REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 470 of 1997

IN THE MATTER OF THE ESTATE OF JOHN MWEU KIBINDA – DECEASED

RULING

What is before me to determine in this ruling is the validity of the written will dated 21st October, 1995 executed by the deceased.

It was agreed by both Learned Counsel that the said issue shall be heard on oral submissions, which I did.

Mr. Osoro the Learned Counsel contended that there are two Wills – one handwritten and another typed. Even assuming that they were prepared simultaneously, there is no indication as to which one is valid and which one was revoked. I do have some problem on this contention, because if the two were executed simultaneously none can be prior in time and both the will have to be considered an original and copy thereof, unless, of course, their contents were different.

Mr. Osoro took me through those Wills and submitted that there are several points which can make those Wills invalid.

He argued firstly that the handwritten Will (which was agreed to be placed on record at the time of hearing of this issue) suggested initially that it was made by the deceased but paragraph 22 mentions, and I quote "***Drawn by the maker as for his Will and testament***" which sentence suggests that it was drafted by someone else and thus implies that it was not the will of the deceased.

I must confess I was unable to understand this averment clearly but the said will is written from the beginning to the end by one hand and there is no suggestion that the said handwritings were not those of the deceased. I may even go further, and state that even if it was drafted and written by someone, there is no dispute that it was not signed by the deceased as per the requirements of the Law of Succession Act (Cap 160 Laws of Kenya).

It was also contended further that the will bequeaths life interest to some of the beneficiaries; and thus it implies that it would revert to the executors and witnesses of the said Will.

I do note here that the concept of vesture of life interest is well known and is adopted also in the Act.

I further find that there is no bar on the members of the family witnessing the will if they are not beneficiaries under the will.

A contention was raised on the contents of paragraph 7 of the will which stipulates:

"***The spouses and their respective children must write, co-operate and integrate with the rest of the family and adhere to Rules and Regulations in the family set up.***"

It was submitted that as the rules and regulations set up are not annexed to the will, it is invalid.

I do not agree that even if those rules and regulations are annexed, the entire will is invalid. The testator hoped that the family remains united even after his death and thus made his hope known to his members of the family. It is not a vesture of any of his property. I also note that he has not stated any consequences of non-adherence of his hope and vision.

Mr. Osoro stressed further that the inventory of the properties mentioned in the will also is not annexed and thus the will is invalid as it contravenes Section 12 of the Act. In response to this contention Mr. Rachuonyo, the Learned Counsel for the Executors submitted that non-annexure of the inventory does not nullify the will because Section 12 of the Act only stipulates that the inventory annexed shall become a part of the will. From the wordings of Section 12 of the Act, I do agree with the submissions made thereon.

It was further contended that the will was not read to widows. This fact also, even if true as per the Act, does not nullify the will.

I do agree with Mr. Rachuonyo that objectors have not contested **(a)** the capacity of the Testator, or **(b)** the formalities of the execution of the will, or **(c)** the authenticity of handwriting and signatures of the testator.

Lastly, the contention, that there was an insertion of a date in the typed will and no authentication of such insertion is made, is also not available to the objector in the circumstances of this case. The date contended to be inserted also appears in the handwritten will and I do rely on Section 20(2) of the Act which stipulates that a typewritten or printed will purports to have been executed by the filling in of any blank spaces, there shall be a presumption that the will has been duly executed. This presumption is not rebutted and has been strengthened, on the contrary, by the handwritten will.

Thus none of the issues raised by the Learned Counsel for the Objectors is validated as per the law.

The upshot of the above is that the handwritten will and the typed version thereof are valid and the same can be relied upon by the executors. The estate of the deceased thus shall be dealt with as a testate one.

I do not make any order on the costs.

Dated and signed at Nairobi this 17th day of July, 2006.

K.H. RAWAL

JUDGE

17.7.06