



REPUBLIC OF KENYA



**In re Estate of George Warui Kariri (Deceased) (Succession Cause 926 of 2014) [2023] KEHC 3346 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3346 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
SUCCESSION CAUSE 926 OF 2014**

**K KIMONDO, J**

**APRIL 24, 2023**

**RE ESTATE OF GEORGE WARUI KARIRI (DECEASED)**

**BETWEEN**

**DAVID MAINA KARUMA ..... PETITIONER**

**AND**

**ESTHER WANJIRU WARUI ..... RESPONDENT**

**JUDGMENT**

1. The core of this dispute is whether George Warui Kariri (hereafter the deceased) left a valid will. The deceased died on September 5, 2006 at St Mulumba Hospital, Thika. According to the death certificate, he was aged 78 years.
2. According to David Maina Karuma (hereafter the petitioner), the deceased had a year earlier made a written will dated September 19, 2005 at the law offices of Karago S. N Advocates. But according to the deceased's 2<sup>nd</sup> wife, Esther Wanjiku Warui (hereafter the respondent), the will is a forgery. In her view, it also runs counter to the wishes of the deceased or includes assets that did not belong to him.
3. The petitioner's case is that the disposition met all the conditions of the *Law of Succession Act* (hereafter the Act). For instance, the deceased's capacity was never in doubt when he executed the will in the presence of two witnesses, Geoffrey Njenga Njoroge and Michael Njihia Mutuota (PW3). It was also attested by advocate Stephen Ndichu (now also deceased). In that will, the deceased appointed the petitioner as the sole executor.
4. On December 9, 2014, the executor, applied for probate with the written will annexed. But unknown to the executor, the respondent had on November 5, 2014 applied for letters of administration intestate in Murang'a High Court succession cause No 813 of 2014.



5. She also lodged a citation to accept or refuse the letters. The citees were members of the 1<sup>st</sup> house being Sarah Watiri Warui, David Gachuhi Warui, Jane Waithira Warui, Mary Gakenia Warui, Joyce Njoki Kihara and Jane Wangechi Kariri. They all entered an appearance on December 3, 2014 through the petitioner’s counsel of record. In the meantime, the court (Waweru J) issued a grant to the respondent on July 6, 2015.
6. The citees then presented a summons on May 27, 2015 to revoke the grant for, among other reasons, that the deceased had left a will; and, that there were separate proceedings pending before the court.
7. On October 5, 2015, Waweru J stayed succession cause No 813 of 2014 “in all respects pending the disposal of succession cause No 926 of 2014 [the present cause]”.
8. This cause proceeded by *viva voce* evidence. The first witness was Isaac Munene Mundia (PW1), an advocate who shared law offices with the late Stephen Ndichu advocate in Thika Town. He confirmed that following enquiries by the executor, their secretary retrieved the will “from their shared safe”. It was in a sealed envelope from the offices of Karago S. N Advocate. The envelope had been signed across by Stephen Ndichu whose signature was familiar to him. On November 13, 2014, he read the contents of the will to the family of the deceased at the latter’s home in Gatura, Gatanga.
9. PW2 was the petitioner. As I stated, he is the executor. He said the deceased was his uncle. David Gachuhi, a son of the deceased, had alerted him that the deceased wanted him to be a trustee to his will. On September 19, 2005, the deceased, the petitioner and Geoffrey Njenga Njoroge went to the offices of S. N Karago Advocate at Thika. The deceased instructed the advocate about his wishes and prepared the will. The advocate also explained the details in Gikuyu language. The deceased and the two witnesses then signed the will which was attested to by the advocate.
10. The witness produced the original will (exhibit 2) and the payment receipts to the advocate (exhibits 3 a & b). He said he got the original will from PW1. He accompanied PW1 at the reading of the will. He said the local chief was also present.
11. In cross-examination, he said he had a copy of the will but the original was left in the custody of the advocate. He disclosed the existence of the will to the family when he learnt there were disputes on the sharing of the estate. He was also taken to task about the schedule of assets and the letter from the chief dated August 19, 2013. In re-examination, he said the parcel referred to in the will as Loc 16/Gatura/176 is an error. The correct parcel should read Loc 16/Gatura/1716 as per the search certificate.
12. When the trial resumed on October 17, 2017, the petitioner’s counsel was absent. The respondent’s case opened and Esther Wanjiku Warui (DW1) took to the stand.
13. However, following a consent on March 1, 2022, the petitioner’s case was re-opened for the testimony of Michael Njihia Mutuota (PW3). The material part of his testimony was that he was present when the deceased instructed the lawyer to prepare the will; and, that it was explained and read back to the deceased before he signed it.
14. Esther Wanjiku Warui (DW1) was then recalled to the stand. She relied on her witness statement dated July 5, 2022 and a list of documents of even date. She married the deceased as his second wife in 1979. The deceased never mentioned to her about the will and she learnt of it in the course of the proceedings. She confirmed that the deceased’s mental faculties were intact. However, the will ran counter to another hand-written document by the deceased. She did not however produce a copy of the hand-written instructions or contradict the signature in the will.
15. But she wondered aloud why the area chief gave her a letter to present the succession cause if he knew of the will; or, why the same chief gave a similar letter to PW2. Regarding Loc 16/Gatura/148, she said



