



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2530 OF 2013

IN THE MATTER OF THE ESTATE OF RAHAB MURUGI KIGAA (DECESAED)

JOSEPH KIMANI KIGAA.....1ST APPLICANT

PETER KIMOTHU KIGAA.....2ND APPLICANT

VERSUS

JANE WACHUKA KIGAA....ADMINISTRARIX/RESPONDENT

JUDGMENT

1. Rahab Murugi Kigaa the deceased to whom these proceedings relate died testate on 15th January 2013. Prior to her death, she had executed a written will dated 20th August 2004 in which she appointed her daughter Jane Wacuka Kigaa as the sole Executrix to the estate. Upon her death, the said Executrix instituted a petition dated 2nd October 2013 for probate of written Will. Subsequently, a Grant of probate of written will was made and issued on 23rd January 2014.

2. Consequently, vide a summons for confirmation of Grant dated 18th September 2014 and filed the same day, the Executrix sought confirmation of the grant. In support of the application, the applicant listed the following as survivors of the estate:

- a. Jane Wacuka Kigaa (daughter)**
- b. Joseph Kimani Kigaa(son)**
- c. Peter Kimotho Kigaa (son)**
- d. John N. juguna K igaa(son)**
- e. George Kinuthia Kigaa (son)**
- f. Patrick M waura Kigaa(son)**
- g. Samuel Maina Kigaa,(son)**
- h. Mary Njeri Kigaa (daughter)**
- i. Rahab Murugi Njeri (G. daughter)**
- j. Irene Murugi (G. daughter)**
- k. Joel kigaa Wacuja (G.son)**

3. The petitioner urged the court to distribute the estate as per the wishes of her late mother and in terms contained in her aforesaid written will. However, through an application dated 4th November 2015 and filed on 10th November 2015 pursuant to section 26 of the Law of Succession and rule 73 of the probate and administration rules, Joseph Kimani Kigaa a son to the deceased (the 1st applicant herein) together with his brother Peter Kimotho Kigaa (hereinafter the 2nd applicant) protested against confirmation of the grant claiming that sufficient provision was not made to them as bonafide dependants of the deceased's estate.

4. In their joint affidavit in support of the said application, the applicants averred that the deceased was their mother and was supporting them prior to her demise. That the deceased was survived by the following children:

- a. Peter Kimotho Kigaa
- b. Joseph Kimani Kigaa
- c. John Njuguna Kigaa
- d. George Kimani Kigaa
- e. Patrick Mihingo Kigaa
- f. Samuel Maina Kigaa
- g. Jane Wachuka Kigaa
- h. Maria Njeri Kigaa
- i. Mary Wambui Kigaa

5. That in her said will, the deceased shared her property as follows;

i. Plot No. Chania Kanyoni/1445 shared equally between;

- a. Peter Kimotho Kigaa
- b. Joseph Kimani Kigaa
- c. John Njuguna Kigaa
- d. George Kimani Kigaa
- e. Patrick Mihingo Kigaa
- f. Samuel Maina Kigaa

ii. Coffee Machine on Chania/Kanyoni/230 in equal shares between;

- a. Peter Kimotho Kigaa
- b. Joseph Kimani Kigaa
- c. John Njuguna Kigaa
- d. George Kimani Kigaa
- e. Patrick Mihingo Kigaa
- f. Samuel Maina Kigaa
- g. Jane Wachuka Kigaa
- h. Maria Njeri Kigaa
- i. Mary Wambui Kigaa

iii. Plot No. 1155/56 Kianjau shared equally between;

- a. Rahab Murugi Njeri
- b. Irene Murugi Njeri

iv. 12 rental houses on plot No. 1154/55 shared equally between;

- a. Jane Wachuka Kigaa
- b. Mary Njeri Kigaa
- v. Joel Kigaa Wacuka grandson Plot No. 883 Mangu Investment Limited absolutely
- vi. Jane Wachuka Kigaa shares No. 363 and 1627 Kianjau farmers Society Sacco, absolutely
- vii. Mary Njeri Kigaa shares No. 363 and 1627 Kianjau farmers Society Sacco, absolutely in equal shares
- viii. Rahab Murugi Njeri (granddaughter) – ICD share certificate no. 92237 absolutely
- ix. Jane Wachuka Kigaa all moveable and immoveable properties to be acquired in future.

