REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 1141 OF 2011

IN THE MATTER OF THE ESTATE OF MURIMI KENNEDY NJOGU -DECEASED

JUDGEMENT

Murimi Kennedy Njogu (herein after referred to as the deceased) died testate on the 25th day of May 2010 at the age of 60 years. On 1st November 2011, **Gerald Macharia Njogu**, the executor of the deceased will (hereinafter referred to as the petitioner) petitioned for Probate or for Letters of Administration with written will to the deceased's estate and named the following persons as the persons surviving the deceased, namely **(a)** *Lincoln Wanjohi Murimi,* **(b)** *Ann Pauline Wangui Murimi* **(c)** *Julia Kabura Murimi and* ***(d)*** *Samuel Macharia*.

The letter from the Chief, Turi Location, dated 12th September 2011 named the above persons as the persons surviving the deceased.

On 8th March 2012, **Samuel Macharia Murimi**, (herein after referred to as the objector) successfully applied for leave to file an objection to the making of the grant out of time. Pursuant to the said leave, the objector filed the objection on 23rd March 2012 stating that:-

a. *That the will purports to give him only 2 plots which belonged to his late mother.*
b. *That the deceased herein inherited all his late mothers' properties vide succession cause no. 32 of 2003 but never allowed the objector to benefit from his mother's estate.*
c. *That the will gives the three children of his other wife the rest of the estate.*
d. *That the will is invalid in so far at it purports to give the objector what belonged to his late mother.*

The objector also filed an answer to petition and a cross-petition. On 6th July 2012, the parties herein obtained directions that this matter be disposed of by way of written submissions and thereafter there was no action on this file until 7th January 2015 when counsel for the objector filed his written submissions. On 6th February 2015, counsel for the petitioner asked the court to vacate the orders directing that this matter be determined by way of written submissions and the court directed that he files a formal application. Subsequently, the said application was filed and was allowed on 28th January 2016.

Hearing proceeded before me on 1st March 2016 and the objectors evidence was essentially what he stated in his grounds of objection referred to above, that the deceased was his father, that he is aware the deceased wrote a will which he was opposed to, that his desire was to have the properties shared among the four children, namely ***(a)*** *Julia Kabura,* ***(b)*** *Lincoln Wanjohi,* ***(c)*** *Pauline Wangui and* ***(d)*** *himself.*

The objector further testified that his mother a one *Susan Wanjira* pre-deceased his father, the deceased in these proceedings, that she owned a plot at Mwea and 2 parcels of land also at Mwea. and that pursuant to the grant issued in the above proceedings relating to his mothers estate, his mothers properties were

passed to his father as per the grant he produced in court. His problem is that all what he got in the will is what his mother owned, hence by implication, he never got anything belonging to his father. The objector stated that after the deceased died he was chased from home by his father.

The objector also stated that the will is dated 23rd November 2002, while the grant in respect of his mothers estate is dated 12th September 2003, hence, alluding to the fact that his father could not bequeath the properties before the grant was confirmed.

The petitioner **Gerald Macharia Njogu**, said that after the will was read, he found he had been appointed the executor, that he has not added anything to the will, that he was aware that the objector and the deceased had differences which led to the objector being taken to his grandparents, that the objector and his father were not in good terms and urged the court to follow what is stipulated in the will because it represents the express wishes of the deceased.

This court in *Lewis Karungu Waruiro Vs Moses Muriuki Muchiri*[1] citing authorities held that:-

> *"All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in Rhesa Shipping Co SA vs Edmunds*[2] *remarked:-*
>
> *"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."*
>
> *Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd*[3] **:-**
>
> *"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"*
>
> *With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person."*

It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed.[4] The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions,*[5]**Lord Denning** said the following about the standard of proof in civil cases:-

> *'The …{standard of proof}…is well settled. It must carry a reasonable degree of probability…..if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'*

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

Turning to the facts of this case and after analysing the facts and the evidence, I find that the following are the issues for determination, namely:-

a. *whether the deceased had capacity to make the will.*

b. *whether there are any grounds to challenge the validity of the will.*
c. *whether the deceased made reasonable provisions for all his dependants in his will.*
d. *whether the deceased could lawfully bequeath the properties he inherited from his first wife, the objectors mother.*

I note that from the objectors evidence, he has not raised as doubts as to the capacity of the deceased to make the will nor has he raised any grounds that may be deemed to challenge the validity of the will. His only argument is that the will only gives him what belonged to his mother, and that the will is dated earlier than he obtained the Grant of letters of administration to his wife's estate.

However, it is important for me to mention that there is a rebuttable presumption under Section **5 (3)** of the Law of Succession Act[6] that a person making a will is of sound mind and that the will has been duly executed. There is no doubt in the present case that the deceased had the requisite capacity to make the will in question.

The essentials of testamentary capacity were laid out in the case of *Banks vs. Goodfellow**[7]*** as cited with approval in the case of **Vaghella Vs. Vaghella-**

> *"a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made."*

The burden of proof in the first instance lies upon the person alleging lack of capacity. Once it is established to the satisfaction of the court that in fact the testator was not of sound mind then the onus is shifted to the person propounding the will to prove the existence of mental capacity. This was the holding of the court in the case of *In Re Estate of Gatuthu Njuguna (Deceased)**[8]*** where it quoted an excerpt from *Halsbury's Laws of England,**[9]***

> *"where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity."*

As pointed above, the objector never raised the issue of lack of capacity or any of the ingredients which may affect the validity of a will neither do I find any grounds to challenge the validity of the will and as such I have no difficulty in concluding that the will was properly made and that the deceased knew what he was doing at the material time.

Section **11** of the Law of Succession Act,[10] provides for the formal requirements of a valid will. It states:-

> *11. 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 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 of the signature of that other person; 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.

There was no allegation that the above section was not complied with. There are four main requirements to the formation of a valid will:-

a. *The will must have been executed with testamentary intent;*
b. *The testator must have had testamentary capacity;*
c. *The will must have been executed free of fraud, duress, undue influence or mistake; and*
d. *The will must have been duly executed.*

Testamentary intent involves the testator having subjectively intended that the document in question constitute his or her will at the time it was executed. There is nothing before me to show that the deceased never intended the said document to be his will. In addition to testamentary intent, the testator must have the testamentary capacity, at the time the will is executed. Generally, it takes less capacity to make a will than to do any other legal act. As guidance, a four-prong test is often used. The testator must:-

a. *Know the nature of the act (of making a will);*
b. *Know the "natural objects of his bounty";*
c. *Know the nature and extent of his property;*
d. *Understand the disposition of the assets called for by the will.*

After evaluating the law, the authorities and the facts of this case, I find that the deceased's will satisfies the above four requirements. Secondly I find that the objector has not alleged any grounds to challenge the validity of the deceased's will. Accordingly, my answer to issues number **(a)** and **(b)** above is in the affirmative.

I will combine issues number **(c)** and **(d)** together, these are:- whether the deceased made reasonable provisions for all his dependants in his will and whether the deceased could lawfully bequeath the properties he inherited from his first wife, the objectors mother.

In an attempt to address the above issues, I find it necessary to pose two questions, namely; ***(a)*** *what constitutes reasonable provision and* ***(b)*** *what may be disposed of by a will.*

Regarding the second question, guidance can be obtained in the book *Williams on Wills*[11]at chapter **7** whereby it is stated:-

> *"In general a testator may dispose of any property vested in him at the time of his death for an interest not ceasing on his death...the general rule is that every kind of property and interest in property may be the subject of a gift by will..."*

In the same book at paragraph **7.18** under the heading *"General Rule allowing testamentary disposition"* it is stated:-

> *"....a testator of full capacity may dispose by will of his equitable interest in any property to which he is entitled at the time of his death, always subject to the paramount interest in such property which by law devolves on the personal representatives for the purposes of due administration......"*

Para **7.20** *"Contingent and future interests"*

> *"All contingent executory and future interests in any property are devisable and this is so whether the testator may or may not be ascertained as the person or one of the persons in whom the same may become vested and whether he may be entitled thereto under the instrument by which the same were created or under any disposition thereof by deed or will. Such interest includes a possibility coupled with a interest"*

The grant of letters of administration issued to the deceased in respect of the objectors mother is dated 12th May 2003. It shows the deceased as the sole beneficiary of his late wife's estate. Guided by the above passages on contingent and future interests, it is clear the deceased could lawfully bequeath his future interests in the said properties. The argument by the objector that he was only bequeathed what belonged to his mother is in my view misguided. First, these proceedings relate to his father's estate. They relate to properties owned by his father as at the time of his death and more particularly as reflected in the will. There is no evidence the grant to his mothers estate was challenged nor did he apply to revoke it.

I reiterate here, the deceased in this case was distributing properties he owned as at the time of writing his will, and such properties included his future interest in his wife's estate before the grant was confirmed. As the learned authors have put it in the above cited passage, *"future interest is devisable*." Further, I find that the deceased made reasonable provisions for all his children including the objector herein. In view of the foregoing I find that my answers to the issues **(c)** and **(d)** are in the affirmative.

A observed above, testamentary intent involves the testator having subjectively intended that the document in question constitutes his or her will at the time it was executed. I find nothing in the testimony of the objector to demonstrate that the deceased never intended the contents in the will to constitute wishes. As stated above, I also find that the deceased made reasonable provisions for all his children. For these reasons, I find that the objection by the objector in these proceedings is without merit. I therefore make the following orders:-

a. *The objection filed by **Samuel Macharia Murimi** is hereby dismissed with costs to the petitioner.*
b. *That a grant of probate of written will be issued to the petitioner **Gerald Macharia Njogu**.*
c. *That distribution of the deceased estate be and is hereby ordered in terms of the deceased's will dated 23rd November 2002.*

Right of appeal 30 days

Dated at Nyeri this **16th** day **March** of 2016

John M. Mativo

Judge

---

[1] Hcc No. 106 of 2012

[2]{1955} 1 WLR 948 at 955

[3] {2007} 4 SLR (R} 855 at 59

[4]Koinange and 13 others vsKoinange {1968} KLR 23

[5]{1947} 2ALL ER 372

[6] Cap 160, Laws of Kenya

[7] [1870] LR 5 QB 549

[8] [1998] eKLR

[9] 4th Edition vol 17 at page 903-904-

[10] Cap 160, Laws of Kenya

[11] Eight Edition, Vol. 1, The Law of Wills, Butterworth's, London, Dublin, Edinburg, 2002, page 65