



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

SUCCESSION CAUSE NO. 2144 OF 2015

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

ANTHONY NJOROGE GATHOGO.....PETITIONER/RESPONDENT

VERSUS

ISAAC GITAU.....PROTESTOR/OBJECTOR

JUDGMENT

1. Samuel Mbugua Kamau whose estate the proceedings herein relate died intestate on 18th day of May 2015 while domiciled in Githunguri, Kiambu County Kenya leaving behind a widow by the name of Mary Wahu Mbugua and children namely, Wilson Ngugi (son), Paul Njenga (son), David Chege Mbugua (son), Carol Wahu (daughter), Carol Njoki (daughter), Joyce Njoki (daughter) Mbugua Waturu (grandson) and K W (dependant – grandson).

2. The following assets were listed as comprising the estate:

(a) Shares in Githunguri Cinemas

(b) Shares in Rioki Estates

(c) Shares in Gathanji Trading Company

(d) Githunguri/Ikinu/775

(e) Githunguri/Kiairia/T.394

(f) Githunguri/Kiairia/746

(g) Githunguri/Kiairia/815

(h) Githunguri/Kiairia/191

(i) 1/3 common share in LR No. 209/4570 measuring 0.1148 which is the s subject of litigation in HCC No. 2352/1985

3. On 7th September 2015, one Anthony Njoroge Gathogo who described himself as the Executor pursuant to a written Will allegedly executed by the deceased during his lifetime petitioned the court for a grant of probate with written Will dated 15th February 2012. Subsequently, on 30th November 2015, a grant of probate with written Will was made to Anthony Njoroge Gathogo as the sole Executor. After six months, the Executor filed summons dated 25th May 2016 seeking confirmation of the grant of probate with written Will and proposed the mode of distribution in line with the deceased's Will.

4. It would appear from the consent form attached to the application for confirmation some beneficiaries among them Isaac Gitau Mbugua (son), Carol Wahu (daughter), Mbugua Matiru (grandson minor), K M (grandson minor) and Mary Wahu Mbugua (widow) did not sign.

5. Dissatisfied with the mode of distribution of the estate, Isaac Gitau one of the deceased's sons lodged Affidavit of protest dated 19th October 2016 and filed on 21st October 2016. In the said affidavit, the Protestor/Objector averred that;

(a) As a beneficiary of the estate, he did not give his consent with regard to the mode of distribution of the estate;

(b) His father who had suffered mental illness over a period of 20 years had no capacity to execute the Will in question;

(c) His late father was illiterate and therefore could not read or write and that the appended signature on the written Will is not his;

(d) One of the beneficiaries Caroline Wahu listed in the proposed Will as a child is a granddaughter being a daughter to Peter James Kamau a son to the deceased who is also deceased.

(e) The deceased father had two more children who are deceased namely, David Wathiru Mbugua and Peter Kamau.

(f) David Wathiru Mbugua was married to Jane Wairimu Mungai with whom they were blessed with four children all of whom are adults (John Mungai, Margaret Njeri, Samuel Mbugua and Peter Kamau).

(g) The late Peter James Kamau was married to one Lucy Njeri Mungai with

whom they were blessed with 3 children namely Mary Waithera, Caroline Wahu and Joyce Njoki (all adults).

6. The Protestor further urged the court to intervene and consider dependants or beneficiaries who were not provided for in the purported Will and who have nowhere to go. He wondered how the portion allocated to the deceased mother as a beneficiary will devolve without substituting her with any of her heirs. He prayed for the estate to be shared out equally amongst all the beneficiaries.

7. In response to the affidavit of protest, the Executor Anthony Njoroge Gathogo filed a replying affidavit deponed on 8th December 2016 and filed on 16th December 2016 in which he stated that the deceased's Will was valid and that the estate will have to be distributed according to the Will and lack of consent by beneficiaries to the mode of distribution is immaterial.

8. The Executor further asserted that he personally knew the deceased as his personal friend whom he had known for over 20 years as a person of sound mind and literate.

9. On 27th March 2017, parties appeared for directions while ready to proceed. The court directed for parties to proceed by way of viva voce evidence.

Protestor's/Objector's Case

10. During the hearing, Isaac Gitau Mbugua (PW1) the Protestor herein reiterated his averments contained in the affidavit of protest. He challenged the validity of the Will purportedly signed by his late father terming it a forgery as his father was illiterate and mentally sick hence could not have signed.

11. He further stated that his father used to attest to documents by thumb printing and not by signing. He identified a letter (PMFI.2) from Mathare Mental hospital dated 24th February 2015 in which a Dr. Okoth confirmed that the deceased was a mental patient having suffered depressive psychoses since 1980. The Protestor urged the court to share the estate equally amongst the deceased's children so that the heirs of two of the deceased's sons would also benefit.

Petitioner's/Executor's Case

12. In his testimony, Anthony Njoroge (DW1) the Executor herein stated that he had known the deceased for a very long time prior to his death. He told the court that he was a long serving employee working as a turn boy to the deceased. He confirmed signing the Will as an Executor (witness) in the presence of the deceased. He denied influencing the deceased in executing the Will. It was his contention that the deceased was of sound mind when he executed the Will in the presence of a lawyer by the name of Jaqueline Njagi and one Samson.

13. David Chege Mbugua (DW2) a son to the deceased told the court that his father never suffered any mental illness during his lifetime. He urged the court to distribute the estate as per the Will arguing that the entire family was comfortable with the manner in which the deceased had shared out the estate.

14. Upon close of the hearing, both counsels agreed to file written submissions. The firm of Amolo appearing for the petitioner filed their submissions on 27th April 2018 and Kagwe and Co. Advocates filed theirs on behalf of the protestor on 11th April 2018.

15. In his submissions, Mr. Kagwe basically adopted the averments contained in the affidavit of protest asserting that the deceased had no capacity to execute a Will as he was mentally incapacitated. Counsel relied on a doctor's letter dated 25th February 2015 which was marked for identification (PMFI.2) but never produced as evidence to prove that the deceased was mentally sick. To prove that the deceased was sick, Mr. Kagwe referred to the listing of Carol Wahu as a daughter in the Will instead of being referred to as grandchild. Learned counsel further questioned the failure by the petitioner in not calling the two witnesses who attested the Will to give evidence.

16. In support of his submissions, counsel referred the court to the High Court Succession Cause No. 685/2015 Nairobi in the matter of the estate of the late **Eugenia Njagi Chabari between Julius Chabari and another vs Mary Mukuria Mrs. Njagi and 4 others (2016) eKLR** in which the court disregarded a Will purported to have been executed at a time when the testator was mentally sick. The court further questioned how the deceased who all along knew the acreage of his land acquired by each child would disinherit them their rightful share through a Will.

Petitioner's Submissions

17. Mr. Amolo for the petitioner submitted that the contested Will was validly executed in accordance with the relevant provisions of the Law of Succession and that the deceased was of sound mind when signing it. Counsel urged the court to disregard any attempt by the protestors relying on a medical letter which was not produced as an exhibit to prove that the deceased was mentally sick. Mr. Kagwe opined that the letter by Dr. Okoth does not amount to expert opinion which under Section 48 and 35 of the Evidence Act must be produced by the author (expert). It is Mr. Kagwe's submission that the protestor has failed to discharge the burden of proving what he has alleged.

Analysis and Determination

18. I have considered the petition herein, Chamber Summons for confirmation, protest, testimonies by both parties and rival submissions by their respective counsels. From the pleadings and court proceedings, issues that crystallize clearly for determination are:

- (a) Whether the deceased executed a written Will in favour of his estate.**
- (b) Whether he was of sound mind when executing the Will.**
- (c) Whether the Will he executed is valid in law.**
- (d) Should the court find the Will invalid, who will be administrators and how will the estate be shared out.**

19. According to the Executor/Petitioner who claimed to have been a long time friend and employee to the deceased, the deceased did execute the contested Will by signing the same in his presence and one Samson. He denied the allegation by the protestor that the petitioner was mentally incapacitated.

20. Capacity of a testator to execute a Will is entrenched under Section 5(1) of the Law of Succession which provides:

“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.

Sub Section 3 goes further to provide that:

“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 the mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing”.

21. Under Section 11 of the Law of Succession, 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)**
- (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.**

22. A Will that is executed without complying with the conditions set out above is null and void. A mere claim that a beneficiary is provided a meagre provision or less than others is not per se a sufficient ground to invalidate a Will (**See Beth Wambui and another vs Gathoni Gikonyo and others (1985) eKLR**). Equally, mere sickness without proof of mental incapacity is not a ground on its own to invalidate a Will. This position was adequately considered in the case of **John Kinuthia Githinji Kiarie vs Githua Kiarie and others Nairobi CA No. 99 of 1985 (UR)** where the deceased was seriously ill at the time he executed the Will while in hospital yet his Will was valid because there was no proof that the sickness had affected his mind.

23. The issue of having mental infirmity on the testator is a matter of fact which has to be proved by way of evidence medical or otherwise and not mere conjecture, speculation or assumption. The onus to prove mental illness on the testator and incapacity to execute a Will squarely lies on the person alleging the same (**See Section 107 and 108 of the Evidence Act**).

24. In the instant case, the protestor claimed that his father was not mentally sound. He attempted to produce a letter (P.MFI.1) purportedly authored by Dr. Okoth of Mathare Mental Hospital to confirm that the deceased had been on treatment for depressive psychoses. Despite the protestor having been given two adjournments to call Dr. Okoth, he was unable to secure the witness. He closed his case without the said doctor testifying to own the document as the maker and prove the content contained therein. In the absence of Dr. Okoth's evidence, the letter dated 24th February 2015 which was marked for identification is not useful as the same is just but mere hearsay evidence which is inadmissible. In the absence of any evidence to the contrary, it is my finding that the deceased was sound as at the time the Will was made.

25. Was the Will executed in accordance with the law? A perusal of the Will in question shows that it was attested before Benson Karina Advocate and two witnesses Wycliffe Ahuya Kidake and Samson Esikote Kutwa. However, none of the witnesses ever gave evidence to confirm that the deceased was the one who attested or executed the Will. The evidence of witnesses attesting the Will is for purposes ascertaining that the deceased did indeed execute a Will.

26. It is unbelievable that even the advocate before whom the Will was executed and the maker of the document never testified. For the Petitioner/Executor (DW1), he was neither a witness during execution of the Will nor was David Mbugua (DW2) a son to the deceased. In the absence of any evidence from the advocate one Karina or witness(s) Samson Esikote Kutwa or Wycliff Ahuga Kidake, there is no proof that the signature appended on the Will was made by the deceased or by somebody else under the deceased's direction.

27. The protestor's allegation is that he was conversant with his father's mode of attesting documents by thumb printing. That the signature on the Will was not made by his father has not been controverted. Nobody confirmed before the court that he witnessed the deceased sign the Will. The Petitioner/Executor's testimony that the Will was signed by the deceased is hearsay. There is nothing to show that he was present at the time it was signed. In the absence of any proof that the testator did sign the Will, I am left with one conclusion to make and that is, nobody knows whether the Will was duly executed by the deceased or not. It then follows that, the Will herein has not been authenticated and where there is factual and reasonable apprehension and doubt which creates a cloud that is not cleared by the executor's side, then that doubt must be held in favour of the doubtful party.

28. It is my finding therefore, that the Will herein purportedly signed by the deceased has not been proved to be a valid Will signed by the deceased in the presence of two witnesses. For those reasons, the court is hereby inclined to disregard and declare the written Will dated 15th February 2017 invalid and incapable of execution. To that extent, the protest herein succeeds.

29. Accordingly, the grant of probate with written will issued herein to Anthony Njoroge Gathogo on 30th November 2015 be and is hereby revoked. In exercise of powers and discretion donated to the court under Section 66 to appoint a person to whom a grant of letters of administration shall issue in the interest of the estate, I shall direct that the protestor herein Isaac Gitau and David Chege Mbugua being sons to the deceased to jointly petition for a grant of letters of administration intestate within 30 days and upon petitioning, a grant of letters of administration intestate shall issue to the two petitioners/administrators jointly. Thereafter, the said administrators shall proceed to file fresh summons for confirmation of the said grant with the necessary consents from beneficiaries attached. Regarding costs, each party shall bear his own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2018.

J.N. ONYIEGO

JUDGE