REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 458B OF 2003

IN THE MATTER OF THE ESTATE OF MUNIU MUCHAI (DECEASED)

JUDGMENT

1. The deceased herein expired on 12th April 1999. Representation to his estate was thereafter sought by Emma Wagikuyu and Elijah Muchai in their respective capacities as his widow and son, respectively, in a petition for grant of letters of administration intestate launched in this cause on 3rd March 2003.

2. Another petition was lodged in the same cause on 22nd April 2003 by John Muchai Muniu, this time for a grant of probate of a will made by the deceased, allegedly on 1st August 1998. A grant of probate of the written will was subsequently made to the executor, John Muchai Muniu on 31st July 2003.

3. The grant of 31st July 2003 was revoked by consent on 10th March 2004, and a new grant was to be made jointly to John Muchai Muniu and Elijah Muchai Muniu, each representing one of the two houses that made up the household of the deceased. A grant of letters of administration intestate of the estate of the deceased was made out to the two bearing the date of 10th March 2004. The said grant was confirmed on 23rd June 2004 and a certificate of confirmation of grant of even date was issued.

4. It was ordered on 25th November 2008 that the parties file consent as to the total estate of the deceased and the total dependency. A further order was made on 9th December 2008 to the effect that the parties file their lists of assets and beneficiaries. Only one party filed a document in purported compliance with the directions of 25th November 2008 and 9th December 2008. I refer to it as a purported compliance since the document dated 19th February 2009, and filed herein on 23rd February 2009, was not a list of the total estate. It purported to be a list of the remaining assets, being two in number – Block 11/Thika Municipality and money sitting in account number 3812588, Barclays Bank, Thika.

5. It would appear that the court, based on the document filed on 23rd February 2009, made the order of 24th February 2009 directing the parties to file a fresh petition for the distribution of the assets not included in the will. Directions were given on 21st July 2009 that the gazettement of the petition to be filed had been dispensed with and that any party unhappy with the petition was at liberty to file a protest or cross-petition.

6. It would appear from the record, at least from the Objection to Making of Grant dated 16th October 2009, that a petition for grant of letters of administration was lodged at the registry by

Emma Wagikuyu Muniu and Elijah Muchai Muniu. I have scrupulously perused through the file of papers before me, and I have been unable to trace a copy thereof.

7. Although the parties unhappy with the petition lodged had been directed on 21st July 2009 to file a cross-petition, none was filed. What was filed instead was the objection referred to above, dated 16th October 2009, at the instance of John Muchai Muniu. The objection dated 16th October 2009 raised four main issues –

a. That the deceased had disposed of Block 11/Thika Municipality by oral will two months before his demise;
b. That funds in the alleged bank account with Barclays Bank, Thika, did not exist;
c. That the petitioners came from one house, yet the deceased had died a polygamist with two wives; and
d. That some of the persons listed as beneficiaries of the estate persons were not beneficiaries of the estate

8. Directions were given on 26th October 2011 to the effect that the papers filed, following the directions of 24th February 2009, were in order. It was directed that the matter proceed to trial by cross-examination of the deponents of the affidavits in the said papers. Further directions were given on 29th June 2010, to the effect that the objectors file affidavits to establish existence of the alleged oral will. There were further directions on the filing of witness statements and that the manager of Barclays Bank, Thika branch, do avail statements on account number 3812588.

9. It is not clear from the record whether the directions above were complied with, but trial on the issues raised in the objection mentioned above commenced on 24th January 2011.

10. The first to take the stand was the objector, John Muchai Muniu. He started by saying that he had petitioned for letters of administration with the oral will annexed, yet there is no such petition on record. He stated that the deceased had made an oral will on 8th July 1998. The decesaed had allegedly called a meeting then with the objector, Solomon Muchai Ng'ang'a (who he described as an elder), Samson Njoroge Muniu (a son of the deceased) and Nahashon Njenga Muniu (another son). He explained that there had been a case concerning a plot known as Block 2/654 (Makongeni Estate, Thika). At the meeting of 8th July 1998 the deceased was said to have said that in the event the court case over the land terminated in his favour, the objector would be entitled to it for the role he had played in supporting the deceased at the time of the prosecution of the suit. He was also to have said that the rent from the property would be shared equally between him and the deceased. The deceased was said to have been unwell at the time he made the pronouncements, and he was reported to have indicated that if he recovered he would call elders and reduce the wishes into writing. He died on 12th April 1999 before the judgment was delivered on 11th June 1999. In the judgment it was ordered that the municipal plot be transferred to the deceased, but the prayer for rent arrears was rejected. On appeal it was allegedly ordered that the deceased was entitled to the rent arrears. The objector asserted that he was person entitled to the municipal land as he contributed to its recovery while the petitioners did not.

11. On the bank account, he conceded that the deceased had been operating one with the Barclays Bank, Thika branch, which he bequeathed to Francis Njau in an amendment to the will, which was witnessed by an assistant Chief. The account was operated by Joseph Muchai Njenga and was utilized to pay school fees for Francis Njau Muniu, a son of the deceased. He asserted that the account had not been bequeathed to Wagikuyu and Mucheru. He testified that the said account was not listed in the succession proceedings.

12. On cross-examination, he stated, on the municipal land, that after the estate won the case, the property was transferred to the name of the then administrator, Joseph Ng'ang'a, who held a limited grant. He conceded that he was the one who was collecting rent from the property as at the date he was giving evidence, which rent he was depositing in the estate account. He explained that

the oral will was made in the presence of Solomon Muchai Ng'ang'a, who he described as the chairman of the will committee, and in attendance were Nahashon objector, both of whom had been summoned by the deceased. The deceased was said to have died two and half months later. Before making the oral will, the deceased had called a meeting of his sons, where he spoke about the case and asked them to assist with the case. He allegedly orally willed the property to the objector after complaining that the rest did not assist him as he had requested.

13. On the bank account, he stated that the same had a balance of Kshs. 543, 139.25 as at the deceased's death, and was operated thereafter by one of the former administrators of the estate, Joseph Ng'ang'a, on the strength of a limited grant obtained for the purpose of preserving the estate and filing an appeal. He conceded that the money in the account had not been willed to him, but was withdrawn by the former administrator and was utilized mainly to settle school fees for one of the minor sons of the deceased. He denied withdrawing the money, and further denied that the money was being given to him after withdrawal from the bank. He alleged that the deceased had orally directed that the money in the account be utilized to pay the said school fees. He stated that the deceased had given shares in limited liability companies to his stepmother and stepbrother, but not the money in the bank account. The reference to bank account had been crossed out by hand and countersigned by the assistant Chief.

14. The next to testify for the objector was Nahashon Ng'ang'a Muniu, a son of the deceased from the same mother with the objector, John Muchai Muniu. He stated that his father had called them on 17th February 1999 with the objector and Solomon Muchai. The deceased allegedly talked to them about the suit at the Thika law courts on the Thika property, saying it was the objector who used to assist him with the case and also with medical care. The deceased allegedly pronounced that in the event of the suit terminating in his favour the plot would become his property with the objector, and likewise if the court awarded the rent arrears to him, he would share the same with the objector. The witness stated that none of his brothers were claiming the plot because they knew that it had been given to the objector by their father.

15. On cross-examination, he stated that the said plot was not included in the written will. The deceased was to call a meeting with elders, if he got better, to give directions on the Thika plot, but he died before that could happen. He said the Thika plot was a gift or reward to the objector for the role he had played in the court case and for generally taking care of the deceased. He stated that the bank account was not the subject of the written will for the deceased had been operating it at the time he made the will.

16. The next witness was Samuel Mwangi Kariuki. He was one of the witnesses to the will of the deceased. He said it was the deceased who gave instructions for the typing of the will. He stated that the will was amended at the sitting where it was read by the assistant Chief. The amendment touched on the bank account. The original draft had bequeathed the money in the account, but the deceased said that he intended to dispose of the shares in the companies, but not the money. He said he needed the money to pay school fees for one of his minor children, and for the court case. The offending clause was crossed out by the assistant Chief on instructions of the deceased. The witness stated, however, that the cancellation was not countersigned by the deceased. He also alleged that the objector was to be compensated for the support he was providing in the ongoing case, but it was not indicated how he would benefit.

17. On his part, the petitioner testified that the Thika property had not been the subject of the written will. He explained that it was not included because it had an ongoing case. He stated that he was present on the two occasions when the two wills were made. The deceased had someone who reduced his wishes into writing. The writing would then be brought to the deceased for him to accept or refuse, whereupon it would be taken for typing. He stated that it was the deceased who used to organize for the typing of the wills. On the Thika property, he stated that he was aware of the outcome of the case, and asserted that the same formed part of the estate of the deceased and should be shared out equally between the two houses of the deceased.

18. On the money in the bank account, it was his testimony that the written will had disposed of the same to the witness's mother and a Stephen Mucheru Muchai. However, at the execution of the will, the entry on the bank account was deleted or crossed out by the assistant Chief in the presence of the deceased, who said nothing. He asserted that the deceased had not instructed the assistant Chief to cancel the entry. He stated that he was aware that as at the deceased's death the account held a sum of Kshs. 543, 139.25, but he could not confirm whether the money was still intact as the account was operated thereafter by the administrators. He said the money should be refunded by those who withdrew it, adding that the money should have been given to him and his mother.

19. On cross-examination, he conceded that there was the case between his father and Mr. Kaberere which terminated with an order that his father be given the Thika property. He conceded too that the deceased used to go to court for the case accompanied by the John Muchai, and the latter even testified in the case. He conceded that he himself did not testify in the case. He testified to being unaware that an appeal had been lodged in the matter and that damages had been awarded in favour of the deceased. He asserted that he used to assist the deceased with the case, denying that the property in question had been awarded to the petitioner. He stated that the said property was among two others that were not included in the original petition. He further stated that he had included his children in the petition for they had been named beneficiaries in his father's will.

20. He conceded that he was the biggest beneficiary under the will of the deceased, adding that he was aware that one child in the second house had not been given a share of the property. He stated that their father had excluded all his daughters from benefit as they were all married. He denied handwriting the will of 1st August 1978. He said the shares held with the Barclays Bank, National Industrial Credit (NIC) and Serena were supposed to go to his mother and his son. He conceded that he was the one who got the will typed. He denied that the deceased had stopped the reading of the will, and asked the assistant Chief to cancel portions thereof. He stated that the will attached to his affidavit of 8th December 2009 and dated 28th June 1998 was valid. He denied knowledge of the appointment of Joseph Muchiri Ng'ang'a as administrator.

21. On re-examination, he insisted that there was no oral will giving the Thika property to the objector, saying, with respect to such documents, their father would bring them and read them in front of all his children and other family members. He said he had included his children in the petition because the deceased had included them in his will. He asserted that the cancellations in the original document had not been done by the deceased.

22. At the conclusion of the matter the parties were directed to file written submissions. None were filed, for none are in the court record before me, and the matter was set down for judgment

23. From the facts placed before the court by the parties, it can be deduced that there are two principal issues for determination, representation with respect to the remaining assets and the distribution of Block 11/Thika Municipality and of the funds in Barclays Bank. I will dispose of the issue of the property first.

24. The objector alleges that Block 11/Thika Municipality had been gifted to him by the deceased in an oral will, and therefore it was not available to the rest of the family. He stated that he was present when the deceased made the oral will, and he called three witnesses to attest to the fact.

25. The law on oral wills is section 9(1) of the Law of Succession Act, Cap 160, Laws of Kenya. The said provision states that:-

> *'No oral will shall be valid unless –*

a. *It is made before two or more competent witnesses; and*
b. *The testator dies within a period of three months from the date of making the will:*

Provided …'

26. The alleged oral will would be valid if it was made in the circumstances envisioned in section 9 of the Act. That is, if it was made by the deceased in the presence of two or more competent witnesses, and if the deceased died within three months of the making the relevant pronouncement.

27. According to the objector, who testified as PW1, the deceased had called a meeting on 8th July 1998. Those at the meeting were PW1, an elder called Solomon Muchai Ng'ang'a, a now dead son of the deceased called Samson Njoroge Muniu and another son called Nahashon Njenga Muniu. Apart from PW1, the only other person who was allegedly a witness to that oral will to testify at the trial was Nahashon Njenga Muniu, who testified as PW2. He stated that the deceased had called the meeting on 17th February 1999, and those present were PW1, PW2 and Solomon Muchai. He did not mention Samson Njoroge Muniu. There is therefore a glaring inconsistency in the testimony of the two witnesses as to when the alleged oral will was made.

28. The deceased died on 12th April 1999. Going by the testimony of PW1, that was roughly nine (9) months after the demise of the deceased. Calculating on the basis of the evidence of PW2, the deceased passed on just under two months after the pronouncement. If the version by PW1 is the correct one, then the deceased died outside of the period set out in section 9(1) of the Law of Succession Act, and therefore the alleged oral will would not be valid. If the version by PW2 is the correct one, then the alleged oral will would be valid.

29. So which of the two versions should the court go by? PW1 is the objector. It is he who asserts that there was an oral will which willed the subject property to him. He gave an oral statement on oath to support that assertion, and he was subjected to cross-examination. He stated categorically, twice, that the oral will was made on 8th July 1998. I do note that on cross-examination he did mention in passing that the oral will was made in February 1999, but he never sought to correct the earlier statement. In my view therefore, his testimony is not reliable. He called PW2 to buttress his testimony, who gave a date that was different from that given by himself. Due to the said inconsistency, I am unable to hold that an oral will was definitively made on either 8th July 1998 or 12th February 1999.

30. I need to mention though that the witnesses, that is to say PW1 and PW2, were positive that the two of them and others were present. That then would satisfy the requirements of section 9(1) (a) of the Law of Succession Act as to the number of witnesses required for the validity of a will, even though PW1 talked of four witnesses while the PW2 mentioned three.

31. I need to consider whether the pronouncement alleged made at the time of the alleged making of the oral will qualify the pronouncement to be an oral will. Section 3 of the Law of Succession Act, defines or interprets a will to be:-

> *'… the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II…'*

32. According to PW1, the pronouncement made by the deceased at the meeting of 8th July 1998 was to the effect that in the event the suit at the Thika court, over the subject property, being determined in his favour, PW1 would be entitled to it on account of the role he played in the prosecution of the suit. The same was also meant to apply with respect to the rents. The version by PW2 was that the property was to revert to the deceased jointly with PW1.

33. The pronouncement by the deceased, if indeed he did so make it, was of his wishes or intentions regarding disposition of his property. The issue is whether these wishes or intentions were meant to become effective upon death. I have carefully and repeatedly gone through the testimonies of these two witnesses and I have not come across an unequivocal statement that the deceased

intended those intentions to come to fruition upon his death.

34. As the pronouncement did not give rise to an oral will, as there is nothing on record to indicate that the wish expressed in it was meant to be effective upon death, can it be said that the pronouncement amounted to an *inter vivos* gift of the land to PW1? As at the date of deceased's death, judgment had not been pronounced in the Thika suit, and therefore there was no basis upon which the pronouncement would have amounted to an *inter vivos* gift. In any event, the subject matter was land. It could not be gifted otherwise than through a memorandum in writing.

35. This then brings me to the conclusion that there is on record insufficient evidence upon which I can hold that the Thika property had been gifted to the objector, either *inter vivos* or as a testamentary gift, therefore making it unavailable for distribution in intestacy. It is my finding that the deceased died intestate with respect to the said property.

36. On the issue of the money that was alleged to be in the bank account at Barclays Bank, Thika branch; it would appear that the parties are agreed that there indeed such money existed. The petitioner argued that it was to go to him and his mother, while the objector said the money was no longer available for it was utilized to settle school fees for one of the minor children of the deceased.

37. It is common ground that the money did not feature in the earlier distribution. The objector explained that it did not as the money was not distributed in the written will of the deceased. The petitioner on his part argued that the same ought to have been distributed for the written will had disposed of it but there was a suspicious cancellation which denied him and his mother access to that money.

38. Was this money available for distribution in testacy or in intestacy? The earlier distribution was founded on the written will dated 1st August 1998. Two versions of the will are on record. There is the handwritten Kikuyu version, which represents the immediate or on the spot transcription of the pronouncements of the deceased as he made them. There is then a typewritten version in Kikuyu, and an English translation thereof.

39. It is clear to me from the handwritten Kikuyu version that there was no disposition of the money held at the Barclays bank account. The deceased only distributed the shares in Barclays Bank, which were given to Wagikuyu Muniu and Mucheru Muniu. The typed Kikuyu version differs in significant particulars from the handwritten one. In the portion where the deceased disposed of the shares in Barclays to Wagikuyu Muniu and Mucheru Muniu, a clause has been added which includes the bank account. The said addition however has been crossed out by hand and endorsed.

40. When both sides testified, they tussled over that cancellation. The objector's case was that the deceased did not dispose of the money, while the petitioner maintained that there was a disposal in favour of his mother and Mucheru Elijah. The latter asserted that there had been an alteration made to the document removing the provision on the money. He stated that the alteration was by the assistant Chief without the consent of the deceased. The objector stated that there was indeed such a provision in the typed will, but the deceased instructed the assistant Chief to cross it out, which he did. Both were in agreement that the deceased did not sign the alteration.

41. I have scrutinized the typed Kikuyu version of the will. There is a signature against the cancellation in question. The said signature is not the same as that made against the name of Muniu Muchai; instead it is closer to that of the Sub-Chief, Antoney Mugo Wainaina. Obviously, the cancellation was not by the maker of the will. Whether it was made with his concurrence is disputed. I am inclined to believe that he did concur in the cancellation, given that the portion cancelled was not in the handwritten version.

42. It is my conclusion, in view of the above, that the money at Barclays Bank, Thika Branch was not disposed of in the written will of the deceased and that it was properly excluded from the testate

distribution. It should therefore be part of the assets of the deceased to be distributed intestate.

43. Is the money in existence? Is it available for distribution? The manager of Barclays Bank, Thika branch, had been directed in the order of 29th June 2010 to avail statements on the said account. I have carefully perused through the file of papers before me, looking for the said statement. I have not come across any, and I am tempted to conclude that none was ever filed. As it stands, there is no record on the current status of the said account.

44. With regard to representation, I have noted from the record, and the testimonies of the witnesses presented at the trial, that the deceased died a polygamist having married twice. He was survived by children from both marriages. Any appointment of administrators ought to take that into account.

45. In the end, I am moved to make the following orders:-

a. **That I do hereby appoint Elijah Muchai Muniu and John Muchai Muniu administrators of the intestate estate of the deceased;**
b. **That a grant of letters of administration intestate shall issue to them accordingly;**
c. **That manager of Barclays Bank of Kenya, Thika branch, shall furnish to court a statement of account in respect of account number 3812588 previously operated by the deceased;**
d. **That the administrators shall apply for confirmation of the grant to distribute the property Block 2/654 (Makongeni Estate, Thika) and the money in the bank account after the manager of Barclays Bank of Kenya, Thika branch, complies with order (c) above;**
e. **That the matter shall be mentioned after thirty (30) days for compliance with (c) above; and**
f. **That each party shall bear their own costs.**

DATED, SIGNED and DELIVERED at NAIROBI this 27th DAY OF May, 2016.

W MUSYOKA

JUDGE