



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CORAM: D.S. MAJANJA J.
SUCCESSION CAUSE NO. 4 OF 2018
IN THE MATTER OF THE ESTATE OF
STEPHEN MAGEMBE GWAKA (DECEASED)

BETWEEN

ELIAS ONSARIGO MAGEMBE.....1ST OBJECTOR

WILFRED NYAMBARIGA MAGEMBE2ND OBJECTOR

AND

COSMAS MOKUA MAGEMBE.....1ST PETITIONER/RESPONDENT

JOHN NYANGARESI MAGEMBE2ND PETITIONER/RESPONDENT

ISABELLA MORAA3RD RESPONDENT

VINCENT ONGANGI4TH RESPONDENT

SCHOLASTICA KWAMBOKA GESICHO2ND PROTESTOR

RULING

1. This case concerns the estate of **STEPHEN MAGEMBE GWAKA** (“the deceased”) who died on 7th September 2017. The deceased’s sons, Cosmas Mokua Magembe and John Nyangaresi, petitioned this court for grant of letters of administration with the written will annexed as the deceased left a will dated 1st March 1996. The petitioners also set out the deceased assets and liabilities as follows:

ASSETS

- BASSI/BOITANGARE/1075, 2931 and 1158 (“Plots 1075, 2931 and 1158”)
- KISII MUNICIPALITY/BLOCK III/253 (“Plot 253”)
- PLOT NO. 29A Igare Market
- PLOT NOS. 1390, 818, 485
- Current and fixed deposit accounts in various banks
- Rental Income
- Motor vehicle registration No. KAB 502 V in use by Sabellah Moraa Magembe
- Rental Income

LIABILITIES

- Loan Facility of Kshs. 600,000/- secured by a charge to Thabiti Finance Company Limited over BASSI/BOITANGARE/1075.
- Loan Facility of Kshs. 2,400,000/- secured by a Charge and Further Charge in favour of Co-operative Bank (K) Limited over KISII MUNICIPALITY/BLOCK III/253.

2. In due course, the deceased's widow, Sabellah Moraa Magembe, moved the court by a summons dated 7th August 2018 seeking to be joined to these proceedings as a co-petitioner on the ground that as a widow she ranked in priority to the petitioners and that she had not renounced her right to administer the deceased's estate. When the application came up for hearing on 1st November 2018, I allowed the application, appointed Sabellah Moraa Magembe, John Nyangaresi Magembe and Cosmas Magembe as executors and a grant of probate of the written will was duly issued.

3. On 29th January 2019, Elias Onsarigo Magembe and Wilfred Nyambariga Magembe, as sons of the deceased lodged an objection on the ground that they were entitled to the estate as beneficiaries under **section 40** of the *Law of Succession Act (Chapter 160 of the Laws of Kenya)*. They opposed the will on the grounds that it was fraudulent and mutilated and was intended to disinherit the other beneficiaries. They also contended that the petitioners were intent of confirming the grant without accounting for the income they had received on account of the estate. They also stated that the petitioners did not rank higher in priority to the objectors.

4. I directed that the objection be resolved by oral testimony. I heard the testimony of Elias Onsarigo Magembe ("Elias"), John Nyangaresi Magembe ("John") and Sabellah Moraa Magembe ("Sabellah"). It was common ground that the deceased had three wives; Pascalia Kemunto Magembe ("Pascalia") who died in 1979, Florence Moraa Magembe ("Florence") who died in 2013 and Sabella, the only surviving wife.

5. Elias (PW 1) testified that he was the deceased's son from the 1st house. He complained that no one in the family knew that the deceased had a will and that they only knew of the will from Sabella after the deceased had passed away. He stated the deceased would have informed him about the will as he was the eldest son and had been involved with him in various businesses.

6. Elias complained that not all the deceased's assets were set out in the will. He also stated that Plot 1075 which was bought by the deceased and his mother, Pascalia, in 1977 was given to Isabella was married much later. He accused Sabella of fraudulently transferring the property to herself yet there was a charge of over the said property.

