In re Estate of the Late Mbugua Kamau (Civil Appeal 193 of 2017) [2023] KEHC 1947 (KLR) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1947 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL 193 OF 2017

LN MUGAMBI, J

MARCH 10, 2023

IN THE MATTER OF THE ESTATE OF THE LATE MBUGUA KAMAU ALIAS ISAAC MBUGUA KAMAU

BETWEEN

DUNCAN KARANJA .... 1ST APPELLANT

NGUGI MWANGI .... 2ND APPELLANT

JOSEPHAT NDUATI .... 3RD APPELLANT

PATRICK KARANJA .... 4TH APPELLANT

AND

NJERI MBUGUA .... 1ST RESPONDENT

JAMES MAINA .... 2ND RESPONDENT

KARANJA KAMAU .... 3RD RESPONDENT

RULING

1. This appeal is founded on two succession causes namely Succession Cause no. 66 of 2014 and Succession Cause no. 7 of 1996. The two causes relate to the Estate of Isaac Mbugua Kamau and the Estate of Kamau Gachui. The properties which were the subject of the two succession causes were Ndarugu /Gacharage/641 for the Estate of Isaac Mbugua Kamau and Ndarugu/Gacharagwe/608 for the Estate of Kamau Gichui. In the course of pursuing the two succession causes which were filed separately, disputes emerged in form of protests that were filed. One of key revelations that emerged and was that Isaac Mbugua Kamau the deceased in respect of whom succession cause number 66 of 2014 was filed was in fact a son to Kamau Gichui the deceased in respect of whom succession cause number 7 of 1996 was filed. Further it emerged, and this fact was not contested, that property Ndarugu/Gacharagwe/641 which was in the name of Isaac Mbugua Kamau (deceased) also belonged

to his deceased father Kamau Gichui only that he had it registered with his said son, Isaac Mbugua Kamau to hold in trust for the rest of his siblings. This is what apparently made the court to find it easier convenient to consider the two succession causes together.

2. In the Lower Court, several protests on distribution of the estate were filed and the Court heard the protesters together with their witnesses' by taking viva voce evidence. It delivered its ruling on November 29, 2017 and ordered distribution as follows:

    a. Ndarugu/Gacharage/641, to three people, namely; Chege Kamau- 1.35 acres, Mbugua Kamau-1.35 acres and Duncan Karanja-1 acre.

    b. Ndarugu/Gacharage/608 to the following; Ngugi Mwangi-1.74 acres, Patrick Karanja-1.74 acres, Duncan Karanja-0.74 acres, Njeri Mbugua-0.39 acres and Chege Kamau-0.39 acres.

3. The Appellants were dissatisfied with the ruling of the court in relation to Succession Cause No. 66 of 1996, especially the distribution of Ndarugu/Gacharagwe 608. They thus filed a Memorandum of Appeal dated 14th December 2017 and a further Supplementary Memorandum of Appeal dated 10th August 2018 citing the following grounds:

    a. That the learned magistrate erred in law and in fact by not allocating any share to Beth Wangari who is a co-wife to Ruth Gathiru and in fact by not apportioning Josphat Nduati Gichui 5 acres of land reference Ndarugu/Gacharage/608 as per the will of the deceased so that he can divide between both houses of his deceased father Mbugua Kamau which houses are headed by two widows Ruth Gathiru and Beth Wangari.

    b. That the learned trial magistrate erred in law and in fact by failing to consider and/or weight to the fact that Keru's sons got land from Keru's second husband house and hence they were not supposed to get more land or any land at all from the Estate of the late Kamau Gichui.

    c. That the trial magistrate failed to consider that Keru was buried at Kwa Ndunyu, her second husband's home in Bahati (igwamiti) Kanyotu despite the evidence provided by the appellants.

    d. That the trial magistrate erred in consolidating the two matters Succession Cause no. 66 of 2014 in the Estate of the late Mbugua Kamau alias Isaac Mbugua Kamau and Succession Cause no. 7 of 1996 Estate of the Late Kamau Gachui while there was a ruling on record which stated that the consolidation would birth injustice.

