REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

SUCCESSION CAUSE 194 OF 2000

IN THE MATTER OF THE ESTATE OF ONESMUS IKIKI WAITHANWA (DECEASED)

AND

LEE GACHUIGA MUTHOGA …………… PETITIONER

JUDGMENT

The deceased in this matter died on 4th October 1994. He died leaving a will. The executor of that will Lee Gachuiga Muthoga petitioned for probate of written will on 12th June 2000. The said petition was objected to by nine objectors. Counsels representing the parties herein drafted issues for consideration by this court as follows:-

1. Whether the will dated 29th January 1993 is valid.

2. Whether the will dated 29th Jan 1993 was executed in accordance with the law.

3. Whether the will dated 29th Jan 1993 was executed by the deceased Onesmus Ikiki Waithanwa.

4. Whether the petitioner/executor and the third wife of the testator influenced the making of the will dated 29th January 1993.

PW 1 was the executor. He said that he is a partner of Muthoga Gaturu and company advocates although presently he has a leave of absence for the duration he was serving as a judge in the international criminal tribunal for Rwanda. When he was working at the firm of Muthoga Gaturu the deceased was his client. In the course of working there the deceased will was prepared where he was named as the executor of the will and failing him any partner of Muthoga Gaturu and company advocates. He said that he learnt he was an executor when the will was being executed. After the death of his client the deceased he petitioned this court for probate. To his best knowledge and belief the will was duly executed by the deceased and was attested by witnesses. The attesting witnesses were Evan Nthiga Gaturu and Hezekiah Wangombe Gichuhi. The executor said that he was present when the will was executed. That he was the one who called Mr. Gaturu to witness the execution of the will. That the practice at his firm was that where a testator did not have a witness a member of the firm would be asked to witness the execution of the will. Prior to petitioning for probate he held several meetings with all the beneficiaries and none challenged the validity of the will on the basis that it was not signed by the deceased. That there was a day that the will was examined at his Nyeri office although he could not recollect the correct date. In that meeting they were present all the beneficiaries that is the wives, children of deceased and Mr. Wahome advocate who was acting for some of the beneficiaries. He said that the will was dated 29th Jan 1993 and he had in his possession the original will and produced before court a counterpart of it. On being cross

examined he responded that the deceased will was drawn according to his instructions. The deceased had been a client of the firm for some time. He assigned the work of getting the deceased instruction on the will to a lawyer within the firm. The deceased was business man and used to travel to Nairobi frequently. That apart from drafting the will the firm acted for the deceased in other matters. He was informed of the death of the deceased on the same day he died. He traveled to his home to give his condolences. He also informed those that were there that the deceased had left a will. There however was no meeting at the home. The meeting with the family members was either on the 10th or 12th of October 1994 at his Nyeri office. In that meeting there were two lawyers that were present with their respective clients. The meeting was called in response to an application that had been filed by some family members to stop the funeral of the deceased. At that meeting no issue was raised on the signature of the deceased. Subsequently some family members filed another Succession Cause in High Court Nairobi No. 944 of 1996. This cause was filed despite the knowledge that there was a will. The grant of letters intestate issued in that succession was revoked on the basis that it was fraudulently obtained. The deceased was very well known to him and he knew him to be semi literate. He could write in kikuyu and sign his name. He however spoke in English as one trained in English. He could write a letter. That in as far as literacy concerns ability to write the deceased could then be described as literate. He however could not say what the level of the deceased education was. He then stated;-

"*I only know that gentlemen of their days did self education. We discussed with the deceased in kikuyu*".

He confirmed that apart from the will before court there was no other will or codicil. He did accept that the will before court was a complicated document and would be complicated to someone semi-literate. That the will must have been discussed with the deceased. He was however unaware that some of the properties in the will had been sold before death of the deceased. On being shown a search of parcel no. THENGENGE/KARIA/1223 he confirmed that the same was in the name of Hezekiah Wangombe Gichohi one of the witnesses of the will. PW 2 was Evans Nthiga Gaturu. He was admitted to the bar as an advocate of the high court of Kenya 35 years ago. He now deals with consultancies in arbitration and mitigation and does private practice. Previously he was a partner in the firm of Muthoga Gaturu and company advocates from 28th June 1975. He stated that the deceased was client of that firm for a many years. When the firms of Muthoga and Gaturu merged in 1975 the deceased was already a client of Mr. Muthoga. On 29th January 1993 between 10.30 and 11 am having just arrived from court he was informed by Mr. Muthoga that he was required to be an attesting witness of the deceased will. The deceased knew him well and he too requested him to attest the will. The other witness to the will Mr. Gichohi was the firm's accountant. The deceased signed the will in the presence of both the witnesses. They in turn both signed as witnesses and dated it. Having attested the will he left the room leaving behind Mr. Gichohi, Mr. Muthoga and the deceased. On being cross examined he stated that he was unaware of who in the firm obtained the instructions that led to the drafting of the will. He also did not know the content of the will. The deceased was a regular and supportive client of the firm. He accepted that the date near the deceased signature and more particularly the figure 9 seemed to have been amended. He however stated that the date next to his signature was not amended. He did not know whether the deceased knew to read or write but deduced from the signature that he could write. PW 3 was Hezekiah Wangombe Gichohi. He is a professional account in private practice. He had known the deceased for 10 years. On 29th January 1993 the deceased went to his office at Maendeleo House on 2nd floor and requested him to be a witness of his execution of his will. The execution was at Mr. Muthoga chambers at Bruce house 7th floor. This was morning time although he did not know the exact time. Whilst at Mr. Muthoga's chamber Mr. Gaturu was invited into the room. The deceased informed Mr. Muthoga that he was to witness the execution of the will. Mr. Gaturu also witnessed the will. Both of them the witnesses were present when the deceased executed the will. Before witnessing he went through the will and confirmed that it was the deceased will. When he entered the chambers of Mr. Muthoga he found the will on the table bound as the counter part that was before the court. He was not of the view that the date 29 had been amended in the will. The deceased sold parcels No. Thengenge/Karia/1223 and 1224 and transferred to him and his wife. He stated that had he read the will he would have informed the deceased that those two properties had been sold. He said that he did not know the content of the will and even as he gave evidence he had not seen the content. He also did not know who drew the will. The case of the sixth to the 9th objectors was stated by Emanuel Kenga. He is

an assistant commissioner of police in the dept of forensic science based at Nairobi. He had trained at local labs at the C.I.D. Headquarters and had also trained in Israel and France. His daily work entailed examination of question documents which covers signatures. He had been in the field for sixteen years. On 7th April 2006 he received exhibits from Onesmus Wagura. He examined the petitioners exhibit no. 1 the will which was in a photocopy form and marked it A. He also examined documents that he marked B1-9. These documents had what he called known signatures. He compared those signatures with the documents marked A. He found that there was no similarities between the signature in the will marked A and the signatures in B 1-9. He made that finding after considering the individual characteristics. He specifically noted that the signature in the will had a letter 'A' missing whereas in B 1-9 that letter was present. Although the proceedings indicate that the witness had prepared a report in this respect that report was not exhibited before court. He however did produce the photocopied will marked A and the documents B 1-9. In chief on being shown the counterpart will he respondent;

"*The original will, the date there is heavy shading on the figure no. 9 indicating some alteration……. Heavy shading of figure 9 giving indication of erasing…. I have observed while on the witness stand, I find that that signature on original will shows difference in the known signature.*"

On being cross examined he stated that sickness and age can affect ones writing but some individual characteristics would remain. Documents marked B 1-9 had various dates such as 9th march 1963, 27th February 1987, 21st February 1989, 4th April 1987 and B 7 had 1966 on it and B8 had 1967 written on it. He noted that the signature on B 1-9 had similarities and the only difference that he pointed between those documents and the will was that the letter A was missing in the signature on the will. He accepted that B4 -8 had a short form signature which did not resemble the will. In carrying out his examination of writing he said that he normally enlarged the signature on the screen and then would follow the flow of the pen. He accepted that he had failed to cover in his report and his testimony that B3 had a letter S missing in the signature. DW 2 was John Wagura Ikiki. He was a son of the deceased, first born of the first wife. The deceased had three wives; Tabitha Wambui, Leah Njoki and Mary Wanjiku. This witness said that he had a good relationship with his deceased father. He said that the deceased was not educated and did not know how to read or write. He only knew how to write his name. In his lifetime he had businesses of transport. He started running buses then later Nissan matatu. Mary Wanjiku his last wife had a son called Antony Wagura. Those two according to the will had taken the lion's share of the deceased estate. After the death of the deceased the family met. They asked Mary Wanjiku whether she was aware of a will of the deceased and she responded in the negative. They did not believe her and accordingly they filed a case in court to stop the burial. That the deceased before his death in the presence of clan members had divided his properties equally amongst his family. He confirmed that Mr. Muthoga brought the will to the family members. He thereafter stated;-

"*Yes the will was read but we could not agree with it. We discussed because the way it was read was not the way we knew. We realiased the will was favouring one person by 75% whilst others were getting 25%.*"

He denied that was stated in paragraph 13(i) of the will was true. The will stated that he had sold the vehicle belonging to the deceased. He denied that he sold his father vehicle and failed to account for it. He referred to a case HCCC Nairobi 1148/1980 which he said was filed against him and his father and which showed that there was no truth in the statement in the will. He also denied having embarrassed his father or having benefited from gifts given by the deceased during his life time. He prayed that the estate be divided equally as he had distributed it in HC SUCC CAUSE NO. 944 of 1996 Nairobi. He said that if the terms of the will were to be followed there would be death in the family. The documents B 1-9 used by DW1 were obtained from the deceased office. DW 3 was Joseph Ndungu Ikiki. The deceased was his father. He is the second born of the second wife. He stated;

"*We were not always in company of deceased father but we had good relationship. We have never met with our father to discuss about his estate in his lifetime.*"

When he arrived at the home of the third wife after the death of the deceased he said that there was tension amongst family members. That the third wife said that the deceased had written a will but she

refused to produce it. The will was read to the family members by Mr. Muthoga on 12th October 1994 but the family members did not accept it. That the bulk of the deceased estate was given to the young wife in the will. That even some of the properties quoted in the will did not belong to the deceased. This was an indication according to them that the will did not belong to the deceased. He denied having a case against his deceased father and more particularly he denied trying to stop his marriage to the third wife. This was in response to the statement in paragraph 3 (ii) of the will. On being cross examined by the advocate for the other objectors, he stated;

"*We did have meeting, to, with our deceased father.*"

In those meeting the said the deceased indicated that his properties should be divided equally amongst the three houses. At the time when the deceased made his will he was 76 years old. He had three wives, the first two had 10 children each. The last wife had one son. When the will was disclosed to the family members it was found that a large portion of the estate had been left with the third wife and her son. It was for this reason that it was rejected by other family members.

John Wagura and Joseph Ndungu sons of the first and second wives respectively alleged that the deceased met with his family members and indicated that his estate should be divided equally amongst the family members. It is however noteworthy that DW 3 had at first denied that there was such a meeting. It is also important to note that these two witnesses did not give the date of the alleged meeting. If their allegation was that the deceased left an oral will section 9 (1) of the law of succession provides that an oral will is only valid for a period of 3 months from the date it is made. In section 18(2) if is provided:-

"*A written will shall not be revoked by an oral will.*"

The petitioner is obligated under the law to prove the validity of the will. See the case of *Karanja & another vs Karanja (2002)2KLR.* Also in the case of *Wambui and other vs Gikonyo and 3 others (1988) KLR 445* the court of appeal considered that obligation and stated:-

"… ***the party who propounds a will must show that it is intended to be the last wishes of a competent testator and that he had a sound disposing mind. And further, that the will was executed and attested in the manner required by law. Thereafter, the burden shifts on those asserting the invalidity of the will to prove it.***"

The petitioner and his witnesses gave evidence on the validity of the will in that they were present when the deceased executed the will. PW 1 did not participate in the drafting of the will. This was done by someone else. In the submissions filed herein by learned counsel Mr. K. Wachira he argued that failure to call the person who drafted the will was fatal to the petitioner's case is in my view wrong. In my view it suffices that the petitioner and his witness gave evidence confirming that the testator signed the will. The suggestion in those submissions that the calling of the drafter of the will would have dispelled the notion that the will was drafted by someone "with a sinister motive" concerning some members of the was not canvassed in evidence and is for rejection. The issue also that the will fails for not having the translation was not canvassed at the hearing other than it was alleged by the objectors that the deceased could not read or write. On that note PW 1 and 2 were clear that the deceased was semi literate. He could write a letter. He was described as self taught. This evidence on literacy of the deceased was given by two independent witnesses who did not stand to gain from the will. The evidence however of the objectors was given by the two sons who the deceased has disinherited. The deceased according to his will seemed to have had difficulties during his life time with those two witnesses. It was noted that DW 2 became evasive on being asked whether he lived with the deceased. DW 3 was rude to the petitioners counsel when he was being cross examined. Perhaps the two were displaying the very character that caused them to be disinherited by the deceased. I had an opportunity to observe the two witnesses DW 2 and 3 and I find the two could not be relied upon nor did their testimony come across as being truthful. They both admitted knowing the existence of the will but proceeded to Nairobi high court and petitioned for grant of letters of administration intestate for the deceased estate. In so doing they were going on the basis that the deceased had not left a will. On the other hand the evidence of the petitioner's witnesses was consistent and reliable. The three witnesses of the petitioners gave truthful testimony. The question that I

need to consider in this judgment is whether the petitioner met the requirement of section 11 of the law of succession act. That section 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 a 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 is shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary."

The evidence of PW 1 was that he was in the room when the testator executed the will. PW 2 stated that when he arrived at their firm of advocates between 10.30 and 11 a.m. he was invited to be an attesting witness to the deceased will. PW 3 was collected from his office by the deceased with a request for him to be an attesting witness. They both witnessed the deceased executing the will. Thereafter both of them attested to that execution. All the three petitioner witnesses knew the deceased. PW 2 in evidence said that he had occasion to see the deceased even after the signing of the will at their law firm. He described the deceased as a jolly man. I find that the petitioner well met the burden of proof in this case. DW 1 the expert handwriting witness did not submit his report in evidence. He relied on what he described as documents having known signatures. These were supplied by Wagura DW 2. The petitioner's counsel it should be noted was not involved in determining whether B 1- 9 contained the known or actual signature of the deceased. That puts doubt in the examination carried out by this witness. The only similarity that the deceased found was that letter A was missing from the signature. The will where it is executed by the deceased it is as follows 'ONESMIKIKI'. In B 1 and 2 the signature showing there is as follow 'ONESMASIKIKI'. In B3 it is 'ONESMAIKIKI'. B4 – 8 has signatures which are unlike the ones quoted here in that it is simply a short form signature with letters that cannot be discerned. What is surprising to the court is that DW 1 did not note that B3 had 'S' missing. Further the will that was examined by this witness was photocopy. That photocopy is very unclear one. Dw1's evidence is subject to consideration of its weight even if it was not contradicted by another testimony. The court is not bound to accept that evidence. See the case of *DAVIES vs MAGISTRATES OF EDINBURGH 1953 SC 34:-*

"***Their duty is to furnish the judge ….. With the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge ….. To form (his or her) own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the judge.***

The evidence of DW 1 did not assist this court to determine whether or not the signature appearing on the will was that of the deceased. The objectors at the hearing raised a point in respect of the date on the will alleging that '9' had been amended. PW 2 in cross examination confirmed that to him No. 9 in the date seemed to be stressed on one side. DW 1 also confirmed that it had heavy shading. That evidence before court does not suffice for this court to find that that date was changed. It could after all be the style of writing of the person who wrote the date on the will. No question was put to the petitioner and his witness as to who appended that signature on the will. It should also be noted that raising of that issue was an after thought because it was not contained in the objections filed. In my view I find that there is no change in the date in the will. In considering the issues filed in this matter by the parties for consideration I find that issue no. 1 and 2 are related. The response of the court is that the petitioner has proved to this court that the will the subject of this matter is the valid will of the deceased. It has been proved that it was executed in accordance with the law. Section 11 of the law of succession act was well met. On the third issue this court makes a finding that the will was executed by the deceased. This was clearly stated in the evidence of PW 1, 2, and 3. On the fourth issue no evidence was adduced to prove

influence by the petitioner or the deceased third wife on the deceased in making this will.

Accordingly, the judgment of this court is that the objections filed herein against the petition for grant of probate are dismissed with costs being awarded to the executor. Further the court does hereby order that a grant of probate or written will of the deceased do issue forthwith to the executor LEE GACUIGA MUTHOGA.

Dated and delivered at Nyeri this 23rd day of October 2008.

MARY KASANGO

JUDGE