Dadhialla v Chaudri (Sued as Executor of the Estate of Gurdip Kaur Sagoo) & 2 others (Civil Appeal E309 of 2021) [2025] KECA 728 (KLR) (2 May 2025) (Judgment)

Neutral citation: [2025] KECA 728 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E309 OF 2021

PO KIAGE, LA ACHODE & WK KORIR, JJA

MAY 2, 2025

BETWEEN

HARVINDER KAUR DADHIALLA ..... APPELLANT

AND

MOHAMED MUNIR CHAUDRI (SUED AS EXECUTOR OF THE ESTATE OF GURDIP KAUR SAGOO) ..... 1ST RESPONDENT

AVTAR KAUR SAGOO ..... 2ND RESPONDENT

JASWINDER KAUR SAGOO ..... 3RD RESPONDENT

(An appeal from the Ruling and Order of the High Court, family division at Nairobi (Thande. J) delivered on 21st May 2021 in HC Succession Cause No. 386 of 2018)

JUDGMENT

1. The ideal outcome in succession matters, whether the deceased died testate or intestate, is attained when the family comes together to peacefully settle the liabilities and thereafter, distribute the Estate to the beneficiaries. Often however, family members fall into disputes which drag on for years in the courts, with each side seeking to convince the court that their version of the narrative is the true reflection of the wishes of the deceased. The story of the family before us in this appeal is no different.

2. The sooner the members of the public realize that courts have no magic wands to wave and establish which side of the family story is the truthful one, the better it will be for everyone. Usually the court will make a finding based on which party's version of the story is more believable on a balance of probability. (See the Court of Appeal decision in James Muniu Mucheru V National Bank of Kenya Ltd, CA Civil Appeal No. 365 of 2017 [2019] eKLR).

3. The dispute herein commenced with an application the appellant Harvinder Kaur Dadhialla, filed in the superior court against Mohamed Munir Chaudri (sued as an executor of the estate of Gurdip Kaur

Sagoo), Avtar Kaur Sagoo and Jaswinder Kaur Sagoo, the 1st to 3rd respondents respectively. The application was filed under Sections 4 and 26 of the *Law of Succession Act*, (the Act) and rules 45 (2), 59 and 73 of the Probate and Administration Rules, seeking orders that reasonable provision be made for her as a dependent of the deceased, out of the net Estate as the court thinks fit.

4. The grounds of the application were set out on the face thereof, and were supported by the affidavit of the appellant sworn on 6th December, 2019.

5. The version of Harvinder's story as can be gleaned from the application was that Gurdip Kaur Sagoo (the deceased) died testate on 27th October, 2015 and was survived by her daughter Harvinder, her daughters-in-law Avtar and Jaswinder, who are 2nd and 3rd respondents respectively, and Manjit Kaur Sagoo also a daughter-in-law.

6. Harvinder deposed that the deceased appointed her and the 1st respondent as the executors in the Will dated 4th November, 2011 and proceeded to provide for her daughters-in-law but did not provide for Harvinder. That during the deceased's lifetime, she did not give Harvinder any gift other than a cash gift of 200,000 pounds to cater for her children's education.

7. Harvinder listed the assets in the Estate of the deceased as follows: 1490 shares in Nanak Crankshaft Grinders Limited; LR No. 209/138/170; 3000 shares in Nanak Crankshaft Grinders (Eldoret) Limited; Barclays Bank PLC, Isle of Man sterling pounds 16,000; and L R No. 7788/4.

8. The second version of this story was presented in the replying affidavit sworn by Mohamed, the 1st respondent, sworn on 16th January 2020 in opposition to the application. He deposed that the Estate in its entirety was a bequest to the deceased from the Estate of her husband (Balwant Singh Sagoo (deceased)), vide Grant of Probate with written will on 19th May 2010 in Succession Cause No. 15 of 2010. That the bequest to the deceased by the husband was specific in the proviso that Harvinder had already been bequeathed and sufficiently provided for. It stated as follows:

> " I declare that during my life, I have already bequeathed and provided for my daughter, Mrs. Harvinder Kaur Dadhiala and the said daughter shall have no right to claim any benefit from my Estate or that of my wife's Estate".

