



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 179 OF 2002

CONSOLIDATED WITH CAUSE NO. 669 OF 2003

**IN THE MATTER OF THE ESTATE OF ANDREW NJUGUNA NG'ANG'A AND GIDRAPH
NG'ANG'A NJUGUNA (DECEASED)**

RULING

1. This succession cause is a consolidation of Succession Cause No. 179 of 2002, the Estate of Andrew Njuguna Ng'ang'a who died on 26th April 2001 and Succession Cause No. 669 of 2003, the estate of Gidraph Ng'ang'a Njuguna who died on 2nd July 2002 respectively. Andrew Njuguna Ng'ang'a (hereinafter Andrew) was the son of Gidraph Ng'ang'a Njuguna (herein after Gidraph).
2. Upon the death of Andrew, his widow Margaret Wangu (hereinafter Margaret) and his son Evans Jidraph Ng'ang'a, petitioned for letters of administration of his intestate Estate, in succession cause No. 179 of 2002 on 25th January 2002. On 20th March 2002 Grace Nyambura (hereinafter Grace), filed an objection to the said grant stating that she too was a widow of Andrew and that, not only had Margaret omitted some of the beneficiaries of the Estate, but she had also failed to disclose some of the assets of the said Estate. She also filed an Answer and Cross Petition.
3. Upon the death of Gidraph a year later, Grace filed succession Cause No. 669 of 2003 for Grant of Probate of his Estate with a Will annexed, in which she had been named as the executrix. Margaret lodged an objection to the petition filed by Grace. It is Margaret's prayer that the Grant issued in respect of the Estate of Andrew should not be revoked and/or amended. That instead, her objection in respect of the Estate of Gidraph should be upheld as the Will annexed thereto is fraudulent, if not executed under duress and undue influence making it null and void.
4. Each of the parties filed affidavits to support their assertions and their counsels filed written submissions.
5. Mr. Waihiga learned counsel for Grace submitted that the affidavit in support of the petition for letters of administration sworn by Margaret in respect of the Estate of Andrew does not conform to the requirements of the Succession Act, as it does not name all the surviving beneficiaries, their interest, or their renunciation thereof, or their respective consents to the proposed mode of distribution. For this reason the said petition should be struck out and a proper cause filed to include Grace and her children as beneficiaries and to include all the assets that were omitted.
6. Mr. Waiganjo learned counsel for Margaret reiterated his client's grounds of objection to the making of grant in respect of Gidraph's Estate and stated that the grounds of objection raise

genuine concerns which this court ought to determine before issuing Grant of Probate in favour of Grace. He submitted that by virtue of the fact that Andrew was the only son and child of Gidraph, he is the only beneficiary to his father's Estate and the beneficiaries of Andrew's Estate will be the beneficiaries to Gidraph's Estate.

7. Mr. Waiganjo also submitted that the marriage of Andrew to Margaret was not a polygamous one and hence distribution of all his properties as stated in the Petition of Letters of Administration Intestate should not assume a polygamous setting. Counsel urged the court to find that Margaret is the sole legal and surviving wife to Andrew.
8. Upon assessment of the grounds in both Petitions and upon consideration of the averments in the Supporting and Replying Affidavits, I have distilled the issues for determination as follows:
 - a. whether there was a valid marriage between Andrew (deceased) and Grace,
 - b. whether the written will in succession cause No. 669 of 2003 is authentic and valid.
 - c. Whether the Grant in succession cause No. 179 of 2002 ought to be revoked.
 - d. What the entitlement of the two litigants in each of the two estates ought to be.
9. On whether there was a valid marriage between Andrew (decease) and Grace, she swore an affidavit on 1st March 2012 and deposed that she contracted a Kikuyu Customary marriage with Andrew. To the said affidavit, she annexed the minutes of the dowry negotiation ceremony at her home in Muguga which included the names of the witnesses thereto. She also deposed that she lived with the deceased from 1988 until he passed away on 26th April 2001, and the marriage was blessed with two issues namely, Samuel Gidraph Ng'ang'a and Moses Karanja whose birth certificates she attached. That she had another child from a previous relationship, whom the deceased accepted as his own.
10. Margaret swore a further affidavit on 2nd March 2012 and deposed that she was the legal wife and widow of the late Andrew as well as the daughter-in-law of the late Gidraph. That she got married to Andrew in 1966 in a church wedding under the Christian Marriage and Divorce Act Cap 151 Laws of Kenya, at the Martyrs PCEA Bahati church, and their marriage was blessed with one issue, namely Gidraph Evanson Ng'ang'a. Margaret averred that they lived together with Andrew in Githuari, where they had constructed a matrimonial home and thereafter moved to his parent's ancestral land in Ruthigiti, Kikuyu after Andrew retired.
11. She reiterated that she never knew Grace as Andrew's wife but as a gardener at their Githurai home, and later as a Caretaker of the said Githurai home when Margaret and Andrew moved to Gidraph's home in Kikuyu. She pointed out that in her affidavit Grace did not mention Joseph Kamau who had sworn an affidavit claiming that he participated in the dowry payment for Grace by the deceased. That after the death of Andrew Grace claimed that she was also Andrew's wife, and that was when Margaret chased her out of the Githurai parcel of land.
12. Grace, in reply to Margaret's further affidavit swore a supplementary affidavit on 21st May 2012 and deposed that Andrew and Gidraph were her husband and father-in-law respectively. She reiterated her earlier averments that she was married to Andrew under Kikuyu customary law, and his parents recognized her and the issues of the marriage and therefore she was not a stranger to the family. That Margaret too knew and admitted this fact in her testimony before the Land Disputes Tribunal to which she filed a complaint.
13. On this issue Mr. Waihiga submitted that according to the minutes of the dowry negotiations ceremony, Grace was married to Andrew in a Kikuyu Customary Marriage. That two witnesses Kagitu Kangethe and Joseph Kimani swore affidavits on 12th May 2008 confirming that they

participated in the process of dowry payment. That Grace had two issues of the marriage with Andrew and their birth certificates bearing the name of Andrew as the father were annexed. That after Andrew's demise, a family meeting was held on 2nd June 2001 where it was agreed that Andrew had two wives, Grace and Margaret and his Estate should therefore be dealt with as that of a polygamous man.

