REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2778 OF 2011

IN THE MATTER OF THE ESTATE OF JAMES MWANGI GAKURE (DECEASED)

JUDGMENT

1. James Mwangi Gakure, the deceased herein, died on 4th October 2010. John Irungu Ngari, the respondent herein, sought and obtained a limited grant of probate *ad litem*, and a grant in those terms was made to him on 4th November 2010 for purposes of filing suit to preserve the deceased's estate. He obtained a full grant of probate of the written will of the deceased on 4th February 2011. The said full grant was confirmed on 27th July 2011.

2. The respondent filed Murang'a SPMCCC No. 464 of 2010 against one Lawrence Mugo Karuri and Nancy Wangui Gichia, the applicant herein, accusing Lawrence Mugo Karuri of wasting the estate, and a temporary injunction was granted by the court restraining Lawrence Mugo Karuri and the applicant from entering into Loc.9/Kiruri/1431.

3. The applicant thereafter filed a summons for revocation or annulment of the grant of probate made to the respondent on grounds, *inter alia*, that: -

a) The grant was obtained fraudulently by making of a false statement and by concealment from court of something material to the cause;

b) The purported will was not a will of the deceased and the same is a forgery and not a valid Will in any way;

c) The grant was obtained by means of an untrue allegation of fact;

d) The court lacked jurisdiction as the deceased was from Kangema and the only asset L.R Loc.9/Kiruri/1431 is within Kangema and not Thika;

e) The respondent filed a petition and summons for confirmation of grant notwithstanding that he is not a beneficiary and distributed the asset of the Estate to strangers leaving out the real beneficiaries of the estate; and

f) The respondent failed to disclose all the beneficiaries of the estate in the application for confirmation of grant and in the petition.

4. In her affidavit supporting the summons for revocation of grant, the applicant stated that the deceased was survived by the following persons, that is to say his widow Nancy Wangui Gichia, a son, Evans Gichia, and two daughters, Tabitha Wairimu and Tabitha Wangechi. She also stated that the deceased died possessed of Loc. 9/Kiruri/1431, being the only asset available as property of the estate. She claimed to be a widow of the deceased having been married in the year 1991, which marriage was never dissolved. She added that the respondent was a distant relative of the deceased, adding that she had priority over the respondent so far as administration of the estate was concerned.

5. In his reply, the respondent stated that the deceased left no immediate family as he had never married and did not have any children. He stated that the Chief's letter placed on record was factual on the issue that the deceased was unmarried. He added that the children named by the applicant as children of the deceased were strangers, and had not been named after members of the deceased's family as was customary with Kikuyu traditions. He denied that dowry was ever paid, and stated that the purported notes of the dowry payment ceremony were a forgery and that the ceremony alleged to have had happened, involved strangers in any case. He stated that he applied for grant of probate of the will at the Thika Law Courts as the said court was the only one with jurisdiction. He asserted that the applicant was a stranger who did not attend the burial of the deceased, and who was not even listed in the funeral programme as a widow of the deceased. He stated that if the deceased was married, his body could never have been released to him as indicated in the burial permit and that the said burial permit application was seconded by Mr. Lawrence Mugo, the person alleged to have taken the deceased for dowry payment, and accused the applicant of manufacturing witnesses. He further deposed that the deceased left a Will, in which he had been appointed him as executor.

6. The issues for determination as they emerged from the application, affidavits and oral testimony are -

a) whether the deceased left a valid will;

b) whether the applicant was a wife to the deceased; and

c) whether the applicant and the three children were dependants of the deceased and if they are entitled to a share of the estate.

7. The case for the respondent was the deceased died testate having left a valid will dated 25th April 2001, where his father, one Jeremiah Ngari Gakure, was appointed sole executor and trustee of the estate if he survived the deceased and if he did not, his son, the respondent herein, would substitute him as executor.

8. Part II of the Law of Succession Act, Cap 160, Laws of Kenya, provides for wills, the validity of which is dependent on the capacity of the maker and whether the same was made in proper form. A will is thus said to be valid if it is made in the proper form by a person who has capacity. The requirements for formal validity are stated in section 11 of the Law of Succession Act, in the following terms: -

'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.'

9. The law on capacity is stated in section 5 of the Law of Succession Act. The maker ought to be a person of sound mind, who is not a minor. It also states that the soundness of mind of the maker is to be presumed unless at the time of executing the will he was not in a state of mind as not to know what he was doing, on account of either mental or physical illness, or drunkenness, or any other cause. The burden of proving lack of capacity on account of lack of a sound mind is cast on the person alleging that the deceased lacked such capacity. Related to that is the provision in section 7 of the said Act, with regard to wills caused by fraud or coercion or importunity or mistake. Such wills are stated to be void.

10. The applicant submitted that the will was not mentioned during the funeral and that the maker did not testify. She attacked the testimony of one of the witnesses to the will, Charles Gakure, as being shaky and unreliable thereby casting doubts as to whether he witnessed the signing of the alleged Will. Charles Gakure, had testified as the respondent's witness, and had stated that he was one of the witnesses who attested the execution of the will, which he said was drafted by an advocate in Nairobi. From the record of the proceedings, the said testimony or evidence was not seriously controverted by the applicant. During cross-examination of the executor of the alleged will, counsel for the applicant enquired as to who had drafted the will, but did not go beyond that.

11. The applicant anchored her claim on invalidity of the will on the ground of forgery but she did not prove forgery on the part of the respondent. It would have been helpful for the applicant if she would have impeached the validity of the will by seeking assistance from forensic and handwriting experts on whether there was a forgery or not. The absence of evidence on forgery would mean that the will could only be presumed to be valid.

12. She testified and submitted that she was a wife to the deceased having been married to him in accordance with Kikuyu customary law. She called two witnesses who apparently witnessed the ceremony. She stated that there was a formal visit by the deceased to her relatives, and dowry was paid. The applicant relied on notes taken on 2nd April 1991 for payment of Kshs. 4,000.00 and on 5th August 1993 for payment of Kshs. 12,000.00, both being dowry payments according to her. She called Mbaru Kamau, who stated that he was a first cousin of the deceased, and testified that the deceased had married the applicant around 1989 or 1990. He stated that he accompanied the uncle of the deceased to the applicant's home in Mihuti Kangema in the year 1991 and also in 1992 where they gave out Kshs. 12,000.00 to the family of the applicant, corroborating the applicant's testimony. He added that by the time the deceased died, he and the applicant had separated. On cross-examination, he conceded that his name was not listed in the exhibit purported to be a list of the persons who attended the dowry negotiations. He then conceded that he did not attend the dowry negotiations meeting. On re-examination, he stated he was present when the family took the dowry to the applicant's family but he was not present when the elders met but he was certain that they took dowry. I find the evidence of Mr. Mbaru credible.

13. Lawrence Mugo, testified as the applicant's third witness and stated that the deceased was his cousin. He added that the deceased had a wife, the applicant herein, and that he married her in 1990. He accompanied the deceased to the home of the applicant twice, first in 1991 and second in 1993 where they paid Kshs. 4,000.00 and Kshs. 12,000.00, respectively. Similarly, I find the evidence of Lawrence Mugo credible as to the dowry meetings and payment.

14. The applicant's fourth witness testified and stated that he is the chief of Kimiri location and that he knew the deceased very well who he said had a wife, who is the applicant herein.

15. The respondent denied that the deceased was ever married to the applicant, stating that the people who allegedly attended the said function were from the applicant's side of the family. I find that assertion to be untrue as Lawrence Mugo and Mbaru Kamau were from the

deceased's side of the family as per the evidence on record.

16. In *In re Estate of DMM (Deceased)* [2018] eKLR, this court stated as follows:

> *'In the case of Njoki vs. Mutheru and Others Civil Appeal No. 71 of 1989 (UR), Kneller JA reading the judgement of the court held that: -*
>
> *a) The onus of proving a customary marriage is on the party who claims it.*
>
> *b) The standard of proof is the usual one for civil action, balance of probabilities.*
>
> *c) Evidence as to the formalities required for a customary law marriage must be proved to the above standard.*
>
> *Further in the case of Hortensiah Wanjiku Yawe vs. The Public Trustee, Civil Appeal No. 13 of 1976, the court held: -The onus of proving customary law marriage is generally on the party who claims it. The standard of proof is the one usually for a civil action namely "on the balance of probabilities." Evidence as to the formalities required for a customary law marriage must be proved to that standard. Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it. Only cogent evidence to the contrary can rebut the presumption. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.'*

17. In *In re Estate of James Njenga Gitau (Deceased)* [2018] eKLR, the court cited Eugene Cotran on *Restatement* of *African Law* on *Law & Marriage and Divorce;* Sweet & Maxwell 1968 which lists the processes of a valid Kikuyu Customary Marriage as including *"njohi ya njurio, ruracio, ngurario ceremonies and mwati harika and ngoima are produced during the ceremonies."* In *re Estate of John Muiruri Muniu* {2017] eKLR, this court cites Eugene Cotran as codified in *Restatement of African Law on the Law of Marriages and Divorce* on the essentials of Kikuyu Customary Law: *'…. These essentials include; capacity to marry, consent of parties, ceremonies of 'ruracio' 'ngurario' and commencement of cohabitation"*

18. From the foregoing, I am satisfied that the applicant has proved her case on a balance of probabilities. She presented evidence that was corroborated on the dowry ceremony and such formalities as per Kikuyu Customary Law. In as much as the deceased and the applicant separated when she was pregnant with her second child, they never divorced with the deceased and as such the marriage still stood as at the time of the deceased's death.

19. Having established that the applicant was a wife to the deceased on a balance of probabilities, what the court needs to establish is whether the three children were dependants of the deceased. It was the applicant's submission and evidence that she had two children with the deceased, one Tabitha Wairimu, born in 1992, and Tabitha Wangechi, born in1998. She added that one Evans Gichia was not the biological son of the deceased but the deceased took him in as his own. The applicant did not produce any evidence such a birth certificates, notification of birth or even baptismal cards to show that the children were sired by the deceased. The strongest evidence available is the testimony of the applicant herself that the two children are those of the deceased and that the deceased took in the eldest, Evans Gachia as one of his own.

20. In *In re Estate of Patrick Mwangi Wathiga - Deceased* [2015] eKLR it was held that:

> *'It is trite law that the burden of establishing all the allegations rested on the objector and in law he was under an obligation to discharge the said burden. It's not enough to state that the deceased's was his father. He ought to have supported the said allegation by adducing the necessary supporting evidence. This court in Lewis Karungu Waruiro vs Moses Muriuki Muchiri[6]held that:-*
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> > *"All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in Rhesa Shipping Co SA vs Edmunds[7] remarked:-*
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> > *"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."*
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> *Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd [8]: -*
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> > *"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"*
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> *With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person.*
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> *It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. [9] The standard of proof in civil and criminal cases is the legal standard to which a party is required to prove his/her case. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of*

proof is the balance of probabilities. In the case of Miller vs Minister of Pensions, [10] Lord Denning said the following about the standard of proof in civil cases: -

> *"'The … {standard of proof} …is well settled. It must carry a reasonable degree of probability…. if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not."*

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.'

21. This Court in *In re Estate of James Njenga Gitau (Deceased)* [2018] eKLR (supra) made the following finding on a child the deceased apparently took in as his own.

> *'The second son (particulars withheld) was stated not to be a biological son of the deceased but the Citor's son whom it was claimed that the deceased had taken into his family as his own. The evidence was not adduced to prove this fact. In this case, he is not a beneficiary of the deceased.'*

22. In *In re Estate of DMM (Deceased)* [2018] eKLR (supra) this Court noted the following in that case:

> *'The protestor has not even produced any documentary evidence to confirm whether they had sired any children with the deceased no witness had testified to this fact, putting to consideration that the protestor has testified that her fifth child was sired by another man apart from the deceased.*
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> *71. It is not proved that the deceased was taking care of the protestor and her children before he died. They separated long before she sired the children she has now and never thereafter cohabited with the deceased. It is noted that the protestor has failed to call any of her children to confirm whether indeed they were taken care of by the deceased purposely to ascertain the point of being dependents.*
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> *72. The court therefore holds that the protester has failed to prove…that her children were sired by the deceased thus her and her children are not entitled to any portion of the deceased estate.'*

23. However, the Court of Appeal in *Ngengi Muigai & another vs. Peter Nyoike Muigai & 4 others* [2018] eKLR (supra) held that:

> *'…. That is why Mugo's lawyers invoked the presumption of law contained in section 118 of the Evidence Act.*
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> *48. The section states as follows:*
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> > *"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten" [Emphasis added].'*
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> *In the case of Njenga vs Njenga [1985] eKLR. Madan, JA (as he then was) cited with approval the English case of Gordon vs Gordon and Granville Gordon [1903] 141 stating:*
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> > *"The law says what has to be proved is that the husband did not have intercourse which might have led to the birth of the child. It does not allow the fact that another person had intercourse with the wife to be a material consideration. That is, I think, a proposition of the utmost importance in such cases as this. It was recognized in the opinion of the judges in Banbury Peerage Case (1812) 57 ER."*
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> *64. In Cope vs. Cope, Alderson B, said:*
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> > *"If once you are satisfied that the husband had sexual intercourse with his wife, the presumption of legitimacy is not to be rebutted by its being shown that other men also had sexual intercourse with the woman. The law will not, under such circumstances, allow a balance (underlining mine) of the evidence as to who is the most likely to have been the father."*
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> *50. Madan, JA added, and Nyarangi & Platt, JJA agreed, that:*
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> > *"And it was said as far back as the year 1811, in the Banbury Peerage case (supra), it still reads heartening:*
> >
> > > *'That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until the presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such child."*

I find that the presumption of legitimacy holds in this case for Tabitha Wairimu, born in 1992, which was right after the customary marriage ceremony between the deceased and the applicant, and Tabitha Wangechi born in 1998. The deceased and the applicant were still married to each other and thus sexual intercourse is presumed between the two that brought forth the two children in the absence of any evidence to the contrary. I note from the evidence of various witnesses, the deceased was a violent alcoholic, and the applicant actually fled and sought refuge at her parents' house on or before the birth of her second born child. They were not divorced at this point and they were legally married until the deceased's death. However, there is no evidence that the deceased took in the applicant's eldest son as his own. That claim fails for want of proof. I find that the two children, Tabitha Wairimu and Tabitha Wangechi, were children of the deceased and are thus entitled to the estate as survivors.

24. It is conclusion, from the foregoing that the deceased left a will, whose validity has not been sufficiently challenged or controverted be it on account of lack of capacity on the part of the deceased to make it or due to want of form. There was no evidence presented by the applicant demonstrating forgery as she claimed. The upshot of this is that the will is presumed to be valid having passed the test as to the capacity of its maker and compliance with the law governing form.

25. Section 5(1) of the Law of Succession Act, gives considerable freedom to any person to dispose of all or any of his property in a manner he deems fit and to change his mind at any time before his death as to how he intends that his property should be disposed of. However, the freedom is not absolute, the court can interfere with its exercise following the filing of an application under section 26 of the Law of Succession Act by any of the dependants listed in section 29 of the Act. Section 30 of the Act requires that such application be filed before the grant holder gets his grant confirmed.

26. Section 76 of the Law of Succession Act provides: -

> *'76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-*
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> *(a) that the proceedings to obtain the grant were defective in substance;*
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> *(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
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> *(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*
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> *(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-*
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> *(I) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or*
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> *(ii) to proceed diligently with the administration of the estate; or*
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> *(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*
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> *(e) that the grant has become useless and inoperative through subsequent circumstances.'*

27. The applicant had presented a case that the deceased had died intestate. I have made a finding that the will on record was properly made and it was therefore valid. The petition that the applicant presented complied with the law as it relates to applications for grant of probate. There is no provision for disclosure of the survivors of the deceased. To that extent it cannot be said that the applicant concealed matter from the court or misrepresented matter in the circumstances.

28. In the end these are the orders that I am constrained to make in the circumstances –

a) That the deceased died testate having left a valid Will dated 25th April 2001;

b) That the applicant, Nancy Wangui Gichia was a wife of the deceased having been married under Kikuyu Customary Law;

c) That Tabitha Wairimu and Tabitha Wangechi are children of the deceased;

d) That grant of probate in this matter was properly obtained, and a case has not been made out for its revocation;

e) That each party shall bear their own costs, this being a family matter; and

f) That any party aggrieved by the orders that I have made herein is at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 11TH DAY OF APRIL, 2019

W. MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 3RD DAY OF MAY, 2019

A. ONGERI

JUDGE