



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO 3413 OF 2003

IN THE MATTER OF THE ESTATE OF Nditu KIHAGURU (DECEASED)

TERESIAH WAGACHIRU Nditu..... 1ST APPLICANT

HANNAH WAIRIMU NJENGA..... 2ND APPLICANT

SUSAN NDUTA MACHARIA..... 3RD APPLICANT

MONICAH WANJIRU NDUNGU..... 4TH APPLICANT

PETER KARANJA MWAURA.....5TH APPLICANT

-VERSUS-

JACOB NJOGU WAINAINA..... RESPONDENT

RULING

1. The deceased, Nditu Kihaguru, died on 22nd August 2003. He left behind a Will dated 28th September 2002, which is the subject of this litigation. What is for determination is an application challenging the Will vide summons dated 20th August 2004. In it the Applicants seek for orders that:

a. A reasonable provision is made to the applicants as dependents of the deceased's estate.

b. The cost of the application be provided for.

2. The application is premised on the grounds that the Applicants are dependents of the deceased being wife, daughters and son respectively. It was their case that the deceased in his lifetime had made no advancements or gift to the applicants even though they depended on him. Further that on 28th September 2002, the deceased made a will, which completely disinherited them.

3. The 2nd Applicant, Hannah Wairimu Njenga, swore an affidavit in support of the application on behalf of all the applicants on 20th August 2004. In it she deposed that the Applicants are the wife, daughters and sons respectively of the deceased who were at all material times dependent on him. She stated that the deceased participated fully in all matters relating to the Applicants and also that the Applicants participated fully in the deceased's funeral arrangement.

4. She averred that the deceased was the sole registered proprietor of land parcel number GITHUNGURI/GITHUNGURI/2065 measuring 3 acres or thereabout. Further that after the death of the deceased, she commenced Githunguri Succession Cause No. 97 of 2003 in respect of the estate of the deceased, the same is still pending. It was her position that the deceased might have been suffering from failing health, old age and or undue influence from Grace Njeri and her children when he made the will, as it was inconceivable for the deceased to leave the applicants out of his will.

5. In response, Grace Njeri Nditu, the 2nd wife and beneficiary in the deceased's estate, filed a replying affidavit dated 26th April 2005 in which she stated that the deceased and Teresiah Wagachiru Nditu separated in 1958 and she left the matrimonial home with her children. She further stated that she had lived with her husband and children in the Githunguri farm since then while Teresiah was given 5 acres by the government in which she lived with her children.

6. Grace averred that the deceased clearly indicated in his Will that she and her children should inherit the suit property as the 1st wife had a farm in Njoro. She asserted that the Applicants were never dependent on the deceased as they were all grown adults with families. Further that the deceased did not involve himself in the applicants' affairs and that they only visited the deceased shortly before his death.

7. Grace contended that it would be unfair for the asset to be distributed to the Applicants since they had another property they could depend on. She refuted claims that the Will was made by use of undue influence and stated that she only came to know the Respondent, who is the executor of the Will, after the deceased's death.

8. On 7th March 2006, the court gave a ruling in which it pronounced that the orders sought in the summons dated 20th August 2004 could not be made at that point. It however ordered that the Applicants be enjoined as parties in the proceedings as potential beneficiaries and that the issues raised in the application be determined on evidence during confirmation of grant.

9. Following the ruling, Hannah Wairimu Njenga swore an affidavit dated 26th October 2010 in which she proposed a mode of distribution as follows;

a. Hannah Wairimu Njenga 0.45ha

(in trust for herself and the 1st house)

b. Grace Njeri Nditu, 0.789Ha

(in trust for herself and the 2nd house)

10. Grace Njeri Nditu swore an affidavit on 1st November 2010 in which she urged the court to respect and distribute the suit property in accordance with the deceased's wishes, being;

a. Grace Njeri Nditu 0.5 acres

b. John Kihaguru Nditu 0.41 acres

c. Isaac Mbugua Nditu 0.41 acres

d. Samuel Mwaura Nditu 0.41 acres

e. Monicah Wanjiru Nditu 0.41 acres

f. Sarah Wambui Nditu 0.41 acres

g. Alice Njanja Nditu 0.41 acres

She contended that she had been tilling the land and practicing animal husbandry and had built homes with her children and planted coffee on the suit property for decades.

11. Grace opposed the mode of distribution proposed by the 2nd Applicant on the basis that the deceased expressed his wishes in his Will which had not been contested. Further that she and her children had resided in the subject parcel of land for over 52 years and developed it.

12. Grace averred that the deceased did not sire the 5th Applicant Peter Karanja Mwaura as he was born in 1964 while the 1st applicant and the deceased had parted ways in 1958. She asserted that the 2nd and 3rd Applicants were married and were heirs of the 1st Applicants portion, which was larger than the portion the deceased had given to the House of Grace.

13. The application was canvassed by way of viva voce evidence and written submissions. Counsel for the Applicants submitted that the deceased was still legally married to the 1st Applicant and that the rest of the Applicants were lawful children of the deceased. It was also her contention that the 1st applicant often visited the deceased's home and participated in various rites relating to her family and that they were dependent on the deceased. Counsel relied on **Section 26 and 27** of the Law of Succession Act and stated that based on those provisions the court ought to make reasonable provisions for the Applicants. They further relied on **Section 29** which defines dependent and cited the cases of **Brian Kadima Vs Jackson William Musera & another (2017) eKLR, Elizabeth Kamene Ndolo Vs George Matata Ndolo**

14. She further submitted that the 1st Applicant as the 1st wife - having her own property does not preclude her from inheriting her husband's estate. She refuted claims that the 5th Applicant was not the deceased's son and stated that no evidence had been adduced in support of the allegation.

15. Counsel for the Respondent submitted that the deceased's Will is valid and that his wishes ought to be respected. He stated that the Applicants had not produced any evidence in support of their claim of the will being invalid. To buttress his assertion, he relied on **section 3, 7 and 11** of the Law of succession Act and relied on the cases of **Banks v Goodfellow (1870) LR 5 QB 549, in the matter of the Estate of James Ngugi Muigai succession cause No 523 of 1996**. He submitted that failure to provide for a beneficiary does not invalidate a Will and relied on the cases of **Curryian Okumu vs Perez Okumu & 2 others (2016) eKLR, James Maina Anyanga Vs Lorna Yimbiha Ottaro**

& 4 others (2014) eKLR

16. It was Counsel's submission that **Section 26** mandates the court to make reasonable provisions to a dependent not adequately provided for and that the discretion should be exercised within the limits of **Section 28**. He pointed out that the land forming the sole asset of the estate measures 3 acres or thereabout and the deceased was purposeful in how he distributed it to the 2nd house. He urged that adopting the Applicants' proposed mode of distribution would unfairly impact the 2nd House.

17. Counsel asserted that the children of the 1st house all have property inherited from their mother, in much larger portions than the suit property. He also stated that the 2nd House was closer to the deceased, whereas the 1st House only related to the deceased when they required his blessing upon marriage and did not depend on him.

18. Counsel urged the Court not to interfere with the deceased's wishes in the Will. He relied on the cases of **Knight Bruce in Bird V Luckie (1850) 68 Er 373, In re estate of Lusila Wairu Waweru (deceased) 2020 eKLR, Re Arthur (deceased) Abakah & Another V Attah Hagan & Another (1972) 1 GL. R435 and Abbot V Middleton (1858) 11 ER 28**

19. The 1st and 3rd Applicants have since demised. The 1st Applicant having died in 2006 and the 3rd applicant died in 2013 respectively. Nothing on record points to the 3rd Applicant being survived by any dependants.

20. From the evidence of either side, it is not disputed that there exists a Will and that the Applicants were not provided for therein. The Applicants in their pleading sought to disprove the validity of the will by claiming that the deceased could not have intended to leave out the 1st House. In their testimony they asserted that the deceased suffered mental illness prior to his death hence he could not have made a valid will. The Respondent on the other hand refuted the claims of mental illness and stated that the deceased was of sound mind in his last days.

21. A clerk from the Law firm which drafted the will testified in support of the Respondent. He stated that he was present at the time the will was made and was a witness that the deceased was of sound mind and understood the contents of the will. The Applicants put forward the allegations of the mental impairment on the part of the Deceased at the time of making of the will, but did not produce any evidence to prove the allegations.

22. The Applicants' attempt to raise questions about the capacity of the deceased at the time of making the Will appears to be an afterthought for the reason that they are not seeking for the Will to be invalidated in their prayers. They allege in their pleadings that the deceased was unduly influenced by the Respondent, having not been of sound mind for a period of 2 years leading up to his death. No evidence has been provided to buttress this allegation. The contention that the deceased might have been suffering from debilitating health conditions in view of his old age at the time of making the Will is therefore a mere summation that is unsubstantiated.

23. The formal requirements of a valid will are stipulated in **Section 11** of the Law of Succession Act. It states -

'11. 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 signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(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.'

24. The will on record is duly signed by the testator and attested to by two witnesses who subsequently appended their signature. For all intents and purposes therefore, the Will remains valid as the last testament communicating the wishes of the deceased. In the circumstances, what is the basis – if any - upon which the Applicants' claim towards a share(s) of the estate of the deceased is premised?

25. To address the above, the issue to be determined is whether the Applicants are dependants and whether this Court should make reasonable provisions for them out of the deceased's estate. **Section 26, 27 and 28** of the *Law of Succession Act (Chapter 26 of the Laws of Kenya)* provides for application for adequate provision for dependants not adequately provided for by will or on intestacy as follows:

26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.

27. In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependants, or to make such other provision for him by way of periodical payment or a lump sum, and to impose such conditions as it thinks fit.

26. The Respondent is not contesting that the 2nd and 4th Applicants are dependants of the deceased. In fact, there is an admission that the 1st Applicant was a Co-wife and the 2nd, 3rd and 4th Applicants are the children of the deceased. This court is alive to the provisions of **Section 29**, which set out the meaning of the term 'dependant' as follows:

For the purposes of this Part, "dependant" means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

27. The sum of the above provision is that the 2nd, 3rd and 4th applicants are dependents of the deceased. The question then is whether they are entitled to the deceased's estate? The respondent's bone of contention is that the 2nd, 3rd and 4th Applicants were married off, and have other property on which they can depend on. That they were not dependent on the deceased in his life and they did not have an existing relationship with the deceased only seeing him when they needed his blessing for marriage and lastly right before he died. As such she contended that the Applicants are not entitled to share(s) of the estate of the deceased. The respondent moved this court to place reliance on **Section 28** of the Law of Succession Act which provides;

In considering whether any order should be made under this part, and if so what order, the court shall have regard to -

(a) The nature and amount of the deceased's property;

(b) Any past, present or future capital or income from any source of the dependant;

(c) The existing and future means and needs of the dependant;

(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;

(e) The conduct of the dependant in relation to the deceased;

(f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

(g) The general circumstances of the case, including, so far as can be ascertained, the testator's reason for not making the provision for the dependant.

28. In determining the nature and extent of the order to make, having regard to the factors set out in **Section 28**, Akiwumi JA, in **John Gitata Mwangi & 3 others -Vs- Jonathan Njuguna Mwangi & 4 Others NBI CA Civil Appeal No. 213 of 1997 [1999] eKLR**, observed that:

“In order that the court may be enabled to come to a proper conclusion as to what order it should make, a dependent has the duty to give satisfactory evidence as to his past, present or future capital or income and his existing and future needs. Without this, the court will not be able to make any sensible order. Whether the deceased has made any advancement to the dependant and the circumstances of the deceased's other dependants are also factors to be considered. The general circumstances of the case including the deceased's ascertainable reasons for not providing for the dependent must also be considered. Which of these factors will play a vital role in their combined effect, depends on each particular case”

29. First, as far as owning property goes it is not in dispute that the 1st applicant had property in Njoro. The contention however is on the size of the property and who inherited the land. The 1st Applicant testified that the property measured 2 acres and not 2 hectares as the respondents claimed. The 5th Applicant testified that only he inherited the land in which he lives with his wife and seven children. Evidence on record, shows that the 1st Applicant's land being NAKURU/RARE/KARIRI, parcel No. 326 measured approximately 2.0Ha. It was subdivided in the year 2000 into three parcels being NAKURU/RARE/KARIRI, parcel No. 1420 measuring approximately 0.874Ha, NAKURU/RARE/KARIRI, parcel No. 1421 measuring 0.513Ha and NAKURU/RARE/KARIRI, parcel No. 1422 measuring approximately 0.63Ha. It is therefore clear that the 1st Applicant owned a substantial piece of land.

30. The size of the property notwithstanding, the Applicants contend and rightly so that ownership of other property does not preclude them from benefiting from their father's estate. There is also no evidence on record to show that this property devolved to the Applicants save for the 5th Applicant who admitted in testimony to living in his mother's property in Njoro. The Respondent however vehemently asserted that the property was inherited by the 2nd, 3rd, 4th and 5th Applicants.

31. It is not in dispute on the other hand that the Deceased was the sole registered proprietor of land parcel number GITHUNGURI/GITHUNGURI/2065 measuring 3 acres or thereabout. This property is comparatively smaller than that which the Applicants own. Grace Njeri averred that the 2nd house was destitute and depended solely on the suit property for their livelihood and this was also the basis on which the deceased made his will excluding provision to the 1st House.

32. The Applicants do not dispute that they are married and have their own families. The Respondent in his response however makes reference to their marriage as a basis for not inheriting. The Constitution of Kenya is very clear on matters of discrimination. It precludes all kinds of discrimination regardless of gender or status. The fact of marriage therefore does not change the status of being a child of the deceased and thus a dependant unless proven otherwise.

