



REPUBLIC OF KENYA



**Popat v Popat & 3 others (Civil Appeal E09 of 2020)  
[2021] KECA 106 (KLR) (22 October 2021) (Judgment)**

Neutral citation: [2021] KECA 106 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E09 OF 2020  
W KARANJA, J MOHAMMED & JW LESSIT, JJA  
OCTOBER 22, 2021**

**BETWEEN**

**ALNASHIR ABDULKARIM CHATUR POPAT ..... APPELLANT**

**AND**

**ADIL ABDULKARIM CHATUR POPAT ..... 1<sup>ST</sup> RESPONDENT**

**GULZAR ABDULKARIM CHATUR POPAT ..... 2<sup>ND</sup> RESPONDENT**

**KARIM SAIFUDDIN ANJARWALLA ..... 3<sup>RD</sup> RESPONDENT**

**AZIM ABDULKARIM CHATUR POPAT ..... 4<sup>TH</sup> RESPONDENT**

*(An Appeal from the decision of the High Court at Mombasa (Mugure Thande, J.) delivered on 18th September, 2020 in HC Succ. Cause No. 346 of 2013)*

**JUDGMENT**

1. Abdulkarim Chatur Popat (hereafter the deceased) was without a doubt an astute businessman and loving husband to Gulzar Abdulkarim Chatur Popat (2nd respondent) and caring father to Alnashir Abdulkarim Chatur (the appellant); Adil Abdulkarim Chatur (1st respondent) and Azim Abdulkarim Chatur Popat (4th respondent).
2. As awaits all mortals, his sojourn on earth came to an end and on 2nd March, 2013 when he took his last bow and went to be with his maker at a ripe age of 87 years. About five years earlier i.e on 15th May, 2008, the deceased had made his last Will and testament in which he appointed all the respondents herein as Executors and Trustees of his Will. He left a vast estate, which as at the time the Will was drawn was estimated to be valued at Kshs. 3,883,894,499/35 approximately Kshs. 4 billion.
3. When his Will was opened, it transpired that Alnashir Abdulkarim Chatur Popat (appellant) was missing from the Will. There was nonetheless no statement in the Will to expressly say why the name was left out. It was clear however that he was not meant to be one of the heirs to the vast Estate.



4. By an application dated 13th September 2013, the executors petitioned the High Court for Grant of Probate of the deceased's Will. The Grant of Probate was issued to the executors by the High Court at Mombasa on 29th January, 2014. The Grant was thereafter confirmed and a Certificate of Confirmation of Grant issued on 2nd December, 2014.
5. Apparently, the proceedings leading to the issuance and subsequent confirmation of the Grant of Probate excluded the petitioner. He successfully moved the court for the setting aside of the said Grant. The Grant was set aside on 14th June, 2019 in a Ruling that also ordered that the summons for confirmation of Grant be reheard after service on the same was effected upon the appellant. The executors were also ordered to within 60 days produce before the court a full and accurate inventory of the Assets and Liabilities of the Estate and a full and accurate account of the executors' dealings with the Estate from the date they took over to the date of the Ruling.
6. It was pursuant to the above orders that the summons for revocation landed for hearing before Thande J. In the application, the executors sought orders that the Estate be distributed as per the deceased's Will which was not contested. Opposing the proposed mode of distribution, the appellant herein filed an affidavit of protest against confirmation of grant dated 24th February, 2020. In his affidavit, the appellant described himself as a son and dependant of the deceased and deposes that he is entitled to a bequest from the assets of his late father's estate. He acknowledges the fact that his father's Will is valid and goes on to list the bequests made to his mother, siblings and other members of his extended family. He avers that he is entitled to reasonable provision from the Estate of his father as a dependant and that in fairness and equity, all the deceased's three sons are entitled to equal treatment and thus to equal apportionment of his estate, as none of them can be said to be more vulnerable or more entitled to the deceased's estate than the other.
7. The appellant deposes further that the executors of his father's Will had failed to give a full inventory of the deceased's properties and more importantly, they had failed to give the full value and supporting documentation for the listed properties; and that the full and accurate account of the dealings with the Estate as ordered by the High Court vide the order dated 14th June, 2019 had not been complied with.
8. The appellant had earlier on 28th October, 2019 filed summons by dependant under Article 35 1(b), 40 and 159(2) of the *Constitution of Kenya, 2010*, Sections 26, 27, 28, 29, 47 and 70 of the *Law of Succession Act* (LSA); Rules 45 and 73 of the Probate and Administration Rules seeking in the main reasonable provision as a dependant of the deceased out of the net estate as the court thinks fit.
9. The grounds upon which the application was predicated were primarily that as a son of the deceased, he was rightfully entitled to a reasonable bequest out of the estate of the deceased under Section 26 of the LSA, however, the deceased excluded him in the Will but made provision for his wife and other sons, 5 grandchildren, one Noorbegum Sadruddin Hasham and charitable organisations.
10. The application was supported by the appellant's affidavit sworn on 25th October, 2019 in which he has given a history of this working life starting way back on 21st March, 1969 when he first started working for his late father upto the time of his father's demise. According to the appellant he decided to sell 17% of his shareholding in Simba Companies and the father expressed an interest in purchasing the shares, on terms to be agreed upon valuation of the shares. He and his father later entered into an agreement in which the father purchased the shares for Ksh. 850, 004, 900.00. This sale marked the appellant's exit from the Simba Companies and he went to be on his own.
11. The appellant deposed further that the executors of his late father's estate on 14th of September, 2019 filed an inventory in purported compliance with the Court Order given on 14th June, 2019 giving a list of the deceased's properties but left out some important information pertaining to the values of



