REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 58 OF 2010

IN THE MATTER OF THE ESTATE OF KARIUKI NGUNYU (DECEASED)

1. ROBERT KARIUKI NGUNYU

2. PAUL NGUNJIRI NGUNYU

3. JOSEPH NGUNJIRI KIAMA.....APPLICANTS

-VERSUS-

MARY WAMBUI NGUNYU.....RESPONDENT

JUDGMENT

This cause is with respect to the estate of **Kariuki Ngunyu (deceased)** who died on the 22 June, 2009 aged 50; he was domiciled in Kenya and his last known place of residence was Mutathiini village in Nyeri County.

On 25 June 2010 the respondent petition letters of administration with written will annexed in respect of the deceased's estate. Alongside this petition, she filed a certified copy of a will purportedly written by the deceased in Kikuyu language on 16 February 2009. Despite the absence of a translation, the record shows that the respondent was granted letters of administration intestate of the deceased's date on 11 August 2010; on the same date, a grant of probate of written will was made to the respondent. This was obviously an error on the part of the court because it is either the deceased died testate or intestate; if he died testate the petitioner would be entitled to probate of written will or grant of letters of administration with the will annexed. If on the other hand he died intestate, only a grant of letters of administration intestate would be made. I will revert to this issue later as it appears to be the central point in the application before court.

By a summons dated 11 July 2011, the respondent applied to have the grant confirmed and sought to have the deceased's estate described as Title No. Aguthi/Gaki/86 shared out between herself and the first two applicants apparently in accordance with the will. The grant was confirmed on 25 November 2011 and according to the schedule on its face, the respondent inherited 7.3 acres of the deceased's estate while the first two applicants got an acre each.

On 15 January 2014, the first two applicants filed what they described as 'notice of objection' basically challenging the will the basis upon which the petition had been made. Later, more particularly on 7 April 2014, they filed a summons for 'rectification or annulment of grant' under sections 58 and 76 of the Law of Succession Act, cap. 160 and rule 44 of the Probate and Administration Rules. It is this application that is the subject of this judgment.

According to the affidavit sworn by Robert Kariuki Ngunyu in support of the summons, the deceased was their step-brother and the respondent is the deceased's sister. Their father one Ngunyu Ndangaruri had two wives; the first wife was Teresia Wangechi Ngunyu while the second wife was Wanjiru Ngunyu both of whom are deceased as well.

The deceased, together with the respondent and one John Wambugu Ngunyu were born in the second house while the first two applicants are from the first house; I gather that the third applicant is a son to Kiama Ngunyu who was also a son from the first house.

It is also the applicant's case that although the deceased is registered as the absolute owner of the Title No. Aguthi/Gaki/86 he held it not only for himself but also in trust for the rest of the children of Ngunyu Ndangaruri in the two houses including the applicants. Apart from this particular parcel, he also owned two other parcels which are identified as Title No. Aguthi/Gaki/552 and Title No. Aguthi/Gaki/431.

They have sworn further that the deceased was illiterate and mentally stable and thus did not have capacity to write a will; in any event, so they deposed, he was so ill at the time the will is said to have been written that he couldn't have written it even if he was literate and of sound mind.

They also disputed the will on the basis that the purported attesting witnesses were strangers to the deceased's family and it is possible that they were the respondent's hirelings.

For these reasons, the applicants sought to have the grant of probate revoked on the specific grounds that the proceedings to obtain it were defective in substance; that it was obtained fraudulently by the making of a false statement or by concealment from the court something material to the case; that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

It appears the respondent did not file any replying affidavit to the applicants' application; all I find in the record is a supplementary affidavit which she swore on 2 November 2016 on which she exhibited the English translation of the will. That notwithstanding, on 5 June 2014 parties took directions to the effect that the summons be disposed of by way of oral evidence.

I had the opportunity to hear them and their respective witnesses on diverse dates between 11 June 2018 and 2 October 2018. By and large, the applicants reiterated their depositions in the affidavit in support of the summons.

The first applicant disputed the will stating in his testimony that his step-brother suffered from amnesia and was also illiterate. Even then, he admitted that the deceased lived on his own and cultivated coffee on the suit land where he occupied one part while he occupied the other part with his brother Paul Ngunjiri Ngunyu. The latter agreed with him in his evidence and testified that he and his brother settled on the suitland as early as 1984.

John Wambugu, the deceased's only brother agreed with his step brothers that indeed they lived on the suit land; he himself lived on Title No. Aguthi/Gaki/552 with Joseph Ngunyu; this parcel of land is, apparently, still registered in the name of their father. He testified that being the deceased's brother, he was entitled to share of his estate. Also testifying to the fact that the first two applicants are settled on the suitland was Joseph Murimi Mwaniki who was at some stage the acting chief of Gakii location where this land is apparently located.

