



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KERUGOYA**

**MISC. APPLICATION SUCCESSION NO. 404 OF 2012**

**IN THE MATTER OF THE ESTATE OF THE LATE VERANDANDO**

**GACANGI alias FERANANDO GACANGI.....(DECEASED)**

**AND**

**FRANCIS MUGUMO.....PETITIONER**

**VERSUS**

**JOHN NDAMBIRI KARIUKI.....PROTESTOR**

**RULING**

1. This matter relates to the estate of VerandandoGichangi alias FeranandoGachangi. The petitioner Francis Mugumo was issued with a grant of probate of the will of the deceased on 29.5.2005.
2. An affidavit of protest against the confirmation of grant was filed by John NdambiriKariuki dated 19.5.2005.
3. This court gave directions that the petition be heard first to determine the validity of the will. The parties proceeded and adduced evidence.
4. The petitioner adduced evidence and called one witness.

**Petitioner's case**

The deceased was his brother and he left a written Will and had informed him all his matters are with Advocate Kathungu at Embu. After the deceased died, he went to the advocate's office and after the Will had been read it was given to him. He produced the Will dated 26/03/2004 in which the testator appointed him as the executor and he was not given anything. He confirmed he was not present when the deceased executed the will by thumb print and confirmed that the Will did not include any wife of the deceased. He also confirmed to be aware that the deceased had a case in Court with the protestor.

The advocateMr. Joe Kathungu testified that the deceased instructed him to prepare his Will and his assistant now Magistrate Susan NyawiraNdegwa witnessed the testator thumb print the Will. The deceased did not tell him that he had any liability. He complied with **Section 11of the Law of Succession Act** and when the deceased passed on the executor went to his office. He confirmed that the original Will got lost.

**Protestor's case**

The deceased is his father and when he died he had two wives Wangechi (deceased) and SebastianaWanja. In the first house, he was the only child and the 2<sup>nd</sup> house has two children. He has lived on the estate since he was born 50 years ago, he was not aware that his father had made a Will and was not called to any office for his Will to be read. Those bequeathed the estate are as follows;

- a. Son MarcellinusMuchiraGacangi – 1.62 Ha
- b. Daughter FelisterMicereGachoki – 0.20 ha

- c. Daughter Mary WanjiruNjeru – 0.20 ha
- d. Grandson Charles MwangiMuchira – 0.40 ha
- e. Grandson Francis WaweruMuchira – 0.40 ha
- f. Grandson MichealMuciruMuchira – 0.40 ha
- g. Grandson Joseph NyagaMuchira – 0.40 ha
- h. John NdambiriKariuki – 0.30 ha
- i. Wife SabastianaWanjaGacangi – all movable property and personal effects.

5. He was allegedly given a smaller portion than the sons of his brothers and his brother and he does not believe the Will was made by the deceased. There are also 3 people who were not given any share Martin Gitari John, Joseph Kinyua John and Lucy Kuthii John who are his children whilst they live on the land. In addition, the Will does not show the deceased's liabilities, he had a decree against the deceased in **Embu HCCA No. 23 of 1999** where the debt was Kshs.76,825/= and the deceased was ordered to pay. In **Embu HC Misc No. 7 of 2004** the debt owed to him by the deceased was Kshs. 10,590/=.

6. He contends that the deceased used to sign documents and not thumb print, for example the affidavit in **Nairobi CMCC No. 499 of 1988**. The date on the Will is handwritten while the Will is typed therefore he cannot tell whether the date was put before or after the deceased died. He was bequeathed 0.3 ha, others got less and some were not given that is why he complained.

#### **Issues arising:**

#### **1. Mental capacity of the testator**

##### **Section 5 of the Law of Succession Act states;**

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

The protestor claimed that the deceased was unwell, he had swelling and stomach was swelling and that he could not think but did not have any medical records to prove the same. In fact he also testified that before his death, the deceased was okay and that he had nothing to show that the deceased suffered ill health.

##### **In re Estate of Samuel NgugiMbugua (Deceased) [2017] eKLR**

The court stated;

**A person, who seeks to rely on unsoundness of mind as a basis for nullification of a will, must adduce evidence tending to prove that the testator had an illness that had affected his mental capacity at the time, or was drunk or drugged. This calls for testimony as to his state of mind at the material time, and, where possible medical evidence that would point towards such a condition.**

**It should be mentioned that the burden of establishing that the maker of the will lacked the requisite mental capacity lies with the person making the assertion, in this case that would be the applicant.**

7. *‘He who alleges must prove - under Section 5(3)(4) of the Law of Succession Act above, the burden of proving otherwise is on the person alleging that the testator was not of testamentary capacity or was of unsound mind at the time of making the Will. Mental incapacity being a medical condition the report and testimony of a doctor who attended to the deceased for mental incapacity before his death would have been important evidence. Since no proof of mental incapacity has been provided, the testator is presumed to have been of sound mind at the time of making the Will.*

#### **2. Validity of Will**

##### **Section 11 of the Law of Succession Act states;**

***“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."*

There are four main requirements to the formation of a valid Will:-

*a. The will must have been executed with testamentary intent;*

*b. The testator must have had testamentary capacity;*

*c. The will must have been executed free of fraud, duress, undue influence or mistake; and*

*d. The will must have been duly executed.*

8. A testator has power to dispose of his property as he pleases and the court is bound to respect those wishes as long they are not repugnant to the law and he does not leave out some dependants and beneficiaries. As pointed out above, the testator had capacity to make the Will, he appended his thumb print in the presence of two competent witnesses. The allegation that the will is fraudulent has not been proved. The advocate and the witness had no interest in the estate of the deceased. The contention that the deceased used to sign does not mean that he could not use a thumb print. The advocate witnessed when the deceased thumb printed. The law requires that he affixes a mark or signs. The testator complied with the law. The only dependants claimed to have been left out are the children of the testator but he was given a portion of the estate though he claims it was small. Consequently, the Will dated 26/03/2004 was properly executed by the testator and conformed with the formal requirements under **Section 11 of the Law of Succession Act**. I find that the last will of Verandando Gacangi dated 26.3.2004 is a valid will.

**Dated at Kerugoya this 24<sup>th</sup> day of July 2019.**

**L.W. GITARI**

**JUDGE**