IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 45 OF 2014

BETWEEN

YASMIN RASHID GANATRA

TARIQ ABDUL RASHID (Suing as legal representatives of

RASHID JUMA KASSAM).....……..APPELLANTS

AND

GULZAR ABDUL WAIS.....….....……....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru

(Lesiit, J.) dated 8th July, 2014

in

Succession Cause No. 290 of 2010*)*

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JUDGMENT OF WAKI JA

1. I have had the advantage of reading in draft the judgments of my learned Sister, Nambuye JA, and Brother, Kiage JA, and I am indebted to them for the lucid exposition of the facts and standard of review on a first appeal. I need not therefore rehash them.

2. In my view, the matter that was placed before the High Court was fairly narrow and specific. It was to determine whether the grant of letters of administration jointly issued to **Gulzar Abdul Wais** and **Yasmin Rashid Ganatra** on 29th November 2010 should be annulled under ***Section 76 (a)*** and ***(c)*** of the **Law of Succession Act** (LSA). The Section in relevant part provides as follows:

> ***"76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-***

(a) that the proceedings to obtain the grant were defective in substance;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;"

3. The applicant was Gulzar, and the onus was on her to demonstrate that there was an *"untrue allegation of fact essential to justify the grant,"* whether or not the allegation was made in ignorance or inadvertently. The 'allegation' advanced in this matter was that the deceased died intestate while in fact she had made a written Will before her death. The proper procedure was therefore for the executor named in the Will to apply for grant of probate and not a grant of letters of administration. The central issue for determination was thus whether in fact the deceased, **Amina Juma Kassam,** had made a written Will.

4. Part II of the LSA lays out provisions on Wills, among them: the *'persons capable of making wills and freedom of testation'*; *'forms of wills'* and *'revocation, alteration and revival'*. **Section 5** is particularly relevant and may be reproduced for full effect:-

"5. (1) Subject to the provisions of this Part and Part III, <u>any person who is of sound mind</u> 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.

(2) <u>A female person</u>, whether married or unmarried, has the <u>same capacity to make a will as does a male person.</u>

(3) <u>Any person making or purporting to make a will shall be deemed to be of sound mind</u> for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

(4) The <u>burden of proof that a testator was,</u> at the time he made any will, not of sound mind, <u>shall be upon the person who so alleges.</u>" (Emphasis added)

5. So is **Section 11:-**

"11. No written will shall be valid unless-

(a) the <u>testator has signed</u> or <u>affixed his mark</u> to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) <u>the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will</u>, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; <u>and each of the witnesses must sign the will in the presence of the testator,</u> but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary." (Emphasis added)

6. The issue was determined through oral evidence from 4 witnesses called by Gulzar and 3 witnesses called by Yasmin. The witnesses for Gulzar included the Advocate who received instructions to draw up the Will and the two witnesses to the deceased's signature. Yasmin and her two witnesses cast aspersions on that claim, and particularly the mental capacity of the deceased to make a Will as well as the timing of discovery of the Will by Gulzar. Upon considering the entire evidence, the trial Court, Lesiit J., found that the deceased had the capacity to make a Will under ***Section 5(2)*** (supra). She believed the procedure

adopted by the Advocate who was given instructions to draw up the Will as well as the witnesses to the deceased's signature, stating:

> ***"I find that PW1, 2 and 3 had no reasons to lie. These were independent witnesses with no relations to deceased. In addition the Petitioner and her sister Reshime were not present and could therefore not influence them. I find them credible witnesses.***
>
> ***Issue was raised by the Objectors that there were more than one Will written by the deceased, considering the evidence of PW1 that she signed twice. The Will was GAW6. It clearly shows that PW1 signed twice on it. It was (sic) the question of signing two documents but one document twice.***
>
> ***The petitioner has adduced evidence to establish that the deceased, who was the testator, signed the Will in the presence of the witnesses and her advocate. The signature of the deceased on the Will is so placed that it shall appear that it was intended thereby to give effect to the writing as a Will. The petitioner has established that the Will was attested by two competent witnesses. I am satisfied there was only one will which PW1 signed once and PW2 signed twice. I am also satisfied that the Will, GAW6, is a valid Will within the meaning of section 11 of LSA."***

7. The learned Judge also considered the objections relating to the mental capacity of the deceased to make the Will but found that the medical reports produced without calling the makers thereof made no reference to the mental capacity or challenge of the deceased in making a valid Will. As the onus was on the objector to establish such incapacity, the Court found that ***Sections 11 (a), (b) and (c)*** (supra) were complied with. It was a valid Will.

8. Those findings would have been sufficient to dispose of the application before the High Court. I have keenly examined the findings of the trial court and perused the record in relation thereto. I find no error in principle in the manner the learned Judge evaluated the evidence placed before her. Eyebrows may well be raised, justifiably, on the timing of discovery of the deceased's Will. But an explanation was tendered by Gulzar and the trial court accepted it. Indeed the Act itself envisages such eventualities by excusing *"ignorance'* and '*inadvertence'* which are common human frailties, so long as they are explicable and within the bounds of reasonableness. Needless to say, when it comes to credibility of the witnesses who testified, the trial court was in a better position to make that assessment. The findings made by the trial court were not based on no evidence at all or on perverted evidence to warrant my interference. On the contrary, there was credible evidence upon which they could be made and I find no compelling reason to interfere with them. On this I agree with my learned Sister.

9. What I must interfere with is the apparent frolic by the trial court in analyzing at length the dispositions made not only in the deceased's Will but also in the Will left by her deceased husband. I agree with my learned Sister that those issues would properly lie for determination once the executor institutes proceedings after grant of probate. I would, in the circumstances, set aside the findings of the trial court relating to disposition of the estate of the deceased.

10. The upshot is that this appeal is dismissed save to the extent stated above. There will be orders as proposed by Nambuye JA in her Judgment.

Dated and delivered at Nyeri this 14th day of October, 2015.

