REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 523 of 1996

IN THE MATTER OF THE ESTATE OF JAMES NGENGI MUIGAI (DECEASED)

RULING

The late J N M (hereinafter referred to as the deceased) passed away on 26th July 1995 at the age of 92 years at Nairobi Hospital. The cause of death as indicated in the certificate of death No. 376040 is Cardiac arrest due to hypertension due to old age.

On 18th March 1996, E M M and E W M (hereinafter called the objectors) petitioned for the grant of Letter of Administration for the deceased estate intestate. They described themselves as the wife and eldest daughter of the deceased. This petition was accompanied by a written consent by B N N, B W , M W and P M .

Citations to accept or refuse Letter of Administration (under Rule 21 of the P & A rules) were sent to the following persons.

1. Mr.M N M
2. B W
3. P N
4. N M
5. J M
6. S K
7. A K
8. J W
9. C W

On 18th April 1996, M/s Kirundi & Co. Advocates entered appearance to the citation on behalf of N Mand J M M

On 16th May 1996, N M and J M M (hereinafter referred to as the petitioners) petitioned for a probate of

written will. The petition was supported by an affidavit by Ngengi Muigai titled "Affidavit in verification of proposed citation to propound a document as a will"

Apparently no objection was filed and on 16th December 1997 the grant of Probate of written will was issued to the petitioners.

On 3rd November 1998 the petitioners applied for the confirmation of the grant of Probate and on 7th January 1999 the objectors lodged a caveat through the firm of Mbai & Kibuthu Advocates. On the same date the objectors filed the Summons under Section 76 of the Law of Succession Act Cap 160 seeking for the revocation of the grant of Probate. On 8th February 1999 the following order was recorded by consent.

"The grant made on 16th December 1997, is hereby set aside. Application for grant and objection to that application be heard by viva voce evidence at Nairobi for one day"

On 14th November, 1999 a further consent order was recorded as follows:

"By consent the petitioner to furnish certified copies of the will sought to be proved. The original of the said will, be availed to the other parties Advocate on written request and such access to the said original document be at such place(s) and times as the Advocate for the petitioners and the objectors may mutually agree and if not agreed then the court may be moved for that purpose".

This seems to be the genesis of a long dispute that has snowballed into a protracted court battle. At the beginning of the hearing of this matter counsel for the petitioners, Mr. Kirundi indicated that the only issue for determination was the Validity of the will of the deceased which was executed on 28th April 1994. However as the hearing progressed other issues such as the beneficiaries of the deceased, properties forming part of the deceased estate and issues of provision for dependants were extensively covered. I shall deal with those other issues later in this ruling.

On the 17th October 2003, the objectors filed grounds upon which they contest the purported will of the deceased through the firm of Judy Thongori & Co. Advocates who had teamed up with the firm of Albert Kamunde & Co. both lawyers and were acting for the four of the objectors. The grounds of objection raise the following issues:

1. That the deceased at the time of making the alleged will was suffering from Serious Physical and mental infirmity and that he was not capable of comprehending the same as he was not possessed of competent understanding.

2. That the will was not attested in accordance with the law

3. That the signature on the purported will is not the deceased's

4. That in the alternative the purported will does not make reasonable provision for the objectors who are the wife, children and dependants of the deceased.

The objectors through the firm of Albert Kamunde summoned the following witnesses as follows:

1. Mr. M.R. Pabary, Advocate "to give evidence on the attestation of the will of J N M "

2. The Director of Criminal Investigation Department C.I.D. Headquaters "to produce document examiners report for the will of the late J N M "

3. Prof W. Gitau "to give evidence on the attestation of the will of J N M ".

These three witnesses although summoned by the objector were lead in evidence by the petitioners and

cross examined by the objectors.

P W 1 M. Pabary

This is the witness who prepared and witnessed the execution of the will. He is a retired Advocate of the High Court. He testified that he was instructed by N M who told him that his father was ailing and was not able to come to the Advocate's offices to give instructions. This witness explained to Ngengi Muigai what he required to be able to prepare a draft that is the list of Beneficiaries and assets of th deceased. He received the instructions on handwritten notes and prepared the draft which he presented to the deceased who was staying at the house of N M . After going through the draft, the deceased made some corrections and he prepared the final draft he said:

"I went to the house where I met J M and I read over and explained to him the contents. He spoke good English and made some changes"

"The deceased was coherent, he spoke to me about his old days at Alliance High School. He was perfectly normal and his mind was strong and steady. I refer to the signature on the document by the deceased. The signature is signed by green pen and I signed as witness and gave my address. Prof. Gitau was called by N M , he came and signed the document in my presence."

P.W. 2 Professor Gitau

This witness is a medical Doctor a practicing Physician and a lecturer at Nairobi University Faculty of Medicine until he retired in 1997. He was summoned to court to testify by the objectors.

