



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 290 OF 2010

IN THE ESTATE OF AMINA JUMA KASSAM (DECEASED)

GULZAR ABDUL WAIS.....PETITIONER/APPLICANT

V.

YASMIN RASHID GANATRA.....1ST OBJECTOR/RESPONDENT

TARIQ ABDUL RASHID.....2ND OBJECTOR/RESPONDENT

JUDGMENT

1. The Petitioner, **GULZAR ABDUL WAIS**, has, by a **Summons for Annulment of Grant** dated 20th January 2011, and brought pursuant to sections 47, 76 (a) and (c) of the Law of Succession Act (hereinafter, LSA) and Rule 44 of the Probate and Administration Rules, sought the annulment of the grant as follows:

i). That the grant of letters of administration to Gulzar Abdul Wais and Yasmin Rashid made on the 29th day of November, 2010 be annulled

ii). That costs of this application be in the cause

2. The said application is premised on the following grounds:

i) The proceedings to obtain the grant were defective in substance.

ii) The grant was ignorantly and inadvertently obtained by means of untrue allegation of fact essential in point of law to justify the grant.

iii) That unless the application is urgently heard and orders sought issued, then the wishes of the late Amina Juma Kassam may not be given effect.

3. The application is supported by an affidavit sworn by the Petitioner of even date. The gist of the affidavit is that the Petitioner petitioned for a grant of letters of administration intestate in an application dated 17th June 2010, after being served with the citation by the 1st and 2nd Objectors. The grant was then issued jointly to the Petitioner and the 1st Objector by a court's ruling of 25th January, 2011. That the Petitioner was misled by a court clerk to file the petition, yet since the deceased had made a Will before she died, the proper application she ought to have made was a

Grant of Probate.

4. The Petitioner avers that the deceased died testate having left a written Will with her advocates, Mohamed and Lethome advocates. The said Will is annexure GAW 6. The Petitioner contends that the Grant of Letters of Administration intestate issued herein as aforementioned should be annulled and the Executors of the deceased's Will be allowed to seek for fresh Grant of Probate so as to give effect to the wishes of the deceased.

5. The application was opposed. It was contended for the Objectors that the application was only meant to delay this cause as the Applicant and her current advocate were aware of the alleged Will, yet they never disclosed it at the earliest opportunity bearing in mind their advocates filed their Notice of Appointment on 18th August, 2010. The Objectors aver that what is now pending is the distribution of the estate. The Objectors have deposed that at the time the Will was allegedly written on 26th November, 2009 the deceased was sick and confined to a wheelchair and therefore incapable of making such a Will.

6. Directions were given on 11th April 2011, whereby Hon. Kasango J. directed the instant application be heard by way of *viva voce* evidence. The Petitioner, who is the Applicant called 4 witnesses, while the Objectors called 3.

7. The issues for determination are whether the deceased in this Succession Cause made a Will and whether that Will is the one adduced in evidence as annexure GAW6 of the Petitioner's affidavit in support of this application?

8. I will begin by setting out the evidence adduced by the Petitioner/Applicant and the Objectors. PW1 Banu Amiral and PW2 Evanson Ng'a ng'a testified that that Amina Juma Kassam (the deceased) was their landlady. PW1 testified that on 26th November 2009, she was in her house when she was called by an advocate by the name Mohammed who told her that the deceased wanted her to sign a form. She went to deceased home where she found the deceased who she said looked okay and could talk very well and that she explained to her that the document she signed was her Will. PW1 testified that the deceased also signed the same Will in her presence.

9. PW2 testified that he knew the deceased as she was his landlady between the year 2006 and 2010. PW2 testified that he was called by a gentleman who introduced himself as a lawyer. PW2 stated that at the deceased request, he read a Will to her in Kiswahili language. PW2 testified that he asked the deceased whether she would provide for all of her children in the Will, and that she told him that her two deceased sons had already gotten a share from her late husband. She further told him that the Will provided for her two daughters. PW2 confirmed that after that discussion with the deceased, he signed the Will. He said that the other witness to the Will was his neighbor. He further testified that at the time he signed the Will, the deceased was physically unable to walk much and needed support and but that she was fully aware of what she was doing.

10. PW 3 Ali Mohammed, an Advocate of the High Court of Kenya, testified that sometimes in November 2009, he was called by his colleague, Ibrahim Lithome who was his senior, and requested to take instructions and prepare a Will for a client in Pangani. PW3 testified that he proceeded to the client's house where he took instructions for the purposes of a Will. He stated that the instructions were in the client's own handwriting. The client was the deceased in this case. PW3 stated that he advised her that she would require two witnesses. PW3 said that on the 26th November, 2009 when the Will was duly typed, the deceased directed him to the two witnesses whom he called and both signed the Will in his and deceased presence. PW3 confirmed that at the time the deceased gave him the written instructions and also at the time she signed the Will, the deceased was in her right senses.

11. The Petitioner was PW4. She testified that the deceased was her mother. She testified that

sometimes in June 2010, a citation was brought by 1st Objector, Yasmin Abdul. The Petitioner testified that because she did not understand the document, she called her then advocate, Anne Weda who advised her to go to the Chief to assist her get Letters of Administration. The Chief directed her to a Mr. Githinji who assisted her file a Succession Cause. PW4 testified that she later learned from her sister Reshma Juma, that their mother had left a Will. They then got new lawyers from whom they learned that the procedure they had adopted in bringing the Petition was the wrong one.

12. PW4 testified that their deceased mother had given her brothers, Abdul Rashid and Elias Juma, both deceased, a share of their father's estate. PW4 requested the court to grant her application so as to pave way for the issue of Grant of Probate in terms of the Will.

13. OW1 Yasmin Abdul Rashid, the 1st Objector in this case, testified that the deceased was her mother in-law and that her husband passed away in 2002. She testified that the deceased had four children, the first one being her late husband, the second being Elias Juma, third was Guzal Abdul Wais, the Petitioner and fourth Reshma Abdul Wais. She testified that the last two were daughters who were alive but the two sons had passed on. She further testified that at the time of her death, her mother in-law left several properties which she has noted in her supporting affidavit. She further testified that these properties were in her father in-law's Will of 1974 before he died. OW1 testified that the properties had been bequeathed to the deceased by her late husband in life interest. She stated that the properties were to be shared equally among all the beneficiaries after her death. OW1 produced the Will of Juma Hassan dated 10th July, 1992. OW1 stated that according to the Will, Amina Juma Hassan (deceased) had been appointed as Executor and Trustee, and that it provided that after the deceased passes away, the properties were to be distributed according to Islamic law.

14. OW1 testified that vide Confirmation of Grant in Succession Cause Number 23 of 1998 in respect of the estate of Juma Hassan, Amina Juma (the deceased) was given a life interest of the whole of **Ntima/Ntakira 1597** and the whole of Plot Number **209/4300/109** and that Plot Number **2345 Kinoru** was given to both sons in equal shares. She further testified that her mother in-law did not follow her father in-law's Will or Islamic law. Further she testified that they were not aware of the Will by Amina Juma which showed that everything had been given to the daughters, leaving the families of the sons with nothing.

15. OW 2 Tarik Abdul Rashid, the 2nd Objector herein, a son of OW1 and a grandson of the deceased, testified that he has a home in Meru at Tuntu estate, which are the same premises occupied by her mother. He testified that the premises are owned by two other people, the top floor being theirs and the down floor being the deceased's. OW2 testified that his grandmother acquired these properties from his grandfather as she was the Trustee. He further testified that his dad had told him that there was a Will showing how land left by his grandfather would be shared and that it was to be shared according to Sharia law.

16. DW2 testified that sometimes in January 2010, he talked to his grandmother over a Will, and that his grandmother said that she had signed a Will in Nairobi before hospitalization and that she was not happy with it. OW2 testified that his grandmother signed three blank pages which were also signed by her maid. OW2 stated that he had returned the blank documents on 16th November, 2009 on demand by the Petitioner's advocate.

17. DW 3 Mohammed Iqbal testified that he knew the parties in this case and that he knew the deceased Amina Juma who was the wife of Juma Kassam also deceased. OW3 testified that Juma Kassam had written a document and that he was a witness to it. OW3 stated that in that document, Juma Kassam set a condition to the effect that the distribution of his estate was to take place after the youngest grandchild attained 21 years, or on the death of his wife, or whichever was earlier. He further testified that Juma Kassam was a very staunch Muslim and distribution of his estate was to be according to Islamic law. He further testified that he knew Amina Juma and had advised

her to write a Will showing her last wish. He further testified that he did not find out whether she actually wrote the Will as he did not see her again. When shown the Will left behind by Amina, he testified that the Will was not in line Islamic law as the deceased had left all her properties to her daughters.

18. The issue for determination is whether the deceased had a written Will, and if so a whether the Will was valid?

19. The deceased in this cause, AMINA JUMA KASSAM was a married woman and of the Muslim faith. Section 5(2) of the Law of Succession Act gives a married woman capacity to write a Will. That section provides:-

5(2) A female person, whether married or unmarried, has the same capacity to make a Will as does a male person.

19. OW3 in his evidence questioned the deceased capacity to make a Will, being a Muslim woman. The LSA does not qualify the capacity to make a Will on religious grounds. It gives every woman the right, and therefore the capacity to make a Will irrespective of gender, religion or marital status. **I find deceased had the capacity and the right to make a Will.**

20. The requirements of a valid written Will are set out under Section 11 of the LSA in the following terms:

11. 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.

21. The evidence adduced by PW1, 2 and 3 is that the deceased made a written Will which they identified as GAW6. PW3 Mr. Mohamed, Advocate testified that he had the Will in question typed after the deceased gave him instructions on a hand written document. PW3 also called PW1 and 2, the people the deceased directed him to, who were also her tenants. PW3 testified, confirming PW2's evidence, that the deceased requested PW2 to read and interpret the Will to her from English language into Kiswahili language which he did. The witnesses then signed the Will in the presence of PW3 and the deceased, and that the latter two also signed.

22. 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.

23. 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 the question of signing two documents but one document twice.

24. 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 the LSA.**

25. The Objectors case was that the deceased was very ill, wheel chair ridden and not in a right mind, and therefore incapable to make a valid Will. The LSA, section 5(4) stipulates:

5. (1) Subject to the provisions of this Part and Part III, any 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.

That section is very clear that he who claims that the testator was incapable of making the Will has the burden of proof. The burden of proof lies upon the Objectors to prove that the deceased was not capable of making a Will. The burden of proof therefore lay upon the Objectors to adduce evidence to prove that, on a balance of probabilities that the deceased, was due to illness, incapable of making a valid Will, or was coerced or forced to write the Will, GAW6.

26. DW2 testified that he obtained the deceased signatures on blank papers intending to have a Will made for the deceased. He said that the deceased gave him the signatures saying she had made another Will but that she was not happy with it. DW2 said that his uncle's wife Zalina and the deceased maid, whose name he could not remember, were present and that deceased and her maid signed the blank documents. These papers were later recalled by PW3 vide Demand Letter D.Exh. 1. Ten days later the deceased made the Will, GAW6.

27. The Objectors did not call the deceased maid or Zalina to confirm that the deceased was unhappy about a will. In any event the alleged dissatisfaction about a will could not have been GAW6 as the same was made several, (ten) days later. The evidence of OW2 that the deceased was unhappy about a Will had nothing to do with the Will herein.

28. Regarding the deceased physical, medical and mental status at the time she made the Will, the Objectors filed a Medical report on the deceased signed by Dr. Silverstein. The doctor was not called as a witness. The report is dated 4th November, 2009. It shows as the 'FINAL DIAGNOSES' the following:

1. Adenocarcinoma of stomach

2. Brain metastases

29. The report shows examinations carried out on the deceased upon admission at Nairobi Hospital between 29th October, 2009 and 4th November, 2009. The report made no reference to

deceased mental challenge or incapacity. Since the doctor who made it was not called as a witness it would be wrong and speculative to imagine what the doctor may have said about the mental capacity or otherwise of the deceased. It is material that deceased died four months after making the Will. **On a balance of probabilities I find that the Objectors did not establish that the deceased was incapacitated and incapable of making a valid Will at the time GAW6 was made.**

30. PW1, 2 and 3 who were present when the Will was attested and signed all stated that the deceased was in her true senses, had perfect memory. From the conversation deceased had with PW2 and 3, I have no doubt that the deceased was in her right frame of mind and fully conscious of the nature of the business she was involved in. In the case of **Banks v Goodfellow (1870) LR 5 QB 549** Cockburn CJ (as he then was), rendered himself thus as regards testamentary capacity:

“He (testator) must have a sound and disposing mind and 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.”

31. The Will was executed by witnesses in the presence of the testatrix who also attested to it when deceased signed it in accordance with the requirements of Section 11(a), (b) and (c) of the Law of Succession Act. I find that ex facie the Will GAW6 was properly executed in such a manner as to show that the deceased intended to give effect to the same as a Will.

32. There was a rebuttable presumption of due execution of the Will. The objector’s adduced evidence. However they were unable to establish facts or circumstances to change the presumption. The evidence deceased was ailing was not disputed. The Objectors did not adduce evidence to establish on a balance of probabilities that the deceased was so ill as to be incapable of making a valid Will.

33. PW2 and 3 in their evidence stated that they had lengthy discussion with the deceased. PW3 had discussions on 14th and 26th November, 2009, at time he got the instructions to make the Will and when the Will was signed. According to PW3 the deceased explained why she made a Will instead of invoking Islamic Law.

