



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
SUCCESSION CAUSE NO. 2340 OF 1996

IN THE MATER OF THE ESTATE OF MANIBHAI KISHABHAI PATEL ALIAS MANIBHAI
KISABHAI PATEL – DECEASED

J U D G M E N T

Manibhai Kisabhai Patel alias Manibhai Kishabhai Patel died on 14th July 1996 at Surrey in London. He was domiciled in Kenya and lived with his wife in Kisumu. Following his sad demise, his wife Shardaben Manibhai Patel and his brother Babubhai Kishabhai Patel petitioned the court for a grant of Probate of the last will of the deceased. The deceased according to the Petitioners in their petition filed on 4th November 1996 executed a will. The two claim to be the executors named in the alleged last will of the deceased and they annexed to the petition the same will of the deceased. The Petition was supported by an affidavit and annexures.

Dilip Patel, son of the deceased objected to the making of representation to the estate of the deceased as sought in the Petition of the two Petitioners on grounds that the signature of the deceased on the Will dated 12th May 1996 and deposited in court is not that of the deceased and is a forged signature; that as such the alleged Will has not been properly executed and lastly that the Affidavit in support of the petition contains false assertions in that the value of the property of the deceased has been grossly undervalued and does not reflect the true value. An answer to the Petition for a grant was filed by the Objector on 25th February 1997. Several annexures were filed with it. On the same day the Objector also filed Petition by way of cross application for a grant. Dilip Patel in that Cross Petition sought to be granted Letters of Administration intestate of the estate of his late father Manibhai Kishabhai Patel who died domiciled in Kenya on the 14th day of July 1996 at Bletchingley, Surrey, England. The Petition was also supported by an affidavit sworn by Dilip Patel, the petitioner by way of cross petition. The Petitioners Shardaben Manibhai Patel and Babubhai Kishabhai Patel filed a Supplementary Affidavit in which they sought and did adjust the value of the estate from K.shs 20,712,463/- in their original Affidavit to K.shs 26,702,463/-.

Thereafter, there were several Affidavits filed by both the Petitioners and the Objector/cross petitioner, and the matter was eventually placed before the court (Lady Justice Owuor J. as she then was) for directions. The court directed and I quote:

“In that regard, I hereby direct that the hearing of the application shall be by way of viva voce evidence and the Affidavits already on record”.

That direction was delivered on 24th April 1998 and so by that direction the affidavits that were already on the record as on 24th April 1998 were to be considered along with viva voce evidence. The Petitioners called four witnesses which included one petitioner. The Objector called five witnesses which also included the Objector.

Babubhai Kishabhai Patel is the second Petitioner and was the first witness for the petitioner. He stated in brief that he is the brother to the deceased. Pradip Patel mentioned in the Will is his son. The deceased

lived in Kisumu with Pradip Patel and the deceased widow. Pradip Patel, the witness's son has been living together with the deceased since the same Pradip was born in 1954. The deceased had been operated sixteen years before his death for a by-pass. He was diabetic and was always on insulin. One of the deceased son called Harshad lived in London, but when he went for a visit to South Africa, he died there. The first Petitioner who is deceased's wife was in South Africa then, and the witness was also in South Africa. First petitioner went direct to London from South Africa while the witness came back to Nairobi. The deceased came to Nairobi from Kisumu.

He was with Pradip Patel. The three met at the witness's house in Nairobi on 12th May 1996. One, a friend of the witness called Manubhai Naranbhai Patel, who was an old friend of the deceased was also there. The deceased had a brief case with him and his bag and papers. Among the papers was a Will which was already typed. He (deceased) discussed the will with Manubhai. He said that day was his 75th birthday and he wanted to sign his will on the same day. This witness never read and is not sure if Manubhai read the Will. The deceased said he wanted the Will to be witnessed by Manubhai but Manubhai said one witness would not be enough, and so a second witness to the will was necessary. As a family member was not accepted, Atulkumar Chimanbhai Patel who was working for Allparts Castings and who was there was called to sign. The witness witnessed the deceased signing the Will first. Atulkumar Patel signed then Manubhai Naranbhai Patel signed second as witness. The will was then put in an envelope and given to the witness who gave it to his nephew Pupendra Patel, and asked Pupendra to put it in a safe. The witness, together with the deceased went to London.

