



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**SUCCESSION CAUSE NO.423 OF 1993**  
**ESTATE OF MWANGI WAGEREKA - (DECEASED)**

**J U D G M E N T**

Mwangi Wageroka (hereinafter referred to as the deceased) died on 13th September, 1992. It is not agreed how old he was as the certificate of death shows that he was 72 years when he died but DW.2, who is one of the Objectors say that he was about 92 years when he died.

Before he died he was sick for sometime as he was a cancer victim.

When he was attending hospital in Nairobi, he stayed with his nephew one Francis Makanga. On 11th August, 1992, he visited the offices of Mr. Mbugua Advocate, of Mbugua & Mbugua Advocates and a WILL was prepared for him in Kikuyu, language. A translation was also prepared in the English Language.

The WILL was produced and marked exhibit 3, and the translation exhibit 5.

The deceased estate which is in issue comprised of what is described as L.R. No.15936/1 in the WILL, but in the application by the Objector as L.R. No.9064. The land measures 65 acres.

Mr. John Muchiri Mwangi applied in the High Court Nairobi for letters of Administration with the WILL annexed as he had been mentioned in the WILL as the person who would take care of the sub-division of the land. He managed to obtain the grant but also made an application for confirmation. If this was necessary or not is not relevant in the matter before me.

But the matter did not go far as DW.1 and DW.2 who had not been provided for in the WILL sought revocation of the grant and an order that they be provided for from the deceased estate. In his application DW.2 also challenged the WILL by saying that it had not been proved to be the WILL of the deceased.

When the matter came before Lady Justice Aluoch she ordered among other things by consent that the dispute between the parties be heard through viva voce evidence, that parties draw issues and that the file be transferred to Nakuru for hearing.

For the Petitioner four witnesses were called to prove the WILL. They were two widows of the deceased and two Advocates. One is Mr. Mbugua, Advocate who drew the disputed will and attested it. The other is an Advocate then an employee of M/S Mbugua & Mbugua Advocates who was called to attest the deceased WILL.

The widows supported the WILL. DW.4 happens to be the mother of the objectors. Her evidence was mainly to the effect that DW.2 and the deceased did not agree. She gave an incident when the two had a row and the deceased was arrested. Nothing much was said as to why DW.1 was left out.

The Objectors denied that they had any serious dispute or misunderstanding with their deceased father. They said that they lived in the father's farm. The father had shown each of them where to stay. They do not believe that the WILL was made by their father. DW.1 said that his father was illiterate and could not sign his name. DW.1 also said that his father had confided to him that his cousin Makanga had made him sign something he did not know. He advised his father to be patient and the matter would be looked into after the deceased felt better but he got worse and died before the complaint was looked into.

The WILL was read at the funeral. It was brought by Makanga 3 days before the funeral.

DW.2 denied being enemies with his father. He said that his father was a drunkard and used to call him names. The deceased arrest by Police was caused by the deceased himself. DW.2 had complained to the Police against the deceased's workers. The deceased obstructed the police from making the arrest. He was arrested. He denied that the relationship between him and his father was so strained as to disinherit him. Much more was said by both sides which I do not have to reproduce in this Judgment. But it is enough to say that the Objectors are blaming Mr. Makanga and think that he is the author of the WILL.

The Advocates for the parties agreed to put in written submissions. For the Petitioner, M/S Mirugi Kariuki & Co. Advocates were very brief. The submissions are wrongly headed as "Objector's submissions". But that does not matter. The Petitioner's counsel relied on the fact that the WILL was attested by two advocates and the reasons given as to why the two objectors and DW.3 were not provided for.

M/S Omae & Co. Advocates for the Objectors attacked the WILL and made other interesting Observations.

I have carefully perused and considered the submissions by Counsel for the parties. Since they are part of the record I need not reproduce them in the Judgment.

The general policy of the court is to give effect to WILLS. But where a WILL is challenged the court has a duty to decide whether it is a valid WILL.

From the evidence adduced before me and it is common ground that the deceased was a sickly old man. It would appear that he died a month after making the disputed WILL.

It is also clear that the deceased was an old man and if literate at all only in Kikuyu language. How did the idea of making a written WILL come to him when he was sickly? It is agreed that the deceased was under the care of Francis Makanga a nephew of the deceased. Francis Makanga benefitted immensely from the WILL. Can I safely disagree with the Objectors that Francis Makanga did not take advantage of the deceased's sickness and closeness and used the influence he had on the old man to have the WILL made to his advantage and to the disadvantage of others?

PW.3 Caroline Asero Ageng'o Advocate, attested the WILL. The main witness is Mr. Mbugua, Advocate. He said that he prepared the WILL. I have perused the English version of the WILL which was first drafted by Mr. Mbugua. I know no special form of words are necessary in making a WILL. But I cannot help agreeing with Mr. Omae for the Objectors that the document was not prepared by an Advocate of Mr. Mbugua's calibre and experience. The document is just in the lay-man's language. Mr. Mbugua's assertion that the old man was in good health is not supported by evidence. With all due respect to Mr. Mbugua, I formed the opinion that he was too much on the defensive in his evidence. He however, agreed that the deceased was in company of somebody else. That somebody else was never disclosed to the court.

Mr. Mbugua however, said that the deceased had a piece of paper where he had written everything. Who had prepared this piece of paper? Was it Francis Makanga?

The deceased did not mention that he was leaving out some of his sons in the WILL.

I also agree with Mr. Omae, Advocate that the WILL is suspect because it does not give the correct Title Number. It gives I.R. Number as the L.R. Number. Did Mr. Mbugua see the Title Deed? I also agree that the WILL tells lies about itself. The deceased had not bought the land as alleged in the WILL. He had acquired it through adverse possession. The statement that Mr. Francis Makanga had bought the land bequeathed to him is not supported by evidence. So is the statement that he took care of the land (plot). These statements were included to cover his guilt.

I have considered all the relevant material placed before me. I find that the alleged WILL was not signed by the deceased with the full knowledge of its contents. He was old and sickly and about to die. I find that the WILL was the work of Mr. Francis Makanga. I find the same not proved. The letters of Administration with the WILL annexed issued to John Muchiri Mwangi are revoked. I declare that Mwangi Wagereka died intestate.

The costs of this cause so far will be borne by the estate. The Objectors will have 15 days within which to formally file their Objection and cross-petition. The Petitioner may amend his Petition or file a Petition on intestate succession.

The pleadings before me do not empower me to go to the distribution of the estate as they stand.

Parties did not also tell me how they would like to have the land distributed in the even of the WILL being found to be invalid.

**Dated and delivered at Nakuru this 3rd day of August, 2000.**

**D. M. RIMITA**

**JUDGE**

**3.8.2000**

**2nd August, 2000**

**The  
P.O  
NAIROBI**

**Reader's  
Box**

**Digest,  
78479,**

**Dear Sir,**

**PAYMENT OF ARTICLES NOT RECEIVED**

**I hope and believe that your records will show that I paid for a book (on Health) and a machine (Insect Repulser) which have not been sent to me as yet. Please may I know the position before dealing with you further.**

**Yours Sincerely,**

**Hon.  
No.830756**

**D.**

**M.**

**Rimita**