REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 331 OF 2000

IN THE MATTER OF THE ESTATE OF LUCY WANGUI MURAGURI (DECEASED)

RULING

1. The present cause relates to the estate of Lucy Wangui Muraguri, who died at the age of 94 years on 18th August 1999.

2. Representation to her estate was sought in this cause in a petition dated 1st February 2000, and filed in court on 23rd February 2000, by Nicodemus Waite Muraguri and Grace Muthoni Muraguri, in their alleged capacities as executors of the will of the deceased made on 11th September 1996. A grant of probate of written will was made to them on 25th April 2000.

3. On 19th June 2002, Naftali Chege Muraguri lodged at the registry and in this cause a Summons of even date seeking revocation of the said grant. It was his case that the will was a fraud and did not reflect the wishes of the deceased, she could not possibly have made it given that she was old, sickly and senile, among other grounds. The application was responded to by the second executor, Grace Muthoni Muraguri, by her affidavit filed in court on 20th July 2002. The application was argued before Waweru J. on 29th October 2003, where applicant's counsel stated that they were not challenging the validity of the will. The application was dismissed on 2nd December 2003 when Waweru J. ruled that the same had no merit.

4. The application that I am called upon now to determine is dated 3rd June 2009. It is a Summons for the revocation of the grant herein, brought at the instance of John Ngunia Muraguri, Babius Muchiri Muraguri, Deodata Wanjiru Muraguri, Edith Wanjira Muraguri, Agnes Njeri Njoroge, Mary Muthoni Kiboi, Pierina Njoki Mugo and Seraphine Wanjiru Muraguri.

5. The affidavit in support of the application was sworn by Seraphine Wanjiru Muraguri on 3rd June 2009. She deposes that the deceased was survived by ten children. She states she and her siblings were surprised to learn that the deceased had left a will in which she had named Nicodemus Muraguri as executors. She states further that at the time of her demise the deceased had been sickly and did not possess the capacity adequate for the making of a will. She argues that the contents of the will suggest that the same was obtained fraudulently or under undue influence and the deceased could not have possibly known what the document meant. She argues that the deceased was close to all of them and there was no way she could have omitted to provide for them. She avers that Nicodemus Waite Muraguri was capable of exercising undue influence of the deceased or even acting fraudulently given that the court in a case between him and their father, being Nyeri **HCCC No. 241 of 1980**, had found him liable for fraud. She says that she believes that Nicodemus Waite had taken advantage of their aged mother and presented her to an advocate to make the will without her free will. She argues that the deceased knew that Grace

Muthoni Muraguri was not the wife of Nicodemus Waite, and therefore it is suspect that she named her as one of the executors of the will. She states that although the will states that the testator was illiterate, her name appears on the document in handwriting, which should raise doubts about the documents execution.

6. The reply to the application is by Grace Muthoni Muraguri, who swore an affidavit on 16th July 2009. She says that she is the surviving executor and the second wife of the other executor, Nicodemus Waiter Muraguri, now deceased. She asserts that the deceased recognized her as the wife of Nicodemus Waite. She states that at the time of executing the will the deceased was fully alert, robust in health, aware of her actions and prepared the will voluntarily. It is her case that the process of obtaining the grant was fully in keeping with the law.

7. The two affidavits which are the subject of paragraph 5 and 6 above are the main ones. There were subsequent affidavits by the parties, but they did not deal with issues that are germaine to the determination of the matter at hand. These are the affidavits of the applicant sworn on 10th August 2009 and 28th February 2010 and that of the respondent sworn on 12th October 2009.

8. Directions on the disposal of the application were given on 29th October 2012, to the effect that the same was to be determined on the basis of affidavit evidence contained in the affidavits on record. The parties were directed to file written submissions to be highlighted. Only the respondent complied with those directions by filing her written submissions on 11th September 2014. The same were not highlighted.

9. The will at the centre of the dispute is on record. It was purportedly made on 11th September 1996. The deceased left her estate, including Tetu/Unjiru/1288, to Nicodemus Waite Muraguri. The apparent reasons for the gift is that the former had been looking after her, all the other children were grown up and independent, the sons had always been given portions of the family land and the daughters were married. There is an endorsement at the execution clause that the testator was not able to read or write and the will was signed on her behalf and at her request by Peter Le Pelley. Her name is handwritten against the endorsement with Peter Le Pelly's name below it. The execution was witnessed by Rachael M'Mbone Lomasi and Esther Wairimu Keraya, both of P.O. Box 30333, Nairobi.

