



**In re Estate of Mbugua Kihanya (Deceased) (Succession Cause
82 of 2016) [2023] KEHC 1618 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1618 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 82 OF 2016**

MM KASANGO, J

MARCH 10, 2023

IN THE MATTER OF THE ESTATE OF MBUGUA KIHANYA) (DECEASED)

JUDGMENT

1. Stephen Mbugua Kihanya (deceased) died in Mombasa on November 30, 2002. His brother, Nginyo Frank (Nginyo) now deceased and the sole executor of the deceased's written Will petitioned for probate of written Will before the Mombasa High Court, in Succession Cause No. 162 of 2003.
2. A grant of probate was issued by that court on May 23, 2005. Nginyo deceased filed an application dated August 17, 2016 seeking the transfer of that succession cause from Mombasa High Court. On October 3, 2016 Justice M. Thande ordered the succession cause be transferred to Kiambu High Court. On being transferred to this Court, the Succession cause was assigned Succession cause No. 82 of 2016. Nginyo (deceased) died on December 14, 2016.
3. By an application dated March 22, 2017 Samuel Munji Kihanya (Samuel) and Hannah Njoki Kimani (Hannah) applied to substitute Nginyo (deceased) as executors of the Will. The application was granted as prayed by the court on May 10, 2018. A grant dated May 10, 2018 was issued to Samuel and Hannah.
4. Samuel and Hannah by their application dated August 27, 2018 sought for confirmation of the grant which was granted on October 23, 2019.
5. Summons for revocation of grant dated November 26, 2019 is now before court. It was filed by Elizabeth Wamira Mbugua (Elizabeth), Dennis Muhiu Mbugua (Dennis) and David Kihanya Mbugua (David). In the affidavit supporting that application, the said applicants describe themselves as follows:-

“We are the only bona fide children of the deceased as well as the beneficiaries of his estate.”

6. The applicants seek revocation of the grant on the grounds that the proceedings to obtain the grant were defective in substance because they were founded upon an invalid Will; that the grant was fraudulently obtained through the making of a false document that the deceased had made a written Will; that the executors have failed to proceed diligently with the administration of the estate; and the



executors have failed to produce to court a full and accurate inventory of the assets and liabilities of the deceased.

The court received *viva voce* evidence from the parties.

7. Only Elizabeth attended the hearing of that application as the applicant. Without providing proof of authority to appear from her co-applicants, Elizabeth stated that she had that authority. She however stated that deceased was her father.
8. Elizabeth's evidence was not clear on her involvement in the succession because she began by saying:-

“I filed succession Cause No. 162 of 2003. After filing it I found out the respondents (Samuel and Hannah) filed another cause in Kiambu Cause No. 82 of 2016.”
9. Elizabeth erred because Mombasa High Court Succession No. 162 of 2003 was filed by Nginyo (deceased). On Nyinyo's (deceased) application, that succession was transferred to Kiambu High Court and was assigned Succession No. 82 of 2016.
10. Elizabeth further stated:-

“I am aware there is a Will of my late father.”
11. She however proceeded to state that the said Will was invalid because it was not dated, it did not have the Id No. of her late father and because the signature of her late father in that Will was witnessed by one witness.
12. Elizabeth also stated that when the said Will was executed her late father had kidney failure and then said:-

“According to me he could not do the Will. Most of the time he was in ICU.
He was not mentally well because he could not sometimes recognize us.”
13. Elizabeth further stated that the substitution of Samuel and Hannah as executor was done without seeking hers and her co-applicants' consent.
14. Elizabeth produced in evidence what she described as the original Will. It is however not the original Will. I noted it is a photocopy.
15. According to Elizabeth's evidence, the executors sold deceased's property plot no. 140 Mushomoroni in Mombasa. She stated that the said sale was without consultation of the applicants and that the applicants did not get a share of the sale proceeds.
16. On being cross-examined Elizabeth reiterated that the applicants filed a succession in Mombasa High Court whereby Nginyo (deceased) was the executor. On further cross examination, Elizabeth acknowledged that the applicants participated in this present succession cause. Elizabeth also acknowledged that the applicants were aware Samuel and Hannah sought to substitute Nginyo (deceased) as executors of the deceased's Will.
17. Samuel tendered *viva voce* evidence on his and his co-executor's behalf.
18. In evidence, Samuel stated that on the death of Nginyo (deceased) the family members had a meeting, as was required under the Will and it was decided that Samuel and Hannah would substitute Nginyo (deceased).



