IN THE HIGH COURT OF JUSTICE ASHANTI REGION KUMASI HELD ON THURSDAY THE 9TH DAY OF NOVEMBER, 2023, BEFORE HER LADYSHIP HANNAH TAYLOR (MRS) J.

SUIT NO.: C7/93/23

IN THE MATTER OF THE WILLS ACT, 1971 (ACT 360) AND THE 1992 REPUBLICAN CONSTITUTION

AND

IN THE MATTER OF THE ESTATE OF MARTIN KWABENA DUAH – A.K.A ALEX KONADU – (DECEASED)

AND

APPLICATION FOR REASONABLE PROVISION OUT OF THE ESTATE OF MARTIN KWABENA DUAH – A.K.A FELIX KONADU (DECEASED)

JULIANA OWUSU DONKOR
SURVIVING SPOUSE OF THE LATE
MARTIN KWABENA DUAH … APPLICANT
(A.K.A ALEX KONADU)
HOUSE NO. 67 PANKRONO ESTATE
KUMASI
VRS

1. **BRIAN AGYEMANG BOATENG**
2. **KWAME MICAH**

TOGETHER SUED AS EXECUTORS OF THE WILL OF THE
LATE MARTIN KWABENA DUAH … RESPONDENTS
(A.K.A ALEX KONADU)

JUDGMENT

The applicant is the surviving spouse of the deceased Martin Kwabena Duah also known as Felix Konadu who died testate on 27th August, 2022. The applicant prays the court for a reasonable provision to be made for her out of the estate of the deceased husband.

The applicant in her affidavit in support deposes that she got married to the deceased on 17th December, 2017 and had lived with him in his House No. 67 Pankrono Estate, Kumasi as the matrimonial home. In the same house, she operated and still operates a hair dressing salon in one of the three shops in front of same given to her by the deceased husband. Further, during the marriage, a Toyota vehicle with registration number, AS-7738-13 was at all times used to ease the burden of transportation.

However, upon the death of the husband, a Will made by him as per the copy of the Will attached to the application and marked as Exhibit "B" came to her attention. It turns out that Exhibit "B" was executed in August 2016, before her marriage to the deceased testator in December, 2017.

Further, in Exhibit "B" the Matrimonial House No. 67 Pankrono Estate, Kumasi has, been devised to some named children of the testator and a nephew. Also devised and bequeathed is the vehicle to a named daughter, the 3 store rooms in front of the house to two named daughters and nephew, all house hold items have been devised and bequeathed to his daughter and the residuary clause was in favour of a named daughter. Therefore, the applicant deposed that with no reasonable provision made for her during the testator's life and no provision made for her under the Will, Exhibit "B" as a spouse, where the court does not intervene, the apartment she occupies being a single room,

living room, kitchen and washroom and the shop she operates her salon will be taken from her as same have been devised to beneficiaries.

Furthermore, the keys to the Toyota vehicle has been seized by the testator's daughter Lydia Konadu Andor the named beneficiary and locked in a garage after which she left for the United States. In the circumstance, the applicant deposed that upon advise which she believe same to be true, she prays the court on the strength of section 13(1) of the Wills Act, 1971 (Act 360) and Article 22(1) of the 1992 constitution to intervene and make a reasonable provision for her needs, accommodation and maintenance out of the estate. In an affidavit in opposition sworn to by Kwame Micah (2nd respondent) one of the named executors with the consent of Brian Agyemang Boateng the other named executor (1st respondent herein), he deposed that having regard to the circumstance of the case, it does not warrant a grant of the prayer. The circumstance outlined by the executors are that, the applicant's marriage lasted for only five (5) years. Secondly, the applicant and the deceased testator each had previous marriages in which they had their children and there is no child in their marriage. Further, the properties which are the subject of Exhibit "B" were all acquired by the deceased testator prior to his marriage to the applicant and the deceased who had lived in his lifetime in Nigeria and United States was a pensioner who lived on his pension from the United States.

Also, the deceased testator adequately maintained the applicant and had been instrumental in sending a child of the applicant to the United States where he works and is enjoying life. On the estate of the testator, the executor deposed that it is comparatively small, made up of one house, one salon car which is fairly old and some small bank account. Furthermore, after the deceased's death, applicant continues to operate her salon in the store room.

Before considering the merits of the prayer made, I would like to look at the deposition of the respondent made in paragraph 30 of his affidavit in opposition, set forth to wit that the applicant thumbprinted her affidavit in support which indicates that she is illiterate and there is no indication that the affidavit was read over and explained to her in the language she understood before making her thumbprint.

The respondent deposed further stated, "I am advised and verily believe same to be true that there should have been an indication that the affidavit was read and explained to her in a language she understood before she thumbprinted. This was not done. The affidavit therefore is a nullity. It cannot support the motion".

However, in the supplementary affidavit filed, the applicant deposed that the matter was thoroughly discussed with her lawyer and the content was read over in twi by her lawyer before she thumbprinted same.

The position of the law for a long time has been that the non-compliance with the Illiterate Protection Ordinance 1962 (Cap 262) rendered the document void in the absence of a jurat. However, this is no longer the case. For the absence of a jurat may only raise the presumption that the illiterate did not appreciate the content before he or she thumbprinted.

Thus, Wood CJ (as she then was) in the case of **DUODU AND OTHERS V. ADOMAKO AND ADOMAKO [2012] 1 SCGLR 198** at page 216 held as follows:-
"….. the courts must not make a fetish of the presence or otherwise of a jurat on executed documents. To hold otherwise, without a single exception, is to open the floodgates to stark injustice. Admittedly, the presence of a jurat may be presumptive of the facts alleged

in the document including the jurat. But that presumption is rebuttable, it is not conclusive".

The court in the **DUODU AND OTHERS V. ADOMAKO case supra expatiated** the scope and intent of the Illiterates' Protection Act, 1962 (Cap 262) enactment as follows:-
"…… the clear object of the Illiterates' Protection Act, 1962 (Cap 262) was to protect the illiterates for whom a document was made against unscrupulous opponent and their fraudulent claims; those who may want to take advantage of their illiteracy to bind them to an executed document detrimental to their interests".
Also, in the case of **ZAMBRAMA V SEGBEDZI [1991] 2 GLR 221** it was held at page 236 – 237 that, the issue of whether an illiterate fully understood the contents of a document before making his mark or not raises a question of fact to be decided like other such questions upon evidence…. The presence of an interpretation clause in a document was not conclusive of the fact, neither was it a sine qua non. It was still possible for an illiterate to lead evidence outside the document to show that despite the said interpretation clause, he was not made fully aware of the contents of the document to which he made his mark".

In this case as well, the applicant in the supplementary affidavit in support now with a jurat has deposed that his lawyer did read and explain the contents of the affidavit in support to her.

Furthermore, section 9 of the Cap 262 provides exception for documents prepared by lawyers and other specified persons. The Court of Appeal in **OWUSU V. KUMAH AND ANOTHER [1984 – 1986] 2 GLR 29** with reference to section 9 of Cap 262 per the holding 1 held "the main object of the Illiterate Protection Ordinance, Cap 262 [1951 Rev] was to protect illiterates for whom documents were made. Section 4 of Cap 262 obliged every person writing a letter or document for an illiterate to read or cause it to be read over and

explained to the illiterate and also ensure that the illiterate thumbprinted or made his mark on the letter or document. But the law expressly excluded in section 9 of the ordinance documents made for illiterates by lawyers and the policy reason for that must be that lawyers who were generally men of standing and were parties' own chosen fiduciaries were unlikely to make anything but genuine documents to reflect their clients' true wishes".

In the circumstance of this case, I am not inclined to follow the reasoning of the respondent and will proceed to consider the application on its merits.

It is not denied by respondent that Lydia Konadu Andor, the named beneficiary of the testator's Toyota vehicle has locked same in a garage after which she has left for the United States. There is no evidence of probate having been taken and any vesting assent vesting the property in the said Lydia Konadu Andor. This is a wrong step she took. For on the death of a testator, his/her estate vests in the named executors. The Administration of Estates, Act 1961 (Act 63) per the section 1 on devolution on personal representative provides;

1(1) The movable and immovable property of a deceased person shall devolve on the personal representatives of the deceased with effect from the date of death.

In the case of the **ANIM ADDO (DECEASED): NKANSAH alias ANANE AND ANOTHER V. AMOMAH ADDO AND ANOTHER [1989 – 1990] 2 GLR, 67** the court explained that an executor appointed by a Will derives his title from the will and the property of the testator vests in him from the moment of the testator's death. Properties which divulge on various beneficiaries do not take effect until probate is granted. Therefore, since probate has not been taken in this case, the devolutions to the various beneficiaries had no legal effect yet. Thus, all the devised properties vest in the executors.

The undeniable fact is that, testator has an unfettered right to dispose of his self-acquired property as he desires. In essence, a testator cannot be compelled by anyone to dispose his property in any particular form. Neither can the court purport to re-write a Will for the testator but must give effect to the intention of the testator. In the case of **AKUA MARFOA V MARGARET AGYEIWAA [2017] 107 GMJ 165, BAFFOE BONNIE JSC** on the liberty of the testator to distribute his estate stated:-

"The general or common law rule is that a testator of a will is free to make his Will and distribute his estate as he pleases. He is not bound to leave any fixed portions of his estate to any particular person and he is permitted to be capricious and improvident.

As Knight Bruce said in **BIRD V LUCKIE [1850] 68 ER 373**:- "No man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise or the good. A testator is permitted to be capricious and improvident, and is more at liberty to conceal the circumstances and the motives by which he has been actuated in his dispositions. Many a testamentary provision may seem to the world arbitrary, capricious and eccentric, for which the testator, if he could be heard, might be able to answer most satisfactorily".

However, section 13(1) of the Wills Act, 1971 (Act 360) makes room for provision to be made for the benefit of recognized dependents of the testator by the court. Section 13(1) of Act 360 and article 22(1) of the 1992 under which the present application is premised provide as follows:-

Section 13(1)

"If on an application made, not later than three years from the date on which probate of the Will as granted, the High Court is of the opinion

(a) that a testator has not made reasonable provision whether in life or by will of the testator for the maintenance of a father, mother, spouse or child under eighteen years of age, and

(b) that hardship will be caused, the High Court may taking account of the relevant circumstances, despite the provisions of the will, make reasonable provision for the needs of the father, mother, spouse or child out of the estate of the deceased".

Also, Article 22(1) of the 1992 Constitution also provides:- "A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will".

In the **MARFOA V AGYEIWA** case supra, the Supreme Court emphasized that section 13(1) of Act 360 has been given a constitutional backing by Article 22(1) of the 1992 constitution. With the effect of Article 22(1) of the Constitution, 1992 and section 13(1) of the Wills Act, 1971 being that even though a testator my have made certain devolutions in his will, if he does not make reasonable provision for either his father, mother, spouse or child under 18 years, and as a result great hardship will befall them, then upon an application to the High Court, the court may make orders for reasonable provision, irrespective of what is in the will.

In every application for reasonable provision, the applicant must establish the following:-

(a) that the applicant was dependent on the testator.

(b) That the application must be brought within three (3) years after the granting of probate of the Will.

(c) That the testator failed, to make reasonable provision either during his life time, or by his Will for the applicant.

(d) That the applicant is suffering or likely to suffer hardship; and

(e) That having regard to all the relevant circumstances, the applicant is entitled to support from the estate of the deceased.

On the duty of respondent as the executors herein in applications brought under section 13(1) the court explained as follows;-

"It is the duty of a respondent to present to the court the particulars of the net value of the deceased's assets, indicate whether there are income earning assets and to show the quantum of the liabilities to be discharged. The full particulars of the beneficiaries and other facts that are likely to affect the court in the exercise of its discretion should be presented".

Relating the foregoing to this case, it is not denied that the applicant is a spouse of the deceased testator. From Exhibit "A", the funeral poster on the testator, he died at the age of sixty-six and that he is a pensioner is not in doubt.

Having regard to the estate of the testator, Exhibit "B", the Will, discloses that the estate is made up of the house No. 67, Pankrono Estate with the three stores, a vehicle, clothing, bank savings, treasury bills and property built by his father for his mother devised to his cousin.

In this case, clearly, the testator did not after the marriage to the applicant prepare a codicil to make changes in his Will. Neither did he prepare another Will except the Exhibit "B". That the testator has a reason for not taking any of the foregoing steps is immaterial in considering this application.

It stands out in the circumstance of this case that, the testator made no provision for the applicant who is his surviving spouse out of his estate. That the properties of the deceased were acquired before the testator's marriage to the applicant is also not a determining factor.

In the Akua Marfoa case supra, the Supreme Court on the constitutional requirement that a person should be reasonably provided for from the estate of his or her spouse, further held;

"The highest law of the country, the 1992 constitution, in article 22(1) requires that a person should be reasonably provided for from the estate of his or her spouse. This provision was not required to take effect only when a marriage was thriving or peaceful **but in all marriages"** (emphasis mine).

In **HUMPHERY-BONSU AND ANOTHER v QUAYNOR AND OTHERS [1999-2000] 2 GLR 781**, on an application brought by a widow of the testator under section 13(1) of the Wills Act, Act 360). The Court of Appeal in deciding that the widow was entitled to reasonable provision, Benin JA speaking for the court said, "….The rule is that if the language of the statute is clear, it must be enforced however harsh the result may appear to be".

Therefore, whatever the situation in the marriage is, a spouse should be reasonably provided for.

Was the applicant a dependent of the testator? Applicant has deposed that testator had catered for her during his life time. The unchallenged affidavit evidence is that the testator allowed the applicant to operate a salon in one of the three shops. Obviously, this is to support herself with the returns she makes and also provided her with an apartment but these have been devised under Exhibit "B".

With the applicant operating the salon even after death of the husband, the testator, she can maintain herself. To enforce the devises affecting the salon and apartment under the Will is likely to cause hardship to the applicant.

The length of the marriage notwithstanding, the applicant will be entitled to the prayer sought. I am minded of the fact that the power to make reasonable provision should not be abused or appear to be re-writing the Will of the testator, the following reliefs are granted;-

1. The applicant be permitted to continue operating the salon in the store given her to do so by the testator during his lifetime.

2. Applicant be permitted to occupy the apartment comprising single room, living room (hall), kitchen and wash room in house No. 67, Pankrono Estate, Kumasi in which she lived at the time of the testator's death.
3. Pursuant to section 13(2) (b) of the Wills Act, 1971 (Act 360) that indicates a grant of an estate or interest in immovable property for life or any lesser period, the permission to use the store room for a salon and the apartment is for her life or where applicant willingly vacates same, they revert to the devisees under the Will.
4. The applicant is permitted to use Toyota Vehicle AS 7738-13.

To this extent, the prayer is granted. No order as to cost.

[SGD]

JUSTICE HANNAH TAYLOR (MRS)

JUSTICE OF THE HIGH COURT

LAWYERS

ROBERT SUMAA …… FOR APPLICANT

KWASI BEMPAH …… FOR RESPONDENT