



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO.30 OF 2015

IN THE MATTER OF THE ESTATE OF M'BIRISI MAETI (DECEASED)

FREDRICK NKONGE NJERU..... APPLICANT

VERSUS

FRANCIS JOHNSON KABURU.....PETITIONER

R U L I N G

1. This cause relates to the estate of the late **M'BIRISI MAETI** who died on 23rd June 2011 at Chuka Hospital resident at a place called Chamunga within Tharaka Nithi County. According to the petition for letters of administration and the Chief's letter the deceased left the following dependants surviving him namely:-

- (i) Damaris Ithiu Njeru - wife/widow
- (ii) Asenath Mukwanjiru Njeru - wife/widow
- (iii) Johana Salai Njeru
- (iv) Salome Gaaji Njeru
- (v) Fredrick George Nkonge
- (vi) Scolastica Kaari Njeru
- (vii) Salesio Marangu Njeru
- (viii) Irene Mukwaiti Njeru
- (ix) Lawrence Kinyua Njeru
- (x) Purity Kanini Njeru
- (xi) Francis Johnson Kaburu
- (xii) Silvester Muthoni Njeru
- (xiii) Jenesio Nyaga Njeru
- (xiv) Inocensia Mukwanyaga
- (xv) Patrick Mbae

(xvi) Nicholas Micheni Njeru

(xvii) Japhet Gitonga Njeru

(xviii) Boniface Justin Mutembei M'Birisi

2. The properties comprising the estate as listed in the petition are as follows:-

(i) Muthambi/Chamunga/495, 652 and 653

(ii) Upper Kandungu Adj. Section/1280, 1284 and 335

(iii) Upper/ Karimba Adj. Section/1232, 1233

(iv) Mariani Adjudication Section 1252

(v) Plot No. 12 Mitheru

(vi) Bank Account No.[...] (Meru South Farmers A/C)

(vii) Upper Karimba

(viii) Muthambi

3. Francis John Kaburu was appointed the administrator of the estate of the deceased herein on 6th October, 2015 and this elicited 2 objections. The first objection was by Fredrick Nkonge, one of the beneficiaries who filed a motion dated 12th September, 2011 stating that the Petition for letters of administration was misplaced as the deceased had left a valid will.

4. Secondly Boniface Justin Mutembei Mbirichi also filed a protest stating that L.R NO MUTHAMBI/CHAMUNGA/652 & 653 had been distributed through an award by Lands Disputes Tribunal No. L.D.T No. 47 of 2010 which award was adopted as the judgment of the court vide Principal Magistrate's Court No. Land Dispute Tribunal No.47/2010 on 22nd September, 2010. The petitioner Francis Kaburu denied the existence of the will terming it invalid as some properties comprising the estate were left out according to him.

5. This court decided to set down the matter to determine the validity of the will before addressing any other issue arising.

6. The first witness to testify for the applicant, was Mr. Ileri Charles Mugo, the advocate who drew the will. Ileri Charles Mugo (PW1) told this court that he first came to know the deceased when he approached him for consultation over an Land Dispute Tribunal matter which was in court. He further told this court that the deceased later approached him over a caution that had been placed by Francis Kaburu on his properties Muthambi/652 and 653 and that advised him to file a suit which he did successfully. He further added that the deceased also approached him with a view to writing a will and he advised him to go to his office with two witnesses which he did on 7th January, 2011. According to Mr. Mugo Advocate, the deceased went to his office accompanied by two persons namely Kaburia and M'Rinkanya. Upon taking instructions Mr. Mugo told this court that he had the will drawn and read over the contents to the testor (deceased) and his two witnesses and demanded to know if the will reflected his wishes and according to him, the deceased was satisfied with what he had drawn. On the basis of that he asked him to append his signature on the will before asking the attesting witnesses to also append their signatures. Mr. Mugo added that he appended his own signature on the 3 copies of the will and duly stamped them after which he kept the 3 copies of the will as per instructions recovered from the deceased. Mr. Mugo further told this court that later in June 2011 two persons namely; Francis Kaburu and Fredrick Nkonge went to his office inquiring whether their father who had passed on had left a will. Mr. Mugo stated that he advised the two to later come after the funeral when he would read the will in the presence of all the family members. He later read the contents of the will to the family members who turned up in his office a week later and gave them a copy of the will which he tendered in this court as P. Exhibit 1.

7. Anslas Kaburia Kanampiu (PW2) told this court that she was close to the deceased and confirmed that she attested the will made by the deceased at Mugo's office together with one Zaberu M'Rinkanya who is now deceased.

8. Fredrick Nkonge Njeru (PW3) testified and told this court that the deceased was his father and had learnt from the deceased while he was hospitalized in 2011 that he had written a will and left it with the advocate. After the deceased passed on he and Francis Kaburu went to Mr. Mugo Advocate and confirmed that indeed there was a will. Salome Gaaji Riungu (PW4) also testified and told this court that the deceased had sent her to carry out official searches on his properties. She accused the petitioner, Francis Johnson Kaburu, her step brother stating that the said Francis Kaburu was always a torn in the flesh of their father (the deceased) and that he never respected him and pointed out the example of disrespect on the caution Francis Kaburu placed on Muthambi/Chamunga/652 and 653 to prevent the subdivisions the deceased had intended to carry out. She added that the deceased had to sue his own son vide Chuka Principal Magistrate's Court Civil Case No.24/2010 to remove the caution. She further added that the Petitioner Francis Johnson Kaburu, Boniface Mutembei and Mbae Johnson stopped the burial of the deceased asking that the will be read first before any burial could go on and that they went and requested Mr. Mugo to accompany them home in order to read the will, a request turned down by Mr. Mugo for safety reasons.

9. Lawrence Kinyua Njeru (PW5) testified and accused his step brothers for refusing to acknowledge the existence of the will when they knew all along that their late father had left a written will. He told this court that his late father had intended to subdivide his parcels Nos.652 and 653 into 20 portions and give every beneficiary a portion.

10. On the other hand, the objector to the will Francis John Kaburu, told this court that he was one of the sons of the deceased and only heard that a written will had been distributed to the dependants but was not present when the will was read. He told this court that his late father did not write a will and that is why he filed for letters of administration because in his view the deceased died intestate.

He further told this court that from early December 2015 his late father (deceased herein) was ailing and was on constant medication until he passed on on 23rd June, 2011.

11. According to the objector, the written included some properties which does not form part of the estate. He pointed out the will had been altered to read January 2011 and also stated that the will had been tampered with. According to him the signatures of attesting witnesses were all fake. He however conceded that he accompanied Fredrick Nkonge to Mr. Mugo's office to inquire about the will when his father died. He told this court that Mr. Mugo requested that all the family members do go to his office for purposes of reading of the will but that he failed to go to Mugo's office on the appointed date.

In his view the distribution of the estate as per the will was not equitable and faulted the will for misdescription of some of the properties comprising the estate. He also faulted the testator for providing for himself in the will.

12. The Objector submitted that the will was invalid because the will drawn shows some confusion which suggests that the deceased lacked capacity to write the will at the material time. He submitted that the will should be ignored and the cause be treated as an intestate cause.

13. The issue for determination in this cause is whether the will dated 7th January, 2011 written by the deceased is valid.

14. The provisions of **Section 5(1) of Law of Succession Act** underscores testamentary freedom. The section reads;

"..... any person who is of sound mind and not a minor may dispose of all or any of his free property by will".

The formal requirements of a valid will are coded under **Section 11** of the **Law of Succession Act** which state as follows:-

"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 discretion of the testator.

b. the signature or mark of the testator or 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 in no particular form of attestation shall be necessary. (Emphasis added.)

The above provisions show that for a will to be valid four requirements must be met namely;

- (i) The will must be executed by testator with testamentary intent.
- (ii) The testator must have had capacity to make the will.
- (iii) The will must have been executed out of free will free of fraud, duress undue influence.
- (iv) The will must be duly executed as provided by law.

15. The objector in this cause has raised the issue of capacity stating that the deceased may not have been well and/or that he lacked capacity to make a will. The law under **Section 5 (4)** places the burden of proof to whoever alleges that the testator lacked capacity. The provisions under subsection 3 provides;

" Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

Under Subsection 4 of the same provision to the law states,

"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 alleges."

The Objector had an obligation in law therefore to place material or evidence before this court that proves that on 7th January, 2011 the deceased was in such a state that he was unable to make a valid will. This court finds that the objectors have placed no such evidence before this court. His allegations that the deceased was sickly and was on medication remains just that. Allegations with no proof. In the case of Allan Awonche Atwak -vs- Florence Achieng Siambe & Another [2007] eKLR, Hon. Koome J while determining a challenge on a written will referred to "Halsbury's Law of England 4th Edition Vol.17 paragraph 903 where the author stated:

"General burden of proof;

Generally speaking, the law presumes capacity and no evidence is required to prove testator's sanity, if it is not impeached. A will, rational on the face of it and shown to have been signed and attested in the manner prescribed by law is presumed in the absence of any evidence to the contrary, to have been made by a person of competent understanding....."

16. In light of the above decision it is very clear given the evidence tendered that the deceased herein was capable of making a will and did indeed make a valid duly drawn and attested by attesting witnesses including Mr. Mugo Advocate. The attestation was done in accordance with the law and this court does not find merit on the objector's allegations that the will was forged and/or altered on account of apparent alteration of letter 'J' on the date appearing on the will. The objector did not call a document examiner to confirm that the signature on the will did not belong to the deceased. This court finds that the will filed conforms with the legal requirements as laid out above. I am also not satisfied that the will should be invalidated for the reasons that there are some properties forming the estate which were left out. If there are properties left out, then this court would treat such properties in accordance with the provisions of law dealing with intestate properties. However I am not persuaded at this stage that there are such properties because the objector has not cited save for the 2 acres that he states the deceased allotted to himself. That 2 acres in L.R.Muthambi/Chamunga/653 shall be treated as an intestate estate of the deceased person. A will cannot be invalidated simply because some properties forming the estate have been left out because the law allows the testator to partially will away his properties. So even if it had been established that some properties forming the estate of the deceased were not included. This court would still have treated the estate partially testate to the extent of the assets or properties mentioned in the will and part intestate to the extent of some properties not mentioned in the will.

17. On the question of misdescription of some of the properties comprising the estate in the will, the law (**Section 22 of Law of Succession Act**) provides that wills should always be construed to effect the intention of a testator. **Rule 23** of the First Schedule provide as follows:-

" Where words used in a will to designate or describe a legatee or a class of legatees, sufficient to show what is meant, an error in the name of description shall not prevent the legacy from taking effect and it shall be sufficient for this purpose if the legatee, or class of legatees is so designated as to be distinguished from every other person or class."

Where a testator makes a mistake on actual names of a beneficiary or a legatee the law allows correction of the mistake so long as the intention of the testator can be positively identified. This also applies to situations where the testator like in this cause apparently misdescribes the property he intended to bequeath so long as the property can be sufficiently identified from the description given, the will takes effect and must be respected. Last wills of departed persons must be respected and courts of law will always try as much as possible to construe the intention of a testator so long as the intention can be construed without any ambiguity or absurdity. In this cause the intention of the testator can clearly be construed for example where he has described a property as Muthambi/Upper Kandungu/1283, instead of Muthambi/Upper Kandungu/1238. This court can clearly construe the intention of the testator and correct the parcel number to read 1238 instead of 1283 and give effect to the will. A will certainly cannot as observed above be invalidated solely on minor misdescription of a parcel number of land. The deceased clearly knew where his properties were situated and was clear in his mind as to what properties he was bequeathing to various legatees.

18. In view of the foregoing this court find that the deceased in this case died partially testate to the extent of testate dispositions made in his last will dated 7th January, 2011. In view of the fact that he duly appointed an executor of his will, this court shall appoint George Nkonge Njeru the executor/administrator of the estate of the late M'Birisi Maeti and revokes the appointment of Francis John Kaburu as the administrator of the estate of the deceased in this cause. This court further finds that to the extent that the deceased left part of the estate undistributed particularly the 2 acres he bequeathed to himself, he shall be treated to have also died partially intestate and the 2 acres of land and any other property not mentioned in the will as may be identified by the beneficiaries in this cause shall be treated as intestate estate and the law applicable to the same shall be applied accordingly.

19. On the issue raised by Mbirichi Bonface Justine Mutembei regarding Land Dispute Tribunal No.47/2010, this court finds that Lands Disputes Tribunal had no jurisdiction to distribute an estate of a person during his lifetime or even upon his demise. That cited award is a nullity in law *ab initio* and there is no basis for this court to be told that that property known as L.R Muthambi/Chamunga/652 and 653 can only be distributed in this cause in accordance with an illegal finding of a body that was bereft of jurisdiction to make such findings. The protest by Mbirichi Bonface Justine Mutembei is therefore untenable in law and cannot be sustained.

In sum this court upholds the validity of the will dated 7th January, 2011.

The estate of the deceased shall in so far as far the said will provide shall be distributed in accordance with the will of the late M'Birisi Maeti. The appointed administrator/executor is given liberty to apply. I will not make any order of costs at this stage.

Dated, signed and delivered at Chuka this 10th day of December, 2018.

R.K. LIMO

JUDGE

10/12/2018

Ruling dated signed and delivered in the open court in presence of parties and Kaaria for applicant and Kimathi for Petitioner/Respondent.

R.K. LIMO

JUDGE

10/12/2018