



REPUBLIC OF KENYA



**In re Estate of Nyambura Kigera (Deceased) (Succession Cause
540 of 2011) [2022] KEHC 10257 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 540 OF 2011**

RB NGETICH, J

MAY 26, 2022

IN THE MATTER OF THE ESTATE ID THE LATE NYAMBURA KIGERA (DECEASED)

BETWEEN

JOHN MUNGAI KIGERA PETITIONER

AND

FRANCIS WAIRIRI KIGERA OBJECTOR

JUDGMENT

1. John Mungai Kigera filed petition for probate of last written will on October 4, 2011 in respect of the estate Dorcas Nyambura Kigera who died on June 27, 2011 in his capacity as son to the deceased.
2. The assets of the deceased comprise as follows:-
 1. Elburgon/Elburgon Block 9/161
 2. Langwenda-Molo South Langwenda block 18/93
3. Dependants listed are as follows: -
 1. John Kamau Kigera
 2. Francis Wairiri Kigera
 3. Catherine Kigera
 4. Anthony Kimemia (deceased)
 5. Mary Wambui (deceased)
 6. and John Mungai Kigera.



4. Attached to the will is a letter of the chief Elburgon and a copy of the deceased will, listing her assets and how the same is to be distributed.
5. A notice of the filing of the petition was published in the Kenya Gazette Notice No 2199 on February 24, 2012 inviting objections within thirty days as required by section 67 of the [Law of Succession Act](#), Cap 160, Laws of Kenya.
6. Francis Wairiri Kigera filed a notice of objection to the making of the grant on April 4, 2012 together with an answer to the petition for a Grant. He alleged that the petitioner John Mungai did not consult the other beneficiaries Francis Wairiri and Catherine Kigera while beneficiaries John Kamau, Anthony Kimami and Mary Wambui are deceased. He averred that the parcel of land known as Elburgon/Elburgon Block 9/16 was sub-divided during the lifetime of the deceased and alleged the will attached to the petition is a forgery.
7. On March 1, 2013, Francis Wairiri filed a petition by way of a cross petition contending that the deceased died intestate. He averred that he is the first born of the deceased and therefore ranks first in priority as a petitioner of the estate of the deceased. He listed dependants of the deceased as follows: -
 1. Francis Wairiri Kigera
 2. Anthony Kimemia Kigera- died on February 22, 2003
 3. Mary Wambui Kigera- died on September 14, 2005
 4. John Kamau Kigera- died on December 25, 2011
 5. Cathereine Wangui Kigera
8. The cross-petition is supported by the annexed affidavit sworn on 28th February 2013 reiterating the grounds of the cross-petition and the attached will was obtained fraudulently by the petitioner.
9. In response to the cross-petition, John Mungai Kigera filed Chamber Summons dated April 29, 2013 seeking an order restraining the objector from selling, transferring, charging and or dealing with titles emanating from Elburgon/Elburgon Block 9/161 or its subdivision. He alleged the objector is interfering with the estate of the deceased; that the objector unlawfully and fraudulently subdivided the estate of the deceased.
10. Francis Wairiri Kigera responded to the application by filing Replying Affidavit dated May 8, 2013 alleging he is not aware of any written will by the deceased. He averred that the deceased had subdivided her estate during her lifetime and the new title deeds generated were issued with the names of the beneficiaries of the deceased and he was not selling any subdivisions at the moment.
11. Directions were given that the matter proceeds through viva voce evidence.

Objector's Case

12. DW1 Francis Wairiri Kigera testified that John Muraya Kigera is his younger brother; that they were 6 siblings though 3 are deceased. He stated that the will adduced by the petitioner is a forgery and the same has not been recognized by the family members. He further stated that before her demise his mother had subdivided the property known as Elburgon/Elburgon Block 9/161 equally amongst all beneficiaries and produced Mutation form dated July 31, 2009 and the new title deeds issued. He stated that the deceased had reported her lost Identity card and title deed to the property and produced Gazette Notice dated September 25, 2009 marked as exhibit 3. He said a new title deed was issued on 21st December 2009.



13. DW1 further stated that he is holding the petitioner's title deed to portion number 518 as the petitioner did not pay the requisite fees for subdivision and he is ready to release the title to the petitioner if he pays the requisite fees. DW1 further stated that he is the owner of the parcel known as Langwenda-MoloSouth Langwenda Block 18/93 and has a share certificate after they swapped with the deceased with Elburgon/Elburgon block 9/161. He also stated that he paid for the transfer fees and later sold the property to Kiptoo Simon Samuel Ruto by the sale agreement dated February 15, 2013.
14. He further stated that the Petitioner placed a caution in the parcel known as Elburgon/Elburgon Block 9/161 and by a letter dated February 2, 2012, he wrote a letter to the Registrar to have the caution removed.
15. On cross-examination, he stated the parcel of land known as Elburgon/Elburgon Block 9/161 was still registered in the name of the deceased in the year 2012 and subdivision was still pending; and Elburgon/Elburgon Block 9/518 is still registered in his name and not in the Petitioner's name and claims Kshs 20,000/= from the Petitioner for processing the title deed though he never adduced any evidence to that he incurred the amount and notified the Petitioner. He confirmed he had no transfer from Arimi Co-operative although the transfer was done after the demise of the deceased.
16. DW2 Raymond Gitonga testified that he is the Land Registrar Nakuru and was attending Court following summons to produce the green cards in Elburgon/Elburgon Block 9/161 and Langwenda-Molo South Langwenda Block 18/93. He stated that the first entry in relation to Langwenda-Molo South Langwenda Block 18/93 was done in February 16, 2006 in favor of Arimi Farmers Society and the land was transferred to Francis Wairiri Kigera on September 1, 2011 and a title deed issued on September 13, 2011 and later registered in the name of Samuel Kiptoo Ruto on February 25, 2013. He further stated that he was not certain if the deceased was the original owner of the land as he had not carried the parcel file.
17. He further stated that Elburgon/Elburgon Block 9/161 was registered in the name of the deceased Nyambura Kigera and a title deed was issued on October 31, 1998 and re-issued on December 21, 2009. He testified that the subdivisions of the land were done by the objector after the death of the registered owner Nyambura. He confirmed there was a discrepancy in the green card as it did not reflect any entry of restriction.

Petitioner's Case

18. PW1 John Mungai Kigera testified that he was the last born child of the deceased Dorcas Nyambura Kigera. He said prior to her death, the deceased lived in Elburgon/Elburgon Block 9/161.
19. He further stated that he learned of the deceased written will dated December 9, 2004 prepared by Julius Ayusa & Co Advocates from the area chief Mr Erick Korir; and he learned he was one of the executors of the will on July 13, 2011 when he went for a meeting and the will was handled over to him by the advocate after the siblings failed to attend the meeting.
20. PW1 further stated that he is a stranger to plot known as Elburgon/Elburgon Block 9/518. He said he was not involved in any subdivisions and neither was he aware of the subdivisions. He said he refused to remove the restriction as his mother was already deceased.
21. PW1 said the title deeds emanating from the subdivision are fraudulent and contrary to the wishes of the deceased and stated that the sale of Molo/South/Langwenda Block 19/93 was illegal as it was done after the demise of the deceased.



22. He said the will was not read out to other beneficiaries and he is not aware of the process of implementing the will. He added that he is the only one with a copy of the will and he was not present when the will was prepared but he was present when the amendment to Simon identity card number was done.
23. The Petitioner in his evidence stated that he was not aware of any subdivisions by the deceased and neither was he aware of any gazettment of the lost title deed despite living with the deceased.
24. PW2 Erick Korir testified that he was the Assistant Chief of Elburgon Location between 1997- 2015. He said he knew the deceased as she hailed from his location. He adopted his witness statement dated January 31, 2017. He stated that him and other witnesses was present at Ayusa's office and they all witnessed the deceased execute the will dated December 9, 2004. He also stated that he was the one who introduced the deceased to Advocate Ayusa to write the will and urged the court to consider the will as the last wishes of the deceased.
25. On cross examination he confirmed he was the assistant chief and not the area chief as per the stamp on the will. He said the amendment was done by the advocate but the same was not countersigned.
26. PW3 Joseph Kamau Ng'ang'a adopted his witness statement dated January 31, 2017. He confirmed being present when the deceased executed her will at Advocate Ayusa's office. He said the will was witnessed by 4 witnesses who were all present at the time the deceased executed the will and the amendment was done in the presence of all witnesses but the same was not countersigned.
27. PW4 Julius Kombo Ayusa testified that he was then practicing in the name and style of JK Ayusa & Company Advocates but left for Botswana in the year 2011 for further studies and he is currently a lecturer at the University of Gaboroni, School of Law. He said he was present in Kenya in the year 2004 and he received instructions from Nyambura Kigera to prepare a will on December 9, 2004. He stated that he drafted the will as per the deceased wishes and she bequeathed all beneficiaries equal shares in respect to the 2 parcels of land. He further testified that the deceased wished that John Mungai Kigera be the executor of the will and the trustee of the deceased's estate.
28. He stated that the will was read out to the deceased in Kikuyu who confirmed to understand the contents of the will and it was witnessed by 4 witnesses and Joseph Kamau Ng'ang'a acted as a translator. He said all witnesses witnessed the deceased as she affixed her signature and the area chief affixed his stamp and he (PW4) corrected the error on Simon's identity card number on the typed will in the presence of all witnesses.
29. PW4 said he delivered the will to the petitioner in the presence of the area chief after learning of the deceased's death. He said he called meeting of the beneficiaries but they failed to attend the meeting.

Objectors' Submissions

30. Counsel for the objector filed submissions dated March 16, 2022 and submitted that the deceased never left a will; that the deceased was not capable of disposing off her property as she was not in a proper state of mind at the alleged time of drafting the will; that she lacked the testamentary freedom as per section 11 of the law of Succession Act.
31. Counsel further submitted that the deceased was fluent in the Kikuyu dialect and thus the will does not reflect the wishes of the deceased having been drafted in English language; that there is no affidavit attached to the will indicating the contents of the will were read over to the deceased person as per rule



54(3) of the *Probate and Administration Rules* and cited the case of *In Re Estate of Salome Wangari Ngungi (Deceased)* [2017] eKLR where the court held as follows: -

“from the evidence tendered by all parties it is clear that the deceased spoke and understood kikuyu, however the will in testament was drawn in English. As issue arising is that the deceased could not have attested the said will as she could not understand the contents therein. I find it would have been diligent on the part of the advocate drawing the said will to also draw up a certificate of translation to indicate that the contents of the said will she had attested to the same. This was not done.from the foregoing it is clear that the said will does not meet all the requirement under the law and as such the same is not valid.”

32. From the foregoing, it is not disputed that the alleged will was drafted in Kiswahili language and was not accompanied by certificate of translation. It is not enough for a witness to say I translated the will to a language understood by the maker of the will. There should have been a certificate to confirm that it was indeed translated and the maker understood the contents of the will. I therefore find that the alleged will has failed to meet the requirements for a valid will and I decline to recognize it as representation of the wishes of the deceased herein.

(ii) Whether Molo South/Langwenda Block 18/93 (Arimi) and Elburgon /Elburgon block 9/161

33. The objector argued that prior to her death, the deceased wrote a letter dated November 28, 2008 to the chairman of Arimi Farmers’ Co-operative Society Ltd, requesting her name to be replaced with that of the objector in respect to parcel number Molo South/Langwenda Block 18/93 (Arimi) while in respect to Elburgon /Elburgon block 9/161 the property no longer exist as the same was closed on sub-divisions on 31st July 2009; that the entire sub-division was done during the lifetime of the deceased and the same does not therefore form part of the deceased estate. That there is therefore no property comprising estate of the deceased.

34. The objector cited the case of *Peter Ndiritu Kibui vs Ann Mugure Kibui* (2016) eKLR where the judge observed: -

“In the instant case, the deceased expresses his intention in a very clear manner. He gave each child a piece of land and transferred. He attended the Land Control Board with the protestor and obtained the consent. He signed the requisite transfer. I find nothing in the petitioners’ evidence to negate this clarification.”

35. The objector urged the court to find that the will is invalid and void and allegation by the petitioner that the transfer was fraudulent should be addressed before the Environment and Land Court; and urged the court to condemn the Petitioner to pay costs.

Petitioner’s Submissions

36. Counsel for the petitioner filed submissions dated February 17, 2022 and submitted that the deceased died testate, her will having met the requirements laid down in Section 11 of the Law of Succession Act; that there was no assertion by the objectors that the deceased suffered from any illness or physical disability that made it impossible to execute the will and old age alone cannot invalidate a will.
37. On whether the deceased died leaving behind properties; Molo South/Langwenda Block 18/93 (Arimi) and Elburgon /Elburgon block 9/161, counsel for the objector confirmed that he conducted a search on 24th October 2011 and found the property known as Elburgon /Elburgon block 9/161 was still registered in the name of the deceased and a restriction had been placed by the Petitioner; and



before the demise of the deceased there was no indication from the green card of any intention to have the land subdivided.

38. Counsel further submitted that the subdivision from Elburgon /Elburgon Block 9/161 are illegal as they were issued on September 7, 2010 before the green card for the mother title was closed and the searches dated September 29, 2011 and October 24, 2011 indicated deceased was still the registered owner of the property. According to counsel it was not true that the green card was closed for subdivision on July 31, 2009 as shown by the green card adduced in court; that the card may have been manipulated by the objector with the assistance of the land officials; that the objector could not have had the title to the subdivisions without a corresponding green card.
39. The Petitioner further submitted that parcels known as Molo South/Langwenda Block 18/93 (Arimi) and Elburgon /Elburgon block 9/161 belongs to the deceased and the objector did not adduce any evidence of how Molo South/Langwenda Block 18/93 (Arimi) was transferred to him; transfer allegedly done on 1st September, 2011 and later illegally transferred to Kiptoo on February 25, 2013; and the objector further failed to demonstrate how plot no. 081 became Molo South/ Langwenda Block 18/93. He urged this court to find that both were different properties.
40. The petitioner submitted that omission of the wording block 9 has not caused any prejudice to any party and the same can be cured by article 159(2) (d) of the *Constitution of Kenya* and urged the court to find the property in dispute is Elburgon /Elburgon Block 9/161 and the deceased died testate living behind property available for distribution and dismiss the objection.

Analysis And Determination

41. I have considered evidence adduced and submissions filed by the parties herein. I consider the following as issues for determination: -
 1. Whether the will dated December 9, 2004 is valid?
 2. Whether the deceased left behind property and which property
 3. Mode of distribution

(i) Whether the deceased left behind a will

42. The Petitioner's contention is that the deceased left behind a will dated December 9, 2004 which names him as executor while objectors argue that the alleged will is a forgery and no property was left by the deceased for distribution.

(i) Whether the will dated December 9, 2004 is valid?

43. The objector argued that the deceased did not understand English and there is no affidavit or certificate attached to the will to confirm that indeed she understood the content of the will. I have perused the will dated December 9, 2004 attached to the petition and note that the will is written in English. It has not been disputed that the deceased did not understand English. Even though it is alleged PW3 Joseph Kamau Ng'ang'a acted as an interpreter and translated the contents of the will to the deceased who only understood Kikuyu, there is no certificate of translation attached to the will illustrating the contents of the will were read out to the deceased and she understood the contents.
44. Rule 54(3) of the *Probate and Administration Rules* requires that if the testator is blind or illiterate or will is signed by another person by the direction of the testator or where it appears to be written in a language in which the testator is not familiar evidence is required before the will is admitted to probate.



45. Rule 54 makes it mandatory for the Court to satisfy itself that the testator had knowledge, by requiring an affidavit showing the contents of the will had been read out over to the testator who understood the contents before the execution of the will.
46. From the record it is evident there is no such certificate was annexed to the will. It was prudent for the advocate to indicate that the contents of the will were read out to the testator and translated in the language she understood.
47. What raises more curiosity is the fact that the objector is named executor and under paragraph 4 of the said will, it is only the Petitioner and one brother Anthony Mungai Kigera to share parcel Elburgon/Elburgon/161 leaving out the other 4 siblings to share a parcel named Arimi B parcel no.81 comprising of 2 acres. The fact that he was the only one present during the alleged reading of the will by the Advocate raises more questions than answers.
48. From the foregoing, I find that there is doubt that the deceased understood the contents of the will if indeed she is the one who thumb printed. In my view the will herein is not valid.

(iii) Whether the deceased left behind property and which property comprises estate of the deceased

49. The objector alleged the deceased did not leave behind any free property for distribution as she had already dealt with her estate before her demise. He alleges that the deceased had bequeathed him Molo South/Langwenda Block 18/93 (Arimi) on September 1, 2011, which he subsequently sold to Kiptoo after the transfer was effected. I do note the transfer to Kiptoo was done in the year 2013 way after the demise of the deceased.
50. The transfer to Kiptoo was done vide a sale agreement dated February 15, 2013. The Objector argued he obtained the title deed on September 13, 2011 but the same did not read his name but that of Kiptoo. I find this transaction to be fishy the Objector obtained a title deed to the property in favor of the purchaser Kiptoo and subsequently an agreement was entered in the year 2013. During this period when the transaction was taking shape the succession cause had been filed but not finalized.
51. Section 82 of the *Law of Succession Act* provides that no immovable property of a deceased person shall be sold before confirmation of grant. The same position is emphasized *In Re Estate of Jamin Inyanda Kadambi (Deceased)* [2021] eKLR where it was stated as follows: -

“A valid sale of estate property can only be by those to whom the assets vest by virtue of section 79, and who have the power to sell the property by virtue of section 82. Even then, immovable assets, like land, such as Kakamega/Kegoye/30, cannot be disposed of by administrators before their grant has been confirmed, and if land has to be sold before confirmation, then leave or permission of the court must be obtained. That is the purport of section 82(b)(ii) of the Law of Succession Act. Clearly, the sale transaction that was carried out by the administrators was contrary to sections 45 and 82(b) (ii) of the Law of Succession Act, and was invalid for all purposes. It cannot be asserted at all, and am surprised that persons to whom administration of the estate herein can purport to support a sale transaction that was carried out contrary to the very clear provisions of the law.”
52. Further, I do note that searches attached as evidence by both the petitioner and the objector conducted on September 29, 2011 and October 24, 2011 for the parcel known as Elburgon /Elburgon block 9/161 do not show any dealing with the land as at the time. Whereas the objector alleges the subdivision commenced in the year 2009.



53. From the foregoing, it is quite clear that the objector dealt with deceased property after her death and he therefore intermeddled with the estate of the deceased and the sale was therefore void. Transfer of the deceased property to Kiptoo is a forgery and a nullity.
54. From the foregoing, the deceased left behind two Molo South/Langwenda Block 18/93 (Arimi) and Elburgon /Elburgon block 9/161 which are subject for distribution among the beneficiaries of the deceased.

Final Orders

55. The will dated December 9, 2004 is invalid.
56. The deceased died intestate leaving behind the following parcels Molo South/Langwenda Block 18/93 (Arimi) and Elburgon /Elburgon block 9/161 subject for distribution.
57. The property known as Molo South/Langwenda Block 18/93 (Arimi) to revert back to the estate of the deceased.
58. The deceased property to be distributed equally between the children of the deceased.
59. The petitioner and the objector to jointly administer the estate of the deceased.
60. Each party to bear own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT KIAMBU THIS 26TH DAY OF MAY, 2022.

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RACHEL NGETICH

JUDGE

In the presence of:

Kemboi - Court Assistant

Ms. Wangare holding brief Waiganjo for Petitioner

Mr. Ouma holding brief for Mrs. Mukira for Objector

