REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

SUCCESSION CAUSE NO. 2677 OF 2000

IN THE MATTER OF THE ESTATE OF RATILAL NARSHI SHAH (DECEASED)

RULING

Brief facts of the case

1. Ratilal Narshi Shah whose estate the proceedings herein relate died testate on 24th August 2000 leaving a written Will executed on 2nd September 1994. According to form P &A 3, the deceased was survived by:

(i) Chandramani Ratilal Shah

(ii) Pratibha Ratilal Shah

(iii) Nitin Ratilal Shah

(iv) Jyoti Pankaj Shah

The four were listed in the Will as either executor or executrix. Listed as assets comprising the estate are:

(i) Proceeds of Guardian Life Policy 59070971/8/9 with Madison Insurance

(ii) LR 20/2601 Nairobi (half only)

(iii) LR No. 209/2058 Nairobi

(iv) LR No. 209/1218 317 Nairobi (half only)

2. On 22nd December 2000, the four survivors who were also named as executor/executrix of the written Will petitioned the court for a grant of probate of written Will. The same was made and issued to the four petitioners jointly on 24th May 2001.

3. On 11th July 2016, through the law firm of Burton Isindu, an application for confirmation of grant was filed with the prayer that the grant of probate of the last Will of the deceased be confirmed in terms of the Will of the deceased.

4. Before confirmation of the grant, Nitin Ratiral Shah (3rd petitioner) filed summons for revocation of grant pursuant to Sections 5, (3), (7), 11 and 76 of the Law of Succession seeking orders:

1. That the grant of probate of written Will made to Chandramani Ratilal Shah, Jyoti Pankaj Shah, Pratibah Ratilal Shah and Nitin Ratilal Shah be revoked.

2. That the honourable court do issue an order compelling Pratibha Ratilal Shah to deliver true accounts of the income received from all the deceased's properties and business from January 2000 till todate. This includes all bank statements and copies of cheques issued for each and every transaction, and explaining the same.

3. That this honourable court do order Pratibha Ratilal Shah to produce all original title deeds and leases of all properties and the death certificate of the late Ratilal Narshi Shah.

5. The application is based on grounds set out on the face of it and an affidavit in support. It is the applicant's averment that; the deceased lacked capacity to make the Will dated 2nd September 1994 due to the illness which compromised, obstructed and destroyed his state of mind and capacity to make a valid Will; that the deceased was unduly influenced by his daughter Pratibha Ratilal Shah to distribute the assets to the detriment of other beneficiaries; that the Will be declared null and void; the said Pratibha Ratilal Shah has been collecting rent from the deceased's property since January 2000 to July 2015 without any share to the applicant and other beneficiaries; the applicant has been grossly prejudiced by the conduct of Pratibha Ratilal Shah and that it is in the best interest of justice that the orders sought be granted.

6. The application is further supported with an affidavit sworn on 8th September 2006. It was averred that the deceased was diagnosed with mouth cancer and could not talk hence could not have executed a Will while in that awful condition thus obstructing his state of mind. He further deponed that the deceased was illiterate and could not understand English language thus could not understand the content of the Will.

7. It was further deponed that for all the years, the purported original Will was never shown to the applicant and other beneficiaries. He further claimed that Pratibha having converted to Islam and gotten married outside the country, she cannot inherit the family property as that will amount to taking outside family property.

8. In opposition to the application, Jyoti Pankaj Shah, Pratibha Ratilal Shah and Bharat Ratilal Shah swore a joint affidavit on 20th September 2016 and filed the same on 21st September 2016. They averred that the application was unreasonable, lacking seriousness/merit, a clear abuse of the process of the court and therefore should be dismissed.

9. They stated that the applicant having petitioned for a grant of probate jointly with the respondents using the impugned Will cannot turn around and seek the grant of probate which he had sought to be revoked. They urged the court to punish the applicant for perjury.

10. They further deponed that the mere fact that the deceased was suffering from cancer of the mouth does not mean that he was mentally incapacitated as he was vibrant and soundly managing his business at Biashara Street. They denied the allegation that the deceased was illiterate and of unsound mind.

11. They accused the applicant of double speech considering that he had been drawing huge benefit from the estate to the exclusion of the rest of the family members. They alleged that Pratibha Shah collects and uses exclusively rents from 2 properties namely; Ashwal Apartments, Plot No. 6 and Plot No. 1870/1/224 and that they only collect rent from one apartment known as Samar Heights No. A.33 on LR 1870/111/544 since May 2016.

12. They accused the applicant of being greedy and selfish. They maintained that proper audit and accounts had been regularly carried out by Nalin Shah & co. Accountants. Regarding Pratibha's marriage outside the community, the same was termed as irrelevant.

13. In his rejoinder, Nitin Ratilal the applicant filed a supplementary affidavit sworn on 4th November 2016. He denied signing the petition for the grant of probate. That Pratibha committed fraud by influencing execution of the Will thereby allocating herself a bigger share. He prayed for equitable distribution of the estate. He claimed that he was a co signatory to the estate's account with Pratibha who has misused the same by withdrawing and transferring money into his (applicant). That she has been taking personal loans and repaying the same using estate's funds. He however admitted that the audit firm of Nalin had been maintaining books of accounts although expensive in their charges.

14. In further response, the respondents filed a further affidavit sworn on 19th January 2017 and filed on 20th January 2017. In answer to the allegation by the applicant that he was not aware of the existence of the Will and that he did not sign the petition application forms, the respondents attached a letter dated 28th August 2000 from the law firm of Amuga & Co. Advocates (JBP1) in which the said firm wrote to the applicant confirming receiving instructions from the applicant seeking their legal services in petitioning for a grant of probate of the deceased's last Will. The said letter further forwarded to the applicant two sets of petition forms in triplicate for his signature and those of the other executors.

15. To confirm that the deceased was of sound mind in 1994 when he executed the Will, they attached a copy of a cheque (JPB3) worth 5 million which he used to pay for the property he bought for the applicant in 1999 implying that the deceased was of sound mind all along despite his sickness which did not impair his mental capacity.

16. They further contended that all expenditures were done by Pratibha with the concurrence of the other family members and that no money was lost and proper accounts were kept.

HEARING

17. During the hearing, the applicant adopted the contents of the application, affidavit in support and supplementary affidavit. He reiterated that his father was sick and could not understand the consequences of making a Will. He termed the Will as a forgery. He denied giving consent in filing the petition for grant. On cross examination, he admitted that the petition/application was filed by Amuga Advocates through the effort of his sister Pratibha. He further stated that the Will did not provide for his wife and children as beneficiaries. On further cross examination, he admitted petitioning for a grant of probate together with the siblings. He further admitted signing the petition forms before an advocate.

18. In re-examination, he prayed for an order to have a document examiner to analyze and examine the Will to confirm whether it was signed by the deceased.

19. On the other hand, Pratibha (DW1) also reiterated the respondent's averments contained in the affidavit in reply and further affidavit in reply to the application. She further adopted the contents contained in her witness statement dated and signed on 6th March 2018 which is a

replica of the averments contained in the aforesaid replying affidavit.

20. She denied influencing her father in bequeathing the estate claiming that, the deceased was brilliant and of sound mind who solely acquired property. She denied misusing the estate property and that all members except the applicant were agreeable to the distribution. She urged the court to confirm the grant and distribute the estate as per the Will.

21. DW2 one Bharat Shah a co-respondent did corroborate the testimony of DW1.

Submissions

Objector's/Applicant's Submissions

22. On behalf of the applicant, the firm of Lakicha & Co. Advocates filed their submissions on 26th April 2019. Counsel restated Section 5 (B) of the Law of Succession in which the law requires that any person executing a Will must be of sound mind. In that respect, counsel relied on the decision **in the estate of Salome Wangari Ngungi deceased (2017) eKLR** in which the court quoted a finding in the case of **Bank v Good fellow (1870) LR 5 Q B** where court held that; "**the testator shall understand the nature of the act and its effects and the extent of the property of which he is disposing… and that no disorder of mind shall poison his affections, pervert his sense of right or prevent the exercise of his natural faculties and that no insane delusions shall influence his will in disposing property and bring about disposal of it which if the mind had been sound would not have been made"**.

23. The court was further referred to the decision in the case of **In the estate of Francis Gikumu Wanjohi (deceased) (2014) e KLR** where the court held that:

> **"it must be remembered that not even severe physical illness can automatically deprive a person of testamentary capacity, and only physical illness that renders a testate incapable of knowing what he is doing will take away his capacity…"**

24. Counsel submitted that the deceased was not of sound mind when he made the Will and that failure to call the lawyer who drew the Will was detrimental to the respondent's/ petitioner's case.

25. Turning to undue influence, counsel submitted that a Will that is not voluntarily executed is an invalid Will. This proposition was supported by quoting the decision in the case of **Julius Wainaina Mwathi v Beth Mbene Mwathi and another (1996) eKLR** where the court held that:

> **"undue influence occurs when a testator is coerced into making a Will or some part of it that he does not want to make. undue influence is proved if it can be shown that the testator was induced, coerced into making dispositions that he did not wholly intend to make".**

26. It was counsel's submission that the making of the Will was influenced by Pratibha who stood to benefit most hence proof of coercion given that the deceased was critically ill at the moment.

