REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 372 OF 2012

TABITHA WANGITHI MURIUKI .....PETITIONER/APPLICANT

V E R S U S

WATHIBA KIMOO.....PROTESTOR/RESPONDENT

JUDGMENT

1. This matter relates to the estate of Wangure Kimoo Rubari, (deceased) who died intestate on 27/7/1983. A citation to accept Letters of Administation was issued to Wathiba Kimoo who was her co-wife by Tabitha Wangithi a daughter in –law of the deceased. On 16/4/2013 Lettters of Administration were issued to, Tabitha Wangithi Muriuki, Peninah Wangithi Kimoo and Helen Wangechi Kimoo and Nancy Wathiba Kimoo.

2. Thereafter Peninah Wangithi Kimoo proceeded to file an application for confirmation of grant dated 30/09/2013 in which she proposed that the deceased's estate **L.R No. Inoi/Kamondo/609** be distribution equally among the following dependants;

- Wathiba Kimoo – 1.14 acres
- Peninah Wangithi Kimoo – 1.14 acres
- Hellen Wangechi Kimoo – 1.14 acres
- Tabitha Wangithi Muriuki – 1.14 acres

3. Tabitha Wangithi Muriuki filed an application for confirmation of grant dated 17/10/2013. She stated that the deceased was survived by Peter Muriuki Kimoo her stepson (deceased) and herself as the daughter-in-law. She proposed the deceased's estate be subdivided equally among Wathiba Kimoo and herself.

This proposal prompted a protest by Peninah Wangithi Kimoo.

Protestor's case

Peninah Wangithi Kimoo proceeded to file an affidavit in protest on 08/01/2014 and stated that the deceased was survived by the following;

- Wathiba Kimoo – co-wife
- Peninah Wangithi Kimoo – stepdaughter
- Hellen Wangechi Kimoo – stepdaughter
- Tabitha Wangithi Muriuki – step daughter-in-law

She proposed the deceased's estate be distributed equally among the four of them.

Undisputed facts;

- The deceased did not have children and her husband Kimoo Rubari married Wathiba Kimoo.

- Wathiba Kimoo is a co-wife of the deceased and Peninah Wangithi Kimoo and Hellen Wangechi Kimoo are her daughters.

- Tabitha Wangithi Muriuki was the wife of Peter Muriuki Kimoo (deceased) who was son of Wathiba Kimoo

- The estate comprises half share of L.R. No. Inoi/Kamondo/609 measuring 3.70 Ha.

4. The petitioner called Denis Njiru Mabute (PW-1-) who testified that the estate of Wangure Kimoo should go to Tabitha Muriuki. He swore an affidavit sworn on 11/6/2012 which he adopted as his evidence. He depones that Wangure was barren and the husband married Wathiba Kimoo who had a baby boy by name Peter Muriuki (who is now deceased). He further depones that when Wangure fell sick she summoned elders on 23/7/1983 and she declared that ***"igai riakwa ria mugunda uyu ni ria Muriuki ona ndingigakua."*** That is my share out of this land belongs to Muriuki even if I die. The elders were himself, Samuel Makindu Njuki, Patrick Kagithi, Muriuki Samuel, Kimoo Samuel, Njiru Samuel, Mutwe Nyaga and Margaret Wakaria. Muriuki married the petitioner and they have three (3) children.

5. The petitioner testified as PW-2- Tabitha Wangithi Muriuki. She testified that she was married to Peter Muriku who was the second born child of Wangure Kimoo. Peter Muriuki was entitled to 4 ½ acres and is what she is claiming. She had sworn an affidavit sworn on 13/9/12 in which she had deponed that the deceased made an oral will on 23/7/1983 leaving her share to Muriuki who is her husband.

6. PW-3- was Patrick Githigi Mbogo. He testified that Wangure Kimoo is his Aunt – sister to his mother. He testified that the deceased made an oral will by stating that her share of land belongs to Muriuki. That she made the will on 23/7/83 and four days later she died. However during cross-examination he stated that the deceased made the will on 24/7/83. He could not explain the contradiction on the two days. He tended to cling to the date of 24/7/83 and said he had seen the date on the affidavit on that day when he was giving evidence. On paragraph 8 of his affidavit he deposes that the deceased said his share goes to Muriuki. While in his evidence in Chief he said Wangure had said Peter Muriuki is the son who can take over her land. These material contradictions raise doubts as to whether PW-3- was telling the truth. He contradicts other witnesses who said Wangure bequeathed his land on 23/7/83.

7. PW-4- James Njiru Makindu testified that she was present when the deceased summoned elders and said her share should go to Muriuki. The witness contradicted the testimony of PW-3- by saying Muriuki was present when deceased called elders as PW-3- had testified that Muriuki was in approved school Wamumu. He also admitted that he was 19 years and there were others present who were below 18 and as young as 12 years old.

