REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 46 OF 2013

IN THE MATTER OF THE ESTATE OF M'ITUNGA M'IMBUTU (DECEASED)

GLADYS NKIROTE M'ITUNGA.....PETITIONER/1ST RESPONDENT

VERSUS

JULIUS MAJAU M'ITUNGA.....OBJECTOR

EVERLYN WANJA .....1ST APPLICANT

NAOMI MWENDWA MAJAU.....2ND APPLICANT

BONIFACE MUGENDI .....2ND RESPONDENT

JUDGMENT

[1] **M'ITUNGA M'IMBUTU ("the deceased")** to whom this Succession Cause relates, died on 11th June 2012. On 28th January 2013, the petitioner petitioned for the letters of administration where she stated that the deceased was survived by:

a. Gladys Nkirote Itunga - Widow

b. Julia Mbuthu Itunga - Daughter

c. Charity Muthoni Itunga - Daughter

d. Lydia Maiti Francis - Daughter

e. Julius Majau M'Itonga - Daughter

His assets comprise in **ABOGETA/U.KITHANGARI/486, ABOGETA/U.KITHANGARI/732** and account NO. 183005564 Kenya Commercial Bank, Nkubu Branch.

[2] On 8th January 2015 grant letters of administration were issued to the petitioner. Thereafter, the petitioner filed an application dated 10th August 2015 where she sort to have the letters confirmed. Though, an affidavit of protest was raised by the objector, Julius Majau M'Itunga. He deponed that the deceased left a will on how his estate should be distributed which was read to the beneficiaries by Mr. Moses Kirima, advocate.

Objector's Claim

[3] The objector formally filed and introduced the will before this court together with the statements of Jamlick Muriithi Murumua, Everlyn Wanja and Wilfred Mwirigi Gitonga. Jamlick asserted that the deceased called for a meeting on 21st February 2012 which was confirmed in the statement of Everlyn Wanja. He called the meeting for he wanted to distribute his property. They advised him that the best way is to write a will. Wilfred Mwirigi Gitonga who was present at the meeting confirmed this. On 22nd February 2012 Jamlick accompanied the deceased to the firm of Meenye & Kirima Advocate where they meet Mr. Kirima to whom he narrated his wishes to. They were joined by Bernard Muguna Mwenda and together they witnessed the will.

[4] **OBW1 Moses Kirima Dulu** told the court that the deceased came to his office on 22nd February 2012 and told him to prepare a will for him of which he did as per his instructions. He was accompanied by two witnesses one of whom was known to him, that is Bernard Mwenda. The deceased told him that the situation at his home was not conducive and that his family was harassing him. In his estimation he found the deceased to be an intelligent and educated person and was quite unique for a person of about 87 years to have such capabilities.

Petitioner's Claim

[5] The petitioner in her statement stated that the deceased died intestate. In the year 2009 the deceased developed bad health and in 2010, his illness persisted and was diagnosed with cancer. That towards the end the deceased's mental capabilities became very low and was totally dependent on others for all his functions. He was constantly under the nursing and care of his grandson, Boniface Mugendi. In February 2012 when the deceased is said to have made his will he was in very poor health making him incapable of writing the will. That if there was indeed any will, then, it must have been dictated by the objector.

[6] That on 22nd February 2012 Majau picked the deceased and took him to hospital. When they returned the deceased indicated that he had been taken to the hospital where he was made to sign some documents and had not been given any medicine. She denied that the will was ever read as she only came to learn of it in court. The petitioner's statement was substantiated by the statement of Boniface Mugendi, Julia Mbutu and Justus Mugambi .

Determination

[7] Having gone through the record in its entirety the issue of determination before this court is *whether or not the deceased left behind a valid will.*

[8] **Part II of the Law of Succession Act** provides guiding provisions when it comes to wills. **Section 11** particularly deals with written wills. It provides that :

> **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 witnesses, including OBW1, Hon Moses Kirima confirmed that the deceased and relevant witnesses signed the will in his presence and in the presence of each other. And a look at the will presented before this court, it has met the formal requirements stipulated under the law. He made the will. But, I shall consider the objections raised to the will and see whether the will is valid or not.

Testator not in right mental health

[10] However, the petitioner averred that the deceased was not in his right mind to legally write a will for he was sick. She claimed that, if any will was written it must have dictated to him by the objector. It is trite law that the person who alleges proves. **Section 5 (4) of the Law of Succession Act, Cap 160** stipulates that:

> ***"(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges."***

[11] OBW1, Hon. Kirima was quite categorical and stated that he found the deceased to be quite unique for he possessed such intellect and understanding that astonished him given his advanced age of 87 years. Other than claiming that the deceased was so old and with cancer, there is nothing to show that he was of unsound mind or without the mental capacity to write a will. Even persons of advanced age are capable of making and make informed decisions. Ironically, the petitioner, the widow of the deceased stated in her statement filed on 5th October 2017 that she was aged 87 at the time she made the statement; and I find the statement to be informed and of clear intellect. Therefore, being advanced in age per se is not equivalent to senility or inability to make informed decisions. The petitioner made allegations but did not prove them. I have heard such claims that the deceased was not in the right mind to make a will in cases without number especially by persons who are driven by insatiable appetite to take more from the estate or whose conduct in relation to the deceased was quite unpleasant or for some other selfish reasons. Therefore, the petitioner has failed to prove that the deceased was not in right mind to make a will.

Discrimination of daughters

[12] However, I am perturbed by one important thing: discrimination of daughters on the basis of gender and status. The will provides in paragraph 12 that that his daughters are married and he had called upon the fathers of his grandsons to come for their children. He stated in the will that he had provided each daughter with 2 acres and that he had advised them to do whatever they wanted with the aid land. Hon. Kirima also stated that the deceased told him that he had given the bulk of his land to his son because the daughters were married. He also informed the court that the deceased was apprehensive that the children of the daughters were going to disinherit his son. He was so preoccupied with daughters taking more land yet they were married. Clearly, the deceased made the will to disinherit his own daughters. Accordingly, a will that offends the law and the Constitution is invalid. I find this will offends the law and the Constitution. Therefore on the basis of this finding, I declare the will herein invalid.

Distribution

[13] In light thereof, this estate will be governed by law on intestacy. The deceased died intestate. He left a widow and the following children:-

a. JULIA MBUTU

b. CHARITY MUTHONI

c. LYDIA MAITI and

d. JULIUS MAJAU (deceased).

[14] By the dictates of the Constitution and the law, surviving spouse should get a distinct portion of the estate. Very soon and very soon, I prophesy, courts will start reconciling the matrimonial property law and the Law of Succession Act with article 45 of the Constitution with regard to the property of marriage between the deceased and the surviving spouse before distribution of the estate of the deceased spouse. This is a call by section 7 of the Sixth Schedule and article 259 of the Constitution. Accordingly, the surviving spouse will take two acres and the balance shall be shared equally amongst all the children of the deceased.

[15] I now appoint Everlyn Wanja and Charity Muthoni Ikiugu as joint administrators of the estate. I make a grant to them. The grant is also confirmed in the above terms.

Dated, signed and delivered in open court at Meru this 13th day of December 2018.

F. GIKONYO

JUDGE

In presence of

Mokua for Petitioner

Mutegi for Objector

F. GIKONYO

JUDGE