



IN REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 45 OF 2019

GICOVI NYAGA.....1ST APPELLANT

JERNADO NDWIGA NYAGA.....2ND APPELLANT

VERSUS

NJAGI NYAGA.....RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Ruling of Hon. M.N. Gicheru (CM) delivered on 17/12/2018 in Embu Succession Cause No.306 of 2016.

2. The Appellants are protestors who objected to the Respondents mode of distribution on the grounds that the deceased had already distributed his estate at a meeting held with the local Chief on the 4/05/1994.

3. The protest was dismissed for lack of merit and the Appellants being aggrieved by the decision instituted this appeal and listed seven (7) grounds of appeal as summarized hereunder;

(i) The trial court dismissed their Protest despite overwhelming evidence being tendered by the Appellants that the **WILL** was a forgery and was null and void;

(ii) The trial court erred in finding that the Appellants had not proved insanity of the testator as required by the law despite there being evidence adduced by the Appellants that the deceased's health had deteriorated to the extent that he could neither talk coherently or walk at the time of making the alleged **WILL** and this evidence was not controverted by the respondent; It disregarded the appellants written statement dated 22/03/2017 that stated that the deceased was not mentally, physically, psychologically and emotionally capable of going on 2/06/1994 to an advocates office to write a **WILL**, The trial court failed to realize that the Appellants had discharged their burden of proof on the deceased's mental capacity;

(iii) The trial court erred in disregarding the evidence of the protestor's witness James Njururi M'thanju whose evidence was that the deceased had distributed his estate amongst the children on 4/05/1994 and there was no reason given that circumstances had changed that necessitated the deceased to make a **WILL** on 2/06/1994 thus altering the distribution;

(iv) The trial court erred by disregarding the document marked '**GNI**' annexed to the Affidavit of Protest which clearly showed the mode of distribution that had been authenticated by all his sons through signatures and thumbprints done less than a month before the making of the alleged **WILL**;and

(v) The trial court's judgment was against the weight of the evidence.

4. The parties were directed to canvass the Appeal by filing and exchanging written submissions; Hereunder is a summary of the respective rival submissions;

APPELLANTS' CASE

5. The Appellants submitted that the trial court erred in finding that the **WILL** annexed to the Summons for Confirmation of Grant was valid yet contrary to this the deceased had died intestate. They further submitted that they had proved that the **WILL** was a forgery, null and void because the deceased's health had deteriorated two (2) months prior to his death rendering him incapable of walking or talking and thus was not in a position to go to an advocates office to draw up a **WILL**; The deceased had no capacity to make a **WILL** on the 2/06/1994 and the

Respondent played a key role in the drawing up and execution of the alleged **WILL** that was done under suspicious circumstances;

6. The Appellants submitted that the deceased's estate ought to be distributed according to the minutes of the meeting held on 4/05/1994 with the local chief Ngandori Location where all the family members were in agreement on the mode of distribution;

7. That the Respondent did not prove the **WILL** as he never called the witnesses to the **WILL** to give evidence in court, no evidence was tendered by the Respondent to confirm that the thumb-print on the document was that of the deceased;

8. In conclusion the Appellants humbly urged the court to allow the appeal and that the Court adopts the mode of distribution made on 4/05/1994 as proposed by the Appellants in their Affidavit of Protest.

RESPONDENT'S CASE

9. In response the Respondent submitted that the deceased drew up a **WILL** on the 2/06/1994 upon which he affixed his mark and two persons witnessed the document one being Tabitha Runji and the other being Harun Utuku (an advocate) He argued that the **WILL** was valid as it was drawn in accordance with Section 11 of the Law of Succession Act;

10. The Respondent contended that the Appellants failed to prove that the deceased was seriously ill and was mentally challenged; In accordance with Section 107 of the Evidence Act and Section 5 of the Law of Succession Act the Appellants ought to have produced medical reports and called medical experts to testify to prove the deceased's mental infirmity at the time of making the **WILL**;

11. It was the Respondent's case that the deceased was at liberty to redistribute the estate as many times as he so wished; That pursuant to Section 18 of the Law of Succession Act the **WILL** revoked and supersedes all other oral utterances made by the deceased before 2/06/1994 and this **WILL** should be the basis upon which the estate should be distributed;

12. In the circumstances the Appeal has no merit and the Respondent prayed that it be dismissed with costs to the Respondent.

ISSUES FOR DETERMINATION

13. Upon reading the parties respective written submissions these are the issues this court has framed for determination;

(i) Whether the deceased had capacity to make the written **WILL** dated 2/06/1994;

(ii) Whether the written **WILL** dated 2/06/1994; and

ANALYSIS

14. In considering the Appeal, this court is guided by the Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**; it held that an appellate court will not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law".

Whether the deceased had capacity to make the written WILL dated 2/06/1994;

15. The deceased is said to have drawn up a **WILL** on the 2/06/1994 upon which he affixed his thumbprint mark and two persons witnessed the document one being Tabitha Runji and the other being Harun Utuku (an advocate); The Respondent's contention was that the deceased had the mental capacity to make the **WILL**;

16. The Appellants filed their respective objections in their Affidavits of Protest raised the issue of mental capacity of the testator and claimed that at the time of making the **WILL** the deceased did not have the requisite mental capacity as his health had deteriorated to such an extent that he could neither walk or talk coherently;

17. The applicable law on testamentary capacity is found at Section 5(3) of the Law of Succession Act which provides that the testator must have testamentary capacity to make the **WILL** and it reads as follows;

'Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose 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, drunkenness, or from any other cause, as not to know what he was doing.'

18. At Section 107 of the Evidence Act and at Section 5(4) of the Law of Succession Act ('**Act**') both sections provide that the evidentiary burden of disproving testamentary capacity lies upon the person who so alleges; Section 5(4) of the Act reads as follows;

'The burden of proof that a testator at the time he made a will, was not of sound mind, shall be upon the person who so alleges.'

19. It therefore follows that the burden to prove mental incapacity before the date of the making of the will was upon the Appellants and they had the onus to adduce evidence in support of their allegations that the deceased was suffering from an infirmity that affected his mental capacity and was therefore unable to make the impugned **WILL**;

20. The deceased's mental capacity is a question of fact and it can be proved by medical evidence or by oral evidence by persons who knew the testator well and it can also be proved by way of circumstantial evidence; The case law referenced by this court is the case of **Re Estate of Gathuthu Njuguna (Deceased)(1998) eKLR**; where it was held that;

‘It seems that, if the objector produces evidence which raises the suspicion of the testator’s capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had the necessary capacity, he will have discharged his burden of proof and the burden then shifts to the person settling up the will to satisfy the court that the testator had the necessary capacity.’

21. This court has had an occasion to peruse the court record at length and has noted that the initial directions given by the trial court was that oral evidence would be tendered at the hearing thereof; These directions were later changed to the matter being canvassed by way of filing and exchanging of written submissions; in those written submissions filed by the Appellants it is noted that it only made reference to the suspicious circumstances surrounding the making of the will, in that the deceased was ailing and it would have been impossible for him to have travelled unaccompanied from Embu to the Muranga office of the advocate to have the WILL prepared and executed;

22. No reference was made to the evidence of any medical expert nor did they annex any medical legal report to the submissions to support their allegations on the deceased's poor state of health or of his mental infirmity at the material time so as to prove his lack of testamentary capacity.

23. The trial court in its judgment found that the Appellants had not proved *‘the allegation that the deceased was of unsound mind at the time of making the will. I find that the protestors have not proved insanity on the part of the testator as required by law.’*

24. There being no evidence to demonstrate that at the material time and date that is 2/06/1994 the deceased lacked testamentary capacity or legal capacity to comprehend transactions like the making of a **WILL** this court is satisfied that the testator had testamentary capacity; This court finds no reason to interfere with the trial courts finding that the Appellants failed to prove that the testator lacked testamentary capacity.

25. This ground of appeal is devoid of merit and it is hereby disallowed.

Whether the written WILL dated 2/06/1994 was valid;

26. The applicable law on attestation is found at Section 11(c) of the Law of Succession which provides that *‘no written will shall be valid unless the testator has signed or has affixed his mark to the will’* and that it was *attested by two or more competent witnesses each of whom must have seen the testator sign or affix his mark to the will.’*

27. The section also goes on to state as follows;

‘The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it is intended to give effect to the writing as a will;’

28. The Appellants raised the issue of forgery and contend that the thumb-print impression appearing on the **WILL** was not that of their deceased father.

29. It is this court's view that the challenge to prove the allegation raised by the Appellants on the deceased's thumb impression was not such a herculean task to disprove, as the Appellants could have simply invited an expert witness in the form of a document examiner to demonstrate to the court the differences between the known thumb print of the deceased and the questionable thumbprint on the **WILL**; Had the expert witnesses testimony or his report oral affidavit been annexed to the submissions these would have greatly assisted the court in making a determination on the authenticity of the mark.

30. Again this court reiterates that the burden of proof was still on the party that had made this serious allegation of forgery in this instance it was the appellants; such allegations of forgery border on criminality and therefore the burden of proof attracts a higher threshold; This court finds that the Appellants failed to prove to the desired threshold that the thumbprint on the **WILL** was not affixed by the deceased.

31. Another key ingredient that goes to formation of a valid **WILL** is that it must have been executed with testamentary intent;

32. The Appellants alleged that the deceased was manipulated into drawing up the **WILL** as the distribution therein differed from the distribution that took place at the meeting held on 4/05/1994;

33. This court has perused the minutes of the meeting of 4/05/1994 at length and notes that the minutes state that Jernado Ndwiga Nyaga who is one of the Appellants herein was opposed to his fathers' mode of distribution; this demonstrates that there was a conflict by some beneficiaries and they were not in agreement with the manner their father wanted to distribute his property; what then followed were deliberations on how the estate should be shared; at the end of the meeting there is nowhere that indicates that the deceased **‘wishes to distribute his estate as drawn up’**(emphasis mine);

34. Again the matter was canvassed by way of written submissions therefore none of the parties were subjected to any cross-examination to test the evidence of what transpired at the meeting of 4.05/1994 and its impossible to conclude. This court cannot therefore find with certainty that the contents of the meeting of 4/05/1994 embodied the deceased's intended distribution of his estate.

35. This court is satisfied that the trial court did not apply wrong principles of law in arriving at its decision that WILL was valid as it

complied with Section 11 of the Act. There being no valid grounds raised by the appellants challenging the validity of the **WILL**, the written **WILL** is therefore found to be valid as it is found to be in compliance with the mandatory provisions of Section 11 of the Law of Succession Act, in that the deceased is found to have testamentary capacity and intent and the mark of the testator is found to be in order and duly attested by two competent witnesses;

36. This ground of Appeal is found to be devoid of merit and it is disallowed;

FINDINGS & DETERMINATION

37. From the foregoing reasons this court makes the following findings and determinations:-

- (i) This court finds that the deceased had testamentary capacity to make the written **WILL** dated 2/06/1994;
- (ii) This court finds the written **WILL** dated 2/06/1994 was valid;
- (iii) This court finds that the appeal is lacking in merit and it is hereby disallowed; and
- (iv) This being a family matter each party shall bear their own costs of the appeal.

Orders Accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 13th day of September, 2021.

HON. A. MSHILA

JUDGE