REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(FAMILY DIVISION)

SUCCESSION CAUSE 1222 OF 2013

(CONSOLIDATED WITH SUCCESSION CAUSE NO 2243 OF 2012)

IN THE MATTER OF THE ESTATE OF AUGUSTINE MUITA KAHARE (DECEASED)

JUDGMENT

1. This cause relates to the estate of Augustine Muita Kahare who died on the 27th May 2008.

2. On the 5th September 2013, a grant of probate with written will annexed was issued to Dennis Mutuma Kibanga, in his capacity as the executor of the will of the deceased made on 6th December 2007 (hereinafter referred to as the executor). The said grant was confirmed on 12th May 2014 and a certificate of confirmation of grant was duly issued on the 30th May 2014 granting the executor authority to distribute the estate of the deceased as per his last will and testament dated 6th December 2007.

3. Rose Chemutai (hereinafter referred to as the objector), moved to the court in the cause by an application dated 13th August 2014, seeking orders for a temporary injunction to issue against the executor of the will to restrain him from wasting, selling, disposing, subdividing, or in any other way dealing with the estate of the deceased pending determination of the application. She also sought revocation of the grant of probate made to the executor on the 5th September 2013 and issued on the 30th May 2014, and for consolidation of HCSC No.1222 of 2013 with HCSC No. 2243 of 2012. She prayed that a grant of letters of administration intestate to the estate of the deceased be issued to herself and Jane Muita, in their alleged capacities as widows of the deceased. She also wanted an order to issue to Jane Muita and the executor commanding them to give an inventory and provide a full disclosure of all copies of the titles and properties of the deceased and an accounts of the estate of the deceased, and an order that Kshs350,000.00 be provided from the estate to meet the school fees of Ian Kiptoo and Sandra Chelimo who named as beneficiaries of the estate.

4. The application dated 13th August 2014 revealed the existence of HCSC No 2243 of 2012, which the objector had filed in respect of the estate of the deceased, and had, together with Amos Korir obtained grant of letters of administration intestate issued on the 19th February 2013 and confirmed on the 23rd January 2014. That meant that two causes had been initiated in respect of the estate of the deceased. That prompted the executor to file a summons in HCSC No 2243 of 2012, dated 12th August 2014, for revocation or annulment of the grant made therein. He also sought that the proceedings in HCSC No.2243 of 2012 be declared null and void *ab initio*, and orders to restrain the administrators in HCSC No 2243 of 2012, that is to say, objector and Amos Korir, from dealing with the estate of the deceased in any manner whatsoever. The executor expressed himself as relying on the grounds on the face of the application and his annexed affidavit.

5. The development meant that the court had before it two applications, seeking revocation of the grants made in the two causes.

6. Several aspects in both applications were addressed during the Interlocutory stages of the cause. For instance, on 14th August 2014, the court ordered that the two causes be consolidated. Through a ruling delivered on 3rd July 2015, the court ordered that the executor provides for school fees for Ian Kiptoo and Sandra Chelimo and that the objector meets the other needs of the children. By consent of the parties adopted as an order of the court on the 28th September 2015 it was agreed that the executor dispose of Kajiado/Kaputiei-North/7841 for purposes of meeting the educational expenses of Ian Kiptoo and Sandra Chemutai, which expenses were to be accounted for during distribution of the estate.

7. Directions were taken that the two applications be disposed of by way of *viva voce* evidence. The issues were drawn and the rival parties and their witnesses testified and were subjected to cross-examination.

8. The first witness for the executor was Prudence Kajuju Kahare. She had sworn an affidavit on 12th February 2015 and testified on the 20th June 2016. It was her evidence that the deceased was her son. She stated that she was aware that her son was married to only one wife, Jane Wangui Muita. She testified that she did not know the objector and had never seen her. She insisted that her son had never introduced her to the objector, neither was she taken to her home. During cross examination she stated that she had had heard that her son, the deceased, had

two children out of wedlock, however she had never met them nor their mother. When shown photographs that the objector relied, she could not recognize her from the pictures.

9. Fredrick Mutembei followed. He had filed an affidavit sworn on 6th October 2016 and testified on the 20th June 2016. He stated that he was a clerk at the firm of Messrs. Mugambi Mungania & Co Advocates. He said that he knew the deceased who had been a client of the lawfirm for some while. He said that he had also been to his medical clinic. He stated that on the 6th December 2006 while working at the said lawfirm he was called upon to witness the deceased executing his will. He said that he witnessed the deceased sign his will in his presence and that of one Catherine Murungi and Mr. Mugambi, advocate. During cross examination, he confirmed that the deceased was well known to him. He stated that the deceased did not look ill and that by looking at him he could not tell whether he was sick or not. He also stated that he was not aware that the deceased was suffering from any illness. He maintained that the deceased was well and that he read and signed his will in his presence.

10. His evidence was corroborated by Catherine Murungi, who testified next. It was her evidence that she was a secretary at the lawfirm of Mugambi Mungania & Co Advocates, when the will was prepared. She stated that she had known the deceased for some time as he had been a client of the lawfirm for a while. it was her testimony that she was the one who typed the will upon the instruction by Mr. Mugambi, the advocate who drew it. She was also asked to witness the execution of the will by the deceased which she did together with Fredrick Mutembei and Mr. Mugambi, the advocate. In cross examination, she stated that she knew the deceased very well and that on the date when the will was made he was in good condition. She also confirmed that she did not know that the deceased was terminally ill. She stated that she had talked to the deceased at the reception when he asked to see Mr. Mugambi. She clarified that the blanks that had been left in the will were there because the deceased had instructed that.

11. Emmanuel Kenga came next. He was a police officer and a forensic document examiner based at the Criminal Investigations Department (CID). He stated that he received a letter on the 26th September 2014 from the executor's advocate requesting that he examines some documents and verify the authenticity of the signatures. He examined several documents vis-*a-vis* the signatures on the will, and came to the conclusion that the signatures were by the same author. He produced in evidence his report dated 3rd October 2014. He admitted that there were some minor discrepancies in the signatures but he attributed the same to the fact that factors like age, intoxication and sickness affect the movement of the hand thus resulting in production of signatures which to the lay man might look different. He explained that as at the time of making the will, the deceased was sick and chances were that his handwriting had been affected by the sickness. He concluded that the signatures bore individual characteristics indicating that they were the writings of the same author. During cross examination he re-affirmed to the court of his expertise in the field. He stated that his report was different from another report done by John Muinde because he and John Muinde had not examined the same documents. When asked to comment on the documents that were examined by Mr. Muinde, he stated that one of them, VSC5000C, had a characteristic similar to the ones in the will.

12. Dr. Christopher Kyalo Musau was the fifth witness for the executor. He was a medical doctor and consultant neurosurgeon. He stated that he had been the deceased's doctor until his death. He gave a medical history of the deceased stating that way back in 2006 the deceased was diagnosed to have had a brain tumor. He underwent surgery and chemotherapy which were very successful and he got well and resumed his duties as a medical doctor at his clinic. He stated that his memory and cognitive functions were normal. He stated that on the 9th December 2007 the deceased was admitted at Nairobi Hospital with a seven-day history of a headache and mild right-sided weakness. He underwent another surgery that revealed that the tumor was deeper than expected and that the same could not be removed. He later on lost his speech, and succumbed on 27th May 2007. He clarified that the tumor that the deceased had was on the left side of his brain thus it had affected his right upper limbs and leg. He produced his medical report dated 24th September 2014 as exhibit. In cross-examination, he confirmed that at the time of his admission to hospital on the 12th December 2007, the deceased was in cognitive condition and had no memory loss. He clarified that he did not agree with the allegation that the deceased did not have capacity to make the will on 6th December 2007. In re-examination, he reaffirmed that the deceased was in cognitive condition when he went to hospital on 9th December 2007, he was able to walk and talk audibly. He was also said to have been able to read and understand documents.

