IN THE COURT OF APPEAL
AT NAIROBI

(CORAM:J.E. GICHERUR.S.C. OMOLOP.K. TUNOI)

CIVIL APPEAL NO. 128 OF 1995

ELIZABETH KAMENE NDOLO…….APPELLANT

AND

GEORGE MATATA NDOLO…..…….……RESPONDENT

(An Appeal from the ruling/order of the High Court of Kenya at Nairobi (Lady Justice Owuor) dated the 15th day of October, 1993

in

H.C. SUCCESSION CAUSE NO. 106 OF 1985)

****

JUDGMENT OF THE COURT

The late Major General Joseph Musyimi Lele Ndolo (hereinafter called "the decease") and who was at one time the Chief of the General Staff of the Armed Forces of the Republic of Kenya died on 6th April, 1984. He was survived by three widows namely, Alice Katiwa Musyimi, Rose Mutinda Musyimi and Elizabeth Kamene Ndolo, the appellant herein. The deceased was alleged to have died testate, leaving behind a written will in which he appointed the appellant and one Jackson Mulwa as the executors and trustees of his will. In that will, the deceased made no provisions at all for Alice and Rose. In February 1985, the appellant applied for a grant of probate of the will of the deceased. It appears from the the superior court record that both Alice and Rose objected to the appellant's application for a grant but on 6th November, 1986, Butler-Sloss J, as he then was, dismissed their objection and made a grant of probate to the appellant. The learned judge, however, gave leave to Alice and Rose to file an application under section 26 of the Law of Succession Act, "the Act" hereinafter, so that reasonable provisions could be made for them as dependants of the deceased. Such an application was in fact filed and was subsequently heard by Commissioner of Assize, Mr. A.B. Shah, as he then was, and by a ruling dated 19th May, 1988. Mr. A.B. Shah ordered, inter-alia:-

"1. That the estate of the deceased do transfer to the applicants (Alice and Rose) the two parcels of land already referred to; and

2. That the estate do pay to the applicants during their respective lifetime a sum of Kshs.1,000/= from 1st May, 1984."

The two parcels of land referred to in the Commissioner's ruling were Title No. Mbitini/Ngetha/101

occupied by Alice and Title No. Mbitini/Ngethat/36 occupied by Rose. It is clear from the record of the superior court that these were small pieces of the ancestral land owned by the deceased. They were really of no use to anyone. Again it is clear from the record that the order for payment to Alice and Rose of monthly allowances of Kshs.1,000/= was not complied with. Owuor J (Mrs) who heard the dispute now the subject of the appeal before us expressly found in her ruling that:-

"The sum of money ordered (by A.B. Shah) was never paid and there was evidence that one of the widows died in a terrible state."

None of the parties to this appeal challenged that finding before us. These matters, however, must await their consideration at the appropriate stage. But we have brought them up because of what follows next.

By a "SUMMONS FOR REVOCATION OR NNULMENT OF GRANT" brought under section 76 of the Act and dated 10th April, 1989, George Matata Ndolo, the respondent herein sought four orders from the High Court and those orders were and we quote:-

(a) THAT the Grant of probate to ELIZABETH KAMENE NDOLO made on the 6th day of November, 1986 be revoked or annulled (sic).

(b) THAT the confirmed grant of letters of Administration of the Estate of the late Major-General JOSEPH MUSYIMI LELE NDOLO be granted to the Applicant GEORGE MATATA.

(c) THAT Elizabeth Kamene Ndolo be ordered to deliver and transfer to George Matata Ndolo all assets and properties of the estate presently under her hands or control.

(d) THAT all persons, by themselves or by their Agents, Employees or Servants, save members of the deceased family and their employees, be restrained from trespassing and remaining on LR. No. 1756 & 1757, SULTAN HAMUD, popularly known as Mawani Farm until the final determination of this succession cause."

As the learned Judge correctly pointed out in her ruling the real valuable asset of the estate is this farm which she found to measure some 9,000 acres. The 4th prayer sought in the summons for revocation was obviously aimed at thwarting the appellant from selling 1,000 acres out of the farm. The respondent in his summons set out a total of eight grounds for revoking the grant but as matter turned out in the High Court, only the first three were dealt with by the Judge. The parties consented to that course and the other five grounds were left in abeyance to abide the decision of the Judge on the first three grounds. Those grounds were that -

"(i) the proceedings to obtain the grant based on the deceased's alleged will were defective in substance.

(ii) the grant was obtained fraudulently by the making of a false statement that the late Major-General Joseph Musyimi Lele Ndolo had made a written will.

(iii) The grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, namely that the deceased had made a valid will."

At the hearing of the summons for revocation or annulment these three issues were further compounded into one, namely that the document produced before the court and purporting to be the last will an testament of the deceased was nothing of that kind because the deceased never signed it. That was the burden of the case put before the learned Judge by the respondent and upon which the Judge was called to pronounce. The learned Judge resolved that issue by holding that the deceased never signed the document and that that being so, the deceased died intestate. She held that the purported will was a forgery but having done so, she did not proceed to say what was to happen to the estate of the deceased.

Right from the start of this judgement, we set out the date when the appellant applied for a grant of probate of the will of the deceased; it was in February 1985. The other two widows Alice and Rose

objected to the application an this was in March 1985. We are unable to tell the grounds upon which their objections were based, but those grounds could not have been that the will had not been signed by the deceased and was accordingly not his will. But even if such had been the case Butler-Sloss, J. rejected the objections on 6th November, 1986 and granted to the appellant the probate of the deceased's will. The judge proceeded to give to Alice and Rose leave to make an application to the court under section 26 of the Act and the application was actually made, heard and determined upon its merits. That could have been done only on the basis that the deceased's will had been valid, but had failed to make reasonable provisions for the two widows. In these circumstances, it is a matter of surprise to us that the present respondent who is in fact the son of Rose by the deceased should in April 1989, some four years after the application for a grant by the appellant, lodge his summons for the nullification of the grant on the basis that the deceased had not signed the will. Why was this point not raised during the objection by Alice an Rose? And if it was raised but over-ruled by Butler-Sloss, J. why was no appeal lodged against that ruling? It is hardly reasonable to think that the respondent was unaware of the dispute over the will between his mother Rose and the appellant. We are cognisant of the fact that section 76 of the Act does not set any time limit within which a summons for revocation or annulment of a grant can be taken out. But the delay by the respondent in the circumstances of this appeal gives to this court the clear impression that the respondent was merely fishing for some plausible excuse upon which he could have the grant to the appellant revoked or nullified. It is noteworthy that on 18th October, 1994, when this dispute was obviously pending before this court, he took out another summons, purportedly under section 35 of the Act seeking a declaration from the High Court to the effect that the appellant is not a wife or widow of the deceased. We think we have said enough on this aspect of the matter and we shall now move to the more substantial aspects of it.

What made the learned Judge find, so late in the day, that the will in dispute before her was a forgery?

We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases. Mr. Billing who led for the appellant before us contended that the learned trial Judge did not appreciate upon whom the burden of proof lay and the standard of that burden. We think there is no substance in that contention. While the learned Judge did not specifically direct herself on the question of where the burden lay and the standard of the burden, it is clear to us from the tone of her judgment that she was perfectly alive to these issues for she specifically says in her judgment and we quote her:-

"Similarly, it is not the applicant's case that it was the Respondent who forged the document in court to my mind the furthest the applicant can go in these proceedings is to allege and prove to the satisfaction of this court that the deceased did not sign the document in court. The issue of who did it and for what reason and what other step should have been taken in a criminal proceedings are matters which are very serious but not before this court……."

It is clear from the passage that the learned Judge was aware of what the respondent had to allege and prove; she was also aware that the burden of proof required was "to the satisfaction of this court" and Mr. Billing conceded before us that proof to the satisfaction of the court is wholly different from proof upon a balance of probabilities. The former is obviously higher than the latter.

