REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Prob & Admin Cause 274 of 2006

IN THE MATTER OF THE ESTATE OF RISPER ACHIENG AWUOCHE (DECEASED)

ALLAN AWUOCHE OTWACK……..…….....…..OBJECTOR/APPLICANT

VERSUS

FLORENCE ACHIENG SIAMBE…….....…1ST PETITIONER/RESPONDENT

MELEKAZEDEK OPIYO SIAMBE…….....….2ND PETITIONER/RESPONDENT

JUDGMENT

Florence Achieng Siambe jointly with Melekazedek Opiyo Siambe (*the 1st and 2nd petitioners respectively*) petitioned for a grant of probate of written will of **Risper Achieng Siambe (*deceased*)** who died on 24th March 1999 at Nairobi. The petitioners were named in the will of the deceased as the executors. On 4th September 2000 **Allan Awouche Otwack** (*herein referred to as the applicant*), applied for the revocation of the grant of probate issued to the petitioners on the grounds that the grant was obtained fraudulently by the making of a false statement. The grant was also obtained by means of untrue allegation of a fact essential in point of law to justify the grant.

Directions were given that this matter be heard by way of oral evidence. The applicant gave evidence in support of his application for revocation. He detailed how he married the deceased at a wedding ceremony which was solemnized at All Saints Cathedral Nairobi on 4th May 1974. He produced a certified copy of the marriage certificate which marriage has never been dissolved until the death of the deceased. The applicant contended that he is the widower of the deceased and the surviving spouse who is the sole beneficiary of the deceased's estate. When the deceased died, the applicant too, applied for a limited grant of letters of administration *ad colligeda bona* in **Succession Cause No. 780 of 1999**. He was issued with limited grant on 30th April 1999. The applicant complained that the petitioners fraudulently petitioned for probate and used a forged document of a purported will to obtain the grant which he sought to revoke.

According to the applicant, he was familiar with the handwriting and her signature of the deceased, and the signature on the will did not belong to the deceased. He contrasted it with other documents which contained the undisputed signatures of the deceased, and signatures are remarkably different. It was the applicant's evidence that as at the time the deceased is purported to have executed the will, she was seriously sick, was admitted at Nairobi Hospital ICU, thus she lacked the mental and physical state to execute a valid will, leave alone to talk or reason properly.

During cross-examination the applicant maintained that he lived with the deceased from 1974 up to about

1990 although prior to the separation the deceased used to occasionally separate for sometime between a period of one or two months. He admitted that in 1990 the deceased left him but they kept contact. He also testified that the deceased used to fall sick regularly and she was admitted in Nairobi Hospital but prior to the deceased's death she was living at Komarock in her own house.

The applicant insisted that he used to visit her while she was admitted at Nairobi Hospital prior to her death and he was aware of her condition that she was bedridden and her sickness affected her memory in such a way that she could not write. The deceased was working with the Kenya Power & Lighting Company as a Secretary and it is the employer who paid the hospital bill. The applicant realized that the letters of administration had been issued to the petitioners when he went to Kenya Power & Lighting Company to lodge his claim. Asked why he did not bury the deceased in his home as the lawful husband, he insisted that when he gets the letters of administration he would exhume the body of his wife and bury it at his home.

The applicant's other witness was a handwriting expert one **Antipus Nyanjwa** attached to the CID Headquarters forensic document examination laboratory. He testified that he was requested to carry out an investigation of whether the signature on the disputed will document in respect of Risper Achieng Siambe was a forgery. He compared the signature with three other documents which contained the known and undisputed signatures of Risper Achieng. He compared the signatures and found them different. He formed the opinion that the signatures on the will and the other signatures contained in the other three documents were not made by the same hand. He testified that he took into consideration and eliminated the natural variations that usually occur during writing such as voluntary intoxication by alcohol, poor eye sight, sickness, old age, the writing instrument, the surface beneath the paper, natural ink failures and natural habits.

On the part of the petitioners, they put forward the evidence of **Alex Aoko Obutha** who works with the National Registration Bureau as a fingerprint expert gave evidence. On the 15th August 2005 Alex received a letter from the petitioners' advocates with a request that he should verify the thumb print on the identity card No. 4434728 belonging to Risper Achieng Awouche. They also submitted a thumb print of a questioned document, the will, and upon comparison he found that the thumb print on the will compares with the one with the identity card. During cross-examination he confirmed that the document he received for comparison was a photocopy. He also confirmed that immediately a person dies it is possible that a finger print of the dead person can be imprinted.

Both Florence Achieng Siambe and Melekazedek Opiyo Siambe testified. They are the sister, and brother of the deceased respectively and they confirmed that the deceased had married the applicant in 1974. Their evidence was collaborated in every material aspect by that of their mother **Phyllis Siambe.** The decease and the applicant stayed together until 1984 when the applicant for no apparent reason returned the deceased to the parents' home for no apparent reason, other than the fact that the deceased had been unable to sire children for the applicant.

All efforts by the deceased's parents to resolve the matrimonial disharmony between the deceased and the applicant did not bear fruits because the applicant refused to discuss the problem or to respond to the deceased's parents. The deceased continued to live with her parents in Eastleigh estate and when they retired and relocated to their home upcountry the deceased moved to a rented house at Highrise estate in Nairobi. After some time she decided to purchase her own house in Komarock estate where she moved and lived until her death. When the deceased fell sick, it is the petitioners who took her to hospital and used to visit her. They confirmed that she was critically ill and she could not move and while at the hospital the applicant never even visited the deceased although the deceased sent the 2nd petitioner and even after the death the applicant was asked whether he wanted to bury the deceased but he kept away. The applicant did not also attend the burial of the deceased. It is the petitioners' family that arranged the burial and buried her at their father's home. While the deceased was at the hospital her health had deteriorated and whenever she needed to withdraw money from the account she used to rely on **Simeon Ogendo** who would arrange to bring a bank official to certify the condition of the deceased. The deceased would sign and thumbprint to withdraw money but this would be certified by a doctor's letter before the bank could honour the withdrawals.

It is during this time, that the deceased decided to write a will so that she could leave her properties with her parents and Simeon brought in a lawyer by the name **Lynn Muchira** at the hospital. The deceased instructed the lawyer to prepare a will which the deceased signed in the presence of the lawyer and her cousin Simeon Ogendo. Lynn Muchira did not however testify.

Dr. Leonard Kamenwa Njenga was the primary doctor who attended to the deceased. He confirmed that the deceased was suffering from left sided weakness of the body which was a neurological deficiency and affected the left side of the brain. The deceased was unable to use the left side of the body but he confirmed that her mental status was intact. Dr. Njenga testified that the deceased used to transact her money matters through a relative and he used to write a letter to the bank certifying that the deceased was not able to write. In that way, the deceased would be allowed to withdraw the money from the bank.

During cross-examination the doctor confirmed that the paralysis that afflicted the deceased on the left hand side resulted to a brain illness and the deceased's condition was more neurological. He however confirmed that he never saw the deceased write the will nor did he certify that the will was signed by the deceased in her condition. This is the summary of the evidence.

The advocates for the petitioners filed very lengthy submissions and made reference to various case law. I have gone through the submissions, l am grateful to the counsel for the petitioners for their efforts. In the course of the analysis of the evidence, I will make some reference to the authorities cited. The applicant's counsel did not file any written submissions.

The issue that falls for determination is whether the grant of probate was obtained fraudulently. Secondly whether the will was a forgery. Another related matter in determining these proceedings are the beneficiaries of the deceased and the mode of distribution. The last two issues may not strictly fall for determination at this stage but bearing in mind that the deceased passed away in March 1999, the proceedings herein started the same year. It is this court that heard the evidence, and in my humble view, it will be in the interest of justice to resolve all the issues at this stage. This court has inherent power by dint of the provisions of section 47 of the law of succession and rule 73 of the P&A Rules to make such orders as may be expedient. It is also not feasible to expect another Judge or another proceeding to be filled to determine those issues.

On the first issue, there is no dispute that the deceased was married to the applicant and the marriage that was solemnized on 4th May 1974 at All Saints Cathedral was not dissolved as at the time the deceased passed away. It is also not in dispute that the deceased was living separately from the applicant and what comes out clearly in evidence is that their relationship had broken down. It is also not in dispute that the deceased was very ill at the time she is said to have executed the will. She was confined in hospital unable to use her hands properly and the doctor confirmed that the disease that had paralysed part of her body had also affected part of her brain. The petitioners confirmed in their evidence that the deceased could not transact even her banking business and whenever she needed to withdraw money her cousin, Simon would get a bank official to verify her condition. The doctor would certify by a written letter that the instructions to withdraw money were signed by the deceased whose ability to sign had been affected by the sickness in his presence.

What is noteworthy here, is that the same procedure was not applied when the deceased executed the will. The doctor was not called to certify that he had witnessed the deceased execute the will. The other noteworthy matter here is that, the will, was drawn by an advocate Lynn Muchira who was not called to testify. This is the other attesting witness whose evidence was critical to determine whether indeed she prepared the will, and that she witnessed the execution by the deceased. There was evidence by the handwriting expert **Antipas Nyanjwa** that the signature on the will and the signatures on the deceased's undisputed signatures were not by the same hand. Counsel for the petitioners submitted that, (*and I agree with that as the correct preposition of the law*):

"***Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such 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 a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges."

The above position is also articulated in **Halsbury's Laws of England 4th Edition Vol. 17 para. 903** where the learned authors have opined 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."***

Furthermore a testator can sign or affix her mark to the will and the evidence of one attesting witness is adequate. I will revisit this preposition later in this judgement. Counsel for the petitioners also drew a parallel between this matter, and a decision by this court in the matter of the estate of **James Ngengi Muigai Nairobi HC Succession Cause No. 523 of 1996** in that case, the testator was dementing and physically incapacitated due to joint pains and hypertension as at the time of making the will. The witness 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 evidence in this case shows that the will was not witnessed by the doctor unlike the case of James Muigai. The signature of the testator was confirmed to have similarities with known handwritings and in the case of James Muigai the lawyer who drew the will, witnessed its attestation and testified in court. What is before this court is just the evidence of the family members who suggested that the deceased should write a will and went ahead to make arrangements to have one written. The person who prepared it and who was independent did not testify. I find the circumstances under which the will was prepared and executed rather subjective and surrounded with mystery.

Secondly the mental and physical capacity of the testator is also questionable in view of the undisputed evidence before this court how she was in a serious condition. The thumbprint on the will was compared with the thumbprint on the deceased's identity card and according to Alex Aoko a finger print expert, it is the same finger print. However, this same witness confirmed that even a dead person's finger print can be used to imprint on a document. This therefore brings doubt regarding the circumstances under which the will was thumb-printed and if in deed the deceased did it willingly, consciously, why the procedure she adopted when withdrawing money was not followed by getting a doctor to certify or even getting the lawyer to testify in the matter. It is for that credibility gap in the petitioner's evidence that I will ignore the evidence of Alex Aoko. In the circumstances I find that the will purportedly executed by the deceased is not valid.

The other reason why the grant of probate should be questioned is for reasons that the applicant who is the deceased's husband was not notified by the petitioners. The applicant was also not disclosed as a surviving spouse of the deceased. The law of succession Section 51 (2g) clearly provides that when making an application for a grant of representation the names and addresses of all surviving spouses, children brothers and sisters of the deceased should be included. Notice should also be issued to every other person entitled in the same degree as or in priority with the applicants. The petitioners in this case had a duty to notify the applicant of the application for the grant of probate.

Having stated that the will is invalid the deceased's estate should be distributed under the provisions of Part V of the Law of Succession as an intestate estate. One issue that one would not ignore in these

proceedings is the fact that although the deceased was not legally divorced or separated there was no dispute that the deceased lived separately from the applicant. The deceased's family was very bitter with the applicant, and rightly so, for neglecting the deceased during the hour of need. Although the applicant said in evidence that he was not separated from the deceased during cross-examination he admitted that they were indeed separated from 1990 and lived in separate households and the applicant was already cohabiting with another woman. He also admitted his visits to the deceased in the hospital were not regular because he was working in Machakos on a project. The applicant also did not attend the funeral of the deceased. There was no evidence, even during cross-examination of the petitioners witnesses, that the members of deceased family were hostile to the applicant, or that they stopped him from burying the deceased or even attending the funeral.

This is a matter that causes this court tremendous concern, in that the applicant did not care for the deceased and now turns round to claim to be the sole surviving spouse to be granted with the letters of administration. The deceased was survived by a mother and other siblings, (it is not clear from the evidence whether the deceased father is still alive). The mother of the deceased is fairly elderly and so would her father if still alive. Naturally the deceased family depended on her and it is also a natural and legitimate expectation on their part that they should inherit part, if not her entire estate bearing in mind the circumstances of this case. However, the law being what it is, that the applicant even as he neglected the deceased is still the surviving spouse cannot be ignored.

In this case l will order that the deceased family comprising of her parents and siblings are beneficiaries of the deceased and in the interest of fairness they should benefit from the estate of their daughter and sister.

I am aware that under **Section 66 of the Law of Succession** the court has the discretion to grant the letters of administration and the order of priority is the surviving spouse or spouses with or without association of other beneficiaries. Due to the circumstances of this case the fact that the applicant although a spouse of the deceased neglected her and it is her family that took care of her, it would be unconscionable to leave the deceased's family out. It is for this reason that I will grant the letters of administration jointly to one of the petitioners **Melekazedek Opiyo Siambe** representing the beneficiaries of the deceased's family being the deceased's parents and the deceased's siblings and the applicant **Allan Awuoche Otwack**. The deceased's estate should also be distributed equally between the applicant and the deceased's family at 50:50. This being a family matter there will be no order as to costs.

It is so ordered.

Judgment read and signed this 9th day of November, 2007

M. KOOME

JUDGE