



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2519 OF 1998

IN THE MATTER OF THE ESTATE OF EVANSON MBUGUA THONG'OTE (DECEASED)

JUDGMENT

1. The deceased herein died on 8th April 1997.
2. What is for determination is the summons for confirmation of grant dated 4th March 2005. It is brought at the instance of Jane Njambi Mbugua and Grace Njeri Mbugua, who are two of the administrators of the estate appointed under the grant made on 29th September 2004. In the joint affidavit, sworn by the two applicants on even date, it is averred that the deceased was survived by seventeen (17) individuals, being the three (3) widows of the deceased and their sixteen (16) children. The widows are Jane Njambi Mbugua, Grace Njeri Mbugua and Hannah Wanjiku Mbugua. The children are Naomi Wairimu Mbugua, Elizabeth Wangari Mwangi, Nelson Njuguna Mbugua, George Gitau Mbugua, Joseph Karanja Mbugua, Lawrence Njuguna Mbugua, James Mungai Mbugua, James Mungai Mbugua (son of Hannah Wanjiku), Lucy Wanjiru Mbugua, Paul Kamau Mbugua, Moses Kabucho Mbugua, Nicholas Ndung'u Mbugua, Wanjiru Matheri and Teresia Nyokabi Njeru.
3. The assets identified as making up the estate of the deceased are Nyandarua/Gathanji/Gatimu B/1/306, Nderi Plot No. 6B, Ndeiya/Makutano/833, Mega Farm LR 12368 North West of Kikuyu Station, Elementaita land (10 acres), Kijabe/Kijabe (Mai Mahiu) land (5 acres), money in the Kenya Commercial Bank (KCB) account number 1001214406, money in account with the Muguga Pyrethrum Board, money in account with Kiambu Dairy, 266 shares in 2 KCB, 2018 shares in Kenya Airways Limited, 1155 shares in Standard Chartered Bank, 185 shares in Kenya Breweries Limited, shares and benefits in Gatina Farm, share certificate Raare No. 132 and 383 shares in Muguga Investments Company Limited.
4. It is proposed that the estate be distributed as per paragraph 5 of the affidavit in support of the confirmation application, to the widows and the children of the deceased in the proportions indicated in the said paragraph. There is on record Form 37 signed by eight (8) of the survivors in support of the confirmation application.
5. The application is opposed by Hannah Wanjiku Mbugua. She swore an affidavit on 26th March 2005. She avers that she was one of the administrators appointed on 29th September 2004. According to her, the estate ought to be distributed as per the will of the deceased. She asserts that the proposed distribution does not accord with the will, and it is for that reason that she opposes the application.
6. The hearing of the confirmation hearing commenced on 2nd November 2005. The protestor, Hannah Wanjiku Mbugua, testified first. She stated that the deceased was her husband, who had three (3) wives, who were all alive. She stated that the deceased had problems with her sons prior to his death as they sought to have his estate distributed. The matter was escalated to the local Chief, but the same was not resolved. According to the witness, the deceased died while in the process of distributing his property

before a lawyer. She was not party to the making of the will although she had information that it was made by an advocate called Kang'ethe. On cross-examination, she stated that she and her co-wives did not get along, and that they were not on talking terms. She was also not in good terms with her step-children. She said that the deceased was staying with her at the time of his death. She stated that the deceased had not told her that he was in the process of making a will. The lawyer who drew up the will had also not called the family about the will, and she did not see the will until her lawyer called for it from the advocate who had drawn it. She also stated that she did not know the two witnesses who attested the will, although she was aware of its contents. She mentioned that she was not clear on some of the contents of the will, although she stood by it nevertheless.

7. The protestor's second witness was George Gitau Mbugua. He testified that the deceased had three wives, one of whom, Jane Njambi, had died as at the date of the hearing. He stated that the deceased had died testate, having left a will made by an advocate called Nancy Wambui Kang'ethe. The deceased had allegedly given instructions to the advocate to make the will in February 1997. He died on 8th April 1997, two months after he had given the instructions. The deceased had, however, not signed the will, for he died of a heart attack in a vehicle as he was travelling to sign it. He stated that he had seen the will and read its contents, and was satisfied that the second house, from which he came, had been provided for. On cross-examination, he stated that he did not witness his father instructing Kang'ethe, Advocate, to draw the will.

8. The protestor's third witness was Nancy Wambui Kang'ethe-Ikunu. She is an advocate of the High Court of Kenya, having been admitted in 1991. She testified that she was introduced to the deceased in 1996, and was instructed on 25th January 1997 to make a will. He later came to her office on 1st February 1997, accompanied by someone else, and carrying the title documents of the assets that were being distributed. She made a draft of the will, which she went through with the deceased, after which he left her to make a fair copy and he was to come back later to sign the will and avail attesting witnesses. She stated that her secretary was not present when she was instructed, but she said that it was the secretary who typed the draft will. She stated that she understood the deceased to mean that he intended to make a written will, not an oral one. He left her with the original title documents. He subsequently died before signing the will. She surrendered to the court the original documents that had been left in her possession by the deceased. These included the original will, receipt issued by the Kiambu County Council in respect of Plot No. 6 dated 1st October 1981, letter of allotment for Plot No. 6 of Nderi-B general shop, original title of Kijabe/Kijabe/Block 1/818, a note card for Mai Mahiu KL Co. Ltd issued to the deceased together with allocation dated 21st February 1984, original title for Ndeiya/Makutano/833 together with a receipt dated 2nd June 1977 and an application for registration of even date, original title for LR No. 102/42/14 situated South of Nakuru Municipality, original title for LR No. 12368 situated North West of Kikuyu Station, certificate issued by Muguga Investments Co. Ltd for 105 shares dated 24th January 1997 and Conveyance/transfer for LR No. 102/42/14 South of Nakuru Municipality. After his death she called the family to her office for the reading of the will, but there broke out a quarrel amongst them.

9. The applicants' case opened on 21st July 2015. The first witness for the applicants was James Mungai Mbugua. He said he was one of the sons of the deceased. He testified to prove he had seen the original will of the deceased. He said the same had anomalies. He mentioned discrepancies in the national identification number of the deceased. He also mentioned the appointment of executors, where the will mentioned Njuguna Mbugua, yet there were two sons of the deceased by that name. He urged the court to dismiss the alleged will. He expressed doubts as to whether his father had instructed Kang'ethe Advocate, to draft the will. The next person to testify was Stephen Kagechu Mundia. He identified himself as a cousin of the deceased, for their parents were siblings. He testified on the dispute that the local provincial administrators handled after the deceased's death. He said he was not aware that the deceased had instructed a lawyer to make a will.

10. At the conclusion of the trial, it was ordered that the parties file written submissions. The applicants filed their written statement through counsel. The said submissions dwell mainly on the facts, although in the end it is submitted that the deceased had not made an oral will, but what he intended was to make a written will.

11. A petition was lodged herein on 13th November 1998 by the protestor, Hannah Wanjiku Thong'ote. It sought a grant of representation founded on the unsigned will of the deceased, which she implicitly sought the court to treat as an oral will having been allegedly made on 25th March 1997 in the presence of two witnesses. On 11th December 2001, Aluoch J. noted that no grant had been made in the cause as at that date, and advised the executors named in the will to apply for a grant of probate. The court left the matter to the discretion of the parties. That direction apparently prompted the application by the petitioner dated 24th March 2003, which sought that a grant of letters of administration be issued to her. A grant of letters of administration with the terms of oral will annexed was made to the protestor herein, Hannah Wanjiku Thong'ote, on 27th May 2003. An application dated 25th July 2003 was lodged at the registry seeking revocation of the grant of 27th May 2003. The application was resolved by consent on 29th September 2004 when counsel for both sides agreed that the grant could be made to the three widows. The consent was adopted, the grant made earlier was revoked and it was directed that a fresh grant be made to the three widows, the applicants and the respondent herein. A grant of letters of administration with the terms of oral will annexed was duly issued, dated 29th September 2004.

12. The applicants in respect of the application for determination were appointed into the office of administrators vide the grant dated 29th September 2004. At the time of their appointment they were aware that the grant on record was founded on the alleged oral will. Indeed, the cause where the said grant was made was initiated on the basis of the alleged oral will. They did not raise any issues when the court revoked the earlier grant which was founded on the oral will, and directed that a fresh one be issued, presumably on the same terms. When a certificate of the grant was issued for administration as per the oral will, the applicants took up office on its terms, and have now moved the court for confirmation of the said grant.

13. The provisions of the law upon which the application dated 4th March 2005 is premised are not stated. It is an application for confirmation of grant. Confirmation of grants is provided for by section 71 of the Law of Succession Act, Cap 160, Laws of Kenya. At confirmation of grant, the court is expected to make orders relating to confirmation of the administrators and distribution of the assets. The applicants must therefore place material before the court that would facilitate the making of the orders envisaged in section 71 of the Act. Section 71(2)(a) of the Act, states as follows:-

'(2) subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may-

(a) If it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or...'

14. According to that provision, the court ought to consider whether the administrators were properly appointed, and if so convinced that they were, proceed to confirm them in their positions as such. It should be after that the court should consider the question of making orders on distribution of the estate.

15. I have noted that the applicants herein have not raised any issues concerning the appointment of administrators, or the manner they have gone about administering the estate. Where there are lapses in the appointment of administrators or in their administration, ideally it would be the protestors who would raise it. The protestor herein has not raised any matter in that direction. I would therefore take it that the administrators are content with the manner of their appointment and also of the administration of the estate. That would explain why they have moved for the confirmation of the grant.

16. I find it in the circumstances strange that the applicants would assert that there was no oral will. I understand them to be conceding that the deceased did indeed intend to make a written will, but not an oral one. If there is no oral will, then the foundation upon which the grant on record was made would be lost, and there would be no basis for confirming the applicants as administrators for their appointment would be faulty for it was based on the alleged oral will. By denying the oral will, the applicants are clearly denying the legitimacy of their appointment. If their legitimacy is called into question, it would follow that they would have no standing upon which they would agitate for distribution of the estate in

the terms that they have proposed. If the alleged oral will was not legitimate, the grant in question ought not to have been made, and it ought not to be available for confirmation.

17. As the validity of the alleged oral will has been called to question, it is incumbent upon me to make a determination thereon.

18. The deceased died after the Law of Succession Act had come into force in 1981. His estate is therefore for administration under the Act. The provisions in the Act governing oral wills are sections 8 and 9, which provide as follows:-

'8. A will may be made either orally or in writing.

9. (1) 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;...'

19. Under section 9, there are only two requirements for a valid oral will. The first is that the will in question be made before two or more witnesses who are competent in terms of the definition in section 3 of the Act. Secondly, the maker of the will ought to die within three months from the date of the making of the will. An oral will is made simply by the making of utterances orally relating to disposal of property.

20. In assessing whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will. Of the persons who testified, only the advocate who prepared the written will alleged to have been with the deceased at the material time. She testified that the deceased went to her office twice, and instructed her to prepare a will for him. The advocate did not categorically state whether the instructions were in writing or made orally, but it would be presumed that a client who goes to an advocate's chambers gives oral instructions, unless they are hard of hearing or dumb.

21. The other consideration is that the utterance ought to be made in the presence of two or more persons. Ms. Kang'ethe-Ikinu testified that when the deceased first came to her chambers, he was not very clear in the description of the property that he was proposing to dispose of. Whereupon, she asked him to come back on another date accompanied by someone else. He did come back on 1st February 1997 with someone called Samuel Kairigo Wakahia. He also brought with him the original titles of the assets he proposed to distribute. According to Ms. Kang'ethe-Ikinu, she, the deceased and Mr. Wakahia went through the fair draft that she had prepared matching the titles numbers to the properties disposed of. In my view that exercise amounted to uttering the will in the presence of the witnesses.

22. The courts have had occasion to rule in cases where a deceased person leaves behind a document made during his lifetime which disposes of his property upon death, but the document is not executed at all or properly so. In *Re Rufus Nge'the Munyua (Deceased) Public Trustee vs. Wambui* (1977) KLR 137, the deceased had called his wives and children together and in their presence disposed of his property, which instructions were reduced into writing by one of the persons present. The writing was not a written will for it was not properly executed in keeping with section 11 of the Law of Succession Act. It was held that the writing disposing of the property amounted to an oral will, as it complied with section 9, for the making of the utterances was in the presence of two or more witnesses and the deceased died a few days thereafter. The holding in *Re Rufus Nge'the Munyua (Deceased) Public Trustee vs. Wambui* (supra) was followed in *Beth Wambui and another vs. Gikonyo and others* (1988)KLR 445, where the deceased called two persons to his residence and asked them to reduce his wishes into writing, which they did, and the hand written document was reduced into typescript the following day. They took back the typed document to the deceased, who signed it, but his signature was not attested by witnesses. It was held that the written document could pass for his oral will.

23. The decision in *Wambui and another vs. Gikonyo and others* (supra) was made by the Court of

Appeal. It is my finding that the circumstances in the two cases were similar to the instant case. The contents of the document prepared by Ms. Kang'ethe-Ikinu emanated from utterances made by the deceased to Ms. Kang'ethe-Ikinu and Samuel Kairigo Wakahia. The deceased may have only intended to make a written will, but the fact that he gave instructions on disposal of his estate in the presence of the two meant that although he did not get to sign the document the same became an oral will so long he died within the three months required.

24. The meeting with Ms. Kang'ethe-Ikinu and Samuel Kairigo Wakahia was held on 1st February 1997. According to the certificate of death on record, dated 16th January 1998, serial number 470607, the deceased died on 8th April 1997. That would mean that he died about two months and one week after 1st February 1997.

25. In view of everything that I have stated above, it is my conclusion that the deceased died testate having made an oral will on 1st February 1997, the terms of which are set out in the document placed before the court by Ms. Kang'ethe-Ikinu. The estate of the deceased is to be disposed of as per the terms of the said will. As the oral will has been found to be valid, the appointment of the administrators based on is hereby declared to have been done properly.

26. At the oral hearing, issues were raised concerning certain errors made in the course of the making of the oral will. The said errors related to the details of the national identity card of the deceased, description of some assets and identity of some of the beneficiaries and executors. The validity of a will is dependent on the provisions of section 9 and 11 of the Act. Any errors in the will on matters which fall outside of these provisions would not be fatal to the will. It is my finding that the faults identified by the witnesses are not fatal to the will the subject of these proceedings.

27. I note from the oral evidence that one of the administrators has since died. Under section 81 of the Law of Succession Act, where one of the administrator dies all the powers and duties of administrators becomes vested in the survivor or survivors of them. I make this observation as I have not been invited to make orders to have her substituted by another.

28. In the end, I do hereby allow the application dated 4th March 2005 in the following terms:

(a) That I hereby confirm Grace Njeri Mbugua and Hannah Wanjiku Thong'ote as administrators of the estate of the deceased;

(b) That the grant of letters of administration with oral will annexed made on 29th September 2004 is to be amended accordingly;

(c) That the said grant is hereby confirmed;

(d) That the estate of the deceased shall be distributed as per the oral will made on 1st February 1997, whose terms are encapsulated in the unexecuted will presented herein;

(e) That the deceased hailed from Kikuyu of Kiambu County and the bulk of the assets are situated within Kiambu County, consequently the cause herein shall be transferred to the High Court of Kenya at Kiambu; and

(f) That there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF NOVEMBER, 2016.

W. MUSYOKA

JUDGE