



REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA AT NYAHURURU

P&A CAUSE NO. 9 OF 2019

IN THE MATTER OF THE ESTATE OF NJUGUNA MUIKO NJUGUNA (DECEASED)

NAOMI WANJIKU NJUGUNA &

JOHN KARIUKI NJUGUNA.....PETITIONERS

-VERSUS-

SIMON MUIKO NJUGUNA.....OBJECTOR

JUDGEMENT

INTRODUCTION:

1. Before this court is an application for confirmation of grant of probate dated 8th July 2020 in the estate of Njuguna Muiko Njuguna, the deceased herein, who died on 11th February 2018 allegedly leaving Naomi Wanjiku Njuguna and John Kariuki Njuguna, the Petitioners herein as the executors of his oral will.
2. The application for confirmation is objected by Simon Muiko Njuguna, the Objector herein through a document he describes as objection to making of grant dated 30th November 2020 and filed in court on 3rd December 2020.
3. The Petitioners filed two witness statements by independent witnesses who were said to be present during the pronouncement of the oral will by the deceased. The two witnesses testified in court.
4. On his part, the Objector testified as the only witness and closed his case.
5. The parties also filed written submissions.

PETITIONER'S CASE:

6. The first witness on behalf of the Petitioners was Susan Nyambura Kanja. She testified on how the deceased made his oral will. Her evidence mirrored her witness statement dated 25th January 2021 and filed on 26th January 2021 which she adopted as her statement.
7. In a nutshell, she testified that on 30th January 2018 she was invited by the deceased who was her relative to his hospital bed at North Kinangop Hospital where she met David Mwangi Karira (the other witness), the deceased's children and wife.
8. That the deceased explained to her that the purpose of the invitation was to witness his last wishes in regard to his properties and in her presence and that of his children and wife, the deceased expressed his last wishes in regard to distribution of his estate.
9. That the specific details on each property were explained by the witness which corresponded exactly and/or substantively to the terms of the oral will filed in court. She further testified that the deceased appointed his wife Naomi Wanjiku Njuguna and his second born son John Kariuki Njuguna as executors of his will.
10. The witness further testified that the deceased had a sketch plan on the specific location of each child's land on the ground which she identified when the same was shown to her.
11. The second witness David Mwangi Kirara adopted his witness statement dated 25th January 2021 and filed on 26th January 2021. He testified that he is a relative of the deceased and that on 30th January 2021 he was invited by the deceased to his hospital bed where he met

Susan Nyambura, the other witness who is also his relative. He reiterated the 1st witness's narration of events and identified the sketch plan produced as **Dexhb-1**. The sketch plan shows the exact location of each child's land and the road reserve, the homesteads for each child who have already build the same, the graveyard and the family school.

12. The Petitioners placed reliance on **Section 5, 6 And 8 of the Law of Succession Act** on testation and oral wills. Further, the submitted that the issues for determination before this court are 1) whether the deceased died testate and whether the oral will is valid and; 2) whether the grant of probate issued in this matter should be confirmed as per the written terms of the oral will annexed to the petition

13. As to the first issue, the Petitioner's submitted that the two witnesses narrated to the court how the deceased distributed his estate in their presence together with his children and wife and the Objector himself confirmed that indeed it did happen as stated by the latter however, he hastened to state that he openly disagreed with the deceased on the appointment of executor and the shares of the daughters.

14. As to whether the will is valid, the Petitioners submitted that there were two witnesses present throughout the time the deceased was pronouncing his will. That it has not been shown that the deceased was suffering from any mental infirmity and it was therefore their submission that the deceased's oral will was valid and has been proved.

15. As to whether the grant of probate should be confirmed as per the terms of the oral will, the Petitioners asserted that the evidence of the witnesses was very clear as to the wishes if the deceased and therefore no person including a court of law can purport to substitute the wishes of the deceased person with those of their own as provided under **Section 5 of the Law of Succession Act** on testamentary freedom. Reliance was also placed on the case of **Erastus Maina Gikunu & Anor vs. Godfrey Gikunu & Anor (2016) eKLR**.

16. In conclusion, it was their submission that the objection should be dismissed with costs and the summons for confirmation dated 8th July 2020 should be confirmed as per the written terms of the oral will annexed to the summons and marked "NWN-1" and the ground positioning of each bequest to be as per the sketch plan produced as **Dexhb-1**.

OBJECTOR'S CASE:

17. The Objector on his part through his 'Objection of the Making of Grant' dated 30th November 2020, submitted that being the first son, he was never involved in the deliberations on the administration of the deceased's estate and that the oral will dated 30th January 2018 is untrue, was secretly done and the deceased was not sober while making it. That the Petitioners have hidden plots and sharing of the same has been inconsistent.

18. It was his submission that all the family meetings held in respect to the deceased estate were made without his knowledge. He stated that other family members should not interfere with the management of the estate.

19. He that averred though he was suffering from bipolar mood disorder, he was of sound mind.

ANALYSIS AND DETERMINATION

20. Having considered all the evidence before this court including all the parties' affidavits and attached documentation, the witness called by either parties and the parties' submissions. In my view, the issues of determination before this court and as deciphered by the Petitioners' counsel include:

a) Whether the deceased died testate and whether the oral will is valid and;

b) Whether the grant of probate issued in this matter should be confirmed as per the written terms of the oral will annexed to the petition

21. Testamentary capacity is provided for under **Section 5 of the Law of Succession Act** which states that a valid will is made by a person who knows what he is doing. It refers to soundness of mind and the fact that the maker ought to be an adult.

22. **Section 9 of the Law of Succession Act** provides that:

(1) No oral will shall be valid unless:

(a) It is made before two or more competent witnesses and

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

23. Further, **Section 10 of the Act** provides for the criteria for proof of oral wills by stating that:

(1) "If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness"

24. It follows that the voice of the deceased through his will must be strictly construed. The deceased made his intentions as to the administration of the estate clear and went further to identify each share of the estate and the respective beneficiaries. His wishes were made before two competent witnesses i.e. Susan Nyambura and David Mwangi Kirara, a fact the Objector did not deny. From the witnesses'

narration of events the deceased clearly explained to them that the purpose of the invitation was to witness his last wishes in regard to his properties and this was done in the presence of his children and wife. The witnesses further testified that the deceased had a sketch plan (**produced as Dexhb-1**) that indicated the specific location of each child's land on the ground which they identified when the same was shown to them. Moreover, the deceased died 11 days after making the will in accordance to **Section 9 of the Law of Succession Act**.

25. In addition, **Section 7 of the Law of Succession Act** provides that a testator must exercise his free will in the distribution of his estate and the absence of such free will invalidate a will;

(1) "7. A will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void."

26. Further, in the case of **Rosemary B. Koinange (suing as legal representative of the late Dr. Wilfred Koinange and also in her own personal capacity) & 5 Others V Isabella Wanjiku Karanja & 2 Others [2017] e KLR** the court examined the issue of mental capacity (to make a will) and stated as follows:

(1) "The essentials of testamentary capacity were laid out in the case of Banks v Goodfellow [1870] LR5QB 549 as cited with approval in the Tanzanian Court of Appeal case of Vaghella v Vaghella [1999] EA 351 thus:

(a) " A testator shall understand the nature of the act and its effects, shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made."

27. In the present case, the Objector submitted that the oral will was untrue, was secretly done and the deceased was not sober while making it. However, he did not proffer any evidence to substantiate his claims save for his bare assertions. It is important to note that the onus lays with the Objector to satisfy the court that the deceased at the time of making the will was too ill or not sober to know what he was doing. Notably, the objector together with the two witnesses and the rest of the family were present as the deceased pronounced his will discounting the allegation that the same was done in secret and it is also quite clear that the deceased had on several other occasions and family meetings conveyed his wishes as to the distribution of his estate.

28. The Objector expressed his reservations with the deceased's choice of the 2nd Petitioner, John Kariuki Njuguna as one of his executors. Even so, **Section 6 of the Law of Succession Act** grants the testator discretion over the appointment of the executor. Accordingly, the deceased did in fact choose the 1st and 2nd Petitioner as his executors and it was well within his right and discretion to appoint the 2nd petitioner as one of his executors.

29. In **Re Rufus Ngethe Munyua (deceased) Public Trustee -vs- Wambui (1977) KLR 137** and **Beth Wambui and Another -vs- Gikonyo and others (1988) KLR 445** the courts in both instances held inter alia that if the witnesses present during the making of an oral will make a record of the terms of the oral will, so long as it meet the requirements of Section 9, of being made in the presence of two or more competent witnesses and the maker dies within three months, then that oral will would be considered valid.

30. Accordingly, the witnesses testified that they dictated the terms of the oral will to the Petitioner's advocate who put them in writing and they confirmed that the written terms of the oral will were the exact wishes of the deceased as expressed by him in their presence.

31. The Objector's evidence seems contradictory and I am unable to ascertain whether his issue is his lack of involvement in the making of the oral will even though he stated he was present on 30th January 2018 when the deceased expressed his last wishes in regard to distribution of his estate, the deceased's choice of executor or the validity of the deceased's will.

32. In my considered view, the evidence tendered by the Petitioners seems to point to all the requirements of a valid oral will having been met. Consequently, it is my view that the grant of probate should be confirmed as per the terms of the oral will in accordance **Section 5 of the Law of Succession Act** on testamentary freedom and having regard to the fact that the testator intended the beneficiaries to be bound by the contents in the last Will and testamentary.

33. In the upshot, this court finds no merit in the objection under consideration and make the orders;

- i. The objection to the will is here by dismissed.*
- ii. The court directs that the grant of probate issued to the Petitioners be confirmed in respect of the oral will therein.*
- iii. Parties will bear their own costs.*

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 7TH DAY OF OCTOBER, 2021.

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CHARLES KARIUKI

JUDGE