REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO. 58 OF 2016

IN THE MATTER OF THE ESTATE OF SARASTINO M'CHABARI

M'UKABI alias CHABARI MUKABI (DECEASED)

AND

MARGARET KARIMI CELESTINO.....PETITIONER

VERSUS

JOHN NJERU MBARE.....1ST PROTESTOR

DAVID MUGENDI MBARE.....2ND PROTESTOR

GEORGE MUNENE MBARE.....3RD PROTESTOR

J U D G M EN T

1. This cause relates to the estate of the late **SARASTINO M'CHABARI M'UKABI Alias CHABARI MUKABI** (deceased) who died on 3rd August, 2015 domiciled at Kiangondu within Tharaka Nithi County. According to the petitioner, Margaret Karimi Celestino, the deceased died testate leaving behind the following dependants, namely:

(i) Grace Ciamaru Mbare (spouse)

(ii) Joyce Njeru Mbare

(iii) John Njeru Mbare

(iv) Margaret Karimi Celestino

(v) Albert Gitonga Mbare

(vi) George Munene Mbare &

(vii) David Mugendi Mbare

2. The assets comprising the estate as per the petition filed are listed as follows:-

(i) L.R. Karingani/Mugirirwa/583

(ii) Karingani/Mugirirwa/57

(iii) Karingani/Ndagani/895

(iv) Karingani/Ndagani/655

(v) A/C NO. 1148459855 KCB Chuka Branch

3. The petitioner herein was appointed the adminsitratrix/executor of the will of the deceased herein on 11th July, 2017. Thereafter John Njeru Mbae filed an affidavit for protest on 14th November 2017 while David Mugendi also filed another affidavit of protest sworn on 16th November 2017. Both Protestors were challenging the validity of the will on the following summarized grounds namely:-

(a) That the deceased made an error by mentioning Robert Gitonga Mbare who is an unknown person.

(b) That the deceased was unwell at the material time the will was purported to have been made.

(c) That the witnesses to the will are unknown to the family.

(d) That the will left out certain properties owned by deceased.

4. This court directed that the question of validity of the will in this cause be canvassed through *vivo voce* evidence. The petitioner's first witness, Peter Mutegi Mutani (PW1) an Advocate of this court came to this court and testified that he knew the deceased herein well as he was a client to him. Mr. Mutani further stated that the deceased went to his office sometime in January 2013 and asked him to prepare a will for him which he did. He asked him to come with two witnesses which he did on 12th January, 2013 and he named the witnesses as Jacinta Joseph and Bernice Muthoni. Mr. Mutani further testified that the deceased was literate and read the will in English and explained the contents of the will to his witnesses in Kichuka before appending his signature in the presence of the two attesting witnesses, who also appended their signatures. He confirmed that he also signed the will and confirmed that the same will is the one dated 12th January, 2013 filed in this cause and that the deceased attached a copy of a Mutation Form on the will. According to PW1,the testator at the time of writing his will was in good state of mind and excellent health. He conceded under cross-examination that he did not write down the ID numbers of the attesting witnesses as he did not see the need/necessity at the time.

5. The petitioner, Margaret Karimi Sarastino (PW2) testified and told this court that she did not know initially that the deceased had left behind a written will until she was approached by Mutani Advocate and informed of the existence of the will. She further told this court that out of the six siblings only two are protesting and faulted John Njeru for being uncooperative and having frustrated their father's intention of sub diving his land by placing caution on it. She asked this court to have the will of their father respected as the signature on the will as well as mutation form according to her belonged the deceased.

6. Bernice Muthoni (PW3) testified and confirmed that she witnessed the deceased execute his will before Mutani Advocate at this office. He further confirmed that she was present together with Jacinta Joseph when the deceased executed his will and that they also appended their signatures as witnesses.

7. On the other hand, John Njeru Mbare (DW1) testified and told this court that he was objecting to the will because the will excluded some properties like Tigania/Ndunyu/Barikui/2562 and some bank accounts. It was his view that his late father could not have left out those assets in his will if he had made it. He further testified that parcel No.655 had not been subdivided holding that the properties mentioned in the will were non existent. He contended that the mutation was never registered and faulted the advocate who drew the will for conspiring to create a unit after the death of the deceased.

8. David Mugendi (DW2) on his part denied having seen any will left behind by the deceased. He pointed out the will contained an error by describing Albert Gitonga as Robert Gitonga. He further stated that the deceased's health deteriorated from 2011 and used to walk with an aid of a stick. He further told this court that there is a rift in the family which began when he demanded to be given land by his late father and that as a result bad blood developed between him, John and Munene on one hand and their mother, Margaret and Albert Gitonga on the other. He reiterated that there was no child in their family by the name Robert Gitonga and doubted the authensity of the will on that account and also the fact that some properties comprising the state were left out.

9. George Munene Mbae (DW3) also testified and denied having seen the will before claiming that he first saw it in court. He stated that the will was not genuine as the signature appearing on it did not belong to his late father. He also told this court that he was one for the sons who had sued their father (deceased) for refusing to give them land. He further stated that their late father wanted to subdivided his land in way that was not acceptable to them. He added that the matter was pending in ELC court when their father passed on. He conceded that their relationship with their late father sored after they sued him in court.

10. The issue for determination is this cause is whether the will filed in this cause dated 12th January, 2013 is valid or not. It must be noted that the law allows people to freely will away their properties. **Section 5(1)** of the Law **of Succession Act** of underscore testamentary freedom of any person. The provision states;

"……. any person may dispose of all or any of his property <u>in a manner he deems fit</u> and the testator may change his mind at anytime before his death as to how he intends that his property should be disposed of." (Emphasis).

A person is therefore at liberty in law to bequeath any of his properties to any one he wishes be it his children, spouse, girlfriend, boyfriend, grandchildren, friends or even charity so long as the property belongs to him .

11. It has been contented that the will dated 12th January, 2013 herein is not valid for the following reasons namely;

(i) That the deceased was unwell at the material time.

(ii) That the will left out certain properties

(iii) Misdescription of a name of a beneficiary.

(iv) That the will includes non-existent properties.

12. The formal requirements of a valid will are provided under **Section11** of the **Law of Succession Act** which provides:-

"No written will shall be valid unless-

a) the testator has signed or affixed or it has been signed by some other person in the presence and by the direction of the testator.

b) the signature or the 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 acknowledgment of his signature or mark, or of the signature of that person; and each of the witnesses must sign the will in the presence of the testator, but it will not be necessary that more than one witness be present at the same time and in no particular form of attestation shall be necessary."

13. From the above four main requirements to the formation of a valid will can be deduced namely:-

a) The will must have been executed with testamentary intent.

b) The testator must have had capacity to make the will.

c) The will was executed out of free will free from duress, fraud, undue influence or mistake.

d) The will must have been duly executed and attested.

14. Now looking at the will before this court and applying the above principles this court finds that;

a) The will was executed by the deceased herein with testamentary intent well illustrated by P.M Mutani, learned counsel drawing the will.

b) The deceased had capacity to make the will as no evidence to the contrary has been laid before. (I will get back to this point herebelow particularly on where the burden of proof lies.)

c) The deceased executed/signed the will out of his free will without undue influence or duress as illustrated by PW1 (Mutani advocate) and one of the attesting witnesses Bernice Muthoni (PW3)

d) The will was duly executed by the deceased and attested by two witnesses in the presence of Mutani Advocate as can be seen from the will and confirmed by Mr. Mutani and Bernice Muthoni.

15. On the question of burden of proof, the law presumes that a testator has capacity to write a will that is to say that he was of sound mind and was not under any undue influence. In the case of ***Allan Aluoche Otwak -vs- Florence Achieng Siambe & Another [2007]*** Martha Koome J held a follows citing Halsbury's Law of England 4th Edition Vol.17 paragraph 903

"***General burden of proof. Generally speaking, the law presumes capacity and no evidence is required to prove the testator's sanity, if it is not impeached. A will, rational on the face of it and shown to have been signed and attested in the manner prescribed by law, is presumed, in the absence of any evidence to the contrary, to have been made by a person of competent understanding. However, it is the duty of the executors or any other person setting up a will to show that it is the act of a competent testator, therefore, where any dispute or doubt exists as to the capacity of the testator, his testaments capacity must be established affirmatively. The issue of capacity is one of facts, the burden of proof of sanity is considerably increased when it appears that the testator had been subject to previous unsoundness of mind."***

16. The Objectors/protestors in this cause have not established any basis to show that the deceased herein was suffering from a disease of the mind. The fact that he was reported to be walking with the aid of a walking stick could be symptomatic of old age (He was over 80 years old) but certainly it does not show that his inability to walk without a walking stick had anything to do with his testamentary capacity.

