



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCC. CAUSE NO.758 OF 2011**

**IN THE MATTER OF THE ESTATE OF GODFREY MWEKA NGARU (DECEASED)**

***(CONSOLIDATED WITH SUCC.757 OF 2011 –***

***IN THE MATTER OF THE LATE ZIPORAH WANJIRU MWEKA)***

**WILLIAM MUTHAMA MWEKA.....**  
**.....APPLICANT**

**VERSUS**

**MARINA CENTRA NDINGURI.....1<sup>ST</sup>**  
**RESPONDENT**

***(Sued in her capacity as the Administratrix of the Estate of ROBERT NDINGURI MWEKA)***

**CATHERINE WANJIKU KAMAU.....2<sup>ND</sup>**  
**RESPONDENT**

***(Sued in her capacity as the Administratrix of the Estate of STEPHEN MAINA MWEKA)***

**RULING**

Godfrey Mweka Ngaru, the deceased (hereinafter referred to as the deceased) to whose estate these proceedings relate died on 30<sup>th</sup> May 1997. The deceased was survived by his widow Zipporah Wanjiru Mweka and six (6) children namely William Muthama Mweka, Stephen Maina Mweka (*whose subsequently died on 29<sup>th</sup> December 2010 – his estate is represented in these proceedings by the 2<sup>nd</sup> Respondent*), Robert Ndinguri Mweka (*who subsequently died on 25<sup>th</sup> August 2010 – his estate is represented in these proceedings by the 1<sup>st</sup> Respondent*), Maria Wangari Mweka, Elizabeth Mwihaki Mweka and Lydia Wanjiku Mweka who suffers from mental incapacity. The deceased had registered some of the properties, as tenants in common, in his name and that of his wife Zipporah Wanjiru Mweka. His widow, Zipporah Wanjiru Mweka died on 18<sup>th</sup> September 2003. Subsequently thereafter, the Applicant petitioned this court in **Succession Cause No.757 of 2001** to administer the estate of Zipporah Wanjiru Mweka. Since some of the properties were registered jointly in the names of the deceased and his widow, the court ordered proceedings in the two estates be consolidated for the purposes of determining the question whether the deceased had left a valid Will.

The dispute that was placed for determination by this court is whether the deceased left a valid Will. According to the brother of the deceased, John Muthirani Wang’aru (PW1) the brother of the deceased, Marina Centra Ndinguri (the 1<sup>st</sup> Respondent) and PW3 Dominic Njuguna Karinga, the Senior Chief of

Magumo Location in Nyandarua County, the deceased had left behind a Will. PW1 testified that prior to his death, the deceased summoned him to his house and informed him that he had written a Will which he would like complied with upon his death. PW1 was not told the contents of the Will. He was however given a copy of the Will in an envelope. The deceased instructed him to summon all his children and escort them to the Chief's office at Magumo Location, Nyandarua County upon his death. This was for the purpose of having the Will read to the beneficiaries. PW3 recalled that prior to his death, the deceased visited his office and showed him the Will. The deceased requested him to read the Will to his children in the event of his death. Subsequently thereafter, he was informed that the deceased had died. PW1 brought the children of the deceased to his office. He read the contents of the Will to the children. This was on 3<sup>rd</sup> July 1997. He put his official stamp on the Will. He also signed on top of the page of the Will. According to PW1 and the 1<sup>st</sup> Respondent, the Will of the deceased was valid and should therefore be upheld by the court.

The Applicant challenges the validity of the Will. It was his testimony that the Will was not valid because it had not been written by the deceased. He told the court that the deceased did not understand the English language having not gone to school. He doubted that the deceased would have dictated the contents of the Will as it was recorded in English. He wanted the respondents to avail a copy of the Will in Kikuyu language if it was indeed dictated by the deceased. The Applicant also challenged the validity of the Will on two other grounds: that the distribution proposed in the Will was not fair as it did not provide for all the children of the deceased. It did not take into account the fact that some of the properties bequeathed to some of the beneficiaries were not solely owned by the deceased but were jointly registered in the names of the deceased and his widow. In his submission, the Applicant challenged the technical aspects of the Will. He essentially stated that the Will was not valid because it was not properly attested by two witnesses.

After the conclusion of the case, counsel for the parties filed their respective written closing submission. This court has carefully considered the evidence adduced by the parties herein in support of their respective opposing positions. The court has also considered the written submission filed by counsel for the parties. The issue for determination by this court is whether the deceased left a valid Will. Upon evaluation of the evidence adduced, it was clear to this court that the deceased, at the time of writing the Will, was not in a position to write the Will himself. It is not clear whether the deceased understood the English language. The Applicant claims that the deceased did not understand the English language. This aspect of his testimony was not disputed by the respondents. On perusal of the Will which is dated 15<sup>th</sup> May 1995, it was apparent that the Will was drawn one E.G. Wakaguima allegedly on instructions of the deceased. E.G. Wakaguima was not called to testify in the case. It was not clear from the evidence adduced in this case why the parties did not deem it necessary to call this crucial witness. Maybe he is not available to give his testimony. This witness would have been in a position to clarify under what circumstances the deceased instructed him to write the Will on his behalf. The Will was witnessed by one person: PW3 Dominic Karinga, the Senior Chief of Magumo Location. Under **Section 11 of the Law of Succession Act**:

***“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 direction of the testator;***
- b. The signature or mark, 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 personal acknowledgment of his signature or mark, or 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, it is clear that the Will that was purportedly written by the deceased is invalid by

virtue of the fact that it was witnessed by one person. Further, if it is true as claimed by the Applicant that the deceased did not understand the English language, then to avoid any future dispute, the Will dictated by the deceased to the said E.G. Wakaguima should have been in Kikuyu, the language the deceased understood. Thereafter the same be translated in English with an appropriate certificate as provided under **Rule 50(2)** of the **Probate and Administration Rules**. Further, the contents of the Will raises doubt that indeed the deceased wrote the Will. In the Will that is the subject of dispute, the deceased bequeathed two properties namely LR. No.367/AXI/1913 and LR. No.8611 to one of the beneficiaries yet the two properties had been registered in the name of the deceased and his widow as tenants in common. If the bequest was to be valid, then the deceased only had capacity to bequeath the portion of the estate that was registered in his name. The Will also contravenes the **Law of Succession Act**, specifically **Section 38** that requires the children of the deceased to be treated equally when it came to distribution of his estate. Unless the deceased had given reasons for unequal distribution of his estate to the beneficiaries, the general rule is that a Will can be invalidated where it is established that the distribution to the beneficiaries was unequal as to constitute unfair treatment to the affected beneficiaries.

The upshot of the above reasons is that the Will purportedly made by the deceased, and which is dated 15<sup>th</sup> May 1995 is hereby declared invalid. The properties that comprise the estate of the deceased shall be distributed to the beneficiaries as if the deceased died intestate. All beneficiaries of the deceased are hereby ordered to file further affidavits indicating their preferred mode of distribution of the properties that comprise the estate of the deceased. The said affidavits shall be filed and served upon each dependant within thirty (30) days of this Ruling. Any party shall be at liberty to list for mention the case before a Judge in the Family Division for the purpose of taking appropriate directions on how the estate of the deceased shall be distributed to the beneficiaries. Since this was a family dispute, there shall be no orders as to costs. It is so ordered.

**DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY 2015**

**L. KIMARU**

**JUDGE**