



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 2501 OF 2011

IN THE MATTER OF THE ESTATE OF KRISHNA KUMAR

SEMBI alias KRISHNA SEMBI SHARMA (DECEASED)

SOMNATH SHARMA.....OBJECTOR/APPLICANT

VERSUS

RISHIKESH SHARMA.....PETITIONER/RESPONDENT

RULING

1. Krishna Kumar Sembi alias Krishna Sembi Sharma, the deceased whose estate is in issue herein, died domiciled in the Republic of Kenya on 28th January, 2010.
2. On 14th November, 2011 Rishikesh Sharma, the Petitioner/Respondent filed a Petition for Grant of Probate of the deceased's last written will. He stated that the deceased died testate and left a valid written will dated 17th June, 2009. He sought to be appointed Executor of the deceased's will.
3. The will was proved in court and a Grant of Probate of written will issued to Rishikesh Sharma by the High Court at Nairobi on 16th May, 2012. The Grant was subsequently confirmed on 23rd April, 2013.
4. Later on 15th June, 2017 Somnath Sharma, the Objector/Applicant filed an application for revocation of the grant via summons dated 15th June, 2017. The application was predicated on the grounds that the will is a forgery and that the grant and certificate of confirmation were obtained fraudulently by non-disclosure and concealment of material facts. On 19th June, 2017 the court directed that the application be served upon the Respondent.
5. The application is supported by an affidavit sworn by the Objector on 15th June, 2017 in which he deposes that the purported written will of the deceased is fraudulent since the deceased had no capacity to make a will. That as at June 2009, the deceased was not of sound mind and was physically ill and therefore not capable of knowing what she was doing. He asserted that in obtaining the grant, the Petitioner also concealed the interests and rights of other beneficiaries, himself included.
6. On 19th March, 2018 the Petitioner/Respondent filed a replying affidavit sworn by himself on 27th February, 2018 in which he deposed that he is the executor of the last will and testament of the deceased. He contended that the Grant of Probate of Written Will issued to him on 16th May, 2012 and confirmed on 23rd April, 2013 is valid and proper having been duly witnessed by Charles Khamala Advocate and one Pravin of I.D. Number [particulars withheld] as shown on the face of the will.
7. According to the Petitioner, the will was duly executed in full compliance with the provisions of the Laws of Kenya as confirmed by the court in the issuance and the subsequent confirmation of the Grant of Probate of Written Will. He urged that the allegations by the Objector that the will was granted fraudulently by making of a false statement and misrepresentation of facts are therefore without basis.
8. The Petitioner deposed that the Objector had come before the court with unclean hands stating that the purpose of this suit is to frustrate the beneficiaries of the deceased's estate and deter the sale of the properties known as L.R. No. 36/I/429; L.R. No. 36/II/192; L.R. No. 36/II/193 and L.R. No. 209/2675. That the application is therefore an abuse of the court process.
9. On 3rd June, 2019 the hearing commenced with the Objector's case. Somnath Sharma, the Objector/Applicant herein, gave oral testimony in which he reiterated the contents of his pleadings in support of his case. He stated that he is an Advocate of the High Court of Kenya and a

retired pensioner who resides in the United Kingdom.

10. The Objector stated that he is a brother of the deceased, who was the youngest of six (6) siblings. That after 2010, the deceased's health began to deteriorate considerably. His younger brother Krishnalala Sharma, who was in Kenya informed him that the deceased had gone senile.

11. It was the Objector's case that in the period between 2007 and 2008, his elder brother Purshottam Sharma visited Kenya and stayed with the deceased in her home. He stated that he was the owner of the flat in which the deceased lived and that the deceased lived therein free of rent because of her medical condition. Purshottam informed the Objector that the deceased was very ill at the time; she had little movement and used a wheel chair and stick to move about. A special bed had been made for the deceased and a housemaid employed to feed her.

12. The Petitioner presented one witness in support of his case. Charles Alenga Khamala gave sworn testimony in which he stated that he is an Advocate of the High Court of Kenya, a member of the Association of Defence Counsels practising before International Courts and Tribunals; ICC Hague and UN International Residual Mechanism Arusha, and a lecturer at Africa Nazarene University. He had sworn an affidavit on 28th June, 2018 which was filed on even date.

13. Mr. Khamala testified that he prepared the will on the deceased's instructions and that he saw her append her thumbprint on it, without which he would not have affixed his stamp on the will.

14. Learned Counsel Ms. Shabana filed written submissions dated 22nd October, 2018 on behalf of the Petitioner in which she urged the court to dismiss the application for revocation of grant with costs.

15. According to Ms. Shabana, the allegation that the deceased was of unsound mind at the time she executed her will is a serious allegation which needs sufficient proof. That the statement that the deceased was not of testamentary capacity at the time of making her last will and testament are thus mere allegations without proof thereof.

16. Ms. Shabana asserted that the burden of proof is on the person who alleges that a testator had no capacity to make a will. That such a person is required to prove that the deceased was of unsound mind, suffered some physical illness, was drunk or drugged or due to some other cause was in no state to know what he/she was doing. She urged that once it is established to the satisfaction of the court that in fact the testator was not of sound mind, then the onus shifts to the person propounding the will to prove the existence of mental capacity. To buttress her argument, Counsel referred to the decisions in **Patrick Muchira v Patrick Kahiaru HCCC 113 of 1999; Bosa & Co. Advocates v Vero Nassanga & Others Kampala HCCS No. 315 of 1992** and **Re Estate of Gatuthu Njuguna (deceased)**.

17. Ms. Shabana contended that while the Objector alleged that there had been a concealment of material facts at the time of petitioning for Grant of Probate, he did not clarify what issues were concealed or what material facts had been withheld from the court. She asserted that the Objector had therefore failed to prove that any non-disclosures were made by the Petitioner to warrant the revocation and or annulment of the confirmed Grant on this ground.

18. According to Ms. Shabana the Objector is not entitled to the orders sought not only because he had failed to prove his case, but also because he had come to court with unclean hands. Counsel contended that the Objector was in contempt having failed to comply with the consent orders adopted on 26th July, 2017 in High Court Succession Cause No. 482 of 2005; Estate of Amar Kumar Sharma. That the application is merely a ploy by the Objector to deter the process of valuation of the properties known as L.R. No. 36/I/429; L.R. No. 36/II/192; L.R. No. 36/II/193 and L.R. No. 209/2675 in order to frustrate the sale process.

19. In opposition, learned Counsel Mr. Misati filed written submissions dated 20th February, 2020 on behalf of the Objector in which he stated that the application for revocation of grant is competent and ought to be allowed.

20. It was Mr. Misati's submission that there was no certification of the thumbprint on the will as being that of Krishna Kumari Sembi, the deceased herein, and that no evidence was adduced to show that the deceased understood the contents of the will before affixing her thumbprint thereon. Counsel drew attention to paragraphs 3, 4, 5, 6 and 7 of the affidavit sworn by Charles Khamala Advocate on 28th June, 2018 and stated that all the affidavit states is that Mr. Khamala Advocate prepared the will on the deceased's instructions, after which he passed it to the deceased who read through it, nodded and enquired where to affix her thumbprint.

21. Mr. Misati asserted that it was suspect that the deceased's will was prepared on 22nd June, 2009, which is the same date on which Vishnu Sharma had through a letter of even date informed his siblings residing outside Kenya that the deceased was sick and had become a vegetable. He asserted that the deceased's state of health was so bad that all her siblings were in constant engagement and contact about her welfare. Further that the deceased had become senile and was therefore not in a state of mind as to make a will.

22. I have carefully considered all the pleadings on record, the oral testimonies of the witnesses who testified in this cause and the written submissions filed on behalf of the parties by the learned Counsels on record and the authorities relied on. In my view, the sole issue for determination is whether the will dated 22nd June, 2009 is a valid last written will and testament of the deceased or not.

