



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2505 OF 2004

IN THE MATTER OF THE ESTATE OF JOSEPHINE WAMBUI MWANGI (DECEASED)

DAVID NDUNGU KINUTHIA.....OBJECTOR/APPLICANT

VERSUS

CAROLINE WAMBUI.....1ST RESPONDENT

JOHN HENRY MWANGI.....2ND RESPONDENT

IRENE WANJIKU.....3RD RESPONDENT

RULING

1. The deceased Josephine Wambui Mwangi died on 6th March 2004. She had two children: the applicant David Ndungu Kinuthia and Jane Njoki. Jane Njoki died leaving four children who are the respondents; Caroline Wambui (1st respondent), Joseph Henry Mwangi (2nd respondent), Irene Wanjiku (3rd respondent) and David Ndungu Kinuthia. On the basis that the deceased left a written Will dated 28th April 2000, the 1st respondent (the executrix in the said Will) petitioned this court and on 4th April 2005 was issued with a grant of probate. The grant was confirmed on 21st February 2006. This followed an application by the 1st respondent who produced a consent to the confirmation purportedly signed by the applicant.

2. In the certificate of confirmation, the deceased's estate was shared as follows:-

- (a) Dagoretti/Riruta/T.103 and Ngobit/Supuko/Block 1/169 went to the 2nd respondent;
- (b) Dagoretti/Riruta/T.102 went to the 1st respondent;
- (c) plot No. 336 in Njiru Ageria Development Company Limited went to the 3rd respondent;
- (d) parcels Nos. 1218 and 236 at Dagoretti Nyakinyua Cooperative Society Land No. 3 went to David Ndungu Kinuthia;
- (e) household goods and personal goods of the deceased were to go to the 2nd respondent, and upon her marriage to go to the 2nd respondent; and
- (f) the residue of the properties was to go to the 2nd respondent.

3. In the application dated 7th July 2009 by the applicant, he sought the revocation of the grant of probate on the basis the deceased had not left any Will and that the purported Will was a forgery; that he had not participated in the proceedings leading to the grant of probate and the confirmation of the grant, and that the consent attributed to him was a forgery. The 1st and 2nd respondents filed each a replying affidavit to reiterate that the deceased was the author of the said Will, and also stated that the applicant had consented to the confirmation of the grant.

4. There is no dispute that the applicant had complained to the police that the said written Will and consent were a forgery. This led to the successful prosecution of the 1st and 2nd respondents in **C.M. Criminal Case No. 3413 of 2013 at Kibera** with forgery contrary to **section**

349 of the **Penal Code** on the Will and the consent. They were jointly convicted on each charge. Each was sentenced to serve seven years in jail on the charge in regard to the Will and three years on the charge in regard to the consent. Their appeal to the High Court was not successful. They have moved to the Court of Appeal.

5. I find that the convictions bind the 1st and 2nd respondents and also bind this court. It follows that the deceased left no written Will and that the applicant did not consent to the confirmation of the grant. Under **section 76** of the **Law of Succession Act (Cap 160)**, I find that the grant of probate issued to the 1st respondent was obtained fraudulently. I further find that the confirmation of the grant of probate was obtained fraudulently. Each is revoked and set aside. Any titles issued to any of the respondents are recalled and cancelled. The 1st respondent shall pay costs of the application.

6. The applicant filed application dated 25th April 2019 seeking orders against the respondents and/or their agents to deposit with court monthly rental income in respect of Dagoretti/Riruta/T.103 pending the outcome of the application dated 7th July 2009. In response to the orders issued by the court to deposit the rent income, the 2nd respondent filed an application dated 21st September 2020 seeking orders to vacate, set aside and/or vary the deposit orders. Both applications were opposed.

7. Given the decision over the application dated 7th July 2009, I find no reason to interfere with the orders issued over the rental income. At least, not in the manner sought by the 2nd respondent. The application dated 25th November 2019 is allowed with costs and the one dated 21st September 2020 is dismissed with costs.

8. I find that, on the evidence, the deceased died intestate. Under **section 47** of the **Act** and **rule 73** of the **Probate and Administration Rules**, and so that the estate does not go to waste for want of administration, I appoint the applicant and the 1st respondent as joint administrators of the estate of the deceased. I ask that both, or any of them, should within 60 days file and serve to all beneficiaries an application for the confirmation of the grant intestate. Whoever is served shall have 14 days to file a response. The cause shall be mentioned on **28th April 2021** for directions.

DATED and DELIVERED NAIROBI this 22ND day of FEBRUARY 2021.

A.O. MUCHELULE

JUDGE