



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 225 OF 2004

IN THE MATTER OF THE ESTATE OF THE LATE NJUGUNA MWANGI alias NYAURU KAMUIRU (DECEASED)

VERISHINA WANGUI MWANGI.....PROTESTOR

VERSUS

DANSON MWANGI.....PETITIONER

RULING

1. The estate relates to the late **Njuguna Mwangi alias Nyauru Kamuiru (DECEASED)** who died on the 9th October, 2003. There is only one (1) identifiable parcel of land comprising the estate of the deceased known as Parcel No. **Forthall/ Loc.13/Karunge/1474** measuring approximately 1.0 acres.

2. The Form P&A5 indicates that the Deceased died intestate and left the following surviving him namely;

(i) Vershina Wangui Mwangi - widow/ petitioner

(ii) Evan Irgungu - son

(iii) Peter Kiragu - son

(iv) Stephen Wanderi - son

(v) Hannah Wairimu - daughter

(vi) Julius Maina - son

(vii) Rahel Wairimu - daughter

(viii) Beatrice Wangari - daughter

(ix) Alice Wanjiru - daughter

3. The Protestor had initially petitioned for the Grant of the deceased's estate and was issued with the Grant on the 14/09/2004; after several contested applications for the Revocation of the Grant the parties agreed that the grant that had been issued to Verishina be revoked and a fresh Grant be issued in the joint names of Danson Mwangi and Verishina Wangui Mwangi; this Grant was then issued jointly to the two of them on the 5/09/2016; thereafter on the 26/09/16 one petitioner Danson filed an application for the Confirmation of the Grant and when Verishina went to file her application for confirmation she found she had been beaten to it by Danson as he had already filed one; since she was not agreeable to the mode of distribution therein she opted to file an Affidavit of Protest and gave her reasons for protesting and included her preferred mode of distribution of the subject property;

4. Directions were taken that the matter proceed for hearing and that '**viva voce**' evidence be tendered; Verishina called six (6) witnesses to support her case whereas Danson called two (2) witnesses; at the close of the case the parties were directed to file and exchange written submissions; hereunder is a summary of the protestor's case and the petitioners' response;

PROTESTOR'S CASE

5. The Protestor Verishina in her testimony stated that she was the widow of the deceased and they had been married from 1972; that the deceased was also survived by eight (8) children whom she named in her protest;
6. Her evidence was that her first husband Mwangi Kigo passed on in 1970 and she got married to the deceased in 1972; at the time she got married to the deceased he was living alone and she didn't know he had a previous wife; she claimed that the deceased never told her he had three children and she had only heard about them from the villagers and that she had also never met her co-petitioner, Danson; that she stayed with the deceased till he passed away;
7. That the deceased was the registered owner of land parcel number Fort Hall Loc.13/Karunge/1474 which had coffee; the deceased had sold a portion of subject property measuring 0.1acres to one Peter Mwangi Wamwere; and that she resided and utilized the remaining portion;
8. Before his demise he had told her that he had left all his wealth to her because they had lived together for many years; when he made the declaration and WILL there were other persons present; she proceeded to name the ones she could recall; some of whom she stated had since passed on;
9. The WILL was reduced into writing and was executed by the deceased and the witnesses present also appended their signatures; the sub-chief one Julius Maina was present and was the drawer of the second and instant Will dated 9/09/2003; the drawer of the first Will was one Josephat Mwangi but she was not there at the making of the first one ; but was present when the second will was made and she appended her signature to the second Will; some months after the making of this second WILL the deceased who had a diabetic condition passed on; she tendered a copy of the Will which was marked for identification for production by the maker;
10. She reiterated her evidence that the deceased was indeed her husband and she had lived on the subject property in the house he had built; which house collapsed and she was forced by circumstances to move back to her first husband's land as she had no money to build another house;
11. The evidence of **PW2** who was a cousin to the deceased was that the deceased had inherited Verishina when her first husband who was also their brother, had passed on; he acknowledged that the deceased had been previously married to Wanjiku Josiah(deceased); and although he had been close to the deceased he didn't know whether the deceased had been blessed with any children from the union with his first wife; he didn't know the exact acreage of the subject property; he recalled that when he was last on the subject land there was a house; but with the demise of the deceased Verishina was chased from the land but he couldn't recall by whom; that she went to reside on her previous husbands' land with all her children; that since then no one had resided in the homestead leading to the house falling down;
12. **PW2** stated that sometime on the 9/09/2003 the deceased summoned him together with family and clan members; but no head-man or chief was called; he then informed them that he was ailing and that he had left all his wealth to Verishina and that no one was to take this wealth away from her; that there was a young man named Riari who was present who took the minutes; he recalled about three other persons who were present at the meeting namely, Timothy Mwangi Wamari, Mwangi Kiogotho and Mwangi WaKimani but he could not recall the others and also couldn't recall whether he had signed any **WILL**;
13. Josephat Mwangi Kiongotho (**PW3**) testified that he hailed from the same village as the deceased and knew both Verishina and the deceased; that they were immediate neighbours and only a footpath separated the two homesteads; as members of the sub-clan he was present on the 9/09/2003 at the meeting where the deceased declared his Will; he recalled that there were ten people present and the assistant chief was present and was the one recording the proceedings; he recalled the contents of the Will and that the deceased gave his property to Verishina; he never knew of the first wife and the deceased had never told him that he had a son; that it was the assistant chief who drew the Will and all the members together with Verishina signed it; he couldn't recall whether the Assistant Chief signed the Will;
14. He recalled that there used to be a house on the subject property and upon the demise of the deceased Verishina demolished it and went to reside with her eight children on her first husband's property;
15. Evan Riari Gatambia (**PW4**) also hailed from the same village as the deceased and he also knew Verishina; his home was about 800metres from theirs and that he knew that the two lived together as husband and wife; he didn't know whether the deceased had children; and that he didn't know Danson;
16. He recalled the 9/09/2003 that as a village elder he was called by the deceased who wanted him to draw a Will; when he got to the house he found ten members of the family; he named those present and that the Assistant Chief was also present; the meeting was held outside the house; that **PW4** was the one who drafted the Will wherein the deceased left all his property to Verishina; he gave them no reasons for making of this decision;
17. He said that upon the demise of the deceased Verishina went to live on the land of her former husband; that there was no house on the subject property;
18. Timothy Mwangi Wamaari (**PW5**) stated that he lived about three plots away from the deceased; he was a church elder and knew the deceased as he was his spiritual leader; in the year 2003 the deceased sent his wife to call him as he had two issues he needed to discuss with him; the first issue was that he needed to be baptized so he got him a priest who baptized him and gave him the name Roland; the second issue was that he wanted **PW5** to be his godfather; about one month and some days from the baptism the deceased passed on;
19. The witness recalled that he had enquired from the deceased on how he intended to divide his estate; and the response he got was that he had a Will which he was glad to hear; he was also told that he had left all his property to Verishina;

20. He acknowledged that Verishina had previously been married to Mwangi Kigio; and after the demise of the deceased Verishina demolished the house as she could not live there and then she moved back to her previous husband's land; his testimony was that he knew that the deceased had many wives and that eight had come and gone and that Verishina was the ninth wife; the deceased never told him of the previous wife and the three children; Verishina lived with him the longest and he never heard of her ever leaving the deceased; she had called on the church to assist in the burial of the deceased and at the funeral the clergy enquired if the deceased had left a Will to which Verishina confirmed that there was a Will;

21. **PW7 Julius Maina Gakomo** was previously an Assistant Chief in Gutu Sub-location where the deceased hailed from; he testified that he knew the Protestor Verishina and that he also knew the deceased prior to his demise and ever since he was in school; he knew where the deceased resided and that he had lived with Verishina;

22. He recalled that the deceased was ailing and on the 9/09/2003 he sent for him (**PW7**) through an elder; the deceased had also called the **wazee** and the clan members whom he found were already at the venue; there was no notification sent out for the meeting; the deceased told him that he had been summoned to write down the deceased wishes in front of the witnesses who were present;

23. There was another Will that had been written in 1999 but he reiterated that he had only written the letter dated 9/09/2003 that captured the deceased's wishes the contents of which he read out to the court; that he signed the letter and the eleven (11) witnesses also signed the letter; that he didn't include Danson in the letter as the deceased made no mention of him; two months after the signing of the Will the deceased passed on;

24. That he did not know Danson or his mother or the deceased's other wives or any of the other children or family members of the deceased; that Danson never resided with the deceased; the Letter where all the deceased's children are acknowledged was written by the Chief whom he never met as he was not in the location then; and the Chief never consulted him on the deceased's children; under cross-examination he confirmed that he knew Timothy (**PW5**) and that one of Verishina's children had married Timothy's daughter; he also knew **PW4** as they were in-laws both having married into the same family;

25. Verishina closed her case after this witness testified; she stated that she was unwilling to share the subject property with Danson because it had been bequeathed to her by the deceased; and prayed that the distribution be confirmed according to the terms of the **WILL**;

PETITIONERS CASE

26. In response the co- petitioner Danson stated that he was related to the deceased by virtue of being his son; that they were three siblings and two had passed on together with his mother; that he was the only one left in that family; he confirmed that the deceased died on the 9/10/2003; and that the annexed affidavit was his response to the Protest;

27. When cross-examined he stated that he hailed from Gitugi sub-location which was where his maternal grand-mother hailed from; that he was born in 1963 and in 1970 he went to live with his maternal grand-mother; by the time his mother passed on he was already living there; at this time his father lived with the person who was helping him till the land; from 1984 to 1986 he lived with the deceased and then left for Nairobi;

28. That the deceased and Verishina hailed from Karunge; that he knew Verishina and most of the witnesses mentioned in the letter and that some had passed on; he stated that he did not know why he had been left out by the deceased as he was the person who was supposed to inherit the subject property; that Verishina having been previously married to Mwangi Kigo (also deceased) had already been adequately provided for with the parcel number Loc 13/Karunge/1504 measuring 2.5acres; in his mode of distribution he proposed that the subject property which was the deceaseds' property be transferred to him absolutely;

29. His witness **DW2** Mwangi Kirubi stated that he hailed from Karunge and that he knew the deceased and that they grew up together; that he lived together with the deceased from when they were children to when they were both old; he also knew Mwangi Kigo who passed on before the deceased; he also knew Verishina and he confirmed that before the deceased passed on that she used to live with the deceased; that she had moved in after the death of Mwangi Kigo;

30. His evidence was that Danson's mother who was called Wanjiku Njuguna Mwangi was deceased; that she used to live with the deceased and had three children with him; two of the children are deceased; that Danson's mother left the deceased's homestead before independence; she left due to the normal fights between married couples; by the time she left the three children were born;

31. **DW3** Nancy Wambui Kagoi states that she knew both Verishina and the deceased as she hailed from the same village and location; she also knew Mwangi Kigo but couldn't recall when he passed away;

32. Her evidence was that Verishina did not live with the deceased; that she used to visit and then go back to her place; and that Verishina did not and does not till the subject property; that Danson lived with his maternal grandmother and that he used to visit his father; that she had heard of the assistant chief (**PW7**) being present at the making of the Will;

33. Danson then closed his case after this witness testified; he prayed that the protest be dismissed with costs;

ISSUES FOR DETERMINATION

34. After hearing the evidence of the parties and upon reading their respective written submissions this court has framed only following issues for determination;

(i) Whether the deceased made a valid WILL dated the 9/09/2003 before his demise;

(ii) Whether the Protestor was a spouse to the deceased; whether the Respondent was a son the deceased and whether either are entitled to benefit from the estate;

(iii) Distribution of the estate.

ANALYSIS

Whether the deceased made a valid WILL dated the 9/09/2003 before his demise:

35. At Section 8 of the Law of Succession Act (Act) the law provides that a Will may be made orally or in writing; the Protestor adduced evidence that on the 13/02/1999 the deceased by a WILL caused his intention to be known that he had bequeathed his property to her; upon carefully perusing the copy of this Will which is written in Kikuyu and has an annexed certified translation this court notes that it does not conform to the provisions of Section 9 (a) of the Act in that it does not indicate that it was made in the presence of two witnesses nor is it attested by any witnesses; for those reasons this court finds this initial will dated the 13/2/1999 to be invalid;

36. Thereafter on the 9/09/2003 he summoned his family and clansmen together with the Assistant chief and had his wishes written down by the Assistant Chief (**PW7**); the deceased passed on the 9/10/2003 exactly one month thereafter; the Respondent contended that the original document purporting to be the last Will and testament of the deceased was not produced and that the deceased who was diabetic and of ill health may not have had the capacity to make the Will and may also have been coerced into making the Will due to the presence of Verishina and the strong delegation that was present;

37. As opposed to the WILL made on 13/02/1999 this WILL passed the test set out in Section 9(a) in that this one was duly attested by more than two witnesses; what is of interest is that despite Verishina engaging the services of an advocate she did not proceed to petition to probate this WILL instead she proceeded to petition for Letters of Administration and declared that the deceased had died intestate; which means that it should be treated as an oral will;

38. From the evidence tendered this court notes that despite being given time to call the maker Verishina did not produce the Original of the Will dated the 9/09/2003; the presumption is that she was not in possession of the original documents and was therefore unable to petition for the probate of the WILL and therefore the only other option was to proceed as if the deceased had died intestate; which therefore means what she was indicating to court together with her witnesses was that the deceased made an oral will;

39. The provisions of Section 9(b) of the Act provides that an oral will is valid if the testator dies within three months of making the oral will; and this indeed was the evidence put forward by Verishina and her witnesses that the deceased made the will on the 9/09/2003 and died of a diabetic condition on the 9/10/2003 which was within one month of having made the will;

40. For the above reasons the WILL made on the 9/09/2003 passed the validity test but for the shortcomings brought out in evidence by both parties together with the witnesses; Danson submitted the presence of Verishina and the strong delegation present may have influenced the testator's decision making the Will invalid; from the evidence adduced it is noted that the deceased had a diabetic condition and within one month of the making of the Will he passed on; the death certificate also confirms that his cause of death was diabetes;

41. There is also overwhelming evidence that Verishina was present at the making of the **WILL** dated 9/09/2003 and the document tendered also demonstrates that she appended her signature thereto; the general rule is that a person named as a beneficiary in a **WILL** should never be an attesting witness; in this instance Verishina was not only a beneficiary but an interested party;

42. That at the crafting of this will there is overwhelming evidence that it was made in the presence of a big audience consisting of clansmen, family and the Assistant Chief; Verishina was also present and appended her signature thereto;

43. There is overwhelming evidence that Verishina resided with him up until his demise; and indeed **PW5** corroborated this by stating that she was the 9th wife and was one of the wives who had stayed for the longest period of time and that she was with him up until his demise; given the deceased's condition and the presence of Verishina an interested party and also his care giver at such a crucial meeting this presents a scenario of manipulation of a sick person and indeed the circumstances resonate of undue influence;

44. Section 10 of the Act goes on to give another condition that should there be any conflict in the evidence of the witnesses as to what the deceased had said in the oral will then it shall not be valid unless the contents are proved by a competent independent witness; in this instance the first inconsistency noted is Verishina stated in her evidence is that the deceased being the registered owner of land parcel number Fort Hall Loc.13/Karunge/1474 bequeathed all his wealth to her; she then added that the deceased had sold a portion of subject property measuring 0.1acres to one Peter Mwangi Wamwere; both of the WILLs were silent on this; none of the witnesses alluded to this sale and neither did she produce any document signed by the deceased and the purchaser; **PW2** stated he didn't even know the acreage of the land;

45. Verishina it is noted called **PW5** the church elder who can be said to have been an independent witness because he had enquired from the deceased as to whether he made a Will; the deceased had confirmed to him that he had done so and had divulged the contents;

46. His evidence indeed could have validated this WILL but Verishina's only undoing is her presence during the making of the Will and the appending of her signature thereto; taking into account the circumstances in which the Will was made in the presence of a big and maybe intimidating audience this court cannot rule out undue influence; thus rendering the WILL dated 9/09/2003 void.

Whether the Protestor was a spouse to the deceased; Whether the Respondent was a son to the deceased; and whether either party is

entitled to benefit from the estate:

47. The dispute is as between a spouse and an alleged son of the deceased; from the evidence adduced there is no dispute as to the property that comprises the estate of the deceased;

48. The applicable provision of the law is Section 29 of the Law of Succession which defines a dependant; it reads as follows;

“Section 29: For the purposes of this Part ‘dependant’ means-

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

49. Verishinas’ witnesses all attest to her being the deceased’s wife; even DW2 acknowledged that she was a wife to the deceased; Verishina claimed that the house collapsed and that she had no money to rebuild it so she left the subject property to reside at her previous matrimonial home; **PW2** recalled that when he was last on the subject land there was a house; but with the demise of the deceased Verishina was chased from the land but he couldn’t recall by whom; **PW3’s** evidence was that it was Verishina herself who demolished the house; **PW4** stated that she left the premises on her own accord; it appears that Verishina instigated her exit on her own accord and left the deceaseds’ homestead and went back to her former husbands’ home; but her departure notwithstanding did not bring the marriage to an end nor the relationship of a spouse;

50. This court is satisfied that Verishina was still the surviving spouse of the deceased and qualifies to be a dependant;

51. As for Danson; there are numerous contradictions noted in the evidence of protestor and her witnesses on the evidence of the deceased’s children with first wife; Verishina claimed that the deceased never told her he had three children and that she had only heard about them from the villagers; **PW2’s** evidence was that although he had been close to the deceased he didn’t know whether the deceased had been blessed with any children from the union with his first wife; **PW3’s** evidence was that he never knew of the first wife and the deceased had never told him that he had a son; **PW4** reiterated that he didn’t know whether the deceased had children; and that he didn’t know Danson;

52. **PW5’s** testimony was that he knew that the deceased had many wives and that eight had come and gone and that Verishina was the ninth wife; the deceased never told him of the previous wife and the three children; **PW7** stated that he did not know Danson or his mother or the deceased’s other wives or any of the other children or family members of the deceased; that Danson never resided with the deceased;

53. **This court reiterates Section 29 of the Act; it provides that**

29(a)children of the deceased whether maintained by the deceased immediately prior to his death.”

54. Verishina’s witnesses all testified that the deceased was indeed polygamous by nature and had many other wives; from her own admission she stated that she had heard of Danson and the other children from the villagers but had never met him or them; also by allowing him to be enjoined as a joint administrator meant that she recognized Danson as a son of the deceased from the first house;

55. In considering the evidence of both sides in totality this court is satisfied that Danson qualifies to be a dependant and a beneficiary of the deceased’s estate by virtue of being the deceaseds’ son whether or not maintained by the deceased immediately prior to his death;

Distribution of the estate of the deceased

56. The dispute hinges on distribution of the deceased’s estate and the parties are not agreeable upon its mode of distribution; this court is therefore tasked with resolving this.

57. There is no dispute as to what comprises the estate of the deceased; no documentary evidence was adduced to support the sale to Peter Mwangi Wamwere whose interest was not even noted by Verishina when she filed her Petition for the Letters of Administration as an existing liability to the deceased’s estate; in the circumstances any interest he might have had in the estate will not be taken into consideration by this court;

58. The evidence tendered demonstrates that the deceased was a polygamist and that he had numerous wives; but in this instance the evidence is limited to the first house headed by the first wife (now deceased) who was the mother of the Respondent and Verishina who was the deceased’s ninth wife; therefore this dispute is found to be as between these two households only;

59. This court finds that Section 40 of the Law of Succession to be the applicable law and distribution shall be subjected to the said provisions; the Section reads as follows;

“Where an interstate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house but also adding any wife surviving him as an additional unit to the number of children.”

60. This court is also guided by the Court of Appeal decision of **Rono vs Rono and Anor (2005) 1 EA 363**; where it was held that the estate of a polygamous deceased should be distributed according to the number of children and not the number of houses.

61. The evidence of Danson was that his mother was deceased and his two other siblings were also deceased; and that he is the only surviving member of the first house; this household is therefore found to comprise of one family member which translate to one unit; the evidence of Verishina is that she had eight children; but from the evidence adduced these children were all from a previous marriage and resided on her previous husband's land; she adduced no evidence that these children had been taken in and had been maintained by the deceased; she did not even seek their consents when she filed her petition; in the light of the above this second house comprises of only one member being Verishina herself; the ratio of distribution is therefore determined to be 1:1 which translates to equal shares in the property;

62. The Grant is hereby confirmed in terms of the subject property being divided into two equal shares; Verishina shall hold a life interest in her portion which shall devolve to the Respondent upon her demise

FINDINGS & DETERMINATION

63. The deceaseds' **WILL** dated 9/09/2003 is found to be void;

64. The Protestor and the Respondent are both found to be dependants of the deceased by virtue of being a surviving spouse and a son; both are found to be entitled to benefit from the deceased's estate;

65. The Petitioner's mode of distribution of the deceased's estate is found to be unfair; the proposed mode of distribution by the Protestor is also found to be unfair;

66. The distribution of the deceased's estate and confirmation shall be as set out in paragraph 61 and 62 hereinabove;

67. Each party shall bear their own costs.

It is so ordered accordingly.

Dated, Signed and Delivered at Nyeri this 7th day of February, 2019.

HON. A. MSHILA

JUDGE