Except for the question on the validity of the will, the respondent agreed with her brother's and step brothers' evidence. She insisted that the will was valid and that her deceased brother left it with an advocate in Nyeri town. She testified that this will was written in an advocate's office in Nyeri and it is in that office that it was kept.

Contrary to her testimony, one of her witnesses, Simon Ngunjiri Mutahi testified that infact he was the one who wrote the will at a Nanyuki hospital where the deceased was admitted; he did not, however, say whether the deceased signed the will. The only other attesting witness identified as Michael Kahiu Munuhe did not testify and neither did the advocate who is alleged to have kept the will.

The central question in this dispute is whether the will upon which the grant sought to be confirmed is a valid will; if this court finds that it is in fact valid then it should be enforced. If on the other hand the court finds that it is invalid, then the deceased will be deemed to have died intestate and the intestate provisions of the Law of Succession Act will automatically apply to the succession to his estate.

Irrespective of whether the court finds that the deceased died testate or intestate another equally important question to consider is whether the applicant's claim on the deceased's estate on the basis of what I suppose is a customary trust is tenable.

On the question of the will, the capacity of the deceased to make will at the material time has been questioned; it must be stated from the outset that section 5 of the Law of Succession Act spells out the basic requirements of what constitutes a testator's legal capacity to make a will; this section reads as follows:

> ***5. (1) Subject to the provisions of this Part and Part III, any 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) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.***
>
> ***(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.***

At 50, the deceased was, no doubt, an adult capable of making a will to dispose of his property if he was of sound mind and he knew what he was doing. Everything else being equal, the court is entitled to assume that any testator is such a person of sound mind and knowledge any time it is called upon to make a grant of probate or a grant of letters of administration with the will annexed; at least, this is what I understand subsection (3) to be saying. And it should be for this reason or partly for this reason that subsection (4) places the burden on the person disputing the state of mind of the testator at the time of making the will to prove that the testator was of unsound mind and, therefore, he may not have been aware of what he was doing.

The underlying principle in these provisions was addressed in **Banks versus Goodfellow (1861-73) ALL ER Rep 47** more than a century before the enactment of the Law of Succession Act. In that case the court addressed the then nagging question of the effect of a testator's partial or complete mental illness on his capacity to make a will and acknowledged that, at the very basic level, the disposition of one's property by way of a will is generally influenced by instincts, affections and common sentiments of mankind. Therefore, it is the exercise of a power involving a moral responsibility so grave that the possession of the intellectual and moral faculties common to human nature should

be insisted upon as an indispensable condition (to any will).

And why is this so? It is essential to the exercise of such powers that the testator understands, among other things, the nature and effects of his acts; the extent of the property which he is disposing; the claims to which he ought to give effect and, to this extent, no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties. The upshot is that no insane delusion should influence his will on disposing of his property, and bring about a disposal of it which would not have otherwise been made. (See pages 55 and 56 of the court's judgment).

It follows that "***if the human instincts and affections or the moral sense is perverted by a mental disease…if reason and judgment are lost and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions and to lead to a testamentary disposition due only to its baneful influence, in such case it is obvious that the condition of testamentary power fails, and a will made under such circumstances ought not to stand".*** (page 56).

Even then the court endorsed the notion that a degree or form of unsoundness of mind which neither disturbs the exercise of the faculties necessary for making a testamentary disposition nor is incapable of influencing the result ought not to take away the power of making a will or place a person so circumstanced in a less advantageous position than others with regard to his rights. It was noted that, in considering whether or not to give effect to a testamentary disposition, it must always be borne in mind that the absolute and uncontrolled power of testamentary disposition conceded by law is founded on the assumption that a rational will is a better disposition than any that can be made by the law itself. Thus, though a mental disease may exist but it presents itself in such a degree and form as not to interfere with the capacity to make a rational disposition of property, the testator's right to dispose of his property should not be taken away.

As noted, there is a legal presumption under the law that the testator is of sound mind; thus, capacity is presumed in cases where a duly executed will is put forward, if, on the face of it is rational. This, however, is a rebuttable presumption and where a real doubt is raised about capacity, then the burden shifts to the propounder to prove, on the balance of probabilities, that the maker of the will indeed had capacity. (see **Re Key deceased [2010] EWHC 408 (Ch), [2010] WTLR 623)**

If the fact that a testator has been a subject to any insane delusion is established, a will must be regarded with great distrust and every presumption should in the first instance be made against it.

Weighed against this legal background, it should be obvious that the applicants in the present application have not proffered any evidence that the deceased was under such sickness that may have influenced his mind to such an extent that he probably neither knew or understood the effect of making a will. It may be true, as both parties agreed, that at the time the will was made the deceased was seriously sick and a fortiori, he died a few months thereafter; however, as long as it has not been demonstrated that the sickness was of such intensity that the deceased was incapable of making a rational decision in respect of disposition of his property, he cannot by the fact of sickness alone, be deprived of his testamentary power to make bequests. The point is, the applicants have not discharged the burden upon them that the deceased was incapable of making a will because he was incapacitated in that regard.

But that is not the end of the matter; capacity to make a will is one thing but compliance with the formalities of a valid will as prescribed in section 11 of the Act is another thing altogether. Just to be certain of these prescriptions, it is necessary that I reproduce the entire section here; it reads as follows:

> ***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.***

The circumstances under which the will in question is said to have been made and subsequently filed in court have left me with a significant doubt in my mind as to whether indeed the deceased ever made the will.

The basis of my doubt starts from the contradictions in the testimony of the propounder herself and her witness who, of the two attesting witness required by law to attest to a will, was the only one who testified. The respondent testified that the will was made in an advocate's office and it is in that office that it was kept until it was filed in court. The supposed attesting witness, on the other hand, testified that as a matter of fact, he is the one who wrote the will upon the instructions of the deceased who was then bedridden in a Nanyuki hospital.

Regardless of where the will was made, there was no evidence that the attesting witness who had the additional responsibility of writing the will, assuming it was done at the hospital as he claimed, or the advocate, if it was made in an advocate's office, ever read the will over to the deceased to ascertain that the deceased not only knew and understood what he had dictated but also that his intentions on disposition of his property had been properly captured. Again, it was never suggested that this attesting witness ever saw the deceased sign the will before he appended his own signature either at the hospital or at the advocate's office. Neither the advocate nor the second attesting witness testified further clouding the issue whether the will was ever written and if it was whether it was read over to the deceased and if it was, whether he signed in the presence of the attesting witnesses.

The record shows that the petition for probate or for grant of letters of administration was made in the year 2010. It is apparent from the petition that it was drawn and filed by the firm of Messrs. Macharia and Company Advocates. The will that was filed alongside the petition was a typed copy though certified in Kikuyu language without any translation. No explanation was given why the learned counsel could possibly have filed a copy of a will that was not in the language of the court without any translation. Strictly speaking no grant of probate or grant of letters of administration ought to have been made based on this will.

If the evidence of the attesting witness is anything to go by, the will that he prepared was handwritten; no explanation was given as to the whereabouts of the handwritten version of the will and also the circumstances under which it was eventually typed. There was also no evidence whether this typed version of the will was ever read over to the deceased before he signed.

When I consider all these vitiating factors, I am bound to agree with the applicants that the deceased did not make any will; the purported will on record has not been propounded to my satisfaction or at least, on a balance of probabilities. In the circumstances, I am left with no other option but to annul it and it so annulled. Accordingly, the grant made to the respondent is also revoked.

Having come to this conclusion, it is inevitable that I have to proceed on the presumption that the deceased died intestate meaning that the administration of his estate is subject to section 39(1) of the Act; it reads as follows:

> ***39. (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority***
>
> > ***(a) father; or if dead***
> >
> > ***(b)mother; or if dead***
> >
> > ***(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none***
> >
> > ***(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none***
> >
> > ***(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.***
>
> ***(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.***

Section 39(1)(c) is more pertinent to the question at hand. The undisputed evidence is that the deceased's immediate kin are his sister, the respondent, and his brother John Wambugu Ngunyu. According to section 39(1)(c) it is upon that the deceased's estate should devolve.

Turning to the question of trust, it is true that the applicant's claim upon the estate is based upon what I understand to be a customary trust. But at the same time, they have conceded, and there is evidence to the effect that the deceased was registered as the absolute proprietor of Title No. Aguthi/Gaki/86 as early as 1958. Although the applicants have testified that they have been living on the deceased land on the basis that he held it in trust for himself and themselves, they never filed any proceedings in a court of competent jurisdiction either prior to or after the deceased's death for a declaration that for a declaration that the deceased's land which now compromises his estate was held in trust for their benefit. Such proceedings are contemplated in Rule 41(3) of the Probate and Administration Rules which states:

> ***(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.***

I need not belabour the point that the question of whether there exists a trust or the applicants are beneficially entitled to the estate other than being the deceased kin ought to have been determined in separate proceedings. In the absence of a determination of their alleged rights under such proceedings I cannot proceed as if a trust exists and to this end I am bound to find and hold that the applicants have not proved that a customary trust exists and therefore their claim fails.

In the final analysis, I hold that the land referred to as Title No. Aguthi/Gaki/86 shall be transferred and registered in the names of Mary Wambui Ngunyu and John Wambugu Ngunyu as owners in common in equal shares.

Having revoked the grant made to Mary Wambui Ngunyu, I hereby make a fresh grant of letters of adminsiration intestate in the joint names of Mary Wambui Ngunyu and John Wambugu Ngunyu. The grant of these letters is confirmed in the foregoing terms. Parties will bear their respective costs.

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

Ngaah Jairus

JUDGE