past, present or future capital or income from any source of the dependant;**
- c. **the existing and future means and needs of the dependant;**
- d. **whether the deceased had made any advancement or other gift to the dependant during his lifetime;**
- e. **the conduct of the dependant in relation to the deceased;**
- f. **the situation and circumstances of the deceased’s other dependants and the beneficiaries under any will; and**
- g. **The general circumstances of the case, including, so far as can be ascertained, the testator’s reasons for not making provision for the dependant.**

25. Having established that the objector and her children are dependants and should be provided for, I should next consider the third issue as to whether the grant of probate should be revoked.

26. Section 76 of the Law of Succession Act provides 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 any 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 the 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 an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*

*(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—*

*i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or*

*(ii) to proceed diligently with the administration of the estate; or*

*(iii) to produce to the court, within the time prescribed, any such inventory or account of*

*administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*

*(e) that the grant has become useless and inoperative through subsequent circumstances.”*

27. The above provision sets out the grounds upon which the court may annul or revoke a grant. In the present case, I am satisfied that a case has not been made out under section 76 of the Act for the revocation sought, as no sufficient material has been provided to warrant revocation of the grant on record.

28. However, since the family had decided to consent on the mode of distribution of the estate, it is in the interest of justice that the court, in exercising its inherent powers under section 73 of the Probate and Administration Rules, and in line with sections 26 and 28 of the Act, to provide for the members of the family who were left out.

29. In the circumstances, I do hereby direct that the objector, and her family, be provided for out of the estate of the deceased. Towards that end I direct that the mode of distribution annexed to the consent dated 17<sup>th</sup> April 2015 shall be the basis for the distribution of the estate of the deceased, as all the members of the family have consented to it.

30. The personal representatives of the deceased shall move the court appropriately for distribution of the estate in terms of the consent to distribution of the estate dated 17<sup>th</sup> April 2015.

**DATED, SIGNED and DELIVERED at NAIROBI this 26<sup>TH</sup> DAY OF FEBRUARY, 2016.**

**W MUSYOKA**

**JUDGE**