



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 3159 OF 2013

IN THE MATTER OF THE ESTATE OF EMILY GATHONI KANOTHA (DECEASED)

JAMES KANOTHA.....PROTESTOR

VERSUS

JANE WAITHERA MWENJA.....PETITIONER

RULING

1. Jane Waithera Mwenja, the Petitioner herein, filed an application via summons dated 16th February, 2016 seeking that the grant made to her in this matter be confirmed and the deceased's estate distributed in the manner agreed upon by the beneficiaries of the estate. The affidavit sworn by the Petitioner in support of the application indicates that the deceased who died intestate on 18th March, 1981 was survived by the Petitioner and two (2) other children: Joy Murugi and Josephine Wanjiru. Further that the beneficiaries wish to share equally in the deceased's estate.
2. On 23rd September, 2016 James Kanotha, the Protestor, filed an affidavit of protest dated 22nd September, 2016 in objection to the application for confirmation of grant. In it, he deposes that he swore the affidavit on behalf of himself and his sister Gathoni Murugi – Jenkins, as beneficiaries of the deceased's estate through their late mother Joyce Murugi Kanotha, who was a daughter to the deceased.
3. The Protestor avers that his late mother Joyce Murugi died on 18th June, 2007 and was therefore deceased at the time of Petitioning for grant and filing of the summons for confirmation of grant. That as her children and therefore beneficiaries of her estate, they ought to have been consulted during the process of obtaining the grant.
4. It is the Protestor's case that the mode of distribution proposed by the Petitioner is contrary to the wishes of the deceased whose estate is in issue herein since the deceased left behind a written will. A copy of the will made on 8th November, 1980 is annexed thereto. The sole beneficiary under the will is the Protestor's late mother Joyce Murugi Kanotha who was bequeathed all of the deceased's immovable property being:
 - a. Ngenda/Gathage/102
 - b. Ngenda/Gathage/T.386
 - c. Plot No. 156 - situated along Hinga Road Kangemi
 - d. Plot No. 234 – situated along Hinga Road Kangemi
5. In response to the Protest, Josephine Wanjiru Kamau swore an affidavit on 2nd November, 2016 in which she acknowledged the existence of the deceased's written will but stated that the late Joyce Murugi was listed as the sole beneficiary therein because she was the oldest and unmarried and therefore made the best choice as custodian of the family property. Josephine contended that as at the date of the will, the deceased was terminally sick and there were recurring threats from her maternal uncle to disinherit her and her sisters prompting the decision to have the will prepared for their late mother's thumbprint to protect their family's interests.
6. On 28th May, 2018 the Petitioner filed a further affidavit sworn by herself on 25th May, 2018 in which she took issue with the validity of the deceased's alleged will stating that she had never seen the original copy of the will and did not believe that the original copy did in fact exist. That in the absence of the original thereof, the administration of the deceased's estate must proceed as intestate.
7. Later on 30th May, 2018 upon an application by the Petitioner's Counsel on record seeking to withdraw the summons for confirmation of grant dated 16th February, 2016 the court granted the Petitioner leave to file and serve a fresh summons for confirmation of grant.

8. The Petitioner consequently filed a fresh application for confirmation of grant via summons dated 7th June, 2018. The summons is supported by an affidavit sworn by the Petitioner in which she indicates that there is no application for provision of dependants pending in the Cause and that all persons beneficially entitled to the deceased's estate, save for the Protestor, have duly consented to the Confirmation of the Grant.

9. According to the Petitioner, the deceased died intestate and her net intestate estate ought to be shared equally amongst her three (3) beneficiaries: Jane Waithera Mwenja (Petitioner), Josephine Wanjiru Kamau and Joyce Murugi Kanotha (deceased). Further that the share due to Joyce Murugi Kanotha (deceased) to devolve to the beneficiaries of her estate.

10. The full inventory of the deceased's assets as stated in the affidavit are as follows:

- a. Ngenda/Gathage/102
- b. Ngenda/Gathage/ T.386
- c. Dagoretti/Kangemi/S 156
- d. Dagoretti/Kangemi/234
- e. Shares in Thome Farmers No. 4 Limited
- f. Shares in Kiambaa Kawainda Company Limited
- g. Shares in Gatwanyanga Dairy Farm Company

11. The summons is further supported by an affidavit sworn by Josephine Wanjiru Kamau on 7th June, 2018 in her capacity as a beneficiary of the deceased's estate. In it, she states that she had previously been misled to believe that a photocopy of a will is an admissible document in law but that she wishes to withdraw the statements following the advice of her Advocates on record. She asserted that to her knowledge, the original copy of the will adverted to in the Affidavit of Protest is non-existent and the administration of the deceased's estate ought therefore to proceed under the rules of intestacy.

12. The matter proceeded by way of *viva voce* evidence with the Protestor's case being heard first.

13. On 9th April, 2019 the Protestor gave sworn testimony in which he stated that his main objection to the summons for confirmation of grant is that the mode of distribution proposed therein contradicts the deceased's last written will.

14. The Protestor stated that he saw the deceased's will in one Mr. Gachiri Kariuki Advocate's office when they had started the succession process and that the contents thereof are similar to those of the copy of the will he presented in court. He received the copy of the will from his sister Jane Murugi Jenkins in 2007 after his mother passed away. He urged that the will was duly attested to by Dr. Josephine Wanjiru Kamau the deceased's daughter, and one Mrs. Wahome who resides in the United States of America.

15. According to the Protestor, his late mother Joyce Kanotha had possession of all the four (4) properties listed under the deceased's will for 27 years after the death of the deceased's herein. Further that upon his mother's death on 18th June, 2007 the protestor continued to use the properties and that they have therefore never been in the custody of his aunts nor have they ever shared in the rental proceeds. That it is not until 2013 that his aunts laid a claim to the deceased's estate. He however stated that the documents of title are with the Petitioner.

16. On cross-examination, the Protestor stated that the Petitioner is his aunt and that he lived with her for many years having started to live with her even before he was enrolled in school and during his university years. He asserted that he saw the deceased's last will at the Petitioner's house and later at Mr. Gachiri Kariuki Advocate's office. He did not however have the original copy of the will, nor had he inquired from Mr. Gachiri Kariuki Advocate about its existence or otherwise.

17. The Protestor however admitted that the names of the witnesses to the will do not appear in the copy of the will and one cannot therefore, identify the persons who attested the document. Further that while the Kenya Gazette Notice alluded to the name of the Petitioner as the executrix, the will itself does not name an executrix and nor does it state where in Nairobi it was thumb printed.

18. It was the Protestor's statement that even though his late mother died 27 years after the deceased's demise, she did not come to court to propound the will because she was a standard four drop out and entrusted her sister Jane with her affairs. The Protestor asserted that Dr. Wanjiru Kamau requested him for financial assistance in 2013, whereupon he started lending financial assistance to his aunts out of magnanimity of heart and not because they are entitled to the income generated from the properties.

19. On 16th September, 2019 the Petitioner then aged 80 years gave sworn testimony in support of her case. She stated that she is the sole administrator of the deceased's estate. She testified that her father died on 15th March, 1943 and that his land in Kangemi was never distributed. That he also owned two parcels of land in Ngenda and the family lived on one of them. She asserted that the properties in Kangemi came from her late father's family.

20. It was the Petitioner's statement that all the properties in dispute are registered in the deceased's name. That the title deeds were released after their late father had passed away and the properties were thus registered solely in the name of their mother, the deceased whose estate is

in issue herein. Her mother later died in 1981 leaving behind three (3) daughters, one of whom is the Petitioner. The Petitioner admitted that she was in possession of the title documents stating that they were handed to her by her late sister Joyce for safe keeping, following their mother's demise. She however denied knowledge of any written will and contended that the deceased had often orally stated her wish to have her property distributed to her three (3) daughters equally.

21. The Petitioner reiterated that she wished to have the deceased's property divided into three (3) portions to be shared between herself, Josephine Wanjiru Kamau and the estate of Joyce Murugi Kanotha.

22. The Petitioner stated that the two Ngenda properties comprise of a house, banana plantation, cattle and a grave yard where her father, mother and sister are buried, whereas the properties at Kangemi comprise of rental houses. The petitioner urged that although it was the deceased who initiated the construction that, the daughters chipped in to complete her building after which each one built their own units on the land

23. The deceased used the rental income from the units for her upkeep but upon her death, Joyce Murugi (deceased) took over the task of collecting the rental income which she would then share out among the three (3) siblings. They however stopped receiving a share of the rental proceeds after Joyce Murugi's demise.

24. The Petitioner told the court that it was she who raised the Protestor who was only three (3) years old when he who moved in to stay with the Petitioner's family. This move was welcomed by both the deceased herein and the late Joyce Murugi, the Protestor's mother. The Petitioner raised the Protestor as her own son and he schooled together with her children. She stated that the Protestor has however since turned hostile towards her and her sister and attempts at reconciliation have proved futile. Further that the Protestor solely enjoys the benefits of the deceased's property to the exclusion of the Petitioner and her other living sister.

25. The Petitioner urged that at the time of the deceased's death, she and her two sisters were adults and they all worked together to manage the rental properties at Kangemi. Joyce Murugi (deceased) would collect the rental income and distribute the proceeds amongst the three sisters. They did not however keep records of what was collected and how it was distributed but observed that the Protestor often accompanied the late Joyce Murugi to collect the rental proceeds.

26. The Protestor contended that when the will in question was brought to her attention, she sought the counsel of her lawyer who informed her that the document was not a will. Further that the deceased had never stated that she would leave her property to the late Joyce Murugi absolutely, nor did the late Joyce Murugi make such claims during her lifetime. She stated that both she and Josephine Wanjiru are married and live with their husbands, while the late Joyce Murugi was unmarried and her son, the Protestor, lives in their late mother's house.

27. On 18th November, 2019 learned Counsel Mr. Gatumuta filed written submissions dated 24th October, 2019 on behalf of the Protestor in which he urged the court to declare the copy of the will a valid written will of the deceased and distribute her estate in accordance with the will. Counsel noted that whereas the Petitioner withdrew the earlier summons for confirmation of grant dated 16th February, 2016 and filed a fresh one dated 7th June, 2018, the affidavit of protest filed on 23rd September, 2016 was never withdrawn. That in any event, the affidavit of protest refutes the mode of distribution on the basis that the deceased left a valid written will, which argument has not been displaced.

28. It was Mr. Gatumuta's statement that the affidavit sworn by the deceased's daughter Josephine Wanjiku Kamau on 2nd November, 2016 in reply to the Protest confirms the existence of the deceased's will. Counsel asserted that Josephine had confirmed that it was she who prepared the will on behalf of the deceased who thereafter affixed her thumbprint thereon. That it was therefore only Josephine Wanjiru who could disclose the location of the original copy of the will and that her failure to do so was aimed at disregarding the deceased's wishes and to defeat justice.

29. Mr. Gatumuta contended that the copy of the document presented hereto amounts to a will because it was duly attested to and is specific as to the deceased's assets and to whom they were bequeathed. Counsel noted that even though Josephine Wanjiru had purported that the deceased was terminally ill as at the date when the will was made, no questions were raised with regard to the deceased's mental incapacity.

30. In opposition, learned Counsel Mr. Mbaabu filed written submissions dated 27th February, 2020 on behalf of the Petitioner in which he asked the court to dismiss the Protest and the annexures thereto and the purported copy of the will and proceed to confirm the Grant of letters of Administration made to Jane Waithera and distribute the deceased's estate in accordance with the law governing intestate succession.

31. According to Mr. Mbaabu, upon withdrawal of the Summons for Confirmation of Grant dated 16th February, 2016 all the affidavits that were filed in support or in Protest to the said summons fell by the way side and could therefore not be relied upon by the parties in the Summons for Confirmation of grant dated 7th June, 2018 filed subsequently. That the court ought therefore not to consider the Affidavit of Protest filed on 23rd September, 2016 and the annexures thereto one of which is the affidavit sworn by Josephine Wanjiru on 2nd November, 2016.

32. Mr. Mbaabu submitted that even if the court was to consider the Affidavit of Protest of 23rd September, 2016 and the annexures thereto, it would arrive at the conclusion that the document exhibited thereto does not amount to the will of Emily Gathoni Kanotha, the deceased herein. Counsel contended that **section 51(3) of the Law of Succession Act CAP 160** provides that where a copy of the will is to be relied upon, the person who introduces the will shall authenticate the said copy of the will or call witnesses who can authenticate the contents thereof. This he says the Protestor failed to do.

33. Mr. Mbaabu asserted that although the Protestor alleged that the first time he saw the will was at the offices of Gachiri Kairuki & Co. Advocates who were previously on record for the Administratrix, he did not file summons to procure the attendance of the said Advocates to testify as to the existence or authenticity of the will. That having failed so to do, the allegation by the Protestor that he saw the will is unbelievable. Counsel argued that the document fails the test of **section 51(3)** and ought not to be considered by the court. To buttress his

argument, Counsel cited the decision in **Re Estate of Savitaben Bhartkumar Shah (deceased) [2018] eKLR**.

34. Mr. Mbaabu contended that the document presented by the Protestor does not conform to the prescribed form of a will since the names of the attesting witnesses are not stated on the face of the document, nor is there any form of identification written on the face of it, or annexed thereto. Further that the thumbprint on the document cannot be authenticated as that of the deceased in the absence of the original will.

35. Mr. Mbaabu asserted that the burden of proving the existence of the will always rested with the Protestor who alleged its existence but that the Protestor failed to discharge this burden. To this end, he cited the decision in **Re Estate of Stanley M'mugwika (deceased) [2019] eKLR** and urged the court to dismiss the Affidavit of Protest and confirm the Grant of letters of Administration Intestate issued to the Petitioner on 24th November, 2014. Further that the court do direct that all the benefits that have been illegally accrued by the Protestor be deducted from his mother's entitlement in the deceased's estate.

36. I have carefully analysed the pleadings on record, the oral testimony of the parties in support of their respective arguments, the written submissions filed by Counsels in support of each party's case and the entire proceedings of this cause and framed two (2) issues for determination:

- a. Whether the document presented by the Protestor amounts to a valid written will of the deceased; and
- b. How the deceased's estate ought to be distributed.

37. Whereas the Petitioner had raised an argument to the effect that the court ought not to consider the Affidavit of Protest filed on 23rd September, 2016, it is my considered view that that argument is unfounded. From the record, it is evident that the orders granted by this court on 30th May, 2018 granting the Petitioner leave to withdraw her summons dated 16th February, 2016 and file a fresh one did not state that all responses filed thereto were also withdrawn. In any event, the basis of the Protest was the existence of a will, which argument he still maintained even after the filing of the subsequent summons on 8th June, 2018.

38. The Protestor's case is that the deceased left a valid will and her estate ought therefore to be distributed in accordance with the said will. Annexed to the Affidavit of Protest filed on 23rd September, 2016 is a document titled "*THE WILL OF EMILY GATHONI KANOTHA*" purported to be a copy of the will of the deceased herein. An examination of the document reveals that it was thumb printed at Nairobi on 8th November, 1980. It is attested to, but the names of the attesting witnesses are not indicated. The sole beneficiary listed thereunder is one Joyce Murugi Kanotha, a daughter to the deceased who has since also died. Whereas the Protestor alluded to the existence of the original copy of the document, it was never produced in court.

39. The applicable law where the deceased is alleged to have left a valid will is **section 51(3) of the Law of Succession Act** which provides thus:

"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) ..."

40. In the instant case, the Protestor did not annex the original copy of the will, or an authenticated copy thereof. The Protestor alleged that he had seen the will at Mr. Gachiri Kariuki Advocate's office but he did not call the Advocate to testify to this fact, or give a compelling reason for his failure to do so. He admitted on re-examination that he had never personally communicated with Mr. Gachiri Kariuki Advocate.

41. The Protestor sought to rely on an affidavit sworn by the deceased's daughter Josephine Wanjiru on 2nd November, 2016 in which she deposed that it was she who prepared the deceased's will. However, by a further affidavit of 7th June, 2018 Josephine stated that the original copy of the will is non-existent. The contradictory statements given by Josephine Wanjiru in her evidence do not add weight with regard to the existence or otherwise of the original copy of the will. In any case, she was never summoned to testify in this respect for her evidence to be tested on cross-examination.

42. I observe that whereas the sole beneficiary under the purported will was the deceased's daughter, the late Joyce Murugi, no evidence has been led to demonstrate that Joyce laid any claim to the deceased's estate during her lifetime. This is bearing in mind that Joyce Murugi died in 2007, 26 years after the deceased's demise. Instead, it is the Protestor who showed up with a copy of the will through his affidavit filed on 23rd September, 2016, a period of over 35 years since the deceased's demise.

43. It is also noteworthy that during her tenure as the administratrix of the estate of their mother, the late Joyce Murugi would collect the rental income and distribute it among the three siblings. Her actions signify that she was aware that she held the property in the estate in trust

for the three siblings.

44. In the instant case, the provisions of **section 51(3)** of the **Law of Succession Act** have not been fulfilled. In the absence of additional evidence, I am inclined to hold that the document adverted to does not constitute a valid will of the deceased. From the foregoing it is my conclusion that the deceased died intestate and her net estate ought therefore, to be distributed in accordance with the provisions of intestacy laid down under **Part V** of the **Law of Succession Act**.

45. The Protestor drew attention to a gazette notice dated 3rd October, 2014 which indicates that Jane Waithera Mwenja is the executrix of the last will and testament of Emily Gathoni Kanotha. The copy of the will adverted to in the gazette notice is however not on record. Since the gazette notice does not bear the date of the stated will, this court cannot hold with any degree of certainty that the will referred to therein and the copy produced in court by the Protestor are one and the same will.

46. Additionally, there is on record a letter dated 25th August, 2014 authored by Gachiri Kariuki & Co. Advocates and addressed to the Deputy Registrar of the High Court of Kenya at Milimani Commercial Courts Nairobi which indicates that the deceased died intestate. The letter which was filed in court on 27th August, 2017 indicates that it was written in furtherance to remarks by the Deputy Registrar seeking to have the parties clarify whether the deceased died testate or intestate.

47. The deceased herein died on 18th March, 1981 and was survived by three daughters: Jane Waithera Mwenja, Joyce Murugi Kanotha (deceased) and Josephine Wanjiru Kamau. She was predeceased by her husband and son.

48. Under **section 38** of the **Law of Succession Act**, where an intestate has left a surviving child or children and no spouse as is the case herein, the net estate devolves to the surviving child or children to be shared equally amongst them.

49. In the premise therefore, I allow the application for confirmation of grant filed via summons dated 7th June, 2018 and order as follows:

- a. The Grant of letters of Administration Intestate made to Jane Waithera on 24th November, 2014 be and is hereby confirmed.
- b. The deceased's net intestate estate shall be shared equally amongst the three (3) listed beneficiaries: Jane Waithera Mwenja (Petitioner), Josephine Wanjiru Kamau and the Estate of Joyce Murugi Kanotha (deceased).
- c. The share due to the Estate of Joyce Murugi Kanotha (deceased) shall devolve to her children in line with **section 38** of the **Law of Succession Act**.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 27TH DAY OF MAY 2020.

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L. A. ACHODE

HIGH COURT JUDGE