23. A will is defined under **section 3** of the **Law of Succession Act** as the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death. From the definition, it is evident that the maker of a will must exercise their free will while expressing their personal wishes and intentions. To be valid, a will must also comply with all the legal requirements as to capacity and formal validity.

24. **Part II** of the **Law of Succession Act** provides the law on wills. In determining the question of the validity of a will, it is important to interrogate the capacity of the maker and whether the will is compliant with all the requirements as to formal validity.

25. The law on testamentary capacity is found under **section 5** of the **Law of Succession Act** which provides that every 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. Under the section, a female person like the deceased herein, has the same capacity to make a will as does a man regardless of their marital status.

26. The provision goes on to state that the maker of a will is presumed to be of sound mind unless at the time of executing the will, he was in such a state of mind as to not know what he was doing either on account of mental or physical illness, drunkenness or any other cause.

27. According to the Objector, as at 22nd June, 2009 the date on which deceased allegedly executed the will, she was not in a state as to understand what she was doing on account of illness and senility. That she was bedridden at the time.

28. In his testimony, the Objector pointed out that the while the purported will is dated 22nd June, 2009 there is a letter of the same date addressed to P.L. Sharma, Somnath Sharma and K.L. Sharma stating that Krishna Sharma, the deceased, had to be provided for. He drew attention to a section of the letter which states that *“She is now a vegetable. She cannot run, walk or even move out of her bed.”* He urged that since the deceased had lost all her faculties, she could not have made the purported will consciously.

29. Under **section 5(3)** of the **Law of Succession Act** there is a rebuttable presumption that a person making or purporting to make a will is of sound mind at the time of executing the said will. This is echoed by **Halsbury’s Laws of England 4th Edition Vol. 17 paragraph 903** where the author states thus:

“Generally speaking, the law presumes capacity and no evidence is required to prove 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...”

30. It is not in dispute that the deceased became ill and was bedridden in 2009 as demonstrated in a letter authored by Vishnu Sharma dated 22nd June, 2009 and addressed to the deceased’s siblings who lived abroad being P.L. Sharma, Somnath Sharma and K.L. Sharma. The relevant part thereof states that *“Krishna has to be provided for. She is now a ‘vegetable’. She cannot walk, move or even get out of bed. She requires assistance for disposal of her waste and this is done day in day out by a maid. She also requires someone to cook for her and feed her.”*

31. What is contested by the parties herein is the deceased’s mental state at the time of writing the will. By virtue of **section 5(4)** of the **Law of Succession Act**, the burden of proving that the testator was not of sound mind at the time of making the will is cast on the person who alleges so, being the Objector in the instant case. This he however failed to do. All the Objector did was state that the deceased was not of capacity, either physically or mentally when the will was made but he did not produce any medical evidence to demonstrate that the deceased had lost her mental faculties.

32. It is not enough to state that the deceased had lost her mental faculties because she was referred to as a vegetable in a letter. In the absence of additional evidence, all there is is the word of the Objector against that of the Petitioner and his witness Charles Khamala Advocate. The Testator’s physical incapacity cannot be extrapolated, without more, to mean that she also suffered from mental incapacity.

33. Questions were also raised regarding the day on which the purported will was prepared and executed since it is on the same date that Vishnu Sharma had authored a letter about the deceased’s condition. However in light of my finding that the deceased’s physical limitations did not impair her mental faculties, I will not belabour this argument.

34. The law presumes sanity unless the contrary is proven. The evidence tendered by the Objectors hereto did not rebut the presumption of sanity. It is therefore my conclusion that the deceased had the requisite testamentary capacity at the time when she executed her written will on 22nd June, 2009.

35. On the question of formal validity, the Objector argued that the manner in which the deceased’s last written will was executed is questionable. He stated that the deceased was a literate person and it is therefore strange that she opted to sign the will by affixing her thumbprint instead of her formal signature.

36. The formal validity of wills is provided under **section 11** of the **Law of Succession Act** thus:

“No written will shall be valid unless-

a. the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

b. 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 was intended thereby to give effect to the writing as a will;

c. the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

37. The deceased's written will whose validity is contested is dated 22nd June, 2009. During cross-examination, Mr. Khamala asserted that his instructions from the deceased were taken at the deceased's residence. The conversation was recorded by Sophia Ambesta, who was a secretary to Vishnu Sharma Advocate. He prepared the will and returned it to the deceased's house on 22nd June, 2009 when she executed it. His evidence was that at the time the deceased executed the will, the only people present were himself, one Pravini, one Rita and Sophia Ambesta.

38. To propel the Petitioner's case, Ms. Shabana submitted that the thumbprint of the deceased as affixed on her written will dated 22nd June, 2009 amounts to a signature since the deceased as the maker of the document intended it to be her signature. Further that there is evidence that the will was attested by two (2) witnesses who saw the deceased sign the will, being Charles Alenga Khamala and PravinKumar Prabhudas.

39. On his part, Mr. Misati contended that the evidence adduced by the Objector indicates that the deceased was a literate person who had at all times written and signed her documents. He asserted that the mode of signing that the deceased previously used is clearly exhibited in the various documents in the Objector's bundle of documents dated 31st May, 2019. That it is therefore suspect that the deceased affixed her thumbprint only in the particular instance of executing the will.

40. The evidence adduced hereto indicates that as at the date on which the will was made, the deceased had been ailing for a period of time and was frail. It is therefore not surprising that the deceased opted to affix her thumbprint and not her signature as she had done when she was strong and in good health. An examination of the one page will on the record reveals that it bears what is said to be the deceased's thumbprint, positioned at the right place within the execution clause. Having been so positioned, there is no doubt that the thumbprint was intended to give effect to the document as the deceased's last written will and testament.

41. Mr. Misati argued that since evidence had been led to show that the deceased could read, write and sign her documents it was mandatory that the will be certified. First, to authenticate the deceased's thumbprint and bind her to her testament and second, to demonstrate that the will had been read out to her and that she was therefore aware of what she was doing when she affixed her thumbprint. Counsel did not however draw the court's attention to any statutory provision or authority which would require that the will or thumbprint be certified as such.

42. Whereas Mr. Misati relied on the persuasive decision in **Ellen Nyatetu Mugweru v Danson Weru & 7 others [2017] eKLR** in an attempt to argue that the thumbprint ought to have been certified, a wholesome reading of the authority reveals that the circumstances therein were different from those in the instant case. In that case, the last page of the will bore neither the mark of the deceased nor the signatures of any of her witnesses. While making deliberations therein, Ngaah, J noted thus:

“There is no doubt that the last page of the will was a pertinent part of the will because, taking the counsel at his own word, the deceased could sign yet she chose to affix a mark by way of a thumbprint on the will. He thought a certification was necessary...

The question that then arises is this: if the deceased did not sign the certification page, can the court proceed on the presumption that the will was read out to her and therefore she is deemed to have been aware of what she was doing when she affixed her mark on the rest of the pages of the will. My answer to this question is in the negative. I am of this persuasion because the learned counsel must have come to the conclusion that a certification was necessary for at least two reasons: first, to authenticate the deceased's thumbprint and thus bind her to her testament and, second, to demonstrate that the will had been read out to her and therefore she was aware of what she was doing when she affixed her thumbprint. The moment learned counsel came to this conclusion, there had to be some proof that thumbprints had been duly authenticated and the will had been read out as alleged. In my humble view, there could be no better and conclusive proof of these facts than the deceased's marks or signature on the last page of the will noting that counsel himself testified that the deceased affixed her thumbprint on all the pages of the will, though, as noted, the available evidence is to the contrary.”

