



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 1140 OF 1991
IN THE MATTER OF THE ESTATE OF TIMOTHY MWAURA NDICHU - (DECEASED)
PHILIP NGETHE MWAURA.....APPLICANT
VERSUS
MARGARET WANJA MWAURA.....PETITIONER

RULING

1. The deceased Timothy Mwaura Ndichu died on 7th September 1991. He left a written Will which was executed on 7th April 1975. He appointed his wife Margaret Wanja Mwaura as the executor. In the Will he bequeathed his property to the executor and to his five sons John Muthami, John Ndichu, Joseph Macara, Paul Njama and Peter Njenga and two daughters Elizabeth Njeri and Nelly Wanjiru. Upon his death Margaret Wanja Mwaura (the petitioner) filed this petition dated 3rd October 1991 for the grant of probate. When the petition was published the objector Philip Ngethe Mwaura filed an objection, and cross-petitioned for the grant. His case was that the deceased had a first wife with whom he had children, and that the Will that the deceased left had not provided for these children. The children were himself, Nicholas Njoma Mwaura, Joseph Ndura, Elizabeth Njeri Mwaura, Anna Wambui and John Muthama.

2. The objector deponed as follows:-

“4. The deceased died leaving a written Will dated 7th day of April 1975. Which Will, I and the other objectors are contesting its validity as we have been disinherited in the estate of the deceased.”

He stated that the Will had not made any provision for them and their mother, and therefore it should be invalidated and the estate administered as if the deceased had died intestate.

3. The objection did not receive any response. The petitioner was represented by G.B.M. Kariuki & Co. Advocates, but later taken up by Muturi Kamande & Co. Advocates. The objection was filed by Timan Njugi Advocate, and subsequently taken over by N.A. Owino & Co. Advocates.

4. The objector acknowledged that the deceased left a written Will dated 7th April 1975. The reason why he states that it was invalid was because it did not provide for his mother and her children, him included. He did not allege that the Will did not meet the formal requirements under **section 11** of the **Law of Succession Act (Cap. 160)**, or that the deceased did not sign the Will, or that the Will was not attested (**In re Estate of Julius Miano (Deceased) [2019]eKLR**). Secondly the capacity of the deceased to make the Will was not challenged. Under **section 5(1)** of the **Act**, any person who is of sound mind and not a minor may dispose of his free property by Will. The objector did not allege that the deceased was either of unsound mind, or that he was a minor at the time of making the Will. Thirdly, under **section 7** of the **Act**: -

“A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void.”

The Will was not attacked on the basis of fraud, coercion or inducement. It was not alleged that the Will was a forgery.

5. I find that the Will, on its face, appears to have been properly executed by a person of age and of sound mind. Now that the objector was attacking it, the burden was on him to prove that the Will was invalid. A Will is said to be valid if it is made in a proper form by a person who had the requisite capacity to make it (**In re Estate G.K.K. (Deceased) [2013] eKLR**). I find that this was a valid Will made by the deceased.

6. The objector attacked the Will because the deceased did not provide for him, his mother and siblings. Under **section 5** of the **Act**, the deceased had testamentary freedom to dispose of his property as he pleased to whoever he wanted. A Will cannot be invalidated merely because it did not provide for some members of his family (**Curryian Okumu –v- Peter Okumu & 2 Others [2016]eKLR**). The objector, or any other person, who feels aggrieved by the fact that he was not provided by the Will has a remedy under **section 26** of the **Act**. The court will still exercise its discretion to alter the terms of the Will to provide for any applicant who proves that he was entitled to the estate of the deceased but that he had been left out of the Will. **Section 26** provides as follows:-

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the

will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”

7. Having found that the deceased died testate, and named the petitioner as the executor of the Will, I find that she (the petitioner) was the only person entitled to petition for the grant, and the only person to whom probate could issue.

8. Consequently, I dismiss the objection and cross-petition. I make no order as to costs.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 30TH day of APRIL 2020.

A.O. MUCHELULE

JUDGE