



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Succession Cause 341 of 1998**

**IN THE MATTER OF THE ESTATE OF THE LATE SOSPETER KIMANI**

**WAITHAKA (DECEASED)**

**RULING**

The only issue for the determination before the court was the validity of the will dated 25<sup>TH</sup> May, 1995 alleged to have been executed by the deceased Sospeter Kimani Waithaka.

The said will was produced by one Simon Njihia Kimani who has filed the summons for revocation of the grant of representation to the Public Trustee in this cause dated 31<sup>ST</sup> October 2005. The supporting affidavit to the said summons is sworn on 6<sup>TH</sup> October, 2008. He has simply averred that he was informed by an elderly man that his father has executed a written will kept by the Advocate's firm called M/s G. N. Wakahiu.

On the basis of this will it is sought to revoke the grant of Administration Ad Colligenda Bona granted to the Public Trustee on 10<sup>TH</sup> March, 1998.

The three witnesses for the applicant have sworn and filed their affidavits. Joseph K. Kiarie has filed his affidavit on 10<sup>TH</sup> March 2009, Mr. Kariuki Kinyanjui has filed his affidavit on 9<sup>TH</sup> March 2009 and Kuria Kimani has so filed on 22<sup>ND</sup> April, 2009.

The affidavits aver in short that on 25<sup>TH</sup> May, 1995 they all accompanied the deceased to the offices of G. N. Wakahiu & Co. Advocates located at Rajab Manzil Building along Tom Mboya Street, Nairobi. The deceased went inside the Advocate's office and after some time they were all called inside his office and the Advocate read a document which was described as a will of the deceased and then on being asked to sign as witnesses, they all did sign the same. They all annexed a copy of will to their respective affidavits.

This will is objected by the interested parties vide Notice of Objection dated 2<sup>ND</sup> February, 2006.

The court gave further directions on 26<sup>TH</sup> November 2008 on the method of hearing which was to cross examine the deponents of the affidavits on record. The Public Trustee was allowed not to be present during this proceedings.

In his cross examination, the objector stated that he met one Kuria Kimani who saw him coming from the court and he was told whether he knew that his father left a will. Mr. Kuria gave him details and on instructions, his Advocate took the necessary action to obtain the will. He agreed that he is a member of the second house of the deceased and that the will was not read over in any meeting.

I may place on record that the witnesses of the objectors were issued with the witness summons before they gave their respective evidence. Kariuki Kinyanjui (PW2) testified that on 25<sup>th</sup> May, 1995 the deceased called him and requested him to accompany him to a lawyer's office as he wanted to distribute his properties. They were also accompanied by two others Mr. Kariuki and Mr. Kuria. He was very close to the deceased. Then he reiterated what is stated in his affidavit.

In cross examination, he stated that when he was visiting his brother at Kiriaini the objector came and asked him whether the deceased had left any will and he responded in positive. He did not know that the deceased had another family and another wife. He refused to have known the objectors to the will seated in the Court. He confirmed that the will has signature only on the last page and the will also discloses the names of children of the deceased.

PW.3 reiterated his affidavit. In his cross examination he denied that his signature on the will and on the affidavit are different. He stated that he did not volunteer to divulge the existence of will at the funeral. He was asked by the deceased's son called Muhoho Kimani. He agreed that he had written a statement on the issue of will before the Police. He also knew only one wife of the deceased.

PW4 testified how he knew the deceased as a neighbour since 1965 – where they stayed next to each other, and reiterated the contents of his affidavit.

In cross examination, he explained his reluctance to appear before the court which was due to abuse received from the interested parties objecting the validity of will.

He was also asked by the Police to record a statement on the issue of the will. He agreed that it was not upto him how to distribute the properties of the deceased, whatever it meant by that question.

The evidence for interested parties was led by Alice Nduta Mburu. She swore an affidavit on 11<sup>th</sup> July 2006 in support of Chamber summons of the same date, and also a further affidavit sworn on 19<sup>th</sup> June 2009.

