



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.998 OF 2006

IN THE MATTER OF THE ESTATE OF CHARLES KARUGA KOINANGE (DECEASED)

DR. ROSEMARY B. KOINANGE (*on behalf of the Estate*

of Dr. Wilfred K. Koinange).....**APPLICANT**

VERSUS

JOHN MIRINGU

SUSAN MUGURE (*On behalf of the Estate of Paul Mbiyu – (Deceased)*

LEONARD KANGETHE

WILLIAM KIHARA

ERNEST NGUGI

PETER MBIYU.....**1STRESPONDENTS**

MARY WANJIRA.

MARION WAMBUI

ISABELLA WANJIKU KARANJA

ROSEMARY GACIKU

JANE WAMBUI.....**2NDRESPONDENTS**

MRS. MARY KARUGA.....**3RDRESPONDENT**

RULING

Charles Karuga Koinange, the deceased to whose estate these proceedings relate died on 20th February 2005. A petition for grant of probate with Will annexed was filed in this court on 10th May 2006. From the proceedings, it appeared that there was a dispute between the beneficiaries in regard to who was

entitled to petition the court for the said grant of probate. This was due to the fact that the firm of Kaplan & Stratton Advocates, who have been appointed in the purported last Will of the deceased dated 16th June 1999, renounced their rights to petition the court for such grant of probate. The issue of who was to be issued with letters of representation in respect of the estate of the deceased was resolved by this court when it issued a grant of letters of administration intestate to Isabella Wanjiku Karanja, William Kihara Karuga, Samuel Karuga Koinange and Peter Mbiyu Koinange on 27th February 2014. The Respondents challenged the Will dated 16th June 1999 on the grounds that the deceased lacked mental capacity at the time to make the Will. On her part, the Applicant, the widow of Dr. Wilfred Karuga Koinange (deceased) continued with the position taken by her late husband which was to the effect that the said Will was indeed valid as the deceased had made it when he had the requisite mental capacity to do so. The reason for the Applicant taking this position is essentially because the Applicant and her children are the main beneficiaries of the said Will. The 2nd Respondents, the daughters of the deceased entered the suit essentially to demand that they be given a bigger share of the estate of the deceased other than the one that it is alleged the deceased bequeathed them. The 3rd Respondent's position is rather unique. She was the wife of the deceased before the deceased divorced her in what apparently were acrimonious divorce proceedings. The 3rd Respondent filed suit seeking division of matrimonial property. From the pleadings filed and the submission made, it became obvious to the court that that suit was not determined during the deceased's lifetime. The 3rd Respondent is demanding a share of the properties that comprised the estate of the deceased as the former wife of the deceased.

When the matter was listed for mention before this court for directions on how the case was to proceed, the Applicant presented to the court a sealed envelope which she was given by the firm of Kaplan & Stratton Advocates. From the accompanying documentation, it was clear that the sealed envelope had been deposited in a safe deposit at Standard Chartered Bank by the deceased. With the consent of all the parties present, the court opened the sealed envelope. In it was a letter written by the deceased dated 8th May 1975. The two page letter contained the following words as a preamble:

“May this letter be regarded as my wish and in case of death, may be regarded as my WILL.”

The letter then proceeds to distribute the properties identified therein to some of the beneficiaries, including the 3rd Respondent who was then the wife of the deceased. Although each paragraph of the letter was signed by the deceased, the letter was not witnessed by any other person. The court directed the letter to be photocopied and given to all the parties. The court gave further directions to the parties to file submission in regard to the issue whether the letter qualified to be considered by the court as the deceased's Will or Wish and whether the court should use it as a basis for distributing the properties that comprise the estate of the deceased. The said submission were duly filed by the parties.

When the parties made submission on the directions the court was to issue in regard to how the issues in dispute were to be resolved, it became apparent to the court that there were two main issues that had to be first canvassed before the court could proceed with the distribution of the properties that comprise the estate of the deceased. As stated earlier in this Ruling, the Respondents challenged the validity of the Will dated 16th June 1999 essentially on the ground that at the time the deceased is alleged to have made the Will, he lacked mental capacity to do so. The second issue that emerged for preliminary determination was on the issue whether the deceased had mental capacity to transfer to Dr. Wilfred Karuga Koinange (deceased) in 1994 the shares of a limited liability company known as CKK Estates Limited. It was common ground that this company owned a parcel of land registered as LR. No.134 which measures 305 acres. On it is a tea plantation and other developments. It was the Respondents' contention that the transfer of the said shares to Dr. Wilfred Karuga Koinange (deceased) was fraudulent and therefore should be reversed by the court and the said shares be held to be part of the estate of the deceased and therefore available for distribution. The Applicant disputed this assertion for among other reasons, that the court, as a succession court, lacked jurisdiction to deal with the matter relating to the transfer of shares in a limited liability company. The Applicant insisted that it was only the Companies' Court as established under the **Companies Act** which had jurisdiction to deal with a dispute, if any, regarding the transfer of shares in a limited liability company.

Having considered the submission made, both oral and written, the first issue for determination is whether the sealed letter dated 8th May 1975 is a valid Will of the deceased. According to the 3rd Respondent, the said letter, for all intents and purpose, is a Will because the deceased had personally written the same and signed on each paragraph of the letter. The Applicant and the other Respondents are of the contrary view. They submitted that, the letter cannot amount to a Will because it does not fulfill the requisites as to a valid Will. They relied on **Section 11** of the **Law of Succession Act** which requires that, apart from the testator signing the Will, the same must be witnessed or attested by two or more competent witnesses who were personally present when the deceased affixed his signature on the Will. It was clear from this court's assessment that the deceased wrote the said letter essentially to indicate how his properties were to be distributed in the event of his death. At the time, the deceased worked as a senior civil servant. He did not wish the contents of the letter to be known to his beneficiaries. That is the reason why he had the letter sealed and deposited in a safe deposit in the bank. This court agrees with the Applicant and the other Respondents that the letter does not and cannot be considered as a valid Will because it was not witnessed by two competent witnesses as provided under **Section 11(c)** of the **Law of Succession Act**. However, this court is of the view that the letter fairly gives an indication of the deceased state of mind at the time in regard to how he wanted the properties that comprise his estate to be distributed to his beneficiaries. What is important at this juncture of the Ruling is to point out the fact that it was apparent that the deceased wanted to fairly distribute his properties to his then wife and children.

There are several events that rendered the contents of the said letter overtaken by events. The first event is the divorce of the 3rd Respondent by the deceased. The deceased divorced the 3rd Respondent in proceedings that were apparently acrimonious. Although the divorce proceedings were concluded, the case relating to division of matrimonial property was not determined at the time of the deceased's death. The pendency of this case relating to division of matrimonial property however had a bearing in this succession cause. The court will deal with this aspect of the case at the later part of this Ruling. Suffice for this court to state that the deceased's divorce of the 3rd Respondent influenced the events that later occurred in relation to the transfer of shares in respect of a company known as CKK Estates Limited.

The second issue for determination is whether the Will dated 16th June 1999 is valid. The Will was prepared by the firm of Kaplan & Stratton Advocates. It was witnessed by James Njenga Karume (now deceased) and Rev. Gideon Hiti Kabetu. Whereas the Applicant insists that the Will is valid, the Respondents have challenged the Will on the ground that at the time the deceased is alleged to have made the Will, he lacked mental capacity to do so. In support of their claim, the Respondents relied on several medical reports of the deceased and the proceedings of the court in the division of the matrimonial property case. It was common ground that the deceased died of complications arising out of Alzheimer's disease. The deceased's death certificate indicates as much. From the proceedings, it was apparent that the deceased had been diagnosed as far back as 1993 with symptoms of the disease. Alzheimer's disease, according to Dr. S.M.G. Mwinzi, a Consultant Neurologist who saw the deceased in January 1998 and later on 21st May 2001 is ***"a chronic progressive degenerative disorder of the brain that is incurable. It has totally impaired all the aspects of his (the deceased's) cognitive function namely speech/language, memory, orientation, personality, judgement and abstract thought. This process of decline of cognitive function has been going for several years now and must adversely affected or influenced many of the decisions he has made in the last nine to ten years."*** It was instructive that the deceased was taken for the medical examination by Dr. Wilfred Karuga Koinange (deceased) whose actions at the time are pertinent to these proceedings. The deceased had earlier been seen on 8th January 1993 by Dr. S.G. Gatere, a Consultant Psychiatrist who was more or less of the same opinion as Dr. Mwinzi. This is what the doctor said in his report:

"1. Over the past three years or so, his physical health has gradually declined, and that this decline, has been characterized by stress related conditions including diabetes mellitus.

2. Over the same period as mentioned in (1) above, signs and symptoms reminiscent of the exhaustion depression have been observed. These signs and symptoms have deteriorated rapidly in the year 1992.

3. Continued indecision on the matter of divorce proceedings constitute a major source of stress for Mr. C.K. Koinange which helps to exacerbate both his diabetes and his anxieties leading to exhaustion depression.”

The deceased appeared in court on 16th February 1999 in the division of matrimonial property case *i.e.* **Nairobi HCCC No.3953 of 1989 (OS) - Mary Njoki Karuga –vs- Charles Karuga Koinange**. The proceedings were before E.M. Githinji J (as he then was). The court made the following observations in regard to whether the deceased was able to follow the proceedings:

“I am being asked to proceed with the hearing of the case by the Respondent Counsel. The Applicants counsel however says that the Respondent is not in control of his faculties. It is not right for the court to order that the Respondent should be examined by a doctor unless the court has doubt about his inability to comprehend the proceedings...I note that he has been escorted to court by a lady who is supporting him. I have heard him making inaudible comments. Before the court decides whether or not to continue with the hearing, it will orally examine the Respondent.”

The deceased’s counsel was opposed to the court orally examining the deceased. However, the said counsel later conceded that it was not possible for the deceased to continue defending himself in the proceedings due to his health condition. Dr. Wilfred K. Koinange (deceased) was appointed to be his guardian ad litem in the suit for the purposes of defending the interests of the deceased.

The Applicant has forcefully submitted that for the court to determine whether

the deceased was in a state of mind to make the Will of 16th June 1999, it must satisfy itself that the deceased indeed lacked mental capacity to make the Will. In making such determination, the court must satisfy itself that the deceased was not in his lucid moments when he made the Will and therefore incapable of making his wishes known as regards to how the properties that comprise his estate were to be distributed. On the other hand, the Respondents argued that from medical evidence, it was clear that the deceased mental condition was such that he was not in a position to make the Will. **Section 5(3) of the Law of Succession Act** provides as follows:

“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 was doing.”

Section 5(4) of the Law of Succession Act places the burden of proving that the testator was not of sound mind to the person alleging it.

In the present case, have the Respondents established to the required standard of proof on a balance of probabilities that indeed the deceased was of unsound mind when he is alleged to have made the Will? On this court’s evaluation of the evidence adduced in this case (in form of affidavits and medical reports), it was clear that the deceased was not in a state of mind to make the Will. The deceased was examined by Dr. Mwinzi, a Consultant Neurologists about a year and a half before he is purported to have made the Will. The deceased was diagnosed to be suffering from a degenerative brain disease. The doctor observed that the symptoms of the disease affected the judgement of the deceased to the extent that he lacked cognitive functions. Dr. Gatere made the same observations regarding the condition of the deceased when he saw him in 1993. It was clear from the medical report of Dr. Gatere that the deceased’s physical and mental condition started declining in 1990 to the extent that rapid deterioration took place in 1992. Dr. Mwinzi in his report dated 21st May 2001 observed that the deterioration of the deceased’s cognitive functions (mental faculties) began ten years before that examination. The Applicant urged the court to consider the medical report prepared by Dr. Wilfred Karuga Koinange himself in relation to the medical condition of the deceased. This court is of the view that the said medical report by Dr. Wilfred Koinange is of no probative value because he was a substantial beneficiary of the said Will and therefore it would be to his advantage to state that the deceased’s medical condition was better than it actually was.

Taking into consideration the totality of the evidence placed on record in regard to whether the deceased had the mental capacity to make the Will of 16th June 1999, this court has reached the irresistible conclusion that the deceased at the time suffered from Alzheimer's disease which is a degenerative brain disease that totally affects the cognitive functions of a person suffering from such disease. The medical reports of Dr. Gatere and Dr. Mwinzi are conclusive in that regard. If there was any doubt as to the state of mind of the deceased in 1999, that doubt was clarified when Githinji J (as he then was) observed the deceased in court. This was about four (4) months before the deceased was purported to have made the Will. *Is it possible that the deceased mental situation improved sufficiently for him to make the Will on 16th June 1999?* The answer to that question is in the negative. Being a degenerative disease, the condition of a person suffering from Alzheimer's disease worsens with time. This court therefore holds that the deceased lacked the mental capacity to make an elaborate Will running to nine (9) pages. This court therefore holds that the Will purportedly made by the deceased on 16th June 1999 is invalid on account of the deceased's mental incapacity to make the same.

As regard whether the shares of CKK Estate Limited were lawfully transferred by the deceased to Dr. Wilfred Karuga Koinange (deceased), upon evaluating the evidence adduced, it was clear that the deceased at the time (1994) lacked mental capacity to transfer the shares to anyone. It is instructive that the deceased, due to his deteriorating health condition decided on 7th October 1988 to confer upon Dr. Wilfred Karuga Koinanage (deceased) a general Power of Attorney to undertake his personal affairs on his behalf. Dr. Gatere's medical report clearly points to the deceased's mental condition at the time. Upon evaluating the evidence adduced (in form of affidavit evidence), this court formed the view that the transfer of the shares that were held by the deceased was effected with a view to frustrating the division of matrimonial property case that had been lodged by the 3rd Respondent. At the time, the only shareholders of CKK Estate Limited were the deceased and the 3rd Respondent. The court wondered how the transfer of the said shares was achieved without the participation of the 3rd Respondent. The Applicant argued that this court lacked the requisite jurisdiction to deal with shares in a Limited liability company. The Applicant went ahead and submitted that the court with jurisdiction to determine whether the transfer of the said shares was legal or not is the Companies Court as envisaged by the **Companies Act**. That may be the case where the shareholders are alive.

In this case, the deceased, was for all intents and purposes, the sole shareholder of CKK Estate Limited. The shares held by the deceased in the said company are therefore subject to the jurisdiction of this court when it comes to making the determination of who is entitled to inherit the said shares. It was clear from the evidence that Dr. Wilfred K. Koinange (deceased) caused the said shares to be fraudulently transferred to himself with the aim, initially of frustrating the claim lodged by the 3rd Respondent, and later with the aim of depriving his siblings of their inheritance of the parcel of land that the said shares represented. If indeed, Dr. Wilfred Koinange (deceased) was convinced that the said transfer of shares was properly effected, why did he engage in discussions relating to the same shares with the Respondents after the death of the deceased? It was clear that Dr. Koinange (deceased) acknowledged that indeed his siblings were at least entitled to some of the shares that constituted the shares in CKK Estate Limited. This court therefore declares the transfer of the said shares to Dr. Wilfred Koinange (deceased) in 1994 to have been procured by fraud. The said transfer is therefore nullified. The said shares shall revert to the estate of the deceased and shall be available for distribution.

The upshot of the above reasons is that the estate of the deceased shall be administered as if the deceased died intestate. The estate of the deceased shall therefore be distributed in according with the provisions of the **Law of Succession Act**. Submission was made before court to the effect that the deceased had given some of the beneficiaries gift *inter vivos*. The parties who allege that such gifts were made will establish their respective cases before the remainder of the estate of the deceased is distributed to the beneficiaries. The parties shall be at liberty to file affidavits indicating their preferred mode of distribution for determination by the court. This does not preclude the parties from amicably agreeing as to the mode of distribution. The parties must also take into account the debts owed by the estate of the deceased before final distribution. This includes legal fees to be paid to the various advocates who acted for the parties in this case. Finally, this court would like to commend Dr. Rosemary Koinange (Applicant) for her conduct in this case. She proved herself to be honest and decent person. She produced documents in court which

in other circumstances, others would have concealed from the court. The court wishes that most litigants would be like her. The fact that the Ruling has gone against her is no reflection of her integrity. The events that took place before she came on record determined the case. The court salutes her.

This being a family dispute there shall be no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF JANUARY, 2015

L. KIMARU

JUDGE