



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE 2340 OF 2004

**IN THE MATTER OF THE ESTATE OF ZIPPORAH NGENDO WAMBUGU ALIAS NGENDO
WAMBUGU (DECEASED)**

JUDGMENT

INTRODUCTION

The deceased Zipporah Ngendo died on 14th September, 2000. She wrote a Will on 12th October, 1998. The deceased appointed Rose Njeri Githongo her first born daughter as the executrix of her estate. She applied for grant of probate of the Will of the deceased which was granted on 4th October, 2004.

PLEADINGS

On 14th March, 2005, Margaret Wambui Mwangi filed summons for revocation and annulment of grant of the deceased estate. Her grounds were;

- i. The Will is a forgery and all the properties listed belong and are registered in her name and not in the deceased's name.
- ii. There was another application for grant of letters of administration in **Succession Cause 2315 of 2003** which she was granted letters of administration.

The Respondent Margaret Wambui Mwangi stated that the deceased had one son Mwangi Kanene who died in 1987 and he was her husband whom they had eleven (11) children. She is therefore a beneficiary of the estate of the deceased by virtue of being the wife of the son of the deceased.

During her life, the deceased showed her one of the properties in Huruma Plot No.16 Site and Service Scheme which she developed and was later transferred to her daughter Jackline Wanjugu Mwangi. The properties registered in her name should not form part of the estate of the deceased.

The Petitioner, Rose Njeri Githongo her sister in-law, should not inherit any property of the deceased as she got married a long time ago and did not come back to the homestead of the deceased.

The Respondent filed a further affidavit on 27th January, 2006, and attached documents to show ownership of Plot number 16 at Huruma Site and Scheme evidenced by a plotbook and receipts of payments marked "MWM2". There is a copy of Title deed Kabazi/Munanda/Block 1/132 in the name of Margaret Wambui Mwangi.

The Petitioner filed a Replying Affidavit on 20th April, 2006 and stated the Will of the deceased was not a forgery as it was properly executed by their late mother Zipporah Ngendo and witnessed by Loise Wangui Wachira and Susan Nyandia Kimani.

The Petitioner alluded to the fact that she had a brother and son to the deceased and he was never married. Before their mother's death the Respondent tried to defraud her of her properties; specially Huruma Plot No.16 Site & Service Scheme and registered it in the name of Jackline Wambugu Mwangi her daughter.

Upon the hearing and determination of **RMCC 1847 A of 1997** proceedings and judgment are attached to this affidavit; and marked '**RNG 3**' The Plaintiff's claim was dismissed and the Court ordered revocation of the Title as shown by the decree marked '**RNG3**'. The Plaintiff did not appeal against this decision.

The Respondent filed a Replying Affidavit on 3rd May, 2009 and elaborated that she is the wife of Godfrey Mathenge Kanene the son of Zipporah Ngendo Wambugu (deceased) she was married in accordance with Kikuyu Customary Laws and they had eleven (11) children and is evidenced by the attached six (6) birth certificates annexed and marked '**MWM 2**'.

The Respondent deponed that the deceased's Will of 12th October, 1998 is not valid as she produced the latest Will of 20th June, 2000 a copy attached as '**MWM 4**'. The alleged Plot No. 16 at Huruma Site and Services Scheme was developed by the Respondent. The Petitioner who is a sister to her late husband is married in Nyeri and should inherit from the married home and not her original home.

The parties agreed through Counsel to file affidavits of witnesses.

Dominic Mureithi Munyiri a cousin to the Respondent's late husband swore an affidavit and filed on 21st May, 2009 and deponed that the Respondent was married by Mwangi Kanene in 1955 under Kikuyu Customary Law and she never left home. When her husband died on 18th July, 1989, he left her and eleven (11) children. He talked with the deceased and she said the plot in question belongs to the Objector and she wrote her Will and the copy was kept by the Objector.

Charity Njoki Macharia a friend of the Respondent for over thirty (30) years deponed in the affidavit filed on 21st May, 2009, that on 20th June, 2000 she was called by the Respondent to witness the deceased; her mother-in-law decision to distribute her property in Huruma. She also saw Maina Waithaka write the Will in Kikuyu and signed and she signed and the deceased put her thumb stamp. The deceased kept a copy and the Respondent a copy too.

Stephen Ngatia Ndirangu filed an affidavit on 21st May, 2009. He said the Respondent was married to Mwangi Kanene in 1955 and administrator Rose Njeri Githongo is married to Githongo Githaiga who is deceased and she lives in Nyeri on her husband's land with her family. He claimed all along the deceased had indicated that the Plot in question belongs to the Objector as the sole beneficiary of the estate. The deceased wrote her Will and she kept a copy and the deceased also kept a copy.

The same witness filed a further affidavit on 23rd October, 2014 and elaborated on the earlier content, specifically that the Respondent built the house on Plot 16 Huruma where there is a six (6) bedroom house which they invited the deceased to come and live with them.

They further elaborated that under Kikuyu Customary a married woman would not inherit at the married home and original home at the expense of son of the family or his widow and children.

On 17th September, 2014, the parties agreed in light of the Objector's ailing state that the parties put in written submissions and affidavit of witnesses. The matter was mentioned on 26th November, 2014 for compliance and the judgment date was obtained. The Court is to rely on the content of the Court file the pleadings submissions filed.

ISSUES

1. Is this a testate or intestate matter?

2. Which Will is valid
 - a. One of 12th October 1998 or
 - b. One of 20th June 2000
3. Is the objector a beneficiary of the deceased's estate?

The issue before this Court is whether the deceased left a valid Will(s) for distribution of the estate. The Petitioner relies on the Will of 12th October, 1998. The Will is in compliance with **Section 11 of the Law of Succession Act Cap 160**

- a) *‘No written Will shall be valid unless; 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 director 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 as it was intended to give effect to the right of the Will.*
- c. *The Will is attested by 2 or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will.....’*

The Respondent also claim that they have a Will of 20th June, 2000 signed by 2 witnesses and that deceased's thumb front. Again for all intents and purposes it was a valid Will.

In the matter of estate of **Humphrey Edward Gichuru Kamuyu HCSC 2322 of 1995 (Visram J)** stated; A will is valid if it fully complies with **Section 11 of the Law of Succession Act Cap 160**. The Will of 2000 did not specifically revoke all other Wills signed before by the deceased, and therefore the Will of 1998 was not defunct.

This Court notes that at the time the Respondent filed for grant of letters of administration in Succession Cause 2315/2003 which was later withdrawn by consent; she did not disclose the Will until the application for revocation of grant. Secondly the alleged Will relates only to the property in question Huruma Plot No. 16 Site and Service Scheme and not any other properties of the deceased.

The Respondent stated that the Will of 12th October, 1998 is forged due to the fact that the thumbprint was not of the deceased but she was coerced by her daughters. Secondly she was not mentally capable of writing the said will. **Section 5(3) of the Law of Succession Act Cap 160** stipulates;

‘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 time of executing the Will, in such state of mind, whether arising from mental or physical illness drunkenness or from any other causes so as not to know what he is doing.....’

Section 5(4) of Law of Succession Act Cap 160

The burden of proof that a testator was at the time he made any Will, not of sound mind, shall be upon the person who so alleges. The Respondent apart from alleging the deceased was not in a mental stable state to write the Will, she did not produce any evidence to prove the same in Court or on the Court record.

Further, if infact the deceased was unwell and incapable of writing the Will in 1998, by 2000 when the deceased subsequently wrote the 2nd Will, she must have deteriorated further in two (2) years to be incapable of writing the Will that the Respondent produced.

The upshot of the matter, is that this Court finds that the estate of the deceased is to be distributed according to the Will of 12th October, 1998 and not the Will of 20th June, 2000, as it did not revoke the will of 12th October, 1998 expressly, in the case of **Re Hawkessey's Settlement Black Vs Tidy (1934)**

Chanery 384 /ALL Eng Reports Rep 94 The Will of the testatrix did not carry an express revocation clause but was described as “the last Will”. It was held that the description of a Will as “the last Will” was not sufficient for an express revocation clause.

The Will of 20th June, 2000 did not revoke the Will of 12th October, 1998. Therefore is the Will of 12th October, 1998 that takes precedence over the Will of 20th June, 2000 which made reference only to the specific property Huruma Plot 16 Site and Service.

The 2nd issue is whether the Respondent is a beneficiary to the estate of the deceased. The deceased is the mother to Geoffrey Mathenge Kanene (deceased) who died in 1987. He was husband to the Respondent and had eleven (11) children.

In the affidavit of the Petitioner Rose Njeri Githongo filed on 20th April, 2005 she depones in paragraph 7 that the deceased in this case had three (3) children and the only son pre deceased her and he was never married.

The documents and affidavits filed by Dominic Muriithi Munyiri, Charity Njoki Macharia and Stephen Ngatia Ndirangu they have deponed that the Respondent was married to the son of the deceased under Kikuyu Customary Law.

From the evidence above the court is inclined to confirm the Respondent as the wife of the son of the deceased as per **Section 3(5) Law of Succession Act Cap 160** which stipulates;

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular Sections 29 and 40 thereof, and her children are accordingly within the meaning of the Act.”

This position is convincing especially from the affidavit filed by the Respondent, Margaret Wambui Mwangi of 3rd May, 2006 when she outlines the children of the marriage and has attached identity cards and birth certificates. As the wife of the deceased Godfrey Mathenge Kanene she is entitled to his share of the estate of the deceased for her and the children as indicated in the Will.

It is curious to note, that the son of the deceased died in 1987. The deceased wrote her Will in 1998 and specifically bequeathed property to her late son. It means she intended to and did provide for the family of the deceased.

The Respondent has raised several issues that require mention. The first one is that she is the entitled owner of Plot 16 of Huruma Site and Service Scheme as evidenced by the documents of ownership attached to her Further Affidavit of 22nd January, 2006. The plot is in the name of her daughter Jacqueline Wanjiru Mwangi. The Respondent stated she developed the said plot and she ought to continue residing and owning the said plot.

On the other hand, the Petitioner Rose Njeri Githongo on 20th April, 2006 at paragraphs 8 – 12, she deponed that before the deceased died, the objector tried to defraud her Plot No. 16 after having registered themselves as proprietor of the plot, they filed suit to evict the deceased by filing RMCC 1847 of 1997 at Milimani Commercial Courts. The suit was dismissed and counter claim entered against the Plaintiff and the Court ordered the registration be revoked and deregistered and return the Title documents; in the deceased’s name. The proceedings were attached and the decree of the Court. The judgment of 2nd September, 1998 was to the effect that the Plaintiff (the Respondent’s daughter Jacqueline) be deregistered and to return the Title documents to the defendant, the deceased herein.

The decree of 4th September, 1998 with the same effect that the plaintiff returns the title documents in respect of Plot No. 16 Huruma to the defendant, the deceased herein. The deceased died before the decree

was executed on 14th September, 2000.

The affidavit of Mr. Mwangi Chege filed on 18th May, 2009 Counsel for the deceased who wrote the Will of the deceased of 12th October, 1998 deponed that he represented the deceased in **Milimani Civil Suit Number 1847 of 1997**. After judgment was delivered on 4th September, 1998 the deceased instructed him to prepare a Will so that there would be no further dispute over her intention in relation to her properties.

The advocate prepared the Will and on 12th October, 1998 read out the contents in Kikuyu language. She confirmed the contents were correct and according to her desires. She executed the Will in the presence of two (2) witnesses Lois Wangari Wachira and Susan Nyendia Kimani. He witnessed, the Will. The intention of the deceased was to fairly distribute her properties to the family in the circumstances.

From the above evidence or record, the Court finds in spite of the Respondents insistence that Plot 16 Huruma belongs to her, she did not provide evidence of her investment, the Courts judgment of 4th September, 1998 was not appealed against or set aside and the Will of 20th June, 2000 is not effective as it did not revoke the one of 12th October, 1998.

The Respondent also alluded to the fact that the Petitioner is married and cannot order Kikuyu Customary Law inherit from the estate of the deceased secondly, since her late husband was the only son, she is the sole beneficiary of the estate of the deceased.

Section 29 (c) of the Law of Succession Act Cap 160 attributes as beneficiaries of the estate of the deceased wife or wives or former wife or wives, and the children of the deceased provided for the three (3) children, the Petitioner, her sister and their late brother.

In the following cases;

In the **matter of the estate of Keingati Waiharo Keingati (deceased) P&A No. 1190 of 1990 Kimaru J.** considered the issue of inheritance under Kikuyu Customary Law, as provided in Article 11 of the Constitution 2010.

“The article formulates all the positive aspects of culture..... and not a Cultural practice that is negative, discriminatory and retrogressive”

In the **Re estate of Solomon Ngatia Kariuki (deceased) (2008) eKLR at page 8 Makhandia J. stated:**

“ The Law of succession did not discriminate between female and male children married or un married daughters of the deceased person when it comes to the distribution of the estate.”

In sum therefore, this Court associates itself with the current position under the **Constitution 2010 and Law of Succession Act Cap 160 of 1981** and orders as follows;

- a. The Will of 12th October, 1998 is valid under **Section 11 of the Law of Succession Act Cap 160**.
- b. The Will of 20th June, 2000 is not valid it did not revoke the earlier will by the deceased.
- c. The Respondent is a beneficiary of the estate of the deceased as wife to the deceased under **Section 3(b) of Law of Succession Act** to the extent of the share of the deceased’s son Godfrey Mathenge Kanene as stipulated in the Will of the deceased of 12th October, 1998.
- d. The land Plot Number 16 Huruma Site and Service Scheme belongs to the deceased Zipporah Ng’endo as per the judgment of the Court of 4th September 1998 in Civil Case 1847 of 1997 and the decree thereof . The plot is for distribution of the estate as provided for in the Will of 12th October, 1998.
- e. The summons for revocation of grant of 14th March, 2005 is dismissed.
- f. The application for confirmation of grant of probate of the Will of the deceased of 12TH October,

1998 is granted.
g. Each party to bear its own costs.

READ AND SIGNED IN THE OPEN COURT IN THE PRESENCE OF:

Mohamed Holding brief for Mr. Kuloba for the Objector

Mr. Kuloba seeks leave to appeal.

COURT: Leave is granted.

DATED AT NAIROBI THIS 29TH DAY OF JANUARY, 2015

M. MUIGAI

JUDGE