



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 292 of 2003

BETWEEN

BENSON MUNGAI NGANGA.....APPELLANT

AND

ELIUD CHEGE WALLACE.....RESPONDENT

(An appeal from the judgment/order of the High Court of Kenya

at Nairobi (Etyang J.) dated 21st September 1999

in

HC SUCCESSION CAUSE NO. 1624 OF 1993

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court of Kenya at Nairobi, (Etyang, J)(as he then was) made on 21st September 1999. The matter before the High Court resulted from objection proceedings taken out by the two objectors namely Benson Mungai Ng'ang'a and Manase Mbugua, against grant of Probate to the respondent in respect of the Estate of one Timau Kinyanjui Nganga (“the deceased”) who died on 20th July, 1993. The deceased was at the time of death unmarried and had no children. He had written a Will bequeathing his property to persons not including the objectors. Grant of Probate was objected to in accordance with the relevant provisions of the **Law of Succession Act Chapter 160 Laws of Kenya**. Various affidavits were filed whereupon a full hearing took place before Etyang, J who dismissed the objection and confirmed the Grant in favour of the respondent. This therefore provoked this appeal.

In the Memorandum of Appeal, the judgment of the High Court is challenged on the following grounds:-

“a) The learned Judge erred in law and fact in finding that the deceased had left a valid will.

b) The learned Judge erred in law in finding that the deceased had capacity to make a will.

c) The learned Judge erred in law and fact in finding that the objectors were not dependants within the meaning of Section 29(b) of the Law of Succession Act Cap 160 and therefore not entitled to a share in the deceased's estate.”

It is prayed that the appeal be allowed and the orders of the High Court be set aside.

The appeal came before us for hearing on 20th February, 2013. Mr. G. Kamonde, learned counsel for the appellant argued that the Will was invalid because there was, according to counsel, contradictory evidence on when the Will was executed.

Mr. N. Nyaga, learned counsel for the respondent in opposing the appeal submitted that a discrepancy on time would not invalidate a Will. He referred to the record of proceedings where the deceased held several meetings leading to execution of the Will.

The issues for our determination are whether there was a valid Will and whether the learned Judge erred in holding that the objectors were not dependants within **Section 29(b)** of the **Law of Succession Act**.

Section 5 of the **Law of Succession Act** provides for persons capable of making Wills and freedom of testation. A testator must be of sound mind and must not be a minor. The testator is deemed to be of sound mind for purposes of that provision unless he was, at the time of executing the Will in such a state of mind, whether arising from mental/or physical illness, drunkenness or other cause, unable to know what he was doing. Once a Will is executed the burden is upon the person alleging that the testator was not of sound mind to prove the allegation.

Section 11 of the said Act sets out conditions precedent to the execution of a valid Will. These are, inter alia, that the testator must sign or affix a mark to the Will or the testator has directed another person to sign for him; the signature or mark of the testator or person signing for him must be placed in a clear manner to give effect to the writing of the Will; 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, or have seen some other person sign the Will; or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of the other person; and each of the witnesses must sign the Will in the presence of the testator, 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.

We found it necessary to set out the requirements of **Section 11** of the said Act in detail in view of the complaint by the appellant forming part of the issues calling for our determination.

Was the Will valid?

There is evidence in the affidavits and the *viva voce* evidence taken by Etyang, J showing the following: The appellant was a brother of the deceased. There were other brothers and sisters Eliud Chege (respondent), Jason Kihuyu (deceased at the time of trial), Arthur Muthemba (deceased at the time of trial), Timau Kinyanjui (deceased at time of trial), Manze Mbugua (objector before the High Court), Henry Kuria (deceased at the time of trial), Monica Wanjiru and Mineh Wakonyo.

The contested Will is set out in full in the judgment appealed from. In that Will the deceased appointed the respondent as Executor of the Will and bequeathed two properties to one Alice Wanjiru Chege and Monica Wanjiru Wallace. The Will is shown to be witnessed by three people, Kinyanjui Kihuyu (ID NO. 3078750/66), Peris Wangari Kimacha (ID NO. 4314532/67) and Kinyanju Michael Mukiri (ID NO. 4828565/67). Testifying before the High Court, the appellant stated that the deceased could not have written a valid Will because he had been ailing for six years after suffering injuries from a road traffic accident; that the accident affected the deceased's state of mind and that the deceased could not have written a Will where he disinherited the appellant.

The second objector before the High Court testified in similar manner.

In the respondent's evidence before the learned Judge is the following:-

“... The deceased then made his Will on the same day that we met. I cannot recall the date. The Will was first handwritten. It was then typed in the offices of Mungai & Gakuru Advocates. The typed Will was then taken to the deceased to sign, which he thumb-printed in the presence of Kinyanjui Kihuyu, Peris Wangari, Monicah and Kinyanjui Michael Mukiri...”

There was also the testimony of Mrs. Peris Wangari Karanja, an Advocate of the High Court of Kenya who drew the Will.

After hearing the testimony of these and other witnesses the learned Judge was satisfied that the deceased executed the Will freely and consciously. We have in this judgment set out the provision in the Law of Succession Act providing for how a valid written Will may be made.

Having re-evaluated the evidence before the Judge in the High Court we are satisfied that the deceased executed the Will freely, considering that the Appellant did not demonstrate that the fact of the deceased's involvement in a road traffic accident and ailment for six years had impaired the deceased's mental capability in any way. In the premises we are satisfied as was the learned trial judge was that the deceased was of sound mind as at the time he executed the said Will and he also executed it freely. The Will was witnessed by three independent witnesses.

The other issue is whether the learned Judge erred in holding that the appellant and the other objectors were not dependants within the meaning of **Section 29** of the said Act.

Sections 28 and 29 of the Law of Succession Act provide:

“28. In considering whether any order should be made under this Part, and if so what order, the court shall have regard to -

- (a) the nature and amount of the deceased's property;**
- (b) any past, present or future capital or income from any source of the dependant;**
- (c) The existing and future means and needs of the dependant;**
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;**
- (e) the conduct of the dependant in relation to the deceased;**
- (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;**
- (g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.**

29. 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;**
- (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, 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) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

The learned Judge found as a fact that the appellant and the other objector were not being maintained by the deceased. The deceased was sickly and was being taken care of by his sisters. The Judge held that the deceased had no obligation to provide for the appellant and the other objector because of the circumstances of the case. The Judge directed his mind to the provisions of **Sections 28 and 29** of the said Act. We have revisited them on our own and we are satisfied that they were correctly construed and applied by the learned Judge.

We have considered the complaint by the appellant in the general circumstances of the case before the Judge and are satisfied that the Judge did not misdirect himself in any way in reaching the conclusions leading to the judgment appealed from. The appeal has no merit and is accordingly dismissed with costs to the respondent.

Dated and delivered this 15th day of March, 2013.

R.N. NAMBUYE

.....
JUDGE OF APPEAL

P. KIHARA KARIUKI

.....
JUDGE OF APPEAL

S. ole KANTAI

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR