



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Succession Cause 2697 of 1995**

**HILDABERTA MUKHANYI JEKI (DECEASED)**

**HEDWIG YOHANINE KUBUKOSYA**

**BRIAN JOHN HAWKES..... PETITIONERS**

**VERSUS**

**GEORGE JEKI.....OBJECTOR/CROSS PETITIONER**

**RULING**

The case before me is a Succession matter concerning the estate of Hildberta Jeki. She died Testate on the 8th of May, 1995 at Mater Hospital.

She was survived by her husband.

George Jeki

and three children:-

Syvia Yvonne - daughter

George Kevin Jeki - son

Sony Kibukosya - son

The two executors of her estate filed this present succession cause praying that they be issued with letters of grant with will annexed on the 17<sup>th</sup> October 1995. On the 24<sup>th</sup> of November, 1995, 2

Hon. Justice Okubasu granted Orders for a notice in the Kenya Gazette to issue.

The two executors to the will are both advocates of the High Court of Kenya and practice in the same firm of advocates. The first executor is related to the deceased as a sister.

The husband to the deceased then filed on the 17<sup>th</sup> of January, 1996 an Objection to the making of the grant to the two executors.

It is this objection that is the subject matter of this ruling. The husband will be referred to as the Objector

herein. The executors as respondents.

The main grounds of his objections was that there was-

- a) Intermeddling by the executor of the estate
- b) Concealment of material facts
- c) The executors were interested parties and therefore not impartial persons.

He also filed a cross-petition after receiving a notice from the registrar to do so in which he prayed that it be he who ought to petition for the said letters.

He stated in his cross-petition that he had been married to the deceased from 1978 to her untimely death on the 8th of May 1995.

There were three issues of the marriage and he required that they be provided for.

The will failed to disclose that he was a joint owner of a house mentioned in the list of assets (P&A 78). It failed to disclose that the executor had obtained funds for Unep.

As he was a dependant under Section 26 of the Law of Succession Act he was not adequately provided for.

In reply to the cross-petition the executor stated that the couple had been separated and as such the two were no longer cohabiting together as man and wife (This reply did not comply with order 18 r 5C pr as to the format required to plead the allegations). The parties nonetheless went for directions before Hon. Lady Justice Aluoch. No formal orders were made for *vivo voce* evidence but the parties were requested to file their agreed issues.

These were as follows:-

- 1) Whether the deceased made a valid will?
- 2) If the deceased left a valid written will providing for executors should the objection be appointed administrator?
- 3) Whether the clause (No.5) in the will purporting to disinherit the objector is valid?
- 4) Whether the executor named in the alleged will intermeddled with the estate of the deceased?
- 5) What are available assets of the estate?

I proceeded to hear the parties under *vivo voce* evidence.

The facts that came out from the objector is that he was still married to the deceased was her lawful husband at the time of his death. From this - as such he was surprised that there was a will that purported to disinherit him from estate of the deceased. He did not believe that the said will was genuine. He was under the impression that the will was one which should have been signed on each page as required by law. The Will itself had some discrepancy for instance the two names of the deceased was not correctly spelt nor were the names of two children.

The first respondent/executor had given an affidavit that also had discrepancy with the Will. The actual period said that they had been separated was said to be two years and another three years.

He questioned in his cross-examination of the second executor/respondent on his impartiality to draw up the said will.

The executor/respondent No.2 gave evidence to identify the will stating that he is an advocate of the High Court of Kenya, in his practice he does a lot of Wills. That he drew up the present Will in this Succession Cause. He identified the same as the one drawn by him. He nonetheless stated that there was no requirement in Law for the deceased to sign all the pages - in this case the Will had only two pages.

He also stated that there was nothing wrong with a wife who was separated from her husband to disinherit him. When he drew the Will he was not present when the same was signed.

It was the executor/respondent No.1 who took the same to be signed.

The evidence of the respondent No.1 and from the affidavits is that she was the sister to the deceased. She was also the first named executor, and an advocate of the High court of Kenya. She was in partnership or employment with the second executor.

She took the Will that had been drawn by the respondent No.2 to the deceased. She, the deceased was then admitted in hospital at Kakamega. The deceased then signed the same.

From the document it is noted that those who witnessed the signature of the deceased were two witnesses. The objector implied and or said that the document required to have been proved by the two witnesses who had witnessed the signing of the Will by the deceased. This was never raised by the objector that he would require the two witnesses and that he never pressed this point except to mention it in passing.

Further facts by the respondent No.2 was that the deceased and objector had not been living as man and wife since the 24<sup>th</sup> of April 1993 or earlier. She brought to the courts attention a letter written by the objector in his handwriting and which was not disputed by him of that date namely 24<sup>th</sup> April 1993 that stated:

"Mukianyi,

I want you out of this house within the next twenty four hours without fail, this is not subject to any discussion whatsoever.

WARNING:

Do not try to lecture or insult me on this one as you are fond of.

The consequences will be very regrettable.

Do not try anything. I am ready and fully prepared. Just leave if you still have any wisdom left in you.

Please kindly move out now. I am serious, too serious. Enjoying yourself whenever you will be.

JEKI

On 24.4.93 at 10.15 p.m

(Emphasis written in red by the objector)

The deceased on receipt of this letter moved to the Mariakani (South B) area where she had her father's house that she moved to live in.

The objector all along in his cross-examination by the advocate for the respondent maintained that he and his wife were still together. That they still spoke and saw each other.

His witness, his first born daughter on the other hand stated that her parents had a stormy marriage. That her mother would often come to share her bedroom with her. (The house was three bedroom with a room for her brothers, her parents and another for herself).

She stated in cross-examination by the objector that the reasons for her mother leaving was due to her grandmother had said that the objector was impotent. Her mother went to live in South B - Mariakani to sort this matter out.

I believe that P.W.2 the daughter to the objector may now perhaps have been the real reasons for her mother's departure from home.

The reasons she came to give evidence is that just before a week her mother died she had told her that she was going to die. That she would take care of the other children. At no time did her mother mention a Will. If there was a Will then she would have been told.

The 1st Respondent in her evidence said that her brother in law was an unpredictable man. At one time he would agree to one thing and do another. It is he who caused the delay of the administration of the estate.

As to proof of marriage, the objector stated that after the deceased's death, there was a meeting whereby he was made to go into an agreement for the completion of the payment of a dowry. This he duly signed and the same was witnessed (see Ext. P1).

If there was no marriage, then this agreement could not have been entered into.

The 1st respondent stated that she was not aware of the agreement nor did it concern her, nor was she party to it.

My task in this ruling is to establish according to the agreed issues above whether there is a valid Will?

Unfortunately the advocate for the respondent came into court with no list of authorities or case law on any of the points to be proved.

According to THEOBALD on the Law of Wills 10th Edition by J.H.C. Morris. (A library copy of 1950. No new copy seems to be available after 49 years in the High Court Library). It states that "No Will can be valid of which the testator does not know the contents. A Will prepared in accordance with the testator instructions is valid" Section 5 of the Law of Succession Act Cap. 160 deals with the capacity of making a Will.

Namely, a person who can make a will must be of a sound mind. He must not be a minor.

"Section 5(2) states "a female person, whether married or unmarried has the same capacity to make a Will as does a male person" it has been brought out. Theobald (supra) that there must not be undue influence in the preparation of the will. For instance a will prepared by a person taking benefit under it raises suspicions.

Evidence of some actual undue influence must be proved. For instance fraud or concern must be shown. That person must have been of feeble mental capacity or weak state of health.

These are the points, I believe, the objection ought to have brought out in his case but had not. He did attempt to bring out the fact that the two executors respondents are advocates of the High Court of Kenya, they work together, they live together and as such (according to his petition) would have an influence on the administration of the will.

The mark of the testator is sufficient signature when we look at the signature on the will. It seems that the respondent No.2 stated that it is not a requirement of the law that the testator does this.

Thus a signature to each page of the will where the last page is left unsigned, is not prima facie a sufficient execution See:-

Sweatband V. Sweatband 1865 45W and T 6.

I believe on the face of it that the will before me is valid what the objection seems to question is the administration of the said estate by the two executors. He also questions his disinheritance.

I believe as long as the executors do not benefit from the said estate they are entitled to administer the same.

The respondent No.1 did state some funds were sent to her but she knew no reasons as to why this was so. There were funds for the children. All these came from the deceased employer but was not proved in court.

Due to the very strong relationship with the deceased and in the light of his letter of 24.4.93 I do not find that the objection should be appointed an additional administrator. I believe the deceased purported to disinherit the objector from her will she is entitled to do so.

On the question as to whether the executors are intermeddling with the property, I do not see this. No grant of letters have been issued. The estate has been at a stand still in the last 4 years awaiting the finalization of objections raised by the objector.

The parties *never* addressed me on issue No.5 as to what are the available assets. I believe that all the deceased had was money in various bank accounts, and from the evidence now before this court a half share of a house LR No.37/264/18 Mai Mahiu road.

I wish to just add that the objector is never and can never be a dependant of his wife. Unless under special circumstances such as an accident or illness. It is a wife who is dependable on her husband. (In Kenya this is not so as often women support their husband or their children. I did not see this happening in this case).

The objector is the one who should support his children in all manner including educating, clothing and sheltering them. The wife's assets and or money left is for the children and should be for their future use to build themselves and not that of the husband and fathers.

For example if a man remarries, the issue of the property doesn't arise. If a woman whose husband is deceased is remarried she loses all the life interest she has in the property of the first husband.

In this case it transpired that the applicant objector had a girlfriend but denied having any children with her during the subsistence of the marriage with the deceased.

Two of the children *are* said to be adults now at the age of majority they would be entitled to their share.

I hereby dismiss this objection with costs to the two respondents.

Dated this 12th day of November, 1999 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**