7. Elias pointed out that the will was invalid as it was not witnessed by two competent witnesses as Isaack Okero, who is alleged to have been present and who witnessed the will, did not append his signature and that instead Thomas Moywaywa appended his signature hence the will was tampered with and did not meet the legal requirement of attestation. He testified that the will was attested by the late Enock Nyakieya Magara who was admitted as an advocate in 1994 but who was not entitled to practice on his own when he attested to the will in 1996. He explained that Enock Magara later joined the firm of *Siagi Magara and Co., Advocates* where he was practicing with Moses Siagi and Shem Omweri Magara who informed him that they did not know anything about the will. He added that the will was in the custody of Mr Nyamurongi, Advocate who was not the deceased's usual advocate and had never handled the deceased's business during his lifetime.

8. Elias asserted that the will was invalid because the deceased bequeathed property to Pascalia and Florence who had pre-deceased him. He complained that the deceased purported to distribute property that had been acquired by him and Pascalia prior to his marriage to Sabella's and whose effect was to disinherit the first house. He pointed out that Plot 253 was misdescribed as it had a total of four floor inclusive of the ground floor yet the deceased did not make provisions for the 3rd or upper most floor in the will. Elias maintained that the will was contrary to Gusii customary law and that it could not have been made by the deceased who would have consulted him and his brothers.

9. John (PW 2) supported the case by Elias. He complained that the deceased purported to distribute the properties that were acquired before Isabella was married. Further that the will did not make provision for the properties that were acquired after Pascalia died. He testified that Sabella had taken advantage of the deceased and hidden some properties she acquired while doing business with the deceased. He accused Sabella of running down the deceased's estate to the detriment of the other beneficiaries.

10. Sabella (DW 1) testified that when he was alive, the deceased gave her Plot 1075 when she was married and the children never complained about it when the deceased was alive. She denied that she tried to transfer the property to herself. She told the court that the deceased divided his only property in Kisii town; Plot 253 among the three houses. She maintained that the deceased was in good health even after Pascalia died in 1979 and he remained in good health until 1990 when started having heart problems but not to the extent that he was unable to write a will. She denied that she influenced the deceased in making the will. In cross-examination she stated the deceased informed her about the will in 2016 and that she accompanied the deceased when he took it to Mr Nyamurongi's office. She told the court that the will was read at Mr Nyamurongi's office and those who attended signed the attendance sheet. She denied forging the will.

11. The objectors have contested the validity of the deceased's will dated 1st March 2016. A will expresses a person's testamentary freedom which is encapsulated in **section 5(1)** of *Law of Succession Act ("LSA")* that, "*any person who is of sound mind and not a minor may dispose of all or any of his free property by will*". The formal requirements of a valid will are set out in **section 11** of the *LSA* which state as follows:

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 discretion of the testator.

(b) the signature or mark of the testator or 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 in no particular form of attestation shall be necessary. [Emphasis added]

12. In summary, the aforesaid provision shows that for a will be valid, the following four requirements must be met;

- i. The will must be executed by testator with testamentary intent.
- ii. The testator must have had capacity to make the will.
- iii. The will must have been executed out of free will, free of fraud, duress or undue influence.
- iv. The will must be duly executed as provided by law.

13. It is in light of the provisions I have cited that I shall consider the issues raised by the objectors, bearing in mind that the objectors have the burden of proving the allegations that the will is not valid as provided in **section 5 (4)** of the *LSA* which 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 alleges.*"

14. I propose to deal specifically with the grounds set out in the Notice of objection dated 29th January 2019. The objectors stated that they are sons of the deceased who are therefore entitled to estate under **section 40** of the *LSA*. Related to this is the fourth ground that the petitioners do not rank higher in priority superior to that of the objectors. **Section 40** of the *LSA* relates to intestate succession of a polygamous person. It is not applicable to the testate succession as the deceased had testamentary freedom to dispose of his property in the manner he desired subject to an application being made by the dependants under the provisions of **Part III** of the *LSA* for reasonable provision.

15. The objectors complained that the deceased did not dispose of all his property by the will. The simple answer to this objection is that the deceased is not required to do so because he had testamentary freedom to bequeath all, any or part of any property he owns. Any property that is not in the will shall be administered and distributed in accordance with the provisions governing intestate succession under **Part V** of the *LSA*. It is for this reason that the petitioners filed the petition for letters of administration intestate with written will annexed to cater for the administration of the deceased properties that were not in the will.

16. In the second ground of objection to the will, the objector termed the will as, "*fraudulent and mutilated*". The objectors did not show or demonstrate how the will was fraudulent and mutilated. As to whether the beneficiaries would be disinherited, I have stated that a testator had testamentary freedom and any dependant who is excluded is entitled to apply for reasonable provision under **Part III** of the *LSA*.

17. The third ground in the objection is that administrators are intent to mislead the court to confirm and administer the estate without providing an account of its income. In my view, this issue does not go to the validity or otherwise of the will. The administrators or executors have a duty to account to the court for how they manage the estate. This duty does not bear any relation to the validity of the will and I will deal this aspect of the matter later.

18. In his evidence and deposition, Elias raised the issue of attestation of the will. Under **section 11** of *LSA*, the testators signature is required to be attested by two or more competent witnesses. The will is attested by Abel Kerimo and Thomas Moywaywa and although the name of Isaac Oseko is cancelled, the objectors have not shown that the signature therein does not belong to the said Thomas Moywaywa whose name and signature appears. I also hold that there is no legal requirement that a will must be drawn or witnessed by a qualified advocate to be valid. That Nyakieya Magara was not qualified to practice on his own did not go to the validity or otherwise of the will.

19. For purposes of completeness, I am satisfied that the will presented in court meets the elements of validity of a will. No evidence has been placed before the court to show that the deceased lacked capacity to prepare and execute the will. The will was duly executed the deceased and witnessed. Sabella testified that the deceased informed her about the will and she went with him to deliver it to Mr Nyamurongi, Advocate. There is no basis for impugning the will on the basis of speculation as to whether other advocates knew about its custody. Since the deceased was of sound mind, he was free to dispose of his property as he deemed fit. He was not under any obligation to inform anyone of his testamentary intent or disclose the contents of the will to his sons or other third parties.

20. The objectors have also challenged the will on the basis of construction thereof. The general principle governing the construction of will is that it must be respected and the courts will try as much as possible to give effect to the testator's intention as long as it can be construed without any ambiguity or absurdity. The challenge of the will is twofold. First, that the deceased bequeathed his property to his wives who had pre-deceased him. Second, that the deceased could not have allocated each of wife a floor of the building on Plot 253.

21. On the first issue as to whether the bequests to the two wives had lapsed in accordance with section 23 as read with the *Second Schedule* of the *LSA*, the objectors submitted that the bequests had lapsed and the property reverted to the deceased as if he died intestate. Sabella took the position that though the deceased had made provision for Paskalia and reference to her was in effect reference to her household. Further that the deceased had made dispositions to her in discharge of a moral obligation with the knowledge that she was deceased and that her share was intended for her children.

22. The issue for determination is whether the doctrine of lapse under section 23 of the *LSA* applies to the facts in this case. Section 23 provides that, "*testamentary gifts and dispositions shall fail by way of lapse or ademption in the circumstances and manner and to the extent provided by the Second Schedule.*" Clause 1(1) of the *Second Schedule* provides that, "*no gift or disposition shall confer any benefit on any person who predeceases the testator, and where a gift or disposition fails on this account it is said to "lapse"*" However, Clause 2 provides

the exception to the doctrine and it states as follows;

2. Exceptions

(1) **Unless a contrary intention appears in the will, there shall be no lapse in either of the following cases—**

(a) **where the gift or disposition is made in discharge of a moral obligation recognized by the testator; or**

(b) **where the gift or disposition is in favour of any child or other issue of the testator, for any estate or interest not determinable at or before the death of the child or other issue and the child or other issue, as the case may be, leaves issue surviving the testator, but in either case the gift or disposition shall take effect as if the deceased legatee had died immediately after the testator. [Emphasis mine]**

23. It is not in dispute that the testator's wives pre-deceased him hence prima facie the gifts to them have lapsed in accordance with section 23 as read with *Second Schedule* of the *LSA*. The 3rd respondent has urged this court to find that the disposition to each of the wives was made in discharge of a moral obligation recognized by the testator. She contended that the property to each wife was for their respective houses and not only the wives.