He said that he gave professional services to the deceased from 1992 having been referred by Dr. Silvestein. "The deceased was suffering from high blood pressure and joint pains which made it very difficult for him to move around I used to visit him at the home of N M."

He was called at the house of N M where he signed the will to attest the signature of the deceased. During cross-examination this witness stated that although he did not witness the deceased append his signature he was aware of the deceased signature.

"I did not see the deceased with my eyes signing the document. I had seen many documents signed by the deceased. It is possible that somebody could have duplicated or copied the deceased signature"

This witness went on to state that

"The deceased was not suffering from intellectual and mental disability. I discerned this from the discussions we held. We ask some questions to establish his mental capacity. I can tell somebody who has suffered memory loss. Memory cannot disappear due to age……….."

On further cross-examination, this witness recalled that he was alerted that if the deceased were to write a will, he would be called to certify that he was medically alright and he therefore combined that role and that of being a witness.

P.W. 3 Antipus Nyanjwa

This is the Forensic Document Examiner attached to the Criminal Investigation Department. He produced the document examiners report marked as exhibit No. 4.

According to this witness, on 15th day of May, 2003 he received instructions from Chief Inspector Kariuki to investigate whether a document of will was a forgery. He was handed the following documents, for comparison, the original will with the questionable signature which he marked "A" and the original identity card and log book which were the documents with deceased known signatures which he marked "B1" and "B2".

The complainant was E W and B W who recorded their complaints to Chief Inspector John Kariuki and John Njoroge of the offence of forgery of wills an offence contrary to Section 350 of the Penal Code. This witness presented the following report:

“I have examined and compared the questioned signature in green ink on page three of the will marked A, with the known holder’s signature on the exhibits marked B1 – B2. The signatures are in my opinion written by the same hand”

On examination this witness explained the methods used in examining the document and the considerations taken into account. He considered the issues of age, sickness and other reasons that can vary the individuals signature but the individual characteristic of the holders hand writing remains. He subjected the document to various laboratories tests having various instruments before he arrived at the conclusion.

P.W. 4 N M ; 1st Petitioner whose evidence I wish to highlight the salient features. He is the deceased eldest surviving son, his father was married to two wives 1st wife was E M with whom the deceased had born the following children:

1. D N born 1932 (deceased)

2. E W

3. B W

4. M W

According to the 1st petitioner, the deceased divorced his first wife and obtained a decree absolute in divorce cause No. 75 of 1973 in the High Court of Kenya at Nairobi. He relied on the information from the file which was marked as an exhibit and especially the decree nisi and absolute that were marked as exhibit No.5.

It is within that petition for divorce that the deceased disowned two children of E M , namely M and N , who are also objectors in these proceedings. He relied on paragraph 8 and 9 of the petition whereby the deceased indicated as follows:

8. “That since the celebration of the said marriage the respondent has committed adultery”

9. “That the respondent has committed adultery with persons unknown to the petitioners as a result of which adultery the respondent has given birth to the last two children named in paragraph 3 above namely Mugo and Nyoike”

The second wife of the deceased and the mother of the petitioners was M N who bore the following children

1. B W

2. P N

3. N M

4. J M

5. S K

6. A K

7. J W

8. C W

The 1st petitioner is one of the named executors of the will of the deceased, he said he was familiar with the deceased signature and confirmed that the signature on the will belongs to his late father. The 1st petitioner gave evidence of how he started looking after his father from sometimes in 1993 as a result of poor health and the fact that his father required regular medical attention. At the same time the deceased gave the 1st petitioner a general power of Attorney which was dated 7th December 1993 and was signed before Kirti Chunilal Shah, an advocate. This document was marked as exhibit No. 7. This document enabled the 1st petitioner to attend to all the business of the deceased, who was running coffee farms and other farming concerns.

He had provided for his father a guest apartment in his house which is a self contained apartment with two bedrooms and a kitchenette well furnished with a T.V., radio and an independent telephone line and opened out into a mature and well kept garden, the witness said that this "was not a dungeon". He denied that he forged his father's will and explained that

"My father was living in my house, he was getting older, I asked him whether he had made a will and he said he did not want to make a will and he would leave all his assets to me and then I would divide among my brothers what I wanted to give them and the rest would pass to my first son as per the Kikuyu customary way. This he repeated and I persuaded him to write a will. When I saw he was adamant I went to the family priest the Rt. Rev. John Gatu"

It is therefore the Rev. Gatu who managed to convince the deceased to write a will. Apparently the deceased was aware that a written will can spark off a court battle, and he therefore requested that his doctor be present when he was supposed to sign a will, the deceased then authorized the 1st petitioner to instruct an advocate by the name Shah & Shah Advocates. However since this firm of advocates no longer practiced law, and the 1st petitioner was referred to Mr. Pabary.

This information was passed to the deceased and he did not seem to mind, and therefore he gave instructions on who should be the administrator and how his assets should be distributed, the 1st petitioner took down the notes and forwarded then to Mr. Pabary who prepared the will. This witness said that he used to discuss with his father all the affairs of his farm, and his memory was legendary upto the time he died. "He knew all his children up to the day and date and time of their birth. He had a good memory, he knew all their stars, my father worked in Karura Forest in 1939 and he could remember about 8 species of trees by their botanic name. He could remember the first fifteen students of Alliance High School where he was the 1st student. There is no way my father could have forgotten two of his children"

On cross-examination Ngengi said that he was living with the deceased for a period of three (3) years until when he met his death. He knew that Dr. Silvestein used to treat the deceased but there is no time the said doctor interviewed him or members of the family about the deceased health condition known as dementia.

After the death of the deceased the 1st petitioner called a meeting of all the beneficiaries and the will was read to them. He was therefore surprised when the objectors proceeded to file a petition for grant of letters intestate when they were aware of the will.

This witness was also surprised that despite holding a family meeting in May 2003 whereby the parties agreed to subject the will for Forensic examination, E W M and M W did not follow the Civil procedure or the consent order recorded earlier but reported the 1st petitioner by recording a criminal complainant at the CID Headquaters.

<u>P.W.5 Prof. David Ndetei</u>

This was an expert witness who was availed by the petitioners to comment on a report presented by Dr. Silverstein on 25th November 1995.

This witness is a medical doctor and Professor of Psychiatry. He is a lecturer at the department of Psychiatry Faculty of Medicine University of Nairobi and also practices medicine since 1981. He is also a member of the Royal College of Physicians of the United Kingdom. According to PW5, the letter by Dr. Silverstein refers to a medical condition within his field of specialization. Dr. Silverstein is a reknown Cardiologist. He described the condition of dementia as loss of brain cells. Diagnosis of dementia is a process which involves the following:

1. The first thing is to get a history of the patient from the person who has lived with the patient for a period of 3 years. This is the person who would recognize and detect the change of behaviour.

After the interview, a mental state examination that would determine the oral mental states of the patient is also carried out.

2. A more focused examination called mini mental state examination (MMSE) is carried out.

In addition a neurological examination is carried out.

According to Prof. Ndetei, the report by Dr. Silverstein which is written about 3 months after the demise of the deceased, does not show that there was clinical, radiological and laboratory data/evidence that is given to support the diagnosis of dementia.

This witness did not treat the deceased and during cross examination admitted that in all cases of dementia, this would be accompanied by disorientation, reduction in intellectual thinking. Incontinent is also another feature.

“There could be a loss of memory depending on the stage, one would have some lucid moment.

Lucidity means the patient would be able to remember things. Delirium is different from dementia which needs tests to tell whether it is delirium or dementia”.

That was the summary of the petitioner case and I now turn to the objectors evidence.

<u>The Objectors case</u>

The following were the Objectors:

1. E M M

2. E W M

3. B W M

4. P M M

5. P N M

According to the Objectors, the deceased could not have written the will, as at the time he is alleged to have written the will he was completely bedridden and was suffering from a myriad of ailments that he did not have any capacity to make testamentary disposition.

In any event the deceased was confined in the house of the 1st petitioner who must have applied undue pressure or influence and was totally controlled by the 1st petitioner who is allegedly given the lion’s

share of the deceased estate.

Thirdly there is no way the deceased could have disinherited his 1st wife and two sons namely M and N and lastly, the will was not attested to, according to the law as Professor Gitau did not witness the deceased signature.

In support of this objection the Objectors called a total of 9 witness whose evidence I shall summarize only the salient points.

DW1 – E M M

This is the deceased first widow and the mother of the following children:

1. The late D N M
2. E W
3. B W
4. M W
5. P M
6. P N

She got married to the deceased on 26th August 1933 at the District Commissioner's Office at Kiambu. She said that she lived with deceased upto 1942 when she left the deceased and moved to stay at her mother's property at Gichugu within the Kawangware Area where she resides todate. She left the deceased due to his cruelty and the fact that he had brought the second wife to her own house.

She testified that the deceased continued to visit her at Kawangware and he used to help her with money which she used for the welfare of her who children Mugo and Nyoike.

During cross examination she denied any knowledge having been served with divorce petition and that she was aware of the divorce proceedings, whereby she was divorced and a certificate of decree absolute was issued in respect of her marriage.

She was not left with any property by the deceased and it is therefore her wish to have all the deceased property shared between the deceased two houses equally. The Objector's second witness was P N , he too is an Objector in his own right.

According to N, he is the son of the deceased, he was however not brought up at Gatundu where his father had established a family home but lived with his mother at Dagoretti. He was born on 6th January 1948 as per birth certificate [particluars withheld] which was issued on24th February 1993 the name of his father is indicated as J N M and his mother's name is E M . This witness gave a lengthy account of his life, but in summary he was brought up by his mother and was circumcised at Dagoretti. He got married in 1972, and his father did not take part in his wedding or marriage ceremonies it was Peter Kenyatta who participated in his wedding. This witness moved to the United States, and did not attend the deceased funeral. He however enjoyed a cordial relationship with the deceased he used to visit him at his place of work at KPCU when he was a grown up. The deceased also used to pass by his business place of work at Nyahururu and he regarded the deceased as his father.

He was of the view that the 1st petitioner hated him and in his opinion it is the 1st petitioner who wrote the deceased will and that explains why he was left out of the will.

The 4th and 5th Objectors are the second and 3rd born daughters of the deceased respectively. They are the Objectors and their evidence was basically similar, in that they testified about the deceased health condition. They obtained the medical report about the alleged health status of the deceased from Dr. Silvestein when they learnt about the deceased will. According to them, the deceased could not have written a valid will in 1994. They had seen the deceased earlier in 1994, he was bedridden, he could not recognize the Objectors and he was in a bad state, having been confined in a cold room in the basement of the house of the 1st petitioner.

The 4th Objector's witness B said that she visited deceased in April 1994 and again in August 1994 during her son's wedding, the son took his bride to the deceased who was still bedridden and could not recognize them. His hands were weak and according to this witness the deceased could not have signed a will and in her opinion, the same way he could not remember the names of his children, similarly he could not remember some of his Assets and children who were left out of the will.

During cross examination DW4 replied as follows:

"I have no medical training. My father was staying at N 's house for 3 years prior to his death. It was not possible to visit him whenever I wanted because he was in someone else's house. I visited him whenever I wanted. He was forgetful even before April 1994. I dispute the will because it was not written by my father………..

The way my father treated us, he could have Shared the properties equally …………….M,N and W did not get any shares.

Even my mother did not get anything………my father could not have written a will. I got a court order to verify my father's signature through a document examiner. I did not follow the court order because my father could not write a will or sign. Even when my father was in hospital he used to sign cheques and would be returned because signatures differed………"

The 5th, 6th and 7th are the deceased daughter in law, B N M , and J M K a son in law and M W K the deceased daughter respectively. All these witnesses were summoned to court by the Objectors through the court summons.

B N M and M W K had withdrawn their objections.

B N M who testified as a witness and not an objector confirmed that she was present when the deceased will was read to the family members. According to this witness she owns a building called Cameo at Kenyatta Avenue which she bought with a loan and they also had a farm in Nakuru which they purchased with a loan from AFC and not with the assistance of the deceased. They also have property in Gatundu where they have built a house.

Mr. K 's evidence only torched on the 45% shares of surrey farm which he stated was bought by him and his wife and the shares are registered in their joint names since 1982. He denied that the property was given to his wife as a gift. The evidence by M W K was essentially the same as that of E M. I need not restate the facts herein, as she repeated the evidence about the condition of the deceased from the time he started living in the house of Ngengi until he died. The Objectors also relied on the evidence of Isaac Kanyanga who was employed by the deceased as a cook since 1990. They were staying at the deceased home in Ichaweri but when the health of the deceased deteriorated they moved together to the house of Ngengi. He used to cook, wash the deceased and change his clothes as well as beddings.

According to this witness the deceased health deteriorated rapidly in 1994 and he could not feed himself, walk or do anything for himself. The deceased was living with his wife Minnie Ngina, it was this witness who used to assist the deceased in doing virtually everything. On cross examination this witness admitted that he used to be relieved by another person called Kamore after every two weeks. He stated as follows:

"Before 1994 he could recognize me and even in the beginning of 1994 he could recognize his children but later on he deteriorated rapidly. In 1995, he could not recognize me. He could call me and another time he could not recognize me. There are times he used to be okey and others the memory would disappear".

For a few moments he could remember. I used to take the food during the hours of eating. Sometimes he would have lucid memory.

The Objectors also called Chief Inspector John Kariuki whose evidence was abandoned and therefore will not be considered in this matter.

Dr. David Silverstein took a considerable amount of time in giving evidence on how he started treating the deceased from 1982 up to 1995 when the deceased met his death.

Except for a period between June 1993 to October 1994, treated the deceased.

Dr, Silvestein is a Consultant Cardiologist and physician based at Nairobi Hospital, he is also a fellow of the American college of physicians and a fellow of American College of Cardiologist as well as a member of the Kenya Medical Association. He started practicing medicine in Kenya in 1974, he started treating the deceased from 1982 and he maintained a file for the patient and every time he would see the deceased he dictated a letter which was a routine history and follow up treatment. He recorded the summary of the regiment of treatment. He saw the patient frequently from 1982 and the primary problem with the deceased was a heart abnormality high blood pressure, back pain, weight loss and was admitted in hospital several times while in a state of confusion, incontinent and had a prostrate problem.

