



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 567 OF 2015**

**IN THE MATTER OF THE ESTATE OF MOSES KELLY MARETE (DECEASED)**

**LUCY MUTHONI MARETE ...1<sup>ST</sup> PETITIONER**

**TITUS KINOTI MARETE ..... 2<sup>ND</sup> PETITIONER**

**-VS-**

**GRACE MOSES MARETE .....PROTESTOR**

**RULING**

**1. MOSES KELLY MARETE** (“the deceased”) to whom this cause relates died on 1/06/2015. A will was acknowledged which led to the court revoking the grant of letters of administration which had been issued to the petitioners. Through this court’s ruling dated and delivered on 2/08/2018 a grant of probate was then made to the surviving widow of the deceased who is appointed executrix of the estate.

2. The Executrix filed summons for confirmation of probate dated 17/06/2019 where she seeks that the grant of probate be confirmed. The application is supported by the supporting affidavit of Grace Moses Marete. It was argued that the deceased is survived by:

- a. Grace Moses Marete - Widow**
- b. Charles Mwirigi Marete - Son**
- c. Kinoti Moses Titus Marete - Son**
- d. Edith Nkatha Kinyua - Daughter**
- e. Lucy Muthoni Marete - Daughter**
- f. Florence Kagwiria - Daughter**
- g. Catherine Kanana Marete - Daughter**
- h. John Kirimi Marete - Son**
- i. Peter Mugambi Marete - Son**

His assets constitute:

- a. NKUENE/URUKU/1764**
- b. NKUENE/TAITA/466**
- c. KCB NKUBU Branch A/C Nos. 1103163876, 281680301 and 181002828**

**d. Motor vehicles registration Nos. KAL 591 (Subaru) and KBX 366U (Nissan X Trail)**

3. That as per the ruling delivered on 23/05/2019 the court directed that she receives the deceased's shares in Yetu Sacco Limited (including Yetu Housing Shares) totaling to Kshs. 1,034,779.61/-. The petitioner and the deceased were joint owners of NKUENE/TAITA/3095, 461 and 467 which by the doctrine of survivorship the said properties are hers upon the demise of the deceased which the petitioner has obtained title deeds in her name. She vowed to distribute the estate as per the will dated 18/05/2015.

4. A protest was raised vide the affidavits of Edith Nkatha Kinyua sworn on 22/10/2019 and 21/11/2019 respectively. She deponed that the deceased had two wives, her mother who was the 1<sup>st</sup> wife and the Executrix. The will was read to them but they were shocked to find out that the deceased gave the protestor's house most of the estate and left a small portion for them. Moreover, the will did not include her two brothers Henry Gatobu Marete and James Mutembei who are deceased but are survived by their sons Kelvin Boss Marete and Muchai Gatobu Marete. The two have not been named as beneficiaries considering that Kelvin Boss Marete had been raised by the deceased who gave him keys to the first wife's house on Nkuene/Uruku/1764 and ordered that nobody should remove him from there.

5. Furthermore, the will was made a month prior to the deceased's death. However, at that time he was already admitted in hospital for he was gravely ill. He was suffering from prostate cancer, diabetes, blood pressure and arthritis. He was also showing signs of memory loss as he could not recognize family members. What's more the will has been altered and it has not been countersigned by the testator. Therefore, the will is invalid for it cannot be the will of the deceased.

6. This matter was heard vide *viva voce* evidence.

**7. PW1 Kiautha Arithi**, advocate of the High Court of Kenya, practicing in the name of Kiautha Arithi & Company Advocates and stated that the deceased was his client who was a retired paramount chief of Nkuene Location. He recalled that the deceased went to his chambers and indicated that he wanted to make his last will and testament. That the Advocate advised him on the requirements being list of the beneficiaries/dependants and properties he wanted to will away and two competent witnesses. According to the advocate the deceased went to his chambers on 18/05/2015 with the details he had requested being copies of IDs of the witnesses, Daniel Mureithi and Kaaria Cypriano. The deceased also had his ID card and he was in a good state of mind.

8. That the deceased nominated his wife as the Executrix. He noted down the dependants, his assets and how he wished to bequeath the same. After typing the same he invited the deceased alone in his office they went through it and he was satisfied. Thereafter, he invited the witnesses into the office. He explained the purpose of their attendance that they were to witness the testator thumb print and sign every page of the will, which they did. They then signed the three sets of the will that he had produced and bound. He stamped, signed and dated every page of the will. On the second page of the will he was the one who dated it on the long hand. The testator discovered that he, **PW1**, had accidentally dated 18<sup>th</sup> June 2015 instead of 18<sup>th</sup> May 2015. In the presence of the deceased and the witnesses he changed then counter-signed, stamped and dated. After the death of the deceased, on 27/07/2015 the widow and most of the beneficiaries came to his chambers. Two beneficiaries were represented by lawyers one of them being Mukuia Mbaya. He read the will out to them, gave them gave copies but gave the petitioner an original copy.

**9. PW2 Kaaria Cypriano Mwamba** stated that the deceased was known to him as the secretary of Njuri Ncheke within Imenti South Sub County. The deceased asked him to witness him signing his will on 18/05/2015. He together with the late Daniel Murithi Angaine witnessed him signing it at the office of Kiautha Arithi advocate. It was the deceased who signed and thumb printed the will first then Murithi signed before him. In the course of signing the deceased noticed that there was a mistake made with the date. Instead of 18/05/2019 it was written 18/06/2019. The mistake was corrected by the advocate.

**10. PW3 Grace Moses Marete**, second wife of the deceased, stated that she got the original will from the deceased's lawyer Kiautha Arithi. It was read to her and the children at the advocate's office. She was named as the Executrix of the estate. Before the deceased died he had attempted to survey and subdivide L. R NKUENE/URUKU/1764 in the same manner as distributed in the will. He had gotten the consent from the land control board. The deceased was in good health and in control of his day to day life. The will reflects true status of the dependants and beneficiaries of the deceased and there is no child who was left out in the will.

11. The will does not provide for daughters but she is aware that the deceased provided for them. She does not know who Henry Gatobu Marete and James Mutembei are. Neither are Kelvin Boss Marete and Kenneth Muchai known to her. When she got married she used to live in Nkubu on Parcel No. 461. The 1<sup>st</sup> wife's home is located on L. R. No. 1764 measuring ten (10) acres. When 1<sup>st</sup> wife died nobody was left staying in her house it remained closed for 10 years until in 2015 when Kelvin came with no consent.

12. At the close of the protestor's case the petitioners gave a sworn testimony.

**13. Petitioner Witness No. 1 Edith Nkatha Kinyua**, daughter of the deceased, relied and adopted her two affidavits sworn on 5/12/2018 and 21/11/2019. She stated that her two brothers Henry Gatobu and James Mutembei died before the deceased but they left behind children Kelvin Boss Marete and Kenneth Muchai who ought to be included in the will. She doubts the authenticity of the will in terms of the date, signature of the deceased and the fact that on 13/06/2015 the deceased was hospitalized. The deceased was not in his normal senses when he was admitted to be able to write the will. Neither could he have written a will giving her mother's property to the 2<sup>nd</sup> wife. He was not in a state of mind to write a will.

14. The deceased gave the 2<sup>nd</sup> wife L R Nkuene/Uruku 1764 and L R Nkuene/Taia , 466, 461, 467 and 3095 which were acquired by the deceased from the estate of her mother in Succession Cause No. 2 of 2003. She also got a share from her mother's estate so did Kelvin Boss Marete as well as her sisters. It is only Muchai Gatobu who did not get a share from her mother's estate. Parcel No. 1764 is occupied by children of the 1<sup>st</sup> house where the first wife lived.

**15. Petitioner Witness No. 2 Kelvin Boss Marete**, the grandson of the deceased whose father James Mutembei the son of the deceased

herein passed on in 2005. He relied on and adopted his affidavit sworn on 21/11/2019. He was born in 1985 and when he was 1 ½ years old he was taken to his father. He stayed with the deceased and the 1<sup>st</sup> wife on L R Nkuene/Uruku/1764. When 1<sup>st</sup> wife died he was 12 years old when the deceased and the 2<sup>nd</sup> wife came and took him. The deceased was living in Nkubu with Grace before he passed on while he was living on parcel No 1764.

16. Having considered the evidence by the Applicant and the Petitioners witnesses the issues for determination are

**a. Whether the will dated 18/06/2015 is a valid will.**

**b. Whether the deceased made reasonable provisions for his dependants in the Will dated 18<sup>th</sup> June 2015**

**c. If the deceased did not make reasonable provisions whether the court should provide for such dependants thereby varying the last will and testament of the deceased.**

17. A Will is valid and authentic as per *Section 11 of the Law of Succession Act* which stipulates as follows:

**“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.”**

18. The original copy of the will which the deceased was said to have made was produced by the advocate who drew it, **PW1 Mr Kiautha Arithi**. The Petitioners challenged the validity of the will on the grounds that at the time of making of the will the deceased was not of sound mind, had memory loss and was ailing. Further that he could not have made a will considering that he was admitted at the hospital.

19. **PW1** acknowledged that while witnessing the signing and thumb-printing of the last will and statement of the deceased an error occurred on the dating and instead of putting the date 18<sup>th</sup> May 2015 he wrote in his hand 18<sup>th</sup> June 2015. That the error was noticed by the Testator who brought it to his attention and the same was corrected by the Advocate by countersigning, stamping and dating against the correction. According to the Petitioners the error was not countersigned by the deceased and that on 18<sup>th</sup> June 2015 the deceased was already admitted in hospital.

20. The evidence of **PW1** was corroborated by **PW2** who was a witness of the will to the effect that when the deceased saw the error made by the advocate on the date the same was corrected by the Advocate as shown on the Will. In the absence of any contrary evidence this court concludes that the last Will and Testament of the deceased is valid as per Section 5 and 11 of the Law of Succession Act.

21. The Petitioners contested the Will on the ground that the daughters and two of their deceased brothers, Henry Gatobu and James Mutembei had not been provided for. They were of the view that their father could not have given out 90% of his property to their Step Mother and leave them out.

22. Testamentary freedom is provided for under *Section 5 of the Law of Succession Act* that a testator has unfettered freedom to dispose of his or her property as s/he may desire. However, responsibility is placed on the testator by virtue of *Section 26 of the said Act* to provide for all the dependants'. The Court of Appeal in the case of Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR states as follows:

**“This court must, however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is expressly recognized by section 26 of the Act which provides as follows:-**

**"Where a person dies after the commencement of this Act and in so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law is not such as to make reasonable provision for that dependant, order that such reasonable provision, as the court thinks fit, shall be made for that dependant out of the deceased's net estate."**

**This section clearly puts limitations on the testamentary freedom given by section 5.”**

23. From the evidence of PW1 and from the Will dated 18<sup>th</sup> May 2015 it is indicated that the dependants of the deceased no. 2 to 10 had already been provided for inter vivos but the assets alleged to have been bequeathed to them is not indicated in the Will and from evidence adduced it has turned out that what the deceased may have been referring to are the properties that devolved from the estate of his late wife which was distributed to himself, to his daughters, sons and even the 2<sup>nd</sup> wife, the Executrix herein. There is no explanation in the Will why the surviving grandchildren of the deceased Kelvin Boss Marete and Muchai Gatobu were not provided for. In any case this cause relates to the estate of the deceased and not the estate of his first wife and entitlements to the beneficiaries from his 1<sup>st</sup> wife's estate cannot be treated as benefits inter vivos. **I am of the view that the deceased discriminated against the daughters and did not provide for them.**

24. When **PW3 Grace Moses Marete** testified she feigned lack of knowledge of Kelvin Boss Marete and Kenneth Muchai Gatobu and yet in her application 14<sup>th</sup> June 2016 she had sought that Kelvin Boss Marete the deceased's grandson be ordered to return to her 40 bags of fertilizer meant for tea bushes. was asked she stated that she does not know them. She told the court that the 1<sup>st</sup> wife and the deceased sired the following children Charles Mwirigi, Titus Kinoti, Judith Nkatha, Lucy Muthoni, Florence Kagwiria, Catherine Kanana, John Kirimi and Peter Mugambi. Later she stated that she and the deceased sired John Kirimi and Peter Mugambi. In the eulogy Henry and James were mentioned as sons. During cross examination she stated that Kelvin benefitted and was provided for in the estate of the 1<sup>st</sup> wife. If that is the case, then it is true that he is the son of James Mutembei. He would not have been catered for if he is not a beneficiary. Therefore, the will also excluded the two grandsons of the deceased who should have been provided for as per section 41 of the Law of Succession Act under Principle of Representation. The deceased person surviving widow was not candid in her representation in court as to the number of children and dependants of the deceased.

25. The legal position is clear that Although failure to provide for a beneficiary in a will does not invalidate a will this court finds that the deceased discriminated against the daughters and the children of his deceased sons and that his Will and last testament was not consistent with the law and Article 27 of the Constitution of Kenya 2010. In that regard and pursuant to Section 28 of the Law of Succession Act this court shall and hereby proceeds to make reasonable provision for the said children and dependants of the deceased.

26. This is because the court is empowered to under **Section 28 of the Law of Succession Act** to make reasonable provision for the dependant in exercise of its discretion. [See **Gulzar Abdul Wais v Yasmin Rashid Ganatra & Another [2014] eKLR.** ]

27. In consideration that the deceased persons 1<sup>st</sup> wife had her matrimonial home on LR. No. Nkuene/Uruku/1764, it will only be fair and just that the same be shared equally amongst the children of the said 1<sup>st</sup> wife namely

- i. Titus Kinoti Marete
- ii. Lucy Muthoni Marete
- iii. Charles Mwirigi Marete
- iv. Edith Nkatha Kinyua
- v. Florence Kagwiria Marete
- vi. Catherine Kanana Marete
- vii. Henry Gatobu Marete (deceased)- his share to be inherited by his children including Muchai Gatobu Marete
- viii. James Marete (deceased) – his share to be inherited by his children including Kelvin Boss Marete.

28. The matrimonial home of Grace Moses Marete and the deceased had always been on Nkuene/Taita/461 which was registered in their joint names on 20 January 2015 and that the provision in the Will that she should get 3.326 ha in the LR. Nkuene/Uruku/1764 when she was registered as joint proprietor with the deceased, on LR. Nkuene/Taita/467 and 3095 on 20<sup>th</sup> January 2013 and 31<sup>st</sup> January 2014 respectively would mean that she is overly and unjustifiably benefitting from the estate of the deceased.

29. The 3 properties should be sufficient for herself and her 2 sons John Kirimi Marete and Peter Mugambi Marete.

30. LR. NO. Nkuene/Taita/466 should in the interest of justice be shared amongst the surviving sons of the deceased equally.

31. The final orders of this court are as follows From the foregoing I am of the view that the following orders be issued:

a. The grant of probate made to the Executrix of the estate, Grace Moses Marete on 2/08/2018 be and is hereby confirmed with the dependants and children of the deceased who are not provided for being provided as follows:

(a) **LR. No. Nkuene/Uruku/1764 – to be shared equally amongst**

- i. Titus Kinoti Marete
- ii. Lucy Muthoni Marete

iii. Charles Mwirigi Marete

iv. Edith Nkatha Kinyua

v. Florence Kagwiria Marete

vi. Catherine Kanana Marete

vii. Henry Gatobu Marete (deceased)- his share to be inherited by his children including Muchai Gatobu Marete

viii. James Marete (deceased) – his share to be inherited by his children including Kelvin Boss Marete.

**b. L. R. No. NKUENE/TAITA/466 (0.030 Ha) – to be shared equally amongst the surviving sons of the deceased.**

**c. L.R No. NKUENE/TAITA/3095 (0.0296Ha)**

To Grace Moses Marete and her sons

**d. L. R. No. NKUENE/TAITA/461 (0.121Ha)**

To Grace Moses Marete and her sons

**e. L.R. No. NKUENE/TAITA/467 (0.030 Ha)**

To Grace Moses Marete and her sons

**f. KENYA COMMERCIAL BANK LIMITED, Nkubu Branch Account No. \*\*\*\*\***

To Grace Moses Marete

**g. KENYA COMMERCIAL BANK LIMITED, Meru Branch Account Nos. \*\*\*\* and \*\*\*\***

To Grace Moses Marete

**h. Kshs. 891,000/- worth of shares in Yetu Sacco Ltd**

To Grace Moses Marete

**i. Yetu Housing Shares**

To Grace Moses Marete

**j. Motor Vehicle Reg No. KAL 591 Subaru and Nissan X-Trail Reg. No. KBX 366U**

To Grace Moses Marete

32. No orders as to costs of application.

**HON ANNE ADWERA ONG'INJO**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED AT MERU THIS 15<sup>TH</sup> DAY OF OCTOBER 2020.**

**HON ANNE ADWERA ONG'INJO**

**JUDGE**

In the presence of:-

CA: Kinoti

Advocate for Petitioner: Kiome Advocate for Petitioner

Applicant:

Advocate for Applicant:- Mr Mwirigi Advocate for Protestor

**HON ANNE ADWERA ONG'INJO**

**JUDGE**

**Mr Mwirigi**

We pray for certified copy of ruling as well as temporary stay of execution for 30 days.

Mr Kiome Advocate

I object to application for temporary stay.

Order:

Certified copy of ruling to be supplied to Applicants counsel upon paying copying charges. Application for stay to be filed and served formally.

**HON ANNE ADWERA ONG'INJO**

**JUDGE**