REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 261 OF 2015

IN THE MATTER OF THE ESTATE OF PETER NZUKI NDETI (DECEASED)

FREDRICK NGAO NZUKI NDETI

SILVESTER PETER NDETI

WILLIAM KIILU PIN NDETI.....APPLICANTS

VERSUS

RAPHAEL MUSYOKA NDETI

WAVINYA NDETI ODUMWOLE.....RESPONDENTS

R U L I N G

1. This matter relates to the estate of Peter Nzuki Ndeti who died on 4th March, 2015 after making what was described as an oral will.

2. A petition for representation to his estate was lodged in court on 22nd October, 2015 by Raphael Musyoki Ndeti and Wavinya Ndeti Odumole, who described themselves as son and daughter of the deceased. A copy of the affidavit sworn in support of the petition listing 6 witnesses to the oral will, dependents of the deceased and inventory of assets and liabilities was filed. The affidavit averred that there was no named executor to the will. Annexed to the affidavit is a letter from the Office of the Chief of Athi River, dated 7.4.2015, which lists the survivors of the deceased as Mary Mwelu Ndeti, Monica Rukia Omari Dodo, Raphael Musyoki Ndeti, Dominic Kioko Ndeti, Fredrick Ngao Nzuki Ndeti, Silvester Peter Ndeti, Willian Kiilu Pin Ndeti, Winnie Kalondu Kivuti, Wavinya Ndeti Odumole and Ignatius Dick Nzuki Ndeti, who are described as sons and daughters. An affidavit was filed on 22.10.2015 wherein it was averred that Fredrick Ngao Nzuki Ndeti, Silvester Peter Ndeti and Willian Kiilu Pin Ndeti refused to sign the consent to making a grant. A grant of probate or written will was accordingly made to Raphael Musyoki Ndeti and Wavinya Ndeti Odumole on 30th May, 2016.

3. On 21st July, 2016, Fredrick Ngao Nzuki Ndeti, Silvester Peter Ndeti and Willian Kiilu Pin Ndeti filed a summons for revocation of the grant. The application is dated 19th July, 2016 and states that the deceased died intestate as no will was left behind and that the deceased passed away on 4th March, 2015 aged 103 years and he was senile hence the grant was obtained fraudulently, by means of a false statement and the proceedings to obtain the grant were defective. The applicants in their joint affidavit averred that the deceased on 21st December, 2014 was 103 years old, had become senile and had no capacity of making a decision or an oral will. It was averred that the gazette notice dated 15th April, 2016 was for petition of grant of letters of administration intestate and that the addresses of the witnesses to the oral will ought to have been provided to the court so that the same would be proven. It was averred that the grant that was issued was that of a written will (Form 45) and what ought to have been granted was a grant of letters of administration with oral will (Form 42) and this is an apparent error. It was averred that the law allows for a maximum of 4 administrators and sought that the court revoke the grant, call for further evidence of the oral will and in the alternative make a finding that the deceased died intestate and issue grant of letters of administration to at most 4 administrators as allowed by law.

4. The administrators replied to the application vide affidavit in reply that was sworn on 14th March, 2017 by Raphael Musyoki Ndeti. He averred that the applicants were informed of the application and refused to sign the consent. According to advice from his advocate, he explained that if a deceased person gave instructions regarding the disposal of his assets and liabilities and the same are reduced to writing, then the written instructions amounted to an oral will. It was averred that the applicants are not in a position to speak to the mental capacity of the deceased and in terms of Section 5(4) of the Law of Succession Act, it was for the applicants to prove lack of capacity of making a will. It was averred that the mistake on the gazette notice was inadvertent and under Section 74 of the Law of Succession Act, a grant can be rectified. It was averred that 4 administrators are not necessary and in this regard the application for revocation ought to be rejected.

5. There is an affidavit on record deponed by Fredrick Ngao Willian Kiilu Pin Ndeti on 20th June, 2018, wherein they withdrew support for the application for revocation and indicated support for the grant of probate.

6. On record is a further replying affidavit deponed by Dr George Mnemo Nyale wherein he averred that the deceased was treated for sever pneumonia, acute kidney injury and cardio-pulmonary arrest that led to his death hence it was not true that he was senile. A copy of the permit for burial was annexed to the affidavit dated 20th December, 2018.

7. On record is a supplementary affidavit deponed by Fredrick Ngao Nzuki Ndeti on 27.5.2019 wherein he averred that Raphael Musyoki Ndeti applied to court for letters of administration ad litem stating that the deceased died intestate and could not turn around to say that the deceased left a will. A copy of the said application was annexed to the affidavit. On record is a further affidavit deponed by Raphael Musyoki Ndeti on 16.1.2020 and filed on 17.1.2020 wherein he averred that at the time of his death the deceased had began a process of transferring his property and he executed several transfers to the trust and annexed a copy of the transfer that was marked RMN1.

