



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 87 OF 2013**

**IN THE MATTER OF THE ESTATE OF M'TUERANDU M'ITUNGA (DECEASED)**

**PATRICK KIMATHI MUTWIRI.....PETITIONER**

**VERSUS**

**SARAH NCURUBI M'TUERANDU.....1<sup>ST</sup> OBJECTOR**

**JOSEPH MURIUNGI..... 2<sup>ND</sup> OBJECTOR**

**GODFREY MATI.....3<sup>RD</sup> OBJECTOR**

**J U D G M E N T**

1. **M'TUERANDU M'ITUNGA ('the deceased')** died on 20<sup>th</sup> April, 2012. He was survived by a widow, two sons and four daughters. The petitioner petitioned for Probate with annexed Will and a grant was granted to him on 4<sup>th</sup> September 2014. The widow and the sons of the deceased (hereinafter "the objectors") lodged a Summons dated 23<sup>rd</sup> May, 2017 under **Section 7 and 73 of the Law of Succession Act Cap 160, Laws of Kenya ("the Act")** whereby they challenged the Will made on 12<sup>th</sup> August, 2011 as being void.

2. The grounds upon which the application was premised were; that the alleged will was made out of fraud, coercion and importunity; that the deceased was not in a stable mind as he was 90 years and under duress of the daughters in the making of the will and that the will did not provide for the widow.

3. The application was opposed vide the replying affidavit of Patrick Kimathi Mutwiri sworn on 28<sup>th</sup> August 2017. He stated that he is the executor and trustee of the deceased's will and has no personal interest over any property of the deceased. That the allegations that the will was made by fraud, coercion and importunity was strange to him as he was not present when the will was being made.

4. The court directed that the matter be determined through viva voce evidence. A total of 8 witnesses (four on each side) filed their affidavits on which they were cross-examined.

5. **OW1 Sarah Ncurubi M'Tuerandu**, the widow, testified that she used to live with the deceased but he later went to live with his daughter and his mind became confused. He even chased her away which caused her to stay with her son Joseph Muriungi. That with age, the deceased became uncontrollable and a bother to her. That she was not aware of any will. She was not aware of how the deceased died or if there was any dispute between him and any of his children.

6. **OW2 Dorothy Kinanu**, a daughter of the deceased, told the court that sometimes in 2009, her sister Alice Mbaya (**PW2**) Alice's husband told her that they would write a will for the benefit of the daughters and make the deceased to thumb print it. The deceased was quite old and senile and was not capable of making up his mind. She declined their plan and informed her two brothers who lodged a case against the deceased in **Nkubu Civil Suit No. 92 of 2010** to prohibit him from selling the land. Alice came for the deceased and took him to her home and only returned him on the orders of the area chief. That later, Alice took the deceased away whereby he died under unclear circumstances.

7. **OW3 Godfrey Mati**, a son of the deceased, told the court that the deceased was old, confused, not coherent and it was a problem for him to remember anything. That in 2010, he sued the deceased in **Nkubu Civil Suit No. 92 of 2010** as his sisters were forcing the deceased to sell his land. That he was now 76 years old. That the deceased had given him 4 acres where he had lived with his family for 40 years. That the deceased had not indicated that that portion will be shared to others.

8. **OW4 Joseph Muriungi**, a son of the deceased, testified that the deceased was 96 years old, senile, confused and sick. That at the time of making the will, he was incapable of knowing what he was doing. That he had previously been made to thump print 3 documents whereby he sold his properties without knowing. That the deceased had allocated him 3 acres of land on the ground where he had lived with his family

for 50 years. He and his brother had sued the deceased at Nkubu court to prevent him from selling the properties.

9. At the close of the objectors' case, the petitioner gave a sworn testimony and called three witnesses. **PW1 Patrick Kimathi Mutwiri** testified that he was a nephew to the deceased. That he was not there when the will was being made. In cross-examination, he stated that he was called to go to the lawyer's office by **Isaac Mutwiri**. When he got there, he met the deceased, Mugaa, Isaac Mutwiri and the deceased's sister Alice Elijah Mutwiri. That all of them signed the will.

10. **PW2 Alice Gacheri Mbaya**, a daughter of the deceased, testified and denied all the allegations made against her by her mother **OW1**. She told the court that the deceased relocated to her place since her mother and brothers were starving him. That he used to go back to his home and check on his tea bushes but got lost in one such occasion. Three days later he was found by the 3<sup>rd</sup> objector who claimed to have found him unconscious. He was taken to hospital where it was established that he had a blunt object trauma at the back of his head. After about three weeks in hospital, he passed on. An inquest file was opened but the same was never concluded.

11. PW2 stated that she did not know when the will was written. She could therefore not tell if there was any serious land dispute in their family before the deceased wrote the will. It was at the burial that, Gichunge Advocate told them about the will. They were summoned to go to the chief's office for the reading of the will but her brothers failed to turn up. She concluded that the allegations that the deceased was coerced to write the will were baseless.

12. **PW3 Janet Kanyamu Mbobua**, a daughter of the deceased, stated that she was not there when the deceased was making his will but only came to know about it at the time of the burial.

13. **PW4 Gerrison Mugaa Gitanta** stated in his affidavit evidence that he went to the advocates office where the deceased, Kimathi and Isaac were present. The deceased made his will which was read to them and he and Isaac Mutwiri witnessed him affixing his signature. The deceased was of sound mind as opposed to what the objectors were contending.

14. In cross-examination, he stated that he did not know who drafted the will but he heard that it was an advocate. That after the will had been drawn, it was given to him which he signed and left. According to him, those present were him, Kimathi Isaac and the deceased.

15. The parties filed their submissions, which I have considered. It was submitted for the objectors that the will was prepared in suspicious circumstances as the deceased was too old and sickly and could not understand what he was executing. The cases of **In re Estate of Lucy Wangui Muraguri [2015] eKLR** and **In re Estate of Salome Wangari Nguni [2017] Eklr** were relied on. Mrs. Kaume for the objectors urged that the will be voided.

16. For the Petitioner, it was submitted that there was no evidence to show that the deceased was of no sound mind. That the will complied with Section 11 of the Act. The cases of ***in re Estate of M.K.K (deceased) [2016] Ekr*** and ***In re Estate of Josphat Gatia Muchiri (deceased) [2018] eKLR*** were relied in support of those submissions.

17. Having considered the testimony of witnesses and the submissions on record, the issue for determination is; ***whether the Will dated 12<sup>th</sup> August, 2011 is valid, if not, how should the estate be distributed.***

18. The basis of the challenge to the will dated 12<sup>th</sup> August, 2011 is that; the will did not provide for the widow; that it was made through coercion or in suspicious circumstances as the deceased did not know what he was executing and that the deceased did not tell either the widow or any of his sons that he had executed a will.

19. The capacity and freedom to will one's property is provided for under **section 5 of the Act** which provides:-

***“(1) Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.***

***(2) ...***

***(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purposes 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”.***

20. From the foregoing, it is clear that a person has the right to will his property as he so wishes provided he is not incapacitated in any way. That answers the objector's complaint that the widow was not provided for. Her recourse is to seek a reasonable provision for her under **section 29 of the Act and not to void the will.**

21. The other observation from the said Section 5 of the Act is that, every testator is deemed by law to be of sound mind at the time of willing away his property. That it is upon the person alleging otherwise to prove the contrary. In the present case, there is a will dated 12<sup>th</sup> August, 2011. It was upon the objector's to prove that the deceased was either of unsound mind or that he was incapacitated either mentally or physically as to have known what he was doing.

22. The objector's case was that the deceased was old, aged over 90 years, frail and sickly. That in his old age, he was unable to know what he was doing. **OW2** who said she lived with him after she returned home in 2010 testified that, as at that time, the deceased could not wear his clothes well and was talking to himself. If he went out of the home, he would return with one shoe' if given food, he could place the plate down and forget that he was eating until reminded. He would often release on himself. This testimony was not challenged. Indeed, **PW2** admitted that there was a time that the deceased disappeared for 3 days and no one knew where he was. He was found after 3 days.

23. There was also testimony that the 2<sup>nd</sup> and 3<sup>rd</sup> objector sued the deceased in **Nkubu Civil Suit No. 92 of 2010** with a view to retrain him from further disposing off his properties. The allegations were that the daughters of the deceased led by Alice Mbaya and her husband Elijah Mbaya, had made the deceased thump print documents that were used to dispose off properties of the deceased. When questioned, the deceased retorted that he had not sold any properties but had been forced to thump print some documents. This piece of evidence was also never denied or even seriously challenged.

24. It would seem that there had been serious disagreements within the family before the deceased died. It all revolved around his properties. It is clear and beyond peradventure that the deceased might have met his death in the hands of his own children or people acting at their behest. How it would have been proper if an inquest would have been held so as to establish those behind the demise of the deceased. For now, they sit pretty knowing that they will never be known and they will comfortably inherit him without a whimper!

25. There was no medical report that was produced as to the state of the mental health of the deceased at the time he executed the will. However, the burden of proof is that of a balance of probability. From the evidence on record, I am satisfied that it is unlikely that the deceased knew what he was doing at the time he executed the will

26. Even if I am wrong in the fore going, the question that arises is whether the will meets the requirements of the law. **Section 11 of the Act** provides:-

***“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.”***

27. The above requirements ought to be met before a will can be accepted to be valid. The will as it appears was thump printed by the deceased and witnessed by two witnesses. Only one statement in the entire of these proceedings that purport to support the validity of the will. This is paragraph 4 of the Affidavit evidence of **Gerrison Mugaa Gitanta (PW4)** sworn on 8<sup>th</sup> June, 2018 wherein he swore:-

***“4. THAT on 12<sup>th</sup> August, 2011 we proceeded to the firm of GICHUNGE MUTHURI & COMPANY ADVOCATES in Meru where the deceased made the will. I and his nephew ISAAC MUTWIRI M'IKIARA witnessed him affix his signature in the will”.***

28. When he testified 6 months later, on 4<sup>th</sup> December, 2018, he told the court that when he arrived at the offices of the advocates, he found the deceased with Kimathi Isaac. That after the will was completed being drawn, it was read to them, he signed and left for his home. He could not clarify that he saw the deceased sign the will. Neither did he state that he saw the other witness sign the will.

29. While **PW4** was categorical that in the offices of Gichunge Advocate they were 4 of them, himself, the deceased, one Kimathi Isaac and the advocate, **PW1** stated otherwise. While **PW1** had stated in his replying affidavit paragraph 4 that he was “*never present when the will was made*”, he stated in cross-examination that they were 5 in number in that office when the will was made. According to him, those present were him (**PW1**), the deceased, Isaac Mutwiri, Alice Elijah Gaceri (**PW2**) and the advocate.

30. From the testimony of **PW1**, **PW4** was not present. Looking at the testimony of **PW4**, it is not clear who **Isaac Kimathi** was. The Will is shown to have been witnessed by one **Isaac Mutwiri M'Ikiara** and not **Kimathi Isaac**. The only Kimathi known in these proceedings is **Patrick Kimathi Mutwiri**, the petitioner. The question that then arise is, who then is this Kimathi Isaac who allegedly witnessed the will.

31. Due to the aforesaid contradictions and inconsistencies, it is difficult to find that the will was valid. Firstly, there was no evidence to show that the thump print thereon was made by the deceased. **PW4** did not state that he saw the deceased thump print the will. He also did not state that he saw **Isaac Mutwiri M'Ikiara** sign the will. The person they were with is Kimathi Isaac on the material day whose identity was not clarified.

32. As if that was not enough, there was no explanation given why **Isaac Mutwiri M'Ikiara** and the Advocate who drew the will were not called to testify. The only logical inference is that if they were called, they would have given evidence that would have been adverse to the petitioner. **See Section 112 of the Evidence Act, Cap 80.**

33. For the foregoing reasons, I find that the will dated 12<sup>th</sup> August, 2011 does not satisfy the provisions of **section 11 of the Act**. The same

is invalid and the deceased died intestate.

34. Having found that the deceased died intestate, how should the estate be distributed. There was testimony of the **OW3 and OW4**. They told the court that they were in their late 70s. The court saw them. They appeared old and frail. Age had taken a toll on them. They testified that the deceased had distributed to them 4 acres and 3 acres, respectively. That they had lived with their families on those portions for over 40 and 50 years, respectively. That they had developed those portions extensively and that there was no tacit intention on the part of the deceased that he would later require them to shed parts thereof to their siblings. They admitted that the deceased had not given them title yet by the time of his demise.

35. The foregoing testimony was neither denied nor challenged. This court is aware of the provisions of **section 31 of the Act** regarding gifts in contemplation of death. The scenario here is not about a gift in contemplation of death. The deceased had exercised his wish which he and his entire family had lived with for 50 years. That two of his sons had been in exclusive use and occupation for 40 and 50 years respectively. Can it be said that he had a contrary intention than to absolutely bequest the two the said 7 acres? I doubt and there was no any evidence to the contrary.

36. To my mind, the law exists to regulate human conduct with a view to ensure peaceful co-existence. The law is not meant to violently disrupt human and societal set up that has existed and been knowingly perpetuated by humans for a lifetime. To my mind, 40 and 50 years is too long a period to wait, then reverse the human set up. As at that time, the human settlement would have taken root and any disruption thereof may be a recipe for social chaos.

37. In my view, when a father or mother divides his/her land amongst his children and stays for a very long time, such that a generation passes while the said children continue to have exclusive use and occupation thereof with defined boundaries and continue developing the same, it will be unjust to disrupt such set up after the demise of the patriarch or matriarch. There need be certainty in social set up. The requirement for distribution of the deceased's property under the law after the deceased's demise did not contemplate such a scenario in my view. This is why **Section 40 of the Act** provide that at the time of distribution the shares given during the lifetime of the deceased be taken into consideration.

38. In this regard, I am satisfied that the deceased had given his two sons, **OW3 and OW4**, 4 and 3 acres, respectively whereon they have lived and which they have developed for 40 and 50 years, respectively. The property that is free for distribution is the balance that was being utilized by the deceased and the widow.

39. Accordingly, I allow the application dated 23<sup>rd</sup> May, 2017 and make the following orders: -

- a) the will dated 12<sup>th</sup> August, 2011 is hereby declared void.
- b) the grant issued to Patrick Kimathi Mutwiri on 4<sup>th</sup> September, 2014 be and is hereby revoked.
- c) a fresh grant hereby issues to Godfrey Mati and Joseph Muriungi jointly.
- d) the estate of the deceased be distributed as follows:-

i) **Abothuguchi/Kithirune/67**

**Joseph Muriungi - Whole**

ii) **Abothuguchi/Kithurine/122**

**Godfrey Mati - 4 acres**

**Balance**

i) **Sarah Ncurubi M'Tuerandu**

ii) **Alice Gacheri**

iii) **Nancy Mwarania**

iv) **Dorothy Kananu**

v) **Janet Kanyamu Equally**

40. This being a family dispute, I will make no order as to costs.

**DATED** and **DELIVERED** at Meru this 25<sup>th</sup> day of April, 2019.

**A. MABEYA**

JUDGE