14. Mr. Waiganjo on the other hand, submitted for Margaret that Andrew having contracted a marriage with her under **Cap 151 laws of Kenya**, he had no capacity to contract another marriage to any other person under whichever laws before his marriage to Margaret was legally dissolved in a court of law, or Margaret demised. That any subsequent marriage (which is denied) contracted by Andrew was null and *void ab initio*. He urged that a person cannot derive benefit from what was void from the onset and hence any allegations that Grace was a legal wife to Andrew cannot stand the test on its validity.
15. I have perused the record before me and find that it is not disputed that Andrew and Margaret did contract a marriage under Cap 151 Laws of Kenya. Whilst it was argued that Andrew cohabited with Grace and his parents accepted her as his wife, a fact which was known to Margaret it is however, pertinent to note that cohabitation in this circumstances did not confer the status of marriage on these two. Andrew had no capacity to contract a marriage to any other person, under whatever law without having dissolved his marriage to Margaret, or in the alternative, Margaret having died. The subsequent marriage contracted between Andrew and Grace was therefore null and *void ab initio* and I find that Grace was not married to Andrew.
16. On the authenticity and validity of the Will ascribed to Gidraph (deceased), Grace filed succession Cause No. 669 of 2003 for Grant of Probate with a Will annexed in which she was named as the executrix. She denied that the Will left her mother-in-law at her mercy and stated that it was clear from the Will that she was to hold the land as trustee for the parents-in-law as long as they both lived. She averred that the Land Disputes Tribunal did not have jurisdiction to hear the matter and issue the award of 2 acres to Margaret as it did. That Gidraph, being dissatisfied with the ruling of the Tribunal, lodged an appeal against it.
17. Grace also denied that the parcel of land No. Karai/Karai/85 measuring 12 acres was ancestral land and stated that Gidraph had purchased it, and as such he was allowed in law to manage it and give it to whoever he desired. Grace urged the court to grant the Grant of probate of Will in succession cause No. 669 of 2003 and confirm it in accordance with Gidraph's Written Will dated 10th August 2001.
18. It was submitted by Mr. Waihiga for Grace that Samuel Gichuru, one of the two people who witnessed the Will is now deceased but the other witness, Kagitu Ngethe had sworn an affidavit to the effect that Gidraph was of good health and sound mind when he wrote the Will. He urged the court to find that Gidraph had the capacity to make the Will dated the 10th day of August 2001.
19. Margaret on the other hand prayed that her objection in respect of the Estate of Gidraph should be upheld, as the Will annexed thereto was fraudulent, if not executed under duress and undue influence, making it null and void.
20. Mr. Waiganjo submitted for Margaret that the alleged Will of Gidraph was an afterthought, a creation by Grace meant to disinherit Margaret of her rightful share of Gidraph's Estate. He gave the basis of doubt in the authenticity of the written Will as arising from the following anomalies:-
 - a. Despite Gidraph having confirmed at the Tribunal sitting in Kikuyu that the property being L.R. Karai/Kari/1837 measures 4 Acres, the Will describes the same as measuring 6 Acres.
 - b. At no time did Gidraph mention having granted Grace his (6) Acres of his property yet he had a wife, Florence Njeri Ng'ang'a who would succeed him. This means that his wife was to be left without a home and at the mercy of Grace.

- c. The Will fails to mention the beneficiaries to the other sub-divided portions of Gidraph's land.
- d. Gidraph held his property in customary trust hence it was illogical for him to bequeath his property to a person not a member of the family.
- e. It is curious that the Will only centres on the parcel of land being L.R. No. Karai/Karai/1837 yet Gidraph had other properties.
- f. It is curious that Gidraph bequeathed to Grace the portion of land where Margaret's matrimonial home stands being L.R. No. Karai/Karai/1838.
- g. The circumstances surrounding Gidraph's death being suspect, here is strong inference on suspicion of undue influence or fraud for the above mentioned reasons.

21. I have considered the averments in the affidavits and the submissions of counsels and observe that Margaret did not rebut the averments of Kagitu Ngethe that he witnessed Gidraph execute the Will. His evidence is pertinent to the validity of the Will and I have taken it into account in view of the decision in **Ndolo v Ndolo (2008) 1 KLR (G&F)** in which Gicheru, Omolo and Tunoi JJA held that:

“The trial judge was wrong in failing to take into account the eyewitness testimony of the witnesses who saw the deceased sign the will. The witness saw the deceased execute the will in the attorney's office and had nothing to gain by lying to the court. No challenges as to the signature they saw were put forward, and accordingly, the will was valid.”

Kagitu averred that Gidraph was of good health and sound mind when he executed the Will. Kagitu is not a beneficiary of the Estate and had nothing to gain by lying to court.

22. Margaret merely made a statement to the effect that the circumstances surrounding the making of the Will and the death of Gidraph who was murdered, were suspicious and there could exist undue influence or even fraud but this was not proved. She did not provide any evidence to show that the Will in cause No. 669 of 2003 annexed to the Petition was fraudulent and/or suspicious, or that it was executed under duress and undue influence.

23. Margaret is a dependant under the meaning of Section 29(a) Law of Succession Act. Under **section 27** of the said Act the court does have complete discretion in making provision for a dependant if in the opinion of the court the disposition of the deceased's estates effected by his will did not make reasonable provision for that dependant. **Section 28** the said Act however, demands that the court do take certain circumstances into account in exercising that discretion and specifically under **Section 28(g)**, one of those circumstances is the testator's reasons for not making provisions for the dependant.

24. The mere fact of Margaret's exclusion by Gidraph from his Will therefore does not make the Will invalid. The proceedings of the tribunal where Margaret lodged her complaint clearly show that she and her parents in laws (specifically the father in law) had serious personal differences. This is the reason given by Grace for Gidraph to sub-divide and transfer a portion of his parcel of land being KARAI/KARAI/85 to other beneficiaries intentionally leaving Margaret out. He also made his intentions known before the Land Tribunal to which Margaret first complained.

25. Besides alleging that Gidraph's land was ancestral land Margaret provided no proof thereof. Grace stated that in view of the bad relationship that Margaret and her parents-in-law had, the Land Disputes Tribunal in 2002 in its award ruled that Margaret unconditionally apologize to the parents for treating them in an inhumane manner, by giving them a he goat and gourd of honey all worth Kshs.5,000/=. Margaret instead continued to insult the parents and did not fulfil the condition until the parents were finally brutally murdered on the night of 1st July 2002. In view of the foregoing I find that the said Will in Succession Cause No. 669 of 2003 was properly

executed and in conformity with the formal requirements under Section 11 of the Law of Succession Act.

26. On whether the Grant in succession cause No. 179 of 2002 ought to be revoked. The circumstances that can lead to the revocation of grant have been set out in **Section 76 Law of Succession**. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.
27. A grant may also be revoked if the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the Estate. See - **Matheka and anor v Matheka [2005] 1 KLR pg 456**. It may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.
28. Indeed Margaret did not disclose to the court that there were other dependants to the Estate of Andrew who included Gidraph, his wife and Grace and her children and she cut them all out of the Estate of Andrew. I do not however find that in the circumstances of this case it is necessary to revoke the grant, but it is necessary that Grace and her children who are dependants of Andrew and are still alive be included in the list of beneficiaries.
29. On what the entitlement due to each of the litigants concerning the two Estates ought to be, Grace averred with regard to succession cause No. 669 of 2003 that the land known Karai/Karai/85 was not ancestral land. This was also what Gidraph himself had stated in his evidence before the Land Dispute Tribunal.
30. Mr. Waiganjo contended that in respect of L.R. No. Karai/Karai/1839, Gidraph at the Tribunal hearing sitting at Kikuyu confirmed that he had the intention of giving this parcel of land to Margaret and advised that she should amicably and respectfully approach him. In counsel's view this portion therefore, should be transmitted to Margaret to hold in trust for her children. He argued that Gidraph's property being ancestral land, it ought to have been transmitted into the Estate of Andrew as the only son of Gidraph.
31. Grace deposed that in the month of September 2001, Gidraph subdivided and distributed this property as follows:
 - i. Karai/Karai/1837 – 6 acres – for himself
 - ii. Karai/Karai/1838 – 4 acres – Grace
 - iii. Karai/Karai/1839 – 2 acres – Caroline Wambui the wife of his grandson Gidraph, Margaret's son), to hold in trust for his minor great grandson.

Gidraph confirmed this subdivision and distribution in his testimony before the Land Dispute Tribunal. He was categorical that the 6 acres registered in his name should devolve to Grace upon his and his wife's death and that Margaret should not get anything from him in view of the ill-treatment she had subjected him and his wife to.
32. There being no evidence tendered by Margaret to prove that Karai/Karai/85 is ancestral land I find and hold that it was not ancestral land. Gidraph was therefore at liberty to dispose of it as he did in his Will in light of the serious difficulties that existed in their relationship with Margaret.
33. Grace stated and this was confirmed by Margaret that after the death of Andrew, Margaret evicted her from the home which she shared with Andrew in Githurai and disposed of her personal effects. Consequently Gidraph took her and the children to his home at Karai in June 2001. Gidraph convened two meetings in his home regarding Andrew's Estate. The first was on 2nd June

2001. In the second meeting held in the presence of the local Chief Margaret agreed to surrender Grace's "matrimonial home" which was identified as Plot No. E.153 at Githurai Ting'ang'a to Grace, but she has not done so to date.

