



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 563 OF 2012

IN THE MATTER OF THE ESTATE OF KARIUKI KANGAU (DECEASED)

MARY KANYI MBUGUA.....1ST OBJECTOR

MICHAEL KIBE KARIUKI.....2ND OBJECTOR

VERSUS

PETER KANGAU NJENGA.....EXECUTOR

JUDGMENT

1. The deceased Kariuki Kangau died on 8th February 2009. On the basis that he left a written Will dated 21st January 2009, the executor Peter Kangau Njenga petitioned this court for the grant of probate. The grant of probate was issued to him on 25th May 2012. The estate comprised 1/3 in Kiambaa/Thimbigua/1746 whose total acreage was 2.80 acres. The grant has not been confirmed.

2. Prior to this, the first objector Mary Kanyi Mbugua and her late son Leonard Kangau Kariuki had petitioned the Chief Magistrate's court at Kiambu in **Succession Cause No. 93 of 2010** for the grant of letters of administration intestate. The grant was issued to them on 24th September 2010 and confirmed on 5th May 2011 with an order that the parcel of land above be shared equally amongst her, the present executor and Kamundi Kangau.

3. The second objector is the son of the first objector. They filed the present application dated 4th September 2017 seeking the revocation of the grant of probate issued to the executor. The grounds were that the Will on which the grant was based was invalid and fraudulent; that the deceased had left no Will; that the deceased was at the time of his death suffering from HIV AIDS, was a perpetual drunkard who was suffering from alcoholism and had no mental capacity to make the Will; that any purported Will was obtained by deception, coercion, undue influence and/or misrepresentation on the part of the executor; that the Will had not made any or reasonable provision for the deceased's children and dependants; that the executor knew that the deceased had left a family and yet he had not involved it in the petition for grant of probate; and that the executor had no claim to the estate of the deceased as he was not the deceased's child or beneficiary.

4. In the affidavit that she swore on her behalf and that of her children and grandchildren, she stated that she was married to the deceased between 1970 and 1975 during which time they got four children as follows:-

- (a) Leonard Kamau Kariuki born in 1972 but has since died leaving a widow and 3 children;
- (b) Mercy Wangari Kariuki who was born in 1973 but has since died unmarried but leaving 2 children;
- (c) Hannah Njeri Kariuki who was born in 1974 but has since died while not married but leaving one child; and
- (d) Michael Kibe Kariuki (2nd objector) born in 1975 and has one child.

5. She stated that the executor was the son of the deceased's brother John Njenga Kangau, and could therefore not benefit from the deceased's estate. She explained that Kiambaa/Thimbigua/1746 was jointly registered in the names of the deceased and his two deceased brothers John Njenga Kamau and Kamundi Kang'au each having a 1/3 share; and that the executor had already benefitted from his late father's estate. In 1975 she remarried, and therefore has no claim to the estate and therefore her application was to benefit her children and grandchildren. She swore that the deceased was sick and an alcoholic who had no capacity to make the alleged Will.

6. The respondent filed a replying affidavit to deny that the deceased had any children with the first objector. He denied that the deceased was HIV positive or that he lacked capacity to make the Will.

7. The application for revocation was heard through the affidavits and oral evidence. The first objector testified and did not call witnesses. The executor testified and did not call witnesses. It was common ground that the first objector was married to the deceased but in 1975 left him and she got re-married to one Mbugua. The executor was cross-examined to admit that the deceased and first wife had children. They were the late Leonard Kamau Kariuki, the late Mercy Wangari Kariuki, the late Hannah Njeri Kariuki and second objector Michael Kibe Kariuki. The first objector took away the children with her to go and live with Mbugua who brought them up.

8. Regarding the Will, the first objector testified that she did not know when it was made. She stated that the deceased became sick and died, but that she did not visit him during his sickness. She stated as follows:-

“I was not visiting the deceased when he was sick. It was Leonard visiting him. I do not know about the Will. I did not visit the deceased at his home. I would see him walking on the road. He was being visited by Leonard. I left the deceased because he was a drunkard. I did not go back.....”

9. The first objector complained that the Will had not provided for her children with the deceased.

10. The executor was represented by Ms Muigai and the objectors by Mr. Wachira. Counsel filed written submissions which I have considered.

11. The objectors challenged the Will on the basis that the deceased had no mental capacity to make it, that he had been coerced and induced to make it, that the Will was fraudulently obtained, and so on. However, the objectors gave no evidence to support these allegations. The first objector did not know when the Will was made and the circumstances under which it was made. She stated that she left the deceased because he was a drunkard, and that he had been sick prior to his death. She did not visit him during the sickness. She did not know when he died, or what killed him. In her oral testimony she did not make reference to HIV/AIDS. She did not say he was infected. There was no medical or other evidence to show that at the time the deceased made the Will he was suffering from any disease that affected his mental status.

12. **Section 5 of the Law of Succession Act (Cap 160)** deals with the capacity of the maker of a Will. Any person who is of sound mind and not a minor may dispose of all or any of his free property by Will. Any person making or purporting to make a Will shall be deemed to be of sound mind, and any person alleging that a testator was, at the time he made a Will, not of sound mind, shall prove the allegation. A person's state of mind may be affected by his mental or physical illness or drunkenness, or by any other cause. He should have been so affected that he did not know what he was doing at the time he is alleged to have made the Will **(In the Matter of the Estate of Zipporah Njeri Mwaura, HC Succession Cause No. 3002“A” of 2003 at Nairobi)**. I find no evidence that the deceased suffered from any mental or physical illness that may have affected his capacity to make the Will. I find no evidence that his drunkenness may have impaired his judgment. I find that the Will executed on 21st January 2009 by the deceased was properly executed and was a valid Will.

13. The objectors further challenged the Will on the basis that it did not make any or reasonable provision for the children between the first objector and the deceased. **In Re Estate of Wangoi Mutonga (Deceased) [2014]eKLR** it was held that:-

“It is imperative to point out that a Will is not to be invalidated purely on the grounds it does not provide for some persons who were dependent on the deceased or on the ground that it does not dispose of all the assets. There is freedom of testation. If a will is valid, on account of having been executed in proper form by a person who was of the requisite state of mind, the same ought to be upheld. Where there are assets that have not been dealt with in the will or at any rate which cannot pass in the terms of the will, then such assets have to be dealt with as if the deceased died intestate with respect to them. A grant of letters of administration intestate ought to be obtained to deal with them. A person, who feels that he is entitled to an estate, but is not provided for as per the terms of the will of the deceased, has a remedy in Section 26 of the Act. He ought to move the court appropriately under Section 26 of the Act.”

14. The grant of probate has not been confirmed. There is still opportunity for the children of the deceased by the 1st objector to make an appropriate application under **section 26** of the **Act** for provision to be made to them in regard to the estate of the deceased.

15. In conclusion, therefore, I find no merit in the application dated 4th September 2017 by the objectors and dismiss it with costs.

DATED and DELIVERED at NAIROBI this 28TH day of JANUARY, 2020

A.O. MUCHELULE

JUDGE