REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 2824 OF 2006

IN THE MATTER OF THE ESTATE OF AYUB KIBI NJOROGE (DECEASED)

MARY WANJIRU NJOROGE.....APPLICANT

VERSUS

GRACE WANGARE NJOROGE.....RESPONDENT

JUDGEMENT

1. The deceased in this matter died on the 7th of March 2005 in Nairobi at the age of 82. A copy of his death certificate produced as an exhibit in one of the many applications filed in court gave cause of death as acute confusion.

It is not clear how this caused his death or whether it was a condition he suffered.

2. During his life time the deceased was married to two wives, and had children with both of them. He was survived by the following persons:

1st Family

a) Josephine Mugure Njoroge (1st wife).

b) Mary Wanjiru (daughter).

c) Ezra Kibi (son).

2nd Family

a) Grace Wangare Njoroge (2nd wife)

b) Joseph Ndegwa (son)

c) Simon Gichemba (son)

d) Paul Kibi (son)

3. By a petition filed in court on the 29th of November 2006, one Kibi Kamau moved the court for Probate of a written will as an executor of the said will. In a supporting affidavit he listed 5 properties as forming part of the estate of the deceased namely:

a) Mustuni Plot No. 66.

b) Ndimo Farm Plot No. 421.

c) L.R Dagoretti/Kangemi/1157.

d) L.R No. Dagoretti/Kangemi/1153.

e) L.R No. Dagoretti/Kangemi/1156.

f) Livestock.

He also listed the survivors as enumerated above.

4. Pursuant to the petition a grant of Probate was issued on the 7th of February 2007. The same grant was confirmed on the 15th of June 2009, before Rawal J. The record of the day does not reflect much save that one Ms. Musaka appeared for the applicant.

5. By turn of events in an application dated 23rd February 2011 Mary Wanjiru Njoroge a daughter from the 1st house moved the court by way of summons for revocation of grant pursuant to Section 76 of the Law of Succession Act, Chapter 63 of the Laws of Kenya (hereinafter referred to as "The Act") and Rule 44 of Probate and Administration Rules (hereinafter referred to as "the rules") seeking to revoke and annul the grant on the following grounds:

a) The proceedings to obtain the grant of Probate were defective in substance as the Petitioner did not inform the 1st wife and her children of the existence of the will nor were they notified of the proceedings.

b) The deceased who was semi-illiterate and in frail health and did not understand the meaning of a will and he was therefore not in a position to make a testamentary disposition.

c) The deceased made the will under the influence from the 2nd wife Grace Wangare and her sons thereby causing him to make unreasonable provision for the 1st family.

d) That the deceased made a subsequent will on the 9th of October 2002 which the Petitioner did not disclose.

6. In her supporting affidavit Mary Wanjiru (Mary) reiterated that the 1st family was not informed by the executor of the existence of the will and he also excluded them from the proceedings.

She further stated that the deceased was semi-illiterate, and of ill-health at the time of his death.

That on the 9th of October, 2004 the 2nd wife and her sons took the deceased to the chief and made him sigN a will, in which will he did not name Kamau Kibi as an executor.

Further, the will dated 7th March 2002 is in English which the deceased did not understand, yet there is no indication of the person who prepared it also, he was unduly influenced.

Further two other properties owned by the deceased being properties; Dagoretti/Kangemi/1144 and 1145 which properties he inherited from his father were not disclosed.

7. Grace Wangare Njoroge the 2nd widow objected to the application through a replying affidavit dated 16th May 2011. It was her contention that the 1st family was informed of the will but were unhappy with the content. She informed the court that at the time of making the will her husband was of good health, and at no time did she influence him or "drag" him to the chief.

As for property 1145 the deceased had distributed the same.

8. The Applicant Mary Wanjiru died on the 15th of December 2014 and was substituted by Ezra Kibi her brother.

9. The court had directed the matter to proceed by way of viva voche evidence. Due to lapse of time and the fact that the matter passed through the hands of many judges for one reason or another, by consent of the parties it started de novo where the substituted applicant was the only witness for the 1st house. The 2nd widow testified and called 1 witness.

10. The applicant Ezra Kibi Njoroge adopted his statement and informed court that he would wish the estate be shared in half by both widows as other properties have likewise been shared. He named Msituni Farm and Kuresoi as properties already shared equally. He informed the court that he did not recognize the wills as their father was illiterate. It was his further evidence that one witness to the will was out to protect his nephew's interest on a portion the nephew had bought from the deceased.

11. He further stated that the deceased was not mentally fit, he was old and his behavior not normal.

According to him the Elburgon Farm was bought in 1969 and distributed in 1984 to both widows. Kuresoi was equally divided in 1983.

Further the plots in Kangemi are in the hands of both widows. His mother has built on 1123 where he has built a school therein. Grace has built on 1135.

12. In his written statement filed in court on the 28th of March 2019 the applicant reiterates the above and in addition states that being a polygamous man the deceased did not discriminate against any of his houses and two years before his demise had been diagnosed of being of unsound mind due to his age and therefore lacked capacity to write a will and since their father had already divided his properties. There was no need to write a will.

13. On her part the respondent gave oral evidence and had a brief statement which she also adopted. She informed the court that she lives in Kangemi.

In cross examination she stated that she had three children, two sired with the deceased. And that upon marrying the deceased in 1980 her son Joseph was 6 months and the deceased took care of him as his own.

She further informed the court that upon marriage she lived on Ndimo Farm and came to Nairobi due to her husband's sickness. Both she and her co-wife have houses in Elburgon and they share a compound. Although she did not build the deceased had demarcated Kuresoi and she rented her portion due to family differences.

There are 4 plots in Kangemi and each one got a share. No one missed out. That Mary got an acre in Kuresoi.

In the will Kuresoi went to the 1st wife and son.

Before his death the deceased had built 6 rental houses. She built others after his death. Mary had built 4. On her side she now has 16. Her children have put others. In total on their side of the plot they have 27. Her sons live in another plot.

It was her evidence also that the deceased could write in both Kiswahili and Kikuyu. She did not know who wrote the will.

She did not know who was given plot No. 1145 in the will. She was not aware of a 2nd will.

14. Asked by the court about Kuresoi and Elburgon, she confirmed that each widow was in possession of their houses (Ndimo Farm No. 421). Joseph farmed on 1 acre of 2½ in Kuresoi. Plot 1153 kangemi has a school.

15. James Ngamate was the 2nd witness for the respondent. He also had a brief statement and gave oral evidence. He is a nephew of the deceased and knew his family. He was the 3rd witness to the will. He saw the deceased sign same. He confirmed that his nephew bought a plot from the deceased.

According to him the Kikuyu customary law allows one to give his property as he wished.

He further stated that Mary did not get any inheritance as she was married, and that each wife got land. He was not aware that the deceased had built in Kangemi.

16. According to him the deceased could read. He prepared the will himself and had the same typed. The deceased was sick and wanted the will read upon his death.

He also stated that the deceased could read and write in Kikuyu but could not tell then why the will was not in Kikuyu.

17. In re-examination as if to retract his earlier evidence, he stated that the deceased had a written document when he summoned them, told them the content and he signed.

18. In his written statement filed in court on the 1st of February 2019 in paragraph 2 the witness stated that on 7th of March 2002 the deceased called 3 elders and him to witness the will. The deceased read it out to them aloud, it was typed and then he got them to sign after he signed. He further stated that the deceased was of good mental state.

19. At the close of evidence each counsel on record filed written submissions summarized as follows:

APPLICANT'S SUBMISSIONS

The deceased was illiterate and could not read. Two years before the alleged will was made, he was diagnosed to be of unsound mind due to old age. Ezra resides in his mother's portion at Ndimu Farm while Mary lived with deceased in Nairobi where she was allowed to build some rentals. The deceased on his part had built 27 houses. Since the demise of the deceased the 2nd widow has been collecting rent. The executor did not inform the first house of the existence of the will nor obtain their consents when he petitioned and also at the point of confirmation. There was undue influence on the deceased from the 2nd widow

The court was referred to; **In Re- Estate of Abdulkarim Chatur Popat(deceased) (2019) Eklr**

Re-Estate of Kipkosgei arap Moita (2020) eKLR

Re-Estate of Arthur Kiberia M'baichu(deceased) (2019) eKLR

RESPONDENT'S SUBMISSIONS

It is submitted that the applicant has attempted to introduce a new ground which should be disallowed, ground 4.

The first ground is unknown to law, nonetheless the matter was gazetted. The Executor called a meeting where he informed the two families about the will. Further no evidence was called to challenge the signature on the will and no evidence of the alleged illiteracy.

No evidence was brought to court either to support the allegation of undue influence from the respondent. As for the alleged second will the applicant failed to prove its existence.

The court was referred to**; In the matter of the Estate of Ngengi Muigai (deceased) Civil Appeal No. 13 of 2001,**

In the matter of George Makunda Ottaro (2014)eKLR

In the matter of the Estate of Philip Nthenge Mukonyo (2018) eKLR

20. Having considered the pleadings, evidence adduced and the submissions on behalf of the parties, the issues before court for determination are as follows:

a) Whether the proceedings before court were defective.

b) Whether or not the deceased had capacity to make the will? Was he illiterate? Was he mentally ill?

c) Is the will valid?

d) Was there a subsequent will?

e) Whether or not the deceased was under influence of the 2nd family.

f) Is the will discriminatory, does it leave out any member of the family?

g) Who pays costs?

21. Whether the proceedings before court were defective in substance. The record of the court does not show the attendance of any beneficiaries in court both at the time of issuing the grant nor at the confirmation. The record at confirmation only indicates the attendance of a counsel for the applicant (executor).

22. There is no statutory requirement that the executor/petitioner should give notice of the proceedings personally as the requirement that the proceedings be gazette is precisely to notify all including the family of the deceased of the pending matter. Since the matter was gazetted, the court finds no fault in this regard. Judicial notice is however taken that a very meagre percentage of Kenyans have a weekly glimpse of the Kenya gazette. It is a rear read for many of us. It is also not your normal newspaper found at every corner of the town. It is therefore good practice to share with the beneficiaries when proceedings are initiated to place them in the know whether they are happy with the will or not.

23. The other issue raised was of participation, by appearing in court and filing of consents. Rule 40(8) of the Rules provide:

"where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before court by which the grant was issued which may, on receipt of the consent in writing in form 37 of all dependents or other persons who may be beneficiary entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the person entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in form 74 to the applicant, the protestor and to such person as the court thinks fit."

24. As observed in the case of **Re-Estate of Abdikarim Chatur Popat (deceased) 2019 eKLR (Popart 2019 case)**, form 37 of the rules is to be filled by all dependents or those beneficiary entitled. The form itself makes reference to both grants of Probate and letters of administration and as observed by **Thande J** in the **Popat 2019 case**:

"Contrary to the contention by the 1st to 3rd respondents, the participation of dependents of a deceased person who died testate, in proceedings for confirmation of a grant of representation is a statutory requirement. The reason for this is to enable a party not provided for or adequately provided for, to file an affidavit of protest or an application for reasonable provision as a dependant. The law is that an affidavit of protest and an application for reasonable provision may only be made prior to confirmation of a grant.

….. Default has led to revocation of grants and our courts are replete with decisions revoking grants where children or dependants have been excluded in the process of confirmation."

25. From the record neither the 1st family nor the 2nd family participated in the proceedings and no consent was obtained and filed which was

procedurally wrong.

26. Was the deceased capable of writing the will, did he have mental capacity?

There is evidence in form of a death certificate which has not been challenged that at the time of death the deceased suffered acute confusion. However, the will in dispute was written on the 7th of March 2002 whereas the deceased died on the 7th of March 2005. There was a considerate time lapse between the writing of the will and time of death. No evidence was placed before the court by the applicant to support his assertion that at the time the alleged will was crafted the deceased was mentally ill.

27. Having made the above finding, notable is the admission by both sides that the deceased could only write in Kiswahili and Kikuyu. It would be safe then to presume that he was conversant only in the two languages and of concern would be that the will was written in English.

The respondent too was not able to explain. She does not know who drafted it.

James Ngamate DW2 awfully contradicted himself. He stated without a blink

> **"Will was made by deceased himself…… He could read. He prepared the will. It was typed."**
>
> **"I heard Mama saying he read will in Kikuyu. It was written in English. He could only read and write in Kikuyu.**
>
> **I cannot tell why will not in kikuyu"**

In his statement filed on 1st February 2019 he said

> **"2 That on 7th March 2002, Ayub Njoroge Kibi, now deceased, called three elders and I to witness his will. He read it aloud to us and it was typed…"**

28. The evidence of Grace and Ezra are in sync that the deceased was semi-illiterate and only spoke and wrote in kikuyu & kiswahili. I find the evidence of **Ngamate** that the deceased read the will aloud to them before they signed to be total lies as the will as signed was in English and there is evidence that the deceased did read or speak English.

I do not trust his evidence.

> **Rule 54(3) of the Rules** provide as follows;
>
> **"Before admitting to proof a written will which appears to have been signed by a blind or illiterate testate or by another person by direction of such a testator, or which appears to be written in a language with which the testator was not wholly familiar , or which for any reason gives rise to doubt as to such testator having had knowledge of the contents of the will at the time of: its execution, the court shall satisfy itself that the testator had such knowledge by requiring an affidavit stating that the contents of the will had been read over to, and explained to, and appeared to be understood by, the testator immediately before the execution of the will."(emphasis added)**

29. Against the above provision of the rules, the fact that the deceased did not understand English and it is in doubt that he understood the content of the will written in English and may have required explanation of the same at the time of its execution, there was need to place before court at least a certificate by a competent person who drafted the will that the content of the same were read, explained and understood by the deceased who had initially dictated or wrote the will in another language.

Based on this fact alone the court must declare the alleged will not valid.

30. Whether or not the deceased was under influence of his 2nd wife. This allegation was countered by the 2nd wife. It was the word of his son from the 1st house as against the 2nd wife.

31. Was the will discriminatory? Yes it was as the initial applicant Mary was completely left out of the will except where generally a property was given to the 1st widow and her children in total contrast as the 2nd house had specific properties bequeathed to each member including Joseph who was not a biological child of the deceased.

Notable also is the provision requiring the 1st house to relocate yet there is an admission by the 2nd widow that the deceased had distributed those named properties during his life time and widows were in possession.

32. Based on the reasons set herein above, the confirmed grant herein be and is hereby annulled and revoked and the alleged will dated 7th March 2002 hereby declared invalid.

33. The two widows and/or their nominees are directed to Petition for grant of letters of administration intestate within the next 30 days taking into account the age of the matter.

34. Costs to the Applicant.

DELIVERED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2021.

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ALI ARONI

JUDGE