In support of his contention that the will was a forgery, the respondent called as a witness one Hezron Wamalwa (P.W. 1) and Chief Inspector of Police John Nderitu Theuri 9P.W. 4). The respondent himself also gave evidence as P.W. 3 and the burden of his evidence was clearly that he submitted the photocopy of the will in issue to a document examiner (P.W. 1) who found that the deceased had not signed it. P.W.1 himself had been a document examiner with the Government of Kenya for some 25 years, but by the time he examined the alleged will of the deceased (around 17th March, 1989) he had retired from the public service and was in private practice. He swore repeatedly that the signature on the will was not hat of the deceased. P.W. 4 was the police officer to whom the respondent reported the alleged forgery of the will. He also submitted the document to an examiner, one A.N. Munga. Munga was not called to give

evidence but P.W. 4 produced his report which is to be found at pages 169 to 170 of the record of appeal.. Munga's report agreed with that of P.W. 1. In support of her contention that the will was not a forged one, that is, that it had been signed by the deceased the appellant had called three witnesses. These were Mr. James Fredrick Hamilton 9D.W. 1), Miss Rosemary Alke Gardner (D.W. 2) and Mr. Mackenzie (D.W. 3). Who was and still is an advocate of the High Court of Kenya and at the time he gave evidence before the learned Judge, he had been practising law for some 51 years. The deceased had been his client and he told the Judge it was him who had drawn up the will in dispute before her. The typed proceedings containing the evidence of D.W. 1 is very confused and obviously not correct but we think we can do no better than to quote Mr. Hamilton verbatim. He is recorded as saying in examination-in-chief:-

"……. The late Major-General Ndolo was a client of mine for many years. I remember preparing a Testamentary Instrument under his instructions. Sometime this year I saw the angle (copy?) of the will but I can't remember who presented it to me. I can see this photocopy of the Will MFI D(i). It is the one I prepared. I recall instructions from the deceased to prepare the document. There are some alterations on page (2) par. (5) (d). The initials in the margin are of the late General Ndolo of Miss Gardner and over the other wives. Also of Mrs. Mweu (Muchiri?) who was working in our office at that time. Taking (H) they are the same hand. I was present when the initials were being placed there. Page (2) letter (d) the words "daughter Magdalene". That is my handwriting.

The signature is General Ndolo's. I saw him writing that signature. The heading 14th May is General Ndolo's. The other is Miss Gardner. She has been with me for approximately 20 years. The other is Mrs Mwalu's (Muchiri's) signature. I have not seen her for a number of years. I can't vouch for her. There…….note reads;……I sent the General a draft of the will with blanks in its. I was not clear on certain things. When he came in with it he said he wished to sign it and he completed the draft in my presence. He……the…….. …… the addition in the word manner."

As we have said this evidence as recorded is difficult to understand but the purpose of Mr. Hamilton's evidence is unmistakable. The deceased was his client for many years. The deceased gave him instructions to prepare a will. He prepared a draft with some blank spaces in it as he was not very clear over certain matters. He then sent the draft to the deceased. The deceased later came to Mr. Hamilton's office with the draft which he said he wanted to sign and Hamilton, in his own hand, filled in the blank spaces in the draft and the deceased and D.W. 2 put their initials on the margins obviously to authenticate Hamilton's handwritten portions of the will. D.W. 2 was Hamilton's secretary for some twenty years and she signed the will as an attesting witness. The deceased also signed the will and the second attesting witness was a Mrs.Muchiri who was not, however, called to testify. Mrs. Muchiri was also a secretary in the firm of M/s Hamilton Harrison & Mathews of which Mr. Hamilton was a partner. D.W. 2 identified her signature and that of Mrs Muchiri.

Finally, we must briefly refer to the evidence of D.W.1. He was a document examiner still in public service. He also examined the signature in the disputed will and his conclusion was that the signature was that of the deceased. We do not subscribe to Mr. Muigua's contention that D.W. 1's evidence agreed with that of P.W. 1 and Munga. Mr. Muigua obviously misunderstood the evidence of D.W.3.

