REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

SUCC CAUSE NO: 718 OF 2012

IN THE MATTER OF THE ESTATE OF DORCAS WAIRIMU RIITHO (DECEASED)

RULING

Dorcas Wairimu Riitho died on 19th Deceased 2009. She was survived by her husband, Charles Mugo Riitho, and their four children – Kenneth Anthony Riitho, Jeanne Watetu Kimani, Nicholas Gakuya and Irene Wanja Riitho. A dispute has erupted between father and his children over representation to the deceased's estate.

On 12th April 2012, the deceased's surviving spouse petitioned for letters of administration intestate to the estate of the deceased. (He shall hereinafter be referred to as the petitioner) He disclosed himself and the four children as the persons who survived the deceased. He also listed the assets that the deceased died possessed of, being landed property, shares in several publicly listed companies, a motor vehicle, a chose in action and monies in several bank accounts.

Simultaneously within the petition, the petitioner filed an affidavit in verification of proposing citations to accept or refuse letters of administration intestate, purposing that the said citations be issued upon Kenneth Anthony Riitho, Jeanne Watetu Kimani, Nicholas Gakuya Riitho and Irene Wanja Riitho. Forms of the citations addressed to the four children were filed with the petition and were subsequently signed by the District Registrar on 11th May 2012.

This was curious – the filing of citations simultaneously with the application for grant of letters. Citations are intended to prompt the citee to take our letters of administration failing which the citor is given a nod by the court to file a petition. In the circumstances, the citations ought not be filed together with the petition. Filing the two at the same time does not give the citee the opportunity to respond, one way or the other, if he so wishes. Secondly, citations issue at the instance of a person who has an inferior right to administration. This means that the citor should be a person with an lesser right to administration than the citee. In this case, the petitioner is the surviving spouse of the deceased, according to ***Section 66*** of the Law of Succession Act, as read with ***Section 35*** of the said Act, he has a superior right to administration over his children. Consequently, he did not have to issue to citations to them before taking out letters. Clearly, the citations issued in the matter served no purpose.

The cause was gazetted on 27th July 2012.

On 8th August 2012, the children of the deceased – Kenneth Anthony Riitho, Jeanne Watetu Kimani, Nicholas Gakuya Riitho and Irene Wanja Riitho – filed an objection to the making of the grant sought by the petitioner. (The children shall hereinafter be referred to as the objectors) The notice of objection was

amended on 5th August 2012, and filed in court on 17th August 2012. On 23rd August 2012, the Deputy Registrar issued a notice to the objectors to file an application for grant. The objectors promptly did so the same day – 23rd August 2012, when they filed two petitions by way of applications for grant of letters of administration, one intestate and the other with written will annexed. They stated that the deceased died partially intestate, as she had left a valid will, and that, should they succeed in proving the will, they would seek representation to her intestate estate as well. A copy of the alleged will was attached to the cross-petition, together with a codicil. Their affidavit in support listed the same survivors as those listed by the petitioner, and the same assets, save for those the subject of the will, and one or two not listed in the petitioner's papers.

It was directed by the court that the objection proceedings do proceed by way of affidavits and written submissions. Apart from the affidavits in support of the petition and the cross-petition, several supplementary affidavits were filed by both the petitioner and the respondents. There are also affidavits by the witnesses who attested to the alleged will – David Gichuki Wahome and Rahab Nderu.

In their affidavit sworn on 2nd August 2012, the objectors averred that the deceased died testate as she had left behind a valid will which had appointed executors – Lillian Muthoni Njuguna, Eshban Nduriri Githiaka and Zablon Kambo Gakuya. The three executors were said to have had renounced probate and that was why the objectors were petitioning for grant of letters of administration with the will annexed.

The attesting witnesses, David Wahome and Rahab Nderu, swore their affidavits on 20th September 2011 and 30th September 2011, respectively. Both affidavits were filed in court on 29th October 2012. David Wahome averred that he worked with the deceased at a company called International Computers (K) Ltd (ICL) between 1994 and 2006, that the deceased was his immediate boss, that he was familiar with her signature, that on 19th February 1998 the deceased went to his office with a document which she said was a will and which she had already signed and asked him to sign it as a witness, that he identified her signature on the document and that he signed against her signature and wrote his name and date, and confirmed that the signature appearing on the will dated 10th February 1998 against the word ***"signed"*** was that of the deceased. Rahab Nderu on her part stated that she was the deceased's secretary when the latter worked at the ICL, that on 10th February 1998 the deceased asked her to type a draft document which turned out to be a will, that she typed the same, that on 19th February 1998 she was requested by the deceased to sign the document she had earlier typed, that the deceased told her that she had already signed her part and she needed Ms. Nderu to witness her signature for her, that at the request she wrote her name and appended her signature against her name and confirmed that the signature appearing on the said document date 10th February 1998 against her name was indeed her signature, that the signature appearing below the dated 10th February 1998 against the word ***"signed"*** was that of the deceased, and that she was familiar with the signature as she had been the deceased's secretary for eight years.

The petitioner filed a supplementary affidavit on 3rd April 2013. He acknowledged the existence of the two attesting witnesses, David Wahome and Rahab Nderu. He had seen David Wahome at the ICL whenever he visited the deceased there, while he had heard of Rahab Nderu from the deceased in connection with the ICL, but that he had never met her. He asserted that the document dated 10th February 1998 allegedly signed by the two was not a valid will. He gave several reasons why he thought so. One, that the affidavits of David Wahome and Rahab Nderu were drawn in 2011 while the succession cause was filed in 2012. Two, that Lillian Muthoni Njuguna advocate, was a sister and confindant of the deceased and if there were to be a will it had to be drawn by her or at least she should have had knowledge of it. Three, that the alleged will was taken to the said Lillian Muthoni Njuguna by one of the objectors, Jeanne Watetu, who is herself a lawyer and a beneficiary under the alleged will, obliquely implying that she had something to do with its making.

To this supplementary affidavit, Jeanne Watetu Kimani and David Wahome responded. David Wahome's supplementary affidavit was sworn on 10th April 2013. He stated that his earlier affidavit was indeed sworn in 2011 before the cause was filed in 2012. He averred that he swore it to confirm the authenticity of the will dated 10th February 1998. He also sought to confirm that he worked with the deceased between 1998 and 2003. Jeanne Watetu Kimani in her affidavit sworn on 12th April 2013 stated that she discovered the will after the deceased had had the accident that caused her death and that this was while

the deceased was lying unconscious at the Aga Khan Hospital. It was after stumbling upon the document that she took it, among others, to Lillian Muthoni Njuguna who had been named as one of the executors of the will. She asserted that she did not see anything sinister in surrendering the will to the executor named in it.

Both parties, through counsel, filed written submissions. The petitioner's submissions were dated 2nd May 2013, while those of the 2nd, 3rd and 4th objectors were dated 13th May 2013. Both submissions summarised the facts affidavits I have identified of the two issues for determination. From my reading of the summarised facts The first is on the validity of the alleged will while the second is on who should be appointed personal representative of the deceased. I must explain my frustration that the first issue is a matter that can best be determined on the basis of oral evidence, where the persons present at the execution of the alleged will are subjected to cross-examination. Affidavit evidence is never good enough when it comes to addressing certain issues, especially where the critical evidence relates to what one perceived by their eyes. As the parties desired that I do determine this matter on the basis of affidavit evidence, so it shall be.

The law for testing the validity of a written will is ***Section 11*** of the Law of Succession Act. The said provision provides:-

> ***"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 person sign the will, in the presence and by the direction of the testator, or have received from the testator the personal acknowledgement 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."***

There are two documents that have been placed me purported to be testamentary intruments. One is headed ***"Last Will and Testament"***, and is dated 10th February 1998. The other is headed ***"Codicil for the Last Will and Testament of Dorcas Wairimu Riitho,"*** and is dated 17th April 1998. The validity of these documents should be tested the basis of on the provisions of Section 11 of the Law of Succession Act.

Regarding the signature that is purported to be that of the deceased, Dorcas Wairimu Riitho, it would appear that there is no dispute. The petitioner has not denied the signature of the deceased in these documents. I note that his affidavits are silent on the authenticity of the signature that is purported to be that of the deceased. I will therefore take it that the signature appearing on the two documents is indeed that of the deceased. The requirement in ***Section 11(a)*** of the Law of Succession Act has been met. I am also prepared to find that ***Section 11(b)*** of the Law of Succession Act has also been met, with respect to the position of the said signature. It appears at the end of the dispositive provisions, after the date on the two documents, and it appears by its location that it was intended to authenticate or give effect to the said documents as testamentary instruments.

The contest centres on the attestation of the documents. Attestation is the subject of ***Section 11(c)*** of the Law of Succession Act. Only one of the two documents is purported to be attested – the will. The other document – the codicil - does not bear the attesting signatures of any purported witnesses . The objectors concede that the latter document is not attested and is therefore not a valid testamentary instrument, and

do not intend to prove it.

The document titled ***"Last Will and Testament"*** has an attestation clause, which comes just after the execution clause. It bears the marks of two witnesses. The first witness is David Gichuki Wahome. The name David Gichuki Wahome is handwritten. There is a postal address and occupation, signature and date. The second witness is Rahab Nderu. Similarly, the name is handwritten. It is accompanied by a handwritten postal address, occupation, signature are date. I am not a handwriting expert, but it is quite obvious to my untrained eye that the hands that wrote these two sets of details and signatures an different. The persons whose names appear on this document as witnesses have sworn affidavits to attest to the fact that the handwritings and signatures on the document are theirs. The petitioner in his affidavit did not at all deny that these signatures were appended by the said persons. Indeed, the petitioner associated the two with the deceased and the ICL. He acknowledged that they worked together with the deceased. He conceded that he used to meet one, whenever he visited the deceased at her workstation. The other, he said, he used to hear the name from the deceased, but he never met her. He placed the two around the deceased, and therefore created that real possibility that they might have just witnessed the documents.

Section 11(c) of the Law of Succession Act requires that the witnesses should either see the testator sign the document or his signature on the document is acknowledged to the witnesses before they put their own on the document. From the material before me, the witnesses averred that they did not see the deceased sign the document, but she took the document to them on 19th February 1998 showed them her signature on it and asked them to sign it to authenticate the signature. Both were in a subordinate position to her- one her assistant in the accounts department and the other her secretary. Persons who daily handled documents signed by the deceased. It would appear that there is truth in their averments that they were familiar with the deceased's signature and they could therefore attest to the fact that the signature on the document was indeed that of the deceased.

Against his evidence, the petitioner's only challenge concerns the affidavits sworn by the two witnesses. He asserts that the affidavits were not valid as they were sworn in 2011 long before the cause was filed in 2012. In other words, the affidavits were not sworn for the purpose of the cause as they were sworn before the cause was filed. To this the objectors cited Order 19 rule 8 of the Civil Procedure Rules which states that:

> ***"Unless otherwise directed by the court an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned."***

The petitioner's other argument is that the will purports to dispose of property that was jointly owned by him and the deceased. His point being that going by the principle of survivorship the deceased's interest in the property merged and united with his upon her death and therefore the deceased's interest no longer exists, is not part of her estate and is not available for distribution by will. Whatever the case, the fact that an asset distributed by will is not available at the time of proving the will does not affect the validity of the will.

One the whole I am satisfied that the purported will was properly attested. The authenticity of the signatures of the attesting witnesses has not been effectively undermined. The requirements of ***Section 11(c)*** of the Law of Succession Act have been satisfied.

It is a general principle of law that the burden of proof always lies with the person who alleges that a document is not valid. In this case it is the petitioner who is attacking the validity of the alleged will of the deceased. The document appears on the face of it to be properly executed and attested. The burden was on the petitioner to prove that the document was not properly executed and attested and he has not discharged that burden. I am satisfied that the said document fully complies with the provisions of ***Section 11*** of the Law of Succession Act, and therefore the said document is a valid will and probate ought to be granted to it.

The will appoints Lillian Muthoni Njuguna as executor, and in the event, for whatever reason, she is

unable to take up the office, executorship goes to Eshban Nduriri Githiaka and Zablon Kambo Gakuya. It has been alleged by the objectors that these executors have renounced executorship. Where a person dies testate without a proving executor, ***Sections 63, 64*** and ***65*** of the Law of Succession Act apply. The universal or residuary legatee or beneficiary may be admitted to prove the will and letters of administration with the will annexed may be granted to him. Where no universal or residuary beneficiary exists, then the persons who would be entitled to the administration of the estate had he died intestate may be granted letters of administration. The spirit of ***Section 63*** of the Law of Succession Act is that where there is no proving executor representation should be granted to a beneficiary. The objectors are named in the will as beneficiaries and therefore they qualify for appointment as administrators of the estate of the deceased the subject of the will dated 10th February 1998.

Regarding the intestate estate of the deceased; that is the property of the deceased that was not covered by the will made on 10th February 1998, the persons entitled to be appointed as administrators are set out in ***Section 66*** of the Law of Succession Act. Priority is given to the surviving spouse, followed by the children, in that order. That would appear to suggest that the petitioner herein has the upper hand. Legally, that should be so. However, in this case there is evidence that the deceased and the petitioner were not on good terms and the petitioner in literally forcing himself on to property of the deceased. The objectors paint a picture of a man who is not altogether responsible. The portrait that emerges is that of an drunkard.

There is evidence that the deceased and the petitioner were separated, even at the time of her death. The two were not divorced, and therefore the petitioner was still married to the deceased before she died, and he became a surviving spouse following her demise. ***Section 66*** gives the surviving spouse preference over the other survivors of the deceased, including the children. The courts have however stated in a number of decisions, among them *In the Matter of the estate of Aggrey Makanga Wamuia* Mombasa High Court Succession Cause No. 89 of 1986, that ***Section 66*** only provides a general guide, it is not mandatory, the surviving spouse can be overlooked to made to share administration with persons of lesser preference.

In this cause, the surviving spouse is at odds with his children over the estate. The law of intestate succession makes the children the ultimate destination of their parents' property, and where there is a surviving spouse, he or she will be entitled only to a life interest. This is the position under ***Section 35*** of the Law of Succession Act. The petitioner in this case is entitled to life interest over his deceased wife's estate, but the ultimate destination of that property is the objectors.

Having taken everything into account I will make the following orders:-

1. That the document dated 10th February 1998 is a valid testamentary instrument that should be admitted to probate.
2. That the document dated 17th April 1998 is not a valid testamentary

instrument and should not be admitted to probate.

3. That I hereby appoint Kenneth Anthony Riitho, Jeanne Watetu Kimani, Nicholas Gakuya Riitho and Irene Wanja Riitho personal representatives of the deceased in respect of the testate estate of the deceased Dorcas Wairimu Riitho.
4. That a grant of letters of administration with will annexed shall issue upon the said Kenneth Anthony Riitho, Jeanne Watetu Riitho, Nicholas Gakuya Riitho and Irene Wanja Riitho.
5. That I hereby appoint Charles Mugo Riitho and Jeanne Watetu Kimani administrators of the intestate estate of Dorcas Wairimu Riitho.
6. That a grant of letters of administration intestate in respect of the said estate shall issue to Charles Mugo Riitho and Jeanne Watetu Kimani.
7. That this cause shall be the operative cause for the purpose of the intestate estate, while a fresh court file, to be numbered **718A of 2012,** shall be opened in respect of the testate estate.
8. That the assets set out in the will shall be removed from the assets listed in the intestate cause.
9. That this being a family matter, each party shall bear their own

costs.

DATED, SIGNED and DELIVERED at NAIROBI this 12th DAY OF July, 2013.

W. M. MUSYOKA

JUDGE