REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1574 OF 2006

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

JUDGMENT

1. The file of papers before me is not complete for it does not have the pleadings that initiated the cause, that is to say the petition lodged herein for representation to the estate of the deceased. From what is available, it would appear that the deceased died on 17th September 2005. It is not clear when representation was sought in the matter, but it would appear that a grant of probate with written will annexed was made to Allan Gitau Mbugua and Gichanga Kimani on 18th October 2006. The record reflects that a summons for confirmation of grant was lodged at the registry on 21st March 2007. The application is dated 21st March 2007, and it seeks to confirm the grant made on 18th October 2006. The first page of the hand written record is missing, so it is not clear as to what might have happened concerning that application.

2. The application that I am called upon to determine is a summons for revocation of grant dated 16th February 2011. It is brought at the instance of Jane Njeri Mungai. She claims to be the surviving widow of the deceased, having married the deceased in a church ceremony on 28th June 2002. She seeks revocation of the grant of probate of 18th October 2006 on the grounds that the same was obtained fraudulently and by concealment of material facts. She challenges the capacity of the deceased to make the subject will, on the grounds that he was extremely ill and in a bad state of health at the time he was alleged to have made it. She explains that the deceased had previous to marrying her gotten married to another woman, Eunice Wairimu, under customary law, and with whom he had had nine (9) children. After his death, she claims, the first family became hostile to her and her children and began to ill-treat them. Eventually she was forced to file a separate succession cause on the estate, being HCSC No. 2084 of 2006. She concedes that after the deceased passed on, it transpired that there was a will. The executors summoned her for a reading of the same. She found it contents unacceptable, wrongful and founded on misrepresented facts. She mentions that it misrepresented that she was separated from the deceased, distribution was unequal, and she had been left out altogether, the signature of the deceased was forged, some details of the deceased were not given, and the alleged witnesses to the will were strangers. The annulment of the will and the revocation of the grant are sought on that basis.

3. The applicant has attached to her affidavit a copy of the grant of letters of administration intestate made to her in HCSC No. 2084 of 2006, a copy of her marriage certificate as evidence of the ceremony conducted on 22nd June 2002 and copy of the certificate of death in respect of the deceased.

4. Upon being served, the respondents filed grounds of opposition dated 12th October 2011, and an affidavit by one of them, Bernard Kimemia Muranja, sworn on 14th October 2011. The grounds are general, stating that the application was an afterthought, full of falsehoods, issues raised could only be disposed of *viva voce*, it was frivolous and an abuse of court process, and it was untenable in view of the

ruling of Nambuye J of 8th July 2010. In the affidavit, it is pleaded that the deceased was in good health and of sound mind as at the date he made the will, all the executors were long time family friends of the deceased and were personally known to the deponent, and that the deponent was one of the attesting witnesses who knew for a fact that no forgeries took place and that all was explained before attestation.

5. The reply by Allan Gitau Mbugua, one of the executors, in his affidavit sworn on 14th October 2011, is more detailed. He says that the deceased was sound mind at the time he made the will in question, no matter was concealed from the court at the time representation was sought, the will was properly signed before an advocate of many years standing and there was no forgery, the applicant had lied in her pleadings in HCSC No. 2084 by representing that she and her children were the sole survivors of the deceased, the applicant did not protest at the reading of the will and her application is therefore an afterthought and that the deceased was a close friend of the deponent and his family as at the date of his death.

6. It would appear that directions on the disposal of the application were given by Nambuye J. in a ruling delivered on 8th July 2008. Unfortunately the minutes relating to proceedings conducted in this cause from the time it opened in 2006 to 18th October 2011 are missing. There is therefore nothing on record to indicate what might have transpired on 8th July 2008. On 13th March 2013, Kimaru J. directed that the disputed will be proved by *viva voce* evidence.

7.The oral hearing commenced on 27th October 2014. The first witness on the part of the executor was Emily Wanja Kareru. She was one of the attesting witnesses. She was also the widow of the advocate who drew the disputed will of the deceased, that is to say Mr. OT Ngwiri. She was at the time working for the said advocate at his law office, and after the will was drawn, she was called to witness its execution by the deceased. The execution of the will was done at the residence of the deceased, where the advocate had taken the will for that purpose. He allegedly took the witness and another attesting witness, Bernard Muranja, to the home of the deceased. The deceased signed the document in their presence and then she signed and Muranja signed as witnesses. She identified her signature on the said document. She said that she had known the deceased previously as he was a friend of her husband. There was no one else in the house besides the deceased, the advocate and the two attesting witnesses.

8. The executor next called Bernard Kimemia Muranja, the other attesting witness. He was an electrician known to both the deceased and the advocate who drew the will. The advocate found him at his chambers and told him that he wanted him to witness a will. He then transported him, and the other witness, to the home of the deceased, where they witnessed the deceased sign the document, and they thereafter signed the same document as attesting witnesses. He acknowledged his signature on the original will availed in court. He described the deceased as a person who appeared to him to be alright, was talking and was able to hear them.

9. One of the executors, Allan Gitau Mbugua, testified last on his part. He was a younger brother of the deceased. He alleged that he saw the will two months after the deceased died, after the same was brought to him by Mr. Ngwiri, the advocate who drew it. he read it over to them, in the presence of, among others, the applicant. The applicant, who was said to have been then separated from the deceased, did not raise any issues at the time concerning the will. He said that he was not an attesting witness, and he did not even know the persons who signed the will as attesting witnesses. He testified that the deceased had married twice. The first wife was dead, and had had nine children with him. The applicant was the second wife. She had two children, one of whom was born after she married the deceased. He mentioned the assets that the deceased died possessed of, and that all the children of the applicant had been provided for in the will.

10. The case for the applicant opened on 28th January 2015, with the applicant taking the stand. She described the deceased as her husband, having married him in 1993 and solemnized the marriage in 2002. She had one child with him, although also she had two other children with another or other persons. She stated that the deceased's first wife had died in 1990, leaving behind nine children. She mentioned that she and the deceased disagreed and she went back to her parents temporarily. She said that the will had

made provision for her children, but she was not satisfied with it for it had made no provision whatsoever for her. She stated that the will did not have details of the deceased's identity card; neither did it have a date. She stated that the deceased was not sober in mind as he was sick at the time of the alleged execution of the will. She said that she had medical records to support her assertion. She explained that the deceased fell ill in 2002, was admitted at the Kenyatta National Hospital and was wheel-chair bound. She could not tell who took him there, but she visited him once at the hospital before she was eventually stopped from doing further visits. She disclosed that he was ill with cancer. She testified that the alleged signature of the deceased on the will differed from his known signatures, and she produced documents allegedly bearing his known signatures. She however admitted that she did not subject the signature on the will being subjected to examination by a handwriting or document examiner. She conceded to filing HCSC No. 2084 of 2006 and to failing to disclose the children of the first house as she could not get them to sign the relevant documents. She did not assign any reasons for doing so eventhough the letter from their local Chief had mentioned all the children of the deceased. She conceded that Mr. OT Ngwiri read the will and that she did not ask questions. She conceded too that at the time the alleged will was executed she had separated from the deceased. She asserted that she was entitled to get a share of the estate in her capacity as widow of the deceased.

11. The applicant's witness was a woman called Faith Wangui, a resident of Jerusalem, Nairobi. She alleged that she got to meet the deceased sometime in 2005 when she visited her son who was a neighbor of the deceased in the Rongai/Kiserian area. They got so acquainted that he told her about his affairs including how the applicant was taking care of him and how he had distributed his property amongst his children. She did not get to know when he was admitted in hospital, she did not visit him there, and neither did she attend his funeral.

12. At the close of the oral hearing, the parties were directed to file and exchange written submissions. There has been compliance with the directions for the parties hereto did file written submissions; complete with the authorities relied upon. I have read through the filings and noted the arguments advanced therein.

13. I have noted from the written submissions of the executors that Nambuye J had on 8th July 2010 identified the issues for determination in this matter. Those were whether the deceased had the requisite capacity to make the alleged will, whether he exercised his free will in making the same, whether the formalities of making the will were complied with and whether the deceased had made reasonable provision for all his dependants under the will. I should mention again that my file is incomplete for the page where Nambuye J recorded that is missing. The issues identified by Nambuye J are no doubt drawn from the application that I am now determining, dated 16th February 2011. The said application is founded on sections 5, 7, 18, 19 and 20 of the Law of Succession Act, Cap 160, Laws of Kenya, which centre largely on validity of wills, in terms of the capacity of the testator and the will making process in general. I note that the applicant raises issues about her being excluded from benefit under the will. Such an issue does not touch on the validity of wills and testaments, and it is not the subject of the provisions that I have mentioned above - sections 5, 7, 18, 19 and 20 of the Law of Succession Act – but section 26 thereof. That provision is not invoked, and there are no prayers in the application inviting the court to make reasonable provision for the applicant under section 26. There cannot therefore be any basis for the court to make a determination on reasonable provisions where the applicant has not prayed for the same.

14. I hold the view that the directions given by Nambuye J on 8th July 2010, inclusive of the issues identified, were superseded by the directions given by Kimaru J. on 13th March 2013, where only a single issue was identified, validity of the will in question. It is my belief that these latter directions capture the spirit of the application dated 16th February 2011. I firmly believe that the applicant raised the issue of her being excluded from benefit not so that the court could proceed to make a determination of her rights under Part III of the Act, but rather to highlight the environment and circumstances under which that will was made in order to shroud it in suspicion and cast doubt as to its validity. I shall therefore only confine myself to examining the validity of the will as directed by Kimaru J. on 13th March 2013.

15. In her application, the applicant challenges the will on several grounds. She claims that the deceased

did not have capacity to make the will at the time as he was sickly and confined to a wheelchair. She also attacks the whole process of its making, in terms of its execution and attestation, including the claim that the signature on the document was not his. She also appears to imply that there might have been undue influence or other factors affecting the process, given her exclusion from benefit.

16. On testamentary capacity, the relevant law is section 5 of the Law of Succession Act. The said provision states as follows –

> *''(1). 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.*
>
> *(2). …*
>
> *(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 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.*
>
> *(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'*

17. There is no doubt at all that the deceased was of majority age as at the time it is alleged that he executed the will in question. Section 5(1) is therefore not of much relevance in the circumstances. It is section 5(3) that should require due attention. A will made by a person who is not of sound mind is not valid. Unsoundness of mind, according to section 5(3) arises from mental or physical illness, drunkenness or any other thing that causes the maker of the will not to know what they were doing. The applicant appears to be relying on this provision, to argue that the deceased could not possibly make a valid will to the extent that he was sickly, apparently with cancer, so as not to know what he was doing at the time he was alleged to have signed the alleged will. What soundness of mind for the purpose of testation means was defined by Cockburn CJ in *Banks v Good fellow* (1870) LR 5 QB 549 in the following terms:-

> "*… he must have a sound and disposing mind and memory In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, and of the persons who are the objects of his bounty and the manner it is to be distributed between them."*

18. That has been interpreted to mean that the testator has a disposing mind if he is able to know what he is doing when making a will. In short, if he is able to know that he is making a will, to remember the persons who ought to be provided for under his will, and the assets that he owns and therefore available for disposal by that means. The ability to know that one is making a will, to remember the property that should be the subject of the will and of the persons who ought to be provided for can be taken away or affected by mental illness or any other factor that affects a person's mental ability. Some of the factors include illness that affects or causes mental incapacity, consumption of excess alcohol or drug abuse. A person, who seeks to rely on unsoundness of mind as a basis for nullification of a will, must adduce evidence tending to prove that the testator had an illness that had affected his mental capacity at the time, or was drunk or drugged. This calls for testimony as to his state of mind at the material time, and, where possible medical evidence that would point towards such a condition. It should be mentioned that the burden of establishing that the maker of the will lacked the requisite mental capacity lies with the person making the assertion, in this case that would be the applicant.

19. In the instant case, the applicant averred in her papers that the deceased was at the material time extremely ill and in a bad state of health. When she gave oral evidence, she described the deceased as wheelchair bound and pointed to his having been admitted in hospital sometime in 2002. She placed before me a case summary from Kenyatta National Hospital dated 12th September 2005, which indicated that the deceased had been admitted at the facility on 11th September 2005 and was discharged on 12th

September 2005. The document is a photocopy, handwritten and not clearly legible. It does not clearly indicate what he was admitted for, although it uses the word prostrate several times.

20. It is my very humble view that the evidence adduced falls short. The applicant was not living with the deceased at the time the alleged will was made on 24th August 2005. She could therefore not give an accurate state of affairs as to his health at the time, and crucially the state of his mind. She testified that she once visited him at Kenyatta National Hospital, but it would appear from the record that that was when he began ailing in 2002. The medical records she produced did not advert at all to his mental state. She did not demonstrate that whatever illness assailed him had affected his state of mind so much so that he did not know what he was doing at the time he made the alleged will. It is my conclusion that the applicant did not discharge the burden cast upon him by section 5(4) of the Act.

21. The material placed before me by the applicant should be juxtaposed against the case presented by the administrators. The will in question was professionally drawn by an advocate. From the oral evidence, it was the said advocate, Mr. OT Ngwiri, who arranged for its execution at the home of the deceased. The execution was witnessed by two persons who signed on the will as attesting witnesses. They gave evidence. Their testimony was that they saw the deceased at the time, he was well and talking. He signed on the document in their presence. Their respective testimonies were not shaken on cross-examination.

22. Related to soundness of mind are factors that have the effect of taking away the free will of the deceased. These are stated in section 7 of the Law of Succession Act; a testator's free will would be affected by fraud, or coercion or undue influence or mistake. The applicant has not pleaded lack of free will on the part of the testator, although there is some faint implication of it in her supporting affidavit. Her testimony in court did not in any way point to any of the vitiating factors mentioned above.

23. The formal requirements for the validity of a will are set out in section 11 of the Law of Succession Act, which states 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 which 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 of or by the direction of the testator, … 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.'*

24. On the face of it, the will before court appears to satisfy the said requirements. It bears a signature which is purported to be of the person who made it, positioned in the manner stated in section 11(b) of the Act. The executor called two witnesses who testified that the testator had complied with section 11(a) and (c), in that he allegedly signed the said will in their presence, and that they attested to his signature as required. I find, from the testimony of the applicant, no material upon which I can hold that the event described by the two witnesses, that is to say Emily Wanja Kareru and Bernard Kimemia Muranja, never happened. Indeed, the whole occasion appears to have been under the stewardship of Mr. OT Ngwiri, whom the applicant admits was an advocate for the deceased. The applicant herself has not denounced the making of the will and the operation described by the witness, save that she alleges that the signature on the document was not that of the deceased, and secondly complains that the will did not provide for her.

25. On the forgery claim, she relies on a document that she placed on record to demonstrate that the signature on the will differed from the deceased's usual signatures. The applicant did not claim to be a document examiner; neither can I claim to be one. Neither of us can speak authoritatively about the

authenticity of the alleged signature. The most effective way of dealing with such matters is to subject the alleged signature to testing by a document or handwriting examiner or expert. The applicant did not subject the signature on the will, alleged to be that of the deceased, to such testing, there is no report of such an expert, and none was called. I cannot therefore make any determination at all on the said signature without such expert evidence.

26. The allegation that the said signature was not that of the deceased amounts to a claim that the signature was forged or that fraud was exercised in the procurement of the alleged will. That is to say that someone other than the deceased had affixed that mark on the will with the intent of passing the same as the signature of the deceased. Forgery is a criminal offence. The applicant is in fact imputing criminal conduct on either the person propounding the will or those who were involved in the operation that is purported to have been its execution. The burden of proving forgery lies with the person alleging it. In *Elizabeth Kamene Ndolo vs George Matata Ndolo* Nairobi Court of Appeal civil appeal number 128 of 1995 it was stated that the charge of forgery or fraud is a serious one, and the standard of proof required of the alleger is higher than that required in ordinary civil cases.

27. It is my finding that the applicant has not discharged the burden of proving forgery or fraud in light of the fact that no expert proof was presented. In any event in *Elizabeth Kamene Ndolo vs. George Matata Ndolo* (supra) it was held that eyewitness evidence of attesting witnesses was superior to that of handwriting experts, which really is only opinion evidence. That would then mean that the testimony of the attesting witnesses called by the executor was sufficient to establish that the deceased did sign the alleged will for they were present and did see him sign the same.

28. The applicant raised an issue as to the signature not being authenticated by the deceased's national identity card. There is nothing in law that requires that the national identification card number of the deceased ought to be indicated in the will. It is also alleged that the attesting witnesses were strangers to the family. Again, there is nothing in the relevant law requiring that the witnesses be known to the family. The only requirement in section 11(c) of the Law of Succession Act is that they be competent, defined in section 3 as being of sound mind and full age. An issue has also been raised relating to the date of the will, it being argued that there is no date against the signature of the testator. Both attesting witnesses endorsed the date of 24th August 2005 as the day when they signed the will. In their respective oral testimonies in court, they also stated that that was the day when they were conveyed by Mr. Ngwiri to the deceased's home, where they witnessed the deceased executing the will. To my mind there cannot be any dispute that the deceased executed the will on 24th August 2005.

29. One other thing that the applicant has adverted to is the issue of not being provided for. I have stated in paragraph 13 here above that the application before me is not premised on section 26 and therefore I ought not to consider whether or not I should make provision for the applicant. My reading of section 26 is that orders made under it ought to be on application, and not *suo moto*. There are criteria to be met, set out in section 28, the facts warranting exercise of discretion under section 26 are to be brought out in an application brought under that provision.

30. Overall, I do not find material upon which I can invalidate the will made on 24th August 2005. The application dated 16th February 2011 is accordingly dismissed with costs. As the deceased died testate the cause in HCSC No. 2084 of 2006, which is premised on his presumed intestacy, is hereby struck out. The executor is at liberty to prosecute the application for confirmation of grant dated 21st March 2007. I note that all the assets that make up the estate of the deceased are situate within Kajiado County, the cause herein shall accordingly be transferred to the High Court of Kenya at Kajiado for final disposal.

DATED, SIGNED and DELIVERED at NAIROBI THIS 30TH DAY OF JUNE, 2017.

W. MUSYOKA

JUDGE