



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 607 OF 2009**

**IN THE MATTER OF THE ESTATE OF MAKOKHA NYILISI MUSA (DECEASED)**

**RULING**

1. The application for determination is dated 16<sup>th</sup> December 2019. Directions were given on 19<sup>th</sup> May 2021, for its disposal by way of written submissions.
2. The summons, dated 16<sup>th</sup> December 2019, seeks review of orders that were made on 11<sup>th</sup> July 2019, on distribution of the estate herein, and the setting aside the entire ruling and orders, and adopting the wishes of the deceased as expressed in his will made on 20<sup>th</sup> November 2004. It is brought at the instance of the administrators Zedekiah Sakwa and Zaddock A. Makokha. They aver that as at the date the court was distributing the estate, based on the proposals of the protestor, ostensibly intestate, the deceased had in fact died testate, as he had made a will, and his estate ought to have been distributed based on the terms of that will. The will was allegedly made on 20<sup>th</sup> November 2004, and was in the custody of the protestor. They aver that the existence of the will was a matter of public knowledge, and that to date the validity of that will was not challenged. They aver that the non-consideration of the will was an error manifest on the face of the record, which the court should revisit. They attach a copy of the ruling of 11<sup>th</sup> July 2019, and a copy of a handwritten document in Kiswahili.
3. There is a reply to that application by Mark Nyangweso Makokha, Francis Lukoye Makokha, Gladys Shisia Makokha, Filis Akonya Makokha, Jeridah Omuwenje Makokha and Ruth Mumonyi Makokha, vide a joint affidavit that they swore on 22<sup>nd</sup> December 2020. I shall refer to them as the respondents in this ruling. They are all from the second house. They oppose the application, dated 16<sup>th</sup> December 2019. They assert that the deceased died intestate, and that they were never in custody of the alleged will. Mark Nyangweso Makokha and Francis Lukoye Makokha assert that they never signed the document purported to be the will of the deceased. They state that after delivery of the ruling on 11<sup>th</sup> July 2019, the administrators had a right to appeal against that ruling, but they did not exploit that opportunity. They aver that the purported document did not meet the threshold of a will, as it purported to bequeath 28 acres of the estate to the deceased, it is not described as the last will and testament of the deceased, it is not attested by two or more competent witnesses as required in law, and the language of the document does not show an intent on the part of the maker to make a will to be enforced upon his demise. They aver that the alleged will does not make provision for daughters.
4. The two sides have filed their respective written submissions. The submissions by the administrators are dated 29<sup>th</sup> June 2021, while those by the respondents are dated 26<sup>th</sup> July 2021.
5. In their written submissions, the administrators address the law on review of court orders and decrees. They submit that no application was ever made in court to either vary challenge revoke or seek revocation of the will, and that the court had failed to take the will into consideration. They aver that the court disregarded the will in distribution of the estate, despite that fact that its validity was never challenged, and they submit that that was a procedural error on record. They have cited decisions in *In re Estate of Livingstone M'mungania (Deceased)* [2018] eKLR (Mabeya J), *In re Estate of Makerer Arap Birir (Deceased)* [2018] eKLR (M. Ngugi J), and *In re Estate of Eliud Wanyama Saratuki (Deceased)* [2021] eKLR (Ouko P, Gatembu & Murgor JJA).
6. On their part, the respondents submit that since what was placed before me was an application for review, the administrators were obliged to demonstrate that they had discovered new evidence which was not within their knowledge when the distribution orders were being made, and that there was an error apparent on the face of the record. They aver that no case has been made out for review for the administrators have not established either of those two, neither have they demonstrated that there was any other sufficient reason for review of the distribution ordered. On the alleged will, they state that the document purported to be a will did not meet the threshold. It was not headed "Last Will and Testament," and it was not signed at the end of it by the maker and two witnesses. It is also submitted that in the document the deceased had given 28 acres of the land to himself, and if he intended the document to take effect after his death, he would not have made such a provision. The same had also made no provision for the daughters of the deceased. They have cited *Republic vs. Advocates Disciplinary Tribunal ex parte Apollo Mboya* [2019] eKLR (Mativo J).
7. The deceased herein died on 5<sup>th</sup> July 2009. Representation to his estate was sought in intestacy by his widows, vide a petition that they filed herein on 5<sup>th</sup> October 2009. One of the widows died, and Zedekiah Sakwa moved the court, by an application dated 16<sup>th</sup> July 2015, to

