



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE 915 OF 1999
IN THE MATTER OF THE ESTATE OF HERMAN GACHUHI NGATIRI
(DECEASED)
MARGARET WAITHERERO.....PETITIONER/RESPONDENT
VERSUS
CORNELIUS KIMANI & OTHERS.....OBJECTOR/APPLICANT
JUDGMENT

APPLICANT'S CASE:

By application filed by the Objector Cornelius Kimani on 11th September 2012; he sought from Court orders; that the grant of probate issued to the Petitioner; Margaret Waitherero on 23rd June 1999, be revoked or annulled.

The Objector/Applicant relied on the following grounds;

- a. That the deceased's Will dated 26th May 1998 was and is a forgery and these proceedings are fraudulent and are null and void.**
- b. The deceased left a valid Will of 7th October 1983 and the Petitioner failed to acknowledge this Will at the time she applied for grant.**
- c. There are beneficiaries of the deceased's estate who were left out and disinherited by virtue of reliance of the Will of 26th May 1998.**
- d. The Petitioner was distributing the estate before confirmation of grant and the disinherited beneficiaries stand to suffer irreparably.**

On 5th November 2015, The Objector/Applicant PW5 testified in reliance of the Supporting affidavit that the deceased had 2 houses that comprised of;

- 1) Margaret Waitherero**
- 2) Elizabeth Wanjiku Mbogo**

3) Rosemary Wangui

4) Jane Wakonyo

5) Clara Wanjiru

6) Wilson Ngatiri

7) Francis Muchina

8) Joseph Mbugua

1) Anne Wanjiku

2) Cornelius Kimani

3) Emily Waithera

4) Veronica Wairimu

The deceased had the following assets;

1) Nairobi/Ruaraka/336/33

2) Lari/Kirenga/132

3) 50% shareholding in Stress Investment Limited.

The deceased by the Will dated 7th October 1983 and Codicil dated 18th March 1986 had provided for his family widow Margaret Waitherero, daughters and sons including Cornelius Kimani only from the rest of the other family. According to the Objector, the Petitioner knew that he is son to the deceased and the Petitioner sought grant of Probate without informing, consulting and involving him.

The Objector contended that the deceased had cancer and was sick in and out of hospital from 1997 until he died on 3rd February 1999. The Will was drawn on 26th May 1998 and therefore he was not in a state of mind in which he could write or sign a valid Will.

The Will of 7th October 1983 provided for all the children of the deceased and later the deceased prepared and signed a Codicil and disinherited his 2 sons because they placed a caveat over LR336/33 and threatened to kill him.

In the current Will, the deceased left out his own son Joseph Mbugua; the Will is flawed as the Document Examiner confirmed that the known signatures of the deceased and the one on the Will were not identical or similar as per Report produced in the Document Examiner's Report marked CK2.

During his testimony he stated that that he visited his late father in hospital and attended the funeral in Lari Kiambu . He had met the deceased wife Margaret Waitherero who came to their home in 1984 and found the deceased with his mother. They continued to meet in other circumstances and knew her 7 children. He went to school at Senior Chief Koinange and the deceased paid his fees. After the deceased's funeral, the family did not discuss anything. His mother had documents in her possession, from Barclays Bank and Hamilton Harrison Matthews Advocates that were given to her by the deceased. they approached both institutions and realized that there was a another Will of 7th October 1983 apart from the one of Will of 25th May 1998 in which the deceased provided for him alongside the deceased's other sons.

In cross examination, the Objector admitted that there are other siblings Michael Mwaura and Samuel

Wanyoike and they are children from different fathers, He also stated that his mother was not married by the deceased. He admitted that he was not named according to Kikuyu customary law as father to the deceased or father of his mother.

He confirmed he filed the applications of 31st May 2000 and then withdrew the same. He wrote the letter dated 7th July 2003 seeking an out of court settlement and requested a house in Buruburu for his family 5 acres in Githunguri and settlement of rent arrears and legal fees.

He then filed an application on 8th September 2005 for reasonable provision from the estate of the deceased and they sold all of them.

The Applicant Objector seeks revocation of grant and the Will of 25th May 1998 be declared a forgery and the Will of 7th October 1983 takes effect.

The Document PW4 Examiner Mr. Mackenzie Muweu stated that on 25th April 2000 received documents which were; the documents relating to Succession Cause 915 of 1999, the documents with known signatures of the deceased and the Will of 7th October 1983. He compared the signatures and they did not agree; they were not by the same hand. He prepared his report and presented to Court as Exhibit.

RESPONDENT'S CASE

The Respondent, Margaret Waitherero; Executor of the Will of the deceased of 25th May 1998. she stated she is wife/widow of the deceased and she undertook the process to obtain grant of Probate of deceased's Will. This is after she went to the deceased's advocate Ms Lilian Mwaniki advocate and was informed of the Will of the deceased.

She did not know of the Objector until she was brought to Court, she denied she knew his mother and siblings. When she got the Will , she realized that there were 8 Plots missing and went to the offices of Jozano Housing Company and found they were allocated to Cornelius Kimani who had transferred to other buyers. There was a certain property in Baba Dogo of 12 acres which the deceased sub divided and sold and at the time of death he had not transferred the same to the purchasers. the remaining plots she has liabilities to pay and upkeep for the rest of the family. the properties are for her children .

She stated that her husband did not tell her, he had another wife and she did not know of another Will. She is familiar with her late husband's signature and he signed the 1998 Will. She confirmed that the 1983 Will included the Objector but she cannot tell why as she did not know of the family. She confirmed in cross-examination that she was not present when the Will of 1998 was drawn, she went to hospital.

PW2 Ms Lilian Wanjiku Mwaniki advocate of High Court of Kenya stated that she went to the deceased's home on 13th May 1998 at his request and she found his daughter Elizabeth and George Joseph Njoroge. The deceased gave her instructions on how to draw the Will and she left. On 26th May 1998, the deceased came to her office and in her presence and the said George Joseph Njoroge after reading the Will and confirming the instructions , he gave her ,signed the Will, George Joseph Njoroge signed as witness and she signed the same too. The witness confirmed that she witnessed the deceased sign the Will after he gave instructions on the content of the same. She gave it to the Respondent after the funeral and it was the basis for obtaining grant of Probate.

In cross examination, she stated the deceased was her client since 1993 and he sent purchasers to her office and came himself. The day he called her to his home in Baba Dogo was the first time, he was ok but seemed frail. When he later went to her office and signed the Will he was ok. She was not aware that on 26th May 1998 the deceased had just been discharged from hospital.

PW3 George Joseph Njoroge stated that he was Pastor and friend to the deceased and met with deceased in 1990 and went to the same Church. He confirmed he was at the deceased's home on 13th February 1999 and the advocate PW2 came in and the deceased said he wanted to write a Will, he told the advocate what he wanted, and on 26th May 1998 they met in the advocate's office, he read and confirmed the

content and signed it and he signed the same document as witness and PW2 Lillian Mwaniki signed the Will.

In cross examination, he stated that on 26th May 1998 he found the deceased at the advocates' office in Hughes Building at the reception area and he was in the company of son in law called Mbogo. He was not informed the deceased had just been discharged from hospital and he looked in good health.

The Objector filed through Counsel written submissions on 19th October 2016.

The Petitioner/Respondent filed written submissions through Counsel on 25th July 2016

DETERMINATION

The issues for determination are;

- 1) Is the Will of deceased of 26th may 1998 a forgery?**
- 2) Is the Objector entitled to beneficial interest of the deceased's estate?**

The law that deals with validity of the Will is as follows;

- a) **Section 5(3) of Law of Succession Act Cap 160** provides that for a written Will to be valid the person making it is of sound mind and the Will is duly executed.

Refer:

BANK vs GOODFELLOW [1870] LR QB 549

VAGHELLA vs VAGHELLA (1999) 2 E.A.351

- b) **Section 5(4) of Law of Succession Act Cap 160** provides that the burden of proof that a testator was at the time he made the Will not of sound mind, shall be upon the person who alleges.

Refer:

RE ESTATE OF GATUTHU NJUGUNA (DECEASED) [1998] eKLR

JAMES MAINA ANYANGA vs LORNA YIMBIHA OTTARO &4 OTHERS

SUCCESSION CAUSE 1 OF 2002 NAKURU HIGH COURT

- c) **Section 11 of Law of Succession Act Cap 160** provides for mandatory requirements of execution of the Will of the deceased

- d) **Section 7 of Law of Succession Act Cap 160** 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.

From the evidence on record, the Will of deceased of 26th May 1998 was properly drawn and executed as shown by evidence of PW2 and witnessed also by PW3. Their evidence was not controverted. If the deceased was influenced or not in a state of mind or capacity to write and sign a Will, they burden of proof was not discharged by the Objector. The Document Examiner relied on documents provided by an independent person from these proceedings, he relied on copies as original Will is with Petitioner and the copies were not certified and the examination was not pursuant to an order of the Court; in which case the

opinion is not independent of influence of the instructing client.

Although there is the Will of 7th October 1983, the Will of 26th May 1998 in its first paragraph states; **"revoke all my former Wills, Codicils and my other testamentary dispositions"** In the absence of any other evidence to cast aspersions of compliance of legal requirements of the valid Will then the Will of 26th May 1998 is valid.

With regard to the 2nd issue; the Objector states that the 2nd family was left out and disinherited by virtue of reliance of the Will of 26th May 1998. And the Petitioner was distributing the estate before confirmation of grant and the disinherited beneficiaries stand to suffer irreparably. Is Anne Wanjiku mother of the Objector wife /widow of the deceased under **Section 3(5) of Law of Succession Act cap 160**? This Court was not furnished with any evidence of a legal marriage between the deceased and Ann Wanjiku. She did not file pleadings or testify in Court. Therefore in the absence of evidence the same cannot be assumed. With regard to the children of Anne Wanjiku, apart from Objector's evidence that the deceased came and stayed at their home on occasion, there is no evidence that they are children of the deceased. The Objector is not named according to Kikuyu customary law after father of the deceased and no evidence was produced on paternity.

If such evidence is obtained then the Objector may pursue reasonable provision from the deceased's estate under **Section 26 and 29 of the Law of Succession Act Cap 160**.

In reliance of the following case;

**IN THE MATTER OF THE ESTATE OF LATE SOSPETER KIMANI WAITHAKA
SUCCESSION CAUSE 341 OF 1998 the Court held;**

The will of the departed must be honored as much as it is reasonably possible. Readjustments of the wishes of the dead, by the living, must be spared for only eccentric and unreasonably harmful testators and weird Wills. But in matters of normal preferences for certain beneficiaries or dependants, maybe for their special goodness to the testator, the Court should not freely intervene to alter them

DISPOSITION

- 1. The application of 11th September 2012 is dismissed**
- 2. The Will of the deceased of 26th May 1998 is valid .**
- 3. The Objector did not furnish the Court with evidence that he and siblings are children of the deceased under Law of Succession Act and/or**
- 4. His mother Anne Wanjiku is widow to the deceased under Law of Succession Act cap 160.**
- 5. Each party to bear its own Costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH JUNE 2017.

M.W.MUIGAI

JUDGE