



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
SUCCESSION CAUSE NO. 92. OF 2011
IN THE MATTER OF THE ESTATE OF PETER
MUKUHA KAGO - (DECEASED)
SIMON GASHWE MUKUHA.....PETITIONER
VERSUS
NEWTON KAGIRA MUKUHA.....OBJECTOR
JUDGEMENT

INTRODUCTION

1. This matter relates to the estate of PETER MUKUHA KAGO who died on 6th May, 2010.
2. Upon his demise a dispute has arisen in regard to the administration of his estate.

The deceased was survived by the following persons:-

- (I) Martha Waithera Mukuha -Widow
- (ii) Teresiah Njeri Mukuha - Daughter
- (iii) Grace Muthoni Mukuha - Daughter
- (iv) Ruth Wanjiru Mukuha - Daughter
- (v) Newton Kagira Mukuha - Son
- (vi) Hannah Njeri Mukuha - Daughter
- (vii) Simon Gashwe Mukuha - Son
- (viii) Grace Wanjiru Mukuha – Daughter
- (ix) Linet Wairimu Mukuha - Daughter
- (X)David Kimani Mukuha - Son

The deceased is said to have died possessed of the following assets:-

- (I) Title No. Kampi ya Moto/Menengai Block 1/89
- (ii) Plot No. 121 Lake View Naivasha.
- (iii) Plot No. 42 Lake View Naivasha.
- (iv) Shares with Standard Chartered Bank Limited.
- (v) Motor vehicle Registration No. KBD 162F
- (Vi) Account No. 8207277 Barclays Bank Naivasha Branch.
- (vii) Fixed account with Barclays Bank Naivasha Branch.
- (viii) Account No. 042115377455 Kenya Commercial Bank Limited Naivasha Branch
- (ix) 10,000 shares in Naivas Limited.
- (x) Post Office Savings Bank Account No. 8434.

Dispute over ownership of Naivas Limited.

3. By way of Summons dated second November, 2012, Newton Kagira Mukuha hereinafter the objector) moved the court to determine the ownership of Naivas Limited. The objector's held position was that there should be no distribution of the Estate of the deceased without determination of the ownership of Naivas Limited.

4. The Court pronounced itself on the issues before court in a Ruling delivered on the 31st October, 2014. I will revert to the said findings. Later in this Judgment for the/their import and effect in these proceedings.

The Petitions and the Objection thereto:-

5. The petition herein was lodged by Simon Gashwe Mukuha. The petition elicited an answer to petition lodged in court on 30th July, 2015, a petition by way of cross application for grant and an objection to the making of grant.

6. In the answer to the petition, the cross petition and the objection, the petitioner is labeled unfit to hold the position as his acts are prejudicial to the Estate of the deceased and shrouded in secrecy and fraud. His actions are said to be calculated to disinherit the objector and that he has failed to give a full inventory of the assets of the deceased.

7. In addition to the assets listed by the petitioner, the objector adds the following asset; - Kenindia Insurance policy.

Directions as to hearing.

8. On 30th July, 2015, the parties herein appeared before court (Mshila. J) where directions were given. The directions given were recorded as follows:-

- 1. Viva voce evidence.**
- 2. List of documents be prepared, filed and exchanged within thirty (30) days.**
- 3. Witness statements be filed and served within 30 days.**

4. Agreed issues are;

(I) Administration

(ii) Distribution of estate

5. Cross petitioner to commence.

9. At a pre-trial conference held on 13th January, 2016 further directions were given to the effect that the petitioner was to start during the hearing, documents were to be exchanged within fourteen (14) days and hearing was set for 10th February, 2016.

The issues for determination were narrowed down to

(a) Whether the deceased died testate.

(b) who is to be executor of the will.

The Petitioners case.

11. The Trial commenced on the 10th February, 2016.

Simon Gashwe (the petitioner) was the first to testify. He stated that he is the Chairman of Naivas Limited. He recalled that he had testified on the 17th July, 2014 on the same matter. He reiterated the evidence given then and the contents of his statement dated 29th January, 2016.

12. He produced as exhibits a certificate of death of Peter Mukuha Kago, a Chief's letter dated 19th May, 2011 a Ruling delivered by this court (**Emukule. J**) the 31st October, 2014 and proceedings in the matter.

13. The Petitioner gave an account of meeting called on 20th March, 2010 by the deceased. The deceased had summoned the petitioner and his brother Kimani Mukuha. The two found the deceased in the company of one Yusuf Mugweru (a cousin to petitioner) and Francis Wambugu Kariuki an in law.

14. The deceased produced a diary in which he indicated he had written his wishes. He took them through the document page by page. He signed the document and Yusuf and Wambugu signed. The petitioner and his brother Kimani did not sign as they were beneficiaries. The document was in Kikuyu language and deceased's own hand writing.

14. The said will was translated after the death of the deceased by Mr. Ngunjiri Advocate who certified the translation as correct. All beneficiaries were provided for in the will.

15. When the deceased passed on, the petitioner locked his bedroom. It was agreed that a meeting was to be held on 9/5/2010 involving the petitioner, Kimani Mukuha and the objector. The objector did not turn up. The petitioner opened the bedroom and retrieved the will and other documents including title deeds. Each beneficiary was given a copy of the will.

16. The Petitioner further testified that the objector was the biggest beneficiary in the arrangement. He was given the plot at Rongai. His eldest son was given a three acre farm at Rongai with a farmhouse. A grand daughter to the objector was to get a share of cash in the bank.

17. The objector was entitled to cash in the bank too. It is therefore not true that he was not provided for. The translated will was produced in evidence.

18. The Petitioner further testified that before he filed the succession cause he sought the consent of all the beneficiaries. All beneficiaries met and agreed on the way forward. The objector was present and

was sitting next to the petitioner. The petitioner was given the mandate to proceed with the petition. The petitioner produced in evidence an affidavit of consent sworn by all beneficiaries except the objector.

19. The Court went ahead and confirmed from the beneficiaries who were in court namely

i. Teresia Njeri

ii. Grace Muthoni Mukuha

iii. Ruth Mukuha

iv. Hannah Njeri Mukuha

v. Grace Wambui Mukuha

vi. Linet Wairimu Mukuha

vii. David Kimani - who all acknowledged their respective signatures in the affidavit of consent.

20. It is the testimony of the petitioner that the deceased held 10,000 shares at Naivas Limited. He bequeathed the said shares as follows;

(a) 4% to the petitioner.

(b) 4% to David Kimani

(c) 6% to Grace Wambui Mukuha

(d) 6% to Linet Wairimu

21. The petitioner challenges the objection specifically the contention that the deceased did not make a will. It is urged that in submissions by the objector filed on 4th August, 2014, the objector introduced the issue of the will. In those submissions (and which the court has had occasion to look at), the objector acknowledges that the deceased left a valid will.

22. The Petitioner reiterates that he would not wish to disinherit the objector. He intends to treat him fairly. He denies being full of secrecy as alleged. He has listed all the assets of the deceased. The deceased did not make an oral will.

23. The Petitioner challenges a purported will introduced by the objector in his supplementary list of documents filed on the 29th January, 2016. The said will is not in the deceased's hand writing. There are no witnesses to it and letter is not signed by the deceased as the signature seen on it is not deceased's.

24. The objector is accused of having been a lone ranger all along. He has been doing things separately and is not in good terms with the others. The family has tried its level best. They have educated all his children. Four (4) of his children are employed at Naivas Limited. A business was started for him in Nairobi. He refused to pay for goods advanced to him.

25. The Petitioner sought to be appointed executor of the Will of the deceased. The beneficiaries are anxious to see this matter behind them. He vows to follow what is in the Will and collaborate with everyone without discrimination.

26. On cross examination the petitioner denied knowledge of a meeting held on 18th April, 2010 attended by the deceased, his wife, the objector and one Herman Mwangi. He stated that the deceased started writing his will on 10th July, 2005 in a 2006 diary. Two (2) entries relate to the year 2005. He added that

the deceased did not possess a life insurance cover.

27. When re-examined by his Counsel, the petitioner in reference to the will of 18th April, 2010 states that the same does not specify the assets referred to. It does not specify the beneficiaries and neither does it specify how the assets are to be distributed.

28. PW2 David Kimani is a son of the deceased. He recalled the meeting of 20th March, 2010 attended by his father (the deceased). PW1, Yusuf (a cousin) and Francis Wambugu (an in law). The deceased produced a record which he indicated was his will. He signed and Yusuf and Wambugu signed. He identified the will in court.

29. The witness stated, that the deceased died on the 6th May 2010. A meeting of the family was held on 8th May, 2010. In attendance were his siblings namely,

- (a) Faith Njeri.
- (b) Grace Muthoni
- (c) Ruth Wanjiru
- (d) Newton Kagira
- (e) Anne Njeri
- (f) Simon Gashwe.
- (g) Grace Mukuha
- (h) Rose Wairimu
- (I) Rose Wairimu
- (j) David Kimani. (PW2)

One sibling Robert Njau was not present as he died long before. All agreed that Simon Gashwe was to be the administrator.

The Will of the deceased was retrieved on 9/5/2010 on a date an agreement to meet had been reached but the objector failed to turn up.

30. PW2 described the relationship with the objector as not cordial. He (objector) left his children with the family. A supermarket was opened for him in Nairobi. He was given stocks. He refused to pay. No other sibling is objecting. The objector was not in good terms with their father.

31. In defence of the petitioner, PW2 stated that it is not true that PW2 is a fraudster. He said he (PW2) started a shop with the petitioner. As at the time of testimony they had forty (40) supermarkets employing 5000 people. If the petitioner was a fraud, such success would have been elusive. PW2 has worked with the petitioner for twenty five (25) years.

32. When shown a purported will filed in the supplementary list of documents by the objector, PW2 states that the same is not in his father's handwriting, it is not signed and neither is not attested.

33. Yusuf Mugweru Kamau PW3 was next on the stand on the witness stand He told the court that the deceased was his uncle(being a brother to PW3's father Joram Kamau Kago) . The deceased was also his best friend.

34. On 20th March, 2010, PW3's friend (the deceased) called him to his place telling him that he wanted to make a statement on his life. He went to deceased's home. In attendance were the deceased, a son in law by the name Wambugu, the petitioner herein and David Kimani (PW2). They were welcomed to the home, were fed and then the deceased read a document he had written. He said that it was his wish that his matters be dealt with as per the document. He said that was his will. PW3 identified in court the book in which the deceased wrote.

35. The deceased signed the document in the presence of PW3. PW3 signed. Wambugu signed. The deceased explained how his property was to be distributed. He was very okay on that day. Nobody forced him to do so.

36. As regards his burial, the deceased had indicated his wish to be buried next to where PW3's father had been buried at Nakuru North Cemetery. The two were great friends. The deceased never called PW3 again to say he had any other Will. PW3 knew all children of the deceased. They were brought up together.

The Objectors Case.

37. The objector called Herman Kamau Mwangi (DW1) who testified that he is an employee of the objector. On the 15th April, 2010 the objector asked him to drive him to Naivasha to see his sick father. DW2's position at employment was a Manager.

38. At the home they found the objector's father, his wife, a house-help and another man who left shortly upon their arrival. The objector was accompanied by his wife. The deceased told them that he was very ill. He went ahead to say that he recognized the objector as his son and that whatever he owned belonged to all his children and that at his death they should share it out. He did not say how the sharing would be done. The objector asked the deceased to put the words in writing but the deceased did not write anything. He promised to write and send the note to the objector.

39. Shown a document dated 18th April, 2010 the witness stated that it contained the exact words spoken by the deceased on the 15th April, 2010. He confirmed that the first time he heard of this document is early this year. (2016).

40. The objector's testimony as recorded is that he is a son of the deceased. He recalled that in 1989 the deceased called his children with a view to bringing them together to do business. Joram Kamau, a brother of the deceased offered to help the deceased start a business. The deceased asked the children to contribute capital. All agreed.

41. In April 1990, they met to put Capital together. Robert Njau and Simon Gashwe never attended or contributed. Robert Njau was blind. He declined. Simon Gashwe had no money as he was unemployed having been sacked at Tuskeys. The deceased contributed shs.30,000/= others contributions were;

- i. Grace Wambui -25,000/=
- ii. Linet Wairimu - 15,000/=
- iii. David Kimani - 10,000/=
- iv. The objector – maize worth Kshs.20,000/=

42. On 1st June, 1990, Joram invited the deceased to take over a shop that was at Rongai. It was stocked and Joram was to be paid in due course. Since Kimani (a driver to Joram) and Simon (a worker at Joram's) knew how the business was ran, they took a leadership role.

At the time, Wairimu was a nurse at Ol Kalou, Grace worked at NYS, the deceased was a farmer at

Cherangani, Kitale and the objector too was a farmer at Kitale.

43. In 1993 Simon and David took over the shop at Rongai. They incorporated a company called Rongai Self Service registration number 53952. The other members of the family only learnt of this in 1996.

44. In 1996 a branch was to be opened in Naivasha, Kimani was to go to Naivasha. It is the deceased who was the leader and he gave the directions.

45. A meeting was called on 31st October, 1996. The convener was the deceased. Minutes were taken. Only the children who contributed to the business were present in this meeting. However, Kimani was present even though he had not contributed. In that meeting, the objector was given the Rongai house. The objector was in agreement with the resolutions.

46. Differences arose between Kimani and the objector leading Kimani to make a report to the police that the objector had stolen Shs.30,000/= . This was after the objector had asked Kimani that they change the signatories at the bank where proceeds from the Rongai house were being banked.

The objector was arrested and incarcerated for four (4) days. During his incarceration, all merchandise at Rongai was taken to Naivasha. Kimani produced a certificate of incorporation of a company claiming to own the business.

The police abandoned the issue terming it a family affair. The objector returned to Kitale to farm.

47. In 1998 Simon Gashwe and David Kimani changed the name of the company to Naivasha Self Service store. This was on 4th July, 1998. The registration number of the company was 81909. The name Rongai was discarded.

48. On 1st November, 2007, shares of the company (10,000) were transferred by Simon Gashwe to the deceased. 7500 shares were allocated to Linet Wairimu Mukuha, 5000 shares were given to Grace Wambui Mukuha. The objector was not given any shares. The objector went back to Rongai and set up a small business.

49. In 2008, the family decided to help the objector. He was given Kshs.12,000.000 to open a supermarket at Kayole, Nairobi. He still runs this business to date. The loan was not documented and he was to pay once he was on his feet. Before he could pay the deceased died.

50. The objector recalled that in April 2010 on a date he could not remember, he went to see his sick father. He went with DW1 and his (Objector's) wife. His father told him that all his (father's) property belonged to himself and his children. He said that should he die the family should sit together and divide the property among themselves. He never said he had shared out his property.

51. The objector requested him to put the words in writing. The deceased said he could not write then but promised to do so later. Later on, the deceased sent a worker from Naivas with a written document and a title deed to the Rongai house. The title deed was in deceased's name. The deceased died on 6th May, 2010 and was buried on 8th May, 2010.

52. The objector further said that he was not told of a Will when his father died. After the burial, the members of the family went to the Naivasha home. Kimani suggested that Simon be the Chairman of Naivas as he was best suited. No will was mentioned.

53. He adds that the Will produced is written in a 2006 diary. He says this document is not genuine. He acknowledges the signature of his father in the document but he doubts the content. He confirms that Yusuf and Wambugu have signed it.

54. It is the objectors further evidence that two (2) weeks after the death of the deceased, Simon filed a

Succession Cause at Naivasha. The document filed indicated the property was worth 100,000. He said two (2) consents were signed one on 24th May, 2010 and another on the 19th October, 2010.

He filed an objection at Naivasha. Matter was then transferred to Nairobi and then to Nakuru. David and Simon wanted to sell shares to a South African company but the objector stopped this. In the website, Naivas is described as a family business. The five (5) persons who contributed are the ones who own the company.

55. When cross examined the objector confirmed that he gave evidence on 17th July, 2014 before Justice Emukule and called a witness called Grace. Simon also gave evidence and called witnesses. The objector said he told Justice Emukule all the issues.

The Judge on 31st October, 2014 gave a Judgment. The objector has appealed. The Judgment of Emukule J indicated that the objector had no shares in Naivas. The Judge said that the 10,000 shares of the deceased should be distributed as per the Will of the deceased. The Court indicated that what remained was to determine who would be the executor of the will.

56. Pressed further, the objector confirmed having filed submissions of 4th August, 2014. In those submissions he asked the court to look at the will of the deceased and he referred in support of his case to the case of **Jessica Atieno -VRS- Angela & others Succession case no. 207 of 2006**. He confirms that the first paragraph of a document annexed to the submissions is an extract of the Will of the deceased herein. The document attached shows the properties and their distribution.

57. Referring to the document dated 18th April, 2010, the objector on being questioned further states that the document is a copy and the original was not in court. He states the document does not talk of specific property and no mode of distribution is given. Nobody else signed the document and the document does not indicate that the objector was given anything.

The objector stated that when the Succession Cause was filed at Naivasha, he was included as a beneficiary. The Chief's letter included his name. He confirms that no other beneficiary objected in the cause.

58. Questioned on alleged shares at Post Bank and a life Insurance allegedly held by the deceased, the objector stated that he had no document in support of the existence of the two (2) assets. He did not have a policy document relating to the policy. He said, however, that at one time he paid premium for that policy

59. The objector also confirms that four (4) of his children are employed at Naivas. Three (3) others work at Greenmart and Naivas sponsored Jane Wambui (objector's daughter) to study in U.S.A.

60. The objector further confirmed having sworn an affidavit on 30th July, 2015 and in paragraph 4 of that affidavit stated that the deceased died testate having given an oral Will.

