



In re Estate of Ngugi Njoroge alias George Njoroge Ngugi (Deceased) (Succession Cause 79 of 2016) [2024] KEHC 14306 (KLR) (15 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14306 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 79 OF 2016**

A MSHILA, J

NOVEMBER 15, 2024

**IN THE MATTER OF THE ESTATE OF NGUGI NJOROGE
ALIAS GEORGE NJOROGE NGUGI (DECEASED)**

BETWEEN

JOSEPH KORI NGUGI APPLICANT

AND

SIMON MWAURA NGUGI RESPONDENT

RULING

1. The Applicant in his Summons for Revocation or Annulment of Grant filed on 24th September, 2014 and brought under Section 76 of the Law of Succession and Rule 44(1) of the Probate and Administration Rules sought the following orders: -
 - a. The grant of letters of administration intestate/grant of probate made on 15th August, 2013 to Stephen Ndichu J. Mukima be revoked and/or annulled and all other proceedings and/or orders thereafter be vacated and set aside.
 - b. A declaration do issue that Ngugi Njoroge alias George Njoroge Ngugi(deceased) herein who died on 10th April, 2002, died intestate and that his estate be administered as such with the three houses therein each appointing one administrator for purposes of the said administration intestate.
 - c. Pending the hearing and determination of this application, an order of temporary injunction and/or prohibition be issued and/or a preservative order do issue against the Respondent herein and against any of all the surviving beneficiaries of Ngugi Njoroge Alias George Njoroge Ngugi (deceased) through themselves, their servants, advocates, agents and/or representatives from selling off, disposing off, causing to be charged and/or encumbered and/or in any way alienating and/or interfering with all that parcel of land known as Karai/Karai/36, Naivasha/



Maraigushu Block 11/330 (Karai) and all moveable and immoveable assets belonging to the estate of Ngugi Njoroge alias George Njoroge Ngugi (deceased).

2. The Court in its ruling delivered on 30th April, 2019 revoked the grant and directed that status quo be maintained. The court also directed that the disputed will be subjected to proof concerning its execution and validity by way of *viva voce* evidence. Further, parties were directed to file their witness affidavits.
3. Subsequently parties filed their witness affidavits and the matter proceeded for hearing on 3rd July, 2023.
4. Moses Njoroge Ngugi (PW1) stated that the deceased was his father and that the court should find that the deceased's will is valid. He stated that his father knew how to read and write.
5. In cross examination he stated that he was informed by Ndichu that his father had left a will and that all the family members were notified. In 2013 his brother Simon Mwaura divided the *shamba* and had the title changed. He stated that the will precludes him and his brother from owning the Kiambu property which is yet to be distributed.
6. Simon Mwaura Ngugi (PW2) the administrator testified that the deceased was his father and that on 9/4/2002 being the eve of the burial, Stephen Ndichu and Charles Kimotho informed the family that the deceased had left a will. Kori was not happy with the will as such he chased Charles away at Kenyatta Mortuary. They went to Kaburu Miriti & Company Advocates office where the family was informed that there was a file with a will. He further stated that Milkah Wanjiru the 2nd widow instructed Kamau Mwangi & Co to contest the will. He stated that all the 3 properties belonged to his father. The Karai/Naivasha plot was said to be un-surveyed and had a ballot paper. The plot was said to have been registered in 2003. The title for the Nyahururu Plot was issued in 1995. The Naivasha plot was said to have been given to Tabitha Muthoni after 2 acres were sold to Elijah. Joseph and Moses got the *shamba* in Nyahururu. He testified that his father knew how to read and write and that he also had a signature. He produced a post bank book with the deceased's signature. All the agreements produced had a signature. He also produced the will. He prayed that the court finds the will to be valid and distribution to be as per the will.
7. In cross examination he confirmed that the will did not have a stamp, the ID numbers of the witnesses were not indicated and their physical address. He stated that the witnesses are already deceased and that his father was not aware that he needed to change the will after the death of the witnesses and also after selling properties. He stated that there was no codicil to amend the will. Karai/Karai/36 was indicated as Karai/Lusingeti to differentiate it from the other Karai plots. His six daughters were not bequeathed with any properties.
8. Kaburu Miriti (PW3) practising in the name of Kaburu Miriti & Co. Advocates stated that he took over Gatimu's firm.
9. Esther Wanjiru Macharia (PW4) testified that her father the deceased knew how to read and write. In cross examination, she stated that she was told about the will a day before his father's burial by Ndichu. The will was not read because of the disruption. She stated that in 1992 her father was not ill or incapacitated.
10. Milkah Wambui Waweru (PW5) testified that the deceased was her father and that he left a will. It was stated that the deceased knew how to read and write. In cross examination she stated that she had seen the will in the advocate's office. In 1992 her father was not indisposed.



11. Margaret Nyokabi Gatimu (PW6) the wife and administrator of Gatimu advocate estate. She stated that she took all the files home when the advocate passed on. The children of the deceased herein took the file from her. She testified that she sold the firms goodwill to Kaburu Advocate.
12. Joseph Kori Ngugi (DW1) testified that the deceased was his father and that he did not know how to read and write. He stated that the signature did not belong to the deceased as he used to sign using a thumb print. He stated that for witness no. 1, there is no name, just a signature, no address, no ID number, no physical address and no profession was stated. For witness no. 2, there is just a signature, no ID number, no physical address and no profession was stated. There is no official stamp of the advocate on the will. The property Karai/Karai/36 was not stated as they wrongly stated Karai/Lusingeti. The plot in Naivasha was sold in 2006 and there was no mention of a will. He stated that in 2014 Steve Ndichu proceeded to divide the Naivasha plot but due to the existence of the will he proceeded to get an order to stop it but the subdivision proceeded either way. He urged the court to disregard the will and the properties to be distributed.
13. In cross examination he stated that he never reported to the police that the will is a forgery. He did not have documents to prove that his father used a thumb print to execute documents. He was not called when the will was being read by Kaburu Miriti and only learnt of the will in 2014. He denied chasing anybody during the burial arrangements. He stated that he resides on Karai/36.
14. Subsequently the parties were directed to file and exchange their respective written submissions.

Applicant's Submissions

15. The Applicant submits that none of the alleged attesting witnesses to the execution of the will by the deceased testified to prove the said execution. The impugned will was said to be a forgery in that the deceased is alleged to have signed it instead of placing his thumb print. It was submitted that no single witness testified to prove that they saw the deceased sign the will. It was submitted that the sale agreement dated 12/12/2006 signed by the 1st and 3rd wife showed that they were selling off properties included in the will. The Applicant raised issue in that the receipt of fee for the will was issued by Gatimu & Wainanina Advocates while the will was drawn by the firm of P.S.Gatimu Advocate. Further, to proving that the will was a forgery, the Applicant submitted that the executor one Stephen Ndichu had a romantic relationship with the 3rd widow thus questioning the executor's personal interest with the estate of the deceased. It was submitted that the will had not been proved as being duly signed by the deceased. It was further submitted that the court cannot establish whether the attesting witnesses were persons of full age as their ID numbers were not indicated in the will. Reliance was placed in the case of *Rabab Nyakangu Waitbanji vs Fredrick Thuku Waitbanje* (2019) eKLR. The impugned will was said to not be formally valid. Further, the will was said to be discriminatory to married daughters as only sons would inherit. Reliance was placed in the case of *Wanjiru & 4 others vs Kimani & 3 others* (2021) KECA 362 (KLR). The court was urged to declare the will invalid and for distribution to proceed as an intestate estate.

Respondent's Submissions.

16. The Respondent submits that it was the evidence of PW3 and PW4 that the deceased was in good health in 1992 and no medical report has been produced to indicate that the deceased was incapacitated. It was submitted that a Postbank card was produced to prove that the deceased knew how to read and write and that he executed his documents by signing. The signature on the will was said to be identical to the one on the Postbank card and other documents produced. It was submitted that the attesting witnesses need not be persons known to the deceased or his family. The will was said to have



been executed in compliance with Section 11(c) of the Law of Succession Act in the presence of two witnesses and that the testator understood the nature of his act, its effect and the properties to be disposed. No particulars of forgery or proof of forgery were presented by the Applicant. He who alleges must prove. Reliance was placed in the case of In Re Estate of Francis Andabwa Nabwangu (deceased) (2021) eKLR. It was submitted that the Applicant did not bring forth any evidence challenging the fact that the deceased indeed affixed his thumb print in executing his documents and/or evidence from the handwriting experts that the signature appended on the will did not belong to the deceased. The Respondent submitted that failure by the advocate to stamp on the will does not invalidate the will as long as the same was signed by the testator. Reliance was placed on the case of Karanja & another vs Karanja (2002) 2 KLR 22. Lastly it was submitted that the testator has power to dispose of his property as he so wishes. The deceased was said to have capacity to make his will and that the same was properly executed as such there are no valid reasons to invalidate the will.

Issues For Determination

17. Having perused the record and the rival written submissions by the parties, the issues arising for determination are:-
 - a. Whether the will was properly executed
 - b. Whether the will is valid

Analysis

18. The Applicant submits that no witness testified to prove that they saw the deceased sign the will. The will was said to be a forgery as the deceased was said to execute his documents by a thumb print and not a signature as in the impugned will. The Applicant accused the deceased's widows of selling properties included in the will. The Applicant also submitted that the receipt was drawn by Gatimu & Wainaina Advocates while the will was drawn by P.S. Gatimu Advocate as such the will is not valid. The executor of the will was said to be in a romantic relationship with the 3rd widow of the deceased raising suspicion. It was submitted that the witnesses ID numbers are missing as such it is not known whether they were adults. It was also contended that the deceased discriminated the daughters as he did not provide for them in the will.
19. The Respondent on the other hand submitted that in 1992, the deceased was in good health as testified by PW3 and PW4 and that there is no medical evidence indicating that he was incapacitated. The signature on the Postbank Card and on the ID number were said to be similar to the deceased's signature on the will. The will was said to have been executed by two witnesses and was thus valid. The testator was not incapacitated and understood the nature of what he was doing. The Applicant was accused of failing to produce evidence of forgery and that no handwriting experts were called. Lack of the advocate's stamp on the will was said not to be a factor to invalidate the will.
20. Section 11 of the Law of Succession Act, provides as follows:
 - a. "Written wills.
 - b. No written will shall be valid unless—
 - 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;
 - 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;



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.”

21. The Applicant raises issues of forgery in regard to the deceased’s will. It is trite law that claims of forgery are serious claims that ought to be strictly proved.
22. In *re Estate of Francis Andabwa Nabwangu (Deceased)* (2021) eKLR the court stated that: -

“The way to deal with allegation of forgeries of signatures on a will is to have them referred to handwriting experts or document examiners for comparison of the alleged forged signatures with the known signatures of the deceased, as was said and done in *In Re JNM (Deceased) [2005] eKLR (Koome J)*. See also *Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR* (Gicheru, Omolo and Tunoi JJA) and *In re Estate of the late Samson Kipketer Chemirmir (Deceased) [2019] eKLR* (Ndung’u J). The opinion of document examiners or handwriting experts is critical.”
23. He who alleges must prove. The Applicant failed to produce any evidence before the court to support his allegations of forgery. No handwriting expert was called to compare the signatures, the applicant had also not reported or lodged any complaint that the impugned will was forgery at the time of the hearing to any investigating agencies. Further, no evidence demonstrating how the deceased used to execute his documents by the use of a thumb print was produced before the court by the Applicant.
24. Having keenly perused at length the impugned will by the deceased dated 12th February, 1992 vis a vis the issues raised by the Applicant, this court notes that the will was indeed executed by two witnesses. The two witnesses as at the time of the hearing were deceased as such could not be called to testify.
25. Be that as it may, from the evidence on the record it can be concluded that the witnesses were of age given the circumstances as such failure to include their ID numbers when signing cannot invalidate the deceased’s will.
26. Further, this court has looked at the deceased’s signature on the Postbank card and the one on the deceased’s identity card as compared with the deceased’s signature on the will, and without any evidence to controvert or contradict the signatures authenticity this court is satisfied that the signatures on the Postbank Card and on the National ID card and signature on the will as being all signed by one and the same person being the deceased.
27. This court is satisfied that the impugned will was properly executed by the deceased and his two witnesses as such this court is satisfied that the will is valid.
28. The Applicant also raises issue with the fact that the deceased did not bequeath any of his properties to his married daughters.



29. The section herein below gives the testator testamentary freedom to bequeath his property anyway he so wished as provided for by Section 5(1) of the *Law of Succession Act* which states that:-
- “5(1) Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.
30. It is noteworthy that the fact that a will does not provide for some beneficiaries does not render the said will invalid as the Court is empowered under Section 26 of the *Law of Succession Act* to make reasonable provision for the dependant. See the case *In re Estate of Timothy Mwaura Ndichu (Deceased)* (2020) eKLR).
31. Be that as it may, the deceased made his will in 1992 before the promulgation of the *Constitution* 2010 which frowns on discrimination based on gender as such the court will not belabour itself in addressing this issue as it will amount to interfering with the wishes of the deceased.
32. The Applicant also raised issue that the will was not stamped by the advocate, that the widows of the deceased sold properties included in the will and that the receipt for legal fees was issued by a different lawyer. This court acknowledges all these issues and the court admits that the will ought to have been drawn in a more proper and professional manner. Nevertheless, this court finds that these mistakes are not as envisaged by Section 11 and cannot indeed invalidate the deceased’s will as the Respondents have proved on a balance of probabilities that the deceased understood what he was doing and his intentions were clear.
33. The upshot is that the impugned will is found to have been properly executed by the deceased and his two witnesses as such the said will is found by this court to be valid.

Findings And Determinations

34. For the forgoing reasons this court makes the following findings and determinations;
- i. This court finds the first prayer for Revocation of Grant is Spent by virtue of the Ruling by Hon. Meoli J dated 30/04/2019.
 - ii. This court finds the deceased’s will to be valid. Grant of Probate to issue to the substituted Executors.
 - iii. Distribution shall be as per the will.
 - iv. The Applicant to bear the costs of this application.

Orders Accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 15TH DAY OF NOVEMBER, 2024.

A. MSHILA

JUDGE

In the presence of;

Sanja – Court Assistant

Wamiti Njagi for the Applicant /Respondent

Mr. Chumba for the Respondent/Applicant

