



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**SUCCESSION NO. 34 of 2015**

**IN THE MATTER OF THE ESTATE OF PETER WALTER KOWALCZYK (DECEASED)**

**THOMAS KOWALCZYK.....APPLICANT**

**VERSUS**

**AGNES SILANTOI KOLII.....RESPONDENT**

**RULING**

1. In the application before me dated 20.3.19, the Applicant, Thomas Kowalczyk seeks the following orders:

**1. THAT no grant of letters of administration to the estate of PETER WALTER KOWALCZYK (DECEASED) who died on 10<sup>th</sup> of March 2013 having been confirmed, such reasonable provisions be made for the Applicant as a son and dependant of the deceased out of his net estate as the court thinks fit.**

**2. THAT this Honourable Court be pleased to make an Order directing the Respondent herein, Agnes Silantoi Kolii who is also the executrix of the estate of the deceased, to provide to this Honourable Court statement of account in respect of the deceased proceeds held at the deceased account held at Barclays Bank Limited, Equity Bank, Pension Scheme in Germany as at the time of his death to enable this Honourable Court ascertain the nature and value of the estate of the deceased.**

**3. THAT costs of this application be provided for.**

2. The grounds upon which the Application is premised are that the deceased was married to the Respondent. The deceased left a will dated 16.7.09 (the Will) in which he appointed the Respondent as the executrix. In spite of the Applicant being his only child, the deceased made no provision for him. The deceased bequeathed his entire estate to the Respondent. He takes issue with the provision in the Will by which the deceased specifically excluded him from the estate. The reason for this as stated in the Will is that the Applicant falsified transfer documents in respect of Title No. Kwale/Diani Complex/354 (the Plot) which reduced the deceased's share therein from ½ to ¼. The Applicant denies that he ever intended to defraud his father. He states that the Plot was purchased by Petra Kowalczyk (Petra) and the deceased. Petra is the Applicant's mother and former wife of the deceased. Sometime in 1994 when the Applicant and Petra appeared before the Land Control Board, they were informed that as foreigners, they could not be registered as the owners of the plot in the absence of a Kenya citizen. The Applicant alleges that after informing the deceased who was then in Germany, it was agreed that their caretaker, Kazungu Kitsao (Kazungu) be included as the 3<sup>rd</sup> owner of the Plot. The Applicant then signed the transfer on behalf of his father and the title was issued in the 3 names. In a judgment in HCCC No. 346 of 1998 filed by Petra against the deceased, the Court ruled that the name of Kazungu be removed from the title.

3. The Applicant lists the following assets of the estate of the deceased:

- i) Money in account no. [xxxx], Barclays Bank Ltd, Diani branch;
- ii) Money in account no. [xxxx], Equity Bank, Ukunda branch;
- iii) Money in account no. [xxxx], [xxxx], Volksbank Koblenz, Postfach [xxxx], [xxxx] Koblenz, Germany;
- iv) Shares in Kenya Commercial Bank Ltd, account [xxxx];
- v) Shares in CDS account no. [xxxx]
- vi) Pension in Germany Bundesversicherungsanstalt fuer [xxxx], Vers. No. [xxxx] Berlin;

vii) ½ share in Title No. Kwale/Diani Complex/[xxxx];

viii) All household goods in Title No. Kwale/Diani Complex/[xxxx].

4. A grant of probate (the Grant) was issued to the Respondent on 30.6.16 but is yet to be confirmed. The Applicant has brought his application for reasonable provision as a son of the deceased.

5. The Respondent challenged the Application by means of a preliminary objection dated 31.5.19 and a replying affidavit sworn on 17.6.19. In the preliminary objection, the Respondent stated that affidavit in support of the Application though deponed in Bonn-Germany was commissioned in Kenya. In the replying affidavit, the Respondent admits that the Applicant is a son of the deceased but states that there is no love lost between them. The Respondent denies that the deceased left anything in the banks and that he was a pensioner and had an account in Germany where she has not gone since his demise. She alleges that the Applicant, his mother and Kazungu had tried to oust the deceased from ownership of the plot. The Court found that the Applicant had acted illegally. This is the reason the deceased decided not to give anything to the Applicant. The Respondent states that the Applicant is of age and is capable of acquiring his own property. She further claims that the Applicant has no *locus standi* to challenge the probate.

6. Nelson Musyoka, a clerk in the firm of Khalid Salim & Company Advocates for the Applicant swore an affidavit on 14.6.19 explaining that he was not aware that the Applicant's affidavit had been notarised in Bonn, Germany. Before filing the Application, he had the same commissioned in Mombasa. He acknowledges the error on his part as he realised later that the affidavit had indeed been notarised. This was confirmed by Mary Wanjugu Waweru in her affidavit sworn on 14.6.19. She stated that when the affidavit was taken to her for commissioning, she did not realise that the same had already been duly notarised, and proceeded to commission the same.

7. Directions were taken that the Application be canvassed by way of written submissions. The Applicant complied with the directions but the Respondent failed to do so. I have considered the Application, the preliminary objection, the rival affidavits as well as the Applicant's submissions.

8. The grounds of the preliminary objection are that though the affidavit in support of the Application was deponed in Bonn-Germany the same was commissioned in Kenya. I have carefully looked at the affidavit sworn by the Applicant. I note that the jurat indicates the same was sworn in Bonn on 18.3.19. However there is a stamp and signature of Mary Wanjugu Waweru, commissioner for oaths, whose address is in Mombasa. A further look at the entire document reveals a page containing the stamp and signature of Edgar Mörtenkötter, Notary who certifies that the Applicant appeared before him in Bonn and acknowledged his signature. My view is that the fact that the Notary's signature and stamp appeared on a separate page would have led Nelson Musyoka to believe that the affidavit had not been commissioned and he proceeded to have the same commissioned by Mary Wanjugu Waweru. The Court is thus persuaded by the explanation given by the said Nelson Musyoka and Mary Wanjugu Waweru. I am satisfied that the Applicant's affidavit was indeed sworn and notarised in Bonn. In the circumstances, without even going into the legal aspects of the same, the preliminary objection being premised on incorrect facts, fails.

9. I now turn to the Application in which the Applicant seeks reasonable provision out of the estate of the deceased, being his biological son. The law relating to an application for reasonable provision by a dependant is found in Part III of the Law of Succession Act. A dependant who is not adequately provided for, or at all, by will or on intestacy may invoke the provisions of the Act to apply for reasonable provision. Section 26 of the Act provides:

***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.***

10. It is not disputed that the Applicant is a biological son of the deceased. As such, he is a dependant within the meaning of Section 29(a) of the Act which provides:

***For the purposes of this Part, "dependant" means—***

***(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;***

11. It is to be noted that the Applicant as a child of the deceased need not in his application for reasonable provision prove dependency. He is a dependant simply by virtue of being a child of the deceased.

12. The Will of the deceased which incidentally is not challenged by the Applicant, makes no provision, reasonable or otherwise for the Applicant. Section 27 of the Act, gives the Court a wide discretion to provide for a dependant not otherwise provided for as follows:

***In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.***

13. Section 28 enjoins the Court in making an order under Section 27 of the Act to have regard to certain circumstances as follows:

***In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—***

- (a) *the nature and amount of the deceased's property;*
- (b) *any past, present or future capital or income from any source of the dependant (sic);*
- (c) *the existing and future means and needs of the dependant;*
- (d) *whether the deceased had made any advancement or other gift to the dependant during his lifetime;*
- (e) *the conduct of the dependant in relation to the deceased;*
- (f) *the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;*
- (g) *the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant*

14. It was submitted for the Applicant that before this the Court proceeds to order that provision be made for a dependant, it must consider the nature and value of the estate of the deceased. The Court should therefore order that the Respondent produces a statement of account of the deceased's bank accounts and pension and further order a valuation of the Plot to facilitate the ascertainment of the nature and value of the estate of the deceased. The Applicant cited the case of Lita Violet Shepard v Agnes Nyambura Munga [2018] eKLR to buttress his submission.

15. It was further submitted for the Applicant that the deceased had not during his lifetime, made any advancement or other gift to him to justify excluding him from his Will. The reason for his exclusion is that the deceased accused the Applicant of fraud in respect of the Plot which the Applicant denies. He relied on the of Lita Violet Shepard case (supra) in which no provision was made to the dependant therein as advancement had been made to her during the lifetime of the deceased.

16. In the Lita Violet Shepard case (supra) the Court of Appeal stated:

***As can be seen above the nature and extent, that is the value, of the deceased's property is the first consideration. In fact, in the ruling by Musyoka J, he notes that the value of the estate is the most significant factor to consider.***

17. This Court acknowledges that the Court of Appeal did in fact find that the nature and value of the estate therein was the most significant factor in that case. A complete reading of the authority however, indicates that the reason for this conclusion is that the learned trial judge had made provision for the applicant therein in the sum of Kshs. 50,000,000/= without a valuation of the estate being done. The Court stated:

***There was no valuation of the estate by a qualified valuer. The learned Judge did not determine the net worth and did not consider the liabilities against the estate as he ought to have done.***

***The finding by the learned Judge that the deceased left behind a substantial estate is not backed by any cogent evidence.***

18. A determination of the nature and value of an estate becomes necessary once a finding is made that reasonable provision ought to be made to a dependant so as to arrive at the quantum and nature of such provision. In the circumstances of the present case however the most important factor for this Court to consider is the deceased's stated reasons for not making provision for the Applicant.

19. On the reasons the deceased gave for excluding the Applicant, it was submitted that the Applicant's actions that led to the reduction of the deceased's share in the Plot from  $\frac{2}{3}$  to  $\frac{1}{3}$  were not fraudulent. The Applicant's case is that he acted in the best interest of the deceased and on advice by the Chairman of the Land Control Board. It was further submitted that although the deceased had the freedom to dispose of his estate as he wished, he also had a responsibility to ensure that he does not disinherit his family members for whom he was responsible during his lifetime. To support this submission, the Applicant relied on the cases of Kamene Ndolo v George Matata Ndolo [1996] eKLR and Gulzar Abdul Wais v Yasmin Rashid Ganatra & Another [2014] eKLR.

20. I have considered the foregoing submissions. It is to be noted from the outset that the Applicant is not challenging the validity of the Will of the deceased nor is he contesting the testamentary capacity of the deceased to make the Will. What he has is disputing is the exercise by the deceased of his testamentary freedom to exclude him from his estate. He now seeks that this Court makes such reasonable provision for him as the Court thinks fit.

21. A reading of the deceased's Will shows that the exclusion of the Applicant was quite deliberate. The deceased stated:

***I also declare that my son, Thomas Kowalczyk did not have the right to get a legal portion of anything from my values after my death (which is part of German Law) because he is doing the signing of false documents in favour of Petra and Kazungu which ends in a fake title deed which is reducing my 50% ownership for 33% or ? in favour of my separated wife Petra and Kazungu and Thomas has no written authority to sign in my name (Judgment 23 July 2009).***

22. The judgment referred to in the Will of the deceased, a copy of which was exhibited by the Applicant, relates to HCCC No. 346 of 1998 filed by Petra and Kazungu against the deceased and the Respondent over ownership, use and possession of the Plot. The deceased in his counterclaim sought the removal of Kazungu's name from the title to the Plot, the inclusion of which was fraudulent. In the judgment, the Court stated as follows:

***I agree with the submission of the 2<sup>nd</sup> Defendant that the transfer form as executed by Thomas Kowalczyk was not valid because he had no power of Attorney. I also agree that the 1<sup>st</sup> Plaintiff Petra Kowalczyk and Kazungu Kitsao connived and presented Thomas Kowalczyk to impersonate the 1<sup>st</sup> Defendant Peter Kowalczyk when they appeared before the Land Registrar. I am not convinced by the evidence given to show that the 2<sup>nd</sup> Plaintiff consented to the impersonation by Thomas Kowalczyk.***

23. The Court proceeded to dismiss the case by Petra and Kazungu and entered judgment for the deceased and the Respondent as prayed in the counterclaim. The Court declared that Kazungu had no interest in the property and directed that his name be removed therefrom.

24. The Applicant asserted that he only became aware of the accusations levelled against him by the deceased relating to the title to the Plot when his mother filed the case against the deceased. He stated that the deceased never attempted to speak to him about the title before the case.

25. One of the factors that the Court is to consider in an application for provision by a dependant of a deceased person not provided for is the reason for exclusion as far as can be ascertained. In the present circumstances, the Court need not speculate as to why the deceased excluded the Applicant from his estate. The deceased explicitly stated his reason in the Will. The reason for exclusion is fortified by the decision in HCCC No. 346 of 1998 where the Court found that the Applicant participated in the connivance of his mother and Kazungu and impersonated the deceased resulting in the reduction of the deceased's share in the Plot from half to a third.

26. The Applicant having found out in 1998, as he stated, when his mother filed suit against the deceased, that his father held him responsible for the loss of his share in the plot from ½ to ⅓, it would appear that the Applicant made no attempts to explain to his father the circumstances he now describes. Notably, even after the judgment was delivered stating that the Applicant's actions were illegal, the Applicant has not demonstrated that he made any attempt to make things right with his father. Given that his father accused him of wronging him, the Applicant ought to have sought out the deceased, to explain to him why he signed the transfer to the Plot without his authority and that his intentions were not fraudulent. The Applicant's attempt to explain to the Court what he ought to have explained to his father prior to his demise is not helpful to his case. Ultimately, the conduct of the Applicant in relation to the deceased and engaging in an illegality led to his being excluded from the Will. By dint of Sections 28(e) & (g) of the Act therefore the Applicant would not be eligible for reasonable provision of the deceased's estate.

27. Given the foregoing circumstances, redistributing the estate of the deceased as requested by the Applicant would be tantamount to rewriting his Will. The wishes of the dead must be respected and honoured by the living and the Court must not be quick to readjust them. This was the holding in In the Matter of the Estate of Late Sospeter Kimani Waitthaka Cause No. 341 of 1998 as cited in In re Estate of Jaswinder Singh Saimbi (Deceased) [2017] eKLR where the Court stated:

***“The Will of the departed must be honoured as much as it is reasonably possible. Readjustments of the wishes of the dead, by the living, must be spared for only eccentric and unreasonably harmful testators and weird Wills. But in matters of normal preferences for certain beneficiaries or dependants, maybe for their special goodness to the testator, the Court should not freely intervene to alter them.”***

28. The foregoing demonstrates that the Court will only intervene where a qualified dependant under Section 29 of the Act satisfies the Court that he has been unreasonably excluded or deprived of reasonable provision. In the present case, the reasons by the deceased to exclude the Applicant are clearly stated in his Will and further asserted in the Court's judgment in HCCC No. 346 of 1998. The Deceased had the testamentary freedom to will away his property as he pleased and it is not for the Court to readjust the bequests at the bidding of the Applicant. Inheritance is a privilege, a gift of love and not a right to be enforced. This is the reason why Section 27 of the Act confers upon the Court complete discretion in an application for making provision for a dependant.

29. The Applicant had submitted that as a biological son of the deceased, he is a dependant, and therefore entitled to reasonable provision from the estate whether or not he was being maintained by the deceased. He relied on the case of Briogan Kadima v Jackson William Musera & another [2017] eKLR in which the Court stated:

***The applicant is a child of the deceased and there can be no question that he is entitled to inherit the estate of his deceased mother as a dependant within the meaning of the term ‘dependant’ as defined in section 29 of the Act as follows:***

30. The cited authority is not helpful to the case of the Applicant. The deceased therein had died intestate and under the provisions of intestacy automatically entitled to a share of the estate. In the present case, the deceased died testate and made clear provisions excluding the Applicant and further stated the reasons for so doing. The Applicant's entitlement is not automatic, necessitating the filing the Application herein invoking the discretionary powers of the Court.

31. In Kamene Ndolo v George Matata Ndolo [1996] eKLR the Court of Appeal had this to say:

***“This court must, however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is expressly recognized by section 26 of the Act...”***

32. Section 26 of the Act places limitations on the testamentary freedom given to a testator by Section 5 of the Act. The Court of Appeal however appears to be saying that the Court may only intervene to make provision for the dependants recognised under Section 29 of the Act for whom the testator was responsible during his or her lifetime. Whereas the Applicant being a child of the deceased need not prove

dependency, the provisions of Section 28 of the Act must be considered. The Applicant has not in his affidavit stated what he does for a living. He has not said what his existing and future needs are. He has also not told the Court of any past, present or future capital or income he has received or expects to receive from any source. Even assuming the deceased had not stated the reasons for excluding the Applicant, without stating his present and future needs as well as any received or anticipated capital or income, it would be difficult for this Court to make a finding in favour of the Applicant.

33. Having taken all facts and the law into account, I find that the Applicant has not placed any material before me to warrant the exercise of my discretion in his favour to grant the orders sought. Accordingly I dismiss the Application dated 20.3.19. This being a family matter, I make no order as to costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 17<sup>th</sup> day of January 2020.**

**M. THANDE**

**JUDGE**

**In the presence of: -**

.....**for the Applicant**

.....**for the Respondent**

.....**Court Assistant**