- the deceased had moved to subdivide it as per the mutation forms. He had also obtained the consent of the land control board. One of the resultant titles was Loc 16/Gatura/1717 which is now registered in her name. She conceded that she got her title after the death of the deceased.
16. She insisted that Gilgil/Gilgil/1850 did not belong to the estate. Surprisingly, she had listed the property as one of the assets in form P&A 5. She also said that Loc 16/Gatura/1716 was transferred to her by the deceased at the same time with Loc 16/Gatura/1717. She confirmed that Loc 16/Gatura/390 is occupied by Mary Gakenia, a daughter of the deceased and who has built a house on it. On re-examination, she said that the will was defective for leaving out some assets of the deceased.
  17. Learned counsel for the petitioner filed submissions on July 25, 2022. Those by the learned counsel for the respondent were lodged earlier on July 18, 2018.
  18. I take the following view of the matter. The deceased had the discretion dispose of all or any of his free property by will. Section 5 (1) of the Act expressly provides that-

Subject to the provisions of this part and part iii, every 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.
  19. The respondent never contended that the deceased had any mental illness or was incapable of making such a disposition. Furthermore, under section 5 (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”. I thus readily find that the deceased had capacity to make the will.
  20. The next key matter is whether the will met all the legal requirements. Section 11 of the Act provides as follows-

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. From the evidence of PW1, PW2 and PW3. I am satisfied that the written will was made and executed on September 19, 2005 by the deceased in the law offices of Karago S. N Advocate at Thika. Like I have observed, the deceased’s capacity was never in doubt and he executed the will in the presence of two witnesses, Geoffrey Njenga Njoroge and Michael Njihia Mutuota (PW3). It was also attested by advocate Stephen Ndichu (now also deceased). There was thus full compliance with section 11 of the Act.
  22. The respondent’s attack on the will is four-fold. Firstly, that the will is a forgery. The reason proffered is that it contradicts the wishes of the deceased in another handwritten document. No such document was produced at the trial. Secondly, she was also suspicious because the area chief gave her an



introductory letter to file the earlier succession cause. If the chief was present at the reading of the will, he would surely have alerted her about the will.

23. The respondent was alleging there was criminal conduct. But the evidence fell far short of the standard of proof for forgery or fraud. See generally, See *Koinange v Koinange* Nairobi, High Court case 66 of 1984 [1986] eKLR, *Ratilal Patel v Lalji Makanji* [1957] EAR 314 at 317.
24. Thirdly, she asserted that Loc 16/Gatura/148 had since been subdivided by the deceased. True, but I find that the subsequent subdivision largely followed the wishes in the will; and, that the remainder of the original Loc 16/Gatura/148 is capable of disposition under the terms of the will.
25. Furthermore, the subdivision did not invalidate the will. After making a will, the testator could still deal with the assets including sale or the subdivision referred to. It was perfectly in order to do so. If a property is no longer available for distribution, the law is clear on the subject: only that part of the will would be incapable of execution. I thus find that there was no substantial change in the subject to cause ademption as submitted by learned counsel for the respondent, Mr Warima.
26. Fourthly, the respondent testified that Gilgil/Gilgil/1850 and Loc 16/Gatura/176 did not form part of the estate; and, that some assets were omitted, for instance shares held at Barclays Bank. The omission of such assets in the will does not invalidate it.
27. Regarding Gilgil/Gilgil/1850, the search produced by the respondent as exhibit 2 in her list of documents confirms that the proper reference should be Gilgil/Gilgil block 1/1850 and which is still registered in the name of the deceased. The respondent was not entirely candid because she had also listed the property as one of the assets in form P&A 5.
28. Lastly, learned counsel for the respondent, Mr Warima, had challenged the will for not being endorsed on all the pages. That may be a good practice but there is no legal requirement that every page of a will be signed by the testator. I also note that as confirmed by PW2 and PW3, this was a fairly brief will of two pages; and, as I have stated earlier, the execution on the last page complied fully with the requirements of section 11 of the Act.
29. In the end, all the objections to the making or validity of the will have not been proved to the required standard and are unmerited. The upshot is that the contested will is valid.
30. My findings mean that the deceased died testate. The proper procedure is the one adopted by his executor (the petitioner) in the present cause by applying to the High Court for probate with the will annexed. It follows as a corollary that the parallel proceedings brought by the respondent on November 5, 2014 for letters of administration intestate in Murang'a High Court succession cause No 813 of 2014 are a nullity. I strike them out. The grant issued to the respondent on July 6, 2015 in that cause is therefore revoked.
31. My final orders are thus as follows.
  - i. That the deceased died testate. Accordingly, the proper procedure is the one adopted by his executor (the petitioner) in the present cause by applying to the High Court for probate with the will annexed.
  - ii. That the parallel proceedings brought by the respondent on November 5, 2014 for letters of administration intestate in Murang'a High Court succession cause No 813 of 2014 are a nullity and are hereby struck out.
  - iii. That the grant issued to the respondent in Murang'a High Court succession cause No 813 of 2014 on July 6, 2015 in that cause is hereby revoked.



- iv. That a grant shall now issue to the executor David Maina Karuma (the petitioner) in this cause.
  - v. That the estate of the deceased shall be distributed in accordance with the proved will dated September 19, 2005 under clause 4 (a) to (e) but with the following necessary adaptations-
    - a. That the deceased during his lifetime (and well after the will) subdivided Loc 16/Gatura/148 in a manner that altered his earlier disposition in clause 4 (b) of the will. Accordingly, Esther Wanjiku Warui (the respondent) shall get 3 (three) acres instead of the 2½ acres mentioned in the will. To avoid further costs and noting that she has a title for the resulting subdivision now known as Loc 16/Gatura/1717, she may retain that portion for so long as it does not exceed the 3 acres.
    - b. That for the same reason, the sub-division from Loc 16/Gatura/148 now known as Loc 16/Gatura/1718 shall be allocated to Sarah Watiri Warui, the 1<sup>st</sup> wife of the deceased.
    - c. That the remainder of the original Loc 16/Gatura/148 or the subdivision now known as Loc 16/Gatura/1716 shall devolve as per clause 4 (b) and (c) of the written will.
    - d. That the proper reference for the property in clause 4 (c) of the will should read Loc 16/Gatura/1716.
    - e. That the correct reference to the property in clause 4 (d) of the will should read Gilgil/Gilgil Block 1/1850.
    - f. That the correct reference to the property in clause 4 (e) of the will should read Mitubiri/Wempa/Block-I/5493.
  - vi. That any other assets belonging to the deceased which were not particularized in the will including shares in both listed and unlisted companies; and, motor vehicles shall be distributed by consent of all the beneficiaries to be obtained within the next 90 days. In default, the executor may distribute them equally between all the beneficiaries.
  - vii. A certificate of confirmation of the grant shall issue to the executor David Maina Karuma in terms of this judgment.
32. Costs normally follow the event and are at the discretion of the court. Considering that this is a succession matter and in the interests of justice, each party shall bear its own costs.

33 It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 24<sup>TH</sup> DAY OF APRIL 2023.**

**KANYI KIMONDO**

**JUDGE**

Judgment read virtually on Microsoft Teams in the presence of:

Mr. Chege for the petitioner instructed by Maina Muiruri & Company Advocates.

No appearance by counsel for the respondent.

Mr. E. Ombuna, Court Assistant.

