In re Estate of Nereah Matende Okaka (Deceased) (Succession Appeal E013 of 2022) [2024] KEHC 1531 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1531 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION APPEAL E013 OF 2022

PJO OTIENO, J

FEBRUARY 16, 2024

IN THE MATTER OF THE ESTATE OF NEREAH MATENDE OKAKA (DECEASED)

BETWEEN

DAVID KWENDO OKAKA ..... APPELLANT

AND

ROBERT OKAKA OKOKO ..... 1ST RESPONDENT

ELPHAS ODANGA OKAKA ..... 2ND RESPONDENT

(Being an appeal against the Ruling of Hon. Eric Malesi (PM) in CMC Kakamega Succession Cause No. 385 of 2019 delivered on 23rd August 2022)

JUDGMENT

1. Following the death of Nerea Matende Okaka ("Deceased") on the 25th day of October, 2018, the appellant petitioned the trial court for grant of letters of administration intestate and indicated that he was the only survivor of the deceased estate which comprised of property known as Land Parcel Number Isukha/Shirere/2452.

2. The grant of letters of administration intestate was issued on the 26th day of November, 2019 and was objected to by the respondents who filed summons for the revocation in an application dated 4th February, 2020. The grounds of the application were that the deceased left a valid Will, that the appellant concealed from the honourable court that the deceased had other children other than himself and that the deceased had no liabilities as has been indicated by the appellant.

3. After giving due consideration to the application, the trial court, by a ruling delivered on 23rd August, 2022 found merit in the respondents summons for revocation of the grant, revoked the grant, issued new grant to the objectors and directed that the distribution of the deceased's estate be in accordance of the deceased's Will dated 15/8/1999.

4. It is that ruling that provoked this appeal initiated by Memorandum of Appeal and faulting the ruling on the grounds that: -

   a. That the learned trial magistrate erred in law and in fact in finding that the deceased died testate.

   b. That the learned trial magistrate erred in law and in fact in finding that the document introduced as a will to be possessing the requirements of what can be termed as a valid will, when it did not.

   c. That the learned trial magistrate erred in law and in fact in holding that there existed a valid will when the two witnesses who were purported to have attested the will denounced it.

   d. That the learned trial magistrate erred in law and in fact in finding that no evidence was led in this manner to show that the will was forged when there was overwhelming evidence demonstrating so.

   e. That the learned trial magistrate erred in law and in fact in considering extraneous issued in making his decision.

   f. That the learned trial magistrate erred in law and in fact in failing to appreciate that the mystery surrounding the purported will cast doubt on its validity.

   g. That the learned trial magistrate erred in law and in fact in finding that the appellant failed to impeach the document introduced as a will when insurmountable evidence was led doing so.

   h. That the learned trial magistrate erred in law and in fact in totally disregarding the appellant's evidence.

   i. That the learned trial magistrate erred in law and in fact in not properly or at all applying the law in his decision.

   j. That the learned trial magistrate's whole judgment is against the pleadings, submissions and the law and this resulted in miscarriage of justice.

5. The appellant is thus praying that the ruling of the trial court be set aside with costs and his position as the administrator restored.

6. The parties were directed to file submissions setting out their arguments for and against the appeal.

7. In the submissions the appellant identifies the first issue for determination by this court to be whether the Will dated 15/8/1999 propounded by the respondents is valid and answers the issue in the negative. He underscores the role of witnesses in the signing of a Will under section 11(c) of the *Law of Succession Act* is to authenticate the making of a Will. In this matter he points out that the alleged witnesses in the making of the deceased's purported Will namely; Rodah Ester Okaka and Dayna Ayuma Okaka denied ever signing the Will thus rendering the Will invalid.

8. He adds that the Will was authenticated by only the 2nd respondent without an independent witness. He then points out that all the witnesses summoned by the respondent resided in Vihiga yet the deceased lived in Kakamega under the care of her son Kennedy Okaka and her daughter Rodah Ester Okaka.

9. He argues that it is suspicious how the 2nd respondent who resides in Mombasa was the only person who gave evidence regarding the validity of the Will and claims that where the circumstances under which a Will is made are suspicious, it can lead to the Will being rendered void especially where the

person who prepares the Will takes a substantial benefit under it and in this regard they place reliance on the case of Vijay Chandrakant Shah v The Public Trustee CA No. 63 of 1984.

10. He concludes the submissions and contends that the original Will was never produced in Court as required under section 5(3) of the *Law of Succession Act* and Rule 7(5) of the *Probate & Administration Rules*.

11. For the respondents, it is submitted that the appellant has failed to prove the allegation of fraud in the making of the Will to the required standard in terms of the decisions of *Christopher Ndaru Kagina v Esther Mbandi Kagina & Another* (2016) EKLR where the court held that an allegation of dishonesty must be pleaded clearly and with particularity.

