REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 2697 of 1995

HILDABERTA MUKHANYI JEKI (DECEASED)

HEDWIG YOHANINE KUBUKOSYA

BRIAN JOHN HAWKES..... PETITIONERS

VERSUS

GEORGE JEKI.....OBJECTOR/CROSS PETITIONER

RULING

The case before me is a Succession matter concerning theestate of Hildberta Jeki. She died Testate on the 8th of May, 1995 atMater Hospital.

She was survived by her husband.

George Jeki

and three children:-

Syvia Yvonne - daughter

George Kevin Jeki - son

Sony Kibukosya - son

The two executor of her estate filed this present successioncause praying that they be issued with letters of grant with will annexedon the 17th October 1995. On the 24th of November, 1995,2

Hon. Justice Okubasu granted Orders for a notice in the Kenya Gazetteto issue.

The two executor to the will are both advocates of the High Courtof Kenya and practice in the same firm of advocates. The first executoris related to the deceased as a sister.

The husband to the deceased then filed on the 17th of January.1996 Objection to the making of the grant to the two executors.

It is this objections that is the subject matter of this ruling. Thehusband will be referred to as the Objector herein. The executors asrespondents.

The main grounds of his objections was that there was-

a) Intermeddling by the executor of the estate

b) Concealment of material facts

c) The executors were interested parties and therefore notimpartial persons.

He also filed a cross-petition after receiving a notice from theregistrar to do so in which he prayed that it be he who ought to petitionfor the said letters.

He stated in his cross-petition that he had been married to thedeceased from 1978 to her untimely death on the 8th of May 1995.

There were three issue of the marriage and he required that they beprovided for.

The will failed to disclose that he was a joint owner of a housementioned in the list of assets (P&A 78). it failed to disclose that theexecutor had obtained funds for Unep.

As he was a dependant under Section 26 of the Law ofSuccession Act he was not adequately provided for.

In reply to the cross-petition the executor stated that the couplehad been separated and as such the two were no longer cohabitingtogether as man and wife (This reply did not comply with order 18 r 5C pr as to the format required to plead the allegations). The parties nonetheless went for directions before Hon. Lady Justice Aluoch . No formal orders were made for vivo voce evidence but the parties were requested to file their agreed issues.

These were as follows:-

1) Whether the deceased made a valid will"

2) If the deceased left a valid written will providing forexecutors should the objection be appointedadministrator"

3) Whether the clause (No.5) in the will purporting todisinherit the objector is valid"

4) Whether the executor named in the alleged willintermeddled with the estate of the deceased"

5) What are available assets of the estate"

I proceeded to hear the parties under vivo voice evidence.

The facts that came out from the objector is that he was stillmarried to the deceased was her lawful husband at the time of his death.From this - as such he was surprised that there was a will that purportedto disinherit him from estate of the deceased. He did not believe thatthe said will was genuine. He was under the impression that the will wasone which should have been signed on each page as required by law.The Will itself had some discrepancy for instance the two names of thedeceased was not correctly spelt nor were the names of two children.

The first respondent/executor had given an affidavit that alsohad discrepancy with the Will. The actual period said that they had beenseparated was said to be two years and another three years.

He questioned in his cross-examination of the secondexecutor/respondent on his impartiality to draw up the said will.

The executor/respondent No.2 gave evidence to identify the willstating that he is an advocate of the High Court of Kenya, in hispractice he does a lot of Wills. That he drew up the present Will in this Succession Cause. He identified the same as the one drawn by him.He nonetheless stated that there was no requirement in Law for thedeceased to sign all the pages - in this case the Will had only two pages.

He also stated that there was nothing wrong with a wife who wasseparated from her husband to disinherit him. When he drew the Will he was not present when the same was signed.

It was the executor/respondent No.1 who took the same to besigned.

The evidence of the respondent No.1 and from the affidavits isthat she was the sister to the deceased. She was also the firstnamed executor, and an advocate of the High court of Kenya. She wasin partnership or employment with the second executor.

She took the Will that had been drawn by the respondent No.2 tothe deceased. She, the deceased was then admitted in hospital atKakamega. The deceased then signed the same.

From the document it is noted that those who witnessed thesignature of the deceased were two witnesses. The objector impliedand or said that the document required to have been proved by the twowitnesses who had witnessed the signing of the Will by the deceased.This was never raised by the objector that he would require the two witnesses and that he never pressed this point except to mention it inpassing.

Further facts by the respondent No.2 was that the deceased andobjector had not been living as man and wife since the 24th of April1993 or earlier. She brought to the courts attention a letter written bythe objector in his handwriting and which was not disputed by him of thatdate namely 24th April 1993 that stated:

"Mukianyi,

I want you out of this house within the next twenty four hours without fail, this is not subject to any discussion whatsoever.

WARNING:

Do not try to lecture or insult me on this one as you are fond of.

The consequences will be very regrettable.

Do not try anything. I am ready and fully prepared. Just leave if you still have any wisdom left in you.

Please kindly move out now. I am serious, too serious. Enjoying yourself whenever you will be.

