REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 39 OF 2017 (O.S.)

IN THE MATTER OF: AN APPLICATION BY ISKOROSTINSKAYA SVETLANA AND SUSSANA SCIACOVELLI FOR ORDERS NULLIFYING THE WILL DATED NOVEMBER 27, 2015 BY DONATO SCIACOVELLI (DECEASED)

AND

IN THE MATTER OF: THE LAW OF SUCCESSION ACT CAP. 160 LAWS OF KENYA

BETWEEN

ISKOROSTINSKAYA SVETLANA.....1ST APPLICANT

SUSANNA SCIACOVELLI.....2ND APPLICANT

AND

GLADYS NASERIAN KAIYONI.....RESPONDENT

JUDGEMENT

1. Through the Originating Summons (O.S.) dated 25th September, 2017 brought pursuant to sections 1A, 1B, 3A and 95 of the Civil Procedure Act and Order 37 of the Civil Procedure Rules, 2010 the 1st Applicant Iskorostinskaya Svetlana and the 2nd Applicant Susanna Sciacovelli pray for the determination of the following questions:

> **"1. Whether the purported will of the late DONATO SCIACOVELLI (DECEASED) dated 27th November 2015 (the "said will") is a forgery, false and fraudulent?**
>
> **2. If the answer to 1 above is in the affirmative, whether the said will should be declared null and void *ab initio*?**
>
> **3. Whether the Respondent should indemnify the estate of the Deceased in the sum of Kshs.15,800,000.00?**
>
> **4. Whether this Honourable Court can grant any further orders in the interests of justice?**
>
> **5. Whether the Applicants should be awarded the costs of these proceedings?"**

2. The applicants have named Gladys Naserian Kaiyoni, the executor of the questioned will, the Respondent.

3. In brief, the applicants aver that Donato Sciacovelli (hereinafter simply referred to as the deceased) died intestate in respect of all his properties in Kenya. According to them, the Will dated 27th November, 2015 (hereinafter simply referred to as the Will) which the Respondent used to obtain a grant of probate in respect to the estate of the deceased in Malindi High Court Succession Cause No. 161 of 2016 is a forgery. They therefore urge this court to declare the said Will null and void *ab initio*.

4. The Respondent's position is that the questioned Will is valid and the challenge to the same should be dismissed.

5. The issue therefore is whether the deceased authored the questioned Will.

6. What is the applicable law? A party who sets out to establish that a will is a fraudulent document has an unenviable task. As submitted by counsel for the Respondent, the standard of proof is higher than that required in ordinary civil cases. The law was stated by the Court of Appeal in **Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR** thus:

> **"We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases."**

7. A high degree of proof is necessary to establish fraud. The burden is therefore much more difficult to discharge than in ordinary civil cases. W. Musyoka, J explained this in the case of **In re Estate of Kimani Kahehu (Deceased) [2018] eKLR** as follows:

> **"10. It is the applicant who alleges that the will was a forgery. The burden is on him to establish that fact to the required standard. Forgery is a criminal act, and facts to establish it must make out a case beyond balance of probability and towards proof beyond reasonable doubt. See the decision of the Court of Appeal in *Elizabeth Kamene Ndolo vs. George Matata Ndolo* Nairobi Court of Appeal civil appeal number 128 of 1995. A charge of forgery would be that the signature on the document was not that of the deceased. To establish forgery, it is usually necessary to subject the impugned document to testing of the impugned signature or signatures by a document or handwriting expert. That was not done in this case. No material was placed before me by way of evidence that the signature on the document purported to be that of the deceased was forged."**

8. The guiding principle in considering whether a will is a forgery was stated by Githinji, J (as he then was) in **Karanja and another v Karanja [2002] 2KLR 22** thus:

> **"When the will is regular on the face of it with an attestation clause and signatures of attesting witnesses and the signature of the testator, there is a rebuttable presumption of due execution (*omnia esse riteatta*)."**

9. The question therefore is whether the applicants have rebutted the presumption of the regularity of the deceased's Will. As was stated in **Karanja** (supra), **"are there circumstances which disturb the conscience of the court about the validity of the wills and codicils?"** Is there anything out of place in the manner the Will was prepared and signed?

10. The applicants started their journey by questioning the authenticity of the signature of the deceased on the document. PW1 Ederson Jorge Sciacovelli stated that the deceased had long-form and short-form signatures. He was familiar with the deceased's signatures and even witnessed him append the long-form signature to his passport. He stated that the signature on the will did not belong to the deceased.

11. PW2 Emmanuel Kenga, a document examiner testified that upon comparing the signature on the questioned Will and other known signatures of the deceased he concluded that the same were by different authors.

12. PW3 Lucy Wangari Mwangi, an advocate, testified that she was familiar with the long-form and short-form signatures of the deceased. Her evidence was that the signature on the Will did not belong to the deceased. She further testified that the deceased would have used the long-form signature on the Will as a will is a serious document.

13. The applicants' evidence was countered by that of DW3 Bernard Kahindi Masha who testified that the document was prepared at the behest of the deceased who requested him to attest the Will.

14. DW2 Chief Inspector of Police Susan Wambugu testified that the signature on the Will and the documents signed by the deceased was made by one hand.

15. Here then is a situation where we have two experts in the handwriting arena giving contradictory opinions on the signature on the Will. Although DW2 questioned the integrity of PW2, my view is that the problem could have been caused by the fact that PW2 and DW2 used different documents with the known signatures of the deceased in examining the genuineness of the signature on the Will. PW2 used an indenture dated 13th July, 2015, a sale agreement dated 9th July, 2015 and an acknowledgement slip. On her part DW2 used the passport of the deceased and a Standard Chartered Bank deposit slip signed by the deceased.

16. A reading of several articles relating to handwriting analysis disclose that original documents are required in carrying out analysis of handwritings. Handwriting experts also need several documents with the known signature of the deceased in order to reach an opinion on the signature on a questioned document.

17. In an article titled **Forgery and forensics-or-, how not to forge a will and get away with it**, **chba.org.uk** written in 2015, Alexander Learmonth, Barrister, TEP identified other challenges as follows:

> **"Handwriting analysis**
>
> **My experience of handwriting evidence is that it is plagued with difficulties. The idea is that an expert can closely examine the handwriting or signature of the deceased on the disputed document, and look for differences and similarities as compared with known examples. The expert will be looking at letter formation, fluency and spontaneity, and pen pressure and line quality to determine whether it is a genuine signature of the person it purports to be, or a 'simulation'. I suppose**

they use the neutral terms simulation as there may be innocent reasons for copying someone's signature. Almost invariably, the expert will require the original disputed document to inspect. So there may have to be an application to court to have it released. (I don't include that as a drawback, because almost all testing involves having the original.)

Drawbacks

I think there are three main drawbacks with handwriting evidence:

1) Comparables

Any expert worth their salt will want to see a large number of undisputed original examples of the testator's handwriting, particularly I think in the case of a signature. In some cases it can be hard to assemble a large number of undisputed original signatures.

2) Effects of ill health

Wills are often made by the unwell or infirm. Muscle weakness, arthritis, medication, symptoms of shaking can all affect the appearance of a signature, as well as just the effect of being propped up in bed rather than sitting at a desk.

3) Reliability

The discipline of handwriting analysis accepts that it is more of an art than a science. Hence they tend to use a seven or even nine-point scale to represent their findings, between conclusive or strong evidence that it is the signature of the relevant person at one end, through moderate and weak, no evidence either way in the middle, then weak evidence that it is a simulation, to moderate, strong and conclusive evidence that it is so."

18. Indeed DW2 correctly stated that no person can generate two similar signatures.

19. Considering that few documents were available to the experts, it is difficult to entirely rely on their reports. In light of the conflicting reports by the two experts, this court must therefore assess the evidence and form its opinion as to whether the questioned Will was authored by the deceased. In **Kenya Ports Authority v Modern Holdings [E.A.] Limited [2017] eKLR; Civil Appeal No. 108 of 2016 (Mombasa)** the Court of Appeal held that:

> **"We agree with the learned Judge that in the event of conflicting expert evidence, it is the duty of the court to consider the evidence and form its opinion. However, in so doing, the court must give cogent reasons why it prefers the evidence of one expert over the other."**

20. The question of the alleged forgery of the impugned Will should therefore be determined by the other evidence adduced by the parties.

21. The evidence of the applicants question the circumstances under which the Will was allegedly prepared. Through the evidence they seek to plant a seed of doubt in the mind of the court as to the unlikelihood of the Will having been made in such circumstances.

22. This calls for a closer examination of the evidence of DW3. He testified that he was a taxi driver based in Malindi and knew the deceased through his work. He adopted his recorded statement as his testimony in the matter.

23. His statement was that he met the deceased in 2015 when he requested him to take him to Narok town to meet the relatives of his wife. Thereafter the deceased would use his vehicle as he did not have a motor vehicle.

24. On the date material to this case he drove the deceased, his wife and their children to Nairobi. When they reached Nairobi the children and wife went off shopping. The deceased asked him to drive him somewhere where he alighted and entered a certain building. He came back a few minutes later with a smartly dressed man. The deceased told him the man was an advocate.