10. The deceased died in 1999, long after the Law of Succession Act had come into force. Her estate is therefore subject to the provisions of the said statute.

11. The law on wills is to be found in Part II of the Law of Succession Act. The provisions of Part II that are relevant for the purposes of this ruling are those relating to capacity and the formalities for the making of a written will. I say so because the applicants appear to raise the issue that the deceased was not of the requisite mental capacity at the time of the making of the will, and also that the will was not properly executed.

12. On capacity, the relevant provision is Section 5 of the Act, which states as follows:-

"(1) Subject to the provisions by 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 of 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 state of mind, whether suffering 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 any will, not of sound mind, shall be upon the person who so alleges."

13. The applicants argue that the deceased was an elderly person, aged 90 years at the time, and sickly, and therefore she did not have the requisite mental capacity to make the will. Old age of itself is no ground for invalidating a will. A person can be aged 90 years but still be as fit as a fiddle and in full control of his faculties. Likewise, being sickly is not evidence that a person does not have mental capacity. What matters is whether the old age and sickness have had an effect on the testator's mental capabilities.

14. Section 5(3) of the Act, creates a presumption that the will presented to court was made by a person of sound mind unless the contrary is proved. Section 5(4) of the Act puts the burden of proving that the testator lacked the requisite mental capacity on the persons asserting so.

15. In this case, it is the applicants who allege that the deceased did not have the requisite capacity, and it is them therefore who had the burden of establishing that the deceased lacked such capacity. The question that should follow is whether they succeeded in discharging that burden. I think not. All what the applicants told the court in the affidavits on record, is that the deceased was at the time of execution of the will old and sickly. There is no statement as to the nature of the illness that she suffered from. No medical evidence were presented. There was no evidence of any connection between the unnamed illness and her mental capabilities. There is therefore nothing on record from which I can conclude that the deceased did not possess adequate mental capacity at the time to make the will of 11th September 1996.

16. Section 7 of the Act is also relevant in cases where it is alleged that the will was procured by fraud or coercion or undue influence. Section 7 states as follows:-

"A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as taken away the free agency of the testator, or has been induced by mistake, is void."

17. In the instant case, the applicants have suggested that the will on record was procured fraudulently or by undue influence. In an effort to establish fraud, it was averred that the first executor, Nicodemus Waite Muraguri, had previously been held liable for fraud in a land case in the 1980's between him and his father. To my mind the fact that the said executor had acted fraudulently in the past alone cannot proof that he also acted in like manner in the instant case. Regarding undue influence, no positive evidence was placed before me. On the whole from the material before me, I am unable to conclude that the will before me was procured by fraud or undue influence exercised on the deceased testator.

18. From the affidavit sworn in support of the application, it would appear that the applicants are also raising the issue of suspicious circumstances, in the sense of saying that the circumstances under which the will was made ought to raise suspicion that the will was not the product of the deceased's intentions or wishes. This still falls under the provisions of Section 7 of the Act. That position has been stated in such English cases as ***Fulton vs. Andrew*** (1875) LR 7 HR, ***Tyrell vs. Painton*** (1894) P. 151, ***Wintle vs. Nye*** (1959)1 ALL ER 552, ***Atter vs. Atkinson*** (1869) LR 1. P & D. 665 and such local cases as ***Vijay Chandrakant Shah vs. the Public Trustee*** CA No. 63 of 1984, ***Mwathi vs. Mwathi*** (1995-1998)1 EA 229 and ***Wanjau Wanyoike and four others*** vs ***Ernest Wanyoike Njuki Waweru and another*** Nairobi HCCC No. 147 of 1980.

19. The position is that where a person who plays the central role in the making of the will, that is other than the testate herself, takes a substantial benefit under the will; that would be regarded as a suspicious circumstance. It ought to raise suspicion as to whether the testator, who is purported to have signed the will under those circumstances knew and approved the contents of the document that she signed. The role of the court in cases where suspicious circumstances are established is to scrutinize the evidence carefully so as to be satisfied that the maker of the will did indeed know

and approve the contents of document that she signed.

20. Can it be said that suspicious circumstances arose in this case? Suspicion should arise in cases where the principal beneficiary under the will is the person who suggested the terms of the will to the maker, or wrote the document himself or took the testator to an advocate of his own choice, among others. The applicants have not articulated this point elegantly. I have noted that the principal beneficiary under the terms of the will of 11th September 1996 is Nicodemus Waite Muraguri. It is not indicated whether the will was drawn and prepared by a firm of advocates, but I have noted that it was executed by Peter Le Pelly on behalf of the testator. The persons who acted as witnesses gave their addresses as P.O. Box 30333 Nairobi.

21. It is a matter of common knowledge in the legal community that Peter Le Pelley was an advocate of long and high standing practicing in the law firm of Messrs. Hamilton Harrison & Mathews, Advocates of Nairobi. There is correspondence in this file from the said law firm, their letter head indicates that their postal address is P.O. Box 30333, Nairobi. From this I can draw inference that the said will was drawn by the law firm of Messrs. Hamilton Harrison & Mathews, Advocates. The will was allegedly executed by a high ranking advocate in that firm on behalf of the testator and the signature of the said advocate was attested by secretaries working at the said law firm. The said firm has been acting for the executors in this cause, the executors being the said Nicodemus Waite Muraguri and his alleged wife, Muthoni Muraguri. It is the said law firm which drew the petition dated 1st February 2000, which initiated this cause, and they have since then been on record. From this material I am satisfied that the circumstances of the making of the will were suspicious.

22. What ought I do in the circumstances? I should adopt the approach suggested by Sir J. P. Wilde in ***Atter vs. Atkinson*** (supra) where he said-

"The proposition however is undoubted, that if you have to deal with a will in which a person who made it himself takes a large benefit, you ought to be satisfied from evidence calculated to exclude all doubt that the testator not only signed it, but that he knew and approved of its contents."

23. I have already found that the will before me was made under suspicious circumstances, for me to order its invalidation on that ground I need before me evidence that the testator signed the document or caused it to be so signed having known and approved its contents. Is such evidence before me? Evidence that is calculated to exclude all doubt? I do not think so. The evidence that I need to decide one way or the other on that point should be of the persons who were present in the events of 11th September 1996. That is to say Peter Le Pelley and the two attesting witnesses. It is a matter of common knowledge in the legal community that Peter Le Pelly died. I do not know of the whereabouts of the two witnesses. They did not swear any affidavit, or at least, their affidavits are not on record. The affidavits for and against the application are by persons who do not appear to have been present at the event of the execution of the will, for they make no averments as to the events of that day. I cannot therefore from what I have before me whether the deceased knew and approved the contents of the will that was executed on her behalf. The respondent was obliged to place evidence before me to help me decide on that point, she did not. I am therefore not satisfied that the deceased knew and approved the contents of the said will before she executed it.

24. The requirements for the making of a valid written will are set out in Section 11 of the Act which provides as follows:-

"No written will shall be valid unless:-

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, 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 persons sign the will, in the presence and by the direction of the testator, or …; and each of the witnesses must sign the will in the presence of the testator …"**

25. The concern of the applicants is that the will appears, in their view, to contradict itself, by stating that the deceased was illiterate, while at the same time having her name handwritten on the document as her signature. This concern is a misapprehension. The testator did not personally sign the document, it was signed on her behalf and at her alleged direction by Peter Le Pelly. There is therefore no contradiction. From the material before me I am unable to find fault with the manner the will was executed and attested. In my view the execution of the document fully complied with Section 11 of the Law of Succession Act.

26. I am invited in the application dated 3rd June 2009 to exercise my discretion and revoke the grant under the powers granted to me under Section 76 of Law of Succession Act. Should I do so?

27. From the material that has been placed before me and from my evaluation of the record, I have come to the conclusion that the will the subject of these proceedings was made under suspicious circumstances and the respondent has failed to satisfy me that the testator knew and approved the contents of the said will dated 11th September 1996 before the same was executed on her behalf. I accordingly find that the said will was null and void. As a consequence, the proceedings for obtaining the grant of probate on record herein were defective, based as they were on the said void will.

28. The orders that I am disposed to make in the circumstances are:-

a. **That the grant of probate of written will made herein on 25th April 2000 and confirmed on 20th February 2002 is hereby revoked;**

b. **That any certificate of confirmation of grant issued on the basis of the said grant is hereby nullified, together with any transaction based on it;**

c. **That the parties are at liberty to apply for appointment of administrators in intestacy; and**

d. **That there shall be no order as to costs.**

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF SEPTEMBER, 2015.

W. MUSYOKA

JUDGE