



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 115 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE BENJAMIN TALI NAMASAKA- (DECEASED)

AND IN THE MATTER BETWEEN

BEN NAMASAKA TALI.....OBJECTOR

VERSES

MURABWA TALI NAMASAKA.....1ST PETITIONER

SABINA NANDUTU TALI.....2ND PETITINER

CHEPTE TALI NAMASAKA.....3RD PETITIONER

JUDGEMENT

1. The late **BENJAMIN TALI NAMASAKA** died on the 15th October, 2014. He was a polygamous man and he left behind the following dependants.

A) First house of the late **DEBORAH MURONJI TALI**

- a. MURABWA T NAMASAKA**
- b. CHEPTE T NAMASAKA**
- c. HELLEN NYONGESA**
- d. DORCAS M. ESSOUMBA**
- e. GRACE NAVALAYO TALI**
- f. MELLAB NEKESA TALI**
- g. MARTHA MWENJE TALI**
- h. JAMES N TALI**
- i. SARAH KHANI TALI**
- j. ROSE NASIMIYU TALI**
- k. CATHERINE NANYAMA TALI**

(B) From the second house of **ROSE NYONGESA TALI**

- l. ELIZABETH Z TALI**

m. **BEN NAMASAKA TALI**

n. **PAMELA NALIAKA TALI**

o. **CAROLYNE TALI**

p. **BEAUTY NAFULA TALI**

(C). SABINA NANDUTU TALI (Third widow).

2. The said third widow did not have any issues with the deceased.

3. On 9th March, 2016 this court issued a joined letters of administration to the Petitioners as well as the Objector herein. The said grant was issued under the presumption that there was a valid will.

4. When the parties, through the 2nd Administrator applied vide an application dated 3rd October, 2016 for the said grant to be confirmed. The Objector raised an objection vide his summons dated 11th October, 2016. He prayed that this court should declare the purported will dated 18th October, 2012 invalid and the estate should be distributed intestate.

5. This court then gave directions that the matter should proceed by way of viva voce evidence. The parties were granted leave to file affidavits and further witness statements if any.

OBJECTORS CASE

6. The Objector herein stated that he was the deceased son from the 2nd house and that there was no dispute regarding the beneficiaries. He challenged the alleged will on the grounds that the same was a fraud as his father did not prepare any since he had been very ill.

7. He said that based on the affidavits of the two witnesses to the will namely BEN WASWA and MAURICE WAFULA WANYONYI the trip to the late J.M. Wafula Advocates office did not take place. He said that the 2nd witness states that they went on 1st October, 2012 yet the 1st witness states that they went on the 18th October, 2012.

8. Secondly it was alleged that MURABWA, his elder brother and the 1st petitioner herein drove them to the Advocates office on the said date. The said Murabwa in his affidavit states that he was not in Kenya on that particular date as he was in the United States of America where he is a resident there.

9. He went ahead to state that the late Wafula Advocate was so sick that he could not be in apposition to witness the signing of the will. He went ahead to produce the funeral programme of the said advocate which contained his eulogy.

10. PW 2 DR JOTHAM MUKHOLA from Kapenguria County Referral hospital testified on behalf of the objector and produced the discharge summary of the late J.M. Wafula advocate which showed his hospitalisation at the said hospital from 28th September, 2012 till 15th October, 2012. He said that the late Wafula had prostate cancer. On cross examination though he said that he could not comment on his physical state by the time he left the hospital.

PETITIONERS CASE.

11. **DW1 BEN WASWA MULATI** testified that the deceased was his friend for a long time and on the 18th day of October, 2012 he called him in the morning so that they could travel to Kitale. They were together with MORRIS WANYONYI, MURABWA and his wife SABINA. Murabwa was the driver. At the KFA building they met the late Wafula Advocate and because the deceased could not walk the advocate came to his car.

12. The deceased then told Murabwa and Sabina to get out of the car. The advocate then produced the document which he read and they all signed including the deceased. After that the advocate left with the document. He said the advocate appeared weak although he did not know him as it was his first time to meet him.

13. He was cross examined by the objector on the question of the dates in his statements which indicated that they went to have the will signed on 1/10/2012 but he refuted this insisting that they went there on 18th October 2012 and not 1st October 2012. He also on cross examinations stated that each one of them used their own pens to sign the will.

14. He insisted that Murabwa drove the vehicle they were in contrary to the allegations in his affidavit that he was at that time in the United States where he resides.

15. **DW2 PASTOR MAURICE WAFULA WANYONYI** testified that he knew the deceased from the year 1996 when he was his member and he was his pastor. He said that they travelled to the office of advocate Wafula on the 18th day of October, 2012 and the vehicle was being driven by Murabwa. He said that they were 5 of them including the deceased.

16. They parked outside the advocate's office and the deceased told Sabina and Murabwa to get out of the car. They then proceeded to sign the will. He said that he knew the advocate before this day.

