REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1615 OF 2013

IN THE MATTER OF THE ESTATE OF HARUN KIRUNGE MWANGI (DECEASED)

AGNES WANJIKU KIRUNGE.....PETITIONER/RESPONDENT

VERSUS

LUCIA WAITHERA KIRUNGE.....OBJECTOR/APPLICANT

JUDGMENT

1. The deceased died on 13th July 1996 at Nyanduma Gathungu within Kiambu. Vide a citation dated 12th November 2012 and filed on 15th November 2012, Agnes Wanjiku Kirunge one of the deceased's widows served acitation on one Lucia Waithera Kirunge her co-wife seeking her to within 15 days cause an appearance to be entered in the Nairobi Registry to accept and or refuse letters of administration of the deceased's estate. According to the citation filed under Succession Cause No. 2777/2012, the deceased died intestate.

2. Despite service of the said citation, the citee did not enter appearance nor file objection. However, in a turn of events, a fresh file Succession Cause No. 1615/2013 the instant file was opened in respect of the same estate as a testate estate. Consequently, Agnes Wanjiku Kirunge again filed a citation dated 12th November 2012 against Lucia Waithera Kirunge seeking her to show cause why she could not petition for a grant of probate of written Will. The citee having failed to enter appearance nor file objection, the citor proceeded to petition for a grant of probate on 8th July 2013 claiming that the deceased had died testate leaving a written Will dated 14th April 1993 appointing the citor and citee as joint executrixes. Consequently, the estate was gazetted on 8th August 2014 and a grant of probate with written Will issued on 16th September 2014.

3. Before the grant could be confirmed, Lucia Waithira Kirunge co-wife to the petitioner Agnes Wanjiku moved to this court on 27th March 2015 vide a summons for revocation and or annulment of grant dated 26th March 2015 seeking orders as hereunder:

> **(1) That the grant of probate with written Will issued to Agnes Wanjiku Kirunge the respondent herein on 16th September 2014 be revoked.**
>
> **(2) That the objector/applicant herein be enjoined in this case as co-administrator of the estate of the deceased's estate.**
>
> **(3) That costs of this application be provided for.**

4. The application is based on grounds;

> **(a) That the grant was obtained fraudulently by making of a false statement and concealment from the court of material facts.**
>
> **(b) The applicant is a co-wife of the petitioner herein and thus ranks in priority with the petitioner in applying for the grant.**
>
> **(c) That the deceased never left any Will and any such purported Will is fake.**

5. The application is further supported by an affidavit sworn on 26th March 2015 by the applicant claiming that, prior to his death, the deceased was so sickly and senile such that he could not have executed a Will. That during his burial, nobody claimed that he had left a Will.

6. She claimed that the petitioner having filed an intestate succession under file No. 2777/2012 was fully aware that there was no Will. She further averred that the authenticity of the Will is in doubt hence the grant issued on the strength of that will should be revoked as it was fraudulently obtained.

7. In response, Agnes Wanjiku Kirunge filed a replying affidavit sworn on 6th July 2015 stating that the deceased left a valid Will and that he was of sound mind when he executed the same. She averred that, all family members were notified of the execution of the Will by Gathirwa Ndangiri S.J.B Advocate on 3rd March 1999. To prove that allegation, she attached a letter from the said firm inviting her to their office for the reading of the Will (see annexure "AWK1".

8. She contended that the filing of the case No. 2777/2012 as an intestate cause was a mistake which was corrected by the advocate on record who withdrew the same vide a letter dated 29th May 2013 and the instant testate cause filed.

9. To prove that the applicant Lucia was aware of the existence of the Will, she attached a letter dated 13th August 2008 written by Njuguna advocate on her behalf (Lucy) addressed to "whom it may concern" alleging that the applicant would be challenging before the High Court the Will left behind by the deceased (see annexure AWK-4). She further averred that the author of the Will was alive ready and willing to testify.

10. Before the hearing of the revocation application, the petitioner filed a notice of motion dated 4th May 2015 seeking to restrain the applicant/objector from distributing the estate and or disposing part of the estate pending the hearing of the pending objection. She further sought orders restraining the objector from intermeddling with the estate and stop any distribution contrary to the Will. In support of the application, the petitioner swore an affidavit on 4th May 2015 claiming that the objector had proceeded with the help of the provincial administration to distribute the estate contrary to the Will.

11. In reply to the application, Lucia the objector filed a replying affidavit sworn on 19th May 2015 denying intermeddling with the estate nor distributing the estate before confirmation of the grant. She averred that, even if the Will were to be proved, she had a right to be made a co-administrator.

12. On 16th September 2015, Lucia filed a further affidavit in reply to a replying affidavit sworn by Agnes on 6th July 2015 claiming that she had appointed her son through a Power of Attorney to represent her due to her sickness and old age.

13. Although the application dated 4th May 2015 was certified urgent on 5th May 2015 and directions made to take a hearing date in the registry, there is no indication from the record that the application was ever heard. Instead, on 29th June 2016, a hearing date for the abjection was fixed for 30th August 2016.

14. On 16th November 2016, the petitioner's first witness Gathirwa Solomon the advocate who drew the Will took the stand. He confirmed drawing the Will and executing the same on 14th April 1993. He stated that the testator put a mark by thumb printing on the document and that it was also witnessed by one Samuel. He confirmed that the will had two executrixes namely; Agnes Wanjiku (petitioner) and Lucia (objector).

15. He also stated that on 3rd March 1999, he wrote a letter to the executors to appear before him for the reading of the Will. According to his assessment, the testator was of sound mind at the time of drawing the Will. On being asked whether the Will was witnessed by two witnesses, he answered in the affirmative stating that he and Samuel were the two witnesses.

16. Before proceeding further, the objector died on 18th November 2016 and vide Chamber Summons dated 30th March 2017, her son Timothy Wanguri Kirunge was substituted in her place.

17. In his testimony, Timothy Wanguri Kirunge (PW2) relied on the averments contained in his supplementary affidavit sworn on 18th July 2017 and filed on 19th July 2016 in which he averred that the deceased ought to have provided for his children in the Will and that the purported Will was invalid and that the testator had given out L.R. No. Gatamaiyu/Nyanduma/2 which was not in his name.

18. Having substituted his mother, he fully adopted the averments contained in his mother's affidavit in support of the application for confirmation. He stated that the land known as Nyanduma belonged to their grandfather hence the deceased had no power to bequeath the same. He also challenged the Will on grounds that the deceased did not provide for his children nor did the Will specify the size of land each wife was to take. He further stated that his mother was never consulted before the Will was written. He wondered why his father had to thumb print the Will yet he was a teacher and later a retired Registrar.

19. On cross examination by Mr. Ogwe, the witness stated that L.R. Nyanduma/Gatamaiyu/2 was jointly registered in the deceased's name and 4 others and that his father (deceased) shared out his share in the said land.

20. On further cross examination, he stated that his mother's house was questioning why the deceased gave Plot marked C to the petitioner alone. He also stated that he had no medical records to show that the deceased was mentally unsound.

21. In re-examination, he stated that as children, they were not provided for. He admitted that the portion given to his mother was for the benefit of her children and that land marked A was for Agnes and her children. He admitted that the distribution of A and B equally between two houses was okay. That the share given to their mother generally was not fair.

22. PW3 Stephen Munyua a neighbor to the deceased adopted his affidavit sworn on 18th January 2016 in which he merely stated that the deceased was an educated man who should have signed the Will. He further stated that the deceased was sickly hence could not have made a will.

23. When it came to the petitioner to give evidence, Mr. Njuguna for the petitioner stated that the petitioner was very sick and unable to

testify. They relied on the evidence of the 1st witness an advocate who drew the Will.

Submissions

Objector's Submissions

24. Through the firm of Kiarie Njuguna, the objector filed his submissions on 5th October 2020. Mr. Njuguna literally adopted the averments contained in the affidavit in support of the application for revocation of the grant as well as the evidences of PW2 and PW3. Counsel opined that the petitioner having not testified, all her documents attached to the affidavit in reply were not admissible as they were not produced by a witness for cross examination to ascertain their authenticity.

25. Learned counsel submitted that the Will was not signed out of the deceased's free Will as he was sick by the time he was said to have signed. Counsel made reference to the decision in the case of **MWW (deceased) (2018) eKLR HCC Succession Cause No. 1266/2008** where the court held that the deceased who was suffering from dementia for the period immediately before writing the Will lacked testamentary capacity to make the Will.

26. According to Njuguna, the objectors had adduced uncontroverted evidence to show that the deceased was sick and was not capable of executing a Will. That having given uncontroverted evidence, the burden shifted to the petitioner to show that the deceased was not incapacitated as at the time he was signing the Will.

27. Submitting on the attestation, Mr. Njuguna asserted that the Will was only witnessed by one witness contrary to Section 11 (c) Law of Succession Act. Mr. Njuguna further submitted that the deceased having distributed his land before elders, he had no reason to draw a Will. Counsel further submitted that the deceased knew and approved of what he was doing and that under the circumstances, it is doubtful that the Will was freely executed. To buttress that submission, reliance was placed in the case of **In the matter of the estate of Lucy Wangui Muraguri (deceased) Succession Cause No. 331/2000 (2015) eKLR** where the court held that:

> **"The proposition however is understood, that if you have to deal with a valid Will in which a person who made it himself is to take a large benefit, you ought to be satisfied from evidence calculated to exclude all doubt that the testator not only signed it but that he knew and approved of its contents".**

28. As regards LR Gatamaiyu/Nyanduma/2, counsel submitted that it was held jointly by five registered owners hence the testator had no capacity to distribute it.

29. Concerning non-provision for children, counsel submitted that they were dependants who ought to have been considered. In support of this view, counsel referred to the case of **In the matter of the estate of Ngengi Muigai (2005) eKLR Succession Cause No. 523 of 1996.**

30. In conclusion, counsel submitted that the way land was distributed in the Will was unfair as the objector has more children than the petitioner.

Petitioner's Submissions

31. On the petitioner's part, the firm of Irungu Mwangi filed their submissions dated 4th September 2020. Learned counsel submitted that the proceedings were procedurally commenced by way of citation which the objector ignored thus prompting the petitioner to petition for a grant of representation alone. Counsel submitted that there was no proof of fraud committed or proved in obtaining the grant.

32. Regarding the validity of the Will, counsel opined that the deceased was of sound mind when executing the Will thus expressing his wishes. He contended that the deceased expressed his wishes freely by drawing a diagram on how he wished to have his land shared out. In support of this proposition, counsel made reference to the case of **In the estate of Philip Nthenge Mukonyo (deceased) (2018) eKLR** in which the court while citing the case of **Banks vs Goldfellow (1870) LR 5 QB 549** stated that, a testator shall understand the nature of the act and its effects and the extent of

the property he was distributing.

33. Concerning the issue that the deceased did disinherit the objector/applicant, counsel submitted that the testator did make provision to all known beneficiaries and that his wives should be honoured as expressed in the case of **In the estate of Philip Nthenge Mukonyo (deceased) (Supra)** where the court stated that the fact that the deceased did not provide for the objector in the Will to his expectation does not cast doubt to the testator's capacity to make a Will.

Determination

34. I have considered the objection/application herein seeking revocation of the grant as well as challenging the validity of the Will. I have also considered the affidavits and further affidavits in support, responses thereto, evidence of witnesses and rival submissions by both counsel. Issues that crystalize for determination are:

> **(1) Whether the Will executed on 14th April, 1993 is valid.**
>
> **(2) Whether the applicant has met the threshold for revocation of a grant.**

Whether the Will executed on 14th April 1993 is valid

35. At the center of this dispute is the alleged invalidity of the Will dated 14th

April 1993. According to the objector, the deceased was not in his sound mind when he is said to have made the Will as he was senile and sick. Further, that the Will was not witnessed by two witnesses; that the Will did not make provision for the children; that the deceased who was educated should have signed the Will and, that the Will did distribute property owned by other people.

36. What constitutes a valid Will? Section 5 of the Law of Succession underscores the character, mental capacity and soundness of a person making

a valid Will as follows:

> **Sub Section 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.**
>
> **Sub Section 2 – A female person, whether married or unmarried, has the same capacity to make a Will as does a male person.**
>
> **Sub-Section 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.**
>
> **Sub Section 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.**

37. Section 7 further goes on to provide that:

> **A Will or any part of a Will, the making of which has been caused by fraud or coercion or by such importunity as takes away the free agency of the testator, or has been induced by mistake is void.**

38. Section 11 of the Law of Succession goes further to provide what a valid Will provides as follows; that 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.**

39. According to the objector, the deceased was sick and senile hence not of sound mind and therefore incapable of executing a valid will. During his testimony, Mr. Gathirwa learned counsel who drew the Will told the court that when the deceased went to his office, in his assessment, he appeared quite okay and sound and that he executed the Will out of his own free will.

40. It is trite law that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of any fact which he asserts, must prove that those facts exist (see Section 108 of the Evidence Act). According to Section 5 (4) of the Law of Succession, it is incumbent upon the person alleging that the testator was not a person of sound mind to prove.