34. According to the deceased, PW3 stated that she wished to give her daughters the three properties she had because they had not been provided for in the confirmed grant in respect of their deceased father’s estate. Secondly the deceased felt that if Islamic Law was invoked, her daughters would be dispossessed or inadequately provided for.

35. PW2 on his part inquired why the Will, GAW6 excluded deceased sons whom he was aware of. PW2 said that on questioning her about it, the deceased said that the sons had been provided for under then father’s estate and the daughters had not.

36. PW1, 2 and 3 all stated that the deceased was clear headed, in good control of her mind, was aware of her surroundings and was okay when she made and signed the Will.

37. On a balance of probabilities I am satisfied that the Will in question was duly executed, duly attested to and ex-facie was valid Will as required under Section 11 of the Law of Succession Act. I find that the Objectors were unable, in the evidence adduced to rebut the presumption that the Will was properly executed and valid. I find that there was no valid objection raised against the deceased Will.

38. The Objectors had issues with the Will on grounds the Petitioner did not reveal its existence until after the confirmation of the Grant of Letter of Administration herein. PW4, the Petitioner explained that she was unaware of the existence of the Will until much later. PW4 explained that

due to being misled, and after being served the citation GAW2 by the Objectors, she filed a Petition for Letters of Administration instead of a Probate. PW4 stated that the error was due to seeking assistance from an unqualified person, a court clerk whose name she gave as Githinji. She explained that at the time, even though aware at some point of the existence of a Will, she did not know petitioning for Letters instead of Probate had any negative impact on the succession cause.

39. There is no evidence to show that the Petitioner was concealing the existence of the Will when she filed the Petition for Letters of Administration. That is unlikely as she stood to lose if she concealed the Will, as the ratio of distribution of the estate of the deceased would have been to her disadvantage under Letters of Administration as opposed to under Probate. .

40. DW3, the family friend of the deceased family challenged the filing of a petition in a civil process instead of invoking Islamic Law. DW3 even suggested that the husband of the deceased left a written Will and that the same invoked Sharia Law. DW3 argued that the deceased could not make a Will nor should the petition have been filed in this court. DW3 suggested that the deceased should have first executed her late husband's Will before writing her own.

41. The husband of the deceased Juma Kassam's Will, which is annexed and is dated 10th July, 1992. The estate of Juma Kassam was the subject of Succession Cause No. 23 of 1998. The court confirmed the Grant in the said Succession in June, 1998. In that confirmed Grant the distribution of the estate of Juma Kassam was as follows:-

1. The sons of the deceased Abdul Rashid Juma Kassam, and Eliud Juma Kassam got PLOT NO. KINORU 2345 in equal shares.

2. The deceased herein got whole of two properties;

(a) Parcel No. NTIMA/NTAKIRA/1597

(b) Parcel No. 209/4300/109 Nairobi

3. The deceased got life interest over a property not legible in annexed grant. However it is clearly not NTIMA/IGOKI/5685.

42. It is too late for a challenge on the manner in which the Will of Juma Kassam was executed, not to mention the Will does not mention any specified real or moveable property. **The challenge on the mode distribution of the deceased (AMINA JUMA) estate or of the execution of deceased (JUMA KASSAM) estate through DW3, himself not a beneficiary to the estate is, to say the least incompetent and invalid.**

43. OW1 and 2 do not object to two properties in the Will GAW6. However OW1 and OW2 challenge the inclusion of a third property, L.R. NO. NTIMA/IGOKI/5686 in deceased Will, GAW6 on grounds it was where their residential home is situated and secondly including the property in the deceased Will results in dispossessing them of their home.

44. OW1 and OW2, admitted as was PW4's evidence that the property L.R.NTIMA/IGOKI/5685 was purchased by the deceased after the death of her husband Juma Kassam. That being the case, the deceased had the right and power to bequeath the property to whoever she willed since it was her property.

45. OW1 and 2 testified that they constructed their home above or on the first floor of deceased's house where she was living before moving to Nairobi upon her illness. The Petitioner has challenged the Objectors' claims over this property. What the Objectors needed to establish is that they purchased the land upon which their residential home stands from the deceased. Alternatively they should have adduced proof that they met the cost of the construction of their

residential home on the said plot.

46. 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.