Dr. Silvestein referred to a letter dated November 25, 1995 and said that he wrote that letter from the history of the deceased compiled from the letters written to Dr. Kiragu from 1991. These letters were produced as exhibits they are dated 9th January 1991, 8th January 1992, 30th September 1993, 2nd June 1993 22nd July 1994, and discharge summary notes dated 22nd July 1994, 17th October 1994 and his terminal admission 26th July 1995.

It is from these records that Dr. Silverstein wrote the following report as follows:

"I have been asked to give my opinion about the mental state of Mr. M in April 1994. I knew Mr. Muigai very well since 1982 when he was first referred to me and found to have a cardiac abnormality.

In the late 80's he began to slow down mentally often repeating the same stories but he was still quite alert for his age. The last time I had him was in June 1993. He had deteriorated significantly. During his admission he had long periods of confusion and disorientation, however, he had acute medical problems. Looking at my report of June 2nd 1993 at the time of his discharge. I note that the patient was still having problems with continent. At that time Mr. Mogere and I "suspect that the in continent to a great part is related to some senility and probably some nerve compression.

At the time of his discharge, he definitely showed down very significantly in his mental status point. Professionally, I did not see him again until October 1994 when he had a seizure. Even after recovery from the seizure it was very apparent that he was severely demented.

<u>I cannot comment specifically about the said date of April 28 1994 as I did not see him professionally from June 1993 to October 1994.</u> Over this period of time his dementia became quite severe and was very progressive.

Dr David M. Silverstein, MD, F.A.C.C., F.A.C.P. Consultant Cardiologist/Physician."

Dr. Silvestein was subjected to intense cross-examination, he admitted that in his treatment notes he did not mention dementia as a diagnosis as he equated senility with dementia.

However he stated that at times one can be senile without being dementie and at times a patient who is dementing may have some lucid moments when his mental faculties would be normal.

This is the summary of the evidence, in addition counsel for the petitioners and objectors filed written submissions and made very extensive oral submissions on law, facts and quoted several authorities which I shall consider as I analyse the evidence.

I have gone through all the material presented before me carefully and I have been able to identify the following issues for determination:

1) whether the deceased was possessed with the mental and physical ability or capacity to write the will on 28th April 1994.

2) Was the will attested to according to the law.

3) Is the will a forgery or was the testator subjected to undue influence?

4) Did the will fail to provide for the deceased dependants or to make adequate provision for dependants.

5) Are the following persons who are not mentioned in the deceased will dependents of the deceased

a) E M , deceased former wife

b) P M

c) P N

and if so, should the court make reasonable provision for them.

Section 11 of the Law of Succession Cap 160, provides for the formalities and what constitutes a valid written will as follows.

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 directions of the testator;

b) The signature or mark of the testator or the signature of persons signing for him is to so placed that it shall appear that it was intended thereby to give effect to the writing of 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 direction of the testator or have received from the testator a personal acknowledgment of his signature of that other person and each of the witnesses must sign the will in the presence of the testator <u>but it shall not be necessary that more than one witness be present at the same time</u> and no particular form of attestation shall be necessary"

I have underlined the above because the objectors strongly submitted that since professor Gitau was not present when the deceased signed the will, the attestation did not comply with the law. The provisions of the law allow the will to be witnessed by the two witnesses at different times but each should sign in the presence of the testator when the testator acknowledges his signature.

The objectors referred to the Halsbury's Laws of England Vol.50 paragraph 261 which provides that the testator's signature must be made or acknowledged by him in the presence of two or more witnesses present at the same time. In the testators presence, each witness must attest and sign the will. I think the

Law of Succession Cap 160 is clear on attestation and it is not possible for me to be persuaded by this text in view of the express provisions of Section 11 of the Law of Succession Act.

This takes me to the crucial issue of whether the deceased was possessed with the requisite mental capacity to make testamentary disposition.

The evidence by the objectors especially, E, B, and M show that the deceased was in very poor health and this is supported by the evidence of Dr. Silvestein who treated the deceased except for a period of about one year within which period the will was signed. So was the deceased mentally impaired by reason of sickness so as to be able to make a testamentally disposition.

I refer to Section 5(3) of the Law of Succession which provides

"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, drunkness or from any other course, as not to know what he is doing"

Section 5(4)

"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 alleges".

The burden of prove in respect of this allegation lies with the objectors.

I have carefully considered the evidence by the objectors and especially by Dr. Silverstein, it is clear from his testimony that the deceased was dementing and he had diagnosed this problem in the course of his treatment of the deceased over the years. What concerns me in his evidence, is that, he did not specifically detail the diagnosis in his notes, although he said that the diagnosis of dementia would stigmatize the patient, I find that he used rather bold language in his notes to describe the deceased other problems and I doubt that Dr. Silvestein would have had difficulties to mention dementia if that was the deceased problem that he was attending to furthermore I have also noted the following:

a) Dr. Silverstein did not specifically see the deceased between June 1993 to October 1994.

b) He stated that a dementing patient may have lucid moments when he can make rational decisions.

c) He did not carry out specific clinical tests of the deceased such as Professor Ndetei said in his commentary that for one to diagnosis dementia the following tests should be carried out.

1. Collateral information from a relative who lived with the patient.

2. The mental state examination (MSE).

3. Mini mental state examination in suspected dementia.

4. Neurological examination finding.

5. Radiological examination.

6. Laboratory work up.

Dr. Silverstein admitted that he did not carry out these tests but from the history of his long treatment of the deceased he did not have to carry out these tests as the deceased would present himself with physical conditions such a confusion incontinent and disorientation. However he said these could have been symptoms of other conditions.

According to the text book by Herold Kaplan page 249

"dementia is characterized by a loss of cognitive and intellectual abilities severe enough to repair social or occupational performance. The full clinical picture consists of the impairment of memory, abstract thinking and judgment and some degree of personality change. The disorder may be progressive or static, permanent or reversible. An underlying organic cause is always assumed, although in rare cases it is impossible to determine a specific organic factor. The reversibility of a dementia related to the underlying pathology and to the availability and application of effective treatment."

In view of this evidence the objector's submitted that the burden of prove that the Testator had the capacity to execute the will shifted to the petitioner as discussed in the case of Cleare Vs. Cleare (1869) LR IP & A 655 where Lord Penzance held at page 557.

"By the law, it is not sufficient that the testator be of memory when he makes the will to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his estate with understanding and reason ………………."

Under paragraph 1015 Halsbary's laws of England Vol. 30

"the burden of establishing testamentary capacity is on the person profounding the will. If a receiver has been appointed in relation to property of a testator mentally disordered at the time when he makes his will, the will is not invalidated merely by reason of the receiver's appointment being correct."

According to Professor Gitau and Mr. Parbary who attested the deceased signature, the deceased looked normal. He was physically incapacitated due to joint pains and hypertension. The other objectors did not see the testator on this day when he signed the will, perhaps Mr. Kanyanga his cook could not specifically reveal this day in any event this witness has no medical training. I have no reason to doubt the testimony of Professor Gitau and Mr. Parbary, even though the evidence of Mr. Parbary has been dismissed by the counsel as inconsistence, I am of the humble view that such inconsistencies to the mistake of whether the deceased was in the house of Ngengi at Lavington or Runda are not so material considering that these events took place 10 years ago.

Similarly I am not able to make out why Professor Gitau would lie and mislead this court about the testator's mental ability to make a testatamentaly disposition.

His evidence was also criticized by the objectors because he did not produce medical notes and reports to support his evidence that he was treating the deceased. With tremendous respect, this witness was summoned by the objectors, I am not aware whether they served him with a notice to produce the records. He stated that he kept a patient's card.

I think professor Gitau did not have anything to lose or benefit by telling this court the state about the deceased mental capacity and ability to execute the will.

The other issue for consideration is whether the deceased was subjected to undue influence.

Under part II of the Law of Succession Section 7 provides:

"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"

It is Ngengi who suggested that the deceased should write a will and obtained the counsel of the family priest the Rt. Rev. Gatu to convince the deceased to write he will.

The deceased was living in the house of Ngengi he was indisposed and was suffering from several ailments, was he therefore subjected to undue influence?

Counsel for the objectors referred to the Text book Theobald on wills 4th Edition by J.B. Clark page 39 which describes undue influence as

"In a probate court undue influence means coercion, i.e. the testator is coerced into making a will (or part of a will) which he does not want to make. Undue influence takes many forms. At one extreme there may be violence to, or imprisonment of, the testator. At the other the pressure exerted by talking insistently to a weak and feeble testator in the last days of his life may so fatigue his brain that he may be induced for …………………………….., to give way to the pressure. Persuation or advice is legitimate but coercion is not; "a testator may be led but not driven"

According to this same author the legal burden of proof of undue influence or fraud always lies on the person alleging it.

Although the objectors did not lead evidence to show that the deceased was subjected to undue influence and by who, the submissions especially by Mrs. Thongori were quite clear that the deceased was driven to write a will.

I am not satisfied that they have discharged this responsibility of proving this aspect for the following reasons:

1) The deceased had donated a power of Attorney to Ngengi that enabled him to

"Be my lawful Attorney and Agent, with full powers and authority for me and in my name………" during the deceased life time.

2) N requested a respected citizen a family priest the Rt. Rev. Gatu to convince the deceased to write a will.

3) Mr. Parbary said that he visited the deceased about three times to discuss the draft will with the deceased before it was finally approved and signed

4) The deceased requested that Professor Gitau be present when the will was signed,and lastly I have also taken note that Ngengi was the deceased eldest surviving son and since the deceased was elderly and ailing there is nothing strange that he stayed with his son. This is usually the case for many elderly Africans.

In view of the above I am not satisfied that the deceased was "driven" but "led" into signing the will. Moreover, if one wants to use coercive methods, in my humble view they do not use the services of a priest and the head of a church.

The next issue for consideration is whether the will is a forgery. Again the burden in this respect of proving forgery lie with the objectors.

The will was submitted before the Criminal Investigation Department at the request of the objectors following a criminal complaint. The expert document examiner subjected the documents to examination and compared the alleged forged signature with the deceased known signatures.

This evidence of Antipus Nyanjwa was not all challenged and nor did the objectors produce a witness to give evidence on the deceased alternative signatures. This witness confirmed that the deceased signature is firm and similar to previous signature.

The sum total of the above findings that the deceased signature on the will is similar to the previous known signature of the deceased as stated by the document examiner. That the deceased was not subjected to undue influence to sign the will, that the will was properly executed and attested by Professor Gitau and Mr. Parbary, on a balance of probabilities.

I find that the deceased was also possessed with the requisite mental capacity to make a testamentally disposition on 28th April, 1994 when he signed the will.

I now turn to the issue of whether the deceased failed to make provision for his dependants namely E M, M and N. The other objectors who were provided for did not give evidence on the inadequancy of their provisions. In any event I do not wish to question the deceased choice of the bequests given to his daughters.

Mr. Kirundi, counsel for the petitioner constantly reminded this court that the only issues for the determination are to do with the validity of the will.

This indeed should be the proper procedure since this matter relates to objection proceedings on the validity of the will. The objector's however adduced evidence on the issue of dependency. The evidence of E Mand N , dwelt on the issue of dependency.

The procedure on the mode of hearing of objection to an application for grant of representation is provided under Section 67, 68 and69 of the Law of Succession.

In this regard if there are issues to do with provision for dependants such issues are dwelt with under Section 26 of part III of the Law of Succession. If there are issues to deal with the deceased ownership of certain properties or shares in properties the law is also clear on the procedure applicable.

The circumstance of this case make me invoke the inherent powers donated to this court vide the provision of Section 47 of the Law of Succession Act and Rule 73 of the P & A rules, whereby this court is empowered to make such orders for ends of justice and to prevent the abuse of process.

I have taken into consideration that this matter has taken considerable period of time to be determined. Some witnesses traveled as far as the United States of America. E M is fairly elderly indeed she was brought in a wheelchair to this court and going by the copy of the marriage certificate found in the D.C. No. 75 of 1973, if she get married to the deceased when she was 25 years old in 1933, she is perhaps about 97 years old.

Asking this witness to return to court to make an application for reasonable provision for a dependant would be quite oppressive.

It is for the above reasons that I have decided to deal with the issue of dependency as well instead of differing it to a letter date.

As regards the dependency by E M . I will recall her own evidence whereby she testified that she separated from the deceased from 1942 due to what she called constant beatings by the deceased. She moved to her own mother's property at Dagoretti where she lives to this day.

According to her, she was not aware of any divorce proceedings. However since there is a certificate of making of Decree Nisi absolute that was issued on 11th July, 1975. I do not wish to belabour the issue, I am satisfied that E M was a former wife of the deceased as provided for under Section 29 of the Law of Succession which provides:

"For the purposes of this part "dependant" means –

a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

E M said that although she was separated and moved from the deceased home at Gatundu the deceased continued to give her money for her own needs and those of her children M and N, I am satisfied that this court should make a reasonable provision for the deceased's former wife.

There was very strong opposition by counsel for the petitioner against giving any consideration to M and N. M of course did not gave evidence but Nyoike gave evidence of how he has only known the deceased as a symbolic father. From his own evidence the deceased played a very minimal role in his life.

I say so because, the deceased did not play any role when he got circumcised or initiated into manhood, he also did not play any role when he got married or when he conducted his marriage ceremonies.

According to the counsel for the petitioners the deceased disowned M and N in the divorce proceedings and indeed there is no dispute as this is found in the Divorce file. however legal issues were raised regarding the status of children who are born during the period of separation but before the decree absolute is issued.