24. In making this determination, the court ought to look at the object of the testator in making his will and determine whether a contrary intention appears from the will. At the time of making the will the testator was aware that Paskalia had died, but recognized she had children. This is confirmed by paragraph 3 of the will under the special clause which reads as follows;

“Any persons of the three wives and children who would like to construct upwards i.e. 3RD FLOOR and more must NOT DO SO WITHOUT THE CONSENT OF ALL MEMBERS.”

25. It appears that the testator intended that each wife and their respective children would be entitled to the benefit of his estate. Though bequeathed the properties to each wife including Paskalia, who he was aware was dead, the fact that he provided that any extensions should be with the consent of all family members confirms that he intended each house to benefit. I therefore hold that in this instance the bequests to the testator's wives have not lapsed and shall take effect as if the testator's wives had died immediately after the testator.

26. Even if I were to hold that the bequests to the 1st and 2nd wife have lapsed, this finding would not render the will invalid. The properties would still form part of the residue of the testamentary estate to be distributed in accordance with the rules of intestacy as the deceased did not make any provisions for distribution of his residuary estate

27. Finally, and as regards the building on Plot 253, I also do not find any difficulty in the deceased giving a floor to each wife and by extension each house. Each floor represents a proportion of the entire property and defines a specific area where each family can earn income. I do not think this goes to the validity of the will. If any floor or portion of the property is not allocated in the will, it shall be dealt with under the rules of intestacy.

28. Elias complained that the deceased bequeathed a property that had been acquired by their mother. He does not dispute that the property was registered in the deceased name hence it was available distribution. In the event, his family has a claim over it, that claim does not invalidate the will. It is a claim that must be determined at the confirmation stage.

29. Elias accused Sabella of intermeddling with the deceased estate. He attached a Certificate of Official Search for Plot 1075 dated 9th January 2018 shows that Magembe Gwaka was the registered proprietor on 19th October 1977. The second Certificate of official search dated 27th March 2018 has an entry under the proprietorship section entered on 28th May 2013 to SABERA MORAA MAGEMBE. The encumbrance section has two entries, a charge to secure a sum of Kshs 600,000/- and a second entry to Thabiti Finance Company Limited. Since the property is charged, the chargee is in possession of the original title and no transfer can be effected on the title until the charge is discharged. The Certificate of Official Search dated 27th March 2018 was cancelled by the Land Registrar due to an error. It is not clear who had made the error and no evidence was adduced to show that Sabella was to blame for the error occasioned on the Certificate of Official Search which is normally prepared by the Registrar.

30. Elias also alleged that Sabella has been collecting rent of Kshs 600,000/-. Under **section 83(e)** of the *LSA*, one of the duties of personal representatives is to, “*within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.*” The Grant of Probate was issued to Sabella Moraa Magembe, John Nyangaresi and Cosmas Mokuia Magembe on 1st November 2018. Nyangaresi filed an affidavit in court on 9th April 2019 purporting to render a full account and disclosure of the rent he collected without supporting documents. The other administrators and any beneficiaries receiving rent or any benefit from the estate are also required to render accounts.

31. In compliance with **section 83(e)** the *LSA*, I direct that the Administrators, jointly or separately, render an account of the status of the estate within **thirty (30) days** hereof and where any necessary information is solely in the custody of one of the Administrators, there be full disclosure. Such accounts shall also be accompanied a schedule of any other assets of the deceased that may not have been disclosed.

32. I dismiss the objection filed on 29th January 2019 but with no order as to costs as this is a family matter.

DATED and DELIVERED at KISII this 2nd day of JULY 2019.

D. S. MAJANJA

JUDGE

Mr Nyambati instructed by Nyambati and Company Advocates for the objectors.

Mr Onchwangi instructed by Ochoki and Company Advocates for the 3rd respondent.

John Nyangaresi in person.