



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 144 OF 2014

IN THE MATTER OF THE ESTATE OF MK (DECEASED)

AND

H W M.....PETITIONER

AND

W K M.....PROTESTOR

JUDGMENT

1. This matter relates to the estate of MK, deceased, who died on 9th January, 2008. A petition for Probate or for letters of Administration with written will annexed was filed by HWM and a grant was made on 4th June, 2009.
2. A caveat was filed by WKM who also filed an affidavit of protest. His contention was that the inventory of assets in the will include assets that do not belong to the estate of the deceased. He further deposes that **Plot No. [particulars withheld] Phase 1 Dandora Site and Service Scheme** belongs to him and is not part of the estate of his late father. That **Plot No. [particulars withheld] Phase 2 Dandora** also belongs to him and is not part of the estate. That the properties should be excluded from the said estate.
3. In a further affidavit the protestor deposes that prior to his father's death he was suffering from chronic diabetes, hypertension and recurrent convulsions and was also mentally sub-normal. That the deceased became seriously sick in 1990 and since then he was never in a stable mental condition. That at the time of making the alleged Will his late father could not have written a Will on his own volition and free will due to his illness and the said will is therefore invalid.
4. Attempts were made to settle the matter but the parties failed to reach an agreement. The parties agreed to proceed with the matter for the Court to determine the validity of the Will. The parties proceeded and adduced evidence.
5. The protestor called Dr. Robert Kingati who testified that the deceased was admitted at Jamii Hospital and was diagnosed with low blood sugars – sugar was below normal and he was unable to talk. He was discharged on 1st November, 2007. He was again admitted on 26th December, 2007 and passed away on 9th January, 2008. He produced a medical report which states that the deceased was an elderly male patient with chronic Diabetes, Hypertension and recurrent convulsions. At time of death he was incoherent and mentally sub-normal.

6. Objector's Case

The Will was objected to by WKM claiming that it is not valid. That the Will contained properties belonging to him and not the testator therefore they ought not to have been included in the Will. He listed the properties as **Plot No. [particulars withheld] Phase II Dandora** and **Plot No. [particulars withheld] Phase 1 Dandora Site and Service Scheme**. He produced agreements and assignments in respect of the two plots and documents/cards from the Nairobi City Council proving that he bought and owned the said plots. Therefore they should not be included in the Will. In addition, one of the witnesses Harrison Muchiri Karumba was never called to testify. Under **Section 11 (c) Law of Succession Act**, a Will has to be attested by two or more competent witnesses but since he did not testify, there was no way of the Court knowing whether he was competent. In the absence of such evidence, the Will is invalid for want of proper attestation by a least two witnesses. Further, the doctor who testified stated that the testator was diabetic and had suffered for a long time. That the condition in advanced states can affect a person's mental ability therefore it is doubtful that the testator had the ability to make a Will as alleged.

7. The Petitioner called one witness Joshua Magee Wa Magee an advocate who testified that he prepared the Will and it was signed by the deceased on 14th June, 2003. He produced the original Will in Court. That a perusal of the Will indicates that paragraphs (i), (ii) and (iii) are properties given as a gift *inter vivos* by the testator which he had bought for the beneficiaries. During cross-examination, the objector had indicated that the testator had been involved during the purchase process. He also confirmed that the other beneficiaries under paragraphs (i), (ii) and (iii) had indeed received those properties from the testator. That the objector was contesting the form of the Will and why it included

properties that had been given out and were in the names of the testator's children. The properties mentioned in paragraphs (i), (ii) and (iii) was for purposes of information that some children had already benefited and received some properties. On the mental capacity of the testator, the doctor conceded during cross examination that he would not know the mental state of the testator as at 2003 and people suffering from diabetes can make rational decisions. The petitioner called the drafter of the Will who was also a witness and he narrated how the Will was drawn and signed. He confirmed that the testator was mentally stable at the time of making and signing the Will.

8. The first issue for consideration is mental ability of the testator. Section 5 of the Law of Succession act states:

“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.”

“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”.

Dr. Kingati testified that the testator's file did not indicate the period in which he was diabetic and he could not know the condition of the patient in 2003. However, he stated that patients who suffer diabetes can make rational decisions. A period of nearly four years had lapsed from the time the deceased made his Will to date he was hospitalized at Jamii hospital in October, 2007. The objector did not have any medical records to prove that the testator was unwell in 2003. He denied the fact that the testator gave him the money to purchase the said plots though he confirmed that the testator was present when he bought them. The objector was not truthful at first he said his father did not know who sold the plots to him but when he was shown the Will he admitted that his father was present when he bought the two plots. In the case of **Re Estate of Samuel Ngugi Mbugua (deceased) 2017 eKLR** the Court stated:

“A person, who seeks to rely on unsoundness of mind as a basis for nullification 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 or drugged. This calls for testimony as to his state of mind at the material time, and, where possible medical evidence that could point towards such a 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.”

He who alleges must prove. The burden is on the person who alleges that the testator had no capacity to make the Will. What he is required to prove is that he was of unsound mind, suffered some physical illness, was drunk or drugged or due to some other cause he was in no state to know what he was doing. The soundness of mind for the purpose of testation was defined by Cockburn C.J. in **Banks –V- Good Follow (1870) L.R. 5 QB549** in the following terms:

“.....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.”

The medical evidence tendered by P.W. 1 relates to a period of slightly over three months prior to the death of deceased. Though the protestor testified that the deceased was suffering from diabetes, he did not produce any medical evidence to prove his condition in 2003 when he made his Will and executed. When the objector was cross-examined he admitted that as stated in the Will his father was present when he bought the two plots and had knowledge of the transaction. He also admitted that the Will catered for all the Children. He further stated that in 2003 he was living in Dandora while his father was staying in Kirinyaga. The protestor has not stated anything to prove that the deceased did not know what he was doing. In any case the doctor who was called stated that he could not tell the medical condition of the deceased in the year 2003. He further stated that people who suffer from Diabetes can make rational decisions. The protestor had the burden to prove that the deceased had an illness that affected mental capacity when he made the Will. Such proof of the mental capacity must be at the time of making the Will. The protestor has not adduced evidence to prove the state of mind of the deceased at the time of making the Will. The protestor did not adduce any evidence as to the mental status of the deceased at the time of writing the Will. Such mental status can only be proved with medical evidence. There was absolutely no evidence led by the protestor to challenge the mental capacity of the testator as at 2003 when he made the Will.

9. The Petitioner called D.W. 1 Joshua Magee wa Magee, Advocate, who drafted the Will. His testimony was that the testator was mentally stable at the time of making and signing the Will. He witnessed when the testator signed the Will. D. W. testified that he was with a witness Harrison Muchiri Karumba who witnessed when the testator signed. This evidence shows that at the time of making the Will the testator was mentally stable. Objector who was not living with the deceased at the time could not give an accurate state of his mental capacity at the time of making. He has not proved that the deceased had a mental illness at the time which affected him such that he could not have known what he was doing at the time he made the Will. I find that the burden of proof was on the protestor to prove that the deceased had no capacity to make a valid Will. I find that he has not discharged this burden and therefore this ground must fail.

10. The second issue is that one witness never testified. From the evidence of D.W. 1 Joshua Magee wa Magee he witnessed the Will with one Harrison Muchiri Karumba. The original Will which was produced in Court as exhibit shows that the two were the witnesses and they signed on every page to witness the signatures of the deceased. The applicant submits that Harrison Muchiri was never called. He cited **Section 11 (c)** of the **Law of Succession Act** which provides:

“No written will shall be valid unless;

- 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 the Will in the presence and by the direction of the testator or have received from the testator, personal acknowledgment of his signature or mark, or the signature of that 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.”

There is no allegation that the witnesses were not competent or that they were minors or of unsound mind. D. W. 1 drafted the Will. His details and those of the second witness appear on the Will. The requirement under the Section is that the will be attested by two or more witnesses. There is no requirement that the two must give evidence when there is a dispute. What must be proved is that the Will is attested by the two witnesses who must witness when the testator signs or affix a mark on the Will. **Section 143** of the **Evidence Act** provides **“No particular number of witnesses shall, in the absence of any provision to the contrary, be required for the proof of any fact.”** In the case of **Serraco Limited v Attorney General [1016] eKLR** the Court of Appeal stated that:-

“By didn’t of Section 143 of the Evidence Act, unless it is required by a provision of law, no particular number of witnesses is required to prove a fact in issue. We do not find any provision of law that required the appellant to call more than one witness, particularly when the evidence of its sole witness was cogent, consistent and backs-up by documents, which were admitted in evidence by consent.”