17. On cross examination he said that they visited the advocate on the 18th October, 2012 and not 1st of October, 2012 as per dw1. He admitted the advocate appeared weak and tired. He said that he did not hear that the advocate had been admitted. He testified that they used the same pen when signing the will. He said that he saw the advocate sign the will but not stamping.

ANALYSIS AND DETERMINATION

18. After they closed their case the parties were advised to file written submissions but the court has only been able at the time of writing of this judgement received submissions by the objector only.

19. The basic issue herein is whether the will prepared by the deceased on the 18th of October, 2012 before the late J.M. Wafula advocate was valid for all intent and purposes. The objector though a lay person and acting in person has put in a strong spirited effort to demonstrate that the same was not valid and that the deceased did not execute one. That even if there was, then it was a forgery.

20. There are two issues that stand out in the entire evidence as presented by the parties, namely the physical health of the advocate and whether the deceased travelled to the advocate's office on the material day. There is no dispute that the deceased was in a poor state that he could not walk and it appears he was in need of assistance and was using a wheelchair to aid his movements.

21. The physical health of the late J.M. Wafula advocate viz a viz his capacity to draft and witness the will ought as of first instance to be interrogated. PW2 produced exhibit P1, the summary from the hospital record which in part read that;

“the above named patient was admitted to this hospital on 28 /09/2012 with a diagnosis of prostate cancer. He was successfully operated on 29/09/2012. (prostate ctomy). He was managed on antibiotics analgesics among others till 15/10/2012 when he was discharged home on medication.”

22. Exhibit P2, the funeral programme which was produced by the objector without any objection goes on to explain the history of the deceased advocates sickness and especially post the operation. It goes on to state that after the operation the deceased began chemotherapy and it appears he never came out of it as he went ahead and lost his eyesight among other painful complications. Eventually because of this cancer decease he lost the battle and died on the 26th June, 2014.

23. In their evidence DW1 and 2 admits that they saw the said advocate weak and tired. That position was indicated by DW1 although he had never seen him before.

24. With the kind of sickness, the advocate was facing and after an operation was it visible that he could have attended to the deceased on the material day two days or thereabouts after being discharged? It should be noted also that the discharge summary from the hospital did not indicate that he was fully recovered but that he had been discharged on medication.

25. The other issue which I find germane is the question of who drove the deceased vehicle on the material day to the offices of JM Wafula advocate. Both DW1 and DW2 clearly and without any ambiguity testified that Murabwa drove the deceased car on the 18th October, 2012. The said Murabwa, who is apparently the 2nd administrator herein, in his replying affidavit dated 27th February 2017, paragraph 15th thereof stated as follows;

“that I would like to categorically rebuttal the allegations by affirming that at the time the will was prepared and executed I was in the United States of America where I reside with my family”.

26. The 2nd Respondent did not testify and neither was he requested by the Respondents /Petitioners. So who drove the deceased and his witnesses to Kitale town? If the alleged driver did not drive the vehicle and the deceased who was said to have been in a wheel chair aid and thus unable to drive, how did they arrive at their destination?

27. It is the finding of this court that the witnesses did not witness the signing of the said will as they did not travel to the late J.M. Wafula advocates office in Kitale. This will in the opinion of this court is void despite the same looking well executed.

28. Further the health of advocate Wafula was already in question as per the evidence of PW2 as well as the family's own testimony as contained in the deceased eulogy produced.

29. It is noted that the two defence witnesses materially contradicted themselves on small minute things like whether they used the same pen or different pens. DW1 for instance said that they used different pens whereas DW2 said they used the same pens.

30. To show some doubt on whether they travelled to Kitale town on the material date they contradicted themselves during cross examination on the position the deceased sat on the car. They also contradicted themselves on how they left for home after the signing of the will. They were also hard pressed to explain how they arrived at the deceased home that morning.

31. The provisions of Section 11 of the Succession Act states as follows;

“11. 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 discretion of the testator.

(b) the signature or mark of the testator or 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 acknowledgement 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 in no particular form of attestation shall be necessary.”

32. In my view the will allegedly prepared by the deceased on the 18th October, 2012 does not meet the threshold expected by Section 11 quoted above. Indeed, it was clearly drafted well but its execution is suspect. The parties who allegedly witness were not truthful. The person they alleged that he took them to the advocates office denied under oath. He was not called to rebut.

33. In the premises, this court agrees with the objection herein and declares that the will dated 18th October, 2012 is invalid for all intend and purposes. The deceased estate therein shall be administered intestate.

34. Meanwhile the grant issued to the 4 Administrators dated 9th March, 2016 shall remain valid for purposes of this cause. The parties are at liberty to apply for the grant to be confirmed intestate.

35. Being a family matter each party shall meet their own costs.

Dated, signed and delivered via Zoom at Kitale on this 5th day of May, 2020.

H. K. CHEMITEI

JUDGE

5/5/2020