13. The sixth witness was Wilson Kimathi Kahare, a brother of the deceased. He stated that he had read several affidavits in support of the objector's case in which he had been adversely mentioned. He acknowledged that he knew the objector, but however denied that he had accompanied his deceased brother for dowry negotiations at the objector's home. He stated that the objector was introduced to him by the deceased at his clinic and that the deceased had intimated that the objector was to take him to see a parcel of land that he was interested in buying. He stated that the objector was not a wife to the deceased and that the only wife the deceased had was Jane Wangui Muita. When shown photographs of himself, the deceased and the objector together, he stated that the said picture had been taken on their way back from inspecting a piece of land the deceased had bought upon the objector's recommendation. He further clarified that other photographs were taken at a funeral in Nandi. He stated that they never went to discuss marriage rites at the home objector's home rather they had attended the objector's father's funeral. In cross-examination, he confirmed that he knew the objector and that he had at once been paid by her to fence her compound and paint her house in Kitengela. He stated that the deceased had two children with the objector and that he visited them once in a while. He reiterated that he never accompanied the deceased to the objector's home for dowry negotiations. In re-examination he reaffirmed that the deceased never stayed with the objector rather he would take his children for outings and take them back to the objector's house.

14. Jane Wangui Muita was the seventh witness. She testified that she and the deceased got married on the 6th of March 1987 through a civil ceremony conducted under the Marriage Act, Cap 150, Laws of Kenya, now repealed. She stated that she first knew the objector. She had met her for the first time on 9th September 2000 when the objector left her two children at the witness's matrimonial home claiming that they were the deceased's children. She later on resolved the issue with the deceased and they moved on. She stated that due to the nature of her work she moved out of the country in 2002 and came back in 2005. She stated that she was aware that the deceased had prepared a will as he had shown her a draft of the same. They had also discussed the same with the deceased while he was hospitalized. She denied allegations that the deceased had no capacity to draft the will and stated that the deceased was in a proper state of mind at that given period as the tumor had not affected his memory and cognitive senses as he was able to resume his duties as a doctor in his clinic. She confirmed that she was the deceased's only legal wife. She said that the deceased had had an affair with the objector but he never married her. In cross examination, she stated that she was not aware that the deceased had taken dowry to the objector's home. She was categorical that the deceased was well before his admission on 9th December 2006, as he was able to read and talk, and although he had headaches the same were mild and did not

affect his functionality. She stated that she was the deceased's caregiver during his illness until his death, and that the objector only came to visit him in hospital once during his illness.

15. The executor was the last witness. He testified that he was a nephew to the deceased and had known him all his life. He stated that he had been appointed an executor in deceased's will. He said that the will was availed to him, and that he took the step of applying for probate, which he obtained. He further stated that he came to learn of HCSC No. 2243 of 2012 when the objector filed the summons of revocation in HCSC No.1222 of 2013. It was his testimony that the objector was not a wife to the deceased as the deceased had severally refuted the allegation when alive. She thus had no capacity to file the succession cause. He denied the allegations that he had accompanied the deceased to the objector's home for dowry negotiations. In cross examination, he confirmed knowledge of the objector and the fact that she had two children with the deceased.

16. On the objector's side, it was the objector who testified first. She adopted her affidavit as evidence in chief. She stated that she was the deceased's second wife, having married him under Nandi customary law, and that they had been blessed with two children. She disputed the will stating that it was a forgery. She also stated that the deceased had no mental capacity to draft the will as at the time he allegedly drafted the said will he was very ill and could not talk. During cross- examination she confirmed that she had filed a children's maintenance suit against the deceased in 2002. She confirmed that in the maintenance suit, the deceased had denied being married to her and that she had not filed for a declaration of the same. She also had no photographs of her, the deceased and their children that showed they stayed together as a family. She also stated that she had nothing to show that she had contributed to the deceased's welfare while he alive. She also stated that she had seen the deceased a few days before he was hospitalized. She affirmed that he was in good condition and that he had lunch with her and the children. She was sure that the deceased had no will and only came to know of it in 2013. She clarified that the deceased had paid her dowry in the presence of her family and his brothers.

17. Her second witness, Thomas Maritim, was her cousin. He stated in his affidavit the he was present during the objector's dowry negotiations. He stated that the deceased agreed to pay the family five heads of cattle and Kshs, 100, 000.00. He stated that the objector was to the best of his knowledge a wife to the deceased. In cross- examination, he stated that he could not recall the date of the said dowry payment and negotiations despite the fact that he chaired the meeting. He stated that he met the deceased twice, at the objector's father's funeral and at a church fundraising. He stated that the negotiations and payment of dowry were endorsed in a document which he however did not produce in evidence. He clarified that he took the money for the dowry from the deceased on behalf of the objector's parents.

18. The objector's next witness, Fredrick Songol, was her brother-in-law. He stated that he met the deceased when he had come for an engagement ceremony at the objector's home. He, however, could not recall the date. He stated that one William Silotei was in charge of the ceremony and led the negotiations. He stated that the deceased paid dowry, being of five head of cattle and Kshs. 100, 000.00 only, and that they became husband and wife. He stated that minutes of the meeting were recorded though he did not know who kept them thereafter. In cross-examination, he affirmed that he could not recall the date when the meeting took place. He stated that the dowry was collected by William Silotei on behalf of the objector's parents in his capacity as the chairperson of the meeting, William was said to have kept the minutes of the negotiations.

19. William Silotei testified next. He stated that he was present during the objector's dowry negotiations. Being the brother of the objector, he participated in the negotiations on behalf of his parents. He could not recall the exact date of the negotiations. He stated that the deceased agreed to pay dowry of five head of cattle that were to be delivered in cash. As per the negotiations, one cow cost Kshs 20,000.00 and thus the deceased was to pay a total of Kshs. 100,000.00. He stated that he did not play an active role in the negotiations. The said money was given to Kipkenei Akiri on behalf of his parents. In cross-examination, he confirmed that he was not the chair of the meeting and that he did not record the minutes. He stated that one Tekla Cherotich kept the minutes of the meeting. He clarified that he had never attended a marriage ceremony between the deceased and the objector.

20. The objector had engaged the services of a document examiner, who testified as her sixth witness. SP John Muinde, a forensic document examiner, testified that he examined the signature on the will and compared it with signatures in other documents, and came to the conclusion that the signatures were not the same. His report was produced as an exhibit. In cross-examination, he confirmed that he had examined the signatures of documents drafted by the deceased between 1993-2002. He stated that the signatures were different from that on the will. He affirmed that sickness and age could affect the quality of signatures.

21. At the end of the oral hearing, the parties were ducted to file written submissions. Both parties herein filed submissions in support of their respective cases.

22. I have looked at the pleadings, the recorded the evidence and the written submissions lodged by both sides. The issues that emerge for determinations revolve around the validity of the will on record, the status of the objector, the propriety of the grants issued in the two causes, and intermeddling with the estate.

23. I will first deal with the issue of the validity of the alleged will. Section 11 of the Law of Succession Act, provides for the formal requirements of a valid 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.'

24. The objector herein disputed the validity of the will on the grounds that: -

(a) The deceased had no mental capacity to draft a will as he was sick.

(b) That the signatures were forgeries and did not match those of the deceased.

(c) That the will had disinherited her despite the fact that she was a wife to the deceased.

25. The essentials of testamentary capacity were laid out in the case of *Banks vs. Good fellow* (1870) LR 5 QB 549, where the court stated that -

'A testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made.'

26. In this instant suit, the objector alleged that the deceased had a brain tumor and thus had no mental capacity to make the will. The Objector having alleged that the deceased had no mental capacity to draft the will, it was incumbent upon her to prove the same. It is trite law that he who alleges must prove. Section 5(4) of the Law of Succession Act places the burden of establishing lack of capacity to make a will on the person who alleges the same. The provision states that: -

'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.'

27. in Halsbury's *Laws of England* 4th Edition Vol. 177 at page 903-904 it is stated that -

'Where any dispute or doubt of sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity.'

28. While dealing with the issue of capacity, Githinji, J. in the case of *In Re Estate of Gatuthu Njuguna (Deceased)* [1998] eKLR stated -

'As regards the testators mental and physical capacity to make the will, the law presumes that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind, in this case, the applicant (S.5(3) and 5(4) of the L.S.A.). However, paras 903 and 904 of Volume 17 of Halsbury's Laws of England show that, where any dispute or doubt of sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of testator's capacity is one of fact which can be proved by medical evidence, oral evidence of the witnesses who knew testator well or by circumstantial evidence and that the question of capacity is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that, if the objector produces evidence which raises suspicion of the testators' capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof and the burden then shifts to the person setting up the will to satisfy the court that the testator had the necessary capacity.'

29. The executor herein defended the will, he called two witnesses who had attested the execution of the will. The two testified that the deceased was in good condition and was able to read and understand and thus had the mental capacity to make the will. A doctor was also called and he testified that at the time the deceased was being admitted he was in good mental capacity. He was aware of his surroundings and although he had headaches, the tumor had not affected his memory and thinking capacity.

30. The Court of Appeal in the case of *Rosemary Koinange suing as legal representative of the Late Dr. Wilfred Koinange and also in her own personal capacity) & 5 others vs. Isabella Wanjiku Karanja*, seems to allude that mental incapacity being a medical condition, the report and testimony of a doctor who attended to the deceased for mental incapacity before his death is important evidence. The court further clarified in *Erastus Maina Gikunu & another vs. Godfrey Gichuhi Gikunu & another* [2016] eKLR that

'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 reasons that the courts insist on the person alleging lack of capacity due to illness to prove that the illness impaired the judgment and

understanding of the testator.'

31. In the case of *Mary Mugure Daniel Kariuki vs. Rahab Waruguru Kariuki & 8 others* [2017] eKLR the court of appeal was of the view that -

> *'Regarding the mental capacity of the deceased, we are afraid the appellant did not adduce any cogent or credible evidence that the deceased lacked mental capacity. No medical evidence was adduced. From the evidence of the appellant, extracts of which we have set out above, her view that the deceased did not have mental capacity was nothing but sheer conjecture and speculation. This is made clear by her testimony that the deceased "might have transferred the land to Rahab without realizing the implication." Plainly this is mere speculation, not positive evidence that the deceased suffered from mental incapacity. The other evidence upon which the appellant relies to prove the deceased's mental incapacity is the fact that he was ailing before he died. With respect, the mere fact that a person is indisposed and hospitalized does not, ipso facto, prove mental incapacity. The appellant was obliged to lead evidence on the nature of the deceased's illness and how, if at all, it affected his mental capacity.'*

32. The objector herein had nothing to prove that the deceased had no mental capacity to make the will. Apart from her oral testimony or evidence, she did not produce any medical documents to show that the deceased was mentally incapacitated at the time the will was made, neither did she call any medical doctor specialized in that line of medicine to shed light on the matter. She utterly failed to prove the allegation and thus the same must fail.

33. It is the objector's contention that the signatures on the will were forged and did not belong to the deceased. She called a document examiner as a witness, who stated that the signatures on the will did not match those of the deceased. The executor also called a document examiner who testified that the signatures on the will were those of the deceased. He stated that the signatures had minor discrepancies that were caused by the physical state of the deceased coupled with the fact that the deceased was sick at the time of making the will.

34. The objector herein claimed that the signatures of the deceased had been forged. Section 109 of the Evidence Act, Chapter 80 of the Laws of Kenya places the burden of proof on her. The provision states 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.'*

35. The parties herein relied on the evidence of expert witnesses to prove their cases. In the case of *Asira vs. Republic* [1986] KLR 227, the Court of Appeal held that -

> *'The most an expert on handwriting can properly say is not that somebody definitely wrote a particular thing but that he does not believe a particular writing was by particular person or that the writings are so similar as to be undistinguishable. It is the duty of a court to make an examination and satisfy itself whether the handwriting expert's opinion can be accepted and the court cannot blindly accept such an opinion … The decision on handwriting, whether it is genuine or not, always rests with the Court. … The art of comparing handwriting is no doubt one in which time and thought are given to the formation of letters and words, and therefore expert status may be accorded to a person versed in such comparisons. But as has been accepted in Wainaina's case (Wainaina vs. Republic [1978] KLR 11) such an expert is not able to say definitely that anybody wrote a particular thing. The reasoning is based upon the knowledge that handwritings can very easily be forged. Moreover a person may not write in the same style all the time. The expert is therefore faced with trying to analyze forged writing as well as disguised writing. In cases where there is a problem about the writing it is the duty of the court to satisfy itself after examination whether the expert's opinion can be accepted and cannot blindly accept such opinion. In these areas of conflict, it is prudent to look for other evidence so that forgery can be excluded on the one hand, and mistaken identification excluded on the other.'*

36. *In Elizabeth Kamene Ndolo vs. George Matata Ndolo* [1996] eKLR the Court of Appeal stated that -

> *'… The evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say - "Because this is the evidence of an expert, I believe it." … eyewitness evidence of attesting witnesses is superior to that of handwriting experts, which really is only opinion evidence.'*

37. In this cause, the evidence of the expert witnesses is conflicting. It is only proper that determination be made on the same *vis-a-vis* the evidence given in court. The executor called two witnesses who witnessed the deceased executing the will. These two were employees in the law firm where the deceased's will was prepared or drawn. Their testimony was that they saw the deceased at the time, he was well and talking. He signed the document in their presence. Their respective testimonies were not shaken on cross-examination.

38. In *re Estate of Samuel Ngugi Mbugua (Deceased)* [2017] eKLR the court was of the view that

> *'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.'*

39. The allegation of forgery placed a heavy burden upon the objector to prove beyond reasonable doubt that indeed the signatures were

forged. It should be noted that the evidence of the document expert relied upon by the objector was based on a comparison of documents made four years prior to the making of the will. As stated in *Asira vs. Republic* (supra) a person may not write in the same style all the time and chances are that a signature might change over time. It was therefore necessary for him to have compared the signatures on the will with those on documents prior to his death. It is clear, therefore, that the objector failed to discharge the burden of proof and thus her allegation of forgery cannot succeed.

40. The objector claimed that she has not been provided for in the will as a wife and for that reason, the will should be declared null and void. The court in *Curryian Okumu vs. Perez Okumu & 2 others* [2016] eKLR was of the view that -

> *'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 …"*
>
> *… 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."'*

41. The same emphasis was laid in *James Maina Anyanga vs. Lorna Yimbiha Ottaro* & 4 others [2014] eKLR where court held that

> *'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.'*

42. It is true that the deceased had a free will to dispose of his estate in a manner that was suitable to him. This free will is the essence of testate succession, and the fact that the will did not provide for some beneficiaries does not, and cannot, invalidate the will. The remedy available to the objector is to move to court appropriately under the provisions of section 26 of the Law of Succession Act, seeking for a reasonable provision out of the estate.

43. In an upshot the objector failed to prove the grounds she alleged to invalidate the will and as such I hold that the will was valid.

44. The other issue for determination is whether the objector was a widow of the deceased. She testified that she was married to the deceased under Nandi customary law, and she thus as a widow she has the right to file for grant letters of administration of the estate. That allegation was disputed by the executor. It is trite law that a party who seeks to rely on a custom must establish that custom by way of evidence. This they can do by calling witnesses who are experts in that custom, or by citing judicial precedence founded on decisions of superior courts on the custom, or treatises written by scholars on the custom.

45. In *Hortensiah Wanjiku Yawe v The Public Trustee* Court of Appeal Civil Appeal 13 of 1976, the former Court of Appeal for East Africa laid down the principles that should guide the courts with regard to proof of a custom. These are -

(a) that the onus of proving customary law marriage is generally on the party who claims it;

(b) that the standard of proof is the usual one for a civil action, namely, 'on the balance of probabilities;

(c) that the evidence as to the formalities required for a customary law marriage must be proved to that standard;

(d) that long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;

(e) that only cogent evidence to the contrary can rebut the presumption; and

(f) that if specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.

46. The instant case ought to be subjected to that test. Was there a customary marriage and were all the essentials of a Nandi customary marriage met? The burden of proof was upon the objector to prove that she was married to the deceased. In her testimony, she stated that the deceased had visited her parent's home and paid dowry of Kshs. 50,000.00. She called two witnesses who stated that the deceased paid a dowry of Kshs 100,000.00 and five head of cattle. The third witness claimed that the deceased paid a dowry of Kshs. 100,000.00 in place of five cows. None of her witnesses could not remember the date of the ceremony, neither did they produce the minutes of the negotiations. They also could not remember the names of those who attended the dowry negotiations with the deceased, save for one George. They all confirmed in cross-examination that no marriage ceremony was carried out. Their evidence was marred with inconsistencies as of how much was paid as dowry, who collected it and who chaired the meeting. These discrepancies do not make any sense considering the fact that the witnesses all claimed to have attended the same meeting.

47. The executor, on his part, called witnesses who denied the allegation. Wilson Kahare, a brother to the deceased, denied the occasion stating that the photographs relied on by the objector had been taken during a funeral and on a trip to Eldoret with the deceased to buy land. He also led evidence by way of an affidavit sworn by the deceased in two suits involving the deceased and the objector in which the deceased denied being married to her. It should be noted that dowry negotiations are family affairs. The objector did not call anyone from the deceased's side to testify on her behalf. All the witnesses testified that minutes of the meeting were taken, however the same were not produced. These minutes would have not only confirmed the occasion but also the attendance of the deceased and people from his side of the family.

48. In *re Estate of Wallace Nderu Kamau* [2017] eKLR the court was of the view that -

> *'In the absence of oral evidence by any family member on either side of the family, I find that the evidence does not disclose a customary marriage between the deceased and the objector.'*

The Court of Appeal in *Hellen Tum vs. Jepkoech Tapkili Metto & another* [2018] eKLR stated that -

> *'One of the most crucial evidence in proof of a customary marriage is the evidence of the customary rites required to establish a customary marriage and proof that these rites were indeed fulfilled … It was clear that one of the crucial ceremonies, in a Nandi Customary marriage is the "Koito" ceremony that signifies a formal engagement ceremony, and also signifies that the couple is now a married couple.'*

49. Looking at the evidence adduced it is safe to say that the objector did not prove that the occasion she alleged took place met the essentials of a Nandi customary marriage and as such her allegation must fail.

50. As the deceased did not go through a Nandi customary ceremony of marriage with the objector in view of the above, the next consideration should be whether the objector and the deceased related in a manner and circumstances from which the court can presume that they were husband and wife. The Court of Appeal in *Phylis Njoki Karanja & 2 others vs. Rosemary Mueni Karanja & another* [2009] eKLR stated that -

> *'Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage.'*

The same was emphasized in *Anastasia Mumbi Kibunja & 4 others vs. Njihia Mucina* [2013] eKLR: where court stated that -

> *'Having children and naming them after some man's relatives is not itself proof of marriage of any sort.'*

51. Nyarangi JA in *Mary Njoki vs. John Kinyanjui Mutheru* [1985] eKLR stated that -

> *'… in my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage. To my mind, these features are all too apparent in the Yawe and in Mbiti (supra). To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law.'*

52. In instant matter, the objector stated that she met the deceased in 1994, she however could not remember the date when he paid her dowry. She testified that they were blessed with two children in 1998 and 1999, who the deceased was taking care of before his death. She stated that they lived in her house along 3rd Ngong Avenue, and later on moved to a house along Lenana Road which the two had purchased on mortgage in 2001. However, she did not adduce any evidence to show that she was indeed cohabiting with the deceased during that period. In cross examination she confirmed that the children were staying with the deceased. It, however, emerged in her evidence that there were two suits that were in court between the objector and the deceased. HCCC No. 1063 of 2003 and Children's Case No 2 of 2002. From the affidavits deposed by both the objector and the deceased in support of their various cases, it is clear that they had a very rocky and frosty relationship between 2002 and 2006.The affidavits impute that the two were not staying together as husband and wife. In both suits, the objector does not refer to herself as a wife of the deceased rather as someone who had a relationship with him temporarily. The deceased on his part denies being married to her. In an affidavit sworn on 14thFebruary 2006 in Children's Case No 2 of 2002, the deceased paints a very bad picture of the objector and indication that they were not in good terms. Jane Wangui Muita the wife to the deceased stated that she married that deceased in 1987 and they stayed together as husband and wife till his demise. Evidence was adduced that she took care of the deceased when he was ailing and catered for the medical bills unlike the objector who only made two hospital visits. There is no positive evidence from the objector and her witnesses that the objector and the deceased ever lived together, and, if ever, for so long as to gain general repute that indeed they were husband and wife. In my view, the objector has failed to place any evidence establishing marriage by long cohabitation and repute between her and the deceased despite the fact that they had two children together.

53. From the foregoing, I hold that the objector failed to adduce evidence to prove that she was a wife under customary law and that there were circumstances of the relationship between her and the deceased from which a court could make a presumption that the two were husband and wife.

54. When determining issues of revocation and annulment of grants, the courts ought to be guided by the provisions of section 76 of the Law of Succession Act which say as follows: -

> *'A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion-*
>
> *(a) That the proceedings to obtain the grant were defective in substance;*
>
> *(b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
>
> *(c) That the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*
>
> *(d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either-*
>
> > *(i)to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or*
> >
> > *(ii) to proceed diligently with the administration of the estate; or*
> >
> > *(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs(e) and (g) of section 83 has produced any such inventory or account which is false in any material particular; or*
>
> *(e) The grant has become useless and inoperative through subsequent circumstances.'*

55. In *Jesse Karaya Gatimu Mary Wanjiku Githinji* [2014] eKLR, the court was of the view that -

> *'The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all of these grounds, whatever the case may be.'*

56. The Court of Appeal in *Matheka and Another vs. Matheka* (2005) 2 KLR 455 laid down the following guiding principles revocation of grant either on application by an interested party or by the court on its own motion. It was stated that even when the revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate. The Court of Appeal affirmed the positon *in Joyce Ngima Njeru & another vs. Ann Wambeti Njue* [2012] eKLR where it held that

> *'The central core of the ingredients required to be established under section 76 of the L.S.A. is that it is meant to be used as a vehicle to attack and fault the process of either obtaining the Grant or inactive use of the Grant after being lawfully obtained in circumstances where it has become useless. It is not meant to fault the decision on the merits.'*

57. It was the executor's case that the grant of letters of administration intestate issued on the 19th February 2013 and confirmed on the 23rd January 2014 to objector and Amos Korir ought to be annulled on the ground that the same was obtained fraudulently. In his testimony he stated that the deceased had left a will and thus his estate was subject to testate succession. He urged that both the objector and Amos Korir were strangers to the estate and thus had no capacity to administer the estate. The same did not also disclose that Jane Wangui Muita was a wife to the deceased and was also entitled to administer the estate. In her evidence, the objector confirmed that she was aware and knew that the deceased had a wife and children. She also admitted not having disclosed the same to the court when she applied for letters of administration. She stated that Amos Korir was her brother and during cross- examination she conceded that he had no locus to apply for the letters of administration. The Court of Appeal in *Cosimo Polcino vs. Tony Kent* [2014] eKLR was of the view that

> *'... the fact that the appellant failed to disclose the existence of his two siblings, is sufficient ground to annul the grant resealed in Malindi Court on 17th November, 2009.'*

58. It was crucial for the objector to disclose the existence of Jane Wangui, the widow of the deceased, and other survivors, non-disclosure of these information was fatal. So too is the fact the objector was not a spouse of the deceased, and therefore she was not entitled to a share in the estate, leave alone administering it. I accordingly hold that the grant ought to be revoked.

59. It was the evidence of the executor that the objector had intermeddled with part of the deceased's estate. He stated that the objector had obtained Kshs 2,975, 000.00 on behalf of the estate of the deceased from the sale of Kajiado /Kaputiei-North/5035 by Dr. Frank Kamunde Mwongera. The objector on her part did not deny receiving the money she, however, stated that she received the same on behalf of her children. The issue of ownership of the land was determined in this suit via a ruling dated 3rd July 2015.

60. The law on intermeddling is set out in section 45 of the Law of Succession Act, which provides as follows -

'45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall -

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.'

61. In the instant cause, money was paid to the objector in the belief that she was the administrator of the suit, she did not sell or dispose of the property herself. However, receipt of the money amounted to handling or dealing with estate property. She handled what was estate property when she had no authority through a grant of letters of administration to handle or deal with it. Estate vests in personal representatives by virtue of section 79 of the Act. At the time she handled the money she did not have representation to the estate, and the money had not been vested in her by law. She was therefore an intermeddler who ought to account to the legitimate personal representative of the deceased.

62. In the upshot, the final orders to be made in this matter are as follows -

a) That I hereby declare that the will of the deceased on record executed on 6th December 2007 is genuine and valid;

b) That I hereby declare that the objector herein was not a wife to the deceased;

c) That the objector had no right to administer the estate of the deceased herein;

d) That the objector shall within forty-five (45) days account for the money that she received from Dr. Mwongera on account of the sale or disposal of Kajiado /Kaputiei-North/5035;

e) That accordingly the application by the objector is hereby dismissed, while that by the executor is allowed, the effect of which the grant made to the objector and Amos Korir is hereby revoked while that made to the executor is affirmed;

f) That there shall be no order as to costs; and

g) That any party aggrieved by the orders made herein shall be at liberty to challenge the same at the Court of Appeal within twenty-eight (28) days.

PREPARED, DATED AND SIGNGED AT KAKAMEGA THIS 31st DAY OF January, 2019

W. MUSYOKA

JUDGE

DATED, SIGNED and DELIVERED at NAIROBI this 15th DAY OF February, 2019

ASENATH ONGERI

JUDGE