



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, F. SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 15 OF 2017

BETWEEN

GRACE NJERI MBUGUA..... APPELLANT

AND

HANNAH WANJIKU THONG'OTE.....RESPONDENT

(An appeal from the whole Judgment & Order of the High Court of Kenya at Nairobi, (Musyoka, J.) delivered on 25th November, 2016

in

Succession Cause No. 2519 of 2017)

JUDGMENT OF THE COURT

The appellant, **Grace Njeri Mbugua**, was the 2nd wife of the deceased, **Evanson Mbugua Thong'ote**, who had three wives, namely, **Jane Njambi Mbugua**, the first wife, **the appellant**, and **Hannah Wanjiku Mbugua**, the third wife.

The appellant has filed this appeal challenging the decision of the High Court (**W. Musyoka, J.**) at Milimani, Nairobi, made in High Court Succession Cause No. 2519 of 1998 relating to the estate of **Evanson Mbugua Thong'ote** ("**the deceased**") in which the learned Judge determined as follows:-

- “(a) That I hereby confirm Grace Njeri Mbugua and Hannah Wanjiku Thong'ote as administrators of the estate of the deceased;**
- (b) That the grant of letters of administration with oral will annexed made on 29th September 2004 is to be amended accordingly;**
- (c) That the said Grant is hereby confirmed;**
- (d) That the estate of the deceased shall be distributed as per the oral will made on 1st February 1997, whose terms are encapsulated in the unexecuted will presented herein;**
- (e) That the deceased hailed from Kikuyu of Kiambu County and the bulk of the assets are**

situated within Kiambu County, consequently the cause herein shall be transferred to the High Court of Kenya at Kiambu; and

(f) That there shall be no order as to costs.”

The appellant's contention in the High Court and in this Court was that there was no oral will on the basis of which the estate of the deceased could be distributed and that the deceased died intestate so that the provisions of the Law of Succession Act applied and governed the intestate succession to the estate of the deceased.

The impugned judgment was made in the summons for the Confirmation of the Grant dated 4th March 2005 filed by Jane Njambi Mbugua, the 1st widow, and the appellant as the administratrices of the estate of the deceased.

The administratrices averred in the application for Confirmation of the Grant that the deceased died intestate on 8th April 1997 leaving many heirs and an estate comprising company shares, cash and the landed properties enumerated in paragraph 1 (a) to (q) of the affidavit in support of the application.

The learned Judge noted in his judgment that:

“it was proposed that the estate be distributed as per paragraph 5 of the affidavit in support of the confirmation application, to the widows and the children of the deceased in the proportions indicated in the said paragraph. There is on record Form 37 signed by eight (8) of the survivors in support of the confirmation application.”

However, Hannah Wanjiku Mbugua, the 3rd widow and an administratrix herself, protested and opposed the application. According to her, the estate ought to be distributed as per the oral will of the deceased. But the validity of the oral will was called into question and it became incumbent upon the learned Judge to hear and make a determination on the matter. After the hearing, the learned Judge found that:

“...the circumstances in the contents of the document prepared by Ms Kang'ethe Ikinu emanated from utterances made by the deceased to Ms Kang'ethe Ikinu and Samuel Kairigo Wakahia. The deceased may have only intended to make a written will, but the fact that he gave instructions on disposal of his estate in the presence of the two meant that although he did not get to sign the document, the same became an oral will so long as he died within the three months required.

It is my conclusion that the deceased died testate having made an oral will on 1st February 1997 the terms of which are set out in the document placed before the Court by Ms Kang'ethe Ikinu. The estate of the deceased is to be disposed of as per the terms of the said will. As the oral will has been found to be valid, the appointment of the administrators based on it is hereby declared to have been done properly.”

The appellant was aggrieved by this decision. In her Memorandum of Appeal, she set out 11 grounds of appeal contending that there was absence of two requisite witnesses witnessing the oral will; that the learned Judge failed to consider that the application for confirmation of the grant was for intestate succession; that the deceased's intention to write a will was not realized; that the draft will did not amount to an oral will; that the draft will which the learned Judge held contained the terms of the oral will contained many ambiguities; that **Samuel Kairigo Wakahia** never testified and denied ever being a witness before the District Officer Kikuyu on 2nd May 2000 when he was summoned to the latter's office; that the decision of the learned Judge was against the weight of the evidence and the learned Judge erred in law and fact in his decision that the estate of the deceased should be distributed as per the oral will made on 1st February 1997 whose terms and contents were quite ambiguous; that the learned Judge further erred in ordering that the matter be referred to Kiambu High Court when he ought to have dealt with the matter to conclusion.

This being a first appeal, we are enjoined to give the appellant a retrial by re-evaluating the evidence and reaching our own conclusions always bearing in mind that the trial Judge had vantage position in assessing the demeanor of the witnesses.

The appeal came up for hearing before us on 2nd October 2017. The appellant had filed written submissions as directed during the Case Management on 21st March 2017 but the respondent had not. Learned counsel Mr. C. N. Kihara assisted by Mr. F. N. Kimani appeared for the appellant. There was no appearance for the respondent who was aware of the hearing as the date was taken by consent. Mr. Kihara reiterated his client's written submissions on which he relied. They replicate the grounds of appeal and we need not repeat the same.

The law applicable to the estate of the deceased, whether testate or intestate, was the **Law of Succession Act, Chapter 160** of the Laws of Kenya because the deceased died on 8th April 1997, after the commencement of the said Act on 1st July 1981. Section 2 (1) of the said Act stipulates:-

“2 (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

The provisions of Section 5(1) of the Law of Succession Act stipulate that any person who is of sound mind and is not a minor may dispose of all or any of his free property by will. Pursuant to Section 8 of the Act a will may be either oral or in writing and under Section 9(1) of the Act, no oral will shall be valid unless it is made before two or more witnesses and the testator dies within three (3) months of making the will. Sections 8, 9 and 10 of the Succession Act state as follows.

“8. A will may be made either orally or in writing.

9 (1) No oral will shall stand valid unless -

(a) it is made before two or more competent witnesses; and

(b) the testator dies within a period of three months from the date of making the will:

Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.

No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made whether before or after the date of the oral will, and which has not been revoked as provided by section 18 and 19.

(i) If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.”

In this appeal, the two persons named as witnesses as required by Section 9(1)(a) of the Law of Succession Act to the deceased's oral will of 1st February 1997 were said to be Ms Kang'ethe-Ikinu, advocate, and Samuel Wakahia. Among the documents before the learned Judge was a summons for revocation or annulment of the Grant issued in Succession Cause No. 2519 of 1998. The appellant in her affidavit sworn on 28th July 2003 in support of the summons for revocation of the Grant annexed various documents including a letter dated 2nd May 2000 signed by both Samuel Kairigo Wakahia and M. A. Abdi, the District Officer Kikuyu, stating that Samuel Kairigo Wakahia was not a witness of the deceased's will. The contents of the said letter stated:

“OFFICE OF THE PRESIDENT

Ref: KIK/LND/16/6/VOL.V(100)

District

Officer

P. O. Box 51

KIKUYU

2nd May 2000

TO WHOM IT MAY CONCERN

“RE: Estate & Family of Evanson Mbugua Thong'ote (Deceased)

I, Mr. Samuel Kairigo Wakahia ID No. 230297 appeared today 2nd May 2000 at the Kikuyu D. O. Office accompanied by my wife on matters regarding the above family.

I wish to declare the following:-

1. I do not know anything about the deceased's will and I am not a witness to any written or oral will.

2. I have no interest on the Estate of the above named deceased person & neither will I be involved in inciting the family in their affairs.

3. I was shown some letters from M/S Kangethe N W

Advocates by members of the family and instructions/contents in them don't concern me and I have no relationship with the Advocate.

SIGNED BY Samuel Kairigo Wakahia (ID No. 2302967)

M. A. Abdi

DISTRICT OFFICER

KIKUYU”

The above letter is hereinafter referred to as “the letter of the 2nd witness to the oral will”. The record of appeal shows that the learned Judge (**Musyoka J.**) heard the summons for Confirmation of the Grant together with the Protest by the appellant and took down the evidence of the witnesses including that of George Gitau Mbugua and Mungai Mbugua, both sons of the deceased, and of Nancy Wambui Kangethe – Ikinu, James Mungai Mbugua, and Stephen Kagechu Mundia. Upon perusing the evidence adduced before the learned Judge, we observe that the aforesaid letter of the 2nd witness to the oral will which was before the learned Judge was discussed in the evidence. On 21st July 2015, the learned Judge allowed the letter to be produced as exhibit No. 1. In spite of the evidence and the fact that the letter stated that the 2nd witness did not witness the making of the oral will, the learned Judge failed to refer or deal with this evidence in the impugned judgment. Instead, he took the view that Samuel Kairigo Wakahia was present with Nancy Wambui Kangethe-Ikinu during the making of the oral will. We are at a loss in understanding why the learned Judge eschewed dealing with the issue thrown up by the letter marked as Exhibit No. 1

when it raised the issue whether Samuel Kairigo Wakahia was present during the making of the oral will. Nor do we understand the rationale on the part of the learned Judge in taking it as proved the fact that Samuel Kairigo Wakahia was present when it was clear that the matter was contested and the witness, Samuel Kairigo Wakahia, who was not said not to be alive had not been called to testify. The learned Judge expressed himself as follows:

“21. The other consideration is that the utterance ought to be made in the presence of two or more persons. Ms. Kang'ethe-Ikinu testified that when the deceased first came to her chambers, he was proposing to dispose in the description of the property that he was proposing to dispose of. Whereupon, she asked him to come back on another date accompanied by someone else. He did come back on 1st February 1997 with someone called Samuel Kairigo Wakahia. He also brought with him the original titles of the assets he proposed to distribute. According to Ms. Kang'ethe-Ikinu, she, the deceased and Mr. Wakahia went through the fair draft that she had prepared matching the titles numbers to the properties disposed of. In my view that exercise amounted to uttering the will in the presence of the witnesses.”

Although the learned Judge directed himself properly on the law, he failed to evaluate the evidence on the issue of witnesses to an oral will which raised doubt whether, on the balance of probabilities, Samuel Kairigo Wakahia was a witness. The fact that exhibit 1 (i.e. the letter by Samuel Kairigo Wakahia) was not rebutted and remained as evidence meant that there was no conclusive evidence to establish that there were two competent witnesses to the making of the oral will by the deceased. For this reason, we think the learned Judge fell into error. We so find.

Accordingly, we allow the appeal and set aside the judgment of the High Court (**W. Musyoka, J.**) delivered on 25th November 2016 in Succession Cause No. 2519 of 1998. The heirs to the estate of the deceased shall be determined on the basis that the deceased died intestate. We so order. The matter shall for this purpose be heard again in the High Court. Each party shall bear its own costs.

Dated and delivered at Nairobi this 24th day of November, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR