REPUBLIC OF KENYA

IN HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE 1201 OF 1999

IN THE MATTER OF THE ESTATE OF GATANA GAKURU (DECEASED)

RULING

The late Gatana Gakuru Alias Gatana Kariuki Gakuru (deceased) passed away on 23rd June 1998 at Nairobi Hospital.

Fred Gitari Kariuki, Ephantus Muchira Kariuki and Dr. Wanjiru Abuto petitioned on 7th June 1999 for the grant of probate of written will.

According to the petition the deceased died testate and left a valid written will dated 1994. Muthoni Mwanjirani, the first daughter of the deceased filed an objection as well as the answer to the petition on 16th September 1994.

The matter was heard by way of oral evidence to determine the twin issues of:

- Which of the deceased two written wills is valid – is it the 1984 or the 1994

will

-Who should be granted the grant of representation of the deceased estate.

The Objector called two witnesses in addition to her twin evidence.

The gist of her evidence is that, she being the first born of her deceased father played a critical role in her family. She assisted the deceased to purchase one of the deceased property being plot No. 466 in 1966. She also assisted the deceased when he was constructing the house. It was due to her contribution that the deceased wrote a will in 1984 and granted her as the Executor. This was done because according to the Objector she used to send money to the deceased while she was working abroad and that money was used to plant coffee and contributed to the education of her brothers. The Objector's husband passed away and due to the hostility of her in laws, she returned to her father's home.

It would seem from the Objector's evidence that there was tremendous hostility between her and the petitioners. This the Objector testified that sometime in 1994, the deceased prepared a will which was given to Gitari (one of the petitioners to have it typed) and in that will the deceased intended to leave this estate under his wife's name to hold in trust for all his children. Just three months before the deceased passed away, this will was read before all the children and the Objector queried why her name was removed as the Executor and thereby replaced with that of Muchira Kariuki and Dr. Wanjiru Abuto. A vote was taken among the children as to who should be the Administrator and according to the Objector

all her brothers voted against her, whereupon the deceased advised them to "leave the matter of the will alone until he was through with the treatment as he was about to be hospitalized. Hence the Objector did not sign the 1994 will as he was very old and sickling and the Objector considers 1984 will which was drawn by M/S Waweru Gatonye Advocate as the valid will.

The Objector also relied on the evidence of Mr. Waweru Gatonye who confirmed that he prepared the will mad eon 12th day of October 1984 and witnessed the deceased signature. The Objector also relied on the evidence of her sister, Margaret Wanjiru Njeru whose testimony confirmed that the Objector helped the deceased purchase the parcel of land known as Plot 466. The Objector used to send money to the deceased for the purchase of land while she was working in America.

Thereafter the Objector also contributed to the contribution of a stone house. She was aware that her late father wrote a will in 1984, whereby the Objector and Fred Gitari Kariuki were appointed as the Executors. She claimed that she was not interested with the deceased property and she told him as much. She was however not aware of a subsequent will made in 1994.

That was the summary of the Objector's case, who called upon the court to make a finding that the will of 1994 is a forgery and uphold the will of 1984.

On the other hand the petitioners supported their petition and relied on their own evidence and that of Harun Musicho Utuko an advocate who prepared the will made in March 1994 which is said to have revoked all the previous wills ……..or testamentary document. This advocate prepared the will and witnessed the execution alongside his clerk one Robert Ndwiga Njeru who subsequently left his employment. The 1st, 2nd and 3rd petitioners also gave evidence in support of their petition. The gist of their evidence can be summarized as follows:

That the deceased indeed made a will in 1984, but he subsequently received the will and the Objector was not named as an executor of the 1994 will. There is tremendous hostility between the Objector and the other siblings principally because the Objector adopted a hostile attitude towards the petitioners and their parents before they passed away. Indeed the Objector did not visit the deceased even when he was admitted in hospital before he passed away nor did she attend the burial. She visited their mother after nine months after the father's death.

Secondly the hostility was exacerbated by the Objector when she attempted to take occupation of plot No.466 by settling in the homestead and undertaking commercial farming on the deceased parcel of land to the exclusion of other beneficiaries.

These incidents were reported to the police and lend to the Objector's arrest and confinement to the local police station.

According to the petitioners the deceased made the will of 1984 but he subsequently revoked it on his own and left the will of 1994 which they are propounding.

Both counsel for the petitioner and the respondent made submissions in support of their clients position which I have also taken into due consideration in determine the principal issue of the validity of the will.

According to the Objector, the deceased will, that the petitioners are propounding is a forgery, as the Objector alleges that the deceased did not sign the will, he was too old and when the will was read he said the matter be left alone until he recovered.

Section 5 of the Law of Succession Act makes provision of the persons who are capable of making wills as follows:

> **5(3) "Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in a state of mind, whether arising from mental or physical ill-ness, drunkenness or from any other cause, as not**

to know what he is doing"

5(4) "The burden of proof of that a testator was, as the time he made any will, not of sound mind, shall be upon the person who so alleges"

The evidence before me by the Objector is not adequate and the Objector has not dismayed this burden of proof. Secondly, the Objector admits that another will was introduced by the deceased which was prepared by Gitari whereby the Objector queried why she was left out as an executor but according to the Objector, the deceased did not sign this will. This clearly shows that the deceased had intention and indeed he had changed his mind about his will of 1984 and hence he prepared another will which was read to his children in 1994 three members before he met his death. Thirdly, I have looked at both will, in the 1984 will the following are the executors:

- Fred Gitari

and

-Muthoni Mwanjirani

The deceased bequeaths his properties to five of his children

namely:

1) Ephastus Muchira Kariuki

2) Fred Gitari Kariuki

3) Mrs. Faith Njeri Wambu

4) Mrs Muthoni Mwanjirani

5) Dr. Wanjiru Abuto.

The only variance with the 1994 will is that the Objector is no longer an executor and in her place the deceased appointed Ephastus Muchira Kariuki and Dr. Wanjiru Abuto.

The beneficiaries are the same excepts that the deceased directs that "the said lands will never be subdivided, sold; transferred or mortgaged whatsoever.

The executors are also appointed as Administrators of the deceased one half share of the Flour mill owned between the deceased, his son in law Jesee Ngecu Ndwiga. During the hearing it was said that the value of this Flour mill is about Ks.50,000/=.

I have considered the above evidence to determine whether the objector was left out as the deceased child and beneficiary. It is averred that the Objector is a beneficiary of the deceased properties known as GICHUGU SETTLEMENT/SCHEME 134 and 466 in equal shares with her own brothers and sisters.

Her fear was that the petitioners who is hostile towards he would marginalize her and deny her of her rightful share. I think the court cannot speculate and in any event, as stated above, the evidence by the Objector fell short of proving that the will of 1994 was a forgery. No evidence was brought of how writing experts to show that the deceased signature on the 1994 will was a forgery. Moreover, no material report or any evidence whatsoever to show that the deceased did not have the requisite mental capacity or ability to revoke the will in March 1994 and to challenge the evidence of Mr. Utuku the Advocates who witnessed the signature.

It was not disputed that the deceased made the 1984 will before Mr. Waweru Gatonye Advocate, but the

same was revoked by the 1994 will.

Accordingly the Objector has not been able to prove the allegation stated in the Objection. The Objector and cross petitioner should therefore fail and are hereby dismissed. This being a family matter I decline to award costs and order each party to bear their own costs.

The grant of probate of written will be and is hereby granted to the petitioners.

It is so ordered.

Ruling read and signed on3rd June 2005.

MARTHA KOOME

JUDGE