REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

(FAMILY DIVISION)

SUCCESSION CAUSE NO 3202 OF 2014

IN THE MATTER OF THE ESTATE CELESTINE AGUTU OKELLO (DECEASED)

PETER WAMAE NGUGI.....APPLICANT

VERUS

VERONICA ACHIENG OCHIENG.....1ST RESPONDENT

CHRISTINA ACHIENG OKELLO.....2ND RESPONDENT

JUDGMENT

1. The controversy in this case revolves around the impugned will left behind by **Celestine Agutu Okello** who died in Karen, Nairobi on the 30th of October, 2014.

2. The deceased died after a history of ovarian cancer. She was predeceased by her first husband Professor Haggai Okello in 2004.

3. It is not in dispute that the deceased was survived by her second husband Peter Wamae Ngugi and 4 children from her first marriage namely:

(i) Michael Odhiambo Okello

(ii) Christina Achieng Okello

(iii) Joseph Andrew Owino Okello

(iv) Peter Clement Omoh Okello

Aged between 32 and 24 years.

It is also not in dispute that Peter Wamae Ngugi brought his son to the marriage and who the deceased took care of at some point.

4. The deceased left behind several assets listed and described by the parties as follows:

a) Land

i. House in Karen

ii. A house in Plainsview

iii. Nyayo Embakasi House

iv. House in Simba Villas, Embakasi

v. Kiserian, Ngong' View house

vi. Kisamis Property

vii. Kajiado Town property

viii. Diani Property

ix. Ukweli Pastoral Centre, Kisumu

x. Two adjacent parcels of Land in Chemelil

b) Life Insurance, Retirement benefits and Pension

c) Kshs.50,000/=

d) Shares in Karen Hospital

e) Shares held in CDS

f) Bank accounts:

i) Barclays Bank –Queensway House

ii) I&M Bank – Karen

iii) Savings & Loan – Haile Selassie

iv) CFC Stanbic Bank – Chiromo

v) Faulu Bank – China Centre.

g) Motor vehicles:

i) Landcruiser Lexus

ii) Mercedes E240

iii) Mercedes A160

iv) Toyota Vitz

v) Mitsubishi Pajero

vi) Lorry KAQ 911J

The deceased was said to have no liabilities.

5. Veronica Achieng Ochieng and Christina Achieng Okello were appointed as executors in the impugned will. In the said will the deceased bequeathed all her properties to her 4 biological children equally save for Kshs.50,000/= to go to her step son described in the will as William Nyambura(Mike) and Lorry registration Number KAQ 911J to her second husband Peter Wamae Ngugi (Mike).

6. The named executors moved the court for probate and the same issued on the 7th of April 2015. By turn of events, on the 5th of July 2017 Peter Wamae Ngugi moved the court to have the said grant annulled on grounds that the same was obtained fraudulently by concealment of material facts, the application was based on a false statement, the will was a forgery, not written or dictated by deceased, same did not reasonably provide for the applicant and his son and for the respondents failure to disclose all beneficiaries of the estate.

7. From the pleadings and evidence before court the issues for consideration are:

i. Whether the deceased had physical and mental capacity to make a will.

ii. Whether the deceased provided reasonably for all her dependants.

iii. If any of the 2 above are in the negative what is the remedy?

8. The applicant's case is that he married the deceased on the 5th August 2005 and remained so married until her demise on 30th October

2012. The two lived together with their two set of children at their matrimonial home in Karen. The deceased with her 4 children and the applicant with a son. However, as soon as the deceased was interred, the applicant and his son were thrown out by the 2nd executor/Respondent, a daughter of the deceased from her 1st marriage. That it took the intervention of court for the applicant to pick his personal effects from the home.

Further that the deceased was extremely ill a few months before her death, She was physically unfit, could not speak and was therefore not in a position to write or dictate the alleged will whose contents are suspicious as names of both the applicant and his son were not property referred to and the legacies left for them are unreasonable. The applicant was bequeathed a lorry that had since 2012 been in possession of the deceased friend and his son the sum of kshs.50,000/=. He also contended that some properties were not listed. He urged the court to cancel and annul the grant of probate and proceed to distribute the deceased properties under intestacy law.

9. The executors/Respondents disputed all the allegations raised in the application and maintained that the deceased though sick had the capacity to make the will, she had recognised the Objector and his son adequately provided for them, and therefore the wishes of the deceased as contained in the will ought to be respected.