9. It was averred that in constructing her Will and Testament, the deceased honored the clear will and intention of her deceased husband by excluding Harvinder and bequeathing the Estate to the sons through their respective Estates. That during the distribution of the deceased's husband's Estate, Harvinder who was cited as a dependent in the petition, never protested the clear terms of the Will. Further, that her exclusion was deliberate and was meant to benefit the other beneficiaries and therefore, her claim for provision was simply borne out of dishonesty and greed.

10. Avtar and Jaswinder lent credence to Mohamed's version of the story through their joint affidavit sworn on 30th March, 2021 in opposition to the application. They deposed that Harvinder benefited from the Estate of the deceased and that of the deceased's husband in the sum of Kshs.143,299,309, comprising of: £200,000 for which the parents executed a guarantee for the purchase of her house and it was realized and called in when she failed to pay the loan instalments as they fell due; Kshs. 6,500,000 that she was gifted on 18th November, 2011; £200,000 gifted on 1st November, 2012; £ 100,000 gifted on 11th December 2012; £100,000 gifted on 13th February 2014; and £250,000 gifted on 4th June 2015. Further, that upon the demise of the deceased Harvinder appropriated Indian Rupees 11,828,206 (equivalent to Kshs.17,742,309) from the Estate.

11. It was their deposition that the aforementioned gifts were structured in accordance with Sikh culture and edict, that a married daughter does not inherit from her deceased parents upon death, but should be given enough provision during their lifetime to avoid claims of discrimination.

12. In a quick rejoinder, Harvinder denied the allegations by Avtar and Jaswinder vide an affidavit sworn on 27th April 2021 and asserted that the term loan was fully repaid and the bank guarantee was never realized as alleged. Further that: Kshs.6,500,000 was not a gift but a refund to her for various advances she made to the parents' company; £100,000 was given to her two times not as gifts but as payments for her children's education; she did not receive £250,000 as it was distributed to various accounts and that she received £100,000 as a refund from the deceased for settling on her behalf, expenses relating to her grandchildren's wedding. She asserted that all the four beneficiaries received an equal sum of Indian Rupees 10,945,470 from the deceased and that excluding her from the Estate of the deceased on account of culture is contrary to the law.

13. In a ruling delivered on 21st May, 2021 Thande J considered the application before her and found no merit in it. She dismissed it ordering each party to bear their own costs.

14. Unbowed by the ruling, Harvinder filed this appeal and raised a litany of grounds in the Memorandum of Appeal dated 10th June 2021, alleging that the learned judge erred in law and fact:

    a. By failing to appreciate that the Estate of Balwant Singh Sagoo ("Balwant") being succession Cause No. 15 of 2010 is separate and distinct from the Estate of Gurdip Kaur Sagoo ("Gurdip") being Succession Cause No. 386 of 2018.

    b. By failing to appreciate and hold that Balwant and Gurdip had separate wills and that succession for their respective Estates is in law separate.

    c. By making a finding of fact that Gurdip's testamentary freedom was curtailed by Balwant's Will (paras 41and 43) and failing to find that the said curtailment under Balwant's Will was void under sections 5 and 7 of the *Law of Succession Act* and paragraph 44 of the first Schedule to *Law of Succession Act*.

    d. By failing to find that there was no evidence why Gurdip would have excluded the appellant, nor did Gurdip state in her Will any reasons for not providing for the appellant.

    e. By holding that the reasons for Gurdip not providing for the appellant were as a result of the provisions in Balwant's will when in fact no such declaration was made in Gurdip's Will.

    f. By importing the wishes of Balwant as valid and operative under Gurdip's Will in contravention of Gurdip's testamentary freedom and the law.

    g. By failing to appreciate that the treatment of £ 200,000 (equivalent to Kshs 20 million) advancement to the appellant was not reasonable taking into consideration the value of the estate estimated at the sum of Kshs 750,000,000/-. The advancement was about 2.6% of the value of the estate.

    h. By holding that the appellant being a biological child of Gurdip did not need to prove dependency, (para 25) and then proceeding to consider any past, current or future income and needs of the appellant under section 28 of the *law of Succession Act*, thereby misdirecting herself while exercising her discretion.

i. By correctly holding that the appellant was a biological child and that no provision was made for her in Gurdip's will, (Para 25) and then failing to find that there was no evidence to exclude her entirely as a dependant of the Estate.

j. By holding that as a child of the Deceased the appellant is a dependant and need not prove dependency, (para 27) and then holding that the Court's absolute discretion was limited to making reasonable provision and not to giving a share that was equal to the other beneficiaries of the estate as of right.(para 40).

k. By misdirecting herself both on the law and on the facts before the court and thereby arriving at a wrong decision.

l. The learned judge failed to exercise her discretion correctly and arrived at the wrong decision in dismissing the appellant's application.

15. The firm M/s Kaplan & Stratton Advocates filed submissions dated 17th September 2024 and contended on behalf of Harvinder that the learned judge, in making her findings, did not appreciate the test set under Section 26 of the Act on whether disposition by way of a gift amounts to reasonable provision. That it is not a requirement that an application for reasonable provision can only succeed if an applicant never received any advancement during the deceased's lifetime. Further, that the reasonableness of a bequest or disposition by way of a gift must be considered in the context of the value of the Estate and the bequests provided to all other beneficiaries.

16. Counsel urged that Harvinder disclosed that the sum of£ 200,000 was the only advancement made by the deceased to her and that it went towards her children's education. That even if the Court was to disregard the purpose of the advancement, it ought to have appreciated that this sum was a paltry 2.6% of the deceased's vast Estate which is valued at Kshs. 750 million in the petition for grant of probate.

17. It was urged that once an application for reasonable provision is made under Section 26 of the Act, the onus to prove that such an applicant received reasonable provision falls on the parties opposing it. It is their view that none of the respondents showed that any reasonable provision for the appellant was made.

18. Counsel relied on this Court's decision in Kamene Ndolo v George Matata Ndolo (1996) eKLR where it was held that in exercising unfettered testamentary freedom the testator must bear in mind that she, or he is not entitled to hurt those for whom he/she was responsible during his lifetime. That the responsibility to the dependants is expressly recognized by Section 26 of the Act.

19. Counsel submitted that preventing Harvinder from inheriting her deceased mother's Estate because she is a married daughter violates Article 27 of *the Constitution* as it is discriminatory and amounts to enforcing practices that are repugnant to justice and morality. He cited the case of Popat v Popat & 3 Others (Civil Appeal E09 of 2020 (2021) KECA 106 (KLR) to urge that the remedy of reasonable provision is not restricted to destitute beneficiaries.

20. Counsel urged that the learned judge erroneously failed to find that the deceased's Will did not declare any reason for excluding Harvinder. Instead, she imported an exclusion clause from a separate Will by Balwant into the deceased's Will. That a Will speaks for itself and the canons on the construction and interpretation of a Will are clearly outlined in the First Schedule of the Act.

21. Counsel contended that once the superior court found that Harvinder was a biological child, the Act did not require her to prove dependency as stated in In Re Estate of the late Annelies Anna Graff (2019) eKLR where it was held that:

> "Section 29 (a) creates a special category of dependants who are dependants due to their relationship to the deceased. Here the wife, wives, former wives or wives and children of the deceased are automatic dependants, and it is immaterial whether or not they were being maintained by the deceased immediately prior to his death."

22. It was posited that the provisions of Balwant's Will did not curtail and were incapable of curtailing the deceased's testamentary freedom and the succession of Balwant and Gurdip were subject of two separate and distinct succession proceedings. Counsel referred to the decision in In Re Estate of Godfrey Kituku & Regina Mukui Ndaki (Deceased) [2017] eKLR, to urge that the Estates of two people are ordinarily dealt with separately even if they died at the same time and that there was a 6-year period between the deaths of Gurdip and Balwant.

23. Counsel argued that Harvinder is a beneficiary in a succession where the deceased's undivided Estate worth Kshs.750 million is to be shared equally among the beneficiaries. Thus, the only logical formula for distribution in line with the deceased's intention for equal division of her state is to divide it into four equal parts with each beneficiary taking a portion.

24. In rebuttal, the firm of M/s Chaudri & Associates filed submissions dated 4th November 2024 on behalf of Mohamed, Avtar and Jaswinder and contended that the exclusion of provision for Harvinder was within Balwant's and Gurdip's right under Section 5 of the Act, which grants a testator broad freedom to allocate their Estate according to personal wishes. That while Section 26 of the Act provides the court with discretion to grant reasonable provision to a dependent, such relief is only justified when a dependent shows compelling need and has not been adequately provided for previously.

25. To buttress this, counsel relied on the decision in In Re Estate of the late Gedion Manthi Nzioka (Deceased) [2015] eKLR and In Re Estate of the Late George M'Mboroki M'Itunga (Deceased) [2017] eKLR, where the two courts were of the view that the will of the deceased must be upheld, unless there is clear evidence that a dependent has been unjustly excluded and has a genuine, compelling financial need.

26. Counsel submitted that the testator's intentions are to be derived solely from the language employed in the Will. Therefore, the absence of provision for Harvinder signifies a deliberate choice on the part of the deceased, a decision that warrants respect from the Court. Harvinder's contention that the deceased ought to have provided reasons for her exclusion is misplaced as the law does not impose an obligation upon the testator to elucidate their decision within the Will. That the court below did not err in its reasoning. It properly contextualized her exclusion within the framework of the family dynamics at play, which constitutes a relevant factor in evaluating claims under the Act.

27. They stated that in In Re Estate of the Late Gedion Manthi Nzioka (Deceased), the Court held that the clear intentions of the testator must be respected by the court, unless compelling evidence of hardship or unmet need on the part of the excluded party is demonstrated.

28. According to counsel, the assertion that the superior court should have disregarded the appellant's financial circumstances following its recognition that she was a biological child is erroneous. Section 29 (a) of the Act does not exempt her from the necessity of demonstrating her actual needs in a claim for reasonable provision. Counsel referred to In Re Estate of the late Annelies Anna Graff [2019] eKLR, to urge that the court is mandated to ensure that all factors influencing the distribution of the Estate are

considered and that the existence of automatic dependents does not preclude the court from evaluating their individual circumstances.

29. Counsel turned to this Court's decision in Elizabeth Kamene Ndolo vs George Matata Ndolo [1996] eKLR to assert that a testator's freedom may only be restricted, if the Will inadequately provided for those they were responsible for during their lifetime. That when a dependent is left without sufficient provision, the court will step in to ensure reasonable arrangements are made.

30. It was counsel's view that the deceased's Will is clear and should be honored. That the deceased fulfilled her husband's wishes by providing for her daughters-in-law after her son's deaths and it is not the court's role to rewrite the will, or to alter Balwant's explicit intentions, as doing so would violate the sanctity of a deceased person's will.

31. The matter came before us for hearing via zoom on 6th November 2024. Mr. Peter Gachohi, learned counsel appeared for Harvinder, while Mr. Chaudri and Mr. Bruno learned counsel, appeared for Avtar and Jaswinder. Counsel made brief oral highlights for each side.

32. In his oral highlight, Mr Gachohi urged that the superior court erroneously imported the deceased father's Estate into that of the deceased mother and consistently considered the father's Estate instead of that of the mother. Further, that it was wrong for the court to find that Harvinder was gifted inter vivos according to cultural practice which was not proved. That in any case, culture cannot be used to discriminate against her.

33. Mr. Bruno submitted for the respondents that what Harvinder protested in her petition was the fact of being omitted as Executor and not as beneficiary. Further that, the father specified that he had provided enough for her during his life time. Mr. Chaudri added that Harvinder has loaned money to the Estate and is therefore, not needy.

34. This being the first appeal our mandate is prescribed in Rule 31 (1)(a) of the Court of Appeal Rules, 2022 as follows:

> "On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power to re-appraise the evidence and to draw inferences of fact."

35. This Court in Abok James Odera T/A A. J. Odera &Associates v John Patrick Machira T/A Machira & Co.Advocates [2013] eKLR crystalized the role of the court on first appeal as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2000) 2EA 212 wherein the Court of Appeal held, inter alia, that: -
>
> > "On a first appeal from the High court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

36. We have considered the record of appeal, the rival submissions and the applicable law. The issues that arise for our consideration are:

a. Whether the court exercised its discretion judiciously by declining to make reasonable provision for Harvinder as stipulated under Section 26 of the Act, if not,

b. What is a reasonable provision for the appellant in the deceased's Estate.

37. It is common ground that Harvinder was a biological child of the two deceased persons; that both deceased persons died testate; that although Gurdip (deceased) appointed Harvinder and Mohamed as executors of her Will she did not provide for Harvinder in her Will; and that no reason was stated in the Will for that omission. The bone of contention is whether Harvinder is entitled to a reasonable provision under Section 26 of the Act.

38. Section 26 of the Act stipulates that:

> " Where a person dies after the commencement of this Act, and 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 effected 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."

39. Harvinder qualifies as a dependent of the deceased under Section 29 (a) of the Act which defines a dependent as:

> " .... the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death."

40. Harvinder invoked Section 26 of the Act seeking for reasonable provision from the Estate of the deceased. On the other hand the respondents urged that Harvinder has not met the threshold for reasonable provision under the section. That she was provided for during her parent's lifetime to the tune of Kshs. 143,299,309, and she has not demonstrated her actual needs for the claim for reasonable provision to be granted. Harvinder negated this allegation and insisted that the only amount that she was gifted by the deceased was 20,000 Sterling Pound, equivalent to Kshs 20 Million for her children's education and that as a dependent, under Section 29 (a) of the Act, she need not demonstrate actual need.

41. We quote in extensor the superior court's discussion on reasonable provision as follows:

> " The discretion of the Court in an application for reasonable provision is absolute and unfettered, but must be exercised judicially. The factors to be considered by the Court in the exercise of its discretion are stipulated in Section 28 of the Act, which provides:
>
> > 'In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—
> >
> > a. the nature and amount of the deceased's property;
> >
> > b. any past, present or future capital or income from any source of the dependant;
> >
> > c. the existing and future means and needs of the dependant;

d. whether the deceased had made any advancement or other gift to the dependant during his lifetime;

e. the conduct of the dependant in relation to the deceased;

f. the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

g. the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant'

The nature and amount of the deceased's property

29. On the nature and amount of the deceased's property Harvinder submitted that the estimated value of the estate is Kshs. 750,000,000/=. Mohamed on the other hand urged the Court to dismiss the Application as no valuation of the estate had been done. In the case of Lita Violet Shepard v Agnes Nyambura Munga [2018] eKLR upon which Mohamed placed reliance, the Court of Appeal stated:

> 'However, Kimaru, J in rendering his decision did not consider this critical factor at all. There was no valuation of the estate by a qualified valuer. The learned Judge did not determine the net worth and did not consider the liabilities against the estate as he ought to have done.'

30. The nature and amount of the deceased's property is a key factor in making a determination as to whether reasonable provision ought to be made to a dependant and the quantum of such provision. In the Lita Violet Shepard case (supra), the Court of Appeal faulted Kimaru, J. for awarding a dependant, the sum of Kshs. 50,000,000/= as reasonable provision when no valuation of the estate had been done. In the present case, the value of the estate was indicated in the petition for grant as Kshs. 750,000,000/=. This is no mean estate and the adequacy thereof is not in doubt, should the Court order that reasonable provision be made for Harvinder. The fact that valuation of the estate has not been done cannot therefore be a ground for dismissal of the Application.

> Any past, present or future capital or income from any source of the dependant and the existing and future means and needs of the dependant

31. Under Rule 45(2)(g) and (h) of the Probate and Administration Rules, an applicant for reasonable provision is required to provide information in his supporting affidavit, of any past, present or future capital or income of the applicant derived or expected to be derived from any source as well as the applicant's existing and future means and needs.

32. Although the onus to give satisfactory evidence as to her past, present or future capital or income as well as existing and future needs rested on her, Harvinder failed to discharge the same. Other than stating that she was a housewife who was dependent on her husband and past savings, Havinder did not give details of the source of her savings. She also made no effort to lay before the Court, particulars of her existing and future needs. Further her averment that she advanced to the company the sum of Kshs. Kshs. 6,500,000/= and to the deceased the sum of £100,000, belies her claim that she is a mere housewife with no income.

33. In order for this Court to make an informed decision in the present Application for reasonable provision, Harvinder was required to place before the Court, which she did not, cogent evidence of her past, present or future capital or income and her existing and future needs for consideration. This was the holding in the case of John Gitata Mwangi & 3 others v Jonathan Njuguna Mwangi & 4 others [1999] eKLR, where the Court of Appeal stated:

> 'In order that the court may be enabled to come to a proper conclusion as to what order it should make, a dependent has the duty to give satisfactory evidence as to his past, present or future capital or income and his existing and future needs. Without this, the court will not be able to make any sensible order.'
>
> Whether the deceased had made any advancement or other gift to the dependant during his lifetime

34. Balwant in his will stated that he had "already bequeathed and provided for my daughter". Harvinder has conceded that the deceased herein also advanced to her the sum of £ 200,000 but says that the same was for her children's education.

Regardless of the purpose for which Harvinder used the money, the fact remains that the deceased did make an advancement of £ 200,000 to her. This coupled with the express provisions of Balwant's will are to my mind the reason no provision was made to Harvinder by the deceased in her will.

The conduct of the dependant in relation to the deceased the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant

35. It was submitted for Harvinder that she enjoyed a good and close relationship with both her father Balwant and her mother, the deceased herein. The deceased appointed Harvinder, executor of her will. Had the relationship with her parents been anything but cordial, the deceased would certainly not have appointed her executor of her will.

30. The reason for Balwant not making provision for Harvinder can be ascertained as it is stated clearly in his will in Clause 2 of his will. The bequest to the deceased by Balwant, was for her life and thereafter to their 3 sons. The record shows that the 3 sons predeceased the deceased. To my mind, the condition in Balwant's bequest to the deceased, appears to be the reason why she bequeathed her entire estate, which is what she got from Balwant, to her deceased's sons' widows in fulfilment of the said condition.

42. The basic tenets of testamentary freedom enshrined in Section 5 of the Act provide that any person of sound mind, male or female, being of age of majority, whether married or unmarried may dispose of their free property as they wish. They are free to dispose of the property with reference to any secular or religious law of their choice. The section provides as follows:

> " 5 (1). Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses."

43. This freedom however, comes with a caution that has been restated by the courts in a myriad decisions. For example, in Elizabeth Kamene Ndolo vs George Matata Ndolo [1996] eKLR this Court stated as hereunder:

> " This Court must, however recognise 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 see 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."

44. Later in Erastus Maina Gikunu & Another vs Godfrey Gichuhi Gikunu & Another [2016] eKLR this Court observed that:

> " ...it is important to say here that, although there is this freedom, Section 26 of the Act enjoins the testator to make reasonable provision for his dependants. The court is permitted, on application and where it is satisfied that the testator has not done so to intervene by making what it deems reasonable provision. The desire of society to protect the family of a testator is the main reason for, not only allowing testamentary freedom, but also imposing certain limitations and protection against disinheritance."

45. Section 26 of the Act is unambiguous on when the court can exercise its discretion in terms of interfering to make reasonable provision for a dependent. However, in exercising its discretion the court must have regard to the circumstances stated in Section 28 of the Act. This Court in John Gitata Mwangi & 3 others v Jonathan Njuguna Mwangi & 4 others [1999] KECA 184 (KLR) restated the importance of having regard to Section 28 of the Act in the following terms:

> "In order that the court may be enabled to come to a proper conclusion as to what order it should make, a dependent has the duty to give satisfactory evidence as to his past, present or future capital or income and his existing and future needs. Without this, the court will not be able to make any sensible order. Whether the deceased has made any advancement to the dependent and the circumstances of the deceased's other dependents are also factors to be considered. The general circumstances of the case including the deceased's ascertainable reasons for not providing for the dependent must also be considered. Which of these factors will play a vital role in their combined effect, depends on each particular case."

46. A glance at the excerpt of the impugned judgment quoted above evinces that the learned judge considered the circumstances provided in Section 28 of the Act before rendering her judgment. We agree with her determination on the nature and extent of the deceased's property and that the deceased advanced £ 200,000 to Harvinder as a gift prior to her demise. We also observe that the two women enjoyed a good relationship in the deceased's lifetime.

47. We agree with counsel for the respondent's submission that the testator's intentions are to be derived solely from the language employed in the Will. However, we note that the deceased's Will is not explicit on the reason why she did not provide for Harvinder. We cannot infer that her reasons were the same as Balwant's reasons for leaving the daughter out of his Will. Harvinder's parents were two adults who made two different Wills. Thus, one's reason for devising his property in a particular manner cannot be extrapolated to the other.

48. We also note that at paragraph 13 of her further affidavit sworn on 27th April 2021, Harvinder deposed that she is financially supported by her husband. These were her words:

> " That in response to the joint further affidavit and the further affidavit sworn by Mohamed Munir Chaudri concerning my failure to evidence my past, present and future income, I wish to state that I am a housewife and do not have any other sources of income besides my husband's and some savings. It is from this savings and financial support from my husband that I was able to service the term loan. That being said, my past, present or future capital or income should not disentitle me from inheriting the deceased's property and does not take away from the fact that I am a biological child of the deceased and as a matter of law

qualify to inherit the deceased's property and seek reasonable provision. If for instance I was in gainful employment, nothing would have been easier than for the beneficiary to have disclosed it in their further affidavit."

49. No evidence was proffered to counter Harvinder's averment that she is financially dependent on her husband and has no income of her own. In the circumstances of this case, we find that it is suitable for the Court's intervention, to make a reasonable provision for her under Section 26 of the Act. The relief is justified because she has shown that she has a compelling need.

50. Having so far found, what then amounts to reasonable provision for Harvinder in the deceased's Estate? This is the second issue for determination. There was no valuation of the Estate by a qualified valuer to determine its net worth with any degree of certainty, or to indicate whether there were any liabilities against the Estate. The value of the Estate was however, indicated in the petition for grant as Kshs. 750 million. The learned judge did observe and rightly so, that this was no mean estate and providing reasonable provision for Harvinder would not be difficult.

51. The respondents deposed that Harvinder benefited from the Estates of the deceased parents in the sum of Kshs. 143,299,309 in total. This sum comprised of: £200,000 in the form of a guarantee executed by the parents for the purchase of her house and which was realized and called in when she failed to pay the loan instalments as they fell due; Kshs. 6,500,000 that she was gifted on 18th November, 2011; £200,000 gifted on 1st November, 2012; £ 100,000 gifted on 11th December 2012; £100,000 gifted on 13th February 2014; and £250,000 gifted on 4th June 2015. Further, that upon the demise of the deceased Harvinder appropriated Indian Rupees 11,828,206 equivalent to Kshs.17, 742, 309 from the Estate.

52. Harvinder countered these averments in an affidavit sworn on 27th April 2021. She deposed that: the term loan was fully repaid and the bank guarantee was therefore, never realized as alleged; the Kshs. 6,500,000 was a refund to her for various advances she made to the parents' company; £200,000 was for her children's education; and, that £100,000 was a refund from the deceased for settling on her behalf, expenses relating to her grandchildren's wedding. She averred that she did not receive £250,000 as it was distributed to various accounts and that all the four beneficiaries received an equal sum of Indian Rupees 10,945,470 from the deceased's Estate.

53. From the foregoing, there is insufficient evidence to prove that Harvinder was adequately provided for previously. It was urged for her that the deceased's undivided Estate worth Kshs.750 million be shared equally among the beneficiaries. That the only logical formula for distribution in line with the deceased's intention for equal division of her Estate is to divide it into four equal parts with each beneficiary taking a portion.

54. We are alive to the fact that reasonable provision does not mean equal provision for those who were excluded, or those who were left out. Indeed, it is not for the Court to step into the shoes of the deceased and decide that her Estate should be divided into four equal shares between the beneficiaries. That would be contrary to her testamentary intent.

55. We have considered all the foregoing arguments and the circumstances of this case. In particular, that Harvinder was gifted 200,000 sterling pounds (Kshs.20 million) inter vivos. Accordingly, this appeal is found to have merit and it succeeds. We order that;

    i. Reasonable provision of Kshs.130 million be made to Harvinder out of the Estate of the deceased.

    ii. Each party shall bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MAY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

Deputy Registrar