    e. That the learned trial magistrate erred in law and in fact by apportioning Peter Karanja Kamau and James Maina with part of the property especially considering the written will in which their father never apportioned them anything in the will.

    f. That the learned trial magistrate erred in law and in fact by failing to distribute Ndarugu/Gacharage/608 as per the written will of the deceased and instead equalled what beneficiaries of Ndarugu/Gacharage/641 got by reducing the shares of the beneficiaries of Ndarugu/Gacharage/608 and then adding the same to Njeri Mbugua on behalf of Mbugua Kamau's Estate, his wife and Chege Kamau whereas Ndarugu/Gacharage/641 and 608 are two different estates which were distributed as per the will.

g. That the learned trial magistrate erred in law and in fact by not apportioning Josphat Nduati Gichui land as per the will so that he can divide to the children of his father of both wives Ruth Gathiru and Beth Wangari.

h. That the learned trial magistrate erred in law and in fact by selectively applying evidence and relying on extraneous evidence not before court and hence arriving at an erroneous decision.

4. The appellants prayed for the appeal to be allowed and the ruling delivered on 29th November 2017 in Succession Cause no. 66 of 2014 be set aside. They further prayed that judgment be entered for the appellant as pleaded in the further amended plaint (sic) and be granted costs of this appeal and that of the lower court.

Appellants Submissions

5. The Appellant filed their submissions on 2nd September 2020 in which they submitted that they had no issue with the ruling of the trial court in regard to the distribution of Ndarugu/Gacharagwe 641.

6. However, they took issue with the Distribution ordered by the Court in respect of Ndarugu/Gacharagwe/608 which comprised10 acres. They argued that in his lifetime, their deceased father- Kamau Gichui had shared out this particular land among his children and even marked out boundaries for the respective parcels of land allocated with an intention of effecting the transfers. Unfortunately, he passed on shortly before he could accomplish that task.

7. According to the appellants, their deceased father had determined their respective shares as follows: Josphat Nduati- 2.32 acres, Beth Gachui- 1.66 acres, Paul Mwangi-1 acre, Patrick Karanja-1.8 acres, Ngugi Mwangi-1.8 acres, and Duncan Karanja- 1.4 acres.

8. They contended that the Appellants had called three witnesses who testified to that fact but the trial court ignored their testimonies and distributed the said land as proposed by the protestor which was against the wish of their deceased father, Kamau Gichui.

9. They submitted that they produced a will before the lower court dated 22nd October 1974 which was written in Kikuyu and expressing the wishes of the deceased and thus cited the case in *Rufus Ng'ethe Munyua (dec'd) Public Trustee v Wambui* [1976-80] 1 KLR 577 and *Wambui & Another v Gikonyo & 3 Others* [1998] KLR 445 which they argued supported their legal viewpoint. In the said case, the Court remarked as follows:

> " ...The court in *Re Rufus Ng'ethe Munyua (Dec'd) Public Trustee v. Wambui* followed the position stated by Cotran in paragraph 26 here above, and held that under Kikuyu Customary Law a valid oral will may be made when the testator is on his death-bed in the presence of his close adult relatives by declaring how his property is to be distributed item by item..."

Respondents Submissions

10. The Respondents filed submissions dated 7th October 2022 and addressed the grounds in the memorandum of appeal seriatim. In ground one, it was submitted that the said Beth Wangari failed to participate in the trial court proceedings and hence her recourse is either in proceeding for review and/or in proceedings for revocation of the confirmed grant which options have not been exercised. On ground two and three, their submission was that the appellant's proposition should fail for failing to meet the threshold of the deceased's wishes and further there was misconception of the law as relates

to remarriage of a widow. On ground four, they stated that the appellant ought to have appealed and/or reviewed the orders for stay of proceedings immediately after the ruling was made on 10th May 2016 and not to wait until after the judgment that was made on the 29th November 2017 and which was after evidence had been adduced. They submitted that ground seven should fail as there was no will which was presented in court and the purported Josphat Nduati Gichui was not an executor of the deceased's will as there was no such will in existence.