JEKI

On 24.4.93 at 10.15 p.m

(Emphasis written in red by the objector)

The deceased on receipt of this letter moved to the Mariakani(South B) area where she had her father's house that she moved to live in.

The objector all along in his cross-examination by the advocatefor the respondent maintained that he and his wife were still together.That they still spoke and saw each other.

His witness, his first born daughter on the other hand stated thather parents had a stormy marriage. That her mother would often cometo share her bedroom with her. (The house was three bedroom with aroom for her brothers, her parents and another for herself).

She stated in cross-examination by the objector that the reasonsfor her mother leaving was due to her grandmother had said that theobjector was impotent. Her mother went to live in South B - Mariakani tosort this matter out.

I believe that P.W.2 the daughter to the objector may now perhapshave been the real reasons for her mother's departure from home.

The reasons she came to give evidence is that just before a weekher mother died she had told her that she was going to die. That she would take care of the other children. At no time did her mother mentiona Will. If there was a Will then she would have been told.

The 1st Respondent in her evidence said that her brother in lawwas *an* unpredictable man. At one time he would agree to one thing anddo another. It is he who caused the delay of the administration of theestate.

As to proof of marriage, the objector stated that after thedeceased's death, there was a meeting whereby he was made to go intoan agreement for the completion of the payment of a dowry. This heduly signed and the same was witnessed (see Ext. P1).

If there was no marriage, then this agreement could not have beenentered into.

The 1st respondent stated that she was not aware of theagreement nor did it concern her, nor was she party to it.

My task in this ruling is to establish according to the agreed issuesabove whether there is a valid Will"

Unfortunately the advocate for the respondent came into courtwith no list of authorities or case law on any of the points to be proved.

According to THEOBALD on the Law of Wilis 10th Edition byJ.H.C. Morris. (A library copy of 1950. No new copy seems to beavailable after 49 years i*n* the High Court Library). It states that "No Will can be valid of which thetestator does not know the contents.A Will prepared in accordance withthe testator instructions is valid"Section 5 of the Law of Succession Act Cap. 160 deals with thecapacity of making a Will.

Namely, a person who can make a will must be of a sound mind. He must not be a minor.

"Section 5(2) states "a female person, whether married or unmarried has the same capacity to make a Will as does a male person" it has been brought out. Theobald (supra) that there must not be undue influence in the preparation of the will. For instance a will prepared by a person taking benefit under it raises suspicions.

Evidence of some actual undue influence must be proved. Forinstance fraud or concern must be shown. That person must have beenof feeble mental capacity or weak state of health.

These are the points, I believe, the objection ought to havebrought out in his case but had not. He did attempt to bring out the fact that the two executors respondents are advocates of the High Court ofKenya, they work together, they live together and as such (according tohis petition) would have an influence on the administration of the will.

The mark of the testator is sufficient signature when we look at thesignature on the will. It seems that the respondent No.2 stated that it isnot a requirement of the law that the testator does this.

Thus a signature to each page of the will where the last page isleft unsigned, is not prima facie a sufficient execution See:-

Sweatband V. Sweatband 1865 45W andT 6.

I believe on the face of it that the will before me is valid what theObjection seems to question is the administration of the said estate bythe two executor. He also questions his disinherit.

I believe as long as the executor do not benefit from the saidestate they are entitled to administrator the same.

The respondent No.1 did state some funds were sent to her butshe knew no reasons as to why this was so. There were funds for thechildren. All these came from the deceased employer but was notproved in court.

Due to the very strong relationship with the deceased and in thelight of his letter of 24.4.93 I do not find that the objection should be appointed an additional administrator. I believe the deceased purported to disinherit the objector from her will she is entitled to do so.

On the question as to whether the executor are intermeddling withthe property, I do not see this. No grant of letters have been issued.The estate has been at a stand still in the last 4 years awaiting thefinalization of objections raised by the objector.

The parties *never* addressed me on issue No.5 as to what are theavailable assets. I believe that all the deceased had was money invarious bank accounts, and from the evidence now before this court ahalf share of a house LR No.37/264/18 Mai Mahiu road.

I wish to just add that the objector is never and can never be adependant of his wife. Unless under special circumstances such as anaccident or illness. It is a wife who is dependable on her husband. (InKenya this is not so as often women support their husband or theirchildren. I did not see this happening in this case).

The objector is the one who should support his children in allmanner including educating, clothing and sheltering them. The wife'sassets and or money left is the children and should be for their futureuse to build themselves and not that of the husband and fathers.

For example if a man remarries, the issue of the property doesn'tarise. If a woman whose husband is deceased is remarried she loosesall the life interest she has in the property of the first husband.

In this case it transpired that the applicant objector had a girlfriendbut denied having any children with her during the subsistence of themarriage with the deceased.

Two of the children *are* said to be adults now at the age of majoritythey would be entitled to their share.

I hereby dismiss this objection with costs to the two respondents.

Dated this 12th day of November, 1999 at Nairobi.

M.A. ANG'AWA

JUDGE