



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 21 OF 2017

IN THE MATTER OF THE ESTATE OF M'MUGUNA M'KIAMBATI – DECEASED

DORCAS IGOKI MUGUNA.....PETITIONER/RESPONDENT

VERSUS

FRANKLINE MURITHI.....1ST APPLICANT

EUNIAH KARIMI2ND APPLICANT

PAULINE KAROKI3RD APPLICANT

CATHERINE NKIROTE4TH APPLICANT

J U D G M E N T

1. **M'Muguna M'Kiambati** (“the deceased”) died on 13/1/2016 at Chogoria Hospital in Meru South District. He left a written Will dated 5/10/2011 (“the said Will”) by which he appointed **Dorcias Igoki Muguna** as the executor of his will. On 14/5/2018, the executor petitioned for probate of the written Will.

2. On 19/9/2019, the 1st applicant lodged a Summons under *section 47 of the Law of Succession Act and Rules 49, 59, and 73 of the Probate and Administration Rules* whereby he challenged the said Will. The grounds upon which the application was premised is that the deceased never left a valid Will. That the purported Will was a forgery or was made under undue influence as 8 children of the deceased were not provided for and the estate of the deceased estate should be shared equally among all the heirs. The three other applicants joined the proceedings and supported the 1st Applicant.

3. The application was opposed through the replying affidavit of **Dorcias Igoki Muguna**, a widow of the deceased. She stated that the deceased had initially made a Will in 2005 but rectified the same by making the said will. That before making the said Will, the deceased called all his children at his home and informed them of the changes he intended to make to his earlier Will of 2005. That he inquired as to any objections from the children and there were none.

4. The attempts to settle the matter failed whereby the matter proceeded to hearing by way of *viva voce* evidence. The witnesses filed affidavit evidence on which they were cross examined. **PW1 Frankline Murithi**, a son to the deceased, told the Court that his father left behind over 100 acres. That in the said Will, he had been given only 3 acres whereas his brother **Vincent Kithinji** was given 26 acres and a fully developed plot at Kanya.

5. He further testified that, the five children of the first wife and five children of the third wife had not been provided for in the said Will. That in the premises, the deceased’s property should be re-distributed to all heirs fairly.

6. **PW2 Euniah Karimi**, a daughter to the deceased, reiterated the testimony of **PW1** and stated that there used to be family meetings but the deceased never stated how his estate would be inherited. That the deceased had told her that the property in town was to be hers. That one of the 3 plots proposed for the daughters of the deceased was not in the name of the deceased as he had exchanged it with someone else.

7. When recalled, she told the court that she was the owner of **plot No. 827 Meru Town** which she had bought from **Titus Gichuru**. The plot was jointly owned by the deceased and her uncle.

8. **PW3 Paulina Karoki** reiterated the evidence of **PW1** and further stated that she had not been provided for in the said Will. She admitted that at no time was she prevented from seeing the deceased.

9. **PW4 Catherine Nkirote** told the Court that she was given 3 acres in the said Will and the reason she joined the objection was to help those who had not been provided for. That the deceased had not exhibited any bias during his lifetime.

10. **RW1 Vincent Kithinji Muguna**, a son of the deceased, told the Court that the deceased first made a Will on 13/1/2005 but rectified it subsequently on 5/10/2011. That on both occasions, he called all his children and told them what he was to put in the Will. That present in those meetings were his longtime friends **Robert Meme Kieni** and **Johannah Mutwiri Kiome**. At both meetings, the deceased invited comments on his proposed Will but there was no objection that was raised by any of his beneficiaries. It was therefore a surprise that the applicants would now raise an objection.

11. He further told the Court that after the deceased had made the said Will, each beneficiary took possession of their respective portions and continued to develop the same. That they had continued to live in their respective portions as had been settled by the deceased to date.

12. He further testified that all the bank accounts and shares were bequeathed to their mother, the petitioner. That **Lydia Makena, Nduru Muguna and Mugure Muguna** were left under his care and superintendence and they had no complaints. **Koome Muguna's** children were provided for in the said Will. That in a family meeting held after the demise of the deceased, **Euniah Karimi** was given a plot in Meru town, **Pauline Karoki** was given a plot in Chaaria while **Salome Mugito** was given **Plot No. 19 Kanyakine**. He denied that the deceased's estate was comprised of 100 acres and millions of Shillings in banks as alleged by the applicants.

13. **RW2 Dorcas Igoki**, petitioner and widow of the deceased, told the Court that she had been married to the deceased for 45 years as at the time of his demise. The deceased had 3 wives each with her own children whom she named.

14. Her testimony was reiterated by **RW4 Robert Meme** and **RW5 Rose Kinya** who attested that the said Will was properly made by the deceased.

15. **RW3 Kaumbi Kioga**, a practicing Advocate within Meru, told the Court that the deceased made the said Will on 5/10/2011. That as of that date, he was an associate advocate in **M. M. Kioga and Company Advocates**. He recalled that the deceased came to his offices to improve an earlier Will which he had made on 13/1/2005 in the same firm.

16. He testified that the said Will of 5/11/2011 revoked the earlier one of 2005. That the deceased was in good health and was well aware of what he was doing. The deceased set out his properties and willed them as per his wishes. He appointed **Dorcas Igoki** as the executor of the Will, signed the same and was witnessed by **Thuranira Magambo and Robert Meme Kieni**. The mode of instruction was Kimeru which he duly read to the deceased before the latter signed it.

17. I have carefully considered the evidence and the submissions on record. The issues for determination are; *whether the Will dated 05/10/2011 is valid? Whether there were beneficiaries who were not provided for in the Will; If so, should the said Will be varied and reasonable provision be made to those not provided for?*

18. **Section 3 of the Law of Succession Act** (hereinafter "the Act") defines a Will as: -

"The legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II, and includes a codicil."

19. On the other hand, **section 5 of the Act** provides, in the relevant parts, as follows: -

"(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.

(2) ...

(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges".

20. It is clear from the foregoing what a valid Will should be. It should be made by a person who is an adult of sound mind. It should be signed by the testator and attested by two witnesses. The law presumes that the testator is of the sound mind at the time of making the Will and the burden of showing otherwise lies on the person alleging otherwise.

21. In the present case, initially the applicants had alleged that the said Will was a forgery; that he and the other beneficiaries had been prevented from seeing the deceased and that the said Will must have been prepared at the instance of **Rw1 Vincent Kithinji Muguna** and **Rw5 Rose Kinya**.

22. However, at the trial, they all admitted that the two lived at Kanyakine Market and Nairobi, respectively while the deceased was living at Kanyakine Farm with the petitioner. They also admitted that no one was prevented from seeing the deceased as and when they wanted to reach him. All they complained about was the closeness between the two and the deceased.

23. **Rw3 Kaumbi Kioga** is the advocate who prepared the said Will. He appeared and told the Court how the deceased came to his offices accompanied by his two witnesses. The deceased was in good health and gave him instructions and was very clear in his mind as to what he wanted. The Advocate even advised him against the inclusion of a paragraph declaring that those of his daughters who would be married be excluded from inheriting his property but the deceased insisted that the same should be included. That, in this Courts view shows that the deceased knew what he wanted.

24. **Rw3** narrated how he ensured all that is required in preparation of a valid Will was done whereby it was signed by the deceased and attested by two witnesses. The Will was valid in all respects.

25. In view of the foregoing, I am satisfied that the said Will is valid. That there was no evidence that it was forged or that the deceased was incapable of making the same at the time he made it. There was no undue influence in the making of the same. The said Will conforms with the provisions of the law including **section 11 of the Act**.

26. The said Will was attacked on the basis that not all the beneficiaries of the deceased were provided for. It was alleged that those left out included **Charity Nduru, Doris Mugure** (widow of the late **Desderio Koome** and her children **Kimathi, Kagane, Karimi and Karani**), **Kathure Muguna, Rose Mugure, Euniah Karimi, Pauline Karoki Muguna, Nanis Kagwiria, Idah Gatwiri, Salome Mugito, Lydiah Makena** and **Jonah Muthaura**.

27. Under **section 5 of the Act**, there are no restrictions on how a testator has to dispose of his free property. In **Re Estate of Julius mimano (deceased) [2019] Eklr**, it was held:-

“The applicant pointed at the fact that the will did not provide for the children of the deceased, and especially himself, being the only son of the deceased. According to him that was unusual, and raised suspicion. Section 5 of the Law of Succession Act gave the deceased freedom of testation, to dispose of his property as he pleased to whomsoever he pleased. It was within his freedom or discretion to determine who was to benefit from his bounty. The mere fact that a will leaves out children from benefit and benefits the spouse substantially should not be ground for invalidation of a will. A party aggrieved by such provision has a remedy in section 26 of the Law of Succession Act, but not in the nullification of the will.”

28. The basis of writing a Will is for a person while alive to freely direct how his property will be dealt with upon his demise. **Section 5 of the Act** gives a testator the freedom to dispose of his property as he pleases to whomsoever and howsoever he pleases. The property belongs to him to the exclusion of everyone else.

29. In this regard, the law allowed the deceased to deal and dispose of his property as he pleased. It was within his freedom or discretion to determine who was to benefit from his property and the extent. The mere fact that a Will leaves out some children from benefiting and/or benefits others substantially than others has never and should not be a ground for invalidation of a Will. Anyone aggrieved thereby has recourse to apply for reasonable provision under **section 26 of the Act**, but not to seek to nullify the Will. A testator of sound mind is allowed by law to deal with his property as he wishes. That is the basis of a Will. Anything to the contrary negates the principle of free will as far as property of a living person is concerned.

30. In any event, from the evidence on record all the beneficiaries were provided for in the said Will. The three who were not provided for in the Will were subsequently provided for, at a family meeting, with properties that were not included in the said Will. These were **Euniah Karimi (Plot No. T827), Pauline Karoki (Plot at Chaaria Gaitu)** and **Salome Mugito (Plot No.19 Kanyakine)**.

31. **Vincent Kithinji** is to give **Lydia Makena, Rose Muguna and Nduru Muguna** one acre each from **LR No. Abogeta/U-Kiungone/2436**.

32. The foregoing disposes off the issues raised in this matter.

33. However, there was the issue that was raised to the effect that the said Will as drawn discriminated against the daughters of the deceased. The case of **Mary M. Mukira & Others v. George Mugambi Succ. Cause No. 93 of 2015 (UR)** was relied on.

34. I have considered the said authority. The facts in that case were completely different from the present case. The case of **Rono v. Rono** was in respect of intestate succession. The present case was testate succession.

35. I am alive to the provisions of **Article 27 of the Constitution** which outlaws discrimination. The said provision is not applicable here because of the freedom of the testator in willing his property under **section 5 of the Act**.

36. One other thing, the deceased in this case seems to have dealt with his Will differently. Unlike in other cases where a testator keeps the contents of the Will secret and is only disclosed after his demise, in the present case, the testator first explained his intentions on how he was to will himself before he made the Will.

37. All the witnesses were in agreement that, before he made the said Will, the deceased called a family meeting at his home and informed all those present how he would distribute his properties. They also agreed that the said Will was as per his directions at that meeting. He is said to have asked those who had objections to the distribution to question him but none did so.

38. In **Paul Kathuni Gichunge v. Victor Polycarp Ntwiga & 2 Others [2016] Eklr**, the Court held of bequests: -

“A person can deal with his property as he wills during his lifetime. Whoever feels aggrieved on how his/her/parent has dealt

with his property should at the earliest question such person during his/her lifetime. He/she cannot wait until such person dies to raise issues of discrimination or unfairness. Such issues can only validly be raised in cases of a will since wills are kept secret until the testator passes on. However, bequests that are given inter vivos, are openly so given and in my view whoever is dissatisfied therewith is at liberty to question the same before the demise of the gifto”.

39. I reiterate the same in this matter. The deceased called a meeting in or about 2010 where he told the beneficiaries what he intended to give each one of them in the proposed Will. He asked those not satisfied to question him but none did so. **Pw3** told the Court that she threatened to divorce her husband and come back home so that the deceased could provide for her but she did not do so. The beneficiaries then settled where the deceased had directed them to.

40. The deceased then made the said Will in October 2011. The parties continued to live as per the directive of the deceased and as per the said Will until the deceased died 5 years later in 2016. No one complained to the deceased or questioned him of the decision he had made at that time.

41. On the foregoing, none, including the daughters can be heard to now turn around and wave the **Constitution** and allege that the Will had discriminated upon him/her. The time to complain ended with the demise of the deceased in 2016.

42. In view of the foregoing, the application is without merit and it is hereby dismissed.

43. The parties were all agreeable and **Vincent Kithinji Muguna** stated on oath, that **Lydia Makena, Nduru Muguna and Mugure Muguna** who were not named in the said Will should get an acre each from the share of the said **Vincent Kithinji Muguna**. Subject to that and the said **Vincent Kithinji Muguna** from which portion the said 3 acres are to be excised from, I find that the said Will has been propounded.

44. Accordingly, the Probate of Will is hereby issued and the estate of the deceased is to be distributed in terms of the said Will. Subject to **Lydia Makena, Nduru Muguna and Mugure Muguna** each getting one acre from **LR No. Abogeta/U-Kiungone/2436**.

45. This being a family matter, I make no order as to costs.

DATED and DELIVERED at Meru this 14th day of April, 2020.

A. MABEYA

JUDGE