33. As far as inheritance by married daughters go, Kimaru J in **Peter Karumbi Keingati & 4 Others Vs. Dr. Ann Nyokabi Nguthi & 3 Others (2014) eKLR** expressed himself as follows;

“as regards to the argument by the Applicants that married daughters ought not to inherit their parents’ property because to do so would amount to discrimination to the sons on account of the fact that the married daughters would also inherit property from their parents’ in-law, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would be no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. ...This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which has a tendency of once in a while rearing its ugly head to be forever buried. The ghost has long cast its shadow on our legal system despite numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for those discriminative cultural practices against women be buried in history.”

It is evident that the fact of marriage has no bearing on the right of inheritance of the Applicants in their father’s estate and any preclusion on that basis is not tenable.

34. As far as dependency and relationship with the deceased goes, the Applicants refute claims that they were not dependent on the deceased and that they did not have an existing relationship prior to his death. What is admitted by both parties is that the Applicants visited the deceased’s home to get the deceased blessing before their marriages. Testimony from the Applicants’ witnesses was that the deceased maintained a relationship with the 1st house. Grace Njeri also testified that the children of the 1st House once sought out the deceased to help solve a land dispute involving their mother, which he did.

35. From the foregoing, it is apparent that the interactions between the Applicants and the deceased were few and far between. The Applicants have not brought any tangible evidence to demonstrate that they had a significant relationship with the Deceased other than his performance of rituals pertaining to marriage. From their evidence this court finds that there was limited interaction and no dependency between the 1st House and the Deceased in terms of **Section 26** of the Law of Succession Act.

36. The Respondent equally questions the paternity of the 5th Applicant on the basis that he was born long after the deceased and the 1st Applicant separated. The deceased in his will made a similar claim which the applicants refuted. It is not disputed that the 5th Applicant was born in 1964 and that the 1st Applicant and the deceased separated in 1957. In any case, if there was an existing relationship between the 1st Applicant and the deceased after their separation, the same was not pleaded nor supported by evidence.

37. It is important to understand the role of testamentary freedom of a testator to have unfiltered discretion to dispose of his or her estate and the fundamental moral duty to provide maintenance for his or her children in death. The treatise by **Jordan F. R.**

“Limitations of the power of testamentary disposition {1907 – 8} 5 Common Wealth Law Review 97 writing for the Court stated: “Children emboldened by the confidence that some share is assured to them in absence of flagrant misconduct, may be tempted to defy parental authority. Any limitation upon a testator’s power to dispose of his earnings as he thinks fit tends to weaken one important incentive to industry and thrift. A testator may be prevented from excluding an utterly worthless member of his family except at the risk of exposing a grave family scandal, which it is perhaps strongly in the interests of innocent members to conceal. The system relegates to a Court of justice discretionary powers in a matter as to the merits of which the testator must in nearly every case be a much better Judge than the Court can possibly be. Complicated questions of fact may arise regarding previous advancements of the claimant. An opportunity is given for speculative and black mailing actions on behalf of persons who have been properly excluded.”

38. The Court of Appeal in **Kamene Ndolo V. George Matata Ndolo (1996) eKLR** stated that:

“This court must, however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is expressly recognized by section 26 of the Act...”

Whereas the law places limitation on testamentary freedom under **Section 5**, the court can intervene and make reasonable provisions for dependents recognized under **Section 29** LSA. The Court is also clothed with discretion under **Section 28** in considering whether or not to allow provision for dependants left out of will.

39. The net effect of the above analysis is that the 2nd and 4th Applicants are dependants of the deceased. I have however, taken into consideration the provisions of **Section 28**, being that the amount of the sole asset of the estate is only 3 acres of land, the existing needs and

means of the Applicants who did not depend on the Deceased in their life time and the situation and circumstances of the deceased's other dependants and beneficiaries who depend on the suit land.

40. I have particularly considered the general circumstances of this case to wit that the 1st house did not live or utilize the land in issue in the four and a half decades leading up to the death of the Deceased nor did they lay claim on any part thereof. further that the Deceased considered the circumstances of the two houses in making his will from the foregoing it is my considered view that the deceased's will should be respected and upheld.

41. For the reasons I have set out above, I find no reason to go against the wishes of the Deceased as stated in the will. The summons dated 20th August 2004 therefore fails and is hereby dismissed.

42. Each party shall bear its own costs

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 15TH DAY OF FEBRUARY 2022

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L.A. ACHODE

HIGH COURT JUDGE