**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CAUSE NO. 533 OF 2012**

**IN THE MATTER OF THE ESTATE OF CHARLES MWANIKI KAMARA (DECEASED)**

**MARY WANGECHI KAMARA.....PETITIONER**

**VERSUS**

**NELSON KAMARA MWANIKI.....1ST OBJECTOR**

**RAHAB WANJIKU KAMARA.....2ND OBJECTOR**

**ROSE MUTHONI KAMARA.....3RD OBJECTOR**

**JUDGMENT**

Charles Mwaniki Kamara died on 13 November 2011; according to the petition filed for grant of probate of what is alleged to have been his last will, the deceased hailed from Thunguma in Nyeri County and was domiciled in the Republic of Kenya.

The petitioner is the surviving widow of the deceased; the latter had married twice but his first wife predeceased him. The two wives had children who have survived their late father; three of these children are the objectors, the first two being from the first house while the third one is from the petitioner's second house.

The origin of the dispute between the two parties is a grant of probate of written will made to the petitioner by this honourable court on 29 July 2012. The grant was made on the basis of a copy of the will filed by the petitioner in support of her application for probate of that will.

The objectors contested the petition for grant of the will and sought for extension of time to file an objection to the grant of probate in favour of the petitioner; this, they did by way of a summons dated 4 February 2013. The record shows that the summons was allowed on 6 June 2013. The court granted them leave to file the objection and also to file a petition by way of cross-application for letters of administration intestate of the deceased's estate.

The 1st and 2nd objectors eventually filed their separate and respective answers to the petition, objections and petitions by way of cross-applications on 18 June 2013. It is these objections and petitions that are the subject of this judgment.

In the affidavits filed by the objectors in support of their petitions, they have sworn that the deceased died intestate and the purported will filed in court is invalid. They have also listed the assets that, in their view, comprise the deceased's estate.

The crux of the dispute is fairly simple to see; the petitioner's position is that the deceased died testate and according to the deceased's testament, she was appointed the executrix of the will and thus entitled to the grant of probate. The Objectors are of a contrary view; it is their case that the deceased died intestate and the administration and ultimate distribution of his estate should be subjected to intestacy provisions of the law of succession Act, cap. 160.

More often than not, resolution of a dispute of this nature wouldn't be complete without hearing the contestants and their witnesses, if any; inevitably, oral evidence had to be taken to determine what, in my humble view, is the central question in this dispute - the authenticity or lack thereof of the will filed in this honourable court on 30 May 2012, and; depending on the answer to this question, whether the deceased died testate or intestate.

The 1st objector's evidence was that the deceased was his father and that the petitioner was her step-mother. His own mother, the 1st wife to the deceased was called Mine Wambaire and she died in 1995. Apart from himself and the 2nd objector, his other siblings are Stanley Wangenye, Damaris Wanyiri and Martha Gakenia.

He named the children of the petitioner as follows:

1. Diana Wachuka
2. Rose Muthoni
3. Jackson Kamara (deceased)
4. Richard Wanjau (deceased)
5. Paul Njeru
6. Francis Kibe
7. Sammy Ndegwa
8. Nyaga Mwaniki
9. Daniel Ngeche (deceased)

The 1st objector testified that his father was a businessman and a politician; as a matter of fact, he was a councillor and also a mayor of the then Nyeri Municipal Council.

Prior to his death, the deceased had been hospitalized for roughly two to three months at Outspan hospital in Nyeri. The 1st objector paid the medical bill that was approximately Kshs 400,000/=; he also visited him in hospital from time to time. The deceased never mentioned to him on any of these occasions or at any other time that he had a will. Again, after his death the family was not informed of any will that the deceased may have left behind despite the several meetings his family held in the wake of the deceased's death over the administration of his estate. The petitioner is said to have told the objector that she would inform him when they will start the succession process.

Later, so the 1st objector testified, he discovered that one of the deceased's properties, a school, was being sold to the Government at Kshs. 56,000,000/=. After inquiries to the Ministry of Local Government which was the intended purchaser, he discovered that the petitioner had initiated a succession cause in respect of the deceased's estate without his knowledge. He sought for a copy of the will that had been filed from the court.

