REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION NO. 107 of 2009

IN THE MATTER OF THE ESTATE OF ONESMUS NYAMAI KYENGO (DECEASED)

DANIEL KATUMO NYAMAI.....PETITIONER

VERSUS

ANN NDINDA NYAMAI.....1ST OBJECTOR

JAPHETH MWENDWA NYAMAI.....2ND OBJECTOR

RULING

1. Onesmus Nyamai Kyengo (the Deceased) died on 7.11.08 at the Coast General Hospital. A Petition for a grant of probate was filed in this Court on 25.3.09 by Daniel Katumo Nyamai, the Petitioner as executor named in the deceased's will dated 5.5.04 (the Will). In his affidavit in support of the Petition sworn on 23.3.09, the Petitioner averred that the deceased was survived by:

Martha Wanza Nyamai widow

Rhoda Mumo daughter

Carex Keli Yaa daughter

Mweu Nyamai son

Dorcas Olangh daughter

Phoebe Kilele daughter

Susan Yego daughter

Naomi Mumbi Nyamai daughter

Daniel Katumo Nyamai son

2. On 24.6.09 an objection to the making of grant was filed by one Carex Keli Wa Yaa (Carex) as one of the daughters of the deceased on behalf of the entire family of the deceased. Carex withdrew the said objection on 27.7.09 and filed another on even date in conjunction with her sisters Dorcas Nthoki Olangh and Phoebe Mueni Kilele. They challenged the validity of the Will.

3. On 27.8.09 Ann Ndinda Nyamai and Japheth Mwendwa Nyamai, the Objectors, filed an application seeking extension of time to file an objection to the making of the grant. By a ruling of 25.2.13 this Court allowed the Objectors application and their objection filed on dated 19.11.09 was deemed as duly filed.

4. The Objectors claim that they are respectively the widow and son of the deceased. The grounds of their objection are that:

i) As beneficiaries of the estate of the deceased, they had been unlawfully omitted.

ii) Plot No. 2639/VI/MN belonged to the 1st Objector and was not part of the estate of the deceased.

iii) Assets such as monies in various banks had been omitted.

iv) The Will is invalid as it was not executed as required by law.

v) The deceased was very ill and senile at the date of the Will and could not have signed the Will and even if he did, he was not capable of understanding the same or its consequences.

vi) The Will fails to make any provision for the Objectors who are dependants and are entitled to reasonable provision.

5. In its ruling of 25.2.13, the Court directed that both objections be heard together by way of *viva voce* evidence. At the commencement of the hearing on 25.10.16, Carex and Dorcas did withdraw their objection. Phoebe was said to be out of the country. Her objection therefore remains unprosecuted.

6. In her testimony, the 1st Objector stated that she met the deceased in 1963 in Mombasa. The deceased told her that he had a wife with whom he disagreed. They became friends and began to cohabit. They got 2 children, the first being Rosemary who is now deceased while the other is the 2nd Objector. She exhibited a birth certificate for the 2nd Objector showing that she and the deceased are his parents. The 1st Objector stated that in 1968, the deceased went to her parents' home in Ukambani and paid dowry for her in a big ceremony. The deceased was accompanied to the ceremony by his brother and an elder by the name of Onesmas Nzioki Kasiwa. Another elder Peter Musyoka was also present. Thereafter they continued staying together in Magongo, Changamwe. The deceased supported her and the children during his lifetime. The deceased then purchased a house on Plot No. 2639/VI/MN in Hamisi estate, Changamwe where he stayed with her and their children. She stays there to date and the Petitioner has not filed any case for her removal from the house. The deceased swore an affidavit of marriage on 4.1.05 stating that he is married to her. The 1st Objector further stated that the deceased was ill for 7 years prior to his demise and was not of sound mind when he is alleged to have made the Will. The children of his first wife took him to Nairobi away from her. She was excluded from the Will and prayed that the Court includes her as a widow and dependant of the deceased.

7. On cross examination, she stated that she did not attend the deceased's burial which took place at his farm in Kikambala as she was not informed in good time. She claimed that during his illness the deceased was staying in Nairobi but his children Dorcas and Carex refused to tell her where exactly he was staying. She denied that she stayed in the house in Hamisi estate as a tenant.

8. On his part, the 2nd Objector stated that the deceased was his father. He was born on 10.6.64 and his birth certificate shows the deceased as his father. He lived with his parents in Magongo until 1974 when they moved to a new house in Plot No. VI/MN/2639, Hamisi estate. He was educated by the deceased. He became aware of the Will after this cause was filed. He was shocked to discover that he had not been provided for in the Will. He became aware of his father's other family around 1970-1971. His prayer was that he be provided for as a son of the deceased. He denied that he and his mother were mere tenants of the deceased otherwise they would not have lived with him. The deceased was ill since 2001 till his demise in 2008. The 2nd Objector stated that he did not attend the burial which was in Kikambala.

9. Peter Musyoka Kuluka testified that the deceased was his friend since 1968. The deceased married his sister, the 1st Objector, under Kamba Customary law. There was a ceremony and a goat was slaughtered. The deceased was accompanied by his brother Joseph Nyamai Kyengo and other close relatives and friends. Thereafter the deceased and the 1st Objector lived as husband and wife. The deceased paid fare for him and his brother Johnstone Mutinda Kuluka to attend the ceremony at their home to marry his sister. He discovered that the deceased had another wife in 1986.

10. Isaac Syengo Makau told the Court that he is the Senior Chief of Changamwe location since 2000. He knew the deceased having met him in 1996 at his home in Hamisi estate where he lived with the 1st Objector. He had been called to resolve a family dispute involving a son of Rosemary Mbula, the late daughter of the 1st Objector. When he went there, the deceased introduced himself as the 1st Objector's husband. The 2nd Objector is the son of the 1st Objector. He wrote a letter dated 20.3.09 indicating that the 1st Objector was the deceased's second wife while the 2nd Objector was his son.

11. In his testimony, the Petitioner stated that he is the son of the deceased who died on 7.11.08 and left a will dated 5.5.04. His father had only 1 wife Martha Wanza Nyamai. The deceased married Martha on 8.9.51 as per the marriage certificate and marriage agreement exhibited in her statement. He denied knowledge of the Objectors and only met them in Court. They were tenants in the deceased's house in Changamwe. The deceased did not at any time introduce them as his family. Neither of them visited the deceased during his illness nor did they attend his burial. Initially the family lived in Majengo, Kingorani before moving to the farm in Kikambala where they lived until the demise of the deceased. The deceased never lived in Changamwe. The Petitioner is not aware of the ceremony in Ukambani and none of the family members was invited. The deceased had told him that he was pursuing the eviction of the Objectors from his house as tenants but fell ill. The deceased authorised his daughters to take over management of the said house. The family has never attempted to evict the Objectors from the house as they were busy taking care of their ailing mother. The deceased began ailing in 2000 and in 2004 he was stable and not badly off. The Objectors were not provided for in the Will.

12. After due consideration of the parties' submissions filed as directed by the Court, I find that the issues that fall for determination are:

i) Whether the Objectors are respectively the widow and son of the deceased.

ii) Whether the Objectors are entitled to a share in the estate of the deceased

iii) Whether Plot No. 2639/VI/MN belongs to the estate of the deceased.

iv) Whether the Will is valid.

Whether the Objectors are respectively the widow and son of the deceased.

13. For the Objectors, it was submitted that they proved on a balance of probabilities that they were widow and son of the deceased and were therefore beneficiaries of his estate. The 1st Objector's case is that she met the deceased in 1961 and they got married in 1968 under Kamba Customary law. They lived together in Changamwe and had 2 children. It was submitted that the 1st Objector and her witness Peter Musyoka Kuluka confirmed that 3 goats were given to the 1st Objector's parents as "*ntheo*" thereby concluding the traditional Kamba Customary marriage.

14. For the Petitioner, it was submitted that out of the many people who attended the ceremony, it was only Peter Musyoka Kuluka who was called to testify. Their testimony was however not corroborated or verified by independent evidence from the deceased's family or her side of the family.

