REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO.198 OF 2005

IN THE MATTER OF THE ESTATE OF SYEVOSE MUKULU

SABINA KILOKO NZIOKA .....APPLICANT

VERSUS

JOHN MUTINDA KIMONGO .....RESPONDENT

RULING

On 22nd December, 2005, **Sabina Kiloko Nzioka**, hereinafter " **the applicant**" mounted an application for revocation and or annulment of a grant made to **John Mutinda Kimongo**, hereinafter "**the Respondent**" by this court on 13th July, 2005.

The application was an anchored on Section 76 of the law of Succession Act and rule 44 of the Probate and Administration rules. The complaint by the applicant was that the grant had been obtained fraudulently by the respondent by way of making of a false statement or by the concealment from the court of something material to the cause; secondly, the grant had been obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

In support of the application, the applicant swore that **Syevose Mukulu**, hereinafter "**the deceased**" died on 27th February, 2004 and a grant of letters of administration intestate was made to the respondent by this court on 13th July, 2005. That grant was obtained fraudulently by the making of a false statement and concealment from the court of something material to the cause since the deceased died testate. The applicant was the executrix and administrator of the estate of the deceased by virtue of the will executed by the deceased prior to her death.

The application was duly served on the respondent but it would appear that he did not bother to put in a response.

When the application came before **Onyancha J.** for directions on 31st July, 2006, he directed amongst other directions that the application be heard by way of viva voce evidence.

On 7th July, 2008, the cause came before **Lenaola J.** who had replaced **Onyancha J.** in the station, for hearing. However, **Lenaola J.** having seen a copy of the will annexed to the application deemed it fit

to probe the will first. In the meantime he proceeded to revoke the grant earlier issued to the respondent on 13th July, 2008. What was then left was proof of the deceased's written will. Parties elected to do so by calling oral evidence. The applicant called two witnesses including the advocate who drew the will and a witness to the same.

The advocate, **Victor Vinya Mule**, testified on behalf of the applicant that he was admitted to the bar in 1995. After admission he practiced privately in the name and style of **V.V. Mule & Co. Advocates** up to the year 2005 when he joined the public service as a State Counsel. On 8th March, 2002 on the instructions of the deceased, he prepared a written will. The deceased was personally known to him as they came from the same Kithangaini Catholic Parish, and had also been a client of his in other matters. He advised her of the legal requirements. She provided a list of all her assets and 2 witnesses who knew her well. On 8th March, 2007, the deceased came with the 2 witnesses, **Ronald Mwangangi Muthangi** and **Fe rista Katheu**. The deceased thumb-printed the will with her left thumb in his presence and in the presence of the 2 witnesses. He required the 2 witnesses to write their names, identity card numbers and addresses on the will and they did so. They also signed the will on both pages in his presence and in the presence of each other as well as the deceased. He then witnessed their signatures. In his view the will met all the requirements. The executrix named in the will was **Sabina Kiloko Nzioka**. She was not present when the will was drawn up and signed as aforesaid. The named beneficiary was again **Sabina Kiloko Nzioka**. He did not know her when he drew up the will. After the will was duly executed, he kept it in his safe. The deceased appeared to be about 60 years old, and was of sound mind. She appeared not to suffer any disability, mental or physical. He tendered in evidence the written will. Subsequently, he learned that the deceased had passed on. He got in touch with the named executrix of the will and gave it to her.

Cross-examined by **Mr. Mutinda**, learned counsel for the respondent, he stated that he had known the deceased for more than 10 years before he prepared the will. She had been his client since 1999 but had known her for much longer as she was a fellow parishioner. He did not ask her whether she was married and had children and or relatives. He had prepared the will in English and translated it into Kikamba language sentence by sentence. The deceased appeared to be between 60 and 70 years old, with all her faculties intact. Initially, the deceased had come to his chambers unaccompanied. She had been referred to him by their local priest. He did not know the relationship between the deceased and the witnesses to the will.