I may point out that even the objector of the original grant has not disputed that he was from 2<sup>nd</sup> House. Thus the fact that Interested parties are daughters of the deceased is indisputable.

In her evidence she stated that deceased married the 2<sup>nd</sup> wife in the year 1958. The deceased had five daughters from the 1<sup>st</sup> wife, and according to her the first marriage was solemnised in the year 1942.

Her averments made in paragraph 5 of her Affidavit in proof of Dependency and proposed mode of distribution sworn on 19<sup>th</sup> June, 2009 to the effect that 10 properties mentioned therein were acquired between 1942 and 1958 which were solely acquired by their parents, are not sustainable as the first property or the oldest one registered in the name of the deceased is 10<sup>th</sup> December 1958 which is Title No. Githunguri/Gathanga/599. All others are after that date. She has annexed an affidavit of their late mother filed in a cause under Married Women's Property Act but I am not told what came out of it. It is also agreed that the deceased had strained relationship with the 1<sup>st</sup> wife and he was living with the 2<sup>nd</sup> wife while the 1<sup>st</sup> wife and her children were staying separately.

Her averments that the daughters paid for the funeral expenses were also not borne from the receipts produced before the court. The photographs of funeral however showed that they were present at the funeral.

In her evidence DW1 testified that three of five sisters are married including herself and two are cohabiting and not officially married. All the five daughters were close to the deceased and used to visit him. When he became sick, he would call her sister Lucy who is the first born.

Around November 1996 when herself, Irene and Florence visited the deceased, he told them about his oral will which he had kept in a safe in his bedroom. After his death they found the safe being broken into and there were no documents.

According to the deceased he had kept all his documents in that safe.

Their complaint to the Attorney General did not bear any fruit and no charge is leveled against anyone.

She also produced photographs of burial as well receipts of some medical expenses which were all in the names of the deceased.

According to her, the 10 properties in paragraph 5 of her further affidavit be distributed equally amongst the children of 1<sup>st</sup> house and remaining be divided equally.

The court had during hearing of this issue further directed the Interested Parties to file affidavit of dependency only in the event the will is proved and the court can then order provisions for their dependency. This is not done strictly by the Interested Parties.

The reason shown to oppose the validity of will is that the signature of the deceased on the face of the will is not that of the deceased and that his signature does not appear on all the pages of the will as well as that the deceased had given an oral will.

It is conceded that they have not obtained opinion of the Handwriting expert as to the authenticity of the signature of the deceased appended on the will even after the court gave them ample opportunity and time to do so.

The above in short is the evidence before the court. Written submissions thereafter were filed and relied upon.

The 1<sup>st</sup> Interested Party's submissions can be summarized as under:

Sections 38 and 40 (1) of Law of Succession Act provide for distribution of the testate estate amongst the wife or wives and children. The will, simply because it is disputed and does not mention the Interested Parties – daughters of the 1<sup>st</sup> house and also the female children of the 2<sup>nd</sup> house, should be invalidated.

Curiously section 35 (3) of the Act was quoted. The said sub-section in my humble view is not at all relevant to the present case and still it was urged that the court has power to revoke **the purported will not only because it is disputed**, but the deceased discriminated against his first wife (though she is also deceased) and her children by not making provision for them, as well as discriminating his female children also from the 2<sup>nd</sup> house. I can place on record that there is no objection by any of the beneficiaries from the 2<sup>nd</sup> house.

It may be prudent to quote section 26 and section 29 of the Act.

***“26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or my gift in contemplation of death, or the law relating to intestacy, or the combination of the will gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.”***

***“29. For the purposes of this Part, “dependant” means –***

- a) 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;***
- b) Such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and***

- c) ***Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.***”

The learned Counsel for the objector submitted that section 5 of the law of succession Act gives freedom of testamentary devolution of the estate.

What is written will is provided under sec. 11 of the Act.

**“11. 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 I 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 a personal acknowledgment 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.***”

Based on the said provision it is submitted that the will before the court is executed as per the aforesaid requirements of the law.

It is trite law that burden of proof where forgery is alleged lies squarely on the person alleging it.

In the cases of *Elizabeth Kameme Ndolo V. Matata Ndolo*; Court of Appeal (Nai) Civil Appeal No. 128 of 1995 (UR) the burden of proof for forgery is clarified by the Court of Appeal.

The Court observed that the charge of forgery is a serious one and the standard of proof required of the allegation of forgery is higher than that required in ordinary Civil Cases, that is proof upon a balance of probabilities, but certainly not beyond a reasonable doubt as in criminal cases.

In the case of *Wambui & another versus Gikonyo & others. (1988)* KLR 445 the Court of Appeal held that ***“the signature or mark could be placed anywhere including as the last signature after the witnesses signatures as the testator need not sign the will since it could be signed on his behalf and still be valid.”***

It was further submitted that the Interested Parties have failed to prove the dependency by evidence which would guide the court to give directions.

I must observe that although the will declares the second wife as the wife of the deceased, the parties before the court has conceded that the deceased had two wives and had their respective children.

The first wife died immediately after the deceased having five grown up daughters.

I tend to agree, from the evidence produced and submissions made before the court that the will of the deceased dated 25<sup>th</sup> May 1995 is drawn and executed as per the provisions of section 11 of the Act and the Interested parties have failed to prove that the signature of the deceased on the said will is a forgery.

I would also reject the contention of the Interested Parties that as there was an oral will, the will before the court is invalid.

The court does not have an oral will which should comply with provisions of section 9 of the Act and I rely on the provisions of section 9(2) of the Act, namely;

**“(2) No oral will shall be valid if and so far as, it is contrary to the written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided in sections 18 and 19.”**

On simply perusing the aforesaid provision, I do find that the Interested parties’ contention of invalidity of the will does fail and I hereby reiterate the same.

The only issue then remains is whether the Interested Parties are entitled to any provisions from the estate as dependants which they are as per section 29 of the Act.

The factors to be considered by the court so that it can order provision to a dependant are enumerated in section 28 of the Act stipulates as under;

**“28. In considering whether any order should be made under this Part, and if so what order, the court shall have regard to –**

- a) the nature and amount of the deceased’s property;**
- b) any past, present or future capital or income from any source of the dependant;**
- 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;**
- g) the general circumstances of the case, including, so far as can be ascertained, the testator’s reasons for not making provision for the dependant.”**

The evidence from the Interested parties which is not contraverted shows that the deceased was in very good terms with them, that they have looked after the deceased during his sickness and have arranged his funeral. I further note that the deceased left many properties behind and there is an evidence that their late mother did claim her shares in some properties on the basis of her contributions towards their acquisitions.

I do not have any further details in respect of the said claim and I can only conclude that on second marriage, the deceased took more care of the second house. It is also borne out from the evidence that the 1<sup>st</sup> wife and the deceased were estranged.

Thus I can definitely find that the children of second house were property provided for by the deceased during his life time and even after the death.

I could summarize the reasons of the deceased in excluding the first wife and her daughters from the will.

The first being his disagreement with the 1<sup>st</sup> wife and secondly the fact that the first house had all daughters and they were all married or presumed to be married under the common law due to cohabitation. A Kikuyu male in the year 1995 would not think of giving any property to the daughters and that too married and/or not living with him.

In the circumstances, I exercise my discretion under the Act and also consider the fact that the Act does not discriminate between

male and female issues. I thus make following orders;

**1) *The Interested parties shall have 1/10 shares of the estate to be shared equally amongst them.***

I am making the aforesaid orders as both the parties agreed to submit on the distribution of the estate despite the initial agreement to determine the issue of validity of the will.

The parties to bear their own costs.

Orders accordingly.

**Dated, signed and delivered at Nairobi this 16<sup>th</sup> day of February, 2010.**

**K. H. RAWAL**

**JUDGE**

**16.02.2010**