



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE 1088 OF 2005
IN THE MATTER OF THE ESTATE OF JOSEPH GICHANGA KIMANI (DECEASED)
JUDGMENT

INTRODUCTION

Joseph Gichanga Kimani (deceased) died on 26th March 2005.

His family comprises of the following as per the Court record;

1st House.

Leah Njoki Kimani (1st wife; later separated and divorced now deceased)

1. **Alexander Kimani**
2. **Edwin Kiarie**
3. **Leonard Gichuru**
4. **Daniel Mburu**
5. **Andrew Gitau**

Risper Wamaitha Gichanga (2nd wife and widow to the deceased)

1. **Lawrence Kimani Gichanga**
2. **Elizabeth Wanjiru Gichanga**
3. **Keziah Gathoni Gichanga**
4. **Felix Kariuki Gichanga**

PLEADINGS

The Petitioner Risper Wamaitha Gichanga widow of the deceased filed petition for grant of Probate or letters of administration with Will annexed on 3rd May 2005 for administration of deceased's estate.

The Petitioner named all children of the deceased. The assets that comprise of the said estate are;

1. **Kajiado/Kipeto/425**
2. **Ngong/Ngong/21013**
3. **Kajiado/Kisaju/641**
4. **Ngong/Ngong/27934**
5. **Ngong/Ngong/18618**
6. **Ngong/Ngong/18619**
7. **Ngong/Ngong/23331**
8. **Ngong/Ngong/21005**
9. **Ngong/Ngong/19848**
10. **Kajiado/Olchoro-Onyore/2175**
11. **Ngong/Ngong/27935**
12. **145/Business-Ongata Rongai**
13. **141/Business-Ongata Rongai**
14. **M/vehicle KAS667H**
15. **M/vehiclekak201G**
16. **Bank A/C KCB [particulars withheld] OngataRongai**
17. **Bank A/CKCB [particulars withheld] Ongata Rongai**

On 1st July 2005 and 15th July 2005, Leah Njoki Kimani; the 1st widow of the deceased filed Notice of Objection to Making a Grant under Rule 17(1) of probate and Administration Rules.

The grounds were;

The deceased died intestate and did not leave a Will; the purported Will is not genuine but fabricated and signatures are forgeries. The purported Will did not provide for Objector and children of the deceased as they are heirs to the deceased's estate. The Will was not drawn according to Law.

She objected on the basis of concealed material facts and that the Will of the deceased of 26th April 1995 was and is a forgery. There were assets that ought to be part of the deceased's estate that were left out; namely;

1. **Water Bore Hole at 145 Rongai (fetched 3,000/- a day)**
2. **Windmill at Ngong /Ngong/27935**
3. **House on Ngong/Ngong/27935**
4. **Kilimo House/Rongai Shopping centre**

5. Karen-Bogani road-5 acres

6. Diani Property

The Objector filed Petition by way of cross-petition application for grant on 2nd September 2006 and sought grant of letters of administration intestate on similar grounds as above.

On 3rd August 2006, Alexander Kimani Gichanga filed application under certificate of urgency for hearing of the Objectors application to making of grant.

HEARING

PW1 Alexander Kimani Gichanga testified that he is first born son to the deceased by his 1st wife Leah Njoki Gichanga who died in 2009.

His mother was married to his father in 1954 and she left the matrimonial home in 1965. The deceased lived with the Petitioner from 1972 to 2005.

In 2005 after his father's death, he asked the Petitioner if there was a Will and he was informed there was no Will. 1 month later the Will of 26th April 1995 was produced. In it was a claim that he had been given property by the deceased during his lifetime and so he was not to claim anything more than what he allocated him. He told the Court he was not given any land or motor vehicle by his late father during his lifetime. The only property the deceased gave him in 1986 was 1/8 plot in Kiserian /Ngong which he sold for ksh.25, 000/- at the time.

In his affidavit filed on 6th March 2009, PW1 deposed that after his mother left the matrimonial home, he remained with his father who brought him up and paid his school fees up to Form Four.

The witness deposed that the Petitioner did not directly contribute to the purchase of assets that comprise the deceased's estate.

After the deceased's death, the Petitioner carried out developments on the properties as sole owner to the detriment of other beneficiaries.

He sought a share of the deceased's estate and asserted he had not been allocated any property. It is unfair and unjust that their mother was not provided for, neither were the 5 sons of 1st wife of the deceased and their late mother was dispossessed of any share of their late father's estate. She died before she prosecuted the objection to making of grant of the deceased's estate.

PW2 Ms Alice Jonathan Tsiyeri Gulenywa Advocate of the High Court of Kenya testified that she worked for Advocate Grace Githu from 1994-1998. During this time she came across the late Joseph Gichanga Kimani (deceased) who came to their offices but Ms Grace Githu was out of the country and the Secretary called Scholastica ushered him to her office. He came in and said he wanted to transfer properties to his family in Nakuru and the one in Nairobi. She asked him to come back when Ms Grace Githu came back.

On a later date, the client came back and Grace Githu Advocate was in the office. He gave instructions and the office Secretary called Scholastica typed the Will.

She was called in and she witnessed Grace Githu Advocate witness the signing of the Will by deceased and also signed and she inserted the office stamp. She also witnessed and signed the Will. Ms Grace Githu is deceased.

PW 3 Assistant Superintendent of Police Michira Ndenge informed Court that on 16th July 2014, he received from E.M.Obonyo Advocate documents for examination. He received the following documents;

- a. Letter dated 10th July 2014 from Daniel Mburu one of the deceased's sons.**
- b. Original application for Land Board Consent that contained a signature.**
- c. Copy of the Will of the deceased dated 23rd September 1987 signature of testator on Page 2 of the Will.**
- d. Copy of Will dated 26th April 1995 signature of the testator at page 3 of the Will.**

He examined the signatures in the said documents as follows;

He compared the signature on the Will of 26th April 1995 marked A' and the signature on the Will of 23rd September 1987 marked B' and the signature on the document Application for Land Board Consent of the known signature of the deceased.

He subjected the signature specimens to image enhancements and magnification procedures and found that they were not from the same author. He produced his report as exhibit 1 in court.

On cross examination by Counsel for the Petitioner, the expert witness confirmed that examination of the signatures was pursuant to a private litigant request through the advocate and the examination was not based on a Court order. He further admitted that the wills in question were copies and that they were not certified.

PW4 Daniel Mburu Gichanga testified in this Court on 6th September 2016 and 3rd October 2016. He filed affidavits on 9th March 2009 and on 30th July 2010. He stated as follows;

The deceased and his late mother were married under Kikuyu customary law in 1954 and converted to a statutory marriage in 1956. They had 5 sons and in 1965 they parted due to domestic differences. The children were left with their father, the deceased.

In 1970; the deceased cohabited with the Petitioner and in 1972 the deceased sent him away from home because differences arose as the Petitioner molested his youngest brother Edward Kiarie. The deceased stopped taking care of them and they went to their late mother who supported them.

He grew up and became a surveyor and dealt with his late father in acquisition of properties.

Therefore they maintained close contact and remained quite close. He tried to reconcile his parents but was not successful.

During the hearing, he stated that he objected to Will of the deceased due to the following grounds;

- a. During his father's funeral they enquired whether there was a Will and the same was not revealed.**
- b. He is conversant with his late father's documents' handwriting and the signature on the Will is not the deceased's signature.**

The deceased did not sign the Will on every page as he did in agreements.

c. His father dealt with Waruhiu & Muite Advocates and Gathenji Advocates. The Will was drawn by Grace Githu Advocates. After her demise on enquiry from Law Society of Kenya, they were advised to contact Igeria Advocates. It was strange that they were contacted by Njuguna Advocates and were issued copies of the Will.

d. At the time of his father's death, he was out of the country; however, before he left, the deceased in the presence of elders sought to hold a meeting with his family to distribute his

estate. The meeting was not held. Therefore they were not allotted any properties as is indicated in the Will.

e. There are 2 properties that the deceased purchased with his knowledge and support. Yet they were not included in the deceased's Will; Kisaju 641 and Kipeto 425.

Since then, they have been in court for 11 years and the 1st Family was deprived of fair share of the deceased's estate.

He confirmed that he instructed his lawyer to engage an expert to authenticate the signature and writing on the Will and availed documents that had his genuine signature and handwriting. He also took issue with the Will of 26th April 1995 by Ms Grace Githu Advocates as signature was forged.

The Petitioner despite service did not attend Court or provide any evidence for this Court to consider. However, throughout the proceedings she was represented by Counsel who cross examined witnesses.

In the absence of the petitioner's testimony, the Court made reference to the Petitioner's Affidavit to objection of making a grant application filed on 16th March 2009. The Petitioner concedes that the Objectors are 1st family of the deceased. She deposed that they resided in L.R. Dagoretti/ Kinoo/1025 as their matrimonial home. The 1st wife deserted the deceased in 1965 to live in Nakuru and left him with 5 sons to bring up. The deceased and 1st wife divorced in 2002 vide **HC DC 203 of 2001** as shown by attached copy of judgment.

The deceased married her under Kikuyu customary law after 5 years from the time the 1st wife left and converted to a statutory marriage in 1970. They lived together for 35 years and had 4 children together until his death in 2005.

The Petitioner's matrimonial home is situated in **L.R. Ngong/Ngong 27935 and 27934.**

The Petitioner deposed that the deceased prior to his death settled with his former wife and her 5 children properties that they had acquired and inherited.

The petitioner stated that after several meetings at Kiambu District Commissioner's office; on 16th August 1991 the 1st wife and her children accepted and executed a settlement agreement at the DC's office; a copy attached as **RWK 5**

The deceased reiterated this position shown in the Written Will of 26th April 1995 that his sons Alexander Kimani and Daniel Mburu have no further claims on his estate.

The deceased further declared that he bequeathed **Dagorretti/Kinoo 1025/1027/1028** to Leonard Gichuru, Andrew Gitau & Edwin Kiarie. That the listed properties that comprise of the deceased's estate as stated above belong to the Petitioner and her children solely.

The 1st Wife now deceased and her children accepted in good faith what her husband and their father gave them.

ISSUES

This court has considered the pleadings evidence on record and submissions for analysis. It is called upon to determine the following issues;

1. Did the deceased leave a valid Will?

2. Which Will is valid; the Will of deceased of 25th September 1987 or the Will of 26th April 1995?

3. **Should the Court issue a grant of probate with Will annexed or grant of letters of administration intestate?**

4. **Should the deceased's estate be administered and distributed according to the Will or intestate process according to Law of Succession Act?**

ANALYSIS/DETERMINATION

The law that deals with validity of the Will is as follows;

a) Section 5(3) of Law of Succession Act Cap 160 provides that for a written Will to be valid the person making it is of sound mind and the Will is duly executed.

Refer:

BANK vs GOODFELLOW [1870] LR QB 549

VAGHELLA vs VAGHELLA (1999) 2 E.A.351

b) Section 5(4) of Law of Succession Act Cap 160 provides that the burden of proof that a testator was at the time he made the Will not of sound mind, shall be upon the person who alleges.

REFER:

RE ESTATE OF GATUTHU NJUGUNA (DECEASED) [1998] eKLR JAMES MAINA ANYANGA vs LORNA YIMBIHA OTTARO & 4 OTHERS

SUCCESSION CAUSE 1 OF 2002 NAKURU HIGH COURT

In the instant case, PW1 and PW3 evidence on record did not allude to the deceased's incapacity in writing the Will. The Wills are of 1987 and 1995 respectively way before his demise in 2005 and therefore mental or physical incapacity was not raised in evidence. What they insinuated from the grounds of objection is that the signatures were forged and not by the deceased's hand and possibly the content of both Wills too.

PW3 Document Examiner produced the report on examination of the specimen signatures from copies of both Wills with known signature of the deceased in form of the Application for Land Board Consent and the earlier Will of 25th September 1987. His expert opinion is that the signatures were not by the same author.

This is expert opinion where the expert who by virtue of academic qualifications, experience and or research gives evidence arising from independent investigations and observations.

The Court is not bound to accept or rely on expert's evidence if there is any vitiating factor(s) on independence, process on investigation or any other reasonable ground.

The expert's evidence shall be considered alongside all other available evidence; PW2 the advocate who witnessed the written Will, testified that she saw the deceased in his Advocate's office and witnessed the deceased sign the Will, then his advocate Ms. Grace Githu Esq witness the same by signing and she then signed the said Will. PW2 had met the deceased before this day as he came to look for Ms Grace Githu who was not in the office. She was conversant with Grace Githu's signature; she signed various documents in the office. No evidence was adduced to controvert her testimony although, Ms Grace Githu Advocate did not testify as she is deceased.

Conversely, this Court questions why the Objectors without an application made to Court for an order for examination of the Will, sought on their own effort to obtain copies of both Wills refer them to Director

of Criminal Investigations (CID) for examination. The fact of obtaining Document Examiners Report without Court order, and relying solely on uncertified copies of both Wills vitiated independent and conclusive investigations and outcome of the examination.

Against this evidence even in the absence of alternative expert evidence, this Court is satisfied that the deceased wrote and signed the Will of 26th April 1995 in the presence of Advocate Grace Githu Esq and PW2 Advocate Gulenywa. The written Will was executed in compliance with **Section 11 of Law of Succession Act Cap 160. Section 7 of Law of Succession Act Cap 160** provides;

A Will or any part of a Will , the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void.

The evidence on record confirms that the deceased wrote the 1st Written Will on 25th September 1987. In this Will he bequeathed the 5 sons of 1st wife 2 acres in LR Ngong/Ngong 5425 in equal shares and 3/4 interest in LR Diani Plot 214 and the rest of the estate to Petitioner and 4 children. Thereafter, an agreement dated 16th August 1991 was signed by District Commissioner Kiambu, Joseph Gichanga Kimani (deceased) Leah Njoki Kimani (deceased) 1st wife of the deceased and Gichuru Kimani, Gitau kimani and Kiarie Kimani 3 of the 5 sons of the deceased by 1st Wife signed the agreement allegedly agreeing to have Caution removed by 1st wife on Dagoretti/Kinoo 1025, 1027, 1029 and 1030. Thereafter, Dagoretti/Kinoo 1025, 1027 and 1029 were to be transferred to the 3 sons of the 1st wife. This agreement , the Petitioner claims in her Replying affidavit filed on 16th March 2009 at paragraphs 16, 17, 18 & 20 that the deceased had prior to his death settled and distributed properties he had acquired to his former wife and 5 sons as shown in the said agreement. Further, that the 1st Wife and children accepted in good faith what the deceased gave them and did not challenge him during his lifetime. Yet such acceptance is not confirmed from the agreement or in any other form.

Secondly the Agreement was not signed by 2 sons PWI Alexander Kimani and PWII Daniel Mburu.

This Court finds that the allegation is not borne out by the content of the said agreement. Leah Njoki Kimani 1st Wife, PW1 Alexander Kimani Gichanga and PW4 Daniel Mburu Gichanga were not allotted any property and PW1 and PW4 were not part of the meeting and they did not sign the agreement.

On 26th April 1995, the deceased wrote another Will as his last Will and Testament and unlike the previous Will, allocated all properties to the 2nd family; the Petitioner and their 4 children.

The 1st family was not allotted any properties except what the 3 sons were allocated in the above agreement. The 1st wife was not allocated any property and later died miserably and was buried in a public cemetery, despite the Objectors seeking Court orders to bury her on any of the properties. PW1 and PW4 were alleged to have been allocated property that was not specifically identified and were not entitled to any other property of the deceased.

Although the Will is valid in form; the Objectors claim is borne out by the above facts that the Will did not provide for Objector and children of the deceased as they are heirs to the deceased's estate. The Will was not drawn according to Law.

In **RE ESTATE OF G.K.K. (DECEASED) [2013]eklr** the Trial court relied on the case of **WINGROVE vs WINGROVE (1885) 11P&D**; Sir James Hanne stated;

To make a good Will, a man must be a free agent. But not all influences are unlawful. Persuasion appeals to affections of ties of kindred, to a sentiment of gratitude for past services or pity for future destitution or he like, these are all legitimate and may fairly be pressed on a testator...in a Will, the testator maybe led but not driven and his will must be the offspring of his own volition and not record of someone else.

The petitioner was with the deceased after his 1st wife left the matrimonial home. The deceased was left

with 5 sons to bring up. It is on record as per the affidavits filed and testimony of PW1 and PW4 that they at some point left their father's home after misunderstandings and allegedly due to the Petitioner's cruelty on the last born. The deceased stopped supporting them and were supported by their mother. These facts were not

controverted by the Petitioner and they strongly suggest that the Petitioner was hell-bent on isolating the 1st family from the deceased to her family's sole advantage and benefit.

The Petitioner over played her hand and drove the deceased to deprive his children from the 1st family by drawing various Wills and agreement at the behest of the Petitioner and in the end the deceased was influenced to a level where it cannot be said that he acted on his own volition. From the above observations and analysis the Will of 25th April 1995 cannot be said to be an expression of the deceased's intentions as envisaged by Section 7 of the Act, compared to the Will of 1987 where the deceased bequeathed the sons of 1st wife some property.

In light of the above finding, the deceased by the written will failed to make reasonable provision for deceased's dependants.

It is not disputed that the Objectors are children of the deceased as were named in the petition for grant of probate filed in court. By the Will of 26th April 1995, the deceased bequeathed all properties to the Petitioner and her children. The Objectors were not allocated property on the claim that they had been provided for during his lifetime. From the evidence on record the 3 sons of the deceased by the 1st wife were allocated Dagoretti/Kinoo1025, 1027, 1029 as per the agreement signed at the District Commissioner's office Kiambu. Curiously, PW1 and PW4 were not at the said meeting and did not sign the agreement. Naturally they were not allocated any property. The Will does not identify the properties allocated to the Objectors if any as was done in the case of the 3 other sons. The totality of the evidence on record confirms that the deceased did not allocate the 1st former wife now deceased and the 2 Objectors property.

IN THE MATTER OF THE ESTATE OF LATE SOSPETER KIMANI WAITHAKA SUCCESSION CAUSE 341 OF 1998 the Court held;

The will of the departed must be honored as much as it is reasonably possible. Readjustments of the wishes of the dead, by the living, must be spared for only eccentric and unreasonably harmful testators and weird Wills. But in matters of normal preferences for certain beneficiaries or dependants, maybe for their special goodness to the testator, the Court should not freely intervene to alter them.

In ELIZABETH KAMENE NDOLO vs GEORGE MATATA NDOLO COURT OF APPEAL CIVIL APPEAL 128 OF 1995 it was held;

This court must however , recognize and accept the position that under 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 [for] during his or her lifetime.

The courts respect and give effect to the testamentary freedom of a testator to distribute his/her estate to his/her family. However, the exercise cannot be at the expense of leaving our certain family members from inheriting from the deceased's estate.

Therefore since the deceased in the instant case distributed his estate to his family and seemingly left out the Objectors who fall under the definition of dependants;

Section 29 of Law of Succession Act Cap 160 stipulates; *for purposes of this Part, dependant means;*

a) wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.

This Court shall exercise its jurisdiction provided in

Section 26 of Law of Succession Act provides;

The Court may, if it is of the opinion that the disposition of the deceased's estate effected 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 such reasonable provision as the Court thinks fit shall be made for that dependant out of the deceased's estate.

It is apparent that although it is not contested that PW1 & PW4 are children of the deceased, the deceased's Will did not provide for them any property. **Article 27 of the Constitution 2010** amplifies non discrimination on the basis of gender, marriage amongst other issues. The children of the 1st wife were left out in administration and distribution of the deceased's estate. The agreement by the District Commissioner Kiambu was not fair and just to the deceased's 1st Family.

Therefore; to settle the longstanding dispute with regard to the administration of the estate of the deceased, the Will of 26th April 1995 though valid in form is invalid in substance to the extent of leaving out children of the 1st family specifically the objectors. The properties alleged they were given during the deceased's lifetime were not listed and they did not participate and sign the agreement at Kiambu District Commissioner's office. They could not have accepted in good faith the settlement as alleged by the Petitioner.

In this regard, since the matter has been in our Courts for long and the status of the properties listed in the petition and those omitted cannot be determined by this Court at this stage; the deceased's estate shall be distributed amongst the Petitioner and all the children of the deceased from both wives or widows in accordance with **Sections 35, 37, 40 & 42 of the Law of Succession Act Cap 160.**

DISPOSITION

1. The objection of 1st July 2005 and 15th July 2005 by the 1st former wife of the deceased now deceased and taken over by her 2 sons PW1 and PW4 vide application of 3rd August 2006 to making of grant is upheld and the petition for grant of Probate shall be amended to include the following;

a) Grant of letters of administration intestate issued in the names of the Petitioner Rispa Wamaitha Gichanga representing 2nd house and PW1 Alexander Kimani Gichanga representing the 1st house.

2. The Petitioner's family's matrimonial home L.R. Ngong/Ngong 27935 and 27934 and developments by Petitioner and businesses shall not be interfered with just as.

3. The 1st house's matrimonial home Dagorretti/Kinoo Dagoretti/Kinoo1025, 1027, 1029 bequeathed to Gichuru Kimani, Gitau Kimani and Kiarie Kimani the 3 sons of the deceased shall not be interfered with.

4. All the existing bequests shall be taken into account in distribution of the deceased's estate.

5. The administrators shall carry out their statutory mandate under Sections 82 and 83 of Law of Succession Act.

6. Within the requisite period file in Court the summons for confirmation for distribution of the estate.

7. Any aggrieved party may apply or file protest to be determined by the Court.

8. Each party to bear own costs.

DELIVERED DATED & SIGNED IN OPEN COURT ON 9TH JUNE, 2017.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

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