REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

SUCCESSION CAUSE NO 28 OF 2017

IN THE MATTER OF THE ESTATE OF THE LATE AGNES NYAMBURA GITHINJI

PETER NJOMO MWANGI .....PETITIONER/RESPONDENT

VERSUS

KENNEDY KARIUKI MWANGI.....OBJECTOR/APPLICANT

JUDGEMENT

Introduction

1. The Applicant brought before the court a petition for proof of oral will under Rule 13 of the Probate and Administration rules. The application was dated 8th December 2016 and filed in court on 12th April 2017. It was accompanied by the sworn affidavits of Peter Njoroge which was sworn on 11th October 2016 and Diana Njeri sworn on 26th October 2016; both were filed in court on 21st November 2016.

2. The Respondent, Peter Njomo Mwangi, in reply filed an affidavit sworn by him self and one sworn by Alphonce James Mwangi. Both affidavits were sworn by their respective deponents on 27th April 2017 and filed in court on 14th May 2017.

3. The parties and their witnesses gave viva voce evidence before the court and subsequently, counsel for the Applicant filed submissions dated 19th July 2018 on the issue of proof of oral will.

4. Letter of administration, intestate, were granted herein to the Respondent, Peter Njomo Mwangi, the second born son of the deceased, on the 27th April, 2015. No confirmation was done thereafter largely due to disputes that arose regarding distribution, specifically around the distribution of Plot No. 65, Kitengela.

Applicant's Case

5. It is the Applicant's case that at the time of her death, the deceased had made it abundantly clear that the Applicant would inherit Plot No. 65 Kitengela upon her demise.

6. In this case the applicant evidence on oath was that her mother Agnes Nyambura who died on 1.4,2014 left an oral will in regard to the distribution of her estate. On the evidence the applicant more specifically made reference to plot number 65 Kitengela as having been bequetted to him alone in exclusion of other beneficiaries to the estate. It was therefore his plea that in confirmation of grant this plot should not form part of the estate to be shared among the beneficiaries who in this case happen to be his own brothers.

7. It was alleged by the Applicant that whenever the deceased was not around, tenants at Plot No. 65 Kitengela would pay rent to him. According to the evidence of the Applicants' witnesses, Peter Njoroge and Diana Njeri, the deceased often reminded them that the heir to Plot No. 65 was the Applicant.

8. It was averred that sometime in the month of February, 2014. Peter Njoroge and his wife Diana Njeri visited the deceased in hospital whereupon they engage in conversation and the deceased reminded them that the plot number 65, Kitengela was her last-born son's property.

9. In Diana Njeri and Peter Njoroge testimony they acknowledge of being tenants to the deceased property land reference plot number 65 Kitengela for a long time. It was further their evidence that during the deceased lifetime she collected the rent and in her absence the applicant Kennedy Kariuki Mwangi was paid the money. According to Diana and Peter their relationship with the deceased became so cordial that they could even discuss her children welfare. In the terminology of Diana and Peter at the time of the deceased ill health she advised them to be paying rent to her son Kennedy Mwangi. The ramification of this to Diana and Peter was that the property identified as plot number 65 Kitengela upon demise of the deceased was solely for the benefit of Kennedy Kariuki Mwangi.

10. It was further averred in their evidence that the deceased never allowed any of her other sons to live at plot number 65, Kitengela saying that the other sons had been allocated their parcels of land in Athi River.

Respondent's Case.

11. It was the Respondent's case that the Application seeking to enforce an alleged oral will be incompetent, vexatious, frivolous and made in bad faith.

12. The respondent Peter Njomo who is also the grant holder to the estate of the deceased in his testimony denied that the deceased left an oral Will capable of being enforced. Further in Peter Njomo testimony as the eldest son has provided the necessary leadership to ensure smooth transition following the death of their mother. Cording to Peter Njomo the property in dispute is the main asset duly developed with rental houses left behind by the deceased and it would be unfair that only one individual benefits from it. There is also vivavoce evidence by Peter Njomo on the net worth of the estate including some properties registered in the name of their Father. In his testimony as the Father had estranged relationship with the deceased it has not been possible to trace him for purposes of discussing the status of the pieces of land. Therefore, Peter Njomo was categorical in his evidence that the deceased died intestate and the will being relied on by his brother Kennedy Kariuki is a fabrication with the sole purpose of disinheriting the other sons who also have an equal share to the estate.

13. The substance of the testimony by Alphonce James Irungu was step by step in conformity with the evidence of his brother Peter Njomo. As stated before this court by Alphonce the claim of existence of an oral will having been left behind by the deceased is a creation of their own brother Kennedy Kariuki. According to Alphonce the background to this dispute as alleged by Peter Njomo this piece of land is the only single valuable asset which the deceased developed earning a steady income during her lifetime. In his plea to the court Alphonce urged the court to find that no oral will was ever left behind by the deceased distributing the estate to her beneficiaries.

14. It was further averred that in the Affidavit sworn by one Joseph Githinji dated 13th October 2016 it was alleged that the property known as Kitengela Plot 65 was orally willed to the Applicant on or about 20th October 2004. This was an outright lie and, in any case, had no legal effect given the Laws position on validity of oral wills.

15. It was further averred that though the parties admit that at the time this alleged oral will was made the deceased was in hospital, they fail to acknowledge how ill the deceased was and further that she was not capable of communicating well let alone logically giving directions as to the distribution of her estate on account of her state of mind if indeed that is what took place.

16. The Respondent further averred that the Objector failed to acknowledge discussions and negotiations presided over by D.O of Kitengela where it was agreed that the beneficiaries to the estate would equally and jointly share proceeds from the estate as was the wish of the deceased.

17. It was the Respondent's position that the estate ought to be shared equally, as per the deceased's wishes.

18. It was the Respondent's position that the matter had been dragged unnecessarily before court with an aim to frustrate without just cause. According to the Respondent, arbitration with relatives and court mandated mediation had proven unfruitful due to the Applicant's selfish acts.

19. It is on the basis of the foregoing that the Respondent asked the court to dismiss the instant application.

Applicant's Submissions

20. In his submissions, Mr. Aloo for the Applicant cited the Law of Succession Act cap 160 of the Laws of Kenya at Section 8 and 9 which provides:

> *8. A will may be made either orally or in writing.*
>
> *9. (1) No oral will shall be valid unless:*
>
> *(a) It is made before two or more competent witnesses and*
>
> *(b) The testator dies within a period of three months from the date of making the will.*

Provided...

> *(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided for by sections 18 and 19"*

21. It was submitted that on several occasions ending with the 8th February 2014 when the deceased was visited at Mater Hospital by the Applicant, Peter Njoroge and Diana Njeri, the deceased consistently stated that the property plot number 65 Kitengela was to devolve to her last-born son, the Applicant.

22. It was further submitted that no evidence was adduced of the existence of any written will made before or after the making of the oral will and which is in conflict with the oral will and further that the deceased died on 1st April 2014, approximately 28 days after making the known will to the Applicant, Peter Njoroge and Diana Njeri

23. Commenting on the principle of testamentary freedom, counsel cited **In Re Estate of G.K.K (Deceased) 2013 eKLR**

24. Counsel submitted that though the Respondent raised the issue of the capacity of the deceased to make a will at the time she is alleged to have stated her will, no evidence was adduced to support this proposition. In the absence of any such evidence, it was submitted that the Honourable court had no option but to take recourse to the presumption under Section 5(3) of the Law of succession Act, specifically that *'Any person making or purporting to make a will shall be deemed to be of sound mind for the purposes of this section…'*

25. It was submitted that the legal burden of proof was upon the person challenging the capacity of the testator to demonstrate that the testator was not of sound mind. No such burden was discharged.

26. Mr. Aloo submitted that in the absence of a challenge or a successful challenge to the deceased's testamentary capacity to make the oral will, it was his position that the will is properly established in law and therefore urged the court to hold that the oral will by the deceased made on the 8th February, 2014 is duly proved.

27. In conclusion, counsel urged the Court to order that the property, plot number 65 Kitengela shall devolve to Kennedy Kariuki Mwangi in accordance with the oral will made by the deceased on the 8th February, 2014.

28. Mr. Thuranira who appeared for the respondents to this objection proceeding does not seem to have filed his final submissions despite directions taken to that effect. However, that cannot stop this court from considering the dispute and render its decision.

Analysis and Determinations

29. I have dutifully perused the evidence laid out before me, the testimonies of the witnesses as well as the submissions of counsel. To my mind, the only issue for determination in the instant application is whether the oral will made by the deceased on the 8th February 2014 has been duly proven as alleged by the Applicant.

30. The provisions of Section 5(1) of the Law of Succession Act stipulate that any person who is of sound mind and is not a minor may dispose of all or any of his free property by will. See **In Re Estate of G.K.K (Deceased) 2013 eKLR**

31. The relevant Section of the Law is **Section 9 of the Law of Succession Act** which provides that:

> *9. (1) No oral will shall be valid unless:*
>
> *(a) It is made before two or more competent witnesses and*
>
> *(b) The testator dies within a period of three months from the date of making the will.*

32. The instant application was brought under the auspices of Rule 13 of the Probate and Administration Rules which provides for the application of proof of an oral will as:

> *"(1) An application for proof of an oral will or of letters of administration with a written record of the terms of an oral will annexed shall be by petition in Form 78 or 92 and be supported by such evidence on affidavit in Form 4 or 6 as the applicant can adduce as to the matters referred to in rule 7, so far as relevant, together with evidence as to—*
>
> *(a) the making and date of the will;*
>
> *(b) the terms of the will;*
>
> *(c) the names and addresses of any executors appointed;*
>
> *(d) the names and addresses of all the alleged witnesses before whom the will was made;*
>
> *(e) whether at the respective dates both of the making of the will and of his death the deceased was a member of the armed forces or merchant marine engaged on the same period of active service;*
>
> *(f) whether the deceased at any time executed or caused to be executed a written will.*
>
> *(2) Subject to the provisions of sub rule (1) the provisions of these Rules relating to applications for probate of written wills or of letters of administration with such wills annexed shall apply in relation to applications for the proof of oral wills."*

33. While contemplating the requirements of a valid oral will, Musyoka J in **re Estate of Evanson Mbugua Thong'ote (Deceased) Succession Cause 2519 of 1998 [2016] eKLR** stated that *"An oral will is made simply by the making of utterances orally relating to disposal of property. In assessing whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will."* The Honourable judge continued *"… The other consideration is that the utterance ought to be made in the presence of two or more persons"*

34. In **Re Rufus Ngethe Munyua (deceased) Public Trustee -vs- Wambui (1977) KLR 137 and Beth Wambui and Another -vs- Gikonyo and others (1988) KLR 445** the courts in both instances held inter alia that if the witnesses present during the making of an oral will make a record of the terms of the oral will, so long as it meet the requirements of Section 9, of being made in the presence of two or more competent witnesses and the maker dies within three months, then that oral will would be considered valid.

35. Taken at face value, the evidence tendered by the Applicant seems to point to all the requirements of a valid oral will having been met. For one, the Applicant produced two witnesses whose position was that on the 8th February 2014, the deceased made it clear to them that the property in contention, Plot 65 Kitengela was to be inherited by the Applicant. For another, the period between when the deceased allegedly made this declaration and when she expired on the 1st April 2014 is less than the requisite three months and therefore within the legal time frame for an oral will.

36. On a summation of the totality of evidence and witness testimony however, a different picture comes to bear. For the most part, the only contention in these probate proceedings between the three siblings is Plot 65 Kitengela. While it is not in dispute that the Applicant would collect rent monies from the tenants at Plot 65 even during the lifetime of the deceased and with her knowledge and blessing, the question that I must contend with is whether ultimately the deceased allocated the property to the Applicant.

37. In my opinion, the fact that the Objector used to collect rent on behalf of her late mother during his lifetime didn't entitle him to possession of the property under the guise of a valid oral Will presumably made at a time when Diana and Peter visited her in the hospital. I think it is useful for this court to reflect upon the pre-dominant circumstances under which this oral Will was supposedly made. The voice of the dead through an oral or written Will must be strictly construed.

38. In congruence with the position taken by Musyoka J in **Re Evanson (supra)** I first address myself to the question of whether there was an oral utterance of the terms of the will. As per the testimonies of Peter Njoroge and Diana Njeri, the deceased on 8th February 2014 allegedly stated that Plot 65 would devolve to her son the Applicant in the event of her death. Does this utterance fit the bill so as to be considered as a term of her will? I find it rather curious that the deceased would only mention Plot 65 if she was indeed making an oral will on how her estate ought to devolve. Even more curious is her choice of witnesses. From my reading of the evidence of Peter Njoroge and Diana they allude to the visit to the hospital on the 8th February 2018, as the day when the Will to dispose of the property was made by the deceased. It is however not clear as to whether they were invited by deceased for purposes of witnessing the Will or just a normal hospital visit to check on the welfare of their land lady. There is no one between the witnesses and the applicant at the time the deceased made the utterances to the effect that Plot 65 would be inherited by the Applicant.

39. I am of the view that if at all the deceased made the utterances as alleged by the Applicant, she would have made her intention as to the administration of the estate, identify each share of the estate and the respective beneficiaries. According to PW1 and PW2, in the course of them conversing with the deceased at her hospital bed it was incumbent for her to confirm who would be receiving the rent during the interim period of hospitalization. This meeting to me did not rise up to the level of making an oral Will. When PW1 and PW2 visited the deceased in hospital on the 8th February 2014, they did so not for the purpose of being witnesses but as concerned tenants visiting their ailing friend and landlord.

40. At that time the deceased was in hill health and may well have had a premonition of her impending death. So one might say clearly she was making a gift Mortis Causa to his children. According to the evidence of Diana and peter Njoroge the deceased had directed how the pieces of land were to devolve to each son. It's clear from the evidence that even as a gift in contemplation of death cannot apply to the facts of this case.

41. The issues in this dispute joined broadly between the applicant and the respondents boils to one thing the premium value attached to parcel number 65 Kitengela township which the applicant by virtue of his close relationship with the mother does not want to part with it. The story by the objector is basically premised on the fact that as last born he lived with his mother while the other siblings settled elsewhere in Athi River. To whom the objector Kennedy Kariuki testified had been allocated some parcels of land which excluded them from any share of the Kitengela property.

42. In order for the applicant to make this story plausible he rallied behind his tenants who asserted that part of the estate has been devolved to the dependents of the deceased save for plot 65 Kitengela. In other breath he said that the land in dispute should not form part of the intestate estate to be distributed equally among his other brothers. It seems to me that the objector as last born son spent most of the time with his mother including staying at the property in dispute. At least it's not disputed by Diana and Peter Njoroge that in absence of the deceased rent was paid to Kennedy Kariuki.

43. It should be remembered that within the African customary law last born sons occupy some kind of special vantage point amongst the siblings. There is nothing wrong for that close knit relationship to subsist in any case they find themselves in that position by virtue of birth. It's not uncommon to find that other older children have either left the household to venture into other entrepreneur activities leaving the last born still crafting their own destiny. Clearly all children of a particular family belong as of right and by birth to that specific family unit, none enjoys superior rights when it comes to inheritance of the estate left behind by their birth parents.

44. When this court considers the two divergent views on the inheritance of plot number 65 I just do not believe that the deceased left an oral Will capable of being enforced by this court. The question I ask myself broadly appraising the facts in contention. What particular parcel of land was left for Peter Njomo and Alphonce James? Did the deceased distribute the shares, to the sons percapita? The evidence accepted by this court shows that some of the parcels of land are registered in the name of the husband to the deceased, does it form part of her estate? It has been proved that this one visit to the hospital by Diana and peter changed the entire narrative on what was to be a family contest between brothers. I think with respect to the objector and his witnesses there is every reason to doubt whether this were utterances from the deceased to the tenants to continue paying rent to the objector or the words properly construed referred to the making of an oral will. I think it would be wrong to gloss over the words and give them such strong meaning which fundamentally touches on the family unit as espoused in Article 45 of the constitution. There can be no doubt that an oral will like a written will must be strongly tested with regard to the well-established principles on wills. To excuse every word uttered by the deceased to be a will in that way is to reward mendacity. The curious position is that

the two witnesses have every reason to lie in support of the applicant in view that their daily roof depends on keeping the relationship cozy.

45. For myself I respectfully doubt whether there was a will in this case with an overriding interest over the rest of the other beneficiaries. If this court holds otherwise it means any daughter or son in close relationship with the mother or father can put together a two witnesses or more to cause words to be uttered during ill health so that a will can be established. This is a case where one brother has declined to yield up possession in one of the properties he has been collecting rent to the estate of the deceased for distribution.

46. As a consequence of the preceding discussion, I have no doubt in my mind that the alleged utterances made by the deceased on the 8th of February 2014 do not meet the legal threshold set out in Section 9 of the Law of Succession Act enabling them to be considered as an oral will of the deceased.

47. In the upshot, I find no merit to the Petition dated 8th December 2016 and the same is hereby dismissed with no order as to costs.

48. It is so ordered.

Dated, Delivered, and Signed at Kajiado on this 3rd day of October, 2018.

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R. NYAKUNDI

JUDGE

Representation

- Mr. Aloo for Objector – Present

- Respondent (Peter Njomo Mwangi)– Present

- Applicant (James Mwangi & Kennedy Mwangi) - Present