



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

SUCCESSION CAUSE NO. 644 OF 2018

IN THE MATTER OF THE ESTATE OF MARIA MANTZINI (DECEASED)

RULING

1. The deceased herein **Maria Mantzini** died on 11th of September 2016 in Attica Greece.
2. The court was informed that Maria Mantzini ('deceased') wrote several wills culminating in her final will and testament that was written on the 26th of September 2013 (Hereinafter referred as 'last will').
3. Amongst other documents the deceased is said to have signed are; a codicil to an earlier will and a Deed of Gift dated 28th September 2012. The latter two are said to have been signed by the deceased just before her departure from Kenya where she had lived for about 20 years. She left for Greece her home country where she stayed until her demise.
4. In these proceedings her last will is not being challenged. Secondly it is not disputed that the deceased wrote a codicil and a Deed of Gift just before departing from Kenya.
5. The parties to this contestation are nephews of the deceased through a mother and a father respectively.
6. The Executor of the deceased last Will, **Nikolaos Pavlos Markis** ('Executor') moved the court for probate on the 21st of May, 2018 and a grant issued accordingly on the 28th of September 2018. And on the 1st of April 2019 he filed for confirmation of the said Grant of Probate.
7. On his part the protestor **Dominic James Grammaticas** (hereinafter referred to as 'protestor') filed an affidavit of protest to the confirmation of probate on 20th May, 2019. The protestor does not object to the validity of the will nor the appointment of the executor. His objection is based on the fact that the executor failed to mention the Deed of Gift wherein the deceased gifted her interest in her late sister **Elly Phaedra Grammatica's** estate to the protestor's sons; **James Aris Grammaticas, Toby Dominic Grammaticas and Findlay Max Grammaticas**, who are the deceased great nephews, a fact the protestor states is known to the Executor.
8. In his affidavit the protestor depones that the deceased specifically bequeathed the executor her house in Greece de 94 Ferraiou street, Keratsini and various bank accounts both in Greece and Kenya but did not mention what she had gifted to his children and the gift does not form part of what is contained in the will.
9. In his rejoinder to the protest the executor states that he was made aware of the existence of the Deed of Gift by non-other than the protestor through an email, though his efforts to get a copy of the Deed of Gift remained unfulfilled due to non-cooperation from counsel for the protestor. Secondly the Executor states that the deceased could not give away what she did not own; thirdly the deceased wrote her last will indicating how she wanted all her properties distributed. Further the deceased was blind and of ill health when the codicil and the Deed of Gift were executed.
10. Counsel **Fauzia Bashir Shah** who drew the codicil and the Deed of Gift for the deceased swore an affidavit on the 28th of November, 2019 where she gave an account of how she received instruction, drafted and had the deceased sign the two documents. I understand the said counsel to say that she received instructions from the deceased, informed her of the content of the documents when she visited the deceased at her residence and the deceased having confirmed the contents thereof appended her signature. I do not fault the counsel's statement, though there is an attempt to cast aspersion on her for having been a lawyer for the protestor's family for long. I note further that counsel's firm acted for the deceased as well while she was in Kenya and for a long time.
11. There is absolutely nothing untoward on account of counsel **Fauzia Bashir Shah** from the above information or even from the executor's responses. I am convinced by the statement by counsel Fauzia that she acted on instructions.
12. Indeed, in a letter written by the executor's counsel and addressed to Shapley Barret Advocate contained in the executor's response and marked as exhibit "NPM 3" counsel stated.

“..... However, she agreed to sign it because it had been prepared for her by yourselves having been her Advocates for many years and whom she trusted.”

13. Having analysed the application, the response and submission by both counsel for determination are the following issues;

i. Whether the deceased had the capacity to instruct and sign the documents

ii. whether indeed she could gift her entitlement from her sister's estate and

iii. lastly whether or not the properties captured in the Will include the deceased share in estate of **Elly Phaedra Grammaticas** and therefore excluding the protestor's children from inheriting the same.

14. The deceased was blind, and at her death 95 years. In 2012 she was 91 and in 2013, 92 years. Both instances when signing the Deed of Gift and the last will she was blind, and of advanced age. It comes out also that when signing her last will she was of ill- health. No evidence was placed before court indicating that she was mentally incapacitated or too ill to give instructions or execute documents in both instances. Indeed the picture the court gets from the detailed documents is that at 90 the deceased was sharp and smart.

15. What also comes out is that, while in Kenya the deceased was close to the protestor's family and while in Greece, she seemed to have been close to the Executor. Both parties claim to have offered the deceased care and attention at different times they were with her, neither disputes the claim of the other.

16. What is interesting is that the deceased signed two documents together a codicil forming part of her will (since changed) and a Deed of Gift. Had the deceased not signed the Deed of gift at the time intent would have been defeated by the last will. However, there is the Deed of gift which cannot be ignored though there is the attempt to object to the same.

17. So far, the court has not been informed whether the estate of **Elly Phaedra Grammaticas** was distributed or not. It is 8 years since the deceased mentioned it in the Deed of Gift and the assumption is that the same is available and already distributed. **Elly Phaedra Grammaticas** is said to have left four heirs who were to inherit her in equal shares as she died intestate. That is the position under the law of Succession Act. And since there is no dispute on this; it makes it obvious why there is this contestation.

18. In my view the deceased had all the right to gift her entitlement in her sister's estate in whichever manner and which she did vide the two documents mentioned above. Though the codicil was over taken by events, in this instance there is a second document with her intentions well expressed; the Deed of Gift. A document that remains valid.

19. **Section 31 of the Law of Succession Act** deals with transfers in contemplation of death. The said section also recognises gift between living persons '*gift inter vivos*'. Where one gifts without necessarily contemplating immediate death and where one does not recall.

20. The deceased herein though old and aged does not appear to have given the gift in contemplation of death indeed she lived for another 4 years after making the Deed of Gift which *inter alia* states.

“a. Elly Phaedra Grammaticas died at the Aga Khan Hospital in Nairobi aforesaid on the 28th of October 2004 without leaving any written will or testament.

b. The beneficiaries of the estate of the late Elly Phaedra Grammaticas are the Donor, Iphigenia Markis, the estate of the late Aris Leonidas Grammaticas and the estate of the late John L. Grammaticas.

c. The Donor is desirous of transferring by way of gift all her right title and interest to and in her share of the estate of the late Elly Phaedra Grammaticas to sons of the trustee.....”

21. In her last will dated 26th day of September, 2013 the deceased was categorical what she gave out and to whom. She named her property in 94 Riga Ferraiou street, Keratsini and monies in Greece and Kenya. She went ahead to provide for the husband (now deceased) and the executor. The Deed of Gift remaining valid, she indeed did not touch on her right and entitlement in her sister's estate; She had indeed dealt with them in the Deed of Gift.

22. Notable is that no sooner had the deceased given a power of attorney to the executor than he started following up the Deed of Gift which apparently, he knew of as he was at the deceased house when it was executed, the intentions of the Executor are obvious but they cannot defeat the deed and action taken by the deceased in 2012.

23. I find that the Deed of Gift made on the 28th of September, 2012 remains a valid document; so that the deceased share in the estate of **Elly Phaedra Grammaticas** ought to go to the Protestor's 3 children as gifted to them by the deceased. The same are not captured and rightly so in the will.

24. The protest succeeds with costs.

Dated and Delivered in Nairobi on this 2ND day of JULY, 2020.

ALI-ARONI

JUDGE