REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 412 0F 2012

IN THE MATTER OF THE ESTATE OF JOHANA KEYA KIKUYU (DECEASED)

JUDGMENT

1. This cause related to the estate of Johana Keya Kikuyu, who died on 7th April 2012, at the age of ninety-one (91) years. Representation to his estate was sought in testacy by Ben Nyanga Aduol, the person claiming to have been named in the will of the deceased, purportedly made on 2nd May 2007, as the executor of the said will. An objection was raised, challenging the validity of the will, on the grounds that the same was not in accord with the requirements of the law, and violated the Constitution, as it did not make any provision for the daughters of the deceased. The challenge took the form of an application, dated 10th September 2012, brought at the instance of Tito Barati and twelve others, who I shall refer to hereafter as the applicants.

2. The matter proceeded by way of oral evidence.

3. PW1, Hesbon Kikuyu Keya, testified that the deceased was his father. He stated that the deceased had two wives Robai Keya and Jerida Kivai. He testified that the first house of Robai Keya, had eight children, three sons and five sons; while the second house had nine children, being four daughters and five sons. He stated that the deceased's estate comprised of one parcel of land, being North Maragoli/Mudete/599. In 1988, the deceased allegedly subdivided the land and showed each of his sons where to stay. The same allegedly was done as per each house and that each of them settled on their allocated portions. He stated that he and his stepbrother, Phineas Keya, as per the wishes of their father, contributed Kshs. 50,000.00 and Kshs. 60,000.00, respectively, money which was used to buy land and settle their cousin, Fredrick Kikuyu, so that they did not have to share their portion with him. He testified that the deceased was a class two dropout, who could not read or write, and challenged the validity of the will stating that it was not signed by the deceased. In cross-examination, he stated that the will was not valid, as the deceased had already subdivided the estate, and differed with how the deceased had shared out the land on the ground the terms of the will.

4. PW2, Tito Barat Keya, a son to the deceased, testified that he was not aware that the deceased left a will. He stated that he was aware of his father's handwriting but said that the signature on the will was not the deceased's. He challenged the fact that the will did not mention the daughters and urged court to ignore the same. In cross-examination, he confirmed that the alleged will was written by the deceased during the subsistence of a dispute between the deceased and his sons. He also confirmed that the deceased could read and write in Kiswahili and Maragoli. He also stated that the daughters had not been provided for under the will, and asked that the same be disregarded, as it was a forgery.

5. DW1, Ben Nyanga Aduol, testified that the deceased was his client for many years. He stated that the deceased had a legal battle with his son, Phineas Keya, who wanted a share of his land, being North Maragoli /Mudete/559. He testified that the suits filed by Phineas Keya were dismissed, and the deceased proceeded to subdivide the land into two portions, North Maragoli /Mudete/1467, and 1468. He stated that due to the disputes between the deceased and his son, the deceased opted to write a will to distribute his land amongst his children as he had already allocated them. He asserted that the will was valid, and prayed that the same be adopted by court. He stated that the will was valid and captured the wishes of the deceased to have his land distributed as per the will. He stated that the same conformed to the laws and that it was proper, and prayed that the same be considered. In cross-examination, he confirmed that the will filed in court was the original, and that he was the one who had prepared it. He also stated that the deceased had a legal tussle with his son, Phineas Ilatsia, which he won and which was pending appeal as the date he was testifying. He clarified that North Maragoli/Mudete/1468 was allocated to Samuel Keya, but Phineas had, contrary to the deceased's wishes, occupied the land and insisted on getting a share of it.

6. DW2, Samuel Keya, testified that the deceased had before his death, distributed his estate amongst his sons. He stated that all the sons took their shares as allocated by their father, save for Phineas Ilatsia, who was not contented with the distribution and wanted more, from the witness's portion. He stated that the deceased allocated to him North Maragoli/Mudete/1468 which Phineas was in occupation. He stated that he was aware of the deceased's will, and that the same was a projection of how the deceased had distributed his land when he was alive. He stated that the deceased could read and write in Kiswahili, and stated that the will was genuine and valid.

7. DW3, Samuel Munyande, testified that the deceased was his brother, and that in 2007, the deceased summoned him, and Mark Kevogo, to his home, where he proceeded to show them how he had subdivided his land amongst the family. He testified that all the sons had occupied their allocated portions, save for Phineas Ilatsia. He stated further that the deceased showed them a will that he had written, which distributed the land in the same way he had subdivided the land on the ground. He said that he witnessed the will. In cross-examination, he stated that

the deceased had distributed his property before his death. He stated that each son had been allocated land, and that they had all built on their portions, save for Phineas, who was said to be still staying on the deceased's *isimba* on the parcel North Maragoli/Mudete/1468 as at the date of the testimony.

8. DW4, Fredrick Kikuyu Chweya, testified that the deceased was his uncle. He stated that the deceased had distributed his land amongst his sons, and had also given him a share of the land. He stated that he sold part of the land to one Samuel, and that he also had another parcel, which he had not processed due to the issues between Samuel and Phineas He testified that the will was proper, and prayed that the same be adopted.

9. DW5, Micah Shikoti, testified that the deceased was his father. He stated that the deceased subdivided his land amongst his sons, and that the will was a true reflection on what was on the ground. He stated that all the children of the deceased had occupied the land that was apportioned to them by the deceased, save for Phineas. He prayed that the will be upheld. In cross-examination, he confirmed that the deceased showed all his sons where to build and settle, and that Phineas was staying on the portion allocated to Samuel Keya.

10. From the pleadings and the evidence, the only issue that emerges for determination is whether the will on record is valid.

11. Validity of wills is provided for in Section 11 of the Law of Succession Act, Cap 160, Laws of Kenya, which dwells on the formal requirements for a written will. It states:

> *"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 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 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 no particular form of attestation shall be necessary."*

12. The applicants herein disputed the validity of the will on grounds that:

(a) the signature on the will purported to be that of the testator did not match the signature of deceased, and it was, therefore, a forgery;

(b) that the deceased was illiterate and could not have written the will; and

(c) the will disinherits the daughters, and, therefore, it does not bring out the correct intentions of the deceased.

13. It is the applicants' contention that the signature on the will did purported to be that of the deceased, was forged, and it did not belong to the deceased. Section 109 of the Evidence Act, Cap 80, Laws of Kenya, places burden of proof on the applicants. The section provides that:

> *''The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.''*

14. The court in *Re Estate of Samuel Ngugi Mbugua (Deceased)* [2017] eKLR, addressed its mind to the matter of proof with respect to an allegation that a signature was forged. The court said:

> *"The allegation that the said signature was not that of the deceased amounts to a claim that the signature was forged or that fraud was exercised in the procurement of the alleged will. That is to say that someone other than the deceased had affixed that mark on the will with the intent of passing the same as the signature of the deceased. Forgery is a criminal offence. The applicant is in fact imputing criminal conduct on either the person propounding the will or those who were involved in the operation that is purported to have been its execution. The burden of proving forgery lies with the person alleging it. In Elizabeth Kamene Ndolo vs George Matata Ndolo Nairobi Court of Appeal civil appeal number 128 of 1995 it was stated that the charge of forgery or fraud is a serious one, and the standard of proof required of the alleger is higher than that required in ordinary civil cases."*

15. The allegation of forgery of a signature places a heavy burden upon the person making it to prove the same beyond reasonable doubt. The applicants herein merely stated that the signatures on the will were forged based on their knowledge of how the deceased's signature looked like. They did not place any other or further evidence on the matter of the forgery beyond that allegation.

16. The need to prove and the burden of proof of such allegations was elaborated by the court in *Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another* [2016] eKLR**,** where the court stated that:

> *''It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be*

taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In Belmont Finance Corporation Ltd. v. Williams Furniture Ltd [27] Buckley L.J. said:

"An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."

In Armitage v Nurse [28] Millett L.J. having cited this passage continued:

"In order to allege fraud it is not sufficient to sprinkle a pleading with words like "willfully" and "recklessly" (but not "fraudulently" or "dishonestly"). This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint."

In Paragon Finance plc v D B Thakerar & Co the court stated that it is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. The burden is always on the claimant to prove fraud on the part of the Respondent. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. It all depends on the nature of the issue and its gravity. Evidence of especially high strength and quality is required to meet the civil standard of proof in fraud cases. It is more burdensome: (see also the cases of Mpungu & Sons Transporters Ltd –v- Attorney General & another. In Jennifer Nyambura Kamau v Humphrey Nandi, the Court of Appeal, Nyeri, emphasized that fraud must be proved as a fact by evidence; and, more importantly, that the standard of proof is beyond a balance of probabilities."

17. It is obvious that the burden of proof was on the applicants to prove the allegations of forgery. In the instant cause, the applicants have not offered any evidence to prove the alleged forgery, and as such they have failed to discharge the burden of proof, and their allegation of forgery cannot succeed. The usual way of proving that a handwriting is forged is by having the impugned handwriting examined by a handwriting expert. That is the direction that the applicants ought to have taken in their quest to prove the impugned signature was a forgery.

18. With regard to the deceased's illiteracy, the applicants submitted that the deceased was a class two drop out, and he could not read nor write. PW2, Tito Barat Keya, testified that the deceased could read and write in Kiswahili and Maragoli. The petitioner, an advocate of the High Court of Kenya, testified that he drafted the will under the instructions of the deceased, and it was done in Kiswahili. The original was sealed and kept at the bank. From the evidence, it is clear that the deceased was able to write and read in Maragoli and Kiswahili, and, therefore, the applicants claim on illiteracy cannot stand.

19. The applicants contend that the will did not provide for the daughters of the deceased, and, therefore, the same was contrary to the law. With respect to that question, of some individuals not being provided for under a will, the court in *Curryian Okumu vs. Perez Okumu & 2 Others* [2016] eKLR, said:

"The legal position is clear however that failure to provide for a beneficiary in a Will does not invalidate a Will. Section 5(1) of the Act gives a testator testamentary freedom as follows:

"Subject to the provisions of this Part and Part III, 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".

It further elaborated that this freedom of a testator to dispose of his free property by will is however is not absolute. The Court can after the death of the testator alter the terms of a will following an application under Section 26 of the Act. Section 26 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."

20. The same was emphasized in *James Maina Anyanga vs. Lorna Yimbiha Ottaro & 4 Others* [2014] eKLR, where court said:

"Failure to make provision for a dependant by a deceased person in his will does not invalidate the will as the court is empowered under Section 26 of the Law of Succession Act to make reasonable provision for the dependant."

21. The deceased had a free will to dispose of his estate in a manner that suited his wishes. This free will is the essence of testate succession, and the fact that the will did not provide for some of his children did not and cannot invalidate the will. The applicants are free to move to court under the provisions of section 26 of the Law of Succession Act and seek for a reasonable provision for the daughters from the estate.

The deceased in his will noted that all his daughters were married and made no provision to them for that reason. It should also be of note that none of the daughters have themselves come forth to demand a share in their father's estate.

22. With regard to the intentions of the deceased not being direct, it should be noted that the deceased subdivided his estate before his death. All the parties herein agree that the deceased allocated his sons land before he died, and that all his sons occupied the parcels of land as per his allocation, save for Phineas Alisa. The court made a visit to the property in dispute, on the 10th August 2012, and a report was compiled. It was established that none of the beneficiaries disputed the distribution of the land as per the will, save for Phineas, and that they had all settled on the land as allocated to them by the deceased.

23. In the end, I am not persuaded that there is any merit in the application, dated 10th September 2012, and I hereby dismiss the same. Let each party bear their own costs. Any party aggrieved by the outcome of these proceedings has twenty-eight (28) days to move the Court of Appeal, appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 3rd DAY OF July, 2020

W MUSYOKA

JUDGE