The will was dated at Nyeri on the 22nd day of October 2010 but it was stated to have been 'commissioned' at Nairobi on the same date. The objector observed that the last page of the will on which the deceased and his witnesses are alleged to have signed is a copy with marks showing there was a superimposition of some sort on the copy itself.

Even then, the signature purported to be that of the deceased was not the deceased's signature, so the objector testified. He testified further he did not know any of the two witnesses who are alleged to have witnessed the deceased sign the will. In any event, the document itself suggests that they signed the document before the would-be testator himself signed.

This objector also testified that apart from the last page, none of the rest of the pages had been signed. The will was also questionable because it had purportedly made reference to certain persons as if they are alive yet they predeceased the testator several years before the will was allegedly made; for example, the objector's uncle Paul Njeru died in 1991 while Daniel Ngache, his son, died in 2000.

Contrary to what the will implied, the 1st objector also testified that his father had cordial relations with all his children and there is no reason why he could have disinherited any of them. The 1st objector concluded that the will was a forgery.

Rahab Wanjiku Mwaniki, the 2nd objector, agreed with her brother that the purported will is not genuine and, in particular, she contested the signature alleged to be her father's. She doubted that her father could possibly disinherit her when he had all along catered for her needs and those of her children.

Also testifying along the same lines as the objectors was Stanley Wanyeye Kamara, another of the deceased's sons. Like his siblings he testified that the will was fraudulent. He asked the court to declare that the deceased died intestate and appoint two administrators, one from each house, to administer the deceased's estate. He went further to say that the estate should be distributed amongst all the children of the deceased equitably.

On her part, the petitioner acknowledged that the objectors are the deceased's children and in fact, the 3rd objector is her own daughter. She agreed with the objectors that the deceased had two wives and she was the second wife.

As far as the will is concerned, she had shifting positions on such aspects as when she learnt of the will; when it was made and when she came to be in its possession. To begin with, she stated that she learnt of the will during her husband's sickness in the year 2011. She later said that she was given the will by her husband's lawyer prior to his death. It was her evidence that the lawyer, whom she identified as Mungai Kivuti, brought the will to her.

Later she said that in fact the will was amongst several documents that her husband gave her before he was admitted in hospital. Initially, she stated that Kivuti was present when she was given these documents but changed her testimony during cross-examination to say that nobody else was present.

Even though she swore that the will had determined how the deceased's estate should be distributed, she testified that she was ready and willing to sit with all the deceased's children to agree on how to share out his estate. With this assertion the court stood her down so that the deceased's family could explore an out of court settlement of their dispute. However, they could not agree and so the hearing had to proceed to its logical conclusion.

When the petitioner resumed her position in the witness box, she agreed with the objectors that some of the people who the deceased made reference to in the will died long before the deceased. At some stage she said that she did not know who it was that signed the will. She said that she was illiterate and could neither read nor write.

When asked about the witnesses named in the will, she initially said that did not know one of them who was identified as Stephen Mwaniki Mwangi. She later said that in fact she knew him. As for the other witness identified as Charles Wahome Wanjira, she testified that he was deceased.

The petitioner also admitted that what was filed in court was a copy of the will and that she couldn't tell where the original was. Although she testified that the petition was filed by Kivuti, she said that she couldn't understand his role in the whole process.

When Mungai Kivuti himself testified he said that he knew the deceased and that at one point he advised him on how to draw a will. The deceased later drafted the will and took it to him at his office in Embu for corrections. Mungai corrected it and sent the corrected version back to the deceased through his e-mail address.

The next time he saw the will was in hospital where the deceased had been admitted. The deceased told him to give it to his wife in the event he did not make from the hospital. Mr Kivuti, however, disowned the last page of the document and denied that it was part of the draft that he sent back to the deceased. He stated that he was the deceased's family lawyer. He also testified that he gave the petitioner the document after the demise of the deceased.

This is the evidence that this court has been confronted with as afar as the status of the will in question is concerned.

The law of testate succession and in particular the provisions relating to testate succession which, among other things, address the issues relating to validity of wills, the capacity and the formal requirements of a valid will is found in Part II of the Law of Succession Act, cap. 160. Section 5 which is part of the provisions found in this part of the Act spells out the basic requirements of what constitutes a testator's legal capacity to make a will; this section reads as follows:

> ***5. (1) Subject to the provisions of this Part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.***
>
> ***(2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.***
>
> ***(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.***
>
> ***(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.***

The deceased was by accounts an adult who was, no doubt, capable of making a will to dispose of his free property. It was never suggested that he was of unsound mind or he was suffering from some disease that could probably have affected his power to make a rational decision prior to his death. Thus, if it was proved that the deceased made the will in dispute, the deceased must be deemed to have known what he was doing and the issue of whether he was capable of making the will wouldn't arise.

On formal requirements of a written will section 11, which also falls under part II of the Act, deals with this particular issue; it states as follows: –

> ***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.'***

The petitioner's case must be tested against these legal provisions and in this regard I hasten to say that the burden was always on the petitioner, the propounder of the will, to satisfy this honourable court that the will presented to court was not only a valid will but also that it was the last will of the deceased. If any authority is necessary for this proposition then the decision of the **Court of Appeal in Beth Wambui & Another versus Gathoni Gikonyo & 2 Others (1988) eKLR** should suffice; in that case, Apaloo JA said as follows:

> ***In so far as issues fought in these proceedings involve any proposition of law, it is that the party who propounds a will must show that it is intended to be the last wishes of a competent testator and that he had a sound disposing mind. And further, that the will was executed and attested in the manner required by law. Thereafter the burden shifts on those asserting invalidity of the will to prove it.***

Even before considering whether the purported will met the threshold of the legal requirements of a valid written will, there is one sticking point that is central to the question whether there is in fact any will on record worth of consideration by this honourable court; I say so because it has been admitted by the petitioner and her witness that what was filed is a copy of a will.

Section 51(3) of the Act says in no uncertain terms that where it is alleged in an application for a grant of representation that the deceased left a valid will, then the original or an authentic copy of the will must be filed. Considering the importance of this provision to the decision that this court has to come to, it is necessary that I reproduce the pertinent part of that provision here:

> ***51. (1) An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.***
>
> ***(2) …***
>
> ***(3) Where it is alleged in an application that the deceased left a valid will –***
>
> ***(a) if it was written, the original will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either***
>
> ***(i) an authenticated copy thereof shall be so annexed; or***
>
> ***(ii) the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;***
>
> ***(b) if it was oral, the names and addresses of all alleged witnesses shall be stated in the application.***

The version of the will filed by the petitioner is neither the original nor the authenticated copy thereof. It was never suggested by the petitioner that the original was lost but even if this was the case, it was incumbent upon her to provide the names and addresses of people who could prove its contents in the application. She did not do so.

I need not belabour the point; the petition by the petitioner clearly violates section 51(3) of the Act and on this score alone, her petition for grant of probate has no foundation and ought to be struck out.

The evidence suggests that even if the petitioner had satisfied the requirements of section 51(3) of the Act and filed the original will or an authenticated copy thereof, it still wouldn't have stood the test of time. There is overwhelming evidence that what has been presented as the deceased's last will is far from what one would regard as an authentic will; it is vitiated from so many angles that by itself, it creates reasonable doubt that it was intended to be the deceased's will.

To begin with, the document is presented as having been dated at Nyeri on the 22nd day of October 2010 but the last page is a jurat showing that the deceased swore, apparently an affidavit, before a commissioner of oaths on the same date of 22 October 2010 at Nairobi. This evidence raises a number of questions which the petitioner did not even attempt to answer; perhaps because there was simply no answer to them.

If the document was presumably drawn in Nyeri how possible was it for the deceased and his two witnesses who, by the way, are indicated to be residents of Nyeri, to travel to Nairobi to sign the will from there on the same date that the document was drawn? And assuming that this was possible, why should it have been necessary for the deceased and his witnesses to travel all the way to Nairobi just to sign the document? Couldn't they have signed the document from Nyeri where it was drawn?

As noted, what has been purportedly signed is a jurat which by its definition presupposes that the deceased must have been swearing an affidavit. The contents of this page are as follow:

> *Stephen Mwaniki Mwangi* *residing at Nyeri (signed)*
>
> *Charles Wahome wanjira* *residing at Nyeri(signed)*
>
> *SWORN BY THE SAID*

*CHARLES MWANIKI KAMARA*

*AT NAIROBI*

*This 22nd day of October 2010 )*

*BEFORE ME ) signed*

*) Deponent*

***COMMISSIONER FOR OATHS***

This page is strikingly different from the rest of the document implying that it must have been plucked from somewhere else and added to the purported will to make it appear as if it is part of the so-called will. It is also apparent to a naked eye that what may have been written on this document, at its foot, apparently showing who may have drawn what, probably was an affidavit, was deliberately blacked out. A faint line showing the edge of a paper that was used to black out this detail is clearly visible.

Even if it was to be assumed that the deceased intended to have the will appear as an affidavit, the question that immediately arises is why didn't the commissioner of oaths commission it?

Further doubts were cast on this document when the lawyer who is supposed to have drawn the document testified that this part of the will was not drawn by him.

It is also worth noting that this page is the only one that the deceased is alleged to have signed; none of the other eight or so pages of the document has been signed. This lends credence to the possibility that the petitioner had to find some document on which she thought the signature of the deceased appeared and attach it to the rest of a document purporting to show how the deceased intended to dispose of his property.

The other factor that casts doubt on the petitioner's purported will is that none of the people indicated as witnesses testified to confirm that they saw the deceased sign the will. The petitioner alleged that Charles Wahome Wanjira was deceased but there was no evidence that such person ever existed and if he did, no evidence of his death was provided. The other witness Stephen Mwaniki Mwangi was alive and according to the petitioner she was never asked to bring him to court.

Assuming the purported witnesses signed the document as alleged, it does appear that they did so before the testator himself signed, if the order of signatures in that document is anything to go by.

The evidence of how the petitioner came to be in possession of the purported will is quite inconsistent in several respects; while she said that she got the document from her husband before his demise, Mungai Kivuti testified that he got the document from the deceased in hospital and only handed it over to the petitioner after his demise.

The evidence of Mungai himself was also not credible; he testified that he effectively engrossed the will as drafted by the deceased yet there is nowhere in that will that shows that as the deceased's advocate, or his family lawyer, as he described himself, drew the will as instructed by his client or that he played any role whatsoever. As much as he testified that he exchanged drafts of the will with his client, he did not produce any evidence of correspondence between him or his office and the deceased over the subject of this will.

Finally, the protestor herself admitted that the will either made reference to or provided for members of the deceased's family yet these people had predeceased him, some having died ten years before the will was purportedly written. No reason was given why the deceased could possibly have made such an error.

The upshot is that irrespective of the angle from which one considers the purported will, only one conclusion can be made which is that, even if it is an original will that was filed in court, it does not pass the test of a valid written will. Indeed, the grant of probate made by this honourable court on 29 July 2012 ought not to have been made in the first place for the simple reason that there was no will upon which such a grant could possibly be made. Nonetheless, this question is now moot because the grant was effectively revoked or annulled when the court allowed the objectors to challenge the petition for grant of probate.

Whatever is worth and for avoidance of doubt, I hereby declare the grant revoked or annulled. For the reasons I have given I hold that the deceased died intestate and therefore the administration of his estate shall be subject to intestacy provisions of the Law of Succession Act. In this regard, I hereby appoint Mary Wangechi Kamara, Nelson Kamara Mwaniki, Rahab Wanjiku Kamara and Rose Muthoni Kamara as joint administrator/administratrixes of the estate of the late Charles Mwaniki Kamara.

Considering that this cause has been in this court for the past seven years, I further order that the administrator/administratrixes are at liberty to file summons for confirmation of grant jointly or separately notwithstanding that six months have not elapsed since the date of the grant of letters of administration. I trust parties would agree with me that it would be in the interest of the administration of the deceased's estate; the interest of the deceased's heirs and generally, in the interest of justice that the administration of the estate is completed as soon as it is practicably possible.

Parties will bear their respective costs. Orders accordingly.

**Dated, signed and delivered in open court this 22nd day of January, 2020**

**Ngaah Jairus**

**JUDGE**