34. Mr. Waihiga contended that Margaret in her affidavit sworn on 2nd March 2012 attached the proceedings of the Land Dispute Tribunal, admitting that she had the knowledge that Andrew cohabited with Grace in Githurai. Further that Grace was one of the surviving widows of Andrew, and was entitled to a life interest in the matrimonial home she shared with Andrew in Githurai. Counsel urged that the residue of the Estate ought to be divided among the houses according to the number of children in each house. Needless to state the court has already found that Grace was not a wife to Andrew.

35. Mr. Waiganjo limited the provisions of **Section 29(a)** and **(b)** of the **Succession Act** to "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." Counsel maintained that Grace was not entitled to any share of the Estate of either Andrew or Gidraph.

36. The court however finds that Grace and her children were dependants under the meaning of section 29(a) of the Law of Succession Act. The deceased's property at the time of his death was set out as follows:

a. Plots at Githurai Kimbo:

- i. Plot No. 32 – title No. 178
- ii. Plot No. 33 – title No. 180
- iii. Plot No. 34 – title No. 181
- iv. Plot No. 35 – title No. 191

b. Plot No. A 93 at Githurai 44.

c. The following plots through shares at Ting'ang'a Co. Ltd:

- i. Plot No. 716
- ii. Plot No. 717
- iii. Plot No. 807

iv. Three plots jointly held with others at Githurai 45

d. Plot No. E.153 at Githurai.

The court notes that failure to make provision for dependants does not invalidate the grant in succession cause No. 179 of 2002 as the court is empowered under **Section 26** of the **law of Succession Act** to make reasonable provision for the dependants. As demanded of me by the said Section (28) I have considered the following:

- a. the nature and amount of the deceased's property;
- b. any past, present or future capital or income from any source of the defendant;
- c. the existing and future means and needs of the dependant;
- d. whether the deceased had made any advancement or other gift to the dependant during his lifetime;
- e. the conduct of the dependant in relation to the deceased;
- f. the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

37. In considering the existing and future means and needs of the dependants and the widow I had regard to the findings of the Court of Appeal in the case of **Irene Njeri Macharia vs Margaret**

Wairimu Njomo & Another [1996] eKLR, Omolo, Tunoi and Bosire JJA that:

“For our part, we agree with the appellant that as the widow of the deceased, she was entitled to a share of her husband’s Estate available for distribution. We, however disagree with her that her entitlement took away the Judge’s power to weigh the conflicting needs of the heirs and determine how much should go to each heir according to those needs. Even if the appellant had acquired the landed property wholly by herself and without any contribution from the deceased, it was a property she possessed and in weighing her needs against those of Jackline, the Judge was entitled to take it into consideration, just as much as he was entitled to take into consideration any paid job or business bringing income to her. In the case of the landed property, the deceased had contributed towards its acquisition and that gave the Judge even more reason to take it into account.”

38.The parties did not attach values of the various assets in the two succession causes, or how the properties in succession cause No. 179 of 2002 was acquired. I observe that although Grace already has the ten acres bequeathed to her in succession cause No. 669 of 2003 she is also the one with three minor children who need provision for school, food and general maintenance out of Andrew’s Estate. Margaret’s son is already an adult and his son was bequeathed 2 acres out of Gidraph’s Estate. I therefore give Grace and her children Plot No. Githurai E 153 that was their home before Margaret evicted them therefrom.

In the premise I order as hereunder:

- i. Both applications for revocation of Grant in the two causes are denied.
- ii. The grant of probate with Will annexed issued to Grace in succession cause No.669 of 2003 be and is hereby confirmed to Grace Nyambura in the terms of the Will.
- iii. The grant issued to Margaret in succession cause No. 179 of 2002 be rectified to include Grace Nyambura and her three children as dependants and their portions shall be Plot No. Githurai E 153.
- iv. Each party to bear their own costs.

SIGNED DATED and DELIVERED in open court this 11th day of November 2015.

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L. A. ACHODE

JUDGE