REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1316 OF 2007

IN THE MATTER OF THE ESTATE OF ANDREW MAKORI ONG'OU (DECEASED)

JUDGMENT

1. This cause relates to the estate of Andrew Makori Ong'ou, who died on 25th July 2006 at Aga Khan Hospital at the age of 56 years.

2. Representation to his estate was sought by George Bwoyere Akoto by a petition for grant of probate of a written will filed in court on 25th May 2007. The petitioner described himself as an executor appointed by a will made on 21st July 2006. A notice of the filing of the petition was published in the Kenya Gazette of 27th July 2007 as Gazette Notice No. 6979.

3. On 27th August 2007, an objection, dated 24th August 2007, to the making of the grant was lodged in the cause by Teresa Osebe Makori, Jackline Kerubo Makori, Kennedy Momanyi Makori, Irene Nyangara Makori and Albert Mokie Makori, in their capacities as widow and children of the deceased. They asserted that the will on record was not properly executed, the signature on it was not the known signature of the deceased, that he was seriously ill in hospital when he was alleged to have made it and therefore he had no capacity to make the will, the deceased died intestate, he had never married Grace Mukayiranga and that Grace Mukayiranga and her children were strangers to the deceased and the estate.

4. Teresa also filed on 2nd October 2007 an answer to the petition for grant dated 28th September 2007 and a petition by way of cross-application of even date.

5. Directions were obtained by consent on 27th February 2008, that the objection proceedings be prosecuted by way of presentation of *viva voce* evidence.

6. The hearings commenced on 7th July 2008. The first witness was Dr. Sandeep Acharya. He testified that the deceased had been admitted at Aga Khan Hospital on 15th July 2006 on referral from Arusha. He died on 25th July 2006. He stated that the deceased was in very low spirits on 21st July 2006 when it is alleged that he executed the will. He was also said to have been very drowsy and tired, and slightly confused although he had appropriate speech with lapses. He stated that he could not tell whether he was in mental state to make a will, adding that he had never had to test the mental status of his patients in order to determine whether they were fit to write a will or not.

7. On cross-examination he stated that once he realized that the patient was terminally ill, he advised him to take care of his legal affairs. He said he had no idea how he handled the same. He reiterated that the patient was slightly confused on 21st July 2006, but said he was not competent

to discuss his mental state at the time. He could not say whether his state of mind qualified him to make a will. He recalled that the patient had told him not to resuscitate him in the event of cardiac arrest, adding that he could not have been confused when he gave that order and that was why he gave effect to it. He did not rule out the possibility of a will having been executed before he met the patient that day.

8. Jane Khisa Wanyama testified next. She was among the nurses who attended to the deceased during his admission at Aga Khan Hospital. She testified that he looked weak and sickly on 21st July 2008, although all his vital signs were normal. She stated that the hospital records before the court did not indicate a visit to the patient on that date by a lawyer saying that it was a rare occurrence for wills to be executed at the hospital, but whenever that happened the nurses and the doctor attending to the patient must be involved and informed, in which case it would be noted on the hospital records. She mentioned that the deceased was able to talk that day, and he even requested for a juice at about mid-day. On cross-examination she stated that she was not able to tell the state of mind of the deceased as of 21st July 2006. She mentioned that the patients at the hospital had access to their mobile phones during admission. She stated that she had never been present when a will was made or signed or read out to patients. She said that she could not tell whether the deceased made a will.

9. The third witness was Teresa Osebe Makori, the objector. She testified that she was the widow of the deceased with whom she had had the four children named in the objection. Theirs was a statutory marriage celebrated on 25th April 1992, and she produced a marriage certificate to support her case. She said she only learnt of the alleged will when she was summoned to the event of its reading. She testified that, the deceased was very ill and could not have executed the will on 21st June 2007 for he could not even talk. She stated that she was by his side throughout his stay at the hospital. She said she did not see the executor of the will, the petitioner herein, at all on date of the alleged execution. She said she did not know Grace Mukayiranga nor was she aware of the deceased's alleged second marriage.

10. The first three witnesses were heard by Gacheche J. On 22nd October 2008, Gacheche J. disqualified herself from hearing the case further after an issue was raised by the objector. It was directed that the matter be heard by any other Judge in the Division. When the matter was placed before Rawal J. on 18th November 2008 it was directed that the matter be heard *de novo* on a date to be given at the registry. The directions of 18th November 2008 were revised on 9th March 2011 when Kimaru J. directed that the matter should proceed from where it had reached. The objector was cross-examined on 5th April 2011 and thereafter closed her case.

11. The matter was placed before me for hearing on 19th November 2014. The date had been given in court on 30th July 2014 by Kimaru J. By 19th November 2014 Kimaru J. had left the Family Division. The petitioner was to open to his case. He was not present in court, neither was he represented. The date had been obtained on 30th July 2014 in his presence. As he was not present to prosecute his case, I recorded that the petitioner was not going to tender evidence and closed his case. I thereafter reserved the matter for judgment.

12. The only issue for me to determine is whether the will made on 21st July 2006 was valid.

13. The matters that objector has raised about the will are that it was not properly executed in accordance with the law, the purported signature on the document was not that of the deceased and the deceased was generally ill on the date he is alleged to have executed the document and that he had no disposing mind. These matters touch on the capacity of the deceased to make the will at the material time and compliance with the formalities in respect of the making of the will.

14. The law governing capacity to make a will is set out in Section 5 of the Law of Succession Act. The said provision states as follows:-

"(1) Subject to the provisions by this Part and Part III, any 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.

(2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.

(3) 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 state of mind, whether suffering from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

(4) 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."

15. The objector alleges that the deceased person was very ill on 21st July 2006 and could not even talk and therefore he was not of the testamentary capacity required by Section 5(1) of the Act. Section 5(3) of the Act makes the presumption that a person making or purporting to make a will is of sound mind unless the contrary is proved. Section 5(4) of the Act, provides that the person who bears the burden of rebutting the presumption stated in Section 5(3) of the Act is the person asserting that the deceased was not of sound mind at the material time.

16. In an effort to satisfy the requirements of Section 5(3) (4) of the Act, the objector called the doctor and the nurse who attended to the deceased over the period of his admission to testify as to his condition on 21st July 2006. Dr. Acharya described the deceased as very tired, drowsy and slightly confused. He mentioned that he still had appropriate speech but with lapses. He said he and the deceased talked about resuscitation in the event of the patient suffering a cardiac arrest, where the patient told him not to undertake that procedure. He confirmed that the witness could not have been confused when he gave that order, and he would not have given effect to it if the patient had been confused. He however was not willing to commit as to whether the patient was of such state of mind as to make a valid will. The nurse, Ms. Wanyama, gave similar evidence. She, like Dr. Acharya, could not state the state of mind of the patient at the time with regard to his capacity to make the will.

17. Of the testimonies of the three witnesses – the objector, Dr. Acharya and Ms. Wanyama – I am persuaded by that of the medical professionals. They had no personal interest in the matter and can be described as neutral witnesses. I take their evidence to mean that, although the deceased was doing poorly health wise, he was still in control of his faculties. He instructed against resuscitation on the material day and they complied. He is said to have even talked to the nurse about being given juice, which was provided. Their testimonies fundamentally differ from that of the objector who sought to create an impression that the patient was so badly off that he could not even talk or communicate in any way.

18. My conclusion from the above is that the objector has not satisfied the court that the deceased was not of such state of mind, on 21st July 2006, as to be unable to make a valid will in terms of Section 5(1) of the Act.

19. The formalities for the making of a valid written will are set out in Section 11 of the Law of Succession Act. However, before I set out in *verbatim* the said provisions, and before I consider whether the document before me complies with the said provisions, I need to determine whether any will was executed on 21st July 2006.

20. The objector testified that she was with the deceased in hospital twenty four (24) hours each day for the entire period that he was in hospital. The doctor on his part stated that once he realized that the patient had a terminal illness, he advised him to take care of his legal affairs. He did not say whether a will was executed that day or not but he did not rule out the possibility of one having

been made on 21st July2006 in the hours before he saw the patient. The nurse testified that the hospital records did not have a minute of a visit by a lawyer on 21st July 2006. She stated that the hospital staff would normally be involved in execution of wills in hospital, although she stated that she had never personally been involved in any such event.

21. What do I make of all this? I understand the medical personnel to be saying that from their end they could not rule out the possibility that a will could have been executed on 21st July 2006 as they were not always by the patient's bedside. The objector said she was on that bedside throughout and if any will was signed by the deceased during that period, she would have seen it. The petitioner did not testify and therefore there is no evidence to controvert her story. In the absence of contrary evidence, I am prepared to find that the objector was by the deceased's bedside throughout and she did not see any will being executed during the period that the deceased was in hospital. I find therefore that no will was made on 21st July 2006, and the deceased therefore died intestate.

22. In view of my finding in paragraph 21 above, it is not necessary for me to consider whether the alleged will of 21st July 2006 was properly executed and whether the signature on the will purported to have been his was actually his.

23. The objector has asserted that Grace Mukayingara was not a widow of the deceased for she never married him in the first place. In fact she stated that she did not know her, nor her children, and she did not know that she was married to the deceased. It was the duty of the petitioner, in his capacity as executor of the alleged will, to lead evidence on the status of Grace Mukayingara. The petitioner did not testify, nor call any evidence. There is therefore no material upon which I can pronounce on the status of the said Grace Mukayingara or her children.

24. In view of everything that I have said above, I do hereby make the following orders:-

a. **That the petition presented herein on 25th May 2007 by George Bwoyere Akoto is hereby dismissed;**

b. **That the petition by way of cross-application for a grant presented herein on 2nd October 2007 by Teresa Osebe Makori is hereby allowed;**

c. **I accordingly appoint the said Teresa Osebe Makori administrator of the estate of Andrew Makori Ong'ou, deceased, and a grant of letters of administration intestate shall accordingly issue to her; and**

d. **The objector cross-petitioner shall have costs of the objection proceedings.**

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF SEPTEMBER, 2015.

W. MUSYOKA

JUDGE