



**In re Estate of Jemimah Nyambura Gakuya (Deceased) (Succession Cause 1792 of 2011) [2024] KEHC 14194 (KLR) (Family) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14194 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 1792 OF 2011  
SN RIECHI, J  
NOVEMBER 14, 2024  
IN THE MATTER OF THE ESTATE OF JEMIMAH NYAMBURA GAKUYA (DECEASED)**

**BETWEEN**

**WILFRED WAWERU GAKUYA ..... PETITIONER**

**AND**

**ELIZABETH NYAKIRINGA GAKUYA ..... PROTESTOR**

**RULING**

1. The Deceased Jemimah Nyambura Gakuya died on 25.5.2020 at Mater hospital in Nairobi. The deceased had 10 children and several properties.
2. The children of the deceased who survived her were:
  1. Wilfred Waweru Gakuya
  2. Julius Ng'ang'a Gakuya
  3. Andrew Gicho Gakuya
  4. Harrison Muya Gakuya
  5. Joyce Wambui Mbai
  6. Elizabeth Nyakiringa Gakuya
  7. Nelly Waithera Waiganjo
  8. Rose Wanjiru Githua
  9. Penina Njoki Njoroge



10. Hannah Nduta Njihia
3. Wilfred Waweru Gakuya and Joyce Wambui Mbai Petitioned for letters of grant of administration intestate on 10.5.2011. They were issued with grant of letters of administration intestate on 2.12.2011. On 14.5.2013 Wilfred Waweru Gakuya, and Joyce Wambui Mbai the administrators filed summons for confirmation as per the Will of the deceased dated 17.12.1997. Nelly Waithera Waiganjo filed an Affidavit of Protest sworn on 13.6.2013 on the grounds that the deceased did not leave behind a Will and as such the estate should be distributed intestate.
4. By application dated 9.5.2023 Mr. Kanyage for the protestant informed Court this one of the administrators Joyce Wambui Mbai had died on 15.12.2021 and sought that she be substituted by Elizabeth Nyakiringa Gakuya. There being no objection by the beneficiaries, the grant issued on 2.12.2011 was revoked and fresh grant issued to:
  1. Wilfred Waweru Gakuya
  2. Elizabeth Nyakiringa Gakuya.
5. After the suit being in court for 13 years the parties on 30.4.2024 agreed that the first issue that the Court should determine is the validity of the alleged Will of the deceased dated 17.12.1997. Directions were issued that the same be canvassed by way of viva voce evidence. PW1 Wilfred Waweru Gakuya
6. Testified that the deceased Jemima was married to their father Antony Gakuya Waweru who is also deceased. They had 11 children, 5 of who are now deceased.
7. The deceased had assets in form of share certificates in various land buying companies. The house where the deceased was staying was inherited by Harrison Muya. In October 2000 Wilfred and Harrison noticed that there was a box in the house which they opened. It belonged to the deceased. In the box they found share certificates in the name of the deceased and a Written Will. The Will was in 3 pages and thumb printed on every page. It was typed in Kikuyu language. He called a meeting of the children of the deceased and informed them of this discovery 5 months after the death of the deceased. He now wants the court to find that the deceased left a Will which should be the basis of the distribution of her estate.
8. Harrison Muya Gakuya testified on how they opened a box containing documents of the deceased. In the box they found share certificates .... land buying companies where the deceased was a member and an envelope which contained a Will in Kikuyu which was thump printed. The Will belonged to the deceased and had distributed her properties to her children. They had meetings with the beneficiaries and informed them of the same. They now want the estate to be distributed as per the Will. This position is supported by 6 beneficiaries.
  1. Wilfred Waweru Gakuya
  2. Harrison Muya Gakuya
  3. Julius Ng'ang'a
  4. Jemimah Nyambura
  5. Jennifer Wanja
9. Elizabeth Nyakiriga Gakuya the Protestor in the Affidavit of Protest dated 26.4.2024 and Co-administrator. She testified that upon the death of their mother, they held meetings about distribution of her property. They appointed Wilfred and Joyce to petition for Letters of Administration. As there



was no mention of a Will they petitioned for letters of Administration intestate in 2013 Wilfred and Harrison informed them that there was a Will. She challenged the Will on the following grounds:

1. For 11 years they had not talked about it.
  2. The distribution in the Will was not fair as Thome 5 was allocated to sons only.
  3. The Will has no witnesses. She testified that she is therefore challenging the Will on validity and equality in distribution. Her Position is supported by:
    - a. Penina Njoki
    - b. Ann Nduta
10. The first issue which was distilled for determination is the validity of the deceased Will dated 17<sup>th</sup> December, 1997.

### **Applicants submissions**

### **Respondents submissions**

11. The Preparation and requirements of making a valid Will is provided for in Section 11 of the Succession Act. There are 4 requirements to the formation of a valid Will.
1. The testator must have had testimonial intent.
  2. Must have testimonial capacity
  3. Must have been written free of fraud, duress, undue influence or mistake
  4. Must be signed by 2 witnesses.
- Besides these conditions the testator must:
1. Know the nature of the act of making a Will.
  2. Know the natural objects of his bounty.
  3. Know the nature and extent of his property
  4. Understand the disposition of the assets called for by the Will.
- Section 11 of *Law of Succession Act* sets out the requirements for the determination of validity of a Written Will. It provides:
- 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.



12. The Will dated 19/12/1997 has been annexed to the application. It is addressed by the deceased to my sons and daughter.

I would like you to listen carefully to what I will say in this letter, because this is what I have seen fit after a lot of thinking for many years since when your father died.

First, you should know that not many children inherit their mothers because not many women have property or those that belonged to the husband, but for the little that is in my name, I have resulted to give you in the best way I have seen to avoid hatred when sharing.

I beg you, if you believe I did not do right forgive me because I have done what I see should be done.

All this I have written on Wednesday, 17<sup>th</sup> January, 1997.

13. There is no dispute that the deceased had the testimonial capacity or that the same was made under duress or undue influence.
- a. It is Thumb printed by the testator and name Nyambura Gakuya next to the thumb print. The Will however is not signed by 2 witnesses. Wilfred Waweru Gakuya admitted on being cross examined by Kanyange for the protestor stating:
  - b. The Will was not done with legal assistance. One of the persons who assisted in the writing of the Will was Joyce Wambui Mbai – she is deceased. The Will did not conform to the legal requirements. I have stated so in my statement. I am not aware of order of Muchelule J. dated January, 2019.
14. It is therefore common ground that the Will referred to was a Written Will. It is however not signed by 2 witnesses as required by Section 11 of the Law of Succession Act. What is the effect of the non-signatory by 2 witnesses?
15. Where a Written Will is not signed by 2 witnesses, the effect is that this omission affects its validity. Where a Will is not attested by the two witnesses as required, then it is invalid and cannot be the basis of distribution of the deceased's estate. I therefore find that the deceased did not leave behind a valid Will and direct that the deceased's estate be distributed as intestate.
16. The administrators to file Summons for confirmation of the intestate estate of Jemimah Nyambura Gakuya.

**DATED AT NAIROBI THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024.**

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**S. N. RIECHI**

**JUDGE**

