



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
SUCCESSION CUASE NO. 246 OF 2004

IN THE MATTER OF THE ESTATE OF ESTHER KAGOIRI MATHU – DECEASED

SHADRACK WAINAINA.....PETITIONER

VERSUS

GEORGE KIMNUGY MUTHUI.....OBJECTOR

J U D G M E N T

1. The applicant /Objector herein filed an application for the annulment of grant issued to the Petitioner/Respondent herein. The substantive grounds are that the applicant is one of the beneficiaries of the estate of the late Esther Kagoiri Muthui hereinafter referred to as the deceased.
2. The cause apparently began at Webuye Senior Resident Magistrate's court to the extend that a grant was issued in favour of the petitioner. The objector then filed the current petition and the Webuye file was ordered to be transferred to Kitale High Court.
3. The parties after along protracted proceedings each filed their respective affidavits and witness statements . The matter then proceeded by way of viva voce evidence.

The summary of the proceedings is as hereunder.

4. **PW1 George Kimmungy Muthui** testified that he is the son to the late William Muthui who had 3 wives including the deceased herein. He testified that his father died in 1995 and that the deceased was his eldest wife. He said that the petitioner then proceeded to file succession cause in Webuye without consulting him and other family members.
5. On cross-examination he stated that the land belonged to the deceased and that his mother is one Veronica. Muthui from the 2nd house. That the deceased who was the first wife was not blessed with children. The deceased herein had 4 children including the petitioner.
6. **PW2 Benson Mwenja Gituinga** testified that the objector was his neighbour and a brother to the petitioner. He solely relied on his affidavit dated 17/10/2014.
7. **PW3 Peter Kariuki Mwangi** who deponed that he knew both parties relied on his affidavit dated 17/10/2014 which was already on record.
8. On the side of the petitioner, **DW1 Shadrack Wainaina** testified that the objector was his step brother and a son to Veronica Njeri. He said that the suit parcel of land Kakamega/Sango/309 belonged to their mother. He went ahead to produce as exhibits copy of the title deed. He further produced a Will which

showed how the deceased wished the land to be divided and according to him this is what informed the sub division.

9. He further stated that the deceased did not give anything to the 2nd house. That after the grant was issued he proceeded to the land control board where he had the land transferred to the relevant beneficiaries.

10. He said that his deceased father had settled the objector's mother at Olkalaou in Nyandarua where she is still todate. He confirmed that the parcels of land his father had in Lodwar were shared equally.

11. **DW2 Margaret Waithera Kiarie** testified that she was the wife of the late Muthui and that she was married to the deceased as per the Kikuyu customary law, since she did not have children, the children she gave birth were customary hers.

12. She testified that the deceased looked for land and succeeded in getting the settlement scheme at Sango Plot No. 309. He said that in 1978, the objector brought his wife to the suit land but the deceased told him to take his family to her mother at Olkalaou where she still lives todate. She further stated that the objector was harassing him. She said that the land at Olkalaou measures 20 acres and that is why the deceased did not consider him.

13. **DW3 John Foro Wainaina** testified that the deceased sent one Shadrack to call him as she wanted to share her property. She then proceeded to share her proprieties as per the written Will and that she did not give any share to the objector as he had her mother portion at Olkalaou. He equally produced a photograph that was taken that specific day. They all witnessed the said Will after the deceased had thumb printed.

14. On cross-examination he denied that the deceased was sick at the time of writing the said Will although she was old but she could talk. She said that the deceased gave him the title deed of the land.

15. At the close of the case parties did file written submissions which I have perused extensively as well as the proceedings herein and the relevant affidavits and the exhibits produced.

Analysis and Determination

16. What is not in dispute is that the deceased herein was the wife of the late William Muthui. It appears that Muthui's first wife by being childless encouraged her husband to marry DW2 the so as to sire children on her behalf. This line of argument was not disputed by the objector. Although there was no direct evidence to this line of argument, the deceased for all intent and purposes was the wife to the late William Muthui and the children sired by DW2 were hers customarily.

17. Equally there was no dispute that the parcel of land Kakamega/Sango/309 was registered in the name of the deceased and not her husband. The objector did produce receipt showing how he paid Kshs 9,350 to settlement Fund Trustee which was loan owned by the deceased. The receipt produced did indicate the name of the deceased.

18. There was no evidence to suggest therefore that the land was registered in the name of the late William Muthui although he was buried on the said parcel of land.

19. Subsequently, when the deceased was old and almost nearing the end of her days she called several people who included DW3 and explained in writing how the land was to be shared. She wrote her Will dated 30/9/2003 and produced as exhibit 3. Save for other properties she owned, she distributed the suit land to Dickson Kiarie 1 ½ acres., Samson Ngige 1 ½ acres, Alex Njoroge 1 acres, David Njogu 1 acre, John Njeiya 1 acre, Shadrack Wainaina 4 ½ acres, Marcan Ndungu 4 ½ acres.

20. The said Will was witnessed by several other 3rd parties although some of the beneficiaries did sign too. The objector's name was apparently not in the list. When asked by DW3 why the name of the

objector was missing the deceased said that the objector was not entitled to the same as his mother the 2nd wife had land at Olkalaou Nyandarua where he was to inherit .

21. The argument that the objector's mother had land in Olkalaou has not been disputed or contested by the objector. It appears that the objector's father although he was staying in Lodwar upto the time he died seemed to have settled his families at Olkalaou and Sango Scheme.

22. The big question therefore is whether in the light of the evidence on record which the deceased directed to be written on 30/9/2003 can it be referred to as a valid Will. Apart from producing the said Will the petitioner equally produced the photograph which was uncontested and which showed the deceased as well as DW3 and others on the material day.

23. Section 11 of the Law of Succession Act provides for the formal requirements for valid Will and it states as follows;

“ 11. No valid 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 person sign the Will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark or if the signature of that other person; and each of the witness 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 time, and no particular form of attestation shall be necessary.”

24. From the case at hand one Thomas Chepkwony the village elder wrote the same and the deceased thumb printed which I find sufficient beside than 2 witnesses signing.

25. Consequently, I find that the said Will dated 30/9/2003 was a valid Will for all intent and purposes.

26. Did the Will provide for the intended Dependants? From the Petitioners point of view, they were satisfied and none of them has raised any objections save for the objector.

27. It has been contested by the objector that the deceased who was about 103 years old was too frail and had suffered stroke and was thus unable to undertake such delicate exercise of writing a Will. It is not in dispute that the deceased was old and frail. However from the evidence of DW3 and the photographs produced it appears that although she was old, she was still nevertheless in a position to talk and give instructions. In any case there was no evidence from the objector which suggest that the deceased had suffered stroke.

28. Section 7 of the Succession Act provides as follows;

“ 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 adduced by mistake is void.”

29. In view of the obtaining situation herein I am persuaded that the deceased approved the contents of her wishes and she applied her mark on the same. There is no evidence to show that the same was obtained by fraud or coercion or that anybody took advantage of her old age.

30. In any case I do not find any evidence to suggest that the land belonged to the late William Muthui her husband or for that matter he instructed his wife to have the same registered in trust for herself and the family. Although the objector argued that the 3 families resided on the land that is the 1st, 2nd and 3rd family, the Court was not furnished with any other evidence. The rest of the objectors siblings indicated in the pleadings were not called to testify although I presume all are adults.

31. I note also that the objector allegedly paid the SFT loan on 2/3/1990 which was about 13 years before the deceased wrote the will herein and about 5 years before his father died, and about 6 years before the title deed was issued. I do not find any reason why he did not ensure that the title was registered in his name or at least in the name of his late father who was still alive by the time he paid the loan.

32. My assumption therefore is that the objector simply assisted in paying the loan on the land just like any other member of the family would do.

33. What I find more intriguing is the fact that the objector did not wish to touch on the issue that her mother who was still alive had been settled by the deceased at Olkalaou in Nyandarua. There was a suggestion the land in Olkalaou measured 20 acres. Infact its on record that the deceased herein stated that she could not bequeath any portion of the land to the objector since his mother had land in Nyandarua. This story of Olkalaou was not disputed by the objector.

34. There was no evidence to suggest that the late William Muthui had divided the land into 3 portions of 5 acres each. No evidence as indicated above was led to show that the mother to the objector who was the 2nd wife to William Muthui resided on the land.

35. In light of the above observations I do not find the objection meritorious. The land in my view was not what can be termed as family land for if it was so the late William Muthui would have clearly stated so. He permitted his wife to have the land registered in her name with full knowledge of the objector who infact went ahead and paid the loan. If the objector had any issues he ought to have raised as early as 1990 when he paid the loan or any other convenient date when both the deceased and his late father were still alive.

36. I find that whatever transpired during and after the deceased funeral especially the issue of whose cow was slaughtered to feed the mourners does not aid the parties in this case.

37. In the premises I shall disallow the objection proceedings herein dated 1st October 2008. The grant confirmed by

Ombija – J is hereby upheld.

38. Being a family dispute each party shall bear their respective costs.

Delivered, signed and dated on this 30th day of October 2017.

H.K. CHEMITEI

JUDGE

In the presence of;

Arunga for the Petitioner

Objector – present

Court: Judgment read in open court.

H.K. CHEMITEI

JUDGE

30/10/17