



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1064 OF 2003

IN THE MATTER OF THE ESTATE OF FRANCIS GIKUMU WANJOHI – (DECEASED)

JUDGMENT

1. Francis Gikumu Wanjohi, whose estate is the subject of these proceedings, died on 8th May 2001 at Aga Khan Hospital, Nairobi, at the age of 81 years.
2. Representation to his estate was sought by Godfrey Gichuhi Gikumu and Nathan Mui Gikumu vide a petition filed in court on 29th May 2008. They sought a grant of probate on an alleged written will made by the deceased on 9th January 2001. A grant of probate of written will was made to the said executors on 18th September 2003.
3. On 10th August 2004, the said executors, by an application dated 29th July 2004, sought confirmation of the said grant. It was proposed that the net testate be disposed of as per the will of the deceased.
4. Before grant could be confirmed, an affidavit of protest was filed in court on 23rd November 2004 by Bernard Chege Gikumu, Anthony W. Gikuru and Erastus Maina Gikumu. They protested that the proposed distribution of the estate was founded on an invalid will as the time it was alleged that the deceased made the will he was not mentally competent – he was terminally ill with cancer. They also came up with their own proposals on the distribution of the estate.
5. The said application was responded to by the respondent executors through the affidavit of Evanson Mwangi Gakunyu and Elijah Gathogo Kimani sworn on 18th February 2005 and erroneously headed “*Supplementary Supporting Affidavit.*” The deponents are alleged witnesses to the executio of the will the subject of the proceedings. They concede in the affidavit that the deceased had medical applications and had undergone a number of operations. They however contest the allegation that the deceased did not have control of his faculties at the time of the execution of the will and that he was unable to comprehend the full import of the execution of the said will. They aver that the deceased had exercised his testamentary freedom freely and voluntarily.
6. There is also an affidavit sworn by Anthony Weru Muthii sworn on 7th June 2005. He avers that he was summoned by the deceased to Nairobi on 21st April 2001. He and another met the deceased at Eastleigh, Nairobi, where the deceased informed them that he had made a will which was with his lawyers, and that the witnesses to it were not from their village or even his relatives.
7. The directions on the disposal of the Summons for Confirmation and the protest were given on 10th February 2009. The parties were given 21 days to file and serve witness affidavits, with leave to file supplementary affidavits.

8. The parties complied with the said directions and the affidavits were filed by:-

(a) Anthony Wanjohi Githinji sworn on 2nd March 2009, who averred that he was a son of the deceased, was close to his father and his father never told him that he had made a will.

(b) Maina Gikuru swore his affidavit for 2nd March 2009 too. He is a son of the deceased, and he avers that the deceased was ill for some time and he never told the deponent about the will. He invited him to Eastleigh between January 2001 and February 2001 where he found deceased very weak and being spoon fed by his daughter. He has attached a report from Dr. Smita Devani, dated 18th November 2004, which in the dependant's view said that the deceased's state was very bad in the year 2001.

(c) Gladys Ngunji swore her affidavit on 19th August 2009. She is the second wife of the deceased. She avers that the deceased said that he had made a will and she was present when he said so to Weru Kiambo, Karuki wa Gichingiri (Karuga) and Benard Chege on 21st April 2001. There were no objections raised when the will was read to the family.

(d) Dr. Vera Somen swore her affidavit on 29th July 2009. She was the deceased's doctor for a long time. She attended to him over a long period of time. She avers that the deceased was terminally ill but only required hospitalization in May 2001. His illness accordingly to Dr. Somen, did not affect him or his judgment and he remained in full possession of his faculties until the time of his death. She comments on the report by Dr. Smita Devani, annexed to the affidavit of Maina Gikuru, and points out that the said doctor did not say that the deceased was confused or mentally incapacitated at the time of his demise. She concludes that despite his ill health, the deceased did not have mental impairment that would have inhibited his ability to control his mental faculties and he was in full possession of his mind and judgment at the time he wrote his will in January 2001.

(e) Nathan Mui Gikunu swore an affidavit on 19th August 2009. He is a son of the deceased. He supports the averments in the affidavit of Dr. Somen and asserts that his father was of sound mind up to the time of his death .

(f) Godfrey Gichuki Gikuru swore his affidavit on 19th August 2009. His averments mirror those of Nathan Mui Gikuru.

(g) Richard Kariuki Karuga's affidavit was sworn on 19th August 2009. He avers that he saw the deceased on 21st April 2001, in the company of others, when the deceased informed them that he had made a written will.

(h) Kirubi Kanyoro swore his affidavit on 13th September 2011. He avers to be a clear confidant of the deceased. The deceased did not confide to him about having written a will.