10. 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.**

11. Section (4) above places the burden of proof upon the person who makes an allegation as to the unsoundness or otherwise of the testator's mind. Mere assertion is not enough, evidence that raises suspicion as to capacity must be laid before the court as the law presumes that every adult of sound mind has such capacity.

Paragraph 903, Halsbury's Laws of England, Volume 17 expounds on the subject 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 in the contrary, to have been made by a person of competent understanding."**

12. The applicant contended that the deceased was too ill at the time she was alleged to have made the will to have been in a position to dictate or even sign the same.

The executors admit to that the deceased was weak and in pain to be able to append her signature on the document. And for the said reason the executor contend, the deceased who was mentally alert gave instruction to her sister, the second executor to sign the same on her behalf. The deceased thereafter imprinted her thumb on the said will. The lawyer who took instructions from the deceased informed the court that her law firm initially received instruction from the deceased in February 2014 and on the date the executor signed the same she took the prepared will to the deceased's house as the deceased was ill. The lawyer stated in part:

> **"Dakatari asked for a pen she could not hold the same steadily. We asked her to explore the possibility of another person signing upon her directions and she said she could nominate her sister to sign in her presence and directions.**
>
> **….we gave Celestine to read. She perused and said it was okay for Veronica to signed. We came with an ink pad and asked her to affix her thumb print which she did. I confirm that this is the will I drew and I witness the signatures. She was unwell so we did not stay long."**

The lawyer further stated:

> **... Celestine was too sick to sign but it did not occur to us that she was too sick even to nominate a person to sign.**
>
> **We were concerned about her mental status. We gauged her mental status by engaging her and getting her to read the will.**

Christina Okello the 2nd executor, a medical doctor and daughter of the deceased on her part stated as follows.

> **"when I took the lawyers to my mother's her mind was okay. She could communicate with all her visitors when they came. I only knew the content when the will was read out."**

13. As were it is the evidence of the Applicant against that of the executors. Important questions to be considered are, whether the applicant discharged his duty? And did the burden of proof shift to the executors?

In **Erastus Maina Gakuru & Ano. Versus Godfrey Gichuki Gikuru Civil Appeal No. 5 of 2015** the Court of Appeal had this to say in a case similar;

> **"It must be remembered that not even severe physical illness can automatically deprive a person of a testamentary capacity. Only physical illness that renders a testator incapable of knowing what he is doing will take away the capacity. It is for this reason that the courts insist on the person alleging lack of capacity due to illness prove that the illness impaired the judgment and understanding of the testator."**

14. Soundness of mind is a fact that can be proved by medical evidence. No such evidence was placed before court and therefore this court has nothing before it other than mere allegation, to find that the deceased was incapable of comprehending her actions at the time she gave directions to her sister to sign the will on her behalf, reasons for the method of execution undertaken was explained by the lawyer. The lawyer went further to explain why even after the deceased sister signed on her behalf, as an addition precaution the deceased placed her thumb print on the will. Though there is no such a requirement in law, the unnecessary caution cannot be used to render the will invalid. I therefore do find that the deceased had the mental capacity to make a will, and the same was signed on her directions.

15. The next issue for consideration is whether the deceased in making her will had an obligation under the law to reasonably provide for her dependants and if so whether she did in fact do so. The applicant's contention that the will is a forgery inter alia stems from the fact that the will states that his wife bequeathed him a lorry which she had since 2010 given to a friend and his son was bequeathed only Kshs.50,000/= yet both were dependants to the deceased. To him the legacies were totally unreasonable.

The Executors on the other hand maintain that the Applicant's son ceased being a dependant though a reasonable provision of Kshs.50,000/= was made for him, further the Applicant had equally been reasonably provided for.

16. The deceased and the Applicant met and married on the 5th of August, 2005. The deceased was at the time 51 years old and the Applicant 37 years. The deceased was then a widower. She was a medical doctor by profession. The Applicant at the time was a gym instructor nothing much is said of his job thereafter safe that he owned a company with the deceased which ran a restaurant that ran into debts, and that he ran errands for the deceased, an example is that for a year he was sent to the USA to take care of the deceased sick son. I did not see much opposition towards this piece of evidence save that both executors a sister and daughter also claimed to have ran errands for the deceased. In an African/Kenyan set up this is expected of family where all give a hand in times of need and distress.