27. Concerning forgery, counsel opined that failure to call the advocate who executed the Will was sufficient proof that the Will was forged. To bolster this position, counsel referred the court to the decision in the case of **Elizabeth Kamene Ndolo vs George Matata Ndolo (1996) Eklr .**

Respondent's Submissions

28. The respondent's submissions were filed on 9th May 2019 through the firm of Sheila Mugo and Company Advocates who literally restated the contents contained in the affidavits in reply to the application. Counsel submitted that it was the applicant who initiated the petition application by instructing the firm of Amuga who prepared the necessary documents for petition and gave them to the applicant who later returned them to him while duly signed. She opined that the affidavit of Amuga Advocate sworn on 6th March 2018 is sufficient proof that it was the applicant who commenced the succession process.

29. Regarding the validity of the Will and mental incapacity of the testator, counsel submitted that the burden of proof lies with the applicant. To buttress this position, counsel referred the court to the decision in **Succession Cause No. 793/2010 in the matter of the estate of HWM vs KM(2017) eKLR**where J. Achode stated that:

> **"It is a fundamental principle of law that a litigant bears the burden or onus of proof in respect of the propositions he asserts to prove his claim. The standard of proof in essence can loosely be defined as the quantum of evidence that must be presented before a court afact can be said to exist or not exist".**

The court was further referred to the case of the estate of **Murimi Kennedy Njogu (2016) eKLR** where similar position was held.

30. Counsel submitted that the applicant did not submit any medical evidence to prove the assertion that the deceased did not have the mental capacity to make a Will. To emphasize on proof of this condition, counsel made reference to the holding in the case of the estate of **Francis Gikumu Wanjohi (supra)** where the court held that:

"it is the protestors in this cause who put forward the case that the deceased in this case did not have the requisite state of mind to make a valid Will. The duty was on them (sic) establish that fact".

31. As to whether the Will was forged, counsel submitted that the applicant could not have used a forged Will to initiate the process of filing a succession cause using the impugned Will.

32. Turning onto undue influence, it was submitted that there was no proof of such influence. Counsel relied on the decision in the case of **James Maina Anyanga v Lorna Yimbiha Ottaro and 4 others Succession Cause No. 1/2002 H.C. Nakuru (2014) eKLR** where the court held:

"undue influence connotes an element of coercion or force, that the deceased did not exercise his free will in writing his Will and was pressured by other forces. Such external pressure must be forceful and intended to coerce him into acting out of fear or involuntarily. The onus is on the person who alleges the existence of undue influence to prove the same".

33. As to the failure to call the lawyer who executed the Will, counsel submitted that the law firm ceased to exist. On the absence of the witnesses who witnessed the Will, counsel submitted that they had relocated to U.K and Germany and therefore could not be served.

34. Learned counsel raised the issue of unreasonable delay in lodging this application 15 year down the line since the grant of probate was issued with the express knowledge of the applicant. He relied on the decision in the case of Re **estate of Josiah Njonjo (deceased) (2018) eKLR** where the court decried indolence in filing a revocation application.

35. Regarding revocation, counsel submitted that the applicant had not satisfied the threshold set under Section 76 of the Law of Succession as there was no proof of fraud; misrepresentation of facts, defective process nor concealment of material facts considering the fact that it was the applicant who commenced the succession proceedings.

36. Lastly, on accounts, it was submitted that the applicant being one of the petitioners/executors who has been managing the estate cannot demand accountability from the other co-executors. That in any event the estate has been managed well by Pratibha as evidenced by auditor's accounts which the objector/applicant had also signed.

Determination

37. I have considered the revocation application and affidavit of protest plus the responses thereto. I have also considered the evidence adduced by both parties, materials placed before the court, submissions by both counsel and the authorities in reference. The issues that crystallize for determination are:

(a) Whether the impugned Will dated 2nd September 1994 is valid.

(b) Whether the applicant has met the threshold for revocation of the grant.

Whether the impugned Will dated 2nd September 1994 is valid

38. The underpinning provision governing the validity of a Will can be traced to Section 5 and 11 of the Law of Succession. Section 5 (1) 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".

39. Section 5 (3) further provides –

"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".

40. Section 11 further recognizes the validity of a Will by providing that –

"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.

41. Pursuant to Section 5 (4) of the Law of Succession, the burden of proof that the testator was at the material time he made the Will not of sound mind, shall be upon the person who so alleges. **In James Ngengi Muigai case (deceased) Nairobi Succession Cause No. 523/1996** the court expressed itself as follows:

> **"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".**

42. In the instant case, the applicant is alleging that the deceased was suffering from mouth cancer which condition then incapacitated him from freely exercising his mental faculties before signing the Will. It is incumbent upon the applicant to prove that cancer of the month had a bearing to the deceased's mental incapacitation. It is not enough to state that the deceased was mentally incapacitated at the time of executing the Will without proof that indeed he was not of sound mind.

43. In addressing a similar scenario, the court in the case of **in re estate of Samuel Ngugi Mbugua (deceased) (2017) eKLR** held as follows:

> **"a person who seeks to rely on unsoundness of mind as a basis for verification of a Will, must adduce evidence tending to prove that the testator had an illness that had affected his mental capacity at the time, or was drunk and drugged. This calls for testimony as to his state of mind at the material time, and where possible medical evidence that would point towards such condition. It should be mentioned that the burden of establishing that the maker of the Will lacked the requisite mental capacity lies with the person making the assertion, in this case that would be the applicant"**

44. The fact that a testator is suffering from some form of ailment which compromises his mobility or exposes him to some form of pain does not perse mean that one is mentally incapacitated. There has to be prima facie evidence that the ailment in question did interfere with the mental capacity of the testator and as a consequence was not able to make an independent and free decision to dispose of his property.

45. The applicant did not call any witness or tender any independent evidence from an independent witness or medical evidence to confirm that his father was of unsound mind at the material time and that he was incapable of executing a Will freely.

46. Apart from the applicant, the rest of the family members are in agreement that the deceased was sane at the material time and his sickness notwithstanding, his mental faculties were not interfered with.

47. To vindicate the position that the deceased was of sound mind, in 1999, he executed a sale transaction whereby he purchased property for the applicant by duly executing a cheque in favour of the vendor for the benefit of the applicant. This is not a conduct consistent to a person of unsound mind.

48. Regarding the allegation that the deceased was illiterate and could not have understood the content of the Will, the law does not prescribe the level of literacy or proficiency in a certain language for one to make or execute a Will. However, the applicant in his further affidavit in response to the respondent's replying affidavit stated that his father was a brilliant guy with whom they formed a company to operate business. Besides, he admitted on cross examination that his father bought him a property in 1999 and executed a cheque in payment. This is not a behavior of an illiterate person.

49. In any event, Section 11 of the Evidence Act does recognize even making a mark on the Will as a sign of execution. I am not convinced with the explanation that the deceased was illiterate. That ground has not been proven to the required degree and the same is dismissed.

50. Concerning undue influence, the applicant claimed that one Pratibha influenced the deceased to give to her a bigger share to disadvantage of others. This is a contradiction to the applicant's claim that the deceased did not execute a Will. One cannot claim that the deceased did not make a Will yet claim undue influence.

51. The fact that the applicant's children and wife were not provided for does not serve as proof of undue influence. Non provision or exclusion of his wife and children does not perse invalidate a will. In any event, the estate was bequeathed only to the four children and not wives, husbands or grandchildren. His share would suffice for his household or family. Equally, Pratibha's marriage outside their community has nothing to do with the validity of the will nor does it affect her inheritance rights.

52. As to Pratibha getting a bigger share, the court takes into account that Section 5 of the Law of Succession recognizes the fact that every adult Kenyan who is of sound mind has unfettered testamentary power to dispose off his or her property by Will in a manner he or she sees fit. **(See Elizabeth Kamene Ndolo v George Matata Ndolo (1996) eKLR)**.

53. Save for situations where a testator fails to make reasonable provision for some dependant under Section 26 of the Law of Succession, the court may intervene. There is no strict requirement that a testator or testatrix must make equal provision to his children or dependants. The claim that Pratibha got a bigger share than others is not tenable and that cannot be a ground to infer undue influence or declare the will invalid.

54. The burden is on the applicant to prove that undue influence was exerted on the deceased by Pratibha. In arriving at this finding I am guided by the decision in the case of **In the estate of Francis Gikumu Wanjohi (supra)** where the court held that to prove undue influence:

"there must be a positive proof of such fraud or importunity – the burden lies on the protestors to prove fraud, undue influence or importunity. They have not discharged that burden".

See also **James Maina Anyanga v Lorna Yimbiha and others (Supra)**. For the reasons stated there is no proof of undue influence.

55. The other ground heavily relied on in challenging the Will was that the Will was forged. This was anchored on the ground that the deceased did not sign the Will. The witnesses who witnessed execution of the Will were not called nor was the advocate who drew the same. It is true that those people were not called. The respondent claimed that the law firm which executed the Will had ceased operating. This is however evidence from the bar which had no backing from the Law Society of Kenya.

