REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESION CAUSE NO. 474 OF 2011

In the Matter of the Estate of M'muremera Iria Muguna alias Muremera Iria Muguna Alias Muremera Iria (Deceased)

DAVIS KIUMBE M'MUREMERA..................PETITONER

-Versus-

EDWARD MURIUKI...................................1ST OBJECTOR

FLORENCE MWARI MUREMERA.........2ND OBJECTOR

GLADYSD MUKUBA MUREMERA........3RD OBJECTOR

JULIA MAKENA MUREMERA…………4TH OBJECTOR

JUDGMENT

[1] The deceased to whom these proceedings relate is ***M'Murumera Iria Muguna.*** He died on 6th November 2011 leaving behind a written Will dated 28th March 2006.

[2] The petitioner herein petitioned for letters of administration with will annexed on 30th August 2011. He was issued with Grant of letters of Administration on 30th December 2011. He thereafter filed Summons for Confirmation of Grant on 23rd August 2011.

[3] The objectors then filed Summons for revocation/Annulment of grant on 15th February 2013 citing the following grounds:-

a. That the proceedings to obtain the grant were defective in substance for they are grounded on a will which is either forged or importunately obtained.

b. That the grant was obtained fraudulently by misdirecting the court or concealing material facts about the true assets of the estate and

c. That the grant was obtained by means of untrue allegations of facts essential to law to justify the grant since the alleged will is neither properlyexecuted by the testator, nor does it contain a statement that the testator understood the language in which the document is written or the contents thereof were sufficiently explained to him.

[4] The Court made a ruling on 30th May 2017 that this matter be determined on via *viva voce* evidence. It also ordered on 1st November 2017 that status quo be maintained in respect of L.R. Kiira/ Ruiru/280.

[5] It is ascertainable from the letter of the chief, Lower Igoki location dated 10th November 2010 and the petition for letters of administration that the deceased left behind the petitioner and objectors as beneficiaries and the following assets;

a. Land Parcel No.s

(i) Ntima/igoki/1443

(ii) Ntima/igoki/1745

(iii) Ngusishi Settlement Scheme/433/720

(iv) Kiirua/Ruiri/280

b. M/v registration No. KSS 595 Peugeot 404 pick-up estimated value 2,000,000/=

[6] The petitioner called 3 witnesses.

ANALYSIS AND DETERMINATION

[7] From the evidence on record and the Documents filed the main issues for Determination are;

A. The validity of the will; and

B. Distribution of the estate.

[8] A grant of letters of Administration with will annexed is made in circumstances where the deceased dies leaving a valid will, but there is no proving executor. This is usually the case where: the will does not appoint an executor or the executor (or executors) appointed has pre-deceased the testator or the executor (executors) has renounced executorship or the executor (executors) appointed has been cited to take out a grant of probate and has failed to do so. **See** ***Law of Succession Musyoka W. law of Africa pg. 149.*** The difference between an administrator and an executor have been adequately explained in the case of **Korashi V Qureshi** ***pg. 566 EALA*** as follows:-

> ***An executor may commence suit before grant of probate and he can carry on the proceedings without grant as far as is possible until he has to prove his title, when of course he must be able to establish the grant of probate because that is the proof or evidence of his title. His right exist as from the death of the testator and the grant is only required as evidence of this.***
>
> ***The position of an administrator is different; his rights date from the grant of letters of administration and any prior acts of the administration of the estate can only be validated by the doctrine of relation back from the grant.***

[9] In this case and as per the written will of the deceased, the petitioner is named as the executor of the will. But the existence as well as validity of the will has been denied by the objectors.

[10] The burden of proof therefore lies upon the petitioner to prove the validity of the will. The petitioner's case is that he catered for the deceased during his lifetime; yet, the objectors neglected him especially during his old age. The petitioner made reference to the Ruling of the Land Tribunal (LDT 62 of 2006) dated 12th April 2007, the Land Tribunal Appeals Board dated 18th July 2007, the High Court cases; Civil Appeal No. 1100 of 2007 contesting the decision in Land Tribunal Appeal Board Ruling and the High Court Civil Case No. 140 of 2009 filed by the deceased against trespass by the objectors to his property.

[11] He stated in the pleadings that all the above mentioned pleadings were conducted during the lifetimeof the deceased and lay bare the position taken by the deceased in his Oral will, minutes of which are dated 17th October 2006 and the written will dated 28th March 2006.

[12] As to the validity of the written Will **Pw1, Eustace Kimandi** testified that he was present at his home in 2004 when he made the Oral Will. He was also present in the Land District tribunals. He witnessed when the will was signed before the advocate by Pw3, Pw2 and the deceased. He stated that the advocate discussed the contents of the will with the deceased in Kimeru and it is only upon his understanding, that the will, written in English, was signed. He however confirmed that he cannot recall the floor no. of the advocates' offices.

[13] **Pw2 Francis M'RingeraM'Mungura** testified that he was in the first meeting of the Oral will and when the written will was signed at the advocates' offices. He said that he witnessed Pw1, the advocate and the deceased signing the will. He affirmed that the deceased thumb printed the will and that he used a pen to sign the will. He however could not recall the hand the deceased used in thumb printing the will.

[14] **Pw3, Hon. Moses Kirima** testified that he is an advocate of the High Court of Kenya and that he practices in the office of Meenye & Kirima Advocates located at Kcb Building. He told the court that on 28th March 2006 and on instructions from his partner he drafted and witnesses the execution of the will of the deceased. He produced the will as ***PExh 1.*** He stated that the deceased was not known to him before the time of execution of the will but to his partner Mr. Meenye. He was clear that he discussed the contents of the will with the deceased in Kimeru before reducing them in writing. In cross-examination, he said that there is no need for a Certificate when attesting to the will and that was not a requirement of law. He also said that, although he used the office rubber stamp, that fact does not invalidate the will. On inclusion of Nyaaki/ Thuura/1008 he testified that it is the party making the will that provides the properties to be included.

[15] Both parties filed their written submissions. The petitioner restated the testimonies of the parties and realigned himself to the provisions of **Section 5 and 11 of the Law of succession Act**. The Respondent equally restated the testimonies of the witnesses and the grounds for the revocation of the grant and relied on the provisions of **Sections 5, 7 and 11 of the Law of Succession Act and Rule 54 (3) of the Probate and Administration Rules.** He equally relied on the Decision by Justice Mabeya in **Julius Kinyua Chabari & Another vs, MukwamugoNjagi& 4 others.**

Was the will properly executed?

[16] Section 11 of the Law of Succession Act, provides for the formal requirements of a valid will. It states;

11. 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.

[17] These provisions were discussed in the case of **James MainaAnyanga v Lorna Yimbiha Ottaro& 4 others [2014] eKLR** where the court stated;

It is required 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. The deceased then placed his mark on the typed document in the presence of two witnesses and the Executor thus acknowledging his signature.

[18] In this case, two witnesses witnessed the deceased sign the will in a manner that he was giving it effect as his last will and testament. The witnesses also signed the will in the presence of each other and of the deceased and the advocate. The advocate who witnessed the execution of the will Hon. Moses Kirima, confirmed that on 28th August 2006 the deceased and two other persons who was quite elderly but intelligent, appeared before him. The deceased gave instruction that he wished him to make a will. He narrated his wishes in kimeru and he reduced it in writing in English. He did as instructed and drafted the will. The will was signed by the deceased and the two witnesses as required in law. From the above, the first formal requirement of a will have been satisfied.

[19] The witnesses of the petitioner stated that deceased made his intention to make the will known during his lifetime. They recited the oral expressions by the deceased in what they called Oral Will and consequent meetings in the land dispute tribunal. The deceased may have made those expressions following disagreements on his properties. It is apparent that he had numerous cases through which he intended to give effect to his wishes as reflected in the will. The material before the court shows that the deceased of his volition, knowledge and approval made the will herein. But does the will complaint with the law?

[20] Let me first remove some matters out of the way. The objectors seemed to place unnecessarily high importance on the fact that the witnesses could not recall the floor no. where the advocate’s offices were situated, the hand which the deceased used to affix his thumb print and colour of the ink used. The witnesses were clear that they visited the offices of Meenye Advocate, they witnessed the deceased sign the will and they too signed the will in the presence of each other, and the advocate signed the will in their presence. The court is cognizance of the fact that it is 10 years since the will was made and memories especially on details as location of office or the hand used by the deceased in thumb printing the will may fade or be forgotten by the witnesses. Such are not so material a matter as to vitiate the will herein.

[21] Again, notwithstanding the additional property mentioned in, the will is valid in respect to all the properties that were in the name of the deceased at the time of his death.

Of certificate of attestation

[22] Hon. Kirima stated that he did not provide a certificate to show that he reduced the instructions in kimeru into writing in English. The witnesses stated that the will was read out to the deceased and to them, and that they all, including the deceased understood its contents. Whereas Pw3 states that he was familiar with the Kimeru language he never sought to attach a certificate to prove that he read to and made the deceased to understand the contents of the will. His statement was to the extent that he was given information by the deceased in Kimeru language and he translated it to English and later gave it to the deceased to sign. There is no indication that at the time of execution/ attestation he read the will over to the deceased and the deceased understood the true nature and content of the will.

[23] Rule 54(3) of the Probate and Administration Rules provides;

54. Evidence as to due execution of written will

(1) Where a written will contains no attestation clause or the attestation clause is insufficient or where it appears to the court that there is some doubt about the due execution of the will, the court shall, before admitting the will to proof, require an affidavit of due execution from one or more of the attesting witnesses or, if no attesting witness is conveniently available, from any other person who was present at the time the will was executed.

(2) If no affidavit can be obtained in accordance with sub rule (1) the court may, if it thinks fit having regard to the desirability of protecting the interests of any person who may be prejudiced by the will, accept evidence on affidavit from any person it may think fit to show that the signature on the will is in the handwriting of the deceased, or evidence of any other matter which may raise a presumption in favour of the due execution of the will.

(3) Before admitting to proof a written will which appears to have been signed by a blind or illiterate testator or by another person by direction of such a testator, or which appears to be written in a language with which the testator was not wholly familiar, or which for any other reason gives rise to doubt as to such testator having had knowledge of the contents of the will at the time of its execution, the court shall satisfy itself that the testator had such knowledge by requiring an affidavit stating that

the contents of the will had been read over to, and explained to, and appeared to be understood by, the testator immediately before the execution of the will.

(4) If the court, after considering the evidence—

(a) is satisfied that a written will was not duly executed, it shall refuse probate and shall mark the will accordingly;

(b) is doubtful whether the will was duly executed, it shall make an order for hearing and give such directions in regard thereto as it deems fit.

[24] The first matter I noted is the inclusion of property known as Nyaki/Thuura/1008 as one of properties of the deceased, yet, as discerned from the Copy of Search records, the said property was not registered in his name. This property was distributed to one of his sons- a fact that clearly shifts the fair distribution of the estate.

[25] The foregoing notwithstanding, the provisions of Rule 54 would be called into play especially because the will was made in English yet he was given instructions in kimeru. From the evidence by PW2 the will was read over to them and explained in Kimeru by the advocate. The advocate herein Hon. Kirima did not tell the court that he read the will over and explained it in kimeru. He was categorical that he did not do a certificate as it was not a strict requirement of the law. Certainly, evidence shows that the will herein was in a language the deceased did not understand. There was need for Hon. Kirima to have adduced evidence to show that he read over and explained the will in Kimeru and that the deceased understood the contents thereof. In the circumstances, I find there is doubt surrounding execution of this will. I also find that the petitioner did not prove the validity of the will as by law required.

[26] There is further reinforcement of the position I have take.

Coercion and Undue Influence

[27] The objectors pleaded coercion and undue influence by the petitioner upon the testator. The allegation states that the petitioner coerced the deceased to give him a larger parcel of land in comparison to the others i.e. the objectors. The proceedings show that the deceased may have moved on his own volition. The proceedings of the Land Dispute Tribunal attest to this. His reasons for giving the petitioner a larger parcel as opposed to the objectors is premised on the fact that the petitioner solely took care of him during his ailing days and provided for his upkeep with the exclusion of the objectors.

[28] The deceased had equally been said to have transferred a portion of land to the petitioner during his lifetime which action was halted by the objection raised by the objectors. It is however equally seen in this proceedings that the petitioner has been given a substantial amount compared to the objectors. The petitioner's actions of instigating the deceased would be seen in the Ruling of Mary Kasango in *H.C.C.C No. 140 OF 2009 MuremeraIreaVrs Edward Muriuki& 3 others* where the deceased had sued the objectors. The objectors had contested that the dispute was instigated by the petitioner. The petitioner also moved to chase away the objector from the premises in L.r. No. Kirua/Ruri/280. From the evidence the petitioner may have taken advantage of being close to the deceased to induce bequest of the estate in his favour.

[29] Although there is no requirement in law, in the circumstances of this case, I find it to be quite peculiar that the will was signed by persons who were much younger than the deceased. The deceased was presumably born in the year 1925, the petitioner was born in the year 1960, one of the witnesses Eustace Kamindi was born in the year 1970- there is no indication of any or any special relationship with the deceased.

Discrimination of daughters

[30] A more astounding blow; the deceased gave a much lesser acreage to his daughters as compared to the acreage given to his sons. The objectors herein are sons and daughters of the deceased. The petitioner is also a son of the deceased. They rely on L.R. Kiirua/ Ruri/280 for their livelihood and upbringing. Whereas the objectors seem to have been in dispute with the deceased during the years towards his death, I find in evidence that they had a resolve to be in amicable terms with the father. See the engagement of the elders and the Area Chief in this matter. The dispute also related to the dim years of the deceased and does not in any way relate to the whole lifetime of the deceased. The evidence shows that the objectors were dependants of the deceased and going by what the petitioner is saying, they were provided for in the impugned will. In the circumstances, even if conduct of the dependants in relation to the deceased is a relevant factor to consider in distribution, I do not find such offensive conduct which will justify total exclusion of any dependant. It has been explained why Judith Kiende and Florence Gaiti were not provided for whatsoever. But, from the evidence it seems the deceased merely discriminated the daughters due to sex and status. Such is prohibited discrimination and should invalidate a will which is based on such prohibited discrimination. See the case of **re Estate of Samuel Ngugi Mbugua (Deceased) [2018] eKLR** it was held;

"…..In my considered view a will must be interpreted in a manner that gives effect to the intent of the testator. That means that the court may only rectify a will if it is satisfied on clear and convincing evidence that the will did not reflect the testator's intention in bequeathing his or her to the beneficiaries.

45. The Constitution at Section 27 provides that a person shall not discriminate directly or indirectly against another person on a number of grounds including on account of sex, marital status, conscience or belief.

46. In the instant case, from the wording of the will, it can be inferred that the deceased intended to disinherit Jane Njeri who is his wife, notwithstanding their separation. This is unconscionable. The Applicants were directly maintained by the deceased during his lifetime, in his death, the contents of a written will should not and cannot be used to render persons who were directly under the deceased's care destitute."

[31] On the basis of the above analysis, I find the will herein is invalid. I will now determine distribution as if the deceased died intestate.

Distribution of the Estate

[32] Having found the will of the deceased to be invalid, the deceased died intestate. The deceased left behind sons and daughters, namely:-

1. JUDITH KIENDE

2. EDWARD MURIUKI

3. FLORENCE MWARI MUREMERA

4. DAVIS KIUMBE M'MUREMERA

5. GLADYS MUKUBA MUREMERA and

6. JULIA MAKENA MUREMERA

[33] Section 38 of the Law of Succession Act should apply in this matter. The section provides:-

> ***38. Where intestate has left a surviving child or children but no spouse 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 be equally divided among the surviving children.***

[34] However, the objectors seem to accept some differentiation perhaps because the petitioner took care of the deceased when he was alive. Accordingly, the estate property listed below shall be distributed as was proposed by the objectors as follows:-

L.R. NO. KIIRUA/RUIRU/280 approx. 16.55 ACRES

a. Edward Muremera 3.6 Acres

b. David Kiumbe 2.6 Acres

c. Judith KIENDE Mwariumwe (deceased)- 2.6 Acres to go to her children in equal shares

d. Florence Gaiti 2.6 Acres

e. Gladys Mukuba 2.6 Acres

f. Julia Makena MUremera 2.6 Acres

L.R. NGUSISHI SETTLEMENT SCHEME/433 approx. 2 HA (5 ACRES)

a. Judith Kiende Mwariumwe (deceased)- 1.25 Acres to her children in equal shares.

b. Florence Gaiti 1.25 Acres

c. Gladys Mukuba 1.25 Acres

d. Julia Makena 1.25 Acres

L.R. NTIMA/IGOKI/1443 MEASURING 1.05 HA (APPROX 2.5 ACRES)

a. Davis Kiumbe Muremera WHOLE

L.R. NO. NTIMA/IGOKI/1754 MEASURING 0.43 HA (APPROX 1 ACRE)

a. Edward Muremera Whole

MOTOR VEHICLE REG KSS 595 (PEUGEOT 404)

a. Davis KiumbeMuremera

SHARES AT MIRIGA MIERU BUILDING CO-OP SOCIETY

a. Edward Muremera

[35] I revoke the grant made to the petitioner, I now issue a grant of letters of administration to the petitioner and Edward Muriuki Muremera for the objectors seems to have bestowed trust and confidence in him. He swore affidavits on their behalf. I also confirm the said grant in the terms of paragraph 30. It is so ordered.

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

F. GIKONYO

JUDGE

In presence of

M/s Mbijiwe for petitioner

Kaumbi for object – Mokua holding brief

F. GIKONYO

JUDGE