IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 5 OF 2015

BETWEEN

ERASTUS MAINA GIKUNU.....................................1ST APPELLANT

ANTHONY WANJOHI GIKUNU.............................2ND APPELLANT

AND

GODFREY GICHUHI GIKUNU...............................1ST RESPONDENT

NATHAN MUI GIKUNU...2ND RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at

Nairobi (W.M. Musyoka, J.) dated 31st day of January, 2014

in

Succession Cause No. 1064 of 2003)

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JUDGMENT OF THE COURT

The saying "*where there is a will there is a war*" confirms that matters of inheritance can be extremely acrimonious. Nothing demonstrates this better than Charles Dickens fictional case of **Jarndyce v Jarndyce ,** in the book **Bleak House**, where an inheritance dispute was only concluded when the entire estate was depleted by legal costs.

The appeal before us arises from a dispute in the family regarding the last will of **Francis Gikunu Wanjohi** (the deceased) who died on 8th May, 2001 at the age of 81 years and was survived by two widows and several children. The widows also died subsequently. Some five months before his death the deceased is said to have instructed **Mr. Charles Njunu Kihara**, an advocate practicing in the name and style of **C.N. Kihara & Company Advocates,** to draw for him his last will and testament. The will was witnessed by the deceased's long-time friends, **Evanson Mwangi Gakunyu** and **Elijah Gathogo Kimani. Godfrey Gichuki Gikunu** and **Nathan Mui Gikunu**, the deceased's two sons from his second marriage were named in the will as joint executors. Upon his demise and burial the advocate convened a family meeting in March, 2002 attended by 18 members of the family at which he read out the will. Those

present accepted the contents, and only asked to be supplied with copies.

When the two executors of the will took out summons to confirm the grant of probate of the written will, three of the beneficiaries, **Bernard Chege Gikunu, Anthony W. Gikunu** and **Erastus Maina Gikunu**, sons of the deceased with his first wife, protested in an affidavit filed on 23rd November,2004.The three are the appellants in this appeal. Their grounds for protesting were;

> ***"4. That…….the deceased was not competent to execute the … will in that;-***
>
> > *i.* ***The deceased had a terminal illness since the year 1993***
> >
> > *ii.* ***The deceased was operated in 1993 because of prostate cancer.***
> >
> > *iii.* ***The deceased was operated in the year 2000 because of the cancer of the stomach.***
> >
> > *iv.* ***The deceased was upto the time he allegedly executed the will very ill and not in control of his mental faculties.***
> >
> > *v.* ***The deceased due to the said advanced debilitating illness, was unable to comprehend the full import of the execution of the said will."***

As a result, they deposed, the distribution of the estate according to the will was unfair as it did not take into account the fact that the deceased had two households. They then proposed the manner the estate ought to be re-distributed. Apart from filing their respective affidavits, the appellants and the executors as well as their witnesses were fully heard through oral evidence by **Mugo, J.** But for reasons that are not apparent to us from the record, the matter fell upon **Musyoka, J.** to render judgment.

It was the appellants' case that in view of the deceased's ill health, which affected his judgment, he was incapable of making a declaration by a will on the disposition of his property; that that fact was apparent from the exclusion from the will of the deceased's two daughters, **Veronica Wanjugu** and **Mary Muthoni**, both married, yet the deceased bequeathed another daughter, **Wanjiru Karanja**, who is also married; that the first house was not adequately provided for in the will; and that the deceased did not, in the period preceding his death, tell any of his family members or close friends that he had written a will.

The executors, who are the respondents in this appeal together with their witnesses maintained that, as far as they could recall, the deceased, although suffering from cancer, his mental faculties were intact; that two family doctors who had known and treated him over the years, upto his last day on earth, were unanimous that stomach cancer could not lead directly to mental incapacity or impairment.

Mr. C. N. Kihara, advocate stressed that when the deceased went to his chambers to instruct him to draft the will, from the general conversation over many topics, and from his demeanor, the deceased was articulate and clear. He was clear about what he wished to do with his property, although he was unwell. His two friends who witnessed his last will confirmed that the deceased was alert, travelled by public means from his house in Eastleigh, Nairobi, walked without support from the bus station to the advocate's chambers on Wabera Street; that he climbed the stairs to the 4th floor where the chambers were located and climbed down after the meeting on his own without help.

Evans Mwangi Gakunyu, who was 75 years old at the time he testified, had been the deceased's friend since 1958, when he (Evans) was employed as a medical assistant, by the deceased's physician of many years, Dr. Annette Gardner. He was emphatic that the deceased suffered no mental imbalance and that when he accompanied him to the advocate's chambers he was in his full senses. When Dr. Gardner retired, the daughter, **Dr. Vera Somen** took over the clinic and continued being the deceased doctor. On 7th December, 2004, after the affidavit in protest was filed, **Dr. Somen** made a report to the effect that at no time did the deceased ***"…. suffer from any impairment of his mental faculties …. that***

he was in full possession of his mind and judgment at the time that he wrote his will in January." Dr.

Somen confirmed this in her oral evidence. **Dr. Loefler**, another doctor who treated the deceased in 1993 when he suffered urinary retention due to enlarged prostate successfully removed the prostate and the deceased recovered fully. He saw him again in March, 2000 this time with cancer of the stomach, conducted an operation on him in April 2000 but was unable to remove the growth; that, although there were some postoperative complications, the deceased recovered and continued receiving care for the advanced cancer. He was attended by the doctor for the last time on 6th June, 2000 before his death. When he saw him on this day the doctor found him to ***"…be fully alert and at no time was there any question of mental impairment."*** Other than the report, Dr. Loefler did not give evidence before the learned Judge.

During the same period when two reports were made, the appellants also obtained a report dated 8th November, 2004 from Dr. Smita Devani, a consultant physician and gastroenterologist, who, from that report appeared to have attended the deceased during his last admission in hospital. The report stated that the deceased was admitted with constipation and vomiting, having been diagnosed to have cancer of the stomach; that he looked ill, pale and dehydrated; and that he **"…**

was fairly stable although unable to retain any food." He passed away after one week. Dr. Devani similarly did not testify.

The learned Judge evaluated the evidence before him. He considered **section 71** of the **Law of Succession Act (the Act)** and Rule **40** of the **Probate** and **Administration Rules (the rules)** and expressed the view that the only questions for determination under those provisions were, whether the grant was made properly and whether the estate was being properly administered. Before answering those questions the learned Judge observed that, apart from the appellants stating that the deceased was too ill to make a will, they did not seek the revocation of the will. Instead they made their own proposals on the re-distribution of the estate. In the learned Judge's opinion the approach was unprocedural and he opined that had the appellants sought to revoke the will, the entire process, including the application for confirmation of the grant would have collapsed and the family would have had to start the whole process afresh.

Guided by the provisions of **sections 5(4), 7** and **26** of the Law of Succession Act the learned Judge concluded that the appellants had failed to discharge the burden of proof to show that the deceased was, due to illness incapable of making a will; that no proof of coercion or undue influence was presented; and that, to the contrary there was evidence that at the time of making the will, the deceased was alert and in charge of his mental faculties. With that conclusion the learned Judge dismissed the protest with costs and confirmed the grant of probate in favour of the respondents.

This appeal has been brought on a record 20 grounds, which in our view should have been no more than six. The learned Judge was said to have erred in admitting the impartial evidence of **C.N Kihara**, who, after drawing the will, represented one side of the family; that the learned Judge failed to specify which of the two summons for confirmation he was determining; that he unduly restricted his consideration and determination to only **section 71** and **rule 40** aforesaid; that he failed to see that the will was invalid as it did not meet legal requirements and standard; that the learned Judge failed to exercise inherent powers to revoke the will; that the evidence of **Dr. Loefler** and **Dr. Somen** which the learned Judge relied on, instead of that of **Dr. Devani,** were not credible.

As we re-evaluate the evidence presented before the learned Judge, we remind ourselves of the cardinal principle that, as the first appellate court from the decision of the High Court in the exercise of its original jurisdiction, and in accordance with rule 29 of the Court of Appeal Rules, it is our duty to re-appraise the evidence and draw inferences of fact, as was explained in **Seascapes Limited** v **Development Finance Company of Kenya Ltd** Nairobi Civil Appeal No. 247 of 2002 thus;

> *"**As the first appeal, the Court of Appeal was enjoined to revisit the evidence that was before the High Court afresh, analyze it, evaluate it and arrive at its own independent conclusion, but always bearing in mind that the High Court had the benefit of seeing the witnesses, hearing them and observing their demeanor and giving allowance for that**."*

A will is defined in **section 3** of the Law of Succession Act to mean;

> ***"….. the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II, and includes a codicil."***

A testator usually has greater freedom to dispose of his personal property in any manner he wishes through a will. That is why we often read of the mega-wealthy people in the West bequeathing their inheritance to pets, the only limitation, in our case being **section 5** of the Law of Succession Act, which provides that;

> ***"5. (1) Subject to the provisions of this Part and Part III, any 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."***

Explaining the purport of this section, the Court in **Elizabeth Kamene Ndolo** v **George Matata Ndolo,** Nairobi Civil Appeal No. 128 of 1995 emphasized that the testamentary freedom to dispose of one's property by will in any manner one sees fit is unfettered as long as the testator is an adult of sound mind. A written will made in accordance with the law cannot be questioned. It can only be altered or revoked by another will made by the testator himself, if he is competent in terms of soundness of mind to do so.

Because of what we shall be stating later, 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 dependents. 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. In addition, by **section 7** of the Act, a will or any part of the will which has been made by fraud or coercion or by such importunity which takes away the free agency of the testator, or has been induced by mistake, is void.

The state of mind necessary to vitiate a valid will, whether arising from mental or physical illness, drunkenness, or from any other cause must render the testator incapable of knowing what he is doing. The burden of proving that a testator was, at the time of making the will, not of sound mind, is upon the person so alleging. This is a factual question often determined by medical evidence.

The only issue raised in the affidavit of protest was that the deceased was terminally ill, having been operated on for prostate cancer in 1993 and in 2000 for stomach cancer; and that;-

> ***"…. Upto the time he allegedly executed the will (*he*) was very ill and not in control of his mental faculties……; that due to the said advanced debilitating illness* (he) *was unable to comprehend the full import of the execution of the said will".***

Under **sub-section (3)** of **section 5** aforesaid, any person who decides to make a will is deemed, as a general rule, to be of sound mind. The burden therefore fell upon the appellants to demonstrate that on 9th January, 2001 the deceased was, in such as a state of mind, due to physical illness, that he did not know what he was doing. More or less like the test of the defence of insanity in criminal cases, the McNaughton rule.

Parties in this appeal recognized the importance of proving this issue through medical evidence, hence their reliance on medical reports by three doctors. The appellants have, however contended that the evidence of **Dr. Devani** was ignored while those of **Dr. Loefler** and **Dr. Somen** which were not credible informed the learned Judge's ultimate decision.

Before we consider the medical evidence, we emphasize that the appellants did not dispute the signature of the deceased on the will, or even the fact that the deceased made the will. It was his state of mind, at the time the will was made that was in contention. We intend to consider this question on two prongs.

First, there is on record evidence of those who were with the deceased immediately before and after he wrote the alleged will. While the appellants sought through their testimony and those of their witnesses to convince the court that the deceased had completely lost the capacity to comprehend anything, the respondents and their witnesses, on the other hand, testified that the kind of cancer from which the deceased was suffering was not likely to affect his mental capacity. According to the two witnesses to the will and the advocate who drew it, the deceased was physically well and lucid. On his own, he traveled by public means of transport from Eastleigh to the city centre, climbed the stairs to the Advocate's chambers and returned to his residence after the transaction.

From the comprehensive seven-page will, drawn, executed on every page, attested according to the law, listing over ten properties and containing a clear ratio of distribution among the beneficiaries, we draw the presumption that the will was rationally made. Secondly, all the three doctors who attended the deceased and examined him during the period preceding his death, contrary to claims by the appellants, were unanimous regarding the deceased's state of mind. **Dr. Somen** who had followed the deceased's medical history for many years was emphatic that he never suffered from any impairment of his mental faculties and that she had no doubt, whatsoever that in January when he wrote the will **"…he was in full possession of his mind and judgment." Dr. Loefler** who attended the deceased in 1993 and on 6th June, 2000 and who appears to us to be a cancer specialist for he treated him for enlarged prostate and cancer of the stomach, concluded in his report that;-

> ***"….At that time he had no complaints. Both in 1993 and in 2000 (*he*) was fully alert and at no time was there any question of mental impairment."***

Dr. Devani's report which the appellants relied on is, in our opinion, no different from those of the other two doctors in the conclusion as to the mental status of the deceased. Apart from observing that the deceased looked ill, pale, edamatous and dehydrated, the doctor formed the overall opinion that; **"…** (he)

was fairly <u>stable</u> although unable to retain any food."

