



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 93 OF 2015

IN THE MATTER OF THE ESTATE OF HENRY MWITHIMBU KARIGU (DECEASED)

MARY. M. MUKIRA.....1ST APPLICANT

ROSE KARURU GATUA.....2ND APPLICANT

SILVERIA MWARI MWITHIMB.....3RD APPLICANT

ALEX MUKARIA MWITHIMBU.....4TH APPLICANT

DANIEL GATUA.....5TH APPLICANT

HILLARY MAINGI.....6TH APPLICANT

FRIDAH KARIMI.....7TH APPLICANT

ALRED GITONGA.....8TH APPLICANT

RAPHAEL MUTUA.....9TH APPLICANT

VERONICA MUTUA.....10TH APPLICANT

LUCY MBAYA.....11TH APPLICANT

ZAVERIA MORORIA.....12TH APPLICANT

MONICA MURORIA.....13TH APPLICANT

GRACE GITUMA.....14TH APPLICANT

MUTUMA MUTUA.....15TH APPLICANT

Representative(s) of the estate

of the late JULIA MWITHIMBU.....16TH APPLICANT

Representative(s) of the estate

of the late VERONICA GACHERI.....17TH APPLICANT

VERSUS

GEORGE MUGAMBI.....ADMINISTRATOR/ RESPONDENT

JUDGMENT

1. Different descriptions or titles have been given to the parties in this cause. Thus, causing confusion. It be noted that clear and appropriate description of the parties eases reference and apportionment of roles.
2. Having said that, validity of the written will of the deceased dated 16th August 1995 has been questioned especially that it has not made reasonable provision of the dependants herein.
3. The deceased died on 12th November 1995 leaving behind ten dependants. **Julia Mukokinya M' Mwithimbu (widow) and Peter Mbaya Mwithimbu** were appointed executors of the will. They however passed on before they could administer the estate. Vide a ruling dated 27th February 2013 Hon Musyoka. J. appointed George Mugambi Muthimbuas the administrator of the estate. Parties however agreed on 9th March 2016 that **Mary Muthoni Mukira, George Mugambi Muthimbu and Gervasio Mutua Muthimbu** (now deceased) to be the joint administrators of the estate.
4. On 18th July 2016 **George Mugambi Mwithimbu** filed summons for confirmation of grant seeking to distribute the estate of the deceased as per the written will. The application was opposed by **Mary Muthoni Mukira** on 17th November 2016.
5. The matter proceeded for hearing on diverse dates; four (4) witnesses testified.
6. **Pw1 Luciano Riunga Raiji** testified that he is an advocate of the high court of Kenya having practised for more than 32 years. That he knew the deceased and his family since they are neighbours where he grew up. That he was called by the deceased on 16th August 1995 at his Commercial Building christened Shirikisho Building and the deceased informed him that he was to write for him a will. The deceased dictated to him in Kimeru language and he wrote with his own handwriting and in the presence of two witnesses' i.e. Julius Marete and Barnabas Makindui. He averred that at the last page there was a certificate of interpretation of the contents of the will.
7. He averred that upon the demise of the deceased, and specifically on 20th November 1995 he summoned members of the family of the deceased and read to them the contents of the will. He presented the will as Exh 1 and a handwritten note of the persons present when he read out the will as Exh 2.
8. On cross- examination he denied that he was introduced to the deceased by one Alex Mweria. He also averred that he tried amicable settlement of the ongoing dispute with the dependants of the estate in vain. He averred that his duty was to write what was dictated to him by the deceased and that he was therefore not surprised that some of the daughters of the deceased were omitted in the will.
9. He also agrees that the daughters of the deceased were not present during the reading of the will.
10. **Pw2 Julius Marete Ibuthi** averred that he was present with one **Barnabas Mukindiu** (now deceased) and that he can identify his signature. He also stated that the he witnessed the deceased, advocate and Barnabas attest to the will. However on re-examination he stated that he was not aware that the deceased gave some dependants a higher portion than others.
11. **Pw3 & Pw4 Lucy Kathinda Mbaya & Zaverio Muroria** respectively testified that they were present when the will was read out. They also confirmed that only the sons were present.
12. **Ow1 Mary Muthoni Mukira** testified that he took care of the deceased for two years when he was hospitalised at Mater Hospital. She averred that the will was written under difficult medical circumstances as the testator was still under medication. She averred that she only came to be aware of the will, later on, since her and the daughters were not present when the will was read out. She opined that the will gave one of the dependants, George Mugambi almost 70% of the estate leaving the other dependants with an insignificant portion. She majorly opposed the key properties in Shirikisho building and the Wanja Building. She however agreed that some of the properties were left out to her mother and the daughters which they are benefitting from currently. She also agreed that she currently pays rent to George Mugambi for the premises in Shirirkisho building left to him under the will. That Rose uses the Maina shop, but she is not aware that that is what is captured in the will. She also lastly agreed that she is familiar with Barnabas Mukindia as a close affiliate of her father,

Validity of the will

13. The applicable law on the mental capacity of the testator is found at Section 5(3) of the Law of Succession Act which provides that the testator must have capacity to make a Will;
14. The Applicant herein deposed that the deceased herein was not of a clear mind since he was sickly hence could not make the written will. The applicants did not however call for a medical expert or produce any medical documents to prove this assertion. I wish to take the position made **In re Estate of Magayu (Deceased) [2018] eKLR where the court held;**

“.....The onus or burden of proof to such a contention lies with the applicants; it is note-worthy that the applicants adduced no evidence to controvert the petitioners evidence on the deceased’s capability of comprehension and that the deceased was possessed of competent understanding; in summary the applicants called no medical expert nor did they produce any medico-legal report to prove their allegations on the deceased’s mental infirmity at the material time to support the lack of testamentary capacity of the deceased at the time of making the WILL; nor was there any no evidence tendered by the applicants of the deceased having been coerced at the time of making the WILL;

15. I therefore do find that the testator/deceased was within his testamentary capacity to make the will.

16. As for the validity of the will the law applicable is section 11 of the Law of Succession Act. The same 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.

17. It is clear from the will that two competent witnesses signed/ attested to the will of the deceased i.e. Julius Marete Ibuthi and Barnabas Mukindu. During the hearing one of the competent witnesses had since passed on. However Julius Marete Ibuthi confirmed that he saw him sign the will. Mary Muthoni also confirmed the witness, Barnabas Mukindiu, now deceased, was known to his father during his lifetime. The Applicants never objected as to the validity of the deceased signature. I have already determined that the deceased had the testamentary Capacity to make the will. However, it is disturbing that the only surviving attesting witness could not fully comprehend what the deceased was dividing or whether or not he fully catered for his dependants. On being Cross- examined the witness could not mention the name of the deceased first wife i.e. Helena. He only referred to her as “bibi mkubwa” and stated that that is the terminology that was used by the deceased. He could also not know how the estate was distributed. He only averred that he was informed of the will and he signed in the presence of the other parties. He however saw the testator affix his signature/mark on the will.

18. On whether the will was interpreted to the deceased in a language he understands I do find that the certificate issued by the advocate. Luciano Raiji is sufficient to prove that the deceased understood the contents of the will.

Reasonable Provision

19. But, the will as propounded clearly gives a larger share of the estate of the deceased to the sons of the deceased against the interest of the daughters. It is only **Cecilia Mwari** and **Julia Mukokinya** who were granted a share of the estate. The daughters of the estate were only granted monies in the amounts of Kshs. 10,000/= each.

20. From the evidence, I find it peculiar that the deceased who had been taken care of by her daughters during his last days of his lifetime did not give his daughters part of his estate. To be noted also is the fact that he did not even grant, **Mary Muthoni Mukira** the shop in Shirikisho Building where she had conducted her business since 1976. I also find it absurd that the daughters were not called upon during the reading of the will and only persons who benefit from the estate were present.

21. I take it that the deceased sought to rely on Meru Customs that does not allow the daughters to inherit from the estate of their deceased parents. Such practices are pure and prohibited discrimination of women on the basis of gender and status. See the abhorrence of such discriminatory practices by law in the decision of **Rono v Rono & Another, 2008 1 KLR (G & F) page 803**. Recent decisions have also held that such actions are discriminatory and not in line with Article 27 of the Constitution. In **Mwongera Mugambi Rinturi & another v Josphine Kaarika & 2 others [2015] eKLR** the Court of Appeal stated bluntly that;

“...with the greatest respect, such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny; not least because it is plainly discriminatory of itself and in its effect. It is anachronistic and misplaced notwithstanding that it was the norm for a vast majority of Kenya’s communities. This Court has long accepted that a child is a child none being lesser on account of gender or the circumstance of his or her birth. Each has a share without shame or fear in the parents’ inheritance and may boldly approach to claim it. What RONO –VS- RONO (Supra) decided about the prohibition of discrimination on grounds of sex under the retired Constitution applies with yet greater force under the current progressive Constitution of Kenya, 2010. See also GRACE WACHUKA –VS- JACKSON NJUGUNA GATHUNGU [2014] eKLR. We have already noted that Mr. Kioga did concede, as he had to, that one cannot exclude daughters. We have also adverted to the irony of his then asserting in the same breath, that Florence should nevertheless have been excluded.

22. I therefore find that the will did not make reasonable provision for the daughters of the estate; I find it to be discrimination on the basis of gender. Such actions offend the Constitution. This justifies the court to interfere with the testator’s power and wish to dispose of his estate in order make provision for the daughters of the estate. I have looked at the proposal sought by the daughters of the estate. They are not seeking equal or greater share in the estate of the deceased compared to the sons. Their proposal is therefore reasonable as it will ensure equity in the sharing of the estate.

23. Accordingly, I will make reasonable provision for them. I endorse their proposal and make provision as follows;

a. Shirikisho Building

(i) Two Shops- one to Rose Karuru and the other to Mary Muthoni Mukiira

(ii) Rental Proceeds to be shared equally among the heirs

b. Semi-Permanent Houses in Plot situated in Kinoru along Meru Nyanyuki Road to Cecilia Mwari.

c. Rental proceeds from Ten Semi-permanent houses in Kinoru area along Meru- Nyanyuki Road- Cecilia Mwari

d. Developed plot in Tom Mboya Street-1/2 a share to Mary Muthoni

e. 24 semi-Permanent houses in Kinoru to Rose Karuru Gatua, Mary Mukiira and Silveria Mwari

f. Shares in standard Chartered bank equally amongst the daughters of the estate.

g. All the other properties shall be shared as per the will.

Dated, signed and delivered in open court this 29th day of May 2019.

F. GIKONYO

JUDGE

IN PRESENCE OF

Ojieko for defendant/applicant (Mary Mukira, Rose Gatua and Silveria Mwari)

Gikunda for 1st administrator

Ndubi for 1st protestor

F. GIKONYO

JUDGE