



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Theuri Matu (Deceased) (Succession Appeal 3 of 2018)
[2022] KEHC 13271 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13271 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION APPEAL 3 OF 2018**

M MUYA, J

SEPTEMBER 22, 2022

IN THE MATTER OF THE ESTATE OF THEURI MATU (DECEASED)

WASHINGTON TAITI THEURIAPPELLANT

VERSUS

JULIUS KAHONGE THEURI.....RESPONDENT

*(Appeal from the decision of SRM'S Court Othaya dated 7th August
2018 (Hon. Ekhubi SRM) in Othaya Succession Cause No.55 of 2018)*

JUDGMENT

1. In the above mentioned decision, the learned magistrate proceeded to distribute the estate accordance with a will dated December 15, 1993.
2. Being aggrieved by this decision the appellant lodged this appeal which is promised on the following grounds:-
 - (a) That the learned magistrate erred in law and in fact in admitting an alleged will in intestate proceedings.
 - (b) The learned magistrate erred in law and in fact in misdirecting himself on the essentials of a valid will and therefore arrived at the wrong decision.
 - (c) The learned magistrate erred in law and in fact in admitting an alleged will without proof of authenticity.
 - (d) The learned magistrate erred in failing to apply section 38 of the *law of succession Act* in distributing the deceased estate.
 - (e) The learned magistrate erred in relying on an alleged written will was authorship was not established.



- (f) The learned magistrate erred in making a decision not supported by evidence availed of the applicable law.

Appellants submissions

3. The petitioner filed petition for letter of administration intestate dated December 2, 2002 and was issued with a grant of letters of administration intestate on January 16, 2003. The petitioner filed summons for confirmation of grant date August 10, 2003. The respondent filed an affidavit of protest dated September 8, 2003 and attached a copy of the deceased will. It is the appellants contention that the learned magistrate erred in admitting the will in an intestate proceedings and instead, should have directed the beneficiaries to file summons for grant of letter of administration with will attached.
4. The appellant cites the case of *The Estate of Thibu Gichieya* (2016) e KLR where the cause was founded on a will but the court granted administration in intestacy and estate distributed to a person other than the beneficiaries named in the will and the court found it irregular and declared the grant to be revoked.
5. It is further submitted that the learned magistrate erred in admitting the alleged will in defective proceedings and that the will dated December 15, 1993 did not meet the essentials of a valid will in that whereas the beneficiaries signed the will, their signatures were not attested by two or more independent witnesses.
6. Distribution ought not to have been as per the alleged will but in accordance with section 38 of the *Law of Succession Act*.

Respondents Submissions

7. The respondent submits that it is the appellant himself who upon request by the deceased reduced the will in writing in the presence of the deceased, the beneficiaries who were four in number and two independent witnesses namely Erastus K Munuhe and John Ngari Mwihuri.
8. That before the grant was confirmed they realized that the appellant was selling some of the properties and shares without their consent and or knowledge.

Legal analysis and conclusion

9. This is a first appellate court. It has a duty to examine afresh, evaluate the evidence on record and in so doing bear in mind that unlike the trial court it did not have the opportunity to hear and assess the witnesses.
10. This is a nutshell is in line with the holding in the case of *v Associated-Motor-Boat-Company-Ltd/ Selle and another v Associated Motor boat Company Ltd* and other (1968) I EA 123
11. The main issue for this courts determination is whether the appeal as presented and lodged has merit.
12. This cause commenced in the High Court of Nyeri as succession cause no 489 of 2002.
13. The petitioner and the applicant appeared in person. at one point it was noted that the protestor/ respondent had filed an affidavit in support of the petition with a will annexed and he was informed by the court that he had to file an affidavit in support of the protest with the will annexed. The matter was later placed before Ekhubi SRM for hearing and determination.
14. In determining whether this appeal has merit, it is in order to revisit the authority relied on by the appellant in this appeal which is the case of *Re estate of Thibu Gichieya* (2016) e KLR.



15. This case is distinguishable from the present one on the following reasons
- a. This cause had been substantially heard by the High Court before the matter was referred to the trial magistrate
 - b. The parties had been acting in person and the protestor had been directed to file an affidavit in protest annexing the will which he did.
 - c. In the above cited case upon confirmation the estate was distributed to a person other than the beneficiaries named in the will.
 - d. In the present cause it's the contention by the Respondent that it's the appellant himself who reduced the will into writing though he denies it. Section 11 of the Law of Succession Act provides:- 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 testators
 - 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 been 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 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 particulars form of attestation shall be necessary.”
16. A perusal of the record of proceedings and in particular the will dated December 15, 1993 goes to show that the four beneficiaries appended their signatures and so did the testator and two independent witnesses. The appellant himself did sign the document and he cannot be heard to say that he is a stranger to the document. He has not principally flatted that his signature was forged nor did he pursue forgery issue and demand for police investigations on the matter.
17. There are no allegations concerning the lucidity of the deceased mind at the time of making the will and hence his intentions cannot be held as suspect.
18. I am satisfied that there was proper execution of the will which was in accordance with section 11 of the Law of Succession Act.
19. The deceased made a proper distribution of his properties to each of the beneficiaries.
20. The distribution by the court was in accordance to the will.
21. I find no good reason to interfere with the judgment of the learned magistrate.

Conclusion

22. The appeal has no merit and it's dismissed

JUDGMENT DELIVERED DATED AND SIGNED AT NYERI THIS 22ND SEPTEMBER, 2022.

M. MUYA



JUDGE

In the presence of:

Present in person - Appellant

Present in person - Respondent

Court Assistant: Kinyua

30 days R/A.

