IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MFALILA, J.A., SAMATTA, J.A., And LUGAKINGIRA, J.A.)

CIVIL APPEAL NO. 32 OF 1996

BETWEEN

RAMNIK VAGHELLA ..... APPELLANT

AND

MAHENDRA VAGHELLA .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Munuo, J.)

dated 29th day of May, 1995

in

Civil Case No. 11 of 1994

JUDGMENT OF THE COURT

LUGAKINGIRA, J.A.:

The parties to this appeal are uterine brothers, the appellant being the elder, and the appeal arises from a judgment and decree of the High Court at Arusha (Munuo, J.) granting the respondent probate of the will of their late mother, Hirubai Meghji Vagella, who died at Arusha on November 21, 1992. In February 1993 the respondent petitioned for probate annexing the deceased's will dated November 18, 1992 (hereinafter "the second will") in which he was named sole beneficiary to a house on Plot No. 7B, Block "R", along Jacaranda Street in Arusha municipality. The petition was challenged by the appellant in a caveat contending, (a) that earlier on September 21, 1992 the deceased had made another will bequeathing the said property equally between the parties, and, (b) that the second will was invalid as it was made at a time the deceased was so physically and mentally incapacitated that she could not understand the contents

..../2

thereof. The trial judge found the second will valid and granted probate to the respondent. In this appeal the issue turns on the validity of that will.

The testatrix was aged 73 years at the time of her death and had been taken ill for three months. According to the respondent who was staying with her, she was having stomach problems and was unable to retain food. She died of old age and starvation according to the death certificate, Exh. P1. During her illness she was being attended by Dr. Samuel Samson Nkulila, a private medical practitioner and consultant psychiatrist, who testified for the appellant. He stated that she had a heart failure with attendant depression. He saw her on November 17 and, to quote his own words,

> ... the patient was physically and mentally incapacitated. She refused all medication. She was conscious but confused which means she could hear, talk, feel but she refused to take medicine. She shouted. When I prescribed medicine for her she shouted. She was so sick that she could not have worked on any will or other document.

The deceased's refusal to take medicine was a central premise in Dr. Nkulila's reasoning. In a report he made to the appellant's counsel after the testatrix's death, and later tendered as Exh. D1, he said:

> The last time I saw her was about November 17th and also November 20th, 1992. Both of these visits she seemed very incapacitated, both physically and mentally; i.e. her judgement was obviously inappropriate as she refused all medication." [Emphasis added.]

..../3

We shall turn to the significance of this reasoning later. In cross-examination, however, the doctor conceded that:

> On 17/11/92 when I visited the patient she recognised me. Some patients may be mentally normal and deliberately refuse medication or treatment. Some very ill and desperate people who think they are about to die refuse medication. If someone refuses medication he would not necessarily be mentally incapacitated.

Indeed, according to the evidence on the respondent's side, the deceased was mentally sound at the time of giving instructions for and executing the will. This came and can also be inferred from the testimony of the respondent who stated that she sent him to bring a lawyer and also that between November 15 and 21, she was mentally sound and talked normally. There was evidence also from Mr. Sudhir Khetia, one of the witnesses to the will, who said in cross-examination:

> The deceased was alert, speaking well ... Nathwani /another witness/ helped the deceased hold her hand when she thumb-printed the will - she was weak but alert mentally. I do not know which doctor attended the deceased. The deceased had a sound mind because I saw and talked with her ... The deceased recognised me so she was mentally sound when I found her at her bed.

He added in re-examination:

> I was a witness to the will Exh. P2. The deceased was alert and mentally sound so she fully understood the contents of

..../4

> the will. The deceased recognised me because she knew my parents and had no problem identifying me. She was in control of her senses and capable of talking and thinking in our presence.

Finally, Mr. Frederick Kinabo, the lawyer who was called by the respondent and who drew up both wills, stated that the deceased fully understood the contents of the second will. He conversed with her in Kiswahili in which she was fluent. She instructed him on November 17 when he drew up the will, but as witnesses could not be found, it was signed the following day. He further said:

> The deceased was not too weak to thumb-print the will. I found the deceased on her bed ... she was talking and sitting up on her bed. She was mentally sound because I knew her since 1966. On the 17/11/92 the deceased even asked me after a cat my father had given her in 1966, which proves that her mind and memory was sound.

It is in the context of all this evidence that the learned trial judge reached the decision now being impeached.

Mr. D'Souza who appeared for the appellant (assisted by Mr. Sabaya) argued two interconnected grounds: the burden of proving the validity of an impeached will and the importance of expert evidence, while Mr. Sabaya raised fraud. It is unnecessary to particularise here the various arguments put forward or the reply thereto by Mr. Ngalo who appeared for the respondent, but they will all be considered in the course of the judgment. It is sufficient to say that the overall argument was that the trial judge did not specifically address her mind to the deceased's capacity to make the second will, and the burden and standard

..../5

of proof in these matters, but approached the whole subject in general and casual terms. Speaking generally, we think the criticism is not entirely unjustified and, it must be said, with due respect to the learned judge, that her judgment is certainly wanting in depth. The task before us, though, goes beyond considerations of form and we have to determine whether, on the whole, the evidence on record justified the decision reached. It will therefore become apparent that we will be proceeding as in a retrial.

Some general observations are appropriate at the outset. It is settled that in order for a will to be legally enforceable it has to be valid, and its validity in turn derives from the capacity of the testator and the circumstances attending its making. A lunatic cannot make a valid will during the subsistence of his insanity and a will obtained by fraud or one improperly executed cannot count for a valid testament. The essentials of testamentary capacity were laid down in Banks v. Goodfellow (1870) L.R.5Q.B.549,565, in these terms:

> ... a testator shall understand the nature of the act and its effects; shall understand the extent of the 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 of his property and bring about a disposal of it which if the mind had been sound, would not have been made.

In the case before us, the appellant's side have been saying that the deceased did not answer to those tests on account of old age

..../6

and disease, and as particularly testified to by Dr. Nkulila. We shall revert to the argument shortly. Presently, some remarks on the burden and standard of proof.

Mr. D'Souza argued, and quite rightly, that the burden to prove the validity of a will rests on the party propounding it and this burden is heavier where the testator's capacity is in question. In the case of Smee & Ors, v. Smee and the Corporation of Brighton (1879) 5 P.D.84, he cited to us, the President of the Court directed the jury (at p. 91) that:

> ... any one who questions the validity of a will is entitled to put the person who alleges that it was made by a capable testator upon proof that he was of sound mind at the time of its execution. The burden of proof rests upon those who set up the will, and, a fortiori, when it has already appeared that there was in some particular undoubtedly unsoundness of mind, that burden is considerably increased.

Again in JARMAN ON WILLS, 8th ed., p. 51, it is stated:

> In cases of weakness of mind arising from the near approach of death, strong proof is required that the contents of the will were known to the testator, and that it was his spontaneous act.

We are equally in agreement with Mr. Ngalo that the law presumes sanity, and no evidence would be required to prove sanity unless it has been impeached. We wish to point out, however, that the deceased's state of mind was questioned in para 7 of the appellant's affidavit in support of the caveat; therefore Mr. D'Souza's argument was not without basis.

..../7

The trial judge considered the testatrix's capacity although she did not expressly address the issues of onus and standard of proof. She referred to Dr. Nkulila's evidence and his concession that patients may deliberately refuse medication even though not mentally incapacitated. She referred to Mr. Kinabo's evidence and the deceased's reminiscence on the 1966 feline. She also noted that Dr. Nkulila last saw the deceased on 17th and conceded that he could not know her state of health on the next day. Although she did not then proceed to state in express terms that the deceased had the necessary capacity, the finding was necessarily implied.

After our own appraisal of the evidence and the law, we are unable to come to a different view. To begin with, we are conscious of the importance of expert opinions in the field of medical issues. In Nkinga Hospital v. Theodeolina Alphaxad, Civil Appeal No. 49 of 1992 (unreported), also cited by Mr. D'Souza, this Court said:

> On such professional and technical issues, courts should not make assumptions based on nothing but conjecture. Opinions of professional and technical people in the field is invaluable to enable the court to make an informed finding.

We adhere to that view but wish to draw attention to the word "invaluable" in the passage which, in our view, reaffirms the settled position that opinion evidence is by no means conclusive. The opinions of experts are relevant but not binding; the weight to be attached on these opinions would depend on the nature of each case. Moreover, there are many matters of common experience in respect of which persons with no special qualifications are permitted to state what is really a matter of opinion. Such an opinion is no less relevant than the opinion of a trained person. The following passage

..../8

in the judgement of the Ontario Court of Appeal in the case of R. v. German [1947] 4 D.L.R. 68, says it all:

> No doubt, the general rule is that it is only persons qualified by some special skill, training, or experience, who can be asked their opinion upon a matter in issue. The rule, however, is not an absolute one. There are a number of matters in respect of which a person of ordinary intelligence may be permitted to give evidence of his opinion ... [e.g.] where a witness has been asked whether a person was sober or not, and has been allowed to state what is after all, a matter of opinion ...

In the instant case there was compelling evidence by non-professionals testifying to the deceased's soundness of mind. She had the mind to send for a lawyer on November 17. She had a conversation with the lawyer lasting an hour and during which she appears to have been so relaxed that she even recalled a small incident twenty-six years in the past. Then came the signing on the next day. The witnesses to the will were a Mr. Suresh Nathwani and Mr. Khetia. These are leading members of the Hindu community, to which the deceased belonged, the former being chairman and the latter secretary of the Hindu Union. Mr. Khetia who gave evidence was emphatic that the deceased was of sound mind and understood the intents of the will. If we may allude to the phraseology of Cockburn, C.J. in Sugden v. Lord St. Leonards (1876) I.P.D. 154, it seems to us utterly impossible to suppose that responsible persons such as these would permit themselves voluntarily to subscribe their hands to a will not consciously made. Our minds revolt from arriving at any such conclusion, and we feel bound to reject it. Mr. D'Souza argued that it could not be asserted that

..../9

the deceased understood the will because Mr. Kinabo gave it to Mr. Nathwani to explain it to her, but Mr. Nathwani does not appear to have communicated her reaction and he was not called to testify. We think, with respect, learned counsel misunderstood Mr. Kinabo's evidence on that aspect. Our own appreciation of the evidence is that after reading the English-written will, Mr. Nathwani talked to the deceased (in Gujerat) apparently to ascertain for himself that she understood it. He did not have to report back unless he was not so satisfied. Mr. Kinabo said:

> I gave the English-written will to Mr. Nathwani to read and he talked to the deceased perhaps to ascertain the accuracy of the will to make sure the deceased understood her will.

It is logical to conclude that Mr. Nathwani's curiosity was satisfied for he proceeded to witness the will and even to assist the deceased to thumbprint it. In view of all these factors and Dr. Nkulila's concessions which, above all, left the possibility that the deceased's refusal of medication could have been deliberate, we think there was justification for a finding that the deceased was of sound mind and a capable person when she gave instructions for and signed the second will.

It is essential to go further in view of the attributes of capacity set out earlier, the reasoning of the phychiatrist and the argument advanced before us. As shown earlier, Dr. Nkulila stated in Exh. D1 that the deceased "seemed very incapacitated, both physically and mentally; i.e. her judgment was obviously inappropriate as she refused all medication." Now, assuming that the deceased had in fact developed delusions about Dr. Nkulila's medication, it did not follow in law that she had lost capacity in all other spheres, in the same way as it does not follow in medicine that a patient who refuses

..../10

medication is necessarily mentally incapacitated. To be precise, it did not follow that she was also incapable of making a will. In order for delusions to be material in the testamentary context, there must be a connection between the will and the delusions, the poisoning of affections and perversion of the sense of right. In Smee's case (supra) the President also said (ibid.):

> A few years ago it was generally considered that if a man's mind were unsound in some particular, the mind being one and indivisible, his mind was altogether unsound, and therefore that he could not be held capable of performing rationally such an act as the making of a will. A different doctrine subsequently prevailed ... It is this. If the delusions could not reasonably be conceived to have had anything to do with the deceased's power of considering the claims of his relations upon him and the manner in which he should dispose of his property, then the presence of a particular delusion would not incapacitate him from making a will.

In that case, it was not in dispute that the testator was of unsound mind. Additionally, it was possible to link his delusions to the two wills made by him. In the first will he excluded his relatives and left his property to his wife absolutely on account of a delusion that they were beneficiaries to his supposed trust money which he had been robbed by his father; in the second will he again excluded his relatives and gave his property to his wife for life or widowhood, and devised and bequeathed the residue to the Corporation of Brighton to set up a public library on account of a delusion that he was a son of George IV who in his life had taken such deep interest in the town. The jury had no difficulty in deciding that the testator was of unsound mind when making both wills and the wills were declared invalid.

..../11

Similarly in Battan Singh & Ors. v. Amirchand & Ors. [1948] A.C. 161, a disease-stricken Indian resident of Fiji made a will excluding his nephews in India in favour of strangers and stating, "I declare that I have no next of kin nor blood relations in Fiji or elsewhere who are known to me." The Privy Council held that the will was the product of a man so enfeebled by disease as to be without sound mind or memory at the time of execution, and that the disposition of his property under it was the outcome of the delusion touching his nephews' existence. Their Lordships stated (at p. 170):

> A testator may have a clear apprehension of the meaning of a draft will submitted to him and may approve of it, and yet if he was at the time through infirmity or disease so deficient in memory that he was oblivious of the claims of his relations, and if that forgetfulness was an inducing cause of his choosing strangers to be his legatees, the will is invalid.

The totality of these decisions, to quote again from Smee's case (at p. 92), is that:

> The capacity required of a testator is, that he should be able rationally to consider the claims of all those who are related to him, and who, according to the ordinary feelings of mankind, are supposed to have some claim to his property as it is to be disposed after his death.

What was the position in the instant case? A ming, as we have said, that the deceased had delusions about medicat , was the delusion an operating factor when she went about makin he second will? Did it poison her mind and render her oblivious o he appellant, her

..../12

elder son? We are unable to find evidence to that effect and no such evidence was referred to us. On the contrary, it seems that the deceased had the appellant in contemplation when making the will, and deliberately excluded him, for it is apparent that she gave a reason for that will. According to Mr. Kinabo, "The deceased revoked the original will because the defendant [appellant] refused to return her gold and jewellery which she had deposited with the daughter of the defendant." Mr. Sabaya suggested that Mr. Kinabo must have obtained this information from the respondent. We see no basis for the suggestion. There was no evidence of any discussion about the will between Mr. Kinabo and the respondent; on the other hand, there was evidence of an hour's conversation between Mr. Kinabo and the deceased, and since Mr. Kinabo had drawn up the earlier will and had it in his custody, the reason for its revocation must have been the inevitable subject of the conversation. We are satisfied that the deceased was under no delusions either with regard to her property or in relation to her children when making the second will; and considering all we have said we are satisfied that there was sufficient evidence proving to the required standard the deceased's capacity to make the will.

Finally, the trial judge addressed the issue of fraud and did not find it established. She distinguished this case, and correctly in our view, with the case of Othman Matata v. Grace Matata [1981] T.L.R. 23, a classic case of fraud where the deceased's thumbmark on a deed of transfer was literally robbed as he lay gravely sick and speechless. In the instant case, the deceased had to be assisted to thumbprint the will because she was both weak and illiterate, but she was alert, seated and talking. Even healthy illiterates are assisted in similar manner almost every day in our courts.

..../13

Mr. Sabaya's contribution on this subject was in turn mostly speculative and does not deserve much attention. We found no evidence of a conspiracy between the respondent and Mr. Kinabo and we are unable to agree that the fact that the former called the latter on November 17, ~~constituted such~~ evidence. The question of the respondent being present at the signing of the will was not raised before the trial judge, but even if it had, it would certainly have failed in view of the respondent's denial in his testimony. He stated that he left his mother's room after ushering the witnesses in, and we do not think the trial judge would have believed otherwise had she been invited to consider the matter. We are satisfied on the whole that the execution of the will was proper.

In the final analysis we agree with the trial judge that the second will was valid. It was made by a capable person; it was not influenced by any delusions; it was properly executed. The burden cast upon the respondent/plaintiff had therefore been discharged. We dismiss the appeal with costs.

DATED at ARUSHA this 18th day of May 1999.

JUSTICE OF APPEAL

JUSTICE OF APPEAL

JUSTICE OF APPEAL