



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 771 OF 2011

IN THE MATTER OF THE ESTATE OF SYLVESTER NJOYI MUCHINYI (DECEASED)

GILPHINE KALEJI MUCHINYI.....APPLICANT

VERSUS

PETER SHIKUKU MUCHINYI.....1ST RESPONDENT

BEATRICE MUKHWANA LUTTA.....2ND RESPONDENT

AND

ASMAN KARAKACHA.....1ST INTERESTED PARTY/OBJECTOR

ALOYS MUCHINYI.....2ND INTERESTED PARTY/OBJECTOR

AUGUSTINE MUSUNGU AKWABI.....3RD INTERESTED PARTY/ OBJECTOR

RULING

1. The deceased Sylvester Njoyi Muchinyi died on 11th March 2011. He left a written Will that was executed on 15th October 2009 in which he appointed his brother Peter Shikuku Muchinyi (1st respondent) as the executor and trustee. In the Will, the deceased identified Beatrice Mukhwana Lutta (the 2nd respondent) as his wife. He identified Dennis Wakhu Lutta, Spencer Murayi Muchinyi, Natasha Mukolwe Muchinyi, Alfred Mbatu Muchinyi, Stephen Muroko Muchinyi and Anthony Ngosia Muchinyi as his children.
2. The assets indicated in the Will were LR No. 2259/214 situated in Karen in Nairobi, LR No. 5/Wanga/Lureko/1495, LR No. S/Wanga/Lureko/ 1500, ½ acre land in Katani in Mavoko, LR No. 97/567 in Tassia Estate in Nairobi and a plot in Kamulu; shares in Multiple Investments (K) Ltd, Kenya Commercial Bank, Norken International Limited and Norken Cooperative Sacco Ltd; retirement benefits at Nairobi City Water and Sewerage Country Ltd and Norken International Staff Provident Fund and Life Insurance Policy; cash balances in banks; and dividends accruing from his shares in companies.
3. The deceased and the 2nd respondent got married customarily in 2005. Spencer Murayi Muchinyi and Natasha Mukolwe Muchinyi were born in the marriage. The respondent had her own child Dennis Wakhu Lutta whom she stated that the deceased acquired permanent parental responsibility over.
4. Prior to his marriage, the deceased had married Gilphine Kaleji Muchinyi in 1982, and the marriage solemnized in 1991. According to her, the marriage was blessed with Juliana Nafula Muchinyi, Stephen Muroko Muchinyi and Anthony Ngosia Muchinyi. The deceased's Will does not mention Juliana Nafula Muchinyi. There is no dispute that the marriage between the deceased and Gilphine Kaleji Muchinyi was dissolved on 11th June 2010 following a petition filed by the deceased in **Divorce Cause No. 97 of 2006** at Milimani Chief Magistrate's Court.
5. On 19th April 2011 the 1st respondent petitioned the court for the grant of letters of administration with written Will. It is evident from the petition that to the children of the deceased was added Evonne Muchinyi.
6. On 9th August 2011 an objection to the making of the grant was filed by the interested parties/objectors Asman Karakacha, Aloys Muchinyi and Augustine Musungu Akwabi who stated that they were members of Wanga Clan to which the deceased belonged. They stated that they had been empowered by the Wanga Clan to file the objection to protect the interests of the deceased's former wife Gilphine Kaleji Muchinyi and also her children with the deceased. Their case was that the Will –

“appear not to have been voluntarily executed by the testator as he was apparently coerced and under duress when he made the same.”

Secondly, that the Will had not made reasonable provision for Gilphine Kaleji Muchinyi and her children. Thirdly, that LR No. 97/567 at Tassia in Nairobi had jointly been registered between her and the deceased and therefore the deceased could not purport to bequeath it to his children. Fourthly, that the property LR No. 2259/214 at Karen in Nairobi was substantially contributed to by her during the marriage.

7. The objection was opposed by the 1st respondent and also by the 2nd respondent. The 1st respondent filed grounds of opposition whose grounds were that the applicant lacked *locus standi* to file the objection to the petition and that the objection lacked merits, was misconceived, frivolous, embarrassing, scandalous, vexatious and an abuse of the process of the court. The 2nd respondent contended that the objection was incompetent and unmerited.

8. Parties filed written submissions which I have read and considered.

9. Under **section 69** of the **Law of Succession Act (Cap 160)** where a notice of objection has been filed under **section 68** (which deals with objections to applications for grant), and there is no answer or cross-application for grant filed by the objector, the court may proceed to make the grant as applied by the petitioner (**In Re Estate of Dorcas Omena Binayo (Deceased)[2012]eKLR**). In the instant case, the objection was filed but no answer and cross-application were filed by the objectors. It follows that there is no objection that can be heard under **section 69(2)** of the **Act**. The notice of objection alone does not constitute a dispute that the court can resolve.

10. The objectors attacked the Will on the basis that the same was not “apparently” voluntarily executed and that it was “apparently” made under coercion and duress. There was no substantiation at all of these claims. There was no affidavit sworn in the matter to which the respondents could have reacted. Under **section 5** of the **Act**, the deceased was free to dispose of his free property by Will. He was presumed to be of sound mind. If the objectors thought otherwise it was incumbent upon them to prove by evidence that the deceased had no capacity to make the Will. In the case, the objectors made no verified claim that the Will was made under any suspicious circumstances, or that the deceased suffered from any disease of the mind, or that his capacity was in anyway weakened. The testator was of age, and there was no evidence that he was coerced to make or sign the Will. Under **sections 5** and **7**, this Will was properly made and signed by a competent person. This was a valid Will (**In Re Estate of Julius Minano (Deceased) [2019]eKLR**).

11. On the question whether the deceased failed to, or sufficiently or reasonably, provide for Gilphine Kaleji Muchonyi or any of her children, this is a situation that **section 26** of the **Act** contemplates and provides for as follows:-

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”

12. It was held in **Curryian Okumu –v- Peter Okumu & 2 Others [2016]eKLR** that the failure to provide for a beneficiary does not invalidate a Will. In **James Maina Anyanga –v- Lorna Yimbiha Ottaro & 4 Others [2014]eKLR** the court held that:-

“Failure to make provision for a dependant by a deceased person in his Will does not invalidate the Will as the court is empowered under section 26 of the Law of Succession Act to make reasonable provision for the dependant.”

13. It follows that Gilphine Kaleji Muchinyi and her children have a remedy under **section 26** of the **Act** to apply for reasonable provision out of the estate of the deceased. Such an application will be made against the executor of the Will, once issued with a grant of probate.

14. The question whether either LR No. 97/567 Tassia Nairobi or LR No. 2259/214 Karen in Nairobi were not the free property of the deceased that he could bequeath by Will will appropriately be dealt with during the application for the confirmation of the grant. The claim cannot invalidate the Will (**In Re Estate of Johana Keya Kikuyu (Deceased)[2020]eKLR**).

15. I hope I have said enough to find that, one, the objection was incompetent and is struck out, and,

16. Two, the same was, in any case, lacking in merits and is dismissed. Costs shall follow the event.

17. It follows that, the grant of probate with Written Will shall issue to the 1st respondent.

18. I ask that within 30 days from today, the 1st respondent shall apply for the confirmation of the grant and serve all the parties herein for them to respond within 30 days. Any application under **section 26** of the **Act** that has been filed will be heard together with the application for confirmation. If any party wishes to file an application under **section 26** of the **Act**, he or she has leave of 21 days to do so and serve for response to be filed within 21 days. Such application will be heard together with the application for confirmation.

19. This matter shall be mentioned on **17th May 2022** for directions on hearing.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY 2022.

A.O. MUCHELULE

JUDGE