REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Probate & Admin. Cause 172 of 1988

IN THE MATTER OF THE ESTATE OF GATUTHU NJUGUNA

(DECEASED)

Issue:

Whether, under the Law of Succession Act, the Registrar of the High Court has power to perform the duties and carry out responsibilities of an executor or administrator of the estate of a deceased person.

RULING

I do not intend to write a long ruling. I will only state that from what has been brought to my attention during the hearing of this summons dated 19th December 2001, the said summons be and is hereby dismissed for the following reasons:

First, I am not persuaded to agree that the Administrator has been given sufficient time and has failed to discharge his duties within that time. Since the grant was confirmed on 16th October 2001 and was apparently collected on a date in November 2001, the filing of this summon on 28th January 2002 did not give the Administrator sufficient time to collect the

Estate, pay out debts and settle other liabilities before he could distribute the net estate. The Administrator has to be diligent in the performance of his duties as administrator. He is not there to distribute parcels of land only.

If to-date it is claimed the Administrator has not signed the documentsalleged he has failed to sign, the filing of this summons may have been a contributing factor to that delay as it injected an element of uncertainiy in the administration of the estate by the Administrator who should be left at peace to perform his duties. Secondly this summons is dismissed because there are no provisions under the Law of Succession Act, Cap 160 Laws of Kenya together with the relevant rales thereof empowering the Registrar or a Deputy Registrar of theCourt to perform the duties and carry out the responsibilities of anadministrator or executor of the estate of a deceased person. This is because the Administrator or Executor of the estate performs

his duties and carries out his responsibilities signing documents like

transfers, applications for consent of land control board, mutations and the

rest because he is administering the estate of the deceased, and he administers because he has been granted Probate or letters of administration, something done through a specialized procedure where there

are provisions of the law, which the applicant herein is not invoking, under the Law of Succession Act, not only for dealing with executors or administrators who fail to administer the estates they are appointed to administer but also for handling such a situation generally. The Registrar or his deputy not having been granted Probate or letters of administration cannot become executor or administrator and as such, cannot administer the estate of a deceased person under the Law of Succession Act and its rules and to order him sign any of the documents mentioned above is to make an order which is not supportable under the Law of Succession Act and is therefore null and void as the Civil Procedure Act and its rules do not apply on this issue and cannot therefore come in to rescue the Applicant.

I will stop here having said I am not writing a long ruling.

As Mr. Njoroge has said that he does not want costs of this application even if the said application is dismissed, there will be no orders as to costs.

Dated this 24th day of April, 2002,

J.M. KHAMOM

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 172 OF 1988

IN THE MATTER OF THE ESTATE OF GATUTHU NJUGUNA (DECEASED)

ALICE WANJAU GATUTHU..... APPLICANT

VERSUSSAMUEL NJUGUNA GATAKA..... RESPONDENT (EXECUTOR)

RULING

This is the application dated 9.12.88 in which the applicant for an order that the Grant of Probate to the Respondent made on 14.7.88 be revoked on the ground that the grant was obtained fraudulently by Making a false statement or by concealment from the court of the material fact, namely, that the will a copy of which is attached to this application purported to have been made by the deceased was not made by him.

The application is supported by the applicants' affidavit. In the relevant paragraphs, she states that.

(i) On 19.11.88 when the alleged will was made deceased was so sick in body and mind as to be incapable of appreciating or comprehending the nature and quality of executing a will or otherwise dealing with his Affairs and the will is not genuine

(ii) The Thumb print on the will does not belong to the deceased and if it does which is denied, deceased was not aware that he was putting his thumb print on the will.

(iii) The will was not executed by the deceased and even if it was executed by him which is denied, it was not executed in accordance with provisions of section 11 of the law of succession Act.

