



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

SUCCESSION CAUSE NO 2353 OF 2014

**IN THE MATTER OF THE ESTATE OF TERESIA MWARA NYAGA alias TERESIAH
MWARA NYAGA AND TERESIA MWARA NYAGAH (DECEASED)**

CHARLES NJAU NYAGAAPPLICANT/OBJECTOR

VERSUS

AGNES WAMBUI NGUGIPETITIONER/RESPONDENT

RULING

The matter before this Court concerns the contested last will of the late Teresia Mwara Nyaga, hereafter “the deceased”, who died on 7th May 2013 as evidenced in the copy of the deceased’s Certificate of Death, and the distribution of her estate. The deceased had six children, namely:

- i. Agnes Wambui Ngugi
- ii. Betty Mwiwaki
- iii. Charles Njau
- iv. Evelyn Wanjiru
- v. Anthony Miringu (deceased)
- vi. Antonina Wangui (deceased)

Agnes Wambui Ngugi, hereafter “the Petitioner/Respondent”, filed a petition on 16th September 2013 for a grant of probate of the last will of the deceased to which she annexed the deceased’s original last written will. The Petitioner/Respondent based her petition on the premise that she was the sole executor named in the deceased’s will. On 18th December 2013, this Court made a grant of probate of written will to the Petitioner/Respondent who is the executor named in the said will. By way of a summons filed on 17th July 2014, the Petitioner/Respondent sought orders from this Court that the grant of probate of written will of the deceased made to her confirmed. The following were named as the deceased’s surviving dependants in the affidavit in support of summons for confirmation of grant of probate:

- i. Agnes Wambui Ngugi – daughter
- ii. Betty Mwiwaki Muchigi – daughter
- iii. Charles Njau Nyaga – son
- iv. Evelyn Wanjiru Nyaga – daughter
- v. Kevin Nyaga Miringu – grandson
- vi. Yvonne Wanjiku Njiraini – granddaughter

The affidavit in support of summons for confirmation of grant of probate also set out the properties constituting the deceased's estate and their respective mode of distribution as follows:

- i. L.R. No. Ndumberi/Tingatinga/1858 – Everlyne Wanjiru Nyaga
- ii. L.R. No. Ndumberi/Tingatinga/T 583 – Charles Njau Nyaga
- iii. Laikipia/Sosian/Sosion Block 2/8276 (Narok Ranch) – Charles Njau Nyaga
- iv. Laikipia/Sosian/Block 2/1721 (Narok Ranch) – Agnes Wambui Ngugi & Betty Mwihaki Muchigi in equal shares
- v. L.R. Longonot/Kijabe Block 2/5581 (Utheri wa Lari) – Kevin Nyaga Miringu & Yvonne Wanjiku Njiraini in equal shares
- vi. Shares in Ukulima Co-operative Savings & Credit Society Limited – Yvonne Wanjiku Njiraini
- vii. Eldoret Municipality Block 15/335 – Yvonne Wanjiku Njiraini
- viii. Shares in Mbari ya Mwae Farmers Group – Charles Njau Nyaga
- ix. Shares in Archdiocese of Nairobi Self Help Programme & Maendeleo Membership – Agnes Wambui Ngugi & Betty Mwihaki in equal shares
- x. Other shares to the four children of the deceased – Agnes Wambui Ngugi, Betty Mwihaki Muchigi, Everlyne Wanjiru Nyaga & Charles Njau Nyaga in equal shares
- xi. Proceeds of sale of L.R. Githunguri/Ikunu/T 259 – Agnes Wambui Ngugi, Betty Mwihaki Muchigi, Everlyne Wanjiru Nyaga & Charles Njau Nyaga in equal shares
- xii. Cash in Bank – Agnes Wambui Ngugi, Betty Mwihaki Muchigi, Everlyne Wanjiru Nyaga & Charles Njau Nyaga in equal shares

The Petitioner/Respondent's summons for confirmation of the grant of probate of written will of the deceased is objected to by Charles Njau Nyaga, hereafter "the Applicant/Objector" by his submissions filed on 8th October 2014. In particular, the will of the deceased is challenged by the Applicant/Objector who has submitted that it is both defective and not according to the deceased's wishes or it is a forgery. The Petitioner/Respondent's summons for confirmation of grant is also challenged on the grounds that: i) the consent of some beneficiaries was not obtained by the Petitioner/Respondent when she began the succession proceedings; ii) the deceased had bequeathed her estate to the beneficiaries through customary means; and iii) the Petitioner/Respondent made false statements that the Applicant was present when the affidavit was made and also that she obtained the Applicant's identity card through fraudulent means.

By his further submissions filed on 2nd December 2014 the Applicant/Objector sought by means of attached exhibits to discredit the will of the deceased and the mode of distribution of her estate presented by the Petitioner/Respondent as based on lies. He also sought to demonstrate that Newton Nyaga Miringu, one of the beneficiaries of the estate, had been left out and was likely to be disinherited. The relevant exhibits and their relevance to the Applicant/Objector's case will be summarized briefly.

Exhibit 1 is a family photograph taken during the memorial of Anthony Miringu depicting the deceased, the Applicant/Objector, the Petitioner/Respondent, Betty Mwihaki Muchigi and Newton Nyaga Miringu. It is intended to show that the deceased recognized the orphaned son of Anthony Miringu. Exhibit 2 is a copy of the will, a sale agreement for land parcel L.R. Githunguri/Ikunu/T259 signed by the deceased, a copy of a letter by the Applicant/Objector, and a copy of the deceased's eulogy; these are intended to show the dissimilarity between the deceased's signature in her will and in the sale agreement. Exhibit 3 is a copy of the deceased's will and it is intended to show that the will is not a valid will. Exhibit 3 is a copy of a letter from Ndumberi Coffee Growers Co-operative Society Ltd indicating that the coffee belonging to the deceased had not been delivered for the 2013/2014; this is intended to show that the Petitioner/Respondent does not know any of the details of the deceased's membership in the cooperative society, particularly the account number and membership number. Exhibit 5 is a copy of the green card that relates to the Ndumberi/Tingatinga/1857 and Ndumberi/Tingatinga/1858; it is intended to show that the land parcels in dispute is family land and should be subdivided among all the surviving descendants.

In response to the above submissions by the Applicant/Objector, the Petitioner/Respondent filed a replying affidavit on 6th March 2015 in which she countered his objections. She emphasized that the deceased died testate and was survived by four (4) children and ten (10) grandchildren, but she elected to only bequeath part of her estate to two (2) grandchildren, namely Kelvin Nyaga Miringu (son of Anthony

Miringu Nyaga, the deceased's fifth born child who predeceased her) and Yvonne Wanjiku Njiraini (daughter of Antonina Wangui, the deceased's sixth born child who predeceased her). As regards the question of Newton Nyaga Miringu having being left out of the will, whom both parties agreed was the son of Anthony Miringu Nyaga and therefore a grandson of the deceased, the Petitioner/Respondent explained that he was neither dependant on nor was he maintained by the deceased at any time. Furthermore, it was the Petitioner/Respondent's contention that there was little familial feeling, contact or communication between the deceased and Newton and hence her decision not to bequeath any part of the estate to him.

The questions raised by the Applicant/Objector's submissions concerning the doubtful validity of the deceased's will given her frail physical and mental condition at the time of its execution were countered by way of documentary evidence. In particular, the Petitioner/Respondent produced copies of hospital bills showing the admission and discharge dates, and also a copy of a CDSC Securities Form signed by the deceased two (2) days after her discharge from hospital to demonstrate that she was of sound mental capacity and also to show the similarity between the signature in that form and the one in her last will.

ISSUES

The pleadings and submissions presented by the parties make clear that the key issues which this Court is called upon to determine in this case are the following:

- i. Whether the will of the deceased constituted a valid will within the meaning of the Law of Succession Act;
- ii. Whether Newton is a dependant of the deceased or has any beneficial interest in her estate;
- iii. Whether the Court can interfere with the will of the deceased in order to make provision for a dependant or beneficiary who has been left out;
- iv. Whether Ndumberi/Tinganga/1858, the parcel of land on which the family house stands, should be inherited exclusively by the two (2) sons of the deceased in accordance with Kikuyu culture and customs and not by the daughter to whom it was bequeathed in the deceased's will.

LAW

The applicable law that is relevant to determine this matter is to be found in the provisions of **Sections 11, 14, 26 & 29** of the **Law of Succession Act Cap 160**.