8. The protestors DW-1- Nancy Wathiba Kimoo relied on her affidavit sworn on 23/12/2014 and another sworn by Penina Wangithi Kimoo on 7/1/14. She depones that the applicant Tabitha Wangithi Muriuki is her daughter in law. She has two daughters Penina Wangithi Kimoo and Hellen Wangechi Kimoo. That the deceased Wangurre Kimoo was her co-wife and she did not have children. She testified that she should get the entire land as it belonged to her late husband and her co-wife is deceased. She further told the court that the deceased Wangure did not call a meeting and what witnesses testified about a meeting is a fabrication.

9. DW-2- Penina Wangithi Kimoo testified that the deceased is a step-mother. She testified that the deceased left her land to her co-wife to use and not to dispose it by sale.

10. DW-3- Hellen Wangechi Kimoo is the daughter of Nancy Wathiba Kimoo and the deceased is her Step-mother. She testified that her Step-mother left her land to Nancy Wathiba Kimoo.

11. Parties filed submissions. For the petitioner it is submitted that the protest lacks merits and is an abuse of court process. Firstly it is submitted that the doctrine of res-ipsa-loqui-torapplies as the evidence by the petitioner has not been rebutted. That the land parcel No. Inoi/Kamondo/609 should be shared equally between Tabitha Wangithi Muriuki and Wathiba Kimoo. That there is overwhelming evidence by witnesses who demonstrated the background of the long standing dispute.

12. It is further submitted that the protestors have colluded to disinherit the petitioner. They have been hostile and failed to recognize her as the wife of Peter Muriuki Kimoo. They have also failed to honor the declarations by the late Wangure Kimoo. The contention that the protestors have failed to recognize the petitioner is not borne out by the evidence. In their affidavits and evidence in court they have stated that she is their Sister-in-law and even in court they did not deny that she is the wife of Muriuki.

13. For the protestors it is submitted that the issues in dispute are are whether the deceased made an oral will and bequeathed her land to Peter Muriuki Kimoo. Secondly whether the deceased died intestate and if so the protestor and petitioner should share the estate equally.

14. It is submitted that the petitioner lacks capacity to represent her husband as she did not take out Letters of Administration in regard to her estate before filing the instant cause. She lacks Locus Standi to represent her husband and her claim must fail. He relied on a persuasive decision in ***Jesse Karaya Gatimu –v- Mary Wanjiku Githinji (2014) eKLR*** where it was stated:-

> ***"Regardless of the descriptions the applicant ascribed to Danson Mwangi Thiongo, it is apparent from the application that he was never authorized in law to persue Thiongo's interest under the purported sale agreement in respect of the deceased's estate or part thereof. There is no evidence presented in the applicant's summons to demonstrate that the applicant had been duly appointed as the administrator of the estate of Danson Mwangi Thiongo or his personal representative. Without such an appointment, the applicant could not initiate any legal proceedings for the benefit of Thiongo's estate in which he claims to have an interest. The legal basis for the need for such an appointment is found in Section 2(1) of the Law Reform Act; it states:***
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> *2.* ***(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of, his estate:***

Provided that, this sub-section shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claim damages for adultery.

According to this provision, the applicant ought to have applied, as a condition precedent to his application, for appointment as representative of Danson Mwangi Thiong'o or an administrator of his estate albeit limited to taking proceedings in enforcement his rights under the contract he is claimed to have executed in 1996. This provision is consistent with ***Section 82(a) of the Law of Succession Act*** *which stipulates powers of personal representatives. It states:*

82. ***Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers –***

a) to enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arise out of his death for his estate:

12. This is the correct position at Law. A person wishing to pursue a claim for a deceased person must obtain a grant of Letters of Administration in his estate. It is only then that a party can legally represent the estate of the deceased. This has been held to be the position by the ***Court of Appeal in the case of Trouistik Union International –v- Ingrid Ursula Heinz –v- Jane Mbeyu and Alice Mbeyu c. a. No. 269/1997*** where a five Judge Bench of the Court of Appeal held that the correct position in law is that for a person to legally represent the estate of a deceased person he/she must obtain a Grant of Letters of Administration in his estate. They stated as follows:-

"***The Act came into force on the 1st July 1981. The person whose death and succession gave rise to this suit, namely. John Katembe, died on the 10th April, 1984. To determine who may agitale by suit any cause of action vested in him at the time of his death, one must turn to Section 82(a) of the Law of Succession Act. That Section confers that power on personal representatives within the contemplation of the Act. That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, Section 3 the interpretive section, provides an all-inclusive answer: it says "personal representative means executor or administrator of a deceased person". It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative is the administrator of the deceased. The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the Act "Section 3 says "administrator means a person to whom a grant Letters of Administration has been made under this Act."***

13. The petitioner in her various affidavits depones that she is pursuing the share of her husband Peter Muriuki Kimoo. She has not shown that she obtained Letters of Administration in the estate of her deceased husband. She could not therefore legally petition this court for the benefit of her late husband as she has not been appointed as the administratix of the estate of her deceased husband. I am in agreement with the submissions by the counsel for the protestors that the petitioner lacks capacity to file the petition and the summons for the confirmation of the grant. ***Section 82(a) of the Law of Succession Act*** is clear that only a personal representative as defined under **Section 3 of the Act** has powers to enforce any causes of action for the benefit of a deceased person or his estate. The petitioner had no capacity ab intio to file the petition and to seek confirmation of the grant.

14. It is further submitted by the protestors that there was no oral will. It is pointed out that the petitioner filed the petition as an intestate succession filed under Form P & A 80 which shows that she filed the petition for Letters of Administration intestate and others, P & A 12 and P & A 5 – affidavit for justification of proposed administrator and affidavit in support of petition respectively.

15. It is further submitted that there was no mention of a will oral or written. That in the petition, the petitioner had named herself and Wathiba Kimoo in the petition and only mentioned her husband at the stage of summons for Confirmation of Grant. That the allegation that there was Oral Will was an afterthought which was fraudulently crafted.

16. It is further submitted that on the issue of Oral Will the evidence tendered by witnesses was contradictory as to who was present and the date the Will was made. It is submitted that at the time she is alleged to have made a Will, the deceased had no mental capacity to make a Will as she was terminally ill. Reliance was had on the Court of Appeal decision in ***Rosemary B. Koinange(suing as the legal representative of the late Dr. Wilfred Koinange and also in her own capacity –v- Isabella Wanjiku Karanja & Others (2017) Eklr***

"***45.*** *Part II of the LSA in its 25 Sections makes various provisions on 'WILLS'. In this matter we are only concerned with the capacity to make a Will since there is no challenge on the formalities required under* ***Section 11. Section 5(1)*** *underscores testamentary freedom by declaring thus:*

"***…. Any person may dispose of all or any of his property in a manner he deems fit and a testator may change his mind at any time before his death as to how he intends that his property should be disposed of."***

The freedom is however not absolute since, amongst other things, the presumption of sanity may be challenged and the Will may be declared void if the making of it is caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been adduced by mistake. See sections 5(3),(4) and 7.

17. It is finally submitted that the protest has merits and the estate should be shared amongst the protestors and petitioner as the petitioner has not shown why in the absence of the Will she should get the estate alone.

18. I have considered all the evidence adduced and the submissions on 16/4/2013 the parties entered a consent that letters of administration intestate be issued to them jointly. Two issues which arise are whether the deceased made an oral Will and secondly, distribution of the estate.

19. **Oral Will:**

The Law of Succession Act provides for the making of the Oral Will which would be enforced in the distribution of the estate of a deceased person.

> ***Section 9 of the Law of Succession Act*** provides;
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> ***No Oral Will shall be valid unless—***
>
> ***a) it is made before two or more competent witnesses; and***
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> ***b) the testator dies within a period of three months from the date of making the Will:***
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> ***Section 10 of the Law of Succession Act*** provides;
>
> ***If there is any conflict in evidence of witnesses as to what was said by the deceased in making an Oral Will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.***

20. The deceased died on 27/7/1985 frail and sickly as she was suffering from cervical cancer for a long time. It is stated that she made the alleged Will three days before she passed on. The issue of capacity to make a Will must arise. There is evidence that she was removed from Kenyatta National Hospital and brought to Kerugoya so that she can be nearer home in the event of her death. She could not have been in a capacity to be able to make a Will. For one to make an Oral Will it must be shown that she was in a fit mental state to understand not only her surrounding but those around and in a state that makes her understand the decision she is making and also the person or person to whom it relates. In ***Re Estate of G. K. Kirima (deceased) Lenaola –J as he then was cited with approval the Case of In Broughton –v- Knight 1873*** where it was stated:

> "***the testor must have a memory to recall the several persons who may befitting objects of testator's bounty, and an understanding to comprehend their relationship to himself and their claims upon him so that he can decide whether or not to give each of them any part of his property by Will."***

There are essentials of testamentary capacity which must be shown to be present when a person is making an Oral Will. In the **case of Banks –v- Good Fellow (1970) LR 5 QB 549** which was cited with approval the Tanzanian Court of Appeal Case in **Vaghella –v- Vaghella (1999) 2 E. A 351** it was stated:

> "**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."**

21. Considering the state the deceased was in she could not have been in a mental state which is given in the above authority. She was in hospital for a long time in a lot of pain. A death certificate on record shows she was 80 years and had difficulty or pain in passing urine. I find the deceased in the state she was in, had no mental capacity to make a Will.

22. I will also consider whether the deceased made a Will. The evidence tendered by the petitioners was that the deceased made a Will in the presence of witnesses giving her property to Muriuki.

23. For the protestors evidence was tendered that the deceased called a meeting and stated that she had left her property to her co-wife Wathiba Kimoo and told her not to sell the land.

24. The evidence tendered by the witnesses of the petitioner was contradictory, witnesses disowned their affidavit and were not consistent on who was present. A classic contradiction is where some witnesses said Peter Muriuki was present when the Will was made while another said he (Muriuki) was at **'Wamumu'** Approved School and had to be picked from there to attend burial. I find that the petitioners evidence that the deceased made a Will is not credible and is a fabrication and an afterthought. The petitioner filed an intestate succession and changed midway to say there was a Will. The alleged Oral Will was not reduced into writing and the witnesses were over ten years later pricise as to what was stated. The contention that there was a Will must fail in all fours and the provisions of **Section 10 Law of Succession Act** quoted **Supra** must apply. Furthermore, there was no compliance with **Rule 13(1) of the Probate & Administration Rules** which states:

> **(1) An application for proof of an Oral Will or of Letters of Administration with a written record of the terms of an Oral Will annexed shall be by petition in Form 78 or 92 and be supported by such evidence on affidavit in Form 4 or 6 as the applicant can adduce as to the matters referred to in rule 7, so far as relevant, together with evidence as to –**
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> ***(a) The making and date of the Will.***
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> ***(b) The terms of the Will***
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> ***(c) The names and addresses of any executors appointed.***

(d) The names and addresses of all the alleged witnesses before whom the Will was made

(e) Whether at the respective dates both of the making of the will and of his death the deceased was a member of the Armed Forces or Merchant Marine engaged on the same period of active service.

(f) Whether the deceased at any time executed or caused to be executed a written Will.

25. From evidence tendered, it is clear that there was a conflict as to what the deceased declared. One party claims that she bequeathed her share to Muriuki and the other claims that the deceased declared that her share is to be cultivated by her co-wife and not be sold. Where such a conflict is clear the court will declare such a Will invalid for all intents and purposes and proceed as though it never existed. This cause was filed as an intestate succession, there is no proof that the deceased made a valid Oral Will or at all. The court will proceed to determine the matter as an intestate Succession.

26. Distribution:

The estate of the deceased comprises of a half share out of land parcel No. Inoi/Kamondo/609. This after she inherited the estate of her deceased husband who owned the said parcel. The deceased was registered with her co-wife Wathiba Kimoo Rubari with each getting equal share. Wathiba Kimoo is alive and so her share does not form part of the estate of the deceased.

27. The deceased was survived by Wathiba Kimoo her Co-wife Penina Wangithi Kimoo – Step daughter, Hellen Wangechi Kimoo step-daughter and Tabitha Wangithi Muriuki – Step daughter in law. The Law applicable with respect to dependants is ***Section 29 of the Law of Succession Act.*** It provides:

Meaning of dependant

"For the purposes of this Part, "dependant" means-

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

28. The step-children of the deceased are dependants under the Section. The deceased had no children of her own and so the step children who survived her must be considered in the distribution of the estate without discrimination. The late Peter Muriuki Kimoo was a step-son of the deceased. The Petitioner claims a share by virtue of the late Peter Muriuki being a grandson. The step-daughters are equally entitled by virtue of being step-children of the deceased.

29. **In Conclusion:**

I find that:

(i) The deceased Wangure Kimoo died intestate.

(ii) The step children of her co-wife are the rightful beneficiaries.

(iii) The petitioner did not obtain a Grant of Letters of Administration in the estate of her deceased husband Peter Muriuki Kimoo but despite this since there was a consent to include her as an administratix and I will therefore proceed to consider her in the distribution of the estate.

I order as follows:-

A. The estate of the deceased Wangure Kimoo which is comprised in half share in Land Parcel No. Inoi/Kamondo/609 shall be shared equally amongst:

(i) Penina Wangithi Kimoo.

(ii) Hellen Wangechi Kimoo.

(iii) Tabitha Wangithi Muriuki.

B. The share of Tabitha Wangithi Muriuki is for the benefit of the estate of Peter Muriuki Kingoo.

C. Wathiba Kimoo is not entitled to a share of the estate of her co-wife. She retains her half share out of land parcel No. Inoi/Kamondo/609.

D. This being a matter involving members of the same family, I make no orders as to costs.

Dated at Kerugoya this 19th Day of December 2018.

L. W. GITARI

JUDGE

Mr. Asimwe for Mr. Magee for Respondent.

Petitioner – Present.

Respondent – Present

C/A:- Naomi.