REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 180 OF 2001

IN THE MATTER OF THE ESTATE OF ISAAC THIONGO (DECEASED).

MUGURE KARIUKI & OTHERS.....APPLICANTS

VERSUS

JAMES THIONG'O KARIUKI.....RESPONDENT

JUDGMENT

1. **ISAAC THIONG'O (DECEASED)** is said to have died testate on 15th May 2001 leaving a will dated 14th July, 2000; where he made the Petitioner **(JAMES THIONG'O KARIUKI)** the executor. The Petitioner applied for grant of probate of written will which was issued on 28th February 2002. The applicants **(MUGURE KARIUKI, HENRY MWAURA, MACHARIA KARIUKI, MARY WANJIRO KARIUKI, SUSAN NJERI KARIUKI and DORCAS WANJIRU KARIUKI)** filed this summons for revocation of grant dated 14th March, 2002 seeking orders that the grant of probate made to the respondent **(James Thiong'o Kariuki)** on the 28th February, 2002 be revoked on the following grounds:

i. The proceedings to obtain the grant were defective in substance

ii. The grant was obtained fraudulently by making a false statement and concealing from court important material facts

2. The matter proceeded through viva voce evidence, and part of the evidence was recorded by Tunya (J), before it was heard de novo by Gacheche (J), then Kaburu (J) took over and again heard it de novo. I took over from where the last judge left, and heard the matter to conclusion. Henry Mwaura (a son of the deceased from the 2nd house) told the court that his late father was survived by two widows **Elizabeth Ngina and Anne Mugure Kariuki and 17 children, all over 18 years old.**

Elizabeth being the 1st wife had 8 children, namely

WANJIRU MUIRU

WANJIKU NGARUIYA

JAMES THIONGO

NJERI KARIUKI

NYAMBURA KARIUKI

WANGOI KARUIKI

WARINGU KARIUKI (deceased)

LUCY NJOKI

Anna being the 2nd wife had 9 children, namely:

SAMUEL THIONGO (deceased)

WANJIRU KARIUKI

MWANGI KARIUKI (deceased)

HENRY MWAURA

MACHARIA KARIUKI

MUTHONI KARIUKI

JOHN KAMAU KARIUKI

SUSAN NJERI

DORCAS WANJIKU KARIUKI

3. According to Henry, their father had the following properties:

Kakamega/Soy Plot No 72 measuring

Kakamega/Kongoni/259 measuring 27 which was subdivided into Kakamega/Kongoni 1635-1640 (5plots)

Eldoret/Kamkunji Plot 46 measuring 5 acres sub-divided into 26 plots Nos. 488-513

Plateau Block 2 Uasin Gishu plot 10-20 acres

Eldoret Municipality Block 1/17 & 18

Eldoret Municipality Block 11/125, 126,167, 168 and 485 and 746

Eldoret Municipality Block 15/45 and 46

Eldoret Municipality Block 16/398

Umoja Innercore B65 Nairobi

Tractor reg No. KSU 356

Trailer Z 6758

Disc and Ox ploughs

Sheller, planter, grinder, chopper and water tank

4. That the deceased also operated a dry cleaners service known as **Sunshine Dry Cleaners** where he was a partner with **Henry and Macharia Kariuki**. He also had 116 shares in Barclays bank and Kenya breweries. He also had a bank account. Henry referred to an agreement of sale for plot in **Umoja Innercore b.65**, which his late father had bought, and he produced the sale agreements and three receipts from **Nairobi City Council** as Exhibit 11 (a-e). He also produced log books of **Tractor KSU 356** and **Trailer Z6758** – Exhibit 12 a & b, a share certificate for 116 shares of **Barclays Bank** and 113 for **East African Breweries** exhibit 13(a & b). He further produced a certificate of registration of **Sunshine Dry Cleaners** with three names of **Isaac Kariuki Thiongo (deceased) Henry Mwaura Kariuki and Macharia Kariuki** (Exhibit 14).

5. The objectors therefore urge this court to revoke the will their late father is said to have made, saying the will was never read to them. Secondly, it was written in English and their late father and his witnesses never understood nor spoke English (the language it was written in). Thirdly, it had many pages yet it was not signed in every page. In addition, their late father was sick for a long time, having diabetes, and finally, the properties were not distributed properly, as the will did not take into account those who helped to acquire the property.

6. Henry stated as follows:

"When my father died we were not told there was a will. We sat as a family to discuss issues when Ngaruiya Munge a son of Elizabeth said there was a will. It was not read to us after burial of our father on 22/5/2001 we agreed my father's titles be kept in the bank. We agreed the will be read on 2/6/2001. I and James Thiongo were told to look for a Hall where it will be read. We decided it be read at U.G. Primary School. We went there but the will was not read. There was disagreement by family. A brother of my father called Peter Thiongo said the will cannot be read before 40 days were over after the death. He said my father's properties cannot be divided before his neck had separated. There is a letter dated 6/6/2001 from M/s Macho & Company Advocates who had written the will to the family members saying the will be read on 9/6/2001 at 10.00 am. I produce the letter –

exhibit 15 we consulted M/s China advocates and instructed him to write M/s Machio & Company Advocates and inform him that family had agreed that reading of the will be postponed until after 40 days. I do not know if it was read. I got a copy of the will. It is written in English. It is signed by Isaac Kariuki Thiongo (deceased), Silas Nganga and Mwaniki Githeru. I know both Silas and Mwaniki. My father did not know English. He could communicate in Kiswahili well. Silas and Mwaniki also did not know English. They were my father's age-mates. Mwaniki was older".

7. According to Henry, his father and the first house had separated long time ago, and he only got to learn about the 1st house in 1980 when his uncle (also known as **HENRY MWAURA**), approached their late father and urged the latter to settle that family in the 20 acre shamba at **PLATEAU.**

8. The 2nd house lived at **Shauri Yako** within **Eldoret**, but they had a farm at **KAKAMEGA/SOY/72**, measuring **60 acres**. In 1966, his mother and father quarreled over the father's intention to sell a parcel of land being **KAMKUNJI BLOCK 16 PLOT NO 46**, which his mother had been tilling. However, the deceased sub-divided the land into 26 small town plots, and relations between the couple deteriorated to the point that the deceased moved out of their matrimonial home and went to stay at **West Estate in Eldoret,** and the couple never reconciled.

9. Between 1997-1998 the deceased stopped his 2nd wife from tilling the land and it took the intervention of the area assistant chief for her to get it back. Eventually his mother filed a suit in **Eldoret SPMCC No. 1045/1998** urging the court to distribute the property between her and her late husband, but the same was refereed to the High Court vide **HCCC No. 136/1999(OS)** which is pending to date. That his mother had filed another suit against her late husband, being **HCCC No 159 of 1999** because the deceased had transferred some of the plots being **KAKAMEGA/SOY/72** to **JAMES THIONGO** where the 2nd wife was living with his two brothers, as well as **ELDORET MUNICIPALITY BLOCK 11/485** (whose construction Henry says he supervised using funds received from his father as well as rent) comprising residential houses and **Parcel No ELDORET MUNICIPALITY BLOCK 2/162** which comprises lodgings, the Dry Cleaning business and two shops. That the deceased transferred to **LUCY NJOKI** (a member of the 1st house) **ELDORET MUNICIPALITY KAMKUNJI BLOCK 11/746** comprising 6 residential houses, whilst **LILLIAN NYAMBURA** also from the 1st house was given **ELDORET MUNICIPALITY BLOCK11/168** comprising residential rooms and a posho mill. **ELDORET MUNICIPALITY KAMKUNJI BLOCK 16/168** comprising residential rooms was transferred to **WANGARI WAITHAKA**, a daughter of the deceased's sister.

10. He further testified that there are discrepancies in the allocation of properties since most of them are the ones the beneficiaries bought and developed themselves. That the will should be declared null and void especially as pertains to properties which did not belong to the deceased estate and should not be subject to the will.

11. On cross examination, he stated that the will does not distribute the property properly. That all those challenging the deceased's will, are from their house and none from the first wife's house.

12. **Pw2 (Mary Wanjiru Kariuki)** confirmed in her testimony that her father had two wives **Elizabeth Ngina and Anne Mugure**. She does not agree with the proposed mode of distribution in the will as most properties are given to the first house. Further, the second house is given properties which were bought using their own money and did not belong to the deceased.

13. They are aggrieved that the will does not recognize and take into account her mother's contribution in acquiring the property, and maintained that their mother used to contribute Kshs. 20/= every month.

14. On cross examination, she stated that her brother (Henry) and father were in a partnership in running the dry-cleaning business. That the she bought her land at Kshs. 25,000 though the same was not in writing as it was based on mutual trust and neither does, she have any payment receipts.

Although the will shows that all her siblings in the 2nd house were given land, she contests that, and points out that their father signed only one page of the will and she cannot tell whether this was her father's will as people are prone to forge signatures. It is her position that their late father never suffered any mental ailments.

15. **DW1 (JAMES THIONG'O KARIUKI)** on his part confirmed that his father had two wives namely **Elizabeth Ngina Kariuki and Anne**. He stated that his father had written the will (DEx 1) which is contested by the 2nd family. The will was drawn by advocate **SALIM MACHIO** (now deceased), was signed by his late father and witnessed by **CYRUS NGANGA AND MWANGI GITURO**. In the executed will, he was named as the administrator.

16. It is his evidence that the will was read after the deceased had been buried and that parties were duly notified of the said reading, as per the letters produced as **DEx 2(a-f)**. He thereafter petitioned for grant of letters of administration, the same was gazetted and a grant was subsequently issued on 27/2/2000. The same was produced as **DEx 5**. The will shows the properties that had been given to some people before his demise (inter vivos). He maintains that the deceased shared out his property as he wished.

17. **JAMES** told this court that he lived with the deceased from the year 1998-2001 and can confirm that the deceased was mentally sound as per documents from **MOI TEACHING AND REFERRAL HOSPITAL (MTRH) and Kikuyu Hospital.** He stated on cross examination that from 1968-2001 he dealt with his father in conducting his business and even while in hospital but was not present when the deceased prepared the will.

18. He confirmed that his father could neither speak or write in English and that nowhere in the will is it indicated that the same was read and translated. Although the will shows that it was drawn by advocate Machio, he never signed it.

19. The deceased had 37 properties but they deposited 36 titles to the properties in safe custody account at **National Bank Eldoret**. The same were produced as DEx 7. He could not explain the whereabouts of the remaining title. He also conceded that the will that was used in the proceedings was not certified as a true copy of the original. The will bears a recent stamp of **June 2011**, and he explained that one **Nganga** was given authority to collect the will from **BARCLAYS BANK** by **ADVOCATE KALYA**.

20. He explained that although **ADVOCATE MACHIO** had his own copy of the will, the late advocate directed that Nganga should collect the original copy from the bank through a letter indicating that the deceased had a written will and that he had a copy of the will. However, he is insistent that:

"The original copy of the will held at Barclays bank is what Machio read to us the contents of the will from the copy that he had".

21. The respondent referred to the affidavit dated 22/10/1998 in response to divorce proceedings filed by the 2nd wife which lists the purported matrimonial property that was to be shared, while at paragraph 8 of the will the same property is bequeathed to **Lilian Nyambura and Teresia Wangui**. It is his evidence that **Kakamega/Soy 72** measuring approximately 60 acres was also not listed in the will as part of the assets to be distributed as it was transferred to DW1 before the will was written.

22. In their submissions, the applicants maintain that the deceased never made a will on record dated 14/7/2000 on whose basis the grant was issued to the respondent by this court is valid. The applicant's case is that the deceased lacked testamentary capacity to make a valid will at the time of making the said will.

23. A major of the point of contention is that the validity of a will is dependent on two principle factors namely the capacity of a testator to make a valid will at the material time and compliance with the formal requirements for the making of a will. The applicants point out that the deceased's will is written in English yet the deceased only spoke and understood Gikuyu language, and in any event, the will is only signed on the last page and is not translated to a language that is understood by the testator thus it would have been possible for the will to be altered. The will is faulted on grounds that it offends the provisions of **Section 11 of the Law of Succession Act together with Rule 54 of the Probate and Administration Rules**. In support of this argument reference is made to the case of **Banks vs Goodfellow (1870) LR 5 QB 549** where the court laid down the essentials of testamentary capacity.

24. It is also argued that from the medical records together with the evidence presented in court it is clear that the deceased was mentally incapacitated and therefore could not have been a position to write a will.

25. The other issue of protestation is that the respondent appears to benefit greatly more than the rest in the will. Also, that there are issues raising suspicion as to the validity of the deceased's purported will on record, for instance, the advocate who drew the will swore an affidavit clearly indicating that he was instructed by the deceased to place the will in custody of **Barclays Bank** and that it be only released to **MUNGE NGARUIYA** yet the will was suspiciously released to **SALIM MACHIO.** Lastly, that the proceedings to obtain grant of probate were defective as they were based on an invalid will.

26. The respondent maintains that the testator had impeccable recollection of his properties and beneficiaries which is a clear indication of his soundness of mind, memory and understanding. Dw1 described how the deceased used to carry own his affairs including giving instructions to his lawyers to handle his case in numerous matters between him and the objectors. That the applicants/objectors did not adduce any evidence to show that the deceased lacked testamentary capacity while executing the will as required by **Section 5(4) of the Law of Succession Act.**

27. The respondent contends that the advocate who drew the will fulfilled the requirements of **Sections 54(3)** as regards the testator having knowledge of the contents of the will at the time of executing the same. This it is argued, is sufficient demonstration that not only was the will read to the testator, he understood its contents and attested it in the presence of the witnesses.

28. Further, that there is no basis for suspicion as to the validity of the will as the will was released to **MUNGE NGURAIYA** in accordance with the testator's instruction in the presence of **ADVOCATE KALYA** who then prepared the application for grant of probate with will annexed.

Issues for determination

29. The main issues for determination are:

i. ***whether the deceased had capacity to make the will.***

ii. ***whether there are any grounds to challenge the validity of the will.***

iii. ***whether the deceased made reasonable provisions for all his dependents in his will***.

30. From the objector's evidence, they have raised doubts as to the capacity of the deceased to make the will. It is important to mention that there is a rebuttable presumption under **Section 5 (3) of the Law of Succession Act** that a person making a will is of sound mind and that the will has been duly executed. The essentials of testamentary capacity were laid out in the case of **Banks vs. Goodfellow** as cited with approval in the case of **Vaghella Vs. Vaghella-**

> ***"a testator shall understand the nature of the act and its effects, shall understand the extent of 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."

31. The burden of proof in the first instance lies upon the person alleging lack of capacity. Once it is established to the satisfaction of the court that in fact the testator was not of sound mind then the onus is shifted to the person propounding the will to prove the existence of mental capacity.

32. This was the holding of the court in the case of **In Re Estate of Gatuthu Njuguna (Deceased) [1998] eKLR** where it quoted an excerpt from **Halsbury's Laws of England,**

"where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity."

33. The Objectors contend that the deceased was not in control of his mental faculties as he was suffering from diabetes and his health had deteriorated. However, during cross examination PW 1 and PW 2 confirmed that the testator was of sound mind and that no report by the Doctors had indicated that he was mentally unstable. The Petitioners have not adduced any evidence to demonstrate that the testator lacked testamentary capacity while executing the Will as required by **Section 5(4) of the Law of Succession Act.** Testamentary capacity is reflected at Section 5 of the Law of Succession Act which provides that:

…every person who is of sound mind and not a minor may dispose of all or any of his free property by Will…

(3) Any person making or purporting to make a will shall be deemed to be of sound mind for 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 the testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.

34. They called no medical expert nor did they produce any medico-legal report to prove their allegations on the deceased mental infirmity during the hearing. The fact that the testator was not in good health is not sufficient to prove mental incapacity. In medical terms, there is no evidence that the deceased did not have the requisite mental capacity to make the will in question.

35. **VALIDITY OF THE WILL**: There is the question as to whether the deceased understood the contents of the will which was written in English, yet there was a general consensus that the deceased only spoke and understood Gikuyu and Kiswahili. This court's attention is drawn to the fact that there is no translation or certificate of translation to confirm that the contents were explained to the deceased. The respondent insists that the will is valid as it contains the name of the deceased, and that next to the name is his signature and thumb print which shows that he intended to give effect to the contents of the Will. Further, that below the name of the deceased's name is the attestation clause, and it has been attested to by **Cyrus Ng'ang'a and Mwaniki Gituru** both of whom individually appended their names, signature and National Identity card numbers.

36. It is argued that the fact that the attestation of the will was NOT done on every page does not in any way affect the validity of a will, as it is not a requirement **Section 11 of the Law of Succession Act** that the signatures of testator and the attesting witnesses must appear on every page.

Section 11 of the Law of Succession Act, provides for the formal requirements of a valid will states:

11. **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.

There was no allegation that the above section was not complied with. However, it is significant that the advocate who drew the will never signed it.

37. The respondent's counsel submits that there is rebuttable presumption of execution where the will contains an attestation clause, signature of the testator and the signatures of the attesting witnesses, then it is deemed to be proper. In support of this argument, he cites the decision in **JOHN WAGURU IKIKI & 7 OTHERS –VS – LEE GACHIGRA MUTHOGA [2019] eKLR** where the court stated:

> ***"We adopt the holding in Karanja & Another –vs- Karanja [2002]2KLR 22 which is of persuasive nature, where Githinji J. (as he then was) held as follows: where the Will is regular on the face of it with an attestation clause and signatures of attesting witnesses and the signature of the testator; there is a rebuttable presumption of due execution (omnia esse riteatta)."***

38. There are four main requirements to the formation of a valid will:

- **The will must have been executed with testamentary intent;**
- **The testator must have had testamentary capacity;**
- **The will must have been executed free of fraud, duress, undue influence or mistake; and**
- **The will must have been duly executed.**

39. Testamentary intent involves the testator having subjectively intended that the document in question constitute his or her will at the time it was executed. There is nothing before me to show that the deceased understood the contents of the document.

40. In addition to testamentary intent, the testator must have the testamentary capacity, at the time the will is executed. Generally, it takes less capacity to make a will than to do any other legal act. As guidance, a four-prong test is often used. The testator must:

- **Know the nature of the act (of making a will);**
- **Know the "natural objects of his bounty";**
- **Know the nature and extent of his property;**
- **Understand the disposition of the assets called for by the will.**

41. **Does the contested will satisfy all the above four requirements?** The objector has alleged failure by the testator to understand the disposition of the assets called for by the will by bequeathing properties to which are not his to some of the beneficiaries.

42. It is also not in dispute that the deceased did not speak or understand English language. I concur with the submission made by the Objectors that Section 54(3) of the Probate and Administration Rules requires that where the Will appears to be written in a language with which the testator was not wholly familiarly or which for any other reason gives rise to doubt as to such testator having had knowledge of the contents of the Will at the time of the execution, the court shall satisfy itself that the testator had knowledge by requiring an affidavit stating that the contents of the Will have been read over to, and explained to, and appeared to be understood by, the testator immediately before the execution of the Will.

43. Whereas **SALIM MACHIO** (deceased), the Advocate who drew the Will, in his replying affidavit dated 11/6/2002 at paragraph 9 stated:

> ***"That I wish to state that the Will dated 14/7/2000 is indeed the last Will of the late Isaac Kariuki prepared under his instructions, it was read and explained to him and he fully understood its contents and said so before he executed the Will in my presence and in the presence of his witnesses."***

This statement does not specify the language which was used to explain the contents of the will to the deceased. I find that what is contemplated by section 11 is sorely lacking in the present instance.

44. **ADEQUATE PROVISIONS FOR ALL BENEFICIARIES**: The objector raised the issue of a skewed manner of distribution of the assets, which may affect the validity of the will. The respondent's position is that the will lists each property, and who is to get what portion as follows:

> **Elizabeth Ngina (the widow) and James Thiongo were given Kamkunji parcels No 488-498, which they were to sell and use the proceeds to pay the deceased's debts**
>
> - **Elizabeth Ngina (the 1st widow): 10 acres of PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)**
> - **James Thiongo Kariuki: The Dry Cleaning machinery and business, land parcel No ELDORET MUNICIPALITY/BLOCK 15/45 HURUMA, ELDORET MUNICIPALITY BLOCK 16 KAMKUNJI 495, 499 and 500, 2**

acres of parcel No PLATEAU/PLATEAU BLOCK 2 (UASIN GHISHU) 10, and the inter vivos gifts already made

· **Samuel Waringu Kariuki: ELDORET MUNICIPALITY/BLOCK 16 (KAMKUNJI) 505 and 2 acres of PLATEAU/PLATEAU BLOCK 2 (UASIN GHISHU)10 absolutely**

· **Agnes Wanjiru Muiru: ELDORET MUNICIPALITY BLOCK 16 (KAMKUNJI) 493 and ELDORET MUNICIPALITY/BLOCK 16 (KAMKUNJI) 509 absolutely**

· **Veronicah Wanjiku: ELDORET MUNICIPALITY BLOCK 16/KAMKUNJI/491 AND ELDORET MUNICIPALITY BLOCK 16/KAMKUNJI/510**

HANNAH NJERI MWANGI: ELDORET MUNICIPALITY BLOCK 16/KAMKUNJI /497 absolutely

LILLIAN NYAMBURA and TERESIA WANGOI KARIUKI jointly: ELD MUNICIPALITY 11 BLOCK /125, 126, and 167 plus 2 acres in PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)10 absolutely

LUCY NJOKI: ELDORET MUNICIPALITY BLOCK 16/KAMKUNJI/506 and 2 acres in PLATEAU/PLATEAU BLOCK 2 (UASIN GISHU)10 absolutely 2nd house

· **Hannah Mugure (widow): ELDORET MUNICIPALITY BLOCK 1/17 during her lifetime, and upon her demise, the said property be transferred in equal shares to THIONGO KARIUKI, MWANGI KARIUKI and WANJIKU KARIUKI absolutely**

· **THIONGO KARIUKI: 1.18 hectares KAKAMEGA/KONGONI 1635**

· **MWANGI KARIUKI: 0.39 Hectares KAKAMEGA/KONGONI 1635 and 0.79 hectares ELDORET MUNICIPALITY BLOCK 1636 absolutely**

· **HENRY MWAURA: 1.18 hectares KAKAMEGA/KONGONI 1635 absolutely**

· **MACHARIA KARIUKI: 1.18 hectares KAKAMEGA/KONGONI 1635 absolutely**

· **WANJIRU MWANGI: 1.18 hectares KAKAMEGA/KONGONI 1636 absolutely**

· **MUTHONI KARIUKI: 0.63 hectares KAKAMEGA/KONGONI 1636 and 0.55 KAKAMEGA/KONGONI 1637 absolutely**

· **NJERI GITHAE: 0.64 hectares KAKAMEGA/KONGONI 1637 AND 0.54 KAMKUNJI/KONGONI 1638 absolutely**

· **WANJIKU KARIUKI: 0.84 hectares KAKAMEGA/KONGONI 1638 and 0.39 hectares KAKAMEGA/KONGONI 1639**

The deceased also bequeathed to his brother Thiongo Mwaura: ELDORET MUNICIPALITY BLOCK 16/512 and to his first cousin John Kiarie ELDORET MUNICIPALITY BLOCK 16/513.

Kariuki Wangare: ELDORET MUNICIPALITY BLOCK 16 (KAMKUNJI) 511 absolutely

Njenga Mwangi, a grandson got ELDORET MUNICIPALITY BLOCK 16 (KAMKUNJI) 508. While another brother of the deceased (John Wanduto) got Block ELDORET MUNICIPALITY BLOCK 16 (KAMKUNJI) 504 and ELDORET MUNICIPALITY BLOCK 16 (KAMKUNJI)507

Majengo Catholic Church Block ELDORET MUNICIPALITY BLOCK 16/502

Stanley Kinuthia, a nephew of the deceased was given ELDORET MUNICIPALITY BLOCK 16 (KAMKUNJI)503

The deceased reserved ELDORET MUNICIPALITY BLOCK 16 (KAMKUNJI) 488, 489, 490, 492,494, 496 and 498 for his own use and upkeep while he remained alive, and the remainder was to be sold to pay off his debts, and funeral expenses. The residue was bequeathed to ELIZABETH NGINA and JAMES THIONGO absolutely. He also bequeathed all the cash in un-named bank accounts to ELIZABETH NGINA and JAMES THIONGO.

· **ELDORET MUNICIPALITY BLOCK 16 (KAMKUNJI) 568 was bequeathed to JOYCE MUTHONI KARIUKI**

· **ELDORET MUNICIPALITY BLOCK 16 (KAMKUNJI) 564 to MARY WANJIKU KARIUKI**

· **ELDORET MUNICIPALITY BLOCK 16 (KAMKUNJI) 567 to SUSAN NJERI**

· **ELDORET MUNICIPALITY BLOCK 16 (KAMKUNJI) 560 to MWANGI KARIUKI**

- **PLOT 46 UNTITLED HURUMA to MACHARIA KARIUKI**

- **ELDORET MUNICIPALITY BLOCK 11/555 to HENRY MWAURA KARIUKI**

45. The deceased also declared that in the event of his death, his 2nd wife **HANNAH** and her family (including her children) were **NOT** to take part in his funeral arrangements, and he mandated his son **JAMES THIONGO and CYRUS NGANGA** responsibility over his burial.

46. The respondent explained on cross examination that between 1998-2001, their late father gave out some of his properties inter vivos. He however conceded that there were some titles which were in the names of his siblings from the second house, and that even the history in the Green Card showed that the properties did not belong to the deceased at any one time. These are:

> **Block 16 Kamkunji 504 in the name of Mary Wanjiru Kariuki** and the green card shows the first owner as **Mary Njambi Githegi,** who transferred it to **Mary Wanjiru Kariuki**

47. The title for parcel **Eldoret Municipality/Block 16 (Kamkunji)/568** is in the name of **Joyce Muthoni Kariuki,** and the green card shows it was initially registered in the names of **Mary Njambi Githegi and Njeri Kariuki** before they transferred it to Joyce on **12/08/1997.**

48. Another property **Eldoret Municipality/Block II** is registered in the name of **Henry Mwaura** who was registered as the first proprietor on **19/08/1994. Eldoret Municipality Block 11/168** is bequeathed to **Lillian Nyambura** and **Teresia Wangui,** yet the title document and the green card show her as the original owner. How then do these end up as comprising part of the deceased's estate, available for distribution

49. From the evidenced adduced in court, the deceased bequeath some of the properties which were not in his name and this lends credence to the claim that the deceased either he did not know what he was doing at the material time, or he was not the one who gave the instructions.

50. As regards to whether the deceased made reasonable provisions for all his dependents in his will and whether the deceased could lawfully bequeath the properties that were not in his names, in the text **Williams on Wills** Eighth **Edition, Vol. 1, The Law of Wills, Butterworth's, London, Dublin, Edinburg, 2002, page 65 at chapter 7**:

> ***"In general a testator may dispose of any property vested in him at the time of his death for an interest not ceasing on his death...the general rule is that every kind of property and interest in property may be the subject of a gift by will..."***

51. In the same text at paragraph **7.18** under the heading **"General Rule allowing testamentary disposition"** it is stated:

> ***"...a testator of full capacity may dispose by will of his equitable interest in any property to which he is entitled at the time of his death, always subject to the paramount interest in such property which by law devolves on the personal representatives for the purposes of due administration....."***
>
> **Paragraph 7.20** ***"Contingent and future interests"***
>
> ***"All contingent executory and future interests in any property are devisable and this is so whether the testator may or may not be ascertained as the person or one of the persons in whom the same may become vested and whether he may be entitled thereto under the instrument by which the same were created or under any disposition thereof by deed or will. Such interest includes a possibility coupled with an interest"***

54. Testamentary intent involves the testator having subjectively intended that the document in question constitutes his or her will at the time it was executed. Even though there is nothing in the testimony of the objector to demonstrate that the deceased never intended the contents in the will to constitute wishes, the deceased did not make reasonable provisions for all his children.

55. It is evident that what the objectors were bequeathed what already belonged to them. Also, it is evident that the executor of the will was the one to benefit more than the other beneficiaries, and needless to say, the will was written in a language not understood by the testator, nor is there any evidence of interpretation into a language understood by the testator. For these reasons, the objection by the objector in these proceedings is merited. The grant issued is thus revoked and any subsequent actions resulting from that grant, including the proposed mode of distribution is rejected as a nullity. Each party shall bear its own costs.

E-Delivered and dated this 15th day of May 2020 at Eldoret

H. A. OMONDI

JUDGE