



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 436 OF 2010**

**IN THE MATTER OF THE ESTATE OF SADRUDIN EBRAHIM JIWANI (DECEASED)**

**NIZAR MERANI.....APPLICANT**

**VERSUS**

**SALIM EBRAHIM JIWANI.....RESPONDENT**

**JUDGMENT**

1. The deceased Sadrudin Ebrahim Jiwani died on 8<sup>th</sup> November 2009 at the Foothills Hospital in Calgary, Alberta in Canada. He was born in a family of four brothers and one sister. The brothers included Nazmuddin Ebrahim Jiwan Jiwani and the petitioner Salim Ebrahim Jiwani. He left a widow Nurbanu Sadruddin Ebrahim Jiwan Jiwani and three adult children who all live in Canada. Nurbanu has a brother called Nizar Merani.

2. On the basis that the deceased left a Will dated 6<sup>th</sup> July 2009, Salim Ebrahim Jiwani petitioned the court for the grant of probate which was issued to him on 8<sup>th</sup> July 2010. The same was confirmed and a certificate issued to him on 15<sup>th</sup> February 2011. In the Will, Salim Ebrahim Jiwani was the sole beneficiary. The estate comprised all the monies in the deceased's current account No. 25400004 at Southern Credit Bank in Nairobi, all his shares from his late father's estate i.e 5100 shares held at Westlands General Stores Properties, 6250 shares held in Mpaka Holdings Ltd and his 25% shareholding in the residential property known as LR No. 209/2259/2 (IR No. 22598), Muthithi Road and all shares in other companies. The property bequeathed to Salim Ebrahim Jiwani.

3. On 15<sup>th</sup> April 2011 Nizar Merani applied to have the grant issued and confirmed to Salim Ebrahim Jiwani revoked on the grounds that the grant was obtained fraudulently by the making of a false statement and concealment from the court of facts material to the case; that the applicant was a beneficiary who was left out of the application for the grant; that the Will was suspect as the date the deceased was alleged to have signed the same he was very sick and not able to understand what he was doing; and that the Will was suspect because at the time it was allegedly made the deceased was sick and lacked capacity. The supporting affidavit was sworn by the deceased's widow (Nurbanu Sadrudin Ebrahim Jiwan Jiwani). She swore that she got married to the deceased in Canada on 29<sup>th</sup> September 2008; that on 29<sup>th</sup> September 2008 the deceased was taken ill and was admitted at Foothills Hospital where he remained most of the time except for a brief period when he was living at Fanning Centre; that while admitted she visited him almost daily and stayed with him all day till late in the evening; that the deceased suffered from diabetes, high blood pressure and kidney failure; that in September 2009 he suffered a stroke which severely paralyzed his right side of the body that he was not able to speak, write, read or take care of himself and his legs were later amputated; that on 6<sup>th</sup> July 2009 the date when he allegedly made the will he was very sick and lacked the mental capacity to execute anything including a Will; and that it was not believable that the deceased could make a Will and not provide for his family.

4. When Nurbanu Sadruddin Ebrahim Jiwan Jiwani swore a supplementary affidavit on 22<sup>nd</sup> November 2011 she stated that on the alleged date of the Will the deceased could not recognize her or the children; he had lost his memory; could not hold anything including a pen; and that the signature attributed to the deceased was not his.

5. Nazmuddin Ebrahim Jiwan Jiwani swore an affidavit on 16<sup>th</sup> September 2013 to support the application. He lives in Nairobi. He stated that he was shocked to learn that the deceased had written a Will. He sought to establish the truth. He stated that he got the hospital to do a report to say that at the time of the alleged Will the deceased was not in a medical condition to make the same; and that he could not even raise his limbs. He also got one Paul Wadron, a Private investigator, who carried out investigations and contacted Azim Adatia who had allegedly witnessed the Will and got him to do an affidavit of denial. Nazmuddin testified to state that he visited the deceased at the hospital in October 2009. At the time, the deceased was not able to speak and could not recognize any person.

6. It is clear that on 18<sup>th</sup> May 2010 in **High Court Succession Cause No. 981 of 2010** Nurbanu Sadruddin Ebrahim Jiwani Jiwani petitioned the court for the grant of letters of administration intestate. She states that before this she inquired from Salim Ebrahim Jiwani Jiwani whether the deceased had left any Will. The inquiry was by emails. He did not respond. Salim Ebrahim Jiwani Jiwani denied that he received any such inquiry. The two causes were subsequently consolidated.

7. In his replying affidavit, Salim Ebrahim Jiwani Jiwani swore that the deceased had separated from his wife and as two had differences. He stated that when the deceased made the Will he was in his true senses and he executed the same in the presence of his physician who also witnessed it. He stated that the deceased's wife was aware of the Will at the time it was made and even endorsed it. Salim and his wife Munitaz Saum Jiwani gave evidence. Their evidence was that the deceased had been abandoned by his family, and that they were the ones who took care of him throughout his hospitalization. According to them, at the time when the deceased made the Will Munitaz and the deceased's wife were present. He was well, able to speak and was aware of what was happening. He had called his wife to be present. He made the will. His wife did not contest. It was known he was bequeathing the estate to his brother Salim. Salim was later informed by Munitaz about the Will.

8. Mr. Oyatta represented Salim whereas Mr. Khalwale represented Nizar Merani. They each filed written submissions which I have considered. There was no dispute that it was greed that the application for the revocation of the grant be heard through the calling of oral evidence where the respective witnesses would be cross-examined. Neither Nizar Merani nor his sister Nurbanu Sadrudin Ebrahim Jiwani Jiwani came to testify. No opportunity was given to the advocate of the other side to test their evidence on cross-examination. Certainly, not much weight can be attached to what Nurbanu Saddrudin Ebrahim Jiwani Jiwani deposed in support of the application by Nizar Merani. It is also not lost that, in fact, the application to support the application was fatally defective because it was stated to be supported by the applicant's affidavit and yet he did not swear any affidavit. Nazmuddin Ebrahim Jiwani Jiwani testified, but he did not live with the deceased once in Canada. He lives in Nairobi. He went to visit the deceased in October 2009 when he was quite ill and not able to speak or recognize people. However, the Will was made on 6<sup>th</sup> July 2009. He was not in Canada. He cannot tell what condition the deceased was in at the time of the making of the Will.

9. Further, the evidence as Munitaz Saum Jiwani that Nurbanu Sadruddin Ebrahim Jiwani Jiwani was present at the time the deceased made the Will, and that she endorsed that Will, was not challenged. She did not come to testify.

10. Lastly, it was understood that Nizar Merani would make available Azim Adatia, Paul Waldron and the makers of the Hospital report that allegedly stated that the deceased was not in a medical condition of making a Will. They were not availed to testify, and be questioned. There was no explanation for their non-calling. The usual presumption is that had they been called they would have given evidence adverse to their caller.

11. Under **section 3(1)** of the **Law of Succession Act (Cap 160)** a Will is defined as the legal declaration by a person of his intentions or wishes regarding the disposition of his property after his death, duly made and executed in accordance with the **Act**. According to the words of **Sir J.P. Wilde in Lemage V. Goodban (1865) LR IP & D57**:

**“The Will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute.”**

12. Under **section 5(3)** of the **Act** -

**“Any person making 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 from any other cause, as not to know what he was doing.”**

Under **section 5(4)** of the **Act**:

**“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.”**

13. The test of mental capacity to make a Will was set down by **Cockburn C.J. in Banks –v- Goodfellow (1870) LR 5 Q.B. 549** as follows:-

**“...he must have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, and of the persons who are the objects of his bounty and the manner it is to be distributed between them.”**

14. It was claimed that the Will was not valid because at the time the deceased made it he was lacking in mental capacity owing to severe mental and physical illness, that he was not able to know what he was doing, recognize people and even write, all owing to his mental and physical condition. Quite unfortunately, no material and acceptable evidence was tendered to support these allegations. On the other hand, those who were with the deceased in the hospital at the time testified to that fact that he was able to talk, able to sign and appreciated fully what he was doing. They testified to the fact that the Will was his deliberate product of his wishes regarding how he wanted his property to be disposed upon his death; and that he wanted all his estate to go to Salim Ebrahim Jiwani.

15. The result is that I find the application for revocation not merited and dismiss it with costs.

**DATED and SIGNED at NAIROBI this 3<sup>RD</sup> day of JUNE, 2019.**

**A.O. MUCHELULE**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 6<sup>TH</sup> day of JUNE, 2019.**

**A. ONGERI**

**JUDGE**