On 29th January, 2016 the objector acknowledges having filed a written will of the deceased.

Petitioners Submissions.

Both parties filed written submissions.

61. For the petitioner it is submitted that the cause herein was filed with the consent of all beneficiaries. The objector insisted that there would be no distribution of the estate of the deceased without a determination of the ownership of Naivas Limited. It is on this basis that the court directed on 15th May, 2014 that ownership of Naivas Limited be determined first by way of viva voce evidence. Both parties testified and called witnesses.

62. On 31st October, 2014 the court delivered its Ruling and held;

“clearly therefore, the objector has no interest legal or equitable in Naivas Limited. His interest in the 10,000 shares held by their deceased father in Naivas Limited is co-equal with that of the petitioner and other children of the late Peter Mukuha Kago, and even then upon intestacy. In this case, the objector does not in any of his affidavits dispute the validity of his father's will and distribution of the 10,000 shares or 20% of their fathers interest in Naivas Limited.

These shares will as already stated be transmitted in accordance with the terms of the Will. He will therefore have no interest at all in Naivas Limited.....

Finally, for completeness, the next question to be determined is the question of the executor (s) of the

Will of the later Peter Mukuha Kago and the distribution of his estate”

63. It is submitted that the aforesaid findings of the court have not been reviewed, vacated and or set aside and it is submitted that **the deceased died testate**. That Ruling and proceedings leading to it are attached for ease of reference.

64. The issues for determination according to the petitioner are narrowed down to;

i. Whether the deceased left a valid Will.

ii. Who should be the administrator of the estate of the deceased.

iii. How the estate of the deceased shall be distributed.

65. It is urged that the objector in his cross application **contends that the deceased died intestate** and that he should be the administrator of the estate. In paragraph 4 of his affidavit in support sworn on 30th July, 2015 and in a glaring contradiction he depones that the deceased **died testate with an oral will as the only testamentary instrument that can be validly presented to this court.**

In a further contradiction the objector on 29th January, 2016 filed a supplementary list of documents where **he annexed a document which he purported to be a written will of the deceased**. The document is not signed. It is not attested to and the same is not specific on any beneficiary or property. It does not qualify as a Will in any way.

I am urged to consider the question that arises, being, what is the objectors position? Did the deceased die intestate, testate through an oral will or testate through a written Will?

It is further urged that the objector acknowledges the Will in his submissions of 4th August, 2014 whereby he annexed the same and urged the court to rely on the same. He cannot now deny what he confirmed to be the Will of the late Peter Mukuha Kago.

66. I am referred to **Section -11 of the Law of Succession Act Cap 160**, the decision in Re **Murimi Kennebly Njogu (deceased), Succession Cause No. 1141 of 2011** and Counsel concludes that the deceased left a valid written Will.

67. Counsel while relying on Section 53 of the Law of Succession Act submits that Letters of Administration with Will annexed in respect of the Estate of Peter Mukuha Kago should issue to the petitioner herein. I am referred to the decision in **Milimani Succession Case No. 573 of 1998, In the Matter Of the Estate of Macharia Ndirangu.**

It is urged that the petitioner qualifies as a beneficiary named in the Will and as per section 63 of the Law of Succession Act. He also has the consent of other beneficiaries. The Estate should be distributed in accordance with the Will of 20th March, 2010 and grant confirmed in those terms.

It is urged that in a family of 10, it is only the objector who seems dissatisfied. His evidence in support of the objection is contradictory and totally unreliable.

Objector's Submissions

68. Counsel for the objector narrowed the issues for determination into 2;

(a) Who should be the administrator of the Estate of the late Peter Mukuha Kago.

(b) Did the deceased die testate or intestate.

69. It is the objectors submissions that the petitioner be stopped from administering the estate of the deceased on grounds:

1. That the deceased died testate and with a testamentary instrument that can validly be presented to court.

2. That the proposed administrator to wit Simon Gashwe Mukuha is unfit to hold this position as his acts are prejudicial to the Estate of the deceased and shrouded in secrecy and fraud.

3. That the acts of the proposed administrator are calculated to disinherit the objector as well as skew the mode of distribution of the estate.

4. That the proposed administrator has failed to accurately disclose the full list of assets and liabilities of the estate of the deceased and therefore risks defrauding the estate.

70. The meeting of 20th March, 2010 is disputed. It is submitted that it is unclear why only the petitioner and a few persons were called by the deceased where such weighty matters were being discussed.

The Petitioner and his witnesses have tried to paint the objector in bad light stating that he was at logger heads with his father, a fact that has not been proved. It is urged that the Will stated only arose in Nakuru Court and was not at the Naivasha court. It is also curious that the Will was written in a 2006 diary yet deceased is said to have started writing the Will in 2005. It is also urged that the translator of the Will has not called to testify. It is submitted that the meeting of 9/5/2010 in which the objector is said to have absented himself was not corroborated by evidence from other family members.

71. The Will produced by the petitioner is challenged as unsigned. The deceased had a known signature. The purported Will is challenged as an afterthought as it was not presented at Naivasha court and that the application at Naivasha was for Letters of Administration and not for Grant of Probate. This shows the will never existed.

72. The meeting of 1989 where the deceased called his children to deliberate on setting up of a business is buttressed in the submissions. The contributions of those present are highlighted.

73. I am referred to a prepared Will in a meeting on 31st October, 1996 where the attendance was by the contributors to the Estate and the convener was the deceased. Participants were asked to sign.

74. I am referred to the decision in the **estate of Lucy Wangari Muraguri (2015) eKLR** where it was held;

“can it be said that suspicious circumstances arose in this case? Suspicion should arise where

the Principal beneficiary under the Will is the person who suggested the terms of the will to the maker, or wrote the document himself or took the testator to an Advocate of his own choice among others.”

It is urged that the Petitioner and PW2 are Major shareholders of Naivas Limited where the deceased was also a shareholder. By locking out other family members including the objector who has demonstrated he was a contributor to the said business, only reasonable suspicion can be inferred.

I am urged to adopt the approach suggested by Sir, J.P Wilde in *Atter -VRS- Atkinson* where he said

“The proposition however, is undoubted that if you have to deal with a Will in which a person who made it himself takes a large benefit, you ought to be satisfied from evidence calculated to exclude all doubt that the testator not only signed it, but that he knew and approved of its contents”

Further the Will is challenged on grounds that the deceased issued a testamentary instrument to the objector with details contrary to what is contained in the will.

I am referred to the decision in the *Re estate of G.K.K. (Deceased) 2013 e KLR*.

75. It is prayed in the end that;

- 1. That the objector be allowed to present his petition in his capacity as the son of the deceased.**
- 2. That every person having an equal or prior right to the grant of representation herein has not contested and has not been issued with a citation to renounce such right to apply for grant of representation and has not done so.**
- 3. That the objector be allowed to faithfully administer according to Law all the Estate which by Law devolves upon and vests in the personal representative of the deceased and he will render a just and true account of such estate whenever required by law so to do and when required by court deliver up thereto the said grant and that costs be borne by the estate.**

Issues for determination

76. I have had occasion to consider the pleadings, Affidavit evidence, documentary evidence, oral evidence and submissions by Counsel. I have also had regard to the entire record herein including an earlier Ruling by this court (**Emukule. J**) delivered on the 31st October, 2014.

77. In that Ruling and in paragraph 54 thereof the court indicated that the next question to be determined is the question of the executor(s) of the Will of the late Peter Mukuha Kago and the distribution of the Estate.

78. The parties appeared before court for directions on the 14th October, 2015 and the agreed issues were recorded as:-

(1) Administration

(2) Distribution of Estate.

79. In a trial conference held on 13th January, 2016 the parties again narrowed the issues to,

(1) Whether the deceased died testate

(2) who is to be the executor of the will.

80. A lot of energy has been expended on the issue of whether the deceased died testate or not. Yet, that issue was determined by this court (Emukule. J) in his ruling of 31/10/2014. At page 19 of the said Ruling the Judge expressed himself thus;

“His 10,000 shares unless first distributed before his death formed part of his estate and will be distributed, in the event of intestacy, equally among all his children surviving him in accordance with the Rules of Intestacy under the Law of Succession Act (Cap 160 Laws of Kenya) or in accordance with his written will upon probate of will again in accordance with the Law Of Succession Act and the probate and Administration rules thereunder

According to the replying affidavit of the petitioner and the objectors own submissions their father died testate, that is left a valid will and bequeathed the 10,000 shares in the manner indicated in paragraph 4 of this Ruling”

On page 24 of the said Ruling the court makes the following findings;

“In this case, the objector does not in any of his affidavit dispute the validity of his fathers will and the distribution of the 10,000 shares or 20% of their fathers interest in Naivas Limited. These shares will as already stated be transmitted in accordance with the terms of the will. He will therefore have no interest at all in Naivas Limited.”

81. From the foregoing the issue of the validity of the will is not open for further determination by a court of concurrent jurisdiction, the court having already pronounced itself thereon based on positions held by the parties in earlier proceedings in the same matter.

82. Indeed that explains why, and it was clear in the courts mind as at the 31st October, 2014 that, the issue of the validity of the will was behind the parties and hence at page 54 of the ruling the court stated;

“Finally , and in the interests of completeness, the next question to be determined is the question of the executor(s) of the will of the late Peter Mukuha Kago and the distribution of the estate.”

83. The above stated findings of the court have not been reviewed, vacated and or set aside. The obtaining situation as per the courts finding is that the deceased died testate.

84. As noted earlier, the parties herein expended a lot of energy on this aspect of these proceedings and I believe largely because of misapprehension of the import of the court’s earlier ruling.

Even assuming for a moment that the issue of the validity of the will was open to my scrutiny and at the risk of regurgitating the issue, I have had regard to the evidence on record and my take is as follows: -

The formal requirements of a valid will are provided for under section 11 of the Law of Succession Act Cap 160 Laws of Kenya. That section provides;

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 the 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 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.

85. The will dated 20th March, 2010 meets all this criteria. In it, the testator affixed his mark. Pw3 and one Francis Wambugu attested to the document. I need to state here that I was greatly impressed by the candid nature of the evidence of PW3 who in addition to demonstrating a very close relationship with the deceased as an uncle and friend was forthright and very at ease as he recounted the events of the day.

The attack on the will by the evidence and submissions of the objector is based on the fact that it is not clear why only Pw1 and Pw2 were summoned by the deceased, the will was not produced initially at Naivasha court in the documents filed and in the submission reliance is placed on the decision in the re estate of *Lucy Wangui Muraguri (2015) ECLR, succession cause No.331 of 2000* where it was held that suspicion arises when a person who suggested the terms of the will to the maker, write the will document himself or took the testator to an advocate of his choice among others.

86. On why only the petitioner and PW2 were called when the will was made, that is an issue in the discretion of a testator. Of note however that is the 2 played a passive role in the meeting. They were never witnesses.

87. As to the inclusion of the will document in the documents filed at Naivasha court, my considered view is that failure does not in itself conclusively prove that the will did not exist. This could as well depend on the legal counsel and advice the petitioner received initially from his erstwhile Advocates.

Having made the inference that the will could have been made fraudulently, the onus was on the objector to discharge that burden. He did not.

In arriving at that finding, I lay reliance upon the principle enunciated in *Ratila/Patel-Vs. Lalfi Makanji (1957) EAR 314-317* where the court expressed itself thus;

“ There is one observation which we must make - burden of proof- standard of proof required- allegations of fraud must be strictly proved, although that standard of proof may not be so heavy as to require proof beyond reasonable doubt. Something more than a balance of probability is required”.

That threshold is far from met by the objector in his evidence.

88. On the issue of suspicion, the decision in *re estate of Lucy Wangui Muraguri* must be distinguished from our instant matter. That suspicion arises if the person suggesting the terms of the will writes the document himself or takes the testator to an Advocate of his choice. The petitioner did not write the document. Neither did he take the testator to an advocate or dictate the terms of the will.

Again there is no evidence at all that the petitioner is the principal beneficiary of the estate. That challenge to the will must fail.

89. Heavy weather has been made over the recording of the will in a 2006 diary yet the testator started putting his wishes together in 2005. On this I can only say that it is not uncommon even in an institution like ours to procure the next year's diary early for planning purposes. Without proof that that diary did not exist at the time, that concern remains hollow.

90. On the flip side of the coin, in the spirited effort to challenge the will herein, the objector while repeating a long history of issues about what he calls the family business (and which issues are not relevant in these proceedings but were in the earlier application decided on 31st October 2014), fails to

mount any effective challenge to the will.

91. He has engaged in a long and tortuous fishing expedition whose catch has been a legally unpalatable mongrel fish whose ugly features are a mixture of contradictions stating variously;

1. That the deceased died intestate (as seen in his cross petition)

2. That the deceased died testate with an oral will as the only testamentary instrument that can be validly presented to court (as seen in his affidavit sworn on 30th July, 2015).

3. That the deceased left a written will (as seen in the document annexed to his supplementary list of documents filed on 29th January, 2016).

92. These are glaring contradictions that put a serious blot on the credibility of the objectors evidence. From the foregoing and even after acknowledging that the issue of the validity of the will had already been settled by this court earlier, I reach the same finding that the will dated 20th March, 2010 is a valid.

93. Thus the issues for determination pending before me are;

1. Who between the petitioner and the objector should be the executor of the will?

2. How are the assets of the deceased to be distributed?

94. It is trite law that whoever alleges must prove that is to say that the person who asserts a position in court must prove it.

I quote from the case of **Koinange and 13 others -vrs- Koinange (2008) 1 KLR (a & f)** where **Amin. J.** had this to say;

“It is a well-established rule of evidence that whoever asserts a fact is under obligation to prove it in order to succeed”.

95. As to the question of who between the petitioner and the objector should be the executor of the Will, the objector's position is that the petitioner is unfit to hold this position as his acts are prejudicial to the Estate of the deceased and shrouded in secrecy and fraud.

He adds that the petitioner intends to disinherit him as well as skew the mode of distribution of the estate of the deceased. It is also urged that the petitioner has refused, failed and /or neglected to accurately disclose the full list of assets and liabilities of the deceased.

96. The objectors evidence as summarized earlier raised a number of issues with a lot of emphasis on the history of the family business. That history and the facts surrounding thereto would of course have been relevant in the earlier proceedings that led to the Ruling on 31st October, 2014.

The evidence touching on the suitability or lack of it of the petitioner as the executor is that he filed the petition without the necessary consents, he retrieved the Will in the absence of the objector, he never informed him of the filing of the cause and the petitioner and David Kimani are accused of having intended to sell shares from Naivas Limited to a South African company.

97. The petitioners evidence is that he involved all beneficiaries including the objector in the filing of the case. On the date the Will was retrieved from the house of their father, the objector had been invited but he refused to appear. It is his evidence that the objector has always been difficult and a Lone Ranger not working closely with anyone in the family. These facts are corroborated by PW2.

98. I have considered the evidence on suitability. No evidence is offered that the petitioner is not fit to hold the position on grounds that his acts are prejudicial to the estate and shrouded in secrecy and fraud.

It is to be noted that allegations of fraud must be strictly proved. The standard of proof is as laid out in **Ratilal Patel -VRS- Lalji Makanji (1957) EAR 314 -317** where the court stated; (to quote again)

“There is one observation which we must make -burden of proof - standard of proof required – allegations of fraud must be strictly proved although that standard of proof may not be so heavy as to require proof beyond reasonable doubt. Something more than a balance of probabilities is required.”

PW2 testified that the petitioner is an upright man who has done business with him for twenty (25) years. They started a shop together. The said business has grown into forty (40) supermarkets. They have employed 5000 people. If the petitioner was a fraud, they could not have reached where they are.

99. The allegation that the petitioner intends to disinherit the objector cannot stand as well as the allegations on a skewed mode of distribution for the simple reason that the executor shall be bound by the will.

100. Indeed from the evidence on record, the past history in the family where the objector is shown to have been a lone ranger and not co-operating with others, it is clear that it is the petitioner who is better suited to be the executor.

101. It has to be put into account that being an executor is a position of great trust. An Executor has a legal as well as a moral obligation to fulfill the role with high standards of care and honesty. The Petitioner, a successful businessman with very cordial relationships with all members of the family except the objector, fits the bill.

102. The accusation that the Petitioner has refused, failed and/or neglected to accurately disclose the full list of assets and liabilities of the estate is rendered hollow by the evidence on record. The objectors allegation is that the petitioner failed to include shares from Post Bank and a Life Insurance Policy as part of the Estate. When cross -examined over this he said;

“The Petitioner left out some money from the list of assets. These are shares from Post Bank and Life Insurance proceeds. I do not have the document to support the existence of the shares in Post Bank. I do not have the policy document from the Insurance.....”

Obviously, this allegation remains as such, an allegation without any foundation

103. On the material before me, I am satisfied that the petitioner is a fit person to be the executor of the will of the deceased herein.

104. How should the assets of the deceased be distributed? The ready answer to that will be found in the Will of the deceased produced in these proceedings and signed on the 20/3/2010. As expected of the executor, he must carry out the wishes of the deceased and administer the estate in accordance with the will.

The executor will all the time be aware that he is answerable to the wishes of the deceased as expressed in the Will.

Determination.

105. With the result that pursuant to the provisions of **section 53 (ii) of the Laws of Succession Act Cap 160**, letters of Administration with Will annexed in respect of the estate of Peter Mukuha Kago are to issue to Simon Gashwe Mukuha and the grant herein is confirmed in terms of the Will annexed. The objection is dismissed. This is a family matter each party to bear its own costs.

Dated, Signed and Delivered in open court at Nakuru this 6th day of October, 2016.

A.K. NDUNG'U.

JUDGE.