



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 926 OF 2008**

**IN THE MATTER OF THE ESTATE OF RAPHAEL OBWAR OWITI ALIAS ABDULLAHI NASIR OBWAR OWITI  
(DECEASED)**

**JUDGMENT**

1. The deceased herein Raphael Obwar Owiti alias Abdullahi Nasir Obwar Owiti whose estate these proceedings relate died testate on 8<sup>th</sup> August 1999 leaving behind a Will dated 30<sup>th</sup> July 1996 with Kennedy Asinuli and Habiba Shabani Obwar appointed as the Executor and Executrix respectively. On 11<sup>th</sup> April 2003, the said Executor and Executrix (herein referred to as the petitioners) petitioned for a grant of probate of written Will. They cited Habiba Shabani (wife), Zubeda Obwar (wife) and Salome Ogweyo (daughter) as the deponents.

2. Subsequently, the petitioners filed an application dated 14<sup>th</sup> March 2013 seeking confirmation of the grant. During the pendency of the said application, Salome Ogweyo Obwar filed an affidavit of protest on 13<sup>th</sup> January 2015 contesting the validity of the Will on the following grounds:

**(a) That her father started ailing in the year 1992 and died on 8<sup>th</sup> July 1999, and his illness was such that he had no capacity to make such a Will.**

**(b) That the existence of the said Will was not known to members of the deceased's family and it was never read or disclosed to the said members following his death.**

**(c) That the said Will failed to provide for the children of the deceased and in particular Ali Omondi Obwar, Abubakar Wasonga Obwar and Juma Otieno Obwar and it purported to bequeath the only farm owned by her late father namely East Gem/Nyandiwa/439 to his brothers Wango and James Onyango and purports to completely disinherit the deceased's children named herein who were his dependants and herself.**

**(d) That the said Will unconscionably purported to bequeath to Habiba Shabani Obwar also known as Rose Abiba Shabani the bulk of the estate of the deceased.**

**(e) That the Will is void for it is tainted with fraud or coercion and also by the fact that the deceased lacked free agency to make it or it was induced by mistake and it is just that the said Will be declared void and the succession of her late father's estate be by way of intestate succession.**

3. In response to the said protest, Habiba Shaban Obwar (2<sup>nd</sup> petitioner) filed a replying affidavit sworn on 23<sup>rd</sup> February 2015 and filed on 12<sup>th</sup> March 2015 claiming that she was the first wife to the deceased having been married in 1966. That the second wife was Zubeda the mother to the objector (protestor) who divorced with the deceased and remarried to another man.

4. She denied the allegation that the deceased had no capacity to execute a Will by 1999 when he died and put the objector to strict proof. She further claimed that the Will was drawn and executed before an advocate and that she came to learn of it after the deceased's death.

5. It was averred that, the deceased having gone to the advocate's office on his own to execute a will implies that he was of sound mind and strong thus had the capacity to make an informed decision hence no proof of fraud or coercion from any quarters. She further claimed that when the deceased died the mother to the objector had long divorced with him and already gotten married to another man in Kangundo.

6. The deponent stated that she was the only person who took care of the deceased when he was ailing as everybody including his brothers showed little or no concern at all. She claimed that her relationship with the brothers-in-laws is not good. Finally she urged the court to uphold the Will as it reflects the wishes of the deceased.

7. In support of her claim, Habiba filed an affidavit sworn by Joshua Asira Sisei on 23<sup>rd</sup> February 2015 stating that, he was a close friend to the deceased and that on 30<sup>th</sup> July 1996, the deceased requested to accompany him to the firm of Njeri Onyango Advocate where he

appended a signature as a witness on a Will he had instructed the said advocate to prepare. He confirmed witnessing execution of the Will and that the deceased appeared normal, jovial and had no signs of any illness.

8. On 9<sup>th</sup> June 2015, Abubakar Wasonga Obwar who claimed to be the 2<sup>nd</sup> eldest son to the deceased filed an affidavit sworn on 18<sup>th</sup> May 2015 supporting the protest. He recognized that Habiba Shabani Obwar was married to his late father but were not blessed with any child. That his father subsequently married his mother Zubeda Obwar who bore him four children namely; Ali Omondi Obwar, Salome Ogweyo Obwar, Abubakar Wasonga Obwar alias Raphael Wasonga Obwar Owiti and Juma Otieno Obwar.

9. He claimed that after divorcing his father, Habiba got married to one Shaban whose name she adopted to date hence Habiba Shaban. He acknowledged that in 1985, his mother separated with his father hence left for Kangundo to stay with her parents. That his father suffered blood pressure from 1980s and a stroke from 1990 – 1991 leading to his paralysis hence lost his capacity to speak, write or care for himself and therefore bedridden till he died on 8<sup>th</sup> July 1999.

10. It was his contention that the impugned Will is a forgery as the same was not signed by his father and instead it was thumb printed confirming his claim that his father had no capacity to sign a Will.

## **HEARING**

### **Protestor's Case**

11. During the hearing, Salome Ogweyo basically adopted her averments contained in the affidavit in support. She insisted that her father was sick by the time the Will was made and hence had no capacity to execute the same. She told the court that her father was retired on medical grounds. She stated that after her mother separated with the father, she remained with her father taking care of him as he was ailing.

12. She dismissed Habiba's claim that she was the one staying with the deceased while sick. Further she termed the Will as a fraud orchestrated by Habiba as none of the deceased's children except her have been provided for. She however admitted on cross-examination that Habiba took care of the deceased by buying him medicine and that she took charge of all his documents belonging to the deceased.

13. PW2 Abubakar Wasonga also adopted his affidavit in support of the protest. He corroborated the evidence of PW1 in its entirety. He claimed that according to Luo customs, he and his brothers are entitled to inherit their father's property. He could not understand why his father failed to make provision for the sons. On cross examination, he revealed that he is a Muslim so is to his mother, late father and step mother Habiba.

### **Petitioner's Case**

14. DW1 Jane Njeri Onyango an advocate from Onyango Njeri and Co. Advocates confirmed that she was the one who drew the Will in contest. She recall that on that day, when the deceased went to her office, he was walking using a three legged walker. That one hand was hanging loosely while the other was holding the walking aid.

15. That she engaged the deceased on a conversation which was in a low tone. She claimed that it was the deceased who thumb printed the Will in the presence of two witnesses known as Joshua and Charles using the left thumb. That he could not use the right hand which was loosely hanging. Counsel however admitted that she did not attest the Will claiming that it was not mandatory as long as the two witnesses signed.

16. DW2 Rose Habiba Shaban the second petitioner also reiterated the averments contained in her affidavit in reply to the protest. She denied manipulating nor influencing the deceased into making the Will. She alleged that the sons were left out because they never bothered to look after their father. That Wasonga did not even attend his father's funeral. She urged the court to uphold the validity of the Will.

17. Joshua Asiri a friend to the deceased also adopted his affidavit in support of the petitioner's replying affidavit. He confirmed witnessing the Will being executed by the deceased.

### **Submissions**

18. After the close of the petitioner's case, parties were directed to file their submissions. However, only Mr. Mwenesi counsel for the petitioner filed his submission on 23<sup>rd</sup> October 2018.

19. In his submissions, Mr. Mwenesi gave a brief history of the case and basically adopted the averments contained in the petitioner's replying affidavit to the protest. Counsel submitted that the objection is under rule 40 of the probate and administration rules cap 160 of the law of succession instead of Section 26 of the Act as read with rule 45 of the Probate and Administration rules. He stated that the prerequisite for invoking the court's jurisdiction have not been satisfied.

20. He further contended that, no objection was raised challenging the making of the grant of probate of written Will nor has an application for revocation of grant been made.

### **Analysis and Determination**

21. I have considered the pleadings herein, testimony by both parties and submissions by the advocate. Issues that arise for determination are:

**(a) Whether the protest herein challenging the application for confirmation will properly challenge the validity of the Will and the grant issued thereof.**

**(b) If the answer to (a) above is yes, whether the deceased left a valid Will.**

**(c) Was the protestor/objector and her siblings provided or reasonably provided for.**

**(d) If the answer to c is no, can the court make reasonable provision for them.**

**(a) Whether the protest herein challenging the confirmation of the grant of probate was the proper procedure in challenging the validity of a Will and the grant of probate issued**

22. There is no dispute that the deceased died on 8th August 1999 and left behind survivors among them the petitioner and her step sons and daughter now objecting to the confirmation of the grant. There is no dispute also that prior to his death, the deceased had executed a Will. Mr. Mwenesi submitted that the filing of an affidavit of protest is not the proper procedure of challenging the validity of a Will giving rise to a grant of probate of written Will. He urged the court to dismiss the protest on that ground. He stated that the applicant should have applied for revocation of the grant of probate under Section 76 of the Law of Succession or sought for provision as dependants under Section 26 of the Law of Succession.

23. Section 47 of the Law of Succession confers jurisdiction upon the high court to entertain any application and determine any dispute under this Act and to pronounce such decrees and make any such orders therein as may be expedient. From the wording of the protest before me, it clearly falls under Rule 40 (6) of the Probate and Administration rules which provides:

**“Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in form 10 against such confirmation stating the grounds of his objection”.**

24. It is clear that the protest is challenging the validity of the Will and insufficient provision of some dependants or no provision at all. By filing the protest under rule 40 of the Probate and Administration rules, the protestors are challenging the mode of distribution which unfortunately best applies in intestate and not testate proceeding given that under testate the testator would have determined distribution in advance. To that extent, I do agree with Mwenesi that the proper application should have been revocation of the grant of probate and then seek provision as dependants.

25. Having not sought revocation of the grant of probate implies that the Will is still recognized as properly executed and therefore the procedure followed to declare the Will invalid is not the proper one.

26. However, from the pleadings, in particular the petition, the testimony of both parties, the spirit and intent of the protest is basically lack of provision for the children of the deceased who claims dependency. Although not specifically stated that they were seeking declaration of dependency under Section 26 of the Law of Succession, the proceedings and spirit of the protest is a clear manifestation of the parties' intention. I will only conclude that under Article 159 (2) (d) of the Constitution, the court is enjoined to determine matters without undue regard to technicalities. There is no prejudice in this court making a declaration of reasonable provision for the dependants if in its opinion there are deserving beneficiaries or dependants. It is not prejudicial to the petitioner and there will be no miscarriage of justice.

27. On the other hand, assuming that I found that the application is properly before the court, I will be duty bound to determine the validity of the Will. What is a Will? As defined under Section 3 of the Law of Succession, a Will means a legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of part II and includes a codicil.

28. Section 5 (1) of the Law of Succession further provides.

**“Subject to the provisions of this part and part III, any person who is of sound mind and not a minor may dispose of all or any of his property by Will, and may thereby make disposition by reference to any secular or religious law that he chooses”.**

29. Section 11 provides requirements of a valid Will as follows:

**“No 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.....”.**

30. Section 5 (3) goes further to state:

**“a person making a Will or purporting to make a Will shall be deemed to be of sound mind for the purpose of this Section unless he is, at the time of executing the Will, in such a state of mind, whether arising from mental or physical illness, drunkenness or any other cause, as not to know what he is doing”.**

Section 5 (4) provides – 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. Section 7 of the Law of Succession further provides that a Will caused by fraud or coercion or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void.

31. From the above provisions, the cardinal consideration in determining the validity of a Will is the soundness of the testator’s mind at the time of making a Will. In the case of the **estate of James Ngengi Muigai (deceased) Nairobi High Court Succession Cause No. 523/1996** the court held:

**“A testator is presumed to be of sound mind by virtue of Section 5(3) of the Law of Succession Act, unless it is proved to the contrary, the burden of proving lack of sound mind is in the person alleging it. The same principle applies with respect to undue influence”.**

In **Wingrove vs Wingrove (1885) 11 P & D 81 Sir James Hanne** stated as follows:

**“To make a good Will, a man must be a free agent, but not all influences are unlawful. Persuasion appeals to the affections of ties of kindred to a sentiment of gratitude for past services or pity for future destitution or the like, those are all legitimate and may fairly be pressed on a testator .... in a Will, the testator may be led but not driven and his Will must be the offspring of his own volition and not the record of someone else”.**

32. Back home, in **Elizabeth Kamene Ndolo vs George Matata Ndolo (1996) eKLR**, the court stated that:

**“This court must however recognize and accept the position that under the provisions of Section 5 of the Act, every Kenyan adult has unfettered testamentary freedom to dispose off his or her property by Will in a manner he or she sees fit”.**

33. In the instant case, the protestor and her brother Wasonga alleged that the deceased had no mental capacity to have executed a Will as he was paralyzed and bedridden. Mr. Wasonga (PW2) went further to state that the deceased was literate who should have signed the Will hence by thumb printing; it means that he was not capable of making a Will.

34. The petitioner Jane Njeri Advocate who drafted the Will confirmed that the deceased went to her office using a walker as a walking aid and that his right hand was loosely hanging. That he used his left hand thumb to execute the Will. According to Section 11 of the Law of Succession quoted above, it is not mandatory for a testator to literally sign a Will. The law allows a testator to affix a mark on the Will which in this case is a thumb print. The ground of lack of a literal signature cannot stand in the face of Section 11 of the Law of Succession.

35. Was the deceased of sound mind when he executed the Will? To the protestors he was not. To DW1 Jane Njeri the advocate who prepared the Will and Dw3 one Joshua the witness to execution of the Will, the deceased appeared to be of sound mind and understood what he was doing. There is no evidence medical or otherwise to suggest that the deceased’s physical illness or immobility due to paralysis interfered with his mental faculties so as not to be able to make a sound and independent decision. That burden has not been fully discharged to the required degree by the protestors. Physical sickness alone without any nexus to mental instability is not a ground to declare a Will void.