- some of the properties while leaving out others. He asked the Court to grant the orders sought so as to safeguard and enforce his constitutional right to the property he was entitled to as a dependant of the deceased.
12. The 1st and 3rd respondents, Adil and Karim opposed the application. The 1st respondent swore a replying affidavit on 24th February, 2020. The respondents accused Alnashir of seeking to delay the matter as the court found that the inventory of the estate had been filed as ordered and the court directed that the summons for confirmation of grant proceed to hearing. Adil stated that Alnashir's right to seek reasonable provision was not tantamount to entitlement to a bequest; that he should have demonstrated that he was entitled to such reasonable provision;
  13. They further averred that Alnashir had always been gainfully employed since leaving university and was a man of considerable means; that prior to the making of the deceased's Will in 2008, Alnashir received Kshs. 850,000,000/= in 2007 from the deceased as proceeds of sale of shares; that from 2007, he owned 14% of Imperial Bank in addition to another 2.4% he initially owned; he was also Chairman of the Bank for many years; that he earned dividends amounting to more than 200,000,000/= between 2008 and 2013; that he was also associated with and had direct shareholding in numerous companies and that he and the deceased were not in good terms prior to his death and was therefore not entitled to any reasonable provision.
  14. According to the appellant, the issues which arose for determination as deciphered by the court were;
    - i. Whether the executors should produce to the Court full and accurate inventory of assets and liabilities of the estate, respective values and their dealings therewith up to the date of the account.
    - ii. Whether reasonable provision should be made by the Court to Alnashir.
    - iii. What orders should be made on the reasonable provision.
  15. The court found that a valuation of the estate to determine its actual net worth would become necessary once a finding was made that reasonable provision ought to be made to a dependant so as to arrive at the quantum and nature of such provision. At that point, the court was yet to make a decision as to whether or not to grant the order for reasonable provision to Alnashir and thus found the prayer for valuation of the estate to be premature.
  16. On whether reasonable provision should have been made, it was the appellant's position that the court ought to have made an order directing that a valuation be done to ascertain the amount of the deceased's property and value of his net estate. Adil on the other hand, was of the view that prior to the making of an order for valuation of the estate, a determination ought to be made as to whether Alnashir was entitled to reasonable provision.
  17. The Court noted that, although valuation of the deceased's Estate had not been done, it could be concluded that the estate was vast. The court also noted that in the application for the Grant of probate, the executors had indicated the value of the Estate in 2013 to be Kshs. 3,883,894,489.35. The court thus opined that the adequacy of the estate was not in doubt, should the court order that reasonable provision be made to Alnashir.
  18. The Court cited Rule 45(2)(g) and (h) of the *Probate and Administration Rules*, which provided that an applicant for reasonable provision was 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 his existing and future means and needs.



19. The appellant submitted that contrary to Adil's allegations in their replying affidavit, he was not a shareholder in any of the companies listed therein and that there was no evidence that he was a wealthy man, that even if it were proved that he was excluded because he was wealthy the same would have to apply to all beneficiaries and he relied on the case of *In Re Estate of Grace Ngubi Michobo (Deceased) [2004] eKLR* for that proposition.
20. The court found that in order to consider the application and make orders in his favour, the applicant was under an obligation to provide to the court all the requisite information as to any past, present or future capital or income derived or expected to be derived from any source. Further, the court held that it was a requirement that Alnashir's existing and future needs be laid before the court for consideration.
21. The court held that the onus to give satisfactory evidence as to his past, present or future capital or income as well as existing and future needs rested on him and the appellant herein had failed to discharge the same. The court held that the appellant having withheld this information, which would have assisted the court to come to a proper conclusion, the court was unable to make any sensible order in respect of his application for reasonable provision.
22. The court noted that on record, was an emotional and bitter letter dated 13th February, 2009 from the appellant to the deceased in which he inter alia accused the deceased and their mother, Gulzar, of playing favourites with Adil, to his disadvantage, way back from their childhood. He also accused his father of not caring for him and denying him the fatherly love and guidance that he so desperately needed, but giving the same to Adil.
23. The court surmised from the said letter, that it was clear that the relationship between Alnashir and the deceased was less than cordial. Given the details in the said letter, the court asked itself whether the appellant had placed before the court material sufficient enough to persuade it to go against the wishes of the deceased and make reasonable provision for him out of the Estate.
24. From the case law cited and the factors stipulated in Section 28 and Rule 45 of the P & A Rules, the court held that it would only interfere with the testamentary freedom of a testator and provide for a dependant not adequately provided for, for 2 reasons. First, if the dependant was dependent on the deceased during his lifetime and second that the dependant had been rendered destitute.
25. The Court opined that Section 26 of the Act was designed to come to the aid of such dependant, hence the reason why the court's power to interfere with the wishes of the deceased was limited to making reasonable provision to an excluded beneficiary and not to give a share that is equal to the other beneficiaries of the Estate as of right.
26. The court found that the appellant had approached the court with a sense of entitlement as a child of the deceased, seeking a share of the estate. The court opined that the appellant was neither destitute nor was he dependent on the deceased during his lifetime. The court found that the wishes of the deceased were clearly spelt out in his Will and it was not for the court to rewrite the deceased's Will or make a new Will for him or indeed alter his express wishes.
27. The court held that its jurisdiction to interfere with the valid Will of a testator should be cautiously and sparingly exercised. The court having carefully considered the matter, and noting that the deceased made his Will freely and had the requisite mental capacity to do so, and further that Alnashir was not dependent on the deceased during his lifetime and was not destitute, was persuaded to honour the wishes of the deceased as expressed in his Will and consequently dismissed the application for dependency.



28. The appellant was aggrieved with the above findings and has proffered this appeal which is predicated on plethora of grounds as follows:-

- a. The learned Judge erred in law by misconstruing the true meaning and purport of Section 26 of the *Law of Succession Act*, Cap 160 Laws of Kenya (“the Act”) which entitles a dependant to apply for reasonable provision on the ground that the disposition of the deceased’s Estate effected by a) his will or b) by gift in contemplation of death or c) the law relating to intestacy, or the combination of the will, gift and law did not make reasonable provision to the dependant concerned.
- b. In the premises, the learned Judge misdirected herself in fact and in law by failing to appreciate that the Summons by the Appellant dated 25th October, 2014 and filed in the Superior Court on 28th October, 2014 (“the Application”), was grounded on the Appellant’s grievance that he had been excluded illegitimately from the Will of Abdulkarim Chatur Popat (“the Deceased”), and that the payment that had been made by the Deceased to the Appellant in relation to the shares in the Simba companies was in fact the Appellant’s fair compensation of his contribution to the development and the success of the Simba companies, and was not a gift inter vivos. Similar allocations of shares were indeed made to other “beneficiaries”.
- c. The learned Judge misdirected herself in law by over-emphasizing the third limb of Section 26 of the Act under which an application for reasonable provision can be made that is intestacy, at the expense of the other two limbs on which the Application was predicated.
- d. The learned Judge erred in law in her interpretation and application of Section 26 of the Act as read together with Section 28 of the Act and Rule 45 of the Probate and Administration Rules, 1980 (“the Probate Rules”).
- e. The learned Judge erred in law and in fact by failing to appreciate that a dependant as defined in Section 29 of the Act is not necessarily a person who was financially dependant on the Deceased during his (the Deceased’s) lifetime.
- f. In finding that the Court should be extraordinarily slow in interfering with a valid will of a deceased person in cases of normal preference of certain beneficiaries over others, the learned judge erred in law and in fact by failing to find that in the particular circumstances of this case, the exclusion of the Appellant without any reason amounted to such eccentric and unreasonable conduct as would have justified interference with the testamentary freedom of the Deceased.
- g. In all the circumstances of this case, the learned Judge erred in law and in fact in declining to make an order for reasonable provision in favour of the Appellant as prayed in the Application.
- h. The learned Judge erred in fact and in law by proceeding to confirm the Grant without first making an order for reasonable provision to the Appellant.
- i. In considering and determining the Application by which the Appellant sought principally an order for reasonable provision against the net Estate of



the Deceased, and despite an application that had been made by the Appellant for valuation of the Estate, the learned Judge failed to Order, right from the outset, a valuation of the Estate of the Deceased as required under Section 28 of the Act.