12. It is further argued that since the appellant failed to challenge the will or seek the provision of a dependant at the trial court, he is estopped from challenging the same through the present appeal in accordance with section 120 of the *Evidence Act* and they cite the case of *Phenehas Nyaga Kavuri (suing as the legal representative of Faith Wanjira Njagi (Deceased) & another v Godwin Murithi Gichovi & another* in that regard where the court held as follows;

> 21. As I have already noted, the duty of this court on appeal is to re-evaluate the evidence tendered before the trial court. I have considered the same and I don't see any evidence that was tendered to prove that the will left behind by the deceased was not valid. The appellants' herein failed in this test. The 1st protestor only testified as to the Plot 12 Kibugu having been sold and other parts of the estate. However, there was no evidence documentary or otherwise which was produced in that respect. The respondents on the other hand produced the will dated 3.07.2009 and called the attesting witnesses and further the advocate who drew the said will. It is my finding that from the evidence tendered before the trial court, the will by the deceased cannot be said to have been invalid.
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> 22. I note that the appellants faulted the trial court for not subjecting the said will to scrutiny to determine its validity irrespective of the fact that the will was made in suspicious circumstances in that the circumstances under which the same was executed were suspicious and that the will was made under coercion, importunity, fraud or mistake and thus void. Further that the testator did not understand his actions and he could not recollect all his assets as such he mis-described some of them and also the names of the beneficiaries.
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> 23. However, it is my considered view that the trial court was under no duty to do so without any evidence having been tendered as to the invalidity of the said will. There having been no evidence challenging the validity of the said will, the trial court would not have proceeded to determine the said validity. In fact the issue as to the testator having been unduly influenced or the issue of coercion or fraud was never raised in the trial court. This court cannot as such determine on the same. The appellants seem to be trying to fill in the gaps in evidence and which this court ought not to entertain. If they intended to do so, they ought to have made an application to tender more evidence on appeal.
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> 24. It is my finding, therefore, that the trial court was right in upholding the mode of distribution as per the affidavit in support of summons for confirmation of grant. There was no evidence to prove that the will was invalid for want of capacity. The trial court's decision cannot be faulted in that respect. As such, grounds 1, 2, 3, 6, 7 and 8 fails."

13. With such submissions, the respondent prays that the appeal be dismissed and the decision by the trial Court upheld.

Issues, Analysis and determination

14. I have perused the record of appeal, the submissions by the parties and the record of the trial court and identify the only issue for determination to be whether the Will dated 15/8/1999 and produced at trial is a valid Will.

15. Section 11 of the *Law of Succession Act* provides for the formal requirements of a valid Will to be that which has been duly signed by the testator or by another person on his behalf and in his presence, with the intention to give effect to making of the Will and the Will is witnessed by at least two witnesses who saw the Will get signed.

16. The contention by the appellant is that the purported will fell short of the requirements spelled out under section 11(c) of *the Act* because one of the two witnesses to the writing and signing of the will has denounced it.

17. I have perused the proceedings of the trial court and I have noted that of the two witnesses to the will, only Rhodah Ester Okaka testified as PW2 and asserted that she did not witness the making and signing of a will from her deceased mother. She further conceded that the appellant when appointed the administrator of the estate and before the grant could be confirmed, proceeded to sell part of the deceased's estate in the absence of the respondents and then shared with her proceeds of the sale. The position was confirmed by the appellant that the proceeds were shared between him and the said Rhoda. That concession depicts the witness as a beneficiary from the unlawful acts of the appellant and a person whose credibility may not be guaranteed. That doubt on credibility become more disturbing when what is sought to be proved is the grave matter of forgery. That notwithstanding, the Will shows that it was witnessed by four people two sons and two daughters. The Court finds that even if one denounced it the requirement of section 11 of the Act was still met.

18. When the appellant in the affidavit sworn on 14th September, 2014 at paragraph 4, asserts that the signatures purporting to be those of Rhodah Ester Okaka and Dayna Ayuma Okaka as witnesses to the signing of the Will are forgeries, it was his duty to prove that grave allegation.

19. The burden of proof thus rested upon him through with Rhodah Ester Okaka and Dayna Ayuma Okaka to distinctly state and distinctly demonstrate that their signatures were forged. In evidence however onlyi Rhoda gave evidence. That did not negate the validity of the Will.

20. The standard of proof in allegations of forgery was addressed by the court in *Christopher Ndaru Kagina v Esther Mbandi Kagina & Another* [2016] eKLR where the court observed as follows;

> " It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case *Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others [26]* the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In *Belmont Finance Corporation Ltd. v. Williams Furniture Ltd* [27] Buckley L.J. said:
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> "An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are

> complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."

21. The appellant indicated that they reported the forgery with the police but provided no OB Number to the court in that regard. As said before the Will apparently witnessed by four children to the deceased passes the test of the number of witnesses even if the signature by Rhoda is discounted.

22. On the failure by the deceased to provide for all her children in her will, the court is persuaded by the decision of the court in *In re Estate of Lusila Wairu Waweru (Deceased)* [2020] eKLR where it was held as follows;

> "A testator has power to dispose of her property as she pleases and the court is bound to respect those wishes as long they are not repugnant to the Law and she does not leave out some dependants and beneficiaries. Failure to make provision for a dependant by a deceased person in her will does not invalidate the Will as the Court is empowered under *Section 26 of the Law of Succession Act* as demonstrated above to make reasonable provision for the dependant. Section 28 sets out the parameters that this Court should consider when making such provisions."

23. For the above reasons, I find that the will 15/8/1999 met the formal requirements for a valid written will as set out in section 11 of the *Law of Succession Act*. On that limb of the appeal there is no basis to interfere with the Judgment.

24. Having found so, and it being common ground that the deceased also left another parcel of land which was admitted sold in an unlawful manner by the appellant before issue of grant and its confirmation, such sale is unlawful and untenable. That sale, and if transferred, is rescinded and asset reverted back to the estate. It reverts there in intestacy and subject to the usual rules of partial intestacy. Such may be pursued as appropriately advised by Counsel.

25. Accordingly, for the reasons set out above, I find no merit in this appealand the same is dismissed with no order as to costs. Let the grant confirmed by the lower court be, if not already implemented, implemented in full.

26. Let this file be closed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF FEBRUARY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for the Appellant

No appearance for the Respondents

Court Assistant: Polycap Mukabwa