41. Unless the contrary is proved, it is presumed that a person making a will is an adult of sound mind short of which, a Will shall be deemed to be void abinitio.

42. **In the case of Bank vs Goldfellow (Supra)**the court observed that;

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

43. Similar position was held in the case of **In the estate of Gathitu Njuguna (deceased) (1998) eKLR** where Githinji J stated that:

"As regards the testator's mental and physical capacity to make the Will, the law presumes that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind, in this case the applicant (Section 5 (3) and 5 (4) of the Law of Succession).

44. Further, in the case of **Karanja and Another vs Karanja (2002) 2 KLR** Githinji J observed that:

"where the will is regular on the face of it with an attestation clause and signatures of attesting witnesses and the signature of the testator, there is a rebuttable presumption of due execution (Omnia Esse Vite atta)".

45. Having alleged senility and sickness as grounds for declaring the Will invalid, the applicant ought to have adduced medical evidence as proof that the deceased was senile and sick to the extent that such senility and or sickness impaired his own free will or judgment in making a sound decision before signing the Will. In the absence of any medical evidence which was admitted on cross examination by PW2 and PW3, the court has no other way of ascertaining that assertion.

46. The objector has not discharged his burden of proof that the deceased was not in a position of the requisite mental capacity to be able to understand what he was doing and its consequences. Mere sickness or senility without proof of interference with the testator's mental capacity to make sound judgment is not sufficient reason to invalidate a Will. Having failed to satisfactorily convince the court with medical evidence that the deceased's mental faculties were impaired, this court does not find that ground sufficiently proven.

47. Regarding the allegation that the deceased was an educated person who

should have signed the Will, the law is very clear. Under Section 11 (c), the testator is only required to sign or mark the Will. By thumb printing the Will, that was sufficient mark for purposes of executing a valid will. There is no legal mandatory requirement that a Will must be signed. The advocate who drew the Will stated that the deceased thumb printed the Will. No evidence was tendered to prove that the thumb print was not of the deceased. For those reasons, that ground fails.

48. Regarding the question that the Will was witnessed by one witness, the advocate(pw1) who drew the will stated that he was one of the witnesses together with one Samuel the deceased's brother. In the applicant's view, the advocate PW1 was not a witness.

49. According to Section 11 (c) a written Will must be evidenced by two witnesses. There is no requirement that it must be prepared by a lawyer and then two witnesses. In this case the lawyer and Samuel were present and indeed witnessed the deceased execute the Will. The lawyer and Samuel were sufficient for purposes of a Will being witnessed by two witnesses. I do not find any merit on that ground.

50. Touching on the allegation that the Will was fraudulently obtained, the applicants did not specify or prove the particulars of fraud (**See Karanja and another vs Karanja (Supra).**

51. As regards the allegation that the deceased did not provide for the children, PW2 stated that, the deceased shared out parcel A and B properly and equally to each wife for the benefit of their children. Why would the deceased again provide for children if their mothers are holding their shares in trust? Their interest was obviously catered for through their respective mothers.

52. From the proceedings and testimony of the objector and his witness, the bone of contention is the unfair distribution of the property marked as "C" which was reserved for the deceased but which upon his death was to devolve to the petitioner. The objector argued that the first house (Lucia's house) was unfairly treated and denied their fair equal share in parcel C.

53. The duty to exercise free Will in expressing his wishes on how his property was to be shared out upon his death lay with the deceased. This court has no mandate to vary, rewrite or adjust the Will to fit some people's interest. The deceased was fully aware of the existence of his children and wives. He chose to demarcate the property by diagram and gave out the land according to his wishes. The applicants cannot demand equality. The deceased knew why he gave varying shares. He cannot be questioned why. Even in situations where totally no provision is made to a dependant, a court can only intervene and make reasonable provision but not equal share.

54. Having found that the Will was properly and validly drawn and executed freely by the deceased without any coercion, he had the free will to dispose his property the way he wanted. The claim that the property should have been divided equally is not tenable given that the deceased did not die intestate. In arriving at this finding, I am properly guided by the Court of Appeal's finding in the case of **John Wagura Ikiki & 7 Others vs Lee Gachigia Muthoga (2019) eKLR** where it held that:

"Having found that the Will was valid, it therefore follows that the deceased had the freedom to dispose of all his earthly possessions as he deemed fit. It was within this very exercise of testamentary freedom that the deceased elected to leave out his sons, John Wagura and Joseph Ndungu Ikiki, and in the same breath, bequeathed the lion's Share of his estate to his 3rd wife for reasons that were personal to himself. This is indeed the objective of testamentary freedom. The argument that the estate of the deceased ought to have been subjected to Kikuyu Customary Law as stipulated under Section 3 (5) of the Act is untenable given that the deceased did not die intestate".

See also **Beatrice Nini vs George M. Kagwe (2012) eKLR in the estate of Margaret Wanjiku (deceased)** where the court held that wishes of the deceased must be honoured.

55. Guided by the above cited case law, a claim of inequality in the distribution of property via a will is not a factor to disregard a valid Will. A testator's wish(s) should not be thrown away through the window simply because somebody feels that he deserved better treatment from the testator than he got. For those reasons that ground also fails.

56. The other issue that arose was with regard to distribution of the L.R. Nyanduma/Gatamaiyu/2 which is jointly owned by some four other persons. During the hearing, PW2 admitted that the deceased shared his share in that property. What wrong was then committed by the deceased sharing out his proprietary interest in that property which is clear even on the ground? I do not see any wrong in the deceased sharing out his beneficial interest in that property and therefore nothing irregular about it.

57. In a nutshell, it is my finding that the Will executed on 14th April 1993 was properly drawn and executed hence valid.

Whether the applicant has met the threshold for revocation of a grant

58. The objector claimed that the petitioner did not consult her as the co-executrix in petitioning for grant of representation. The petitioner claimed that she served a citation but the objector ignored. For a court to revoke a grant, the applicant must comply with Section 76 which provides that a grant of representation whether confirmed or not may be revoked or annulled, either on application by the interested parties or on the court's own motion if proved that:

(a) Proceedings to obtain the grant were defective in substance.

(b) That the grant was obtained fraudulently by the making of a false statement or by concealment from court of something material to the case.

(c) That the grant was obtained by means of untrue allegation of facts essential in point of law to justify notwithstanding that the allegation was made in ignorance or inadvertently.

(d) …..

(e) …….

59. The main contention here is that the original objector now deceased was not consulted. According to the Will, both the petitioner and objector were appointed as joint executrixes. However, the petitioner claimed that despite making every effort to call upon the deceased objector to jointly petition for the grant the objector refused. It is this refusal that prompted the petitioner to serve a citation hence the sole petitioner.

60. It is trite that where there are two executors, they should jointly petition for a grant unless one renounces such appointment or is disqualified on account of not legally qualified to be an executor either by the court on its own motion or by application by another party. The petitioner did not object to the co-wife also co-executrix from jointly petitioning for the grant.

61. Unfortunately, the objector is deceased. Under Section 81 of Law of Succession, where there are more than one executor or administrator, and one or more dies, the duties to administer the estate shall vest on the surviving executor or administrator. In the circumstances of this case, the executrixes were two and one is now deceased. Ideally, that prayer is overtaken by events and pursuant to Section 81 of the Law of Succession, it is the surviving executrix in this case the petitioner who shall solely administer the estate.

62. I do not find any prejudice in the petitioner administering the estate as the only surviving executrix. Had the objector lived, I would have automatically made her a co- executrix for joint administration of the estate.

63. In a nutshell, I do not see any fraud or material non-disclosure committed by the petitioner who provided the Will and even listed the co-wife as a co-executrix but she refused. For the reasons stated, that ground does not apply and in the interest of justice, the current executrix shall continue with the administration of the estate.

64. The objector raised the issue that the petitioner/respondent did not call witnesses to controvert the evidence of the objector. It is trite that the petitioner relied on the evidence of Mr. Gathirwa who drew the Will. Although the petitioner did not testify due to sickness, the factual and legal issues in controversy were the validity of the Will which was sufficiently and adequately addressed by Mr. Gathirwa Advocate who gave evidence for the objector. I do not find any prejudice in not calling for more evidence. As to filing of Succession No. 2777/12 intestate at first, the same was adequately addressed as an oversight which was corrected by filing proper pleadings of testate estate.

65. Having settled salient issues as raised by the objector, I am left with one conclusion to make in that; the Will dated 14th April 1993 is valid and that the grant made herein was properly issued and that the petitioner should immediately file a formal application for confirmation of the grant in accordance with the Will. As to costs, this is a family issue, I will order that each part bears own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF JANUARY 2021

J.N. ONYIEGO

(JUDGE)