The Objector, Dilip Patel stays at Westlands according to this witness. The Objector separated from the family since 1984 and whenever the deceased came from Kisumu to Nairobi, he could stay with his nephew Pupendra and he never stayed with his son, the Objector. The Affidavit in support of the two Petitioners application was signed by the two Petitioners before Chaganbhai Patel, Advocate in the firm of Kholi Patel & Raichura, Advocates, Kisumu. Patel, Advocate explained the Affidavit to the witness and deceased's wife understood it.

On cross-examination, he said that when Chaganbhai Patel explained the affidavit to him, the first Petitioner was there. He is a businessman ever since he came to Kisumu. He did his business half in Kiswahili and half in Gujarati. He was in Kisumu from 1944 to 1973. He has little understanding of English language. He read the will for the first time 15 days after the funeral of the deceased. Pupendra is a director in his company and is his nephew. Pupendra gave him the will 15 days after the funeral. When it was given to him, he took it to Kisumu and read it for the first time in Kisumu although it was given to him in Nairobi. He called Chhaganbhai Patel and the Will was read in the presence of Chhaganbhai Patel and the widow of the deceased. He did not know why the widow did swear an Affidavit denying having seen deceased's will till 18th February 1997 in Mr. Goswami's office, but the witness was told by the same widow in September 1997 that the Objector had taken her to Goswami's office and had her sign Affidavit without explaining the contents to her. Witness knew the widow since 1944.

The Objector had been staying in Nairobi since 1973 and did not stay with the widow. The Will was signed by the deceased at 5.00 p.m. whereas the witness had arrived in Nairobi from South Africa at 3.00 p.m. The witness and deceased were doing business in Kisumu jointly from 1944 to 1972. He had 25% shares. Since his death the Business has closed down – the shop was closed about one year after the deceased's death. By the time the deceased died he had two houses and a flat. The value of the houses was close K.shs 10,000,000 each but he is not aware of the exact value. When the deceased signed the will, he was not well. He was emotional about his son but he signed the same Will as he said he was on his 75 years old and so he wanted to sign his will. Chhaganbhai Patel was deceased's Advocate. The witness does not know who had prepared the Will. The Will does not indicate who prepared it. Atul had worked for the witness for two years prior to the time of signing the will. He obtained work permit for Atul as he was not a citizen. He was employed and would do whatever he was asked to do.

PW2 was Atul Chimanbhai Patel. He said in his evidence in chief that he is not related to any of the parties to this matter. He works for All Parts Casting Ltd. a company owned by PW1 and B.C. Patel. He knew the deceased. He went to PW1's house for condolences on three occasions. On Sunday 12th May 1996, he went there in the evening. As he was at the gate, PW1 called him inside the house. He went

inside and found PW1, and deceased in the house. PW1 told him that the deceased wanted him to witness the deceased's signature on the deceased's will. The deceased signed first and then asked him to sign. He identified his signature. After signing the will he went out of the house and he knows nothing of what happened to the same will. He is certain he never signed any other paper looking like that copy of the will. Sometimes later the Objector whom he knew asked him to go to lunch with the objector. That was on 15.1.1997 at Rickshaw Restaurant. Sroya was also there. He told them what he had told the court.

On cross-examination, he denied having told the Objector that PW1 told him to sign Blank forms. During his employment with PW1, the same PW1 had never asked him to sign any documents for him. He signed the same documents in one of the three sitting rooms of PW1's house. He cannot remember what deceased, himself or Manubhai were each wearing on that day. He used company's car to go to PW1's house. He saw the Objector on Friday only and not on Sunday. When he arrived at PW1's house, PW1 was already there and there were about 10 people when he arrived at the house. He came to Kenya in 1991 and was on a work permit. The deceased signed the will while seated on a chair. He went there on Sunday to take the shop's keys from him to be ready to open the shop on Monday. He cannot speak both English and Hindi well. The Affidavit he signed was explained to him in Gujarati. One Vishubhai explained the affidavit to him but he signed it when he was taken to Commissioner for Oaths. The Commissioner for Oaths A. Adere read it to himself. When he was invited to lunch by the Objector, he became suspicious as it was not usual for Director to call an employee for lunch. He thought, they wanted something. He concluded his evidence by saying that he stays with his family and does not stay with PW1.