(i) Charles Njuru Kihara swore his affidavit on 9th March 2012. He is the advocate who prepared the will of the deceased. He avers that he got instructions on 9th January 2001 from the deceased to prepare the said will, and that at that time the deceased was of sound mind with no mental impairments or limitations. He also read the will to the family and no objection was raised at all by any of the family members.

9. The matter was heard by two judges, Maraga J. and Mugo J. on 27th June 2011 and 12th March 2012 respectively. Three witnesses testified for the objectors, while five gave evidence for the executors.

10. The objectors testified as follows:-

(a) PW1 – Anthony Wanjohi Githinji – said he was the eldest son of the deceased. Accordingly

to him, his father was unwell and therefore incapable of making a will. He confirmed that the will was read to them at the office of C.N.Kihara, Advocate. They protested about inadequate provision. He further confirmed that Dr. Somen was close to their father.

(b) Pw2 – Erastus Maina Gikumu – said he was a son of the deceased. He testified that his father had told him on 7th May 2001 that he had not made a will, that that he could not have made a will as he was very sick. He complained that all the properties had been given to the other family. He said his father in April 2001 when he was very weak and wondered how he could have gone to the lawyer's office. He stated that the deceased used to stay with the step family.

(c) PW3- Kirubi Kanyoro – he said that he was a close friend of the deceased. The deceased was ill and he never talked to him about a will. He testified that the deceased was not completely stable during the period of the second operation.

11. The witnesses who testified for the executors were-

(a) DW1 – Godfrey Gichuki Gikumu – he said that he was a son of the deceased. He attended the reading of the will, when all the other family members were present. The protestors did not object to the will. He had lived with father until the time of his death. He referred to the medical reports of Dr. Somen, Dr. Loeffler and Dr. Devani – all of which do not refer to any unsoundness of mind on the part of the deceased.

(b) DW2 – Vera Somen – She was the doctor who attended to the deceased. She saw him in May 2001 and at that time he was not mentally impaired. In her estimation as a doctor, stomach cancer cannot lead directly to mental incapacity or impairment.

(c) DW3 – Charles Njuru Kihara – He was the advocate who drafted the deceased's will. The deceased had been his advocate for a long time. He received instruction from him in 2000 to draw a will for him. He drafted the will and the deceased brought two witnesses who signed it as attesting witnesses. He identified the will he had drafted, and which was executed by the deceased and attested by the witnesses. He stated that the deceased signed it on every page. At the time the deceased had a clear mind and no difficulty in thinking and expressing himself. He also confirmed that he read the will to the family in a gathering called for that purpose.

(d) DW4- Evanson Muraya Gakunju. He was one of the witness and was present when the deceased appended his signature to the will. He had been invited to Mr. Kihara's, office, he did not know why the deceased wanted him at that office. There was another man called Githaiga. The lawyer produced a will, the deceased signed it first, then the witness and thereafter Gathogo. It was after he signed the document that he was told it was the deceased's will. He was not informed of the contents of the will. In his view, the deceased was not sick. He walked on his own from the bus station to the building housing Mr. Kihara's offices and went up the four flights of stairs. He was normal and recognized the people who signed the will. He recognized too the people around him when he signed the will. He also walked himself out of the office to the bus stop and took a bus to Eastleigh.

(e) DW5 – Elijah Gathogo Kimani – He was the second attesting witness. He testified that he was called to an advocate's office in 2001 near the High Court building. He was with DW4, who was a person he had not met before then. A document was placed before them, the deceased signed it first, followed by DW4 and then the witness. The witness wrote his full name and his identification number and address on the document and then thumb printed it. He put his print after that of the deceased and of DW4. He was told he should sign first to confirm that it was the document that the deceased had signed. No family members were present when he signed. He did not know of the deceased's illness. The deceased was not sick then and he knew exactly what he was doing. He was in good mental condition. He averred that there were only four of them at the time – the advocate, the deceased, DW4 and himself.

12. After conclusion of the oral hearing, it was directed that the parties do file and serve written submissions. The executors submissions are dated 26th September 2012; and were filed in court on 28th September 2012, those by the protestors are dated 26th October 2012 and were filed in court on 29th October 2012.

13. What is up for determination is a summons for confirmation where a protest has been raised. The law governing these proceedings is *Section 71* of the Law of Succession Act and Rules 40 of the Probate and Administration Rules. According to *Section 71* of the Act, confirmation of a grant is designed to empower the distribution of the capital assets. The application is for the purpose of proposing distribution of the capital assets. Confirmation will be made where, according to *Section 71(2) (a)* of the Act, the court is “*satisfied that the grant was rightly made to the applicant and that he is administering, and will administer, the estate according to law...*” By virtue of *Section 71 (2) (a)* of the Act, the only matters for consideration are whether the grant was made rightly and whether the administrators are properly administering the estate. *Section 71* of the Act does not deal with protests, these are governed by Rules 40 and 41 of the Probate and Administration Rules – an aggrieved person filed an affidavit of protest.

14. In these proceedings, the protestors have filed an affidavit of protest to assert that the grant was not properly made as it was founded on an invalid will. However, I note that the protestors are not calling for the revocation of the will, but propose that I should dispose of the estate in manner different from that proposed in the alleged will. This approach is not procedural. Once the court declares that a will is invalid at this stage, the entire process ought to collapse. The grant of probate has to be revoked and the family advised to identify the persons to apply for a grant of letters of administration intestate. This would mean that the confirmation application will have to be dismissed and with it the protestors’ proposals on the distribution of the estate. In a word, the parties have to go back to the drawing board.

15. Is the will the subject of these proceedings valid? The answer to this question will depend on whether the deceased had capacity to make the will. It would appear to be the protestors’ case that the deceased did not have such capacity.

16. The law on capacity to make a will is stated in *Sections 5 and 7* of the Law of Succession Act. According to *Section 5(1)* of the Act, a valid will is made by a person of sound mind, who does not suffer the disability of minority. Under *Section 5 (b)* a person is deemed to be of sound if at the time of executing the will his of mind was such that he did not know what he was doing. This could be on account of mental or physical illness, drunkenness or other cause. *Section 5(4)* casts the burden of proving that the testator was not of sound mind on the person so alleging. It is the protestors in this cause who put forward the case that the deceased in this cause did not have the requisite state of mind to make a valid will. The duty was on them establish that fact.

17. *Section 7* of the Act on the other hand deals with situations where wills are caused by fraud, coercion, importunity or mistake. The matters covered in this provision were not raised directly in the protest but were alluded in the witness affidavits, when it was averred that the deceased used to live with the children of the second family, implying that the children might have influenced him to will the property to them.

18. I have anxiously gone through the affidavits filed in this cause on the execution of the will of the deceased. I have also gone through the recorded oral evidence. The protestors allege that the deceased was not of a state of mind conducive to the making of a valid will as he was ill at the material evidence. These allegations appear to me general in nature, and not specific to January 2001 when the will was allegedly made. The protestors have no medical evidence, save the report by Dr. Smita Devani dated 18th November 2004, which describes the deceased’s condition on his admission to hospital on 1st May 2001. The said doctor did not deal with the deceased’s condition as of January 2001. The assessment of the deceased was that he was ill looking, pale, edematous and dehydrated. He was said to have been fairly stable save for inability to retain any food. Dr. Devani did not say anything about his mental state. I have weighed this evidence against that of the executors. This comprises the testimony of persons who treated the deceased during his last illness, and well as the persons who were present when the will was

executed. There is medical evidence from Dr. Somen who treated the deceased for many years. There is a report by Dr. Loeffler. Both doctors say that he did not suffer any impairment of his mental facilities. The lawyer who drew the will and before whom it was executed and attested also testified. He told of a man who knew what he was doing, both at the time he instructed him to prepare the will and at the time of its execution. The attesting witnesses also gave similar evidence.

19. I am not satisfied from the material placed before me that the deceased was not of the required state of mind when he made the alleged will. I find that the evidence presented by the executors is cogent and compelling. It establishes that the deceased person was of the appropriate state of mind at the time he executed the will. I also found that the will was properly attested and it is therefore valid.

20. There was an allusion to undue influence, implicit in the allegation that the deceased lived with the children of the second family as at the time of the execution of the will. This was conceded by one of the children of the second house. The protestors case was that this raised a possibility of undue influence. However, the mere possibility of undue influence without concrete evidence thereof is not sufficient. *Section 7* of the Act states that a will is void if it is caused by fraud or importunity. This means that there must be positive proof of such fraud or importunity. There is no such proof. Indeed, no evidence was led on this. The burden was on the protestors to prove fraud, undue influence or importunity they have not discharged that burden.

21. From the papers filed by the protestors, it would appear that they are complaining not so much about the validity of the will but about its contents. They say that it provided mainly for the second house and disinherited some of the children. The relief for disinheritance or inadequate provision does not lie in protest proceedings but in an application brought under *Section 26* of the Law of Succession Act. The said relief cannot be granted *suo moto* but on the application of some party. No such application is before me and I find no basis that I can here and now make provision for those that have been allegedly disinherited or inadequately provided for.

22. I find that that the will on record in this matter is valid for having been executed in proper form by a person of sound mind. The grant made on the basis of the valid will was therefore properly and rightly made to the executors, the respondents herein. The protest by the protestors is therefore without merit and I hereby dismiss it with costs. I hereby confirm the grant of probate made to the executors on 18th September 2003. The estate of the deceased shall devolve as per the terms of the will made on 9th January 2001.

DATED, SIGNED and DELIVERED at NAIROBI this 31st DAY OF January, 2014.

W. MUSYOKA

JUDGE