



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 26 OF 2008

IN THE MATTER OF THE ESTATE OF NGETHE KARUGA (DECEASED)

FRANCIS MUNGAI NGANGA.....PETITIONER

-VERSUS-

HANNAH WAIRIMU NGETHE.....OBJECTOR

RULING

1. The matter before this Court concerns the contested validity of the will of the estate of the deceased, Ngethe Karuga of Kiserian, Kajiado County, who died on the 19th of August 2007.
2. Hannah Wairimu Ng'ethe (hereinafter the Objector) petitioned the court in Succession Cause No. 2656 of 2007 and was issued with a grant of Letters of Administration on the 5th of November 2010 to the estate of Ng'ethe Karuga in her capacity as the widow. She had earlier been issued with a Grant of Letters of administration Ad Colligenda bona on 15th October, 2007.
3. Francis Mungai Ng'ang'a (hereinafter the Petitioner), alleging that the deceased left behind a will dated 23rd December 2004, petitioned for Grant of Probate of the written will, in succession cause No. 26 of 2008 on 11th January 2008 in his capacity as the executor named in the said Will. The Petitioner was issued with a Grant of Probate of the written will on 17th September 2008.
4. Upon the Petitioner filing an application for confirmation of grant, the Objector, filed the objection thereto dated 16th February 2011 which is the subject of this ruling. Subsequently the court on 6th April 2011 consolidated the two Succession causes No. 26 of 2008 and 2656 of 2007, by consent of the parties.

Petitioner's case

5. Three witnesses testified in the Petitioner's case. **PW1 - Mr. Paul Mwicigi Kinuthia** the advocate said to have drafted the deceased's Will dated 23rd December 2004, **PW2 - Mr. Domisiano Gitao** said to be one of the witnesses who was present when the deceased appended his thumb print to the will in **PW1's** office and the Petitioner himself who alleged that the deceased left a will behind when he died.
6. M/s. Wambui learned counsel for the Petitioner cited Section 5 and 7 of the Law of Succession Act on capacity to make a will and on situations where a will is affected by fraud, coercion, importunity or mistake. She stated that the matters covered in Section 7 were not raised directly in the protest but were alluded to in the Objector's testimony in court. She argued that the Objector must prove that the will did not meet the requirements of the provisions of the law.

7. Counsel also argued that **Section 5** of the **Law of Succession Act** creates the presumption that the person who is making a will is of sound mind and places the burden of proving otherwise on the person alleging that the testator was not of testamentary capacity, or was of unsound mind at the time of making the Will. She asserted that the evidence was that at the time of making the Will the deceased was of good health and sound mind and was capable of reading the newspaper for himself.

8. Counsel contended that the Objector's testimony that the deceased would forget that he had eaten his meals, was the only issue raised and the allegation appeared to be general in nature and was not specific to 23rd December 2004 when the will was made and there was no medical evidence in support thereof. He submitted that the Objector had failed to prove the lack of capacity of the deceased at the time of making the Will.

9. Counsel relied on the findings of Justice Musyoka in **Succession Cause No. 1064 of 2003** in the matter of the Estate of **Francis Gikumu Wanjohi(deceased)(2014) eKLR** and the decision in **John Kinuthia Githinji v Githua Kiarie & Others, Civil Appeal No. 99 of 1988** where it was held that it is essential to the validity of the will that at the time of its execution, the testator knew and approved its contents.

10. Counsel submitted that the Objector did not raise any issue as to attestation of the Will as set out in Section 11 of the Law of Succession Act. He urged the court to find that the subject Will is valid for having been executed in proper form, by a person of sound mind and having been properly attested. That the grant made on the basis of the valid will was therefore properly and rightly made to the petitioner herein. He therefore prayed that the protest by the Objector be dismissed as being without merit and the court do confirm the grant of probate made to the Petitioner on the 17th August, 2008.

Objector's submissions

11. Three witnesses testified in support of the Objector's case. **DW1** was the Objector who stated that when she filed the petition before the court she had no knowledge of the existence of a will. She testified that the deceased was wealthy and owned cattle and it was therefore untrue that the petitioner helped the deceased with his land case. She asserted that the Petitioner hid the deceased's identity card for 20 years and it took the police to forcefully extract it from him after the deceased died.

12. The Objector stated that she attended the deceased's funeral but was also involved in organizing the said funeral in her capacity as the widow. She testified that prior to his death the deceased had been forgetful. Further that his address was Box 43 Kiserian and not 83 Kiserian.

13. **DW2** - was **Mr. Charles Muturi** who testified that he had known the deceased as his neighbor and chaired the deceased's funeral committee in the home of the Objector and the Petitioner would attend some times. **DW3 - Karuga Ng'ethe** was the son of the Objector and the deceased, who told the court that distribution in the purported will was skewed in favour of one home.

14. Mr. Maina Counsel for the Objector contended that **PW1** who drew the will gave very scanty information on the process that led up to the preparation of the alleged will. He contended that before a will can be declared lawful, it must be proved as a valid testamentary disposition of the testator and that in proving so the court must examine whether the formal requirements of making a will have been complied with such as; whether the testator had the legal capacity to make the will and whether it was made voluntarily without any duress, undue influence or mistake.

15. Counsel submitted that after drawing the Will **PW1** said he kept copies and gave the Will to the deceased, which evidence was contradicted by the Petitioner. On cross examination the Petitioner stated that it was incorrect for **PW1** to state that he handed over the Will to the deceased before he died, and that the alleged will was brought to the Petitioner by a process server months after the deceased's demise.

16. Counsel pointed out that **PW3** had gone to great length in his evidence to present the Objector not as a wife, by asserting that the deceased never showed him any other wife besides his mother in law. He however admitted that he frequented the deceased's home and saw the Objector living there. He

submitted that the circumstances under which the Will was allegedly drawn were suspect and raised serious doubts as to whether the Will was drawn by **PW1** and whether in light of the erasures and alterations such a will can be declared to be a valid.

Issues for determination:

17. From the submissions of the respective parties and the authorities, cited the issues coming up for determination are:

- (i) Whether the deceased left two houses. (widows)
- (ii) whether the subject Will is valid and
- (iii) whether the grant of probate should be revoked or annulled.

Analysis

18. As to whether the deceased was survived by two wives **DW1** - the Objector testified that she was married to the deceased as the 2nd wife in 1970 and lived with him in Kiserian until his demise. She stated that the deceased had another wife who has since died, known as Margaret Wairimu Ng'ethe and that their houses were situated in one compound and shared one gate.

19. I note that **PW3** was anxious to dispute that the Objector was a wife to the deceased by asserting that the deceased never showed him any other wife besides his mother in law. He however admitted that he had frequented the deceased's home and saw the Objector living in that compound. This lends support to the Objector's assertion that the Petitioner knew very well that she was a wife to the deceased, as she had served him tea in her home on many occasions.

20. It is noteworthy that in the chief's letter marked as Annexure "A" to the Petitioner's own petition dated 11th January 2008, those who survived the deceased are indicated to include two widows being Hannah Wairimu Ng'ethe the Objector herein, and Margaret Wairimu Ng'ethe (deceased). It was not disputed that the Objector organized and attended the deceased's funeral, in her capacity as his widow. After the burial, the two widows amicably shared the deceased's eleven goats with the first widow getting six animals and the Objector being the second widow getting five.

21. I also observe that the Chief's letter included a total of thirteen (13) children, which lends credence to the Objector's evidence that her co wife had 4 children while she had 9 children with the deceased. It is also in evidence that on attaining the age of majority, the Objector's children did obtain national identity cards in the name of, and with the help of the deceased.

22. The evidence of the Petitioner is not reliable in view of the many contradictions including the fact that he stated that he did not know Moses Sankale Ngethe only to later state that he called Moses Maina when the deceased died. Moses Maina and Moses Sankale Ngethe are one and the same person.

23. I am persuaded that it is in their capacity as the deceased's second family that the Petitioner called the sons of the Objector, when the deceased died in his house. This would also be the reason why **DW2** who had known the deceased as a neighbor, upon receiving news of his death, was accompanied by two sons of the Objector to the Petitioner's home, where they confirmed that the deceased had died and commenced funeral arrangements.

On the validity of the Will

24. The Objector cast doubt on the deceased's mental capacity at the time of the making of the Will. The relevant provision on capacity is **Section 5 of the Act**, which states as follows:-

“(1) Subject to the provisions by 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.

(2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.

(3) 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 state of mind, whether suffering from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.”

The ground of forgetfulness on its own does not invalidate a will. It must be shown that this condition had an effect on the testator’s mental capabilities at the time of making the Will.

25. Gachuhi, Apaloo JJA and Masime Ag. JA in their decision in **Wambui & Another v Gikonyo & 3 others [1988] KLR pg.445** held *inter alia* that:

“Even in cases where a person is very sick or mentally ill at the time of executing a will, it cannot be a ground for nullifying the will because there are lucid periods where the persons become normal and capable of giving instructions for writing a will. There was no evidence that the deceased was not normal at the time he gave instructions to write the documents.”

Section 5(3) of the Act, creates a presumption that a will presented to court was made by a person of sound mind unless the contrary is proved, while **Section 5(4) of the Act** puts the burden of proving that the testator lacked the requisite mental capacity on the person so alleging.

26. The Objector attempted to establish that the deceased lacked such capacity by stating that he had become so forgetful that he would forget that he had eaten his meals. This particular allegation however was not specific to the time of execution and attestation of the will.

27. No statement or any medical evidence was presented in court as proof of any illness that the deceased may have suffered from and which might have impaired his mental capacity. There is therefore nothing on record from which the court can conclude with any degree of certainty that the deceased did not possess adequate mental capacity before his death to make a will.

28. From the submissions in support of the application, the Objector has called into question the circumstances under which the will was made which she says ought to raise suspicion that the will was not the product of the deceased’s intentions or wishes. This still falls under the provisions of **Section 7 of the Act**.

29. Where a person who plays the central role in the making of the will, that is other than the testator himself, takes a substantial benefit under the will; the role of the court is to scrutinize the evidence carefully so as to be satisfied that the maker of the will did indeed know and approve the contents of the document before he signed it.

30. Suspicion would arise for instance in cases where the principal beneficiary under the will is the person who suggested the terms of the will to the maker, or wrote the document himself, or took the testator to an advocate of his own choice, among others. It is noteworthy that the principal beneficiary under the terms of the subject will is the Petitioner.

31. **PW1** testified that he had been the advocate of the deceased for a long time and identified the Will before the court as the one he had drafted and which was executed by the deceased by way of thump printing and was attested by two witnesses.

32. He told the court that the deceased had a clear mind and no difficulty in thinking and expressing himself. That the Will represented the deceased's final wishes and that he did not question the instructions given to him since **Section 5(1)** of the **Law of Succession Act** provides for testamentary freedom of a person to dispose of all or any of his property in a manner he deems fit.

33. **PW1** on cross-examination conceded that there were many flaws in the Will. He admitted that the date was inserted by hand; that the body of the will which had no date was inserted by hand; that there were alterations by hand on the identification numbers; that it was erroneous to indicate in the last page that anything else in the estate was bequeathed to Francis Nganga; and that he gave the will to the deceased upon drawing it.

34. Other suspicious circumstances surrounding the Will include alterations such as paragraph 3(d) where two acres of land are said to have been bequeathed to one Jane with other names "wambura Bisley" and identification card number being added by pen. The delay of four years in making known the existence of the Will to all the beneficiaries.

35. The Petitioner stated in cross examination that it would be incorrect for the lawyer who prepared the will to state that he handed it over to the deceased before he died. He asserted that the alleged will was brought to him by a process server months after the deceased's demise but he did not know whether it came from the court or the Advocate.

36. What compounds the suspicion is that the Petitioner, who allegedly witnessed the drawing of the will, did not mention that the deceased left a will during the burial and for the four years following the deceased's demise. It was the evidence of the Objector and **DW2** that when the chairman of the funeral committee enquired during the burial preparation whether anyone had a claim against the deceased, or anything to state before the deceased was buried, no one came forward yet the Petitioner was present. According to the Objector the Petitioner knew by 2007 that she had filed a succession cause but even then there was no mention of a will.

37. The requirements for the making of a valid written will as set out in Section 11 of the Act are as follows:-

"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. **The signature or mark of the testator, or the signature of the person signing for him is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;**
- 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 persons sign the will, in the presence and by the direction of the testator, or ...; and each of the witnesses must sign the will in the presence of the testator ..."**

38. **Section 20** of the **Law of Succession Act** provides the guiding principles on the effect of obliteration, interlineation or alteration in a will Subsection (1) provides that no obliteration, interlineation or other alteration made in a written will after the execution thereof shall have any effect unless the alteration is signed and attested as a written will is required to be under section 11. Under subsection (2) a will so altered can only be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the will opposite or near to the alteration, or is referred to in a memorandum written at the end or some other part of the will and so signed and attested.

39. The alterations made in the Will of Ngethe Karuga were not duly executed and attested by the testator and his witnesses through the affixing of their signatures next to the alterations as required by law. None

of the witnesses stated that the alterations were made on 23rd December, 2004 in their testimonies in court and their subscriptions do not appear anywhere in the will. I therefore find that in the circumstances the Will presented to court in this cause cannot pass muster and is therefore declare invalid.

On whether the grant issued herein should be revoked/annulled

40. The circumstances that can lead to the revocation of grant have been set out in **Section 76 Law of Succession**. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.

41. In **Matheka and anor v Matheka [2005] 1 KLR pg 456** it was held that a grant may be revoked if the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the Estate. It may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.

42. There was evidence that the petitioner had in the presentation of the petition for Probate and confirmation of the Grant of Probate, concealed material facts by only listing beneficiaries from the first house and leaving out the Objector's house. The grant was therefore issued without full disclosure of all material facts by the petitioner, which facts would have significantly weighed on the court's determination of the matter.

43. It is also evident that the Respondent did not give notice, or obtain consents of parties with priority for applying for the grant. The identities of the beneficiaries and their interests in the estate are material facts and once it is established that their interests were concealed, the grant of representation issued is flawed. **Section 51(1)(g)** of the **Law of Succession Act** as read together with **Rule 26(1)** of the **Probate and Administration Rules**, provide that:

“Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”

In the circumstances these would have been the Objector and other surviving members of the family of Ngethe Karuga.

44. The Objector has complained that provision was not made for some of her sons and her daughters. She stated that the distribution of the land in accordance with the alleged will was skewed in favour of the first house. The beneficiaries who were omitted and whose status as sons and daughters of the deceased has not been challenged before this Court, are beneficiaries entitled to inherit from the deceased's estate even though they did not file their own contestations to the will. **DW3** did testify in support of the Objector that indeed the distribution in the Will was skewed in favour of the 1st House.

45. Having considered all the above, I have come to the inescapable conclusion that the deceased was survived by two widows and 13(thirteen) children. I also make a finding that the alleged will in these proceedings was invalid. In the premise the objection dated 16th February, 2011 succeeds and it is hereby ordered as follows:

- (i) That the subject will in these proceedings is declared to be invalid;
- (ii) The deceased is declared to have died intestate and his estate is subject to distribution in accordance with the provisions of **Section 40** of the **Law of succession Act**.
- (iii) The grant of probate made to the Petitioner is hereby revoked for reasons of material non-disclosure of vital information.

(iv) That each of the two houses of the deceased to present the name of the person to be appointed as an administrator to represent the respective houses in the succession proceedings.

Costs shall be in the cause.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 27th DAY OF March, 2017.

L.ACHODE

JUDGE

In the presence of: