



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CITATION NUMBER 11 OF 2012

IN THE MATTER OF THE ESTATE OF

KARIUKI WAHOME NJANGE.....(DECEASED)

WILLIAM WAHOME KARIUKI.....1ST PETITIONER

PETER MAINA KARIUKI.....2ND PETITIONER

=VERSUS=

JANE RUGIRO KARIUKI.....OBJECTOR

JUDGMENT

1. Kariuki Wahome Njage died on 29/8/2011. He was survived by Jane Rugiro Kariuki (a widow) and 9 children from his marriage to Zipporah Nyambura Kariuki (who pre-deceased him) and 3 children from his marriage to Jane Rugiro Kariuki.

2. Upon his death there was a back and forth tussle on the filing of a succession cause culminating in a consent which was not abided to and the Court directed the setting aside of the consent and leave was granted to Peter Maina and William Wahome (hereinafter the petitioners) to apply for letters of administration which they did on 12/8/2014.

3. Jane Rugiro (herein the objector) filed an objection and a petition by way of a cross petition application for a grant (under Section 68(2) of the Law of Succession Act and Rule 17(5) of the Probate and Administration Rules on the 23/9/2014. The thrust of her objection and cross petition is that the deceased died testate.

4. The objection was heard by way of oral evidence.

THE OBJECTOR'S CASE

5. The objector testified that the deceased had told her to refer to one James Karanja who had details about the deceased's wishes. The said Karanja informed her that there existed a will of the deceased executed at Mr. Muhia Advocate's office.

6. Karanja took her in company of all the children of the 2 houses to Mr. Muhia's offices. Mr. Muhia

read the will to all and gave each a copy. Everybody was content with the will. She produced the will as an exhibit. She also produced some handwritten wishes of the deceased which she states are same as those in the executed will. 2 children who share a name Alice Wandia were not provided for.

7. She stated that parcel of land number Nyandarua/Upperhill Gilgil/66 which was listed in the will was registered in the names of Zipporah Nyambura, widow of deceased (deceased).

8. On cross examination, the objector stated that in 1998 an agreement was reached on all the properties of the deceased which agreement was signed by the beneficiaries and the deceased. The document was handwritten. It contains the will of the deceased.

9. She acknowledged that parcel No. Nyahururu 55 had been distributed by the deceased during his lifetime. Documentation was done but titles were not processed. The objector was given a portion of parcel 55.

10. She denied that her husband was a sick man when he wrote the will.

11. Shown some specimen signatures of the deceased on his ID card, a death announcement form and one on a Power of Attorney, the objector states that those signatures are not similar to the one on the will. She, however, stated that she could not tell the lapse of time between the period when earlier signatures were appended and the one on the will was appended.

12. James Karanja told the Court that the deceased was a neighbour and friend. On 19/7/2011, the deceased asked him to accompany him to Muhia and Co. Advocates. He had an intention of making a will. He was sober and in good health at the time. The deceased gave his wishes to Muhia Advocate who recorded and had them typed. He read over the will to the deceased who confirmed it was correct. The deceased signed, Karanja signed and the Advocate signed. The deceased and Karanja were given a copy each. The advocate retained a copy.

13. On cross-examination, he acknowledged that the letters “Wa” in the signature appended to O Exh1 which reads Kariuki “home” were omitted.

14. Mr. Sylvester Mwangi Muhia Advocate told the Court that he received the deceased in his offices on 19/7/2011. The deceased was accompanied by one Karanja. The deceased was sickly but in his full mental capacity. He recorded the deceased’s wishes in the will which he produced in evidence.

15. On cross-examination, he noted that parcel number 66 was not in the names of the deceased and if he had had that fact, he would have known it did not belong to the deceased. He had occasion to read the will to the family on 6/9/2011. Despite the apparent disparity in the signatures, Mr. Muhia affirmed that this was a sickly old man and he signed in his presence.

THE PETITIONER’S CASE

16. William Wahome Kariuki (the 1st Petitioner) testified that he was called to Muhia’s office and a will was read to him. He was given a copy of the will. He produced the copy in evidence. He queries the disparity in the signatures Kariuki “Home” and Kariuki “Wahome” seen on pages 1 & 2 of the will.

17. He produced a copy of minutes of a meeting held on 20/10/1998 signed by deceased. He referred to a Power of Attorney signed by the deceased.

18. He disputed the alleged will on grounds that the signature on the will is not his father’s. He produced a title deed in respect of plot number 66 which shows the land belonged to Nyambura Kariuki. He says the will omitted his sisters.

19. Peter Maina Kariuki testified that the deceased was on and off hospital in the year 2011. He suffered from cancer and hypertension. He produced a medical report. It shows the deceased had been admitted

in hospital on 29/7/2011 to 3/8/2011 and from 10/8/2011 to 12/8/2011. The will is said to have been written on 19/7/2011.

20. The witness produced certificates of official searches. Parcel number 55 is shown to belong to the deceased. The witness disputes the will based on the signatures thereon.

21. On cross-examination, he stated that there is no evidence that the deceased was admitted in hospital on 19/11/2011. He stated deceased was 90 years old. The witness produced a document (death announcement) signed in 1979 (actual year on document is 1977). He confirmed going to the Advocate's office where the will was read.

22. On further cross examination, he affirmed that in a meeting held in 1998 minutes were recorded and signed by the deceased in which the witness was to get parcel number 471. He asserts that there is a difference between what was agreed in 1998 and the will. Pressed further, he states there is no difference.

SUBMISSIONS

23. Both parties file written submissions.

ANALYSIS AND DETERMINATION

24. I have had occasion to consider the pleadings, the evidence and the submissions by learned counsel.

25. Of determination is whether the deceased died testate or intestate.

26. It is the objector's case that the deceased died testate having made a valid will. This fact is contested by the petitioners.

27. What is a valid will and does the will allegedly made by the deceased meet the criteria? **Section 11** of the **Law of Succession Act** provides;

“Section 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 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 from the attestation shall be necessary.”

28. The objector's evidence as adduced by the objector, Mr. James Karanja and Mr. Sylvester Muhia Advocate is that the deceased was taken to Mr. Muhia's Advocate by Mr. James Karanja to make a will. He duly made one and the same was witnessed by Mr. Karanja and Advocate Muhia. That will has been produced in Court.

29. For the petitioners, it is their case that the deceased did not make the will alleged. At the time, he was sickly. The signatures in the will are not his. He included land that did not belong to him in the will.

30. I have applied my mind to the rival evidence herein. I note that Mr. Karanja and Mr. S. Muhia

Advocate are independent witnesses in these proceedings with absolutely nothing to gain in the proceedings.

31. Mr. Muhia, an officer of this court and a lawyer of many years standing has confirmed that the deceased appeared before him for the making of the will, the same was made and duly signed. Mr. Muhia goes ahead to candidly acknowledge that at the time the deceased, an old man, was ailing. He is quick to offer, however, that the deceased was in a sober frame of mind, In his own words he states “he was sickly but in his full mental capacity”. He confirmed that what is in the will were the last wishes of the deceased. I place heavy reliance on this evidence.

32. I take note of the important emphasis given by Mr. Muhia Advocate during cross-examination when he states, again in his own words “The signatures do not look the same. This was a sickly old man. He however signed in my presence.”

There is no evidence on record that the deceased had no mental capacity to make a will. Being sick does not make one loose capacity. In the case of **Vijay Chand Rakant Shah - vs - Public Trustee, Nairobi Court of Appeal Number 64 of 1984**, the Court held that **a will was valid where the deceased was very sick from diabetes at the time he executed his will.**

33. The evidence of Mr. Muhia Advocate is corroborated by that of Mr. James Karanja, another independent witness with no discernable gain from the estate under reference.

34. It is also instructive to note that all parties acknowledge being called to Mr. Muhia’s Advocate’s office for the reading of the will proof that Mr. Muhia had a copy of the will in his office.

35. In rejoinder to his evidence is the evidence of PW2 and PW3 whose main contentions were the alleged disparity in the signatures, the fact of illness of the deceased and the inclusion of the property not registered in the names of the deceased in the will.

36. On the signatures, once the petitioners disputed the same, the burden of proof was on them to show that the signatures on record in the will were not the deceased's.

37. The specimen signatures from ID card, Power of Attorney and a death announcement signed in 1977 is not prove enough. Neither the Court nor the petitioners have the capability to confirm the author of the signature. The duty lay on the petitioners to call in expert evidence for an expert opinion on the signatures.

38. From the naked eye, it may appear that there are discrepancies in the signatures on the will produced.

39. However, an advocate of long standing has confirmed on oath that the signatures were appended in his presence by an old sickly man (which could in itself explain the disparities resulting for example from the natural shaking of the hands of a 90 year old) and this signing was witnessed by James Karanja. In any event, the lapse of time from the time the documents exhibited by the petitioners were made and the time the will was executed is enormous and the deceased may not have been expected to sign the same way.

40. Certainly, the inclusion of a property which belonged to a different person in the will is an error. It does not form part of the free property of the deceased. **Section 3 of the Law of Succession Act** defines free property in the following terms;

“free property” in relation to a deceased means the property of which that person was legally competent, freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death.”

41. The parcel of land Nyandarua/Upper Gilgil/66 registered in the names of Nyambura Kariuki was not therefore available as a free property of the deceased.

42. Any bequest made in respect of that parcel of land must fail.

43. Any arguments relating to an agreement or wishes of the deceased exhibited vide minutes of a meeting held in 1998 cannot vitiate the will as in the will made on 19/7/2011. The deceased revokes all wills made by himself before and he declared the will of 19/7/2011 to be the last will. In any event there is striking similarity in the distribution allegedly done in 1998 and the provisions in the will.

44. Heavy weather has been made of the deceased's health condition at the time the will was signed. The exhibited admission to hospital do not show that the deceased was admitted in hospital on 19/7/2011. Thus the mere fact of being admitted to hospital prior to and after the will was made is no prove that the deceased didn't have the opportunity to make the will.

45. There is a rebuttable presumption under Section 5(3) of the Law of Succession Act (Cap 160 Laws of Kenya) that a person making a will is of sound mind and that the will has been duly executed. The essentials of testamentary capacity were laid out in the case of **Banks - vs - Goodfellow [1870] LR 5QB 549**. The burden of proof in the first instance lies upon the person alleging lack of capacity. (See **Re Estate of Gatuthu Njuguna (Deceased) (1998) eKLR and Halsbury's Laws of England 4th Edition Vol 17 at page 903 – 904**).

46. From the foregoing, I am satisfied that the deceased died testate. One bequest in the will, however, fails as the deceased did not have the necessary capacity to dispose of it as he did. This is in respect of parcel No. Nyandarua/Upper Gilgil/66.

47. A grant of letters of administration is to issue to Jane Rugiro Kariuki. The said Jane Rugiro Kariuki to move the Court for confirmation of the grant as soon as possible in any event not more than 90 days from the date hereof. Such application be served on all beneficiaries.

48. In view of the relationship of the parties, each party is to bear its own costs.

Dated and Signed at Kisii this 10th day of January, 2018.

A. K. NDUNG'U

JUDGE