The test for testamentary capacity laid down by Cockburn CJ in 1870 in the decision of a four-judge appeal panel of the Queen's Bench in the case of **<u>Banks</u>** v **<u>Goodfellow</u>** (1870) LR 5 QB 549 has been applied in many Anglophone jurisdictions to this date. The learned Chief Justice explained, not in medical terms, but in plain English language that;

> ***"It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties- that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made".***

We approve and adopt this test.

Applying the test to the circumstances and facts of this case, and bearing in mind that it was the appellants who bore the burden of proof, on a balance of probabilities, we, like the learned Judge entertain no doubt that the deceased understood the nature, content and effect of the will. He discussed with the advocate the matter before inviting two of his bosom friends to witness his free intentions and wishes regarding the disposition of his property upon exiting the scene on earth. He listed all his property and bequeathed his beneficiaries in the manner he alone determined and knew best. It was alleged that he omitted two of his married daughters **Veronica Wanjugu** and **Mary Muthoni**; and that that was a sign he did not know what he was doing. We cannot conclude that this omission was inadvertent. The two daughters have not themselves complained, neither were they called by the appellants to state their grievance, if any. In any case, we do not share the conclusion that the omission of the two by the deceased pointed to unsound mind. The most interesting and telling aspect of the will is its last paragraph, where the deceased warned his children against challenging, by a suit or through a panel of elders, the

distribution of the estate contained, in the will. Any of his children who disregarded this, he declared would be disinherited. Perhaps, like a Hebrew prophet, and as an old experienced polygamous man, the deceased foresaw division and acrimony in the family arising from the manner he exercised his testamentary freedom.

It must be remembered that not even severe physical illness can automatically deprive a person of a testamentary capacity. Only physical illness that renders a testator incapable of knowing what he is doing will take away the capacity. It is for this reasons that the courts insist on the person alleging lack of capacity due to illness to prove that the illness impaired the judgment and understanding of the testator.

It was alluded to but not seriously pursued in this appeal, that there was likelihood of undue influence on the deceased to distribute his property in a skewed manner by members of his second house where he lived. We however do not think that undue influence is established merely by inequality of the provisions for dependants, granted the testator's ability and freedom to dispose of his property as he pleases. In any case, the mere fact that the deceased lived with members of the second house cannot, without more, be evidence of undue influence. Before us it was alleged that the advocate who drew the will was biased against the appellants and that the learned Judge ought not to have placed any weight on his evidence. Whereas courts have emphasized the need for advocates to avoid situations where there may be conflict of interest, we do not think, in the circumstances of this case, that such a conflict existed. The only issue in contention was the capacity of the deceased to make a will. Even if the advocate's evidence on the appearance and mental state of the deceased was to be excluded, the final outcome of this question would not be different.

Regarding the two applications for confirmation of the grant, we note that both were taken out by the respondents. Only the one dated 9th May, 2004 was pursued and determined in the impugned judgment. The one dated 29th July 2004 was by, necessary implication subsumed in the former.

Finally, from the appellants' own pleadings and evidence, it appears to us that they were pursuing relief under **section 26** of the Act for reasonable provision and not for revocation of the will as implied by the learned Judge. We have concluded, however, that nothing in the will suggested that the deceased made a mistake in the manner he expressed his wishes in the disposition of his estate.

We come to the conclusion that all the grounds proffered in this appeal lack merit. The appeal fails and is dismissed. We do not think, this being a family matter, it is appropriate to condemn the appellants with costs. Accordingly, we make no orders as to costs.

Dated and delivered at Nairobi this 4th day of November, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR