



REPUBLIC OF KENYA



**In re Estate of Michael Ngigi Kamami (Deceased) (Succession Cause 52 of 2019) [2024] KEHC 10514 (KLR) (28 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10514 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
SUCCESSION CAUSE 52 OF 2019**

**A MSHILA, J**

**AUGUST 28, 2024**

**IN THE MATTER OF THE ESTATE OF MICHAEL NGIGI KAMAMI (DECEASED)**

**BETWEEN**

**NANCY WAIRIMU NGIGE ..... 1<sup>ST</sup> APPLICANT**

**BERNARD NDUNGU NGIGI ..... 2<sup>ND</sup> APPLICANT**

**JACINTA WANGARI WAIRIMU ..... 3<sup>RD</sup> APPLICANT**

**AND**

**CHARITY WAMBUI NGIGI ..... RESPONDENT**

**RULING**

1. Before court is the Summons dated 25<sup>th</sup> March, 2021 and brought under Sections 47, 76 of the [Law of Succession Act](#), Cap 160 Laws of Kenya, Rules 44 and 73 of the [Probate and Administration Rules](#) and all other enabling provisions of the law. The Applicants sought for orders:-
  - a. Spent
  - b. Spent
  - c. Spent
  - d. Spent
  - e. That this Honourable Court be pleased to revoke the grant of probate issued on 16/9/2019 and the Certificate of Confirmation of Grant dated 23<sup>rd</sup> November, 2020.
  - f. That in the alternative to prayer (e) above, this Honourable Court be pleased to set aside the Certificate of Confirmation of Grant dated 23/11/2020 and grant leave to the Applicants to file an application for reasonable provision from the deceased's Will.



- g. This Honourable court be and is hereby pleased to order the executors to render a full inventory and account and the extent of the distribution of the estate of the deceased.
- h. This Honourable court be pleased to declare that the Applicants are beneficiaries of the estate of the deceased and entitled to a share of his estate.
2. The application is based on the grounds that the Applicants were not included as dependants of the deceased and that they were not provided for in the Will of the deceased as such they will be prejudiced if the estate is distributed.
3. Nancy Wairimu Ngige in her supporting affidavit deposed that she is the deceased's first wife and her co-applicants are the children of the deceased. She contended that they were not recognized in the deceased's will which they doubt its authenticity or the deceased's capacity to write it. They were recognized as the first family in the chief's letter. At the time the deceased wrote the Will, he was very sick. She averred that they were not aware of these proceedings until when she learnt that the Respondent had obtained a grant of probate and the same had been confirmed on 23/11/2020. They had also tried to petition for grant of letters of administration but their petition was rejected at the registry. Lastly, she sought for preservation orders of the estate.
4. Charity Wambui Ngigi the Respondent herein, filed her replying affidavit sworn on 16<sup>th</sup> April, 2021, she deposed that the Applicants are strangers to the deceased's estate. She was married to the deceased in 1986 under the Kikuyu Customary Law and that she lived with the deceased until his death where she assisted in the acquisition of the deceased's properties. They later conducted a church wedding and the 1<sup>st</sup> Applicant did not object to the same if indeed she was a 1<sup>st</sup> wife. The 1<sup>st</sup> Applicant has to discharge the burden of proving that she is a wife. The deceased could not sire children biologically and as a result they adopted their son Allan Kamami. In the circumstances the deceased cannot be the father to the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants. The Applicants only emerged after the death of the deceased and never helped with the deceased's medical bills. In any case, the Applicants' application for exhumation was dismissed as the court found that the Applicant was neither a personal representative or a beneficiary. The summons were said not to meet the required legal standards for revocation of grant. In any case, the deceased died testate and the process of applying for and obtaining for confirmed grant was done in compliance with the law of succession and no objection was filed as such the court should not interfere with the deceased's Will.
5. Nancy Wairimu Ngige filed a further affidavit sworn on 16<sup>th</sup> June, 2021. She averred that she was married to the deceased in 1980 under the Kikuyu Customary Law. She produced her father's Will where together with the deceased they were bequeathed Plot No. 2489/5/R where they used to reside. In the circumstances, she wonders why the deceased would bequeath the same to the Respondent and also why the deceased would want to be buried in Lang'ata cemetery when he had so much land. She separated with the deceased in 1986 and that the Respondent buried the deceased hurriedly at Lang'ata cemetery. She was welcomed by the deceased's family causing the Respondent to hurriedly bury the deceased.
6. Charity Wambui Ngigi filed her response to the further affidavit dated 28<sup>th</sup> September, 2021. She reiterated that she was married to the deceased in 1986 and never saw the deceased support the Applicants financially. No evidence was produced to support that Plot no. 2489/5/R belonged to the 1<sup>st</sup> Applicant's father. That the Applicants have failed to prove that they were depending on the deceased before his demise.
7. The Summons proceeded for hearing by way of viva voce evidence and thereafter parties filed their written submissions.



## **Applicants' Submissions**

8. The Applicants submit that they have proven dependency by producing the birth certificates and that the deceased used to pay school fees and provide upkeep money for the Applicants. Further the Applicants submit that the process of obtaining the grant were attended by procedural flaws, fraud and concealment of matters from this court as she concealed the deceased's first family. The court was urged to revoke the grant.

## **Respondent's Submissions**

9. It was submitted that the Applicants failed to discharge their burden that they were wife and children of the deceased. The 1<sup>st</sup> Applicant failed to prove that she was married through Kikuyu Customary Law. The Applicants did not prove that they depended on the deceased during his lifetime. Reliance was placed in the case of *John Gitata Mwangi & 3 others vs Jonathan Njuguna Mwangi & 4 others* (1999) eKLR. Lastly it was submitted that the Applicants have not satisfied any condition for revocation of grant having failed to prove dependency.

## **Issues for Determination.**

10. Having considered the Summons herein, the Respondent's replying affidavit and the rival submissions. The issues framed for determination are;-
- i. Whether the Applicants are dependants of the deceased's estate.
  - ii. Whether the grant issued herein should be revoked

## **Analysis**

### **Whether the Applicants are dependants of the deceased's estate.**

11. The Applicants contend that they are the wife and the children of the deceased and that they learnt that the deceased has died testate and they were not provided for. The grant was said to be defective as the Applicants were left out. The Applicants submitted that they have proved dependency as such the court should make a provision for them. Finally, the Grant was said to be defective as the Applicants were left out as such they urged the court to revoke the same.
12. The Respondent submitted that the Applicants failed to prove that they were dependants of the deceased to be provided by the court and that the Applicant failed to prove that she was married to the deceased by way of a Kikuyu customary marriage. In the circumstances the court was urged not to revoke the grant as it was properly obtained.
13. The formal requirements of a valid Will are found in Section 11 of the *Law of Succession Act*. It 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.’

14. The Applicants claim that the deceased’s Will herein is not valid as at the time of making the Will he was very sick and that they were not provided for in the said Will. The court in Curryian Okumu vs. Perez Okumu & 2 others (2016) eKLR held that:-

“The legal position is clear however that failure to provide for a beneficiary in a Will does not invalidate a Will. Section 5(1) of the Act gives a testator testamentary freedom as follows:

“Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses ...”

... This freedom of a testator to dispose of his free property by will is however is not absolute. The Court can after the death of the testator alter the terms of a will following an application under Section 26 of the Act. Section 26 provides:

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”

15. This court notes that failure by the deceased to provide for the Applicants cannot be a ground to invalidate the Will. However, the Court under Section 26 of the Law of Succession Act can order for a reasonable provision out of the estate.

16. Section 26 of the Law of the Succession provides that:-

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”

17. In the instant case, the 1<sup>st</sup> Applicant avers that she was married to the deceased under the Kikuyu customary law and that the deceased used to maintain her together with the children before his demise.



18. Section 29(a) of the *Law of Succession Act* defines a 'dependant' to mean;-
- “For the purposes of this Part, "dependant" means—
- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;”
19. This court has perused the record, and has also considered the testimonies tendered by the Applicants' witnesses. The same does not prove that the 1<sup>st</sup> Applicant was married to the deceased under Kikuyu Customary Law.
20. Eugene Cotran's "Casebook on Kenya Customary Law" at page 30 sets out the essentials of a Kikuyu Customary marriage. These are stipulated as;
1. Capacity; the parties must have capacity to marry and also the capacity to marry each other.
  2. Consent; the parties to the marriage and their respective families must consent to the union
  3. Ngurario; no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.
  4. Ruracio; there can be no valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid.
  5. Commencement of cohabitation; the moment at which a man and a woman legally become husband and wife is when the man and woman commence cohabitation i.e. under the capture procedure when the marriage is consummated after the eight days' seclusion, and nowadays when the bride comes to the bride groom's home”.
21. Reference was made to the case of *Gituanja vs Gituanja* [1983] KLR 575 where the Court held inter-alia that;
- “The existence of a marriage is a matter of fact which is proved with evidence. The evidence at the trial produced a valid marriage under Kikuyu customary law as was evidenced by the slaughtering of the ngurario.”
22. It is also noted that the Applicants contend that the deceased used to support them by paying the children's school fees and giving them money for their upkeep. However, these claims are not supported by any documentary evidence.
23. Refer to the case of *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others* (2016) eKLR, where the court observed that:
- “A dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts.”
24. In the upshot, this court is satisfied that the Applicants have not demonstrated to this court that they were dependant on the deceased during his lifetime.



### Whether the grant issued herein should be revoked

25. The Applicants requested the court to revoke the grant issued to Charity Wambui Ngiigi on 16<sup>th</sup> September, 2019 and the Certificate of grant dated 23/11/2020 as they were left out and that they were not provided for in the deceased's Will.
26. The law in regard to revocation and annulment of grants is found under Section 76 of the Law of Succession Act which provides 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 an 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 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 has ordered or allowed; 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 has produced any such inventory or account which is false in any material particular; or
  - f. The grant has become useless and inoperative through subsequent circumstances.’
27. See the case of Jesse Karaya Gatimu vs Mary Wanjiku Gitbinji (2014) eKLR, where the court opined that -
- ‘The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all of these grounds, whatever the case may be.’
28. In this instance the deceased died on 14<sup>th</sup> January, 2019 leaving behind his Will dated 29<sup>th</sup> June, 2018 where he distributed his estate. The Respondent herein was appointed as the executrix and she petitioned for a grant of probate and a certificate of confirmation of grant was issued 23/11/2020.
29. The Applicants contend that they were left out as beneficiaries of the deceased's estate and that they were not provided for in the Will by the deceased. Having found that the Applicants are not dependants



of the estate of the deceased as the same has not been proved, finds that the deceased's Will dated 29<sup>th</sup> June, 2018 is valid as such the prayer for provision by the court is found to be without merit.

30. In the end this court is satisfied that the deceased's Will is valid. The grant was properly issued as such the same cannot be revoked.

### **Findings and Determination**

31. For the forgoing reasons this court makes the following findings and determinations;
- i. This court finds that the Applicants were not dependants of the deceased.
  - ii. This court finds the Will to be valid.
  - iii. This court finds the application to Revoke the Grant to be devoid of merit and the same is hereby dismissed
  - iv. This being a family matter each party to bear their own costs.

Orders Accordingly

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 28<sup>TH</sup> DAY OF AUGUST, 2024.**

**A. MSHILA**

**JUDGE**

**In the presence of;**

Mourice – Court Assistant

Ongeri for Respondent

Mwangi for Applicants

No appearance by Applicants