In view of the above, if the petitioner was not required to call Harrison Muchiri Karumba since the advocate who prepared the Will had testified. In addition, there is no provision of law that requires all the witnesses for a Will to adduce evidence. This ground must fail.

11. The next ground for consideration. The protestor stated that some of the properties in the Will were his and should not have been included in the Will. The advocate who prepared the Will testified and stated how the testator gave him instructions to prepare the Will up to when he appended his signature. That numbers (a) to (f) he described how he wished his properties to be distributed and from (i) to (iii) he was explaining how he had distributed his properties to some beneficiaries. The objector on the other hand claims that though the testator was present, he was the one who signed the sale agreement and bought the said plots. During his cross examination, the objector confirmed that the other properties under paragraphs (ii) and (iii) belonged to the testator. This raises query on why the testator would choose to include the objector’s plots to his Will. Under paragraph (i), the testator states that he bought the said plots for the objector this would therefore explain why he was present during their purchases. The objector has therefore not proven that the properties ought not to have been included in the Will.

12. The D.W.1 testified that what is subject of distribution are the properties listed at paragraphs a, b, c, d, e and f. The properties mentioned in paragraphs (i) (ii) and (iii) was for purpose of information that some children including the protestor had already benefited and received some properties during his life time.

(i) RWM

- Plot [particulars withheld] Dandora Site and Service Scheme.
- Half share interest in Plot No. [particulars withheld] Bahati.
- 300 Kenya Commercial Bank Ltd. shares a/c [particulars withheld]
- 540 Barclays Bank Ltd. a/c [particulars withheld]

(ii) I W M

- Share in Plot No.[particulars withheld] Kibirigwi market

(iii) G N G M

- Lock-up No.[particulars withheld]Kibirigwi market
- 105 ICDC Investment Company Ltd. shares a/c No. [particulars withheld]
- 350 Standard Chartered Bank Kenya Ltd. shares a/c No. [particulars withheld]

The testator further bequeathed unto the beneficiaries in full consideration of gifts I have given unto:

- WKM Plot No. [particulars withheld] Phase II Dandora.
- Plot No. [particulars withheld] Phase I Dandora Site and Service Plots purchased for him by the deceased.
- Kiine/Ruiru/[particulars withheld]
- Kiine/Kibingoti/Ngunguine/[particulars withheld]. Grace Njeri Mwangi
- Kiine/Kibingoti/Ngunguine/[particulars withheld] Kibirigwi Market.

This according to D.W. 2 were not being distributed but were included to show what some of the beneficiaries had been gifted. It was for the purpose of information. The objector was contesting the form of the Will and particularly why it included properties which had been given out and were in the names of the testators children. That in my view is not a ground to invalidate the Will. The testator included for information properties he had gifted to his children in his life time which the protestor admitted. It is not a ground to invalidate the Will.

13. Finally the Court has to determine the validity of the Will. Section II Law of Succession Act provides:

“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) Supra.

There are four main requirements to the formation of a valid Will:-

(a) The Will must have been executed with testamentary intent;

(b) The testator must have had testamentary capacity;

(c) The Will must have been executed free of fraud, duress, undue influence or mistake; and

(d) The Will must have been duly executed.

A testator has power to dispose of his property as he pleases and the Court is bound to respect those wishes as long as they are not repugnant to the law and he does not leave out some dependants and beneficiaries. As seen above, the testator had capacity to make the Will, he appended his signature in the presence of two witnesses and no dependant has claimed that they were left out of the Will. Consequently, the Will dated 14th June, 2003 was properly executed by the testator and conformed with the formal requirements under Section 11 of the Law of Succession Act.

14. The Conclusion

The protestor has not discharged the burden to prove that the deceased had no capacity to make a valid Will owing to sickness. The deceased testator made a valid Will which was witnessed by two witnesses one of them D.W. 1 who gave cogent and sufficient evidence to establish that the deceased signed the Will in his presence and he did see him sign. The Will fully complied with the provisions of Section II of the Law of Succession Act. No material was laid before the Court upon which the Court can invalidate Will made by the deceased on 14th June, 2003. My determination on the issue which parties were seeking determination, that is, the validity of the Will, is that the Will is valid. The Petitioner is at liberty to move the Court for the confirmation of the grant. I award the costs to the Petitioner.

Dated and delivered at Kerugoya this 12th day of July 2018.

L. W. GITARI

JUDGE