25. The advocate removed a set of documents for him to sign. The deceased told him he wanted him to be a witness to his Will as he trusted him. He signed the documents as directed by the advocate. The deceased informed him that he wanted his properties in Kenya to remain with his wife, the Respondent, and her two children and the properties outside the country to go to his family in Italy. The deceased asked him not to mention the incident to his wife and children.

26. DW3 further testified that when the deceased passed away he met the Respondent in Malindi and asked her whether she had received the documents from the advocate. She informed him that she was not aware of what he was talking about. He then informed her about the Will and they travelled to Nairobi to trace the advocate who prepared the Will.

27. Counsel for the applicants made the story of DW3 unbelieveable through cross-examination. DW3 stated that when he told the Respondent about the Will, the Respondent asked her to take him to Nairobi and show her the advocate. He told her he did not know the advocate and neither did he see the building.

28. Asked where the building was located, he first stated that the same was at River Road before quickly correcting himself and stating that they went to the city centre. He stated that the Respondent entered a certain building and later came out telling him that the advocate was not present. His evidence was that he never saw the advocate again.

29. The evidence of DW3 leaves a lot of questions unanswered. How did he know that the advocate was from the firm of Tobiko, Njoroge & Co. advocates? How many law firms were in the building? Why did he talk of the building being in River Road? How did the Respondent get the Will if they did not meet the advocate when he took her there? Why did DW3 have to sign the documents from the vehicle?

30. The unbelievability of the evidence of DW3 was enhanced by the evidence of the Respondent. She contradicted DW3 by stating that she went to Nairobi with DW3 and they traced the advocate. She was later told that the advocate who had prepared the Will had relocated to United States of America. Why didn't any other person from the law firm come to court to testify?

31. The law firm which allegedly prepared the Will did not respond to a letter from the applicants' counsel enquiring about the validity of the Will.

32. Counsel for Respondent urged this court not to rely on the documents availed to PW2 by PW3 as the said documents were released in breach of the privilege that existed between her as an advocate and the deceased as her client. Counsel for the Respondent made lengthy submissions on the issue but having held that no reliance will be placed on the reports of the handwriting experts, I find no reason for exploring the issue as to whether PW3 acted unprofessionally.

33. Counsel for the Respondent also urged this court to ignore the evidence of PW3 in so far as it relates to the instructions given to her by the Respondent. Whereas Section 134 of the Evidence Act, Cap. 80 does indeed protect information shared between an advocate and a client, the said provision does not protect **"any communication made in furtherance of any illegal purpose."**

34. The evidence of PW3 was to the effect that the Respondent asked her to prepare a Will for the deceased after the deceased had passed away. She rebuffed the Respondent's advances. Later, the Respondent told her to take action against one Dominic for receiving money to prepare a Will and failing to deliver on the promise. PW3 later met Dominic who was a person known to her and he told her that he could not deliver a will and neither could he refund the money paid to her by the Respondent.

35. There is no reason why PW3 would tell lies against the Respondent. Indeed PW3 rightly wondered why the Respondent would rush to have the Will of the deceased registered after his demise.

36. The totality of the evidence adduced in this case shows that the deceased died intestate in respect of his properties in Kenya. He did not leave any will and the document presented to court by the Respondent as the Will of the deceased was made after his demise.

37. Counsel for the applicants requested this court to determine if the Respondent was married to the deceased.

38. The Respondent testified that she was married to the deceased under customary law. No evidence was adduced to back this statement. In an affidavit sworn in January, 2015 the Respondent had averred that she was a single mother. This despite the impression given in her testimony that she married the deceased immediately after they met sometimes in 2012 or 2013.

39. There is evidence on record that the monogamous marriage between the 1st Applicant and the deceased existed at the time the Respondent met the deceased. The deceased was therefore incapable of getting married to any other woman without first divorcing the 1st Applicant – see **Machani v Vernoor [1985] eKLR**.

40. I therefore find that there is no evidence to support the Respondent's claim that she was married to the deceased. Even if she had availed evidence of marriage to the deceased, such a marriage could not be recognized by the law.

41. From the evidence adduced, the appropriate order in this matter is a declaration that the document dated 27th November, 2015 presented to the court by the Respondent in Malindi H.C.S.C. No. 161 of 2016 as the Will of the late Donato Sciacovelli is invalid. The deceased died intestate in respect of his properties in Kenya. It follows that any monies drawn from the estate of the deceased based on the invalidated Will should be paid back to the estate for distribution by whoever will be appointed to administer the said estate.

42. Considering the undisputed fact that the Respondent took care of the deceased when he was in Kenya, I do not find it just to order her to meet the costs of these proceedings. The parties will therefore meet own costs of the proceedings.

Dated, signed and delivered at Malindi this 7th day of February, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT