



**In re Estate of Philip Nzamba Kitonga (Deceased) (Succession Cause
1884 of 2021) [2022] KEHC 14932 (KLR) (Family) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1884 OF 2021
MA ODERO, J
OCTOBER 28, 2022
IN THE MATTER OF THE ESTATE OF PHILIP NZAMBA
GITONGA (DECEASED)**

BETWEEN

CAROL NTHENYA MBUVI APPLICANT

AND

JAMES IVIA KITONGA RESPONDENT

RULING

1. Before this court for determination is the summons for revocation or annulment of grant dated June 3, 2022 by which the Applicant Carol Nthenya Mbuvi seeks the following orders:-
 1. That pending the hearing and determination of this application, the Respondent be restrained from using the Grant of Probate with Written Will issued by this Honourable court on March 4, 2022.
 2. That the Grant of Probate with Written Will issued by this Honourable court on March 4, 2022 be revoked and/or annulled.
 3. That the court does re-distribute the estate of the deceased on account of the fact that the deceased died intestate on account of the forged will presented in the application for grant of probate by the Respondent.”
2. The application which was premised upon sections 34, 35, 37, 47 and 76(b) of the [Law of Succession Act](#), Cap 160, Laws of Kenya and Rules 27, 44, 49 and 73 of the [Probate and Administration Rules](#) was supported by the Affidavit of even date as well as the Further Affidavit dated July 21, 2022 both sworn by the Applicant.



3. The Respondent James Ivia Kitonga opposed the Application through the Replying Affidavit dated July 1, 2022. On June 27, 2022 this court directed that the parties file written submissions in respect of Prayer (1) only of the application. In compliance, the Applicant filed the written submissions dated July 21, 2022 whilst the Respondent filed the written submissions dated July 8, 2022.

Background

4. This Succession Cause relates to the estate of the late Philip Nzamba Kitonga (hereinafter 'the Deceased') who died on October 24, 2020. A copy of the Death Certificate Serial Number xxxx is annexed to the Affidavit dated September 17, 2021 sworn by the Applicant.
5. According to the letter dated August 27, 2021 authored by the Chief of Kilimani Location, the Deceased was survived by the following persons:-
 1. Carol Nthenya Mbuvi – wife
 2. James Ivia Kitonga – son
 3. Mary Mwathi Kitonga – daughter
 4. Kavengi Kitonga – daughter
 5. Eve Mukami Kitonga – daughter
6. Following the demise of the Deceased the Respondent filed a Petition for Grant of Probate with Written Will dated September 17, 2021. A Grant of Probate was duly issued by the court in the name of the Respondent on March 4, 2022.
7. Following the issuance of that Grant the Applicant who claims to be the legal wife of the Deceased filed this application seeking to have the Grant issued to the Respondent revoked on grounds that said Grant was issued on the basis of a forged Will. Secondly, the Applicant alleged that the Respondent obtained the grant fraudulently by concealment of facts material to the case.

Analysis and Determination

8. I have carefully considered the application filed in court the Reply filed by the Respondent as well as the written submissions filed by both parties. As stated earlier the court will at this stage be considering only Prayer No (1) of the application.
9. The Applicant avers that she is the widow of the Deceased, the Deceased having married her in a customary wedding conducted at her parents home in Makueni County on November 4, 2017. She states that the Petition for Probate was filed without her consent, knowledge and/or involvement nor was the consent of the other beneficiaries of the estate obtained. The Applicant also alleges that the Respondent has not disclosed full particulars of the Deceased assets as only the fixed assets have been included.
10. The Applicant further averred that the Will dated May 1, 2020 which was annexed to this Petition filed by the Respondent is in fact a forgery. That the Will read out to the family after the demise of the Deceased and the one produced in court are different. The Applicant asserts that the Deceased could not have signed the Will on May 1, 2020 as on that day she was with the Deceased in the village attending the burial of one of the Deceased's sisters. That in the said Will the Respondent and his siblings have been bequeathed all the income generating properties as well as money held in the Deceased's accounts whilst the Applicant has only been bequeathed the uncompleted matrimonial home in Athi River. The Applicant therefore asserts that the distribution of the estate as per this Will is not fair.



11. The Applicant states that she fully intends to challenge the validity of the Will used by the Respondent to obtain the Grant of Probate.
12. In his reply the Respondent insists that the Will dated May 1, 2020 is a genuine Will which revoked the previous Written Will dated October 30, 2015. The Respondent asserts that he is the Executor named in the Will and was therefore entitled to file a Petition for Grant of Probate.
13. The Respondent denies that the Applicant is the widow of the Deceased. He states that he knew the Applicant as a companion to the Deceased and insists that the two (2) had no child together. That they maintained separate homes and states the two never cohabited as man and wife.
14. The Respondent states that he has made great effort to meet the demands made by the Applicant and to accommodate her in the distribution of the estate. He states that the Will was read out on February 24, 2021, in the presence of both the Applicant and her Advocate were both present and neither raised any objection to the contents of the Will as read out.
15. The Respondent maintains that nobody challenged the authenticity of the Will until the Applicant began to make unreasonable demands, which were tantamount to varying the Written Will. He declined her applicants demands and informed all parties that he would proceed to file a Petition for Grant of Probate. The Respondent therefore denies that he filed the Petition behind the Applicants back. The Respondent insists that all the assets listed in this Petition for Grant of Probate are also listed in the Deceased's Will and he denies that there has been any concealment of assets.
16. The Respondent submits that the Applicant has failed to demonstrate what prejudice she stands to suffer if the estate is distributed in accordance with the wishes of the Deceased as contained in the Written Will dated May 1, 2020. That this application is a mere afterthought and is meant to intimidate the Executor into varying the Will of the Deceased. He urges the court to dismiss the application entirely.
17. By prayer (1) of this motion the Applicant seeks for orders to restrain the Respondent from using the Grant of Probate with Written Will issued to him on 4th March 2022. In other words, the Applicant is seeking a temporary injunction to 'suspend' the Grant issued to the Respondent pending the hearing and determination of the main summons for revocation of Grant.
18. The grounds upon which a temporary injunction may be issued were set out in the case of *Giella – vs – Cassman Brown*[1973] EA where it was stated as follows:-
 - “ 1. The Applicant must establish a *prima facie* case with a probability of success.
 2. The Applicant must demonstrate that he stands to suffer irreparable harm if the orders sought are not granted.
 3. If there is any doubt then the court will decide the case on a balance of probability.”
19. The definition of what constitutes a 'prima face' case was given in the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others*[2003] KLR 125 where the court held as follows:-

“In civil case a prima facie case is a case in which as the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but



the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. This is clearly a standard which is higher than an arguable case.”

20. The Applicant has made a series of allegations – that the Respondent went behind her back to petition for the Grant, that the Will presented to court by the Respondent is a forgery and finally the Applicant states that the distribution of the estate of the Deceased is not fair.
21. The court is not required at this point to determine the merits or otherwise of the summons for revocation of Grant. Nor is the court required at this stage to determine and/or pronounce itself on the allegations made by the Applicant. These are matters that can only be determined upon a full hearing of the suit at which evidence is called by both parties.
22. Suffice to say I am persuaded that a *prima facie* case has been established to warrant the grant of the interim orders being sought.
23. In conclusion therefore I am satisfied of the merits of this application. Accordingly, I do grant orders in terms of Prayer No 1 of the summons dated June 3, 2022. This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 28TH DAY OF OCTOBER, 2022.

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MAUREEN A. ODERO

JUDGE