36. Regarding the allegations of fraud, no particulars were submitted hence the same is not proven. As to undue influence, the protestors alleged that the protestors influenced the deceased. Since they claimed to have been close to the deceased than Habiba Shaban, how come none of them was capable of changing his mind? As stated in **Wingrove vs Wingrove** above, mere persuasion of a testator cannot be classified as undue influence.

37. It is my finding that that allegation has not been proved to the required degree. To that extent, it is my finding that the deceased though physically affected by illness, he was mentally sound enough and capable of executing a Will. Although a court can declare a Will invalid where there are sufficient grounds, it should be cautious not to interfere with the free will and wishes of a deceased person. To whimsically declare a Will invalid on speculation or imaginary grounds will be akin to watering down the very spirit and intention of Will making and its legal sanctity.

38. For the above reasons stated, I am satisfied that the Will was validly executed and thus uphold the same.

#### **Did the Will provide for the protestors?**

39. The protestor and her siblings are the children to the deceased. There is no dispute about it. The deceased did not make provision for his three sons. He also made provision for his daughter Salome (protestor) by giving her one property and one other property to his two brothers. The protestor and the brothers are claiming reasonable provision being children to the deceased. Although not specifically stated, their claim is anchored under Section 26, 28 and 29 of the Law of Succession.

40. Section 26 empowers this court to make reasonable provision for dependants of the deceased where the Will does not make provision for that dependant. However, under Section 27 this authority is left to the unfettered discretion of the court subject to some conditions set out under section 28 such as; the nature and amount of the deceased’s property; any past, present or future capital or income from any source of the dependant; existing and future means and needs of the dependant; whether the deceased had made any advancement or other gift to the

dependant during his lifetime; conduct of the dependant in relation to the deceased, situation and circumstances of the deceased's other dependants and beneficiaries under any Will; and general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

41. Section 29 defines who a dependant is and it includes children, wives or former wives. The protestor and her siblings are children to the deceased. It is also admitted that the three sons were not given anything. There is no proof of advancement of gifts *inter vivos* having been given to the children prior to the deceased's death. The protestor and her brother Wasonga claimed to have had good relationship with their father and even cared for him as he approached his death. The petitioner also who had divorced from the deceased claimed to have taken care of him as she was living in the neighbourhood. PW1 admitted that DW2 used to buy her dad medicine thus confirming the petitioner's assertion that she took care of him as well.

42. Under Section 29, both the protestor and her siblings being children to the deceased and the petitioner (2<sup>nd</sup>) being a former wife are classified as dependants of the deceased. Strictly speaking, the law does not say that a person who on the verge of dying having fallen sick for a long time would be maintaining the adult children or divorced wife. Instead, the answer is in the reverse. By virtue of being children, they are entitled to get a share from the deceased subject to conditions set out under Section 28.

43. In my opinion, there is no good reason advanced under Section 28 of the Law of Succession not to make reasonable provision for the children of the deceased who were left out; It will be unfair to leave at least everything to the 2<sup>nd</sup> petitioner who was even divorced to the exclusion of the children. On account of dependency by virtue of being children to the deceased, I am of the opinion under Section 27 of the Law of Succession that there is need to make reasonable provision to the children and more particularly those left out. **(See James Maina Anyanga vs Lorna Yimbiha & 4 others (2014) eKLR)** where J. Emukule made provision for the children left out in the Will.

44. For the above reasons stated, the application for protest partially succeeds and partially fails with orders:

**(a) That the Will executed by the deceased herein be and is hereby declared as valid.**

**(b) That Abubakar Wasonga Obwar, Salome Ogweyo Obwar, Ali Omondi Obwar, Juma Otieno Obwar be and are hereby declared as children and also dependants of the deceased and therefore entitled to reasonable provision.**

**(c) That parties to value the deceased's properties through a mutually agreed valuer within 60 days from the date of delivery of this judgment to enable the court determine sufficient provision to make to the said dependants in relation to properties listed in Clause 5 – 6 – i and k**

**(d) That the Executor and Executrix shall be at liberty to engage the dependants named in order (b) above and agree on reasonable provision in default the court shall determine the same. For avoidance of doubt, the properties bequeathed to the deceased's brothers under Clause 5 (j) shall not be subject of valuation or variation.**

**(e) This being a family dispute each party to bear own costs.**

**(f) That the file be mentioned on 18<sup>th</sup> July 2019 for further directions.**

**DATED, DELIVERED AND SIGNED, AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF MAY 2019.**

**J.N. ONYIEGO**

**(JUDGE)**