15. The existence of the alleged marriage is a matter of fact which must be proved and the burden of proof lies on the Objectors by dint of Section 107 of the Evidence Act which provides:

> ***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

16. It is further well established that the onus of proving a customary marriage is on the party who claims it. In the case of Kimani vs Gikanga [1965] EA 735 at pg 739, Duffus JA on the requirement of a party to prove customary law pronounced himself thus:

> ***As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case.***

17. In order for this Court to draw the conclusion that a Kamba customary marriage did exist between the 1st Objector and the deceased, the evidence called by the Objectors must be sufficient. In Re Estate of Stephen Kimuyu Ngeki [1998] eKLR, Mwera, J (as he then was) stated:

> ***Akamba customary marriage follows an elaborate course and emphasis seems to lie more with payment by the groom of 3 traditional goats called Mbui Sya Ntheo.***

18. The essentials of a Kamba Customary marriage as well as its elaborate course were described by Kneller, J in Anna Munini & another v Margaret Nzambi [1984] eKLR as follows:

> ***At the end Mr Mututo brought in Dr Cotran's summary of the essentials of a valid marriage in kamba customary in Kenya: I Marriage and Divorce, 1st edn, (1968) 28 which is :-***
>
> ***(a) Capacity***
>
> ***(b) Consent***
>
> ***(c) Slaughter of a billy goat***
>
> ***(d) Marriage consideration***
>
> ***(e) Cohabitation***
>
> ***Dr Cotran deals with each, save for cohabitation, in greater detail beforehand (see pp 23 and 24) and I set out some of these details.***
>
> ***At one time the male and female had to be circumcised to marry (p 23). The female may still not marry before she has had her first menstrual period. The man may enter into any number of marriages provided each subsequent one is valid. A woman may not do so while her husband is alive. Consanguinity, affinity, a blood brotherhood relationship or the fact that the intended parties were breast fed by the same woman are bars to marriage among the Wakamba.***
>
> ***Dr Cotran has the same steps in the formation of the marriage as those in the evidence though he has it that the mother of the man visits the mother of the woman to see that she is satisfied, though which mother is meant to be satisfied is not clear. At any rate it is not the man's father she visits, as Ruth Gatongu would have it. Then there are visits with presents of goats and beer made by the man's father or relatives to the woman's father (and during one of those the dowry is fixed) and a return visit by the man's father and some of his elders to see what sort of family his daughter is joining. Later, the girl is collected by her future***

husband and escorted to his house. He is accompanied by one male and two female relatives. The bride's neck is smeared with ghee by her mother-in-law on arrival. The marriage is not consummated that night but on the next. The bride is visited by her friends on the third day with presents and they wail with regret because she has left the ranks of the unmarried (and what the husband's reaction to that, if he hears it, is not revealed).

Dr Cotran includes one that was not touched upon in the evidence. One of the billy goats (which he calls a ram) belonging to the man's father or guardian must be slaughtered by the woman's father and its blood allowed to seep into the ground.

19. The Court notes that no details of the alleged ceremony were given by either the 1st Objector or her witness Peter Musyoka Kuluka. The 1st Objector merely stated that she and the deceased got married in a big ceremony in accordance with Kamba Customary law. She then stated that the deceased paid dowry for her in 1968. The deceased was accompanied at the ceremony by his elder brother and one Onesmus Kasiva who was now too old and blind. The 1st Objector did not say that any goat was slaughtered nor did she say that any goats were taken to her father's home. The testimony of Peter Musoka Kuluka was equally lacking in specifics. He stated that the deceased married the 1st Objector under Kamba Customary law. He too simply stated that at the alleged marriage ceremony, a goat was slaughtered and they celebrated. He said the deceased's brother Joseph Nyamai Kyengo and other relatives and friends were present. Significantly no names or details of other people present were given. Neither of the 2 witnesses talked of dowry negotiations preceding the ceremony. They did not state the number of goats and to whom they were given. They also did not give any details of the elaborate course followed and rites that may have been performed at the ceremony. This is a critical omission. In Hellen Tum v Jepkoech Tapkili Metto & another [2018] eKLR, the Court of Appeal stated:

Being alive to our duty to reconsider the evidence and draw our own conclusion as an appellate court, we take into account 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.

20. Further and equally significant is that Peter Musyoka Kuluka the Objectors' only witness to the alleged marriage is a brother to the 1st Objector. No independent testimony to verify claims of a customary marriage was availed. It would have been helpful if this evidence was corroborated by an independent witness, say from the deceased's family. All this evidence when scrutinised in light of the denial by the Petitioner that such a marriage took place, is not adequate to conclude that the essentials of a Kamba customary marriage were proved sufficiently or at all.

21. Beyond the alleged customary marriage, the 1st Objector relied on an affidavit of marriage allegedly sworn by the deceased on 4.1.05. At the trial, the affidavit was marked for identification pending the testimony of the commissioner for oaths before whom it was sworn. The said commissioner for oaths was not called to testify. The veracity of the affidavit was therefore not tested. In any event, in her testimony, the 1st Objector stated that the deceased ailed for 7 years prior to his death and was not of sound mind on 5.5.04 when he was alleged to have made the Will. If he was not of sound mind on 5.5.04 when he is alleged to have made the Will, he could not, in my view, have been of sound mind 7 months later on 4.1.05 when he allegedly swore the affidavit of marriage. The 1st Objector is obviously approbating and reprobating. She is blowing hot and cold which is not acceptable. In Republic v Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Geteria [2010] eKLR, Wendoh, J found unacceptable, the applicant's conduct of approbating and reprobating. She stated

It is obvious that Mundia is approbating and reprobating which is an unacceptable conduct. Such conduct was considered in EVANS V BARTLAM (1937) 2 ALL ER 649 at page 652 where Lord Russel of Killowen said;

> ***"The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit."***

Again in BANQUE DE MOSCOU V KINDERSLEY (1950) 2 ALL EER 549 **Sir** ***Evershed said of such conduct;***

> ***"This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish Lawyers (frame it) approbating and reprobating or, in the more homely English phrase, blowing hot and cold."***

22. It is clear to me that from the available evidence that the 1st Objector did have a relationship with the deceased. The conclusion I draw however, is that the same did not amount to a marriage at all.

23. As regards the 2nd Objector, it is claimed that he is a son of the deceased. The Objectors relied on the exhibited birth certificate. It was submitted that the 2nd Objector depended upon the deceased for food, clothing, school fees, etc. For the Petitioner however, it was submitted that the 2nd Objector's date of birth in the birth certificate is given as 10.4.64 while in the 1st Objector's affidavit sworn on 3.3.06 the date of birth is given as 14.6.61. This discrepancy it was submitted, casts doubt on the testimony of the 1st Objector. I have carefully looked at the birth certificate. It indicates that the 2nd Objector's father's name is the deceased while his mother is the 1st Objector. It is also indicated that the 1st Objector was born on 10.4.64. The birth certificate was issued on 7.8.79. This is long before the demise of the deceased. The Birth Certificate was issued under the Birth and Death Registration Act and is *prima facie* proof of the contents therein. No evidence was placed before me to show that the birth certificate was not genuine. The discrepancy in the date of birth of the 2nd Objector in the birth certificate and in the affidavit as aforesaid in my view only casts doubt on the 2nd Objector's date of birth. The discrepancy does not in any way take away from the veracity of the formation contained in the birth certificate that the 2nd Objector is a son of the deceased. In the absence of any evidence to the contrary, my finding is that on a balance of probability the birth certificate is *prima facie* evidence that the 2nd Objector is a son of the deceased.

Whether the Objectors are entitled to a share in the estate of the deceased

24. The proceedings herein are objection proceedings. It is therefore premature at this stage to determine the beneficiaries of the estate of the deceased and their entitlement.

Whether Plot No. 2639/VI/MN belongs to the estate of the deceased.

