



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE 2355 OF 2013

IN THE MATTER OF THE ESTATE OF PRATIK RAMESH MEGHJI SHAH

C.P.S.....1st DEPENDANT

M.P.S.....2nd DEPENDANT

N.S.H EXECUTOR /BENEFICIARY

JUDGMENT

PLEADINGS

The deceased died on 22nd August 2013. By an application of summons by dependents brought under section 26 of Law of Succession Act, filed on 8th September, 2014 they sought from the Court orders that;

- a. The dependents obtain reasonable provision from the estate of the deceased.
- b. The applicants are declared the sole beneficiaries of the deceased's estate.
- c. The dependents are appointed administrators of the estate.
- d. The executrix ordered to disclose all assets and personal effects of the deceased.

The Application is based on the following grounds;

- a. The Applicants dependents are the biological children of the deceased born in 1993 and 1994 respectively as evidenced by birth certificates attached to the application.
- b. The deceased and their mother divorced in **Divorce Cause 126 of 2004** whose decree is annexed to the application. There is a Court order vesting custody of the children with the Applicant, their mother and the deceased was to pay Ksh.12, 000/= per month as maintenance for the children.
- c. The deceased left a Will dated 24th day of July 2000 and named the Executrix his sister. The executrix applied for a grant of representation, which was issued on 12th September 2013.
- d. The executrix concealed important facts from the court namely, the deceased's survivors and dependents, a full inventory of the assets that comprise the deceased's estate and provision for the dependents of the deceased.

The Respondent, the executrix of the deceased's estate filed a Replying affidavit on 7th October 2014. In a nutshell, she denied the dependents were biological children of the deceased.

- a. She stated that the Applicants did not maintain any meaningful contact with the deceased. The deceased pleaded to their mother and the children that he wanted an emotional bond and contact with the children.
- b. The executrix attached copies of notes from the deceased's diary that confirm that he longed for company, comfort and bonding with his children.
- c. The executrix alluded to discussions held with his late brother, the deceased prior to his death on how his children failed to have a relationship with him despite several attempts to reach out to them.
- d. After the deceased and the Applicant's mother divorced she was married by the Applicants step father A.A.G who has taken care of the children to date.
- e. On 12th August, 2013 when the deceased fell ill, he was rushed to hospital by the neighbor's driver and was admitted in hospital. She contacted the doctor who asked to come back to Kenya from Australia as his condition deteriorated. She arrived on 14th August, 2013. The deceased and the children barely had a meaningful relationship.

The Applicants /dependents filed a supplementary affidavit on 23rd October, 2013 and expounded on various issues particularly in paragraph 8 where they alluded that the deceased picked them and they went to watch movies, attended religious and social functions and stayed with him at his home on invitation. They stated that despite the divorce, their mother encouraged them to maintain a cordial father and sons' relationship. They visited their father in hospital and their mother prepared meals for him to take while in hospital.

The Respondent/Executrix filed Reply to Supplementary affidavit on 5th December 2014 and she reiterated that the deceased did not intend the applicants and their mother to inherit from him otherwise he would have provided for them in his Will. The applicants have not furnished the Court with evidence that they spent time with the deceased apart from claiming so. In December 2010, the deceased travelled to India for a hip operation and the children did not know about it or help him.

HEARING

The 1st dependent, C.P.S. is a student at Griffins College. He said the deceased is his father and upon his death, he left a will. The executor of the will is his Aunt who resides in Australia. The Executrix is the sole beneficiary to the deceased's estate. The deceased took care of him and his brother until their parents' divorced. They continued to spend time together. He visited him in hospital and attended the burial.

He is opposed to confirmation of grant because they have not been provided for in the deceased's will as dependents of the deceased. The summons for confirmation of grant does not disclose the all beneficiaries, all assets and mode of distribution. The foreign bank accounts are left out. The HSBC account had a tidy sum in the deceased's name. He would like his present and future needs; especially education, be catered for.

The 2nd dependent, M.P.S. confirmed he is son to the deceased and he recalls that the deceased provided for them until their parents divorced. He spent time with his father on occasion; he visited him in hospital and attended the cremation ceremony.

He was not aware of the Will of the deceased; he has not consented to the confirmation of grant, as he was not included as a beneficiary to his estate. He hopes to pursue studies in South Africa and would need funds to assist him. His mother and stepfather have taken care of him but are limited in resources to fund his studies abroad.

The mother of the children, G S testified that the deceased was the father of the Applicants. During the marriage they had many problems that led to divorce. Later she obtained custody of the 2 sons. The deceased was to pay Kshs. 12,000/- a month for maintenance of the children. After a few months the deceased defaulted. She entered into consent with the deceased and absolved him from paying

maintenance.

She struggled to open a small business to sell clothes and took care of the children. The children were educated through the Community's help. She has been with the children to date. The children had a meaningful relationship with the deceased contrary to the executrix assertion. The deceased fell sick and she went to hospital and took care of him. His sons were in in the hospital with him. The executrix came later after 2 to 3 days when he was admitted in hospital. The deceased's sons attended the cremation.

The children's stepfather confirmed the children belong to the deceased. He lived with them when he moved in with their mother in 2008. He has taken care of the 2 children. They met in social and family gatherings with the deceased they mingled amongst guests so he never knew what transpired. The deceased had a good relationship with the sons and they communicated and spent time together.

He went to see the deceased in hospital when he was admitted. During the funeral arrangements the children attended and he was present as a well wisher. The ladies are not allowed to attend and participate in the ceremony.

The Respondent adduced evidence that the deceased was her elder brother. Their parents died and they had each other. Their parents' property was transferred to them jointly. The property comprised of the house the deceased lived in and the other houses he rented out. The deceased collected rent and banked in a joint account and would use the funds for medical expenses. The deceased died from diabetes, kidney and heart failure. He had written a Will, which she kept. He appointed her executrix and sole beneficiary of the estate.

She said the deceased was sick; he had attended Kikuyu hospital due to eye problems and was taken to hospital by a friend at the City market Stall. His eyesight was not good and he could not watch TV. The deceased went to India for a hip operation for 2 months. The sons did not contact or care about him. They even did not know he had attended treatment in India. She communicated with him and he stayed with mutual friends. Later, when the deceased was admitted in hospital here, she asked the 1st dependent to visit his father in hospital but he was not too keen. When they met in hospital, he said he was told to come to hospital.

The executrix stated that the deceased, her brother was a sick and lonely man. In his diary he wrote that he looked forward to travel to Mombasa with the boys. It never happened. From the conversations the deceased and executrix had, he said it was painful, that the children did not acknowledge him in family parties. They did not take photographs with him. When the children were of age they did not seek him out. He was not invited or allowed to be a father to his children. He was bitter, lonely and sad. His health deteriorated and he had lost funds from investments that did not materialize. He died a broken hearted man.

Ms. Usha Shah a teacher by profession and social worker is the Chairperson of the Hindu Community in Kenya. She knew the deceased from childhood, she taught him in Visa Oshwal School. Their families were friends. The deceased and mother to the dependents were married but had many problems. She tried to reconcile them to no avail. They separated. He blamed her for not saving his family he was lonely and he underwent a depression. He used to visit the Visa Oshwal Library and sit alone. He later became sick; he was admitted in hospital and passed on.

She informed the Court, the deceased was mostly alone, and she never saw the deceased with his sons. She attended most community, family and social functions and the deceased was always alone and not with his children.

Mr. Anil Kumar Shah, a member of the Shah Community stated, he used to see the deceased alone at the Oshwal Centre. After his death, he helped in preparation of the deceased's funeral; he did not see his sons during the preparations except his sister. He saw the children of the deceased at the cemetery.

Ms. S R C S is maternal aunt to the deceased and executrix. She told the Court that the deceased and

mother of the dependents married. After they divorced, she went with both sons and remarried. The deceased did not discuss his children. In family functions, she saw him with his niece. The sons of the deceased would come to functions with their mother and they kept off the family. She never saw the deceased's sons with him in personal or private functions or family and social functions.

Mr. Leonard Mutuku worked for the deceased's parents and later worked for the deceased and his family, G and the 2 sons. After they separated, he looked after the deceased and worked at their shop and came to sleep in the servants' quarters. From the time, the deceased divorced with G, he did not see the sons of the deceased visit him at home. He took the deceased to Kikuyu Hospital for eye treatment. He went to India with the help of a family friend. On the day he fell ill, the neighbor's driver rushed him to hospital. The deceased had diabetes; he travelled to US and India for treatment. The sons of the deceased did not visit him or take care of the deceased.

ISSUES

The Court has put into consideration the pleadings, submissions and evidence on record for analysis. The court is called upon to determine the following issues;

1. Did the deceased leave a valid will?
2. Are the Applicants dependents of the deceased?
3. Should the Court grant reasonable provision for the children from the deceased's estate?
4. If so to what extent should the reasonable provision be apportioned from the deceased's estate?

DETERMINATION

The deceased's will was kept and produced by the executrix and she applied for grant of probate which was granted on 13th January 2014

The Applicants have not contested validity of the Will or attributed any irregularity or illegality of the Will as being contrary to **Section 5 and 11 of the Law of Succession Act Cap 160**.

The Court has seen a copy of the Will attached to the petition and on the face of it is valid. It was drawn and signed on 24th July 2000, 13 years before his death and drawn at a time that he enjoyed good health. Secondly, the Will was drawn before Aziz Mohammed Advocate. He must have voluntarily gone to the advocate to have the Will drawn. In the absence of any aspersion cast or evidence of any irregularity as to drawing of the Will, this Court finds the Will valid.

The Applicants lodged their claim on the basis of being biological sons of the deceased and therefore dependents. They based their claim on the fact of being dependents of the deceased and therefore entitled to a share of his estate. They also pleaded to be administrators of the deceased's estate and the executrix to account for the estate.

At the outset, since the Will is valid, the deceased appointed the executor as required by **Section 6 of the Law of Succession Act**. The Applicants cannot replace the executor unless and until the Will is declared invalid.

The executrix in this instant is also the sole beneficiary, so she cannot be held to account unless there are other beneficiaries of the estate. At the moment there has been no one else but herself, sister to the deceased.

Section 26 of the Law of Succession Act Cap 160 prescribes;

.....The Court may, if it is of the opinion that the disposition of the deceased's estate effected by his Will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependent, order such reasonable provision as the Court thinks fit shall be made for that dependent out of the

deceased's net estate.

Section 29 of the Law of Succession Act Cap 160 stipulates;

For purposes of the Part, dependent means

- a. *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.*

The Applicants are biological sons of the deceased as confirmed by the evidence of the mother (PW 3) stepfather (PW 4) and Respondent (DW 1) and attached birth certificates to the Summons by dependents under **Section 26 of the Law of Succession Act Cap 160.**

The 3rd issue is whether the dependents are entitled to a reasonable provision from the deceased's estate.

Section 28 of the Law of Succession Act Cap 160 prescribes;

In considering whether any order should be made under this Part, and if so what order, the Court shall have regard to

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

The Pleadings and evidence adduced is at variance and parallel as to whether the children of the deceased had any contact with the deceased, if it was a meaningful relationship and if the dependents acknowledged him as their father and interacted with him as such.

The Deceased and PW3 married in 1992 and they had PW1 in 1993 and PW2 in 1995. They lived at the deceased's home. PW3 moved out in 2002 and they divorced in 2007.

By the **Court Ruling dated 13th May 2007 in Children Case 81 of 2007** attached to the Summons, the Court granted custody of the children to PW3 and the deceased was to pay ksh.12,000/- a month as upkeep for the Children.

By a Consent signed on 4th March 2008, the deceased was relieved of any financial contribution towards the children and was granted visitation rights every weekend.

The deceased did not have access to the children as evidenced by the following instances;

The copy of the deceased's Diary annexed to the Respondent's affidavit of 6th October, 2014 shows as follows;

Thursday, 20th March 2008

“1st trip to South Coast Mombasa at Kaskazi.....called Greta **to let the kids come to Mombasa for Easter but no reply.** Went to South Coast after 16 years.”

The letter dated 16th February 2005 attached to Respondent's affidavit from PW3's Advocate reads as follows;

“My instructions are that your client forcibly moved into my client's place of residence which is not the matrimonial home. This was on or about 7th January 2005. My client has never accepted him back. **The same sentiments are of the children.**”

The letter dated 28th July 2006 attached to the Respondent's affidavit from the deceased's advocate to the children's mother's advocate reads as follows;

“Our client categorically denies having caused any kind of harassment to the children of the marriage, though he maintains that he has every right to visit them and be in contact with them.”

“It was at this juncture that the child of the marriage came out of the house and our client instinctively and affectionately as any loving parent would do, asked the boy to pose with him for a photograph, which the boy refused stating that he was getting late for school and walked away.”

All these instances depicted in the diary and letters speak to a desperate man and father reaching out to his children whose efforts were futile. The mother and children were hostile to the deceased. The deceased did not have any access to the children. PW3 did not allow him to see and engage with the children. He was not invited to school functions, children birthdays or other family functions. He was frustrated and depressed. PW3 remarried and lived with PW4 and the 2 children of the deceased. The deceased even moved into PW3 & PW4's home to be with the children and they did not reciprocate. He gave up.

The deceased was ill severally, the children were now older but they did not seek him out, visit him, and care for him. He went for treatment to India, the children did not know about it or contact and care for him. In May 2013, he was admitted to hospital, they did not visit him. Finally when he was admitted again in August 2013 they only came when it was imminent that he would succumb to illness.

PW1 PW2 & PW3 pleaded in the Supplementary affidavit filed on 28th October, 2014 and testified that the children went to visit the deceased, they went for movies, attended social and family gatherings together and they visited and stayed with him at his house. Apart from alleging the same in Court, they did not provide any proof of any photographs, friends and or other family members who could attest to these facts. Of interest is the Respondent's annexure of the deceased's medical record that confirms that as at 2012, the deceased had poor vision in both eyes. He was diabetic and he had undergone corneal transplant. Surely, he could not with poor eyesight watch movies and therefore take his sons to watch movies.

The evidence of the Applicants was controverted by DW2 a family friend and Community leader that the deceased was a depressed after he lost his family and was a loner, she found him alone in Community library. At social functions he sat alone; his sons did not interact with him.

DW3 an aunt confirmed in family functions, the deceased's sons did not acknowledge him as their father, they steered clear of him and the deceased's family.

DW4 who helped in the funeral preparations of the deceased saw his sons at the crematorium.

DW5 who worked and took care of the deceased was categorical, the children never visited and stayed with the deceased in his house.

Therefore the totality of these facts strongly suggests that PW1, PW2, PW3 and PW4 lived as one and single family exclusive to the deceased. His sons did not interact, visit, talk or acknowledge him as their father.

Although they are biological children of the deceased, they did not recognize him as their father, they did

not want anything to do with him especially when he needed them most. They are adults and could make independent decisions, which it seems they did not find it necessary to do so.

Their conduct towards the deceased is unfortunate and regrettable and undeserving of the deceased's estate. These circumstances divulge and confirm valid reasons that made the testator not to make any provision for the applicants either as gifts *intervivos* or in the Will. By virtue of **Sections 28(e) & (g) of the Law of Succession Act cap 160** they would not be eligible for reasonable provision of the deceased's estate.

The Court has considered cited case law on the subject;

ELIZABETH K. NDOLO vs GEORGE.M.NDOLO CIVIL APPEAL 128 of 1995

The Court held, the deceased left a valid Will but did not provide for the first 2 wives. The Court further held that

“ in Section 5 every adult has an unfettered testamentary freedom to dispose his or her property by will any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property.....given by section 5 must be exercised with responsibility, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime.”

The Applicants were not the deceased's responsibility at all; he was absolved from paying upkeep of the children through a consent filed in Court. The Applicants were brought up by their stepfather and not the deceased. There is no evidence of contact and interaction between the deceased and the Applicants during his life.

IN THE MATTER OF THE ESTATE OF LATE SOSPETER KIMANI WAITHAKA SUCCESSION CAUSE 341 OF 1998 The Court held;

“The Will of the departed must be honored as much as it is reasonably possible. Readjustments of the wishes of the dead, by the living, must be spared for only eccentric and unreasonably harmful testators and weird Wills. But in matters of normal preferences for certain beneficiaries for certain beneficiaries or dependents, maybe for their special goodness to the testator, the Court should not freely intervene to alter them.”

I have considered all relevant factors herein, the evidence in totality and the law and find no legal basis to award the Applicants reasonable provision as they did not acknowledge the deceased as their father during his life and instead the Court shall honor the deceased's wish that the Respondent is executor and sole beneficiary of his estate.

FINAL ORDERS

- 1. The deceased's Will of 24th July 2000 is the Valid Will of the deceased**
- 2. The Applicants are dependents of the deceased by virtue of being his biological sons from the previous marriage.**
- 3. They did not acknowledge the deceased as their father, therefore by virtue of Sections 28 (e) & (g) of Law of Succession Act Cap 160 they will not inherit from the deceased's estate.**
- 4. The Summons of 8th September, 2014 is dismissed**
- 5. The Executrix to file for Confirmation of grant of Probate of 13th January,2014.**
- 6. Each party to bear its own costs**
- 7. Each party is at liberty to apply**

DELIVERED, DATED & SIGNED IN OPEN COURT ON 16TH NOVEMBER 2015

M.W.MUIGAI

JUDGE

In the presence of;

Mr. Ongondi for the Applicants

Mr. Mohamood Sevany for the Respondent Absent