



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 117 OF 2010

IN THE MATTER OF THE ESTATE OF PETER MUIGA WAMBUGU

JANE NYOKABI MUIGA

LEMMY WAMBUGU MUIGA.....OBJECTOR/APPLICANTS

BETTY WANJIKU MUIGA

VERSUS

GEORGE GITONGA WAMBUGU.....RESPONDENT

RULING

1. The estate relates to the late Peter Muiga Wambugu (deceased) who died on the 6th August, 2003; the identifiable properties comprising the estate of the deceased are the land parcel numbers listed hereunder;

(i) **Ruguru/Gachika/949**

(ii) **Ruguru/Gachika/1156**

2. The deceased died testate and as set out in the Letter from the Office of the Chief Kiganjo Location dated 23/09/2004; the deceased had three (3) wives and at the time of his demise he left two (2) widows and ten (10) children surviving him; his family comprised of;

(i) **Mary Thuguri Kamenju** - (deceased)^{1st} wife

(ii) Betty Wanjiku Muiga – daughter

(iii) Lemmy Wambugu Muiga – son

(iv) Joyce Wariga Muiga – daughter

(v) **Serah Murigi Muiga** – 2nd wife

(vi) Liz Wanjiku Muiga – daughter

(vii) George Wambugu Muiga – son

(viii) Joseph Mbacha Muiga – son

(ix) **Jane Nyokabi Muiga**– 3rd wife

(x) Betty Wanjiku Muiga – daughter

(xi) Moses Waruru Muiga – son

(xii) Wambugu Muiga – son

(xiii) Brenda Wangui Muiga– son

3. Directions were taken on the 4/11/2019 that the parties canvass the objection to the **WILL** by filing and exchanging written submissions; hereunder is a summary of their respective submissions;

2nd OBJECTOR'S CASE

4. The 2nd objector relied on her Replying Affidavit dated 30/01/2019 in which she deponed that she was the widow of the deceased; that the deceased was polygamous and had three (3) wives and ten (10) children; she avers that she doubted the authenticity of the **WILL** and contends that it alters the wishes of the deceased; the validity is also contested on the basis of the signature appearing on the **WILL** which she states was not that of the deceased; she annexed documents that contained the known signature of the deceased.

5. She also contends that at the time of making the **WILL** the deceased was seriously ailing from brain cancer and lacked the mental capacity; the deceased was under her care and due to the illness the deceased could not have written the will on his own volition and free will; the medical report in support of the deceased's condition was annexed to the affidavit of Betty Wanjiku Muiga, the 3rd Objector; the **WILL** was made under suspicious circumstances; which circumstances are set out in the affidavit of a co-objector Betty; the submissions made reference to Section 5 of the Law of Succession Act.

6. The 2nd objector also contends that she was not notified by the petitioner when the cause was coming up for confirmation; and argued that the petitioner had a duty to issue notices to every person entitled to benefit from the deceased's estate;

7. For those reasons the estate of the deceased should not be distributed as testate.

3rd OBJECTOR'S CASE

8. The objector goes by the name Betty; she deponed that she was from the first house of the deceased; her mother was Teresiah Wambui Muiga and that she had died on the 5th June, 1980; she confirmed that there were two (2) other widows of the deceased;

9. Before his demise the deceased had transferred the parcel known as **Ruguru/Gachika/1159** to the widow named SerahMurugiMuiga, a copy of the register was annexed in support of this fact;

10. The cause had been gazetted as that of an intestate which then meant that the respondent knew that the deceased had left behind no **WILL**; she further contends that on the date the alleged **WILL** is purported to have been made her father was critically ill with temporal Glioma (a malignant tumour affecting the brain) and already too ill and disoriented in time, place and events that he could not make any decisions; she annexed a copy of a Medical Report from Consolata Hospital Mathari dated 4/04/2018;

11. The 3rd Objector reiterated that the **WILL** was forged and that is why the **WILL** had been executed twice by a signature and a thumb-print of the deceased; that the signature on the will was not the deceased's and she annexed two documents that had the specific signature of the deceased;

12. That the **WILL** discriminates against the first house of the deceased and prayed that the court intervenes and find that the **WILL** is fake and distributes the deceased's estate as intestate so that there be equitable distribution;

RESPONDENT'S CASE

13. In response to the objectors' claims the respondent who is also the executer of the **WILL** stated that the **WILL** was valid; it had been executed by way of thumb-print and witnessed by two independent witnesses; that at the time of making the **WILL** the deceased was sober, alert and healthy and was sure of what he wanted; and the will was exactly in accordance with his wishes;

14. The three (3) objectors had not tabled any Medical or Psychiatric Report to prove the allegations that the deceased was at the material time on a mental decline or suffering from mental impairment or disability and therefore could not manage his affairs or that he had no legal capacity to comprehend transactions or protect his interests;

15. In conclusion the respondent stated that the written **WILL** was legally competent and that it was in accordance with the deceased's wishes; that there was no reason to disturb the probate proceedings as the due process was adhered to.

16. The respondent prayed that the objections be dismissed with costs.

ISSUES FOR DETERMINATION

17. After hearing the rival presentations of the respective parties this court has framed the following issues for determination;

(i) Whether the written **WILL** dated 27th February, 2002 is valid;

(ii) Distribution of the deceased's estate;

ANALYSIS

Whether the written WILL date 27/02/2002 is valid;

18. The deceased is said to have made a **WILL** and Mr George Gitonga Wambugu was appointed by the deceased as the executor thereof; the Petitioner proceeded to petition for the **WILL** to be probated; after obtaining the initial grant he then proceeded to file an application to have the Probated Grant confirmed in terms of the written **WILL**.

19. The Objectors filed their respective objections and attacked the validity of the **WILL** claiming it did not bear their father's signature but instead had a thumb-print and also at the time of making it the deceased did not have the requisite mental capacity;

20. The objectors raised the issue of mental capacity of the testator; the applicable law on testamentary capacity is found at Section 5 of the Law of Succession Act which provides that the testator must have testamentary capacity to make the **WILL**; it is trite law that the evidentiary burden of disproving testamentary capacity lies with the objectors who had to adduce evidence in support of the allegations that the deceased was suffering from a debilitating disease that affected his mental capacity and was therefore unable to make the impugned **WILL**; the evidence they produced was Medical Report from Consolata Hospital Mathari dated 4/04/2018;

21. This court has had occasion to peruse the annexed Medical Report from Consolata Hospital Mathari dated 4/04/2018; firstly, it is noted that the **WILL** is dated 27/02/2002 and the Medical Report makes reference to a fall and admission to the hospital on 1st August, 2002; the period in between translates to six (6) months after the date of making of the **WILL**; the Medical Report makes no reference to any illness prior to the date of admission which could have left the deceased disoriented in time, place and events that he could not make any decisions; the objectors also failed to annex any psychiatric report to demonstrate that at the material time of making the **WILL** the deceased was on a mental decline or was suffering from some form of mental impairment or disability and therefore could not manage his own affairs;

22. In their evidence the objectors adduced nothing to demonstrate that there was any form of coercion from any of the surviving spouses or from the beneficiaries;

23. There being no evidence to demonstrate that at the material time and date that is 27/02/2002 the deceased lacked testamentary capacity or legal capacity to comprehend transactions like the making of a **WILL** this court is satisfied that the testator had testamentary capacity;

24. Secondly, the objectors raised the issue of the signature of the testator; they contend that the signature or thumb-print appearing thereon was not that of the deceased; again the burden of proving such facts lies with the objectors;

25. The applicable law on attestation is found at Section 11(c) of the Law of Succession which provides that no written **WILL** shall be valid unless it is attested by two or more competent witnesses each of whom must have seen the testator sign or affix his mark to the **WILL**;

26. This court's view is that the challenge raised by the objectors on the deceased's signature or mark was not such a herculean task to disprove as the objectors could have simply called either of the two (2) attesting witnesses to the **WILL**; their testimony or their affidavits would have assisted the court with evidence as to whether or not they saw the testator sign or affix his mark on the **WILL**;

27. There being no valid grounds raised by the Objectors challenging the validity of the **WILL**; the written **WILL** is therefore found to be valid as it is found to be in compliance with the mandatory provisions of Section 11 of the Law of Succession Act in that it bears the signature or mark of the testator and was attested by two competent witnesses each of whom must have seen the testator sign or affix his mark to the **WILL**;

Distribution of the deceased's estate

28. The **WILL** having been found valid the next issue to be addressed is the disposition of the properties of the deceased as set out in the **WILL**;

29. Firstly, the 3rd objector named Betty pointed out two flaws; one being the error in the gazettement of the succession cause as being that of an intestate as opposed to testate; this court has had the occasion to peruse the said gazette notice and notes that it was wrongly depicted as pointed out; this error can be attributed to the court registry that forwarded the Notice to the Government Printer; this error was then cured by the issuance of an appropriate grant dated 15/03/2013 which is headed '**Grant of Probate for a Written WILL**';

30. The second flaw was at the stage of confirmation of the grant; it is noted that the court record is devoid of such notices, consents and citations; which means that the respondent indeed never obtained the consents of the spouses nor of the beneficiaries as required by Rule 26 of the Probate and Administration Rules; if the parties had been unwilling to co-operate the respondent had the option of Citations;

31. The latter omission should not be utilized as a reason for stopping the **WILL** from being effected as the respondent can be given time to regularize and correct the anomaly;

32. This court notes that the objectors have no dispute over the distribution of the property known as **Ruguru/Gachika/949** and that the contentious property relates to **Ruguru/Gachika/1156** and the objectors' contention is that the named beneficiaries had already been gifted with **Ruguru/Gachika/1159**.

33. Again this court reiterates that it was upon the objectors to provide evidence to prove that they were disinherited and that there was an inequitable distribution of the deceased's estate; no witnesses were called nor witness statements were annexed by the objectors neither did they provide any Valuation Reports to enable this court to give effect to the principle of equity;

34. This court has also had the occasion to see the demeanor of the parties as and when they attended court sessions and has noted that the 3rd objector can be described as the rabble rouser and the cause of the disaffection between the first house and the second house;

35. Despite the court's findings the objectors still have the recourse of filing an appeal but pending the final decision the 3rd Objector is requested to work on creating harmony between the houses so as to give effect to the wishes of the testator;

36. Therefore the distribution of the properties known as **Ruguru/Gachika/959 and Ruguru/Gachika/1156** shall be distributed in accordance with the **WILL**; but in the interest of doing justice this court hereby extends the order of effectuation of the Certificate of Confirmation dated 24/11/2015 to enable the respondent to obtain the requisite consents from the spouses and beneficiaries.

FINDINGS & DETERMINATION

37. For the foregoing reasons this court makes the following findings and determination;

(i) The objections are all found to be lacking in merit and are hereby dismissed.

(ii) The written **WILL** is found to be valid; the distribution of the deceased's estate shall be in accordance with the **WILL**;

(iii) The stay of effectuation of the Grant confirmed on the 24/11/2015 is hereby extended for thirty (30) days to enable the respondent secure the requisite consents from the spouses and beneficiaries.

(iv) In default the respondent shall be at liberty to apply for the discharge of the stay of effectuation and the confirmation of the Grant in the terms of the order dated 24/11/2015.

(v) The parties shall be at liberty to apply;

(vi) The objectors are hereby condemned to bear the costs of this application.

It is so ordered.

Dated, Signed and Delivered Electronically at Voi due to the Pandemic this 1st day of October, 2020.

HON. A. MSHILA

JUDGE.