



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO.61 OF 2017

(Formerly H.C Nakuru Succ.644/2008)

IN THE MATTER OF THE ESTATE OF KAMAU MBAU KAMAU (DECEASED)

- A N D -

MARGARET NJOKI KAMAU.....1ST PETITIONER

DANIEL MWANGI KAMAU.....2ND PETITIONER

- V E R S U S -

MARGARET NJAMBI NJIHIA.....PROTESTOR

JUDGMENT

Kamau Mbaui Kamau died on 2/8/2007 at North Kinangop as per the death certificate filed with the petition for letters of administration on 4/12/2008.

Margaret Njoki Kamau and Daniel Mwangi Kamau were issued with grant of letters of administration intestate on 16/3/2009. They filed a summons for confirmation of grant on 7/1/2010 and on 23/3/2010 Margaret Njambi Njihia filed an affidavit of protest to the confirmation of grant.

On 8/6/2010, the parties took directions that the protest proceed by way of viva voce evidence. On 3/5/2012, the parties entered into a consent inter alia that parties should file further statements and witness statements but I note from the file that no other statements were filed.

Margaret Njambi Njihia (PW1) the protestor, adopted the affidavit she swore on 23/3/2010 as her evidence. It is her evidence that she is a daughter of the deceased; that the deceased had two houses and she belongs to the first house; that they were born four girls in the first house namely:

- 1) Esther Njeri;
- 2) Mary Wanjiku
- 3) Eunice Wakarura;
- 4) Margaret Njambi.

PW1 swore the affidavit on her behalf and on behalf of her three sisters; that the 1st petitioner is the 2nd wife of the deceased. PW1 was in agreement with the 1st petitioner's list of beneficiaries at paragraph 2 of the affidavit in support of the summons for confirmation. PW1 was also in agreement with the identified assets that form the deceased's estate to be as listed in the petitioner's affidavit.

PW1 does not agree with the proposed mode of distribution where it has been suggested that the protestor and her three sisters get one acre of land while the rest of the estate devolves to the 1st petitioner and her 12 children. It is PW1's proposal that her father treated his children equally and therefore the estate should be shared equally amongst the deceased's 16 children and wife; that their father had during his life gifted the protestor and her sisters 4 acres of land when they went to visit him in his home after hospitalization; that the protestor and her sisters visited the father with their children and bought him medicine. She denied that the father ever talked of inheritance or how his estate would be distributed upon his death. She also requested that they be given the portion of land where their mother was buried.

PW1 also told the court that Nyandarua Mawingo/1339 does not belong to the deceased but that he held it for other people. It is PW1's contention that they are being discriminated against because they were only born girls whereas the 2nd house has both girls and boys.

The 1st petitioner Margaret Njoki Kamau (DW1) confirmed that the deceased had two houses and she was the second wife; that the 1st wife died before the deceased; that the first house had 4 children while she had 11 children; that before his death, the deceased called all his children on 15/4/2006, a neighbor Philomena Ngeria (Mama Kamau) and William Ndirangu were present. He also called his uncle's children including Pharis Kamau; that he gave the children of the first house Plot 306 – three of them, while PW1 got one acre and PW1 could sell ½ acre to Njambi (PW1); that after they were given the land PW1 asked if they could be given where their mother was buried so that they could care for their mother's grave but the deceased refused to give them because the land Nyandarua/Mawingo/71 belonged to the second house and that they might sell it and disturb the children of the 2nd house.

According to DW1, the deceased left an oral will that the land Plot 71 belonged to Peter Njoroge, Daniel Mwangi, John Main, Moses Mukuru, her sons and that her daughters were not given any land. She confirmed that Plot 1339, though registered in the deceased's name, belonged to a group of 12 people and should therefore be given to the people.

DW1 admitted that she did not disclose to her advocate that the deceased had left a will; that she has distributed the deceased's estate according to his wishes.

DW2 Peter Kamau Kimani, a nephew to the deceased recalled that the deceased went to his home in Kikuyu in April, 2007 and informed him that he had distributed his land to his children; that 4 daughters had got one acre each and one had 1½ with the option to purchase it and that the land where he had built belongs to his sons.

Mr. Njuguna and Mr. Kamanga counsel for the protestor and petitioner respectively filed written submissions.

Mr. Njuguna submitted that the totality of the evidence on record does not suffice to establish a valid oral will made in accordance with Section 9 of the Law of Succession Act; that the deceased was said to have made a will on 15/4/2006 and the deceased died on 9/7/2007 over a year since the making of the will which renders the will invalid; that the said oral will was not annexed to the petition as required by law; the neighbours present when the will was purportedly made were not called as witnesses and DW2 who was said to have been present contradicted DW1's evidence as to when and where the will was made.

Further, counsel submitted that the petitioner did not follow the due process for filing a cause where one died testate under Rule 13 of the Probate and Administration Rules; that the protestor instituted intestate proceedings over the deceased's estate. Counsel relied on the decision of *Re: Estate of Elizabeth Wanjiku Muga (deceased) [2015] eKLR* which considered provisions of Section 9 of the Law of Succession Act.

Lastly, on the issue of the will, counsel submitted that the evidence on existence of an oral will was an afterthought and hence not credible because it was raised for the first time during hearing of the protest. Counsel relied on the decision of *Tabitha Waguthi Muriki vs Wathiba Kimoo (2018) eKLR* where the court found that the allegation that the deceased had left a will to be a fabrication and therefore Section 10 of the Law of Succession Act had to apply. See also *Re: Estate of Elizabeth Wanjiku Munge*.

It is also Mr. Njuguna's submission that the petitioner is bound by his pleadings and having failed to prove existence of an oral will, cannot sneak in such evidence at this stage. Counsel relied on the decision of *IEBC and another v Stephen Mutinda & 3 others (2014) eKLR and Benjamin Ogunyo Andama v Benjamin Andola Andayi (2013) eKLR* where the court held inter alia that parties are bound by their pleadings. He also cited the decision in *Kimani Wanyoike v IEBC (1995) eKLR* where the court underscored the need for parties to adhere to the prescribed procedure in the Constitution and Acts of parliament.

As regards the contradictions in the evidence of DW1 and 2 about the will, counsel cited the case of *Jack Gitari Mieri v Kiarie Muriithi (2016) eKLR* where the court considered conflict in the evidence of witnesses on the will that go to the root of the will. The court said it must reject such contradictory evidence.

On the mode of distribution, counsel urged that the proposed mode of distribution is biased, discriminatory and gender insensitive. Counsel relied on the case of *John Ngugi Karanja v Samuel Njau Karanja (2016) eKLR*. The court observed that the spirit of Part V of the Law of Succession Act is equal distribution amongst the deceased's beneficiaries. Counsel urged the court to find that the deceased died intestate and distribute the deceased's estate into 16 equal parts.

Mr. Kamanga, the petitioner's counsel submissions were brief where he urged the court to distribute the estate in terms of the oral will left by the deceased.

I have given due consideration to the affidavits filed, the oral evidence of the witnesses, the submissions by counsel and cases that were cited by the protestor's counsel.

The undisputed facts are that the deceased had two houses. The protestor is the deceased's daughter belonging to the first wife who had pre-deceased the deceased. The first wife left four daughters.

The 1st petitioner is the deceased's second wife and has 11 children.

The beneficiaries of the deceased are listed in paragraph 2 of the petitioners affidavit in support of the summons of confirmation and are as follows:

(1) Margaret Njoki Kamau	2nd widow
(2) Esther Njeri Kamau	1st house
(3) Mary Wanjiku	“
(4) Eunice Wakarura	“
(5) Margaret Njambi Njihia	“
(6) Jane Wanjiku Maina	2nd house
(7) Julia Nyambura Thuo	“
(8) Mary Wanjiku Mungai	“
(9) Peter Njoroge Kamau	“
(10) Daniel Mwangi Kamau	“
(11) Edward Kiuna Kamau	“
(12) John Maina Kamau	“
(13) Alice Wambui Kamau	“
(14) Jacinta Wairimu Kamau	“
(15) Moses Mukiria Kamau	“
(16) Irene Wambui Kamau	“
(17) Eunice Wakarura Kamau	“

The protestor also agreed with the assets listed in the 1st petitioner’s affidavit as forming the deceased’s estate.

They are as follows:

- 1) Nyandarua/Mawingo/71
- 2) Nyandarua/Mawingo/546
- 3) Nyandarua/Mawingo/603
- 4) Nyandarua/Mawingo/941
- 5) Nyandarua/Mawingo/1104
- 6) Nyandarua/Mawingo/1566
- 7) Nyandarua/Mawingo/2221
- 8) Nyandarua/Mawingo/1946
- 9) Nyandarua/Mawingo/1716
- 10) Nyandarua/Mawingo/1339
- 11) Plot.No.490/Kantafu Komarock Estate Phase VII
- 12) Plot.No.25/Githioro Township & Tol Githioro Township

It is also not in dispute that L.R.Nyandarua/Mawingo/1339 does not form part of the deceased’s estate and should therefore be transferred to the respective owners.

DW1's explained that her proposed mode of distribution of the deceased's estate is as per the deceased's wishes which were in an oral will made on 15/4/2006. Section 9 of the Law of Succession Act provides for the making of an oral will. For purposes of this judgment, the relevant section is Section 9(1) which stipulates as follows:

“9(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:

Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.”

The key elements of an oral will therefore are that;

(1) It must be made in the presence of two competent witnesses;

(2) The testator must die within three months of making of the will.

Where a deceased dies having left an oral will, the executor of the will or in this case, the petitioners should have moved the court under Rule 13 of the Probate and Administration Rules which governs applications for grant of Probate where the deceased left an oral will. Rule 13 of the Probate and Administration Rules provides as follows:

“Rule 13

(1) An application for proof of an oral will or of letters of administration with a written record of the terms of an oral will annexed shall be by petition in Form 78 or 92 and be supported by such evidence on affidavit in Form 4 or 6 as the applicant can adduce as to the matters referred to in rule 7, so far as relevant, together with evidence as to:-

(a) The making and date of the will;

(b) The terms of the will;

(c) The names and addresses of any executors appointed;

(d) The names and addresses of all the alleged witnesses before whom the will was made.”

The petitioners did not follow the procedure provided in the Act and Rules on how to file the petition with an oral will. It is trite law that each party is bound by its own pleadings. This is necessary for purposes of certainty so that if there is an opposing party, they may know what case to meet. It is also important for the court to understand what prayers the applicant seeks. There is a host of authorities on this issue. *Re: Kimani Wanyoike v IEBC [1995] eKLR:*

*“In our view, there is considerable merit in the submissions that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.... In the same way, the matters which Mr. Cheboiwo had alleged in his plaint and in the application for an injunction if they were proved, would constitute an election offence. But in a plaint, the court would have no power to find a person guilty of an election offence and hence disqualify him or her from participating in the next election, of course subject to any pardon that may be granted. What we are saying is that there are special procedures when it comes to matters of election and those procedures ought to be strictly followed as the court observed in *Karume's case*... The applicant has not shown to us that the procedure he has adopted in coming to the court is correct and on that score we are also not satisfied that his appeal is arguable.”*

In the instant case, the petitioner petitioned the court for grant of letters of administration intestate in Form P & A 80. They did not comply with provisions of Rule 13 at all. Even when PW1 filed the protest, the petitioner never filed any further statements in which they alluded to the existence of an oral will. It is not until the testimony of DW1 that the allegations that an oral will existed cropped up.

DW1 testified that the deceased called all his children, two neighbours and DW2 on the day he made his will. Although the two neighbours were said to be alive and neighbours of DW1, they were not called as witnesses. DW2 who testified totally contradicted DW1's evidence as to when the will was made.

According to DW2, the deceased went to his home in Kikuyu in April, 2007 and told him of having distributed his property to his children. Contrary to what DW1 had said, DW2 was not present when the will was allegedly made on 15/4/2006. DW2 did not know when the deceased had made the will. It follows that DW1 did not satisfy this court that a valid oral will was ever made by the deceased because, the names and addresses of the witnesses were not disclosed and even DW2 who was said to have been present denied it. I wish to echo the decision of *Re: Estate of Elizabeth Wanjiku Mwangi [2015] eKLR* where Musyoka considered a matter of a similar nature when he said:

“Section 9 of the Law of Succession Act provides for the making of oral wills. The relevant part of that provision, for the purposes

of this ruling, is Section 9(1) which provides as follows:- “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: Provided that....”¹⁹. Where it is alleged that the deceased died testate and that there existed a valid will, the person named in the will as executor petitions for a grant of probate. Rule 13 of the Probate and Administration Rules governs applications for grant of probate where the deceased left an oral will. The said provision states as follows:- (1) An application for proof of an oral will or letters of administration with a written record of the terms of an oral will annexed shall be by a petition in Form 78 or 92 and be supported by such evidence on affidavit in Form 4 or 6 as the applicant can adduce as to the matters referred to in rule 7, so far as relevant, together with evidence as to – (a) The making and date of the will; (b) The terms of the will; (c) The names and addresses of all the alleged witnesses before whom the will was made; (e)(f)....²⁰. It is clear from the wording of both Section 9 of the Law of Succession Act and Rule 13 of the Probate and Administration Rules that the date of the making of an oral will is critical. The life of an oral will is only three (3) months, unless it is made by a mariner. The maker of the will should die within three months of its making for it to be valid. From the material before me, the date when the alleged oral will was made is not disclosed in any of the affidavits on record or even in any other document. The persons alleged to have been present when the will was made did not swear affidavits. Neither is the date mentioned in the minutes of 13th April, 2013 when the alleged witnesses are said to have given evidence before the elders. There is no telling therefore whether the deceased died within three months of the making of the oral will. The validity of the alleged will cannot therefore be ascertained.²² As there is no proof that there was a valid oral will, I shall presume that the deceased died intestate. I shall therefore determine the application before me on the understanding that the deceased died without leaving a valid oral will.

The alleged will did not comply with the due process set out in the above cited case. Similarly the elements of an oral do not exist. Under Section 9 of Law of Succession Act for the oral will to be valid the will must be witnessed by two competent witnesses and the testator must have died within 3 months from the date of making the will. In this case, PW1 said the will was made on 15/4/2006. The deceased died over a year later on 2/8/2007. Even if a will existed, the same was no longer valid by the time the deceased died.

Further, there being a conflict in the evidence of DW1 and 2 as regards the existence of the will, the court will proceed under Section 10 of the Law of Succession Act and find that no valid will exists. In addition to the above, it is trite law that a party is bound by his pleadings. This is to ensure certainty and predictability of the case of the petitioner in the event the adversary needs to respond and the court needs to know exactly what redress the petitioner seeks. There is also a wealth of authority on that position. In IEBC v Stephen Mutinda [2014] eKLR the Court of Appeal said:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”

See also Benjamin Ogunya Andana case (Supra). The petitioner clearly indicates that the petition was for letters of administration intestate meaning the deceased did not have a will. The petitioners cannot be heard to spring up a will later in the day during the hearing of the matter.

In the end, I am of the firm view that the allegation that the deceased left an oral will is an afterthought and no evidence has been adduced to prove its existence. The court will find that the deceased died intestate.

How should the court distribute the deceased’s estate?

Section 29(a) of the Law of Succession Act recognizes the deceased’s children as dependants of the estate and they include:

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

The above provision does not indicate whether the children to inherit should be sons or daughters. The section must mean children whether male or female.

Article 27 of the Constitution prohibits any form of discrimination. It provides 27:

“(1) Every Person is equal before the law and has the right to equal protection and equal benefit of the law;

(2) ...

(3) Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social sphere;

(4) *The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*”

The court considered such an issue in *John Ngugi case (Supra)* where the court stated that the distribution of the estate should not be unfair, biased or discriminatory against some or any of the beneficiaries and that daughters have a right to inherit just as sons have. See also *Rono v Rono (2005) 1EA 363.*

In *Re: Estate of Solomon Ngatia Kariuki*, J. Makhandia stated:

“The Law of Succession Act does not discriminate between female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of this estate. All children of the deceased are entitled to stake a claim to the deceased’s estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father’s estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father’s inheritance because they are likely to enjoy inheritance of their husband’s side of the family.” On the question of distribution, the starting point is to refer to the relevant applicable law. Section 38 of the Law of Succession Act [14] provides that:-

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.” In my view, the spirit of Part V of the Law of Succession Act [15] is equal distribution of the estate amongst the beneficiaries of the deceased. The word used in section 35(5) and 38 is “equally” as opposed to ‘equitably’. “[16] This is the plain language of the provisions. The provisions are in mandatory terms – ‘the property shall.....be equally divided among the surviving children. Equal distribution is envisaged. Guided by the above provisions I find that the deceased petitioner now represented by the protestor and the applicants herein are entitled to equal shares of the deceased’s estate.”

In the end, I find that the proposed distribution by the petitioner was discriminatory and unfair as against the children of the 1st house because they are married daughters. They have a right to inherit just as the sons have.

The deceased having died intestate, distribution should be under Part V of the Law of Succession Act and specifically Section 35, 40 and 41 of the Law of Succession Act.

Consequently, I make the following orders:

- (1) The deceased died intestate. The distribution of the estate will be in accordance with the Rules of intestacy under Sections 35 as read with Section 40 and 42 of Law of Succession Act;*
- (2) All the deceased’s children and his wife will share equally the deceased’s estate that is the estate shall be divided into 16 equal units;*
- (3) Previous benefits made to any of the beneficiaries shall be taken into account;*
- (4) During distribution, regard will be made to where the beneficiaries who may have already settled on the land and built permanent structures to avoid unnecessary inconvenience;*
- (5) As to whether the protestors will be allocated where their mother’s grave is will depend on the Surveyor’s Report after valuation has been done;*
- (6) The estate be valued for ease of distribution;*
- (7) Valuation costs and advocates costs be borne by the estate in terms of the consent orders of 3/5/2012;*
- (8) Mention within 60 days to confirm compliance;*
- (9) Plot No.1339 does not form part of the deceased’s estate. It will devolve to the respective owners.*

Dated, Signed and Delivered at NYAHURURU this 19th day of May, 2019.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Kamanga for petitioners

Mr. Njuguna for protestor

Eric – court assistant