REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

P & A NO.28 OF 2015

1. ALBERT ALEXANDER AGGREY EKIRAPA

2. HUMPHREY ELISAI EKIRAPA.....PETITIONERS

VERSUS

JANE ASAMI OMBAYA.....OBJECTOR

R U L I N G

1) The late John Richard Ino Ekirapa, passed on at the age of sixty five (65) on the 14th September 2013. Thereafter, in their capacity as The executors of his written will, his brothers namely **Albert Aggrey Alexander Ekirapa and Humphrey Ekisai Ekirapa** (herein the petitioners/respondents) filed a petition for letters of administration with written will attached respecting the estate of the deceased. Accordingly, on the 2nd November, 2015, necessary grant of letters of administration with written will annexed was issued to the petitioners. However, on the 22nd February 2016, the deceased, widow **Jane Asami Ombaya** (herein objector) applied for the revocation of the grant vide the summons for revocation of grant dated 15th February 2016 which sets out all the grounds for the application as fortified or buttressed by the averments, contained in a supporting affidavit deponed by the objector/applicant of 15th February 2016.

The application was opposed by the petitioners on the basis of the grounds and averments contained in a replying affidavit dated 29th January 2014 by the first petitioner.

(2) The court considered the application on the basis of the rival written submissions filed herein by both parties and rendered its ruling on the 30th April 2014 in which it dismissed the application and gave the parties thirty (30) days within which to take a date for interrogation of the authencity or otherwise of the annexed will. This was in accordance with **Section 70** of the **Laws of Succession Act** which provides that: -

> **"whether or not there is a dispute as to the grant, every court shall have power, before making a grant of representation-**
>
> **a) examine any applicant on oath or affirmation, or**
>
> **b) call for further evidence as to the due execution or contents of the will or some other Will, the making of an oral Will, the rights of dependents and of persons claiming interests on intestacy, or any other matter which appears to require further investigations before a grant is made or**
>
> **c) issue a special citation to any person appearing to have reason to object to the application."**

(3) Accordingly, oral evidence on the authenticity of the impugned Will was led by the petitioner's through the first petitioner **(PW 1)** and by the objector **(OBW 1).**

Whereas the petitioners contended that the impugned Will **[EXH –AAAE 1]** was a valid Will for purposes of all and sundry, the objector contended that the Will was not a valid document for purposes of a testate succession.

Having considered the evidence in its entirety and the arguments by the respective parties in support of their respective positions regarding the impugned Will, it became apparent to this court that the validity of this Will was the basic issue falling for determination by this court. This matter therefore turns on the validity or otherwise of the impugned will such that if the will is a legally valid document then it would safely be stated that this was a testate succession for which the petitioners legally and properly obtained the disputed grant of letters of administration with written Will annexed and which grant ought to be confirmed in their favour. On the other hand, if the Will is an invalid

document, then it would mean that this is actually an intestate succession for which grant of letters of administration intestate would issue in accordance with the necessary provisions of the **Law of Succession Act** (cap 160 LOK).

(4) **Under Section 3 of Law of Succession Act**, a Will is defined as "the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part ll and include, a codicil" and **under section 5 (3) of the Act**: -

> **"Any person making or preparing to make a Will shall be deemed to be of sound mind for the purposes 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, drunkeness, or from any other cause, as not to know what he is doing"**

The burden of proof that the maker of the Will was at the time of making it not of sound mind lays on the person who so alleges as provided for under **Section 5 (4)** of this Act.

Herein, the sanity or otherwise of the deceased in making the Will was not at all or substantially disputed. It would therefore be taken that the deceased was of sound mind when he expressed his intention and Will as indicated in the impugned Will.

(5) Under **Section 6** of the Act, there is no mandatory requirement for the appointment of an executor or executors of the Will and any Will or part thereof made by fraud or coercion or by such importunity as takes away the Free exigency of the testator or is induced by mistake is null and void for any purpose (see **S.7** of Act)

Herein, no evidence was provided by the objector to show and prove that the impugned Will was a culmination of a fraudulent act committed at the behest of the petitioners. Neither was there any proof that there was any form of coercion exerted upon the deceased at the time of writing the Will in the presence of his brothers or any one of them.

Indeed, no substantial evidence was led by the objector to show that the impugned Will was invalid in terms of **Section 11** of the Law of Succession Act. The document itself speaks for itself inasmuch as it shows that it was signed by two competent witnesses (i.e the two petitioners) even though the name of the second petitioner is not typed on the document. There is nothing to show that the two signatures of the witnesses were forged and do not belong to the petitioners. Neither is there any evidence to show that the signature of the deceased in the document was forged.

(6) For all the foregoing reasons, it would follow that the impugned Will was properly and legally made and executed for purposes of a testate succession such as the present one. The issuing of the grant of letters of administration with written Will annexed to the petitioner was therefore proper and lawful.

In sum the objection by the deceased's widow is wanting in merit and is hereby dismissed with the result that the summons for confirmation of grant dated 17th December 2015 be and is hereby allowed as prayed. Each party shall bear their own costs.

Ordered accordingly.

DELIVERED and **SIGNED this 11TH day** of March **2021**

J.R KARANJAH

JUDGE