17. This court finds that the protestor's claim that the testator in this cause was ill when he made his will is not supported by evidence. Nothing was tendered by the protestors/objectors to prove their allegations when the burden, as observed, above was upon them. It is a principle of law coded under **Section 107** of the **Evidence Act** that whoever alleges must prove. The objectors/protestors' objection on the will from the evidence placed before me appears misplaced because based on what they told this court, it is clear that the protestors/objectors have always harboured illusory feeling of entitlement on the estate even during the lifetime of the deceased which perhaps explains why

they took their late father to court in an attempt to compel him to give them (objectors) a share of his estate. Though this court does not wish to comment on the merits or demerits of actions the protestors took for want of jurisdiction, their actions to object to the will of their late father appears to be driven more not because of the validity of the will but it is more driven by the same illusory feelings of entitlement and is aimed at attaining the same objective shown when they sued the deceased during his lifetime. The protestors told this court that they respected their late father (deceased) but their actions against him in his lifetime and in death reveals anything but respect.

18. The objectors have also attacked the validity of the will on grounds that there is misdescription of one beneficiary named Robert Gitonga instead of Albert Gitonga. However a perusal of the provision of **Section 22** of **Law of Succession Act** and more specifically **Rule 23** of the First Schedule in the **Law of Succession Act** provide as follows:

> ***" where the words used in a will to designate to describe a legatee or class of legatee, sufficiently show what is meant, an error in the name of description shall not prevent the legacy from taking effect, and it shall be sufficient for this purpose if the legatee, or class of legatee. is so designated as to be distinguished from every other person or class."***

The will in this cause refers to a legatee named 'Robert Gitonga Mbare but even the objectors at the back of their minds know that the deceased meant Albert Gitonga who is his son and therefore it is not difficult in the circumstances to know the intent of the testator. Under **subsection 2** of the same rule;

> ***" A mistake in the name of a legatee may be corrected by a description of that legatee and a mistake in the description of a legatee may be corrected by the name of that legatee"***

A will cannot be invalid merely on grounds of error of description of either a legatee or some property so long as the intention of the testator can be clearly deduced and in this cause all legatees can be identified clearly and there is no ambiguity that prevent the will from taking effect.

19. The objectors other ground that some properties were let out of the will does not affect the validity of the will because any prove that the deceased left out some properties undistributed in his will, will be treated as an intestate disposition and the deceased will be treated to have died partially testate and partially intestate. The objectors are at liberty therefore to place evidence before this court on the existence of any other property or properties belonging to the deceased left out by will and this court will apply to the law applicable to intestacy and distribute the left out properties accordingly. Otherwise for now this court finds that the deceased in this cause had capacity and competency to make a will and indeed made a will filed herein because there is no evidence to show that he lacked capacity. The conclusion therefore is that the deceased had mental and physical capacity to write a will and the will he wrote and produced in this court is valid in law. It must be respected and is enforceable in law.

20. In view of the above findings and in view of the testator appointed as executor of his will, that executor as appointed the administrator on 11th July 2017. He is given liberty to apply and carry out investigations on all the properties mentioned by the protestor (David Mugendi) in his affidavit sworn on 16th November, 2017 and if the properties form part of the estate, he should move this court accordingly as by the findings of this court regarding properties left out in a will.

This court at this stage finds it desirable not to make any order as to costs. The executor/administratrix is directed to move expeditiously in order to bring this matter to an end for the ends of justice to be met.

Dated, signed and delivered at Chuka this 13th day of December, 2018.

R.K. LIMO

JUDGE

13/12/2018

Judgment signed, dated and delivered in the open court in presence of Fatuma for Petitioner and in presence of all the Objectors.

R.K. LIMO

JUDGE

13/12/2018