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Advocates:	M/s Ochieng' Gai & Co. Advocates M/s Ikua, Mwangi & Co. Advocates M/s Muigai, Gatei & Co. Advocates
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Advocates For:	-
Advocates Against:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 241 OF 1993**

**IN THE MATTER OF THE ESTATE OF GICHUHI WAKANO ALIAS WILFRED WAKANO GICHUHI (DECEASED)**

**RUTH NJOKI.....1<sup>ST</sup> APPLICANT/PROTESTOR**

**HANNAH NJERI KINYANJUI.....2<sup>ND</sup> APPLICANT/PROTESTOR**

**MARY WAITHERA.....3<sup>RD</sup> APPLICANT/PROTESTOR**

**VERSUS**

**JOSEPH WAWERU GICHUHI.....1<sup>ST</sup> RESPONDENT**

**MARY NJOKI WAWERU.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

1. **Gichuhi Wakano Alias Wilfred Wakano Gichuhi (Deceased)** died on the 20<sup>th</sup> October, 1985. He was polygamous having married three wives and had 19 children. This was how his houses were;

**· REBECCA NJERI GICHUHI- 1<sup>ST</sup> WIFE (DECEASED)**

1. JOHN WAWERU GICHUHI- DECEASED

2. MARY WAITHERA MBURU- DECEASED

3. WANJIKU KAHONDA- DECEASED

4. NJOKI GAITHO

5. HANNAH KAREI- DECEASED

6. HANNAH NYAMBURA MACHARIA

7. NJAMBI KURIA- DECEASED

8. JAMES MUGO GICHUHI

**· MIRRIAM WANJIRU GICHUHI- 2<sup>ND</sup> WIFE (DECEASED)**

1. JOSEPH WAWERU GICHUHI

2. DANIEL WAITHAKA GICHUHI

3. NDUNGU GICHUHI

4. MARY WAITHERA NDUNGU

5. HANNAH NJERI KINYANJUI

6. RUTH NJOKI NGANGA

7. WANGUI WAHOME

· **LYDIA WANJIKU GICHUHI -3<sup>RD</sup> WIFE (DECEASED)**

1. MARY WANJIKU KURIA (DECEASED)

2. WAMBUI KAIRU

3. WAIRIMU WA SAMMY

4. WANGARE GICHUHI (DECEASED)

2. The deceased left the following assets;

*1. Shares in Kiamukasagiki Farmers Company Limited , a plot measuring 8 acres;*

*2. Shares in Kimukasagiki Farmers Company Limited, a plot measuring 8 acres;*

*3. Shares in Maombi Farmers Company Limited, Plots no. 717 and 718 Maombi Farm Subukia measuring 4 ½ acres*

*4. Shares in Maombi Framers Company Limited, Plots no. 719 and 720 Maombi Farm Subukia measuring 4 1/2 acres*

*5. Shares in Agricultural and Industrial Holdings Limited;*

*6. Plots no. 356 and 357 in Block 1*

*7. Plots 72 and 73 in Block C in Kikopey Farm Gilgil;*

*8. Shares in Ngwataniro Mutukanio Farm with a Plot in Pwani Farm Njoro;*

*9. L.R no. 6244/2, 7172/30, 7172/17, 10450, 3360/4, 6340/1, 7172/44,487/138 all in Elburgon and measuring approximately 122.5 acres.*

3. According to the respondents the deceased died testate by the will dated 12<sup>th</sup> September 1985. That he appointed **John Waweru Gichuhi & Joseph Waweru Gichuhi** the 1<sup>st</sup> borns sons in the 1<sup>st</sup> and 2<sup>nd</sup> houses as joint executors.

4. He made provision for the 1<sup>st</sup> and 2<sup>nd</sup> houses leaving out the 3<sup>rd</sup> house. He did so by bequeathing properties to all his sons in the 1<sup>st</sup> and 2<sup>nd</sup> houses leaving out all his except for **Mary Waithira Mburu** who was given 2 acres of land.

5. The executors petitioned this court for grant of probate and the said grant was issued on 9<sup>th</sup> May 1986 and confirmed on the 15<sup>th</sup> of July 1996.

6. The 3<sup>rd</sup> wife **Lydia Wanjiku Gichuhi** moved the court under **section 26 of the Law of Succession Act** seeking for reasonable

provision for her and her children. She did not expressly challenge the validity of the will. The court vide its judgement dated 19<sup>th</sup> January, 1996 (*Rimita J*) found in her favour, varied the will and distributed some of the deceased's properties to her and her children.

*“I therefore order that the following be set aside for lydya’s household.*

*(a) 8 acres of land to be registered in lydya’s name.*

*(b) The residential house erected for her by the deceased and the plot on which it stands. Plot to be more than ½ acre.*

*(c) One (1) acre plot with the 8 rooms for renting.*

*(d) The livestock in her possession.*

*The costs of the application will be borne by the estate of the deceased.*

*The parties will apply for confirmation of grant of letters of administration with the will attached and the order for provision.*

*Each party will otherwise be at liberty to apply.”*

7. The petitioners/respondents did not apply for Confirmation of the Grant until 2<sup>nd</sup> of June 2015. It is noteworthy that they only attached the said will but not the orders of *Rimita J* of 19<sup>th</sup> January, 1996.

8. Prior to their application the applicants had filed Summons for the Revocation or Annulment of Grant dated 16<sup>th</sup> August, 2013 brought under **section 47 & 76 of Cap 160 Rules 44(1), 49 & 73 of the Probate and Administration Rules** seeking the revocation and or annulment of the Grant of Letters of Administration issued to the respondents together with costs...

9. That application was supported by the Affidavit sworn by **Ruth Njoki** on her behalf and on behalf of her co-applicants on 16<sup>th</sup> August, 2013. She deponed that deceased herein was their father and that the grant was obtained secretly and fraudulently without their consent. That the respondents had totally disinherited them claiming that by virtue of being daughters they had no capacity to inherit from their deceased father.

10. That respondents failed to disclose to them the existence of this cause and they learned about it when the respondents prohibited them from cultivating their parcels of land comprising part of the deceased's estate and threatened to evict them.

11. She deposed that respondents had refused to diligently administer the deceased's estate and were intermeddling and wasting the estate to the detriment of the lawful beneficiaries. That the respondents had failed to give a complete and accurate account of their dealings with respect to the deceased's estate as by law required and therefore the grant had been rendered useless and inoperative due to respondents' conduct.

12. Following the filing of the Summons for Confirmation of the Grant, **Ruth Njoki & Hannah Njeri Gichuhi** filed an Affidavit of Protest on 5<sup>th</sup> October, 2015. They averred that the deceased lacked capacity to make the will dated 12<sup>th</sup> September, 1985 due to illness which had irreparably compromised, obliterated and destroyed his state of mind and capacity to make a will. That the will did not conform to material aspects of the law and in particular the same had not been executed by the deceased as required by the law.

13. They deposed that the daughters of the deceased who are also beneficiaries of the estate were not provided for in the purported leading to unfair treatment in the distribution of the estate and bias against the female children of the deceased. That the purported will was not authentic, valid, lawful or enforceable and that they were entitled to a reasonable and just provision from the deceased's estate.

14. They proposed that the deceased assets to be shared as follows;

1. Shares in Kimukasagiki Farmers Company Limited, a plot measuring 8 acres be distributed to JOSEPH WAWERU GICHUHI- 2<sup>ND</sup> HOUSE.;
2. Shares in Kimukasagiki Farmers Company Limited, a plot measuring 8 acres be distributed to DANIEL WAITHAKA GICHUHI- 2<sup>ND</sup> HOUSE;
3. Shares in Maombi Farmers Company Limited, Plots no. 717 and 718 Maombi Farm Subukia measuring 4 ½ acres be distributed to JAMES NGAU GICHUHI- 1<sup>ST</sup> house.
4. Shares in Maombi Framers Company Limited, Plots no. 719 and 720 Maombi Farm Subukia measuring 4 1/2 acres be distributed to JOHN WAWERU GICHUHI- 1<sup>ST</sup> HOUSE.
5. Shares in Agricultural and Industrial Holdings Limited together with plot numbers 356 and 357 in Block 1 and 72 and 73 in Block C in Kikopey farm Gilgil measuring 20 acres be distributed to NDUNGU GICHUHI- 2<sup>ND</sup> HOUSE;
6. Shares in Ngwataniro Mutukanio Farm with a Plot in Pwani Farm Njoro MEASURING 9 ACRES be distributed to NDUNGU GICHUHI- 2<sup>ND</sup> HOUSE;
7. Pieces of land known as L.R Numbers 6244/2,7172/30,7172/17,10450,3360/4,6360/1,7172/44,487/138 ALL IN ELBURGON AND MEASURING 122.5 ACRES BE DISTRIBUTED AS FOLLOWS;
  - 1.0 acres be distributed to Presbyterian Church East Africa
  - 2 acres be distributed to – MARY WAITHERA- 1<sup>ST</sup> HOUSE.
  - 10 acres be sold to pay out all estate liabilities.
  - 8 acres be distributed to the 3<sup>rd</sup> house absolutely.
  - The remainder of 101.5 acres without permanent business and residential buildings be distributed equally amongst all the children of 3 houses in consideration of what each has been bequeathed prior to the demise of the deceased.
  - PLOT NO.14939/29 with permanent business and residential building be distributed to the 1<sup>st</sup> House.
  - Plot No.14939/27 with a permanent business and residential building be distributed to the 2<sup>nd</sup> house.
  - PLOT NO. 14939/24 with a permanent residential building be distributed to the 3<sup>rd</sup> house.
  - The permanent residential and business building built by the deceased for MIRIAM WANJIRU be distributed to the daughters of the 2<sup>nd</sup> house.
  - The permanent residential buildings where MIRIAM WANJIRU lived be distributed to the sons and daughters of the 2<sup>nd</sup> house.
  - The permanent residential building on plots nos. 7172/17 and 7172/18 be distributed to the 2<sup>nd</sup> house to be shared equally by JOSEPH WAWERU & DANIEL WAITHAKA
  - Permanent residential building adjacent to plot Nos. 7172/17 & 7172/1 be distributed to the 1<sup>st</sup> House.

15. The Respondent's filed Supplementary Affidavit sworn on 23<sup>rd</sup> July, 2018 in which they set out to explain their side of the case. They deponed that following the deceased's death they applied for Letters of Administration and the same was granted and confirmed on 9<sup>th</sup> May 1986 and on 15<sup>th</sup> July, 1986 respectively. They spoke about the variation of the will by the court pursuant to an application by the 3<sup>rd</sup> wife of the deceased. That thereafter they proceeded to distribute the estate in accordance with the will and

the court order. That they had fully distributed the estate as per the will and the court order and that the land and plots were fully subdivided, the beneficiaries were on their properties and most of them had sold off portions of their said plots or fully developed them.

16. That the co administrator **John Waweru Gichuhi** died on the 20<sup>th</sup> December, 1991 and was replaced by his wife **Mary Njoki Waweru** who was his wife. The administrators position is that Mary Waweru became the administrator of her husband's estate distribute his share of the estate to his beneficiaries. That are of the position that there is nothing left of the deceased's estate to distribute.

17. It was also the respondents position that for **Felista Wambui Kairu & Susan Wairimu Gichuhi**, their mother **Lydia Wanjiru Gichuhi** had obtained her share of the deceased's estate for herself and her children and they could therefore not come up now to demand a share of the estate. They contend that this matter has been determined through a valid will and court order and it is trite law that litigation should come to an end. That two other daughters of the deceased namely **Mary Waithera & Mary Wangui** have not shown interest in these proceedings. That the claim by the applicants is baseless, time barred and an abuse of the court process and that the applicants acquiesced to the said will, court order and distribution through their actions. Their claim is an afterthought as they should have challenged the will and presented their claim at the time of determination of the claim by **Lydia Wanjiru Gichuhi**.

18. They deposed that one of the applicants **Hannah Njeri Kinyanjui** had bought estate land from several beneficiaries in this matter reinforcing the fact that the estate has been fully distributed.

19. That there were third parties on the ground who had purchased developed and were in possession of their respective land parcels; that these persons would most certainly oppose any valuation of the property without their involvement in the matter.

20. That allowing the application would open a can of worms and unsettle everybody on the land, leading to many suits and counter suits.

21. It is their position that they have been diligent in distributing the estate and they are only awaiting the title deeds from the land office.

22. On 22<sup>nd</sup> October, 2015 parties took directions for the protest to be heard by way of *viva voce* evidence.

### **PROTESTORS' CASE**

23. Hannah Njeri's testimony reiterated what was in their affidavits emphasizing that the deceased was not in a state to make a will, that her brothers Daniel Waithaka & Joseph Waweru Gichuhi in her mother's house were provided for but she and her sisters were cut off the so called will. She stated that the will never made any provision to them but to her brothers.

24. On cross examination, she stated that the estate consisted of 120 acres, rental houses, shares & 3 houses. That some plots had since been sold and 1<sup>st</sup> respondent took everything that was bequeathed to the 1<sup>st</sup> house.

25. Susan Wairimu Gichuhi's testimony similar. In addition she disputed that the deceased signed the will and that the signature therein is a forgery

### **RESPONDENTS' CASE**

26. Joseph Waweru Gichuhi in his testimony reiterated the averments in his affidavit.

27. On cross examination, he stated that the deceased drew his will in September 1985 and passed on in October 1985. He denied that the deceased drew his will when he was sick; that the will was read to all his family members a few days after his death. He confirmed that he did not witness the will being drawn and signed by the deceased and his witnesses. He confirmed that his sisters, the protestors herein Ruth & Hannah were not given any property in the will. He also confirmed that he sold his land to Hannah and that the estate properties were still registered in the deceased's name.

28. **Mary Njoki Waweru** testified that the deceased was her father in law. She was married to the deceased's son **John Waweru** who is also deceased. She said her husband was allocated 15 acres of land by the deceased which she had since distributed to her children and only remained with 2 acres. She testified that the protestors **Felister and Susan** were given land which they leased and sold.

29. On cross examination, she stated that she has never sold her share of the land and the sale agreement indicating that she sold land to **Monica Waweru** was a forgery. She said that her deceased's husband told her about the existence of a will and confirmed the deceased's assets are still registered in his name.

### **SUBMISSIONS**

30. Only the applicants/protestors' submissions are on record.

### **RUTH NJOKI'S SUBMISSIONS**

31. She submitted on the following issues;

- *Whether this matter had been determined and concluded;*
- *Whether the will dated 12<sup>th</sup> September 1985 was valid;*
- *Whether the female children of the deceased were discriminated upon;*
- *Whether the sale of the deceased estate by the petitioners is valid; &*
- *How the estate should be distributed.*

32. On whether this matter had been determined and concluded it was her submissions that the certificate of confirmation of grant tendered by the petitioners was issued on 15<sup>th</sup> July 1986 however the 3<sup>rd</sup> wife to the deceased made an application for reasonable provision and through a judgement dated 19<sup>th</sup> January 1996 court ordered parties to apply for Confirmation of Grant of Letters of Administration with the will attached. The petitioners never applied for Confirmation of Grant until 2<sup>nd</sup> June, 2015 when they applied for Confirmation of Grant and the protestors herein objected the mode of distribution. That the petitioners have not fully distributed the estate of the deceased as titles to the parcels of land are still in the name of the deceased.

33. On whether the will dated 12<sup>th</sup> September 1985 was valid. It was invalid for the following reasons;

- The time it was allegedly drawn the deceased was very sick and therefore lacked physical and mental capacity to make the will due to his condition.
- The evidence of the 1<sup>st</sup> petitioner contradicted the testimony of the advocate MUNGAI MBUGUA who testified before *Judge Rimita* that when the deceased instructed him to draw his will the 1<sup>st</sup> respondent was present whereas the 1<sup>st</sup> respondent herein testified that he was not present.
- The court in its judgement dated 19<sup>th</sup> January, 1996 found that the circumstances under which the will was made raised suspicion.
- The will did not meet the requirements of section 11 (c) of the Law of Succession Act.

34. On whether the female children of the deceased were discriminated upon, she submitted that except for **Mary Waithira** who was given 2 acres no other daughter of the deceased were bequeathed any property which act was in violation of **Article 27 of the Kenyan Constitution 2010**. The protestor cited the case of **Re Estate of Bethwell Muya Gakuru (Deceased)** where the court opined that the Law of Succession does not discriminate between female and male, married or unmarried daughters of the deceased person when it comes to the distribution of estate. All children of the deceased are entitled to a share of the deceased's estate.

35. On whether the sale of the deceased estate by the petitioners is valid; she submitted that the sale by the 1<sup>st</sup> respondent was invalid and amounted to intermeddling of the deceased's estate. For this proposition she relied on provisions of **section 45 and 82(b)(ii) of the Law of Succession Act** and the case of **Re Estate of John Gakunga Njoroge (Deceased) 2015 eKLR** where the court stated that contracts of sale before Confirmation of Grant are invalid for offending the provisions of **Section 45 and 82 of the Law of Succession Act**.

36. On how the estate should be distributed; she submitted that deceased died intestate and his estate should be distributed as per the proposed mode of distribution in paragraph (h) of the affidavit of protest by Ruth Njoki & Hannah Njeri. That in the alternative the court should distribute the estate in accordance with section 40 of the Law of succession Act.

#### **SUSAN WAIRIMU'S SUBMISSIONS**

37. She submitted that the will is invalid for reasons that;

- it was drawn by the deceased when he lacked testamentary capacity due to illness
- it was not witnessed by two independent /competent witnesses
- It was made under suspicious circumstances since DW1 who is also executor of the will and also a major beneficiary administrator to the estate did not call the other members of the family when the will was read.

38. The protestor also submitted that deceased erred in failing to bequeath his daughters any property. She urged this court to invoke **section 26 of the Law of Succession Act** and provide for the protestors.

#### **HANNAH NJERI'S SUBMISSIONS**

39. She submitted on the following issues;

- *Whether the deceased left a valid will*
- *Whether the deceased left a valid will*
- *Whether the Applicants are provided for in the will*
- *Whether the Applicants are entitled to the share of the estate*
- *Whether the estate has been distributed before.*

40. On Whether the deceased left a valid will; she submitted that the will was invalid as the witnesses who attested to its execution were never called to testify and that there was no evidence that the deceased executed the alleged will.

41. On Whether the Applicants are provided for in the will; it was her submissions that it's clear at paragraph 4 (vii) (c) of the will that female children were excluded from the will.

42. On Whether the Applicants are entitled to the share of the estate; she submitted that by dint of **Article 27 of the Constitution** the applicants are entitled to a share of the estate.

43. On Whether the estate has been distributed before; it was her submissions that since the properties are still registered in the deceased name and have not been transferred; it was possible for the estate to be redistributed among all beneficiaries a fresh. The protestor cited the provisions of **Section 47 of the Law of Succession Act** and asked this court to intervene & revoke the grant herein so that the estate could be distributed in a fair and equitable manner.



## **ISSUES FOR DETERMINATION**

44. Having considered the application, the affidavits both in support of and in opposition to the application, the evidence as well as the submissions filed, the following are issues for consideration;

- i. *Whether the WILL dated 12<sup>th</sup> September 1985 is valid;*
- ii. *Whether the will made any provisions for the Applicants;*
- iii. *Whether the Applicants are beneficially entitled to a share of the deceased's estate*
- iv) *Whether the WILL can be varied to provide for persons left out.*

## **ANALYSIS**

### **Whether the will dated 12<sup>th</sup> September 1985 is valid;**

45. The validity of a will is dependent on the capacity of the testator to make a will at the material time and compliance with the formal requirements for the making of a will.

46. The applicable law on the mental capacity of the testator is found at **Section 5(3) of the Law of Succession Act** which provides that the testator must have capacity to make a Will. The relevant provisions under the said **section 5** state as follows -

**'5(1). ... any person who is sound of mind and not a minor may dispose 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.'**

47. The essentials of testamentary capacity were laid out in **Banks vs Goodfellow (1870) LR 5 QB 549**, where the court stated that -

**'A testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made.'**

48. The **Laws of Succession, Law Africa 2006** William Musyoka states at **page 43**;

**"In addition to having testamentary capacity; a testator must know and approve the contents of their will. A testator knows the contents of the will if he is aware and understands the terms of the will. He need not understand the precise legal effect of the terms. A testator approves the terms of the will if he executes it in those terms on his own volition and not because of coercion or undue influence of another....."**

49. In **Re Estate of Gatuthu Njuguna (Deceased) [1998] eKLR**, the court held:-

**"As regards the testator's mental and physical capacity to make the will, the law presumes that that the testator was of sound**

*mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind..."*

50. On the formal requirements of validity of a will, **section 11 of the Law of Succession Act** states -

**"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 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."**

51. In this case the protestors did not avail any evidence to show that signature did not belong to the deceased or that that was not the manner in which he signed his documents. No comparative handwriting document was produced. Perhaps expert evidence would have helped.

52. While it is not in doubt that the deceased died about a month after he made the will and the he was sick for a while, the protestor's did not establish that he was too sick to make a will. Nevertheless *Justice Rimita* made the observation while hearing the 3<sup>rd</sup> wife's application for provision from the will that circumstances under which the will was made were suspicious. The only thing was that the applicant had not contested the validity of the will. In the case of **John Kinuthia Githinji Kiarie vs Githua Kiarie and Others NBI C.A No.99 of 1988 (UR)**, where the deceased was seriously ill and executed a will while in hospital, it was held that in the absence of evidence that the illness had affected the mind of the testatrix so as not to know what she was doing when she signed the will, the subject will was valid.

53. Though the applicants challenge the will they bore the burden of proving the elements required by the law but they did not discharge their burden with respect to the deceased's testamentary capacity.

54. The protestors argued that **section 11 (c) of the Law of Succession Act** which requires a will to be attested to by two or more independent/competent witnesses had not been complied with. The 3<sup>rd</sup> protestor in particular submitted that the will was attested to by Mungai Mbugua who was an advocate. That the said advocate cannot be the advocate who drew the will and also be one of the competent witnesses to the signature by the deceased. On the face of the will, it is clear it was signed by the deceased and two witnesses R M Mbugua and Waireri Kigeria. It is not clear from its face whether the R M Mbugua who signed the will as a witness is the Mungai Mbugua the advocate or was a different person. Both are now deceased and cannot be called to testify. In any event **section 3** of the **Law of Succession Act** defines a competent witness to mean a person of sound mind and full age, and an independent witness to mean a witness who is not a beneficiary under a will or the spouse of any such beneficiary. No evidence has been led to suggest that R M Mbugua and Waireri did not meet any of this criteria.

55. Further in this case there was no evidence that the deceased neither comprehended the contents of his will nor was coerced and influenced into approving the terms of the will. There is therefore nothing placed before the court to invalidate the will.

#### **Whether the will made any provisions for the applicants**

56. A look at paragraph 4 of the will shows that protestors herein were never bequeathed any property by the deceased.

57. The deceased bequeathed property to only one of his daughter **Mary Waithera Mburu** who is now deceased.

58. The court however in its judgment dated 19<sup>th</sup> January 1996 varied the will and made provisions for the 3<sup>rd</sup> wife's household.

The third wife was a mother to Felista Wambui Kairu & Susan Wairimu Gichuhi the protestors. Their mother's house was the third house. It was provided for when the court directed that the respondents file Summons for Confirmation of Grant annexing the court order and the will. Clearly, their house was provided for and the two cannot be heard to be seeking any further provision from the same will yet they were no appeal against *Rimita J's* judgment. This cannot be said about Ruth Njoki, Hannah Wambui, Mary Waithera & Mary Wangui. The will did not provide for them and they did not challenge it at that time.

**Whether the applicants are beneficially are entitled to a share of the estate**

59. **The protestors are the deceased's daughters. No provision was made for them in the will. Is that a normal thing for one to do?"** Court of Appeal in the case of **Stephen Gitonga M'murithi Vs. Faith Ngiramurithi [2015] eKLR** that:-

*"Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried..."*

60. **Section 29 (a) of the Law of Succession CAP 160 of the Laws of Kenya** in recognizing children does not classify them on the basis of gender or marital status. *Makhandia, J.* (as he then was) in **In Re Estate of Solomon Ngatia Kariuki (deceased) (2008) eKLR** rendered himself *inter alia* thus:

*"The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate..."*

61. The protestors named herein are therefore entitled to a share of the deceased's estate.

**Whether the will can be varied to provide for persons left out**

62. The court varied the will to provide for the 3<sup>rd</sup> wife of the deceased despite the administrators position that the 3<sup>rd</sup> wife was not in good terms with the deceased and that was the reason for being left out. The applicant did not at that time challenge the will. They have come now as protestors after the respondents filed Summons for Confirmation of the Grant.

63. It is the administrators/executors position that they proceeded to distribute and share the estate and even sell the same without a Certificate of Confirmation of Grant. The estate assets are still registered in the name of the deceased.

64. The record shows that the grant of probate was issued to John Waweru Gichuhi & Joseph Waweru Gichuhi on 9<sup>th</sup> of May, 1986. The same was confirmed by this court on 15<sup>th</sup> July 1986. Before the estate was distributed, the deceased's 3<sup>rd</sup> wife made an application for reasonable provisions to be made to her and her children under **Section 26 of the Law of Succession Act**. Her application was allowed vide court's judgment dated 19<sup>th</sup> January 1996 where the court directed the parties to apply for Confirmation of Grant of Letters of Administration with the Will attached and the Order for provision. That meant that the previous Certificate of Confirmation of Grant had been rendered useless.

65. The respondents purported to proceed under that useless grant to distribute the estate and even sell other parts of the estate.

66. **Section 82 of the Law of Succession Act** states;

**"Powers of personal representatives**

**Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—**

**(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:**

**Provided that—**

(ii) no immovable property shall be sold before confirmation of the grant;”

67. Personal Representative is defined by **Section 79 of the Law of Succession Act**;

**“79. Property of deceased to vest in personal representative**

**The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”**

68. The court in **In the Matter of the Estate of Isaac Kaburu Marete (Deceased) Daniel Gituma Marete vs Frankline Mutwiri [2017] eKLR** stated: -

*‘Acquisition of land before confirmation of grant is unlawful and does not enjoy property rights under the Constitution...’*

69. In the case of **Re the Matter of the Estate of M’Ajogi M’Ikiugu alias Ikiugu Ajogi (Deceased)** on sale of estate property before confirmation of grant the court said.

*“Sale of estate property before confirmation, courts have said time and again- and I will not be tired of stating it again- that, under section 82(b) (ii) of the law of Succession Act, sale of immovable property of the estate before confirmation of grant is prohibited. ”*

70. The alleged sales made by the respondents and any other transactions with respect to the property of the deceased were done without legal authority as there was no confirmed grant. All these transactions are a nullity.

71. Hence nothing stands in the way of the variation of the Will to make provisions to be made to the protestors herein one **Ruth Njoki & Hannah Wambui** who are the daughters and beneficiaries of the deceased estate.

72. This is because it is clearly evident that the only reason the protesters were not provided for is because they are daughters and most probably were married at the time of the Will. The **Law of Succession Act** frowns upon such discrimination as it regards the children of a deceased person. There is no distinction between boys and girls or females and males. The law provided for children. To this I cite the case of **Mwongera Mugambi Runturi vs Josephine Kaarika & 2 Others [2015] eKLR**, the Court of Appeal held:-

*“With the greatest respect, such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny; not least because it is plainly discriminatory of itself and in its effect. It is anachronistic and misplaced notwithstanding that it was [once] the norm for a vast majority of Kenya's communities. This Court has long accepted that a child is a child none being lesser on account of gender or the circumstances of his or her birth. Each has a share without shame or fear in the parents' inheritance and may boldly approach to claim it. What **RONO-VS-RONO [2005] 1 EA 363** decided about the prohibition of discrimination on grounds of sex under the retired Constitution applies with yet greater force under the current progressive Constitution of Kenya 2010”.*

73. With that reality, it is evident that the respondents are reluctant to distribute the estate in a fair manner to accommodate the remaining beneficiaries. It is not for them to say. The assets did not belong to them but belonged to the deceased. According to **Section 40 of the Law of Succession Act** each house was to get its respective share. The respondents decided to take everything for themselves. They cannot be allowed to do that. the property of a deceased person is subject to the Law of Succession and the respondents must keep that in mind. The courts cannot allow a situation where some of the beneficiaries proceed to treat the property of the deceased as belonging to them and disposing of it, even before the Certificate of Confirmation is issued.

74. It is with that in mind that I find that the Will must be varied to provide for the protestors.

75. It is with that in mind that I find that it is inevitable that the respondents sit down and reassess the assets of the deceased and file an appropriate Summons for Confirmation of Grant in accordance with **Section 40 of the law of succession Act**. They will take into

consideration that the 3<sup>rd</sup> house was provided for by *Rimita J* in 1996. In the event that that fails then I find applicable the words of the court in the case of **Justus Thiora Kiugu & 4 others vs Joyce Nkatha Kiugu & another Civil Appeal No. 30 of 2014 [2015] eKLR** the Court of Appeal held;

*“We have revisited the foregoing provision because we urged the parties herein to reconcile and if they reach an agreement, we as a court would adopt their written consent to settle this matter. We did this because we appreciate that an estate of a deceased person who died intestate leaving one spouse and children like in this case of M’Ikiungu Mwirichia cannot legally be distributed in any other way other than the parties agreeing among themselves and filing a consent, or by the court following the provisions of Section 35 of the Law of Succession. In the event that parties agree and they record consent on the mode of distribution, the court has no choice but to adopt the consent and make it an order of the court. Short of a written consent on the mode of distribution, the court has no discretion but to distribute the estate of the deceased as per the provisions of Section 35 of the Law of Succession which makes provisions for an intestate who has left one surviving spouse and child or children.”*

76. The parties are also at liberty to hold a discussion and arrive as at a consent as was stated in **Re Estate Of Mishael Oyaa Diang’a (Deceased) 2019] eKLR** the court directed parties to agree on the mode of distribution by stating as follows;

*“Parties shall thereafter agree on proper distribution of the estate of the deceased and accordingly take out necessary summons for confirmation of grant within the next six (6) months from this date hereof, failure to which the matter shall be forwarded to the Public Trustee for necessary distribution in accordance with the law.”*

77. The protestors have proposed how the estate should be distributed in their Affidavit. The respondents did not propose any mode of distribution. The respondents are the personal representatives of the deceased. This court would like to give the personal representatives the opportunity to do carry out their legal duty as conferred to them by the law.

78. Hence: It is my finding that;

1. The Protest by the applicants from the 1<sup>st</sup> and 2<sup>nd</sup> houses succeeds partially on the basis that the initial Certificate of Confirmation of Grant made in 1991 was essentially set aside by *Rimita J*'s judgment of 19<sup>th</sup> January 1996.
2. The executor's of the deceased's Will having been directed to file Summons for Confirmation of the Will together with the Court Order varying the will, and having failed to do so, the distribution, and sale of the assets of the estate without the Certificate of Confirmation of Grant was null and void.
3. That the applicants from the 3<sup>rd</sup> house were provided for in the Judgment of *Rimita J*.
4. The applicants from the 1<sup>st</sup> and 2<sup>nd</sup> house are beneficially entitled to the estate and ought to be provided for.
5. The respondents as the personal representatives have the responsibility to provide for the said applicants.

79. I direct that they proceed within ninety (90) days hereof to make provision for the applicants from 1<sup>st</sup> and 2<sup>nd</sup> house. To that end the both the applicants and the respondents will meet under the guidance of a court annexed mediator and come up with a consent on the provisions for the applicants from the 1<sup>st</sup> and 2<sup>nd</sup> House.

80. In default, the court will proceed to distribute the estate as per the provisions of **Section 40 of the law of Succession Act.**

**Dated, Signed and Selivered virtually this 7<sup>th</sup> day of April, 2022.**

**Mumbua T. Matheka**

**Judge**

Edna C/A

M/s Ochieng' Gai & Co. Advocates N/A

M/s Ikua, Mwangi & Co. Advocates N/A

M/s Muigai, Gatei & Co. Advocates N/A

Via email



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