



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 429/2002

IN THE MATTER OF THE ESTATE OF THE LATE MARY NYAMBURA NDUNG’U (DECEASED)

JUDGMENT

1. Mary Nyambura Ndung’u (deceased) died on the 24/3/2001. The P & A form filed and letter by Assistant chief P.K. Kaboya shows that she was survived by three (3) sons namely;

1. Macharia Kamau Githu
2. John Ndung’u Gichuhi
3. Mungai Gichuhi

2. The deceased’s estate comprised of

- a) Laikipia/Kinamba Block 1/959(Mwenje)
- b) Laikipia/Ol Arabel Scheme 118
- c) Account Number [xxxx] Barclays Bank Nyahururu Branch

3. A grant issued to Macharia Kamau Githu was challenged vide the summons for revocation of grant dated 25/1/2007 lodged in court on the same date by John Ndung’u Gachuhi.

4. A consent was entered into by the parties on the following terms;

1. The registration of the respondent as the absolute owner of LR No. LAIKIPIA/OL’ARABEL 118 be cancelled.
2. The grant of letters of administration intestate and certificate of confirmation thereof granted to the respondent herein in this matter be cancelled.
3. This honourable court do proceed to determine the following issues by way of viva voce evidence the applicant being the one to begin testifying.
 - a) Whether the deceased died testate or intestate.
 - b) What portion and or property of the deceased’s estate herein is each heir entitled to be it the applicant, respondent and or any other person.
 - c) What is the fate of monies spent by the respondent in respect of the estate of the deceased herein?
 - d) Who should be issued with the Grant of Letters of Administration of the estate herein.

5) The applicant’s case was based on his evidence and that of **Peter Ngigi Njuguna** and **Philip Kipkorir Kengoe**.

6) It is the applicant’s evidence that the deceased left a will and in the said will, plot number 118 OL’Arabel was bequeathed to him

(applicant). PW2 stated that he was directed by the deceased to write the will. He wrote and signed it. The deceased thumbprinted twice on the will. The directions to PW2 were given in the presence of the chief and four (4) elders. The deceased directed PW2, who was her pastor, to write all she said.

7) PW2 exhibited the document he wrote in court. The deceased thumbprinted it, the chief and elders signed it as well as PW2. This document was left in the chief's office and PW3 confirms as much.

8) The petitioner's case was based on his short testimony. He said that the will was not made by the deceased and the thumbprints on it did not belong to the deceased.

9) The issues for determination are the ones summarized by consent of the parties reproduced above and which are;

a) Whether the deceased died testate or intestate.

b) What portion and or property of the deceased's estate herein is each heir entitled to be it the applicant, respondent and or any other person.

c) What is the fate of monies spent by the respondent in respect of the estate of the deceased herein?

d) Who should be issued with the Grant of Letters of Administration of the estate herein.

10. The ingredients of a valid will are set out in **Section 11** of the **Law of Succession Act**. The Section provides;

“S. 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.”

11. The will produced in court is a written one, done by PW2 under the directions of the deceased. It is thumbprinted by the deceased and this is done twice and the explanation given is that one of the prints got spoilt and a repeat had to be done. The denial by the respondent that the thumbprint belonged to the deceased is not supported by any evidence. The effort to challenge it through the Registrar of Persons office came to nought as the Director of National Registration stated that the thumbprint impressions appearing on the questioned document was unsuitable for verification. There is therefore no proof that the thumbprint was not the deceased's.

12. The available evidence thus remains that of eye witnesses who saw the deceased thumbprint the will. That evidence has not been effectively challenged.

13. The will is attested by four (4) persons who included a chief. The capacity of the deceased to make the will has not come into question.

14. The burden lay heavily on the respondent to prove that the will was a forgery. As held in the case of **ELIZABETH KAMENE NDOLO vs. GEORGE MATATA NDOLO, Civil Appeal Number 128 of 1995**, the charge of fraud or forgery is a serious one. The standard of proof required of the allegor is higher than that required in ordinary civil cases, that is proof upon a balance of probabilities, but certainly not beyond a reasonable doubt as in criminal cases. In our case, the respondent alleged the thumbprint was not the deceased's but did not adduce evidence to support this claim.

15. The burden must be heavy on a person challenging a will. This stems for the fact that the wishes of the deceased as to disposition of his property and his interment must be respected.

16. It is noteworthy that at the time challenges to a will like the one before court come ashore, the deceased is long gone to a world unknown (destination being inferred only from his known beliefs). He is not present to defend his wishes. It must therefore be made a herculean task to successfully challenge a will.

17. This is the more relevant in our contemporary setting where almost invariably beneficiaries have been known to challenge almost every written will that is used to apply for a grant of probate.

18. It is my considered view that the court has a duty to protect wills if society is to embrace the making of wills, a step that would go along way in bringing civility in the administration of estates in this country. This, the courts will do, by ensuring that a will only be invalidated upon presentation of tangible and cogent evidence.

19. From the evidence on record this court is satisfied on a balance of probability that the deceased made a valid will in which she bequeathed plot number 118 OL'Arabel Scheme to John Ndung'u Gachuhi.

20. The will is silent on the distribution of parcel Laikipia/kinamba Block 1/959 (Mwenje) and monies at Account Number 8433234 held by the deceased at Barclays Bank Nyahururu Branch.

21. The deceased is thus within the meaning of **Section 34**, deemed to have died intestate in respect of these two (2) properties and the same should be administered as such. Notably the applicant has raised an issue of what is the fate of monies allegedly spent by the respondent in respect to the estate of the deceased and this is an issue for determination.

22. In the end, I come to the conclusion that issues for determination answer as follows;-

a) The deceased died testate.

b) Plot number 118 OL'Arabel is given to John Ndung'u Gachuhi in whole share.

c) Neither existence of monies at Barclays Bank nor alleged use by the respondent has not been proved and therefore that claim is dismissed.

d) I appoint John Ndung'u Gichuhi the executor of the will of the deceased and also the administrator intestate of the part of the estate not shared out in the will.

e) In determining any share to a beneficiary, the bequest in the will aforesaid shall be considered.

f) Each party to bear its own costs.

Dated and Delivered at Nakuru this 13th day of February, 2019.

A. K. NDUNG'U

JUDGE