



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO. 222 OF 2000
CONSOLIDATED WITH
SUCCESSION CAUSE NO. 59 OF 2001
IN THE MATTER OF THE ESTATE OF M'MUKIRA M'IKANDI (DECEASED)

BENJAMIN BUNDI.....PETITIONER

VERSUS

JACOB MUGWUKU MUKIRA.....OBJECTOR

JEREMIAH MUTUMA M'MUKIRA...OBJECTOR

JOHN NKUNGA MUKURA.....OBJECTOR

LUCY GAITI.....OBJECTOR

REBECCA KARIMI.....INTERESTED PARTY

R U L I N G

1. This is a classic example of how delay in prosecution of cases can cause extreme injustice. This matter was lodged in court, 18 years ago. During that period, a multitude of applications have been filed all of which, in the view of this court, were not meant to advance the cause of justice at all. As a result, not only that several beneficiaries have died, but the original record has aged so much that it is not clear what the first pleading might have been.

2. The trial began before Tuiyot J in 2001. The matter was later heard by Kasanga Mulwa J, Onyancha J and then Lenaola J. I only heard the testimonies of OW4 and the Interested Party in 2017. In this regard, this court did not have the advantage of seeing most of the witnesses testify. Be that as it may, the typed record is clear to as what the dispute between the parties is, ***whether or not there was a will left behind by the deceased.***

3. **M'Mukira M'Ikandi** ("the deceased") died on 17th June, 2000 at Chogoria hospital. From the letter of introduction dated 29th September, 2000 by the Chief of Munithi Location, the deceased left the following:-

(a) **Survivors**

1. **1st House**

- a) Stephen Kiringo - son
- b) Joseph Kaimenyi - son
- c) Benjamin Bundi - son
- d) Jenniffer Ntinyari - daughter

- e) Michael Murira - son
- f) Zipporah Gitikuri - daughter
- g) Zachary Kathunkumi - son
- h) Lucy Kanini - daughter

2. 2nd House

- a) Harriet Gakii - 2nd wife
- b) Monicah Ntarara Muriithi - daughter
- c) Lydia Gaiti - daughter
- d) John Nkunga - son
- e) Jacob Mugwuku - son
- f) Jeremiah Mutuma - son
- g) Gladys Mwariumwe - daughter
- h) Stanley Kirema - son

3. 3rd House

- a) Hellen Mokwanjeru - 3rd wife

4. 4th House

- a) Mary Nkatha - 4th wife
- b) Solomon Kiambi - son

(b) **Properties**

- a) LR. No. Meru Municipality/Block II/293
- b) LR. No. Meru Town/Block II/52
- c) LR. No. Nyaki/Munithu/541
- d) LR. No. Nyaki/Thuura/738
- e) LR. No. Nyaki/Munithu/684
- f) LR. No. Nyaki/Munithu/1240
- g) LR. No. Nyaki/Thuura/2139
- h) Plot No.1 Thimangiri Market
- i) Plot No. 18 B Thimangiri Market
- j) Plot No. 46 Thimangiri Market
- k) Plot No. 47 Thimangiri Market
- l) Plot No. 11 Kaithe Market

4. Pursuant to the demise of the deceased, **Jacob Mugwuku Mukiira** applied for letters of administration intestate and a limited grant was

issued to him on 11th October, 2000. However, on 5th March, 2001, **Benjamin Bundi Mukiira** (“the Petitioner”) lodged **Succession Cause No. 59 of 2001** to be granted probate and therein produced a Will dated 4th August, 1999. He contended that the deceased died testate and he sought to propound that will.

5. It is that will which the objectors namely, Jacob Mugwuku, Jeremiah Mutuma M’Mukira, John Nkunga Mukira, Stanley Kirima and Lydia Gaiti have challenged. The gist of the objection is that they have not been provided for; that the will was not made by the deceased and that some properties of the deceased had been left out. Before the matter could be concluded, Jacob Mugwoko and Jeremiah Mutuma are said to have been killed during the pendency of this cause leaving John Nkunga Mukira, Stanley Kirima and Lydia Gaiti as the only objectors.

6. **PW1 Elijah M’Ikunyua** testified that the deceased was his elder brother and that he died on 17th June 2000. That sometimes in the year 1999, the deceased asked him to attest his will and that they were 2 attesters the other one being Edward Mungatia. It was his evidence that the contents of the will were read to him and he understood them. That on 26th August 2000, at the deceased’s home, the will was read to the entire family and that no one disputed the contents the will. It was his evidence that Benjamin Bundi, Stephen Kirinya and Munguku Jacob were appointed as the executors of the will.

7. **PW1** further told the court that the objectors were of the same mother and that they had been provided for in the will. That Jeremiah Mutuma was given some money by the deceased to buy land; that John Mugwuku was given over 7 acres of land with the 4th objector Stephen Kirima being given land and KShs.100,000/= to marry. It was his further evidence that the mother of the objectors did not object to the will when it was read.

8. In cross examination, **PW1** stated that he was not there when the deceased drew the will; that Stephen Kinoti Murira and Jeremiah Mutuma were left out of the will as they were given money to buy land. That Plot No. 48 that was included in the will belonged to him and not the deceased. That the deceased’s 1st wife by the name Jerica Kathambi died between 1998 and 1999 but was allocated Plot No. 293. He concluded that when he signed the will at the lawyer’s offices, neither the deceased nor the other witness, Andrew Mungatia was present.

9. **PW2** was **Father Francis M’Mbijiwe** who told the court that he knew the deceased as a member of his congregation and that sometimes in August, 1999, the deceased handed him a document which he said was his will and asked him to keep the same until his death. It was his evidence that on 26th August, 2000, the will was read in his presence and none of the family members objected to it. In cross examination, he stated that he neither discussed the will with anyone nor scrutinize the same.

10. **Jacob Mugwoko’s** evidence was expunged from the record by consent of the parties on 13rd February, 2006, as he died before he could be cross-examined.

11. **OW1 Jeremiah Mutuma M’Mukira**, the 2nd objector (now deceased), testified that he was not aware that the deceased had left a will and that if he had, he would have known. That the will was not made by his father for the reasons that; the will was made by the petitioner; that his father knew all his land reference numbers but in the will no parcel number was indicated; that the person distributing the land in the will did not know the exact acreages of the property concerned and that the will purported to give land already occupied by the beneficiaries. It was his contention that the person who made the will knew nothing about the locations of the land, the acreages as well as the correct title numbers for the properties.

12. It was his evidence that; the will did not cater for everyone in the family; that out of the 16 children, five of them had not been provided for. These were, himself, Lydia Gaiti, Monicah Ntarara, Jennifer Ntinyari and Gladys Mwariumwe. That the will said nothing about his father’s 2 living wives and that his father could not make a will and leave his wives without a place to live and be buried on.

13. **OW1** further testified that he used to operate cereal business together with his father; that he was the one who kept his father’s title deeds and that there was no way his father would have left him out of the will. That Plot No. 46 Thimangiri and 1000 shares in Standard Chartered Bank had been left out of the will. He claimed That the petitioner’s grudge with him started in the 1970’s. That Solomon Kiambi, a son to the 4th wife was shown to be taken care of in the will but the land parcel given is not known to the family.

14. He further testified that the deceased would not have given any property to his already deceased 1st wife. That the deceased also would not have shared out Plot No. 48 that belonged to his brother **PW1**. He stated that the signature in the will did not belong to his father as he knew his signature well. That the witnesses to the will, **PW1** and Andrew Mungatia Anjuri, were his father’s business rivals and there is no way his father would have picked them to be witnesses of his will.

15. In cross-examination, he told the court that although the deceased was illiterate, he knew his land parcel numbers. That he had produced an agreement (OExh.8) to show that the signature in the will was not that of the deceased. That he was very close to his father and yet no land was provided to him by the deceased in the will.

16. **OW2 John Nkunga** testified that he was objecting to the will because some of his father’s properties namely; Plot No. 46 Thimangiri Market and shares in Standard Chartered Bank had been left out of the will. It was his evidence that had his father drawn the will, he would have included these properties. That although he was included in the will as a beneficiary of some land, he did not know the parcel number as the same was not specified in the will. That he knew his father’s signature well which according to him was not the one in the will.

17. **OW3 Stanley Kirima Mukira**, testified that the deceased was his father and that upon his demise, a will was read. That he disagreed with the will because some of the assets set out therein did not exist. This included the plot No. 48 that was allegedly allocated to him yet it did not belong to his father. That there was said to be some money in an account whose particulars was not disclosed. It was his evidence that **Jeremiah Mutuma (OW1)** was left out of the will yet he was very close to his father as they used to work together in the cereals’ business. That Lydia Gaiti was also not provided for. That had the will been made by the deceased, he would have provided for them.

18. **OW4 Lydia Gaiti**, a daughter of the deceased told the court that, before the deceased passed on she was living at his matrimonial home with her children and he used to cater for her and her children. That she was not provided for in the will. That two of the beneficiaries had been shot dead because of this case. She was not aware that the interested party had caused Plot No. Meru Municipality/Block 11/791 "B" to be transferred into her name through **NBI Succession Cause No. 2217 of 2007**. According to her, the will had not provided for her, Jeremiah Mutuma, two of her sisters, Gladys Mwariumwe and Monica Tarara.
19. In cross-examination, she testified that she had protested when the will was read on the basis that she had not been catered for. That at that time, Gikunda Miriti, the Advocate who drew the will indicated that the will would be amended to include her and Jeremiah Mutuma.
20. **IPW1 Rebecca Karimi**, testified that the deceased was her father-in-law. That she was aware that prior to his demise, the deceased had made a will and that he was sober at the time. It was her evidence that she lived on Meru Municipality/Block 2/791 (originally Plot No.11/52). That according to the will that property had been bequeathed to Stephen Kiringo, her deceased husband. That upon the demise of her said husband, she filed **Nairobi succession Cause No. 2217 of 2007** and was issued with a certificate of confirmation of grant on 25th March, 2009, setting out his properties one of them being Plot No. 11/52 (now Meru Municipality/Block II/791). She urged the court to sustain the will.
21. In cross examination, she stated that Plot No. 11/52 was allocated to Hellen Mukonciro who was to be taken care of by her husband. That no succession cause had been undertaken for the estate of the said Hellen Mukonciro. That the daughters of the deceased had not been provided for in the will.
22. **IPW2 David Gikunda**, an Advocate of the High Court of Kenya testified that sometimes in the year 1999, he prepared the last will for M'Mukira M'Ikandi and that at that time, he was healthy and of sound mind. That on 4th August, 1999, the deceased executed the will in his presence and two witnesses after which it was delivered to Father Mbijiwe of St. Joseph Cathedral, Meru Diocese, as directed by the testator. After the demise of the deceased, he accompanied Fr. Mbijiwe to go and have the will read to the family. In cross examination, he admitted that the two witnesses to the will did not sign it at the same time.
23. After close of the case, the parties were directed to file written submissions within 60 days but in their usual manner dragging the matter as they have done for the last 18 years, none of the them filed submissions. The court nevertheless not willing to be an active participant in the parties' prevarication decided to proceed and make its determination in the absence of the parties submissions notwithstanding. I have carefully considered the evidence on record. The issue for determination is, **is the will dated 4th August, 1999 that of the late M'Mukira M'Ikandi and if so, is it valid?**
24. It is not in dispute that the deceased had four wives namely; Angelica Kathambi (1st house), Harriet Gakii (2nd house), Helen Mukonciro (3rd house) and Mary Nkatha (4th House). As at the time of his demise, the 2nd, 3rd and 4th wives were still alive. However, as at the time I heard the matter, only Mary Nkatha was alive. Angelica Kathambi, the first wife died in or about 1998 while the deceased was still alive.
25. Another fact that is not disputed is that the deceased had a total of 17 children whose names are set out in paragraph 2 of this Ruling. It was not in dispute that the deceased loved all his children and took care of them during his lifetime. At least there was no evidence to the contrary.
26. The objectors' evidence was that the will was not made by the deceased but by the Petitioner. They told the court their father, although illiterate, knew all the land reference numbers of his properties. However, in the will, no parcel number was indicated.
27. They further testified that since the deceased knew his properties well, there was no way he could have left out any of those properties out of the will. The will failed to include Plot No. 46 Thimangiri Market and 1000 shares in Standard Chartered Bank. It also included Plot No. 48 belonging to his brother, Elijah M'Ikunyua (**PW1**). The objectors further faulted the will for purporting to allocate non-existent property to Stanley Kirima Mukiira (**OW3**).
28. Finally, they faulted the will for the failure to provide for five of the deceased's children. That the deceased was doing cereals business with one of his sons, Jeremiah Mutuma Mukira (**OW1**). That the two were very close as the said son used to keep the deceased's properties for him and that there is no way therefore the deceased would have failed to include him in his will. That the will left out three of the deceased's daughters including Lydia Gaiti and her children whom the deceased used to take care of before his demise as she was physically challenged.
29. On the other hand, the Petitioner's case was that the will was made by the deceased. That it was properly executed by him and attested to by two witnesses, Andrew Mungatia Anjuri and M'Ikunyua M'Ikandi (**PW1**) on 4th August, 1999. That it was kept by Fr. Mbijiwe until the demise of the deceased when it was read to the family and no one protested. Their case was that Jeremiah Mutuma was given money by the deceased to buy land that is why he was left out of the will.
30. Most, if not the entire evidence tendered by the objectors was not challenged. Under **section 5 of the Law of Succession Act, Cap 160 of the Laws of Kenya (hereinafter "the Act")**, there is absolute freedom to testamentary disposition of one's property. A testator is at liberty to dispose of his property howsoever he wishes. The only limitation is to be found in **section 26 of the Act**.
31. In **Elizabeth Kamene Ndolo v. George Matata Ndolo (1996) eKLR**, the Court of Appeal held that:-

"This section clearly puts limitations on the testamentary freedom given by section 5. So that if a man by his will disinherits his wife who was dependent of him during his lifetime, the court will interfere with his freedom to dispose of his property by making reasonable provision for the disinherited wife. So that though a man may have unfettered freedom to dispose of his property

by will as he sees fit, we do not think it is possible for a man in Kenya to leave all his property for the maintenance and up-keep of an animal orphanage if the effect of doing so would be to leave his dependants unprovided for”.

32. In this regard, if the challenge on the will by the objectors was only on the ground that the will had excluded them therefrom, the answer would have been found in **section 26 of the Act**. However they have challenged the will on the grounds, inter alia, that it is not valid. That if it was made by the deceased, he would have provided for all his children, that he would not have included properties that were not his own in the will while leaving his own properties out. Further, that he would have identified his properties by their Land Reference Numbers in the will.

33. I am alive to the provisions made in the **Rules on Construction of wills** and **Rules on Failure of testamentary dispositions in the First and Second Schedule to the Act**, respectively. These Rules provide how wills are to be construed, where clauses in the wills make no sense or are contradictory or where a testator bequeaths property that does not belong to him. In the present case, the disposition of the property is in reference to locations rather than by way of Land Reference numbers.

34. This court did not have the opportunity of seeing **PW1 and PW2** testify. The testimony of the two was that the will was made by the deceased. **PW1** testified that he did not see the deceased execute the will. He was also not present when the deceased and Andrew Mungatia Anjuri signed the will. **PW1** told the court that two of the sons of the deceased, Stephen Kinoti Murira and Jeremiah Mutuma were left out of the will because they had been given money to buy their own land. He did not state when and where that money was given or the exact amount that was allegedly given to the two. Of course the two denied this fact when they testified.

35. **PW1** stated that the will was read to him and he understood it. If that be true, how then did he agree that his own property Plot No. 48 Thimangiri be given to Kirema M’Mukiria? **IPW2 David Miriti** testified that the will was made by the deceased. That it was executed by the deceased on 4th August, 1999 in his presence and two witnesses, Andrew Mungatia Anjuri and M’Ikunyua M’Ikandi. (**PW1**). However, on cross examination and on being shown the testimony of **PW1**, he changed his testimony and stated that the two witnesses signed at different times but in the presence of the testator. His evidence was obviously at variance with that of **PW1**. **PW1** had clearly stated that when he went to the offices of the Lawyer (**IPW2**), the deceased and Andrew Mungatia had left. I observed **IPW1** testify. Although an advocate of this court, he never appeared to me as being truthful. I did not believe him.

36. **Section 11 of the Act** provides:-

“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 acknowledgment of his signature or mark, or 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.”

37. The testimony of **PW1** was clear. When he went to the offices of the lawyer, he did not find either the deceased or the other witness, Andrew Mungatia Anjuri. **PW1** signed the will alone. The deceased did not see him sign the will neither did he himself see the deceased sign the will. Andrew Mungatia Anjuri who is said to have been with the deceased when the latter signed the will was not called to testify neither his failure to do so explained. The objectors averred that both **PW1** and Andrew Mungatia Anjuri were business rivals of the deceased and there is no way the deceased would have chosen them to attest his will.

38. From the evidence on record, it is most unlikely that the will dated 4th August, 1999 was made by the deceased. There was no explanation why the deceased did not disclose the actual property numbers of his properties that he was bequeathing his beneficiaries. The titles to those properties were available. Indeed **OW1** stated that they were at all times in his possession and he produced them as exhibits. **IPW2** the advocate who prepared the will did not explain why the deceased could not avail copies of the titles from which he would have properly specified the title numbers to the properties. Neither did he explain why the will did not identify who the beneficiaries of the deceased were in full. He would not have ended in willing away PLOT No. 48 belonging to a 3rd party.

39. Further, there was no explanation why the deceased left out some of his children from the will. It was also not explained why the deceased left out some of his properties when making the will. Similarly, the deceased would have disclosed to the advocate that his first wife was already deceased and no bequest could validly be made to her as it would lapse. The only logical inference that can be made is that; the will was not made by the deceased; it was hurriedly prepared after his demise and that the information to prepare the will was provided by a person who did not have full details of the deceased’s properties.

40. To my mind although no particular form of will is required under Section 11 of the Act, it would be good practice if the sets out who his beneficiaries are (wife or wives and children together with his properties in details before proceeding with the bequest.

41. In any event, from the evidence on record, the will was not executed in accordance with the provisions of **section 11 of the Act**. M’Ikunyua M’Ikunda (**PW1**) did not see the deceased sign the will and neither was the deceased present when **PW1** signed it. **PW1** did not testify that the deceased had acknowledged to him that the signature or mark appearing in the will was that of the deceased. Indeed, the

objectors produced an agreement for sale dated 19th July, 1993 (**OExh. 8**) signed by the deceased and the signature thereon seemed to the naked eye to be completely different from the one appearing on the will.

42. For the foregoing reasons, I find that the will dated 4th August, 1999 not to be valid and the estate of the deceased is to be administered intestate. Anything and everything undertaken in pursuance of that will is therefore null and void.

43. From the foregoing, it follows that the case by the interested party cannot stand. It is surprising that she misled the court in Nairobi to confirm a grant and pass to her Plot No. 11/52 (now Meru Municipality/Block II/791) in the **Nairobi succession Cause No. 2217 of 2007**. At no time had that property passed on from the deceased to either Hellen Mukonciro or Stephen Kiringo, her husband. She could not include it in the estate of her deceased husband until the will dated 4th August, 1999 had been propounded and probate given thereon.

44. Since the alleged will has fallen by the wayside, so does the confirmation of grant in the aforesaid **Nairobi succession Cause No. 2217 of 2007** as far as plot NO. 11/52 is concerned. The property known as Plot No. 11/52 (now Meru Municipality/Block II/791) should revert back to the name of the deceased at the cost of the Interested Party. She very well knew that the will had been challenged in these proceedings and no decision had been made thereon yet she proceeded to succeed it *pendent lite*. It was also not clear why she lodged the succession cause at Nairobi and not here in Meru where she told the Court she resides and where the property is situated The Certificate of grant in the aforesaid **Nairobi succession Cause No. 2217 of 2007** is subject to the outcome in these proceedings having been filed subsequent to this Cause in so far as Plot No. 11/52 (now Meru Municipality/Block II/791) is concerned.

45. In order not to delay this matter any further and since there is no dispute as to who the beneficiaries of the estate of the deceased are, I make the following directions:-

- a) I appoint the petitioner as the administrator of the estate of the deceased forthwith;
- b) the objectors do supply the petitioner with copies of the title documents belonging to the deceased's properties that are in their possession within 7 days of this Ruling;
- c) the petitioner is directed to carry out a valuation of all the properties of the deceased and file a valuation report on the same in court within 60 days. Together with the said valuation report, the petitioner should file copies of all title documents belonging to the estate of the deceased;
- d) fourteen days thereafter, the petitioner is to file and serve upon the objectors and the Interested Party an application for the confirmation of grant;
- e) fourteen days after service of the said application for confirmation, any party opposed to the mode of distribution that the petitioner would have proposed is to file and serve his/her protest within 14 days of service of the application upon them;
- f) in addition to the application for confirmation, the petitioner shall file a detailed affidavit stating with exactitude where each beneficiary was residing immediately before the demise of the deceased;
- g) In default of the petitioner carrying out the directions given in c) above, the objectors are granted leave to carry out the said exercise immediately upon expiry of the period set out therein and proceed to apply for confirmation of the grant forthwith.
- h) The matter is to be mentioned on a day to be agreed by the parties for directions.
- i) The property known as Plot No. 11/52 (now Meru Municipality/Block II/791) do forthwith reverts back to the name of M'Mukira M'Ikandi and the Land Registrar Meru is directed to rectify the records accordingly at the costs of the interested party.
- j) Since this is a family matter, I will make no orders as to costs.

DATED and **DELIVERED** at Meru this 5th day of April, 2018.

A. MABEYA

JUDGE