REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1266 OF 2008

IN THE MATTER OF THE ESTATE OF MWW (DECEASED)

JUDGMENT

PLEADINGS;

The deceased **MWW** to whom these proceedings relate died testate on 11th February 2008. Onesmus Githinji Advocate; Executor of the deceased's estate named in the Will of 13th October 2007; on 13th June 2008 petitioned for probate with will annexed. She was survived by the following beneficiaries;

i. John Kuria-son

ii. Elizabeth Njeri –daughter

iii. Nelly wambui - daughter

iv. Lucy Mwihaki-daughter

v. Pauline Wanjiku Kuria- granddaughter/daughter of John Kuria

vi. Cynthia Wanjiku- granddaughter/daughter of Lucy Mwihaki

vii. Cathrine Wanjiku- granddaughter/daughter of Nelly Wambui

viii. Mary Wanjiku –grandaughter/daughter of Elizabeth Njeri

ix. Joseph Gitau Waweru-son

x. Esther Mumbi Waweru-daughter

xi. Wanjiru Waweru- daughter

xii. Wainaina Waweru- son

xiii. Maria Wanjiku Waweru-wife

xiv. Mary Njeri Waweru-wife

The deceased left the following assets; 3-plots

i. Waithaka/Dagoretti in Gituamba area

ii. Plot No.[…] Waithaka Shopping Center.

iii. Plot No. […]-Dandora Estate

By application filed on 23rd December, 2008 Timothy Mwaura Wangugi sought revocation or annulment of the grant and indicated that the said grant of probate was taken out without his knowledge and consent, there was concealment of material facts to the case.

Elizabeth Njeri Wangugi in her replying affidavit dated 15th May 2009 opposed the said application. She averred prior to the deceased's demise the deceased had left a valid will in which the applicant was not one of the beneficiaries. She stated that the grant of probate was properly granted to her and stated that the applicant was not a beneficiary to the deceased as per the said will.

In their affidavit dated 31st December 2009, Timothy Mwaura Wangugi and Kenneth Njuguna Wangugi, biological sons of the deceased averred that at the time of writing of the alleged will dated 13th October 2007, the deceased was suffering from senility and dementia which deprived the deceased testamentary capacity hence any alleged will is voidable. They averred they are dependents of the deceased as provided under **Section 29 of Law of Succession Act Cap 160** by filing application of 1st February 2008. They are unemployed and were fully dependent on the deceased prior to her demise. That the advances made to them by the deceased were not enough to cater to their basic individual and family needs and which they no longer receive after her demise .

That other dependants of the deceased include John Kuria Wangugi son, Elizabeth Njeri, Nelly Wambui and Lucy Mwihaki, daughters of the deceased. They averred that the deceased's capital assets consists residential plots gifted to them by their late father some years back. That in addition to the said capital they have not received any other capital assets and currently have no incomes as they relied on the deceased for food, clothing and other essential expenses including pocket money. That the deceased was admitted at Melchizedek Hospital on 15th December 2007 and transferred to Kenyatta National hospital on 21st December 2007 where she died on 11th February 2008 at the age of 80 years.

Elizabeth Njeri Wangugi in her affidavit in reply dated 14th February 2010 averred that although the applicants are capable people with means as they own properties. She denied allegations that the deceased was suffering from senility and dementia at the time of writing the will and that she could effectively communicate and make rational decisions. She avers that the applicants did not have a cordial relationship with the deceased due to their irresponsible behavior. That the applicants are over 45 years and have not adduced any evidence to show how they were maintained adding that the wishes of the deceased should be honored unless the requirements of **Section 26 of the Law of Succession** is satisfied otherwise.

John Kuria Wangugi in his affidavit dated 14th April 2011, annexed letter dated 21st March 2008, to his two sisters Njeri and Wambui on their alleged suspicious circumstances surrounding the purported will. He added that the respondent in her statement dated 14th December 2010 misled the court terming their father as late while he is still alive although suffering from dementia. He joined issues with his two brothers in their application for revocation of the grant. He denied claims that the applicants had a strained relationship with the deceased. Further that their father had allocated all his 12 children 0.25 of an acre of the suit property and allocated the balance to his two wives. That Mwaura has a wife and children and that the same should not be a criteria to determine who is entitled to inherit. Further that the estate of the deceased's estate is undervalued.