6. They averred that the value of the deceased's net estate after payment of reasonable funeral expenses was approximately Kshs.1,000,000 and that their income is Kshs. 50,000/- each from sale of produce from subsistence farming with their probable income means remaining the same. They further stated that their present needs consist of housing, clothing, food, school fees for their children and medical allowance. That the deceased other than the willed gifts did not give them any other gifts. They contended that the deceased did not make sufficient provision for them as compared to their sisters.

7. In opposition to the said application, the petitioner filed her replying affidavit sworn on the 8th November 2016. She denied claims raised by the applicants that the deceased was supporting them prior to her demise. Further, she admitted to the correctness of the list of beneficiaries as listed as well as the properties surviving the deceased save for Plot No. 883 Mang'u Investment which allegedly had been disposed off during the deceased's lifetime. That their late father Joel Kigaa Kimani died in 1966 leaving a written will which was proven in court vide High court Succession cause no. 517 of 1997 where the grant of probate was issued and confirmed with **Chania/Kanyoni/230** bequeathed to their mother and upon her demise to her children as follows; Peter Kimotho Kigaa, Joseph Kimani Kigaa, John Njuguna Kigaa, George Kimani Kigaa, Patrick Mihingo Kigaa and Samuel Maina Kigaa getting 2.5 acres each while the daughters namely; Jane Wachuka Kigaa, Maria Njeri Kigaa and Mary Wambui Kigaa getting 1.6 acres each.

8. Further, that during his lifetime, their late father had purchased a 25 acres piece of land in Tharaka Nithi and had given all his sons including the applicants 5 acres each, which almost all of them sold after his demise. That their late father had constructed two room brick house in the portion of land belonging to Joseph Kimani Kigaa as his residence since he was a bother and troublesome towards him. That after their father's demise, he returned to live in his parcel of land in Thika, which he had been bequeathed by their late father. She alleged that after their father's death, Kimani became abusive towards the deceased (mother) and his relationship with the deceased was deplorable and hostile.

9. She claimed that the applicants are irresponsible and drunkards incapable of managing themselves and have failed to manage the residential and commercial property erected on plot No. **Chania/Kanyoni/1445** which was bequeathed to them by the deceased and instead of it fetching Kshs.3,000 per unit, its fetching Kshs. 1,300. She refutes claims that the deceased did not make reasonable provision to the applicants and urged the court to dismiss the application with costs.

10. The applicants in their supplementary affidavit dated 16th December 2016 disowned claims that they had a strenuous relationship with their mother. Further, they alleged that it was the respondent who influenced the deceased to write a will favoring daughters.

11. When the matter came up for hearing, parties agreed to dispose of the same by way of written submissions. Consequently, parties filed their respective brief submissions with no authorities cited.

Applicant's Submissions

12. Through the firm of Karanja Kangiri Advocates, the applicants filed their submissions dated 31st October 2018. The applicant's objection to confirmation of grant is anchored under Section 26 of the Law of Succession and rule 73 of the Probate and Administration rules. It is the applicant's claim that as children to the deceased they are bonafide dependants hence entitled to sufficient provision. Mr. Karanja submitted on three issues namely:

- 1) **Whether the applicants qualify to be dependants of the deceased.**
- 2) **Whether the court can issue an order for the applicants to be provided for as dependants.**
- 3) **What type of relationship did the deceased and the applicants have prior to the deceased's death?**

13. Learned counsel referred to Section 29 (b) of the Law of Succession which recognizes among others, children of a deceased person as dependants. Regarding the issue whether this court can issue an order for the applicants to be provided for as dependants, Mr. Karanja made reference to Section 27 of the Law of Succession which provides that the court has discretionary powers to make the orders sought subject to conditions set out under Section 28 of the Law of Succession.

14. Concerning the type of relationship the deceased and the applicants had prior to her death, the applicants expressed shock when the respondents alleged their relationship to the deceased was strenuous on account of assaulting and using abusive words against the mother. They described their relationship with their mother then as cordial and that the respondent's allegation is calculated at tarnishing and soiling

their reputation.

Respondent's Submissions

15. On the other hand, the respondent filed her submissions on 5th November 2018 through the firm of Stanley Henry. It is the respondent's submission that the validity of the Will is not in dispute and that the applicants were dependants to the deceased by virtue of being her children. According to the respondent (Executrix), some of the properties bequeathed to some beneficiaries are no longer in existence. It was contended that, the applicants had not demonstrated on how the Will failed to make reasonable provision to them. Learned counsel further submitted that the applicants like the rest of the sons have been given equal share out of L.R. Chania/Kanyoni/1445 to the exclusion of daughters. That Chania/ Kanyoni/230 was shared equally to all children.

16. Further, that there is a commercial property/rental houses erected on Chania/Kanyoni/1445 which the applicants have failed to manage thus reducing its value in terms of rent collected from 3000/= to 1300/= per month per unit. That owing to the applicant's hostility against their mother, she (deceased) was forced to move out of her matrimonial home in 1998. The court was urged to find that the Will did make sufficient provision for each dependant.

Determination

17. I have considered parties' pleadings herein filed and rival submissions by both counsel. Issues that emerge for consideration are:

(a) Whether the deceased left a valid Will.

(b) If so, whether the testatrix was under undue influence when making the Will.

(c) Whether the Will failed to make reasonable provision for the applicants being dependants to the deceased.

Whether the deceased left a valid Will

18. As defined under Section 3 of the Law of Succession, "Will" means, the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II, and includes a codicil. In other words, the testator or testatrix as the case may be, must have a testamentary capacity that is to say, he or she must have a sound and disposing mind, enabling him to understand the nature of will making, a sound memory, enabling him to recollect the property he means to dispose of, and a sound understanding, enabling him to remember the persons who should benefit from his estate and the manner it is to be attributed **(See Banks vs Good Fellow (1870) LR 59QB 549.**

19. Section 5 (1) of the Law of Succession provides for requisite qualifications of a person capable of making a Will as follows:

"subject to the provisions of this part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by Will, and may thereby make any disposition by reference to any secular or religious law that he chooses".

20. In the instant case, there is no dispute that the deceased did execute a Will. It is common ground that the validity of the Will in question is not in dispute. To that extent the issue of validity of the Will is settled.

Was the Testatrix under any influence when making the Will

21. A Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake is void **(See Section 7 of the Succession Act)**. It is the applicant's argument that their mother (deceased) did favour daughters who are married to their disadvantage. That they got less than their sisters is by implication an act of bias which was a product of undue influence. It is trite that he who alleges must prove the facts alleged. The duty to prove undue influence on the Testatrix by the respondent lies squarely on the applicants.

22. In the matter of the **estate of James Ngengi Muigai (deceased) Nairobi High Court Succession Cause No. 523/1996** it was held that:

"A testator is presumed to be of sound mind, by virtue of Section 5 (3) of the Law of Succession Act, unless it is proved to the contrary, the burden of proving lack of sound mind is on the person alleging it. The same principle applies with respect to undue influence".

23. Having admitted that the Will is valid, the applicants cannot be heard to claim that it was made through undue influence by the respondents. The invocation of the word undue influence presupposes that the deceased did not execute the will freely which will then mean if proved, that the Will is null and void. The applicants cannot recognize the Will as valid on one hand and on the other hand, claim invalidity by virtue of undue influence. It is my finding that the applicants have not discharged their burden of proof in establishing the nature and extent of undue influence applicable in this case. To that extent that ground is not tenable as the applicants have not demonstrated that the testatrix did what she should not have done had it not been for some undue influence.

24. It is incumbent upon the applicant or objector to the Will to prove that the Will was made as a result of undue influence and be specific as to the nature of influence in question. A court can not be left to speculate as to the actual influence contemplated by the applicants. The allegation of undue influence in this case is a mere general statement which does not meet the threshold to nullify or vary a will whose

validity is admitted. For those reasons, that ground fails.

Whether the Will made reasonable provision for the applicants

25. As stated earlier, the claim herein is hinged under Section 26 of the Law of Succession. Section 26 provides as follows:

“ Where a person dies after the commencement of this Act, and 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 effected 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”.

26. Section 28 goes further to provide Circumstances to be taken into account by a court in making orders as follows;

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

- (a) the nature and amount of the deceased’s property;**
- (b) any past, present or future capital or income from any source of the dependant;**
- (c) the existing and future means and needs of the dependant;**
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;**
- (e) the conduct of the dependant in relation to the deceased;**
- (f) the situation and circumstances of the deceased’s other dependants and the beneficiaries under any will;**
- (g) the general circumstances of the case, including, so far as can be ascertained, the testator’s reasons for not making provision for the dependant**

26. Section 27 goes further to provide that:

“In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit”.

27. From the above provisions, the court is clothed with unfettered discretion to make reasonable provision for a dependant whose provision out of the deceased’s net estate is in the opinion of the court inadequate.

28. According to the Will, the estate was shared out as follows;

- (i) Plot No. Chania Kanyoni/1445 shared equally
 - (a) Peter Kimotho Kigaa
 - b. Joseph Kimani Kigaa
 - c. John Njuguna Kigaa
 - d. George Kimani Kigaa
 - e. Patrick Mihingo Kigaa
 - f. Samuel Maina Kigaa
- (ii) Coffee Machine on Chania/Kanyoni/230 in equal shares
 - a. Peter Kimotho Kigaa
 - b. Joseph Kimani Kigaa
 - c. John Njuguna Kigaa

d. George Kimani Kigaa

e. Patrick Mihingo Kigaa

f. Samuel Maina Kigaa

g. Jane Wachuka Kigaa

h. Maria Njeri Kigaa

(iii) Plot No. 1155/56 Kianjau shared equally

(a) Rahab Murugi Njeri

(b) Irene Murugi Njeri

(iv) 12 rental houses on plot No. 1154/55 shared equally

(a) Jane Wachuka Kigaa

(b) Mary Njeri Kigaa

(v) Joel Kigaa Wacuka grandson Plot No. 883 Mangu Investment Limited absolutely

(vi) Jane Wachuka Kigaa shares No. 363 and 1627 Kianjau farmers Society Sacco, absolutely

(vii) Mary Njeri Kigaa shares No. 368 and 1627 Kianjau farmers Society Sacco, absolutely in equal shares

(viii) Rahab Murugi Njeri (granddaughter) – ICD share certificate no. 92237 absolutely

(ix) Jane Wachuka Kigaa all moveable and immoveable properties to be acquired in future.

22. Section 29 of the Law of Succession does define who a dependant is. This includes; children and grand children. From the above distribution schedule, it is apparent that the property was given by the Testatrix to both her children and grand children. Although the properties were not valued individually, it is apparent that two major properties i.e. Chania/Kanyoni/1445 and 230 were adequately distributed amongst the 8 children with Chania/Kanyoni/1445 given exclusively to the sons and 230 to all children equally.

23. The deceased made very interesting and disturbing remarks in the will that, nobody shall question her mode of distribution and that her six sons had disrespected and even assaulted her. Although no evidence was called to prove the allegation of assault and disrespect, one would be persuaded to believe that for it to have specifically been included in the Will whose validity is not in dispute, the deceased must have been offended by the applicants hence a sign of a poor relationship between the deceased and her sons.

24. That notwithstanding, the applicants have not shown the extent to which the respondents were favoured. No valuation was attached to show that the respondents got more than adequate as compared with the respondents' share. The word 'reasonable provision' is subjective. It is not measured with any mathematical precision. One would only conclude that a court faced with such question will be properly guided by the relevant law bearing in mind that reasonable provision is not synonymous to equal provision or share. A court will therefore apply its judicial discretion in undertaking a proper assessment to arrive at a conclusion that the disparity in terms of allocation of shares of the estate to dependants is unreasonably big and unjustified in the circumstances. I am however alive to the fact that a testator has powers to dispose of his or her property but that freedom is not absolute (see **Evarlyne Wagitie Kamau and Another vs Jane Wanjiru Kamau (2006) Eklr**).

25. In my own assessment, I do not see any unreasonable disparity in the distribution of the estate herein. Where a will is properly executed and the same is valid, a court exercising its discretion to determine sufficiency in terms of provision, should be cautious not to interfere with the wishes of a testator or testatrix unless there is manifestly extreme discrimination or unjustifiable disparity. The application of discretion in varying distribution contained in a will on account of insufficient or unreasonable provision for a dependant should sparingly be used so as to maintain the integrity and sanctity of the Will making process as well as respecting the deceased's wishes. After all, the property in question does not belong to the survivors hence they should be contented with the share given unless there is proof of unreasonableness, malice, or lack of justification or at all on the part of the testatrix in the manner in which she distributed the estate.

26. In the instant case, I have not been sufficiently persuaded by the applicants that the deceased (mother) did not make sufficient provision with the commercial property at their disposal. They should make good use of the same and create wealth. The fact that the respondent and her co-sister are married is not an issue to influence distribution. One's gender or marital status is immaterial (**see Solomon Ngatia Kariuki (deceased) (2008) EKLR** and **Peter Karumbi Keingati and 4 others vs Dr. Ann Nyokabi & 3 others (2014) eKLR.**

27. Accordingly, it is my holding that;

1. The application herein lacks merit hence dismissed with orders that;

2. The application for confirmation of grant dated 18th September 2014 be and is hereby allowed and the grant of probate issued on 23rd January 2013 confirmed.

3. The estate be distributed as per the deceased's annexed written Will dated 20th August 2004.

4. This being a family matter, each party to bear own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI ON THIS 9TH DAY OF MAY, 2019.

J.N. ONYIEGO

JUDGE