47. Both admitted that they had not produced in court proof that they bought any of the materials used in constructing the residence where they now live. Without any cogent proof of purchase of the land or the materials used to construct the residence, the Objectors cannot be said to have established their claim over the said property, on the required standard of proof on a balance of probabilities. **I find that the Objectors failed to prove any right to claim of ownership over the land or residence on L.R. NTIMA/IGOKI 5685. I find that the Objectors have not raised a valid Objection to the inclusion of the said land in deceased Will.**

48. Mr. Mutunga for the Objectors' submitted Will was invalid on account of showing it was made by a male testator. PW3 who wrote the Will admitted he referred to the deceased Will as "his" instead of "her" and said same was a typographical error. **I agree reference to deceased as a "his" instead of "her" is a typographical error which does not affect the Will.**

50. **Are the Objectors rendered destitute or "un provided for"?** Mr. Mutunga urged that the Will was invalid as it did not provide for her most obvious dependants, those who lived in the same building or residence as herself. The counsel relied on Ndolo v Ndolo Nairobi. C.A No. 128 of 1995. In that case the Court of Appeal, commenting on a testator's exercise of freedom to dispose of his/her property as provided under section 5 of the LSA, and the responsibility required under section 26 of the LSA in the exercise of that freedom expressed itself thus:

"This court must, however, recognize and accept the position that under the provisions of Section 5 of the Act every adult Kenyan 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 to which all of us are entitled the 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 during his or her lifetime."

51. The responsibility to the dependants is expressly recognized by Section 26 of the LSA which provides as follows:

"where a person dies after the commencement of this Act and in 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 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."

52. This Section clearly puts limitations on the testamentary freedom given by section 5. So that if a man by his Will disinherits his wife, or child who was dependent on him during his lifetime, the court will interfere with his freedom to dispose of his property by making reasonable provision for the disinherited wife or child.

53. I am guided by the cited case. The legal position is clear that failure to provide for a beneficiary in a Will does not invalidate a Will. This is because the court is empowered to under section 28 of the LSA to make reasonable provision for the dependant in exercise of its discretion. Section 28 of Law of Succession Act provides that the court should have regard to:

“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 defendant;**
- (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.**

54. In the instant case, the Objectors, OW1 and 2, were provided for from properties which formed part of the estate of their father in law/grandfather respectively through the deceased son Abdul Rashid Juma Kassam. The Petitioner and her sister Reshma were not provided for under their father’s estate.

55. It is important to note that the estate of Juma Kassam was distributed under the Law of Succession Act and not under Islamic Law. No one complained at that stage. The important fact to note is that the Petitioner and her sister Reshma were totally left out of the Grant and distribution of their father’s estate and were not provided for at the time.

56. The Objectors have admitted in their evidence that apart from the property that was bequeathed to them under the estate of Juma Kassam, they obtained other properties through their late husband/father respectively. Those other properties, DW2 testified, included the plot on which Tusky’s Supermarket in Meru stands.

57. The Objectors are not destitute by any standards. They have been provided for under both deceased husband’s estate and their husband/father’s estate. To interfere with the deceased’s Will in order to “provide” for the Objectors would be to act contrary to the provision of Article 27 of the Constitution and sections 35, 37 and 38 of the Law of Succession Act, which prohibit any form of discrimination on account of gender and marital status, and which do not distinguish between male and female children and their marital status.

58. Since the Objectors live on one of the properties purchased personally by the deceased and bequeathed by her to the Petitioner and her sister Reshma, I would direct that the Petitioner exercises her powers pursuant to Section 82(d) of the Law of Succession Act. Section 82(d) provides:

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the

respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation: Provided that except so far as otherwise expressly provided by any Will—

(i) no appropriation shall be made so as to affect adversely any specific legacy;

(ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or

by the manager of his estate (if any) or by the court shall be required.

59. I direct that the petitioner consults the Objectors and her sister Reshina in terms of Section 82(d) of Law of Succession Act over the property L.R. NO. NTIMA/IGOKI/5685 and offer to the Objectors the option to purchase the property or the residence where they live upon consideration subject to the advice of a qualified valuer.

60. In regard to moveable properties allegedly not mentioned in the Will, the Objectors have not given details of any of the alleged moveable properties. All the Objectors did was to mention that there were vehicles and Bank Accounts. That is insufficient to enable the court rule on same.

61. In the result, having carefully considered this case I order as follows:

1) That the grant of Letters of Administration to GULZAR ABDUL WAIS and YAMIN RASHID GANATRA made on 29th November 2010 be and is hereby annulled.

2) Each party should bear their own costs of this application.

DATED, SIGNED AND DELIVERED AT MERU THIS 8th DAY OF July, 2014.

LESIIT, J.

JUDGE