REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 1942 of 2003

IN THE MATTER OF THE ESTATE OF WARINGA GITAU

alias WARINGA SIMON GITAU (DECEASED)

RULING

The parties before me are a ghost wife (as described by the Land Tribunal) and biological daughter of the deceased.

Initially I was asked to decide validity of a written will executed by the deceased but, as the hearing proceeded, I was also asked to proceed with the distribution of the two properties left by the deceased.

The Petitioner/Respondent is the daughter and is married and the Objector/Petitioner is the ghost wife of the deceased.

It is now agreed that the deceased left two properties namely:-

1. **Land parcel number Loc.7/Ichagaki/328 – comprising 5.6 acres.**
2. **Land parcel number Loc.7/Ichagaki/3152 comprising of 1.9 acres – 0.64 hectares.**

I shall first deal with evidence before me.

The Petitioner called as her witness the Advocate who had prepared and get the written will executed by two attestors. DW.1 is Mwangi Kamau and testified that he was an advocate of the deceased and was involved in Land Dispute Tribunal case No.141/01. After getting advice on formalities to execute a will, the deceased came to his office on 19th March, 2001 in company of two elders– namely Moses Mwangi Mungai and Muchoki Kamau and his daughter. The capacity of Muchoki Kamau to so attest the will is questioned by the Objector.

The deceased was very certain of how to divide her properties after her death. She mentioned both parties and also nine children of the objector. She expressed her wish that land parcel Loc.7/Ichagaki/328 to be shared equally between the two parties herein. He specifically testified that as he knew that the deceased also had another parcel of land, he asked her about that parcel. But she stated that the same is sold by her to John Mwangi Njuguna and this cannot be included. I do note that in her supporting affidavit sworn on 20th July, 2004, the Petitioner has annexed the transfer form dated 18th April, 2002 as Ann. Twn 3(a).

I cannot ignore the existence of this document but cannot rely on the same as both parties are agreeing that both parcels are now available as estate properties. But this fact can be considered to determine the validity of the will.

Going back to the evidence of the DW.1 he testified that after he prepared the will, he called two attestors and explained in kikuyu language the purpose and contents of will. Thereafter the will was executed by the deceased placing her right thumbprint and two attestors signing as per law.

He also explained the mention of other property before the Land Dispute Tribunal because of the failure to get the same transferred. He also asked about nine children of the Objector. He stressed that the will is a genuine document. In cross-examination he denied that the will was prepared after the death of the deceased.

The Petitioner then testified and explained that initially she filed her petition as an intestate one because the will was supposed to be read at the funeral, which was not done, and she came to know of a written will when she came to the court. She produced a letter dated 24th June, 2004 addressed by her advocate to DW.1 to produce the original one. (D.Ex.2). In her cross-examination she specified that the Objector was supposed to stand as a son to the deceased as if she was her brother and that she came with her three children and bore six children after she came to the deceased. She agreed that the deceased was looking after the Objector and her children. She said that she was not present when the will was executed. That could be true as DW.1 also testified that after preparing the will he called two attestors and did not mention the Petitioner, being present when the same was executed.

I have to take in consideration that the witnesses before me are illiterates and may not know the nature of the legal documents. Even if she knew and tried to hide it, that fact cannot invalidate the will. I also note and find that if the will was prepared after the death of the deceased as alleged by the Objector, it mars her own case as she is mentioned in the will. Why the Petitioner would make a fraudulent will which mentions also the Objector as an equal share-holder?

DW.1 is one of the attestors who attested the written Will. He denied that the Petitioner was with them. But he testified that the other attestor also signed the will.

The Objector stated in her testimonythat when she went to the deceased, she was supposed to have married a son who was not there. That is the reason of her being described as a ghost wife even in the award of the Land Disputes Tribunal. (D.Ex.1). The award stipulates that both the deceased and the Objector be registered as tenants in common in respect of both the properties.

She further stated that the will is invalid because she was not present at the time of its execution and that one of the attestors Muchoki Kamau was mentally challenged and not fit to attest the same. She explained her averment by stating that the said Kamau sold his properties for nothing. Of course nothing was brought forth to prove this averment.

At this juncture, I can and do find that the mental status is a medical condition and has to be proved strictly through appropriate evidence advisably through a medical report. She has totally failed to prove her allegations.

