



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 808 OF 2016**

**IN THE MATTER OF THE ESTATE OF KAMAU GITAU - DECEASED**

**LEAH WAMBUI KAMAU.....OBJECTOR/APPLICANT**

**VS.**

**NDUNGU GITAU.....PETITIONER/1<sup>ST</sup> RESPONDENT**

**AND**

**MARGARET MAGIRI MURIU.....BENEFICIARY/2<sup>ND</sup> RESPONDENT**

**SAMUEL GITAU MAGIRI.....BENEFICIARY/3<sup>RD</sup> RESPONDENT**

**ANTHONY WAINAINA KAMAU.....BENEFICIARY/4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Deceased herein KAMAU GITAU (DECEASED) died on 29<sup>th</sup> April 2015 leaving a Will dated 10.4.2015 signed and thumb printed in the presence of SAMUEL M. MWANIKI Advocate and witnessed by two witnesses.
2. The objector who is the widow of the deceased has filed this Summons dated 21.6.2018 seeking the following orders;
  - a) THAT the Objector be allowed to collect rent on lands known as Plots C315 and C316 Kayole Investments.
  - b) THAT the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents do cease to collect rent forthwith and render an account on monies thus far collected.
  - c) THAT the costs of the Application be provided for.
3. The Parties filed written submissions which I have duly considered.
4. I find that the objector who is the widow of the deceased has challenged the validity of the Will.
5. There is a rebuttable presumption under **Section 5 (3)** of the **Law of Succession Act (Cap. 160, Laws of Kenya)**, that a person making a will is of sound mind and that the will has been duly executed. The essentials of testamentary capacity were laid out in the case of **BANKS Vs. GOODFELLOW [1870] LR 5 QB 549** as 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.”*
6. The Deceased appointed the 1<sup>st</sup> Respondent NDUNGU GITAU as Executor of the Will dated 10.4.2015.
7. The said executor, NDUNGU GITAU petitioned for grant of Probate but the grant of Probate has not been issued as the widow has challenged the Will.

8. The burden of proof in the first instance lies upon the person alleging lack of capacity. Once it is established to the satisfaction of the court that in fact the testator was not of sound mind then the onus is shifted to the person propounding the will to prove the existence of mental capacity. This was the holding of the court in the case of **IN RE ESTATE OF GATUTHU NJUGUNA (DECEASED) [1998] eKLR** where it quoted an excerpt from **Halsbury's Laws of England, 4th Edition vol 17 at page 903-904-**

*“where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity.”*

9. In her submissions the Applicant has stated that the Will is not signed or thumb printed on the 1<sup>st</sup> page and that it left her with no means of subsistence.

10. The Deceased bequeathed all free assets and properties including money in the Bank and personal effects to the Objector/Applicant.

11. The objector stated in her Affidavit in Support of the Application dated 21.6.2018 that the Deceased died intestate.

12. I find that the executor of the Estate is the 1<sup>st</sup> Respondent. Since he has already applied for grant of Probate, I direct that the grant of probate be issued to the 1<sup>st</sup> Respondent.

13. Thereafter, the objector is at liberty to raise her objection if she wishes to challenge the Will under **Section 26 of the Law Succession Act** if she feels she is not adequately provided for or if she is alleging that the will is not valid.

*“26. Provisions for dependants not adequately provided for by will or on intestacy*

*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.”*

14. In the meantime, I direct that the rental collections from Plots No. C315 and C316 Kayole Investments be deposited in Court pending the determination on the validity of the Will dated 10.4.2015.

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 26<sup>TH</sup> DAY OF APRIL, 2019**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI**