REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSES NOS. 2734 and 2800 OF 2006

IN THE MATTER OF THE ESTATE OF VERONICA NJOKI MUNGAI (DECEASED)

JUDGMENT

1. The deceased herein died on 11th August 2006. A letter from the Chief of Riabai Location, Kiambu, dated 30th October 2006, states that she was survived by four individuals, being her stepchildren, Peter Mararo Mungai, Gladys Ndundu Mbugua, Anastasia Wamucii Njonge, Njeri Ngoiya, Philip Njoroge Mungai and Margaret Wangari Kamau. Representation to the estate was sought in HCSC No. 2734 of 2006, in a petition filed herein on 10th November 2006 by two of the stepchildren, Philip Njoroge Mungai and Anastasia Wamucii Njonge. They listed themselves as the survivors of the deceased, together with the others listed in the Chief's letter. The deceased was expressed to have died possessed of Ndumberi/Riabai/3260, 3261, 3262, 3265, 3266, 3267, 3268, 3269 and 3270, and money in an account with Kiambu Unity Finance.

2. There is no evidence of gazettement of the cause but there is an objection on record filed by Kanyi Ngumo, Magdalene Wanjiku and Nduta Gachoka, dated 1st February 2007. They allege that the petitioners were not beneficiaries of the estate and that the deceased had died testate having left a valid will. I have carefully perused the record and I have not come across an answer to the petition, nor a cross-application.

3. Another cause in the same estate was initiated in HCSC No. 2800 of 2006 by way of a petition for grant of probate in that cause on 16th November 2006. The petitioners in that cause are siblings of the deceased. They founded their petition on grounds that the deceased had made a valid will on 18th August 2005. There is an objection lodged in the matter by Philip Njoroge Mungai on 22nd December 2006. He filed an answer to the petition and a cross-petition herein on 31st May 2007.

4. Directions were given on 30th January 2012; to the effect that the objection proceedings would be conducted to determine the validity of the will of the deceased. .

5. The oral hearings commenced on 20th January 2014. The first to take the stand was the petitioner in HCSC No. 2734 of 2006, Philip Njoroge Mungai. He said he was a stepson of the deceased, who was the third wife of their late father. The deceased was said to have been childless. Their father had shared out his property amongst his three wives. The share given to the deceased was meant to be held by her during lifetime to revert thereafter to sons of their father, that is to say Peter Mararo, Philip Njonge and Michael Ikonya. When their father died, the deceased was allegedly left under the care of the petitioners. She allegedly began ailing in the 1980s, and was hospitalized in 2006. He identified that Kanyi Ngumo, Magdalene Wanjiku and Nduta Gachoka as siblings of the deceased. Kanyi was described as dead, while Magdalene and Nduta were said to be married. He asserted that it could not be true that the deceased had had made a will, for she had been instructed by her late husband that the land would remain in the family.

He said he knew Simon Ngumo Gachoka was a nephew of the deceased. He denied that the former ever lived with the deceased, or was brought up by her. He particularly denied that the said nephew lived with her since 1972 till her death. He described an event on 7th August 2006, during the deceased's hospitalization. He said she was in a coma then, when she found Peter Waithaka, Kanyi Ngumo and Peter Njenga Njoroge in a cubicle within the hospital. He claimed that he witnessed as the three made the deceased sign some papers. Peter held the documents and lifted the deceased's hand and had a fingerprint affixed on it. He alleged that he protested, but they said that she was signing a document to consent to her removal to a theater for an operation. He was not convinced, so he went to see the nurse on duty, who informed her that it was only a doctor or a senior nurse could take the signatures of a sick patient for such an operation. When he returned to the ward he found that the three individuals had already left. He insisted that the deceased was unconscious at the time, and was not in control of her faculties, and she never recovered from the coma. He stated that the deceased had subdivided the property prior to her death, and sold three portions to raise money for her maintenance, but the rest was retained in her name. His case was that he was opposed to the property being given to persons outside the family, saying that that was not allowed traditionally.

6. During cross-examination, he identified the property in question as Ndumberi/Riabai/1813. He confirmed that the land was the deceased's share from his father's property, and that each of the three houses of their father got their share, a parcel each. He also confirmed that the deceased subdivided her parcel, and sold portions of it to several individuals, including a church. He had no objection to the transitions given that the deceased had been given the property by his father, her husband. He stated that she died in August 2006 during her last hospitalization, and that in the cause of that hospitalization certain persons came to hospital with documents which were then presented to her. He conceded that the will placed before court was dated August 2005, but he insisted that that that was the document that the deceased was forced to sign, and then it was backdated. He asserted that the deceased could not have possibly made the document. He, however, said that he could not deny that she might have prepared a will which she kept secretly from him. He conceded that he did not read nor even see the document that was allegedly presented to the deceased on her deathbed. He said that he did make a report of it to the hospital authorities, but no action was taken as the three persons had left the hospital. He did not take any other step thereafter. He said that he was not able to produce documents from the hospital for the admission in August 2006 as the hospital had informed him that all those records had been destroyed. He conceded that he had nothing from the hospital as evidence of the alleged destruction. He further conceded that the deceased was the registered proprietor of the subject property, and she could deal with it as he pleased.

7. The next witness for the objector to take the stand was Sylvester Kituri Wangugi. He introduced himself as the Assistant-Chief of Kihingo Sub-Location since 1997. He said he knew the family of Philip Njoroge Mungai, it lived in his area of jurisdiction. He stated that the deceased had four wives, one of whom, the deceased, did not have children. He testified that he got to know Simon Ngumo Gachoka after the deceased's demise, although he later said that the latter used to visit the deceased from time to time, adding that the latter was never brought up by the deceased. He mentioned that he also knew the sisters of the deceased. His office was allegedly located on the land of the deceased, which had been acquired by the community. He described the relationship between Philip Njoroge Mungai and the deceased as having been cordial. During cross-examination he conceded that there had been a dispute brought to his office by the deceased against Philip Njoroge Mungai on grounds that he had insulted her. He said that both had come home drunk, they quarreled and fought, and then the deceased reported the matter to his office. He was unable to recall how he resolved the dispute. He mentioned that it was Simon Ngumo Gachoka who resided in the house of the deceased standing within the property.

8. The respondent's case commenced on 27th January 2015. The first on the witness stand was Ruth Nyokabi Ngaruiya. She described herself as having been an employee of the firm of advocates who prepared the will in dispute, Njoroge Baiya & Company, Advocates She testified that she was a secretary in that firm for the period running between 2002 and 2008, and produced her letter of appointment to support her evidence She identified the will produced in court in the cause as the will prepared by the law firm she worked for. She testified that the deceased came to the law firm, accompanied by two elders, and asked to see the advocate, Mr. Njoroge Baiya. She ushered them in, and left them with the advocate, who,

after taking instructions, gave her the draft papers to type the will, which she did. She took the draft to the advocate after typing. She stated that she was the one who explained the contents of the typed will to the deceased in Kikuyu. She witnessed as the deceased thumb printed the document before the advocate, and she then signed as one of the attesting witnesses. She asserted that the deceased was able at the time as she had walked to the law firm's offices on her own feet. She identified the will before court as the document that she typed and signed as an attesting witness. During cross-examination, she identified the persons who had accompanied the deceased to have been her siblings and friend of the deceased. She stated that it was the advocate who asked her to explain the contents of the documents in Kikuyu to the deceased and her party, adding that the advocate did not sign the document nor was a rubberstamp of the firm affixed on the document. She stated that there was no legal requirement for that. She asserted that she signed the document in the presence of the advocate. She also stated that the thumbprint of the deceased was affixed in her presence and that of the advocate.

9. The next witness for the respondents was Peter Waithaka Muchigi. He testified that the deceased sold two portions of land to the church, in which he was one of the elders. He said that he was party to the transactions as a witness. He mentioned that he was aware that the deceased had made a will. He also said that he was aware that she had been hospitalized prior to her death, but added that she was not very sick. During cross-examination, he alleged that the deceased had called her to have him witness her will, but he was busy and was therefore not available for that exercise as he was engaged elsewhere in a funeral that he presided over.

10. The applicants' third witness was Magdalene Wanjiku, a sister of the deceased. She testified that she was the one who was staying with the deceased during her final hospitalization, and was present when she died. She stated that the deceased did not have a mental problem before she died. She mentioned that the deceased had a farm that had been given to her by her late husband, portions of which she had been sold to some persons. She mentioned that the deceased had told her before her death that she had made a will. .

11. The last witness on the objectors' side was Simon Ngumo Gachoka, a nephew of the deceased. He said that he used to live with the deceased since 1972, after she took her in as her own child since she did not have children of her own. He testified that she paid for his secondary schooling. He added that he was staying with her to the point of her death and thereafter, even as at the date of his testimony. He conceded that the deceased had property that she had been given by her late husband. He mentioned that his parents survived the deceased, and died during the pendency of these proceedings. He testified that the deceased sold portions of the subject land to various individuals, in transactions that he was privy to as a witness. He produced the original will, which he said used to be in the custody of his father, and when he died it passed to the hands of his late mother. He stated that the copy of the will used for the purpose of initiating the proceedings had been obtained from the offices of Njoroge Baiya, the advocate who had drafted it. He conceded that he was not one of the persons who attested the will. He also conceded that he was not a child of the deceased.

12. At the close of the oral hearing I directed the parties to file and exchange their respective written submissions. Both sides complied with the directions. I have perused through the submissions and taken note of the arguments made therein.

13. The only issue for me to determine as per the earlier directions of the court is whether the will placed before the court is valid.

14. The deceased died sometime in 2006. This was after the Law of Succession Act, Cap 160. Laws of Kenya, had come into force. The said law governs both testate and intestate succession to estates of person dying after the Act had come into force. The estate of the deceased herein is therefore subject to that law, and the validity of the will before me is to be tested on the basis of that law.

15. The provisions of the Act relating to validity of wills are to be found in Part II thereof. The relevant provisions for the purpose of this case being sections 5, 7 and 11 thereof..

16. Section 5 deals with freedom of testation and capacity to make a will, and says 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 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 a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he was 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 dispute that the deceased had freedom, as a female, to dispose of by will any property she owned, in accordance with section 5(1)(2) of the Law of Succession Act. The only issue is as to whether she made the will before court as alleged by the persons who seek to propound it.

18. The respondents allege that the deceased made a will, and have placed before court the original of the alleged will. According to section 5(3) of the Law of Succession Act, it shall be presumed that a person who is purported to have made a will made it while of requite testamentary capacity. Section 5(3) should be read together with section 5(4), which casts the burden of establishing that the deceased was not of the requisite capacity at the material time on the person alleging the lack of capacity. In the instant case, the respondents do not have the duty to prove that the deceased had the requisite capacity at the material time to make the will, going by the provision in section 5(3) of the Act. The burden is on the cast on the objectors by dint of section 5(4) of the Act. The question then is whether the objectors have discharged that burden.

19. The respondents' case is that the deceased made her will professionally through an advocate, sometime in 2005. The objectors acknowledge that such a will was made, but not in 2005 as alleged but in 2006, during the deceased's final hospitalization. They argue that the will could not be valid as at the time of the alleged will the deceased was in a coma having lost consciousness, meaning therefore that she was in no physical or mental state of mind to make the will, and that the matter therefore fell within the provisions of section 5(4) of the Act.

20. The principle in civil practice is that he who alleges must prove. The objectors allege that the deceased had been hospitalized in August 2006 and had lapsed into a coma. It is not disputed that the deceased was hospitalized in August 2006, but the fact that she had lapsed into a coma at some point is disputed. The matter of the coma is critical, for it is alleged by the objectors that it was at this stage that the alleged will was made. Regrettably, the objectors provided no proof of the alleged coma, for no medical documents were placed before court as to the nature of the deceased's illness and treatment at the time, and more particularly as to her mental and physical state as at the time the objectors allege the respondents procured the deceased's signature. There is therefore no evidence as to the deceased's lack of testamentary as at the date the objectors allege she signed the will in question.

21. It equally the objectors who allege that the said will was made in 2006 and not 2005 as alleged by the respondents. The document before court bears the date of 18th August 2005. It was incumbent on the objectors to adduce and produce evidence tending to show that the will was actually signed in 2006 and not 2005 as alleged. No evidence to that extent was led by the objectors. When Philip Njoroge Mungai testified he alleged to have witnessed the respondents take the hand of the unconscious deceased and to forcibly make a thumbprint make on the alleged will in 2006. He allegedly raised the issue with the duty nurse, however the said nurse was not called to lend credence to that allegation. The alleged conduct of the respondents bordered on criminality, and a report ought to have been made to the relevant authorities, however the witness took no further step and the matter rested at that point. It is clear that there is no material upon which I can hold that the will in question was actually made in 2006 but backdated.

22. Section 7 provides for other factors that tend to affect the validity of a will apparently made by a person of competent mind. These include cases where the making of the will is attended by fraud or coercion or undue influence or mistake. The allegation by the objectors is that the deceased was in a coma when her hand was taken against her will, and a thumbprint made on the alleged will. That would bring the matter within the realm of fraud or coercion, but not undue influence or mistake. Such act would affect the validity of the will. In my view the objectors are making a case for fraud. The deceased was allegedly unconscious, therefore one cannot talk of her being coerced or influenced to do anything. Instead, the respondents are alleged to have fraudulently manipulated her hand to procure a thumbprint. In my view this was more of fraud than coercion. Whatever the case, I am not persuaded that a case has been made out to prove the alleged fraud, in view of what I have said in paragraph 21 hereabove.

23. Section 11 of the Act deals with the formal requirements for validity. The written will must have been signed by the testatrix or by someone else by her direction and in her presence; and two, the execution ought to be in the presence of attesting witnesses, or there ought to be acknowledgement of the signature by the testatrix to the witnesses.

24. In the instant case, the document before court has a thumbprint alleged to be that of the deceased, positioned at the right place within the execution clause. To my mind that would amount to compliance with section 11(a)(b) of the Act. On attestation, names of two witnesses are provided, complete with their signatures. One of them, Ruth Nyokabi Njoroge, was availed at the hearing. She testified to having been the person who typed the will, to having been present when the deceased affixed the thumbprint mark on the will, and to have herself signed the document as a witness. On the face of it, it would appear that the will was properly attested in keeping with section 11(c) of the Act.

25. The objectors argue that the advocate who drew the will did not attest to its execution, and was not called as a witness. My attention was not drawn to any statutory provision or authority which would make it mandatory for the advocate drawing a will to at the same time be an attesting witness to its execution. None was pointed to also regarding the advocate being required to testify during the probating of the will. The will named witnesses who appended their signatures. Such persons sign the document so that in the event of a dispute they can come forward and give evidence as to the process of the making of the subject will. The omission to call the advocate as a witness is a matter of little value so long as one of the other key players in the alleged making of the will came to court and testified.

26. It emerged from the trial that the deceased was not conversant with English, the language of the will, and it fell upon Ruth Nyokabi Njoroge, the attesting witness, to explain to her the contents in her language, Kikuyu. Two issues were raised here by the objectors; the first is as to why is it that it was the secretary rather than the advocate doing the translation in Kikuyu for the testatrix. The objectors did not cite to me any law that would suggest that the translation ought to be by the advocate personally. I see nothing wrong with an advocate asking any of his assistants familiar with the language of the testator to offer an interpretation. The second issue was as to a certificate of translation. Again, no statutory provisions have been cited to me to support the contention that there ought to be a translation certificate.

27. Regarding the second issue, the objectors probably had rule 54(3) of the Probate and Administration Rules in mind. The rule requires that where the testator is blind or illiterate or the will is signed by a person other than the testator himself or appears to be written in a language with which the testator is not familiar, evidence would be required before the will is admitted to probate. The rule requires the court to satisfy itself that the testator had knowledge by requiring an affidavit showing that the contents of the will had been read over and explained to and appeared to have been understood by the testator before they signed the will. The provision in Rule 54(3) is designed for non-contentious probate. When a petition for grant of probate is filed, and it appears to the court that the testator was in any of the conditions cited, then the court ought to require some evidence as proof that the maker of the will was made aware of the contents prior to appending his signature. This would be the case where the document is thumb printed. The requirement of such evidence is at the discretion of the court.

28. In the instant case, it would appear that the provisions of Rule 54(3) were not activated, by the court exercising the discretion envisaged, and therefore the evidence does not appear to have been called for

and provided as envisaged. As said earlier this is discretionary and the failure to do so is not fatal to the respondents' case. In any event, one of the attesting witness was availed as a witness in court and she did provide the evidence that would have been required under Rule 54(3) of the Probate and Administration Rules. The issue raised is therefore not fatal.

29. From the objectors case it was argued that devolution of the estate to the beneficiaries named in the will would result in benefiting persons who were outside of the family. The deceased did not have children of her own, and the objectors argue that they being her stepchildren were the person entitled to her estate in priority to the respondents who are her siblings. Their case is no doubt anchored in customary law. They claim that their father had said that they should take the property after the deceased's demise. Indeed, the objectors' contest of the will appears to be informed more by this argument founded on culture than on anything else.

30. The answer to the above is that the deceased died testate. It has been demonstrated that the land in question is registered in her name. under section 5 of the Law of Succession Act, she had the freedom to will away her property as she wished. She now doubt exercised that freedom. Secondly, she died after the Law of Succession Act had come into force. One of the effects of the coming into force of that law, according to section 2, was to oust the application of customary law. the cultural arguments advanced therefore cannot possibly hold. More fundamentally, if she had died intestate it was her siblings, the respondents, who would have been entitled under section 36 of the Law of Succession Act to inherit her estate.

31. In the end, I come to the conclusion that the objectors have not persuaded me that the will placed before court was not validly made by the deceased. I shall therefore hold that the will dated 11th August 2005 is valid and should be admitted to probate, and further that the deceased died testate and her estate ought to be disposed of in accordance with the said will.

32. The estate comprises of assets wholly situated within Kiambu County, I shall accordingly order that the cause herein be transferred to the High Court of Kenya at Kiambu for final disposal.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH DAY OF SEPTEMBER, 2017.

W. MUSYOKA

JUDGE