



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCC CAUSE NO. 42 OF 2008

IN THE MATTER OF THE ESTATE OF OWEN NDUNGU NJOROGE (DECEASED)

MARY WANGARI NDUNGU.....OBJECTOR

VS

SALOME WANJIKU NDUNGU.....1ST PETITIONER

ANN. W. NDUNGU.....2ND PETITIONER

JUDGMENT

BACKGROUND

1. The petitioners herein petitioned for a grant of administration intestate on **15th February 2008** and stated beneficiaries of the late **Owen Ndungu Njoroge** as follows:

- a. **Salome Wanjiku Ndungu (Widow)**
- b. **Ann W. Ndungu – Daughter**
- c. **Benjamina Njoroge –Son (deceased)**
- d. **Peninah W. Ndungu – Daughter**
- e. **Martha Ndungu –Daughter**
- f. **Crispo K. Ndungu Son**

2. Temporary grant of letters of administration was issued on **29th April 2008**. Following issuance of temporary grant, the objector filed a summons for revocation of grant on **4th July 2008** on grounds that the grant was obtained fraudulently by the concealment of material facts and sought to have the petitioner restrained from administering the estate of the deceased.

OBJECTOR'S CASE

3. The objector averred that she is the second wife of the deceased but the petitioners failed to disclose to the Court about her and her two children who are also beneficiaries of the estate of the deceased. The objector filed the chief's letter showing the beneficiaries of the deceased as follows:-

- a. **Salome Wanjiku Ndungu (widow) 1st wife**
 - i. Ann W. Ndungu – Daughter
 - ii. Peninah W. Ndungu – Daughter

iii. Martha Ndungu –Daughter

iv. Crispo K. Ndungu Son

b. Mary Wangari Ndungu – Widow 2nd wife

i. Raymond Kinuthia Ndungu- son

ii. Simon Maina Ndungu - son

4. She averred that the deceased died testate living behind a will and the petitioner left out other properties owned by the deceased.

5. She attached a copy of the deceased's will and a chief's letter recognizing her and the 1st petitioner as widows of the deceased and also the beneficiaries of the deceased.

PETITIONER'S CASE

6. In opposing the application, the petitioners filed an affidavit and averred that the objector has no *locus standi* as she is neither a widow nor a beneficiary to the estate. She stated she is the legal wife to the deceased and attached a copy of the marriage certificate and that she is not aware of the presence of the alleged will; that the will is not authentic as the deceased was blind and the two children alleged to be beneficiaries of the deceased were not being maintained by the deceased prior to his death.

7. She further averred that the property alleged to have been omitted belonged to the father of the deceased and no succession has been filed to vest the same property to the deceased.

8. The objection proceeded through *viva voce* evidence before **Hon. Anyara Emukule Judge**. The objector called a total of 3 witnesses.

OBJECTOR'S CASE

9. DW1 **Mary Wangari Ndungu** gave sworn evidence and testified that she is a widow of the deceased, married under Kikuyu Customary Law, and the deceased paid dowry by way of money. She testified that the deceased left behind a will which she was given after the demise of the deceased.

10. She testified that she lives in plot **No. 4 Subukia Trading Centre** where she lived with the deceased and she knows **Salome Wanjiku** as the deceased wife.

11. On cross-examination, the objector stated that she does not know where the will was drawn, but confirms that the deceased could not see at the time of preparing the will. She confirms that the deceased was sick and was suffering from diabetes and had a stroke as a result of which he was being treated at Nakuru Nursing Home from time to time. She said she got married in the year 1990 and in 1994 they went to their home and she is not aware when the plot at Subukia was purchased but she went to live there in 1997. She said that previously they lived at the deceased father's plot in **Subukia Danga Farm Plot 6507**, while **Salome Wangui** occupies **plot 21**.

12. She stated that she does not know when the petitioner got married to the deceased. She sold motor vehicle KSF 908, Peugeot 404 Pick Up and kept the money while KAN 943 was sold by the petitioner's son **Njoroge**. She said she was informed of the will by the advocate **Mungai and Mbugua** in 2007. She said she is aware that 3.5 acres were sold by the deceased.

13. DW2 **Benson Kiragu Muriithi** testified that the deceased was his brother-in-law and that they were neighbors before the deceased migrated to Subukia. He testified that the deceased married his first wife **Salome** and after some time she ran away from her matrimonial home and the deceased married the objector herein. He said that he was present as dowry was paid for the 2nd wife.

14. DW1 said after the demise of his brother-in-law, the contents of the will were read out. He testified that he was not present when the will was drawn and only learned that he was an executor when the will was read out.

15. On cross-examination by **Kariri**, he confirmed the deceased had an eyesight problem and was suffering from a stroke. He said the will was handed to him by the advocate but he did not know his duties as an executor. He stated that the petitioner was not present at the meeting.

16. He said he visited the deceased while admitted at Nakuru Nursing Home but he does not remember when he asked him to sign the will. He admitted that he did not know the deceased's signature. He said the objector was married and dowry was paid.

17. DW3 **Patrick Jesse Kago** testified that he could recall the deceased married the petitioner first and at the time when he married the objector, they had separated with the petitioner. He said he became aware of the will when he was called by the advocate and the will was read to them in the presence of the objector and 3 daughters of Salome. He said he was not present when the will was written and/ or executed. He confirmed that the deceased had suffered from diabetes and later stroke.

18. On cross-examination by **Mr. Kereri**, he confirmed that that the deceased lost his eyesight in the 1960s and he could not remember when he suffered the stroke first but he could recall he became sick in the year 2005. He confirmed the objector was married under Kikuyu

Customary Law in the year 1994.

PETITIONER'S CASE

19. After the transfer of the trial **Judge Emukule**, the matter was heard by **Judge A.K. Ndungu**. Despite being given ample time, the petitioner's advocate did not call any witness and on 24th January 2019, the Court closed the petitioner's case having issued the last adjournment on 2nd October 2018.

20. On 24th January 2018, the Court directed that the parties do file written submissions. The petitioner filed submissions on 25th June 2019, while the objector despite being given sufficient time, failed to file written submissions.

PETITIONERS' SUBMISSIONS

21. The petitioner submitted that there are two issues to be determined by Court as set out hereunder:-

- a. Whether the grant of administration intestate was obtained fraudulently
- b. Whether the deceased died testate.

22. On the first issue, the petitioner submitted that the objector failed to prove that she was married under Kikuyu Customary Law as she did not exhibit formalization of any rites that were carried out under Kikuyu Customary Law like *ruracio*, *ngurario* as required as cited in the case of **Eva Naima Kaaka & Anor vs Tabitha Waithera Mararo (2018)** the court held: -

“...without the presence of the central feature of the *ngurario* ceremony, it cannot be said that a valid Kikuyu customary marriage came into existence between Waithera and the deceased.”

23. The petitioner submitted that failure to exhibit the performance of the various rites proved that she is neither a dependant nor a wife to the deceased by virtue of **Section 29 of the Law of Succession Act**.

24. Further that the objector at the hearing failed to adduce evidence as to how the grant was obtained fraudulently by concealment of material facts and cited the case of **Christopher Ndaru Kagina vs Esther Mbandi Kagina & Anor (2016) eKLR where the Court held that the fraud must be proved as a fact by evidence and more importantly the standard of proof is beyond a balance of probabilities....”**

25. The petitioner further submitted that the objector's aim is to reap the benefit of the deceased's estate when she did not contribute to the acquisition of the property; that there was no evidence of proof of marriage said to have been celebrated in 1990.

26. On the issue of whether the deceased died testate, the petitioner submitted that the deceased died intestate as he was not in a capacity to write a valid will, the deceased was of ill health suffering from diabetes, stroke and no eyesight thus he was not in his right state of mind to execute the will. Further that he could not make comprehensive decisions at the time of making the will and that the objector's witnesses confirmed the position of the ill health of the deceased and urged to dismiss the objector's case.

ANALYSIS AND DETERMINATION

27. I have considered evidence adduced and submissions filed and consider the following as issues for determination:-

- a. Whether the deceased died testate
- b. Whether the objector was a wife of the deceased
- c. Mode of distribution of the deceased's estate.

Whether the deceased died testate

28. **Section 5 of the Law of Succession Act** provides capacity:

“5(1). ... any person who is sound of mind and not a minor may dispose of his free property by will ...

(2) ...

(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.’

29. **Section 11 of the Law of Succession Act** provide as follows:-

“ **No written will shall be valid unless-**

(a) The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment 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.’

30. It is not disputed that the deceased suffered from diabetes and he later suffered stroke. It is not also disputed that the deceased was blind. No explanation was given to counter effect of the above in making a valid will. No explanation has been given as to whether he had mental capacity to prepare a will and was also able to know what was written in the will. Further DW2 said he did not witness the deceased execute the will neither did he sign as a witness nor was it witnessed by any other person. Such evidence was not availed.

31. In view of the above I am inclined to find that the deceased did not have capacity to make a will neither were the procedures for making a will followed. I therefore find that the deceased died intestate.

32. Further in **Section 7** states:-

‘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.’

33. There is no evidence that a will was voluntarily made by the deceased. The witnesses called who were named as executors of the will gave evidence and stated that they did not recall having been called by the deceased when the will was being drafted. And after the will was read out to them, they were never aware of their responsibilities as the executors of the will.

34. I find that the deceased failed to meet the threshold of a valid will, the testator lacked the capacity to draft the will in his critical condition. And thus, the will produced herein is not valid. The deceased thus died intestate.

Whether the objector was deceased’s wife

35. **Section 29 of the Law of Succession Act** provides dependants to mean:

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.”

36. The objector adduced evidence to the fact that she was married to the deceased in the year 1990, and they went to her home in the year 1994, and dowry was paid in form of money. She lived with the deceased together with her children in Plot No. 4 Subukia Trading Center. She stated she got married after the petitioner had deserted the deceased.

37. The objector testified that she was married to the deceased under the Kikuyu Customary Law but the petitioner challenges the marriage by arguing that the rites required under Kikuyu rituals were not conducted. DW2 testified that dowry was paid in respect to the objector. Beside denying the objector as being deceased’s wife, the petitioner did not avail evidence to controvert her evidence. No explanation was given as to why the objector occupies the deceased’s plot No.4 in Subukia if she is not his wife. She testified that she lived in the plot with the deceased. Further, the chief confirmed in his letter that the deceased had 2 wives and also confirmed that the first wife had 4 children while the second wife had 2 children.

Whether the application for revocation is merited?

38. **Section 76** provides for revocation and annulment of grant it stipulates as follows:-

76. *Revocation or annulment of grant*

“

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the 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 the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

39. The question then is, was the grant obtained fraudulently? I note that the applicant while filing summons for grant of letters of administration attached a letter from the chief that listed the beneficiaries as *Salome Wanjiku Ndungu (widow), Ann W. Ndungu, Benjamina Njoroge (deceased), Peninah W. Ndungu, Martha Ndungu, and Crispo K. Ndungu*. The above are the names of her children. The objector has attached a letter from the chief in Subukia that lists her two children together with the children of the petitioner.

40. The objector on the other hand attached a letter from the chief that lists 8 beneficiaries of the estate of the deceased. She indicates that the applicant obtained the letter without disclosing that she was also a wife to the deceased and thus entitled as a beneficiary to the estate.

41. From the record, I note that each party has a different letter from the chief Subukia. The petitioner's chief's letter is signed by **J. K. Kirui** on 27th July 2007 while that of the objector is signed by the acting chief **A. H. Bushiri** on 24th June 2008. The chief has also written a letter to the effect that the assistant chief when writing the beneficiaries of the deceased omitted the names of the objector and her children when the petitioner obtained the chief's letter.

42. From the forgoing, I find that the deceased had two wives with 4 children from the first wife and 2 children from the second wife. They are all dependants of the deceased. The first house is therefore made up of 5 units while the second house is made up of 3 units.

43. FINAL ORDERS

a. Grant of letters of administration issued on 29th April 2008 is hereby revoked.

b. Grant of letters of administration is hereby issued jointly to petitioners and objector.

c. The deceased's estate to be distributed in the ratio of 5 to 3. Ratio of 5 to the first house and 3 to second house.

d. Each party to bear own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 30TH DAY OF SEPTEMBER, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Miruka - Court Assistant

Ms. Mwaniki holding brief for Njeri Njagua for Petitioners

No appearance for Objectors