Chhaganbhai Mutibhai Patel is an advocate in Kisumu. He knew the deceased and family since 1945 and acted for him as advocate. He received a call from the deceased and went to the place where the deceased was. He was told the deceased had been taken home. He went to his house in Kisumu to console the deceased. He was there for about 2 hours. In the afternoon, he went again to the deceased. The deceased called him aside took out a form and a sheet of paper written by him. The deceased instructed him to draft a will as per instructions written in the sheet. He gave him the sheet of paper on which he had written his instructions. That was on Friday evening. On Saturday, the witness went and drafted the will in English. The sheet given to the witness was written in Gujarati but the witness drafted the will in English. At 12.00 noon, he went to the deceased's house and returned his form together with the paper on which the instructions were. He then told the deceased to get the draft typed and signed because on Saturday afternoon the witness's office was not working. He read the draft and explained it to him in Gujarati. The deceased left for Nairobi on Sunday morning and then to London. Witness went to the airport to see the deceased off. The witness was shown Exh.1 and he confirmed that it is the will as per his draft.

In cross-examination, he said he made the draft of the will on Saturday and he did it in his handwriting. The will is as per his draft. Deceased had never made any other will with the help of the witness. Deceased spoke English well and read English well and could read the draft. He had written many wills during his period of practice – about 1000 wills. He uses precedents in preparing wills. He would send six copies of other wills to the court by Tuesday 9.11.99. He knew the widow very well and sees her in Kisumu. She stays in Kisumu with Pradip Patel. Pradip supports her and she get something extra as she gets 25,000/- rupees. She went to his Chambers and he explained to the widow the petition and the will. According to this witness, if the widow says he never explained to her the will then Brambhatt must have drafted it for her to sign. He insisted that he explained to her the will but stated further that he normally does not append a signature certifying that he has explained to anybody about a will. He is not aware of any law requiring such a certificate, but he explained it to her twice. He dismissed witness's affidavit sworn before Brambhatt as a pack of lies. His draft was approved by the deceased but he did not know where the final will was typed.

The last witness called by the Petitioner was Manubhai Naranbhai Patel. He was a friend of the deceased for over 40 years. PW1 is also his friend while PW2 is an employee of PW1. After the death of the deceased's son in South Africa, the witness went to the residence of PW1 in Nairobi on 12.5.96 to pay his condolences to the deceased. He got into the house in the afternoon. Later PW1 told him that the deceased wanted to talk to him. Deceased, PW1 and himself went to a separate room where the deceased showed them a will. The witness read it. He then witnessed it and PW2 also witnessed it but PW2 was called

afterwards to sign it. The same will was left with PW1. He did not see the Objector around at that time. In cross-examination, he said he had known the deceased for well over 40 years and PW1 is also his friend. They do real estate business and farming. They have a farm and have a joint interest in Patel Flats and Chemelil Sisal Estate. He got to PW1's house between 2 p.m. and 2.30 p.m. When he got there PW1 was not there but deceased was there. Before PW1 came, the witness was just seated consoling the deceased who did not tell him of any assistance needed. Atul was not there then but there were about 10 people there as people were coming and going into the house. He read the document as the deceased wanted to know what he thought of it but he did not make any changes. Deceased signed the will, then Atul signed and the witness signed it as a third person. He confirmed that it was PW1 who was left with the document and not any other person. The Objector was not there where they were sitting but the witness remembers seeing the Objector sometimes that evening. The will was signed at about 4.30 p.m. or 5.00 p.m. on Sunday.

As I have stated hereinabove, the Objector/Petitioner by way of cross petition Dilip Patel gave evidence and called four witnesses. He was DW2 as his witness, DW1 the handwriting expert gave evidence first. I will however begin with the evidence of DW2 the Objector first. He is the son of the deceased. He feels the will is not genuine and that it is forged. It is not true will of his father. The will is dated 12.5.1996 while he was with the deceased on that day. The deceased had arrived in Nairobi from Kisumu at 11.00 a.m. on that day and was on transit to London to attend the funeral of his son who had died in Durban South Africa. The deceased was on that day in a shock and there were dozens of people who came to offer condolences to the deceased over his son's death. He was with the deceased from the time the deceased arrived from Kisumu to the time the deceased went to bed at 10.00 p.m. PW1 arrived in Nairobi from South Africa at 4.00 p.m. and that is the time the deceased and PW1 got together, but the deceased was very upset about the death of his son. He (Objector) was with the two from the time PW1 arrived in Nairobi upto the time they went to bed. Deceased did not sign any will. PW4 who is one of the witnesses to the deceased's signature was there but PW2 was not there. After the funeral he met PW2 over lunch at Rickshaw Restaurant in the City Centre. DW3, Yunis Sroya was present and the Objector's wife was also there. PW2 was shown a copy of the will and he confirmed that one of the signatures on the will was his. PW2 said he had signed the same at PW1's shop as he was working for PW1. PW2 however did not tell him the date he had signed it. Atul said PW1 told him to sign the document which was among other documents. PW1 told him they were some share certificates, but he was not clear as to whether they were share transfers but vaguely said they were share certificates. According to the will, the deceased bequeathed two properties in Kisumu town to Pradip Kumar Babubhai Patel who is the son of PW1 who is the other Applicant for the grant of Probate. These properties are a residential property on Impala Walk in Kisumu and the other is a property with a going business Kawa Motors. Those properties were valued at that time between K.shs 50,000,000 to 60,000,000 plus the value of the stock in the running business. Deceased also left some shares in the company which are being controlled by other partners. The Objector is not certain as to the value of the same. On 12.5.1996, when the will was said to have been executed the deceased health was not good and Dr. Warshaw treated him. Because of his health, the doctor did not allow him earlier on to travel to South Africa to see his son who was in the ICU. His mother had told him that the deceased told her he made a will leaving everything to her and that the will was with PW1. She told him that PW1 had given her some documents which she signed but as she was illiterate she did not understand the documents. Shown an Affidavit, he confirmed that these were the documents his mother signed. The will was read to his mother by the witness's lawyer Mr. Goswami. It was Rahul Shah who explained the will to his mother but cannot remember what date it was. According to this witness when the will was read to his mother, she was shocked and looked slightly disturbed. She then agreed to swear another Affidavit and that was the Affidavit sworn on 5th September 1997. She is now 78 years and lives in Kisumu. She lives with Pradip Kumar, who is PW1's son. He got hold of the services of a handwriting expert to enable him confirm that the signature on the will was not that of the deceased. He ended his evidence in chief by saying that he wants the letters of administration to be in joint names of himself and his mother.

On cross-examination, he said his brother and sister are in London and that is why he wants letters of administration in his name and that of his mother. The same brother and sister have not come forward to demand the same and have not joined him in challenging the will. He cannot say anything as to whether the brother and sister believe the will is in order. He met his father from Kisumu at the airport and from

that time he was with him all the time except when he went to the bathroom. He was with the deceased because the day was an unhappy day and he was the only son of the deceased in Kenya. The amount left in the will could go to him if his mother did not live much longer but the real estates were bequeathed to Pradip Kumar irrespective of what happened to the mother. He denied persuading his mother to get the will out of the way. He was only serving the interest of his mother who was then 74 years old as if the will was not there his mother would have been better off. The Objector himself said he was comfortable in his business. He did not want PW1 to get joint letters as he is in a better position to advise his mother. He did not know that what was to go his mother would go to her only during lifetime and not permanently. He believed his father's assets should have been given to his mother and not to his cousin. The business was a joint family business. He separated from the same joint business and took his money out. He is looking after his mother's interest, but he is quite comfortable as he is an insurance broker. The farming business was being run by PW1, deceased and Pradip in Kisumu and his mother was being looked after by the three in Kisumu. He found it odd that Pradip his cousin should have something when they had none. The deceased could not have been strong enough to gather all the information in the will after hearing of the death of his son. He would have needed to go to auditor for the information.

John Baptist Mujuzi, was the handwriting expert. He is at present self-employed in the examination of handwriting. He has a certificate in the examination of handwriting which he obtained in USA. He is a graduate of Makerere University where he obtained a Bachelor of Science degree. He had earlier been employed by Uganda Government as the handwriting and Ballistic expert. Sometimes in January 1997, he received some documents from the Objector's counsel. These were photocopy of the last will of the deceased; photocopy of 2nd & 3rd pages of the deceased's passport. He also received photocopy of Kenya Revenue Authority VAT form signed by the deceased. Further he received photocopy of balance sheet bearing the deceased's signature and lastly he received photocopy of a trust form relating to insurance policy signed by the deceased. He examined the same and prepared a report which is in record as Exh.2. He explained at a good length his reasons for concluding that the signature in the will is not that of the deceased touching mainly on the differences he could see in letters P, M, K and T.

On cross-examination, he agreed that he was given to understand that the signature on the will had been questioned. In the modern times, according to this witness, it is not difficult to identify signature from photocopies. He agreed that a pen or a biro can make impression that may not show on the photograph. In a photocopy the image is made by lighting striking on the original and taking the image on the photocopy paper. He also agreed that whenever one tries to reproduce something one loses some details as original may contain some other areas that may not appear on carbon copy. He was not told the circumstances of signing the other documents. He did not know the deceased's age neither did he know that by the time deceased signed the will he was diabetic and sick. The sickness may have effect on the signature. Further old age may also have effect on the signature in some areas, as when one is sick, he is weak and may not hold the pen firmly and the speed may be different. Shown the letters Ms he conceded that he did not know whether a pen or a biro was used in writing the same letter. If he had the original writing he would have been able to tell. He then described the differences and said the writers of the two Ms have different writing habits. Sometimes there may be variations even on the two signatures on a will.

In re-examination, he stated that a sick and aged person can make variations in his signature but he would not say the signatures were written by an ill and aged person because that person would have been weak and would write an even and laboured strokes while his writing habits would remain unchanged. He could not see the effect of old age and sickness in the signature.

DW3, Mohamed Yunis Sroya recalled on 15th January 1997 he had lunch with Dilip Patel (DW2) at Rickshaw. Atul Patel (PW2) joined them after they had seated themselves, later Dilip's wife joined them. PW2 told them (after discussing other matters concerning the death and cremation of deceased's son, he went to PW1's house to say condolences. Atul told them that sometimes during the week day PW1 gave him documents to sign which were share certificates plus a folded sheet of paper and told PW2 to sign. Something was written in that paper. He signed it but it was not explained to him. He said that when he signed the paper there were no other signatures on the paper. He then stood by the Affidavit he did swear on 24.2.97 and filed in the court on 26.2.97.

On cross-examination, he said Atul said he signed a blank paper. This was said by Atul (PW2) in his presence. He admitted that in his Affidavit he said that Dilip had told him what PW2 had told Dilip. He said that was in his office but he knew what he had said when he went for lunch. He denied fabricating evidence and denied that his role was to confirm Objector's evidence.

Kanaiyalal Somabhai Brambhatt is a Practicing Lawyer and Commissioner for Oaths. He was shown affidavit sworn by the first Petitioner and filed on 5th September 1997. He confirmed that the First Petitioner had sworn that Affidavit and executed it freely after it was explained to her in Gujarati language which she understood well. On cross-examination he agreed that the First petitioner confirmed her Affidavit including paragraph 9.

The last witness was Rahul S. Shah, a solicitor by qualification, but who is doing some other businesses. He translated the affidavit sworn by first Petitioner to the same First petitioner. That was the Affidavit filed on 5th September 1997. He also translated the will to the First Petitioner. Objector was there but took no part in the discussions.

