



In re Estate of Anthony John Thompson - Deceased (Succession Cause 1965 & 1788 of 2009 (Consolidated)) [2014] KEHC 8475 (KLR) (Family) (21 November 2014) (Ruling)

Solomon Njoroge Kiore v Beatrice Wairimu Kariuki [2014] eKLR

Neutral citation: [2014] KEHC 8475 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

FAMILY

SUCCESSION CAUSE 1965 & 1788 OF 2009 (CONSOLIDATED)

LK KIMARU, J

NOVEMBER 21, 2014

IN THE MATTER OF THE ESTATE OF ANTHONY JOHN THOMPSON – DECEASED

BETWEEN

SOLOMON NJOROGE KIORE PETITIONER

AND

BEATRICE WAIRIMU KARIUKI OBJECTOR

RULING

1. Anthony John Thompson (the deceased) died between 23rd June 2009 and 6th July 2009 at Saint Claire Sur Elle (Manche), 14 LA Haye Besvet in the Republic of France. According to the death certificate issued by the French authorities, the deceased's body was found in his house on 7th July 2009. Upon the deceased's death, a petition seeking a grant of letters of administration intestate to the estate of the deceased was filed on 11th September 2009 in this court. It was registered as Succession Cause No. 1965 of 2009. The petition was filed by Solomon Njoroge Kiore (hereinafter referred to as the Objector). He filed the petition in his capacity as a director of a company known as Furncon Limited. This company allegedly purchased from the deceased a parcel of land registered as LR No. 1012/47/2 measuring 4.8 acres or thereabout situate at Roysambu along Nairobi Thika road.
2. In the meantime, Beatrice Wairimu Kariuki (hereinafter called the petitioner) also filed a petition in this court seeking to be issued with a grant of probate in respect of the last Written Will of the deceased. The petition was filed on 14th August 2009. The Petitioner claimed that the deceased had written his last Will on 28th May 2009 bequeathing to her his Kenyan estate. This was in petition No.1788 of 2009. Tina Louse Belcher Cox, swore an affidavit opposing the grant of probate to the Petitioner. She stated that she was the mother of Clara Amy Cox, the daughter of the deceased. She had also been issued with



a grant of letters of administration by the court in Saint Lo Cedex (Manche) in the Republic of France. She denied the Petitioner's assertion to the effect that the deceased had appointed the Petitioner as the executor of his Will in respect of his estate in Kenya or that the deceased had appointed the Petitioner as such beneficiary.

3. An objection to the grant of probate of the Will was filed by Solomon Njoroge Kiore (hereinafter called "the objector") on 27th October 2009. Another objection to the grant of probate of the Will to the Petitioner was also registered on behalf Clara Amy Cox, the deceased's daughter (hereinafter called "the interested party"). In their objections, they averred that the deceased died intestate and never executed the alleged Will propounded by the petitioner. It was contended that the said Will was not genuine. It was also argued that the deceased did not have the testamentary capacity at the time of executing the said Will, that the property bequeathed by the deceased in his Will was not free property and that the execution of the Will had been obtained by fraud, undue influence and coercion on the part of the Petitioner. It was therefore contended that the Will was invalid.
4. There have been various applications filed by the parties to these proceedings. It became clear to the court that the two separate proceedings relating to the estate of the same deceased person could not proceed unless the two succession causes were consolidated. The two succession causes were duly consolidated. It also became apparent that the issue that would be given priority in determination is whether or not the Will which is alleged to have been written by the deceased is indeed valid. It is upon the determination of the validity of the Will that other issues will be determined thereafter. In that regard, this court directed the parties to file their respective written submission for the court to determine the validity or otherwise of the Will. The parties to these proceedings duly complied and filed their respective written submission. The court fixed the cause for hearing on various dates where the parties to this succession cause were given an opportunity, either in person or through counsel, to highlight their written submission. The hearing commenced on 1st April 2014. The cause was heard on various subsequent dates. It was concluded on 22nd October 2014.
5. During the hearing of the cause, Mr. Oriema, learned Counsel for the Petitioner submitted that the Will was executed by the deceased and duly attested by two qualified witnesses. It was the Petitioner's case that in the aforesaid Will, she was appointed as the executrix of the Will. Counsel for the Petitioner submitted that the deceased had capacity to make the Will. To support his assertions, the Petitioner placed reliance on the affidavits deposed by James Otieno Okeyo, the advocate who drafted the Will and supervised the execution and attestation of the Will. She also relied on the affidavit of Collins Ochieng Oyomba, an attesting witness. She submitted that this demonstrated that the statutory requirements for due execution of the Will were satisfied. It was submitted that the said attesting witnesses had sworn that they were present and saw the testator affix his signature to the Will. The witnesses also put their signatures in the Will in the testator's presence. It was further argued that the deceased was of sound mind when he executed the said Will. Thus it was the Petitioner's case that the requirements of Sections 5(1),(3),(4) and 11 of the Law of Succession Act were complied with. It was Mr. Oriema's submission that the Objector's claim in the estate was that of a buyer which can be argued later after the Will has been proved during the determination of the extent of the deceased's estate.
6. On his part, Mr. Munyalo, Learned Counsel for the Objector challenged the validity, content, execution and attestation of the alleged Will. The Objector argued that the alleged Will was an attempt to bequeath to the Petitioner property that was not free and available for distribution by the deceased. According to Mr. Munyalo, the foreign property implied to in the Will had been sold to the Objector. That notwithstanding, the Objector submitted that the said property was jointly owned by the deceased and his late sister Sheila Thompson, and therefore the deceased did not have capacity to dispose it. On the other hand, it was urged on behalf of the Objector that if at all the deceased



made the said Will, he did not execute the same out of his own free will. To support this assertion, counsel for the Objector made an attempt to demonstrate that the Will was allegedly made in suspicious circumstances. It was submitted that the deceased had been confined in the Applicant's house at the time the Will was allegedly made. . The deceased was under tight security. The Objector argued that it was the Petitioner who played a critical role in procuring the execution of the said Will through coercion.

7. Counsel for the Objector submitted that the Will was not valid for reason that it did not have a schedule of assets contrary to Section 3 of the Law of Succession Act. The Objector argued that the court could not therefore assume that the property subject of the suit is part of the deceased's estate. It was further submitted that the deceased was not of sound mind at the time it is alleged he executed the Will. To support this assertion, Counsel for the Objector relied on a letter by the deceased written in 2004 in which he had indicated that he was suffering from a brain tumour disease which required him to be on constant medication.
8. On behalf of the Interested Party, Mr. Kabucho contended that the Will was invalid. Mr. Kabucho also joined issue with the Objector in regard to the argument that the Will could not have being valid in so far as purported to dispose a property that was not free. Mr. Kabucho's submitted that even if the deceased made the Will, the same was made in circumstances where a mistake may be presumed to have occurred ab initio.
9. On his part, Mr. Solomon Kiore (the Objector) the Petitioner in Succession Cause No. 1965 of 2009 also challenged the execution of the alleged Will on the ground that the same was procured by coercion. According to him, the fact that the deceased deliberately misrepresented his passport number to the drafters of the will demonstrates that the deceased must have been in danger. Mr. Kiore further submitted that the Will was invalid since it was not drawn by the deceased himself, that it was forged and that it concerned properties of the deceased outside Kenya.
10. In a rejoinder, Counsel for the Petitioner denied all the allegations contained in the objections and specifically reiterated and reaffirmed the averments in the Petitioner's pleadings. He stated that the Will could not be invalidated simply because a property stated therein is not free or that it did not have a schedule of assets. It was Mr. Oriema's submission that no medical evidence was adduced to prove the deceased lacked mental capacity to draw the Will. On the issue of the will containing erroneous passport number of the deceased, Mr. Oriema submitted that the affidavit of James Okeyo, the lawyer who drafted the Will, did not specifically state that the Will contained the correct passport number. He therefore urged the court to disregard the allegation that the error was intentional and meant to invalidate the Will. According to Mr. Oriema, it is not a requirement that the Will be personally prepared by the deceased for it to be deemed valid. In view of the foregoing, Counsel for the Petitioner urged the court to find that the will was indeed valid.
11. This court has carefully considered the rival submission, both written and oral, made by the parties to this succession cause. As earlier stated in this Ruling, there several issues that have been brought forth for determination by the court. This court formed the view (a view which was accepted by the parties) that the first issue that ought to be determined is whether or not the Will that is sought to be proved by the Petitioner is valid. The Will that is the subject of these proceedings is dated 28th May 2009. The deceased died about a month later after allegedly executing the Will. The said Will was said to be in respect of the "foreign estate" of the deceased. It is important that the relevant contents of the Will be set out in full in this Ruling. After the usual introduction, the Will provides thus:
 1. I Declare that notwithstanding that I am domiciled in France I wish this Will to be governed and construed according to the laws of Kenya.



2. If My Friend Beatrice Wairimu Kariuki (ID NO.13XXX062) shall survive me for a period of not less than thirty days but not otherwise then I appoint her to be the sole executor of this my Will and subject to the payment of my funeral and testamentary expenses and foreign debts and all foreign duties which with any legacies given by any codicil hereto shall be paid primarily out of my personal and movable Foreign Estate I give devise and bequeath all my Foreign Estate to my friend for her own use and benefit absolutely.
 3. If My Friend shall not survive me as aforesaid, then I direct and declare that the following clauses shall take effect in lieu of clause 2 hereof.
 4. I Appoint my friend Tabitha Wanja Mbatia whom failing my friend Ruth Njeri Mbatia to be executors of this my Will.”
12. The Will was prepared by James Otieno Okeyo, an advocate at the firm of Muthoga Gaturu & Company Advocates. In the affidavit he swore in support of the Petitioner’s case, he deponed that on 19th May 2009, the deceased instructed him to take over the conduct of two cases which dealt with the parcel of land that is the subject of this dispute. He took over the cases from the firm of Satish Gautama. The two cases are High Court Succession Cause No.2276 of 2006 (In the matter of the estate of Sheila Thompson) and High Court Civil Suit No. 109 of 2005 (Furncon Limited –vs- Anthony John Thompson and Sheila Thompson). He further deponed that he extensively interviewed the deceased and was satisfied that he had mental capacity to prepare the Will. It was then that he drafted the Will and witnessed it. The Will was further witnessed by Collins Ochieng Oyomba, another advocate.
13. It is the Petitioner’s case that the Will fulfilled all the legal requirements as regard the capacity of the testator to make the Will, the preparation of the Will and its execution and finally, the two witnesses who swore that they saw the deceased sign the Will after which they appended their signatures. In that regard, the Petitioner relied on Section 5 and Section 11 of the Law of Succession Act. The Objector and the Interested Party challenged the Will on the grounds that the deceased, in the first place, lacked capacity to execute the Will due to his mental incapacity. The Objector stated that the deceased had a brain tumour which was diagnosed in 2004 and which ailed the deceased until the time of his demise. In this period, the deceased required medication to ameliorate his medical condition. They further argued that the deceased would not have written the Will without acknowledging the fact that there existed several proceedings in court touching on the only subject matter of the succession cause. They contended that the Will was imprecise because it did not state what estate the deceased was referring to.
14. This court has evaluated the facts of this succession cause in relation to whether or not the Will is valid and has taken the following view of the matter. Section 5(1) of the Law of Succession Act essentially embodies the principle of testamentary freedom; by providing that any person is capable of disposing of all or any of his free property by Will so long as he is of sound mind and not a minor. The testator’s testamentary freedom is however constrained by Sections 26, 27 and 28 of the Law of Succession Act that requires a testator to, at the very least, provide for his dependants as defined under Section 29 of the Law of Succession Act. Under the Law of Succession Act therefore, a testator cannot, by Will, fail to provide for a dependant unless he gives reasons for his failure to make provision for such dependant (see Section 28(g) of the Law of Succession Act).
15. Persons of unsound mind are not capable of making valid Wills. This requirement is not absolute. A Will can be declared to be valid if it is established that the testator, though a person of unsound mind, was in his lucid state when he prepared the Will. Such Will will be validated if it is established that the testator made the Will before his mind became afflicted. In *Vijay Chandrakant Shah vs. The Public Trustee Nairobi* CA Civil Appeal No. 63 of 1984 (Kneller JA, Platt and Gachuhi Ag. JJA),



the deceased was very sick from syphilis and diabetes at the time he executed his Will, but it was held by the Court of Appeal, on the evidence, that he had executed the same during a lucid moment and therefore the will was valid.

16. The test for mental capacity to make a will is not directly linked to a mental disorder. Cockburn C.J set the test in *Banks Vs. Goodfellow* (1870) L.R. 5 Q.B 549 in the following terms:

he must...have sound and disposing mind and memory. In other words, he ought to be capable of making his Will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, and of the persons who are the objects of his bounty and the manner it is to be distributed between them.”

17. In the Matter of the Estate of James Ngengi Muigai, Nairobi HC Succession Cause No. 523 of 1996 (unreported) the testator had dementia and was physically incapacitated due to joint pains and hypertension. At the time it is alleged he made the Will. The witnesses who attested the Will testified that the deceased looked normal. The court was satisfied that he was of sound mind as the objectors had failed to prove unsoundness of mind at the time of the execution of the Will. The court observed that the Objectors were supposed to prove that at the time of executing the Will the deceased was of unsound mind occasioned by mental or physical illness, drunkenness or other cause to make him not know what he is doing.

18. Section 11 of the Law of Succession Act provides thus:-

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 necessitating that more than one witness be present at the same time, and no particular form of attestation shall be necessary”.
19. In *Halsbury’s Laws of England* 4th Edition Vol. 17 para 903, the authors states as follows:

General burden of proof

Generally speaking, the law presumes capacity, and no evidence is required to prove the testator’s sanity, if it is not impeached. A will, rational on the face of it and shown to have been signed and attested in the manner prescribed by law, is presumed, in the absence of any evidence to the contrary, to have been made by a person of competent understanding. However, it is the duty of the executors or any other person setting up a will to show that it is the act of a competent testator, and therefore, where any dispute or doubt exists as to the capacity of the testator, his testamentary capacity must be established and proved affirmatively. The issue of capacity is one of fact. The burden of proof of sanity



is considerably increased when it appears that the testator had been subject to previous unsoundness of mind.”

