REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 1112 OF 2002

IN THE MATTER OF THE ESTATE OF MBOGO NJUE (DECEASED)

ALESIO MBOGO NJUE.....RESPONDENT/ADMINISTRATOR

VERSUS

MIRRIAM MARIGU NJAGI.....1ST PROTESTOR

LEONARD NJERU KAVANDA.....2ND PROTESTOR

R U L I N G

A. Introduction

1. This is a ruling on a protest against confirmation of grant to the petitioner by the 1st and the 2nd protesters both dated 6th November 2001. The 2nd protestor herein passed away sometime in 2015. The 1st protester proceeded with the protest in absence of substitution of the 2nd protestor.

2. The protest by the 1st protestor was grounded on the following basis: -

a) That the protestor was not included as a beneficiary of the deceased husband's estate.

b) That the petitioner included his sons Patrick Njiru Njue and Johnson Gicovi Njue who are not entitled to inherit the deceased's estate.

c) That the petitioner left out plot No. Ngandori/Kathangariri/T.219 which is part of the deceased's estate.

3. The 1st protestor proposed the mode of distribution of the estate of the deceased as follows: -

a) Mary Werimba Mbogo to inherit 5 acres out of land parcel number NGANDORI/NGOVIO/44 on behalf of her household.

b) Miriam Marigu Njagi to inherit 4 acres out of land parcel number NGANDORI/NGOVIO/44 on behalf of her household.

c) Plot number NGANDORI/KATHANGARIRI/T.219 to be shared equally between Mary Werimba Mbogo and Miriam Marigu Njagi.

4. This matter was partly heard before the parties agreed to dispose of it by way of written submissions.

B. The Evidence

5. The 2nd protestor testified his reiterated the contents of his affidavit of protest and added that the respondent/ administrator applied for letters of administration against the wishes of other beneficiaries.

6. In cross examination the 2nd protestor stated that he did not know that the 1st protestor had any children sired by the deceased during his lifetime.

7. In re-examination the 2nd protestor stated that the deceased could not read or write nor hold a pen and as such did not sign the document

alleged to have been translated on his behalf. Further the 2nd protestor stated that his father was very sick having undergone an operation on the 2/09/1986, the day the alleged will was made, and died two days later on the 4/09/1986.

8. PW2, Mwaniki Njue testified that he knew the deceased as they were village mates and had stayed in the same neighbourhood for a long time. He further testified that he knew one of the beneficiaries, Patrick Njiru Njue and that he was not a son to the deceased but a son to the Respondent herein. He concluded by stating that he was not aware that the deceased had distributed his assets before his death.

9. The 1st protestor stated that the 2nd protestor passed on sometime in 2015 and that his protest abated.

10. The court did not get the benefit of the oral evidence of the 1st protestor as the parties agreed to dispose the matter by way of written submissions.

11. I hereby give direction that the demise of the 2nd protestor and for purpose of this application, the 1st protestor will herein be referred as the protestor.

C. 1st Protestor's Submissions

12. The protestor submits that she was not consulted or informed by the respondent when the petitioner applied for confirmation of the grant.

13. She further submits that the petitioner was in contravention of Section 40(1) of the Law of Succession Act that provides how a deceased's estate is to be distributed where the deceased had more than one wife.

14. The protestor further submits that the respondent acted contrary to the aforementioned section by including his two sons as beneficiaries at the expense of the protestor.

15. It is on these submissions that the protestor opposes the confirmation of the grant and seeks this courts intervention in distributing the estate of the deceased equally between all the deceased's beneficiaries.

D. Respondent's Submissions

16. The respondent submitted that summons for confirmation of grant should be allowed on the basis that he had provided for all dependants of the deceased and further that the mode of distribution was agreed upon by all members of the family.

17. The respondent further submits that the mode of distribution proposed by the protestor is unreasonable since it proposes distribution of the estate of the deceased between his wives in exclusion of other beneficiaries, a fact which the petitioner finds absurd especially as the *"protestor proposes that she holds lands in trust for her children despite her children being adults."*

18. The respondent further submits that he merely carried out his father's wishes and provides a copy of minutes from a meeting in which his father distributed the land and as such asks court to dismiss the protest by the protestor.

E. Determination

19. Having therefore set out the facts and the position of the parties, this court I must now determine if the will provided by the respondent is valid and whether the protestor is entitled to benefit from the deceased's estate.

20. For a will to be declared valid, it must be proved as a valid testamentary disposition of the testator based on compliance with the formal requirements of making a will. These are whether the testator had the legal capacity to make the will and whether it was made voluntarily without any duress, undue influence or mistake. It would also be important to consider whether the testator revoked the alleged will before his death.

21. It was the testimony of the now deceased protestor that the deceased made no oral will before he died and further that the deceased could not have made the written will presented before court as he was "*very sick*". The 2nd protestor further testified that the deceased had stomach surgery on the 2/09/1986, the same day he is purported to have made the will and subsequently passed on two days later on the 4/09/1986.

22. The burden of proof in the first instance lies upon the person alleging lack of capacity. Once it is established to the satisfaction of the court that in fact the testator was not of sound mind then the onus is shifted to the person propounding the will to prove the existence of the deceased's sound mental capacity. This was the holding of the court in the case of **IN RE ESTATE OF GATUTHU NJUGUNA (DECEASED) [1998] eKLR** where it quoted an excerpt from **Halsbury's Laws of England, 4th Edition vol. 17 at page 903-904 provides: -**

> ***"where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which***

generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity."

23. In this cause, the burden of proof shifted after consideration of the testimony of the 2nd protestor. It has not been denied by the protestors that the deceased was very sick at the time he purportedly made the will. He underwent a stomach surgery the same day he made the will. This evidence was uncontroverted and it is sufficient by itself to cast doubt on the mental capacity of the deceased.

24. I reach a conclusion that there is no evidence placed before this court by the respondent propounding the capacity of the deceased to make the will. The petitioner has failed to discharge the burden of proof as to the deceased's mental capacity.

25. Section 11 of the Law of Succession Act, provides for the formal requirements of a valid will. It states: -

"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."

26. It is a legal requirement that the testator must append his signature on the will with an intention of giving it effect as his last will and testament. The fact that the same was typed by another person, acting on the instruction of the deceased, does not invalidate the will as long as he signed the same acknowledging the typed will as containing his wishes.

27. The 2nd protestor testified that the deceased could not read and write and thus did not sign the will presented by the petitioner before court. I do note that this will contains a thumb print at the bottom alleged to belong to the deceased. However, it is worth noting that the 2nd protestor further testified that there was no evidence of the signature of any witness in contravention of the provisions of **Section 11 (c) of the Act.**

28. Consequently, it is my view that the will provided by the petitioner has not met the formal requirements of **Section 11 of the Law of Succession**.

29. It is noteworthy that if the circumstances under which a will is made are suspicious, this can lead to the will being rendered void, where the person who writes or prepares the will or plays a central role in its making takes a substantial benefit under it. There is abundant case law on this, represented by such local cases as ***VIJAY CHANDRAKANT SHAH VS THE PUBLIC TRUSTEE*** **CA No. 63 of 1984,** ***MWATHI VS MWATHI AND ANOTHER*** **[1995-1998] 1 EA 229** and ***WANJAU WANYOIKE &FOUR OTHERS VS ERNEST WANYOIKE NJUKI WAWERU & ANOTHER*** **HCCC No. 147 of 1980,** and the English cases of ***TYRELL VS PAINTON*** **[1894] 1 P 151,** ***BARRY VS. BUTLIN*** **[1838] 2 MOO PC 480** and ***WINTLE VS. NYE*** **[1959] ALL ER 552**.

30. The protestor submitted on this very issue and cited a number of circumstances, both prior and after the making of the impugned will, and submit that the same were suspicious. These include the lack of her presence as a beneficiary whereas her children with the deceased are stated to be beneficiaries, the fact that two of the petitioner's own sons are beneficiaries to her exclusion, the fact that the petitioner did not notify her nor seek her consent when initiating the succession proceedings and finally the fact that the petitioner left out plot **No. Ngandori/Kathangariri/T.219** which is part of the deceased's estate.

31. I am of the considered opinion that the will presented by the respondent fails the test of **Section 11 of the Act** and is therefore invalid for all intents and purposes.

32. Although the respondent says that the deceased left a will, he did not explain to the court why he petitioned for letters of administration intestate in the existence of a will. It came in the lime light after the protest was filed. I am of the view that this purported will was an afterthought in this cause.

33. With regard to the final matter of an omitted parcel of land belonging to the deceased, I also find it suspicious that the aforementioned parcel of land plot **No. Ngandori/Kathangariri/T.219,** is not listed in the Summons for Confirmation of grant filed in the court on the 12th April 1999 whereas it is willed to the respondent in the will he presented before court.

34. Further to this it is noteworthy that with regards the inclusion of the respondent's sons Patrick Njiru Njue and Johnson Gicovi Njue in the deceased's estate, **Musyoka J. IN RE ESTATE OF JOHN MUSAMBAYI KATUMANGA – (Deceased) [2014] eKLR** stated **that** grandchildren are not entitled to inherit from their grandparents so long as their own parents, the children of the deceased, are alive and themselves taking a share in the estate. Secondly, that grandchildren are not dependants of the estate unless they inherit the shares of their deceased parents.

35. The law provides under ***Section 29*** of the Act that a grandchild can be a dependent of her grandparent, but for him/her to qualify as such it must be demonstrated in an application properly brought under ***Section 26*** of the Act that he/she was dependent on the grandparent immediately before his death.

36. I find that the deceased's grandchildren Johnson Gicovi Mbogo and Patrick Phinehas Njiru Njue who were given shares by the petitioner are neither beneficiaries nor declared dependants of the estate. The respondent flouted the law in giving them shares in exclusion of the right beneficiaries.

37. The deceased died on the 4th September 1986. The deceased had married twice. It is not clear whether he was a polygamist or not, however from the evidence before this court, it is evident that at some time in his life he married the 1st protestor and even had children with her. Whatever the case it would appear that the appropriate provisions to apply would be **Section 40 of the Law of Succession Act.**

38. Under the Succession Act it is provided that where a person dies intestate and was polygamous his estate devolves under **Section 40 of the Law of Succession Act** which provides: -

> ***"(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children."***

39. Section 40 (2) proceeds to provide: -

> ***"The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in sections 35 to 38."***

40. The Law of succession Act specifically, **Section 66 of the Law of succession Act** provides for preference on who to take out a grant in case of intestacy. The said provision provides: -

> ***"when a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of reference -***
>
> **a.** ***surviving spouse or spouses, with or without association of other beneficiaries;***
>
> **b.** ***other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;"***

41. From the foregoing it is not in dispute that the 1st protestor being a surviving spouse to the deceased ranks in priority to the respondent who is a son to the deceased. The procedure is that the respondent ought to have cited the protestor and her children to accept or refuse to take a grant as provided for under **Rule 22 of the Probate and administration Rules** which provides: -

> ***"(1) A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto."***

42. The respondent, by failing to include the 1st protestor as a legitimate beneficiaries of the deceased's estate could be said to have concealed material facts important and material to the case and this forms a basis for revocation of grant. The protestor also argues that a parcel of land **Ngandori/Kathangariri/T.219** had been omitted in the list of the deceased's assets. The respondent did not adduce any evidence to controvert the allegation.

43. The respondent argues that he has provided for all the beneficiaries of the deceased's estate but this is no excuse to a grant obtained contrary to the law. Non-compliance with the law renders the grant defective and calls for the intervention of the court.

44. From the foregoing it is clear that the petitioner concealed information that the deceased had other two beneficiaries who were entitled under the law to his estate. I find that the grant issued to the petitioner was obtained fraudulently by concealment of material to the case and this forms a basis for revocation of grant.

45. I do not wish to make any finding on the mode of distribution proposed by the protestor or the respondent in the application for confirmation at this stage. The reason for this decision is that there was one asset left out from the list in this cause **LR. Ngadori/Kathangariri/T.291**. It is important that the parties decide on the distribution of all the deceased's assets together.

46. The application for revocation of grant is therefore allowed in the following terms: -

> ***i. That the purported written will is null and void*** *ab initio* ***for non-compliance with the law and it is hereby declared that the deceased died intestate.***
>
> ***ii. That the grant issued on 24/04/1994 to the respondent is hereby annulled/revoked.***

iii. That the protestor Miliam Marigu Njagi and the respondent Alesio Mbogo Njue are hereby appointed as co-administrators of the estate.

iv. That the administrators or any of them to file an application for confirmation of grant within 30 days.

v. That each party to meet their own costs of this application.

47. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21st DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Nzekele for Maina for Applicant/Petitioner