



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 1805 OF 2008**

**IN THE MATTER OF THE ESTATE OF STEPHEN KIBERA GATHUKU (DECEASED)**

**JUDGMENT**

1. The deceased herein died on 20<sup>th</sup> June 2008. Representation to his estate was sought in a petition lodged in this cause on 30<sup>th</sup> July 2008 by Joyce Mugure Kibera in her alleged capacity as his widow. The deceased was expressed to have been survived by nine (9) individuals, being a widow and eight (8) children. The widow was named as Joyce Mugure Kibera, while the children were Virginia Gakuhi, Peter Kimani, Susan Njambi, Nyambura, Ndung'u, Paul Njoroge, Moses Boro and Grace Wanjiku. He was expressed to have died possessed of Dagoretti/Riruta/1189 and 4739, Dagoretti/Karandini/49, Loitokitok/Enkariak-Rongena/630 and 648, Parcel Nos. 273 and 1270 and money in Postbank Account No. 71353. A letter from the Chief of Kawangware Location, dated 24<sup>th</sup> July 2008, lodged at the registry simultaneously with the petition on 30<sup>th</sup> July 2008, indicates that the deceased was survived by twelve (12) individuals. The names of those not listed in the petition being Hannah Nyakio and Moses Ndung'u, who are described as wife and son, respectively, of the deceased. A grant of letters of administration intestate was duly made to the petitioner on 1<sup>st</sup> December 2008.

2. On 13<sup>th</sup> January 2009, a summons of even date was lodged at the registry. It was brought at the instance of Virginia Njeri Njoroge and it sought revocation of the grant made on 1<sup>st</sup> December 2008 on three (3) grounds. One, it was alleged that the grant was obtained fraudulently on the basis of a false statement and concealment of matter material to the case, being that the applicant was a beneficiary of the estate. Two, that the grant was obtained fraudulently for it was not disclosed that the deceased had died testate. Three, that it was not disclosed that the applicant was the executrix of the last will of the deceased.

3. The affidavit in support of the application is sworn by the applicant, in her alleged capacity as the executrix of the will of the deceased. She avers that she contacted the deceased's advocate, P. K. Mathanjuki, after former's death who informed her of the will and who began to make arrangements for the reading of the will to family members. The local District Officer (DO) summoned a meeting of the family on 24<sup>th</sup> June 2008 where all family members, the local Chief and the deponent were in attendant. The will was allegedly read at that meeting by Mr. Mathanjuki. The administrator thereafter moved the court for simple administration even though she was aware that the deceased had died testate.. The documents attached to the affidavit of the applicant include copy of the will allegedly made by the deceased on 11<sup>th</sup> January 2008 in the presence of Daudi Nduati Kwamuma and Teresia Mbutu Kinuthia. There are also copies of correspondence exchanged between the deceased's advocate and the provincial administration, which identified fourteen (14) persons as survivors of the deceased.

4. The administrator herein, hereinafter referred to as the respondent, replied to the application through an affidavit sworn on 20<sup>th</sup> February 2009 and filed herein on even date. She avers that the deceased had

married twice, but the first wife had predeceased him without issue. She states that Mr. Mathanjuki was not the family lawyer, adding that the family's lawyer was Mr. Mwangi Chege. She asserts that the deceased did not make a will, nor appoint the applicant as executrix. She states that if there exists an alleged will, then the same must be invalid, null and void. She says that the deceased was prior to his death very sick, bed-ridden and suffered from senile dementia, and therefore he was incapable of making a valid will. She states that one of the alleged witnesses, Daudi Nduati Kwamuma, was an old man of over 100 years of age who was not literate. She accuses the applicant of fraudulently transferring estate property to her name shortly after the deceased's death. She has attached several documents to her affidavit to support her case. There is copy of a letter from Dr. Peter Mungai Ngugi dated 12<sup>th</sup> February 2007 stating the deceased had senile dementia for over four (4) years and could not give an account of himself. There is also copy of a letter dated 18<sup>th</sup> February 2009 signed by Dr. Mwawingwa of PCEA Kikuyu Hospital which is in similar terms.

5. There are also affidavits sworn by the persons who were alleged to be central in the making of the will, that is to say the lawyer who drew it and the two attesting witnesses – Peter Kihara Mathanjuki, Daudi Nduati Kwamuma and Teresia Mbutu Kinuthia. Mr. Mathanjuki swore his affidavit on 3<sup>rd</sup> February 2009 and the same was filed in court on 6<sup>th</sup> March 2009. He avers to be a practicing advocate in the firm of P. K. Mathanjuki, Advocates. He states that he was the deceased's advocate. He was allegedly instructed by the deceased on 11<sup>th</sup> January 2008 to prepare a will for him. The will was executed the same day, witnessed by Daudi Nduati Kwamuma and Teresia Mbutu Kinuthia. He says that he read the will to the family on 24<sup>th</sup> June 2008 before the DO of Dagoretti and the Chief of Kangemi. He adds that no one from either side of the family raised objections on the will.

6. On his part Daudi Nduati Kwamuma swore his affidavit on 25<sup>th</sup> February 2009, which was then filed in court on 6<sup>th</sup> March 2009. He describes the deceased as a relative and friend. He says that sometime in 2007 he had a discussion with the deceased, where the latter intimated that he wanted to distribute his estate and was planning to consult his lawyer about that. On 10<sup>th</sup> January 2008 the deceased sent word that he required him the following day to accompany him to his lawyer for the purpose of making the will. The following day, 11<sup>th</sup> January 2008, he and Teresia Mbutu Kinuthia were picked in a taxi and taken to the deceased's lawyer where he witnessed the deceased signing the will after which he also signed as an attesting witness. The other attesting witness is said to have also signed the document. Teresia Mbutu Kinuthia swore her affidavit on 9<sup>th</sup> March 2009 and the same was lodged in court the same day. She says that the deceased telephoned her on 10<sup>th</sup> January 2008 requesting her to accompany him to his lawyer's office the next day. The next day, 11<sup>th</sup> January 2008, she was driven to the lawyer's office in the company of the deceased and the co-attesting witness. She then saw the deceased execute his will, and she witnessed it too by signing on the will. She avers that deceased had not disclosed to her the purpose of the visit to the lawyer's office.

7. Directions on the disposal of the application were given on 24<sup>th</sup> February 2009. Priority was to be given to the validity of the will.

8. The hearing commenced on 8<sup>th</sup> March 2010. The first witness on the stand for the applicant was Daudi Nduati Kwamuma. He said he was 89 years old at the time he took the stand. He testified that the deceased had called him to the office of his lawyer and he saw him sign his will. He said the deceased was at the time in a good mental condition, and that he had not been in bad health for the last five year prior to signing the will. The next in line was the applicant. She testified to be a daughter-in-law of the deceased from the first house. She stated that the will was read at the DO's office by Mr. Mathanjuki and translated into Kiswahili by the Chief. She said that the will appointed her executrix. She mentioned that all the children of the deceased had been provided for. She protested that when the administrator applied for representation she did not disclose her as a survivor of the deceased. She stated that the deceased died at the age of 98, of pneumonia. She added that she was unaware that he suffered from hypertension. She stated that he did not suffer from senile dementia, and that she had not heard that he was being treated at the Kikuyu Hospital. She said that the deceased was alert and conducted his business until he died. She revealed that he was sick for one week before he died.

9. Peter Kihara Mathanjuki testified next. He stated that the deceased was his client, for he had acted for him previously in respect of some matters. Regarding the will, he testified that the deceased went to his chambers on 11<sup>th</sup> January 2008 in the company of the two attesting witnesses and instructed him to draw the will. He drew it up, the deceased signed it and it was attested by the witnesses in his presence. He described the deceased as an old man who was in full capacity. He said that before the document was signed he, the witness, read it over to the deceased and explained its contents to him in Kikuyu. The witness identified the document lodged herein as the will of the deceased. When he received communication on the death of the deceased, he arranged with the provincial administration for the reading of the will to the family. That happened at the office of DO for Dagoretti, in the presence of the DO and the Chief of Kangemi. No objections were raised at the occasion.

10. Anthony Waweru Kibera testified as the last witness for the applicant. He described the deceased as his paternal grandfather, saying that he was the one living with him prior to his death as he was not living with his second wife, who was still alive. He is the one who used to cook for them. He said the second wife would visit from time to time. The children of the second wife were said not to have been visiting the deceased. He described him as having had good health and a sound mind before he died. He said he was literate for he could write in Kiswahili and used to read telephone numbers for himself. He stated that he was with the deceased when he died. He was said to have developed chest pains and he could not walk properly as a result. The condition is said to have persisted for three months. He testified that the deceased had no other health problems, but stated that he was not aware that he was being treated at Kikuyu Hospital.

11. The respondent's case opened on 29<sup>th</sup> May 2015. She described herself as the widow of the deceased, having been his second wife. She said the first wife did not have children, although she had adopted a son called Ndung'u who was the husband of the applicant. She stated that she was the one living with and taking care of the deceased prior to his death. She said that the deceased had memory lapses and was so sickly that he could not take care of himself and he could also not remember the names of his children. The condition was said to have persisted for four years. She testified that at the date the will was alleged executed the deceased was having memory loss problems. She stated the deceased was being treated at the PCEA Hospital at Kikuyu, Thogoto. She described Anthony Waweru Kibera as an employee of the deceased, assisting the deceased in his water vending business. She contested the evidence that he used to live with and care for the deceased. She conceded that she had not enlisted the applicant as a survivor when she lodged her petition in court. She conceded that the will was read at the DO's office but she stated she did not believe in it and did not even attend the event. Her problem with it was that the deceased was not of sound at the time he allegedly made the will, and in any event there was no seating by the family to agree on the distribution. She mentioned that the deceased was being taken care of by her children. She said a Njambi used to check on him every morning and evening. Ndung'u and Boro were also mentioned as persons who would check on him every day in the morning and evening. She also mentioned that there was a dispute as to where the deceased was to be buried.

12. Paul Njoroge Mwaura testified as the respondent's second witness. He described himself as a nephew of the deceased, as his mother was a sibling of the deceased. He alleged that he began to working with the deceased in 1968. He testified that the deceased invited him to live with him, which he did while the former's wives were all alive and living in one house. Three years before he died the witness allegedly used to visit the deceased every day, every morning and evening. At the time he began to ail from blood pressure and his legs began to weaken. He would then spend time with the deceased at his work place, and he, the witness, would take him there in his car. He would feed him and later take him home. He stated that the deceased had not received formal education, but he had received adult education, and was able to read Kikuyu and Kiswahili. He said the deceased had memory loss, saying that he often called him the wrong name. He gave instances of how the deceased began to behave like a child, and of how he used to take him all over the place, including when he had to drive to Mombasa with him. He also stated that he was the one responsible for taking him to hospital at Kikuyu. He said he used to take him to hospital himself for he did not want to be interfered with by any other person. He said he would call him and ask him to take him to hospital. He said that as from July 2007 the deceased could not know anything. He alleged that the deceased literally died in his hands, and denied that Waweru helped the deceased in any way. He said that the deceased died as he and Waweru and Ndung'u took him to hospital. He identified

the applicant as the wife of the adopted child of the deceased.

13. At the close of the formal hearing, it was directed that the parties do file written submissions. Both sides have complied with the directions and filed their written submissions. I have gone through the same and noted the arguments advanced therein.

14. The deceased died in 2008, long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force on 1<sup>st</sup> July 1981. The law on validity of wills executed after 1981 is Part II of the said Act. The specific provisions relevant for our purposes are sections 5 and 11 of the Act, which deal with testamentary capacity of the parties and formalities surrounding the making of the will. Section 5 states 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 is doing.*

*(4) The burden of proof that a testator was, at the time he made the will, not of sound mind, shall be upon the person who so alleges.’*

15. Section 11 of the Act states the formal requirements for a written will. The said provision states as follows:-

*‘No written will shall be valid unless-*

*(a) The testator has signed or affixed his mark on the will, or it has been signed by some other person in the presence and by the directions 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,’*

16. The effect of section 5 is that a will is valid if it is made by a person who is of sound mind and not a minor. A person would not be of sound mind if at the time of making the will his mental state was affected by mental or physical illness or drunkenness. Section 5(3) creates a rebuttable presumption with respect to wills, that the maker was of sound mind at the time of making the will, until the contrary is established. Burden of proving lack of mental capacity is cast by section 5(4), on the maker of the allegation.

17. It is not disputed by the respondent that there was a will. The contention is that the alleged will was not valid for the deceased could not possibly have had a disposing mind. The respondent’s case was that the deceased was suffering from memory loss. She specifically deposed that he had senile dementia. She

and her witness testified at the trial that he had memory loss and could do nothing on his own. In her affidavit in reply to the application, she attached copies of letters from doctors which said that the deceased suffered from senile dementia. However, at the trial the respondent did not call any of the two doctors whose alleged medical reports were attached to her affidavit.

18. I have reproduced the provisions of section 5 here above, to emphasize the law on will making. At the heart of the validity of a will is the mental capacity of the testator. There is a general presumption that a person making a will has the relevant mental capacity, unless there is proof that at the time of making the will the testator's soundness of mind has been affected by the factors set out in Section 5(3), and the burden of proving those factors is cast on the person denying the lack of capacity. It is the respondent in this case who is alleging that the deceased lacked the capacity to make a will on the grounds of suffering from senile dementia. By virtue of section 5(4), the burden of proving the lack of soundness of mind of the deceased was therefore on the respondent. Whether the deceased had mental disorder or had senile dementia is a medical issue. It was critical that a doctor testified on it. In this case, the respondent did not call any doctor to testify on the matter, although there are two documents on record allegedly prepared by doctors which mention that the deceased had that condition. The failure to call the doctors as witnesses has undermined the respondent's case that the deceased did not have the requisite capacity to make the will.

19. Section 11 of the Act states the formal requirements for a valid written will. I have seen and perused through document that has been put herein in evidence by the applicant as the will of the deceased. It is professionally drawn by an advocate. There is what is purported to be the signature of the deceased. There are also signatures of the two attesting witnesses. The advocate who drew the will also endorsed the same. The advocate testified to having had received instructions from the deceased to prepare the will, and of having prepared the will, and witnessed its execution by the deceased and its attestation by the witnesses. The two witnesses also testified to having witnessed its execution by the deceased and to having themselves signing on it as attesting witnesses.. The evidence of all three witnesses' tallies. The common thread being that a will was executed on 11<sup>th</sup> January 2008 by the deceased. On the face of it, there is compliance with the formal requirements for a valid written will.

20. I have noted from the evidence adduced by the respondent that she did not dwell on the authenticity of the signature of the deceased, although I do note that the issue of fraud or forgery was raised in the affidavit in reply. It was argued that the deceased had senile dementia and therefore he could not possibly have signed the alleged will, and that the signature on the alleged will, said to be that of the testator, must have been a forgery. I have seen on record a report of a handwriting expert on the alleged signature, however no evidence was led on this, and the said report was not produced as an exhibit in the proceedings to avail opportunity for cross-examination of the maker of the report.

21. In view of what I have stated above, it is my conclusion that the deceased did leave a valid will executed on 11<sup>th</sup> January 2008. I am moved in the circumstances to make the following orders:-

**(a) That I do hereby allow the application dated 13<sup>th</sup> January 2009, and revoke the grant of letters of administration intestate made herein on 1<sup>st</sup> December 2008 to Joyce Mugure Kibera;**

**(b) That I hereby appoint Virginia Njeri Njoroge personal representative of the deceased and direct that a grant of probate of the written will of the deceased made on 11<sup>th</sup> January 2008 be issued accordingly to her and;**

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

**DATED, SIGNED and DELIVERED at NAIROBI this 25<sup>TH</sup> DAY OF NOVEMBER, 2016.**

**W. MUSYOKA**

**JUDGE**