Ronald Mwangangi Muthengi testified on behalf of the applicant as well, that he had known the deceased since they belonged to the same church; in Kithangaini parish, where he was the parish chair. On 8th March, 2002, the deceased approached him to witness the will prepared by **V.V. Mule & Co. Advocates** on her instructions. He proceeded to the advocates offices with her and one, **Ferista Kathau Ndunda** who was also going to be a witness. She was also a church member. The advocates read and interpreted the will to the deceased in Kikamba language. The deceased confirmed the contents and signed the will by thumb printing in their presence. The witnesses then witnessed the thumb print by signing. Thereafter, the advocate signed the will in their presence. They signed on both pages of the will. The deceased had approached the witnesses in church to be her witnesses to the will. The deceased was aged 60 – 70 years old and was strong and walked without the aid of a walking stick. She was equally of sound mind and appeared to have had the will prepared out of her own volition. **Sabina Kilonzo Nzioka** was not present at the time the will was executed.

Cross-examined, he stated that he did not know that **Sabina's** home was in the same area as his. Her home was about 4 kms from his though. He did not know her husband as well. He knew that **Ferista** had children and though he knew her home, he had never been there. He knew as well that **Ferista** was the daughter of the deceased. He disagreed with counsel that the deceased was over 90 years old when she died nor that she was ailing. There was no other person in the advocate's chambers other the witness, deceased, **Ferista** and the advocate. The will was read and explained in Kikamba.

The respondent similarly called 2 witnesses to testify on his behalf. **Beatrice Mueni Kitala,** testified that she had known the deceased since her youth. That when the deceased passed on she was almost 90 years old. Before she passed on she had been ailing for close to a year. She used to bleed from her private parts

and had been taken to Masii health centre a couple of times by **Peter Kyunguli, Joseph Mwanzia** and herself, but was never admitted. The witness used to take care of her at home as her husband had pre-deceased her. They had 2 children **Kimongo Mukulu** and **Katheu Mukulu (Ferista).** She was not aware that the deceased had left a will in favour of **Sabina Kioko**. Sabina is a granddaughter of the deceased and a daughter of **Ferista Katheu**. The deceased was taken away while she had gone to fetch water by **Ferista Katheu**. She reported the matter to the village elders. Apparently, the deceased was taken to the home of **Sabina**. She died a month or so thereafter. When nursing her, the deceased had lost her faculties. She was old and feeble. She was in pain and could not communicate properly.

Cross-examined by **Mr. Kilonzo**, learned counsel for the applicant she responded that the deceased was her neighbour. Her husband's mother was the deceased's sister. The deceased's daughter had married far from deceased's home. Her own son had already died. The deceased was living alone as the respondent had gone to look for employment. That was why she was nursing and taking care of her. Before her death, the deceased had been ill for about 1½ years. **Ferista** took her to **Sabina's** home and not hospital. Before she fell ill she was strong as she farmed, attended church and was able to take care of herself. She conceded that in the year 2002, she was quite healthy, strong and mentally sound. If anyone said to the contrary, he would be lying. The deceased could not have been carried by anyone to the offices of the advocate as she was then not yet ill.

Thereafter **Waweru J.** who had been presiding over the cause, left the station on transfer and could not conclude the cause. On 21st November, 2011, the cause came before me for directions. Parties agreed that the cause proceeds from where **Waweru J.** had stopped.

The 2nd witness called by the respondent was **Peter Mutunga Kyunguli.** He knew both the applicant, respondent and the deceased. The deceased was the wife of his father's brother. She died when she was over 90 years. The respondent was a grandson of the deceased. Before she died, she was staying in her home at Masii on her own most of the time but neighbours would come and assist her because of her age. Mostly it was **Beatrice Katala** who used to do so. The deceased started ailing in 1990's and he used to take her to hospital. She was not in a position to write a will as she was very senile. According to his clan, if a person intended to write a will he must call relatives. If the deceased had written a will, he would have known since he was her closest relative. To him the estate of the deceased should revert to her grandson who is the son of her son, the respondent.

Cross-examined, he responded that it was a mistake if the deceased wrote a will alone. She ought to have told him. He had never seen the alleged will. He could not tell whether the deceased had been taken to the advocates offices where the will was drawn and she signed. **Ferista** was his cousin and the deceased was her mother. **Sabina Kioko** was a daughter of **Ferista** and therefore a granddaughter to the deceased.

With the close of the respondent's case, parties agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered the same alongside cited authorities.

