In re Estate of Kimetto Arap Kili (Deceased) (Succession Cause 1 of 2021) [2023] KEHC 636 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KEHC 636 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

SUCCESSION CAUSE 1 OF 2021

RN NYAKUNDI, J

FEBRUARY 10, 2023

BETWEEN

KIPLAGAT STEPHEN KITUR ..... PETITIONER

AND

HELLEN CHEPTUM KE BENEI & 3 OTHERS ..... OBJECTOR

JUDGMENT

1. By way of Summons for Revocation or Annulment of Grant, dated January 21, 2010, the Objectors seeks revocation of the Grant of Probate issued to Kiplagat Stephen Kitur in respect of the estate of Kimetto Arap Kili (Deceased) on October 19, 2009.

2. The application is premised of the face of the grounds therein and is further supported by the affidavit sworn by Kimisik Metto, on January 21, 2010.

The Objectors' Case

3. The Objectors' case is that the deceased herein died on the August 17, 2008 and a grant of probate was issued to the Petitioner on October 19, 2019. The Objector's case is premised on a Will allegedly signed by the deceased.

4. The Objectors contended that the Petitioner herein failed to disclose material facts in relation to the estate of the deceased. The Objectors maintain that the deceased left behind other dependants who were not listed in the Affidavit in support of the Petition for the Grant of Probate.

5. The Objectors deposed that one Thomas Kebenei had previously commenced succession proceedings in Succession Cause No 84 of 2009 in relation the deceased herein.

6. The Objectors contended that the letter by the Assistant Chief in the instant cause was conveniently written so as to exclude some of the children and beneficiaries of the deceased.

7. The Objector further deposed that at the time of the death of the deceased had land in Nandi District and at Chemoset Farm in Uasin Gishu and also had herds of cattle which property was not disclosed in the petition.

8. The Objectors contended that at the time when the deceased was writing the impugned Will, he was well over 105 years and was visually challenged, ailing and could not move alone without being assisted.

9. The Objectors contended that the deceased was illiterate and innumerate and could not understand either English or Kiswahili. The Objectors further contended that the deceased could not have therefore signed the impugned Will or even comprehend it contents. The Objectors further deposed that there is no certificate of translation of the Will on record to show that he understood its contents.

10. From a cursory glance of the Will, the Objectors deposed that the deceased purportedly bequeathed parcel of land known as Uasin Gishu Ngeria to his son Thomas Kebenei and Kaptaling Farm MB (Kimoson Farm) to one Somoei Metto. The Objectors contended that the deceased never owned the above listed property and could have therefore bequeathed the same.

11. From the contents of the impugned Will, the Objectors contended that the distribution and tone of the said Will was done in a manner so as to favour one Pascally Sirtui, who was allegedly in control of the deceased herein at the time when the Will was being written. The Objectors maintain that the said Pascally Sirtui has since time immemorial attempted to fraudulently steal a match from the rest of the children of the deceased.

12. The Objectors further argued that the Petitioner herein in collaboration with the said Pascally Sirtui have harvested and sold mature wattle trees from the estate and have even gone ahead to lease out part of the deceased estate to third parties to the detriment of the other beneficiaries.

The Petitioner's case

13. The application is opposed by the Petitioner vide his Replying Affidavit dated February 11, 2010 and filed in court on February 12, 2010.

14. The Petitioner deposed that he is the Executor of the Will of the estate of the late Kimetto Arap Kili. Further he deposed that a Grant of probate of the last Will dated October 19, 2008 was issued to him on 19th October.

15. The Petitioner contended that this instant application has not met the grounds to warrant the revocation of grant. The Petitioner maintains that the proceedings to obtain the grant of probate were proper and that all the requisite procedures were adhere to.

16. The Petitioner denies all the allegations that the impugned Will was obtain through fraud and coercion. The Petitioner maintains that no evidence has been tendered before the Court by the Objectors to prove the said allegations.

17. The Petitioner contends that he duly executed the last wishes of the deceased and that he did not leave out any of the beneficiaries or assets of the deceased that had been mentioned in the Will. The Petitioner's position is that those left out in the Will can seek a remedy under Section 26 of the *Law of Succession Act* rather than seeking the revocation of the grant.

