



**IN THE COURT OF APPEAL
AT NAIROBI**

CORAM: GICHERU, KWACH & SHAH, J.J.A.
CIVIL APPEAL NO. 123 OF 1992

BETWEEN

JULIUS WAINAINA MWATHI APPELLANT

AND

BETH MBENE MWATHI

GRACE WANJIRU MWATHIRESPONDENTS

**(Appeal from the Judgment of the High Court of Kenya at Nairobi (Justice Bosire) dated 24th
June, 1992
in
P & A 121 OF 1988)**

JUDGMENT OF THE COURT

Ngugi Mwathi Wangige (the deceased) died on 9th March, 1987 at Nazareth Hospital aged 65. He never married and left behind no wife or children. He was survived by a brother, Julius Wainaina Mwathi (the appellant), two sisters Beth Mbene (the first respondent) and Grace Wanjiru (the second respondent). The deceased hailed from Wangige in Kiambu District. The deceased owned a parcel of land Plot No. Kabete/Kibichiku/675 (the suit land).

On 7th March, 1987, only two days before his death, the deceased made a Will under the terms of which he bequeathed the suit land to the appellant. According to the appellant, the deceased dictated his wishes and he, the appellant, reduced it into writing. It was then thumb-printed by the deceased and witnessed by among others, the appellant and his wife, Rahab Nyambura. Following the death of the deceased, the appellant applied for grant of probate of the Will of the deceased and letters of administration were issued to him on 6th October, 1988.

On 25th August, 1989, the respondents made an application under section 76 of the Law of Succession Act (Cap 160), seeking the revocation of the grant made in favour of the appellant on the ground that the Will on the basis of which the grant was made was not genuine as it had not been made by the deceased as alleged by the appellant.

The application was heard by Bosire, J, who in a considered ruling held that the deceased at the time he was alleged to have made the Will did not have the requisite testamentary capacity. He declared the Will invalid, and ordered the estate, which comprised only the suit land, to be shared equally between the appellant and the respondents. The appellant felt aggrieved by this decision and sought leave from the

Judge to appeal to this Court, which was granted.

There are 5 grounds of appeal the import of which is that the Judge erred in law in annulling the Will and in ordering the estate to be distributed between the appellant and the respondents. Mr P.S. Gatimu, who is the appellant's Advocate on record, did not attend Court to argue the appeal on his behalf. Instead, he sent Mr Momanyi, a junior Advocate, to say he was indisposed and to apply for an adjournment, which in the event was refused. Mr Momanyi was granted a short adjournment to study the record and argue the appeal, but when the Court reconvened he confessed he was unable to be of any further assistance to the Court. We then invited Mr Kasanga Mulwa, learned counsel for the respondents, to address us on the grounds of appeal.

Mr Mulwa submitted that the Judge was right to revoke the grant and declare the Will invalid because the circumstances in which it was written and executed were suspicious and did not exclude the possibility of fraud. He drew the attention of the Court to the fact that shortly before the execution of the alleged Will, the appellant had removed the deceased from his mother's house to his own house. He also pointed out that the appellant harboured considerable animosity against the respondents whom he banned from entering his house. So the real motive for moving the deceased to his house was not just to make the Will, but also to place the deceased and the whole exercise of making the Will, beyond the reach of the respondents. There was evidence that at the time the deceased is alleged to have dictated the Will he was quite ill and could not walk without support. Regarding the conduct of the appellant on the two occasions when he shifted the deceased from his mother's house to his own house the Judge remarked:

"Thirdly, the conduct of the petitioner two or three days before the deceased died excites suspicion. He shifted the deceased from his mother's house to his own house for baptism. After that he shifted him back. Then when the deceased allegedly wanted to dictate his Will, he shifted him again to his house. Why was all that necessary? The reasons the petitioner gave for doing so were unsatisfactory. The inference I draw for this conduct is that he did not want the objectors to know what he was doing with regard to the suit property. The petitioner was obliged to but did not demonstrate that the deceased freely and consciously dictated and executed the alleged Will. He did not call evidence to exclude the possibility of him having unduly influenced the deceased to will his property to him."

As the appellant was not only the author of the Will but also the sole beneficiary under it, he had a duty to do everything above board. In the case of *Wintle v Nye* [1959] 1 ALL E.R. 551, Lord Reid said at page 561:

"To tell a layman that he must be vigilant or jealous or suspicious of the evidence may not convey to his mind the weight of the onus which must be discharged if the will is to stand. In *Fulton v Andrew*, Lord Cairns, L.C., referred to the duty "to bring home to the mind of the testator the effect of his testamentary act", and pointed out that failure to perform that duty might amount to a greater or less degree of fraud. In *Atter v Atkinson*, Sir J.P. Wilde said:

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

That is the correct legal position in Kenya as well. On the evidence, we are satisfied that the appellant did not discharge the onus of showing that he did not procure the execution of the alleged Will by unfair means, and the Judge was perfectly right to revoke the grant made in his favour and declare the Will invalid. This ground of appeal accordingly fails and is dismissed.

Having annulled the Will, the Judge correctly observed that the deceased's estate fell to be distributed in accordance with the law of intestacy but instead of leaving it at that, he proceeded to order that the appellant and the respondents, as the only surviving persons beneficially entitled to the deceased's estate, should share the suit land in equal shares. This part of the Judge's order cannot be sustained. The

intestate succession of a deceased Kikuyu is governed by the Kikuyu customary law. The asset involved is a piece of land and the matter must therefore be determined by the Kikuyu customary law relating to land inheritance. As we have already said, the deceased died leaving no wife or children. He was survived by one brother and two sisters. The Kikuyu customary law on devolution of land is notorious and courts can take judicial notice of it, thereby dispensing with the need to prove it by evidence.

In the RESTATEMENT OF AFRICAN LAW: 2 (The Law of Succession) by Eugene Cotran, the relevant Kikuyu customary law is stated at p.14 as follows:-

"4.Estate of an unmarried man the property of an unmarried man, whether land, livestock or movables, is inherited as follows:-

(a)by his father, if alive; or, in his absence

(b)shared equally among his full brothers; or, in their absence,

(c)shared among his half-brothers; or, in their absence, and so on."

From the above extract, it will become plainly obvious that among the Kikuyu, sisters cannot inherit their brother's land. So the order made in favour of the respondents must be set aside as it is contrary to law. We allow the appeal on this ground only. We accordingly set aside this part of the Judge's order by which he gave the respondents a share in the suit land. To that extent only the appeal succeeds. The estate of the deceased will be dealt with according to the customary law governing the intestate succession of a deceased Kikuyu. We make no order as to costs.

Dated and delivered at Nairobi this 9th day of May, 1996.

J.E. GICHERU

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JUDGE OF APPEAL

R. O. KWACH

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR