



In re Estate of Julius Marete Ibutu (Deceased) (Succession Cause 11 of 2018) [2022] KEHC 14396 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14396 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 11 OF 2018**

**TW CHERERE, J
OCTOBER 27, 2022**

**IN THE MATTER OF THE ESTATE OF JULIUS MARETE IBUTU
(DECEASED)**

BETWEEN

PRISCILLA NKIROTE MARETE APPLICANT

AND

GLADYS KINAITORE MARETE 1ST APPLICANT

JANET MWARANIA MARETE 2ND APPLICANT

SALOME KANARION MARETE 3RD APPLICANT

ESTHER MAKENA MARETE 4TH APPLICANT

RULING

1. Julius Marete Ibutu(deceased) died on April 20, 2018. On June 26, 2018, Priscilla Nkirote Marete (Petitioner) petitioned the court for a grant of letters of administration intestate but annexed deceased's will dated May 10, 2015 which appointed David Muriungi Machegu and Jukius Gennings Gichoga as executors. Annexed to the petition is a letter dated June 14, 2018 by the chief Chugu Location listing the Gladys Kinaitore Marete (1st Applicant) as deceased's first wife and her 5 children who include the 2nd, 3rd and 4th Applicants and Priscilla Nkirote Marete as deceased's second wife and her six children. The letter contains names of deceased's grandchildren and daughter in law and list of his assets.
2. Letters of Administration Intestate were issued to the Petitioner on February 21, 2029.
3. Before Certificate of Confirmation of Grant could issue, the Applicants moved to this court *vide* a summons for reasonable provision dated December 21, 2018 mainly on the grounds that the will was



discriminatory against them and was a forgery. The summons is supported by 1st Applicant's affidavit sworn on December 21, 2018 in which she reiterates the grounds on the face of the application.

4. Additionally, 1st Applicant avers that she and deceased acquired LR Ruiiri/Rwarera/5XX and built a matrimonial home where she lives to date and by their joint efforts acquired hotel businesses in Mikinduri, cereals businesses in Tharaka Nithi and Ukambani, Posho Mill I Meru Town and transport business where they acquired a lorry, a bus and a garage. It is her case that it is through her contribution that deceased acquired his estate and that the will alleged to have been made by deceased which is skewed towards the 1st house unfairly discriminates against her and her children.
5. In response, Petitioner filed an affidavit sworn on November 19, 2019 stating that deceased's will was read by Mr Kiautha Arithi Advocate on May 30, 2018 in her presence and deceased's children and 2 original copies of the same for purposes of commencing succession proceedings.
6. By an order dated November 25, 2019, the court directed that the issue of validity and authenticity of the will be determined by way of *viva voce* evidence.

Respondent's case.

7. Mr Lawrence Kiautha Arithi advocate stated that on November 10, 2015, deceased who was his client called on him in company of David Muriungi Machege and Jukius Gennings Gichoga and expressed his wish to make a will. That deceased had a draft will which he instructed the advocate to incorporate some changes and after it was typed and read out to him, he thumb printed and signed it and his two witnesses too signed subsequent to which it was registered with the Central Land Registry on November 20, 2015. It was his evidence that he was with deceased for about 5 hours and he appeared to be of sound mind and health. He invited deceased's family for reading of the will on May 30, 2018.
8. In cross-examination by counsel for the Applicants, counsel confirmed that the 1st Applicant was not provided for in the will.
9. Gennings Gichoga one of the witnesses to the will stated that deceased was mentally and physically healthy when he made the will dated November 10, 2015. In cross-examination by counsel for the Applicants, the witness stated that the Applicants were unknown to him.
10. Petitioner stated Applicant was unknown to her and that she did not know the mother to 2nd, 3rd and 4th Applicants. She was however aware that deceased had another wife before her. It was her evidence that 2nd, 3rd and 4th Applicant who are deceased's children were provided for by the deceased

Applicants' Case

11. 1st Petitioner stated that she was deceased's first wife as evidenced by chief's letter dated June 14, 2018. It is her testimony that whereas she could not recall when deceased married the Petitioner, she remained deceased's first wife until his death. 1st Petitioner complains that she and her daughter the 3rd Applicant were not provided and her other children 2nd and 4th Applicants were not provided as much as the Petitioner and her children. She additionally complains that LR Ruiiri/Rwarera/5XX where her matrimonial home is built was bequeathed to her children, the 2nd and 4th Applicants herein.
12. 2nd and 4th Applicants similarly faulted the Will on the ground that their house was not provided as much as the 2nd house. 3rd Applicant stated that just like her mother the 1st Applicant, she was not provided for in the Will.



Analysis and Determination

13. I have considered the evidence on record and submission filed on behalf of the parties identified the issues for determination as follows;
1. Whether the Applicants are lawful beneficiaries of the deceased
 2. Whether there exists a valid Will and testament of the deceased.
 3. Whether deceased made reasonable provision for Applicants

Whether the Applicants are lawful beneficiaries and dependants of the deceased

14. Section 29 of The *Law of Succession Act* Cap 160 Laws of Kenya (The Act) defines a dependant to be :-
- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - b. such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
 - c. Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.
15. Petitioner filed a letter dated June 14, 2018 by the chief Chugu Location listing Gladys Kinaitore Marete (1st Applicant) as deceased's first wife and her 5 children who include the 2nd, 3rd and 4th Applicants and Priscilla Nkirote Marete as deceased's second wife and her six children.
16. That the 1st Applicant resides on deceased's land LR Ruiru/Rwarera/519 is not disputed. The Petitioner's claim that she does not know the 1st Applicant as deceased's wife but knows her children as deceased's children flies in the face of her own evidence contained in the chief's letter mentioned hereinabove which she herself filed in court at the commencement of this cause.
17. Consequently, I find that the Applicants are deceased's dependants and unless the contrary is proved are entitled to his estate.

Whether there exists a valid Will and testament of the deceased.

18. Section 5 of the *Law of Succession Act* does provide that;
- (1) Subject to the provisions of this part and part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by a will, and may thereby make any disposition by reference to any secular or religious law that he chooses.
 - (2) A female person whether married or unmarried, has the same capacity to make a will as does a male person.
 - (3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.



- (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.
19. The case by the Applicants is that the Will is a forgery. Section 109 of the *Evidence Act*, Cap 80 places the burden of proof on him who alleges and states as follows: -
- ‘The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.’
20. The need to prove and the burden of proof of such allegations was elaborated by the court in *Christopher Ndaru Kagina v Esther Mbandi Kagina & Another* [2016] eKLR where the court stated that -
- ‘It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In Belmont Finance Corporation Ltd v Williams Furniture Ltd [27] Buckley LJ said:
- “An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity.”
21. In this case, the Applicants neither particularized nor proved that the Will was forged.

Whether deceased made reasonable provision for Applicants

22. It is the Applicants’ case that the Will does not provide for the 1st and 3rd Applicants and provides more for the Petitioner and her children as compared to the provision made to 1st Applicant’s two children. Petitioner on the other hand contends that the Will makes reflects the deceased’s wishes which ought to be respected.
23. In support of the will, the Petitioner relied on Knight Bruce in *Bird v Luckie* [1850] 68 ER 373 where it was held that:
- “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 be heard, might be able to answer, most satisfactorily.”

24. Petitioner similarly relied on *In Re Arthur (Deceased) Abakah and Another v Attab-Hagan and Another* [1972] 1 GLR 435 where Archer JA (as he then was) said:

“What should be borne in mind is that whenever a will is granted, the court is not giving its blessing and support to all the contents of the will. The court is only expressing its satisfaction that the will has been validly executed and that the named executors are at liberty to administer the estate. The Court should be extraordinarily slow in interfering with the will of a deceased person because the will constitutes hallowed ground and no one should tread upon it. If the Court decides to interfere, it does not expunge anything from the will. If it decides to omit anything on the well-known grounds, the omission is made in the probate and not in the will itself. For instance, the court will exclude from a will any words introduced into the will by mistake without the instructions or knowledge of the testator. The court may exclude from the probate and from registration words of atrocious, offensive or libellous character and it will exclude words of a blasphemous character.”

25. Applicants on the other submitted that Section 5 of the *Act* is not absolute and that responsibility of the testator to the dependents is recognized under Section 26 of the *Act* which provides that:

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”

26. Applicants also placed reliance on *Elizabeth Kamene Ndolo v George Matata Ndolo* [1996] eKLR where the court of Appeal stated that:

This court must, however, recognize and accept the position that under the provisions of section 5 of the *Act* every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is expressly recognized by section 26 of the *Act*.

27. The court further stated that:

“So that though a man may have unfettered freedom to dispose of his property by will as he sees fit, we do not think it is possible for a man in Kenya to leave all his property for the maintenance and up-keep of an animal orphanage if the effect of doing so would be to leave his dependants unprovided for. While the deceased was entitled to dispose of his property as he pleased, he was not entitled to leave his first two wives Alice and Rose without any reasonable provision for their maintenance..... We cannot allow that to continue and the only way we can think of to make reasonable provisions for all of the deceased’s lifetime dependants is to do so according to the three house, each house representing a widow.”



28. Additionally, Applicants placed reliance on *re Estate of Gideon Sawe Kipkessio (Deceased)* [2019] eKLR where the court stated as follows:

“It is clear that the purported Will herein cannot stand the test of the law since it did not provide for all the beneficiaries/dependants. There is no justifiable reason why the beneficiaries from the 1st house were denied inheritance and that some of them got so little as compared to the beneficiaries from the 2nd house.”

29. Likewise, Applicants relied on *Gulzar Abdul Wais v Yasmin Rashid Ganatra & Another* [2014] eKLR where the court had this to say about Section 5 of the Act: -

This Section clearly puts limitations on the testamentary freedom given by section 5. So that if a man by his Will disinherits his wife, or child who was dependent on him during his lifetime, the court will interfere with his freedom to dispose of his property by making reasonable provision for the disinherited wife or child..... The legal position is clear that failure to provide for a beneficiary in a Will does not invalidate a Will. This is because the court is empowered to under section 28 of the LSA to make reasonable provision for the dependant in exercise of its discretion.

30. In support of the proposition that the will discriminated the 1st house, Applicants placed reliance on *re Estate of Gideon Sawe Kipkessio (Deceased)* (supra) where the court stated as follows:

“The above cited section of the law gives a guideline on the factors to be taken into account in the mode of distribution, even if an argument were to be advanced that the deceased had a right to distribute his property as he pleased. The deceased property was large and it could be apportioned well to cater for all the dependants and beneficiaries. The mode of distribution preferred in the contested will is un-proportional and unjustified given the fact that the two houses are involved.”

31. The court went further and stated that:

Even if the will was to be found to have been properly executed it fails to meet the guidelines set out in section 28 was not strictly followed, therefore some beneficiaries received more and other so little compared to the acreage of land. In view of the above holdings the impugned will and the proposed mode of distribution is set aside set aside I proceed to make provision for all the dependants and/or beneficiaries equitably in accordance with the law. Having been a polygamous set up I am guided by section 40 of the *Law of Succession Act* of section 40 of the *Law of Succession Act* Cap 160 Laws of Kenya which states as follows; “40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children”.

32. On October 24, 2022, this court made a request to identify the members of each of each of the two house. Counsel for both parties duly complied and Applicants ‘counsel went further and summarized to demonstrate what assets had been bequeathed to the each of the dependents.

33. The family of members of the deceased’s two houses are as listed here below.

1stHouse

1. Gladys Kinaitore Marete - Widow (1st Applicant Herein)
2. Janet Mwarania Marete – Daughter (2nd Applicant Herein)



3. Salome Kanario Marete – Daughter (3rd Applicant herein)
 4. Esther Makena Makena Marete _ Daughter (4th applicant herein)
 5. Charles Kigorwe Marete – Son (deceased)
2ndHouse
 1. Priscilla Nkirote Marete – Widow (petitioner herein)
 2. David Gikunda Marete – Son
 3. Mary Mukiri - Daughter
 4. Betty Kaimuri – Daughter
 5. Stephen KinotI Marete – Son(deceased)
 6. Norman Mwirigi Marete _ Son
 7. James Muriithi Marete – Son
34. For ease of reference, the the impugned mode of distribution is as set out in the Table below.
- 1ST HOUSE



No.	Names of beneficiary	Property given as per the will
Gladys Kinaitore Marete	Nil	
Janet Mwarania Marete	1. 2 Acres out of L.R No. Ruiru/Rwarera/519	
Salome Kanairio Muthuri	Nil	
4.	Esther Makena M'Marete	1. 1/5 Share of L.R No. Nyaki/Kithoka/3468 2. 2 Acres out of Lad Parcel No. Ruiru/Rwarera/519.
5.	Charles Kigorwe Marete	1. Part of Nyaki/Mujoga/Giaki/1/2 2. L/Abothuguchi/makandune/733 3. Plot No. 191 Kooje 4. Ruiru/Tutua/ 519
6.	Derick Kimathi Kiogore (son of Charles Kigorwe Marete (deceased son	1. LR. Nyaki/Muthalankari/2729 2. LR. 7918/19 Isiolo Municipality
Kelvin Mwenda Kiogore (son of Charles Kigorwe Marete (deceased son)	1. LR. Nyaki/Muthalankari/2729 2. LR. 7918/19 Isiolo Municipality 2 ND HOUSE	



No	Name of Beneficiary	Property Given as per the WILL
Priscilla Nkirote Marete	<ol style="list-style-type: none"> 1. Nyaki/Mulathankari/2730 2. Ntima/Igoki/3523 3. Ntima/Igoki/7508 4. Parcel No. 117 – Ex Lewa Measuring 5 acres 5. Nyaki/Kithoka/3467 6. Meru Municipality Block 11/55 7. Mikinduri P/No. 3124 8. Tigania/Antuamburi/2242 9. Tigania/Antuamburi/5181 10. Block 11/788 	
2. 2.	David Gikundi Marete	<ol style="list-style-type: none"> 1. Nyaki/Mulathankari/1218 2. Nyaki/Munithu/2860 3. Ntima/Igoki/7803 4. Nyaki/giaki/3994 5. Ex lewa/117 6. Block 2787 Nanyuki 7. Block 11/788 8. Parcel no. 4899 Akaiga
Betty Kaimuri	<ol style="list-style-type: none"> 1. Ntima/Igoki/7509 2. Flat no. 5B Nairobi 3. Uringu Plot No. 1180 4. Flat No. 5B on LR. 5/44 Nairobi 	
Norman Mwirigi Marete	<ol style="list-style-type: none"> 1. Nyaki Mulathankari/2732 2. Ntima/Igoki/3523 3. Ntima/Igoki/3223 4. Ex- Lewa Plot No. 117 5. Meru Municipality Block 11/55 	



	6. Block 11/788 7. Uringu 1476 8. Mikinduri Plot No.3602 9. Akaiga 3974	
5	James Murithi Marete	1. Nyaki/Mulathankari/2731 2. Ntima/Igoki/7508 3. Ex- Lewa 117 4. Meru Municipality Block 11/788 5. Akaiga 1527 6. Meru Municipality Block 11/55
Damaris Nkatha Kinoti w/o Stephen Kinoti Marete Son(deceased)	1. Nyaki/Mulathankari/1218 2. Nyaki/ Mulathankari/2859 3. Block 2787 Nanyuki 4. Mikinduri P/No. 5978 5. Akaiga 4814	
Melvin Maingi Kinoti s/ o Stephen Kinoti Marete Son(deceased)	1. Ntima/Igoki/7803 2. Ex- Lewa 117	
Kevin Maingi Kinoti s/ o Stephen Kinoti Marete Son(deceased)	1. Part of Nyaki/Giaki/3993	

35. The Will also includes Makena Kinyua, Fabiaan Kinyua, Kaimenyi Kinyua, Mutethia Kinyua, Eric Gitonga and Brian Kirimi who are grandchildren of the deceased but it did not come out clearly from which house they belong. It is apparent that the Will disinherits 1st Applicant and 3rd Applicant who are widow and daughter from the 1st house and Mary Mukiri, a daughter from the second house. A comparison of what was provided for to the first house compared to the provision made to the second house leaves no doubt in the mind of the court that the Will discriminated the first house. What is even more unsettling is that the 1st Applicant has been left exposed after her matrimonial home LR Ruiiri/Rwarera/519 was bequeathed to the 2nd and 4th Applicants.
36. Case law supports the proposition that deceased's Will must be honored as much as it is reasonably possible. There are however instances that call for intervention especially where dependents are



disinherited or discriminated against. In *Re The Estate of Sospeter Kimani Waithaka (Deceased)* [2010] eKLR, the court stated as follows;

“The will of the deceased must be honored as much as it is reasonably possible. Re-adjustments of the wishes of the dead by the living must be spared for only acentric and for only unlawfully harmful testators and weird wishes. But in the matters of normal preferences for certain beneficiaries or dependants, may be for their social goodness to the testator, the court should not freely intervene to alter them”.

37. The court having satisfied itself that deceased’s will disinherits and discriminates the Applicants, the next question that begs answers is what the effect of discriminatory provisions in a Will would be and whether such provisions can stand.
38. Article 27(3) of the *Constitution* guarantees the right to equality and freedom from discrimination. It provides that “women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.” Sub-article (4) read together with (5) prohibits discrimination on the basis of inter alia sex or marital status.
39. The constitutional right to equality and non-discrimination is inalienable. This Court does not contemplate a situation where the scales of justice would tip in favour of one of deceased’s houses as though they were diminished in human worth in matters of inheritance, or in any other matter. Indeed, the constitutional right to equality and freedom from discrimination is the mainstay of our personal dignity, which Courts should strive to uphold.
40. In so far as deceased’s Will discriminatory, it cannot stand. The Will goes against the grain of the *Constitution*, statute law and the international human rights instruments binding on Kenya under and by virtue of Article 2(5) and (6) of the *Constitution*. Its contents erode its legal validity.
41. Finally, I am mindful of the principle that section 40(1) of the Act does not take away the discretion of a court in determining an equitable and fair mode of distribution. This Court so held in *Scholastica Ndululu Suva v Agnes Nthenya Suva* [2019] eKLR where the learned Judges observed that: “.....although section 40 provides the general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”
42. From the foregoing analysis, this court makes the following orders:
 1. Applicants are lawful beneficiaries and dependants of the deceased
 2. Deceased’s Will is a nullity on account of its discriminatory provisions
 3. Deceased’s estate except one acre of Nyaki/Giaki/3993 bequeathed to a buyer one Kariuki Kware shall be administered and distributed as an intestate estate in accordance with section 40 of the *Act*
 4. The parties shall bear their own costs
 5. Mention on February 15, 2023 to confirm distribution

DELIVERED THIS 27TH DAY OF OCTOBER, 2022.

WAMAE. T. W. CHERERE

JUDGE

Appearances



Court Assistant - Kinoti

For Applicants /Objectors - Mr Kariuki for Mithega & Advocates

For Petitioner/Respondent - Ms. Gikundi for Charles Kariuki & Kiome Advocates

