



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 140 OF 2014

IN THE MATTER OF: THE ESTATE OF LILLI JORGENSEN (DECEASED)

SALLY NJAMBI MAHIHU.....1ST APPLICANT

RUPERT PATRIDGE.....2ND APPLICANT

VERSUS

MWANGUZA KAI DECHE.....1ST RESPONDENT

JEFWA ERICKSON.....2ND RESPONDENT

JUDGEMENT

The late LILLI JORGENSEN died on 11.9.2014. The petitioners herein filed the petition seeking letters of administration intestate for the deceased's estate. A grant was issued on 24th March, 2015. Unknown to the petitioner, a second Succession Cause Number 43 of 2014 was filed in Mombasa by SALLY NJAMBI MAHIHU and RUPERT PATRIDGE indicating that they are the executors of the deceased's Will. The two alledged executors filed an application dated 8.5.2015 seeking to have the grant issued by this court revoked.

This court issued a ruling on 22.3.2016 whereby it ordered that the objection proceedings be heard by way of oral evidence and that the Mombasa High Court Succession Cause Number 431 of 2014 be consolidated with this cause and be heard together in Malindi High Court.

The suit was fixed for hearing on 17.5.2016 but the objectors, although served did not attend. The matter was adjourned to 9.6.2016. The court did not sit on 9.6.2016 and the case was listed for hearing on 1.9.2016. The objectors were served but once again failed to turn up. The case proceeded ex-parte.

ERICKSON SAMPULI JEFWA testified as PW1. He informed the court that the deceased used to live at Tumbili in Kilifi. He was employed by the deceased as a cook and her secretary. The deceased was 86 years old. She died at that age. She died on 11.9.2014 and was buried at Shangila in Kilifi three days later. It is his evidence that the deceased had seven workers namely CHANGAWA NDUNGI, THOMAS KENGA KALU, SAFARI CHENGO, SERAH KAPOMBE, KAI MWANGUZA, EVE DAMA THUVA and himself.

It is PW1's evidence that the deceased did not leave any Will. The purported Will does not include all the workers. When the deceased died, he called RUPPERT PATRICK who was the chairman of the White

Community in Kilifi. He went to see the body and left. The deceased's employees then took the body to the mortuary in Kilifi. After three days the employees took the body and buried it at Shangila in Kilifi. Rupert and Sally, the petitioners in the Mombasa Cause, did not attend the burial.

The following day Rupert went to the deceased's house. He asked PW1 if the deceased had left a will and PW1 informed him that the deceased left no Will. The deceased had informed PW1 six months to her death that she had no will. PW1 was given the deceased's documents including share certificates to keep. Before her death, the deceased could not walk and for five years the workers used to carry her from her bed to the sitting room and outside. At one time the deceased had done a Will. She disagreed with her advocate and cancelled it. He has not seen Lali Jorgensen or Erick Jorgensen who are mentioned in the purported Will.

PW2, EVE DAMA TUVA, a female adult, informed the court that she was the deceased's employee. She worked for four years. She used to clean the home and also wash the deceased as she was quite old. She also used to cook whenever PW1 was not around. They buried the deceased at Kilifi at a cemetery meant for white people. The deceased used to assist her financially.

It is PW2's further evidence that Rupert Patridge is the chairman of white people in Kilifi and is the deceased's neighbor. The deceased was not in good terms with Rupert as Rupert used to send people to her asking her to write a Will. At one time Rupert went to the deceased's compound. The deceased refused to leave the toilet until Rupert left her compound. Rupert had to leave. The deceased told them that she had no child or relative and that since the workers had taken good care of her and no white person assisted her, her workers would inherit her property.

SERAH KARISA TETE testified as PW3. She was also the deceased's employee. She used to sleep with the deceased and assist her putting on her clothes. She worked for her for five years. She is aware that initially the deceased had a Will. Due to pressure from Rupert she shredded the Will and told her workers that she would leave them her property. After the deceased's death, they called Rupert since he is the chairman for white people in Kilifi. Rupert wanted to have the body buried on the same day but they took the body to the mortuary. PW3 used to accompany the deceased to Mombasa. In 2013 the deceased was quite sick.

PW4 DARSI JAN RUYSENAAR lives at Kaya Waa in South Coast. He knew the deceased. She was his teacher in the 1960s at Eldoret Hill School. In 2012 they visited the deceased with an old friend of his who lives in Australia and was also the deceased's student. They saw her at her Kilifi residence. It is a small house. They spent the whole afternoon with her. She looked frail and was on her wheel chair throughout. The deceased passed on two years later. It is his evidence that a Will had been done about fourteen (14) years ago by the firm of Bowyer Mahihu & Co. Advocates. The deceased then cancelled the Will. The deceased was his mathematics teacher. The only Will that was drawn by the firm of Bowyer Mahihu & Co. Advocates was cancelled. PW4 also comes from Australia but lives in Kenya, South Coast. The deceased looked frail and had eye sight problem. She was very happy with her workers.

The main issue for determination is whether the objection should be upheld, whether the deceased left a Will and whether the petitioners should inherit the deceased's property. The objectors were served but did not attend court. The petitioners annexed a letter from the firm of Bowyer Mahihu & Co. Advocates dated 5.5.2007 addressed to the deceased. The letter reads as follows: -

“Dear Jorgensen

I am concerned that you have not responded to my several letters and I hope you are well.

According to our records, I was handling three (3) matters on your behalf as follows: -

a) YOUR WILL – REF: MBA/1/J.91/07

You had mentioned to me that your Will had been misplaced through our former offices of Bryson Inamdar & Bowyer but that in any case you wished to amend your Will. I suggested to you that you give me instructions to prepare you a fresh Will but to date you have not responded to me on that issue and I assume that someone else has done your Will on your behalf but if not, please let me have your instructions at our earliest or if necessary I can send my legal assistant to visit you in Kilifi and take your instructions face to face and then I will prepare the Will which will be returned to you for signing.

b) (i) MOMBASA/BLOCK XI/358 &

(II) PLOT NO. 22 GROUP XI/KILIFI (FUMBENI)

The other matter I was handling on your behalf was in respect of your two (2) titles whereby we were obtaining a copy of a replacement of Indenture dated 31st August 1967 in respect of the Fumbeni Plot, and we obtained the said Indenture and forwarded it to you.

With regard to the second title we prepared a statutory Declaration to enable us apply for a Provisional Title in respect of Mombasa/Block XI/358 whereby you later instructed us not to proceed because you had found the original title in your premises. I therefore send you a fee note for Kenya Shillings Twenty Eight Thousand Four Hundred and Twenty Five (Kshs.28,425.00) which fee note you have not settled.

c) DEMAND FOR OUTSTANDING AMOUNT OF KSHS.452,130.00

FROM ASHAD SALUDIN DEENS BY YOURSELF

The third matter I was handling is litigation matter where we were demanding a sum of Kenya Shillings Four Hundred and Fifty two thousand One Hundred and Thirty (Kshs.452,130.00) from Mr. Ashad Saludin Deens which matter however you have not responded to my letters requesting you to update us of any payments paid by Mr. Sajid in respect of his promises and hence we have not filed a case yet in respect of the same. I requested you for a sum of Kenya Shilling Thirty Five Thousand Seven Hundred and Forty (Kshs.35,740.00) in respect of our fees.

On the 31st January 2007 you sent me a cheque for Kenya shillings Thirty Five Thousand Seven Hundred and Forty (Kshs.35,740.00) but you did not indicate whether you were paying this money in respect (b) or (c) above and I therefore assumed and allocated it to (b) above since I had already completed this particular matter.

Consequently, in the event that you wish me to continue with (c) above i.e. pursuing the amount from Mr. Saludin, you will need to send me a sum of Kenya Shillings Twenty Eight Thousand Four Hundred and Twenty Five (Kshs.28,425.00) so that we can file the relevant suit in court.

Yours faithfully

BOWYER MAHIHU & CO.

SALLY MAHIHU (MRS)”

The record also show that the deceased responded on 8.5.2007. She wrote back and her letter is reproduced herein.

“Dear Sally,

REF MBA/1/J.92 dated May 5, 2007

You hope that I am well. BUT the vast sums of money I owe you are a big headache.

a) Will – reference MBA/1/J.91/07

I have cancelled this will by making a new Will which is with another lawyer in Mombasa.

b) i) Mombasa/block XI/358

As stated in your letter, I notified you that I have found the deeds so no further action be required. Please quote your costs for the initial investigations. NOT TOO EXORBITANT.

b) ii) FUMBENI PLOT.

As I have no proof of who lost these deeds and yet I deposited the same with Bowyer Mahihu, I am prepared to pay part of the costs. Please quote half costs.

c) OUTSTANDING FROM Ashad Saludin Deens

This matter has now been closed. Mr. Saludin paid me some money and has left the country. The sum you quoted certainly more than covers a few letters and contact Ashad. The 35,740/= I sent was for this enormous quotation.

Yours faithfully

L. Jorgensen”

Further, on 12.7.2007, the firm of Bowyer Mahihu wrote to the deceased acknowledging receipt of her letter dated 8.5.2007 together with a payment cheque of Kshs.25,000/=. The letter reads as follows: -

“Dear Miss Jorgensen,

I acknowledge receipt of your letter dated 8th May, 2007 together with our cheque for Kenya shillings Twenty Five thousand (Kshs.25,000.00) (in respect of which I enclose herewith our official receipt for your records).

In view of the sentiments you have expressed in our letter I am cancelling all further fees in respect of the work I did for you as a sign of good faith.

I have noted that you have already done your new Will with another lawyer and that you have all your title documents in respect of all your properties with you and that you do not need any further assistance from me.

May I take this opportunity, to thank you most sincerely, for allowing me to render you legal services which I trust were satisfactory, but where I may have fallen short of your expectations I sincerely apologize and seek your forbearance.

May the Lord bless you, abundantly.

Yours faithfully

BOWYER MAHIHU & CO

SALLY MAHIHU (MRS)”

It is the objector’s position that the deceased signed a Will on 25.7.2013. There is no correspondence between the deceased and her previous advocates. The last communication between the deceased and

Bowyer Mahihu Advocates was the letter she received dated 12.7.2007. The Will was done six years later on 25.7.2013. The last letter refers to a new will done by another Advocate. No new Will from any other advocate has been produced. The purported Will is not signed in all pages. The reference in all the three letters was MBA/1/J.92 while the Will gives a reference of MBA/IND/J.01/2013. There are letters dated 15.9.2014 written by Bowyer Mahihu & Co. Advocates to the deceased's employees informing them about the deceased's last Will.

Given the deceased's letter dated 8.5.2007 and the final communication of 12.7.2007 as hereinabove reproduced, and given the evidence herein, I am satisfied that the deceased left no Will. The deceased was not happy with her advocates as they had lost part of her documents. She also told the advocates that she had cancelled the Will drawn by Bowyer Mahihu advocates. The Advocate/client relationship was at its lowest ebb and it is not clear how the deceased could have gone back to the same advocates and prepare another Will yet she had told them that she had done another Will with a different advocate. I believe the deceased did not make any other Will but simply wanted to end her relationship with her advocates. The purported Will is therefore not the deceased's Will. The advocates had done a previous will for the deceased and knew her properties and employees. That is how the employees' names appeared in the list of beneficiaries of the purported new Will. I do find that the objection lacks merit and is grounded on falsehoods.

The petitioners were the deceased's employees. They lived with her up to the time she took her last breath. They were kind enough to inform the chairman for the white community in Kilifi. However, it appears that there was no support from that community. The workers buried the body three days later. No relative or child has ever since appeared to claim the deceased's property. It is the petitioner's evidence that the deceased orally told them that she wanted them to inherit her property as she had no child or relative. Section 9 of the law of Succession Act, Cap 160 provides for oral Wills. An oral Will is valid if it is made in the presence of two or more competent witnesses and the testator dies within a period of three months from the date of making the oral will. Since the deceased left no written Will, I do find that she intended to leave her estate to her workers. I do find that the petitioners have proved their case.

The deceased's estate is listed as follows: -

“ASSETS:

a) HOUSE AND PLOT ON TITLE 2/7 ON LAND SURVEY PLAN 7998 AND 2/8 GROUP (XI) SURVEY PLAN NUMBER 7999

b) CASH AT IMPERIAL BANK, BARCLAYS BANK, CFC STANBIC

c) SHARES IN THE FOLLOWING COMPANIES:

(i) KENYA POWER AND LIGHTING COMPANY (KPLC)

(ii) EAST AFRICA BREWERIES LTD (EABL)

(iii) SAFARICOM

(iv) UNGA LTD

(v) MARSHALLS

(vi) CMC LTD

(vii) TPS EASTERN AFRICA LIMITED

(viii) CFC BANK

(ix) ATHI RIVER MINING LTD

(x) MUMIUAS SUGAR CO. LTD

(xi) CO-OPERATIVE BANK

(xii) MOTOR VEHICLE REGISTRATION NUMBER KBK 304X

(xiii) CURRENT ACCOUNT IMPERIAL BANK A/C NO. 7900000730

(xiv) SHARES IN KENGEN

(xv) SHARES IN UCHUMI LIMITED

Total estimated value Ks.50,000,000/=”

The workers filed a consent indicating that they have appointed ERICKSON SAMPULI JEFWA, MWANGUDZA KAI DECHE and WILLIAM MUENDO DANIEL to be the administrators of the deceased's estate. The consent is signed by the seven employees of the deceased. I do grant that wish. The grant issued by this court on 24.3.2015 is hereby confirmed. The deceased's employees shall be the beneficiaries. The grant is confirmed and the administrators shall be ERICKSON SAMPULI JEFWA, MWANGUDZA KAI DECHE and WILLIAM MUENDO DANIEL. The beneficiaries are Erickson Sampuli Jefwa, Dama Eve Thuva, Thomas Kenga Kalu, Changawa Ndungi Ngute, Safari Chengo Kambi, Mwannatudza Kai Deche, Serah Kapombe and William Mwendo Daniel as per the consent. It is ordered accordingly.

Dated and delivered in Malindi this 27th day of October, 2016.

S.J. CHITEMBWE

JUDGE