18. In addition, the Petitioner deposed that he is not aware of any ongoing succession proceedings in relation to the estate of the deceased and argued that if they were any, then they ought to be dismissed as they are void ab nitio.

19. The Petitioner argued that he is not the marker of the Will and was not present went the Will was being made. The Petitioner further maintains that he is not aware of any property belonging to the deceased that had been omitted in the Will.

20. The Petitioner further deposed that parcel of land known as Nandi/Mutwot/713 was transferred in the year 1998 way before the demise of the deceased.

21. According to the Petitioner, he has diligently and properly managed the estate of the deceased and that no notice has ever been served upon him requiring to diligently administer the estate of the deceased. The Petitioner further deposed that he shall be able render a full and accurate inventory of the assets and liabilities of the estate of the deceased up to date if called upon.

22. The Petitioner contended that this instant application has been brought in bad faith and ought to be dismissed.

The matter proceeded by way of viva voce evidence.

Determination

23. I have carefully considered the summons before me, the response thereto, the oral evidence of the witnesses tendered and the submission filed by the respective parties. The only issues for determination are: -

a) Whether the deceased had testamentary capacity to make a valid Will?

b) Whether the Grant of Probate issued on October 19, 2010 ought to be revoked?

24. A Will is the means by which a person exercises his or her testamentary freedom to bequeath his or her estate without relying on intestacy rules of probate. The validity of a will is dependent on, the capacity of the testator to make a will at the material time and compliance with the formal requirements for the making of a will.

25. The threshold of the essentials of testamentary capacity were laid out in the case of *Banks v Goodfellow {1870} LR 5 QB 549* as cited with approval in the case of *Vaghella v Vaghella*:

> ' A testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made.'
>
> (See also the principles as domesticated in the cases of *Ngegi Muigai & Another V Peter Nyoike Muigai &4 Others in the matter of James Ngengi Muigai (Deceased) [2019] eKLR*, *Rosemary B Koinange (Suing as legal representative of the Late Dr Wiflred Koinange and also in in her own personal capacity) & 5 others v Isabella Wanjiku & 2 Others [2017]*

26. Section 5 of the *Law of Succession Act*, deals with capacity to make a will, and of testation. The relevant provisions state as follows -

> 5(1)Any person who is sound of mind and not a minor may dispose of his free property by will
>
> (2)

(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 such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

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

27. In the case of *Re Estate of Gatuthu Njuguna (Deceased) [1998] ekLR* Githinji J as he then was construing the issue of capacity of a Testator had this to say: 'As regards the testator's mental and physical capacity to make the will, the law presumes that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind, in this case the applicant. However paras 903 and 904 of Volume 17 of Halsbury's Laws of England show that, where any dispute or doubt of sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity, and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of testator's capacity is one of fact which can be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that, if the objector produces evidence which raises suspicion of the testator's capacity at the time of execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof and the burden then shifts to the person settling up the will to satisfy the court that the testator had the necessary capacity.'

28. The definitional elements or the minimum requirements behind the rationale justifying formalities in the making of the Will was restated by De Villiers J in Real and personal property in England, Cambridge University press 106 at page 4-5 as follows: 'It is obvious that will are always more than other legal documents open to the dangers of fraud, perjury and forgery, duress and undue influence, and to doubts as to the mental capacity of the testator, for the reason that the testator is necessarily unable personally to guard against these dangers at the time when the will takes effect. On this account most or all systems of law have required some formality or other to be observed in the execution of will.' This was further revisited more recently by William F Ormistone, QC 'Formalities and Wills: A plea for Caution' [1980] 54 ALJ 451 where he observed:

> ' Sufficient protection against witnesses who would misrepresent the wishes of those who are dead and unable to give direction evidence ae dead and unable to give direct evidence of their testamentary wishes and acts.'

29. Capacity is the ability to appreciate the intention of disposition of property by the deceased and to act in accordance with that appreciation. Throughout our succession law, value judgments have been on challenges to the making of the Will by the testator on the basis of testamentary capacity and or undue influence to pass on his or her estate to the next generation. It therefore emerges that avalanche of disputes on this subject under Section 5 of the Act revolves around assessment of testamentary capacity which has a powerful influence on the outcome of the impugned Will. The courts as such like in the instant cause are confronted with the different possible perspectives for and against the making of the Will. It's noteworthy to appreciate that although testamentary capacity is a legal concept the threshold of it falls ultimately in the arms of the court. This inquiry is the basis for the test on testamentary capacity which is determined on a case by case basis. What is intriguing is how such an

important assessment and meaningful process in the Will making can be decided conclusively without the inferential stated by Lord Templeman commonly known as the 'golden rule' in *Kenward v Adams 1975) AC* in which he made the following observations:

> ' That In the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest that precautions be taken, the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfied himself of the capacity and understanding of the testator, and records and preserves his examination and finding'

30. Given the above narrative from the persuasive jurisprudence I take judicial notice that the Kenya life expectancy as at 2022 stands at 67.2 1 years. It is even lower in the early years when the testator pronounced himself as to the disposition to bequeath his estate to the inheritors. In the book of Psalms verse 90: 12 the Psalmist asked God to make known the measure of his days. That revelation in God's command teaches us to number our days a right to 70 years. The average life expectancy globally stands at between 75 for women and 70 for men. The great price of extended life expectancy is from the Lord who reigns and clothed with majesty. The beings whose life is beyond 70 years have everything to thank God for the bonus extension of life.

31. One then must ask whether the deceased aged 95 at the time he gave instructions to his counsel Mr Kalya he had the ability to understand and give proper consideration to the various matters which are called for, to identify the estate portfolio and to appropriate it fairly and justly. That is whether he had testamentary capacity to give the contested instructions and whether those instructions reflected his intentions. So from jurisprudence the testator's legal counsel was under professional duty in the circumstances of this case to carry out an assessment of the testator's capacity. This is of necessity given the fact that he was dealing with an aged testator. It is important to emphasize no such assessment exists as a preamble to the making of the Will. In light of what has been alluded in the objection proceedings, a certificate from qualified medical practitioner making specific reference to the testator's ability to understand the effect of a Will the nature al extent of his or her estate was an indispensable indicator. This is one case that a certificate of capacity was a condition precedent to the making of a statutory Will.

32. In the instant cause, the Objectors have challenged the testamentary capacity of the deceased at the time of making the will. The Will's validity is questionable as when it was purportedly made the deceased was aged (97) years. The Objectors have argued that the deceased did not possess the requisite soundness of mind for purposes of making the impugned Will as he was also in poor health. The burden of proof in the first instance lies upon the person alleging lack of capacity. Once it is established to the satisfaction of the court that in fact the testator was not of sound mind then the onus is shifted to the person propounding the Will to prove the existence of mental capacity. In the instant case, the Objectors did not adduce any evidence as to the condition of the deceased as at the time of the execution of the Will. They did not tender any medical report to that effect.

33. The Objectors have also called into question the circumstances under which the will was made which they say ought to raise suspicion that the Will was not the product of the deceased's intentions or wishes.

34. In addition to having testamentary capacity, a testator must know and approve the contents of this Will. A testator will be deemed to have known the contents of his Will if he is aware of its contents and understands the terms. Approval is seen from the execution of the Will and in *John Kinuthia Githinji v Githua Kiarie & Others, Civil Appeal No 99 of 1988*, it was held that it is essential to the validity of the Will that at the time of its execution, the testator should have known and approved its contents.

35. The law on knowledge and approval of a Will is found in Section 7 of the *Law of Succession Act* which provides that;

> ' A Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been adduced by mistake is void.'

36. Where a person who plays the central role in the making of the will, that is other than the testator himself/herself, takes a substantial benefit under the will; the role of the court is to scrutinize the evidence carefully so as to be satisfied that the maker of the will did indeed know and approve the contents of the document before he/she signed it.

37. Suspicion would arise for instance in cases where the principal beneficiary under the will is the person who suggested the terms of the will to the maker, or wrote the document himself, or took the testator to an advocate of his own choice, among others. It is noteworthy that the principal beneficiaries under the terms of the subject Will is the Petitioner and his siblings.