She agreed that as per custom, she became kind of a brother to the petitioner and that she would inherit the deceased as a daughter-in-law and would inherit through her son. She agreed that her ID also confirms that the deceased's husband was her father.

She further vehemently averred that the deceased cannot give the properties to anyone without her consent. But conceded at the same breath that the Petitioner should be given property number 3152 which is 1.9 acres and she should be given plot no.328 as she has nine children who were dependants to the deceased.

She also agreed that the relation between her and the deceased became hostile after the land case and that the deceased was living with the Petitioner at the time of her death.

The learned counsel from both parties filed written submissions and made oral submissions, after the close of their respective case.

It was contended by Mr. Kinuthia, the learned counsel for the Objector, that the will is invalid. He elaborated the grounds. But I do find that It is not proved sufficiently by the Objector that: (1) the deceased was a senile person. I also note that she gave evidence before the tribunal after the will and no issue of her senility was raised. On the contrary, award of the Tribunal is relied upon by the Objector; (2) that the mark of the deceased is not shown as to whether it is of her right hand or left hand. I note that It is sufficiently on evidence that it is of her right hand; (3) that one of the attestor was not a competent witness. I have considered this issue earlier and reiterate that this allegation is not proved. It is trite law that the witness should be proved to be an imbecile and mentally challenged or deranged at the time of signing. Only because he did not give his evidence at the time of the hearing, without anything further, I cannot presume his imbecility at the time of attestation. I thus reject this contention by the Objector.

Considering the evidence as a whole and my observations made in this ruling, I dismiss the claim of the Objector that the written will of the deceased produced in the court is invalid. I do hold that the same is valid.

Having found so I shall have to address the evidence produced as regards the award of the Land Dispute Tribunal case No.41/2001 which declared that the two properties be registered in common between the deceased and the Objector. The award as per both parties adopted by the Principal Magistrate's court Murang'a.

On this evidence, Mr. Ngugi the learned counsel for the Petitioner submitted that the award, being later in time than the will, does not make any difference. He also stressed the importance of evidence of the Objector when she agreed that she was a daughter-in-law of the deceased and that she would inherit the deceased as such. According to Mr. Ngugi the will and the award thus state the same thing. Both parties according to the law and the will shall share equally.

I have considered carefully the above issue and the effect of the award on the written will which was made earlier than the judicial pronouncement over the two properties. The Tribunal did consider the fact of the nine children of the Objector and after consideration, divided the lands in equal portions. I also note that the will only talked about the big property because at the time of the will, according to her the other property was sold. That is not the situation on ground. Both properties according to the parties are estate properties. The Objector despite being entitled to half of the small property, being number Loc 7/Ichagaki/3152 has agreed to give the same wholly to the Petitioner.

I am of a view that even if the written will may loose its effectiveness after the award of the Tribunal, it is clear that the Objector was bequeathed her share during lifetime of the deceased and may not be entitled to claim her share once again on the half portion of the land. I say so, because the deceased did not leave any other beneficiary behind her except the two parties.

I have been addressed on the application for dependency of the nine children of the Objector. In my humble view, considering the award as well as Objector's concession that she is a daughter-in-law and would claim her right through a son (her customary husband), the dependency of her children would be through the ghost son, and not through the deceased.

With these facts and circumstances created by the customary law and statutory law, I have to determine the distribution of the estate.

As stated earlier the deceased left two parcels of land. The bigger parcel comprise of 5.6 acres and the smaller comprised of 1.9 acres. I also note that both parties are at logger head.

I do consider the equitable side of the case and also my inherent power to make orders which is just and fair. (see 47 of the Laws of Succession Act and Rule 73 of Probate and Administration Rules made there under.

Considering all the circumstances of the case and doing the best I direct that the estate be distributed as under:

1. Land Parcel number Loc 7/Ichagaki/3152 be registered in the Petitioner Felista Wanjira Njogu absolutely.

2. Land Parcel Number Loc.7/Ichagaki/328 be divided as under:

(a) 4 acres thereof be given to the Objector Cecilia Wanjiru Gitau and

(b) remaining 1.6 acres to the Petitioner.

The parties to bear their own costs.

Dated and signed at Nairobi this 8th day of February, 2007.

K.H. RAWAL

JUDGE

8.2.07