



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 462 OF 2007

In the Matter of the Estate of Arthur Kibera M'baichu (Deceased)

JULIUS MURUGU KIRERA.....PETITIONER

-Versus-

THOMAS MUTHURI.....1ST OBJECTOR

JOHN GITONGA.....2ND OBJECTOR

JUDGMENT

1. The deceased herein Arthur Kibera M'Baichu died on 30th January 2007. As per the letter of introduction by the Area Chief Kibaranyaki Location where he was domiciled, the deceased left behind; *Isabella Kangai M'Kirera (wife), Grace Kanyua M'Kirera, Charity Mwitw M' Kirera, Joyce Karee Mwitw, Thomas Muthuri M' Baichu, Esther Njiru Gichuru, John Gitonga Kirera, Julius Murugu Kirera.*

2. The petitioner herein petitioned for letters of administration with will annexed on 6th November 2007 listing the following assets **L.R. Abothuguchi/ Kithiruine/1009, L.R. No. Abothuguchi/ Githongo/353, Motor vehicle Reg. No. KXJ/388 Land Rover, Money in Barclays bank ltd & Meru Central Sacco, L.R.No. Ntulukuma/231.**

3. The petition was gazetted on 18th January 2008. The objectors lodged their objection proceedings on 18th February 2008 objecting knowledge and validity of the will. They also averred that the petitioner was filed secretly despite there being deliberations of the issues raised herein between the same parties by the area Chief. The petitioner and Charity Mwitw, also a beneficiary of the estate, filed an Application dated 7th March 2008 claiming that the objectors herein were intermeddling with the estate. The said application was heard and Emukule J. on 6th May 2008 made Orders that the status quo ought to be maintained. He also directed the parties to set the matter down for hearing.

4. Both parties filed their respective statements and the matter was set down for hearing on 13th December 2018.

Parties Testimonies

5. **Pw1 Martin Muugambi Mithiga** testified that he is an advocated of the High Court of Kenya admitted in the year 1988 and currently practicing in the name and style of Mithiga & Kariuki advocates. He averred that he previously knew the deceased having represented him in a case pitting his son i.e. HCCC No. 46 of 1997 Thomas Mithuri vrs Arthur Kibera M' Baichu. That he was previously consulted by the deceased and on 22/02/2003 the deceased came to his office and he made the will. That he used the test of a reasonable man to ascertain that the deceased was of sound mind. That he was present during the execution of the will and saw the deceased, M'IKiugu and Silas attest to the will. That he captured the I.D's of the witnesses to show they were adults. He averred that he was also familiar to Silas because they come from the same area.

6. On cross-examination he averred that the will does not show the relationship between the parties to the will. He testified that the deceased also wished to give the petitioner and his grandsons a share of the estate because they took care of him. In re-examination he averred that he never read out the will to the beneficiaries but confirmed that his representative Mr. Kariuki may have read out the will to them.

7. **Pw2, the Silas Mwitw** testified that he was a son in law of the deceased, married to his first born daughter, and that he was present when the deceased signed the will. He averred that the deceased first signed the will then M' Ikuigu signed and he then signed after. He averred that he had also known the deceased for about 50 years and was familiar to the dispute pitting the deceased and his son Thomas over Land Reference 353. He averred that at the time the deceased was making the will he was of sound mind and only had normal health challenges. He confirmed that the grandsons were granted land by the deceased and also averred that the daughters were not given land by the deceased since they were already married and as per Kimeru Customs only the daughter who was not married would be granted land. He also averred that the deceased did not understand English but the will was translated to him by the advocate in Kimeru language.

8. Parties also agreed to adopt the statements as filed without calling the makers.

Statements

9. The petitioner filed his statement on 8th December 2018 wherein he stated that the deceased transferred L.R. No. Nturukuma/231 to the 2nd Objector during his lifetime and that transferred Motor Vehicle KXJ 388 to the petitioner. He averred that the deceased had testified and gave a coherent testimony in *Succession Cause No. 159 of 2000 In the matter of the Estate of Justus BaichuKinoti (deceased) and Succession Cause No. 289 of 1996 In the matter of Estate of M' NjauNtimuhence* at the time he was making the will he was of sound mind and he voluntarily and freely distributed the estate.

10. The objectors averred in their witness statements that they are brothers to the petitioner. They denied that the deceased ever left behind a written will and that the purported will displaces them to properties which were far away. They state that the petitioner is of unstable mind hence not best place to administer the estate of the deceased.

Submissions

11. Both parties have filed written submissions basically restating the averments made by the parties and I have considered the same.

ANALYSIS AND DETERMINATION

12. The issues for determination herein is the validity of the will and whether or not the Grant should be revoked.

Validity of the Will

13. The provisions on the validity of a written will are found in section 11 of the law of section Act which provides;

11. 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.

14. On the face of the will alleged to be made by the deceased. it looks compliant with the legal requirements, for it has been attested by two witnesses and was allegedly signed by the deceased. The evidence of Pw1 also points out that the witnesses were present when the same was being made.

15. The will however is put to question in the following respects; (1) *capacity of the deceased to make the will;* (2) *Whether Pw2 was an Independent witness? Whether the will reasonably provide for all the beneficiaries? and Whether the deceased understood the terms of the will when he signed the same?*

16. The element of mental capacity of the testator is provided for in Section 5(3) of the Law of Succession Act; that the testator must have capacity to make a Will. The essentials of testamentary capacity were laid out in the case of **BANKS Vs. GOODFELLOW [1870] LR 5 QB 549** as was cited with approval in the case of **VAGHELLA Vs. VAGHELLA-**

“a testator shall understand the nature of the act and 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 the 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 been made.”

17. But, the burden of proof lies upon the person alleging lack of capacity. The objectors herein have not provided any or any medical evidence to ascertain lack of capacity of the deceased and/or mental unsoundness of the deceased. To the contrary the petitioner has attached evidence showing that the deceased had testified in two Succession causes almost at the same time he allegedly wrote the will. The estate of the deceased is also well defined and he administers the same to persons known to him and who for all intent and purposes are the rightful beneficiaries. I however find that the deceased mentioned Plot No. Nturukuma/221 which belongs to M'Ikiugu Mtuaruchiu in his will as opposed to Nturukuma/231 which the petitioner avers was the property bequeathed to the 2nd Objector. This is not a mere defect.

18. The competence of the witnesses was also put to question since one of the witnesses was a son-in-law of the deceased. It was not however shown that the witness was getting a benefit by attesting to the will. This person was knew the deceased for the last 50 years. I

therefore find that he was a competent witness within the meaning of Section 11 of the Law of Succession Act. The 2nd witness was said to have passed on at the time of the hearing.

19. It was stated that the advocate who prepared the will read it over to the deceased. The deceased did not understand English. Although the advocate stated that he explained the will in Kimeru, this is a case where a Certificate thereto would have been necessary. See **Rule 54(3) of the Probate and Administration Rules** which inter alia provides that where the testator is illiterate or where it appears the will to be written in a language which the testator is not familiar with, evidence is required before the will is admitted to probate. Accordingly, in such circumstances as the ones herein, the court should be satisfied that the testator understood the content of the will that was made in a language he does not understand. An affidavit showing that the contents of the will had been read over and explained to the testator and appeared to be understood by the testator immediately before the execution of the will is necessary. I find it would have been diligent on the part of the advocate drawing the said will to have also drawn-up a certificate of translation to indicate that the contents of the said will had been read out to the deceased in a language he understands and he had attested to the the will. This was not done. See also **In re Estate of Salome Wangari Ngungi (Deceased) [2017] eKLR**

20. Another important matter; the will disinherits the daughters of the deceased since it did not make any reasonable provision for them. The will may have been made on the basis of Kimeru Customs where only unmarried daughters are allowed to inherit properties left by their fathers. Wills must comply with the law and should not embody an illegality such as discrimination of women on the basis of gender, sex and status. Such discrimination of women on the basis of gender, sex or status is prohibited discrimination in article 27 of the Constitution. This action is actually discriminatory and breeds injustice. It's festering waters invalidates any will that inflicts an injustice on daughters on the basis of discrimination. I also note that the will gave the petitioner and grandsons of the deceased a higher stake against all other beneficiaries.

21. I therefore find that the will does not satisfy the threshold of Section 11 of the Law of Succession Act and I declare it to be invalid.

Distribution of the Estate

22. Having found that the Will as drafted was in valid I shall move to distribute the estate on the premise of intestacy. First, I make a grant of letters of administration to **Isabella Kangai M'Kirera (widow), Thomas Muthuri M' Baichu and John Gitonga Kirera.**

23. The deceased herein was polygamous and he has left behind a spouse and children. The estate shall therefore be distributed in terms of section 40 of the law of Succession Act that provides;

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.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

24. I have also taken into consideration the evidence of the parties that the grandsons of the deceased took care of him during his lifetime. This evidence was however based on the will that this Court has declared as invalid. The grand sons ought to have proved that they are dependants under section 29 of the Law of Succession Act. They did not so prove and I find and hold that they are not dependants of the deceased.

25. In the upshot, I confirm the grant herein. Distribution of the estate shall be to the immediate beneficiaries of the estate as hereunder;

L.R. ABOTHUGUCHI/ KITHURINE/1009 (2 Acres)

To be distributed equally amongst; Isabella Kangai M'Kirera (wife), Grace Kanyua M'Kirera, Estate of Charity Mwitw M' Kirera, Joyce Kareia Mwitw, Thomas Muthuri M' Baichu, Esther Njiru Gichuru, John Gitonga Kirera, Julius Murugu Kirera.

L.R. NO.ABOTHUGUCHI/GITHINGO/533 (9Acres)

To be distributed equally amongst; Isabella Kangai M'Kirera (wife), Grace Kanyua M'Kirera, Estate of Charity Mwitw M' Kirera, Joyce Kareia Mwitw, Thomas Muthuri M' Baichu, Esther Njiru Gichuru, John Gitonga Kirera, Julius Murugu Kirera.

M/v Registration No. KXJ 388

To Julius Mburugu

Money in Barclays Bank Ltd & Meru Central Sacco

To Isabella Arthur

Dated, signed and delivered in open court at Meru this 26th February, 2019

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F.M GIKONYO

JUDGE

In presence of

M/S Mbijiwe for petitioner

Muchiri for Atheru for 1st objector

Munene for Mokuu for 2nd objector

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F.M GIKONYO

JUDGE