



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 88 OF 2009

IN THE MATTER OF THE ESTATE OF NGONDU MUGO ALIAS NGONDU MUGO 'A'

NAOMI NJERI GACHUKI.....1ST APPLICANT

SALOME NYAMBURA KIMANI.....2ND APPLICANT

VERSUS

JAMES KIHUMBA NJENGA.....1ST RESPONDENT

WILLIAM P. NGUGI MWANGI.....2ND RESPONDENT

JOSEPH KIMWAKI NGANGA.....3RD RESPONDENT

ZEPHANIA NGUGI.....TH RESPONDENT

JUDGMENT

1. James Kihumba Njenga & William P. Ngugi Mwangi petitioned for a grant of Probate of the last Will of Ngondu Mugo Alias Ngondu Mugo "A" on the 2nd April 2009. The deceased died on the 19th June 2008 at Gathangari. The deceased died leaving a valid will dated the 28th April 2008. The only asset listed in the petition is Githunguri/Gathangari/335. The petition indicates that the deceased was survived by the following;

- a. Njeri Mukonja- widow of the late Mukonja Mugo
- b. Joseph Kimwaki- son of the late Gakenia Mugo
- c. James Njenga- son of the late Margaret Wambui Mugo
- d. Joseph Ndungu- son of the late Margaret Wambui Mugo
- e. Hannah Karungari- daughter of the late Margaret Wambui Mugo
- f. Zephania Ngugi-son of the late Eunice Gathoni Mugo
- g. William Ngugi-son of the late sister Eunice Gathoni Mugo

2. After gazattement a Grant of Probate with Written Will was issued to James Kihumba Njenga and William P. Ngugi Mwangi on the 16th November 2009. On the 23rd July 2010 the 2 administrators filed a Summons for Confirmation of Grant. A Certificate of Confirmation of Grant was issued on the 22nd February 2011, each beneficiary got a share of 1.6 acres of Githunguri/Gathangari/335. An application to rectify the grant was filed on the 14th May 2014, it was to include the alias names of Joseph Ndungu (alias Ephantus Njoroge Kihumba) and Hannah Karungari (alias Elizabeth Njeri Gacharu).

3. On the 18th September 2014 Naom Njeri Gachuki (hereinafter referred to as Naom) filed an application dated 18th September 2014, a Summons to Revoke or Annul the Grant under Section 76 of the Law of Succession Act Cap 160 (the Act) seeking the following orders

that ;

- i. The proceeding to obtain the grant were defective in substance
- ii. The grant was obtained fraudulently by the making of false statement and representation and concealment from the court of facts material to the case.
- iii. The grant was obtained by means of untrue allegations of facts essential in point of law of justify the grant
- iv. The Title Deeds of Land Parcel Number Githunguri/ Gathangari/3373-3739 be cancelled and the same be reverted back to the original parcel of L.R. Ref. Githunguri/ Gathangari/335.
- v. Land Reference No. Githunguri/ Gathangari/335 be distributed amongst the applicants equally.
- vi. That costs of the application be provided for.

4. In her supporting affidavit Naom depones that she is a daughter in law of Ngondu Mugo the deceased. Salome Nyambura Kimani is her step sister in law and was married to Duncan Mwangi Mugo a step brother to the deceased around 1984. She married Mukonga Mugo a brother to the deceased around 1978. Ngondu Mugo the deceased became a registered owner of L.R. Githunguri/ Gathangari/335 during demarcation. Their father in law Mugo Ngondu caused the land to be registered in the deceased's name to hold in trust of himself and that of Mukonja Mugo and Duncan Mwangi Mugo. They have been living in the land uninterrupted to date. She took care of Ngondu Mugo at his home and hospitals till his demise. That Ngondu Mugo died intestate and the purported Will in the Petition is a forgery. That they learnt from their neighbours that the parcel of land was earmarked for sale and on conducting a search they learnt that the succession cause of the deceased had been concluded and a Green card of the said parcel of land closed on sub-division. The said succession cause was secretly filed by the children of their sisters- in- law without their knowledge and they have been disinherited of their entitlement. That they reported the matter to the Criminal Investigation Department Kiambu who have launched investigations. That a Will done by an advocate can never be handwritten, thus it's a forgery.

5. The application was opposed. The administrators filed a replying affidavit dated the 15.10.2014. They deponed as follows; they were present when the deceased instructed Thomas Thuku Nganga advocate in the firm of Irungu Mwangi Nganga T.T & Co. Advocates to make the Will dated 28.4.2008. The deceased insisted on having two witnesses who were not beneficiaries to the estate. The property was bequeathed equally to the beneficiaries and they were appointed the executors of the Will. They came to court and petitioned for grant of probate and the grant was confirmed on the 22.2.2011. That the allegations made by the applicant is malicious because as soon as the testator disclosed to them his Will the 1st applicant rushed to Kiambu land Registry and placed a caution dated 29th April 2008. That the testator was fully aware that the 2nd Applicant was squatting on his land and advised them to move to their land in Ithanga as they were not his beneficiaries. The land had been divided into 7 equal portions and some titles have been issued. That the applicant once reported them to the CID at Kiambu. They have executed their mandate above board and they have not concealed any material fact as alleged.

6. At the hearing the following persons testified during the Applicants case; **Naom Njeri Gachuki (PW1), Kamau Njuguna (PW2), Njoka Njomo (PW3), Margaret Waithira Njenga(PW4) Joseph Gichuhi Njuguna (PW5) and Paul Mucheru Muniu (PW6).** They filed witness statements.

7. The Respondents called 4 witnesses **William P Ngugi Mwangi (DW1), James Kihumba Njenga (DW2), Kamau Gachungu (DW3) and Thomas Thuku Nganga (DW4).**

8. The Applicants' evidence from the witness statements in summary is as follows; Land Reference No. Githunguri/Githangari/335 was purchased by Mugo Ndongu and was registered in the names of Ngondu Mugo the eldest son of Mugo Ndongu 'A'. Mugo Ndongu had 2 wives Karungari Mugo and Nduta Mugo. Karungari Mugo had the following children; Ngundo Mugo 'A', Mukonya Mugo, Nyambura Mugo, Gathoni Mugo, Mugechi Mugo, Wambui Mugo and Njeri Mugo. Nduta Mugo had the following children; Ngondu Mugo 'B', Gakenia Mugo, Wangari Mugo and Waithira Mugo.

9. Ngondu Mugo 'A' did not have children and died childless. Mukonja Mugo and Ngondu Mugo 'B' occupied and utilized the said parcel of land till their death. The 2 were survived by Naom Njeri Gachuki and Salome Nyambura Kimani (the Applicants). The daughters of Mugo Ngondu got married before the year 1958 when the parcel of land was registered in the name of Ngondu Mugo 'A'. That it is strange that the children of Karungari Mugo of the 1st wife of Mugo Ngondu secretly petitioned for the estate of Ndongu Mugo 'A'. That the parcel of land should be inherited by Naom Njeri Gachuki the widow of Mukonja Mugo and Salome Nyambura Kimani the widow of Ngondu Mugo 'B'. According to Joseph Gichuhi Njuguna sometimes in 2008 he met the children of Karungari Mugo with a hired car entering into Ngondu Mugo 'As' home. The said children were accompanied by the area Assistant Chief Mbitiru Kimani. Ngondu Mugo was very sick then. He later learnt that they had come to force Ngondu Mugo 'A' write a Will.

10. During cross examination Naom testified that; her husband built a house in the suit property. She knew the land was registered in the name of Mugo Ngondu. Her husband and her father in- law had told her that the land was not to be subdivided. There was no fight over the land. Ngondu Mugo used to drink a lot. The Respondents did not farm there in 1980's. She has heard that Nduta has children at Ithanga. She does not know about the Will. The deceased had no Identity Card. The Respondents should not get the land as they have their own land. She and Salome currently live in the suit land. Kamau Njuguna, a neighbour, also testified that Salome and Naom reside in the said land. Njoka Njomo testified that he is a neighbour to the Mugo's and that he is aware that the deceased was a Trustee of the land. Joseph Gichuhi testified that he heard of a fight between the family members over the land, and that the younger Ngundo would ask the elder Ngundo to give him land. He was not present when the Will was written. He knows that Nduta moved out, but indicated he didn't know where she moved to.

11. The Respondents evidence from the witness statements in summary is as follows; As Trustees, James and William were appointed by the

Testator in his Will dated 28th April 2008 and both were present when the deceased reduced his oral Will in writing before Thomas Thuku Nganga; an advocate of the High Court. This happened at the Testator's homestead and the other persons present were; Mbitiru Kimani, the Assistant Chief, Gitiha Sub-Location, Zephania Ngugi, Ephantus Njoroge Kihumba alias Joseph Ndungu and Kamau Gachungu. The Will was drafted by the advocate in his own writing and those present signed it. The Will is not a forgery, but is the deceased last Will which dictated how his property Githunguri/Gathangari/335 was to be distributed equally to the beneficiaries. The Will also instructed Mwangi Mugo known as Wagithambo, who was squatting on the land to return to Ithanga in accordance with the elders decision that had been made previously. As administrators, they have distributed the estate in accordance to the deceased Will. According to Kamau Gachungu, he recalled that on 28th of April, 2008, he was invited by Ngondu Mugo, the deceased to witness his last Will. He was introduced to the advocate, Thomas Thuku Nganga, who wrote down the deceased's Will in his own writing. He used his right hand thumb print to witness the Will. Thomas Thuku Nganga, testified that he is an Advocate of the High Court and working in the name and style of Irungu Mwangi Nganga T.T & Company Advocates, based in Nairobi and Githunguri. That on the 28th of April, 2008, he went to the deceased's home accompanied by Zephania Ngugi, and drafted the Will in his own writing. The deceased wanted the Will written by hand in his house. Those present were the Testator, Kamau Gachungu and Chief Mbitiru Kimani. They were later joined by Joseph Nganga and Ephantus Kirumba. The Testator was an elderly man with all faculties of a sound mind. The deceased was known to him before, having been brought to his office in January by Zephania Ngugi, when he wanted to write a Will. He had no other relationship with the deceased, save for, client-advocate relationship. The Will was witnessed by four people and he also signed.

12. During cross-examination, William Ngugi testified that in 2008, the deceased called him together with Zephania to his place. He also called the Assistant Chief and Kamau Gachungu. Naom Njeri stays on one side of the Boma while Ngondu Mugo B, lives on the other side. He saw Naom within the compound. Ngondu Mugo B was not there at the time. The deceased expressed his will regarding the shamba. William signed the Will in the presence of the Advocate and others. Ngondu Mugo A was not sick. He admitted that Naom and Salome still stay in the said Shamba and that they (Petitioners) did not tell the Applicants when they were going to petition for the grant. James Kihumba Njenga testified that he was present when the Will was written and that the deceased did it voluntarily. Naom knew about the Will. On the next day, 29th April, 2008, Naom went and placed a caution at the Land Board. Naom inherited 1.6 acres.

13. Parties filed written submissions. The Applicants submitted as follows: That there were salient facts and issues such as; the Will was not written in the presence of persons the deceased lived with; three out of the six persons present received a substantial share under the alleged Will and two were appointed executors; the deceased address in the Will is the same as the Petitioners; the Advocate was taken to the deceased's homestead by Zephania Ngugi who benefitted substantially from the Will; the deceased thumb print on Page 1 and 2 of the Will is not attested to nor witnessed; Paragraph 3 of the Will mentions house and/ or Commercial plot in Huruma which was not included in the list of assets of the deceased's estate, which raises the issue on the deceased's mental capacity at the time of making the alleged Will; the Advocate stated that the Assistant Chief stated that he was aware of the squatters in the estate Property; James Kihumba Njenga admitted the deceased had no Identity Card, Bank account, nor was the deceased a member of any cooperative which raises the issue of the deceased's mental capacity to form testamentary intent; the Advocate failed to demonstrate to the Court any inquiry undertaken to confirm such capacity; L.R. Githunguri/Gathangari/355 was given a worth of Kshs. 400,000 an estimate that is false and misleading; the application for rectification made three years after confirmation of the grant was to alter the list of beneficiaries under the alleged Will by dropping Joseph Ndungu and Hannah Karungari and replacing them with Ephantus Njoroge Kihumba and Elizabeth Njeri Gacharu, with an application signed by Zephania Ngugi of 14th of May 2014, yet DW2 admitted Zephania died on 21st August 2010.

Regarding their arguments that the Will was made by coercion, under suspicious circumstances, and that the deceased had no capacity of making his Will, the Applicants relied on Section 7 of the Act, Justice Koome's finding in the case of **in the matter of the Estate of James Ngengi Muigai HCSC No. 523 of 1996, [2005] eKLR**, (on coercion); Justice Musyoka's decision on suspicious circumstances in the case of **Re Estate of Lucy Wangui Muraguri NRB HCSC. 331 of 2000 [2015]eKLR**, and Justice Achode's decision in the case of **Estate of Ngethe Karuga (deceased) HCSC No. 26 of 2008 [2017]eKLR**. On the issue of capacity of making the Will, the Applicants relied on the case **in the matter of Risper Achieng Awuoch (deceased) P & A 274 of 2006 [2007]eKLR** where Justice Koome held as follows, *"General burden of proof. Generally speaking, the Law presumes capacity, and no evidence is required to prove the testator's Sanity; if it is not impeached. A will, rational on the face of it and shown to have been signed and attested in the manner prescribed by Law, is presumed, in the absence of any evidence to the contrary, to have been by a person of competent understanding. However, it is the duty of the executors or any other person setting up a will to show that it is the act of a competent testator, and therefore, where any dispute or doubt exists as to the capacity of the testator, his testamentary capacity must be established and proved affirmatively. The issue of capacity is one of the fact. The burden of proof of sanity is considerably increased when it appears that the testator had been subject to previous unsoundness of mind."*

14. The Respondents submitted as follows: The issue for determination is whether the Will dated 28th April 2008 is valid in Law. It was submitted that Section 11 of the 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 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."

It was submitted that the Will presented had met the threshold by Law, as it had the testator's thumb print fixed on it, and was attested by more than two independent witnesses. Further, it was submitted that the deceased was of sound mind at the time of executing the Will and

that the Objectors to the will had not adduced any evidence to demonstrate that he lacked testamentary capacity while executing it as required by **Section 5(4)** of the **Law of Succession Act**. That the mere fact that the testator was ill is not sufficient to prove mental incapacity as demonstrated in the case of **Banks v GoodFellow (1870) LR. 5 O.B.549** and **In the Estate of Syevrose Mukulu Machakos HCSC No.198 of 2005** in support of this proposition.

Regarding the issue of undue influence on the deceased at the time of making the Will, it was submitted that no inference was proved merely because certain beneficiaries were present at the time of making the Will. It was noted that the Objectors failed to prove that beneficiaries had coerced the testator to make dispositions that he did not intend to make in making of the Will. It was further submitted that, even if beneficiaries influenced the making of the Will, the fact would not in itself invalidate that Will. Reliance was made on the case of **Wingrove v Wingrove (1885) 11 P.D. 81** where it was held that all influences are not unlawful and persuasion may be legitimate but the testator must not be driven since the Will must be the offspring of his own volition and not the record of someone else. It was submitted that the making of the Will was done out of the testator's own volition, as he called the meeting himself and invited all the parties he wanted present including the Applicants who did not show up at the meeting and that his own words were put into writing by an Advocate of the High Court. It was also submitted that no evidence was tendered showing suspicious circumstances as the Will had other independent witnesses as required in Section 13 of the Act. The Respondents urged the Court not to interfere with the unfettered discretionary powers conferred to a testator by Section 5 of the Act (**see Ndolo v Ndolo Civil Appeal No. 128 of 1995 1 KLR (G&F) 742**).

DETERMINATION

15. I have considered the evidence, the rival submissions and the Law and I find that the issues for determination are;

i. Is the will dated the 28th April 2008 a valid Will in law?

ii. Should the Grant be revoked?

The deceased herein is said to have died testate according to the petitioners. He died in 2008 after the Law of Succession Act Cap 160 came into force and therefore the validity of his will is tested against the provisions of the Act. Part 11 of the Act provides for wills. The validity of wills is dependent on whether the same was made in proper form and capacity of the maker. The law on the form is stated in section 11 of the Act and the law on capacity is stated in section 5 of the Act.

16. According to section 11 of the Act a testator can sign or affix his mark to the will, the signature or mark of the testator shall be so placed that it shall appear that it was intended to give effect to the writing as a will and the will has to be attested by two or more competent witnesses each of whom must have seen the testator sign the will or affix his signature and each witness must sign the will in the presence of the testator.

17. It is the Respondent's evidence that the Will is valid and that the testator affixed his right thumb print on pages of the will. The Applicants state that the Will was forged. Section 107 of the Evidence Act Cap. 80 provides, that, "*(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*" The Applicants have to prove that the Will was forged. The Applicant stated that they did not know of the Will. The Will in question was hand written by DW4 the Advocate Mr Thuku who was taken to the deceased's home. I have evaluated his evidence and find that the advocate explained what he did when he attended to the deceased on the 28th April 2008. According to him the deceased was of sound mind and the deceased narrated the contents of the will and he recorded the contents of the will in the presence of the 5 people. The Will was witnessed by 4 people, who were present when it was written, he too appended his signature. The Will has the right hand thumb print (affix mark) of the deceased on every page except the page with the witnesses' signatures. The fact that his thumb print is not on the page with the signatures in my view does not make the will invalid nor does it prove it was forged. Section 11(c) provides that the will has to be attested by two or more persons each of whom must have seen the deceased sign or affix his mark to the will and that no particular form of attestation shall be necessary. The advocate DW4 Mr Thomas Thuku was fairly consistent in his evidence, he stated that he had a conversation with the deceased and the deceased insisted that the Will had to be hand written. The Applicant has not alleged that the deceased lacked the capacity to make the will. The maker of any will ought to be a person of sound mind and the soundness of mind of the maker shall be presumed unless at the time of executing the will he was not in a state of mind as not to know what he was doing, on account of either mental or physical illness, or drunkenness, or any other cause. The burden of proving lack of capacity on account of lack of a sound mind is cast on the person alleging that the deceased lacked such capacity. The Respondents have fulfilled their burden of proof. (**See In the matter of the Estate of Risper Achieng Awouche (deceased) (supra)**).

18. Another issue that arose was that 3 witnesses out of the six present had taken a substantial share under the Will and that 2 were executors. Coercion/undue influence was also alleged. Justice Musyoka held as follows in **Succession Cause No. 3221 of 2013 In the matter of the Estate of Krishna Kumari Bhatti (Deceased) on undue influence**,

"It should be understood that the same would occur where the testator is coerced or induced or driven into making certain dispositions that he did not really want to make. It is all about pressures, persuasions, threats, importunity, among others. The question is whether these take away the free will or volition of the testator so that the contents of the will are the product of the person exerting the pressure but not of the testator himself. What encompasses undue influence was very well articulated by Sir James Hannen in *Wingrove vs. Wingrove (1885) 11 P&D 81*.

19. The Applicants were not present in the house where the Will was written. They therefore have no proof of coercion and undue influence. The issue of coercion or undue influence was also not raised when DW4 was cross examined. The Applicants have taken issue with the fact the Zephania Ngugi took the lawyer to the deceased's homestead. This alone in my view cannot be considered as undue influence or coercion. The deceased decided on who were to be his beneficiaries they were to share the parcel of land equally, the 1st Applicant included. James Njenga and William Ngugi the executors were to get a share. The other beneficiaries were the sons of his late sisters, Joseph Kimwaki, Joseph Ndungu, Zephaniah Ngugi and a daughter of his late sister Hannah Karungari. None of the beneficiaries took a substantial benefit that would

be regarded as suspicious. There was no evidence led that any of the beneficiaries or witnesses suggested the terms of the will to the testator or even wrote the document. The Advocate admitted that Zephania had taken the deceased to him in January of 2008 and in April Zephania took him to the deceased's home. This alone does not prove coercion of undue influence. Further even on allegations of suspicious circumstances it was the burden of the Applicants to prove the same. I find that there was no evidence adduced to support the said allegation. The applicants' evidence was that the deceased held the property in trust. The deceased chose to have the parcel of land shared by his siblings' children and his sister in law the wife of his brother Mukonga Mugo. There was evidence led that his step mother Nduta Mugo moved out of their home and that they settled in Ithanga. Having considered the evidence I am satisfied that the deceased knew what he was doing he was aware of the contents of his written will and affixed his signature, thus the will is valid.

Should the Grant be revoked?

20. Section 76 of the Act dedicates the circumstances that could cause a grant to be revoked. The Applicants reasons for seeking a revocation are that the grant was obtained fraudulently by making of false statement representations and concealment of material fact from the court and the proceedings to obtain the grant were defective in substance. In the affidavit in support of the petition for Probate of Written Will the petitioners attached the will gave the value of the property at Kshs. 400,000/-. The beneficiaries are also indicated. When the petitioners applied to confirm the grant a consent to the mode of distribution was filed. All beneficiaries signed except Njeri Mukonja the 1st Applicant. James Kihumba stated that Njeri refused to sign the consent when she was requested to do so. The Applicant alleges that she was not aware of the matter in court and only got to learn of it when she learnt from the neighbours that the land was earmarked for sale and she did a search and found that the succession cause had been concluded and the Green card of the said parcel of land had been closed on subdivision. She reported the matter to the CID and a restriction was lodged. The green cards attached show that Naomi had placed a caution on land parcel no. Githunguri/Githangari/335 of the 29.4.2008. Another caution was placed by Ephantus Njoroge Kihumbu on the 1.12.2008. The said cautions were removed on the 1.12.2011 and thereafter the administrators were registered as the proprietors. Restriction were placed vide CID letter dated 6.6.2014. From these documents I confirm that the Applicant Naom knew of what was happening and filed a caution just after the deceased wrote his Will. I am persuaded and I believe the Respondent's evidence that after the Will was written in April 2008, Naom went and lodged a caution. The entry in the green card supports this evidence. I am also persuaded that Naom was requested to sign the consent and she declined to do and the administrators moved to court to have the grant confirmed on the 22.2.2011. The proceedings of the day show that the advocate informed the court that the beneficiaries were present except the 1st beneficiary who is the applicant Naom. Naom got an equal share like the other beneficiaries. There was no concealment of any material fact. No purpose will be served in revoking the grant. I find no merit in her application and it is dismissed. Since this is a family matter each party to bear its own costs.

Dated signed and delivered in Nairobi this 30th day of May 2019

R.E.OUGO

JUDGE

In the presence of;

Applicants Absent

Mr. Njogu h/b for Mr. Mwangi For the Respondents

1st Respondent Present

2nd Respondent Present

Ms Charity Court clerk