19. He also stated that it was Nginyo (deceased) who applied to transfer the succession cause form Mombasa to Kiambu High Court because the family of the deceased resided in Limuru, in Kiambu County and they were elderly. He stated that most of those family members are now deceased.
20. He further stated that the applicants were well provided for by their deceased's father but that under his will their deceased's father stated that they would not inherit the property until they attained the age of 40 years.
21. While accepting that, he and his siblings sold one house on plot 140 Mushomoroni and the applicants sold the other house on that same property, he denied wrong doing.
22. Samuel said he was residing in Mombasa during the lifetime of deceased and did sometimes drive the deceased to hospital. Samuel in evidence stated of the deceased:-

“He (the deceased) was sick but he had the state of mind to write the Will. He did the Will and signed it.”

Analysis and determination

23. There are two broad issues that emerge for consideration. They are:
 - a. Whether the deceased died leaving a valid Will.
 - b. Whether the executors have failed to diligently administer the deceased's estate.
24. On the first issue, the applicants' evidence is that the Will before court was witnessed by one person.
25. The Will annexed to the grant of probate issued to Nginyo (deceased) dated May 23, 2005 was witnessed by one witness called Simon Saroni Nauru and by Kabbie Kabuki Advocate.
26. The case the applicants brought forth is that Kabbie Kabuki advocate having drawn the deceased's Will, he was not competent to witness the deceased's signature on the Will. The applicants cited Section 11 of the *Law of Succession Act*, cap 160 and lay more emphasis on Section 11(c) which provides:-

“No written Will shall be valid unless;

- 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 the Will in the presence and by the direction of the testator or have received from the testator, personal acknowledgment of his signature or mark, or the signature of that person and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary.”

27. The applicants through their written submissions stated that the deceased's Will fails to meet the formal requirements of a valid Will as provided under cap 160.
28. The executors through their written submission stated that the deceased's Will was witnessed by two witnesses one of whom was the deceased's advocate.
29. The applicants have not alleged the signature on the deceased' Will was not the deceased's signature. Their contention is that the deceased's signature was not witnessed by two witnesses as required under Section 11(c) of *cap 160*. That subsection cited above requires the testator's signature be attested by two



or more competent witnesses. Section 3 of [cap 160](#), the definition section defines competent witness as:-

“Means a person of sound mind and full age.”

30. That definition section also defines independent witness as:-

“Means a witness who is not a beneficiary under a Will or the spouse of any such beneficiary.”

31. There is no allegation that the two witnesses of deceased’s Will, who include the advocate who drew the Will were not competent or not independent witnesses. I could find no provision in cap 160 which disqualified the firm that drew a Will from being witnesses of the testator’s signature. In this regard, I am persuaded by the decision of Justice Mumbua T. Matheka in the case [In re estate of Gichubi Wakano alias Wilfred Wakano Gichubi \(deceased\)](#)(2022) eKLR

“The 3rd protestor in particular submitted that the will was attested to by Mungai Mbugua who was an advocate. That the said advocate cannot be the advocate who drew the will and also be one of the competent witnesses to the signature by the deceased. On the face of the will, it is clear it was signed by the deceased and two witnesses R M Mbugua and Waireri Kigeria. It is not clear from its face whether the R M Mbugua who signed the will as a witness is the Mungai Mbugua the advocate or was a different person. Both are now deceased and cannot be called to testify. In any event Section 3 of the [Law of Succession Act](#) defines a competent witness to mean a person of sound mind and full age, and an independent witness to mean a witness who is not a beneficiary under a will or the spouse of any such beneficiary. No evidence has been led to suggest that R M Mbugua and Waireri did not meet any of these criteria.”

32. I hereby make a finding that the deceased’ Will was witnessed by two witnesses and is therefore a valid Will of the deceased. The issue (a) above is therefore determined in the positive, that is, the deceased’s Will is valid.

33. The applicants although did not adduce evidence in respect to rule 50 of the [Probate and Administration Rules](#) however in their written submissions sought to adduce evidence that the executors had failed to comply with that Rule. That Rule requires register be maintained by the court where the original Will shall be retained and the details of the deceased recorded.

34. The fact that the applicants submitted that there was no compliance with that Rule, only proves that the applicants did not peruse the court file because if they had done so, they would have seen a document dated July 22, 2003 and signed by the Deputy Registrar. Under the column title as “Will” in that document, it is recorded in hand writing: -

“Original Will plus two copies filed.”

35. It follows that the executor did comply with the Rule 50 and did provide the original Will to the court. I dare say that even if there was noncompliance with Rule, the failure to comply would not have been fatal to the succession.

36. The applicants did also misrepresent the viva voce evidence when they submitted Samuel testified that he was present when deceased had his Will drawn. Samuel did not also state that deceased went alone into the advocate’s chambers to sign the Will. Samuel categorically stated he was not present when the



deceased had his Will drawn. If he was not present Samuel could not have known if the deceased went into the advocate's chamber lone.

37. The applicants erred to submit that the executors were unprocedurally appointed. Samuel and Hannah filed an application dated March 22, 2017 seeking an order for them to substitute Nginyo (deceased) as executors of deceased's Will. That application was served upon Dennis and David who received the application on their behalf and on behalf of Elizabeth. The applicants instructed the law firm of Gachiri Kariuki & Co. Advocates to file Notice of Preliminary objection to the application. The application was fixed for hearing on May 10, 2018 and because the applicants who had been served failed to attend court to object to the application, the application for substitution of executor of the deceased's Will was allowed by the court as prayed.
38. There is nothing that I can therefore discern to be unprocedural in the substitution of Nginyo (deceased) by Samuel and Hannah.
39. The deceased' Will provided that on the death of the executor before the distribution of the estate is concluded, the deceased family, his brothers and sisters and his children and his wife would meet to appoint executor to replace the deceased executor.
40. In accordance with that clause in the deceased's Will, the family met in the absence of the applicants and selected Samuel and Hannah (deceased). Since the applicants did not attend the family meeting which made the aforesaid selection, the applicants were served with the application for substitution of the executor of the deceased's Will and as stated above in this judgment, the applicants failed to attend court on May 10, 2018 and the substitution was allowed by the court.
41. The grant of probate issued to Samuel and Hannah was confirmed by the by the court on October 23, 2019 in the presence of the applicants' advocate.
42. The applicants thereafter filed their summons to revoke the grant dated November 26, 2019 which application is the subject of this judgement. Bearing in mind the confirmation of the grant as stated above was on October 23, 2019 and the applicants filed their application on November 26, 2019 it is not clear how the applicants can allege the executors failed to execute their duties of distributing the estate. This matter stalled and executors could not proceed once the applicants filed their application to revoke the grant. It follows that issue (b) is found in the negative. The executors have not failed to deal diligently with the estate. They were hampered by the applicants' pending application.
43. The applicants' application is most unmerited. Their witness, Elizabeth vacillated on her evidence on whether she was or was not ware of the succession first filed in Mombasa High Court in the year 2003. At one point, she testified that succession was filed by her and her co-applicant. Later, she denied filing it. Even the misrepresentation of the record of the court file and of the evidence tendered is unexplainable.
44. For the record, I wish to confirm that the court file has a Will which is attached to the grant of probate dated May 23, 2005. That Will is dated October 18, 2002. It is signed by the testator. It is witnessed by two witnesses. No evidence was adduced to prove the testator was suffering from unsoundness of the mind. The applicants who bore the burden to prove the same did not provide evidence. See the case *In Re Estate Sameul Ngugi Mbugua (deceased)* eKLR and its relevance to this matter is obvious where it was held:-

“A person, who seeks to rely on unsoundness of mind as a basis for nullification of a will, must adduce evidence tending to prove that the testator had an illness that had affected his mental capacity at the time, or was drunk or drugged. This calls for testimony as to his state



of mind at the material time, and, where possible medical evidence that could point towards such a condition. It should be mentioned that the burden of establishing that the maker of the Will lacked the requisite mental capacity lies with the person making the assertion, in this case that would be the applicant.”

45. The application dated November 26, 2019 is without merit. It is dismissed with costs.
46. Having reached the above decision, I do order that the caution registered by Elizabeth Wamira Mbugua on title Number CR 17994 (L.R. No. 616/III/MN) be removed.
47. Further, an order is hereby issued that the property Mtwapa Plot containing Betha Club in paragraph V in the Will dated October 18, 2002 is declared to be Title Number 17994 (L.R. No. 616/111/MN).
48. Leave is granted to the executors of the deceased’s Will to sell property CR 17994 (L.R. No. 616/111/MN) and the proceeds thereof shall be divided in equal shares by the beneficiaries listed under paragraph V of the Will dated October 18, 2002 of Stephen Mbugua Kihanya (deceased).

JUDGMENT READ, DATED AND DELIVERED AT KIAMBU THIS 10TH DAY OF MARCH, 2023.

MARY KASANGO

JUDGE

In the presence of :-

Coram:

Court Assistant: Mourice/Julia

Instructed by J.M. Njenga & Co. advocates

For the Executors:- Miss Kimani

Instructed by S.W. Macharia & Co. Advocate:- Mr. Macharia

For Elizabeth Mbugua, Dennis Mbugua and David Mbugua