25. It is not disputed that Plot No. 2639/VI/MN forms part of the estate of the deceased. The Petitioner has stated so his petition. The Objectors have also stated that the same was purchased by the deceased. It is the Objectors contention that they lived on the property as the family home uninterrupted since her marriage to the Deceased in 1968. According to the Objectors, it was the clear intention of the deceased that this property be left to them. The property should therefore be excluded from the estate of the deceased and transferred to the 1st Objector. This argument in my view is a misapprehension of the law of succession and in particular the provisions of Part VII of the Law of Succession Act. This property being registered to the deceased remains part of his estate until the same is distributed to the rightful beneficiary or beneficiaries upon confirmation of the grant of representation that shall be issued in accordance with the law.

Whether the Will is valid.

26. The Objectors contend that the Will is not valid. They challenge the same on the basis of an affidavit sworn by Phoebe Mueni Kilele, a daughter of the deceased who said *inter alia* that the deceased was due to his advanced age, senility and poor health not in a state of mind as to be able to make the Will. The Objectors further state that the Will did not provide for all dependants and only provides for 2 namely the Petitioner and 1 other son. The Will is suspicious as it disinherits the other beneficiaries. For the Petitioner, it was submitted that the Objectors have not discharged their burden of proof in respect of their allegations on the validity of the Will.

27. Section 5(3) of the Law of Succession Act provides:

> ***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 is doing.***

28. From the foregoing provision, there is a rebuttable presumption that a person who makes a will is of sound mind. The law however takes into account the fact that a testator may, owing to mental or physical illness, be in such a state of mind as not to know what he is doing. In the instant case, no evidence of the nature and extent of the illness suffered by the deceased was adduced. The Objectors did not say how the illness or age of the deceased affected his mind. Further Phoebe Mueni Kilele did not testify at the hearing. While the Court notes that her affidavit still forms part of the record, the averments therein were not tested by cross examination. The same are therefore of little probative value. Further, under Section 107 of the Evidence Act, the burden of proving their case lay squarely on the Objectors and they cannot seek to rely on the affidavit of a party who did not come to Court to testify. They ought to have summoned sufficient evidence to support their claim. This they have not done thus rendering the burden of proof upon them undischarged.

29. The Objectors further challenge the Will on the basis state that the same provides for 2 beneficiaries to the exclusion of all others. Is this sufficient to invalidate the Will? Section 5(1) of the Act grants a testator testamentary freedom to

> ***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.***

30. It is clear from the foregoing that a person has unfettered freedom to dispose of all or any of his free property by will as he chooses. Failure to provide for all beneficiaries therefore is not in itself a ground for invalidating a will. A testator need only be of sound mind at the time of making the will. This testamentary freedom is however subject to limitation under Section 26 of the Act which 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.***

31. The limitation of a testator's testamentary freedom was considered in Kamene Ndolo v George Matata Ndolo [1996] eKLR the Court of Appeal had this to say:

> ***"This court must, however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is expressly recognized by section 26 of the Act…"***

32. Where it appears that the testamentary freedom has not been exercised responsibly, the Court may step in and interfere with that freedom by making reasonable provision for the disinherited beneficiaries. This is not however to say that the Court invalidates the will.

33. Section 11 of the Act provides for the essentials of a written will as follows:

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.***

34. The Court notes that the Will contains a signature that is purportedly that of the deceased and those of 2 attesting witnesses. Further, the signature of the Deceased is so placed that it appears that it was intended thereby to give effect to the writing as a will. No evidence has been placed before me to persuade me that the signature on the Will is not that of the deceased or that the attesting witnesses were incompetent. In the absence of any evidence to the contrary, my finding is that the Will of the deceased is valid.

35. The upshot of this matter is that the Objectors have failed to prove their case on a balance of probabilities. I now make the following orders that are necessary for the ends of justice:

a) The Objection filed on 19.11.09 lacks merit and the same is hereby dismissed.

b) Phoebe Mueni Kilele is directed to fix her objection for hearing within 60 days from the date hereof. In default, grant of probate shall be made to the Petitioner.

c) This matter shall be mentioned on 16.9.19 for directions.

d) Each party to bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 12th day of July 2019

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M. THANDE

JUDGE

In the presence of: -

..... for the Petitioner

.....for the Objectors

.....Court Assistant