38. During cross-examination PW1, Counsel Wilson Kalya, told the Court that the deceased did not speak English but had a smattering of Kiswahili. He further told the Court that the deceased spoke Nandi but could not read. He conceded that the Will was drawn in English and that he did not have a Certificate of translation to show that the contents of the Will had been explained to the deceased. Rule 54(3) of the *Probate and Administration Rules* provides that where the testator is blind or illiterate or will is signed by another person by the direction of the testator or where it appears to be written in a language in which the testator is not familiar evidence is required before the will is admitted to probate. Rule 54 makes it mandatory for the Court to satisfy itself that the testator had knowledge, by requiring an affidavit showing that the contents of the will had been read over and explained to appear to be understood by the testator immediately before the execution of the Will.

41. There is also a cautionary function on formalities alert to adhere to the requirements on language. It appears on the phase of the Will that the testator gave instructions in English to the author of the Will. Looking more closely to the evidence the testator was absolutely conversant Nandi sub tribe dialect. A general irreducible minimum content of the Law in the making of the Will requires a core certificate on the language of communication and interpretation from the Legal Counsel. Effective channels of communication with the testator's legal counsel are vital for the courts to appreciate the particular events in regard to the testamentary intention to connote the validity. For example this court was told that the legal counsel and the testator in creating the impugned Will canvassed in their local dialect. I echo the permissive words stated in the objection proceedings relating to whether the intentions of an aged testator had been given fruition for want of a certificate on the language being conveyed to his legal counsel to ensure none of his intentions were not captured in the Will. This means the contextual interpretation of the disputed Will remains questionable. One such question is whether the measure designed to protect or advance the essential exercise of power to the extent of distributing his estate was impaired by the deficit in language, loss in lucid intervals, delusions or presumption of sound disposing mind. Keeping a vigilant examination of all the evidence it came to bare that the testator's estate in the category introduced in the Will suffered from omissions or mistakes apparent on the face of the record. One wonders whether the questionable Will reflects that the testator's actual intentions and that those intentions must have been freely formed by the testator. The evidence goes further to demonstrate the most complex relationship between the knowledge of the testator and approvals on distributions of the estate in the presence of his legal counsel. The primary purpose of the Law as enacted by parliament applicable to all citizens in this context is to protect vulnerable the testators likely to act in discrimination of the beneficiaries incorporated in the testamentary.

39. Further, during cross-examination PW2, Doris Anyango Oswago, told the Court that the deceased was illiterate and was speaking Nandi language. She also conceded that she did not have a Certificate of translation to prove that the deceased understood the contents of the impugned Will.

40. From the evidence tendered by all parties it is clear that the deceased was illiterate, he did not how to read and write however, the Will in testament was drawn in English. An issue arising is that the deceased could not have attested the said will as she could not understand the contents therein. I find it would have been diligent on the part of Counsel Wilson Kalya, who drew the said will to also draw up a certificate of translation to indicate that the contents of the said will had been read out to the deceased in a language he understands and he had attested to the same. This was not done.

41. The Objectors also testified that the deceased did not make any provision for them in the impugned will. The deceased only made a provision for the Petitioner and his siblings.

42. In *James Maina Anyanga v Lorna Yimbiha Ottaro & 4 others [2014] eKLR* where court held that

'Failure to make provision for a dependant by a deceased person in his will does not invalidate the will as the court is empowered under Section 26 of the *Law of Succession Act* to make reasonable provision for the dependant.'

43. It is true that the deceased had a freedom to dispose of his estate in a manner that was suitable to him. The freedom is the essence of testate succession, and the fact that the will did not provide for some beneficiaries does not, and cannot, invalidate the will.

44. However, my reading of the will dated January 17, 2007 indicates that the deceased herein indeed only made a provision for some of his beneficiaries but excluded others. It is not disputed that the deceased was a polygamous man having married five (5) wives. Further, it is not in contention that the Objectors are beneficiaries of the deceased and equally ought to have benefited from the estate of the deceased.

