REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

SUCCESSION CAUSE NO.24 OF 2017

IN THE MATTER OF THE ESTATE OF MARGARET NJAMBI THUO (DECEASED)

PHILIS WANGUI KIBURI.......................................PETITIONER

V E R S U S

CECILIA WANGARI THUO.....................................PROTESTOR

JUDGMENT

Margaret Njambi Thuo of Milangine died intestate on 7/9/2000 and was survived by her two daughters **Philis Wangui Kiburi** the petitioner, and **Cecilia Wangari Thuo** the objector. The only property that comprises the deceased's estate is ***Nyandarua/Silibwet/793*** which measures about 5.58 HA.

This matter was commenced by way of citation, whereby Philis Wangui Kiburi filed a citation in which she was inviting the objector to take out letters of administration but the objector having declined to appear, despite service by the court's order of 26/6/2014, the petitioner was ordered to take out letters of administration in respect of the deceased's estate.

Grant was issued to the petitioner on 19/2/2015 and she filed the summons dated 11/1/2016 seeking the confirmation of grant. It is at that stage that the objector, Cecilia Wangari filed the summons dated 1/3/2016 seeking the following orders:

(1) ….Spent…

(2) That this court be pleased to review, set aside its orders dated 26/6/2014 allowing the respondent to take out letters of administration in respect of the deceased's estate;

(3) That pending the hearing and determination of the summons, the grant of letters of administration dated 19/2/2015 be suspended;

(4) That the court be pleased to revoke and annul the grant of letters of administration dated 19/2/2015 issued in favour of the respondent;

(5) That the court be pleased to hold that the deceased left a valid Will and hence the letters of administration issued to the respondent null and void;

(6) That the court do hold that the objector is the only heir and beneficiary to the deceased's estate;

(7) That the court do issue a grant of Probate in favour of the objector, Cecilia Wangari.

The objector contends that the letters of administration were obtained fraudulently by making a false statement and concealment of material facts from the court in that the petitioner failed to disclose that the deceased left a valid Will dated 2/7/1998; that the petitioner did not engage the objector before obtaining the order of 26/6/2014 and that the petitioner swore a false affidavit; that failure to reply to the citation was occasioned by the advocate who failed to attend court. The objector only learnt of the matter when she was served with the hearing notice for the summons dated 11/1/2016 that was scheduled for hearing on 18/3/2016; that the objector has not been served with the application dated 11/1/2016.

The petitioner, filed a replying affidavit setting out how she filed the citation, which was duly served on the objector and the objector's advocates, Nderitu Komu, responded to it by stating that they were filing a petition, testate (PWK4); that thereafter, the objector failed to appear or file the petition after which the court allowed the petitioner to file this petition after which she was issued with a grant of letters of administration on 19/2/2015. The petitioner is of the view that the objector is not sincere in stating that she was not aware of this cause and no material facts were concealed when she applied for the letters of administration. The petitioner denied ever having seen the purported Will and questioned why it had taken 15 years to disclose its existence since 2000 when the deceased had; that she has been advised that the purported Will does not meet the threshold; that both the petitioner and the objector have a right to inherit the deceased's estate although the objector has been benefiting exclusively from the estate; that the petitioner wrote to the Land Registrar to register a restriction (PWK10) dated 20/4/2012 but instead, the objector applied to the Registrar to have the land transferred to her as per the search certificate dated 24/4/2012(PWK9) while knowing very well that there were succession proceedings that were ongoing; that the transfer was only cancelled after a complaint was lodged by her Advocate Ndegwa Wahome (PWK12).

On 23/10/2017, directions were taken that the application for confirmation dated 11/1/2016 and the application for revocation of grant dated 15/3/2016 do proceed by way of viva voce evidence with the objector beginning. **David Munyua PW1** and the objector **Cecilia Wangari** (PW2) testified on behalf of the objector while Philis Wangari (DW1) was the only witness for the petitioner.

PW1 David Munyua testified that on 2/7/1998, he was called by the Assistant Chief of the area because he was a village elder. He was informed that Margaret Njambi (deceased) wanted to write a Will and he should go and represent the Chief which he did. He went to the deceased's house, found two other elders, James Gitonga and Joel Muraya, the deceased, Cecilia Wangari, her son Michael Chege also deceased; that he told the deceased that he had been sent by the Assistant Chief and she told him what she wanted him to write and that it is him who wrote down in Kikuyu and signed the Will after which the deceased and the objector thumb printed while those other present also signed. He produced the Will and the English translation as P.Ex.1(a) & (b). PW1 told the court that the objector and her children lived with the deceased on the subject land as the objector is not married. PW1 is married to the daughter of the objector and he said that he left the original Will with the deceased but denied having any interest in the estate.

PW2 Cecilia Wangari confirmed that she is a sister to the petitioner and has the original title to the deceased's land dated 29/6/1993 (P.Ex.No.2); that the deceased had lived on the land since 1965; that the objector has never been married, has 12 children and has resided on the said land since 1966. PW2 confirmed that the petitioner is her sister but is married and has 7 acres of land with her husband at Sabugo; that the petitioner has never lived on the deceased's land; that indeed the Will was written by PW1 after the deceased requested the Assistant Chief to come and help write the Will; that thereafter the deceased went to the Land Control Board at Ol Jororok where she gave her consent and PW2 was present. The Land Control Board is dated 25/2/1999 (PW3). According to PW2, the deceased fell sick after writing the Will; that it is her and her children that took care of the deceased; that the petitioner never assisted in taking care of the deceased and urged the court to transfer the land into her name as no provision was made for the petitioner. PW2 said that the deceased did not sign any transfer forms even though she went to the Board.

The objector admitted that on 24/4/2012, she caused the land to be registered in her name but it was later cancelled. She also admitted that she never called the petitioner for reading of the Will after the deceased's death.

DW1 Philis Wangui (the petitioner) reiterated the contents of her affidavit, that she called the objector so that they could file a suit; that the objector asked for two weeks to enable her file the suit but, she went ahead to transfer the land into her name instead of filing a Succession Cause; that although in the objector's lawyer's letter it was alleged that the deceased left a Will, none was

availed to her (D.Ex.No.2). DW1 denied that their mother left a Will nor did she know about the Will. She denied knowing the two signatories to the Will. DW1 knew PW1 as the objector's son in law; that when the deceased was sick, she used to go to assist her but never heard of the Will; that sometime back she used to plant pyrethrum on the suit land and help the deceased pay for the land with Settlement Fund Trustee; that the objector was once married to one Apollo but they separated and she went back to their home. DW1 requests the court to order that objector and petitioner share the deceased's land equally.

Both counsel for the objector and petitioner filed written submissions which I have taken into consideration. The issues that seem to arise are:

(1) Whether the deceased left a valid Will;

(2) Whether the objector has made a case for revocation of grant issued to the petitioner;

(3) Whether the petitioner is entitled to inherit from the deceased and if so, how much"

Of validity of the Will:

The petitioner has denied that any Will was made by the deceased and that the Will produced by the objector is suspicious. A valid Will depends on the capacity of the testator to make a Will and the Will must also conform to the legal requirements of making a Will.

There is a rebuttable presumption under Section 5 of the Law of Succession Act that the person making a Will is of sound mind and therefore has the capacity to make the Will.

Section 5 provides as follows:

"5(1)……any person who is of sound mind and not a minor may dispose of all or any of his free property by Will…….

(2)…….

(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing;

(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges."

By alleging that the Will is suspicious, the petitioner is relying on Section 7 of the Act which 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 above section covers situations where one may be of age and of sound mind but the circumstances surrounding the making of the Will undermines its validity.

In the decision of the ***Re Estate of Julius Mimano. Succession Cause 417/2005 and 1345/2014***, J. Musyoka observed that an allegation that a Will was made under a cloud of suspicion raises the question of fraud and that the Will was procured by fraud or through fraudulent means. The principle behind it being that the testator must understand the document he has signed as his Will, he must also have approved of the contents which must reflect his wishes.

In the case of ***John Kinuthia Githinji v Githua Kiarie and others Court of Appeal Succ. Cause 63/1984,*** it was held that it is essential to the validity of the Will that, at the time of its execution, the testator should have known and approved its contents.

Section 11 of the Law of Succession Act provides for what constitutes a valid written Will.

It states as follows:

"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 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 the 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."

From the above provisions, there are four main requirements for formation of a valid Will:

(1) The Will must have been executed with testamentary intent;

(2) The testator must have had testamentary capacity;

(3) The Will Must have been executed free of fraud, duress, undue influence or mistake;

(4) The Will must be duly executed.

The Will produced by the objector was executed by the deceased by way of a thumb print. The objector also thumb printed. The two witnesses Joel Murage and James Gitonga appended their signatures. On the face of it, the Will was properly drawn, executed and witnessed. The petitioner's counsel took issue with the manner in which the signatures were appended but I would not place much importance on the order of the signatures. This is because the signatories were not versed in drawing legal documents like a Will.

The suspicion however arises from the fact that the objector, who is the sole beneficiary, took a very active part in its drafting. The author of the Will (PW1) happens to be the son in law of the objector. The other witnesses are deceased and cannot be called as witnesses to shed light on how the Will was made.

In the case of ***James Ngengi Muigai Succ. Cause 523/1996***, the court held that the validity of a Will derives from testamentary capacity of the testator and from circumstances attending to its making. It means that a part from considering the capacity of the testator, the court must look at the circumstances surrounding the making of the Will.

In the case of ***Vijah Charidrakant Shah v Public Trustee E.A.63/1984***, the court held that it is the duty of the court to ***"scrutinize the evidence of the propounder vigilantly and jealously if he is the principal beneficiary."*** In this case, the propounder of the Will is the objector who is a principal beneficiary and the court will examine the evidence to establish whether the Will was made freely.

In the case of ***John Kinuthia Githua (Supra)***, the court said that where on the face of it, the Will appears to have been properly executed by a person of age and sound mind, a presumption of due execution arises, but that presumption may be displaced by

circumstances emerging from the evidence adduced which tend to counter balance the presumption.

The question of lack of knowledge, approval and execution of a Will by the testator under suspicious circumstances usually arises where the testator is in a weakened state, either due to old age, intoxication or illness. ***See Re Estate of Julius Mimano*** and ***Shah case Supra***. The suspicious circumstances may arise if the propounder of the Will plays a key role in the execution of the Will by the testator or where the propounder of the Will is named as the principal beneficiary. It is therefore for the person alleging suspicion to prove the weakened state of the testator, the role played by the propounder in the making of the Will especially if he/she took a central part in the making of the Will e.g. choice of advocate and taking the testator to the Advocate for purposes of making the Will.

In the instant case, the author of the Will was a son in law of the sole beneficiary, the objector, two people who would be considered to be interested in the Will. The court will therefore examine all the circumstances surrounding the said Will to determine whether it is a valid Will or it is a document made to represent the objector's wishes.

First of all, after the Will was allegedly made, there is no evidence that the petitioner, the only other child of the deceased, was aware of it. The objector admitted that even after the burial of the deceased, the Will was never read to both the objector and petitioner in the presence of the Local administration as Chief or his Assistant, or at all.

It is evident that PW2 never filed any Succession Cause from the year 2000 when the deceased died. The objector was cited to team up with the petitioner to a file Succession cause but the objector was unwilling.

The objector cannot convince this court that she was not aware of the citation proceedings because she was served with the citation and by a letter dated 10/4/2012, the objector's counsel, Nderitu Komu, (PWK 4) wrote back to Ndegwa Wahome the petitioner's advocate.

In the reply to the letter written by Ms. Ndegwa Wahome, Mr. Nderitu stated that the objector was in the process of instituting testate proceedings for the estate of Margaret Njambi (deceased). That is when it was revealed that there was a Will in existence. This was over 12 years after the deceased's death. If a Will was in existence, why did it take the objector over 12 years to disclose that the deceased died testate"

It did not end there because the objector did not file Succession proceedings even after her advocate intimated that they were in the process of filing a suit testate. It is not until 26/6/2014 that the court allowed the petitioner to take out letters of administration. The matter was gazetted and a grant of representation was issued on 19/2/2015. It means that for the twelve years, the objector had not disclosed who was in custody of the Will and why the Will was not read soon after the deceased's burial or soon thereafter. The objector waited till the petitioner filed this cause, was issued with a grant of letters of administration, then she came in to challenge it by the application dated 15/3/2016 seeking revocation of grant. The conduct of the objector considered above is suspect and has not been explained.

On 20/4/2012, the petitioner's advocate applied to the Land Registrar for a restriction to be registered on the subject land (PWK10) as evidenced by the search certificate PWK9. However, though served with the citation, instead of filing a Succession cause, the objector caused the title ***Nyandarua/Silibwet/793*** to be transferred to her names on 24/4/2012 as evidenced by the search certificate (PWKII).

At the time, the objector did not have letters of administration and therefore must have conspired with the land registrar to have the said land transferred un-procedurally and illegally.

The said title was subsequently cancelled and the title was restored to the deceased's names after the petitioner's advocate wrote to the land registrar complaining about the illegal act. If indeed the objector was in possession of the Will, why would she engage in such illegal acts in trying to get short cuts to be registered as the owner of the land when the Will would guarantee her rights"

The objector had engaged an advocate by then and she must have been advised on how to proceed. In fact the objector had just addressed a letter of her intention to file testate proceedings on 10/4/2012 but instead, the objector engaged in underhand dealings of having the land transferred into her names on 24/4/2012. This conduct goes to buttress the suspicions that there may have been no

Will left by the deceased.

By the time the deceased died, she was about 84 years old. PW2 said that she was sickly and she depended on the objector and her children for support and at times, even had to be carried. The objector lived with the deceased in the same home and it cannot be ruled out that in the deceased's weak state, she was influenced and taken advantage of to write a Will totally disinheriting the petitioner. It is no wonder that only the objector and her son in law were present at the writing of the said Will but not the petitioner. The question is, why did the deceased not communicate to the petitioner what she had done, I find the purported Will to have been made under extremely suspicious circumstances if at all it was made by the deceased.

The objector was the person generally in control of the deceased person, having been the one living with her in the same home and caring for her in a weakened and sickly state. The objector was present when the Will was allegedly written by the objector's son in law, **David Kinyua (PW1)** and she kept the Will a secret from everybody including the petitioner, who should have known about its contents especially after the demise of the deceased. The said Will remained a secret of the objector and her son in law till over 12 years later. All those reasons considered above taken cumulatively lead to the inescapable conclusion that if indeed there was a Will, it may have been made under the influence of PW2 and it was kept under extremely suspicious circumstances and this court cannot rely on it as a valid Will. The conduct of the objector in trying to pull the carpet from under the petitioner's feet by transferring the title into her names buttressed the suspicion. The suspicious circumstances render the Will null and void.

Whether the grant should be revoked or annulled:

The provisions of Section 76 of the Laws of Succession Act provide for circumstances when a Will may be revoked or annulled. The Section reads as follows:

"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion:-

(a) That the proceedings to obtain the grant were defective in substance;

(b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either:-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) That the grant has become useless and inoperative through subsequent circumstances."

The Court of Appeal in considering the above section in the case of ***Joyce Ngina Njeru and another v Ann Wambeti Njura (2012) eKL*** held as follows:

"The central core of the ingredients required to be established under section 76 of the Laws of Succession Act is that it is meant

to be used as a vehicle to attack and fault the process of either obtaining the grant or inactive use of the grant after being lawfully obtained in circumstances where it has become useless. It is not meant to fault the decision on the merit."

It is the objector's contention that grant of the orders of 26/6/2014 allowing the petitioner to take out letters of administration and the grant of letters of administration issued on 19/2/2015 be revoked because they were obtained by the petitioner making false statements and concealment of facts that the deceased had left a valid Will; that the petitioner did not inform the objector of her intention to apply for letters of administration and that the objector only learnt of the state of affairs when the Notice of Motion dated 5/2/2016 was coming up for hearing on 18/3/2016.

Although the objector told the court that the petitioner was aware of the Will, there is no evidence of how and when the petitioner became aware of the Will. The objector denied that the Will was read after the deceased's burial. The objector never disclosed how the petitioner was expected to know of the Will.

There is evidence on record that the petitioner first filed a citation after the objector was served and failed to join her to petition the court for letters of administration for the deceased's estate. The objector is not being truthful in alleging that she was not aware of the petitioner's actions to commence the succession proceedings because on being served with the citation, she engaged Nderitu Komu Advocate who wrote to Ndegwa Wahome, counsel for the petitioner on 10/4/2012 intimating that the objector was in the process of instituting testate proceedings. Even after this letter was written, the objector did nothing until the court allowed the petitioner to go ahead and petition the court for letters of administration by the court order of 26/6/2014. As earlier observed, the objector also tried to pull the carpet from under the petitioner's feet by fraudulently having the suit property transferred to herself. The order of 26/6/2014 was properly issued to the petitioner.

The petitioner waited for another two years for the petitioner to petition the court to no avail. Letters of administration were then issued to the petitioner on 19/2/2015, but even then, the objector took no action. She lay low only to spring up into action when the application for confirmation of grant dated 11/1/2016 was set down for hearing. The objector is not truthful. If anything it is the objector who withheld material facts from the court and her conduct was unwanting.

The process leading to the issuance of the letters of administration to the petitioner on 19/2/2015 was not defective nor were the letters obtained through withholding of material facts from the court. The grant was regularly issued. I find that the objector has failed to discharge the requirements under Section 76 of the Law of Succession Act as to why the grant should be revoked or annulled.

<u>On distribution of the deceased's estate:</u>

The next question then is, how the deceased's estate should be distributed. The objector and petitioner are the only children who survived the deceased. The deceased only left one asset which is ***<u>Nyandarua/Silibwet/793</u>***. The applicable law to the deceased's estate is Section 38 of the Laws of Succession Act which provides that:

> ***"Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."***

The above provision is read with Article 27(3) and (4) of the Constitution which provides:

"(3) Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social systems;

(4) Any form of discrimination directly or indirectly against any person on any grounds including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour …etc."

In this case, the objector contends that the petitioner is married while she is unmarried; that she has 12 children and that is why she is entitled to inherit the deceased's estate as opposed to the petitioner who is married has only 7 children, a husband and 7 acres of land. To deny the petitioner her right to inherit the deceased's property on account of being married is itself discriminatory.

There is no evidence that the deceased had, during her lifetime made any advance gift to the petitioner and for that reason, the proper mode of distribution is that the two siblings, the objector and petitioner, should share their deceased mother's estate equally.

In the end, I make the following orders:

(1) That the summons for revocation dated 15/3/2016 is hereby dismissed;

(2) The deceased did not leave any valid Will but died intestate;

(3) The grant issued to the petitioner Philis Wangui Kiburi be confirmed as prayed with the petitioner and objector sharing the deceased's property Nyandarua/Silibwet/793 in equal shares.

(4) During the demarcation of the land, the surveyor to take into account the area where the objector has settled or built houses, if any;

(5) This being a family matter, each party to bear their own costs.

Dated, Signed and Delivered at NYAHURURU this 19th day of July, 2019.

....

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Maina Kairu for petitioner/respondent

Ms. Wanjiru Muriithi for objector

Soi – Court Assistant

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