REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 2783 OF 1997

IN THE MATTER OF THE ESTATE OF GITAU NJOROGE 'B' (DECEASED)

JUDGMENT

1. The deceased herein died on 17th June 1997. Representation to the estate was sought in a petition for probate of written will lodged herein on 19th December 1997 by Peter Njoroge Gitau and David Njoroge Gitau. The deceased was expressed to have had died testate having made a will on 17th September 1993. He was said to have been survived by two widows, Peris Gichiru and Esther Kiringa, and fourteen (14) children – Peter Njoroge, David Njoroge, Charles Kamweru, Geoffrey Njogu, Mary Wairimu, Wanyenji Gitau, Wilson Kinyanjui, Ruth Wangui, Solomon Munge, Richard Karuru, Alice Wairimu Mwaniki, Stephen Macharia, Hannah Nyawira and Allan Kanau. The deceased was expressed to have died possessed of the following assets – Githunguri/Muthike/171, Plot No. 627 Mwihike Farmers C. Ltd and 785 KPCU redeemable shares. A grant of probate of written will was made to the petitioners on 3rd March 1998. The said grant was confirmed on 30th April 1999 and there is a certificate of confirmation of grant to that effect. The land was shared out amongst the widows and the children in stated proportions, the coffee mill went to the children of Esther Kiringa, while the cash was shared by the widows at the ratio of 40:60.

2. What is for determination is the summons for revocation of grant dated 10th January 2003. It was brought at the instance of Richard Karuru Gitau and Charles Kamweru Gitau. In their joint affidavit in support of the said application, sworn on 10th January 2003, the applicants allege that the grant on record had been obtained fraudulently as it was concealed from the court that the deceased had made a will dated 20th January 1995, which had revoked the earlier one of 7th September 1993. Geoffrey Njogu, Gitau Thuo, Peris Gichiru, Joseph Kibe, Ruth Wangui, Mary Wairimu, Wilson Kinyanjui and Solomon Munge, all swore affidavits on 16th May 2003, in similar terms, supporting the revocation application. They argue that the deceased had revoked the will of 7th September 1993, adding that he was not on good terms with the respondents since 1994. They state that the deceased had sued David Gitau in Githunguri RMCCC No. 185 of 1996 after the former lodged a caution in Githunguri/Muthike/171. They express support for the mode of distribution of the estate stated in the will of 20th January 1995.

3. In reply Ann Nyawira, Esther Kiringa, David Njoroge, Alice Wairimu, Stephen Macharia and Allan Kamau swore affidavits on divers dates but in similar terms. They object to the application for revocation on ground that the deceased never made any other will apart from that of 7th September 1993 and that the one of 20th January 1995 was a forgery.

4. There are several other affidavits sworn by a diversity of persons. Francis Kamau Gatiba swore his affidavit on 9th May 2007. He states that the deceased had sold to him Githunguri/Nyaga/171 for Kshs. 550, 000.00, whereof he paid him Kshs. 374, 077.30. He filed suit for specific performance in HCMISCA No. 1470 of 2004, which the court had directed be heard together with the instant succession cause. Samuel Njoroge Njogu, Allan Kamau, Esther Kiringa Gitau and David Njoroge Gitau swore affidavits on 21st January 2008, to say that the deceased had subdivided his land and settled his two families on the two unequal parts. They state that each side of the family knows the side they are entitled to. David Njoroge swore an affidavit on 16th October 2008, on his efforts to refund the said purchase price but the purchaser declined to accept the cheque. James Mbugua Githinji swore his on 29th October 2008, to state that he was a member of the Githunguri Land Control Board when the deceased sought to subdivide his land and the Board rejected his application. Stephen Macharia swore his on 29th October 2008, to say that he followed up with the Chairman of the Land Control Board to establish whether consent had been granted but he was informed that it was not. Richard Karuru swore his on 25th November 2008. His case is that the deceased had expressed his wishes before he died on how Githunguri/Nyaga/171 was to be distributed. He even called elders on 10th February 1996 and gave them directions on the same. He has attached minutes of the alleged meeting to his affidavit. He thereafter went and obtained the consent of the Land Control Board and paid for the subdivision of the land.

5. Directions were given on 20th May 2003 that that the application would be disposed of by way of *viva voce* evidence, to determine the sole issue as to which of the two wills before court was the deceased person's valid will.

6. On 7th December 2004 orders were and to allow release of the two wills for the purpose of their being placed before a document examiner

for comparison of the alleged signatures of the testator on them with his known signatures. A report of the said comparison dated 17th July 2005 was filed in court on 5th November 2007.

7. The oral hearing began on 30th September 2013. The first on the witness stand was Richard Karuru Gitau. He stated that they were not agreeable to the will made in 1993. When the petition was filed they discovered from their father's file a receipt from an advocate called PSK Kimiti, which indicated that the deceased had made a will before him. The receipt was allegedly dated 23rd January 1995. He told the court that he went to the offices of the said lawyer, who admitted that he was holding a will made by the deceased, but said he could not disclose its contents to him unless he came accompanied by some two men, Thuo Njenga and Muiruri Wainaina, who were in fact his brothers-in-law, on account of their being husbands to his sister and half-sister, respectively. He took the two to the lawyer the next day and they were shown a copy of the will made on 20th January 1995. He was happy with it as it distributed the estate to all the beneficiaries, while the other will had not.

8. Christopher Mungai Gitau came next. He was a nephew of the deceased. He said he was a witness in Githunguri RMCCC No. 185 of 1996, but the matter was never concluded. He also testified on the meeting of 10th February 1996 when the deceased allegedly distributed his property amongst his widows and children. He also stated that the deceased had sold a portion of the land to Francis Gatiba. He said he did not know whether the deceased left a will, and he also said that he did not hear him tell the elders that he had one. He stated that he never discussed about a will with him, and he would not have been surprised to hear that he had made one.

9. Geoffrey Thuo Ng'ang'a came next. He said that he understood that he had been named an executor in the will of the deceased. He said he came to know of the will through Richard Kamau Gitau, who told him that an advocate called Kimiti had said he had a letter which he could not release unless he was present. He then went to the offices of that lawyer with Richard Kamau and Muiruri Wainaina, who had also been named in the will as executor. He stated that he and Muiruri were sons in law of the deceased. When they met the lawyer, he asked for their identity cards before pulling out a large envelop. He said he had a will and he would read it to them. The witness stated that the document had the signature of the deceased, and had been witnessed by Mr. Kimiti and his secretary. There was map attached to the back of the said will. He said he was unaware that anyone had applied for representation based on the said will. He said that at the meeting with the lawyer there was no child from the second house. He said that when he shared information about the new will with David Njoroge of the second house, David Njoroge said that they in the second house had another will, and were not interested in his will. He stated that he was unaware that both wills had been given to a document examiner. He said he had never seen the earlier will, but the one that named him executor had made a fair distribution of the estate, as it has provided for all equally.

10. Patrick Simon Kuria Kimiti followed. He testified that he was the advocate who drafted the will dated 20th January 1995 and was paid a fee of Kshs. 4, 000.00 for his services. He produced a receipt that he issued for the payment, dated 23rd January 1995 serial number 089. He stated that the will bore the signature of the deceased and the same was executed in his presence. He attested the deceased's signature, together with Sarah Wangui Nguiye, his secretary. He explained that the will was executed in his presence, then he called his secretary to come and sign as an attesting witness. He stated that the will bore a standard revocation clause. He said that the deceased was not his client before then and he had not previously acted for him in any other matter, and that he was introduced to him by his regular advocate, Mr. Kamonde, for the purpose of preparing the will. He stated that he could not recall whether the deceased came into his chambers accompanied by any other person. He said that he did not know the executors of the will, but they were named in the will. Neither did he know how they were related to the deceased, although the will said that they were the testator's sons in law. He said he did not know of the deceased's relatives, including Richard Karuru and Charles Kamweru. He said he could not recall whether the testator had told him that he had a previous will or other wills. He said that he did not know how the existence of the will of 20th January 1995 was discovered. He said that except for Mr. Kamonde none of the family members would have known that he had the will. He stated too that he was unaware that the said will and another had been subjected to forensic examination, adding that he would be surprised if the handwriting expert were to say that the signature on the will of 20th January 1995 was not that of the deceased.

11. The case for the respondent opened on 30th March 2016. David Njoroge Gitau was the first on the stand. He stated that the deceased was his father and that he, the witness, was one of the administrators of the estate. He said that the deceased called the family sometime in 1993 and told them that they were to go to Nairobi and visit the firm of Vohra & Gitau, Advocates. They did so, and while at the chambers they were introduced to Mr. Gitau, advocate. The deceased told Mr. Gitau that in his absence he was to release his will to him, the witness, and Peter Njoroge. He stated that they were not shown a copy of the will, the deceased merely introduced them to the lawyer. After the deceased died in 1997, of high blood pressure and diabetes, and was buried, the witness and Peter Njoroge, went to see Mr. Gitau, who gave them the will the deceased had talked about, and advised them to take it to their advocate. They took it to Mr. Kiania Njau who then moved the court in this cause for representation, and got probate. Thereafter the two went home and informed the family about the will. Some rejected it, protesting that the deceased had subdivided his property. At that point no one talked of another will. Later, the applicants moved for revocation of the grant of probate on grounds that the deceased had left another will made on 20th January 1995. He said that he and his co-administrator had not concealed the existence of the second will. He said that the two wills were subjected to examination by an expert who said that the signatures on them did not match that of the deceased, whereupon he and his co-administrator accepted the verdict, and so did the applicants. He said that the second will named his brothers in law as executors. He asserted that his father could not have done so as he was not in good terms with them for reasons that he stated in his testimony. He asserted that the will was not genuine as it had displaced him and his mother from the spots on the ground which they had developed. He conceded that there was a case at the Githunguri law courts between him and the deceased over the land in question.

12. Nicholas Kiania Njau followed. He said he was an advocate of the High court of Kenya practising at Nairobi. He said that in 1997 Peter Njoroge and David Njoroge brought him a will which had been prepared by the firm of Vohra & Gitau, Advocates. He was instructed to obtain probate of the said will. He did so, and a grant of probate issued. Later another will cropped up, prepared by PSK Kimiti, advocate. A dispute arose as to which of the two wills was genuine. Mr. Kamonde came in at that time to apply for revocation of the grant and produced the second will. He and Mr. Kamonde agreed to subject the two documents to examination by a document examiner. They did so and the document examiner found that the signatures on both wills did not match the known signatures of the deceased. He stated that neither he nor Mr. Kamonde had a quarrel with the report. He said that he was not instructed to dispute the findings of the handwriting expert. He confirmed that he did not draft the first will, it was merely brought to him to propound. He stated that as a lawyer his position would be that

once the document examiner found the two signatures did not match those of the deceased then the grant on record ought to be found not to have been proper.

13. Mackenzie Mweu came next. He was the document examiner to whom the two wills were given for examination. He testified that after examining the disputed signatures as against the known signatures of the deceased he concluded that they did not conform to the pattern of formation in the known signatures of the deceased. He stated that signatures are often affected by the age or sickness of the persons making them, but he added that their individual characteristics persist. He said he could not recall the dates of the known signatures of the deceased.

14. The respondents last witness was Ann Nyawira Gitau. She described herself as a daughter of the deceased. Regarding the wills, she testified that the first one reflected the wishes of the deceased as expressed by him previously, while the last will did not capture those wishes. She stated that the execution of the last will would dislocate her mother. She stood by the opinion of the handwriting expert that the signatures on both wills were not authentic.

15. At the conclusion of the oral hearing, I directed the parties to file written submissions. There has been compliance as both sides have filed their respective written submissions complete with supporting authorities. I have perused through the submissions and the authorities, and I have noted the arguments advanced.

16. The only issue for determination, going by the directions of 20th May 2003, is which of the two wills is valid.

17. The validity of wills and testaments is dependent on two general factors, capacity of the makers and compliance with the formal requirements regarding the making of the said wills and testaments. In the instant case, the parties have not raised questions on the capacity of the deceased to make the two wills at the time when the two were allegedly made, and therefore that is not a matter that the court should strain its mind in addressing. The issue for determination centres on the formal requirements.

18. The argument by the applicants is that the will that was used to initiate the instant cause was revoked by the will of 20th January 1995, and therefore the instant cause ought to be founded on the second will. The administrators position appears to be that the first will is the valid one, the second will is not valid as the same is forged. From these arguments what emerges is that both sides appear to agree on the first will, that the same is valid and was made by the deceased. The only point of departure is on whether the second will is valid, for it is its validity that will determine whether or not the first one could stand. Predictably, much effort was concentrated on adducing evidence on the circumstances of the making of the second will. It bears pointing out that authenticity of the first will has not been raised by the applicants. Their case is that the same was revoked by the second will.

19. The formal requirements that must be complied with for validity of a will or testament are stated in section 11 of the Law of Succession Act, Cap 160, Laws of Kenya. The provision basically says that the will must be executed by the testator in the presence of two attesting witnesses, who must also sign the document in his presence and by his direction. The document can also be executed by the testator in the presence of only one of the witnesses, with the testator thereafter acknowledging his signature to the second witness who should thereafter append their own signature as attesting witness, in the presence of the testator.

20. As stated above, the making of the first will is not so strongly contested and therefore no evidence was led on the circumstances of its making. It is the second will which is seriously contested, and it is here that some evidence was adduced. The primary evidence on the making of the second wills was provided by Mr. Kimiti, the advocate who allegedly drafted it and before whom the deceased allegedly executed the same. He testified that the testator was introduced to him by Mr. Kamonde, which meant that he did not know him at all prior to that event. Mr. Kimiti's testimony on the making of the said will was subjected to cross-examination. He was not really challenged with regard to the truthfulness of what he was telling the court.

21. There is only one serious challenge to the validity of the second will, and that is the verdict of the handwriting expert, that the signature on the said will, and even on the first will, was not that of the deceased. the conclusion was arrived at after he allegedly compared the signatures on the two wills with the signatures that were availed to him by the parties said to be the deceased's known or uncontested signatures. He was subjected to cross-examination. He concluded that signatures made by the same person could differ over time on account of age or sickness.

22. The findings of an expert witness are not binding on a court. Such findings amount to no more than mere opinion. Although the same are admissible as evidence, they are not conclusive, the court has to evaluate them alongside any other available evidence. Section 48 of the Evidence Act, Cap 80, Laws of Kenya, characterizes such evidence as opinion. The persons who lead such opinion evidence are expected to be persons specially skilled in such matters and are referred to as experts.

23. In cases where a signature or handwriting is disputed, the court, in *Shah vs. Padamshi* (1984) KLR 531, suggested that a court would be in error to compare signatures of parties without the involvement of an expert. In *Gatheru s/o Njagwara vs. R* (1)(1954) 21 EACA 384, it was said that the competence of an expert witness should be shown before his evidence is admitted. However, in *Mohamed Ahmed vs. R.* (1957) EA 523, the non-observance of the rule stated in *Gatheru s/o Njagwara vs. R.* does not render such evidence inadmissible, so long as the witness by their calling are *prima facie* qualified to give such expert evidence and their capacity to do so is not challenged. And where such experts are involved, the court in *Asira vs. Republic* (1986) KLR 227, said, their opinion is not to be accepted blinded but must be examined by the court to assess whether or not the same ought to be accepted. In *Hassan Salum vs. Republic* (1964) EA 126, it was said that the most that an expert can say, in appropriate cases, is that he did not believe a particular writing was by a particular person or, positively, that two handwritings are so similar as to be indistinguishable. I believe Lord Hewart CJ in *R vs. Padmore* (1930) 22 Cr App Rep 36, 46 TLR 365, CCA, perhaps best captures the essence of the opinion of a handwriting expert, when he said –

> 'Let me say a word about handwriting experts. Let everyone be treated with proper respect, but the evidence of handwriting experts is sometimes rather misunderstood. A handwriting expert is not a person who tells you, this is the handwriting of such and such a man. He is a person who, habituated to examination of handwriting, practiced in the task of making minute examination of

handwriting, directs the attention of others to things which he suggests are similarities. That, and no more than that, is his legitimate province.'

24. Applying the principles stated above on handwriting expertise in general, I note from the record that the expert witness called in this case did state the basis for his competence to render an opinion in the matter based on his training and experience. It is not lost to me that the expert, Mackenzie Mweu, is not a new face in the corridors of justice on matters that relate to expert opinion on handwritings. His expertise cannot therefore be doubted. In any event he was not challenged on that front when he took to the witness box.

25. What I believe should be of greater focus is the opinion that he has rendered and whether the same ought to be accepted by the court or not. Case law suggests that the opinion must be based on some criteria. In *Hassan Salum vs. Republic* the court stated, on the facts of that case, that the expert ought to have pointed out the similarities or dissimilarities between the forged documents the subject of that case. In *Shamas Charania vs. Harit Sheth t/a Harit Sheth Advocates* (2007) eKLR, it was said that it was incumbent upon the expert after carrying out the exanimation and comparison, to state the features that were peculiar with the offending signatures on the disputed document, inclusive of giving explanations and interpretations of discrepancies and differences.

26. The opinion that I am required to work with is contained in a letter from the document examiner dated 11th July 2005, addressed to NK Njau Advocates. The relevant paragraphs thereof say as follows –

> 'I have examined and compared the questioned signatures indicated with arrows on the two wills marked A1 and A2 with the known signatures on the documents numbered 1 – 6.
>
> I can find no agreement. The disputed signatures show a different pattern of formation which does not conform with the pattern of formation on the known signatures. The disputed signatures also show evidence of tremor as opposed to the known signatures which do not show them.'

27. In my very humble opinion that the one-page, two-paragraph seventy-three (73) word report by the examiner is inadequate, if, indeed, it was prepared for consumption by a court of law, to assist it form an opinion on the authenticity of the documents that it was called upon to decide on. It should have been more comprehensive. The one page letter does not point to the features on the disputed signatures that the expert says show a pattern of formation which does not conform with pattern on the known signatures. He also refers to evidence of tremor in the disputed signatures which he says is lacking in the known signatures, yet there is no demonstration of the alleged tremor in the offending signatures. It is not enough to make generalized conclusions that are of no help to the court, the report ought to have demonstrated the differences or features being referred to or to clearly identify the said features. The alleged report cannot possibly help the court in any conceivable way to form an opinion on whether or not the signatures in question were authentically the deceased's or not.

28. With the opinion of the expert amounting to no opinion at all, I am left with nothing more except the testimony of Mr. Kimiti. He is an advocate of the High Court of Kenya of many years standing. He has stated on oath that he drafted the second will and that the same was executed by the deceased in his presence. He stated further that he signed it as an attesting witness and so did his secretary. No evidence was placed before me to suggest that the deceased was at the material not of testamentary capacity. Similarly, no evidence was placed before me to suggest that the officer of the court, that is Mr. Kimiti, was a rogue whose word could not be taken to be the truth by this court. I have no reason therefore not to believe what he told the court to be the true state of affairs. I find therefore that the will allegedly executed by the deceased on 20th January 1995 to be a valid will and testament.

29. As I stated earlier, there is ample material on record to demonstrate that the validity of the will of 7th September 1993 was not challenged by the applicants. They merely argue in their pleadings that the same was revoked by the second will. I need not therefore expend my energy examining whether or not the same is valid. The copy before me shows it to have been executed by the deceased in front of two advocates, who also affixed their signatures and advocates' stamps as attesting witnesses. It has not been established that the deceased lacked the mental capacity to make it. I shall therefore find that the said will was also valid as at the date it was made.

30. Was the first will valid as at the date of the deceased's death. I have perused through the will of 20th January 1995. It carries a standard revocation clause, at Clause 1, which say, 'I revoke all my former wills and other testamentary dispositions hitherto made by me and declare this to be my last will. The effect of that clause is no doubt to revoke earlier wills, which include that made on 7th September 1993. Consequently, as at the date of the demise of the deceased in 1997 the will made on 7th September 1993 was no longer valid having been revoked by the will of 20th January 1995.

31. In the end the orders that I shall make in determination of the revocation application dated 10th January 2003 are as follows –

> **a. That for avoidance of doubt I hereby declare that the wills on record were properly and validly made by the deceased;**
>
> **b. That the will dated 20th January 1995 revoked that made on 7th September 1993, and the distribution of the estate herein shall hereafter be based on the said will of 20th January 1995;**
>
> **c. That as a consequence of the above, the grant of probate of written will made herein on 3rd March 1998 is hereby revoked, the orders made on 30th April 1999 confirming the said grant are hereby set aside, and the certificate of confirmation of grant issued thereon is hereby cancelled;**
>
> **d. That any and all transactions carried out on the strength of the said grant of probate and the certificate of confirmation of grant are hereby declared null and void;**

e. That I hereby grant probate of the written will made on 20th January 1995 to Thuo Nganga and Muiruri Wainaina, and the relevant certificate of probate shall issue to them accordingly;

f. That the executors shall move with dispatch thereafter to have their grant confirmed;

g. That this being a family matter, each party shall bear their own costs; and

h. That any party or parties aggrieved by the orders made in the judgment herein shall be at liberty, within twenty-eight (28) days, to lodge appeal against the same at the Court of Appeal.

DATED and SIGNED at NAIROBI this 14TH DAY OF JUNE, 2018.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 21ST DAY OF JUNE, 2018.

M. MUIGAI

JUDGE