



REPUBLIC OF KENYA



**In re Estate of Joseph Kamau Nzuki alias Joseph Kamau (Deceased) (Succession Cause 17 of 2018) [2022] KEHC 14260 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14260 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
SUCCESSION CAUSE 17 OF 2018  
CM KARIUKI, J  
OCTOBER 19, 2022**

**BETWEEN**

**RAHAB WANJIRU KAMAU ..... PETITIONER**

**AND**

**DERRICK MWANIKI KAMAU ..... 1<sup>ST</sup> OBJECTOR**

**CATHERINE MUMBI KAMAU ..... 2<sup>ND</sup> OBJECTOR**

**SAMUEL MWORIA KAMAU ..... 3<sup>RD</sup> OBJECTOR**

**ELIZABETH NJAMBI WANJOHI ..... 4<sup>TH</sup> OBJECTOR**

**JUDGMENT**

1. By application dated 14<sup>th</sup> April 2016 Applicant seeks the following orders: -
  - i. Spent
  - ii. That the operation of the Grant of Probate with a Written Will annexed made by this Honourable Court in favour of Rahab Wanjiru Kamau, the Petitioner/Respondent herein and the Certificate of confirmation of Grant in respect to it issued by this Honourable Court on 13<sup>th</sup> November 2015, be suspended and stayed pending the hearing and determination of this application.
  - iii. That the Grant of Probate with a Written Will annexed made on 30<sup>th</sup> December 2014 in favour of Rahab Wanjiru Kamau, the petitioner /Respondent herein, and the Certificate of Confirmation of Grant in respect to it issued by this Honourable court on 13<sup>th</sup> November 2015, be revoked and annulled forthwith.
  - iv. That the costs of this application be provided for:



- v. That such other and further orders be issued as this Honourable Court may deem fit and just to grant in the unique circumstances of this matter.
2. It is based on grounds on the application. The proceedings to obtain the grant of letters of Administration with Will Annexed were defective in substance. The grant of Letters of Administration with Will annexed was obtained fraudulently by making a false statement or by concealment from this Court of Something material to the case. The Grant of Letters of Administration with Will annexed was obtained using an untrue allegation of a fact essential in the law of justifying the Grant.
  3. The said Grant of Letters of Administration with Will annexed issued to the Petitioner/Respondent on 30<sup>th</sup> December 2014 and certificate of Confirmation of Grant issued on the November 2015 were obtained fraudulently in that the Petitioner/Respondent deliberately concealed from and failed to bring to the attention of this Honourable Court the fact that a Grant of Letters of Administration Intestate of the Estate of the deceased were issued to the Deceased's widow, one Lucy Njeri Kamau (now deceased) on 15<sup>th</sup> December 2003 and certificate of Confirmation in respect to it used on 7<sup>th</sup> November 2005 vide High Court Succession Cause No. 3130 of 2002 at Nairobi.
  4. The deceased died intestate and the purported will annexed to the Petition by the Petitioner/Respondent and on the basis, is of which a Grant of Letters of Administration with Will was made on 30<sup>th</sup> December 2014 and confirmed on 13<sup>th</sup> November 2015 is a forgery. The petitioner/Respondent was not the deceased's wife, and she is a stranger to the estate.
  5. The Applicant also supports the same via supplementary affidavit sworn on 14<sup>th</sup> April 2016, reiterating the grounds. There is also an additional affidavit of Catherine Mumbi Kamau 2nd, Objector on b, on behalf of herself and for Objectors 1, 3, 4<sup>th</sup> sworn on 5<sup>th</sup> September, 2015.
  6. The Application is opposed by an Affidavit sworn by Rahab Wanjiru Kamau on 25<sup>th</sup> May, 2015. The parties testified and called witnesses in hearing the application. The parties were after that directed to canvass their arguments via submissions filed and exchanged.

### **Objector's /Applicant's Case and Submissions**

7. The Late Joseph Kamau Nzuki alias Joseph Kamau ["the Deceased"] died on 14<sup>th</sup> May, 1997 at North Kinangop Catholic Hospital. At the time of his demise, the Deceased was legally and lawfully married to Lucy Njeri Kamau [now Deceased], with whom they had four children; the Objectors herein, namely Derrick Mwaniki Kamau, Catherine Mumbi Kamau, Samuel Mworira Kamau, and Elizabeth Njambi Wanjohi, all who were adults at the time of the all of the deceased's demise.
8. According to the deceased's late Wife, Lucy Njeri Kamau, the deceased died intestate, and as a result of which she petitioned for Letters of Administration Intestate vide High Court of Kenya at Nairobi, Succession Cause No. 3130 of 2002. The Grant of Letters of Administration Intestate was issued to the late Lucy Njeri Kamau on 15<sup>th</sup> December, 2003 and confirmed on 7<sup>th</sup> November, 2005. Copies of the said Grant of Letters of Administration Intestate and the Certificate of Confirmation of Grant were produced through the Affidavit of Derrick Mwaniki Kamau as exhibit DMK-3[a] and DMK-3[b] and which were at the hearing marked as P. Exh.3 and P. Exh.4 respectively.
9. The Objectors herein were shocked to learn that the Petitioner /Respondent had secretly petitioned for a grant of Probate with a Will annexed of the deceased's estate purportedly based on an alleged Will of the deceased and a Grant of Probate with a Will annexed was issued to her vide High Court Succession Cause No. 453 of 2014 at Nakuru on 30<sup>th</sup> December 2014 and subsequently confirmed on 13<sup>th</sup> November ,2015.



10. The Objectors contention that the proceedings to obtain the Grant of Probate with a Written Will annexed were defective.
11. The Grant of Probate with a Written Will annexed was obtained fraudulently by making false statements and concealment of material facts and means of untrue allegations or facts essential in law.
12. Further, the Objectors contend that the Deceased having been legally married to the late Lucy Njeri Kamau [now deceased] under the *African Christian Marriage and Divorce Act*, CAP 151 Laws of Kenya could not contract any marriage with the Petitioner/Respondent.
13. The deceased died intestate, and the purported Will annexed to the Petition for a Grant of Letters of Administration with Will annexed by the Petitioner/ Respondent is a forgery.
14. The Petitioner /Respondent also concealed the fact that the deceased was survived not only by his late wife, Lucy Njeri Kamau, Samuel Mworira Kamau, and Derrick Mwaniki Kamau, but he was also survived by his two daughters, namely Catherine Mumbi Kamau and Elizabeth Njambi Wanjohi, both of whom the Petitioner left them out in her Petition
15. Contrary to the due process and fundamental requirements of the law, the Petitioner /Respondent did not serve the Objectors with the Petition itself and any other document [s] filed in this Honourable Court with the sole intention to hoodwink this Court into granting her a Grant of Probate with an alleged Written Will.
16. The Petitioner /Respondent deliberately concealed and failed to bring to the attention of this Honourable Court the fact that a Grant of Letters of Administration intestate of the estate of the Deceased was issued to the deceased's wife, one Lucy Njeri Kamau [now deceased] on 15<sup>th</sup> December 2003 and a Certificate of Confirmation of Grant issued on 7<sup>th</sup> November 2005 in High Court Succession No. 130 of 2002, Nairobi.

### **Submissions**

17. It is submitted that Section 11 of the *Law of Succession Act*, Cap. 160 Laws of Kenya ["the Act"] provides, inter alia, that 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.
18. The Objectors, in their summons, contend that the deceased died intestate and that the alleged Will is a forgery and thus not valid and/ or of any legal effect.
19. The Affidavit of Derrick Mwaniki Kamau sworn in support of the summons and also to the evidence of Hannah Lucy Wangari Njoroge [PW1], Mohammed Ngwili Nzuki [PW2], and Catherine Mumbi



- Kamau [PW3], respectively who in their respective witness statements and which they adopted in their evidence in chief denied the existence of the alleged Will.
20. The Petitioner /Respondent, in an effort to rebut the evidence of the Objectors to the effect there was no will besides her evidence that the said Will was by the deceased himself called Mr. Silvester Mwangi Muhia, the Advocate who allegedly drew the said Will and who testified as DW3. DW3, in his evidence in Chief, said that he is the one who prepared the alleged Will and attested to the same with his clerk but who was never called by the Petitioner as a witness.
  21. On cross-examination by the counsel Objectors/ Applicants, Silvester Mwangi Muhia [DW3], the Advocate who allegedly prepared the alleged Will, said that he had no document in Court to prove that he had been instructed by the deceased to draw the alleged Will nor did he have a receipt as a proof for payment of his legal fees by the Deceased.
  22. Also on cross-examination, Rahab Wanjiru Kamau, who testified as DW4, said that she was given a copy of the Will by DW3 and that is, that copy which was allegedly read to herself and the deceased's late wife and her children at the District Officer's office but which evidence was categorically denied by PW1, PW2, and PW3.
  23. The Objectors/Applicants submit that although the Petitioner /Respondent called DW3 to support the existence of the alleged Will, failure by her to call the second attesting witness, one Mr. Patrick Gitonga Mwangi, who allegedly attested the execution of the same by the Deceased so as to avail him for cross-examination in order to enable this Court conclusively decide on the validity of the Will or otherwise is fatal because his evidence, besides that of DW3, was critical in proving the validity of the alleged Will.
  24. The existence of the alleged Will having been disputed by the Objectors/Applicants and evidence has led to that effect, the burden of proof of its existence and validity shifted to the Petitioner/Respondent but failed to discharge that burden. Reliance is made on Sections 107 and 109 of the *Evidence Act*, Cap. 80 Laws of Kenya. As is provided in the aforesaid provisions of the said *Evidence Act* and in particular to Section 108 thereof, the Petitioner /Respondent has failed to rebut Objectors'/ Applicants' evidence to the effect that the alleged Will is not valid and has therefore failed to satisfy the requirement of Section 11 [c] of the *Law of Succession Act* which provides, inter alia, that for a Will to be valid it has to be attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the Will.
  25. On whether the proceedings to obtain the Grant of Probate with a Written Will annexed were defective in substance? Applicants rely on the provisions of Section 53 of *the Act* provides: -A court may
    - a. Where a deceased person is proved [whether by production of a will or an authenticated copy thereof or by oral evidence of its contents] to have left a valid will, grant, in respect of all property to which such will applies, either;
      - i. Probate of the Will to one or more of the executors named therein; or
      - ii. If there is no proving executor, letter of administration with the will annexed;
  26. In the instant case my Lord, the Testator in the alleged Will allegedly appointed Raphael Kimani Nzuki as the executor of the Will but not the Petitioner. In the circumstances, it is Raphael Kimani Nzuki who ought to have petitioned for the grant of probate as opposed to the Respondent herein, as she was not the executor.



27. There is nothing on record to show that Raphael Kimani Nzuki, the alleged executor renounced his executorship as required under Section 59 of the Act and the Petitioner /Respondent did not tender any evidence to that effect before this Court. Section 59 aforesaid provides and I quote: -

“Any person who has been appointed by a will as an executor thereof may, either by oral declaration before the court or by writing under his hand, renounce executorship, and shall thereafter be finally precluded from applying for grant of probate of that Will.”

28. As the Petitioner/Respondent herein was not named as the executor to the deceased's alleged Will, she ought to have filed for letters of Administration with Will annexed after making an application to this Court to issue a citation against the named executor, Raphael Kimani Nzuki to renounce his executorship as provided under Section 62 of the Act. The said Section 62 of the Act provides that: -

“When a person who has been appointed by a will as an executor thereof has not renounced the executorship, letters of administration shall not be granted to any citation has been issued, calling upon the executor to renounce his executorship or apply for a grant of probate of the will...”

29. The Petitioner/Respondent herein did not provide any evidence to show that the said Raphael was served with a Citation and failed and/ or ignored to Petition for the letters, although the same has been alluded to in her Petition dated 10<sup>th</sup> June, 2014. If indeed the Petitioner/Respondent had served Raphael Kimani Nzuki with a citation as alluded to, she ought to have provided an affidavit of service to that effect, but she did not do so. It is trite law that letters of grant of probate with will annexed can only be issued to the named executor only or in the event that the named executor [s] is unable to perform his duty vide a court order.

30. Failure by the Petitioner/ Respondent to notify the other beneficiaries of her intention to apply for a Grant of Letters of Administration with a Written Will annexed makes the procedure totally defective in substance as the same contravenes the mandatory requirements of Rule 26 [1] of the *Probate and Administration Rules*. The aforesaid Rule 26 [1] provides and quote: -

“Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.” Emphasize mine.

31. The Petitioner/Respondent did not provide evidence to show that she made any attempt or effort to serve the Petition for a Grant of Probate to the objectors herein despite being fully aware that they ought to have been involved in the proceedings by virtue of their relationship with the deceased.

32. The Petitioner/Respondent, on being asked on cross-examination why she failed to notify the objectors dint particular, Samwel Mworira and Derrick Mwaniki, of her intention to petition for the Grant who was named in the alleged Will as beneficiaries, she said that she did not know of their whereabouts but no evidence whatsoever was tendered before the Court to show and the case of; *Rahab Nyakangu Waitthinji v Fredrick Thuku Withanje* [2019] eKLR [copy attached]

33. In view of the said fatal omission by the Petitioner/Respondent to notify the Objectors of the proceedings herein and also to comply with the clear provisions of Sections 53 and 62 of the Act aforesaid, it is submitted that the answer to issue No.2 here above, is in the affirmative, that is to say that the proceedings to obtain a Grant of Probate with a Written Will annexed were defective in substance and I humbly urge you to so find.



34. On whether the Grant of Probate with a Written Will annexed was obtained fraudulently by making a false statement or concealment of material facts to the Court, it is submitted that the Respondent obtained the Letters of Administration with will annexed fraudulently as she misled the Court by alleging that she was the wife of the deceased in her Petition for Grant of letters of probate. From the evidence tendered before this court by the Objectors/ Applicants, the deceased was married to the late Lucy Njeri Kamau under the *African Christian Marriage and Divorce Act*, Cap. 151 (now Repealed). A copy of the said Marriage Certificate of the deceased to the said Lucy Njeri Kamau was produced in evidence as P. Exh.2. The said marriage of the deceased to the late Lucy Njeri Kamau was neither annulled nor dissolved at the time of the deceased's death and therefore the deceased did not, therefore, therefore, legal capacity to enter into a valid marriage with the Petitioner/Respondent as alleged and she could therefore not have been a wife to the deceased.
35. The Petitioner/Respondent, in her witness statement, stated that the deceased was at the time she got married and divorced, and in support of her evidence, she produced, copies of a petition filed by the late Lucy Njeri Kamau, a Notice to Enter Appearance and an affidavit by her filed at Chief Magistrates' Court at Nairobi in the Divorce Cause 121 of 1993.
36. PW3, Catherine Mumbi Kamau, in her evidence, stated that the divorce by her late mother against her late father, i.e., the deceased, was never prosecuted, and indeed, the Petitioner/Respondent in cross-examination did not have any document to show that the divorce was concluded.
37. The Petitioner/Respondent further, in her summons for confirmation of grant listed one, Grace Nyakio Wanjiru as a daughter to the deceased, knowing fully well that the said Grace Nyakio Wanjiru was not the deceased's daughter.
38. The Respondent in her statement dated 5<sup>th</sup> October, 2017, confirmed that she had given birth to the said Grace Nyakio Wanjiru prior to meeting the deceased and she is therefore not the deceased's daughter.
39. Further, the said Grace Nyakio Wanjiru proceeded to sign the consent to confirmation of Grant despite not being named as a beneficiary in the alleged Will dated 15<sup>th</sup> February, 1997.  
It is trite law that only beneficiaries of the estate can sign for consents in the distribution of the deceased's estate, and therefore, since the said, Grace Nyakio Wanjiru was neither a daughter to the Deceased nor a named beneficiary of the deceased in the alleged Will, she was a stranger in the said proceedings incapable of giving any valid and legal consent as required by law.
40. The Petitioner /Respondent herein also concealed the fact that a Grant for Letters of Administration Intestate had been issued in respect to the deceased's estate to the late Lucy Njeri Kamau who was the deceased's wife vide High Court Succession Cause No. 3130 of 2002 at Nairobi on 15<sup>th</sup> December, 2003 and which was confirmed on 7<sup>th</sup> November, 2005. Copies of the said Grant and the Certificate of Confirmation were produced as P. Exh.3 and P. Exh.4 respectively.
41. It is the Objectors/Applicants' submission that the Petitioner/Respondent knew and/or ought to have known of the said Grant for letters of Administration Intestate issued to the late Lucy Njeri Kamau in that she had in her own petition named her as a widow of the deceased and also in her affidavit sworn in support of her Summons for Confirmation of Grant dated 17<sup>th</sup> July, 2015 as the late Lucy Njeri Kamau had lodged caveats on the properties in respect of which the Petitioner /Respondent obtained the Grant of Probate with an ill annexed.
42. The Grant of probate that was issued to the Respondent was marred by fraud as she misrepresented herself before this Court as being a wife to the deceased, whereas the deceased was in a monogamous



marriage with the late Lucy Njeri Kamau until the date of his demise. The Respondent also misled this Honourable Court by stating under oath that Grace Nyakio Wanjiru was the deceased's daughter knowing fully, well that that was not true. The said Grace Nyakio Wanjiru even went further to sign a consent for the confirmation of grant despite not being a dependant under Section 29 of the Law of Succession and also not being a beneficiary according to the alleged Will of the deceased dated 15<sup>th</sup> February, 1997.

43. In view of the foregoing, it is submitted that the answer to issue No.3, is in the affirmative, i.e. to say that the Grant of Probate with a Written Will annexed was obtained fraudulently by making a false statement or concealment of material facts to the.
44. The Respondent herein made an untrue allegation of fact in her Summons for Confirmation of probate in paragraph (d) of the Grounds upon which the Summons was made where she was stated that the parties had agreed on an amicable distribution of the estate.
45. That indeed the said statement by the Petitioner/Respondent that "the parties have agreed on an amicable distribution of the estate" also contradicts her averment at paragraph 5 of her affidavit sworn in support of the Summons for Confirmation when she has deponed "That Derrick Mwaniki Kamau resides in Nairobi at unknown place and I lastly saw him at the Deceased's burial in the year 1997 and Samwel Mworika Kamau moved to U.S.A after the deceased's burial."
46. The said averment by the Petitioner/Respondent was untrue statement of fact as the Objectors/Applicants herein were not even aware of the alleged Will upon which grant of probate was being issued let alone the proceedings.
47. In the Petitioner's/Respondent's evidence tendered before this Court and in the documents filed herein, she has not led any evidence to show that Ruth Wanjiru Kamau d/o Gatua referred to in the said Will and Rahab Wanjiru Kamau, the Petitioner/ Respondent refers to one and the same person.
48. From the foregoing, it is submitted that the answer to issue No. 4 is also in the affirmative, i.e. that Grant of Probate with a Written Will annexed was made by untrue allegation of a fact essential in point of law to justify the Grant notwithstanding that the allegation was made in ignorance or inadvertently.

### **Petitioner's Submissions**

49. The Petitioner filed a petition for letters of Administration with will annexed on the 18<sup>th</sup> June, 2014 and she attached the deceased will dated 15<sup>th</sup> February, 1997 to the petition. The will listed the beneficiaries and assets and it is therefore not true that the Petitioner omitted some beneficiaries at the time of lodging the petition. It's worth noting that the petition herein is a testate not intestate and there is no requirement of listing beneficiaries in the petition as the petitioner was propounding the deceased's will in her capacity as an executor upon failure by the appointed executor to do so.
50. The petition was gazzetted on 17<sup>th</sup> October, 2014, and the being no objections lodged, a grant was issued on the 30<sup>th</sup> December, 2014. The Petitioner list applied for summons for Confirmation of grant vide a summons dated 17<sup>th</sup> July, 2015 and the grant was confirmed as per the deceased's will on the 13<sup>th</sup> November, 2015.
51. On the Validity of the will dated 15<sup>th</sup> February, 1997, Petitioners relied on Section 11 of the Law of Succession Act Cap. 160 Laws of Kenya (supra).



52. In the case of *in re Estate of MK (Deceased)* (2018) eKLR, the Court on restating the aforesaid provisions of the law, proceeded to hold that: -
- “There are four main requirements to the formation of a valid Will: -
- a. The will must have been executed with testamentary intent;
  - b. The testator must have had testamentary capacity;
  - c. The will must have been executed free of fraud, duress, undue influence or mistake; and
  - d. The will must have been duly executed.”
53. The will dated 15<sup>th</sup> February, 1997 was produced as DEXH NO. 2 by the maker one Advocate S.L. M.H MUHIA. The advocate confirmed that he was engaged by the deceased to prepare the will and which he did and that the deceased signed the will in his presence and that of one Peter Gitonga Mwangi whom he confirmed was his clerk at that time.
54. The advocate confirmed that he knew the deceased prior to the date of writing the will and indeed the Objectors’ witness one Hannah Lucy Wangari PW1 who was said to have been close to the deceased, confirmed in cross examination that the deceased had an advocate from Nakuru called Muhia. The advocate had no reasons of lying to Court and it was not shown that he had any interest in the estate other than confirming that the deceased left behind a written will.
55. No iota of evidence was adduced by the objectors to prove that the will dated 15<sup>th</sup> February, 1997 is invalid. The deceased’s name and ID Number is properly identified and there was no indication that the signature on the will is a forgery and no evidence was led to that effect. Failure to call the clerk who witnessed the will alongside advocate Muhia does not invalidate the will as was correctly held in the case of *In re Estate of MK* (supra).
56. The deceased’s testamentary intent and capacity was not challenged. No evidence was tendered to prove that he had no capacity to write a will. The Petitioner is the deceased’s 2<sup>nd</sup> wife although the objectors attempted to deny the obvious fact. The objectors’ witnesses admitted having knowledge of the petitioner prior to the deceased’s death but some labelled her as a mistress whereas others a house help.
57. The petitioner was living with the deceased prior to his demise as the deceased had separated with the 1<sup>st</sup> wife and divorce proceedings were in progress. The 1<sup>st</sup> wife and her children resided in Nairobi whereas the petitioner and the deceased resided in Nyandarua.
58. The petitioner produced photographs taken during the deceased’s burial and she is captured seated in front of the coffin as a wife which is very common in communities in Kenya.
59. The deceased had powers under Section 5 of the *Law of Succession Act* to dispose of his properties to any person by a will and in exercising these powers, he bequeathed land to the petitioner herein and he correctly referred to her as the second wife. The Petitioner explained that the deceased fondly referred to her as Ruth and not Rahab and the reason why her name is written as Ruth Wanjiru Kamau d/o Gatua in the will. No other person has come forward to claim the name and the objectors did not indicate that the name refers to one of them or that the deceased had another second wife namely Ruth.
60. The deceased’s properties are properly identified and the objectors have not challenged the will for failing to adequately provide for them under Section 29 of the *Law of Succession Act*. Parties are bound by their pleadings.



61. Under Section 5 (3) of *Cap 160*, Any person making or purporting to make a will shall be deemed to be of sound mind and the burden of proof that a testator was at the time of making a will of unsound mind lies on the person who so alleges. (see Section 5 – (4).
62. In the case of *In the matter of the estate of Late Sospeter Kimani Waithaka Cause No. 341 of 1998* as cited *in Re Estate of Jaswinder Singh Saimbi (deceased)* 2017 eKLR, it was held that: -
- “The Will of the departed must be honoured as much as it is reasonably possible. Readjustments of the wishes of the dead, by the living, must be spared for only eccentric and unreasonably harmful testators and weird Wills. But in matters of normal preferences for certain beneficiaries or dependants, maybe for their special goodness to the testator, the Court should not freely intervene to alter them.”
63. The Petitioner followed all due process of the law from the inception of the citation proceedings to the stage of confirmation of the grant, and the grant was confirmed as the deceased’s will. Thus, the Court is urged to dismiss the summons for revocation of the grant with costs.

### **Issues, Analysis, and Determination**

64. From the evidence tendered before this Court for the parties and their respective witnesses plus the submissions on record, the salient issues are: -Whether the alleged Will of the Deceased was valid or not? Whether the proceedings to obtain the Grant of Probate with a Written Will annexed were defective in substance. Whether the Grant of Probate with a Written Will annexed was obtained fraudulently by making a false statement or concealment of material facts to the Court. Whether the Grant of Probate with a Written Will annexed was made by the untrue allegation of a fact essential in point of law to justify the Grant notwithstanding that the allegation was made in ignorance or advertently.
65. On the first issue, Section 11 of the *Law of Succession Act*, Cap. 160 Laws of Kenya ["the Act"] provides, inter alia, that 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 test tor, 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 them 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 acknowledgment of his signature or mark, or of the signature of that other person. 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.
65. The Objectors, in their Summons, contend that the deceased died intestate and that the alleged Will is a forgery and thus not valid and/ or of any legal effect. The Affidavit of Derrick Mwaniki Kamau sworn in support of the Summons and also to the evidence of Hannah Lucy Wangari Njoroge [PW1], Mohammed Ngwili Nzuki [PW2], and Catherine Mumbi Kamau [PW3], respectively, who in their respective witness statements and which they adopted in their evidence in chief denied the existence of the alleged Will.



66. The Petitioner /Respondent, in an effort to rebut the evidence of the Objectors to the effect that there was no will besides her evidence that the said Will was by the Deceased himself called Mr. Silvester Mwangi Muhia, the Advocate who allegedly drew the said Will and who testified as DW3. DW3, in his evidence in Chief, said that he is the one who prepared the alleged Will and attested to the same with his clerk but who was never called by the Petitioner as a witness.
67. On cross-examination by the counsel Objectors/ Applicants, Silvester Mwangi Muhia [DW3], the Advocate who allegedly prepared the alleged Will, said that he had no document in Court to prove that he had been instructed by the Deceased to draw the alleged Will nor did he have a receipt as a proof for payment of his legal fees by the Deceased.
68. Also, on cross-examination, Rahab Wanjiru Kamau, who testified as DW4, said that she was given a copy of the Will by DW3 and that is, that copy which was allegedly read to herself and the Deceased's late wife and her children at the District Officer's office but which evidence was categorically denied by PW1, PW2, and PW3.
69. Failure by the petitioner to call the second attesting witness, one Mr. Patrick Gitonga Mwangi, who allegedly attested the execution of the same by the Deceased so as to avail him for cross-examination in order to enable this Court conclusively decide on the validity of the Will or otherwise raises doubt as to the existence of will by deceased, because his evidence, besides that of DW3, was critical in proving the validity of the alleged Will, especially in instant dispute which is seriously contested.
70. The existence of the alleged Will having been disputed by the Objectors/ Applicants and evidence has led to that effect, the burden of proof of its existence and validity shifted to the Petitioner/Respondent but failed to discharge that burden. See provisions Sections 107,108 and 109 of the Evidence Act, Cap. 80 Laws of Kenya
71. As is clearly provided in the aforesaid provisions of the said Evidence Act and in particular to Section 108 thereof, the Petitioner /Respondent has failed to rebut Objectors'/ Applicants' evidence to the effect that the alleged Will is not valid and has therefore failed to satisfy the requirement of Section 11 [c] of the Law of Succession Act which provides, inter alia, that for a Will to be valid it has to be attested by two or more competent witnesses , each of whom must have seen the testator sign or affix his mark to the Will.
72. On the second issue, on whether the proceedings to obtain the Grant of Probate with a Written Will annexed were defective in substance? it is trite law that a grant of probate can only be issued to the executor mentioned in a Will. Section 53 of the Act provides: - A court may where a deceased person is proved [whether by production of a will or an authenticated copy thereof or by oral evidence of its contents] to have left a valid will, grant, in respect of all property to which such will applies, either; Probate of the Will to one or more of the executors named therein; or if there is no proving executor, letter of administration with the will annexed;
73. In the instant case, the Testator in the alleged Will allegedly appointed Raphael Kimani Nzuki as the executor of the Will but not the Petitioner. In the circumstances, it is Raphael Kimani Nzuki who ought to have petitioned for the grant of probate as opposed to the Respondent herein as she was not the executor.



74. There is nothing on record to show that Raphael Kimani Nzuki, the alleged executor renounced his executorship as required under Section 59 of the Act. The Petitioner /Respondent did not tender any evidence to that effect before this Court. Section 59 aforesaid provides, and I quote: -

“Any person who has been appointed by a will as an executor thereof may, either by oral declaration before the court or by writing under his hand, renounce executorship and shall thereafter be finally precluded from applying for a grant of probate of that will.”

75. As the Petitioner/Respondent herein was not named as the executor to the deceased's alleged Will, thus, she ought to have filed for letters of Administration with the Will annexed after making an application to this Court to issue a citation against the named executor, Raphael Kimani Nzuki to renounce his executorship as provided under Section 62 of the Act.

76. The Petitioner did not provide any evidence to show that the said Raphael was served with a Citation and failed and/ or ignored to Petition for the letters, although the same has been alluded to in her Petition dated 10<sup>th</sup> June, 2014.

77. If indeed the Petitioner/Respondent had served Raphael Kimani Nzuki with a citation as alluded to, she ought to have provided an affidavit of service to that effect but she did not do so. It is trite law that letters of grant of probate with will annexed can only be issued to the named executor only or in the event that the named executor [s] is unable to perform his duty vide a court order.

78. As the record stands now, the Petitioner /Respondent did not in her evidence produce any court order showing that she did indeed obtain a court order granting her leave to Petition for grant of Letters of representation for the estate of the deceased and therefore making the procedure applied in obtaining grant defective in law in view of the aforesaid clear provisions of Sections 53 and 62 of the Act.

79. The process and procedure of obtaining the Grant of Probate by the Petitioner were also defective as the Respondent failed, ignored, and/ or neglected to notify the other named beneficiaries of the estate of the Deceased of both the alleged Will and the proceedings for petition of a grant of representation.

80. Failure by the Petitioner/ Respondent to notify the other beneficiaries of her intention to apply for a Grant of Letters of Administration with a Written Will annexed makes the procedure defective in substance as the same contravenes the mandatory requirements of Rule 26 [1] of the Probate and Administration Rules. The aforesaid Rule 26 [1] provides and quote: -

“Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”

81. Nowhere has the Petitioner demonstrate that she made any attempt or effort to serve the Petition for a Grant of Probate to the objectors herein despite being fully aware that they ought to have been involved in the proceedings by virtue of their relationship with the deceased.

82. The Petitioner, on being asked on cross-examination why she failed to notify the objectors and, in particular, Samwel Mworira and Derrick Mwaniki of her intention to petition for the Grant who was named in the alleged Will as beneficiaries, she said that she did not know of their whereabouts but no evidence whatsoever was tendered before the Court to show and/or demonstrate the effort she took, if any, towards that end thus the court makes a finding that no effort was ever made by the Petitioner to notify the objectors of the instant proceedings and that by itself made the proceedings defective in substance.



83. In the case of; *Rahab Nyakangu Waithinji v Fredrick Thuku Withanje* [2019] eKLR, the court held that: -
- “ . ..... The identities of beneficiaries and their interests are material facts, and once it is established that their interests were concealed from the court, the grant of representation issued was flawed accordingly; the defective nature of proceedings to obtain and procure confirmation of the grant is patently evident since no notice was given to the beneficiaries.”
84. In view of the said fatal omission by the Petitioner to notify the Objectors of the proceedings herein and also to comply with the clear provisions of Sections 53 and 62 of the Act aforesaid the proceedings to obtain a Grant of Probate with a Written Will annexed were defective in substance.
85. The third issue is as to whether the Grant of Probate with a Written Will annexed was obtained fraudulently by making of a false statement or concealment of material facts to the Court. The petitioner herein obtained the Letters of Administration with Will Annexed by alleging that she was the wife of the deceased in her Petition for Grant of letters of probate. From the evidence tendered in this matter, the deceased was married to the late Lucy Njeri Kamau under the *African Christian Marriage and Divorce Act, Cap. 151* (now Repealed) vide marriage certificate exhibited.
86. The said marriage of the deceased to the late Lucy Njeri Kamau was neither annulled nor dissolved at the time of the deceased's death. Therefore, the deceased did not, therefore, have any legal capacity to enter into a valid marriage with the Petitioner therefore she could not have been a wife to the deceased.
87. The Petitioner in her witness statement stated that the deceased was at the time she got married divorced and in support of her evidence she produced copies of a petition filed by the late Lucy Njeri Kamau, a Notice to Enter Appearance and an affidavit by her filed at Chief Magistrates' Court at Nairobi in the Divorce Cause 121 of 1993.
88. PW3, Catherine Mumbi Kamau, in her evidence stated that the divorce by her late mother against her late father, i.e., the deceased was never prosecuted and indeed, the Petitioner Respondent in cross examination said that she did not have any document to show that the divorce was concluded.
89. The Petitioner /Respondent further in her summons for confirmation of grant listed one Grace Nyakio Wanjiru as a daughter to the deceased knowing fully well that the said Grace Nyakio Wanjiru was not the deceased's daughter.
90. The Respondent in her statement dated 5<sup>th</sup> October, 2017 confirmed that she had given birth to the said Grace Nyakio Wanjiru prior to meeting the deceased and she is therefore not the deceased's daughter.
91. Further, the said Grace Nyakio Wanjiru proceeded to sign the consent to confirmation of Grant despite not being named as a beneficiary in the alleged Will dated 15<sup>th</sup> February 1997.
92. It is trite law that only beneficiaries of the estate can sign for consents in distribution of a deceased's estate and therefore since the said Grace Nyakio Wanjiru was neither a daughter to the deceased nor a named beneficiary of the deceased in the alleged Will, she as a stranger in the said proceedings incapable of giving any valid and legal consent as required by law.
93. The Petitioner /Respondent herein also concealed the fact that a Grant for Letters of Administration Intestate had been issued in respect to the deceased's estate to the late Lucy Njeri Kamau who was the Deceased's wife vide High Court Succession Cause No. 3130 of 2002 at Nairobi on 15<sup>th</sup> December,



- 2013 and which was confirmed on 7<sup>th</sup> November, 2015. Copies of the said Grant and the Certificate of Confirmation were exhibited.
94. The Petitioner/Respondent knew and/or ought to have known of the said Grant for letters of Administration Intestate issued to the late Lucy Njeri Kamau in that she had in her own petition named her as a widow of the Deceased and also in her affidavit sworn in support of her Summons for Confirmation of Grant dated 17<sup>th</sup> July, 2015 as the late Lucy Njeri Kamau had lodged caveats on the properties in respect of which the Petitioner /Respondent obtained the Grant of Probate with a will annexed.
  95. The Grant of probate that was issued to the Respondent was marred by fraud as she misrepresented herself before this court as being a wife to the deceased, whereas the deceased was in a monogamous marriage with the late Lucy Njeri Kamau until the date of his demise. The Respondent also misled this Court by stating under oath that Grace Nyakio Wanjiru was the deceased's daughter knowing fully well that that was not true.
  96. The said Grace Nyakio Wanjiru even went further to sign a consent for the confirmation of grant despite not being a dependant under Section 29 of the Law of Succession and also not being a beneficiary according to the alleged Will of the deceased dated 15th February 1997.
  97. In view of the foregoing, it is my humble submission that the answer to issue No. 3 is in the affirmative, i.e. to say that the Grant of Probate with a Written Will annexed was obtained fraudulently by making a false statement or concealment of material facts to the court and I humbly urge you to so hold.
  98. Finally, the court is to determine whether the Grant of probate with a written Will annexed was made by untrue allegation of a fact essential in point of law to justify the Grant notwithstanding that the allegation was made in ignorance or inadvertently
  99. The Respondent herein made an untrue allegation of fact in her Summons for Confirmation of probate in paragraph (d) of the Grounds upon which the Summons was made, where she stated that the parties had agreed on an amicable distribution of the estate.
  100. That indeed the said statement by the Petitioner/Respondent that "the parties have agreed on an amicable distribution of the estate" also contradicts her averment at paragraph 5 of her affidavit sworn in support of the Summons for Confirmation when she has deponed "That Derrick Mwaniki Kamau resides in Nairobi at an unknown place and I last saw him at the deceased's burial in the year 1997, and Samuel Mworira Kamau moved to the U.S.A after the deceased's burial."
  101. The said averment by the Petitioner Respondent was untrue statement of fact as the Objectors/ Applicants herein were not even aware of the alleged Will upon which grant of probate was being issued, let alone the proceedings.
  102. The Petitioner /Respondent further made a false allegation that she was the deceased's wife and that the deceased had divorced his first wife so as to hoodwink this court into issuing her with letters of Administration with will annexed knowing very well that she was not legally married to the deceased.
  103. It is also very important to point to this court that the alleged Will on the basis of which the Petitioner / Respondent obtained the Grant states the deceased second wife as Ruth Wanjiru Kamau d/o Gatua and not Rahab Wanjiru Kamau.
  104. In the Petitioner's/Respondent's evidence tendered before this court and in the documents filed herein, she has not led any evidence to show that Ruth Wanjiru Kamau d/ o Gatua referred to in the said Will and Rahab Wanjiru Kamau, the Petitioner/ Respondent refers to one and the same person. It



is noted this serious anomaly and in respect of which no explanation at all has been proffered by the Respondent and this goes to proof that the alleged Will is a forgery.

105. From the foregoing, it is my finding that issue No. 4 is also in the affirmative, i.e., to say that Grant of Probate with a Written Will annexed was made by untrue allegation of a fact essential in point of law to justify the Grant notwithstanding that the allegation was made in ignorance or inadvertently.

106. In sum the application herein succeeds and thus court grants the following orders;

- i. The Grant of Probate with a Written Will annexed made on 30<sup>th</sup> December, 2014 in favour of Rahab Wanjiru Kamau, the petitioner /Respondent herein, and the Certificate of Confirmation of Grant in respect to it issued by this High Court on 13<sup>th</sup> November 2015, be and are hereby revoked and annulled forthwith.
- ii. (ii) Fresh grants to issue to Derrick Mwaniki Kamau, Catherine Mumbi Kamau, Samuel Mworira Kamau and Elizabeth Njambi Wanjohi or as the objectors may agree.
- iii. The mode of distribution together with application to confirm grant be lodged within 45 days from dates herein.
- iv. Parties to bear their costs.

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 19<sup>TH</sup> DAY OF OCTOBER, 2022.**

.....

**CHARLES KARIUKI**

**JUDGE**