17. The 2nd executor in her testimony alluded to the deceased and the applicant having had marital problems that may be so. isn't that though, the nature of marriages, up and downs? She also alluded to infidelity; however, these marital issues were not in contention before court not proved and were irrelevant for purposes of this cause.

The deceased and the Applicant remained husband and wife, with no divorce proceedings in any court and I so find.

18. In advancing his case and in his own words the Applicant stated:

> **"I reside in Outering, I am jobless. Celestine Okello was my late wife.**
>
> **After marriage we moved to Karen. My son and I moved to live with the deceased and her children."**

In cross examination he had this to say:

> **"I was part of the family. I am old. I cannot work, I have a back problem. I am not so qualified. I seek for a reasonable share of the estate. I invested my emotions, time, money on the family. I am left out with nothing."**

19. From the evidence before court, I have formed the opinion that the deceased maintained and catered from the needs of the Applicant, he was a "kept husband", he entirely relied on the deceased. He moved to her house, got his son's school fees paid for and seemed not to eke a living for himself. He was by all sense of the word a dependant of the deceased.

20. As for the applicant's son, he did not move the court and being an adult of sound mind, he ought to have moved this court to assert his interest which he did not do. Neither is there any evidence that he authorised the Applicant to make a claim on his behalf. I will say no more regarding him.

21. **Section 5 of the Law of Succession Act** gives power to a testator to will his/her property as he/she so wishes.

However, this freedom is not absolute it is curtailed where the court forms the opinion that dependants of the deceased have not been reasonably provided for.

Section 26 of the Act provides as follows:

> **"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 the dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate."

Section 27 of the Act provides

"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."

Section 29 in defining who dependants are (c) provides that a dependant;

"Where the deceased was a woman, would include her husband if he was maintained by her immediately prior to the date of her death."

22. In propagating the provisions of Section 5 of the Act as read with 26 courts have stated as follows:

Ndolo v Ndolo Case No. 128 of 1995 Court of Appeal stated as follows**:**

"This court must, however recognise 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 life time."

In **John Kinuthia Githinji vs Githua Kiarie & Others Court of Appeal Case No. 79 of 1998** referred to in the **Estate of James Ngugi Mungai** Succession Case No. 523 of 1995 Gicheru JA as he then was quoted C J in **Banks vs Good Fellow 1870 L.R.** as follows:

"The law of civilized people concedes to the owner of property the right of determination by the last will, either in whole or part to whom the effects which he leaves behind him will pass…

A moral responsibility of no ordinary importance attaches to the exercise of the right given. The instincts and affections of mankind, in the past majority of instances, will lead men to make provisions for those who are nearest to them in kindred and who, in life have been the object of that affection….

The same motive will influence him in the exercise of the right to disposal when secured to him by law. Hence arises a reasonable and well warranted expectation on the part of a man's kindred surviving him, that on his death effect shall become theirs instead of mere strangers. To mock the common sentiments of mankind and violate what all man….. deeming an obligation is moral law."

23. Guided by the authorities above, I perceive the expectations of the Applicant to be in tandem with the obligation that his wife who was his keeper for close to 9 years ought to have reasonably provided for him taking the totality of her assets (though I bear in mind that her house in Karen and several other properties were acquired during with her first husband), the lifestyle he was accustomed to and comfort she exposed him to. The Lorry given out to a friend 9 years ago and whose state is not known cannot by any means be reasonable provision, and I so find.

24. It will not be efficacious for the court to revoke and or annul the entire will as the properties were otherwise evenly divided amongst the children of the deceased.

25. In a bid to make reasonable provisions for the Applicant and in the interest of justice, I invoke the wide discretion donated to the court by, Sections **26, 27, & 47 of the Act and Rule 73 of Probate and Administration Rules and** direct the executors to value the below mentioned properties within the next 30 days to enable the court take the next necessary step towards giving final orders , namely;

i. A house in Plainsview

ii. Nyayo Embakasi House

iii. House in Simba Villas, Embakasi

iv. Kiserian, Ngong' View house

v. Kisamis Property

vi. Kajiado Town property

26. Costs will await final decision of the court.

DATED AND **DELIVERED** IN **NAIROBI** ON THIS **6TH DAY OF FEBRUARY, 2020.**

…….

ALI-ARONI

JUDGE