In re Estate of Johana Kiprotich Lel (Deceased) (Succession Cause 372 of 2009) [2024] KEHC 2910 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2910 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

SUCCESSION CAUSE 372 OF 2009

HM NYAGA, J

MARCH 20, 2024

IN THE MATTER OF THE ESTATE OF THE JOHANA KIPROTICH LEL (DECEASED)

RULING

1. The deceased herein died on November 13, 2007 at Tenwek Hospital.
2. On 13th November 2009, a Petition for Letters of Administration with will annexed were presented to this court by one Joseph Arap Chumo the executor of the said will. In his Petition, he also filed a will said to have been made by the deceased on 15th April, 2007.
3. Subsequently a Grant of Probate of Written will (P & A 45) was issued by the Court on February 15, 2011.
4. On 14th June 2011 one Dinah Chelangat John filed an application dated 9th June 2011 in which she sought the following orders;
   a. That the Grant of Probate of Written Will granted to Joseph Arap Chumo on February 13, 2011 be revoked.
   b. That the costs be in the cause.
5. The Application was supported by the grounds set out on the face of it and the Affidavit of the said Dinah Chelangat John sworn on June 9, 2011.
6. In a nutshell, the Applicant states;
   a. That the purported will was not written by the deceased.
   b. The mode of distribution is not fair and had prejudiced members of the 1st house.
   c. The executor did not disclose the list of dependants in his petition.
   d. The administrator has not disclosed who he is to the estate.

7. The Applicant states that she is the 2nd born daughter in the 1st house, which had seven daughters. That each house had their property with the 1st house occupying land reference number L.R. No. 9721/36 (IR 79974), belonging to the deceased.

8. The Applicant further avers that she had been occupying a distinct portion of this deceased's land, but the respondents namely Clara Lel and Erick Rotich had threatened to dislodge her from the said land.

9. The Applicant further avers that from the will, which she denies as having been made by the deceased, the mode of distribution is not practical since the land that is occupied by the 1st house is not 44 acres as alleged for the following reasons;-

    a. The deceased had in his lifetime sold a total of 17 acres to the persons mentioned in paragraph 7 of her Affidavit.

    b. After the deceased's death one (1) acre was sold to offset medical bills.

10. The Applicant laments that members of the 2nd house have been allocated land belonging to the 1st house yet none of the members of the 1st house have been allocated that with the 2nd house.

11. The Applicant thus applies that the estate should be distributed fairly and that each house should occupy their own portions, with the 1st house allowed to retain parcel number 9721/36.

12. The Applicant also prays that the grant be revoked, fresh administrators be appointed and distribution be done afresh.

13. The Application was opposed by the said executor, Joseph Arap Chumo, who swore a Replying Affidavit on 17th September 2011.

14. In a nutshell, the Respondent states that it is not in dispute that the deceased had two (2) houses. That the deceased made his last wishes through the will in question, which duly appointed him as an executor. That the will was made in the presence of two witnesses namely Joel Kiprotich Terer and Wilfred Kiptoo Kimutai. That he has fully disclosed his relation to the deceased as required. That the estate was properly distributed in accordance with the will, which was fair and equitable.

15. The Respondent further avers that the Applicant was keen to become an Administrator, the reason why she filed a citation, knowing very well that there was a will.

16. To the Respondent, the will in question is valid.

17. Directions were given that the Application proceeds by way of viva voce evidence. The parties filed their respective statements.

18. When the matter was listed for hearing, only the Applicant gave her evidence on March 9, 2020. The Applicant basically rehashed her averments in the Affidavit in support of her application.

19. It was the Applicant's case that the deceased had two (2) houses and she was from the 1st house, which had girls only. The other house also had seven children. That when the deceased married Clara (the 2nd wife) he took her to live at Burgei Farm. The 1st house lived at Boito.

20. The Applicant further testified that at the time of the death of the 1st wife, the deceased was himself very ill and had to be taken from hospital to attend her burial. He then went to Burgei, but was taken back to hospital after he had allegedly written the will.

21. The Applicant states that the purported will was written on April 15, 2007 and the deceased was re-admitted in hospital on April 17, 2007. It was her contention that the deceased was not in a state of

mind to write the purported will, owing to his ill health and advanced age. She produced a hospital bill showing that the deceased was admitted in hospital on the same day he is purported to have written the will.

22. The Applicant further testified that in his lifetime, the deceased had sold part of Boito Farm as follows;

    i. To Samuel Rator – 10 acres

    ii. To Mangereka – 4 acres

    iii. To betty Kibet – 1 acre

    iv. To Frank Kigen – 1 acre

23. The Applicant further stated that after the death of the deceased, one (1) more acre was sold to offset the medical bills. Thus, for Boito Farm, a total of 17 acres were sold, leaving 27 acres available.

24. The Applicant stated that her objection to the will was further prompted by the fact that the 1st house were not to get any land at Burgei Farm and that the 2nd house were not to get any land at Boito Farm as per the information she got from her deceased mother.

25. The Applicant denied the allegations that the will was read out immediately after the death of the deceased, but this was done after one (1) year, when the person who had guaranteed the debt at Tenwek Hospital, where the deceased was being treated, complained.

26. The Applicant stated that the deceased did not know how to read or write, she acknowledged that she knew the executor and the two (2) witnesses named in the will. She also acknowledged that according to the will she was to get five (5) acres but she was adamant that her mother she was adamant that her mother had stated that no one from either family would get any laid from the other's land.

27. Joseph Arap Chumo, the executor to the will, filed his statement, which reiterated the contents of his Affidavit. He stated that the will in question was read out a day after the deceased was buried and he realised that he had been appointed as an executor.

28. Wilfred Kiptoo Mutai, who described himself as paralegal filed a witness statement dated June 26, 2018. He stated that the deceased called him and told him that he wanted to sub-divide his properties in written form. Thereafter, the deceased narrated how he wanted his property divided, as he put it down in writing (in Kalenjin language). That the deceased was of sound mind, consistent in his intention and he explained the contents thereof to him, and he signed the will. That together with Joel Terer, they witnessed the will.

29. Joel Kiprotich Terer also filed a statement. He stated that the deceased who was a neighbour asked him to visit. When he did so, he took them (with Wilfred Kiptoo Mutai) to his son's quarters. That the deceased was jovial and in good health. He narrated his intentions as Wilfred wrote them down. It was read to him and he confirmed the same by appending his signature. That the deceased appointed Joseph Arap Chumo as the executor of his will.

30. As I stated earlier, the respondent did not testify. However, there being a statement and affidavits, the court cannot overlook them, hence my consideration of the same as above.

31. The Applicant filed her Submissions. It was her submission that the deceased did not have the capacity to make the will in question. She referred the court to section 5 of the *Law of Succession Act* (The Act) which deals with capacity to make a will. To her on the evidence adduced, there is a rebuttable presumption that the deceased lacked the capacity to make the will.

32. To buttress her submission, the Applicant referred the court the decision in *Banks v Goodfellow* (1870) L.R. 5GB 549.

33. The Applicant states that from the medical evidence, the will was made when the deceased left hospital, on a temporary basis, to bury his 1st wife. That since he was re-admitted in hospital on April 17, 2007, an inference can be drawn that the circumstances behind making the will were suspicious and there would be a suggestion of fraud. The Applicant cited the case of *John Kinuthia Githinji v Githua Kiarie*.

34. Also cited was *Vijay C. Shah v The Public Trustee* where the testator had been hospitalised with syphilis and diabetes. The suspicion arose about the manner the will was written several days before the testator died.

35. The Applicant also referred the court to *Wanjau Wanyoike and 4 others v Ernest Wanyoike Njoki* and *Muathi v Mwathi & another*. in which the testators were sickly and elderly and the circumstances the will was made was said to be suspicious.

36. On whether the will in question was properly executed. The Applicant stated that the witnesses have not informed the court how the deceased accessed them due to his condition. That Wilfred Kimutai could not double up as the person who wrote the will and also become a witness to the same will. That the witnesses did not inform the court that the will was read out to him before he executed the same.

37. The Applicant thus submits that the will ought to have been drawn by an independent person and on that account, its validity is in question. It is submitted that from the manner the will was prepared, it is difficult to ascertain the deceased's intentions.

38. The Applicant referred the court to *Perin v Morgan* (19431 A.C. 399 where the court held that the sole subject is to ascertain from the will the testator's intentions and it is not about what the testator intended to do and where there is an ambiguity or deficiency on the face of the will, no extrinsic evidence as to the instructions of the testator may be admitted.

39. It is thus the Applicant's Submissions that the will was not properly executed.

40. On whether reasonable provisions were made for all the dependants, the Applicant answered in the negative.

41. The Applicant acknowledged the well settled law that a testator rich or poor should be permitted to exercise his/her full mind voluntarily without any hindrance as set out in the case of *Knight Bruce in Bird v Luckie* [1850] 68 ER 373.

42. The Applicant contends that in disposing of the assets in the will, some of the beneficiaries were left out and the actual assets were never ascertained in the will. The Applicant referred the Court to Section 22 of the Act which governs the realm of construction of wills. It is submitted that in giving effect to a will, the court must be satisfied that its interpretation will not constitute prejudice or injustice to the wishes of the testator.

43. The Applicants further submits that section 26, 27 and 28 of the Act provides for adequate provisions for dependants by a will or upon intestacy and that even though a deceased has the right to dispose of his property as hectares and the court is bound to respect those wishes, this can only happen if those wishes are not repugnant to the law and does not leave at some dependant and beneficiaries.

44. The Applicant submits that most of the beneficiaries from the 1st house were left out on account that they were married. It is pointed out that Sections 35, 37 and 38 of the Acts caters for children of a deceased and does not distinguish between the male and female or the marital status of any child. That

Article 27 of *the Constitution* outlaws any form of discrimination in the grounds of gender and marital status.

45. It is thus submitted that the girl children of the 1st house ought to have been included as children of the deceased and that under Section 26 of the Act, the court ought to make provisions for them. Alternatively, it is submitted the subsisting provisions prior to the demise of the deceased ought to be maintained.

46. The Applicant concludes by submitting that she had laid sufficient grounds to revoke the grant herein as she has surmounted the threshold set out in *Jesse Karana Gatimu v Mary Wanjiku Githinji* [2014] eKLR.

Analysis and Determination

47. Having considered the Application, the responses thereto, the submissions filed, I find that the following issues fall for my determination;

   a. Whether the will was valid or not.

   b. Whether the deceased's alleged failure to provide for all dependants is ground to revoke the will.

48. On the first issue, the Applicant has raised the argument that the will in question was not properly executed on account of;

   i. The lack of deceased's capacity to make the will.

   ii. The alleged will was not prepared/attested in accordance with the law.

49. Part II of the Act provides for the law governing wills.

50. Section 5 of the Act provides as follows;

"5. Persons capable of making wills and freedom of testation

(1) Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.

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

(3) Any person making or purporting to make a will shall be deemed to be of sound mind 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 burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges."

The law on the essentials of testamentary capacity fairly well settled. In *Banks v Goodfellow* it was held that;

> " a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his

> natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made."

51. The burden of proof in the first instance lies upon the person alleging lack of capacity. Once it is established to the satisfaction of the court that in fact the testator was not of sound mind then the onus is shifted to the person propounding the will to prove the existence of mental capacity. This was the holding of the court in the case of *Re Estate of Gatuthu Njuguna (Deceased)* [1998] eKLR where it quoted an excerpt from *Halsbury's Laws of England*, 4th Edition vol 17 at page 903-904-

> " where any dispute or doubt or 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 the 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."

52. In the above decision, the Court of Appeal stated that the nature of evidence that may be adduced to establish the capacity of the testator is either medical, oral or circumstantial evidence. Such evidence should relate to the time that the will in question was made and the surrounding circumstances.

53. In the instant case, the Applicant's case is that the deceased was ailing for some time and that at the time he is alleged to have written his will, he had just been discharged from hospital and two (2) days after he allegedly wrote the will, he was re-admitted in the hospital.

54. The Applicant/Objector did not state the nature of the illness that the deceased was suffering from, but posits that the circumstances clearly point to his lack of capacity to make a voluntary testamentary disposition.

55. The Respondent Wilfred Kiptoo Mutai, the paralegal who drafted the will and Joel Kiprotich Terer were categorical that the deceased appeared to be in good health and he was able to give instructions on how his property was to be distribute upon his demise.

56. The rule of the thumb and in accordance with section 107 of the *Evidence Act* is that he who alleges must prove that allegation. (See *Re estate of Gathuthu Njuguna (Deceased)* 1998 eKLR).

57. The deceased died on November 13, 2007, seven (7) months after he allegedly made the will. His situation is thus not comparable to that in *Vijay C. Shah v The Public Trustee* (*supra*), Njau Wanyoike & 4 others v Ernest Wanyoike(supra) where the deceased died just days after allegedly making their testamentary instruments.

58. Although the deceased was of advanced age, having died at 87, that in itself is not sufficient to impute his incapacity to make a will.

59. There being no evidence of the nature of the illness, and whether such would ordinarily be presumed to lead to diminished mental capacity, I find that the Applicant/Objector has failed to discharge the burden placed upon her to prove that the deceased had no capacity to execute the will.

60. Also, looking at the will itself, it is very detailed. For instance, there is reference to the debtors and creditors named by the deceased. The witnesses to the will were not close family members and would not have been expected to know such details. They could only have come from the deceased himself, the same person now alleged to have lacked capacity to make the will.

61. To me, the details such as those cited above, lead to my finding that the deceased had the mental capacity to make the will and no sufficient evidence has been adduced to rebut that presumption.

62. It is thus my finding that this particular argument by the Applicant/Objector fails.

63. The Applicant took issue with the fact that Wilfred Kiptoo Mutai, was allegedly wrote the will, was also a witness to the same. To her, an independent witness ought to have supplemented the other witness, Joel Kiprotich Terer.

64. If the court is to find that Wilfred Kiptoo Mutai was not supposed to be a witness, then the will would be left with only one witness, hence fall short of the legal threshold set by the Act.

65. Section 11 of the Act provides that;-

> "11. Written wills
>
> No written will shall be valid unless—
>
> (a) the testator has signed or affixed his mark 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) 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, 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; 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."

66. The said Section does not expressly bar any person from witnessing the will.

67. The said Mutai had no interest in the estate as none of the properties were bequeathed to him by the will. He explained through his statement, that the deceased expressed to him how he wanted the estate distributed, and he drafted the will. It was in Kalenjin language and before the deceased signed it, it was read out to him.

68. I am yet to find any authority that has found a will invalid on the ground that a will in invalid in this ground. Indeed in the case of *Re Estate of Harun Kirunge Mwangi (Deceased)* (2021) eKLR, the will in

question was witnessed by two witnesses, who included the advocate who drafted the will. The court found no impropriety that affected the validity of the will. The court held that;

> "Regarding the question that the Will was witnessed by one witness, the advocate(PW1) who drew the will stated that he was one of the witnesses together with one Samuel the deceased's brother. In the applicant's view, the advocate PW1 was not a witness.
>
> According to Section 11 (c) a written Will must be evidenced by two witnesses. There is no requirement that it must be prepared by a lawyer and then two witnesses. In this case the lawyer and Samuel were present and indeed witnessed the deceased execute the Will. The lawyer and Samuel were sufficient for purposes of a Will being witnessed by two witnesses. I do not find any merit on that ground."

69. Therefore this particular ground raised by the applicant also fails.

70. On the face of it, the will in question has satisfied the requirements of the law and I dismiss the objection as to its validity.

71. The next question is whether the will has not adequately provided for some beneficiaries. The Applicant/Objector states that the will failed to provide for the girl children from the 1st house.

72. Now, failure to make such a provision is not a ground to declare a will invalid or revoke a grant made upon such a will. This was the position of the court in *Re Estate of Julius Mmano* [2019] eKLR, where it was held;

> "The applicant pointed at the fact that the will did not provide for the children of the deceased, and especially himself, being the only son of the deceased. According to him that was unusual, and raised suspicion. Section 5 of the *Law of Succession Act* gave the deceased freedom of testation, to dispose of his property as he pleased to whomsoever he pleased. It was within his freedom or discretion to determine who was to benefit from his bounty. The mere fact that a will leaves out children from benefit and benefits the spouse substantially should not be ground for invalidation of a will. A party aggrieved by such provision has a remedy in section 26 of the *Law of Succession Act*, but not in the nullification of the will."

73. Therefore if any beneficiaries were left out, they have a recourse under Section 26 of the Act, but not to seek the nullification of the grant.

74. Curiously, although the Applicant/Objector claims to be acting on her behalf and that of the other girl children from the 1st house, she did not annex any authority from them. It is thus apparent and until such evidence is adduced, that the Applicant has come to court on her own behalf only.

75. That being the case, then the court is to look at whether there has been adequate provision made for the Applicant. From the will itself, the Applicant has been bequeathed 5 acres of the land at Boito. If she feels that this was inadequate, her recourse does not lie in revoking the grant but to make an application for provision under Section 26 of the Act.

76. As I conclude, I find that the will as it stands, meets all the requirements to hold it valid. The testator has appended his signature, which the Applicant/Objector has acknowledged that it resembles that of the deceased. No questions have been raised as to whether the deceased appended his signature.

77. The grounds of objection to the will adduced by the Applicant/Objector, fall short of threshold required to rebut the presumption that the will was validly executed by the deceased.

78. The objection is thus without merit and it is dismissed but each party will bear their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF MARCH, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Oleperon

No Appearance for parties