



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

(FAMILY DIVISION)

SUCCESSION CAUSE NO 961 OF 2006

IN THE MATTER OF THE ESTATE DEVCHAND LAGDHIR SHAH (DECEASED)

MAHENDRA DEVCHAND SHAH.....APPLICANT

VERSUS

DHIRAJLAL DEVCHAND SHAH.....1ST RESPONDENT

KIRAN DEVCHAND SHAH.....2ND RESPONDENT

SARLA DHIRAJLAL SHAH.....3RD RESPONDENT

NITA KIRAN SHAH.....4TH RESPONDENT

PARAS VINOD SHAH.....5TH RESPONDENT

JUDGMENT

1. The deceased herein Devchand Lagdhir Shah died on the 23rd of May 2003. He was survived by a widow Shanta Devchand Shah since deceased, 3 sons and 2 daughters as follows:

- i. Mahendra Devchand Shah (son)
- ii. Dhirajlal Devchand Shah (son)
- iii. Kiran Devchand Shah (son)
- iv. Anjna Devchand Shah (daughter)
- v. Bindu Devchand Shah (daughter)

2. Three years after the demise of the deceased his sons Dhirajlal and Kiran (respondents) filed for probate of a Written Will dated 26th March 2002 in which the two had been appointed as executors. The Grant of Probate was issued on the 25th of July 2006 and confirmed a year later on 4th July, 2007.

3. His other son Mahendra (applicant) moved this court on the 7th of May, 2015 seeking to revoke the Grant of probate issued on the 26th of July 2006.

His case is that at the time the deceased allegedly executed the Will on 26th March 2002, he was of sound mind and did not have the mental capacity to give instructions to make a will, further the respondents failed to disclose that the deceased widow was alive at the time they applied for probate, assets were undervalued, the signatures of the applicant and his two sisters were forged and none of them appeared before a lawyer as alleged as they signed the consent letters.

Further, there was concealment of the alleged Will for over 6 years.

4. The applicant called 3 witnesses. The applicant and his witnesses informed the court that for several years preceding his death the deceased suffered from Alzheimer disease, his health gradually deteriorated and at the time it is allegedly that he made his will he had no mental capacity to give such instructions.

PW1 Dr. S. K. Haria who was the deceased family Doctor, though not a neurologist, informed the court that from 1999 the deceased started having memory loss, he deteriorated and could not remember names of close relatives. 2 years before his death the deceased needed assistance as he could not manage himself, he trembled and by 2002 he had become of unsound mind. The witnesses doubted that the deceased could give instructions for preparation of a will. He further doubted whether the deceased could even read by the time he died.

The witness is married to a cousin of the parties.

During cross examination he confirmed that at the time of writing his report he had no notes as he had long closed his practice and was writing from his memory.

5. In his report dated 10th December 2014, Dr. Haria said inter alia as follows regarding the deceased condition;

“By end of 1999 he had rapidly progressed to moderately severe cognitive decline. He now suffered major gaps in memory and deficit in cognitive functions including disorientation to time and place, failed to remember and recognise close family members, having trouble identifying and recalling objects, decline in language ability, writing and reading. He also displayed signs of difficulty in understanding, perceiving, retaining information, planning and making decisions”

6. The sentiments of Dr. Haria on the deceased's health were echoed by the applicant PW2 and his sisters. Anjna and Bindu PW3 and PW4 respectively. The Applicant informed the court that his father's mental condition was diagnosed in India in 1999 where his two other siblings were Kiran and Anjna. He also took issue with undervaluation of assets and denied signing consent to confirmation of grant. He further stated that he had no idea of the existence of a Will until 2012.

PW3 Anjna affirms that she was in India in 1999 when her father was diagnosed with Alzheimer disease. In her own words she said;

“My father had loss of memory and Alzheimer disease. By end of 2001 my father's memory loss was bad. He was finding it difficult to walk and eat. Hands were shaking, was forced to take a bath. He needed assistance in everything. His health had deteriorated badly. He was of unsound mind. Did not know what was happening. He did not recognise people. The only person he knew was our mum but not her name. He did not recognise any of us

He was very weak and found it difficult to walk. He had become very restless. He was not coherent in his speech. He was incapable of giving instructions.”

As for her signature on the consent to confirmation of grant, she denied signing the same or appearing before an advocate for attestation of the same. She maintained that she visited her parents regularly.

Bindu (PW4) on her part stated that she happened to have been in India on a difference mission in 1999, when she visited her father and learnt that he had been diagnosed with Alzheimer disease, she described her father's condition as follows,

“..... he was weak, he could not recognise what to eat, could not dress and needed assistance in everything he did.

He was of unsound mind”.

She denied appending her signature to a consent letter for purposes of confirmation of grant. She also denied knowing those who attested to her father's alleged will.

7. Five respondents were cited namely Dhirajlal (son), Kiran (son) Sarla (daughter in law), Nita (daughter in law), and Paras Vinod Shah (lawyer).

8. The 1st to 4th respondent's case as presented by the 1st respondent is that in his last years the deceased was active, went to the shop did accounts in the office together with the 1st respondent. He was never diagnosed with Alzheimer disease by any doctor as alleged, the deceased was coherent, well-groomed and could engage in conversation. Further that no signatures were forged as alleged by the applicant and his witnesses. There was an admission though that the applicant, PW3 and PW4 did not sign their consents in the presence of the 5th Respondent. On the deceased health the 1st Respondent said;

“My late father was active and he came to the shop daily before his semi-retirement.

By 1997/1998 he was in semi-retirement.

.....at age of 75/77 no mature person would get violent my father always dress up immaculately in a suit and tie”.

9. Having considered the evidence and submissions by the counsel for the parties the issues herein for determination are:

i. Whether or not the deceased had the capacity to execute a will.

ii. Whether the grant of probate was irregularly confirmed.

iii. Whether lack of consents and under valuation of the assets may render a will invalid.

10. Whether or not the deceased had capacity to execute a Will:

From submissions by the Applicant's counsel and 1st to 4th Respondents' counsel there is appreciation of the law that anyone of sound mind can make a Will and where the testator's capacity has been challenged then the burden of proof shifts to the executor to prove the testamentary capacity of the testator.

The question in issue therefore is whether or not the applicant adequately challenged the testamentary capacity of the deceased and whether the burden of proof shifted to the respondent.

11. Section 5 of the Law of Succession Act provides as follows:

“(1) Subject to the provisions of this Part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.

(3) 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 is doing.

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

12. Section 5(4) places the burden of proof of a testator's capacity on the person who makes an allegation. The test of one's testamentary capacity was laid in the notable case of *Vagella vs Vagella (1999) 2 E.A.* where the court held:

“The validity of a will derives from testamentary capacity of the testator and from the circumstances attending its making. The testator must understand the nature of the act and its effects, the extent of the property he is disposing, understand the extent of the property of which he is disposing and that no disorder of mind shall poison his affection, pervert his sense of right or prevent the exercise of his natural faculties.

The burden to prove the validity of a will rests on the party propounding it and this burden is heavier when the testator's capacity is in question.”

13. In this case the testator's mental capacity as at the time he is alleged to have executed the Will was put to question. His personal doctor though not a neurologist testified to the deceased mental incapacity so did his 3 children. They all painted a pathetic picture of the deceased physical and mental capacity before his death.

14. Paragraph 903, Halsbury's Laws of England, Volume 17 states as follows;

“General burden of proof. Generally speaking, the law presumes capacity, and no evidence is required to prove the testator's sanity, if it is not impeached. A will, rational on the face of it and shown to have been signed and attested in the manner prescribed by law, is presumed, in the absence of any evidence to the contrary, to have been made by a person of competent understanding. However, it is the duty of the executors or any other person setting up a Will to show that it is the act of a competent testator, and therefore, where any dispute or doubt exists as to the capacity of the testator, his testamentary capacity must be established and proved affirmatively. The issue of capacity is one of fact. The burden of proof of sanity is considerably increased when it appears that the testator had been subject to previous unsoundness of mind. The justice or injustice of the disposition may throw some light upon the question of the testator's capacity. The testator's suicide shortly after making the will raises no presumption of insanity if there is no other evidence of insanity”. (emphasize added)

15. In my view the applicant and his witness raised suspicion as to the mental health of the deceased. They were people close to the deceased and who often interacted with him, even though a report from a neurologist or mental health expert was not adduced by them. Needless to say, that the respondents did not either. The testator's capacity can be proved by medical evidence, oral evidence of the witnesses who know the testator well or by circumstantial evidence.

In the matter of the Estate of Gatuthu Njuguna (deceased) (1998) eKLR E. Githinji J (as he then was) quoting Halsbury's Laws of England (supra) Paragraph 903 & 904 had this to say;

“ As regards the testator's mental and physical capacity to make the will, the law presumes that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind, in this

case, the applicant.....However paras 903 & 904 of Volume 17 of Halsbury’s laws of England , show that, where any dispute or doubt of sanity exists the person-propounding a will must establish and prove affirmatively the testators capacity and where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during lucid interval. The same treatise further shows that the issue of testator’s capacity is one of fact which can be proved by medical evidence, oral evidence of the witnesses who know the testator well or by circumstantial evidence

It seems that, if the objector produces evidence which raises 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 had discharged his burden of proof and the burden then shifts to the person setting up he will to satisfy the court that the testor had the necessary capacity.”

16. I am satisfied that the applicant has raised serious suspicion as to whether the deceased was capable of giving instructions, writing a will and disposing of his property in the manner he did.

17. Therefore then, the burden of proof shifted from the applicant to the 1st and 2nd Respondents who propounded the will to satisfy the court that the testator had capacity.

18. The 1st Respondent who was the sole witness on behalf of 1st – 4th Respondents denied the alleged incapacity. In my view mere denial was not enough. No reason was given why Kiran, the 2nd respondent who lived with the deceased, Sarla and Anita the two daughter in laws of the deceased who equally lived with him failed to testify in order to shed light, on the deceased physical and mental capacity, as persons close to the deceased

19. Further, the maker/drawer of the will and those who attested to the will would have been called to testify as to the Physical and mental capacity of the deceased. The witnesses were said to have been close workers of the deceased.

20. Based on the above I am of the view that taking into account the totality of the evidence before me, when the burden of proof shifted to the respondents, the Respondents failed to prove that the deceased had capacity as at the time of making the alleged will to give instructions for a will to be made, or to make one and to dispose of his properties in the manner he did.

Needless to say, that I found the 3 witnesses called by the applicant to be honest and truthful in the evidence. I found the 1st respondent rather casual and evasive when answering questions. He did not strike me to be a truthful witness.

21. Having arrived at the above decision there will be no need to consider whether lack of consents and/or whether the action of the 5th Respondent in failing to physically attest to the signatures of the applicant, PW3 and 4 affected the validity of the will.

22. Consequently I declare that the deceased died intestate and his estate shall revolve to his beneficiaries in accordance with the law of Succession Act.

23. Further, I declare all Acts, deeds, transfers, assent to request and all other acts and deeds to dispose of assets of the deceased by the 1st and 2nd Respondents or any one acting on their behest as executors of the alleged Will are null and void for all intents and purposes.

24. Costs to the Applicant.

Dated and Delivered in Nairobi on this 16TH day of January, 2020.

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ALI-ARONI

JUDGE