REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

PROBATE & ADMIN APPEAL NO. 5 OF 2011

MICHAEL WACHIRA GAKUU...... APPELLANT

-VS-

GRACE WAHU GAKUU...............RESPONDENT

(Being an appeal against judgment in Karatina Principal Magistrates Court Succession Cause No. 8 of 2007(Hon. Lucy Mbugua, Principal Magistrate, as she then was) on 27th April 2011)

JUDGMENT

Gakuu Gachingiri alias Gakuu Gicingiri (the deceased) died on 8th August, 1994 at the age of 80 years. He was domiciled in Kenya and he hailed from Gachuiro sub-location in Nyeri County. He was survived by eight children, two of who are the appellant and the respondent respectively; the other children are named as follows:

1. Veronicah Nyaguthii Macharia
2. Francis Wahome Gakuu
3. Peter Nderi Gakuu
4. Jane Wambui Gachari
5. Gatheri Wamuyu Mwangi
6. Teresia Nyawira Mundia

At the time of his demise, the deceased was the registered absolute proprietor of land parcel known as Title No. Kirimikuyu/Gachuiro/782 measuring approximately 1.75 ha which now comprises his net intestate estate.

The grant of letters of administration of the deceased's estate was made by the magistrate's court in the joint names of the appellant and the respondent on March 18, 2009. Subsequently, and more particularly on March 22, 2010 the respondent filed a summons for its confirmation. She proposed that the entire estate devolves upon her absolutely. According to her depositions in the affidavit in support of the summons, her brothers were beneficiaries of inter vivos transfers from the deceased and, as a matter of fact, Title No. Kirimikuyu/Gachuiro/782 was excised from the original title which the deceased owned. The other three parcels being Title No. Kirimikuyu/Gachuiro/781, Title No. Kirimikuyu/Gachuiro/783 and Title No. Kirimikuyu/Gachuiro/784 were given to her brothers the appellant herein, Peter Nderi Gakuu and Francis Wahome Gakuu respectively.

The appellant protested against the confirmation on the ground that the deceased died testate and, apparently according to his will, the estate was to be shared between him and the respondent; it is not clear why the appellant took this course having been appointed as a joint administrator of the deceased's intestate estate. The point is, his appointment as a joint administrator of an intestate estate presupposed that the deceased died intestate.

Be that as it may, after taking oral evidence from the parties and their witness the learned trial magistrate dismissed the appellant's protest and confirmed the grant in terms proposed by the respondent. It is that decision that the appellant has appealed against; the grounds upon which he appeals have been framed as follows:

1. That the learned trial magistrate erred in law and fact by failing to consider the evidence adduced by the appellant.

2. That the learned trial magistrate erred in law and fact by failing to consider the Will produced as exhibit by the Appellant.

3. That the learned trial magistrate misapprehended the law by confirming the suit land to the respondent.

4. That the learned trial magistrate erred in law and fact by drawing his conclusion on a hypothesis.

5. That the learned trial magistrate erred in law and fact by basing his decision on one side.

This being the first appeal, it is the duty of this court to re-evaluate all the evidence on record and to draw its own conclusions but bearing in mind that unlike the trial court, this court neither saw nor heard the witnesses. **(See *Selle v Associated Motor Boat Company Ltd [1968] E.A 123).***

At the hearing, the appellant conceded that the deceased's original parcel of land registered as Title No. Kirimikuyu/Gachuiro/129 was subdivided into four equal parcels one of which was given to him during the deceased's lifetime. The other parcels were given to his brothers. He conceded further that though he lived on the parcel allocated to him, he cultivated the land that now comprises the deceased's estate. The deceased had lived on this latter parcel until his demise. It was his position that the land should be shared equally between himself and his sister.

On her part the respondent insisted that the deceased died intestate though she proceeded to say that it was the wish of the deceased that she inherits the estate to hold it in trust for herself and for the rest of her sisters should it become necessary for them to come back to their parents' home; it is apparently for this reason that none of her other siblings laid any claim on the estate.

Her brother Francis Wahome, testified in support of the respondent's case and disputed the purported will in which he appeared as an attesting witness. He testified that the signature appearing on will as his was in fact forged as it was clearly different from his known signature. The trial court took note that the purported signature was different from the witness' signature on his identification card.

Two issues that emerge from this evidence are first, whether the deceased died testate; the answer to this question leads to the second issue which is, if the deceased died intestate how his estate should be distributed.

The first question revolves around the appellant's assertion that the deceased left behind a written will which the trial court was bound to enforce. Certain provisions in the Law of Succession Act relating to testate succession and in particular the requirements and formalities of a written will should guide this honourable court on whether the purported will is valid and, accordingly, whether it ought to be given effect. Part II of the Act provides for, among other things, the capacity to make will and the formal requirements of a valid will; the provisions under this part provide the legal basis against which wills are generally made and the legal requirements for such testaments. Inevitably, it follows that what the appellant presented as the deceased's will should be weighed against this threshold.

Section 5 falls under this part of the Act; it underlines the power to make testamentary gifts and states that any person who is an adult and is of sound mind is capable and has the right to dispose of his free property by will. And when he so does, it is presumed that he understands and knows what he is doing.

It was never suggested that the deceased in this cause fell short of any these conditions and therefore it is safe to conclude he was in a good stead to make a testamentary gift.

Section 11 which is also under part II of the Act deals with the formal requirements of a written will; it states as follows: –

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.'

A casual look at the document which the appellant presented as the deceased's will shows that it is in Kikuyu language which, presumably, was the native language of the deceased. It is dated 6 June 1994 and bears what is alleged to be the deceased's thumb print and signatures of three witnesses. Together with it is a copy of the English translation of the will.

One of the persons named as a witness to the will denied having seen the deceased make a will or attest to his signature. He was categorical that his signature was forged. This evidence, by itself, put the validity of the will in question and I dare say the trial court was entitled to invalidate the purported will based on this evidence alone.

But there was more to the will; the appellant who is also the propounder of the will is also named and indeed did sign as a witness to the making of the will. He is a beneficiary and also the propounder of the will.

Now, in law there is nothing wrong in a propounder of will having prepared it or having played some role in it, including having been an attesting witness of the same will from which he also stands to benefit. However, whenever that happens and more so, whenever the will is challenged, the suspicion of the court against validity will be aroused.

The question was properly addressed in **Barry versus Batlin (1838) 2 MooPCC 480** (also reported in 12 ER 1089, PC) where Parke, B, delivering the opinion of the Judicial Committee said:

> **The rules of law according to which cases of this nature are to be decided, do not admit any dispute so far as they are necessary to the determination of the present appeal; and they have been acquiesced in on both sides. These rules are two; the first that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is that if a party writes or prepares a will under which he takes a benefit, this is a circumstance that ought generally to excite the suspicion of the court and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. These principles, to the extent that I have stated, are will established. the former is undisputed; the latter is laid down by Sir John Nicholl in substance in Paske v Ollat (23 Digest(Repl) 131, 1354; Ingram versus Wyatt 162 ER 1158; Billinghurst versus Vickers (formerly Leonard) (1810) 1Philim 187,199 and is stated by the very learned and experienced judge to have been handed down to him by his predecessors, and this tribunal has sanctioned and acted upon it in a recent case. (underlining mine).**

This was followed in **Wintle versus Nye 1959 AL ER 552** where Viscount Simmonds, L.J., reiterated the position in almost similar terms and said:

> **It is not the law that in no circumstances can a solicitor or other person who has prepared a will for a testator take a benefit under it. But that fact creates suspicion that must be removed by the person propounding the will. In all cases the court must be vigilant and jealous. The degree of suspicion will vary with the circumstances of the case. It may be slight and easily dispelled. It may on the other hand, be so grave that it can hardly be removed.**

Although the trial court did not address this question, I am satisfied that had it addressed it, it would have come to the conclusion that the suspicion which ought to have excited it was not easily dispelled; rather, it was so grave that it could hardly be removed. All in all, the trial court had every reason to find that the purported will was invalid and come to the conclusion that the deceased died intestate.

Having so concluded, the next logical issue to be considered is, of course, the most appropriate scheme which this honourable court should adopt in the distribution of the deceased's intestate estate; the answer to this question lies in section 38 of the Act which states as follows:

> **38. Where intestate has left a surviving child or children but no spouse**
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> **Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.**

Equality as basis for distribution of an intestate's estate such as the deceased's is the central theme in this provision; however, as the provision itself puts it, the distribution is subject to the provisions of sections 41 and 42 the latter of which is pertinent to the present circumstances, if the evidence on record is anything to go by.

Section 41 has everything to do with the devolution of property upon a child; such property, so it is stated, shall be held in trust until such time that the child attains the age of the majority. The eligible heirs of the deceased's estate are all adults and therefore this provision of the law is of little significance to their case.

Section 42, on the other hand says where an heir is a beneficiary of an inter vivos transfer from the deceased, whatever he received must be taken into account in distributing what has been left as the deceased's estate; it states as follows:

> **42.Where**
>
> **(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or**
>
> **(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.**

It was common ground between the parties that the deceased's original parcel of land registered was registered as Title No. Kirimikuyu/Gachuiro/129 but the deceased himself subdivided it into four equal parcels three of which he transferred to his three sons, including the appellant. The deceased retained the remaining parcel which now forms his estate, the subject of the succession cause in the magistrates' court.

There is nothing to suggest that as much as the deceased did not transfer any of the four subdivisions to his daughters, he deliberately intended to disinherit them. It is true that in the absence of any will, whether oral or written, his intentions may never be known, at least, as far as the Act is concerned. However, considering that the appellant and his brothers are beneficiaries of the deceased's inter vivos transfers, it would, in my humble view, be meet and just; and, in any event, it would be in accordance with section 38 of the Act, if the respondent and the rest of her sisters inherited what remained of the deceased's estate.

The respondent's sisters and one of her brothers had no trouble endorsing this arrangement; as matter of fact, they were all in agreement that the estate should be registered in the name of the respondent exclusively.

In the ultimate, I have to come to the conclusion that the appellant's appeal is deficient of any merit and ought to be dismissed; accordingly, it is hereby dismissed.

For avoidance of doubt I endorse the learned trial magistrate's decision the effect of which is that the summons for confirmation of grant dated 17 March 2010 be confirmed in the terms of the respondent's affidavit sworn on 22 March 2010.

Parties being siblings shall bear their respective costs. It is so ordered.

Signed, dated and delivered in open court this 20th day of December 2019

Ngaah Jairus

JUDGE