45. What is even more suspicious in this matter is that at the time when the Petitioner was petitioning for the grant of Probate with Will annexed in this matter. The following parcels of land were listed as the deceased's assets;

46.

a) Land Parcel No Nandi Mutwot/216

b) Land Parcel No Nandi Mutwot/713

c) Land Parcel No Nandi Mutwot/712

d) Land Parcel No Nandi Mutwot/203

47. As part of the annexures that were listed at the time when the petition was being was the title deed and the search for parcel of land known as Nandi/Mutwot/203 measuring approximately 26.8Ha.

48. The Objectors contended that parcel of land known as Nandi/Mutwot/203 belonged to the deceased and was never sub-divided into parcels of land known as Nandi/Mutwot/712 & 713 respectively as alleged by the Petitioner. The Petitioner on the had maintained that parcel of land known as Nandi/Mutwot/203 had been sub-divided into parcels of land known Nandi/Mutwot/712 & 713 but the sub-division registered was never closed as there was a Court order which stopped the sub-division process before it was completed.

49. From my perusal of the Will it is evident that the deceased bequeathed the whole parcel of land known as Nandi/Mutwot/713 to one Pascaly Sirtui and directed that parcel of land known Nandi/Mutwot/712 to be shared equally between Pascaly Sirtui and Rose Cherotich.

50. Flowing from the above there is no doubt that the sub-division of parcel of land known as Nandi/Mutwot/203 was ever completed. This is even evidenced by the search document on record that was conducted on March 9, 2009 after the demise of the deceased that still indicated that parcel of land number Nandi/Mutwot/203 was still registered in the names of the deceased herein. Further from the copy of Court order dated September 16, 1999 that was issued in Eldoret High Misc. Application No 238 of 1998 it is clear that no sub-division was to take place on the subject parcel. There is in fact nothing on record to show the said orders were ever discharged so as to allow the alleged sub-division. It even more suspicious as to how one Pascaly Sirtui, was able to obtained title to parcel of land known Nandi/Mutwot/713 on April 13, 2016, after the demise of the deceased and when clearly there were orders barring the sub-division of the subject parcel. From the materials placed before this Court, it is without a doubt that the sub-division of parcel of land known as Nandi/Mutwot/203 had not taken place at the time of the demise of the deceased. How then was the deceased able to categorically state in his Will dated January 17, 2007, that he had bequeathed parcel of land known as Nandi/Mutwot/712 to Pascaly Sirtui and Rose Cherotich from original No Nandi/Mutwot/203 when at the time it was evident parcel of land number Nandi/Mutwot/203 still belonged to him and had not been sub-divided yet. How then can one Pascaly Sirtui, then allege that parcels of land known as Nandi/Mutwot/712 & 713 had been transferred to him by the deceased in the year 1998 when the deceased was still alive only for the deceased to still include said properties in his Will. Did the deceased really understand the contents of his Will? I doubt.

51. From the totality of the evidence presented before this Court, I am persuaded that there is insufficiency on the attestation. I find that therefore the Will dated January 17, 2007 has not met the formal requirements of Section 11 of the Law of Succession. I am compelled to decide the probate case in accordance with the law even though my decision has the effect of defeating the purpose and intentions of the testator. I have no slightest doubt that the deceased never intended the extract of the Will which is before me to constitute his Will. There is every reason why the so much contested document should be deemed to a valid Will.

52. Having already found that the deceased herein lacked the testamentary capacity to make the Will dated January 17, 2007, it therefore follows that the Grant of Probate made on October 19, 2009 and issued to the Petitioner herein cannot therefore stand and is hereby revoked.

    Accordingly, I hereby order that;

53.

    i. The Will of the deceased on record, executed on January 17, 2007 is invalidated.

    ii. The deceased is declared to have died intestate and his estate is subject to distribution in accordance with the provisions of Sections 35, 36,37,38, and as read purposively with section 40 of the *Law of succession Act*.

    iii. That a declaration is hereby made that the grant of probate of written will made to Kiplagat Stephen Kittur on October 19, 2009 is hereby annulled.

    iv. Each party shall bear their own costs.

It is ordered so.

DATED and DELIVERED at KAPSABET this 10TH day of FEBRUARY 2023.

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R. NYAKUNDI

JUDGE