



REPUBLIC OF KENYA



**In re Estate of Sureshkumar Dwarkadas Samji, also known as Sureshkumar Morjaria (Deceased)
(Succession Cause 55 of 2019) [2024] KEHC 3533 (KLR) (26 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 3533 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 55 OF 2019**

G MUTAI, J

JANUARY 26, 2024

**IN THE MATTER OF THE ESTATE OF SURESHKUMAR DWARKADAS
SAMJI, ALSO KNOWN AS SURESHKUMAR MORJARIA (DECEASED)**

BETWEEN

BHAVIN SURESH MORJARIA APPLICANT

AND

JAIVIN SURESH MORJARIA RESPONDENT

RULING

Introduction

1. Sureshkumar Dwarkadas Samji Morjaria, a businessman based in Mombasa, died on 20th October 2017, at Ganjoni, Mombasa, after suffering respiratory arrest due to acute pontive infarction. He was 75 years old at the time of his death. I shall hereafter refer to Sureshkumar Dwarkadas Samji Morjaria as “the deceased”.
2. The deceased died testate, having executed a will on 23rd April 2010, in the presence of 2 witnesses. The deceased bequeathed his son Jaivin Suresh Morjaria all his real and personal property whatsoever and wheresoever in Kenya and elsewhere, subject to and after the payment of his debts and funeral and testamentary expenses. He gave his wife, Usha Suresh Morjaria, a maximum of Kes.2,500,000/-, but permitted his son, Jaivin Suresh Morjaria (hereafter referred “Jaivin” or “the Applicant”), at his own discretion to give her more money if he so wished. Lastly, he directed Jaivin to put the sum of Rupees Three Hundred Thousand in a fixed deposit account for a period of 12 months, renewable every year, and to distribute the interest accruing therefrom to the poor and the needy. He bequeathed nothing to Bhavin Suresh Morjaria (hereafter “the Applicant” or “Bhavin”).
3. The deceased left behind 3 dependants:-
 1. Usha Suresh Morjaria - wife;



2. Jaivin Suresh Morjaria – son; and
3. Bhavin Suresh Morjaria – son.
4. He had the following assets:-
 1. 1/3 share in the land title, LT 143633 in Leicestershire, United Kingdom, valued at Kes.4,582,753/08;
 2. ½ share in Flat No 201 Rajda Tejal Complex, Dev Bhumi, Dwarka District, India, valued at Kes.1,874,934/15;
 3. ¼ share in Title No Mombasa/Block XXI/99, valued at Kes.15,000,000.00; and
 4. Title No Mombasa/Block XXI/99, Flat No 1, valued at Kes.6,000,000.00.

The total estimated value of his estate was given as Kes.27,457,687/23. According to the Petition for Grant of Probate of his Written Will, he had no liabilities.

5. Jaivin filed a Petition for Grant of Probate of the Written Will of the deceased on 28th November 2019. According to the Respondent, both Usha Suresh Morjaria (hereafter “Usha”) and Bhavin declined to give their consent to Jaivin to file the Petition.
6. The Grant of Probate of the Written Will of the deceased was issued by this Court on the 10th day of November 2020 to the Respondent.
7. Vide the Summons for Confirmation of Grant dated 31st May 2021 and filed on 22nd June 2021, Jaivin sought to have the grant issued to him confirmed. In paragraph 7 of the Supporting Affidavit, he deposed that “the Will referred to herein made by the deceased provided for the distribution of his entire estate and therefore that there was no intestacy in respect of any portion of the estate.
8. On 24th October 2022, Bhavin filed a Chamber Summons dated 21st October 2022 vide which he sought the following orders:-
 1. That a reasonable provision be made for Bhavin Suresh Morjaria as a dependant of the above-named SureshKumar Dwarkadas Samji Morjaria, who died on 20th October 2017 at Pandya Memorial Hospital out of the deceased’s net estate as this honourable court thinks fit;
 2. That this honourable court issues an order for the valuation of all the assets of the deceased to establish the current market value of the estate of the deceased;
 3. That this honourable court be pleased to grant such other or further orders and or issue such direction as it shall deem fit and just, having regard to the nature and circumstances of this case;
 4. That the costs of this application be paid out of the estate of the deceased.
9. Bhavin deposed in the Supporting Affidavit that Jaivin, as the executor of the Will of the deceased, was issued with a grant of Probate of the Written Will on 10th November 2020. The grant was yet to be confirmed. The deceased bequeathed Kes.2,500,000.00 to Usha and left the rest of the estate to Jaivin leaving him with nothing. Bhavin stated that at the time he filed the application he worked for Kensalt Limited as a shop manager and earned Kes.179,804/-. He averred that he had no other source of income. He stated that Jaivin, on the other hand, was financially stable compared to him.
10. The Applicant further deposed that prior to the deceased’s death, he lived with his mother. He averred that his relationship with the deceased was good and that he did not act in any manner that would have warranted the deceased to leave him out of his Will. He sought to have the estate valued, as



- what was given in the Summons and the Petition were estimates. Bhavin stated that he has a wife and hopes to have children in the future. His wife and mother depend on him fully. At the time of filing the applications, his wife was with his mother in India as her caregiver while the latter underwent treatment.
11. Bhavin accused Jaivin of neglecting their mother and of being hostile to her despite the fact that he had been given the discretion to give their mother further support. He also accused Jaivin of evicting them from the flat in Ganjoni after their father died. Bhavin also stated that he had a loan of Kes.1,380,000.00 with Stanbic Bank, which he continues to service. He thus implored this Court to make provision for him under the provisions of section 26 of the *Law of Succession Act*.
 12. The Respondent opposed the Application. Jaivin filed a Replying Affidavit sworn on 1 February 2023. In the said affidavit, Jaivin averred that the Applicant moved out of the Ganjoni home and deserted their father. After their father died, he tried to have the Applicant sign succession documents but declined to do so. He also accused the Applicant of having intermeddled with the estate of the deceased by taking jewelry from safe deposit boxes in Kenya and India without authority.
 13. The Respondent also deposed that the Applicant's relationship with the Applicant was strained.
 14. Bhavin, his father-in-law, Mukheshkumar Shantilal Shingala, and his mother, Usha, deposed to affidavits dated 17th February 2023. Bhavin denied that his relationship with his father was strained. He explained that he moved out of the family flat at Ganjoni so as to have room for his family and not for any other reason. Regarding his refusal to sign the petition, he deposed that the Respondent approached him while drunk and did not disclose the purpose and nature of the document he, Bhavin, was required to sign. He stated that after the death of their father, Jaivin demanded that their mother move out of the Ganjoni flat. He averred that he had taken out loan facilities from his father-in-law and Stanbic Bank. He denied that he sent his mother-in-law money for her own use. He averred that he accessed the safe deposit lockers with his mother's permission.
 15. He urged that I look at the nature and amount of the deceased's property, any source of income available to him, existing and future means and needs, whether he had received any advancement and or other gift from the deceased, his conduct in relation to the deceased, his brother's situation and circumstances and the general circumstances of the case.
 16. Usha supported the averments of the Applicant. In particular, she averred that the Applicant and the deceased had a good relationship and that she was surprised when he was excluded as a beneficiary in the Will. She deposed that she was receiving treatment in India. Her treatment is paid for by the Applicant who sends money to her through his mother-in-law.
 17. Mr Mukheshkumar Shantilal Shingala, in his affidavit, confirmed that he lent Bhavin Indian Rupees Eight Hundred Thousand (then approximately Kes.1,211,318/-) to enable him to meet his obligations to his family.
 18. The Respondent filed a Further Affidavit in response to the Supplementary Affidavit and affidavits of Usha and Bhavin's father-in-law. He sought to have these struck out as they, in his view, introduced new matters. In response to the said affidavits, he denied knowledge of an arrangement between his mother and Bhavin's mother-in-law on her upkeep and medical needs. He reiterated that the relationship between the deceased and the Applicant was so strained that the Applicant made a declaration, witnessed by his mother, that he was not interested in inheriting anything from the deceased. The said letter was annexed. He denied that he coaxed his late father into doing anything. He further denied that his father visited the Applicant in India when he worked there.



19. The matter proceeded by way of Written Submissions pursuant to my directions of 27th September 2023.

Written Submissions of the Applicant

20. The Applicant submitted that his father died testate and left a widow and 2 sons. In his Will, the deceased made no provision for him.
21. The Applicant identified 2 issues as coming up for determination: -
1. Whether the Court can interfere with the deceased's testamentary freedom and make a provision for the Applicant out of the deceased's estate; and
 2. If the answer to No. 1 is in the affirmative, what is the quantum of provision to be made to the Applicant?
22. The Applicant's counsels, Anjarwalla & Khanna Advocates, submitted that sections 26, 27 and 28 of the Law of Succession Act give the Court power to make reasonable provision in suitable cases. This Court was referred to the decision of the Court in Elizabeth Kamene Ndolo versus George Matata Ndolo [1996]eKLR, Popat versus Popat & 3 others (Civil Appeal No E009 of 2020 [2021] [KECA 106(KLR), John Gitata Mwangi & 3 others [1999]eKLR, In re Estate of Ezekiel Mabeya Kegoro (deceased) [2019]eKLR, In the Matter of the Estate of Gurdip Kaur Sagoo[2021eKLR.
23. It was submitted that the Applicant is entitled to reasonable provision out of the estate as he had demonstrated his need for reasonable provision. Counsel pointed out that the estate was worth Kes.27,457,687.23 as per the estimate given by the Respondent. It was necessary that the true value be established through valuation in accordance with the precedence in the Popat case.
24. Counsels submitted that the Applicant had lost his job at Kensal Ltd on 15th January 2023. The salary from the said job was his only source of income. Thus, unlike the Respondent, he was destitute. It was urged that the Respondent has a business and investment income and is wealthy on his own.
25. The applicant denied that his deceased father made any advances to him during his lifetime.
26. The Applicant submitted that he enjoyed a cordial relationship with the deceased. Regarding the handwritten and undated note, said to show that he had renounced his right to inheritance, counsel submitted that the same was vague and irrelevant. It was submitted, relying on Balfour versus Balfour [1919]2KB 571, that an agreement which relates to a domestic matter is presumed not to give rise to legal relations being created and thus cannot be enforceable in law. It was urged that if there was a strained relationship between the deceased and the Applicant, the same should have been stipulated in the Will.
27. It was submitted that the Applicant takes care of his mother and family and is already in distress, having borrowed Kes.1,380,000.00 from Stanbic Bank and a further sum from his father-in-law, both of which he was obliged to repay. That notwithstanding, he had lost his employment and no longer had a source of income.
28. It was further submitted that there was no ascertainable reason why he was excluded as a beneficiary of the estate.
29. Counsels submitted that this Court had complete discretion to order a specific share of the estate to be given to the dependant or to make such other provision for such dependants by way of periodic payments or a lump sum and to impose such conditions as it thinks fit. The Applicant submitted that the equitable maxim that "equality is equity" should apply and that he should be granted 50% of the



assets comprising the estate less the bequest of Kes.2,500,000.00 made to the deceased's widow under the Will.

Submissions of the Respondents

30. The Respondent's counsel, AB Patel & Patel Advocates LLP, fled Written Submissions dated 24th November 2023.
31. Counsels submitted that this Court should not interfere with the deceased's testamentary freedom. The Will was lawful and had not been challenged. It ought to be construed to give effect to the deceased's intentions.
32. The Respondent's counsel identified the issue coming up for determination as whether the Applicant is entitled to provision out of the deceased's estate as claimed and whether this honourable Court should conduct a valuation of the said estate.
33. It was submitted that it was not in dispute that the estate was valued at Kes.27,457,687.23. Counsels submitted relying on *In re Estate of Peter Walter Kowalczyk (deceased)* [2020]eKLR that valuation could only be done once the Court pronounces itself on whether or not it was necessary for reasonable provision to be made. As the Court hadn't done so it was urged that the ground was premature.
34. Regarding the Applicant's past, present, and future capital and income, it was submitted that the Applicant had a duty to show that he lacked means, including by proving that he lost his job with Kensalt.
35. It was urged that the Applicant and the widow intermeddled with the estate by emptying safe deposit locker No 143, Bank of Baroda, and Locker No 96, State Bank of India. Given what he took from the said lockers, his salary and the loans, it was urged that the Applicant had a rich source of capital and could not be said to be destitute. Counsels submitted that in the event the Court was minded to order valuation, the valuation that ought to be done is that of the safe deposit lockers.
36. On the conduct of the Applicant, the Respondent's learned counsels submitted that the conduct that was material was that of the Applicant to the deceased. The Respondent cited the finding of the Court of Appeal in *Popat versus Popat & 3 others* (Civil Appeal No E09 of 2020 [2021][KECA 106 (KLR) (22 October 2021) (judgment) where it was held that:-

“... The requirements actually talks of “the conduct of the dependant in relation to the deceased” and not the other way around. As rightly submitted by Mr. Regeru, this letter paints a man who was crying out for fatherly love and attention which he appears to have been denied over the years. The latter clearly shows that the Appellant's love and respect for his father was constant. It is his father who was not responsive.”
37. The Respondent submitted that the Applicant dissented his family, went to live in India, and engaged in angry exchanges with his father. Counsels surmised that he was excluded for these reasons.
38. It was therefore urged that I should not interfere with the testamentary freedom of the deceased.

Analysis and Determination

39. I agree with the parties that the sole issue coming up for determination is whether reasonable provision should be made in favour of the Applicant. It would appear to me that the quantum of provision is a contingent issue, dependent on the decision on the main issue.



40. It is common ground that the deceased died testate. The validity of his Will has not been challenged. The deceased had 2 children and the widow, Usha. The deceased bequeathed the bulk of his estate to the Respondent, only leaving Kes.2,500,000/- to the widow and Indian Rupees 300,000/- to the needy. The Applicant was completely left out.
41. Since the deceased was competent, he had testamentary freedom to make bequests in his will as he wished.
42. The testamentary freedom, as the courts of Kenya have declared, is not absolute. It is circumscribed by the provisions of the Law of Succession Act, which provides in sections 26, 27 and 28 as follows:-

“26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.

27. In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

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.”

43. The scope of testamentary freedom has been discussed by Courts in several cases. In re Estate of Gurdip Kaur Sagoo [2021]eKLR, the Court stated that:-

“Where a dependant is left without a reasonable provision for their maintenance and is rendered destitute, the Court will step in to make reasonable provision for such a dependant.



A testator's failure to provide for a dependant, thereby rendering him destitute, is clearly what section 26 of the Act sought to cure."

44. *In re Estate of Ezekiel Mabeya Kegoro (deceased)* [2019]eKLR, the Court- similarly held that:-
- "The net effect of the aforesaid provision is that the deceased's daughters cannot be disinherited. Where the testator excludes them from the will, they are entitled to apply for reasonable provisions from the estate without proof of maintenance or dependency."
45. The Court of Appeal in *Elizabeth Kamene Ndolo versus George Matata Ndolo* [1996]eKLR stated that:-
- "This Court must, however, recognise and accept the position that under the provisions of sections 5 of the Act, every adult Kenya has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms which all of us are entitled, freedom to dispose of property given by section 5 must be exercised with responsibility, and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible for during his or her lifetime."
46. Limits to testamentary freedoms aren't whimsical; they are not ways by which courts conjure up decisions that fit with their moral perspectives. Rather, such limits ensure that a testator does not dispose of his property in a way that is perverse or repugnant to justice and morality, for example, where a testator, for, say, sexist reasons, denies his daughters a share of the estate.
47. In this matter the Applicant adduced evidence showing that he was employed by Kensalt Ltd and earned Kes.179,804.00. He averred that he had since lost the said job. The Applicant has 2 dependants, a wife and mother. The Applicant averred, and it wasn't denied, that his wife is unemployed, while their mother is presently undergoing treatment in India. The Applicant has 2 loans to pay. It would appear to me that the Applicant has serious financial challenges. Given that he received no bequests in the will and taking into account the totality of the evidence I find and hold that he is entitled to financial provision from the estate of his father.
48. By completely excluding the Applicant, the deceased exceeded his testamentary freedom. This court is thus entitled to make orders for the reasonable provision for the Applicant.
49. Having found that the Applicant is entitled to financial provision, I now turn to the issue of the quantum of provision. The Court in *John Gitata Mwangi & 3 others versus Jonathan Njuguna Mwangi & 4 others* [1999]eKLR said as follows regarding reasonable provision:-
- "In order that the Court may be enabled to come to a proper conclusion as to what order it should make, a dependant has the duty to give satisfactory evidence as to his existing and future needs. Without this the Court will not be able to make any sensible order, whether the deceased had made any advancement to the dependant and the circumstance of the deceased's other dependants are also factors to be considered. The general circumstances ... including the deceased's ascertainable reasons for not providing for the dependant must also be considered."
50. I will look at each of the test in turn.



Nature and amount of the deceased's estate

51. The deceased left a sizable estate, the value of which was given as Kes.27,457,687/23. These are from four landed properties, two of which are in Kenya, one in India, and the other in the United Kingdom. The current open market value of these can only be known if they are valued.

Past, present and future capital or income of the Applicant

52. The Applicant averred that he is without employment, having lost his job with Kensalt Ltd. Although this is denied by the Respondent, I do not see how the Applicant would possibly lie about a matter that is easily ascertainable. I am thus inclined to believe his account in this respect. He does not appear to have any income. That notwithstanding, he has obligations to provide for his mother, who is elderly and sickly, and a wife without employment.
53. The Respondent averred that the Applicant's net pay of Kes.125,001/- is twice the national average monthly pay in Kenya, which the Kenyan National Bureau of Statistics gave as being Kes.64,000/- in 2021. Whereas that may be so, the cost of geriatric treatment, which does not appear to me to be borne by an average Kenyan employee, is prohibitive. I notice that the Respondent made no mention of his obligation to treat his own mother. In the circumstances, I presume that Usha's treatment costs are a burden borne solely by the Applicant.

Whether the deceased made any advancement to the Applicant

54. It is common ground that the deceased made no advancement for the Applicant.

The Conduct of the Applicant

55. Although the Applicant wishes to hold himself out as having been a model son, wrongly denied his inheritance, the circumstances appear to be quite different. For example, his email of 13th August 2005 is entitled "What happened after Dad left the UK." The first paragraph states "I am writing this letter, which is by no means an apology; it is a sequence of events that have occurred here as a result of dad's stupidity."
56. Although the email is old, there is no evidence the relationship ever improved. This is buttressed by the undated "renunciation" purportedly made by the Applicant. The Applicant did not deny having the note. What he questioned was its legal validity.

Although the Court accepts that the document isn't legally binding, the mere fact that the Applicant felt the need to write it shows that his relationship with his father was rocky. Further, the circumstances under which he exited the family home are suspicious. Although his explanation was plausible, the court is left with a nagging suspicion that he did so after a fallout with his father, the deceased.

57. The foregoing, notwithstanding the Will, did not provide the reason for the Applicant's exclusion.

The circumstances of the Deceased's other Dependents

58. The Respondent has business and investment income. The Applicant, on the other hand, is financially challenged. The widow of the deceased only received Kes.2,500,000/-, which amount would appear to this Court to be insufficient given her health and age.



Disposition

59. I find and hold that in the circumstances of this case, the Court is entitled to interfere with the testamentary freedom of the deceased. The deceased made no provision for the Applicant in his Will. Although the Applicant had his own share of blame, excluding him from the bequests in his will was an extreme decision. Without reasonable provision the Applicant's life, and that of his mother, will be miserable.
60. The Petitioner appears to be comfortable in life, unlike the Applicant, who has been unemployed since January 2023. The Applicant takes care of his mother, who received only Kes.2,500,000.00 from the deceased. The mother is in bad health and depends on the Applicant and his wife.
61. The reasonable provision must, however, be such an amount that, while ensuring that the Applicant isn't destitute, doesn't negate the wishes of the deceased. Thus, the proposal that there should be a 50:50 distribution is a non-starter; the court is making reasonable provisions for the Applicant, not countermanding the choices the deceased freely made. A fairer rate, in my view, is 25% of the estate, which leaves the Respondent with the majority of the estate as his father intended while ensuring that the Applicant and their mother have something that they can live on.
62. I therefore direct that the valuation of the assets of the deceased be done within 60 days of the date of this ruling to establish their current market value.
63. The Protector/Applicant shall have 25% of the estate.
64. As this is a matter involving two brother it is my view that awarding costs will not promote reconciliation and restoration of family ties. I therefore decline to award costs.
65. Orders accordingly.

DATED AND SIGNED THIS 26TH DAY OF JANUARY 2024 AT MOMBASA.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Provia Odhiambo for the Applicant;

Mr Baraza for the Respondent; and

Arthur - Court Assistant.

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