20. From the affidavit evidence on record, it was clear that the deceased had in the recent past suffered from a brain tumour. The deceased himself indicated that he required medication to ameliorate his health situation. This was in 2004. The Petitioner argued that the Objector and the Interested Parties had not placed recent medical evidence on record to establish that the deceased had mental incapacity at the time he made the Will. That may be so. However, the fact that the deceased died hardly a month and few days after allegedly making the said Will raises suspicion as to whether he had the mental capacity to make the Will.
21. The death certificate issued by the French Authorities does not indicate the deceased’s cause of death. The reason for this failure to indicate the cause of death of the deceased maybe attributed to the fact that the body of the deceased was found several days after his death. Being summer in the northern hemisphere at the time, it was probable that the body of the deceased was decomposed that a definitive cause of death could not be established. It is however on record that the deceased himself stated that he had brain tumour. There was no evidence which was adduced to suggest that the tumour was removed in a surgical operation. Therefore, if the deceased had the brain tumour at the time it is alleged he made the Will, then his health situation may have worsened to the extent that it affected his mental capacity. It is the finding of this court that the deceased may have lacked mental capacity to make the Will at the time it is alleged that he made the Will. The court has qualified its decision on the issue of the mental health of the deceased. That qualification will however become clearer when the court analyses other surrounding facts of this case.
22. In the present cause, it was clear that what was described in the Will as “Foreign Estate” of the deceased is infact a parcel of land known as LR. No.1012/47/2 situate at Roysambu in Nairobi. This parcel of land has been the subject of litigation for a period of more than twenty (20) years in this court. The parcel of land was originally registered to the parents of the deceased. The mother of the deceased had entered into an agreement to either sell or lease part of the suit parcel of land to the Objector. Upon the demise of their parents, the deceased and his sister, Sheila Thompson, inherited the land. The deceased and his sister entered into another agreement whereby they agreed to sell the suit parcel of land to a company associated with the Objector. From the pleadings filed in the various suits, it was apparent that there was dispute whether the Objector paid the full purchase consideration to the family of the deceased. What is not in dispute is that upon the death of Sheila Thompson, the Objector was issued with a grant of letters of administration intestate in respect of her estate. The deceased and her late sister still remain the joint registered owners of the suit property.
23. Part of the claim lodged by the Objector was settled by consent with the deceased. The other part was not determined at the time of the deceased’s death. During the pendency of these suits, the Petitioner then allegedly acting as an advocate for the deceased procured a purchaser to purchase the suit property. The purchaser was a company by the name Kimuri Housing Company Limited. The purchase consideration was stated to be GBP 885,000. The Petitioner prepared this agreement even though she was aware that the Objector was the administrator of the estate of Sheila Thompson, the sister of the deceased who was a co-owner of the suit parcel of land. She concealed this fact from the Objector. The agreement was annulled by intervention of the Objector. It was therefore improbable that the deceased would have made the Will without acknowledging the existence of these facts. The Law of Succession Act does not prohibit a testator from making a Will with general bequests i.e. where the testator has not specifically defined what constitutes his estate and the extent of what he or she owns.



24. However, in the circumstances of this case, the Petitioner as a beneficiary in the Will, should have insisted that the deceased defines the extent of what he considers to be his “Foreign Estate”. The fact that the deceased allegedly made a general bequest without defining the extent of his estate, in light of the numerous suits pending in court, leads this court to no other conclusion that the deceased was not exercising his free will when it was purported that he made the Will. It is further improbable that the deceased would have excluded his only child as a beneficiary to his estate in favour of a friend. This court therefore finds that the Will was procured by undue influence with a view to fraudulently conferring an advantage to the Petitioner as compared with other claimants in the suits now pending before court. This decision is made pursuant to Section 7 of the Law of Succession Act which grants this court jurisdiction to void a Will where it is established that the testator’s free will was taken away either by coercion or undue influence. This court therefore holds that the Will purportedly made by the deceased on 29th May 2009 is invalid.
25. What remains is for this court to determine the way forward in this petition. Since the court has declared the purported Will of the deceased null and void, the dispute in this succession cause shall proceed as if the deceased had died intestate. The Petitioner will be required to establish, by evidence, her dependency in accordance with Section 29 of the Law of Succession Act. In that regard, the daughter of the deceased Clara Amy Cox and her mother Tina Louise Belcher shall have priority to be granted letters of administration intestate to administer the estate of the deceased. The Objector will establish his claim as a creditor of the estate of the deceased at the appropriate time. To forestall interference with the property that comprises the only estate of the deceased, the title in respect of the suit property shall remain registered in the name of the deceased and that of his late sister Sheila Thompson until the two succession cases are heard and determined by the court. In the premises therefore, the Petitioner’s petition for grant of probate of the alleged written Will of the deceased is hereby dismissed. The Petitioner shall pay the costs of the said petition to the Objector and the Interested Party. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2014.

L. KIMARU

JUDGE