On cross-examination he agreed he was not there when it was being sworn.

These were the facts of this case. The learned counsels did also address me and also filed written submissions. It does appear that the main dispute is as to whether the deceased signed the will that appointed the petitioners executors. The issue of the valuation of the estate was not canvassed in the viva voce evidence before me and I take it that after the Petitioners filed further Affidavit increasing the value of the estate; the parties did not find it important to pursue this line. The main issue therefore is whether the subject will was forged or not. Forgery is an allegation that requires high standard of proof higher than the normal proof with the standards of probability. Of course such proof is not to be as high as is required in criminal cases but I must be fully satisfied that the allegation of forgery has been fully proved. The Objector has alleged forgery of the will and he has the burden of proving the same.

In this case, Hon. Lady Justice Owuor had ordered that both the viva voce evidence and the affidavit evidence be considered. I note that of all those who did swear various Affidavits, only the first Petitioner who is the widow of the deceased did not appear before me to give evidence. All the others gave evidence and I have set out herein above their evidence in brief. The Applicants witnesses, Babubhai K. Patel (P.W.1) Atul C. Patel (PW2) and Manubhai N. Patel (PW4) each maintains that he saw the deceased Manubhai Kishabhai Patel alias Manubhai Kisabhai Patel actually sign the will in their presence on 12th May 1996 in one of the rooms in the house of Babubhai Patel in the afternoon. The Objector says that from the time the deceased arrived in Nairobi from Kisumu by aeroplane, he was with the deceased throughout till 10 p.m. when the deceased retired to bed and did not witness the signing of the will by the deceased and the witnesses i.e. PW2 (Atul) and PW4 (Manubhai). He says that Atul had told him under what circumstances his (Atul's) signature appeared in the will, and his mother, the first petitioner had been told of the existence of a will by the Deceased but the will produced in court could not be the same will as the will in court had a forged signature. He has attached a handwriting expert's report.

I have considered the entire evidence before me. The handwriting experts evidence, while it must be given serious consideration, must nonetheless be evaluated as all evidence before a court of law. In the case of Elizabeth Namene Ndolo vs George Matata Ndolo, the Court of Appeal had this to say on the expert evidence which was also the evidence of a handwriting expert:

“The evidence of PW1 and the report of Munga were, we agree entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say: “Because this is the evidence of an expert, I believe it”.

The evidence of DW1, the handwriting expert was clearly to the effect that all the documents he examined were photocopies i.e. photocopy of the will, photocopy of pages 2 & 3 of the passport of

deceased. Photocopy of the Kenya Revenue Authority VAT signed by the deceased, photocopy of the balance sheet and photocopy of Trust Form all signed by the deceased. He received these from the offices of the Objectors learned advocates. He agreed in cross-examination that whenever one tries to reproduce something one loses small details and that original may contain some other areas which would not appear on the carbon copy. In my humble opinion there is bound to be differences when one is examining photocopies and when one is examining original documents. I have myself seen the documents that were examined and which were marked specimen 1, which do not even show the name of the second witness to the will properly due to photocopying. In fact specimen 1 page 3 leaves out the names of the 2nd witness completely. Specimen 2 seems to leave out a letter before "Ms" the first signature and specimen 3 does not show even the signature properly. Much as I may accept that with modern facilities it may be possible to get comparisons done of photocopies of signatures, still in the case before me, where I have not been shown which modern method was used, it does not appear to me that an accurate result could have been obtained purely by comparing photocopies. Be that as it may, the will in question was allegedly signed on 12.5.96; I was not told when the passport was signed. That date may be in the seal on the passport but as only a copy was available, I cannot read it and there was no evidence on it. Kenya Revenue Authority VAT Form was apparently signed in December 1995 and balance sheet was signed apparently on 17th May 1989. Thus the document signed nearest to the date of signing the will was Kenya Revenue Authority VAT form and that was signed about six months to the date of signing the will. As I have said, I found it difficult to read the signature in that document due to photocopying process which left blank marks all over it. As to the other form signed on 17th May 1989, there is a clear marked two differences between the date of signing the will and the date that document was signed. The witness admitted that when one reaches old age it may have effect on his signature in some arrears. Further he also admitted that he was not told that the deceased was old, sick and diabetic whereas his evidence was that the sickness may have some effect on the signature. He said in his report inter alia as follows:

"These letter forms showed a hand movement in the execution of the strokes which I found to be completely different from the hand movement that formed these letters in the two signatures found in the will".

One cannot stop the feeling that diabetic and sick conditions including the state and circumstances the deceased was in on 12.5.1996, only some hours before flying out of Kenya to attend his son's funeral, could have made the differences that the handwriting expert could have observed. If the handwriting expert had been fully briefed on all these conditions, his opinion may have been different. In so far as all these were not considered and the expert evidence was based only on the photocopies, and in so far as the expert witness was informed before hand the questioned signatures, I do not find his evidence of any help to me particularly, I do not find his evidence of the standard required to prove forgery of the will the subject matter of this suit.

However, the Objector also says that he felt the will was forged because, he was with his father the deceased all the time on the date the will is alleged to have been signed. There is evidence of people going into and out of that house of PW1 for the whole of that afternoon of 12th May 1996. They were people who were offering their condolences to the deceased over the sad demise of his son in South Africa. Under these circumstances it is difficult to accept that the Objector could have kept full eye over the deceased. Further one has to accept and take judicial notice of the fact that the deceased may not have made the signing of the will a public issue for all to see and particularly, he may have decided rightly not to tell the Objector as objector, being his son was not required to know the contents of the same will before the deceased's death. The Objector also says that the first Petitioner had told him that the deceased had told her he had made a will leaving everything to her (First Petitioner). Even if I were to accept this, all it would mean to me is that PW3 Chhaganbhai Mutibhai Patel whose evidence I do accept was right when he said that the deceased gave him a piece of paper with instructions in it telling the same Patel to draft a will out of the same instructions. That sheet of paper containing instructions out of which the subject will was drafted and could have been what the deceased could have referred to when he talked to his wife the First Petitioner. The Deceased was a layman in legal matters and could have considered what later turned out to be instructions sheet as his will as indeed that sheet he had drafted contained what was his will in layman's language and which PW3, an advocate relied upon to draft the will. There was also an allegation that as the deceased was so shocked by the death of his son and was sickly he could not sign

the subject will. In my opinion the death of the deceased son plus the prospects of his travelling by air to London when sick and against his doctor's advice (as was in evidence) could very well have brought into the mind of the deceased the reality and necessity of finalising matters about his will before he left Kenya.

There was the allegation about Atul C. Patel having not known what he was signing as it was alleged that he was told by PW1 to sign some documents which were share certificates and other documents. These allegations came from the Objector and DW3 Mohamed Yunis Sroya. I heard Atul Chimanbhai Patel give evidence before me. He explained under what circumstances, he had signed the will and denied what he was said to have told either the Objector alone or the Objector together with Sroya and Objector's wife. Two things are clear as to what Objector and Sroya say. First is that it appears this lunch at Rickshaw Restaurant was purposely arranged to trick Atul C. Patel into shedding some information on the question of the signing of the will. In other words it was meant to enable the Objector gather evidence. Secondly Sroya ended his evidence by adopting contents of his Affidavit filed into the court on 26th February 1997. That affidavit is not date stamped by the court to indicate when it was filed. Notwithstanding that, in that Affidavit he readily admits at paragraph 12 that he cannot speak Gujarati and can only understand the gist of what is being discussed in Gujarati. The conversation at Rickshaw restaurant went on partly in Gujarati, partly in Hindi and partly in English. Under these circumstances one may ask how much this witness heard on his own and how much he was informed by the Objector. I also note from his same Affidavit that he was helping the Objector all through in this matter so that one cannot say he was an independent witness. I do agree that Atul (PW2) an employee of PW1 stood a chance of being influenced by PW1 but his evidence as to how he came to sign the will did not leave any doubt in my mind that he acted on his own and did not append his signature to the subject will at his place of work. I also find that he was not tricked into signing this will without his knowing what he was signing. I accept his evidence and reject the evidence of the Objector and Sroya which was in my mind a poor attempt to discredit PW2.

I have referred to allegations about the circumstances under which the First Petitioner did sign documents in respect of the petition. First Petitioner was not called as a witness, but the parties and particularly the Objector maintained that she was coerced into signing the application and Affidavit in support thereof. There was an Affidavit she is alleged to have signed in the Objectors Advocate's office which the Objector urged me to accept. This First Petitioner swore several Affidavits most of which denounced her Affidavit sworn in the offices of the Objectors Advocates. Even if I were to strike all of them out as Mr. Goswami has asked me to do, one they still remains and that is that she is not a witness to be relied upon in support of either side and understandably so because she is the mother of the Objector and is currently living and being taken care of by Pradip Patel. Whatever is her evidence, it is clear that on the day the subject will was signed she was not in Nairobi. Secondly all she is alleged to have said is that the Deceased told her that he (deceased) had made a will leaving her everything. There is no other will produced by either party and so there is no question as to which will should be operative and which one should be rejected. As I have said hereinabove, it is possible that her husband was talking about this subject will which in any case leaves her substantial properties. In my mind her evidence has no bearing as to whether this subject will is forged or not. If it is being alleged that PW1 Babubhai Patel has hidden the true will of the deceased, then first evidence of PW3 who was deceased's advocate to the effect that his subject will contains the contents of the will he drafted in accordance with deceased's instructions and given to deceased to go and type goes directly against that allegation. It thus becomes the duty of the Objector to prove that another will existed. That duty has not been discharged to my satisfaction. I do agree that under these circumstances evidence of the First Petitioner, Shardaben Manubhai Patel would not have added more to the matter in issue namely whether or not the subject will was forged.

The next matter I need to consider is the allegation by the Objector that the will gave his cousin property at the expense of the members of the family. My answer to that is that if he seriously feels so then remedy is not necessarily on his being appointed Administrator of the Estate of the deceased. His remedy lies in Section 26 of the Law of Succession Act.

I have considered the application, the Objection and cross petition. PW1, PW2, and PW4 were present at the time of signing the subject will. They testified as to how the will was signed. I do accept their evidence. I do accept that they did witness the deceased sign the will and they also did sign it on that same day at that time. As I have said, I do not accept the evidence of DW2, and DW3. I have also given

my humble opinion on the effect of the evidence about the First Petitioner who is the widow of the deceased. That takes care of the evidence of DW4 and DW5. As to the DW1, I have stated that his evidence falls far short of what is required to prove forgery. PW3's evidence is accepted.

In conclusion, I do accept that the Applicants have proved that the will was properly executed by the deceased. The Objector has not proved that the will was forged.

The Objectors also submitted that the Petition is fatally defective and sought its being struck out. I have stated that the First Petitioner did not give evidence in court. I have also stated that from what she stated in her Affidavits I cannot rely on her evidence as she seems to have been under pressure from both sides for the reasons I have stated above. Further the Affidavit the Objector is relying on to discredit all her other Affidavits is in my mind a suspect in that it was sworn on 18th February 1997 but was never filed until 5th September 1997 some six and a half months later. Secondly the same Affidavit being challenged i.e. Affidavit in support of the Petition was filed on 4th November 1996. The Objector took no action to have the Affidavit struck out of the record till now. I would not do that on such doubtful evidence as that of the First Petitioner. Thus I do find that the Petition is not defective.

The upshot of all the above is that this Petition succeeds. There shall be a grant of Probate of the last will of Manubhai Kishabhai Patel (also known as Manibhai Kisabhai Patel) to the Petitioners Shardaben Manubhai Patel and Babubhai Kishabhai Patel. The Objection filed by Dilip Patel and Cross Petition filed by the same Dilip Patel are hereby dismissed. Costs to the petitioners.

Dated at Nairobi this 22nd day of May 2001.

ONYANGO OTIENO

JUDGE