56. On the other hand, the witnesses who witnessed the Will allegedly relocated to UK and Germany. Of course there was no effort made to call them. Is that sufficient proof that the Will was forged? From the pleadings, the petition was lodged by the applicant and his siblings (the respondents). Although he denied filing the petition, he did not disown the signature appearing on the petition application. With this petition, the impugned Will was attached. According to the respondents, the process was initiated by the applicant himself who contracted Amuga Advocates who drafted the petition and through the applicant all the executors signed. This fact is admitted in the testimony of the applicant on cross examination. Besides, the respondents did attach a letter dated 28th August 2000 to their further affidavit filed on 20th January 2017 (Paragraph 3) in which Amuga Advocates addressed the applicant as follows:

Re: Ratilal Narshi Shah (deceased)

We refer to the above and your instructions to us to represent you in seeking grant of probate of the deceased's last Will. We enclose herein two sets of documents in triplicate each to be signed by all the named executors and the deceased's last Will.

57. The existence of this letter was not denied or challenged and the same was relied on as evidence for the respondent without any objection. Subsequently, the firm of Amuga Advocates lodged the petition herein on 22nd December 2000 with the applicant as one of the petitioners.

58. The question that begs an answer is how could the applicant use a forged Will to initiate a succession process? He does not deny his signature in the petition. He is only claiming that the deceased's signature in the Will was forged. Why use a forged signature in a petition to succeed the estate of the deceased? How come the petitioner has been enjoying the fruits of the estate using a grant of probate obtained through a forged Will? It is inconceivable from the conduct of the applicant that he held the grant as genuine and has benefited from its execution hence cannot turn round and disown it.

59. For those reasons, the non- attendance of some of the crucial witnesses like the lawyer who executed the Will is superseded by the applicant having acquiesced to the validity of the Will.

60. It is my conviction that the Will was properly executed by the testator who was of sound mind despite his sickness which did not affect his mental status and that there was no proof of any undue influence exerted nor was the Will forged. I do therefore find that the Will was validly drawn and that the deceased exercised his free testamentary wish in bequeathing the estate.

Whether the applicant has met the threshold for revocation of the grant

61. The applicant claimed that the grant was issued without his knowledge or consent. Section 76 of the Law of Succession provides grounds for revocation as below:

> **"a grant of representation whether or not confirmed may at be revoked or annulled if the court decides, either on application by an interested party or of its own motion –**
>
> **(a) that the proceedings to obtain the grant were defective,**
>
> **(b) that the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case.**
>
> **(c) that the grant was obtained by means of untrue allegation of a fact, a statement on point of law to justify the grant notwithstanding that the allegations were made in ignorance or inadvertently.**

62. It is the applicant's case that the grant herein was obtained without his consent and knowledge. As already stated, there is sufficient proof that the applicant was one of the petitioners for grant of probate. He has been enjoying the fruits of the same grant by receiving part of the deceased's property among them rent which he does not deny. How can he go round and disown the same grant to which he petitioned? He does not deny that he signed the petition. He admitted on cross examination that he did petition for the grant.

63. This court has not been persuaded by the ground cited which are a contradiction to the applicant's conduct and testimony. For those reasons the prayer for revocation is dismissed.

Statement of accounts by Pratibha Shah

64. The applicant claimed that Pratibha has been managing the estate affairs single handedly since the year 2000 up to now. He demanded for an audit and statement of accounts explaining how the money generated from business and rental income has been spent. He however admitted that he has been a beneficiary of some of the properties' income.

65. The respondents attached to their further replying affidavit (Paragraph 10 – JPB5) a statement of audited accounts for the year ending 31st December 2013 duly signed by the applicant, Pratibha R. Shah and her late mother Chandramani Ratilal Shah**.**

66. For the applicant to seek audited accounts from the year 2000 to date he is not being sincere. He could not have been a party to the audit report for the year ending 31st December 2013 if there were any issues prior to that period. In any event, as one of the executors, he is duty bound to give an account on how the estate is managed. However, for the period commencing 1st January 2014 to date, Pratibha shall submit statement of accounts touching on the properties she has been managing.

67. In a nutshell, it is my finding that the application for revocation and protest against confirmation of the grant has not been proven to the required degree.

68. Accordingly, the application for revocation and affidavit of protest are dismissed. This being a family dispute I will order each party to bear own costs. Parties to fix the application for confirmation of grant dated 8th July 2016 for hearing. Prior to the hearing of the confirmation application Pratibha to submit the statement of account for the period referred herein above.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER, 2019.

J. N. ONYIEGO

JUDGE