- j. Further, the learned Judge disregarded the provisions of Rule 45 (2) (f) of the Probate Rules which requires that a valuation of the Estate be available to the Court at the time that an application for reasonable provision is considered and determined.
- k. In the result, the learned Judge misdirected herself in law in finding that the Appellant's application for a valuation of the Estate of the Deceased prior to determination of the issue of reasonable provision was premature and that a valuation of the Estate would become necessary only if an order for reasonable provision had been made in favour of a dependant.
- l. The learned Judge misdirected herself in fact and in law by failing to find that under Section 28 of the Act, and Rule 45 (2) (f) of the Probate Rules the Respondents, as the Executors of the Estate of the Deceased, were bound to provide a full and accurate inventory of the assets and liabilities of the Estate and a full and accurate account of their dealings therewith up to the date of the account.
- m. As a consequence of the foregoing, the learned Judge erred in law and in fact by failing to find that the Respondents, as the Executors of the Estate of the Deceased had not complied with the statutory requirements above-mentioned.
- n. In holding that the discretion of the Court in an application for reasonable provision is absolute and unfettered, the learned Judge failed to appreciate that the factors listed in Section 28 of the Act, which the Court is mandatorily bound to consider, in and of themselves fetter and limit the Court's otherwise wide discretion.
- o. The two main grounds upon which the learned Judge disallowed the Application, namely that a dependant applying for reasonable provision must show that he was dependent on the Deceased during his life-time and that the dependant had been rendered destitute are not grounds stipulated either in the Act or in the Probate Rules.
- p. The learned Judge misdirected herself and erred in law by proceeding as if the factors listed (a) to (g) in Section 28 of the Act are necessarily conjunctive and that an applicant for reasonable provision must meet or satisfy each and every of the said factors.
- q. The learned Judge erred in law and in fact by failing to have due regard of the fact that the Respondents, as the Executors of the Estate of the Deceased, had breached Section 83 (e) of the Act, which bound them in mandatory terms to within six months from the date of the Grant, (29th January, 2014), to produce to the Court a full and accurate inventory of the assets and liabilities of the Deceased and a full and accurate account of all dealings therewith up to the date of the account.



- r. The learned Judge misdirected herself and erred in law and in fact by failing to appreciate that effective compliance with Section 83 (e) of the Act necessarily required a valuation, in pecuniary terms, of the assets and liabilities of the Estate of the Deceased.
- s. The learned Judge erred and misdirected herself in law by on the one hand finding that a valuation of the net Estate was premature and unnecessary and on the other hand, proceeding to speculate as to the adequacy in pecuniary terms of the net Estate.
- t. The learned Judge erred in law and in fact by failing to appreciate that under Section 28 (f) of the Act, “the situation and circumstances of the deceased’s other dependants and the beneficiaries under any will” is a pertinent factor that the Court should consider if raised by an applicant for reasonable provision, as the Appellant did in this case.
- u. The learned Judge erred in fact in finding on the one hand that the Appellant had failed to give satisfactory evidence of his past, present or future capital or income in the Application whilst on the other hand, the Judge acknowledged in paragraph 30 of the Ruling that the Appellant had in fact made full and candid disclosure of his dealings with the shares that he had acquired in the Simba companies.
- v. The learned Judge misdirected herself in fact and in law by failing to appreciate the Appellant’s submission that a factor for consideration in an application for reasonable provision of a dependent is that the Court is donated power to interfere with testamentary freedom on the basis that some testators may act in an eccentric manner and make weird wills. This is such a case as no reason whatsoever was given by the deceased for the exclusion of the Appellant from the deceased’s Will.
- w. The learned Judge erred in law and thereby misdirected herself by failing to find that the testamentary freedom given to a testator under Section 5 of the Act can be interfered with on equitable grounds.
- x. The learned Judge erred in law and thereby misdirected herself by having regard only to statutory provisions and failing to take into account relevant equitable principles which have recently been elevated to constitutional principles and should therefore override statute in appropriate cases.
- y. The learned Judge erred in law and in fact by failing to take into account the fact that complete silence in the Will of the Deceased as to why the Appellant excluded was a material and weighty factor in determining the Application.
- z. In the premises, the learned Judge’s speculation as to why the Appellant was excluded from the Will of the Deceased was wholly unjustified and led the Superior Court to grave error.
- aa. The learned Judge erred in law and in fact by failing to appreciate that the 1st Executor’s conduct had a direct and material bearing on the Application and that the same ought to have been taken into account pursuant to the provisions of Section 28 (f) and (g) of the Act.



- bb. The learned Judge erred in fact in proceeding with the confirmation of the Grant of the deceased's Estate when there were two different lists by the executors itemizing different assets of the Deceased's Estate.
29. The parties filed written submissions adumbrating their rival positions. In submissions filed on his behalf by the firm of Njoroge Regeru & Co. Advocates, the appellant compresses the issues raised in the listed grounds of appeal as;
- a. Whether a dependant applying for reasonable provision must show that he was dependent on the deceased during the deceased's lifetime and that the failure to provide for the dependent had rendered the dependent destitute;
  - b. Whether the respondents as Executors and Trustees of the Will of the Estate of the deceased were bound to provide a full and accurate inventory of the Estate, complete with their respective values, and a full and accurate inventory of their dealings therewith up to the date of the account;
  - c. What Orders should this Honourable Court make?
30. On the first issue, he submits that this Court will be invited to determine whether a deceased person has absolute freedom to disregard the expectations of his kindred to inheritance of his property upon his death; that the High Court was wrong on basing its judgment on the Ndolo case and the Ngugi case which he submits had different circumstances from the instant one in that in those cases, the dependent in question were the wives who had to prove dependency but in the instant case he submits that the appellant is an independent dependant who did not have to prove dependency.
31. He submits that this Court, in line with contemporary justice, ought to make an order for reasonable provision even where the testator has explicitly given the reasons for not allowing any bequest vide his Will, that in contrast to the case of *Tataryn vs. Tataryn Estate [1994] 2SCR 807 NO.8 of SAA* the deceased's Will gave no reason for disinheriting the appellant and as such, in light of the moral duty owed to the appellant by the deceased, this Court should make an award for reasonable provision in favour of the appellant; that it is noteworthy that the Tataryn Case (Supra) rejected the need-maintenance rationale of making provision to dependants; that this need-maintenance rationale called for the deceased providing maintenance to the dependants in need upon his passing on; that this rationale is quite similar to the two-test threshold applied by the High Court in declining provision to the appellant; that the two-test threshold adopted by the High Court having not been explicitly incorporated in the Kenyan *Law of Succession Act* (LSA), cannot be used to limit provisions to only those dependants who have been left destitute and were depending on the deceased during their lifetime.
32. He further submits that reasonable provision that ought to be made in favour of the appellant must be considered in light of the standard of living enjoyed by the deceased's family during his lifetime and the size of the deceased's Estate.
33. It was his case that if this Court were to find that the appellant was not entitled to reasonable provision as he was not depending on the deceased during his lifetime and would thus not be rendered destitute, such a finding would be inconsistent with the broad and purposive interpretation that should be given to Articles 24, 40 and 48 of the Constitution; that in any event, such an interpretation and finding would also disentitle the 1st, 2nd, and 4th respondents from inheriting any part of the estate of the deceased (if they had been excluded as was the appellant), as none of them were "dependents" of the deceased (in accordance with the definition of dependence applied by the High Court); that such a



conclusion would be untenable and unacceptable to those three respondents; that why would a court of equity apply double standards to disinherit one child, and not others, only because that child was not included in the Will, and no reasons for his exclusion were assigned or stated by the deceased; that the High Court's conclusion that the payment that had been made by the deceased to the appellant (during his life time) in relation to the shares in the Simba Companies was a "gift inter-vivos" is not based on any evidence and if that was so, nothing would have been easier for the deceased than to say so in his Will.

34. On the second issue, he submits that provision of a full inventory of the assets of a deceased's Estate is mandatory under both the LSA and the Probate Rules, and is not conditional to the grant of an application for reasonable provision.
35. On the third issue, he requests the Court to allow the appeal and grant the orders sought in the memorandum of appeal.
36. The 1st and 3rd Respondents have filed joint submissions. They submit that a court has and exercises complete discretion in determining an application under Part III of the LSA; that in determining the appellant's Summons for reasonable provision and the respondents' Summons for Confirmation of Grant, the court exercised its discretion judiciously, having regard to the matters listed under Section 28 (a) to (g) of the LSA, the evidence submitted and the general circumstances of the case; that the appellant simply failed to establish before the High Court in line with the law as well as principles developed from case law, that he was entitled to reasonable provision;
37. They further submit that the comparative statutory provisions and foreign case law invoked by the appellant for persuasive purposes are either irrelevant or distinguishable from the facts of this case, when viewed within the context of the LSA; that discretion cannot be invoked to disregard express provisions of statute; that having dismissed the appellant's Summons for Reasonable Provision, the learned Judge was right to consider the appellant's protest and having found the same unmeritorious, to allow the Summons for Confirmation.
38. The Appellant filed submissions in response to the respondent's submissions.
39. When the appeal came up for plenary hearing vide the Go-to-meeting platform, learned Counsel Mr. Regeru appeared with Ms. Mwangi for the appellant, while Mr. Kago appeared for the 2nd respondent with the 1st and 3rd respondents being represented by Mr. Mohammed Karega. Mr. Kago informed the Court that they were supporting the stand taken by the 1st and 3rd respondents and had not therefore filed separate submissions. The 4th respondent was nonetheless not represented in this appeal and we were informed that he was not participating in the appeal. Mr. Regeru and Mr. Karega made extensive highlights of the salient points in their submissions.
40. According to Mr. Regeru, while Section 5 LSA recognizes a testator's freedom to bequeath his property to whoever he chooses, the Court can interfere where the testator did not act reasonably, or where the Will was "weird" or eccentric as the Will subject of this appeal was/is. According to learned counsel, the learned Judge made a grave error in determining the application before her based only on two considerations i.e whether the appellant was dependent on the deceased before he died and that he was not destitute when Rule 45 of the P & A Rules lists a non-exhaustive list of 8 other considerations.
41. He concluded by saying that the learned Judge emasculated and fettered her discretion and failed to render contemporary justice in the circumstances of this case. He implored the Court to apply the principles of justice, fairness, equity and morality which principles transcend our *Law of Succession Act* and are universally accepted, hence their reference to caselaw from other jurisdictions. Counsel faulted the learned Judge for surmising, speculating and making insinuations leading to conclusions that were



not supported by the evidence presented before her, which conclusions counsel said displayed nuances of bias. He urged the Court to allow the appeal and make a declaration that the appellant is entitled to reasonable provision after considering the inventory of properties and their valuation.

42. Opposing the appeal, Mr. Karega submitted that there was only one issue for the Court to determine, i.e What is an applicant for dependency required to demonstrate? Learned counsel reiterated that the appellant had not proved that he is a dependant as provided by Rule 45 of the P & A Rules. He emphasized that the appellant had failed to provide evidence of his present, past capital and income as required. He maintained that the learned Judge had exercised her discretion properly, judiciously and within the applicable law. He submitted that Section 26 LSA only comes in to prevent a situation where a testator leaves his children destitute. Urging the Court to dismiss the appeal, counsel submitted that the principles of equity cannot be used to interfere with a testator's right to dispose of his property in any manner he wishes.
43. In a brief rejoinder, Mr. Regeru urged the Court to look at Rule 45 in extenso in its entirety. He posited that the said grounds are not cumulative or conjunctive and an applicant is not required to satisfy all the listed grounds. In this case, counsel submitted that his client met most of the requirements but the learned Judge only focused on ground (g). He maintained that the applicant had disclosed his wealth and finally that the Court had discretion to interfere with a testator's freedom in instances like this where one child had been discriminated against for no rhyme or reason, and that this is one such case where exercise of the court's discretion was called for.
44. This being a first appeal, the duty of this Court is as was stated in the case of *Abok James Odera t/a A. J. Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*, where this Court pronounced itself 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 re-analyze 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 Kustron (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.’”

45. It therefore behooves us to critically re-reconsider the record of appeal placed before us, the rival submissions of the parties and the law, particularly as espoused in the legal authorities cited to us by learned Counsel. From a careful perusal of the record of appeal, parties' rival submissions which we have analysed above in sufficient detail and the authorities, the legal issues falling for our determination can be discerned to be:

“Whether a dependant applying for reasonable provision must show that he was dependent on the Deceased during the Deceased's lifetime; and that the person claiming dependency must be destitute for him to qualify for provision from a deceased's estate.”

46. Section 29 of the LSA sets out the meaning of the term 'dependant' as follows:

For the purposes of this part, “dependant” means:-



- (a). 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;( Emphasis added)
- (b). Such of the deceased’s parents, step-parents, grand-parents, grand-children, step-children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- c. ....

The appellant’s argument in the trial Court that as a biological son of the deceased, he did not have to prove that he was a dependant was valid as it was rather automatic. That statement is axiomatic even from a literal interpretation of the above provision. Indeed, in her Ruling, now impugned, the learned Judge acknowledged at page 9 paragraph 5.2 that it is not contested that the appellant was/is a dependant of the deceased, and further that he had not received any bequest from the deceased’s Will. We shall not therefore belabour that point.

47. Equally, the learned Judge after analysing and citing the relevant parts in the cases of *In re Estate of Samuel Ngugi Mbugua (Deceased) [2018] eKLR* and in *In re Estate of Magayu (Deceased) [2018] eKLR* rendered herself as follows:-

“Having established from the foregoing that this Court has the power to vary the Will and order for the Applicant’s reasonable provision, we proceed to examine the factors that the court should consider under Section 28 of the Act and Rule 45(2) of the Probate Rules.”

48. We are in agreement with the learned Judge in her findings above. The Court does indeed have discretion to interfere with a testator’s freedom which is provided for under Section 5 of the LSA. Addressing this issue in *John Gitata Mwangi and Others vs Jonathan Njuguna Mwangi and Others, Nairobi Court of Appeal Civil Appeal No. 213 of 1997*, this Court found relevance in the case of *Re Inns, Inns vs Wallace & Others (1947) 2 All E.R. 656*, where Wynn-Parry, J. (as he then was) said at page 311:

“The Act is not designed to bring about any such compulsion. It proceeds on the postulate that a testator should continue to have freedom of testamentary disposition, provided that his disposition as regards dependants should be capable, having regard to all the circumstances, of being regarded by the Court as reasonable. From this it follows that the jurisdiction is essentially a limited jurisdiction ..... The previous decisions clearly establish that the jurisdiction is one which should be cautiously if not sparingly used.” [Emphasis ours]

49. Can the disposition in the deceased’s Will herein be said to be reasonable, considering all the circumstances surrounding this case? We do not think so. Even though we do not want to describe the deceased’s Will as “eccentric or weird” it is the kind of Will where the invitation to the Court to interfere with it is justified. We cannot fail to mention that even the 4th respondent who, like the appellant appears to have been edged out of his father’s heart by the 1st respondent had issues with the disposition in the Will.

50. The learned Judge correctly found that the court could interfere with the deceased Will and went on to consider whether the appellant had satisfied the requirements set out under Section 28 LSA. The elephant in the room is whether the learned Judge exercised her discretion judiciously as expected of her. Can this Court interfere with the learned Judge’s exercise of discretion? The law in this area is clear as explicitly and succinctly set out in the locus classicus case of *Mbogo & Another vs Shah [1968] EA 93*. This Court does not willingly interfere with



the findings and conclusions of the trial court, which is not the same as saying that we would not do so in appropriate cases. The appropriate cases are where, as was stated by this Court in the Shah case (supra), the Judge misdirected himself/ herself in some matters with the result that he/she arrived at some wrong decision or where it is manifest from the case as a whole that the Judge was clearly wrong and his/her decision amounted to an injustice. See also *Peters vs Sunday Post Ltd* [1958] EA 524 and *Mwanasokoni vs Kenya Bus Services Ltd* [1985] KLR 931.

51. The next step for us is to examine the law relied on by the learned Judge, the evidence placed before her and the reasons she gave for arriving at her decision. We will then be in a position to draw our independent conclusions as to whether the learned Judge considered material that was irrelevant, or failed to consider material that was relevant to the matter and thus arrived at a conclusion that was wrong, which would then beckon our interference.

52. Our first consideration is Section 28 LSA 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 reason for making the provision for the dependant.”

We now examine these clauses individually, examine how the learned Judge applied each of them and the conclusions she made in respect of each and then make our own conclusions as to whether to support her findings or not.

53. (a). The nature and amount of the deceased’s property;

The Court found that executors having indicated the value of the estate in 2013 to be Kshs. 3,883,894,489.35/= the Court thus opined that the adequacy of the estate was not in doubt, should the Court order that reasonable provision be made to Alnashir. We are in agreement with the learned Judge with that conclusion.

54. (b). Any past, present or future capital or income from any source of the dependant;

The learned Judge found that the appellant had only disclosed the shares in the Simba companies which he had been given by the deceased, which shares he sold back to the deceased for 850,000,000/=. The learned Judge concluded that the appellant had withheld the said information and the court could not therefore help him. From the supplementary affidavit sworn by the appellant on 6th March 2020, the appellant deposed that he indirectly owned 2.4% in Imperial Bank Limited; he also stated that in his working life he has been a director of several companies; and that he is employed by DMI Kenya Limited although he did not give the amount of salary that he earns from the said employment.



We observe however that the list of directorships supplied by the respondents was not proved. We are satisfied that the information given by the appellant was indeed sufficient to satisfy this requirement.

55. (c). The existing and future means and needs of the dependant;

The learned Judge found no information was tendered on this, but we think this is partially covered by (b) above. This requirement in our view applies to the dependants who were actually financially dependent on the deceased and not to an independent dependant like the appellant herein.

56. (d). Whether the deceased had made any advancement or other gift to the dependant during his lifetime;

The Court held, that there was indeed an advancement given to Alnashir but the same applied to Azim and Adil. We agree that the other sons benefited from the same advancement and that cannot therefore be used against the appellant.

57. (e). The conduct of the dependant in relation to the deceased;

On this issue, the Court held:

“There is on record, an emotional and bitter letter dated 13.2.09 from Alnashir to the deceased in which he inter alia accused the deceased and Gulzar of playing favourites with Adil, to his disadvantage, way back from their childhood. Alnashir also accused his father of not caring for him and denying him the fatherly love and guidance that he so desperately needed, but giving the same to Adil; that when he went to work for the deceased after graduation, he was sent to the stores department yet when Adil graduated, he did not have to start at the bottom and was given better terms than Alnashir; that the deceased quickly accepted his decision to leave SCM after 31 years of service and thereafter made life very difficult for Alnashir and his family and even called him names.

From the said letter, it is clear that the relationship between Alnashir and the deceased was less than cordial. This letter was written 4 years before the demise of the deceased. There is nothing on record to show whether the deceased responded to the same. Notably the letter was written almost a year after the deceased had made his will on 15.5.08. It would appear that the letter did nothing to assuage the acrimonious relationship between Alnashir and his father. The fact that the deceased did not make any changes to his Will to provide for Alnashir, is indicative of a man whose mind was firmly made up. Given the foregoing circumstances, should this Court interfere with the testamentary freedom of the deceased and make provision for Alnashir as he has prayed. Put differently, has Alnashir placed before the Court material that is sufficient to persuade the Court to go against the wishes of the deceased and make reasonable provision for him out of the estate?”

58. On our part, with respect to the learned Judge, we think she missed the point on this issue. The requirement actually talks of “the conduct of the dependant in relation to the deceased” and not the other way round. As rightly submitted by Mr. Regeru, this letter paints a man who was crying for fatherly love and attention which he appears to have been denied over the years. The letter clearly shows that the appellant’s love and respect for his father was constant. It is his father who was non responsive. The appellant’s conduct towards his father cannot be impugned. Even after feeling discriminated against by his own father, a feeling that he shared with the fourth respondent, the appellant continued to reach out to his father. On his part, the fourth respondent had migrated to Canada to get away from that unfavourable situation, which is blamed on the first respondent, but the appellant hang on in the hope that one day, the situation would change for the better. It is evident that the deceased is the one who appeared to have issues with the appellant but not the other way round. Other than speculation



by the learned Judge as to the reasons the deceased appeared displeased with the appellant, there was no evidence placed before the court to demonstrate why the appellant's name was excluded from the deceased's Will.

59. (f). The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;- (Emphasis ours)

The Court held:

“It is common ground that Alnashir is neither destitute nor was he dependent on the deceased during his lifetime. His own averment is that he is a 68 year old business man who has worked since 1976 and has at various times been a director in various companies. He stated that he and his brothers are wealthy.”

60. Again, and with respect to the learned Judge, she also missed the point on this one. The above provision is very explicit and refers to the situation and circumstances of the deceased's other dependants and beneficiaries and it is not in respect of the applicant for dependency, in this case the appellant. Our view on this point is that the other dependants and beneficiaries of the Will are no doubt wealthy in their own right as can be deciphered from the affidavits on record and cannot be said to be more financially disadvantaged than the appellant herein.

61. (g). The general circumstances of the case, including, so far as can be ascertained, the testator's reason for not making the provision for the dependant; –

The learned Judge expressed herself thus:-

“Why then did the deceased exclude Alnashir from his Will? Could the fact that Alnashir later sold the very shares displease the deceased. Could it be that the deceased felt that Alnashir did not value the gift of the shares and treated it with contempt? One can only speculate. The advancement made to Alnashir by the deceased during his lifetime may or may not have been a consideration for excluding Alnashir when the deceased made his Will.” (Emphasis Ours)

62. The learned Judge admits that she was speculating about the reasons why the appellant was left out of the Will. Judges do not surmise, they do not speculate. They are guided by the law and evidence before them. There were no reasons at all given in the Will as to why the appellant was left out in the Will. It is not our place to speculate. Had the deceased found it necessary to give reasons, nothing stopped him from doing so. Let us not ascribe reasons for the appellant's exclusion.

63. From the above analysis, it becomes evident that the learned Judge considered some extraneous irrelevant matters and failed to apply some provisions of the law properly which resulted in her arriving at the wrong conclusion. Accordingly, the law enjoins us to interfere with her exercise of discretion with the result that this appeal is hereby allowed and the Ruling of Thande J dated 18th September, 2020 and all consequential orders arising therefrom are hereby set aside.

64. Ultimately, we hold that the appellant is entitled to provision that is not only adequate but also just and equitable considering the pecuniary magnitude of the deceased's Estate and the financial status of the other beneficiaries which is evident from the several annexures to the affidavits filed before the High court.



65. More specifically, the Court grants orders as follows:

- i. The Summons for dependancy dated 25th October, 2019 is hereby allowed; the order allowing the Summons for confirmation of Grant dated 22nd October 2014 is hereby set aside;
- ii. We make a declaration that the appellant herein is entitled to a reasonable provision from the Estate of the Deceased and the same should be made to him;
- iii. The quantum of such provision be determined by the High Court after considering the parameters set out para. 64 above;
- iv. In order for the Court to make a fair assessment on the provision due to the appellant, we order that a full, accurate current inventory and valuation report of the deceased's Estate be filed with the High Court within 30 days from the date hereof.
- v. The matter is hereby remitted to the High Court Family Division at Mombasa for compliance with the above orders by any other Judge with jurisdiction except Thande J.
- vi. Each party to bear its own costs of this appeal, this being a matter involving close family members.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

**J. LESIIT**

.....

**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**

