



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 562 OF 2008**

**IN THE MATTER OF THE ESTATE OF KAMU MASIKA NTHIW'A (DECEASED)**

**ONESMUS KIMONDIU MAILU.....PETITIONER**

**VERSUS**

**MAINGA MASIKA NTHIWA.....1<sup>ST</sup> OBJECTOR**

**NGUNGA MASIKA NTHIWA.....2<sup>ND</sup> OBJECTOR**

**KIMEU MASIKA NTHIWA.....3<sup>RD</sup> OBJECTOR**

**PHILIP KASANGA KINGOO.....4<sup>TH</sup> OBJECTOR**

**NDILA JOHN MASIKA.....5<sup>TH</sup> OBJECTOR**

**SIMON MAILU MASIKA.....6<sup>TH</sup> OBJECTOR**

**R U L I N G**

1. The petitioner herein petitioned for letters of grant of Probate of Written Will in respect of the estate of the deceased herein **Kamu Masika Nthiw'a** who died on 30-4-2005. The grant of Probate of Written Will was duly issued on the 29-10-2009. The petitioner thereafter filed summons for confirmation of grant dated 22-10-2013 and sought to distribute the only property of the deceased namely **Muthetheni/Kalamba/13** in accordance with a Will made by the deceased dated 10-2-1995 in which the deceased had appointed him as executor and trustee of her estate.

2. The protestors had initially filed summons for revocation of grant dated 12-5-2011 but which was overtaken by events following the filing of the summons for confirmation of grant and directions being issued by the court to the effect that they file affidavits in protest if any. The protestors thereafter filed an affidavit in protest against confirmation of grant dated 4-10-2013 wherein the 3<sup>rd</sup> protestor Philip Kasanga Kingoo deponed inter alia; that the petitioner is a son of the 6<sup>th</sup> protestor and therefore cannot rank higher in terms of inheritance and above the objectors; that the deceased herein who had been of unsound mind died without bearing children and could not have had capacity to make a Will; that the summons for confirmation of grant is defective as it contravened Section 5 and 11 of the Law of Succession Act since the alleged Will is yet to be probed; that the petitioner has deliberately concealed crucial and material fact from the court in that the true and actual beneficiaries of the estate have not been disclosed; that the grant together with the summons for confirmation should be revoked in order for the ends of justice to be met.

3. Vide a replying affidavit dated 22-10-2012 and a further affidavit dated 24-10-2013 the petitioner responded to the protest inter alia; that no medical notes have been shown to the court to support the claim of unsoundness of mind of the deceased; that each of the protestors were allocated land from the ancestral land as can be seen by copies of official searches; that nothing was concealed from the court as the Will expressly disclosed the beneficiaries of the estate; that the application lacks merit and should be dismissed.

4. Parties agreed to canvass the protest and confirmation by way of viva voce evidence.

5. The protestors called three witnesses namely **Philip Kasanga Kingoo, Maingi Masika Nthiwa** and **Joseph Ngunyi Malua**. Philip Kasanga Kingoo stated that the deceased herein was his second grandmother who had no children of her own and who was of unsound mind and was incapable making a Will. He further averred that the deceased used to scavenge left over items as she could not control herself. On cross examination, he admitted that he had no psychiatrist report on the deceased indicating that she was of unsound mind. He also admitted that none of the family members lodged a report with the police over the alleged Will.

The protesters second witness Maingi Masika Nthiwa stated that the deceased used to reside in his house and that she had a mental problem which was treated with traditional medicine which was provided by one Moline Mwithya. He added that the deceased was his stepmother and that he did not take her to any hospital for medical check-up as the hospitals were far. The protesters third witness was Joseph Ngunyi Malua who stated that he was the area chief between the years 1971 – 2004 and had known the deceased very well as she was of unsound mind and used to roam the market place picking up rubbish. On cross examination, he denied being a psychiatrist and further could not tell if the deceased used to have lucid moments.

The petitioner called two witnesses one of whom witnessed the Will while the other is the advocate who drew the Will. The petitioner relied on the contents of his affidavits. He stated that he is a step grandson of the deceased herein. He averred that prior to the demise of the father of the protesters and husband to the deceased, the ancestral land was sub divided and each of the sons together with the deceased were allocated a portion of land as confirmed by the official searched (Exhibit 2 – 7). He went on to add that the deceased lived in their compound for over 30 years and during that time did not notice any mental illness. He stated that he was not aware of the existence of a Will until the same was handled over to him by his father Simon Mailu Masika who is the 6<sup>th</sup> protestor herein. On cross examination, he confirmed that the protesters are step children of the deceased. Shamrock Mutua Kiandiko was the second petitioner's witness. He stated that he knew the deceased very well and who later requested him to accompany her to the offices of an advocate in town. He confirmed that at the time of writing and signing the Will deceased was of sound mind as she was the one giving instructions to the advocate. He also confirmed that the deceased had a mild mental illness in 1997 but she was of sound mind during the writing of the Will in 1995. Philip Mulwa Advocate testified as the petitioner's last witness. He produced the original Will and confirmed that the testator and her witnesses appeared before him. He further confirmed that the testator was of sound mind at the time of making the Will. On cross examination, he confirmed that the Will has two pages but only one page is signed by the testator and her witnesses. He also stated that it is not a requirement that the Advocate drawing the Will must sign the document.

6. I have considered the rival affidavits of the petitioner and the protesters. I have also considered the oral evidence tendered herein. I have also considered the submissions filed. It is not in dispute that the deceased herein had no children of her own. It is also not in disputed that the deceased made a Will on the 10-2-1995. The issues for determination are as follows:

**a) whether the deceased was of sound mind at the time of making the Will and whether she had capacity to make the said Will.**

**b) whether the grant should be confirmed in accordance with the Will dated 10-2-1995.**

7. As regards the first issue I need to describe what a Will is under the Law of Succession Act. The said Act describes it as:

**“...the legal declaration by a person of his wishes or intention regarding the disposition of his property after his death, duly made and executed according to the provisions of part II and includes a codicil”.**

In Black's Law Dictionary a Will is described as the legal expression of an individual's wishes about the disposition of his or her property after death. It also refers to a document by which a person directs his or her estate to be distributed upon death.

The protesters herein have attacked the Will made by the deceased and which was produced by Philip Mulwa Advocate as petitioner's exhibit No. 8 on the grounds that the deceased was at the time of unsound mind and thus lacked the capacity to make the purported Will. The protesters further contended that the deceased who used to roam Miu centre market scavenging could not be said to have been a person with sober mental capabilities. One of the protesters Maingi Masika Nthiwa claimed that the deceased used to live in his house and that he used to secure the services of a traditional herbalist namely Mulinge Mwithya to treat the deceased's mental condition and that as far as he was concerned the deceased did not have a sound mind to make the will. Section 5 (1) – (3) of the Laws of Succession Act provides that a person who has the capacity to make a will must be an adult whether male or female and is of sound mind. As the protesters have made the allegation that the deceased was of unsound mind at the time of making the Will then the burden was upon them to prove the same as demanded by Section 5 (4) of the Laws of Succession Act that provides thus:

**“...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.”**

Looking at the evidence presented by the protesters it becomes quite clear that their allegation that the deceased was of unsound mind does not stick. For instance, Philip Kasanga Kingoo despite claiming that the deceased was of unsound mind went ahead to confirm that the deceased had processed her title deed at the lands registry which was issued to her on 12-4-1990. This was despite his claim that she had been of unsound mind since 1976. It was highly unlikely for a person of unsound mind and who is alleged to have been roaming the market centres scavenging to personally organise for the processing of a title deed up to the stage of issuance singlehandedly. I find the protesters not candid regarding the allegations they have raised herein. It is instructive to note that the said Philip Kasanga Kingoo admitted on cross examination that the deceased was expected not to bequeath her property to persons outside the family. This is a clear indication that the protesters are after the deceased's land despite the fact that they were each allocated parcels of land from the ancestral land as confirmed in the copies of official searches produced by the petitioner as exhibits 2 – 7. It was the right of the deceased to bequeath her property to whomever she chose. In any event the two beneficiaries chosen happen to be children of some of the protesters and so the land did not leave the family. Further Maingi Masika Nthiwa one of the protesters claimed to have engaged the serves of a traditional herbalist to treat the deceased of her mental condition but the said herbalist was not called to testify. His further claim that there were no hospitals around is not believable since by 1976 several hospitals and dispensaries or clinics must have been set up to meet the medical demands of the community. It is untrue to note that no medical notes were produced by the protesters to back their assertions. Finally, the evidence of Joseph Ngunyi Malua did not help matters as he was unable to produce proof that he was the area chief between 1971 – 2004. He confirmed that the current chief was one Pauline Ndeto who apparently is the author of the introductory chief's letters relied upon by both the petitioner and protesters. The said Pauline Ndeto was not called to testify as the area chief and this seems to point to an irresistible conclusion that the said former chief might have been sweet talked by the protesters to come forward and support their case even though the area chief was very much around and available. All these circumstances lead me to come to the conclusion that indeed the deceased was of sound mind at the time of

making the Will and that the allegation raised by the protestors was meant to attack the Will and so as to achieve one main goal namely the deceased's parcel of land Muthetheni/Kalamba/13 to be shared amongst themselves. The petitioner and his witnesses on the other hand appeared to be truthful witnesses. They all stated that they saw the deceased who was then of sound mind during the making of the Will. Mr. Philip Mulwa was the Advocate who prepared the Will on instructions of the deceased. He confirmed that the deceased was of sound mind at the time and who gave him the instructions. There were two witnesses to the transaction namely Shadrack Mutua Kiandiko and George Mbule Nzive. One of the witnesses namely Shadrack Mutua Kiandiko stated that he and the 6<sup>th</sup> protestor worked as civil servants in the same department and that he used to visit the home of his said colleague and could meet the deceased who lived in the same compound. It was out of those frequent visits that he became acquainted with the deceased and who later requested him to witness her making a will at the offices of an Advocate. He confirmed that the deceased was of sound mind during the making of the Will and added that towards 1997 the deceased started having a mild mental illness. It became clear from the evidence of the Advocate and the two witnesses for the petitioner that the deceased had capacity to make the said Will as she was aware of what she was doing as she could remember the properties in issue as well as the beneficiaries of her bequest. She left her home and resolutely directed her two witnesses to accompany her to the offices of her Advocates for the sole reason of making a Will. This depicted her as a person who knew exactly what she was doing. Hence if the testator was able to be seized with the above conditions, I have no reason at all not to find that she was of sound mind and had the requisite capacity to make the Will on the date in question. The testator seems to have fulfilled the requirements imposed by Section 11 of the Laws of Successions Act namely:

**a). the testator having 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.**

A perusal of the Will in issue which was produced as exhibit No. 8 shows that the testator complied with Section 11 (c) of the above Act as the two competent witnesses duly saw the testator sign or affix her mark to the Will before they signed their part. Even though it transpired during the cross examination of the Advocate who drew the Will that the testator and her witnesses only signed the last page (page two) and left out the page one, I find the discrepancy not to be fatal as the Will reflected the wishes of the testator and that the witnesses together with the Advocate have given their evidence on oath and been cross examined at length. What emerged out of this is that indeed the deceased had made a legal declaration as to the disposition of her property to the named beneficiaries.

From the above analysis I find that the deceased was of sound mind at the time of making the Will and that she had capacity to make the said Will. The protest therefore must fail.

8. As regards the second issue and as noted above, the deceased having made a will therefore had died testate. Indeed the institution of the cause was accompanied with Will and which led to the issuance of a grant of probate of Written Will. As the issue of the making of the Will has been upheld by this court it follows therefore that the grant of probate of Written Will should be confirmed in accordance with the Will dated 10-2-1995.

9. In the result it is my finding that the protestors' protest lacks merit. The same is ordered dismissed with no order as to costs. The summons for confirmation of grant dated 22-10-2012 are allowed. The grant of probate of Written Will issued on 29-10-2009 is hereby confirmed and that the estate shall be distributed as proposed vide paragraph 5 of the supporting affidavit sworn on 22-10-2012. A certificate of confirmation of grant is to issue.

It is so ordered.

**Dated and delivered at Machakos this 23<sup>rd</sup> day of April, 2020.**

**D.K. Kemei**

**Judge**