This was the state of the evidence before the learned Judge and as we have said, having analysed that evidence, she came to the conclusion that the deceased had not signed the will. This was clearly a finding of fact and an appellate tribunal like our court will not readily interfere with a trial judge's findings of fact unless it be shown that there is no evidence to support a particular conclusion, or that the judge has failed to appreciate the weight or bearing of circumstances admitted or proved or that the judge has plainly gone wrong - see PETER V SUNDAY POST LIMITED [1958] E.A. 424. Of course, it must also not be forgotten that this being a first appeal to this Court, we are entitled, indeed duty bound, to review the evidence to determine whether the conclusions of the learned Judge should stand, though we must bear in mind that we have neither seen nor heard the witnesses as did the Judge.

D.W.1 and D.W. 2 swore that they saw the deceased sign the will. The assertion by D.W. 1 that the deceased was a long-time client of his was never challenged. The learned Judge herself expressly found that the deceased went to D.W. 1's office and asked D.W. 1 to prepare a will. D.W. 1 said he did so and he identified a copy of the will in court and identified the signatures of the deceased and D.W. 2 on it. He also identified his hand-writings on it. D.W. 2 had been a secretary to D.W. 1 for some twenty years and it could not be reasonably said that D.W. 1 would not be familiar with her signature. D.W. 2 herself identified her signature on the will. D.W. 1 was neither a beneficiary under or an attesting witness to the will so that even if the evidence of D.W. 2 required corroboration as the learned asserted it did, the evidence of D.W. 1 could not possibly require such corroboration. The learned trial Judge obviously failed to appreciate that if the evidence of D.W. 2 required corroboration because she was an attesting witness, Mrs. Muchiri could not have provided such corroboration if she had been called because she was also an attesting witness and her evidence would have fallen in the same category with that of D.W. 2. Evidence which itself requires corroborative cannot be corroborative of other evidence. The Judge did not, in fact, disbelieve D.W.1 and D.W. 2. On the contrary she said in her ruling and we quote her:-

"……..I must state here and now that at no time did I form the impression that these two witnesses (i.e. D.W. 1 and D.W. 2) were not telling me the truth. The impression I formed was that the matter had taken so long that none of these two were quite sure whether the General ever came to their office for the sole purpose of signing a will. Mr. Hamilton was not sure whether the attestation was done in Miss Gardner's office by the General. Miss Gardner's evidence was also not clear where this was done. Secondly, there is the issue that the General was a long standing client of Mr. Hamilton. It is quite obvious that Mr. Hamilton could genuinely be confused as to whether the General ever signed the will. I have not doubt in my mind that the General did give some instructions for the will to be drawn. I have my doubts based on the evidence before me that he never actually signed the same."

We agree with the learned Judge that D.W. 1 and D.W.2 could not have been liars in the matter; there was absolutely no possible reason for their lying. We also agree with the learned Judge that by the time the two witnesses testified before her, the events they talked about had taken a very long time and there was a possibility of forgetfulness arising. But we still ask ourselves: Where could the confusion the learned Judge talks about arise from? She agrees the deceased was a long time client of D.W. 1; she also agrees the deceased instructed D.W. 1 to prepare a will. D.W. 1 and D.W. 2 identified a copy of that will before here. They also identified the signature of the deceased upon it. D.W. 2 identified here signature upon it and D.W. 1 also identified D.W. 2's signature. Could it be said that the matter had taken so long a time that D.W. 1 and D.W. 2 could have forgotten what the signature of the deceased used to be? Could the matter have taken so long that D.W. 2 would have forgotten her own signature? And if it be accepted, as it must be, that D.W. 2's signature was on the document, what would she have been attesting when she appended that signature - the signature of the phantom forger of the will? We think the learned Judge did not appreciate the weight of these admitted facts and her conclusion from them was plainly wrong.

The evidence of P.W. 1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say"-

"Because this is the evidence of an expert, I believe it."

The evidence of P.W. 1 was nicely balanced by that of D.W. 3 and though P.W. 1 had support in the report of Munga, the matter could not be resolved by saying that D.W. 3 stood alone. The learned Judge was still duty-bound to say why she believed P.W. 1 and Munga and disbelieved D.W. 3. We note that when the deceased signed the will, he simply wrote all this names while all the known specimen signatures submitted for comparison with that in the will were all in shortened versions of the deceased's names. The difference was bound to be obvious. We have said enough, we think, to show that

The learned trial Judge plainly went wrong in rejecting the eye-witness account given by D.W. 1 and

D.W. 2 and preferring the expert opinion of P.W. 1. It is to be noted that at no stage was it ever suggested to D.W. 1 and D.W. 2 that they were mistaken as to the signature they identified as that of the deceased and that the deceased never signed any will before them.

We accordingly allow grounds five, six, seven, eight, nine and ten of the grounds of appeal. We set aside the Judge's finding that the will was not signed by the deceased and that it was a forgery and substitute therefor a finding that the will was signed by the deceased and was not a forgery.

That would have been the end of the matter before us, but we were asked or authorised by counsel on both sides to finally determine this dispute without referring it back to the High Court. We think we should do so and put an end to this very unfortunate wringling.

In his life time the deceased was a polygamous man married to three wives. Polygamy is a lawful institution in our country and it will probably taken some doing by Parliament to put an end to it. The seeds of the dispute were sewn by the deceased himself when he failed to make any provision in his will for his first two wives. This court must, however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is expressly recognized by section 26 of the Act which provides as follows:-

"Where a person dies after the commencement of this Act and in so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law is not such as to make reasonable provision for that dependant, order that such reasonable provision, as the court thinks fit, shall be made for that dependant out of the deceased's net estate."

This section clearly puts limitations on the testamentary freedom given by section 5. So that if a man by his will disinherits his wife who was dependant on him during his lifetime, the court will interfere with his freedom to dispose of his property by making reasonable provision for the disinherited wife. Or if a man at the point of his death gives to his mistress the family's only home and makes no reasonable provision for his children who were dependent on him during his lifetime, the court may well follow the mistress, under section 26, and make reasonable provision for the dependent children out of the house given to the mistress. So that though a man may have unfettered freedom to dispose of his property by will as he sees fit, we do not think it is possible for a man in Kenya to leave all his property for the maintenance and up-keep of an animal orphanage if the effect of doing so would be to leave his dependants unprovided for.

While the deceased was entitled to dispose of his property as he pleased, he was not entitled to leave his first two wives Alice and Rose without any reasonable provision for their maintenance. As we have said elsewhere in the judgment the Commissioner of Assize Mr. A.B. Shah, now a member of this Court, made some provisions for the two women but as the learned trial Judge pointed out in her ruling those provisions came to naught and Alice was said to have died in terrible poverty. We cannot allow that to continue and the only way we can think of to make reasonable provisions for all of the deceased's lifetime dependants is to do so according to the three house, each house represent a widow. We must, however, take into account the undoubted fact that the appellant herein was the deceased's preferred wife and we can only do so by allocating to her house a larger share of the deceased's net estate. And of course the only valuable asset in the estate is the Mawani Ranch which was said to be over 9,000 acres. 1,000 acres have been sold, leaving some 8,000 acres. There may still be livestock on the ranch but we shall not go into all those details. We accordingly order that out of Mawani Ranch, the appellant and her house shall receive 40% thereof while the houses of Alice and Rose shall each receive 30%. If there still are livestock on the ranch, they shall also be shared in the same manner and in case there should be any dispute over the question of livestock, we give to the parties leave to apply to the High Court to settle any

such dispute.

On costs, though we have allowed the appeal, we do not think it would be right for us to award costs to anyone. We accordingly make no order as to the costs of the appeal. These then, shall be our orders in this appeal.

Dated and delivered in Nairobi this 10th day of May, 1996.

J.E. GICHERU

…….

JUDGE OF APPEAL

R.S.C. OMOLO

……..

JUDGE OF APPEAL

P.K. TUNOI

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR