REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1800 OF 2011

IN THE MATTER OF THE ESTATE OF SAMUEL NJOROGE KAMAU ALIAS NJUNGE KAHURA (DECEASED)

BENNEDETA WANJIRU.....................APPLICANT/OBJECTOR

VERSUS

STEPHEN CHEGE NJOROGE.....RESPONDENT/PETITIONER

RULING

1. The Summons for Revocation of Grant dated 2nd of April, 2012 was taken out by the Objector/Applicant, Bennedeta Wanjiru**,** in her capacity as a daughter to the late Samuel Njoroge Kamau Alias Njunge Kahura, the Deceased herein. The application is premised on the following grounds:

a. THAT the will dated 26th November, 2008 and annexed to the petition for probate of written will filed on 23rd August, 2011 is not valid as it is a forgery

b. THAT the said will document is not the true and original will and a true record of the last will of the Deceased

c. THAT the will has not provided adequately for Bennedeta Wanjiru, Teresia Wanjiku Nganga and John Kahura Njoroge.

2. The application is supported by the Affidavit of Bennedeta Wanjiru dated 26th March, 2012. It is deponed therein that the Deceased died on 13th March, 2009 and a grant of probate with will annexed was made to one Stephen Chege Njoroge on 30th January, 2012. The Objector alleges that the grant was fraudulently obtained by the use of a forged will which was not disclosed to the beneficiaries of the estate of the Deceased at the time of filing the Petition. Further, that the Will does not provide for herself, Teresia Wanjiku Nganga and John Kahura Njororge who are all children of the Deceased.

3. The Objector's averments are vehemently opposed by the Petitioner/Respondent (*hereinafter Petitioner*) in a Replying Affidavit dated 24th April, 2012. The Petitioner deponed that prior to his demise, the Deceased approached the firm of Dave Kamangu Advocates in the company of two witnesses where he executed his last will. It was his assertion that at the time, the Deceased was of sound mind, good health and was not coerced into writing the will.

4. The application was heard by way of *viva voce* evidence. Five witnesses were called in support of the application. PW1 was the Objector, Bennedeta Wanjiru, a daughter of the Deceased. It was the Objectors testimony that in 2006, the Deceased called a surveyor and subdivided the parcel of land known as Mugunga/Gitaru 374 into six smaller parcels. She produced the Land Control Board Consent, Surveyor's Plan and payment receipts to the surveyors in support of her evidence. She testified that the Deceased allocated five of the six parcels of land to his children and kept one parcel for himself because their sister, Teresia Wanjiku Njoroge declined to take her share.

5. The Objector told the Court that she had placed a Caution on the parcel of land Mugunga/Gitaru 374 on behalf of, and with the consent of her siblings because the Deceased later attempted to sell the parcel of land to sustain his drinking problem. Further, that the sub-division and processing of titles was never completed as they were unable to raise enough money to complete the process.

6. The Objector stated that she learnt of the alleged will from her brother John Kahura Njoroge and efforts to seek clarification from the Advocate who drafted the will were unsuccessful. It was her testimony that the will was not the last testament of the Deceased because it purported to disinherit her, yet she was the favorite child of the Deceased.

7. She stated that in 2007, the Deceased was involved in an accident and suffered a brain injury, as a result he suffered convulsions and did not fully recover. She testified that at the time when the alleged will was made, the Deceased's health had greatly deteriorated causing him to convulse often and he could therefore not have executed it. The Objector also contended that the purported witnesses to the will, Julius Mungai Gacheha and Ndegwa Gitau, were close friends to the Petitioner but not the Deceased.

8. The 2nd witness called to the stand was Samuel Njoroge Kamau, who stated that he was a cousin of the Deceased. It was his testimony that the Deceased did not leave behind a will because he had already distributed his property prior to his death. He also stated that the Petitioner and the Deceased did not have a good relationship and that it was the Objector herein who had been taking care of the Deceased while he was alive.

9. PW3 was Grace Muthoni Kamau, the sister of the Deceased. She testified that she was present when the Deceased distributed his property amongst five of his six children, and only learnt of the disputed will after the demise of the Deceased. She affirmed that the relationship between the Deceased and the Objector was good, further, that it was the Objector who took care of the Deceased after his accident.

10. PW4 was one Allan Kariuki Kahura, who told the Court that he was also a cousin to the Deceased. He testified that the alleged will was never brought to his attention by the Deceased or anyone else until September 2009, six months after the Deceased had passed on. He affirmed that the Deceased had distributed his parcel of land prior to his demise and that the eldest daughter refused to take a share because she was married and had her own land.

11. Teresia Wanjiku Njoroge was PW5 and one of the daughters of the Deceased. She testified that in 2005 the Deceased informed her of his intention to include her in the distribution of his property, but she declined. She too refuted the existence of a will and stated that she was never informed of the filing of any succession matter before Court in regard to the estate of her Deceased father. It was her testimony that all six of the children of the Deceased should inherit that which their father left behind.

12. The Petitioner/Respondent on his part called four witnesses. Dave Kamangu of Kamangu and Company Advocates testified that on 26th November, 2008, the Deceased came to his office in the company of Julius Mungai Gachaha and Simon Ndegwa Gitau, and requested him to prepare a will. Mr. Kamangu averred that the Deceased wished to bequeath his only property Muguga/Gitaru/374 to his children and grandchildren.

13. Mr. Kamangu averred that the Deceased did not wish to bequeath any property to his daughter, the Objector herein, and his son John Kahura Njoroge because they were abusive to him during his lifetime. The Deceased instead bequeathed their portions of the property to his grandchildren, Stephen Njoroge Wanjiru and Samuel Njoroge Kahura being the sons of the Objector and John Kahura Njoroge respectively. It was Mr. Kamangu's testimony that the Deceased communicated his intentions in the presence of two witnesses and that he signed the will and appended his thumb print because he feared that some of the beneficiaries would contest the Will.

14. John Kahura Njoroge filed two statements in this matter, one dated 8th June, 2012 in support of the Objector and another dated 5th May, 2015 denouncing the averments contained in his earlier statement. He testified in Court as the Petitioner's 2nd Witness.

15. It was his testimony that the Deceased had indeed prepared the disputed will prior to his death, and that he had disinherited the Objector because she placed a caution on the land. He stated that the reason he had also been disinherited by the Deceased was because he quarreled with the Deceased after the Deceased had beaten his mother. He however told the Court that because the Deceased had instead bequeathed his share to his son, it meant that the property was given to him.

16. The Petitioner's 3rd and 4th witnesses were Simon Ndegwa Gitau and Julius Mungai Gicara, whose testimony was to the effect that they were both approached by the Deceased to act as witnesses to his will. They both visited the firm of Kamangu advocates on 26th November, 2008 where a will was prepared and executed in their presence. It was the testimony of Julius Mungai Gicara that at the time, the Deceased was of good health, sound mind and was not coerced in any way to make the will.

17. In her submissions, the Objector argued that the will was made under suspicious circumstances, and that the Deceased lacked capacity to make the will. To support her case the Objector cited the case **of the Estate of Murimi Kennedy Njogu – Deceased [2016]eKLR,** wherein the Court restated the essentials of testamentary capacity as were laid out in the case of **Banks v Goodfellow** cited with approval in the case **Vaghella v Vaghella (1999) 2 EA 351)** –

> **"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."**

The Objector pointed out that the will did not provide for three dependants and should therefore be invalidated by the Court.

18. The Petitioner on the other hand submitted that the Objector had not proved forgery and urged the Court to dismiss the Application as being premature and not brought in good faith.

Analysis and Determination

19. I have carefully considered the pleadings, the oral testimonies of the witnesses, the rival submissions of the Counsels on record and the entire proceedings of this cause. What is for determination in the instant application is;

a. Whether the deceased had capacity to make the disputed will.

b. Whether the disputed will is a valid will.

c. Whether Bennedeta Wanjiru, Teresia Wanjiku Nganga and John Kahura Njoroge are dependants and whether the Deceased made reasonable provisions for all dependants in the will.

20. The Objector has argued that the grant was fraudulently obtained by the use of a forged will, and further that the Deceased lacked capacity to execute the will because he had suffered a brain injury in an accident in 2007.

21. Under **Section 5 (3)** of the **Law of Succession Act** there is a rebuttable presumption that a person making a will is of sound mind and that the will has been duly executed. This is echoed by **Halsbury's Law of England 4th Edition Vol. 17 paragraph 903** where the author stated thus:

> **"Generally speaking, the law presumes capacity and no evidence is required to prove 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 made by a person of competent understanding..."**

22. The essentials of testamentary capacity are further laid out in the case of **Banks Vs. Goodfellow [1870] LR 5 QB 549** as cited with approval in the case of **Vaghella v Vaghella (1999) 2 EA 351)** where the Court stated as follows:

> **"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."**

23. According to **section 5(4),** the burden of proof that a testator, was at the time he made the Will not of sound mind, shall be upon the person who alleges. On the evidence adduced by the rival parties, I come to the conclusion that the Objector did not discharge this burden. There is no demonstration at all through medical evidence or any other evidence that the Deceased lacked the capacity to make a will. The Discharge Summary from the accident the Deceased sustained in 2007 indicates that no neurological deficit was noted. Further, the Death Certificate states the cause of death to be cardio pulmonary failure due to pulmonary tuberculosis due to convulsions.

24. Mr. Dave Kamangu, the advocate who prepared the disputed will testified that the Deceased did indeed instruct him to prepare the said will. The two witnesses who attested the will, Julius Muigai Gachara and Simon Ndegwa Gitau, corroborated this evidence. The fact that the Deceased did not disclose his intention to make the will to the Objector and his family is not sufficient basis to cast any doubt on his capacity. The testator knew his property, knew his heirs and knew what share he wanted to give each of them. It is therefore my finding that the deceased clearly knew and understood the nature of the business he was engaged in when making his will and providing for his dependants.

25. On the question of the validity of the will, I find guidance in **section 11** of the **Law of Succession Act** which provides for the requirements of the validity of a written will 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 acknowledgment of his signature or mark, or of the signature of that 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."**

26. From **section 11** cited above, it is evident that for a will to be valid, it must have been duly executed by the testator and attested by two competent witnesses. In the instant application, the evidence of execution of the disputed will can be found in the testimony of Dave Kamangu, the advocate who prepared the will, and the two attesting witnesses, Julius Muigai Gachara and Simon Ndegwa Gitau, all of whom were present at the time the will was executed. The disputed will bears both the Testator's signature and his thumb print at a place which leaves no doubt that it was intended to give effect to the will.

27. The disputed will was prepared and signed on the same day. Thereafter an original copy of the will was kept in the custody of Kamangu and Company Advocates until the death of the Deceased. There is no evidence that the Petitioner unduly influenced, or exercised any dominion over the Deceased to bequeath property in his favour.

28. The final issue for determination is whether the Objector and her siblings are dependants and whether the Deceased made reasonable provisions for all dependants in the will. It is trite law that a testator has power to dispose of the rights to his/her property as he so pleases but this freedom is not absolute; the deceased is expected to make reasonable provision for his dependants. **Section 26 of the Law of Succession Act** states as follows:

“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.”

29. It is not disputed that the Bennedeta Wanjiru, Teresia Wanjiku Nganga and John Kahura Njoroge are children of the Deceased and therefore dependants within the meaning of **section 29** of the **Law of Succession Act**. **Section 28** of the **Law of Succession Act Cap 160** prescribes that in considering the specific order to be given in the distribution of an estate, certain key circumstances must be taken into account. The section reads as follows:

"In considering whether any order should be made under this Part, and if so what order, the Court shall have regard to

a. the nature and amount of the deceased’s property

b. any part, present, future capital or income from any source of the dependent;

c. the existing and future means and needs of the dependent;

d. whether the deceased had made any advancement or other gift to the dependent during his lifetime;

e. the conduct of the dependent in relation to the deceased;

f. the situation and circumstances of the deceased’s other dependents and the beneficiaries under any will;

g. the general circumstances of the case, including so far as can be ascertained, the testator’s reasons for not making provision for the dependent.”

30. Going by the evidence of Teresia Wanjiku in her statement dated 9th June, 2012 and evidence she adduced in Court orally, when her father was still alive, he informed her of his intention to subdivide his land amongst his children including herself. She however informed him that she did not want a portion. In this regard this Court finds no good reason to interfere with the Deceased’s will to make reasonable provision for Teresia Wanjiku because she willfully renounced and disclaimed her entitlement to the Deceased's property.

31. This Court has looked at the evidence adduced by the parties herein and their witnesses as to the nature of the relationship between the Objector and John Kahura Njoroge on the one hand and the Deceased on the other and noted that it is at variance and parallel. While the Petitioner has argued that the reason as to why the Objector was disinherited was because she was disrespectful and aggressive towards the Deceased, the Objector has contended that she is the one who took care of the Deceased after his accident and that their relationship was good. On the other hand, John Kahura Njoroge in his oral testimony before the Court stated that the reason he had also been disinherited by the Deceased was because he quarreled with the Deceased after the Deceased had beaten his mother. During cross examination however, he stated that he was in very good terms with the Deceased.

32. I am of the considered view that the Objector and John Kahura Njoroge were not provided for in the will of the Deceased owing to their strained relationship with the Deceased. It is clearly stated at paragraphs 4 and 5 of the Deceased’s will dated 26th November, 2008 that he did not give the Objector and John Kahura Njoroge any share out of his estate because they were abusive to him. In exercise of his free will, the Deceased instead elected to provide for his grandchildren Samuel Njoroge Wanjiru and Samuel Njoroge Kahura who are the children of the Objector and John Kahura Njoroge respectively. John Kahura Njoroge appears to have accepted the wishes of the Deceased. In his oral testimony before this Court, he stated that because the Deceased had bequeathed his share of the property to his son, it meant that the property was given to him.

33. The fact that the Deceased did not provide for the Objector in his will, to her expectations or satisfaction, does not cast any doubt to his capacity. The Court in **In the Matter of the Estate of Late Sospeter Kimani Waithaka Succession Cause 341 of 1998** stated as follows:

“The Will of the departed must be honored as much as it is reasonably possible. Readjustments of the wishes of the dead, by the living, must be spared for only eccentric and unreasonably harmful testators and weird Wills. But in matters of normal preferences for certain beneficiaries or dependents, maybe for their special goodness to the testator, the Court should not freely intervene to alter them.”

34. Having come to the conclusion that the Deceased’s will dated 26th November, 2008 was valid, I find no legal basis to the Objector’s Application dated 2nd April, 2012 and decline to interfere with the wishes of the Deceased. The Application is dismissed with no order as to costs.

SIGNED DATED and DELIVERED in open Court this 25th day of June, 2019.

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L. A. ACHODE

JUDGE

In the presence of....Advocate for the Applicant/Objector

In the presence of.............................Respondent/Petitioner