



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO. 8 OF 2019

IN THE MATTER OF THE ESTATE OF PAULINE MUTHONI GATU(DECEASED)

DR. FRANCIS PAUL KERRE.....PETITIONER

-VERSUS-

CECILIAN NYAMBURA GICHIA.....1ST APPLICANT/OBJECTOR

PATRICK WAMBUGU GICHIA.....2ND APPLICANT/OBJECTOR

LUCY NJAMBI GICHIA.....3RD APPLICANT/OBJECTOR

ANDREW GATU GICHIA..... 4TH APPLICANT/OBJECTOR

RULING

1. By summons, the applicants seek orders for extension of time to lodge objection to making of grant in respect of estate of deceased herein plus costs.
2. The application is based on **section 68(i) of Cap 160 L. S. A.** The same application is based on grounds;
3. THAT the intended objectors are some of the children of the late PAULINA MUTHONI GATU(DECEASED) who died domiciled in Kenya on 02.09.2016 and the other children are DR FRANCIS PAUL KERRE, ANDREW GATU GICHIA and CHARLES KARIUKI GICHIA(DECEASED) but left behind 3 children namely, GEORGE KAMAU, PAULINE MUTHONI and FLORENCE WANJIKU.
4. THAT the deceased left a will dated 09.04.2016 where she had appointed FRANCIS KERE and ANDREW GATU as executors of the will whose terms were that:-
5. A portion of 50 by 100ft out of **TITLE NO. LAIKIPIA/NYAHURURU/159** to cover the area occupied by mobile provider company to be registered in name of the executors in trust for all beneficiaries.
6. The remainder of the land to be divided into 7 equal portions out of which 5 children to inherit a portion each, ANDREW GATU GICHIA AND Patrick Wambugu were to remain on portions they had built and one portion was to be shared out amongst the three grandchildren and the 7th portion was to be a subject of further will or it remains undistributed.
7. THAT the deceased also wrote her las will and testament dated 04.08.2016.
8. THAT during her life time she had authorized a surveyor to subdivide the subject parcel of land as she willed as per a letter of consent dated 19.04.2016 and mutations deed 05.05.2016.
9. THAT the deceased and bequeathed to FRANCIS PAUL KERRE the petitioner of that he chose and desired as well as her other children who were put into actual, physical possession and occupation of their respective portions.
10. THAT the deceased also bequeathed the main house to ANDREW GATU GICHIA who had built it as well as other residential houses (which he built too) during the life time of the deceased.
11. THAT the cited wills have since been overtaken by the distribution of the estate on the ground by the deceased during her lifetime which is recognized by the law.

12. THAT the petitioner herein purported to use one of the written wills dated 09.08.2016 which does not mention any assets of the deceased or any bequeath upon the beneficiaries but attached the will dated 09.04.2016 omitting the other will.
13. THAT the petitioner never sought consent of the other equally competent beneficiaries prior to his application for a grant.
14. THAT the petitioner herein totally failed to mention the other beneficiaries or dependants of the estate herein in his court papers which is a fatal omission on his part.
15. THAT the petitioner never sought consent of the other equally competent beneficiaries prior to his application for grant.
16. THAT the petitioner had filed a citation in NYAHURURU CHIEF MAGISTRATE COURT CITATION CAUSE NO. 12 OF 2018 which he abandoned prior to it being heard and determined and later on unilaterally wrote to court seeking to have it withdrawn.
17. THAT in view of the secretive way the petitioner applied for a grant and immediately thereafter filed an application for restraining orders against fellow beneficiaries, they are of the view that the petitioner may back stab them and make it hard for them to get their entitlement out of the estate.
18. THAT it is due to the confusion created by the citation and the interim application that the matter was finally gazetted without the knowledge of the intending objectors who were disadvantaged in not being aware and thus could not lodge an objection to the grant which has since been issued to the petitioner.
19. The application is supported by Affidavit of the Applicants sworn on 30.10.19 which reiterates the grounds.
20. I have not seen any replying Affidavit by the Respondent or any form of opposition to the application. The parties were directed to submissions which they did and exchanged.

21. Issues, analysis and determination

22. The Petitioner lodged petition of letters of administration with a written will annexed and attached will vide copy dated 09.04.2016.
23. The same appointed Francis Kerre and Andrew Gitu as Executors of the will. The same seem to distribute the Estate of the deceased person.
24. The will also listed her children namely:

Francis Kere

Andrew Gitu

Cecila Nyambura

Parick Wambugu

Lucy Njambi

25. Also the children of her deceased's son Charles Kariuki namely;-

George Kamau

Pauline Muthoni

Florence Wanjiku

The assets listed in the will was; **Laikipia/Nyahururu/159**

26. In the petition the assets added the proceeds from **Safaricom & Orange mobile companies and monies at Equity Bank Ltd A/C No. 0160101243608**
27. Via Gazette Notice number 6647 the cause was published showing the application for grant of letters of administration intestate.
28. The Applicants concede that there was a will dated 09.04.16 but also mentions a second will of 04.08.16.
29. However, they state that the wills were overtaken by distribution of estate on the ground by the deceased during her life time.
30. The application to file objection out of time is not based on contest in the content of the will annexed of 09.04.2016 but apprehension

that the applicant's might not get their share of the estate.

31. The petition was lodged on 11/4/019 and served on 14/4/2019 upon applicant advocate. On 20/5/019 an application to stop intermeddling was lodged and on 14/6/019 applicants herein replied to the same. There is no explanation as to why objection was never lodged within time as applicants were well aware of the petition way back in April 2019.

32. However, the court notes that the alleged will of 04.08.16 is not annexed nor is there prove same revoked the will of 09.04.16. This court cannot consider the same alleged will of 4/8/2016 as there is no evidence of existence and that it revoked the will of 9/4/2016.

33. Under section 18 (1) of L S A cap 160 LOK, provides for the revocation of a will or codicil by another will or codicil declaring an intention to revoke it. Read together with section 17, this provision enables testators to revoke their wills so long as they have the capacity to do so.

34. Revocation may be of whole or part of the will or codicil. A codicil is often used when only parts of the will are to be revoked. Express revocation requires an intention to revoke on the part of the testator.

35. The alleged subdivision of suit land on the ground unless implemented by deceased and transfer effected of specific shares to the heirs cannot overtake a valid will.

36. If the said sub-division are not in accordance with the will of 09.04.16 same can only be validated by all heirs by consent.

37. In absence of that the assets have to be shared in accordance with the will annexed.

38. Since the will is not contested the court finds no valid reason for allowing of the lodging of the objection out of time.

39. Parties should embark on sharing the assets as stipulated in the will of 09.04.16. If they do not agree amongst themselves as guided by the will, they file their proposal of sharing in the court for a ruling on sharing. Thus the court rejects the application with no orders as to costs. The final orders are that;

(i) The petitioner to file and serve application for confirmation of grants within 14 days showing the proposed mode of distribution of the estate as indicated in the will of 9/4/016.

(ii) The beneficiaries dissatisfied with the said proposals to put their proposals 7 days after service thereof.

Dated, Signed and Delivered at NYAHURURU this 24th day of November 2020.

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CHARLES KARIUKI

JUDGE

PRESENT:

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