REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 836 A OF 2015

(IN THE MATTER OF THE ESTATE OF DANIEL MUHIA WANJOHI (DECEASED)

VERONICAH WAIRIMU MURAGURI.....APPLICANT

-VERSUS-

PETER WACHIRA MUHIA.....1ST RESPONDENT

EMMANUEL WANJOHI MUHIA.....2ND RESPONDENT

JUDGMENT

The application before court is the applicant's summons dated 11 July 2016; It is made under Section 76 of the Law of Succession Act, cap. 160 and Rules 44 (1) and 44 of the Probate and Administration Rules; it is primarily seeking to have the grant of letters of administration intestate in respect of the estate of Daniel Muhia Wanjohi (the deceased) made to the respondents on 15 April 2016 revoked or annulled.

The petition for the grant of letters was made by the respondents less than a year before the present summons was filed, more particularly on 4 November 2015; in the affidavit in support of the petition, they swore that the deceased died at Consolata hospital in Nyeri on 20 February 2015. He was domiciled in the Republic of Kenya and his last known place of residence was Kiganjo location in Nyeri County.

The respondents petitioned for the grant in their capacity as sons of the deceased; besides them, the deceased was survived by eight other children and his wife as well; the latter died during the pendency of this cause.

According to the applicant, the grant was obtained without the respondents having disclosed that the deceased died testate. In the affidavit in support of the summons for revocation or annulment on grant, she swore that she not only knew the deceased but that prior to his death, they had been living together at a place called Nyaribo where, as far as I understand her, she had been nursing him throughout his illness to which he apparently succumbed.

Upon learning of the deceased's death, she went to inform the deceased's advocate, Mr. Gichimu Muhoho of Messrs. Muhoho & Company Advocates who represented the deceased in a suit in the land and environment court, being Nyeri ELC No. 30 of 2013. Counsel informed her that he was already aware of the death as he had been informed sometimes in September 2015. He also informed her that the deceased had left a written will with him. Out of her own investigations, she discovered that this cause had been filed and that the grant had been made.

Her case is simply that the deceased died testate.

The respondents opposed the summons and swore that the applicant is neither a relative of the deceased nor a beneficiary of his estate. They were aware that their deceased father never wrote any will and what is alleged to be the deceased's will is nothing more than a forgery.

Although the applicant claimed that there existed a written will, she neither filed any nor exhibited a copy thereof to her affidavit in support of the summons. It is only at the hearing that the alleged will was produced by her advocate.

This leads to the first question for determination in this application; it has everything to do with the propriety of the applicant's summons; how could she make an application and question the validity of the grant made to the respondent's based on a will that she had neither seen nor had been read to her? To appreciate my point and also to understand whether the summons was made in good faith it is necessary that I reproduce here part of the applicant's testimony; this is what she said:

"To date I am not aware what the deceased had said. I am in court so that I can be told what the deceased said...."

She stated further:

> ***"I took care of him. The deceased never told me what he will reward me with. I have come to be told if the deceased gave me anything."***

These statements would imply that the applicant's summons is speculative and nothing more than a gamble.

The basis of what in her view would be a reward from the deceased is no less intriguing; I say so because as much as she swore that she lived with the deceased, taking care of him from either 2010 or 2013, she admitted that she had a family of her own comprising a husband and children. To quote her, this is what she said:

> ***"I am married and I have children. My husband is called James Muraguri."***

She proceeded to name her five children the eldest of whom was born in 1980 while the youngest was born in 2003. Without any evidence or suggestion that that the applicant was related to the deceased in any way, it would baffle anyone that she would leave her husband and children and move in with a man who was, literally speaking, on his death bed. For present purposes, it just enough to say that the basis upon which the will is claimed to have been made raises reasonable suspicion as to whether it was ever made as alleged.

A scrutiny of the will itself raises even more doubt on its validity. Mr. Muhoho, the learned counsel who prepared it testified that on 3 April 2014, the deceased called him from his office at Vera Building in Nyeri; he could not take the stairs to the advocate's office and so Mr Muhoho had to walk to his car parked outside the building. He found the deceased in the car and his two witnesses. The learned counsel testified that he took instructions from the deceased and went back to his office. He typed the purported will and went back to the vehicle from where he read it to the deceased; the latter, according to counsel, signed it in the presence of his witnesses who also signed it.

When this will is weighed against the legal prerequisites of a valid will, it would be found wanting in several respects. Being an alleged written will, Section 11 of the Law of Succession Act is the legal standard against which it should be measured; this section states as follows:

> ***11. Written wills***
>
> ***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.***

To begin with, the signature purported to be that of the deceased was contested; the petitioners produced documents previously signed by the deceased to demonstrate that the purported signature on the Will was not the deceased's signature; these included a letter dated 18 October 1991 by the deceased to the traffic base commander in Muranga; an invoice signed by the deceased on 12 February 1989 for purchase of a 12-inch television set; and, a group membership card from the Ministry of Gender, Children and Social Development on which the deceased signed as a member on 22 April 2008.

A casual comparison of all these signatures on the three documents shows that they are consistent, and they were made by the same person; however, none of them is similar to the signature purported to be the deceased's signature on the will. There is no resemblance whatsoever; they are simply varied to such an extent that an opinion of a document examiner would not be necessary to persuade any objective observer that the signatory in the three documents produced by the petitioners is not of the same person who is alleged to have signed the will.

In any event, under section 76 of the Evidence Act, cap. The court is entitled to compare the signature alleged to have been made by the deceased on the Will with that that is proved been made by the deceased. That section reads as follows:

> ***76. Comparison of signatures, seals, etc.***
>
> ***(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.***
>
> ***(2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person.***
>
> ***(3) This section applies with necessary modifications to finger impressions.***

The evidence that the deceased signed the three documents which the petitioners produced was never questioned or controverted and therefore it was open to this honourable court to compare the deceased's signatures on those documents with the one on the Will in its bid to ascertain the validity of the signature on this latter document.

Still on this particular aspect of evidence, the will has two pages and the deceased is alleged to have signed on both of them; however, casual examination of the two signatures shows that even these two signatures are inconsistent; the one on the first page is different from the one on the second page. It is obvious that whoever was imitating the deceased's signature faced the natural difficulty one is bound to face whenever he attempts to reproduce a signature of another person more than once.

To compound matters for the applicant, none of the witnesses who are alleged to have witnessed the deceased sign the will testified. As earlier noted, under section 11(c) of the Act, one of the conditions for a valid will is that it must be attested by two or more competent witnesses, each of whom must have seen the testator sign. In the absence of any evidence from these witnesses that they attested the deceased's will as by law prescribed, it is safe to conclude that the deceased never signed any will which the purported witnesses are alleged to have attested. It is also possible that the signatures of those alleged to have attested the deceased's signature were themselves forged.

It came out during cross-examination of the applicant that one of the alleged attesting witnesses, named Bernard Kagwi Ngare was actually her son-in-law; he was married to one of her daughters. This lends credence to the petitioners' case that the purported will was conjured up after the deceased's death.

It is also worth noting that Mr Muhoho did not produce any notes to prove that he took instructions to write a will from the deceased. The purported will has seven paragraphs and in it are names of two people who are described as witnesses who, according to Mr Muhoho were strangers to him. The estate was allegedly being distributed amongst several people. These are details which must have certainly been noted in some form before the learned counsel returned to his office to type the will.

Without appearing to cast aspersions on the learned counsel's memory capacity, I doubt he would have been able to reduce these instructions into a formal typed will without having taken notes. And if he indeed took notes as was expected, the production of such notes would have provided some measure of credibility to his evidence that that he took instructions from the deceased as alleged. On the flipside, the absence of these notes would suggest that the alleged instructions were neither given nor written.

Finally, there is one further ground that raises doubt on the validity of the alleged will.

Although counsel testified that he could not read the will to the deceased's family members because the chief of Kiganjo location where the deceased lived could not whip them together, he admitted that it is only after the applicant visited his office to tell him of the deceased's death that he told her about the will. Yet it was his evidence that the applicant is a person he had known all along. Going by the applicant's and counsel's evidence, the applicant must have been in the latter's office after September 2015, at least seven months after the deceased's death.

Honestly, if that will have existed, there is no reason why the learned counsel suppressed this information from the applicant until she came to tell him about the deceased's death yet he was fully aware that she was as much a beneficiary as the rest of the people he wanted the chief to marshal. By the same token, it is disturbing that it took the applicant seven months for her to inform the learned counsel of his client's death considering that she was aware that he was party to a suit in court and in which he was represented by the learned counsel.

In the ultimate, I am satisfied that the deceased died intestate and no sufficient reason has been given why the grant made to the applicants should be revoked or annulled; in short, none of the grounds for revocation or annulment of grant prescribed in section 76 of the Act, has been proved. Accordingly, the applicant's summons dated 16 July 2016 is dismissed with costs. Orders accordingly.

Signed, dated and delivered on 26 June 2020

Ngaah Jairus

JUDGE