substitute her as administrator, and the application was allowed.

8. The new administrator, Zedekiah Sakwa, filed a summons for confirmation of grant, dated 4<sup>th</sup> March 2016, on 21<sup>st</sup> March 2016. In that application he did not propose distribution based on any will, and he did not disclose that the deceased had left any will, neither did he place one before court and invite the court to consider distribution of the estate based on the same. A protest to that application was filed by his co-administrator, who also did not advert to the deceased having died testate.

9. The document said to be the will of the deceased was first raised or placed on record on 29<sup>th</sup> August 2016, when Zedekiah filed a Motion dated 4<sup>th</sup> August 2016, seeking orders against intermeddling by a Gabriel Osundwa Ekeya, and generally preservation of the estate, claiming that the administratrix was selling a portion of that estate to that person. He averred that the deceased had already shared out the estate amongst his sons, and he attached the document to the application dated 16<sup>th</sup> December 2019 as a copy of the will that distributed the estate, dated 20<sup>th</sup> November 2004.

10. No directions were taken on the disposal of the application dated 4<sup>th</sup> August 2016, but directions were given on 10<sup>th</sup> April 2017, for disposal of the summons for confirmation of the grant by way of *viva voce* evidence. The oral hearing happened on 6<sup>th</sup> March 2018 and 6<sup>th</sup> June 2018. Both administrators testified, and they called one witness. The alleged will, dated 20<sup>th</sup> November 2004, featured prominently in those proceedings. The administratrix, Catherine Makokha Musa, who was the protestor to the confirmation application, and the first to testify, stated that prior to his death, the deceased had called the sons to a meeting, attended by the Assistant Chief, on a date that was not disclosed, at which the property was distributed. She asserted that nothing was written down on how the estate was distributed by the deceased, but said that there was a dispute that went to the local District Officer over land during the lifetime of the deceased, after that meeting that had distributed, after the deceased refused to give some of the sons their share. She called a witness, Isaya Ambululi Ambundo. He said the deceased had left a will. He said that the deceased had called a meeting, at a time when he was sick, and subdivided his land. He said that that was on 6<sup>th</sup> September 2006, and the deceased was present, together with the Assistant Chief and villager elders. Zedekiah Sakwa, the other administrator, testified that the deceased called a meeting on 20<sup>th</sup> November 2004, when the Assistant Chief and other distributed the land. An agreement was written down, which he produced and was marked as an exhibit. Thereafter, the family disagreed on the distribution inked in that agreement, and the dispute was escalated to the Land Disputes Tribunal. He stated that he and the other sons took the deceased to the Tribunal after he reneged on the agreement of 20<sup>th</sup> November 2004, and he blamed his stepmother and co-administrator of making the deceased move away from that settlement.

11. The ruling of 11<sup>th</sup> July 2019 was by Njagi J, based on those oral proceedings. In the body of the ruling, the court did consider the document dated 20<sup>th</sup> November 2004. At paragraph 6, the court noted that the protestor referred to a meeting of elders called by the deceased to divide the land between his two houses. She did not refer to any date. At paragraph 7, the court noted that the witness for the protestor talked of a meeting that the deceased called to demarcate the land on 6<sup>th</sup> September 2006. At paragraph 8, the court noted that the Zedekiah Sakwa testified of a meeting that was held at the home of the deceased on 20<sup>th</sup> November 2004, to distribute land, and an agreement was reached, which was reduced into writing, and he produced the writing as D. Exhibit No. 1. It was noted that there was, after that a disagreement on its contents, and the deceased reneged on it, and was sued at the Land Disputes Tribunal. At paragraph 9, the court noted that Zedekiah Sakwa had testified that the document dated 20<sup>th</sup> November 2004 was not signed by the deceased. At paragraph 16, the court ruled that since the document dated 20<sup>th</sup> November 2004 had not been signed by the deceased, it was not a valid agreement, it was not enforceable, and it could not be used as a basis for distribution of the estate of the deceased.

12. The application dated 16<sup>th</sup> December 2019 principally rides on the document dated 20<sup>th</sup> November 2004, which the administrators assert to be the will of the deceased. If indeed it was the will of the deceased, one would wonder why the administrators obtained representation to the estate of the deceased intestate instead of treating him as a person who died testate. Secondly, the administrators, and in particular Zedekiah Sakwa, who perpetuates the argument that that document was the will of the deceased, keeps prevaricating. In one breath, he asserts that it was the will of the deceased, while in the other he says it was an agreement on how the deceased distributed his property during his lifetime. In his filings, he has asserted it was a will, but at the oral hearing he asserted that it was an agreement on the lifetime distribution of the property by the deceased, and he produced it as such as an exhibit. He testified that the deceased reneged on it, and they then sued him at the Tribunal. So, was it a will or was it not.

13. From the material on record, it would appear that it was not a will. Zedekiah Sakwa himself told the court that the same was not signed by the deceased. The handwritten notes that Njagi J took, when Zedekiah Sakwa testified on 6<sup>th</sup> June 2018, reflect him as saying:

*“My father had the original agreement. It is not true that the agreement I have produced is fake. The deceased did not sign the agreement...”*

14. The court observed at paragraph 9 of the ruling, talking about Zedekiah Sakwa:

*“... He also conceded that the deceased has not signed the alleged agreement entered into on 20/11/2004, D. Ex 1.”*

15. The court went on to say at paragraph 16, again about Zedekiah Sakwa:

*“The petitioner conceded at cross-examination that the deceased did not sign the alleged agreement, D. Ex 1 dated 20/11/2004. The fact that the document is not signed by the deceased means that it is not a valid agreement. It is thereby not an enforceable document. It cannot be used as a basis of this suit that the deceased distributed the land to his sons.”*

16. From the above, it should be clear that the document dated 20<sup>th</sup> November 2004 could not pass as the will of the deceased because the deceased himself did not sign it. The validity of a will is provided for under section 11 of the Law of Succession Act, Cap 160, Laws of

Kenya, and it is predicated on its execution by its maker and its attestation by two or more witnesses. I will stick to the provision on execution. Without execution, by its maker, the document purported to be a will cannot possibly be one. Period. See *In re Estate of John Karabu Gichuru (Deceased)* [2013] eKLR (Musyoka J) and *In re Estate of Hanson Nicholas Charles (Deceased)* [2020] eKLR (Chemitei J).

17. I find it curious that the administrators are now arguing that the document dated 20<sup>th</sup> November 2004 was a will. When Zedekiah Sakwa placed it before Njagi J, and had it marked as an exhibit, he did not describe it as a will, and he did not invite the court to treat it as one. Rather, he said it was an agreement on the distribution of the land during the lifetime of the deceased. He said that they tried to get the land subdivided on the basis of the document, during the lifetime of the deceased, but the deceased reneged on it. A will is intended to take effect upon death. The administrators here did not treat the document dated 20<sup>th</sup> November 2004 as one that was intended to take effect upon the death of the deceased. They treated it as a document guiding distribution of his property during his lifetime, hence the push to have him implement it, and when he reneged they sued him to force him to impliment it. The administrators cannot now turn around and claim that the document was a will that the court ignored at distribution, when they did not present it to court as a will, but as an agreement to distribute land during the lifetime of the deceased. The administrators are clearly speaking from both sides of their mouths. It was an agreement when they were prosecuting the confirmation application, but it has now become a will because the argument that it was an agreement was rejected by the Judge. Surely, they cannot have it both ways.

18. Njagi J, at paragraph 16, ruled very clearly, that that document was not signed by the deceased, which then meant that it was not valid, it was not enforceable, and it could not form basis for distribution of the estate. The administrators are now asking me to treat the same document as valid, and enforceable and as forming a basis for distribution of the estate, despite that clear finding by the court. They are inviting me to rely on a document that a court of concurrent jurisdiction has dismissed as invalid, unenforceable and incapable of forming basis for distribution. I cannot make orders that would contradict subsisting findings by another Judge of the High Court in the same matter. In any event, the administrators have not sought to have this finding reviewed. That finding is one of merit, and it can only be challenged on appeal.

19. The Judge was faulted for disregarding the alleged will or failing to take it into account. I believe that what I have stated above answers this submission. Njagi J discussed the said document comprehensively in the ruling, before coming to the conclusion on its status at paragraph 16. The document was unsigned and, therefore, invalid and unenforceable, surely how was the court expected to have regard to a document that has no force in law whatsoever. Having concluded that it was not valid and enforceable, the court could not thereafter take it into account during distribution. Being unsigned, it could not be valid or enforceable, either as an agreement or as a will, or anything else for that matter.

20. The application before me is for review of the orders on distribution on the basis of the document of 20<sup>th</sup> November 2004. Review is founded on two specific grounds, and one general ground. The specific grounds are discovery of new evidence and error apparent on the face of the record. The general ground is any other sufficient reason. The document dated 20<sup>th</sup> November 2004 is not a new discovery. It was initially placed on record through the Motion of 4<sup>th</sup> August 2016. It was at the centre of the oral hearings that Njagi J conducted. It was produced as an exhibit in those proceedings and the witness who relied on it was cross-examined on it. Njagi J also discussed it at length in the ruling, and the judge dismissed it as an invalid document that was of no effect whatsoever. So, nothing new turns on it. It cannot form basis for review of the orders that Njagi J made on 11<sup>th</sup> July 2019. Regarding error on the face of the record, the argument appears to be that the disregarding of the document dated 20<sup>th</sup> November 2004 amounted to a fundamental error on record. I do not understand how it can be said that Njagi J disregarded the document, when the same was referred to at paragraphs 8, 9 and 16 of the ruling. Indeed, at paragraph 16, the court concluded that the document was invalid and unenforceable, and could not be a basis for the court to distribute the estate. There was no disregard. Disregard is about ignoring or not paying attention to. See *Concise Oxford English Dictionary*, Oxford University Press, 2011. Njagi J did not ignore nor not show attention to the document dated 20<sup>th</sup> November 2004. He paid attention to it, and to the evidence given about it, before ruling that the document was invalid, unenforceable and did not provide basis for distribution of the estate. Clearly, there is no error apparent on the face of the record. On the general ground, it has not been demonstrated that there is any other reason, sufficient or otherwise, to review the orders of 11<sup>th</sup> July 2019 on account of the said document.

21. I do not think I need to say more. There is absolutely no merit in the application dated 16<sup>th</sup> December 2019, and I hereby dismiss the same. There shall be no order on costs. It is so ordered. **F FEBRUARY 2022**

**W. MUSYOKA**

**JUDGE**

**MR. ERICK ZALO, COURT ASSISTANT.**

**MR. SHIFWOKA, INSTRUCTED BY NYIKULI SHIFWOKA & COMPANY, ADVOCATES,  
FOR THE ADMINISTRATORS.**

**MR. AMASAKHA, INSTRUCTED BY AMASAKHA & COMPANY, ADVOCATES, FOR THE  
RESPONDENTS.**