REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO-FAMILY DIVISION

SUCCESSION CAUSE NO. 45 OF 2017

IN THE MATTER OF THE ESTATE OF SAMUEL NGUGI MBUGUA (DECEASED)

BETWEEN

JANE NJERI MUNGAI.....1st APPLICANT

MARTIN MUNGAI.....2ND APPLICANT

JOSHUA MBUGUA A.K.A PETER MBUGUA NGUGI.....3RD APPLICANT

SUSAN WANJIRU AKA SUSAN NAIPONO LETUYA.....4TH APPLICANT

VERSUS

ALLAN GITAU MBUGUA.....1ST RESPONDENT

GICHAGE KIMANI.....2ND RESPONDENT

RULING

INTRODUCTION

1. The deceased Samuel Ngugi Mbugua died Testate in September 2005.

2. The validity of his will was challenged and upheld by Musyoka J in Succession Cause 1574 of 2006 in a judgement delivered on 30 th June 2017.

3. Following that judgement, the Applicants filed the instant application brought under Sections 26 and 29 of the Law of Succession Act and Rules 45 and 49 of the Probate and Administration Rules for orders that adequate provision be made for Jane Njeri Mungai, Martin Mungai, Susan Wanjiru A.K.A. Susan Naiponoi Letuya and Peter Joshua Mbugua A.K.A Peter Mbugua Ngugi. The application was supported by an affidavit sworn by the Applicants on 21st July 2017. The applicants subsequently filed a further affidavit sworn on the 30th October 2017.

4. The grounds for the application were as below:

a. The applicants are the 2nd wife and children of the late Samuel Ngugi Mbugua thus beneficiaries of the estate deceased.

b. It is alleged that the deceased left behind a will which will, did not adequately provide for Martin Mungai, Susan Wanjiru A.K.A Susan Naipono Letuya & Peter Joshua Mbugua A.K.A Peter Mbugua Ngugi and at all for Jane Njeri Mungai

c. Though Jane Njeri Mungai has unsuccessfully challenged and given her Notice of Intention to Appeal against the decision challenging the validity of the alleged will she is still entitled to apply for reasonable provision having not been provided for at all.

d. Though Martin Mungai, Susan Wanjiru Aka Susan Naipono Letuya & Peter Joshua Mbugua A.K.A Peter Mbugua Ngugi have all been provided for the provision is not adequate and aligned to the nature and amount of the deceased's property.

e. Whereas the net value of the deceased estate as applied is kshs 4,494,500/= the deceased only left property whose net value is kshs 150,000/= to his 2nd Family and only provided for 3 out of the 4 dependants.

f. The deceased had not made any other advancement to his family and seems to have overlooked them and/or discriminated against them in his distribution.

g. The reason given by the deceased in not providing for Jane Njeri Mungai are wanting and not in line with the law.

h. The deceased did not give any reasons for having insufficiently provided for Joshua Mbugua A.K.A Peter Mbugua Ngugi Martin Mungai, Susan Wanjiru Aka Susan Naipono Letuya & Jane Njeri Mungai whose circumstance and situation in life are not so advantaged so as not to have been equally provided for like the rest.

5. The application was opposed by grounds of opposition filed on the 10th October 2017. The grounds espoused were that the deceased will which was found valid by Justice Musyoka in his judgement dated 30th June 2017 ought to be implemented to the letter as it expressed the deceased wishes. No valid/tenable reason has been advanced as to why his wishes should not be honoured; during the propounding of the will the dependants herein relied on inter-alia the alleged lack of provision to render it invalid and their application herein which relies almost entirely on the said ground is to all intent and purpose res judicata; the deceased in making his will was of sound mind and the will as it emerged from the evidence when propounding the same was influenced by several factors which amongst others included his relations with each of the dependants; it was not incumbent on the deceased to provide for each dependant to begin with and secondly there is no law guiding the deceased to provide all dependants equally or proportionately; there is no law that guides a person on what proportion he/she should bequeath any dependant; no sound reasons(s) has been provided by the dependants to warrant/merit cancellation or reversal of the deceased wishes; the application is not well founded in law, is founded on empathy and/or emotion and is in the circumstances obtaining untenable; it is more than 12 years since the deceased passed on testate and it is only fair that the beneficiaries are entitled to enjoy their inheritance/gift as the deceased wished.

6. The Respondent also filed two affidavits sworn by Edward Kiarie Ngugi and Peter Mbugua Ngugi dated 17th day of November 2017.

APPLICANTS SUBMISSIONS

7. Makumi for the Applicants identified the issues for determination as:

a. Whether the marriage between the deceased and the applicant was legally dissolved.

b. Whether the applicants are dependants of the deceased?

c. Does the decision by Justice Nambuye in her ruling delivered on 8th July 2010 and the decision by Justice Musyoka delivered in his ruling of 30th June 2017 render this application res judicata?

d. Whether the proceedings before you relate to contribution in the division of matrimonial property or succession of the deceased's estate.

e. Whether the applicants were reasonably provided for and if not, should the court interfere and ensure equitable provision.

8. On the first issue, Mr Makumi submitted that the temporary separation as between the deceased and his wife Jane Njeri Mungai did not amount to a divorce. To the contrary it was proof that Jane Njeri Mungai cohabited with the deceased on Ngong/Ngong 12680 and left of her own volition. Citing Section 66 of the Marriage Act, counsel submitted that the marriage between the deceased and the applicant was never dissolved as the law on dissolution of marriages was never put in play.

9. Regarding the second issue, it was submitted that the Applicant, Jane Njeri Mungai was a wife by virtue of section 3 (1) of LAW OF SUCCESSION ACT as her separation from the deceased was only temporary and the marriage had not been dissolved and a decree absolute issued. Further, it was submitted that all the applicants fell within the meaning of dependant as contemplated by section 29 of the Law of Succession Act. Mr Makumi was quick to note that the will of the deceased referred to Jane as a wife and had provided for the children as dependants.

10. It was counsel’s submission that the applicants therefore qualified to move the court under section 26 of the Law of Succession Act.

11. When it came to the issue of res judicata, Makumi submitted that the applicants have not in the past applied for reasonable provision and what Jane Njeri Mungai did was to challenge the deceased will and her being unsuccessful cannot now pre-empt the applicants so applying as the Court would not have moved itself Suo moto. Counsel asserted that both Justice Nambuye and Justice Musyoka held that if the applicant was unsuccessful in challenging the deceased will, they would still be entitled to move the Court under Section 26.

12. As for reasonable provision, counsel began by stating that the deceased in his Will acknowledged Jane Njeri. Despite the acknowledgement the deceased did not provide for her for his reasons that they were "permanently separated". It was further submitted that the deceased did not expressly provide for his daughter Susan Wanjiru Ngugi.

13. Counsel urged the court to take into account the provisions of Section 28 of the Law of Succession Act in considering whether to grant the Applicants prayers for reasonable provision.

14. It was argued that neither the deceased nor the applicant within the deceased's lifetime terminated their marriage or moved the Court under section 7 of the Matrimonial Property Act so that the Court would determine their interests in the matrimonial property.

15. Counsel submitted that the deceased only made complaints of his 2nd wife which perhaps made him paranoid leading him to exclude her in his Will despite the two having cohabited since 1993 and solemnized their marriage on 28th June 2002. Since no evidence was lead to the effect that they two had divorced and before his death divided their matrimonial property there was no legal justification in failing to provide for her.

16. It was further submitted that since the deceased in his Will acknowledged the Applicant's children as his children and even expresses his intention to provide for them equally, he should have equally or equitably provided for them. For this argument, learned counsel moved the court to consider the decisions in **Nairobi Hcsc 523 Of 1996 In The Matter Of The Estate Of James Ngengi Muigai (Deceased) [2005] Eklr On 214 April 2005** and **Nairobi HCSC 522 of 2001, In The Matter Of The Estate Of Kam Wandaka Alias Geoffrey Kamau Wandaka (Deceased), Evaly Wagitie Kamau & Another V Jane Wanjiru Kamau (2006) eklr.**

17. In conclusion, learned counsel for the Applicants urged the court to allow the application dated 21st July 2017 and make such equal or equitable provision to all members of the deceased's second family so that they can at least get 45% of his estate with the larger 55% going to his 1st family.

RESPONDENT'S SUBMISSIONS

18. it was the Respondent's Advocates submission that the deceased had no obligation whatsoever to equitably provide all his dependants. Counsel argued that a testator usually bequeaths according to his own desire. There is no obligation that he provides all persons

19. Learned Counsel for the Respondents submitted that when deciding to make a will, it is important to consider whether a particular person should be excluded who may ultimately have a claim against the estate. It is good practice to leave a letter with the will explaining why a particular person has been ignored or left with relatively small gift. In the case of Jane Njeri Ngugi the deceased stated he was separated from him at the time of making the will. This assists the court in arriving at decision as to whether a beneficiary is entitled to any provision save what is in the will. Counsel invited the court to the decision in the **Estate of Wilfred George Makunda, Nakuru High court Succession Cause 1 of 2002** where it was held that a testator has power to dispose of his property as he pleases and the court is bound to respect those wishes as long as they are not repugnant to the law.

20. It was Counsel's submission that there was nothing repugnant to the law in the bequests made by the deceased. He catered for the second family save his second wife who from the will we can deduce was left with nothing because of the acrimonious fall out.

21. It was submitted that the deceased wishes ought to be respected as his intention in making the bequests as he did was to bequeath each family with what was acquired during this respective marriage.

22. The court was invited to the decision in **the Estate of Pratik Ramesh Megji Shah Nairobi Succession cause 2355 of 2013** for the proposition that the Will of the departed must be honoured as much as possible.

23. Counsel went on to submit that the 1st Applicant was hostile to her husband and made no amends before his demise. She ought not to benefit from the provisions of Section 29 of the Law of Succession Act.

24. On the issue of whether the Applicants were dependants of the deceased, counsel for the Respondents submitted that indeed the dependants fell under dependants as contemplated under Section 29 of the Law of Succession Act.

25. It was further submitted that evidence that Joshua Mbugua was shown where to build his house when he grew up had no probative value as it was uncorroborated. Evidence was led that in the traditional agikuyu setup, a minor such as Joshua Mbugua as he then was, could not put up a thingira. Only adults are shown where to build their home.

26. On the alleged value of the properties in question., it was submitted the valuations so to speak are unscientific. It would be unwise to go by them.

27. Counsel addressed the court on the 1st Applicants alleged lack of candour expressing that the 1st Applicant had in her original application failed to reveal material facts yet she now sought equity from the court.

ANALYSIS AND DETERMINATIONS

28. I have given due consideration to the submissions by both parties and to the pleadings and evidence on record. The Applicants raised five issues for determination but anchored their arguments on four main points. The Respondents on the other hand only raised the question of whether the Applicants had been adequately provided for.

29. From the submissions, it is clear that the Respondents have acceded to the Applicants falling under the meaning of dependants of the deceased as contemplated by Section 29 of the Law of Succession Act, I need not concern myself this point. I will briefly comment on whether the application is res judicata before proceeding to the substantive issue of adequate provision.

30. The doctrine of *res judicata* in Kenyan law is embodied or anchored on Section 7 of the Civil Procedure Act which states:

> ***"7. Res judicata***

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

31. The Court of Appeal in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** had this to say about res judicata

'The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.'

32. Applying the above principle to the instant case, it is clear that what was in contention in the earlier proceedings was the validity of the will. Musyoka J in his judgment opined that:

"I have stated in paragraph 13 here above that application before me is not premised on section 26 and therefore I ought not to consider whether or not I should make provision for the applicant. My reading of Section 26 is that Orders made under it ought to be on application, and not suo moto. There are criteria to be met, set out in Section 25, the facts warranting exercise of discretion under Section 26 are to be brought out in an application under that provisions"

33. It follows therefore that the instant case is not res judicata as it is concerned with different issues, that is adequate provision for the dependant. Though the issue might have been argued in the earlier proceedings, the context in that case was in challenge to the validity of the will. It has been settled that the will was indeed valid. This therefore does not preclude the Applicants from applying for adequate provision under Section 26 of the Law of Succession Act.

34. Before going any further, I feel that it is important to note at this juncture that the Will of the deceased was found to be valid by Musyoka J in his judgement dated 30th June 2017. The following determinations will therefore be based on this premise.

35. The law on adequate provision for dependants is Section 26 of the Law of Succession Act which is couched in the following terms:

"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."

36. It is the Applicants' contention that, the deceased in his will, failed to adequately provide for them and specifically for Jane Njeri and Susan Naipanoi Letuya. The Respondents rebuttal is anchored on the testamentary freedom of the deceased. Their position is that that the deceased had no obligation whatsoever to equitably provide all his dependants as a testator usually bequeaths according to his own desire.

37. Testamentary freedom of a testator can only go as far as it is not in contravention of the laws of the land. A reading of the will left by the deceased reveals that the deceased did not provide for his wife Jane Njeri. His reasoning as per his will is that they were permanently separated.

38. It has been held by the Court of Appeal in ***Elizabeth K. Ndolo Vs George.M.Ndolo Civil Appeal 128 Of 1995*** that:

'' in Section 5 every adult has an unfettered testamentary freedom to dispose his or her property by will any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property.……given by section 5 must be exercised with responsibility, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime.''

39. In ***The Matter Of The Estate Of Late Sospeter Kimani Waithaka Succession Cause 341 Of 1998*** the Court held*;*

''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 for certain beneficiaries or dependents, maybe for their special goodness to the testator, the Court should not freely intervene to alter them.''

40. In construing the contents of a will, the first principle is to discover the intention of the testatrix as clearly stated in the will as a whole. This was articulated by Lord Romer of the House of Lords in the case of **Perrin v Morgan 1943 AC 399-420** where the court stated as follows:

" I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will

was made. To understand the language employed, the court is entitled to use a familiar expression, to sit in the testators armchair. When sitted there however, the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said.

41. In addition, the court stated further

"rules of construction should be regarded as a dictionary by which all parties including the court are bound, but the court should not have recourse to it to construe a word or phrase until it has ascertained from the language of the whole will read in the light of the circumstances whether or not the testator has indicated his intention of using the word or phrase otherwise than in its dictionary meaning. In other words, whether or not the testator has been in his own dictionary.

42. In **Re Bailley 1951 Chancery 421** it was held inter alia that:

"the law requires that the probate court not to speculate upon what paradventure may have been in the testator's mind. It is not the function of a court of construction to improve upon or perfect the testamentary dispositions. The function of the court is to give effect to the dispositions actually made as appearing expressly or by necessary implications from the language of the will applied to the surrounding circumstances of the case."

43. These cases raise profound questions about the nature of family obligations, the relationship between family obligations and the state and the relationship between the freedom of property owners to dispose of their properties as they see fit.

44. In my considered view a will must be interpreted in a manner that gives effect to the intent of the testator. That means that the court may only rectify a will if it is satisfied on clear and convincing evidence that the will did not reflect the testator's intention in bequeathing his or her to the beneficiaries.

45. The Constitution at Section 27 provides that a person shall not discriminate directly or indirectly against another person on a number of grounds including on account of sex, marital status, conscience or belief.

46. In the instant case, from the wording of the will, it can be inferred that the deceased intended to disinherit Jane Njeri who is his wife, notwithstanding their separation. This is unconscionable. The Applicants were directly maintained by the deceased during his lifetime, in his death, the contents of a written will should not and cannot be used to render persons who were directly under the deceased's care destitute. I can do better than reproduce Koome J's position in In **Nairobi HCCC 523 Of 1996 In The Matter Of The Estate Of James Ngengi Muigai (Deceased) [2005] Eklr:**

E M said that although she was separated and moved from the deceased home at Gatundu the deceased continued to give her money for her own needs and those of her children M and N. I am satisfied that this court should make a reasonable provision for the deceased's former wife. These persons were not provided for in the deceased will and I wish to follow the reasoning by the Court of Appeal Gicheru JA (now the Chief Justice) in the case of ***John Kinuthia Githinji Vs Githua Kiarie,& Others Nairobi CA. No. 99/89*** *whereby the observations of Cockburn, J was reiterated as in the case of* ***Banks Vs Good Fellow 1870 L.R.*** *as follows:*

"The law of every civilized people concedes to the owner of property the rights of determining, by his last will, either in whole or part, to whom the effects which he leaves behind him shall pass.....A moral responsibility of no ordinary importance attaches to the exercise of the right given. The instincts and affections of mankind, in the vast majority of instances, will lead men to make provisions for these who are nearest to them in kindred and who, in life have been the object of their affection..... The same motives will influence him in the exercise of the right of disposal when secured to him by law. Hence arises reasonable and well warranted expectation on the part of a man's kindred surviving him, that on his death effects shall become theirs, instead of being to strangers. To disappoint the expectation thus created and to disregard the claims of kindred to the inheritance is to mock the common sentiments of mankind and to violate what all men deeming an obligation in moral law.....

I agree with that passage that the Testator has power to dispose of his property but that freedom is not absolute. The expectations of our society in this case could be similar to the above passage, that is, the deceased was expected to make a reasonable provision for his former wife and children.

The honourable judge went on to add:

"…In this regard, this court should interfere with the deceased freedom to dispose of his property and make reasonable provision for the disinherited former wife and children. In this regard the court has to take into account the provisions of Section 28 in determining the reasonable provision and the nature and amount of the deceased's property…"

47. The above passage solidifies my position that the deceased's wishes ought to be varied to provide maintenance for a spouse that depended on him in his lifetime. Having held as much, I must now take into account Section 28 of the Law of Succession Act which outlines the factors to be taken into consideration when making provisions for dependants to wit:

"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 past, present or future capital or income from any source of the dependant;

(c) the existing and future means and needs of the dependant;

(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;

(e) the conduct of the dependant in relation to the deceased;

(f) the situation and circumstances of the deceased's other dependants 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 dependant."

48. Koome J in **Nairobi HCSC 522 of 2001, In The Matter Of The Estate Of Kam Wandaka Alias Geoffrey Kamau Wandaka (Deceased), Evaly Wagitie Kamau & Another V Jane Wanjiru Kamau (2006) eklr** stated as follows:

"I have taken into consideration all the conditions laid down under Section 28 of the Law of Succession including the deceased attitude to his 1st and 2nd wife and Esther Nyambura. However, the deceased even if it is land did not recognize Esther Nyambura as his child or wife of his "son", he did not expel her from his household. Instead children were born and named after him and his 2nd wife. Both objectors recognize Esther as part of their household and in my view she cannot be thrown out at this eleventh hour that would occasion injustice to her and her children who have always considered themselves as the part of the deceased household.

Thus considering the extent of the deceased estate and considering that the deceased first two widows were only given one acre it would be met just that I make an order that the Executrix do make provision of one acre of land to be made available and Loc 15/Kimathe /477 for the deceased following dependants."

49. The deceased in his will made provision for the 2nd family to the effect that, of LR No. Kajiado/ Olchoro- onyore/6194 that is approximately 1.1Ha he allocated one acre to Joshua Mbugua and one acre to Peter Mungai, the balance of it was to go to Susan Wanjiru. The Applicants have contended that by this division, Susan would not receive a share. This is not the correct position. A conversion of 1.1Ha to acres results in 2.71816 acres. Simple mathematics dictates that the balance one two acres are removed would be 0.71816 Acres. This leaves only Jane Njeri without any provision.

50. The Applicants contentions as to the value of the land have not been substantiated as no valuation report has been tabled before this court. In the premises, the court will exercise its discretion in making its determinations.

51. At the time of his death, the properties attributable to the deceased were:

a. LR No. Ngong/Ngong/ 12680 approximately 2.144 Ha (5.168 Acres)

b. LR No. Kajiado/ Olchoro- onyore/6194 approximately 1.1Ha (2.7 Acres)

c. LR No. Loitoktok/Enperon/171 approximately 6.47498 Ha (16 Acres)

d. Kajiado Town Plot

e. Pension benefits

f. Post office bank accounts

52. The deceased in his will made bequests out of all his properties to the beneficiaries listed in his will, including the 2nd, 3rd and 4th Applicants but with the exception of the 1st Applicant.

53. Applying the preceding analysis to the instant case, this court will only interfere with the testamentary freedom of the deceased in order to make adequate provision for the 1st applicant who has not been provided for.

ORDERS

54. The executor of the will of the Estate of Samuel Ngigi Mbugua do make a provision for the 1st Applicant by annexing from LR No. Loitoktok/Enperon/171 one (1) acre to be given to Jan Njeri.

55. This being a family matter each party bear their own costs.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF APRIL 2018

…….

R. NYAKUNDI

JUDGE

In the presence of

Mr. Turunga for Mr. Makumi for the applicant present

Mr. Maseno for Kahonge for the respondent