The application is opposed by the respondent who deposes, among other things, that deceased gave instructions to Mr. Njore advocate on 10.1.88 at Aga Khan Hospital to prepare the will and that on the morning of 19.1.88, Mr. Njore visited him with a typed will and deceased executed the will in the presence of the respondent Mr. Njore, other people, his wives and children. He further deposes that deceased was composed and alert and understood what he was doing but later on that day his condition worsened and was taken to Thika Nursing Home and eventually at Aga Khan Hospital where he died on the same day.

Before the application was heard, the applicants counsel applied that the thumb print on the will be examined by a finger print expert The order was granted by Owuor J (now J.A) Mr. Daniel Mutua Mutisya (PW5) a Finger print expert of National Registration Bureau examined the thumb print on the will comparing it to the deceaseds thumb print obtained from deceased national registration bureau when deceased was applying for an identification card (I.D card) He found that the thumb print on the will was the left thumb impression of the deceased but observed that it may not have been recorded under normal condition since it appears to have been obtained in a hurry and is similar to the finger prints obtained from a corpse.

The dispute was partly heard by Shields J. but when he left the Judiciary, Aluoch J, on 22.9.94 ordered that the case be heard de novo.

On a point of procedure, Shields J had directed that as it is the executor who was to propound the will he is the one who had a right to begin. Consequently, the executor gave evidence. He called one witness and he was to call the others before shield's J left. However, when the hearing resumed before me, I directed the objector to start. The reason is that Grant of probate of the will had been given on 14.7.88 meaning that the will had been proved as a valid will but applicant was seeking a revocation of the Grant of the Probate. There is a presumption of due execution and capacity to make a will and the statutory burden as regards capacity is on the applicant - S. 5(4) of law of succession Act. It is my view that the executor would only have been required to propound the will and to begin had the proceeding been an objection to the making of a Grant under Rule 17 of Probate and Rules.

The relevant medical history of the deceased is as follows Dr. Henry Gichuhi Waiyaki (DW2) started treating deceased for a liver problem in 1987. He admitted him in Kerugoya District Hospital for sometime and on 9.12.87 referred him to Aga Khan Hospital. From the medical report of Dr. Flora dated 27.9.98, deceased was admitted at Aga Khan Hospital on 9.12.87 Diagnosis was Hepatic failure from cirrhosis of the liver. He was toxic, deeply jaundiced and confused. He was disorientated in time and space but his sensory system was normal. Tests were done on 9.12.87; 10.12.87 and *on 14.12.87*. He was put on treatment He improved over the next weeks and was discharged on 24.12.87. He was readmitted on 28.12.87 with abscess on the right upper thigh which healed slowly after treatment and was discharged on 14.1.88. His last admission was on 19.1.88 when he was presented in a drowsy state with inability to pass urine and haematemesis and Melena stools. On examination he was found to be in a hepato - renal failure and despite treatment had a cardiac arrest on 19.1.88. The clincal sheets show that he was admitted At Aga Khan Hospital on 19.1.88 at 11.40 a.m. in a confused state. He was given some treatment at 2.45p.m. but was certified dead at 11.30p.m. A detailed examination of the clinical sheets shows as follows: 9.12.87 Semi conscious drowsy confused looks at one on being asked questions 10.12.87 slightly better 10.12.87 4.30p.m- much better talks sensibly Now 10.12.87 confused but better 12.12.87 still confused 13.12.87 still confused 14.12.87 patient getting better not confused 15.12.87 well orientated now 16.12.87 still deeply jaundiced 18.12.87 much better has had has breakfast oriented now. still jaundiced 21.12.87 much better 28.12.87 Generally stable state though confused and drowsy conscious drowsy confused 29.12.87 patient not confused well oriented 30.12.87 not confused 5.1.88 - general condition poor 6.1.88 - better than yesterday 9.1.88 - not confused slightly drowsy 10.1.88 - much better than yesterday 11.1.88 - remains the same 13.1.88 - patient wants to go home 14.1.88 - condition remains the same. Not confused 3.30 patient refusing drugs and food wants to go home It is Dr. Florah who was treating deceased on most occasions but she was abroad at the time of hearing. Dr. Mohammed Abdulla (PW3) was the Chairman of the Department of medicine. He never saw nor treated deceased but formed an opinion from Dr. Florah's report and clinical sheets that deceased were very ill, mentally confused and therefore not capable of making a will.

Dr. Mahesh Shah (PW4) treated deceased on some occasions. He formed the opinion that deceased was not, on 19.1.88, in a fit state of mind as to be able to make a will and sign it. He explains in his evidence that deceased had chronic liver disease and the liver was so diseased that it would not take toxic which had to go to the brain causing faces of intermittent confusion.

The applicant last talked to deceased on December 1987 when

Deceased appeared confused.

In contrast, Mr. James Macharia Njore (DW1) an advocate of the High Court of Kenya and deceased lawyer and friend testified that he was informed by the respondent on 9.1.89 that deceased had sent the respondent to inform him that deceased wanted him to go to the hospital on the following day to record a will. Mr. Macharia Njore described lucidly what happened when he met the deceased on 10.1.88 at 10 a.m at Aga Khan Hospital He found a big crowd, deceased wives, sons, daughters and relatives. He recognized Mr. Macharia Njore from the crowd. Deceased told those people who were not members of his family to leave the room. The applicant was present and she was also told to leave. Deceased also told his daughter Njoki to leave. Thereafter deceased gave his instruction to Mr. Macharia Njore as to how he would distribute his estate. This was in the presence of deceaseds first sons, his three wives and the respondent Mr. Macharia Njore took notes and left for his office to prepare a draft a will. Mr. Macharia Njore states that deceased was in a normal frame of mind and could recognise anybody. According to Mr. Macharia Njore he visited deceased at Aga Khan Hospital several times. His general assessment of the deceased is that whenever deceased was in pains he was in a bad state but when not in pains he was stable and one would not think that he was sick at all.

Mr. Macharia Njore also described what happened on 19.1.88. He was called from his office at 8.a.m. and informed that deceased wanted to see him and the copy of the will. He went to the deceased house which is about 400 metres from his office. He found deceased seated on a sofa set in the company of his two wives, several of his sons and his clerk. He looked to be in pain and was not comfortable. Deceased talked to Mr. macharia Njore after which deceased told him to read the will. Mr. Macharia Njore read the will in kikuyu language. He was doing a direct translation from English to Kikuyu langauge. After the will was read, deceased asked:

"Isn't that what I had said?" Everybody present said "yes" after which he thumb printed the will and Mr. Macharia Njore and one Samuel Njuguna Gitaka (DW3) signed in the presence of deceased children and wives. Mr. Njore explained why the thumb print is placed below the word "Testator". He states that deceased fingers were stiff and that the paper slipped abit when deceased thumb printing.

In his evidence in Cross examination, Mr. Macharia Njore testified among other things that; deceased could not sign as his fingers were stiff; that he guided his thumb print by holding it; that he left deceased house at 8.30 a.m.; that deceased was stable but in pain when he left; and that he is not surprised that deceased was okay at 8.30 a.m. and admitted in hospital at 11.30 as pain would pick quickly and subside very quickly.

Both counsels have addressed the court on the facts and on the law.

Starting with the law, it is clear that the applicant is challenging the validity of the will on two grounds - first, lack of due execution and lack of capacity to make the will. On the issue of execution, by S.ll of the law of succession Act (LSA) a will is not 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 direction of the testator.