Mr. Kariuki counsel for N referred to Section 118 of the Evidence Act which provides:

"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten"

Further counsel drew the attention of this court to the provisions of Section 12 of the Births and Deaths Registration Act Cap 149

"No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such, evidence as he require that the father and mother were married according to law or, in the case of applicant, in accordance with some recognized custom"

According to Mr. Kirundi Counsel for the petitioner, the deceased swore an affidavit on 18th December 1973 in the Divorce Proceedings and stated as follows:

"I J M J make oath and state as follows:

1. That I am the petitioner in the above named cause.

2. That as stated in paragraph (2) of the petition, the respondent left the matrimonial home in 1942 and since then there was never and has not been any resumption of cohabitation

3. That over one year of the respondent leaving the matrimonial home she gave birth to a child M of whom I am not and could not be the father. Thereafter, the respondent gave birth to another child of whom I could not possibly be the father.

4. That I have made enquiries in the neighbourhood with a view of ascertaining the identity of the person with whom the respondent committed adultery but have ben unable to identify their identity.

In an answer and cross petition that was filed by E M on 7th March 1974 she states under paragraph 3.

"The respondent denies that the petitioner is not the father of M M as alleged in paragraph 4 of the petition but states that the said M M was born on 10th February 1943 and was a child in "Ventre La Sa Maere" in June 1942 when the respondent left the petitioner"

Although the paternity of M and N are highly contested at least the legal position of M could be covered by the provisions of the Section 118 of the Evidence Act. I do not wish to dwell with this controversy save to say that both of these gentlemen have used the name of the deceased and passed out as deceased children.

I am intrigued by the fact that the deceased who belonged to the High Eclair of the Society during the yester-years of male chauvinism when men took pride particularly in their male children could disown two of his sons and fail to participate at all the activities of their lives.

Whichever the case, I am satisfied on a balance of probabilities Mugo and Nyoike are children of the deceased under Section 29 of the Law of Succession.

These persons were not provided for in the deceased will and I wish to follow the reasoning by the Court of Appeal Gicheru JA (now the Chief Justice) in the case of JOHN KINUTHIA GITHINJI VS GITHUA KIARIE, & OTHERS NAIROBI C.A. No. 99/89 whereby the observations of Cockbirn, CJ was reiterated as in the case of BANKS VS GOOD FELLOW 1870 L.R. as follows:

The law of every civilized people concedes to the owner of property the rights of determining by his last will, either in whole or part, to whom the effects which he leaves behind him shall pass……………

A moral responsibility of no ordinary importance attaches to the exercise of the right given. The instincts and affections of mankind, in the vast majority of instances, will lead men to make provisions for these who are nearest to them in kindred and who, in life have been the object of their affection……………….

The same motives will influence him in the exercise of the right of disposal when secured to him by law. Hence arises a reasonable and well warranted expectation on the part of a man's kindred Surviving him, that on his death effects shall become theirs, instead of being to strangers. To disappoint the expectation thus created and to disregard the claims of kindred to the inheritance is to mock the common sentiments of mankind and to violate what all men ……………………….deeming an obligation in moral law……….."

I agree with that passage that the Testator has power to dispose of his property but that freedom is not absolute.

The expectations of our society in this case could be similar to the above passage, that is, the deceased was expected to make a reasonable provision for his former wife and children.

M who is said to have been born in "Ventre la sa mere" and N who passed out as the deceased son and still believes he is the deceased son, should be provided for with reasonable provision for dependancy.

In this regard, this court should interfere with the deceased freedom to dispose of his property and make reasonable provision for the disinherited former wife and children.

In this regard the court has to take into account the provisions of Section 28 in determining the reasonable provision and the nature and amount of the deceased's property.

Going by the petitioner's evidence certain properties such as the Runda property were not included in the will, although it formed part of the deceased estate.

The deceased widow M N subsequently passed away. The deceased properties and what forms part of the estate are stipulated, in the affidavit of the 1st petitioner sworn on 28th October 1998 which was an affidavit in support of the Summons for confirmation, I have taken into consideration that list of properties which clearly show the deceased had a vast estate. Taking all the matters into consideration, and all the circumstances of the dependants, E M , N and M, and considering their relationships with the deceased, I would award them the property known as House in Runda Estate LR No. 209/8229 and 10 acres of land at Ichaweri Farm in Gatundu LR No. 7785/18 as reasonable provision for their dependancy.

Accordingly these are the orders of the court.

1) The grant of probate of the written will of the deceased be and is hereby granted to the petitioners, and named executors in the deceased will of 28th April 1994.

2) The petitioners do make reasonable provision for E M , P M M and P N M by vesting or transmitting properties known as

a) House in Runda L.R. [particulars withheld]

b) 10 acres of land to be excised from Farm in Gatundu Ichaweri L.R. [particulars withheld]

The properties to be held by E M for life and in trust of P M and P N in equal shares.

This being a family matter let each party bear their own costs.

It is so ordered.

Ruling read and delivered on 21st day of April 2005.

MARTHA KOOME

JUDGE