



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 591 OF 2007**

**ESTATE OF NJONJO NGUNJURO KIHIGA (DECEASED)**

**JUDGMENT**

1. Njonjo Ngunjuro Kihiga died on the 2/10/2003 aged 83 years. As per the letter from his local chief (Kabazi Location) he was survived by a widow and children namely;

1. Grace Wanjiru Njonjo – widow
2. Kimani Njonjo
3. Gachiingu Njonjo
4. Wangari Njonjo
5. Mwangi Njonjo
6. Ng'anga Njonjo

He was survived by 2 children from his first wife (deceased) being;

1. Benard Kamau Njonjo
2. Hannah Wangui Njonjo

2. A grant of letters of administration intestate was issued to Benard Kamau Njonjo on 22/4/2010. He proceeded to take out a summons for confirmation of grant on the 22/10/2010.

3. That summons elicited a protest from Grace Wanjiru Njonjo who through an affidavit of protest against distribution disagreed with the mode of distribution proposed by Benard Kamau Njonjo and further stating that the deceased had made a written will before his death.

4. In an affidavit sworn on the 3<sup>rd</sup> February, 2011, Benard Kamau impugns the affidavit of protest on grounds that the said affidavit is indicated as sworn by Grace Wanjiru Njonjo on the 1<sup>st</sup> page but the same is sworn by Stephen Kungu Kamau on the jurat. It is further urged that no mode of distribution is proposed and neither is the alleged will annexed (The record does not show this proposition).

5. On the 4/4/2011, directions were taken that the matter be disposed off by way of viva voce evidence.

6. The administrator Benard Kamau Njonjo called 2 witnesses, himself (PW1) inclusive. It was the administrators evidence that the deceased left behind land parcels as follows;

1. Kabazi/Kabazi/Block 374 (Jumatatu) measuring 1.6 Ha.
2. Kabazi/Kabazi/Block 1/852 (Jumatatu) 0.42 Ha.

7. PW1 stated that land parcel number Maji Mazuri Block 1 (Igre) 747 measuring 1.606 Ha belonged to Margaret Wangari Kamau. He produced a search certificate (exhibit 3a). He denied inheriting the land and states that it was brought by his wife.

8. He further stated that he was not aware of any will by the deceased. It is his position that if there be one, then it is fraudulent. He prayed that the two (2) properties be divided into two (2) between the two (2) wives.

9. PW2 told the court that he was a committee member of Jumatatu Co-operative Society. He was the secretary between 1964 and 1991. He said that the deceased herein had appointed Benard (PW1) as a nominee. The deceased had plot numbers Kabazi/Kabazi/Jumatatu Block 2/374 and Kabazi/Kabazi Block 2/282 (sic).

10. The protestor (DW1) testified that the deceased had 3 parcels of land. These were plots number 374 and 852 (Jumatatu) and plot number 127 (Iguire). She stated that she was living on plot number 374. She added that the deceased left a written will in which he bequeathed her parcel number 374 and 852. Parcel number 127 (Iguire) was bequeathed to administrator (Benard). A sister to Benard was not left with anything but the deceased indicated that should the sister ever return, she was to be given a plot to stay on.

11. DW2 testified that he was the chairman of Jumatatu Farm. The deceased made a written will in the presence of DW2, Mwaniki Njoroge and Christopher Kiboi. Njoroge and Kiboi were treasurer and secretary of Jumatatu Society. He stated that at the time the deceased was in good health and he signed the document of his own free will.

12. On cross-examination, DW2 stated that the will exhibited in court had no date.

13. Both parties filed written submissions.

14. I have had occasion to consider the pleadings, the evidence and submissions on record.

15. Four (4) issues emerge for determination;

1. Whether the deceased left a valid will.
2. If in the negative, what mode of distribution of the deceased estate should the court adopt.
3. If (1) is in the affirmative whether the said will failed to make reasonable provision for some dependants.
4. Based on the answer to (3) above, whether the will should be varied to provide for dependant(s) left out.

16. As regard the existence of the will, the protestor has tabled in court exhibit marked P. Exhibit 1 – the will. The same is undated. It is witnessed by Simon Mburu who testified as DW2 together with Christopher Kiboi and Mwaniki Njoroge. The deceased has signed it and the witnesses too.

17. The challenge posed to the will by the petitioner (Benard) in his evidence is that he did not know of any will, he knew the deceased's signature and he was of the opinion that the alleged will was not the deceased's. He further states that he had been shown a register from Jumatatu farm showing that he was to be in charge of Jumatatu farm.

18. In support of the will, Simon Mburu testified that he was present and he witnessed the writing of the will and the signing of the same by the deceased on the one hand and Mwaniki, Njoroge and himself (the witnesses).

19. **Section 11** of the **Law of Succession Act** provides for the ingredients of a valid will.

**Sec 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."**

20. The burden of disproving a will must of necessity be high on the person so challenging it. And this for a good reason. The wishes of the deceased as regards the disposition of his free property must at all times be respected.

21. In a society where experience shows that majority of wills by deceased persons come under challenge, extra care must be taken to ensure that such challenges are bona fide.

22. If care is not taken, there is all the likelihood of having wishes of a deceased being substituted with the wishes of a living person. The unfortunate bit is that at the time the will is being contested the deceased's spirit is long gone and the body is six (6) feet under the soil and

without any capability to utter a single word in defence of his or her wishes.

23. It cannot be gain said therefore, that the task of challenging a will cannot be a light one. It must be predicated on cogent and tangible evidence whose veracity must be vigorously tested in trial.

24. Other than stating that the alleged will is fraudulent and that the signature on it is not the deceased's, the petitioner offered no evidence in support of his allegations.

25. It is the petitioner who alleges that the will is a forgery. This is a serious allegation that if proved gives rise to a cognizable offence in law. The burden to prove it falls squarely on the petitioner's shoulders. Indeed, by its very nature, the standard of proof required of him was obviously one that is higher than that required in ordinary civil cases, i.e. prove upon a balance of probabilities, even though bearing in mind that the burden was certainly not one beyond reasonable doubt as in criminal cases.

26. Looking at the evidence in totality, I am satisfied that the deceased made the will produced herein and the same satisfies the requirements of **Section 11 of the Law of Succession Act.**

27. And whereas the said will is not dated, the law does not invalidate an undated will. Such a will can obviously lead to a lack of clarity as to whether the document in question truly represents the deceased's last wishes. The burden, however, to show that there existed other wishes after such a will must fall on the person challenging the will.

28. From the foregoing issue number 2 listed above is spent which leads me to issue number 3 for determination.

29. Did the deceased fail to make reasonable provision for some dependants? There is no dispute that the petitioner and his sister Hannah Wangui Njonjo are children of the deceased by his first wife (deceased).

30. It is also not disputed that the deceased had at the time of his death six (6) other children with the protestor.

31. The will herein bequeaths the entire estate to the objector in exclusion of all the children of the deceased.

32. So what befalls the children and especially the children of the first wife noting that the protestor would in ordinary expectation take care of the interests of her own children?

33. Confronted by such a scenario, the **Court of Appeal** in **ELIZABETH KAMENE NDOLO AND GEORGE MATATA NDOLO [1996] eKLR** stated as follows;

**“In his lifetime the deceased was a polygamous man married to three wives. Polygamy is a lawful institution in our country and it will probably taken some doing by Parliament to put an end to it. The seeds of the dispute were sewn by the deceased himself when he failed to make any provision in his will for his first two wives. This court must however, recognize and accept the position that under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is expressly recognized by section 26 of the Act which provides as follows:-**

**Where a person dies after the commencement of this Act and in so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law is not such as to make reasonable provision for that dependant, order that such reasonable provision, as the court thinks fit, shall be made for that dependant out of the deceased's net estate.”**

34. The only justification offered by the protestor why the petitioner was disinherited in the will is that he was given land being Maji Mazuri Block 1 (Ifigure) 747 by the deceased during his lifetime.

35. No iota of evidence was forthcoming during the hearing in support of this proposition and whatever evidence that may be said to exist is completely whitewashed by the evidence of the petitioner that the said land was registered in the name of Margaret Wangare Kamau and not the deceased and therefore the deceased was not in a position to gift this land to the petitioner.

36. It follows then, therefore, that this court has a duty, being a court of law and equity, to find and hold that while the deceased was entitled to dispose of his property as he pleased, he was not entitled to leave the 1<sup>st</sup> house without any reasonable provision from his estate.

37. Like held in Elizabeth Ndolo case above, the only way I can think of to achieve justice in this matter is to make reasonable provision for all the deceased's lifetime dependants. This will best be achieved by providing for both houses of the deceased.

38. Guided further by the decision in Elizabeth Ndolo case, I will take into account that the deceased had his own reasons why he preferred the protestor to get a lion's share of the estate, and noting the number of children in the petitioner's house, I will allocate to her house a larger share of the deceased's net estate.

39. With the result that the protest herein partially succeeds, there shall be orders in the following terms;

1. The protest is allowed to the extent that the deceased left a valid will.
2. A grant of probate with will annexed is issued to Grace Wanjiru Njonjo.
3. That the said grant of probate is confirmed on the following varied terms on distribution;

**NAME DESCRIPTION OF PROPERTY SHARE OF HEIRS**

BENARD KAMAU NJONJO KABAZI/KABAZI BLOCK 2/852 (JUMATATU) 1/3 SHARE

To hold in trust for himself

and HANNAH WANGUI

NJONJO

GRACE WANJIRU NJONJO KABAZI/KABAZI BLOCK 2/852 (JUMATATU) 2/3 SHARE

To hold in trust for herself

and

KIMANI NJONJO

GATHIINGU NJONJO

WANGARI NJONJO

MWANGI NJONJO

NGANGA NJONJO

NJERI NJONJO

BENARD KAMAU NJONJO KABAZI/KABAZI BLOCK 2/374 (JUMATATU) 1/3 SHARE

To hold in trust for himself

and HANNAH WANGUI

NJONJO

GRACE WANJIRU NJONJO KABAZI/KABAZI BLOCK 2/374 (JUMATATU) 2/3 SHARE

To hold in trust for herself

and

KIMANI NJONJO

GATHIINGU NJONJO

WANGARI NJONJO

MWANGI NJONJO

NGANGA NJONJO

NJERI NJONJO

40. Each party to bear its own costs.

**Dated and Delivered at Nakuru this 11<sup>th</sup> day of December, 2018.**

**A. K. NDUNG'U**

**JUDGE**