REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CASE NO. 20 OF 1976

IN RE THE MATTER OF THE ESTATE OF RUFUS NGETHE MUNYUA (DECEASED)

JUDGMENT

In this suit, which is brought by way of an originating summons, the Public Trustee, as the intended administrator of the estate of the late Rufus Ngethe Munyua, seeks an order that a particular document written in the Kikuyu language, together with a translation of the document in the English language, both of which are exhibited to the Court, should "be treated as the last will and testament" of the deceased and that the English translation be certified by a court interpreter. In effect, the suit is a probate action for the purpose of establishing the document as the will of the deceased under statute law and authorising the High Court registry to issue to the applicant a grant of letters of administration with the alleged will annexed. It was conceded at the hearing that the purported translation of the document in English is not textually accurate and could not properly be certified.

Certain facts are agreed. The deceased, who was elderly and had two wives, was admitted as a patient to the Heptulla wing of the Kenyatta National Hospital, Nairobi, on or about 2nd March 1974 and died there on 8th March. He was survived by two wives, namely Esther Njoki and Florence Wambui (Esther being the elder wife), together with nine children, namely Jane Nyakaru (an adult daughter of Esther) and eight children of Florence (four being infants).

A few days after admission to the hospital the deceased sent word to a friend, Samuel Kinyanjui Waiganjo (to whom I will refer as "Samuel"), to come to see him, which Samuel did; and on the evening of 5th March 1974 the deceased to1d Samuel how he wished his property to be dealt with after his death. Samuel recorded these directions in writing on a piece of paper in Kikuyu language in the presence of the deceased, his wife Florence, a son named Rufus N'gethe Munyua (also known as "Brown Munyua" and to whom I will refer as "Rufus,'), a man named Obadiah Kanyonge Rugwe (to whom I will refer as "Obadiah") and Samuel's wife Eunice Waithira (to whom I will refer as "Eunice").

The document so prepared, to which I will refer as "the instrument," as rendered into English for the purpose of these proceedings by a translation which was accepted by the parties as sufficiently correct for that purpose, is in the following terms:

Kenyatta National Hospital 5th March 1974 I, Rufus Ngethe Munyua state and declare as follows: The plot of land situate in Kinoo village including all the property thereon for example cows is for Njoki and her household. The farm situate at Kinoo is for Wambui and her household. As regards money and shares investments this should be distributed to Wambui to assist all her existing children. I am not indebted to any person and as such no claim of debt can be lodged against my surviving heirs. I Rufus Ngethe Munyua.

I Samuel K Waiganjo has been instructed to write a stated above by Rufus Ngethe Munyua in the presence of the after-mentioned persons:

1.S K Waiganjo

2.Eunice Waithira

3.N Rufus

4.Obadiah Kanyonga s/o Willie Rugwe

The four names at the foot of the instrument were in the form of signatures. The instrument did not purport to appoint either an executor or a "*muramat*i" under Kikuyu custom.

The estate of the deceased is said to consist of a house in Kinoo village, a farm at Kinoo, and cash and investments, the value of the entire being about Shs 40,000.

By an order of 2nd December 1976 it was directed that in order to follow as nearly as possible the provisions of the Probate and Administration (Contested Suits Rules 1940), the originating summons should be treated as a petition for the issue of a grant of letters of administration with the will annexed; that Esther and her daughter Jane Nyakaru, both of whom desired to challenge the testamentary validity of the instrument, should be at liberty to file a caveat pursuant to section 71 of the Probate and Administration Act 1881 (India); and that Florence, who wished to support the instrument as being a valid will under statute law, should have liberty to appear as a party to the proceedings. On 17th December 1976 Esther and Jane Nyakaru filed a caveat.

The matter subsequently came on for hearing before me in open Court when Mr Kamau appeared for the Public Trustee, Mrs Kinyanjui appeared for Florence and Mr Ngibuini for Esther and Jane Nyakaru as caveators.

The following issues were agreed by counsel. (1) Was the deceased of testamentary capacity at the time of the execution of the instrument? (2) Was the instrument duly executed as a valid will according to the statute law? (3) Was the deceased at the time of his death subject to or affected by Kikuyu customary law? (4) If the answer to the third issue is in the affirmative, does the instrument, if otherwise valid as a will under the statute law, conflict with such customary law? (5) If and in so far as such conflict arises, to what extent does (a) the statute law or (b) Kikuyu customary law prevail in relation to the instrument? (6) Does Kikuyu customary law recognise the testamentary validity of an oral will? (7) If the answer to the sixth issue is in the affirmative, did the giving by the deceased to Samuel on 5th March 1974 of instructions for the disposition of his property constitute a valid oral will under Kikuyu customary law?

In view of the conflicting contention put forward, it is necessary to state shortly the legal position, as I understand it, of the statute law of Kenya in relation to the several systems of African customary law which exists and which have been collected and concisely summarized by Cotran J in his valuable *Restatement of African Law: Kenya*.

By the East African Order in Council 1902, under which the High Court of East Africa was established, article 20 provided that in all cases, civil and criminal, to which Africans were parties every Court (a) shall be guided by African law:

so far as it is applicable and is not repugnant to justice or morality or inconsistent with any Order in Council or Ordinance, and (b) shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

This measure of protection for customary law has since remained substantially unaltered in regard to civil matters, having been re-affirmed by Orders in Council in the years 1911, 1921 and 1958, and is now to be found in section 3(2) of the Judicature Act, which declares that:

The High Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not

repugnant to justice and morality or inconsistent with any written law, and shall decide all cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

In the present case it is contended by the caveators that, where customary law is inconsistent with the statute law and if the justice of the case so requires, customary law prevails; and, furthermore, that where the statute law would appear to work an injustice (as in the case of the Land Control Act) the Court is at liberty to ignore the law and attempt to do "substantial justice". The only authorities cited in support of these propositions were two unreported decisions in *Mukiri v Njoroge* and *Kimani v Kimani;* but as neither of these cases was opened to me and I am unaware both of the facts and of the specific terms of the judgments I cannot express any opinion with regard to them.

It is clear, however, that in the present case no considerations of "substantial justice" can enable the customary law regarding wills to prevail over the relevant statute law. Such a course is expressly precluded by the requirement in section 3(2) of the Judicature Act that the customary law sought to be applied must not be inconsistent with any written law, and this requirement of the Judicature Act admits of no exceptions.

The "written law" which governs this matter is the African Wills Act, section 3 of which (with the Second Schedule) declares that a number of sections, including section 46 and 50, of the Succession Act 1865 (India), shall apply to all wills made by any African on or after 1st January 1962. Accordingly, it is to the provisions of these two sections that I must now turn.

Section 46 (explanation 4) of the Act of 1865 declares that no person can make a will while he is in such a state of mind, whether arising from illness or other cause, that he does not know what he is doing.

Section 50 sets out three rules for the execution of a will. First, the testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction. Second, the signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will. And, third, the will shall be attested by two or more 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 acknowledgment of his signature or mark, or of the signature of such 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 is necessary.

As will be seen, these requirements are somewhat stricter than the corresponding provisions of the present law of England. [His Lordship then considered the conflicting evidence as to the mental state of the deceased at the time of the execution of the instrument.]

Having considered the evidence, I answer the issues as follows. (1) The deceased was of sufficient testamentary capacity at the time of making the will and the first issue is answered in the affirmative. (2) The will was signed by Rufus in the presence of the deceased and by his direction but as his was the last of the signatures to be appended none of those other signatories can be said to have signed after he did and, accordingly, his signature was not duly witnessed as required by the third rule in section 50 of the Succession Act 1865. This issue is answered in the negative. (3) Counsel were all agreed that the deceased at the time of his death was subject to or affected by Kikuyu customary law and this issue will be answered in the affirmative. (4) and (5) in view of the answer to issue (2), issues (4) and (5) do not arise. (6) Counsel were also all agreed that Kikuyu customary law recognises the testamentary effectiveness of oral wills and this issue will be answered in the affirmative.

Issue (1), as to whether the giving by the deceased to Samuel on his deathbed on 5th March 1974 of instructions for the disposition of his property constituted under Kikuyu customary law a valid oral will, raises a question of some interest. In his *Restatement of African Law: Kenya III: the Law of Succession,* Cotran J, dealing with the customary law among members of the Kikuyu tribe, says (at pages 15 and 16):

A person may make a will in his old age or on his deathbed. He calls a meeting of all his close relatives from his '*mbari*', other '*Muhiriga*' relatives and close friends and declares orally how his property is to be distributed item by item, and also declares who shall be his '*muramati'*. No other formalities are required, but the will is invalid unless the above witnesses (the number is not specified) are present ... A person may not make a will if he/she cannot understand the nature of his/her act, eg if insane, a senile ... Bequests to strangers: such bequests are completely invalid ... Bequests may by will give some of his property to a member of his '*muhiriga*', provided he does not thereby deprive an heir of his whole inheritance ... A polygamist may not by will give a share to a son from one house out of a share already allocated during his lifetime to a son from another house, eg if a polygamist with two wives gives five acres on marriage to a son of his first wife, he cannot by will direct that a part of these five acres shall go to a son of his second wife.

In the glossary of vernacular terms in the same volume the following meanings are given: "*mbari*" and "*muhiriga*" both mean clan; and "*muramati*" means the family head or the administrator of the deceased's estate.

Counsel for the Public Trustee and for Florence both submitted that if the instrument is not valid as a will under statute law the oral instructions for its preparation given by the deceased in hospital constituted a valid oral will, contending that the requirements of Kikuyu customary law had been sufficiently complied with. Counsel for the caveators argued that although the Court should take into account the special circumstances of the deceased being in hospital on his death-bed and being unable therefore to call a meeting of all his close relatives, clan elders and close friends, nevertheless the instructions given by the deceased did not constitute a valid oral will.

There is no doubt that at the material time the deceased was on his deathbed and I am satisfied that he made a reasonable and genuine attempt to secure the attendance of his close adult relatives, several of whom appear to have been actually present when his testamentary wishes were being expressed to Samuel. No doubt the caveators were not there at that time although they had visited him a day or two previously, but I cannot hold that in such circumstances the inability or refusal of some of his close relatives to be present should have the effect of rendering him unable to make a will. Admittedly the deceased does not appear to have declared who shall be his "*muramati*" but, just as under the general principles of equity a trust will not fail solely for want of a trustee, so I do not consider that a will should fail solely for want of a "*muramati"* particularly where, as here, there is an entirely suitable person in the shape of the Public Trustee able and willing to undertake this role, and one of whose functions is by law to do so in cases of necessity.

Looking at the terms of the will it would appear that the entire property of the deceased has been bequeathed only to persons entitled to inherit, that is his two widows and his children by one of them, and accordingly that no attempt was made to bequeath any part of the property to strangers. No question was raised as to this.

For these reasons I answer issue (7) in the affirmative and I hold that the oral instructions given by the deceased to Samuel on 5th March 1974 and recorded by him constituted a valid oral will. The order to be made on the originating summons will, accordingly, be that the relief sought is refused and instead there will be a declaration that the deceased died testate, having on 5th March 1974 made a valid oral will under Kikuyu customary law, the terms of which have been recorded in the Kikuyu language in the document annexed to the summons, and that the Public Trustee is hereby authorized to apply for a grant of letters of administration to the estate of the deceased with that document, and a proper English translation certified by the Court as correct, annexed.

[His Lordship then invited the parties to address him on costs.]

Order accordingly.

Dated and Delivered at Nairobi this 11th day of July 1977.

L.G.E.HARRIS

JUDGE