Section 11 of the **Law of Succession Act Cap 160** sets out the requirements of a valid will as follows:

- a. 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 direction of the testator;*
- b. the signature or mark of the testator, 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 acknowledgment 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.*

In the present case, the will of the deceased was attested by two witnesses in the presence of the deceased. The relevant part of the will states:

“SIGNED by the said **I TERESIA MWARA NYAGAH** also known as **TERESIA MWARA NYAGA & TERESIAH MWARA NYAGAH** as her last will in the presence of us being at the same time who at her request in the presence of each other have hereunto subscribed our names as witnesses”

The Petitioner/Respondent has stated under oath that the will attached to her petition for probate of written will is the true and original last written will of the deceased. She has also provided documentary evidence to show the similarity between the signature in the will and signatures from earlier dealings by the deceased. It is important to clarify that the law does not preclude the Petitioner/Respondent in her capacity as the executor of the deceased's will from proving the validity of that will. **Section 14 of the Law of Succession Act Cap 160** is instructive in this regard since it provides:

No person, by reason of being an executor of a will, shall be disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

Accordingly, the affidavit evidence of the Petitioner/Respondent is admissible as evidence to prove the execution or validity of the deceased's will. On the other hand, the Applicant/Objector has also produced documentary evidence to challenge the validity of the will on grounds that the signature thereon is a forged signature of the deceased. This Court has examined the exhibits provided by both parties and has made a finding that, on a balance of probabilities, the signature that appears on the will resembles the signatures found in both the copy of the CDSC Form and the copy of the sale agreement for L.R. Githunguri/Ikunu/T259. This Court has also made a finding that, in light of the evidence that the deceased was not hospitalized for a long time and that she even signed a CDSC Form only two (2) days after being discharged from hospital, that the allegation that she was physically and mentally incapable of executing her will cannot hold. In the above regard, the will of the deceased which formed that basis on which the grant of probate of written will was made to the Petitioner/Respondent is found to be valid within the meaning of **Section 11 of the Law of Succession Act Cap 160**.

The second issue for determination concerns whether Newton Miringu Nyaga was a dependant of the deceased and therefore has a rightful share in her estate. **Section 29 of the Law of Succession Act Cap 160**, which is situated in Part III of the Act that makes provision for dependants, provides:

For the purposes of this Part, "dependant" means?

a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

b. such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;

This provision is pertinent to one of the central claims by the Applicant/Objector who has maintained that Newton Miringu Nyaga, a grandson of the deceased, is a dependant who has not been adequately provided for and who should be given a portion of the deceased's estate. It is common ground that Newton Miringu Nyaga is a grandson of the deceased, but there is little evidence to suggest that he was being maintained by the deceased immediately prior to her death. In fact, it was the Applicant/Objector's testimony in Court that he is the one who has been educating Newton Miringu Nyaga who currently studies in Malindi. It is therefore reasonable to conclude that, contrary to the depositions and testimony of the Applicant/Objector, Newton Miringu Nyaga is not a dependant of the deceased within the meaning of **Section 29 of the Law of Succession Act Cap 160**.

Section 26 of the Law of Succession Act Cap 160 is also relevant insofar as it touches upon the issue of dependants not adequately provided for in a will. It provides:

Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.

Even if it could be shown, which it has not in the present case, that Newton Miringu Nyaga is a dependant who has not been adequately catered for in the will of the deceased, it rests with the Court's discretion to determine what reasonable provision should be made for him out of the deceased's net estate. While the finding of this Court is that Newton Miringu Nyaga is not a dependant of the deceased and therefore has no beneficial interest in the estate, it is important to state that the possibility exists to make provision for dependants who have been left out of the will. Thus, the Court can disturb a will in order to serve the interests of justice by making reasonable provision for a dependant. But in the present case the testamentary freedom of the deceased cannot be interfered with because there is little basis on which to conclude that Newton Miringu Nyaga was being maintained by the deceased immediately prior to her death, and therefore should benefit from her net estate.

The fourth issue relates to the contention by the Applicant/Objector that land parcel Ndumberi/Tinganga/1858 where the family house stands should be inherited by the two (2) sons of the deceased to the exclusion of the daughters in accordance with Kikuyu culture and customs, and not by the daughter to whom it was bequeathed in the deceased's will. An important point that is related to the above statement is that all children of the deceased, including the daughters who are married, are entitled to inherit from her estate. It is useful to clarify the fact that the **Law of Succession Act Cap 160** does not discriminate beneficiaries on any grounds, be it gender or marital status; it defines dependants as including the children of the deceased without any adverse distinction. It would therefore be disingenuous to argue that sons have a prior claim to property than daughters. This view is well established in our legal system and has consistently been restated in our jurisprudence. In the case of ***ELISEUS MBURA M'THARA V HARRIET CIAMBAKA AND ANOTHER* [2012] eKLR**, Lesiit J stated that:

The Law of Succession Act does not discriminate between gender in matters of succession or inheritance. Under the Law of Succession Act and indeed under the Constitution a child is a child and every person has equal rights under the law irrespective of gender. The Law of Succession Act does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person.

More recently, the above view has been reaffirmed in the case of ***Peter Karumbi Keingati & 4 Others v Dr Ann Nyokabi Nguithi* [2014] eKLR**, where Kimaru J emphatically stated that customary practices can no longer be used as a smokescreen for discriminatory conduct. debunked much of the myth and disingenuous logic that underlies arguments that are typically advanced in a bid to disinherit unmarried daughters. He held as follows:

This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. This ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for these discriminative cultural practices against women be buried in history.

This Court is similarly of the view that the typical arguments raised by parties in cases where women are sought to be disinherited in favor of their male siblings are inconsistent with our law. An examination of the will of the deceased shows that the Applicant/Objector is in fact the greatest beneficiary in the will, having been bequeathed the largest share of the deceased's estate. It is thus difficult to agree with him the he should get the parcel of land Ndumberi/Tinganga/1858 on which the family house stands at the expense of Everlyne Wanjiru Nyaga who not only got a lesser share of the estate than his, but was also specifically bequeathed that property in the deceased's will. Accordingly, this Court is of the view that his argument is unconvincing and cannot hold.

FINAL ORDERS

On the basis of the foregoing, this Court deems it fair and just to find as follows:

- a. The will of the deceased is valid and thus the grant of probate of written will made to Agnes Wambui Ngugi by this Court was properly issued.
- b. The grant of probate of written will be confirmed, and the mode of distribution of the deceased's assets set out in the deceased's will, which has been found by this Court to be fair and equitable, should be adopted in the confirmed grant.
- c. The mode of distribution to be adopted in the confirmed grant shall be as follows as per the will:
 - i. L.R. No. Ndumberi/Tingatinga/1858 – Everlyne Wanjiru Nyaga
 - ii. L.R. No. Ndumberi/Tingatinga/T 583 – Charles Njau Nyaga
 - iii. Laikipia/Sosian/Sosion Block 2/8276 (Narok Ranch) – Charles Njau Nyaga
 - iv. Laikipia/Sosian/Block 2/1721 (Narok Ranch) – Agnes Wambui Ngugi & Betty Mwihaki Muchigi in equal shares
 - v. L.R. Longonot/Kijabe Block 2/5581 (Utheri wa Lari) – Kevin Nyaga Miringu & Yvonne Wanjiku Njiraini in equal shares
 - vi. Shares in Ukulima Co-operative Savings & Credit Society Limited – Yvonne Wanjiku Njiraini
 - vii. Eldoret Municipality Block 15/335 – Yvonne Wanjiku Njiraini
 - viii. Shares in Mbari ya Mwae Farmers Group – Charles Njau Nyaga
 - ix. Shares in Archdiocese of Nairobi Self Help Programme & Maendeleo Membership – Agnes Wambui Ngugi & Betty Mwihaki in equal shares
 - x. Other shares to the four children of the deceased – Agnes Wambui Ngugi, Betty Mwihaki Muchigi, Everlyne Wanjiru Nyaga & Charles Njau Nyaga in equal shares
 - xi. Proceeds of sale of L.R. Githunguri/Ikunu/T 259 – Agnes Wambui Ngugi, Betty Mwihaki Muchigi, Everlyne Wanjiru Nyaga & Charles Njau Nyaga in equal shares
 - xii. Cash in Bank – Agnes Wambui Ngugi, Betty Mwihaki Muchigi, Everlyne Wanjiru Nyaga & Charles Njau Nyaga in equal shares
- d. Parties to file for the confirmation of grant as per the will within 90 days.
- e. Any aggrieved party is at liberty to apply.
- f. No orders as to costs

SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2015

M. MUIGAI

JUDGE

In the presence of Mrs Khisa for the Petitioner