REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 300 OF 2013

IN THE MATTER OF THE ESTATE OF THE LATE SILAS KAGINA GICHONI -DECEASED

CHRISTOPHER NDARU KAGINA.....APPLICANT

VERSUS

ESTHER MBANDI KAGINA.....1ST RESPONDENT

TABITHA IKAMBA KAGINA.....2ND RESPONDENT

RULING

After carefully evaluating the applicants' application dated 8th April 2013, the submissions by both parties, I hold the view that one fundamental legal issue falls for determination, namely, whether or not the Respondents have in any manner intermeddled with the deceased's estate. At the outset, it is important to state that intermeddling is the performance of tasks which an executor or administrator would normally undertake in the normal course of their duties. Where an individual or organisation carries out acts by which they appear to accept the role of personal representative of the deceased then they run the risk of intermeddling.

Section **45** of the Law of Succession Act[1]provides that:-

> *"45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*
>
> *(2) Any person who contravenes the provisions of this section shall-*
>
> *(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*
>
> *(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."*

Clearly, Section **45** of The Law of Succession Act[2] provides that anyone who has no authority under the Act, or by any other written law, or has grant of representation under the Act takes possession or dispose of or otherwise intermeddles with any free property of a deceased person for any purpose is guilty of an offence under the said Section. This position was reiterated in the case of ***Gitau and 2 others – Vs – Wandai & 5 others.[3]***

What **constitutes estate or free property of the deceased?** Section **3** of The Law of Succession Act[4]defines *" **Estate"** as the free property of a deceased person."**Free property",* **in relation to a deceased person, is defined under the Act as the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.**

Case law would shed more light on these provisions and I am content to cite a passage from the Indian case of ***Balgangadhar Tilak vs. Ganesh Srikrishna,*[5] where it was held** that:-

"The grant of probate only perfects the representative title of the executor to the property which belonged to the testator and over which he had disposing power..."

Therefore, a reading of the law reveals that there are properties which the deceased cannot freely dispose of during his lifetime, and in respect of which his interest has been terminated by his death; such property does not form part of the free property of the deceased. Also, if a deceased person has during his life time sold, transferred, disposed or in any manner given out his properties either in exchange of consideration or as gifts *inter vivos*, such gifts or properties whether transfer had been registered or not do not form part of the deceased's estate. In fact, the Law of Succession in my view protects and preserve transactions made by the deceased during his life time.

Section **47** of the Law of Succession Act[6] enjoins the High Court to entertain any application and determine any dispute under the Law of Succession Act[7] and pronounce such decrees and make such orders therein as may be expedient. Further Rule **73** of the Probate and Administration Rules provides that *"Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."*

Rule **49** of the Probate and Administration Rules provides that *"A person desiring to make an application to court relating to the estate of a deceased person for which no provision is made elsewhere in the Rules shall file a summons supported if necessary by affidavit"*

Essentially, the grounds in support of the application are that the Respondents colluded with third parties to intermeddle with the estate and crafted fictitious and false sale agreements purporting to have been drawn by the deceased during his life time. It is alleged that the Respondents disposed off to themselves or to third parties Land parcel numbers **508, 172, 693, 1852, 4170, 6553 & 4339**. Further, it is alleged that the first Respondent sub-divided parcel number **Mbeere/Mbita/41** and created two parcels namely **Mbeere/Mbita/ 4257** which was transferred to the District Commissioner, Mbeere South and **Mbeere/Mbita/ 4259** to herself. It is also alleged that she also fraudulently transferred **Embu /Municipality/1112/37** to herself while the second Respondent is alleged to have fraudulently transferred to herself **Embu /Municipality/112/107.** Other properties alleged to have been disposed of are listed in paragraphs **15, 16 (i)** to **(v)** of the supporting affidavit.

On record is the evidence of **Emanuel Kenga** a document examiner whose evidence was that the signatures appearing on the transfer of lease for title number **Embu /Municipality/107, Embu /Municipality/37,** and sale agreements relating to Embu/**Mavuria/227, Mbeti/Gachok/1460,** parcel number **143**, Kiambere Location Mbeere District, parcel number **1282**, Gitubiri and **Embu/Mavuria/227** did not match known signatures of the deceased. The applicant has in my view attached great reliance to this evidence, hence, I find it necessary to analyse it in detail.

Even though the above witness claimed to have been trained in various places he did not specify the exact nature of the training he underwent or the qualifications (if any) he attained. The said evidence, in my view forms the basis upon which the applicant states that the transfers or transactions pertaining to the above properties were effected fraudulently and that the said properties form part of the deceased estate.

The above evidence under the category of expert evidence and the general rule is that questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. Expert testimony must be subjected to vigorous cross-examination and ought to be weighed along with all other evidence.

The duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise. This is a duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions.[8]

Under the common law, for expert opinion to be admissible it must be able to provide the court with information which is likely to be outside the courts' knowledge and experience, but it must also be evidence which gives the court the help it needs in forming its conclusions. The role of the experts is to

give their opinion based on their analysis of the available evidence. The court is not bound by that opinion, but can take it into consideration in determining the facts in issue.

I emphasize that the expert must be able to provide impartial, unbiased, objective evidence on the matters within their field of expertise. I find useful guidance from a passage from a judgment by **Sir George Jessell MR** in the case *Abringer v Ashton*[9] where he described expert witnesses as *"paid agents*." Almost **100** years later **Lord Woolf** joined the list of critics of expert witnesses in his Access to Civil Justice Report, when he said:-

> *"Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients."**[10]**(Emphasis added)*

The fundamental characteristic of expert evidence is that it is opinion evidence. To be practically of assistance to a court, however, expert evidence must also provide as much detail as is necessary to allow the court to determine whether the expert's opinions are well founded.

While the test for admissibility of expert evidence differs from jurisdiction to jurisdiction, judges in all jurisdictions face the common responsibility of weighing expert evidence and determining its probative value.[11] This is no easy task. Expert opinions are admissible to furnish courts with information which is likely to be outside their experience and knowledge. The evidence of experts has proliferated in modern litigation and is often determinative of one or more central issues in a case.[12]

Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence and the circumstances of the case including the real likelihood of the expert witness having been compromised or the real possibility of such witnesses using their expertise to mislead the court by placing undue advantage to the party in whose favour they offer the evidence. The court must be alert to such realities and act with caution while analyzing such evidence.

It is important to bear in mind the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.[13] Four consequences flow from this as reiterated by this court in the case of *Stephen Wang'ondu Vs The Ark Limited*.[14]

Firstly, expert evidence does not "trump all other evidence." It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be *"artificially separated"* from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and *vice versa*. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.[15]

A further criteria for assessing an expert's evidence focuses on the quality of the expert's reasoning. A court should examine the expert's testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd. v. Minories Finance Ltd. and Another**[16]*** Jacob J. observed that what really mattered in most cases was the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented "[i]f the reasons stand up the opinion does, if not, not." A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion.

In my view its correct to state that a court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it.[17] A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative[18] or manifestly illogical.[19] Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable.

It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court "of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence." An expert report is therefore only as good as the assumptions on which it is based.

An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based.[20] In my opinion, the factors which the court may take into account in determining the reliability of expert opinion, include:-

a. the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;

b. if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);

c. if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;

d. the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;

e. the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;

f. the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);

g. if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and

h. whether the expert's methods followed established practice in the field and, if they did not,

whether the reason for the divergence has been properly explained.

In addition, in considering reliability, and especially the reliability of expert evidence, the court should be astute to identify potential flaws in such opinion which detract from its reliability, such as:-

a. being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;

b. being based on an unjustifiable assumption;

c. being based on flawed data;

d. relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or

e. relying on an inference or conclusion which has not been properly reached.

I have considered the evidence tendered by the document examiner and the report prepared by the said witness and I am persuaded that the said evidence is not build on a sub-strum of facts which are proved to the satisfaction of the court according to the appropriate standard of proof. As stated above, such evidence must be read together with the rest of the evidence but not independently. The evidence by the document examiner in the opinion of this Court does not establish that it is *'highly probable'* that the documents in question were forged.

I respectfully agree with the finding by the Supreme Court of South Africa[21] which stated that courts are enjoined to apply caution before accepting handwriting expert evidence. I also find myself in agreement with the statement rendered by Cresswell J[22] on the duties and responsibilities of experts in relation to the court which include the following:-

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation.[23]

2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within their expertise.[24].

3. An expert witness should state the facts or assumption on which their opinion is based. They should not omit to consider material facts which could detract from their concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside their expertise.

5. If an expert's opinion is not properly researched because they consider that insufficient data are available then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification that qualification should be stated in the report.[25]

6. If, after exchange of reports, an expert witness changes their view on the material having read the other side's expert report or for any other reason, such change of view should be communicated (through legal representative) to the other side without delay and when appropriate to the court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

The applicant also called the District Land Registrar who gave evidence on the transfer process relating to

parcels numbers **107** and **37**. His testimony was that the transfers were in order. He also stated that all the requisite documents were presented and the requisite consents were misplaced at the time of setting up Mbeere District Registry. He also stated that the transfers were by way of a gift. Perhaps at this juncture I should mention that the law permits a person to give gifts *inter vivos* and once given such gifts are protected by the law as valid and also the law protects and preserves wishes of a deceased person made during his life time. The transfers were registered as required and the lands office accepted them and had no reason to doubt the authenticity of the signatures of the deceased. No application has been made to annul the said titles on the basis of the alleged fraud. The fact the records at the council offices had not been up dated is not a ground to challenge the titles. The court takes judicial notice of the fact that in practice local authorities take time to update their records after titles change hands and this has never been a ground in law to challenge the validity of a title.

Njiru Marete also a witness called by the applicant stated that the transfers for plot numbers **172, 508, 693, 6553, 1852, 4170, 4339** were lawful. He was the adjudication officer at Mbeere. He also stated that the transfers were effected on the strength of the documents presented. I find no fraud has been proved in respect of these transfers.

It is also important to mention that the Respondents maintained that the properties in question were given to the various recipients by the deceased during his life time. They also stated that the applicant was also given parcel of land. The applicant did not refute having been given a parcel of land by the deceased during his life time nor did he include it among the properties he alleges were fraudulently transferred or seek to have it included as part of the deceased estate if at all he is challenging any properties allegedly given out by the deceased during his life time.

I have also evaluated the evidence of a tenant in one of the premises also called by the applicant. Other than being a tenant, he did not state he interacted with the deceased in such a manner that he knew whether or not the deceased gave out his properties during his life time or whether he transferred the properties in question or not.

The applicant accuses the Respondents of having transferred the properties in question fraudulently. The Respondents asserted that the deceased gave out the various parcels of land prior to his death and as stated above, the applicant was also a beneficiary of the gifts *inter vivos* which he did not dispute. The fact that the transfers may have been registered at later dates is not itself evidence of fraud.

Its trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case ***Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others[26]*** the Court of Appeal in considering the standard of proof required where fraud is alleged stated that *fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case.*

The burden of proof lies on the applicant in establishing the fraud that he alleges. In *Belmont Finance Corporation Ltd. v. Williams Furniture Ltd* [27]Buckley L.J. said:

> ***"An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."***

In *Armitage v Nurse**[28]*** Millett L.J. having cited this passage continued:

> ***"In order to allege fraud it is not sufficient to sprinkle a pleading with words like "willfully" and***

"recklessly" (but not "fraudulently" or "dishonestly"). This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint."

In *Paragon Finance plc v D B Thakerar & Co* the court stated that it is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. The burden is always on the claimant to prove fraud on the part of the Respondent. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. It all depends on the nature of the issue and its gravity. Evidence of especially high strength and quality is required to meet the civil standard of proof in fraud cases. It is more burdensome: (see also the cases of ***Mpungu & Sons Transporters Ltd –v-Attorney General & another[29]).***

In *Jennifer Nyambura Kamau v Humphrey Nandi*,[30] the Court of appeal, Nyeri, emphasized that fraud must be proved as a fact by *evidence*; and, more importantly, that the standard of proof is *beyond* a balance of probabilities. In the instant case the applicant alleges fraud but has not provided particulars nor has it been proved to the required standard. The report by the document examiner is not in my view conclusive nor can it be said to be convincing if analysed independently or together with the rest of the evidence. As stated above, some of the witnesses called by the applicant were clear that the transfers were effected legally. In short the applicant has failed to prove any of the allegations of fraud against the Respondents. Accordingly, I find that there is no basis to grant prayers **three, five** and **six** of the application.

The contents of paragraphs **17, 18, 19** and **20** seem in my view to raise issues contained in the mode of distribution proposed by the Respondents' which in my view will be addressed at the hearing and determination of the application for confirmation. Further, the rest of the affidavit seems to dwell on whether or not the deceased distributed his properties prior to his death. In my view, such issues will be determined after hearing evidence from both parties and their witnesses. Such a grave issue cannot be determined at this interlocutory stage. It follows that prayer **4** of the application cannot be granted at this stage as this will be tantamount to determining the main dispute without affording the parties the opportunity to adduce evidence.

Further, prayer **two** of the application is rather unclear, ambiguous and in any event, there is nothing to stay. The same cannot be granted nor is there a basis for granting such a prayer.

As to whether the deceased died intestate or not is a matter to be determined at the hearing of the main dispute after hearing the evidence in support of the application for confirmation and the proposed mode of distribution. Granting such a relief at this stage will amount to granting final orders at an interlocutory stage. Accordingly, prayer **four** is refused.

In conclusion I find that the application dated 8th April 2013 has no merits at all and the same is hereby dismissed with costs to the Respondents.

Right of appeal 30 days

Signed, Dated and delivered at **Nyeri** this **20th** day of **September** 2016

John M. Mativo

Judge

[1] Cap 160, Laws of Kenya

[2] Ibid

[3] **{1989} KLR 23, Tanui J,{** as he then was}

[4] Supra

[5] **26 Ilr Bombay 792**

[6] Cap 160 Laws of Kenya

[7] Ibid

[8] see R v Harris and others[2005] EWCA Crim.1980.

[9] {1873} 17 LR Eq 358 at 374

[10] Lord Woolf MR, Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, HMSO, London, 1995, p. 183.

[11] Evan Bell, Judicial Assessment of Expert Evidence, Judicial Studies Institute Journal, 2010 Page 55

[12] State v. Pearson and Others (1961) 260 Minn. 477.

[13] Huntley (also known as Hopkins) (a protected party by his litigation friend, McClure) v. Simmons [2010] E.W.C.A. Civ 54.

[14] High Court Civil Appeal No. 2 of 2014

[15] Jakto Transport Ltd. v. Derek Hall [2005] E.W.C.A Civ. 1327.

[16] Routestone Ltd. v. Minories Finance Ltd. and Another; Same v. Bird and others [1997] B.C.C. 180.

[17] Drake v. Thos Agnew & Sons Ltd. [2002] E.W.H.C. 294.

[18] Gorelik vs. Holder 339 Fed. App 70 (2nd Cir 2009)

[19] Golville vs Verries Pechet et du Cauval Sciete Anonyme (Court of Appeal (Civil Division), unreported, 27 October 1989).

[20] Makita (Australia) Pty. Ltd. v. Sprowles, {2001} N.S.W.C.A. 305

[21] *See Kunz v Swart 1924 AD 618 and Annama v Chetty 1946 AD 142*

[22] See The “Ikarian Reefer [1993] 2 Lloyd's Rep. 68, at pages 81-82.

[23] See Whitehouse v Jordan [1981] 1 W.L.R. 246, HL, at 256, per Lord Wilberforce

[24] see Pollivitte Ltd v Commercial Union Assurance Company Plc [1987] 1 Lloyd's Rep. 379 at 386, per Garland J., and Re J (1990) F.C.R. 193 , per Cazalet J.

[25] Derby & Co Ltd v Weldon (No.9) , The Times, November 9, 1990, CA, per Staughton L.J.

[26] **Civil Appeal No. 215 of 1996**

[27] [1979] Ch. 250, 268

[28] **[1957] 1 QB 247**

[29] **[2006] 1EA 212**

[30]Civil Appeal 342 of 2010 [2013] eKLR