8. The court directed that the application be disposed of by way of written submissions. The applicants filed their submissions and averred that the administrators did not comply with Rule 13 of the Probate and Administration Rules for proof of the oral will. It was submitted that the administrators did not cite the applicants as was required under Rule 21 and 22 of the said Rules. It was reiterated that the deceased died intestate and that the grant issued to the administrators ought to be revoked as the same was obtained vide an untrue allegation. Learned counsel for the respondent submitted that the applicant's case is based on the propriety of the process of obtaining a grant. Counsel submitted that no case of fraud or making of a false statement had been proven. Counsel in placing reliance on the case of **Stephen Kurgat Kimwei (2017) eKLR** submitted that the applicant had not established grounds for revocation of the grant. Learned counsel sought that in terms of Section 74 of the Law of Succession Act and Rule 43(1) of the Probate an Administration Rules, the inadvertent error in making a grant of letters of administration intestate be rectified and as such a grant of letters of administration with oral will be made.

9. The issue for determination whether or not the application for revocation ought to be granted.

10. The evidence on record that the applicant seeks to move the court for revocation of grant shows that on 13th May, 2015, one of the administrators Raphael Musyoki Ndeti petitioned for a grant of letters of administration ad litem intestate. If this is the case then it means that the deceased had died intestate, then the deceased's estate was to be distributed accordingly to Part V of the Law of Succession Act which governs intestate succession to the estate of a person who died after 1st July 1981.

11. The applicants Fredrick Ngao Nzuki Ndeti and Silvester Peter Ndeti seem to intimate that the administrator had turned around to say that the deceased had died testate as he had made an oral will before named witnesses. The applicants have challenged the oral will and the procedure leading to the issuance of the grant.

12. The date of the making of the oral will was disclosed as 21st December, 2014.

13. Section 9 of the Law of Succession Act provides for the making of oral wills. The relevant part of that provision, for the purposes of this ruling, is Section 9 (1) which provides as follows:-

> ***"No oral will shall be valid unless:-***
>
> ***(a) It is made before two or more competent witnesses; and***
>
> ***(b) The testator dies within a period of three months from the date of making the will:***
>
> ***Provided that …"***

14. Under section 9, there are only two requirements for a valid oral will. The first is that the will in question be made before two or more witnesses who are competent in terms of the definition in section 3 of the Act. Secondly, the maker of the will ought to die within three months from the date of the making of the will. An oral will is made simply by the making of utterances orally relating to disposal of property.

15. In assessing whether there was an oral utterance of the terms of the will, it was averred in the application for grant that there were 6 persons present. However the record does not indicate whether the persons testified. It was averred that the will was reduced to writing but there is no indication of the same on the record.

16. Where it is alleged that the deceased died testate and that there existed a valid will, the person named in the will as executor petitions for a grant of probate. In the instant case, it was alleged that no executor was named. Rule 13 of the Probate and Administration Rules governs applications for grant of probate where the deceased left an oral will. The said provision states as follows:-

> **"(1)** ***An application for proof of an oral will or letters of administration with a written record of the terms of an oral will annexed shall be by a petition in Form 78 or 92 and be supported by such evidence on affidavit in Form 4 or 6 as the applicant can adduce as to the matters referred to in rule 7, so far as relevant, together with evidence as to-***
>
> ***(a) The making and date of the will;***

(b) The terms of the will;

(c) The names and addresses of any executors appointed;

(d) The names and addresses of all the alleged witnesses before whom the will was made;

(e) …

(f) …"

17. It is clear from the wording of Section 9 of the Law of Succession Act that the life of an oral will is only three (3) months, unless it is made by a mariner. The maker of the will should die within three months of its making in order for it to be valid.

18. From the material before me, the date when the alleged oral will was allegedly made was December, 2014 while the deceased died in 2015 within three months thereafter. The persons alleged to have been present when the will was made did not swear affidavits to give evidence on oath as to what were the circumstances under which the will was made and what is available vide affidavit is the averment that the words used by the deceased were "..all my property shall be transferred to the Trust (Peter Nzuki Ndeti Trust)". At this point I note that the further affidavit that was filed on 17.1.2020 seems to suggest that the deceased had conveyed his property to the trust. I find that the same is not material at this point in time because it relates to a single property and the consideration of the same would be necessary at the time of confirmation of the grant and not at this time that the court is concerned with whether or not the deceased left behind a will. There is no evidence that the applicants were served with the affidavit and it would also occasion prejudice to the applicants if the court were to make a determination in the absence of a response by them to the issues raised in the said further affidavit.

19. Having considered the pleadings and evidence on record, I would need to be satisfied that there was an oral utterance of the terms of the will. As per the evidence of Raphael Musyoki Ndeti and Wavinya Ndeti Odumole, the deceased allegedly stated that all his property shall be transferred to the Trust (Peter Nzuki Ndeti Trust) upon his death. Does this utterance warrant to be considered as a term of his will? I find it rather curious that the deceased would only mention the trust if he was indeed making an oral will on how his estate ought to devolve. Even more curious is his choice of witnesses. From my reading of the evidence of Raphael Musyoki Ndeti and Wavinya Ndeti Odumole it is not known whether they were at the hospital or at home on the day when the Will to dispose of the property was made by the deceased. None of the witnesses indicate the time and the venue that the deceased made the utterances to the effect that his property would be disposed in the manner stated.

20. I am of the view that if at all the deceased made the utterances as alleged by the Applicant, he would have made his intention as to the administration of the estate, identify each share of the estate and the respective beneficiaries and that the same would be written down and that that the words indicated in paragraph 5 of the application for grant did not rise up to the level of making an oral Will. An oral will like a written will must be strongly tested with regard to the well-established principles on wills. To state words uttered by the deceased to be a will without sufficient detail would cast doubt on the terms of the will.

21. The applicants have averred that the deceased lacked capacity to make a will. Section 5(1) of the Law of Succession Act stipulate that any person who is of sound mind and is not a minor may dispose of all or any of his free property by will. (**See In Re Estate of G.K.K (Deceased) 2013 eKLR)** Section 5(3) of the Law of succession Act, specifically states that 'Any person making or purporting to make a will shall be deemed to be of sound mind for the purposes of this section…'. In the absence of proof of incapacity on the part of the deceased, I am not convinced that the deceased was incapacitated.

22. The applicants have in their application averred that the administrators obtained the grant fraudulently. Fraud has been defined as "actual fraud or some act of dishonesty." In **Waimiha Saw Milling Co. Ltd. v. Waione Timber Co. Ltd.** [1926] AC 101 at p. 106. Lord Buckmaster said that *'fraud implies some act of dishonesty.'* The rules of procedure require that where fraud is alleged it must be specifically pleaded and the particulars thereof given in the pleading. The particulars have not been given. However I note some actions of one of the petitioners, that is Raphael Musyoki in stating on oath that the deceased died intestate vide affidavit deponed on 13th May, 2015 in support of the application for grant of letters of administration intestate and then later in the application with Wavinya Ndeti Odumwole turn around and state that the deceased died testate was not being honest.

23. I find that there is no proof that there was a valid oral will and therefore I shall presume that the deceased died intestate.

24. The application dated 19.7.2016 is premised on Section 76 of the Law of Succession Act. Section 76 makes provision for revocation of grants of representation on various grounds. The relevant grounds for our purposes are set out in Section 76(a), (b) and (c) of the Act, which states as follows-

"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(a) ***That the proceedings to obtain the grant were defective in substance;***

(b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to just the grant notwithstanding that the allegation was made in ignorance or inadvertently …"

25. The applicant's case is that the deceased lacked capacity to make a will. However I must dismiss the claim as there was no proof. I find that the terms of the will were not presented to the court to enable it to probe it. This suggests that the application to obtain the grant was defective to the extent that it suppressed the details of intention as to the administration of the estate, identify of each share of the estate and the respective beneficiaries. From the documents available there is evidence that one of the administrators herein had filed affidavit indicating that the deceased died intestate and again later on claim that the deceased died testate. This creates confusion as to whether the proceedings are testate or intestate. Put differently it was defective to the extent of presenting to court incomplete information. To that extent therefore the process of obtaining the grant in this cause was defective and that the grant that was made on 14th June 2016 is available for revocation and ought to be revoked.

26. I note, however, that the power granted under Section 76 of the Act for revocation of grants is discretionary. Where a case is made out for revocation of a grant under Section 76, the court has the option to either revoke the grant or make other orders as may meet the ends of justice. The deceased in this cause died in 2015. The revocation of the grant may set the parties back several years, yet the applicants apparently are dissatisfied with omission of their names as administrators. That can be cured by having their names included as administrators and thereafter the distribution of the estate can proceed.

27. Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules enjoin the court to exercise inherent jurisdiction to make orders as are necessary to meet the ends of justice. It is appropriate to appoint a third administrator in this matter and I expect the administrators to now embark on the process of administration of the estate for the benefit of the beneficiaries.

28. In view of the aforegoing observations the Applicants application dated 19th July 2016 is allowed in the following terms:

a) ***That the name of Fredrick Ngao Nzuki Ndeti be included as one of the administrators of the estate of the deceased***

b) ***That a fresh grant of letters of administration intestate be issued in the names of three administrators namely Raphael Musyoki Ndeti, Wavinya Ndeti Odumwole and Fredrick Ngao Nzuki Ndeti.***

c) ***That the orders made on 14th June 2016 issuing grant of probate of written will are hereby set aside and/or vacated;***

d) the administrators shall proceed to apply for the distribution of the estate of the deceased

e) That this being a family matter there shall be no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 22nd day of January, 2020.

D. K. Kemei

Judge