P. N. WAKI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR

JUDGMENT OF NAMBUYE JA

1. The litigation resulting in this appeal has its roots in a citation issued by Meru High Court on the 4th day of June, 2010, at the request of ***Yasmin Rashid Ganatra*** and ***Tariq Abdul Rashid,*** the Appellants herein in their capacity as personal representatives to the Estate of ***Abdul Rashid Juma***, a deceased son of the deceased herein ***Amina Juma Kassam***; directed to ***Gulzer Abdul Wais*** and ***Reshma Salim Ganatra*** the respondents, inviting them to show cause as to why they should not accept or refuse letters of administration of all the intestate estate which by law devolves and vests in the personal representative of the deceased ***Amina Juma Kassam***, or alternatively to show cause why the same should not be granted to any other person.

2. In response to the above citation, the Respondent **Gulzar** ***Abdul Wais*** with the consent of her co beneficiary ***Reshma Juma*** petitioned for a grant of letters of administration intestate to the estate of the deceased as the only beneficiaries of the estate of the deceased. The process eventually resulted in the Court granting a grant of representation of the intestate estate of the deceased to the Respondent and the 1st Appellant.

3. Before confirmation of the said grant, it transpired that the deceased had left a will. This discovery prompted the respondent to present to court summons for annulment of grant dated the 20th day of January, 2011. It was opposed by the replying affidavit of ***Yasmin Rashid Ganatra*** deposed on the 24th day of March, 2011. Directions were given on the 11th April, 2011 for the matter to proceed by way of *viva voce* evidence. The merit disposal of that process is what resulted in the impugned judgment delivered on the 8th day of July, 2014 in which the learned trial Judge upheld the respondent's application for annulment of the grant initially granted intestate to the Respondent and the Appellant and upholding the validity of the will.

4. The appellants were aggrieved by that decision. They have appealed to this Court raising ten (10) grounds of appeal. They contend that the learned trial Judge erred both in law and fact:

- ***in holding that the deceased died testate, despite the fact the will had (sic) many discrepancies making (sic) impossible to pass the test of valid will.***

- ***in holding that the deceased made a valid will despite the appellants showing in court that the deceased was sicky/disillusioned and thus incapable of making a will as per medical reports by two doctors.***

- ***in holding that the deceased was not incapacitated and incapable of making a will at the time of making it since the evidence on record is contrary to that holding in view of two (sic) by Dr. David Silverstein and Dr. Eliud Njuguna.***

- ***in holding that the will was valid thus went a head to disinherit her deceased son Rashid Juma, when the evidence on record shows that her deceased son's wife and children (Objectors) have been staying (sic) the deceased on (sic) same house while occupying the first floor and the deceased together with the petitioner occupy the ground floor for over thirty five years.***

- ***in failing to consider the earlier will made by deceased husband (Juma Kassam- deceased) dated 10th July, 1992 which advocated for application of Sharia law in distribution of his estate to all the dependants.***

- ***in finding that the deceased personally purchased the Land parcel No. Ntima/Igoki/5686 (matrimonial property) when there was no evidence (sic) support that holding.***

- ***by finding that the will was free from influence and manipulation by the petitioner who kept the deceased at the Nairobi (sic) in isolation from the rest of the family when she was sick.***

- ***in annulling the grant issued jointly to both parties thus leaving the estate without an administrator and therefore vulnerable (sic) being wasted.***

- ***the entire decision of the learned Judge was unfair inequitable, illegal and unconstitutional contrary to all sense of justice and was against the weight of the evidence adduced in court.***

5. In his oral submissions before me ***Mr. Mutunga*** learned counsel for the appellant urged us to interfere with the trial court's findings on the grounds that the evidence in support of the respondents case was full of contradictions rendering it incredible and un reliable; the alleged will should have been treated with caution as it had been drawn by an advocate who used to work for one of the beneficiaries of the will; the deceased could have been manipulated by the respondent who had a power of Attorney over the deceased's affairs shortly before she died; no reason was given for the late disclosure of its existence; the court should not have ignored the medical evidence as it went to demonstrate that either the deceased was totally incapable of making a will at the material time or that if any will was made then the same was obtained through manipulation; and lastly, that the alleged will should not have been upheld as it was biased against the Appellants.

6. In response to the appellant's submissions, ***Ms Makobu*** learned counsel for the respondent urged me to dismiss the appeal, on the grounds, that there was no need to tender the hand written draft will in evidence as it had been perfected; there was nothing on the record to show that there was more than one will; there was nothing in the medical reports tendered in evidence to suggest that the deceased had no capacity to make the contested will; as none of these reports made any reference to the mental status of the deceased as at the time of giving instructions for the drawing of the will or at its authentication; not every disease that afflicts a person's body affects the mind; also that the deceased's failure to give the numbers of the property forming the will was no justification for suggesting that the deceased had no mental capacity to make the contested will.

7. ***M/s Makobu*** continued to submit that the respondent's evidence all went to demonstrate that the deceased knew what to bequeath and to whom; that the power of Attorney donated to the respondent by the deceased, was simply for the respondent to manage the affairs of the deceased on her behalf (deceased's) and there was nothing to suggest that it was meant to manipulate the deceased to the respondent's own advantage and to the disadvantage of the appellants or other family members.

8. On the validity of the will generally, ***M/S Makobu*** urged that the learned trial Judge applied the correct threshold under section 5(2) and 11 of the Law of Succession Act Cap 160 Laws of Kenya and arrived at the correct conclusion that the contested will was valid. Lastly, that the content of the will of the deceased husband of the deceased herein had no application to either the proceedings before the learned trial Judge or this appeal and was rightly rejected by the trial Judge.

9. In response to the respondent's submissions, ***Mr. Mutunga*** urged us to find that the issue of the contents of the will of the deceased husband of the deceased is alive and should have been considered by the learned trial Judge because it referred to property in which the deceased only had a life interest in and which she had no capacity to dispose of freely as her own. Still maintained that the evidence on the record indicated that the deceased signed two documents both of which should have been tendered in evidence for the court to verify their contents.

10. This being a first appeal, the mandate of this court is as set out in Rule 29(1) of the Rules of this Court, namely, to re-appraise the facts before us and arrive at our own conclusion. The court is however, enjoined in the exercise of the above mandate not to interfere with the High Courts' findings of facts unless there be demonstration that such a finding was based on no evidence; or that it was based on a

misapprehension of the facts; or that the Judge was shown to have acted on wrong principles in reaching the finding. See ***Sumaria & another versus Allied Industries Limited [2007] 2 KLR 1***. Also where the appeal arises from an alleged wrong exercise of Judicial discretion interference with such exercise of judicial discretion can only arise where there is demonstration that the exercise of such discretion was not based on sound reason but on whim, caprice or sympathy and therefore not exercised with the sole purpose of doing justice to the parties. See ***Githiaka versus Ndururi [2004] 2 KLR 67***. Or alternatively where there is demonstration that the trial Judge misdirected himself in some matter and as a result arrived at a wrong decision or that it was manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion resulting in a misjustice to the parties. See the case of ***Mbogo & another versus Shah [1968] EA 93.***

11. The application giving rise to the ruling impugned in this appeal was expressed to be brought under section 47 and 76 (a) and (c) of the Law of Succession Act. Section 47 simply donates a jurisdictional power to the High Court to entertain any application and determine any dispute under the Act and to pronounce such decree and make such orders there on as may be expedient whereas the prerequisites the respondent was required to satisfy under section 76 (a) & (c) were simply to demonstrate two things, **one,** that the proceedings to obtain the grant were defective in substance; and **two,** that the grant was obtained by means of an untrue allegation of a fact essential in a point of law to justify the grant not withstanding that the allegation was made in ignorance or in advertently.

12. In her affidavit in support of the application for annulment, the respondent deposed that upon receipt of the citation served on her, she sought wise counsel from the area chief who issued her with a letter enumerating the deceased's dependants and then advised her to seek assistance from a former court clerk at Meru Law Courts who advised her to file a petition for the grant intestate which she did resulting in the intestate grant issued jointly to her and the first appellant. Shortly thereafter is when she learned from the deceased's advocate that the deceased had in fact died testate. She accordingly instructed her advocate to apply for annulment of the grant as soon as it was issued hence the application giving rise to this appeal.

13. The 1st appellant countered the respondents deposition through her replying affidavit contending that the respondent's application for annulment was a ploy to delay the conclusion of the intestate proceedings as no good reason had been given as to why the respondent's advocates failed to disclose its existence soon after the deceased's death. It was also the 1st appellant's contention that as at the time the alleged will was made on the 26th November, 2009, the deceased was sick and confined to a wheel chair. She was therefore incapable of making a will. To fortify her assertions, the 1st Appellant annexed medical reports. She also took issue with the will bequeathing the deceased's entire estate to two daughters to the exclusion of the families of two deceased sons of the deceased.

14. The learned trial Judge assessed the above rival pleadings together with their respective supportive *viva voce* evidence, construed section 5(2) and 11 of the Law of Succession Act (supra) and arrived at the conclusion that section 5(2) does not qualify the capacity to make a will either on gender, religious or mental status and on that account the deceased therefore had capacity to make a will. She believed the testimony of the respondent's witnesses namely PW1, ***Banu,*** PW2 **E*vanson*** and PW3 **Ali *Maahmud Mohamed*** that two visits were made to the deceased in connection with the making of the will. The first was when PW3 went to obtain instructions to draft the will and the second when he went back with the final will for its endorsement by the deceased and her two witnesses PW1 and 2. She was convinced the three witnesses were truthful and GAW 6 was therefore a valid will and the only will of the deceased.

15. On my appraisal of the facts, I note that there was a minor discrepancy in the testimonies of PW1, 2 and 3 with regard to the number of copies of the will endorsed by them. It was PW1 who mentioned two documents similar in content apparently endorsed on the same 26th PW2 mentioned only one final copy of the will endorsed on the 26th. While PW3 mentioned two documents one hand written and another typed. It was the typed copy that was before the court for interrogation. PW3 explained that he had intended to tender the hand draft in court alongside the refined copy. The draft had been left in the client file, but unfortunately PW3 gave his testimony before the draft copy had reached him. The learned trial Judge was therefore entitled to focus on the document that was before her to determine whether it met the

thresh hold of a valid will or not. I therefore find that the minor discrepancy noted above though not reconciled by the learned trial Judge was inconsequential to the core issue before her, that is the determination as to whether the document before her, GAW6, met the threshold of a valid will. She found it did. I find no fault with that finding. This is because PW1, 2 and 3 were firm it contained the wishes of the deceased. In fact PW2 read the contents to the deceased and even inquired from the deceased about the inheritance of the families of her deceased sons to which the deceased replied that these had been catered for in their deceased father's will. This will was annexed by the Appellants. Its contents clearly indicated that the beneficiaries of the deceased father's estate were his widow the deceased herein and her two sons. This goes to confirm that the deceased knew the correctness of the responses she gave to PW2's inquiry that the daughters had not been provided for in that will.

16. On endorsement I find as did the learned trial Judge that the deceased's will had also been endorsed in accordance with section 11 of the Law of Succession Act as parties either signed or wrote their names. To the learned Judge all these satisfied the requirements of existence of "***a mark"*** necessary to give it a clean bill of health. I have no reason to differ from that finding as the same was supported by facts before the learned Judge.

17. On the mental status of the deceased as at the time the alleged will was made, it was the learned trial Judge's findings that on the facts before her the Appellants had not established that the deceased was incapable of making a valid will at the time GAW6 was made. From her assessment of the facts before her, it was clear that she was alive to the need for her to satisfy herself that the testator must have a sound and disposing mind and memory, that is, the deceased ought to have made her will with the understanding of the nature of the business in which she was engaged, must have had a recollection of the property she intended to dispose of and a clear picture of the person to whom she intended to bequeath the said properties and in what proportion. In arriving at her conclusion as above, the learned Judge opined that there is a rebuttable presumption under section 5(3) of the L.S.A. that the testator is of sound mind unless otherwise demonstrated; that this provision placed a burden of proof on the contending party who in this case were the appellants to prove otherwise; that the appellants placed reliance on medical evidence tendered in evidence without calling their makers and which did not mention anything about the mental status of the deceased and it could not therefore be assumed that going by the physical condition of the deceased at the time the alleged medical reports made, she was mentally unstable.

18. The above finding were based on the respondents testimonies through PW1, 2 and 3 who all maintained that the deceased was fluent in her conversation with them, she was clear headed, was in good control of her mind, was aware of her surroundings and was focused on the topic of discussion and was also coherent. To the learned Judge, the deceased's memory was sound going by her response to PW2's query as to why she had not provided for the families of her deceased sons to which she responded that these had been catered for in her late husbands' will. A will the witnesses did not have before them but whose contents turned out to be true as put by the deceased. On the basis of the above, I find nothing wrong in the learned trial judge's finding that PW1, 2, 3 were credible and worthy of belief.

19. It was submitted by ***M/s Makobu*** that one may be physically incapacitated but mentally sound. The learned trial Judge made findings that at the material time when the deceased made her will, she was no doubt confined to a wheel chair but there was nothing to suggest that she was not mentally stable going by the conversation she had with PW1, 2, and 3. I too have no doubt that the deceased was in her right frame of mind and fully conscious of the nature of her engagement namely, the making of the will as there is nothing on the record to show me otherwise. I therefore find no error in the learned Judge's finding that the will in question was duly executed, duly attested to and ex-facie was a valid will as it had met the thresh hold under section 11 of the Law of Succession Act (supra) and that the burden to rebut the presumption placed on the Appellants as the persons who entertained doubt as to the deceased's mental capacity to make a will at the time she made the said will in terms of section 11(3) of the Law of Succession Act had not been discharged.

20. The above findings would have been sufficient to dispose of the Appellants appeal as they have already satisfied the prerequisites required to be met under section 76(a)& (c) of the Laws of Succession Act. However, the learned Judge went further to wholesomely deal with other attendant issues raised by

the Appellants. I find it prudent to respond to these as I ll. On the failure to disclose the existence of the will at the earliest opportunity, I find nothing wrong with the learned trial Judge's finding that the reasons advanced by the Respondent were truthful and therefore believable as she and her sister were the ones who stood to lose had the will not been disclosed and the Succession to the deceased's estate concluded through intestate proceedings.

21. The appellants also raised two other pertinent complaints against the said will. **One,** that it had not been drawn in accordance with Islamic law; and, **two** that it had not made provision for the families of the two deceased sons of the deceased who had predeceased the deceased. I note from the record that the learned trial Judge interrogated those issues fully and made conclusive pronouncements on them. On my own, I make a finding that indeed these issues were raised. I however, refrain from trekking the path the learned trial Judge took. My reasons for taking this stand is that the trial judge went beyond what she had been invited to rule on by the respondent in the application for annulment, namely to determine whether the respondent had established the validity of the will in terms of section 76(a) & (c) thereof matters touching on the intend or purport of the will were clear. There was no mandate for her to interrogate the intent and purport of the validated will. I am also satisfied that there is nothing in section 47 of the same Act which donate the general jurisdictional power to the High Court that could have authorized the learned Judge to go beyond the invitation to her pursuant to section 76 (a) & c. No prejudice will be suffered by the Appellants as they will have a chance to raise these two issues and others if any in the intended probate proceedings.

22. The upshot of the above is that I affirm the learned trial Judge's finding that the deceased had capacity to make a will; **two** that she also had the mental capability to make the will; and **three** that it is a valid will. The above being the position, it follows that the intestate proceedings were defective in substance as the same had been obtained by means of an untrue allegation that the deceased had died intestate when in fact she had died testate.

1. I therefore, affirm the annulment of the grant made to ***Gulzer Abdul Wais*** and ***Yasmin Rashid Ganatra*** on the 29th day of November, 2010.

2. The executors of the will are directed to forthwith proceed to process the succession to the deceased's estate by institution of probate proceedings.

3. Each party shall bear their own costs.

Dated and Delivered at Nyeri this 14th day of October, 2015.

R.N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF KIAGE JA

This appeal is the latest battle in an unedifying-intra-farmilial feud pitting a daughter-in-law and her son on the one hand against two daughters bouting and squabbling over the estate of their matriarch, one **Amina Juma Kassam**, deceased (Amina) who expired on 16th April 2010.

Upon Amina's demise, Yasmin Rashid Ganatra (Yasmin) and her son Tariq Abdul Rashid (Tariq) who were her daughter-in-law and grandson respectively, and who are the appellants herein, on 4th June 2010 took out a citation under **Rules 21** and **22** of the Probate and Administrative Rules under the Law of **Succession Act, Cap 160** Laws of Kenya (the Act). The citation was addressed to Amina's daughters Gulzar Abdul Wais (Gulzar) the respondent herein, and her sister Reshma Salim Ganatra (Reshma) and directed them to enter appearance at the High Court Succession Registry in Meru and accept or refuse letters of administration to Amina's estate, or show cause why the same should not be granted to any other person.

In an affidavit sworn on 31st May 2010 in verification of the said citation, Yasmin averred at paragraph 10 that to the best of her knowledge, information and belief, Amina died intestate. She also deposed to alleged harassment by Gulzar at her home on **NTIMA/IGOKI/5685** as well as interference and intermeddling on Amina's estate that rendered it imperative that succession proceedings commence forthwith to submit the said estate to determination by the High Court.

That citation prompted Gulzar to lodge a petition for letters of administration on 17th June 2010 respecting Amina's estate. In that petition she stated that Amina died intestate. It was accompanied by, *inter alia*, **Form 38** clearly and boldly titled "***Consent to the Making of a Grant of Administration Intestate to person of Equal or Lesser Priority"*** dated 13th May 2010 by Reshma and by **Form** "***P&A5"*** again boldly titled "***Affidavit in Support of Petition for Letters of Administration Intestate"*** and by **Form** "***P&A12"*** titled "***Affidavit of Justification of Proposed Administrator***" sworn on 15th May 2010 by Gulzar in which Amina is described as having died intestate.

The petition was duly published under Gazette Notice Number 9762 in the Kenya Gazette of 20th August 2010 in which the Deputy Registrar of the High Court at Meru gave notice that letters of administration intestate to Amina's estate had been sought by Gulzar.

That publication provoked an objection by Yasmin and Tariq on various grounds including alleged omission of some dependants, under-valuation of the estate, blatant intermeddling, threats to evict the objectors from their home and such like. The objectors also filed an answer to Gulzar's petition and themselves cross-petitioned for letters of administration intestate to Amina's estate.

On 1st October 2010, Yasmin and Tariq took out summons under **Section 47** of the **Act** and Rules **46** and **73** of the Probate and Administration Rules by which they sought various orders including an injunction to restrain Gulzar from entering their home built on **NTIMA/IGOKI/5685** without notice and supervision; and from seeking to lease out or sell the said property, and for rental income from part of that property to be held in a joint account of the parties' advocates.

Gulzar opposed that application by way of replying affidavit sworn on 19th October 2010 in which she averred that the objectors were indeed living on the 1st floor of the property in question even before Amina's death but "***by virtue of tradition and no more***". She stated that the property in question had been "***our family home over the years***" and that, at paragraph 23;

> ***"the Petitioner as an administrator of the deceased's estate is duty bound to evict the Objector/applicant from the Deceased's home to avoid wastage as the objector through her husband who is the Petitioner/Respondent's late brother has already been bequeathed their rightful shares". (Annexed hereto and marked GAW 5 is a certificate of such grant showing shares granted to my brother)".***

That application was heard by Kasango, J, who by a ruling dated and signed on 29th November 2010,

granted the prayer for injunction, and directed the parties' advocates, Ms. Joan Ndorongo & Co. and Kilonzo & Co., to open a joint account for the rental income. Kasango J. also made the following orders;

> ***"3. A grant shall be issued forthwith in the joint names of Gulzar Abdul Wais and Yasmin Rashid Ganatra.***
>
> ***4. The issue about distribution of this estate shall be heard in Court on 25th January 2011."***

I have taken the trouble to set out that background in some detail because I consider it to be the relevant context for what was to later transpire, and which informs the present appeal.

Virtually on the eve of the set hearing for distribution of the estate, on 21st January 2011, Gulzar filed, through Kilonzo & Co. Advocates, Summons for Annulment of Grant under **Section 47** and **76(a)** of the **Act** and **Rule 44** of the Probate and Administration Rules.

She specifically prayed that the grant of letters of administration made to her and to Yasmin on 29th November 2010 be annulled on the grounds that;

> " ***(a) The proceedings to obtain it were defective on substance.***
>
> ***(b) The grant was ignorantly and inadvertently obtained by means of untrue allegation of fact essential in point of law to justify the grant.***
>
> ***(c) That unless this application is urgently heard and orders sought issued, then the wishes of the late Amina Juma Kassam may not be given effect."***

Gulzar supported her application by an affidavit sworn on 20th January 2011 in which she swore that on being served with the citation she filed the petition based on "advice from a former High Court of Meru (sic) **Clerk"** which turned out to be improper as she ought to have applied for grant of probate. She also averred, at paragraph 3, that;

> ***"… at the time of filing my said application, I was not aware of the legal implications, having been mislead (sic) and unduly influenced by the said former court clerk at such a time when I was bereaved and vulnerable…"***

She also blamed two law firms that had previously acted for her in the matter before court for failing to advise her accordingly and that by the time she "***got proper legal advice and realized [her] unfortunate mistake"*** her application for letters of administration had already been gazetted. She stated that it was not factual that Amina had died intestate, as her written will had since been availed by the firm of Mohammed & Lethome Advocates, hence the need to revoke the grant of letters of administration intestate.

That application was strenuously opposed by the appellants. Yasmin swore an affidavit on 24th March 2011 in which she questioned the timing and *bona fides* of this new discovery of a will and its disclosure after Kasango J. had already issued a grant and fixed a date for the distribution of the estate. She suggested that the will must have been procured through coercion and the taking advantage of Amina's frail health and incapacitations. She then averred that the will was fake and, moreover, went contrary to the wishes of Juma Kassam (Kassam) who had by will directed that his entire estate of which he appointed Amina as trustee, be distributed in accordance with Islamic law. She also attached a copy of Kassam's will as well as a medical report dated 4th November 2009, the latter by Dr. David Silverstein.

The learned Judge, Lesiit J, directed that the application for annulment be heard by way of *viva voce* evidence. The applicant therein called a total of four witnesses, including herself, while the objectors called three, including themselves. All the testimony revolved around the central question of whether Amina died testate or intestate. I have carefully and thoroughly gone through the testimony of the

witnesses and perused the documents that were before the learned Judge. I have done so cognizant of our duty as a first appellate Court to subject all the evidence to a fresh and exhaustive analysis consistent with a re-hearing but without the advantage possessed of the trial court, of hearing and observing the witnesses.

After hearing the witnesses and the submissions made by Counsel, the learned Judge by a ruling dated and delivered on 8th July 2014 granted Gulzar's application and annulled the letters of administration. This aggrieved the appellants who filed a notice of appeal followed by a record of appeal. In their memorandum of appeal they complain that the learned judge fell into error by; to paraphrase;

- **Holding that Amina died testate yet the will had too many discrepancies to pass the test of validity including the Amina's illness and incapacity per two medical reports.**

- **Holding that the will was valid notwithstanding that it purported to disinherit and dispossess the objectors from a house they occupied for over 35 years.**

- **Failing to consider Kassam's earlier will which directed the application of sharia law in distributing the estate to all the dependants.**

- **Finding, without evidence, that Amina personally purchased land parcel NO. NTIMA/IGOKI/5685.**

- **Finding that the will was free from influence and manipulation by Gulzar yet she kept the sickly Amina in isolation from the rest of the family.**

- **Annulling the grant issued jointly thereby leaving the estate vulnerable to being wasted**.

At the hearing of the appeal, ***Mr. Mutunga,*** learned counsel for the appellants submitted that the evidence given by the two witnesses to Amina's execution of the will gave contradictory evidence but that the learned judge did not properly or at all appreciate those contradictions. He also referred to the evidence of Ali Mohmud Mohammed, the advocate who prepared the will in question. That advocate spoke of having gone to Amina and had attesting witnesses sign the will twice; a handwritten one on 14th November 2009 and the typed one produced in court on 26th November 2009. This contradicted the testimony by the attesting witnesses Banu Amirali (PW1) and Evans Thuo (PW2) who spoke of having met Mr. Mohammed only once on 26th November and signed only the typed will.

Mr. Mutunga also referred to a letter from Mr. Mohammed's former law firm dated 14th September 2010 and addressed to Mutula Kilonzo Jnr, Gulzar's advocate. The letter is as follows;

"MOHAMED L LETHOME ADVOCATES

5th Floor Dev. Towers

Turban Rd/Biashara Street

P.O. Box 40572 – 00100

NAIROBI, Kenya

Our Ref.M&L/GEN/CORR/2010

Mutula Kilonzo Jnr

Mutula Kilonzo & Co. Advocates

NAIROBI.

Dear Sir,

REF: WILL BY AMINA JUMA (DECEASED)

Refer to the above.

I wish to confirm that on 14th day of November 2009 I did take instructions from one Amina Juma holder of ID. No. 7677346 at her residence at Pangani Shopping Centre and drafted a will for her in my handwriting. She dictated to me the contents of her will. I do confirm that she was in her true senses at the time of taking her instructions and that she voluntarily and freely without any assistance executed her said will in my presence and other two witnesses.

That on the 26th November 2009 I received further instructions from Amina Juma to have the handwritten will typed with some modifications giving Land Reference numbers to the properties being bequeathed. The contents of the two wills are same with only minor adjustments.

Your s faithfully,

A.M. MOHAMED

FOR: MOHAMED & LETHOME ADVOCATES"

(My emphasis)

Mr. Mutunga submitted that the said letter went to show that there were unreconciled discrepancies between what Amina is said to have stated in the handwritten will and the purported typed version of the same. He posed the question of what those "***minor adjustments"*** were and added that they were not in fact minor as their effect was to disinherit the appellants. He then posed the question of where the handwritten will was and posited that the oral evidence given by the witnesses regarding the will did not meet the test of **Section 11** of the **Act.**

Counsel then questioned Gulzar's *bona fides* and cast doubt on the explanation given for the failure to mention the existence of the will until just days before the hearing for the distribution of the estate. He also questioned her conduct in having a controlling stranglehold on Amina and denying the appellants' access to her in her last days. This improper control, in counsel's view, was amply reflected in Gulzar's obtaining of a power of attorney over Amina's property on 10th March 2010.

Mr. Mutunga criticized the learned Judge for failing to appreciate the eight grounds of objections to Amina's will as were set out in the appellants' submissions which he repeated before us and I have variously adverted to herein. He rested by submitting that the learned Judge was in error for failing to have heed to Kassam's will and for exposing the estate to wastage by annulling the grant. He urged us to allow the appeal.

Resisting the appeal, ***Miss Makobu***, the respondents' learned Counsel defended the High Court's judgment as having properly applied the test on **Section 11** of the **Act** in upholding the validity of Amina's will. She submitted while pointing to a copy of the will on the record, that even the mere writing of his name by Evans Thuo (PW2) amounted to a valid attestation. She submitted further that PW2 did in fact enquire of Amina why she was bequeathing everything to her daughters and she explained that it is because they had been left out of their father's will.

Regarding Amina's medical condition, Miss Makobu blamed the appellants for merely bringing two medical reports but failing to call the doctors who made them to explain whether Amina's illness affected her capacity to make a will. When we asked her what meant the "***brain metastases***" Dr. Silversten's report indicated Amina to have, counsel indicated she did not know and insisted that whatever that

condition, Amina may still have been lucid as illness does not necessarily deprive one of capacity. She cited the case of In Re: **JNM (DECEASED)** [2005] eKLR; Nairobi H.C.C.Succession Cause 523 of 1996 **(IN THE MATTER OF THE ESTATE OF JAMES NGENGI MUIGAI (DECEASED)** in aid of that proposition.

She also adverted to the presumption of sound mind and capacity in **Section 11** of the **Act** as well as the holding of Cockburn C.J. on the test to be applied in **BANKS – VS- GOODFELLOW** [1870] LR 5 QB 549;

> ***"he must have sound and disposing mind or memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, and of the persons who are the objects of his bounty and the manner it is to be distributed between them".***

As to the argument that sharia law should have applied, counsel contended that **Section 5(2)** of the **Act** gives married women capacity to make wills and Amina was not bound by her late husband's preference of sharia law. She freely exercised her right and did so without manipulation by Gulzar. Her donation of a power of attorney to Gulzar was because "***she had become incapacited"*** Counsel submitted, but was not out of pressure or manipulation.

Regarding the contentious **NTIMA/IGOKI/5685** property, ***Miss Makobu*** maintained that it was not part of Kassam's estate. She referred us to a certificate of official search dated 1st February 2010 which indicates that Amina became proprietor of the property on 22nd July 1998 while Kassim had died on 19th October 1995. She urged us to dismiss the appeal.

In his reply to those submissions, ***Mr. Matunga*** focused on two aspects of the case namely whether Amina, who had obtained from Kassim a "*life interest"* in the various properties bequeathed to her could dispose of them in the manner she purported to do; and whether her will could be said to be valid in the face of the attesting witness (PW1)'s statement that she signed two documents (not the same one twice) and also when she and the other attesting witness (PW2) were categorical they met the advocate, Mr. Mohammed (PW3) only once and not twice as he asserted.

In a first appeal we proceed by way of re-hearing as I have already indicated. I do however pay some deference to the trial Judge's findings of fact and are deliberately slow to disturb them. That is not to say I am necessarily bound by such findings and we may, in appropriate cases, depart therefrom. The guiding principles have been restated in many instances including the oft-cited **SELLE –VS- ASSOCIATED MOTOR BOAT CO**. [1968] EA where the predecessor of this Court put it thus;

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif – vs- Ali Mohamed Sholan [1955], 22 E.A.C.A.270)."***

Having carefully gone through the record of appeal herein, I find that I am unable to uphold the learned Judge's central finding and decree that the grant of letters of administration issued jointly to Gulzar and Yasmin on account of the will said to be Amina's should have been annulled. I am far from persuaded that Amina did leave a valid will for the reasons I am about to set out.

The first thing that strikes me as odd is the timing of Gulzar's application for annulment of the joint grant. The application was made literally on the eve of the scheduled hearing for the distribution of the

estate. It appears to me strange that the application should have been made so late in the day yet, by her own showing, Gulzar stated in cross-examination that she came to be aware of the will eight months before in mid-May 2010. That is when her sister Reshma Juma informed her of it and then Mohammed Advocate gave it to her in the same month.

What that means is that right from the inception of the succession proceedings before the High Court, indeed, at the time she was served with the citation to accept or refuse the letters of administration intestate dated 4th June 2010, Gulzar knew that there was a will. She filed various documents in court including sworn affidavits, in which she stated that Amina had died intestate and I am unable to accept her rather half-hearted explanation that she was misled, while grieving, by a clerk at the Law Courts and was not aware of the legal consequences of consistently referring to Amina as an intestate and failing to disclose the existence of the will.

It is noteworthy that Gulzar in her application for annulment was content to lay blame on her previous firms of advocates, Bwonwonga & Co. as well as Weda & Co., for failing to advise her properly. She got the proper legal advice when Kilonzo & Co. Advocates came on record but it is to be noted that they filed their Notice of Appointment of Advocates on 17th August 2010 and participated in the proceedings without bringing to the attention of the High Court that Amina had died testate. This includes the long and detailed Replying Affidavit they drafted for Gulzar on 19th October 2010 in opposition to the appellants' application for injunction. They argued that application before Kassango J. and never once breathed, even from the bar, that a will did exist. Only when the application went against Gulzar, and a distribution was scheduled, did this will get to be unleashed. Such silence does not accord with my own conception of what would be reasonable, logical and dutiful in the circumstances and goes to question the assertions about the existence or validity of the will in the first place.

As to the will itself that was produced before the learned Judge, I observe that it is not paginated but runs into two typed pages. The properties and the beneficiaries appear on the first page while the second only states that the testator made the will freely while in good physical and mental health without undue influence, duress and or misrepresentation. It is then followed by what purports to be Amina's signature followed by the words;

> ***" This page was signed and <u>then preceding pages were initiated(sic) by the Testator</u> and published and declared as <u>his</u> last will and testament in the presence of us both".***

It is followed by the word "***Witnesses"*** under which is typed;

> ***"1. …….***
>
> ***ID NO.***
>
> ***2. ……***
>
> ***ID NO. "***

The dots are then filled in by hand. The first witness is indicated in capital letters as **EVANSON NGANGA THUO** and his ID Number filled in as **21970988.** The second witness as filled in capital letters is **BANU AMIRALI EBRAIMJEEE DRUAGAR** with the ID Number indicated as **20499072** to be followed by what appears to be her signature.

> ***Now, the Act provides at Section 11 that;***
>
> ***"No will shall be valid unless –***
>
> ***….***
>
> ***(c) the will is attested to by two or more competent witnesses, each of***

whom must have seen the testator sign or affix his mark to the will---

and each of the witnesses must sign the will in the presence of the

testator ----

(My emphasis)

Looking at the exhibited will, I am not convinced that it complied with

vital formal requirements. The document itself says that the previous pages had been initialed (not initiated, in the context) by the testator. There is only one previous page. It does not bear Amina's initials on it and therefore there is nothing to show that she owned it. Matters are not helped by the reference to the "***testator"*** in the masculine ***"his".***

Worse, in my view, is the fact that whereas the second witness did sign the will in attestation, there is no indication that Evanson Nganga Thuo did. His name and ID Number are indicated, the former in bold, but there is nothing to show on the document that it is he that wrote the name and number. His signature does not appear on the will.

It is also curious that the will as typed has the names of the witnesses left blank to be filled in by hand yet, if Mohammed is to be believed, the typed will was meant to be a reproduction of the handwritten will signed by Amina and by the said two witnesses some twelve days previously. It would have been reasonable to expect that the witnesses' names would be typed in as well then they would be invited to sign.

This only adds to the mystery that is already captured in the contradictions and inconsistencies between those witnesses' accounts of having

met Mohammed only once, and signed the typed will (or form) on 26th November 2009 and his own account in court of twice, and in the letter to Kilonzo & Co. Advocates dated 14th September 2010 that also speaks of the handwritten will executed and attested to on 14th November 2009.

The conclusion appears to me inescapable that even on the basis of formalities alone, the will the learned Judge relied on to annul the grant was not a valid will. That being so, I do not consider it necessary to go into the question of whether improper and undue influence was brought to bear by Gulzar on Amina to sign the will as presented. I also need not delve into the effect of Amina's illness, a painful cancer of the stomach that had mastatized to the brain, on her capacity to execute a will. Enough to say, I think, that there does exist under Section **5 (3)** of the **Act** a rebuttable presumption of soundness of mind. The presumption is rebutted by a showing that the testator is "***in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing."*** The burden of rebutting soundness of mind is borne by he that alleges the contrary. The burden though, is not an onerous one, for, as the learned authors of **Halsbury's Laws of England** 4th Edition Vol. 177 opine at page 903-904;

> ***"where any dispute or doubt of sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at time of the execution of the will which generally disturbs the conscience of the court as to whether or not***

the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity."

I take the view that the learned Judge ought to have interrogated in some depth the issue of Amina's capacity considering that she is alleged to have written her will but a fortnight or so after being discharged from hospital, for financial and not recovery reasons, and had a history of possible cancerous tumors in the brain and complicated neurological findings. She was 72 years old and died a mere five months later.

The final, and disturbing aspect of this appeal that I must address is the contentious inclusion in the will of property **NO. LR.NTIMA/GOKI/5685.** It is not in dispute that on that land is built a house with a ground floor in which Amina used to reside before moving to Nairobi, and an upper floor in which the appellants reside. The appellants contend that it was not available to Amina to dispose, by will or otherwise, of the said property in whole in so far as part of it was their home. Their case in fact was that it is Rashid Juma Kassam, their husband and father who built that upper floor. Tariq testified that his father built the upper floor and that he had receipts to show payments to the contractor and for materials, though he did not have them in Court.

The learned Judge was not impressed with the appellant's claim to own part of the property. Said she;

"Both Objectors, OW1 and 2 were very clear that they had no documentary proof to support any of their claims. They had no documents to show that either of them purchased the property NTIMA/IGOKI/5685 from the deceased. They had no documents to prove they constructed the residence on the first floor of deceased home by materials bought at their expense."

With respect, the evidence appears to have been quite abundant that the upper part of the house had always been the appellants' home since April 2000.

Their husband and father lived there before his death in 2002. Gulzar herself admitted as much in cross-examination and in her replying affidavit of 19th October 2010 though she denied that the appellants occupied the same out of entitlement, preferring instead to attribute their occupation to ***"tradition and no more"***

Whereas the learned Judge rejected the appellants' claim to part of the property for want of documentary evidence, she accepted, impermissibly in my view, Gulzar's evidence that Amina had purchased the property, without any evidence in support of the claim. She held that the appellants had admitted that Amina bought the property after her husband's death, but said nothing about Tariq's evidence that she did so using funds from the sale of a business that Kassam left her.

No evidence was led by Gulzar to show that Amina had any other property before or after the death of Kassam save what she received from him by virtue

of his will dated 10th July 1992 by which he appointed her Executor (sic) and Trustee of the same, and directed her to distribute his estate among his beneficiaries in accordance with Islamic law, but to be postponed until his youngest grandchild attained the age of twenty-one years or until her death. The list of the properties that passed on to Amina is not listed in the will but the Certificate of Confirmation of Grant issued in Nairobi H.C. Succession Cause No. 23 of 1998 confirmed a grant of representation issued to Amina respecting Kassam's estate. In it is a schedule that gives her, in clear terms, the following properties;

(a) Parcel No. NTIMA/NTARIRA/1597 - WHOLE

(b) Plot No. 209/4300/109 NAIROBI - WHOLE

That Certificate of Confirmation of Grant, at any rate the one exhibited on the record of appeal, has a curious and crucial blind spot. It indicates quite clearly that Amina also gets yet another property but that

property is not named or described. It must have been either omitted, whited out or erased and there is no telling which it is, I am wholly unable to fathom how such a yawning gap could appear on the face of a Certificate of Confirmation of Grant. I do not subscribe to such slips or accidents or coincidence in especially in such highly contentious matters where so much is at stake. I cannot have it away as a mere coincidence that Amina got a lifetime interest from Kassam, of a property the particulars of which are mysteriously missing. It behoved the learned Judge to enquire into and interrogate this aspect of the matter and not state, rather peremptorily that;

> "***3. The deceased [Amina] got life interest over a property not legible in annexed grant. However it is clearly not NTIMA/IGOKI/5685"***

With great respect, precisely because the certificate of grant is strangely blank or totally illegible, there exists no basis upon which the learned judge could categorically state that it was not the disputed property herein. Indeed, it is not lost to me that in the letter dated 14th September 2010, Gulzar's advocates, at her instructions, addressed the appellants on precisely that property and stated, *inter alia*

> ***"for the avoidance of doubt, until the demise of Amina Juma Kassam the said property was her matrimonial home. Her daughters Reshma Ganatra and Gulzar Juma have the right to access her home without any hindrances".***

The only matrimonial status Amina had was with Kassam and it goes to suggest, if not more than suggest, that the property in question came to her from Kassam.

Given the views I have expressed, the conclusion is inevitable and the logic quite unerring, that the application for annulment of the grant of administration intestate jointly to Gulzar and Yasmin should not have been granted. Certainly not on the basis of Amina's impugned will. The learned judge erred in allowing it. Equally, and for the same reason, the learned judge fell into error and went well-beyond the provision of the purview of the application before her when she made

this direction;

> ***"I direct that the petitioner consults the objectors and her sister Reshima (sic) in terms of Section 82(d) of [the] Law of Succession Act over the property L.R. NO. NTIMA/IGOKI/5685 and offer to the objectors the option to purchase the property with residence where they live upon consideration subject to the advice of a qualified valuer".***

The upshot of my consideration of this appeal is that it ought to succeed. I would set aside the judgment and decree of the learned Judge and substitute therefor an order dismissing the Summons for Annulment of Grant dated 20th January 2011. I would direct that proper steps be taken by the parties for the confirmation of the grant of letters of administration to Gulzar Abdul Wais and Yasmin Rashid Ganatra made on 29th November 2010 and a distribution of the estate of Amina Juma Kassam in the High Court at Meru within sixty (60) days hereof before any judge other than Lesiit J.`

The parties would bear their own costs of this appeal.

As am alone in this, my learned colleagues Waki and Nambuye JJA being of a contrary view, the appeal shall be disposed of along the lines proposed by WAKI JA.

Dated and delivered at Nyeri this 14th day of October 2015.

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR