



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

SUCCESSION CAUSE NO 293 OF 2013

(FORMERLY NYERI SUCCESSION CAUSE NO 225 OF 2011)

IN THE MATTER OF THE ESTATE OF JOSEPH KAGUCHIA WAHIU, DECEASED)

BETWEEN

GLADYS WANGUI MWANGI.....2ND ADMINISTRATOR/APPLICANT

AND

1. LYDIA WAIRIMU MAINA.....1ST ADMINISTRATOR/PROTESTER

2. GEORGE MUCHEKE MWANGI.....2ND PROTESTER

J U D G M E N T

1. The Deceased in this matter, **JOSEPH KAGUCHIA WAHIU** (alias **JOSEPH KAGUCHIA**), died on 18/05/1994. Following a petition for a grant of letters of administration intestate to his estate, such grant was issued on 19/10/2011 to the three Petitioners, **LYDIA WAIRIMU MAINA**, **GLADYS WANGUI MWANGI** and **LUCY WAMUYU MWANGI** (herein after referred to as the 1st, 2nd and 3rd Administrator respectively).

2. By a summons dated 08/06/2012 the 2nd Administrator, **GLADYS WANGUI MWANGI**, applied for confirmation of the said grant. At paragraph 4 of her supporting affidavit she proposed that the two parcels of land comprising the free estate of the Deceased, **LR NO. LOC19/NYAGANGA/1041** and **LR NO. LOC 14/KIRU/929**, should be inherited by herself absolutely.

3. Accompanying the summons for confirmation of grant was a consent dated 08/06/2012 signed by a number of persons, including the 3rd Administrator, **LUCY WAMUYU MWANGI**.

4. On 28/10/2013 the 1st Administrator, **LYDIA WAIRIMU MAINA**, filed an *affidavit of protest* dated 24/10/2013. She disagreed with the 2nd Administrator's proposal for distribution outlined above. She counter-proposed that the Deceased's estate ought to be shared equally by his three children. Two of the children were already deceased but were survived by spouses and/or children, as will be seen later. Those 3 children were –

(i) **ANDREW MWANGI KAGUCHIA** – a deceased son but survived by his wife, the 2nd Administrator/Applicant and children.

(ii) **LYDIA WAIRIMU MAINA** – daughter.

(iii) **MARY MAGDALINE WAMBUI MWANGI** – deceased daughter survived by her own daughter (3rd Administrator) and other children.

5. On 18/11/2014 the 2nd Protestor, **GEORGE MUCHEKE MWANGI**, filed his affidavit of protest. He is a son of the 2nd Administrator/Applicant. At the hearing of this matter he was advised by the court that he cannot have a direct claim in the Deceased's estate independent of his own mother's (2nd Administrator/Applicant's) claim, because he is only a grandson of the Deceased, not a son; his claim as such in the Deceased's estate can thus only be through his mother (the 2nd Administrator/Applicant). The court therefore declined to give him audience to press for his perceived independent claim.

6. At the time of giving directions upon the summons for confirmation, it turned out that the 2nd Administrator was basing her proposal for distribution upon an alleged oral will by the Deceased, by which he allegedly decreed that his two parcels of land should be inherited by her husband. As already seen, the 3rd Administrator, LUCY WAMUYU MWANGI, agreed with this proposal for distribution. The 1st Administrator/Protector denied that there was an oral will of the Deceased.

7. The court therefore directed that the issue of whether or not the Deceased left a valid oral will be tried by oral evidence. The 2nd Administrator testified and called 3 witnesses. The 1st Administrator/Protector testified through her daughter, CATHERINE WAMUYU MAINA, as she was out of the country and unable to attend the hearing.

8. I have considered the testimonies of the witnesses and other evidence placed before the court.

9. The 2nd Administrator/Applicant testified that she was not present when the Deceased made his oral will but was told by her now deceased husband (a son of the Deceased as already seen) and three elders who were present what had transpired. She stated that those elders were JASON KAHUMBA WAMAI (PW2), CHENEY RICHARD NJARO (PW4) and GERUASIO MUCHIRI KIBARU (PW3). The 2nd Administrator/Applicant did not give any date of the Deceased's alleged oral will. Her testimony regarding the alleged oral will of the Deceased was essentially hearsay.

10. PW2 stated that he was related to the Deceased in that their grandfathers were related. He was the Secretary of his sub-clan. He did not give a date of the Deceased's alleged oral will. He testified that before he died the Deceased called him, the husband of the 2nd Administrator/Applicant and other elders to a meeting. He said that in the meeting the Deceased stated that he wanted to give his daughter, the 1st Administrator one of the parcels of land because she attended to him by providing food and clothing to him, but that the elders prevailed upon him not to give to a married daughter land; and that the Deceased then stated that his son should give the 1st Administrator KShs 10,000/00 so that he (the son) could inherit both parcels of land. He did not know if the son ever paid to his sister the KShs 10,000/00.

11. PW3 was a cousin of the Deceased. His testimony was similar to that of PW2. He also did not give a date of the alleged oral will of the Deceased.

12. PW4 was a kind of nephew to the Deceased. His testimony was that on a day in 1999 he accompanied the Deceased's son to the home of the 1st Administrator in Nairobi where the son offered to his sister the KShs 10,000/00, but that she declined to accept the same.

13. DW1 testified on behalf of her mother, the 1st Administrator by authority of a power of attorney. She denied that the Deceased left any valid oral will, and stated that her mother's stand was that the three children of the Deceased should share equally the estate as by law provided.

14. **Section 9** of the *Law of Succession Act, Cap 160* states as follows –

“9 Oral Wills

(i) No oral will shall be valid unless –

a) It is made before two or more competent witnesses;

and

b) The testator dies within a period of three months from the date of making the will.

Provided that”

The case of the 2nd Administrator/Applicant completely lacks in the date when the Deceased's alleged oral will was made. It is therefore not possible to know if he died within three months of making the alleged oral will. This is a requirement of the law, and the 2nd Administrator/Applicant, being the one alleging existence of the oral will, was duty-bound to bring evidence of the date of making of the oral will. She did not discharge this burden.

15. I therefore hold, upon the material now before the court, that the Deceased did not leave a valid oral will. Even upon the evidence, it was clearly the desire of the Deceased to give his daughter (1st Administrator) who took care of all his worldly needs, land. The elders present substituted their own opposition to a married female child inheriting land for the wishes of the Deceased. It was therefore the elders who were purporting to disinherit the 1st Administrator, not the Deceased.

16. The Deceased thus died intestate survived by three children. Two of the children have since died, but they were survived, one by a spouse and children, and the other by children. His estate must devolve in accordance with section 38 of the law of Succession Act. The Deceased's two parcels of land named elsewhere in this judgment shall be inherited equally by his three children. The 2 children who are now deceased, shall be represented, one by the 2nd Administrator/Applicant (who is the widow of the Deceased's son), and the other by the 3rd Administrator (being a daughter of the Deceased's deceased daughter).

17. The grant shall therefore be confirmed in the said terms. Parties shall bear their own costs of the proceedings. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 12TH DAY OF AUGUST 2021

H P G WAWERU

JUDGE

DELIVERD AT MURANG'A THIS 29TH DAY OF OCTOBER 2021