



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 7 OF 1989
IN THE MATTER OF THE ESTATE OF BETH WAMBUI NGUYA- (DECEASED)
WILSON KIMOTHO VARIUKI.....APPLICANT
VERSUS
STEPHEN MAINA MWANGI.....PETITIONER
RULING

1. The deceased Beth Wambui Nguya died on 13th May 1988 at the Kenyatta national Hospital. She had a brother and two sisters, each of whom had a family. The petitioner Stephen Maina Mwangi was her nephew, a son to her sister. In 1989 the petitioner filed a petition stating that the deceased had left an oral Will made on 5th May 1988 in which she had bequeathed to him two properties (Plot No. 50 Mathare Project and Plot No. 343 Mwioko) that comprised her estate. The Will had been made in the presence of three witnesses (James Muthee Gicuhi, Mwangi Kariuki and Virginia Wanjiru Mucami). On 8th March 1989 he was issued with a grant of letters of administration with the terms of the oral Will annexed. On 16th June 1989 the grant was confirmed and certificate issued giving him the estate.

2. The applicant Wilson Kimotho Kariuki is the son of the deceased's brother. He filed this application dated 2nd May 2019 seeking the revocation of the grant. He swore that the petitioner had obtained the grant and the property fraudulently by failing to disclose that the deceased was survived by a brother and two sisters, each of whom had children, who were beneficiaries to the estate. They had all been disinherited. The beneficiaries had not participated in the proceedings leading to the grant and certificate of confirmation; and that the alleged oral Will was a forgery.

3. The petitioner swore a replying affidavit denying that the grant and certificate had been obtained fraudulently. He reiterated that the deceased had left the oral Will in which she had given him the two properties. The petitioner stated that in **HC Succession Cause No. 1600 of 2002** the applicant's brother Mwangi Kariuki had filed a petition for letters of administration in respect of the deceased, but that he (the petitioner) had successfully applied for the petition to be struck out because he had already obtained the above grant which had been confirmed. He swore that the applicant had participated in that petition, along with his brother. The proceedings in the **Cause No. 1600 of 2002** are on record. The applicant did not challenge the averments of the petitioner contained in the replying affidavit.

4. It is material that the applicant did not indicate why it took him 30 years to file the present application. There was no evidence given to show at what point he became aware that the petitioner had obtained the grant. He did not explain why no action was taken after his brother's petition was struck out in 2002.

5. Under **section 9 of the Law of Succession Act (Cap 160)**, an oral Will is valid if made before two or more witnesses, and the testator dies within a period of three months from the date of making the Will (**In re Estate of Evanson Mbugua Thongo'te (Deceased) [2016]eKLR**). In this case, it was the evidence of the petitioner that the deceased made the oral Will in the presence of three witnesses, who have since died, and that she died within three months from the date of making the Will.

6. The applicant did not give any reason why he thought the Will was a forgery. The only thing he said was that there was no way the deceased could have left out all the beneficiaries, meaning her siblings. However, under **section 5(1) of the Act**, any person of sound mind and is not a minor may dispose of all or any of his property by Will (**In re Estate of G.K.K. (Deceased) [2013]eKLR**). It follows that the petitioner did not misrepresent himself to be the only beneficiaries. The Will said that he was the only beneficiary.

7. The deceased died eight days after making the oral Will. This was questioned by the applicant. He wondered what illness had taken her to Kenyatta National Hospital where she had died. He claimed that the petitioner had failed to prove that she had the mental capacity to make the oral Will. Under **section 5(3)** of the **Act**:

“(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.”

In **In re Estate of Gatuthu Njuguna (Deceased) [1998]eKLR** it was stated, in relation to the mental and physical capacity to make a Will, that the law presumes that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind. The applicant did not lead any evidence regarding the deceased’s state of mind, or physical capacity, prior to her death, and prior to her making the oral Will, that would show that she had any deficiency.

8. The applicant took issue with the fact that the grant was confirmed within three months of its being issued. This court cannot be asked to question the discretion placed on the court that confirmed the grant before the expiry of 6 months. Under **section 71(3)** of the **Act** the court may, on the application of the holder of a grant, direct that such grant be confirmed before the expiration of six months. The matters the court will consider are provided under the **section**.

9. In conclusion, I find no merit in the application which I dismiss with costs.

DATED and DELIVERED at NAIROBI this 11TH day of MARCH 2020

A.O. MUCHELULE

JUDGE