(b) the signature or mark of the testator or the signature of a 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 signed the will in the presence of the testator and 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 signature of that other person but no particular form of attestation shall be necessary . Even in uncontested matters, if the written will has no attestation clause or has insufficient attestation clause or court is in doubt about the due execution of the will the court is bound before admitting the will to probate to require an affidavit of due execution of the will from any of the attesting witnesses or if the witnesses are not conviniently available, from any person present at the time of execution or if that is not possible, from any other person (Rule 54 of Probate and Administration Rules)

The burden of proving due execution of the will rests with the person setting up the will, in this case the executor But where the will is regular on the face of it with an attestation clause and the signatures of the witnessing witnesses and testator in the proper place, there is a presumption of due execution which

however can be rebutted by attesting witnesses.on 24.10.87 on Zantack oraly. He was readmitted on 28.12.87 with abscess on right upper thigh which was incised and drained and treated with antibiotics. It healed slowly and he was discharged on 14.1.88 His last admission was on 19.1.88. He was presented again in a drowsy state with inability to pass urine, and melena stools"

Mr. James Macharia Njore (DW1) assessed deceaseds condition when admitted at Aga Khan Hospital as follows

"His condition then was that he would come up very well then drop and then come up again leading to various admissions and discharges from Aga Khan Hospital" Later he says

"I used to visit him several times at Aga Khan . if you found him in pain he would be in a bad state but when pain goes, you will not think that he is sick at all" That assesement of the deceased is verified by the clinical sheets on various dates and is in agreement with the evidence of Dr. Mahesh Shah that deceased had intermittent faces of confusion. The evidence cumulatively show that deceased had some good days and bad days during his admission and on those good days he was not confused.

Mr. James Macharia Njore described in detail the circumstances under which deceased made a will on 10.1.88 at 10 a.m. at Aga Khan Hospital. Deceased was in a normal frame of mind. He excluded some members of his family from his ward after which he gave. Having considered the whole document, the evidence and submissions, I am satisfied that the position of the testators thumb print on the will shows that the testator by the thumb print intended to give effect to the documents as a will and that the will is duly executed.

As regards the testators mental and physical capacity to make the will, the law presumes that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind, in this case, the applicant (S.5(3) and 5(4) of the L.S.A.). However paras 903 and 904 of volume 17 of Halisbury's laws of England show that, where any dispute or doubt of sanity exists the person - propounding a will must establish and prove affirmatively the testators 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 testators capacity is one of fact which can be proved by medical evidence, oral evidence of the witnesses who knew testator well or by circumstantial evidence and that the question capacity of is one of degree, the testators 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 testators' 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 then shifts to the person setting up the will to satisfy the court that the testator had the necessary capacity.

Although applicant and PW2 testified that the testator was confused, their evidence show that each last saw the testator about two weeks before he died. None of them saw him on the material date - 19.1.88 when the will was executed. Dr. Mohammed Abdulla (PW3) did not see or treat the deceased during testators' admission at Aga Khan Hospital. His opinion is based on analysis of the clinical sheets. He is in the same position as Dr. Alluwalia in the case of Vijay Shah versus The Public Trustee - Appeal No. 63 of 1984. In that case which executors counsel relies on, the testator was shot by robbers on 8.10.7 5 and admitted in hospital in the intensive care unit He made a will on 3.11.74 which he executed on 6.11.75 after a second operation and died on 10.11.75. Dr. Alluwalia who relying on clinical sheets formed the opinion that deceased was not physical and mentally fit to make the will. The trial Judge preferred the evidence of those who saw the testator to the evidence of Dr. Ahluwalia. The Court of Appeal agreed saying that the evidence of those who saw the testator was the best available evidence. Dr. Mahesh Shah (PW4) who attended the deceased on some occasions testified that deceased had chronic liver disease and had faces of intermittent confusion. Both Doctors agree with Report of Dr. Flora dated 27.9.88. Dr. Flora reports in part:

"He improved over the next few weeks and was discharged on 24.10.87 on Zantack oraly. He was readmitted on 28.12.87 with abscess on right upper thigh which was incised and drained and treated with antibiotics. It healed slowly and he was discharged on 14.1.88 His last admission was on 19.1.88. He was presented again in a drowsy state with inability to pass urine, and melena stools"

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Mr. James Macharia Njore described in detail the circumstances under which deceased made a will on 10.1.88 at 10 a.m. at Aga Khan Hospital. Deceased was in a normal frame of mind. He excluded some members of his family from his ward after which he gave Instructions to Mr. Njore in the presence of some of his wives, sons and relatives. The evidence of Mr. Njore as to the deceased's state of mind on 10.1.88 when deceased made a will is supported by the clinical sheets which show that deceased was not confused from 29.12.87 to 14.1.88 The clinical records also show that on 9.1.88 when deceased sent for Mr. Njore he was not confused and that on 10.1.88 when he made the will he was much alert than on previous days. In addition to clinical records, there is the evidence of Samuel Njuguna Gitaka (Respondent) (DW3) who testified how deceased sent him on 9.1.88 to call his relatives and how deceased behaved in the ward on 10.1.88 before he made the will. I am satisfied from the evidence that deceased had a sound disposing mind on 10.1.88 when he made the will.

The will was executed on 19.1.88 Mr. Njore testified as to how the will was executed. He found deceased in his house in Thika seated on a sofa set. He looked to be in some pain and uncomfortable. They talked and he then read the will to him Deceaseds relative including some of his wives and sons were present. Deceased even asked Mr. Njore about some pending cases and Mr. Njore left at about 8.30 a.m. after the will have been executed. It is the evidence of Samuel Njugunba Gitaka that after Mr. Njore left, deceased sent him and one Peter to deceaseds home at Gatura to pay coffee pickers and when he returned at 12.30 a.m. he found deceased at Thika Nursing Home. Dr. Henry Gachuhi waiyaki (DW2), one of the deceased's personal Doctors, visited deceased on 19.1.88 at Thika Nursing home. He found deceaseds condition to be

Not very good as deceased was going into a comma and advised deceaseds relatives to take him back to Aga Khan. But Dr. Waiyuka testified that he would not have known deceased condition before he found him at Thika Nursing home but he says that somebodys condition can change suddenly.

Deceased had been discharged on 14.1.88 and was at home on 19.1.88 when he allegedly executed the will. Although Mr. Daniel Mutua Mutysa (P5), the finger print expert, observed in his report that the finger print may not have been recorded under normal conditions since it appears to have been obtained in a hurry and is similar to finger prints obtained from a corpse, his evidence shows that the only reason that he formed that opinion is because the finger print was not rolled. It was his evidence that the finger print was otherwise normal. The finger print was not obtained from a corpse on the morning of 19.1.88 as deceased died at 11.30p.m. From the clinical sheets, it appears that deceased condition could change intermittently. It is plausible that, from the nature of deceased illness he could have been normal on the 19.1.88 at 8 a.m. but going into a Comma a few hours later.

I have found Mr. Njore to be a truthful witness. He is an independent witness who has nothing to gain from the estate. Mr. Samuel Kitaka is not a beneficiary of the estate and there is nothing to arouse suspicion that he is not telling the truth. There is no medical evidence to rebut the evidence of Mr. Njore and Mr Gitaka that deceased was mentally fit to execute the will on the morning of 19.1.88.

The fact that the applicant was not included as a beneficiary-is not decisive. There is evidence that she was estranged from deceased and deceased had accused her of stealing some money from the Thika shop. There is also evidence that some of the deceased's children were omitted. None of the deceased wives was given any specific legacy. It would appear from the will that the deceased wish was to from a company and leave most of his valuable assets in the name of the company from which beneficiaries would benefit. The mere fact that some beneficiaries were omitted in the will does not, ipso facto, make the will invalid. They have a separate remedy.

Further, this application appears an after thought for applicant states that she was called for the reading of the will in April, 1988 and was aware when the petition for Grant was made. Yet she did not file the present application until December 1988.

From the foregoing I find that deceased had a sound disposing mind on 10.1.88 and on 19.1.88 and that he executed the will dated 19.1.88

I dismiss the application with costs.

E.M. Githinji

Judge

16.11.98