HEARING

Kenneth Njuguna Wangugi (PW1) stated that he is son to deceased **MWW**. His mother was sick for long, she had anaemia and dementia and was taken to hospital on and off. She was taken to Health Centre, on 15th December 2003 she was taken to Meteldezeck Hospital and in 2007 she was taken to Kenyatta Hospital.

He had a cordial relationship with his mother, he worked at his sister's garment factory and he relied on the salary and rent paid from houses in Waithaka and Dandora which was now collected by Elizabeth Njeri his sister.

He said the Will was not written by his mother, she was sick for long and had brain atrophy and dementia. She was taken from her home and taken to stay with Elizabeth Njeri in Ngong. She took the deceased to Onesmus Githinji Advocate where she signed the Will. He was left out of the Will and his brother, Timothy Mwangi. ; because the Will was prepared on his sisters instructions; LucyMwihaki, who had a case with her son, he testified for her son, his nephew against her and the Advocate was Onesmus Githinji for his sister. The Will was written by his sisters and their advocate as Executor.

Timothy Mwaura Wangugi (PW2) testified that he is son of the deceased and he had a cordial relationship with his late mother. She lived in Waithaka and when she was sick, they took her to local dispensaries for 2 years. She was walking with a walking stick, was frail and weak. In 2007 she was admitted at Meteldezeck Hospital. Later she was admitted to KNH. The Kenyatta National Hospital h notes indicated that she had; Sepsis, Anaemia, PUD stomach and dementia. He lived with his mother and she lost her memory from time to time.

He was unemployed, he ran a Juakali workshop and later started selling and buying properties. He relied on his mother for upkeep.

The Will was not prepared and written by his mother because at the time she could not make comprehensive decisions.

He was left out of the Will as son of the deceased because, he also testified on and for the sister's son whom she wanted to evict from land he was left by his father.

His late father distributed the suit property to all his children equally each ¼ acre and the rest left to his 2 wives. It is the portion for their mother that has a dispute.

Elizabeth Njeri Wangugi (DW1) testified that she is daughter of the deceased and the Objectors are her brothers. She said that her mother wrote the Will and was lucid and made her own decisions. She was not present but she was with Advocate Onesmus Githinji who is her family friend. Their mother was not senile, she had workers on the land, had food made for all, and cows she milked. Her Brothers PW1 & PW2 were not working and lived with their mother, she provided food but did not give them money.

She agreed that the land in Karai was divided to all 12 children and it has not been subdivided and all children of their father have to agree and consent.

She stated that their mother's property should not be divided equally as their mother made her wishes. When their mother was sick, she took her to her home and took care of her and the brothers did not help as they no home to take her to. According to her, her late mother had kidney failure only, her memory was ok.

She reiterated, that John Kuria objected in support of the 2 Objectors yet, he is the largest beneficiary of the Will.

Daniel Kioko Musyoka (DW2) Advocate of High Court of Kenya testified, that in 2007, Mr Onesmus Githinji asked him to prepare Will for the Client, the deceased herein. She gave him details of her children and properties. He prepared the Will according to her instructions and 2 Law Clerks of the Firm signed the Will as Witnesses. They were Samuel Munyiri and Charles Wahome.He kept the Will until the following year he was informed she died and he gave the children of deceased a copy of the Will.

SUBMISSIONS

APPLICANTS'/OBJECTORS' SUBMISSIONS

Parties filed written submissions. The applicants in their submissions gave a background of the matter culminating to the current application. In their submissions the applicants took issue with the advocate that drew up the said will was the Respondents' advocates for over 5 years. Further, the applicants took issue with the bequest to the deceased's grandchildren who are the children of the respondent. It was submitted that in cases where the issue of mental capacity has been raised where the applicants seek first interest and priority to have their interests as dependants of the deceased the court has made use of **Sections 26, 27, 28 and 29 of the Law of Succession Act** to address the same. He relied on the case ***ELIZABETH KAMENE NDOLO VS GEORGE MATATA NDOLO C.A. 128 OF 1995***, it was held,

> ***"This court must however, recognize and accept the position that under provision of Section 5 of the Act every adult Kenyan has unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose by will in 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 under section 5 must be exercised with responsibility and a testator exercising the freedom must bear in mind that in enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible for during his or her lifetime."***

It was submitted that though the deceased had the freedom to distribute her estate the way she wanted as the same has been held in many decisions of this court the same cannot be done at the expense of leaving out the certain members of the family from inheriting from the deceased's estate. They relied on the case of the estate ***FRANCIS KHAEMBA LUKHALE (DECEASED) SUCCESSION CAUSE NO. 13 OF 2009***,

> ***"In considering this issue and addressing the needs of the dependants I will invoke the wide discretion donated to the court by Section 47 of the Act and Rule 73 of Probate and Administration rules to make such orders as will ensure the ends of justice are met.''***

In ***JOHN KINUTHIA GITHINJI VS. GITHUA KIARIE & OTHERS, COURT OF APPEAL CASE NO. 79 OF 1998*** *referred to in the matter of the estate of* ***JAMES NGUGI MUNGAI SUCCESSION CASE NO. 523 OF 1995 GICHERU JA QUOTED COCKBURN CJ IN BANKS VS. GOOD FELLOW 1870 L.R.*** *as follows;*

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

It was submitted that for the sake of them being left out of the alleged will the applicants two sisters included in that will the names of persons who were granddaughters of the deceased and who were not the deceased's dependants as provided for under section 29 of the law of Succession Act and therefore they are not entitled to inherit directly from the estate but from the respective parents who are direct dependants.

They relied on the case of ***ESTATE OF JOHN MUSUMBAYI KATUMANGA (DECEASED) [2014] EKLR,***

> ***I suspect that she is a daughter of the said heir, and therefore a granddaughter of the deceased. She is described in one of the papers as a dependent of the deceased. The said Laura Mesitsa is not entitled to a share in the estate of the deceased. There are two reasons for this. She is not an heir of the deceased, for grandchildren are not entitled to inherit from their grandparents so long as their own parents, the children of the deceased, are alive and themselves taking a share in the estate. Secondly, she is not***

a dependant of the estate. She did not apply, as she should have, for provision under Section 26 of the Act, and there is no court order making her a dependant of the deceased. Under Section 29 of the Act, a grandchild can be a dependent of her grandparent, but for her to qualify as such she must demonstrate to the court in an application properly brought under Section 26 of the Act that she was dependent on the grandparent immediately before his death.

It was submitted that the deceased lacked mental capacity to make the will as the applicants who were closest to her most noticed her forgetting problems and despite many visits to the hospital she never got better. That the respondent chose to keep quiet about her dementia, senility, brain atrophy and chronic renal failure after her admission at Melchizedek Hospital and continued admission at Kenyatta Hospital despite being in possession of the original diagnosis from both hospital.

That according to Text Book by Herold Kapran, page 249;

"***dementia is characterized by a loss of cognitive and intellectual abilities severe enough to destroy social or occupational performances. The full clinical picture consists of the impairment of memory, abstract thinking and judgment and some degree of personality change. The disorder may be progressive or static, permanent or reversible. An underlying organic is always assumed, although in rare cases it is impossible to determine a specific organic factor."***

It was submitted that one of the beneficiary of the deceased as opposed to the making of the said will as evidenced by his letter to Nelly. They relied on the case of the ***ESTATE OF JAMES NGENGI MUIGAI SUCCESSION CAUSE NO. 523 OF 1996*** Counsel for the objectors referred to the Text Book Theobald on Wills 4th Edition by J.B. Clarks page 39 which describes undue influence as:

"***In a probate court influence means coercion, i.e. the testator is coerced into making a will or part of the will which he does not wish to make. Undue influence takes many forms. At one extreme there may be violence to, or imprisonment of the testator. At the other the pressure exerted by talking insistently to a weak and feeble testator in last days of his life may so fatigue in his brain that he may be induced ….to give way to pressure."***

It was submitted that in the instant case was worse as the two daughters knew that the deceased as in her last days and had multiple illness weakening her brain. Further that prior to making the said will the deceased was diagnosed will full brown dementia, Senelity, Brain atrophy all of which made the deceased lack capacity to make the will dated 13th October 2007.

Further, it was submitted that the affidavit and oral evidence adduced by the applicants raises suspicion to the capacity of the deceased to draw up the said will, adding that they had discharged their burden of proof to shift the burden to the respondent to the respondent to prove to the court that the testator had mental capacity to draw up the said will.

It was submitted that the respondent have all along been intermeddling with the estate of the deceased by collecting rent from commercial properties and spending the income without leave of the court which is contrary to **Section 45 of the Law of Succession Act** which states,

"*(1)* ***Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased.***

(2) Any person who contravenes the provisions of this section shall-

a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such find and imprisonment; and

b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."

They urged the court to provide for the applicants in accordance to **Section 26, 27, 28 and 29 of the said Act** and make a finding nullifying the alleged will as the deceased lacked capacity. They urged the court to compel the respondents to adduced true accounts of the estate in court.

RESPONDENTS' SUBMISSIONS

The respondents in their submissions raised 2 issues for determination namely;

i. Whether the deceased had capacity to make the will dated 31st December 2009 and if she exercised her free will in making the same

ii. Whether the deceased made reasonable provisions to all his dependants in his will?

It was submitted that **Section 5 of the Law of Succession Act** provides;

"*there is a rebuttable presumption that a person making a will is of sound mind and the will has been properly executed."*

They relied on the case of ***BANKS VS GOOD FELLOW (1870)*** *it was held,*

"a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made."

It was submitted that the burden of proof in the first instance lies on the person alleging lack of capacity. Further that the protestors did not adduce any medical evidence to prove his allegations that the deceased was not of sound mind. That the protestors admitted to not having taken the deceased to hospital hence could not adduce evidence that the deceased was not lucid at the time of making the will. That the advocate who drew up the will testified that the deceased was lucid at the time of making the will. Further, it was submitted that deceased was able to collect rent and run her own affairs. That under **Section 29 of the Act** grandchildren are included as the same provides that for one to qualify as a dependant they must have been maintained by the deceased immediately prior to her demise. That the deceased have not tendered any evidence to prove that they were dependants of the deceased. It was submitted that the will the requirements of **Section 11 of the Act.** That failure to make a provision for a dependant does not invalidate the will. It was submitted that **Section 28 of the Act** provides circumstances to be taken into consideration by the court in making the order it states,

a) "the nature and amount of the deceased's property

b) any part, present, future capital or income from any source of the dependent;

c) the existing and future means and needs of the dependent;

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

e) the conduct of the dependent in relation to the deceased;

f) the situation and circumstances of the deceased's other dependents 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 dependent."

It was submitted that the objector's relationship with the deceased was not cordial as they did not take care of her during her illness and did not participate in the deceased's funeral arrangements. In **Civil appeal Case No. 213 of 1997,** it was held that in exercising their power given by **Section 26** the court should not re-write the wills of the deceased. ***IN THE MATTER OF THE ESTATE OF SANDHU SINGH HUNJAR, HCSC NO. 107 OF 1994***, cautioned that the will of the departed must be honored as much as is reasonably possible readjustments of the wishes of the dead by the living must be spared for the wills of essential and unreasonable testators. It was submitted that the objectors have not adduced any evidence to qualify under **Section 29(b) of the Act** and has not adduced adequate evidence to invoke the discretion of this court under section 28 of the Act. In the case of ***JOHN GITATA MWANGI & OTHERS VS JONATHAN NJUGUNA MWANGI & OTHERS, NAIROBI CIVIL APPEAL NO. 2013 OF 1997,*** it was held,

"***In order for this court may be enabled to come to a proper conclusion as to what order is should make a dependant has a duty to give satisfaction evidence as to his past, present and future capital or income and is existing and future needs."***

It was submitted that in order for the court to come a proper conclusion a dependant had a duty to give satisfactory evidence as to his past present and future capital or income and is existing and future needs because without this the court will not be able to make sensible order whether the deceased has made any advancement to the dependant and the circumstances the general circumstances of the deceased's pother dependants are also factors to be considered.

DETERMINATION

I have considered the parties pleadings, evidence and written submissions and find that the issues for determination are as follows;

i. Whether the deceased had testamentary capacity to make the will ?

ii. Are the Objectors/Protestors/Applicants children of the deceased?

iii. Whether the deceased made reasonable provisions for all his dependants in his will ?

Section 5(1) Law of Succession Act Cap 160 prescribes the testamentary freedom of the testator as follows;

"Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor <u>may dispose of all or any of his free property by will,</u> and may thereby make any disposition by reference to any secular or religious law that he chooses."

Section 5(3) Law of Succession Act Cap 160 prescribes the testator's

Testamentary capacity to draw a valid written Will and provides;

"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."__

Section 5(4) Law of Succesion Act Cap 160 prescibes the burden of proof as follows;

'The burden of prof that a testator was, at the time he made any will; not of sound mind, shall be upon the person who so alleges.'

Section 7 Law of Succession Act Cap 160 outlines factors that vitiate validity of the Written Will and provides;

"A will or any part of a will, __the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void."__

The law as set out applied to the facts on record are; that the deceased suffered ill health over a long period, from 2003 upto her demise in 2008. In the intervening period at first when she lived in Waithaka, her sons took her to local dispensaries, later in 2007 she was admitted in hospital discharged and later she was taken to Kenyatta National Hospital. The Objectors discharged their burden of proof under Section 5 (4) Law of Succession Act Cap 160. They attached vide their Further Affidavit of 10th May 2011 annexed medical records of the deceased; namely;Report from Melchizedek Hospital of 23rd December 2007 of MWW that outlines the deceased's medical problem as **''sepsis, anaemia, PUD stomach and Dementia'' ''Investigations done; CT scan features suggestive of brain atrophy''**

Report from Kenyatta National Hospital dated 23rd January 2008 the deceased was diagnosed with ''Chronic renal failure, senile dementia and PUD''

The Respondents did not controvert this fact by oral or documentary evidence to the contrary; that the deceased did not suffer mental ill health.

These 2 medical documents indicate that the deceased suffered dementia 2007-2008, she did improve but instead deteriorated in mental and physical health and consequently she lacked testamentary capacity to write the Will of 13th October 2007.

The essentials for testamentary capacity were laid out in the case of **BANKS VS. GOODFELLOW [1870] LR 5 QB 549** supra and they have not been met in the instant case due to the deceased's ill health and incapacity at the time the Will was drawn.

Am guided by the case of ***RE ESTATE OF GATUTHU NJUGUNA (DECEASED) [8] [1998] EKLR***, where it quoted an excerpt from Halsbury's Laws of England, 4th Edition vol. 17 at page 903-904-

which provides that,

"where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and __that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval.__ The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity."

According to the evidence adduced before this court the deceased at the time of her demise was of ill health and had been admitted at Melchizedek Hospital and continued admission at Kenyatta Hospital with various ailments ranging from chronic renal failure to dementia.

It is not in dispute that the applicants Kenneth Njuguna Wangugi and Timothy Mwaura Wangugi are biological children of the deceased. They are entitled to their beneficial share of the Deceased's estate. They were excluded from the list of beneficiaries in the Will. This Court noted the following facts; that the deceased was moved from her home to the Elizabeth Njeri's House in Ngong so as to give her care and support she needed at the time.

In the midst of care, she was taken to the Firm of Onesmus Githinji Advocate and DW2 prepared the Will as per the deceased's instructions

And she signed. I am not satisfied from her state of health as confirmed from medical records above; she was capable of concrete decisions, by this time she needed help. Most likely her daughter(s) assisted her. However, it is more than coincidence that the Will gave larger beneficial interests to daughters and their children and John Kuria to the exclusion of other children of the deceased. It is also on record the Objectors PW1 & PW2 who were left out in the Will were/are the same persons who were not in good terms with their sister over a matter in Court against her son, and they testified on their nephew's side.

Strangely, apart from stating that the 2 Objectors did not have a good relationship with their mother, the Respondents did not spell out what they actually did to their late mother. The Affidavits of Nelly Wambui Wangugi filed on 11th August 2011, attributes to Kennedy Njuguna

Wangugi and Timothy Mwaura Wangugi despite being highly educated were unable to obtain gainful employment and instead they have engaged in excessive drinking and have been supported by Elizabeth Njeri for food and recuperation.

The letter by John Kuria Wangugi dated 21st March 2008 within a month after their mother's death, to Nellie Wambui Wangugi and Elizabeth Njeri Wangugi in part; he admonishes his sisters for; "obtaining the Will of the deceased under duress which renders it illegal and non binding." He and his family disassociated themselves from the property allocated to them in the bill. He admitted to them that their mother told him that the sisters pestered her about writing a Will and she was not willing. He accused his sisters of taking advantage of their mother's illness and senility, their father's mental incapacity from Alzheimer's disease (and they did not disclose in the Petition that he is alive) their 2 brothers' PW1 & PW2's incapacity due to alcohol addiction and his absence away from home and living abroad for 8 years and pressured the deceased to write the Will. Despite the denial by NellieWambui Wangugi in her affidavit; of the Will not being made of the deceased's free Will and excluding siblings merely because they are not able upcoming and financially stable they were deliberately excluded by the daughters of the deceased through their design and intent but not by their mother as she was incapacitated.

Article 27 of Constitution of Kenya provides that all persons are equal before the law and enjoy equal benefit and protection of the law. **Sections 35 ,38 and /or 40 of Law of Succession Act Cap 160** mandates equal distribution of estate of the deceased amongst the children, where there is a surviving spouse or no surviving spouse or in a polygamous setup. ***PETER KIRUMBI KEINGATI & 4 OTHERS VS DR ANN NYOKABI NGUITHI & 4 OTHERS SUCCESSION CAUSE 1140 OF 1990 HIGH COURT /COURT OF APPEAL*** held that there can be no discrimination allowed on the basis of gender, marriage, station in life etc. There is no provision to discriminate on gender, marriage, financial ability, success and in this case because the 2 Objectors were unable but not unwilling to look after their mother and instead looked up to her for their support. As the fight for women/girls rights is on discriminated on the basis of gender, let the girls/women/daughters not take up the mantle to discriminate against their brothers merely because they are not successful. They are all entitled as children of the deceased to their beneficial share; in respective of their action in life.

Although **Section 29 of Law of Succession Act** includes grandchildren as beneficiaries; they are to benefit from the beneficial share of their parent if alive and if the parent is deceased the children step in place of their parent and take up his/her share as was stated in ***ESTATE OF JOHN MUSUMBAYI KATUMANGA (DECEASED) [2014] eKLR,*** **supra**

In the Will the deceased she advocated property to her children who are alive they were allocated their share and on top of which their children were also allocated property to the exclusion of other children of the deceased namely, PW1Kennedy Njuguna Wangugi and PW2 Timothy Mwaura Wangugi. That was unfair and inequitable distribution of the deceased's estate.

In the instant case, it is not clear how and when the deceased knew the advocate who drew the Will and appointed the Senior Associate as Executor of the Will. Yet the deceased drew the Will of 13th October 2007. How the Will was prepared for the deceased by DW2 did not indicate that the deceased read it over before signing it or it was read to her to confirm that she agreed with contents. Can the Court confirm the deceased made the Will of her free Will? I am afraid not. Finally, the Applicant attached copy of the said Will but no evidence was tendered to show the Will was read to all the family members of the deceased and they were issued with copies of the same.

DISPOSITION

1. The Objectors' application filed on 23rd December 2008 is granted that the petition for grant of probate was filed without knowledge and consents of some beneficiaries; PW1 and PW2 sons of the deceased.

2. The Will is declared invalid as the deceased did not make the Will on her free Will she was mentally and physically incapacitated as shown by medical records.

3. The estate of the deceased shall be administered by grant of letters of administration intestate.

4. This Court appoints administrators of the estate of the deceased under Section 66 of Law of Succession Act Cap 160;

a) John Kuria Wangugi

b) Elizabeth Njeri Wangugi

5. The administrators shall exercise their statutory mandate under Sections79-83 of LSA in the interests of ALL beneficiaries ; children of the deceased.

6. After consultations and agreement with ALL beneficiaries of the estate of the deceased; administrators shall file summons or confirmation with written consents from beneficiaries on proposed mode of distribution.

7. Indefault, any party who does not agree to proposed mode of distribution to file Protest(s) to be determined by the Court.

8. Any aggrieved party to file appeal in Court of Appeal.

9. Each party to bear own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 20TH DAY OF DECEMBER 2018.

M.W.MUIGAI

<u>JUDGE –FAMILY DIVISION –HIGH COURT</u>

IN THE PRESENCE OF;

KIMANI KIMONDO ADVOCATES FOR APPLICANTS

KABIRU & COMPANY ADVOCATES FOR RESPONDENTS

PATRICK KINUTHIA COURT CLERK