REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 1 OF 2002

IN THE MATTER OF THE ESTATE OF WILFRED GEROGE MAKUNDA OTTARO

BETWEEN

JAMES MAINA ANYANGA.....EXECUTOR

AND

LORNA YIMBIHA OTTARO.....1ST OBJECTOR DANAE OTTARO.....2ND OBJECTOR ROSEBELLA OTTARO.....3RD OBJECTOR KEES KEFA OTTARO.....4TH OBJECTOR DECLAN OTTARO.....5TH OBJECTOR

JUDGMENT

1. The succession cause herein relates to the estate of Wilfred George Makunda Ottaro *(the deceased)* who died on 30th September 2001 at Tarari Farm in Nakuru District. The deceased left a written will dated 27th June 2001 by which he appointed one James Maina Anyanga as the Executor of his will. On 25th January 2002 the Executor petitioned this court for a grant of probate of the written will.

2. On 28th March 2002, Lorna Yimbiha Ottaro, Danae Ottaro, Rosebella Ottaro, Kees Kefa Ottaro and Declan Ottaro *(the objectors)* filed a Notice of Objection to the making of grant on the following grounds-

(a) that the deceased herein lacked capacity to make the will dated 27th June 2001 due to illness which had irreparably compromised, obliterated and destroyed his state of mind and capacity to make a valid will,

(b) that the deceased was unduly influenced by Violet Amisi and Jennifer Wamwona to distribute his assets in their favour to the detriment of the other beneficiaries,

c. that the will herein does not conform in material aspects to the law and in particular that the same has not been validly signed or attested to as the same has been typed whereas the deceased did not know how to type,

(d) that Violet Amisi and Jennifer Wamwona were not legally married to the deceased yet they were among the beneficiaries in the will,

(e) that some of the deceased's dependants were not provided for in the will or were treated unfairly in the distribution and the will shows unlawful bias towards the lawful widow and her children,

(f) that the Executor appointed in the will is an outsider and his appointment is dubious, unlawful and discriminatory.

3. For those reasons they asked the court to declare the will invalid and deny the Grant of Probate sought by the Executor. Lorna Yimbiha Ottaro also filed an answer to the Petition for the Grant on 19th April 2002 on the same grounds as those in support of the Objection.

4. The Objection was heard by way of *viva voce* evidence. The Objectors called 3 witnesses. PW1 was Lorna Caroline Yimbiha Ottaro a W. BUKUSU/S. KANDUYI/2187 resident of Uhuru Gardens in Lang'ata. She testified that she married the deceased on 14th June 1969 at St. Lukes Cathedral Anglican Church, Butere and produced their marriage certificate *(exhibit 1)*. They resided in their matrimonial home at Maraua West Sub-location in Butere District and their union was blessed with four issues-

-Danae Nadwa Ottaro born on 2nd December 1969

-Kees Kefa Ottaro born in 1972

-Rosabella Lydis Hemo born in 1974; and

-Declan Ottaro Wakhu born in 1981

5. She produced their birth certificates as exhibits P.1 (a), (b), (c), and (d). PW1 testified that her relationship with her husband was cordial but had its own hard times. They have lived separately since the year 1992, as she resided in Ngara Girls High School Nairobi where she had been appointed Headmistress while the deceased resided in Nakuru but she would visit him during holidays when she was not busy. The children lived with their father in Nakuru and would live in both homes during holidays. During cross- examination she acknowledged having written to her husband in the year 1992 seeking to be set free from the marriage but it was her testimony that the two reconciled and continued with their marriage life. She denied having been separated or divorced from her husband and was even recognised as the widow at the funeral and the letter from the Assistant Chief dated 19th June 2003 *(exhibit P4)*.

6. PW1 learnt that the deceased had made a will at his funeral when she was informed by the deceased's brother, Dr. Murunga. She however did not know the contents of the will until the same was obtained by her lawyers. PW1 objects to the will **firstly** because at the time when the same was made, the deceased's health had greatly deteriorated and he had just received chemotherapy treatment earlier that month. She also objected to Violet Amisi and Jennifer Wamwona receiving large portions of the estate of the deceased. It was her testimony that to the best of her knowledge the deceased only had 1 wife although the two are described in the will as having been married to the deceased under customary law. She knew Violet as the deceased's tenant in Molo and his care taker and saw her children in the deceased's house at Nakuru. She had been informed that Jennifer was the deceased's aunt and did not know her as his wife or see any of her children. It was also her testimony that some of the deceased's assets and in particular land parcel No. W. BUKUSU/S. KANDUYI/2187 which was bequeathed to Jennifer Wamwona and Wycliffe Wanzetse Ottaro under the will but had already been transferred to them while the deceased was still alive.

7. PW2 was Danae Nandwa Ottaro the first born child of the deceased. She confirmed that the deceased had been diagnosed with rectum cancer in April 2001. That the deceased lived at her home in Nairobi for a week in June while undergoing chemotherapy treatment at the Nairobi Hospital. Although he could talk he was in great pain and was due for further sessions in July. According to her the deceased did not have capacity to make a will at that time.

8. PW2 denied that her parents had divorced or separated and only lived apart because of their jobs. The deceased was very close to his children and would have informed them of his marriage to Violet and Jennifer and of the existence of the will. He knew Violet as the deceased's tenant and saw her with Jennifer at the funeral where they presented themselves as the deceased's widows. She also testified that

the two had attended her engagement function but they were not introduced to the family. She did not inquire who had invited them but suspected that it was the deceased.

9. PW3, Kees Kefa Ottaro, was the deceased's son. He worked in Nakuru and would visit the deceased about 5 times a week. He testified that Violet and the deceased had lived together at the Tayari Farm since the year 2000 when the deceased retired although he did not know in what capacity they were living together. He assumed that she was a personal friend taking care of the deceased and who used to collect rent from some of his properties. It was his testimony that the Executor appointed was a stranger to them and had not been involved in the family affairs, that he was close to the deceased and visited many times after the will was made yet nothing was mentioned to him.

10. The Petitioner on his part called 3 witnesses. DW1 Jennifer Wamwona testified that she met the deceased in 1979 when he was separated from PW1. They married under Luhya Customary Law and were blessed with 2 issues- Jacqueline Achieng Ombwikwa and Wycliffe Wanzetse Ottaro. She lived with him in Molo before relocating to Bungoma where the deceased built a home for her but with her assistance. She acknowledged that Violet was the deceased's wife and they lived together in Molo.

11. DW2 was Jared Michael Ottaro, the deceased's brother. It was his testimony that on 27th June 2001 he was called by the deceased to his home in Molo. He found that the deceased had prepared notes on how he wished to distribute his property. The Executor and DW3 were present during the making and signing of the will. The deceased went through the notes he had prepared with them and made a final draft which he asked DW2 to have typed. Both wills were signed by the deceased and witnesses. He confirmed that Violet and Jennifer were the deceased's wives and this was generally accepted by the family.. After signing the will the deceased gave it to DW2 who kept it all through. It was his contention that the deceased was sane at the time he wrote the will and he urged the court to adopt the same.

12. DW3, Gilbert Onyango Ottaro also witnessed the deceased sign the will. According to him the deceased was of sound mind although he was in pain. He denied that there were any alterations made after the deceased signed the will and stated that the alterations in the will were made by the deceased to correct the errors he had made.

13. Counsel for the parties put in written submissions in further support of their respective positions in the case. I have considered the objections herein, the testimonies of the witnesses and the documentary evidence produced in these proceedings and I find the following to be the issues for determination-

(a) whether the deceased had capacity to make the will dated 27th June 2001 and if he exercised his free will in making the same,

(b) whether the will dated 27th June 2001 was properly executed, and

(c) whether the deceased made reasonable provisions for all his dependants in his will,

OF WHETHER THE DECEASED HAD CAPACITY TO MAKE THE WILL DATED 27TH JUNE 2001

14. There is a rebuttable presumption under Section 5 (3) of the Law of Succession Act *(Cap. 160, Laws of Kenya),* that a person making a will is of sound mind and that the will has been duly executed. The essentials of testamentary capacity were laid out in the case of **BANKS Vs. GOODFELLOW [1870] LR 5 QB 549** as cited with approval in the case of **VAGHELLA Vs. VAGHELLA-**

> ***"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."***

15. The burden of proof in the first instance lies upon the person alleging lack of capacity. Once it is established to the satisfaction of the court that in fact the testator was not of sound mind then the onus is shifted to the person propounding the will to prove the existence of mental capacity. This was the holding of the court in the case of **IN RE ESTATE OF GATUTHU NJUGUNA (DECEASED) [1998] eKLR** where it quoted an excerpt from **Halsbury's Laws of England, 4th Edition vol 17 at page 903-904-**

"where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity."

16. The deceased in my view was of sound mind at the time of making the will. From the evidence it is clear that the deceased's mind was not affected by his illness. PW2 testified that the deceased was still able to cater for his medical bills and in fact gave her money to pay for the same. In addition the deceased was able to identify his properties in the will and in particular crops growing on his land, various contracts attaching to those lands and those acquired but ownership had not yet reverted to him. He appreciated that some of his children were still in school and made provision for their school fees from his properties. DW2 and DW3 who were with the deceased at the time of making his will described him as having been of sound mind despite his illness.

17. It is therefore my finding that the deceased clearly knew and understood the nature of the business he was engaged in when making his will and providing for his dependants. The fact that he did not disclose his intention to make the will to the Objectors did not in my view cast any doubt to his capacity.

18. It was also contended that the deceased was unduly influenced by Violet Amisi and Jennifer Wamwona into making distributions in their favour to the detriment of the other dependants. Section 7 of the Law of Succession Act provides that a testator must exercise his free will in the distribution of his estate and the absence of such free will invalidate a will. It provides-

> ***7. A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void.***

19. Undue influence connotes an element of coercion or force, that the deceased did not exercise his free will in writing his will and was pressured by other forces. Such external pressure must be forceful and intended to coerce him into acting out of fear or involuntarily. The onus is on the person who alleges the existence of undue influence to prove the same.

20. It was the evidence of DW2 and DW3 that Jennifer was nowhere near the deceased when he made the will while Violet was in the other room. The handwritten will was typed and signed the same day and thereafter kept in the custody of DW2 until the death of the deceased. There is no evidence that Violet and Jennifer unduly influenced or exercised any dominion over the deceased into bequeathing the properties in their favour. The Objectors failed to demonstrate to the satisfaction of this court that the deceased was at the time not acting as a free agent.

OF WHETHER THE WILL WAS PROPERLY EXECUTED

21. 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.***

22. 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 then placed his mark on the typed document in the presence of two witnesses and the Executor thus acknowledging his signature. There was no evidence that the signature of the deceased on the typed will had been forged and PW2 confirmed that the signature on the typed will was his father's although it appeared dragged.

23. In addition, there was produced the handwritten copy of the will of the deceased *(exhibit 16)*. It was not contended by the Objectors that the handwriting therein was not the deceased's or that its contents differed from the typed will. Although there are alterations on the fourth page of the typed will, they were only on the names of the cars and not the persons to whom the same should be bequeathed and were made by the deceased in the presence of the witnesses.

24. Consequently, I find and hold that the will dated 27th June 2001 was properly executed by the deceased and conformed with the formal requirements under Section 11 of the Law of Succession Act.

OF WHETHER THE WILL FAILED TO MAKE REASONABLE PROVISION FOR THE DECEASED'S DEPENDANTS

25. It was alleged by the Objectors that the deceased gave Violet and Jennifer large portions of his property whereas they had not proved that they were married to him under the Luhya Customary Law or that the formal requirements of valid Luhya marriage had been adhered to.

26. A testator has power to dispose of his property as he pleases and the court is bound to respect those wishes as long they are not repugnant to the law and he does not leave out some dependants and beneficiaries. In the instant case, it is clear from the evidence that the deceased regarded Violet Amisi and Jennifer Wamwona as his wives whom he had married under the Luhya Customary Law, acknowledged their children as his and maintained them during his lifetime.

27. He also presented them to the family as his wives, as confirmed by DW2 and DW3. The two attended the deceased's funeral and were regarded as his widows. Although PW1, PW2 and PW3 denied having any knowledge of the deceased's marriage, they knew of Violet and Jennifer. PW1 confirmed that she was aware that Violet resided with the deceased in the Tayari Farm and had seen her and her children during her visit to Molo. PW2 confirmed having seen Jennifer during his engagement. He also stated that Violet would accompany the deceased to Nairobi for treatment. It was also acknowledged by all the witnesses that the deceased lived together with Violet in Molo and the suggestion by PW1, PW2, PW3 that they

only knew her as the deceased's tenant and care giver or that they did not know in what capacity the two were living together, was not truthful. It is my view therefore that Violet Amisi and Jennifer Wamwona were not strangers as alleged by the Objectors but were regarded as the wives of the deceased. In addition, they did not need to prove that they were married to the deceased as he acknowledged them and in exercise of his free will bequeathed them his property. The court cannot interfere with such dispositions where it has already been demonstrated that the deceased was of lucid mind and was acting without undue influence.

28. Failure to make provision for a dependant by a deceased person in his will does not invalidate the will as the court is empowered under Section 26 of the Law of Succession Act to make reasonable provision for the dependant. In exercise of its discretion, 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;

(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

29. It was not contended that the deceased was also survived by PW1 as they had not legally divorced or separated at the time of his death, and 5 daughters- Danae Nadwa Ottaro, Maureen Atemo, Rosabella Lydis Hemo, Susan Ottaro and Jacqueline Ochieng who are dependants within the meaning of Section 29 of the Law of Succession Act. PW1 alleged that she was still married to the deceased but had been unlawfully left out of the will. It was her contention that her relationship with the deceased was still very cordial and he had no reason to leave her out. In his will the deceased referred to PW1 as his ex-wife. He stated therein that she had deserted the matrimonial home in the year 1992.

30. It appears that according to him, the marriage with PW1 had broken down and he no longer regarded her as his wife. Indeed while in Nairobi for treatment, he lived with PW2 and not with PW1, who has a home in Nairobi which she had acquired on her own. It is clear that the relationship with the deceased was not as cordial as represented by PW1. He nevertheless bequeathed her the property situate in Kakamega and four motor vehicles. He stated his reasons for treating PW1 differently from the other widows and this court will respect his reasons.

31. The provisions of Section 35, 37 and 38 of the Law of Succession Act caters for children and does not distinguish between male and female children or their marital status. Where the deceased leaves them out on account of Customary Law which does not allow daughters to inherit, then the court may interfere as such considerations are repugnant to the Constitution which prohibits discrimination on the basis of gender or marital status. The deceased included Danae Nadwa Ottaro and Maureen Atemo, in his will but did not leave any property to Rosabella Lydis Hemo, Susan Ottaro and Jacqueline Ochieng. Being daughters of the deceased, and not having willfully renounced or disclaimed their entitlement to the deceased's property, they are entitled as dependants to inherit the same.

32. In the end I find that the deceased herein had capacity to make the will dated 27th June 2001 and that the same was properly executed. I also find that no valid objection has been raised against the appointment of the Executor and consequently confirm his appointment. Section 6 of the Law of

Succession Act grants the testator discretion over the appointment of the Executor. The fact that he was not known to the beneficiaries is not material for purposes of his appointment and it is he who is ranked in priority under Section 62 of the Law of Succession Act to entitlement to be issued with a Grant of Letters of Administration.

33. In this judgment the expressions *"executor"* and *"personal representative"* have the respective meanings assigned to them under the Law of Succession Act, *"Executor"* means *"a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided."*

and *"personal representative"* means -

"the executor or administrator of a deceased person."

34.For the avoidance of doubt as to his powers, Section 82(d) of the Act confers upon personal representatives the powers -

> ***(a) – (c)***
>
> ***(d) to appropriate, at any time after confirmation of the grant, any assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for the purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary), the value of the respective assets and liabilities of the estate, and to make any transfer which may be requisite for giving effect to the appropriation.***
>
> PROVIDED that, except so far as otherwise expressly provided by any will -
>
> ***(i) no application shall be made so as to affect adversely any specific legacy;***
>
> ***(ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the Manager of his estate (if any) or by the court shall be required."***

35. In light of the provisions of Sections 35, 37 and 38 of the Act cited in paragraph 31 *(supra)* and the provisions of Article 27 of the Constitution against any form of discrimination on the grounds of gender or marital status, I direct the executor to exercise his powers pursuant to Section 82(d) of the Law of Succession Act, and to make provision for all the children of the deceased including the daughters to get equal shares of the parcels of land and residential plots cited in clauses 1, 2 and 5 (b) of the Will and in making such provision, the Executor shall consult the beneficiaries in terms of the proviso to Section 82 and exclude the properties bequeathed to the widows where their matrimonial homes are situate that is, the two plots in Tayari Farm, the residential plot in Kakamega which had been bequeathed to PW1 and the two plots in Bungoma known as Title No. E. BUKUSU/S KANDUYI/4476 and Title No. E. BUKUSU/S. KANDUYI/3518.

36. I do note that the title to the parcel of land known as W. BUKUSU/S. KANDUYI/2187 was transferred to Wycliffe Wanzetse by the deceased during his lifetime and this shall be taken into account by the Executor in the distribution of the property in favour of Wycliffe Wanzetse. The management, use and occupation of the properties by the deceased's widows during their lifetime shall remain as per the wishes of the deceased. The Executor's proposals for provision of the children of the deceased shall be

filed before this court for confirmation.

37. This being a family matter, each party shall bear its own costs.

38. It is so ordered.

Dated, signed and delivered at Nakuru this 21st day of February 2014

M. J. ANYARA EMUKULE

JUDGE