43. A reading of the above section of the ruling reveals that the learned Judge was not stating that there is requirement that thumbprints affixed on a will or document be certified as argued by Mr. Misati but rather that it was required owing to the fact that the deceased failed to affix her thumbprint on the last page of the will which often bears the execution clause.

44. Evidence of execution of a will can be found in the testimony of the attesting witnesses and that of any other person present at the time the will was executed.

45. Charles Khamala Advocate who was one of the attesting witnesses was emphatic that the deceased appended her thumbprint on her last written will and testament dated 22nd June, 2009. He asserted that he was with the deceased and that he saw her append her thumbprint on the will. He gave a vivid description stating that the deceased who was wearing a maroon dress on the said date came out of her bed and spoke with him.

46. In an attempt to displace the Petitioner's case, Mr. Misati contended that Charles Khamala Advocate having allegedly prepared the deceased's will, cannot be a competent and independent witness within the meaning of **section 11(c)** of the **Law of Succession Act**.

47. I note that **section 3** of the **Law of Succession Act** defines a competent witness to mean a person of sound mind and full age, and an independent witness to mean a witness who is not a beneficiary under a will or the spouse of any such beneficiary. No evidence has been led to suggest that Charles Khamala Advocate did not meet any of this criteria. The Objector did not also draw attention to any provision of the law that states that a person who prepares a will under the Testator's instructions is not a competent or independent witness.

48. From the evidence on record, I am satisfied that the will dated 22nd June, 2009 was prepared under the direction of the Testator who duly

executed it by affixing her thumbprint thereon after which it was attested by two (2) competent witnesses being Charles Khamala Advocate and one Pravin of Identity Card number [particulars withheld], in the presence of the Testator in line with **section 11** of the **Law of Succession Act**.

49. Mr. Misati took issue with Charles Khamala Advocate's testimony in cross-examination, when he informed the court that the will was prepared by one Sophia, a secretary to the deceased's brother Vishnu Sharma. Counsel noted that while Charles Khamala had stated that he got the particulars of the deceased's properties from Sophia, he did not explain the capacity in which Sophia was able to supply him with the ownership information. Counsel urged that it is therefore no coincidence that all the beneficiaries listed under the deceased's will are children of Vishnu Sharma.

50. Charles Khamala Advocate testified that Sophia Ambetsa was at the deceased's house on his invitation and typed the deceased's will under his instructions. He stated that he sought Sophia's assistance because she knew the extent of the deceased's properties. That after the will was prepared, he read and explained its contents to the deceased who understood the contents thereof and appended her thumbprint thereon on 22nd June, 2009.

51. Mr. Khamala asserted that Vishnu Sharma was his close friend and colleague and a brother to the deceased herein. He admitted that he did some work for Vishnu Sharma from time to time but stated that he maintained an independent law firm in which he practised under his own name. Further that Vishnu Sharma was not present at the date and time of making of the will.

52. Whereas the deceased's will was prepared in the presence of Sophia Ambetsa, a secretary to the deceased's brother Vishnu Sharma, no evidence has been led to suggest that Sophia manipulated the will in any manner or unduly influenced the deceased. In any event, all she did while at the deceased's residence was under the instruction of Charles Khamala Advocate who obtained his instructions from the deceased. Further, in the letter dated 22nd June, 2009 Vishnu Sharma had indicated to the addressees that they were at liberty to call for information from Sophia Ambetsa whom he stated had all the papers to back up the estate accounts.

53. While testifying in examination in chief, Charles Khamala Advocate stated that he visited the deceased on more than one occasion and satisfied himself that the deceased was lucid and that her intention was that those who had looked after her during her illness should receive all her property. Particularly that whatever belonged to her as her shares in the properties listed under her will should go to her nieces and nephews in equal shares. That there was no question of the deceased being coerced and it was her intention to distribute her property as she did in the will.

54. The Objector did not tender any evidence to suggest that the beneficiaries under the will did not take care of the deceased as alleged or that there was any undue influence occasioned upon the deceased. In light of the evidence of Charles Khamala Advocate and the letter dated 22nd June, 2009 authored by Vishnu Sharma which has been relied upon by both parties hereto, I am convinced that the deceased freely and consciously gave instructions and executed the will.

55. Mr. Misati argued that the deceased could not have purported to grant an absolute share of her interest in the properties listed under her will since the properties comprise the estate of Amar Kaur Sharma (deceased). It is therefore important to interrogate whether the properties listed under the will comprise the deceased's free property.

56. Under **section 3** of the **Law of Succession Act**, free property in relation to a deceased person means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.

57. Whereas the properties listed under the will are not registered under the deceased's name, a reading of the will demonstrates that the deceased did not purport to distribute the properties absolutely but rather her share in the properties.

58. From the record the court gathers that the properties are registered in the name of Ajudhia Parshad Sharma (deceased), a father of the deceased herein and whose estate was the subject in Succession Cause No. 508 of 1984. As per the confirmation of grant issued therein on 25th October, 1985 Krishna Sharma the deceased herein, was apportioned half (1/2) a share of the property known as L.R. No. 36/II/193.

59. At the time of his death, Ajudhia Parshad Sharma (deceased) was survived by his wife Amar Kaur Sharma who has since also died. The estate of Amar Kaur Sharma (deceased) was the subject of Succession Cause No. 482 of 2006 filed in the High Court at Nairobi in which a grant of letters of administration was issued on 22nd May, 2006 and confirmed on 6th May, 2009. In the confirmation of the grant, the deceased herein was granted a share in the properties known as L.R. No. 36/I/429; L.R. No. 36/II/192 and L.R. 209/2675.

60. I note that the Objector did not present or suggest any evidence to contradict the evidence that the deceased herein was entitled to a share in the listed properties by virtue of grants dated 25th October, 1985 and 6th May, 2009 confirmed in relation to the deceased's late father and mother respectively. I am therefore inclined to find that the information represents the true state of the affairs. In any case, the Objector's only argument in this respect was that the properties listed under the deceased's will are not registered in the deceased's name.

61. Bearing in mind that the deceased's last written will was made on 22nd June, 2009, I find that though the title to the properties were not in the deceased's name, the deceased had a beneficial and equitable title in the properties by virtue of the respective Certificates of Confirmation of grant. In any event there is nothing to suggest that the statement that the deceased had a share in the properties is inconsistent with the Certificates of Confirmation of Grants in respect to the estate of the deceased's late parents. As such, my considered view is that the properties constitute the deceased's free property within meaning of **section 3** of the **Law of Succession Act**, which she had the freedom to will away as she did.

62. It is noteworthy that even if the properties were registered in the deceased's name, such a registration should be founded on the schedule in the Certificate of Confirmation of Grant failure to which the properties would not constitute free property.

63. Whereas one of the grounds upon which the summons for revocation of grant was predicated on was non-disclosure and concealment of material facts, no evidence was led in this respect. All the Objector and his Counsel on record did was state that there was concealment of material facts at the time of petitioning for Grant of Probate. Without more, this court cannot belabour the argument since it is not the duty of the court to make a case for any party to the proceedings.

64. In the end, I come to the conclusion that the will dated 22nd June, 2009 meets all the requirements as to formal and essential validity and is therefore a valid written will and testament of Krishna Kumar Sembi, the deceased whose estate is in issue herein. The deceased died testate and her estate ought therefore to be distributed in accordance with her last written will and testament.

65. The upshot of the foregoing is that the application for revocation of grant filed via summons dated 15th June, 2017 is found to be lacking in merit and is consequently dismissed. Each party shall bear their own costs. It is so ordered.

DATED SIGNED AND DELIVERED VIA EMAIL AT NAIROBI THIS 8TH DAY OF APRIL, 2020.

.....

L. A. ACHODE

HIGH COURT JUDGE