11. Lastly, on ground eight, that the appellant had not pinpointed the part of evidence that was selectively applied and/or where extraneous evidence was relied upon by the trial court.

Analysis and Determination

12. Having reviewed the supplementary memorandum of appeal together with the written submissions on record, my view is that the issues arising for determination in this appeal are as follows;

    a. Whether Succession Cause no. 7 of 1996 and Succession Cause no. 66 of 2014 were in fact consolidated;

    b. Whether there was a valid will;

    c. Whether the trial court erred in failing to allocate any share to one Beth Wangari, the co-wife to Ruth Gathiru who should have obtained her share through Josphat Nduati Gichui who according to the will should have been allocated 5 acres from Ndarugu/Gacharagwe/608 on behalf of his deceased father Isaac Mbugua Kamau to share to the two widows of his father had the Court respected the wishes of the deceased in the will.

    d. Whether the remarriage of deceased wife Keru who also died and was buried at the second husband's land should disentitle her sons from getting land from their deceased father- Kamau Gichui given that they got more land from Keru's second husband.

    e. Whether the appeal is merited;

    f. Who should pay costs of this appeal?

13. Prayer (c) of the memorandum of appeal, the appellants seek judgment to be entered as pleaded in the further amended plaint. This must be an error. This is a succession cause where plaints are not used. I strike out this particular prayer as it is misdirected.

a. Whether succession cause Number 7 and Succession cause number 66 of 2014 were consolidated.

14. The Appellants in ground 4 of their appeal claimed that the trial magistrate erred in consolidating the two succession causes when there was a ruling on record which stated that consolidation would result in injustice.

15. The trial court in its ruling in succession cause no. 66 of 2014 noted that the property therein and the property in Succession Cause no. 7 of 1996 belonged to the same deceased person and therefore through a court ruling delivered on 3rd August 2016, an order was issued that the two cause be determined together. This court ruling delivered on 3rd August 2016 in Succession Cause no. 7 of 1996

was not included in the record of appeal but it forms part of original lower court file forwarded for purposes of this appeal. It stated as follows:

> "…. The protestor's advocate on record applied to consolidate the two succession causes but on 10.5.16, the court disallowed the application on the ground that those were two different estates and one matter was actually at an advanced stage in its hearing. However, due to the realisation aforementioned, I find that it will not be prudent to make a decision in this cause then proceed to make another decision in Succession Cause no. 66 of 2014 yet the property in both causes belong to one person.
>
> In the circumstances, I hereby review my orders of 10.5.2016 and allow the protestor's application dated 17.9.2015, to consolidate the two causes. I make the decision in the interest of justice and to avoid miscarriage of justice by separating the two causes when actually the properties in both causes are alleged to belong to one person.
>
> Since this cause has been heard to conclusion and is only awaiting determination, I direct that Succession Cause no. 66 of 2014 be set down for hearing as soon as possible. The orders made on 10.5.2016 staying further proceedings in the cause are hereby vacated.
>
> It is so ordered."

16. The orders made on 10.5.2016 in Succession Cause no. 66 of 2014 were made by Hon. A.M.Maina and had held as follows;

> "… Having considered those factors, I find that it will not be in the interest of justice to consolidate the two causes. Even though there may be some similar facts in the two causes, they remain totally different and injustice may be occasioned by consolidating the two at this stage.
>
> In the circumstances, I disallow the application to consolidate the two causes and direct that each cause be heard separately. In the interest of justice, I would direct that proceedings in the case be stayed, pending the conclusion and determination of succession 7 of 1996…"

17. Both rulings were delivered by same trial magistrate and the latter ruling of 3rd August 2016 set aside the orders issued on 10th May 2016.

18. The Appellant's assertion that consolidation was made while there was a ruling on record indicating that consolidation would birth injustice is thus utterly flawed as it is evident that the trial court revisited the issue and reviewed its earlier decision noting that it was more convenient for the two succession causes to be determined in one fell swoop.

b. Whether there was a valid will

19. The appellant has faulted the trial magistrate for failing to consider the will in Succession Cause no. 7 of 1996 and instead, opting to apply Section 40(1) of the *Law of Succession Act* in distributing Ndarugu/ Gacharagwe/ 608 among the beneficiaries.

20. Section 40 of the *Law of Succession Act* governs mode the distribution of the estate where the deceased was polygamous. It provides:

> "…Section 40-(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net estate shall, in the first instance, be divided among the houses according to the number of children

in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.…"

21. This Record of Appeal has the typed proceedings in Succession no. 7 of 1996 running from page 46 to page 67. At page 65 of the Record of Appeal, the 1st Appellant while giving his evidence in chief on 5/7/2001, informed the court that his father (deceased) had directed how he wanted Ndarugu/ Gacharagwe/ 608 to be apportioned and that those instructions were reduced into writing by one James Kabogo Mbuthia and the same was marked for identification.

22. The court proceedings then hop and resume in 2012 after the court record was reconstructed. The hearing of the suit began afresh and PW2, one James Njuguna Mbuthia, testified and informed the court that he had reduced the wishes of the deceased in writing. On cross examination he stated follows;

"…The piece of paper I wrote was left with the family of the deceased. I produced the document in court as an exhibit in another case in the year 2003. The court file in that case got burnt when the court was burnt in 2009. I also do not know whether Duncan Karanja Kamau has a copy of that document…"

23. Section 9 and 10 of the *Law of Succession Act* provides for oral and written wills. Section 8 provides as follows;

"

"1) No oral will shall be valid unless –

a) It is made before two or more competent witnesses

b) The testator dies within a period of three months from the date of making the will:

Provided that an oral will made …

2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral Will and which has not been revoked as provided by Sections 18 and 19."

24. Section 11 states as follows;

25. No written will shall be valid unless-

a. The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

b. The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

c. 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 sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other 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 said James Njoroge Mbuthia who testified as a witness in two separate occasions being 28/7/2014 and 2/7/2015 recalled the way the deceased distributed Ndarugu/gacharagwe/608. He testified that the deceased informed him that he was sharing out his land amongst his five children as follows; Ngugi – 1.8 acres, Karanja – 1.8 acres, another Karanja – 1.4 acres and Josephat Murunga – 5 acres.

28. The question that now arises is whether the said will or written document was produced as an exhibit before the trial court. The Appellants maintain that there was a will produced. Their witnesses before the trial court especially one James Njoroge Mbuthia, said he in fact reduced wishes of the deceased Kamau Gachui's into writing. He testified that he was approached by the sub-chief and taken to the late Kamau Gachui's home where he was handed an exercise book and told to record what the deceased said. He further testified that he made two copies and signed them before handing them over to the deceased in the presence of the elders and his children.

29. Despite the testimony aforesaid, I have carefully perused the proceedings comprised in this record of appeal together with the un-typed proceedings in Succession Cause no. 7 of 1996 and it is clear to me that neither appellants' nor any of their witnesses produced the said will as an exhibit before the court.

30. Although the said James Njoroge Mbuthia informed the court that he had earlier produced it in 2003, I did not find any recording by the trial court to support that claim. All the record indicated was that it was marked for identification, not produced. The appellants' witnesses' position was that the 1st Appellant had a copy of the said will but he provided none.

31. In Presidential Election Petition No. 1 of 2017 between *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR the Supreme Court held as follows on the issue of evidential burden of proof at paragraphs 132 and 133 thereof: -

> (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
>
> (133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law..."

32. Applying the above legal principle in regard to matters of proof in this case, I find that it was incumbent upon the appellants to produce the written document that contained the wishes of the late Kamau Gachui in relation to sharing out his land Ndarugu/Gacharage/608 as testified. The case law cited by the appellants, Wambui & Another v Gikonyo & 3 Others[1988] KLR 445, where the Court of Appeal quoted the decision in Rufus Ngethe Munyu (Dec'd) Public Trustee v Wambui [1977] KLR 137 held

that where the deceased gave instructions which were written and signed by him in the presence of two witnesses and then died a few days later, the document qualified to be construed as an oral will.

33. The difference between the above quoted decision and the present one is that in the present case, there are claims that a document was written in line with the wishes of the deceased but none was exhibited for the court's inspection although it is clear the deceased passed on a few days thereafter. Under section 97 of the *Evidence Act*, it states;

‘…when terms of a contract, or of a grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act…”

34. The descriptive details of what was contained in the purported document in which it was being insisted that the deceased had instructed the manner his property was to be disposed of upon death without availing the said document or fulfilling the conditions for tendering secondary evidence offended section 97 of the *Evidence Act* and such evidence was inadmissible and could not form a basis for a decision in favour of the Appellants.

35. It is therefore my finding that there was no valid will which could be acted upon hence the trial court did not err in applying Section 40 of the *Law of Succession Act* to distribute the estate of the late Kamau Gachui, particularly, Ndarugu/Gacharagwe/608.

Issue

c. Whether the trial court erred in failing to allocate 5 acres from Ndarugu/Gacharagwe/608 to Josephat Nduati Gathiru on behalf of his deceased father Isaac Mbugua Kamau to share to the two widows of his father Beth and Ruth Gachiru had the Court respected the wishes of the deceased in the will.

36. This court has already returned a verdict that there existed no valid will and the trial court was right in distributing the land of the deceased Ndarugu/Gacharagwe/608 in strict compliance with section 40 of the *Law of Succession Act*. The fact that this ground of appeal is based on a non-existent will thus makes it collapse.

37. In any case, this is an appeal and the Court is relying on the record and evidence that was taken. It is not a forum to introduce new issues that were not taken up in the original proceedings unless leave was sought. Beth did not feature in the lower court hence any attempt to introduce her at the appellate level must fail. I concur with the submissions of the Respondent that if she was left out, then she can apply to the lower court for review or revocation of the said grant so that her interests are also given consideration.

Issue

d. Whether the remarriage of deceased wife Keru who also died and was buried at the second husband's land should disentitle her sons from getting land from their deceased father-Kamau Gichui given that they got more land from Keru's second husband.

35. This contention is made in complete ignorance of the law. It is not denied that the said Keru's sons were biological children of the deceased Kamau Gichui. Her remarriage cannot disinherit her children with the deceased based on the reasons advanced by the appellants. Pursuant to section 35 of the *Law of*

Succession Act, remarriage of a widow terminates her life interest in the intestate estate but this does not affect the children of the deceased. This ground of appeal is misconceived and must inescapably fall flat.

38. In light of the foregoing reasons, I find that this appeal lacks merit and is hereby dismissed in its entirety.

39. This being a family dispute, each party will bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 10TH DAY OF MARCH, 2023.

L.N. MUGAMBI

JUDGE

In Presence of:

Coram- (ON-LINE)

Before L.N. Mugambi Judge

Court Assistant- Brian

Appellant- M/s Gathia for Appellant.

Respondent – M/s Njeri Mbiyu holding brief for Muturi Njoroge for the Respondent.

Appellant Advocate-

Respondent Advocate-

Ruling delivered digitally to be transmitted by the Deputy Registrar to the Parties Advocates on record through their respective email addresses.

L.N. MUGAMBI

JUDGE

10.3.2023

Before Hon. Justice L. N. Mugambi

CA – Brian

Interpretation – English/Swahili

M/S Gathua for Appellant

M/s Njeri Mbiyu holding brief for Muturi Njoroge for Respondent

M/S Gathua for Appellant

We pray for 30 days stay of execution.

Miss Mbiyu- no objection

Court – 30 days stay of execution of ruling dated 10.3.2023 is granted.

L.N. MUGAMBI

JUDGE

10.3.2023