From the onset, I must say that I do not understand what this exercise was all about. The application before court was for the revocation and or annulment of the grant. By **Lenaola J.** revoking the grant on 7th July, 2008, he effectively disposed of the application. What was left, was for the parties to decide on their next move. That would have entailed the applicant petitioning for the grant of probate of the written Will. It could then have been open to the respondent to challenge the will as appropriate. However, it appears the parties agreed to engage the process in an overdrive gear. So that without waiting for appropriate proceedings to be mounted, they wanted the authenticity and genuineness of the will established first. I want to assume that once that is done with, the grant shall issue to the appropriate and deserving party in this cause. I will go along with this rather unorthodox manner of dealing with the cause since the parties asked for it.

From the record before me, the deceased died on 27th February, 2004. According to the death

certificate annexed to the petition for letters of administration intestate filed by the respondent on 13th May, 2005, she was aged 74 years contrary to the evidence of **Beatrice Mueni Katala** and **Peter Mulunga Kyunguti** that she was aged over 90 years. Upon her demise, the respondent, a grandson petitioned for a grant of letters of administration intestate of her estate. An interim grant was duly issued on 13th July, 2005. The respondent on 13th January, 2006 applied for the confirmation of the grant after the statutory period had lapsed. It was at this juncture that the applicant filed summons for revocation and or annulment of the grant based on the fact that though the interim grant of letters of administration intestate had been issued, the deceased had in fact left behind a valid written will. A copy of the will was annexed to the application. On 7th July, 2008 **Lenaola J.** ordered:

"***Having seen a copy of the will annexed to the application dated 28th November, 2008 I deem it fit to probe it first. In the meantime, I revoke the grant issued on 13th July, 2005. The will to be probed on 3rd November, 2008***".

According to the applicant, this order was made *sui moto* by the judge based on the strength of the will annexed to the application. To the respondent however, it is not true as alleged by the applicant that the order was made *suo moto*. Rather it was mutually agreed between the parties that the interim grant be set aside and the prove of the will be heard first.

This is a court of record. The record does not show that there was a consent to revoke the interim grant. The wording of the order is self-explanatory and smacks of no ambiguity. The judge on his own motion having seen a copy of the will decided to revoke the grant *suo moto*. If it was a consent order, no doubt, that would have been captured in the record. In the premises I would agree with counsel for the applicant that the interim grant was revoked by the judge *suo moto*.

In probing the will, we need to establish whether, the will as drawn met the statutory requirements of a valid will. The submissions by the applicant is that the will met all the requirements of a valid will and therefore it ought to be upheld by this court. The respondent submits to the contrary. That the will did not comply with rules 54, 55, 56 and 57 of the probate and administration rules. Otherwise, he concedes that the applicant seemingly complied with rule 2 of the same rules. He also claims that because of her age and failing health, she could not have been in a position to write a will.

What entails a valid will? This is covered by section 5 through to 15 all inclusive of the Law of Succession Act as well as rules 51 through to 54 of the Probate and Administration rules. According to section 5, any adult person of sound mind whether a woman or man can write or execute a will. There is a presumption that a person making a will is deemed to be of sound mind unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing. The burden of proof that the testator was, at the time he made the will, not of sound mind, shall be upon the person who alleges in this case, the respondent.

The deceased was an adult woman capable of making a will. However, the respondent has challenged in her capacity to undertake such an exercise on account of her age and failing health. On that basis she had no mental capacity to execute a will. Dealing with the aspect of age, the respondent's witnesses were not candid when they claimed that the deceased was aged 90 years at the time of her death and was therefore suffering from senility. It is a misconception to hold or assume that a person aged 90 years *perse* is incapable of mental capacity to execute the will. There are countless senior citizens of this country aged over 90 years who are active and still maintain sharp mental capacity. **Charles Njonjo** is one of them. Secondly, it is there in black and white that in fact the deceased was not aged 90 years at the time of her death. She was indeed aged 74 years. (See the death certificate). Again the advocate who drew the will testified and he was not seriously challenged on this aspect of the maker, that the deceased had been his client for over 10 years and had been introduced to him by the local priest. She was of sound mind at the time she gave instructions to him to draw up the will. She used to come to his offices on 2nd floor alone and climb stairs without assistance. Similarly **Ronald Mwangngi Muthangi** confirmed that on the day they witnessed the will, they had walked with the deceased for ½ kilometer from the bus stage

to the offices of the advocate. She was strong and walked without the aid of a walking stick. She also walked up a flight of stairs to the 2nd floor, where the offices of the advocate were located. Finally, **Beatrice Mueni Katala**, the respondents witness testified under cross-examination that the deceased fell ill about June, 2003. Prior to that she was strong and used to cultivate her shamba, attended church and was able to take care of herself. As a matter of fact, in the year 2002, when she executed the will, she was according to this witness, quite healthy, used to give stories and her mental ability was not in doubt.

With this kind of evidence, how can the respondent claim that the deceased had lost it, mentally at the time she is said to have executed the will? I reject that proposition.

With regard to ill health, again there is no evidence that at the time, the deceased executed the will she was suffering from debilitating illness. The respondent's first witness confirmed that the deceased started ailing if at all, 1½ years before she succumbed to death. This is a witness who claimed to have been staying with and taking care of her. The deceased died in 2005. If her evidence is to be believed then the deceased must have started ailing in 2003. Yet the will was executed in 2002 long before the deceased became ill.

The other witness, **Peter Mutunga** testified that the deceased used to live alone most of times. He also claimed that the deceased had been ailing since 1990's. However, he tendered no evidence to support his contention aforesaid. In any event his evidence contradicts in material terms the evidence of **Beatrice Katala** who stated that the deceased had only been sick for 1½ years prior to her death. Between the evidence of these two witnesses, I would rather go with **Beatrice Katala**. After all, she was the one who kept the deceased company and took care of her. I would in the premises discount the evidence of **Peter Mulungi** on the issue. The conclusion I have reached on the twin issues is that the deceased was of sound mind and not senile when she made the will. In the premises there could not have been fraud, coercion or mistake on her part in making the will.

Once a party opts to draw a will, he is required to appoint an executor or executors. The deceased duly appointed her granddaughter, **Sabina Kiloko Nzioka** such an executor. Had she pre-deceased her, then her grandson-in-law **Simon Nzioka** would have been the executor of the will. However, as it turned out, **Sabina Kiloko Nzioka** survived her. The respondent has not queried such appointment, meaning it was proper. Though as executrix she ended up being the sole beneficiary of the estate, I do not see anything wrong with that just like the respondent.

A will may be made either orally or in writing. In the instant case, the deceased opted for a written will. A written will can only be invalid if the testator has not signed or affixed his mark on it, the signature or mark of the testator is so placed that it was not intended thereby to give effect to the writing, as a will, the will is not attested by two or more competent witnesses and each of whom had not seen the testator sign or affix his mark to the will and each of them had not signed the will in the presence of the testator.

The deceased's will does not suffer from this ignominy. The will was drawn by an advocate. It was witnessed by two witnesses whose signatures were in turn witnessed by the advocate. The deceased duly thumb printed the will in the presence of the two witnesses. The executrix and the sole beneficiary of the estate of the deceased was not present when the same was executed. The deceased had come with the two witnesses on the date of signing the will, all of whom attested to her thumb print. They were all of sound mind. Apparently, the advocate read the will to all present in kikamba and the deceased confirmed the contents before she thumb printed the same.

The totality of the foregoing is that all the legal requirements for a valid will were met. Of interest however, is the evidence of the respondent's witness, **Peter Mutunga**. He does not seem to challenge the validity of the will. To him the will is illegal since it was executed or written without the knowledge of family members and relatives. However, this is not a legal requirement. In any event, a will is supposed to be a secret and personal affair.

Finally, I do not think that the respondent is serious or candid when he claims that the will is

invalid for want of compliance with rules 54, 55, 56 and 57 of the Probate and Administration rules. Those rules will come to play where there is doubtful evidence as to due execution of the written will, doubts as to terms, conditions and date of execution of the will and apparent or attempted revocation of the will. None of these circumstances are obtaining in this case. The case of the respondent is that because of her age and failing health, the deceased could not have executed the will. These allegations and or assertions have been discounted effectively.

On the evidence on record, I find that the will to be valid and I so hold. I make no order as to costs in this cause so far.

Ruling dated, signed and d**elivered** at **Machakos**, this **15th** day of **February**, 20**12**.

ASIKE-MAKHANDIA
JUDGE