



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.87 OF 2017**

**IN THE MATTER OF THE ESTATE OF NDUNGU MAINA NJAU (DECEASED)**

**A N D**

**AMOS MAINA .....1<sup>ST</sup> PETITIONER**

**CECILIA WANJIRU NDUNG’U.....2<sup>ND</sup> PETITIONER**

**V E R S U S**

**PAULINE NJAMBI.....OBJECTOR**

**JUDGMENT**

**Ndungu Maina Njau** died on 17/6/2005. Amos Maina and Cecilia Wanjiru Ndung’u (the petitioners) applied for and were issued with Grant of Letters of Administration of the deceased’s estate on 25/7/2007.

By a summons dated 19/3/2008, the petitioners applied for confirmation of the grant and the same was confirmed on 9/3/2009 distributing the whole estate. In the petition filed before the court on 22/5/2007, it is indicated that the deceased died intestate.

On 28/5/2013, Pauline Njambi a daughter of the deceased from the 2<sup>nd</sup> house, filed a summons seeking revocation or annulment of the grant confirmed to Amos Maina and Cecilia Ndungu on 9/3/2009.

The grounds upon which the application is brought are that the grant was obtained fraudulently by concealment from the court of material facts; that there was a written will made by the deceased in which he set out the modalities in which the estate would be distributed.

The applicant Pauline Njambi also swore an affidavit in support, in which she deposed that the petitioners failed to disclose to the court that there was a written will and proceeded to apply for letters intestate; that the distribution that was done was not in accordance with the deceased’s wishes; that during the hearing of the application for confirmation, she was not in court and did not sign the consent by beneficiaries dated 11/11/2008; that at the time of confirmation, she was sick which fact was not brought to the attention of the court; that she wishes to file Probate and Administration afresh so that the estate can be distributed in accordance with the will.

On 8/2/2018, the court took directions that the application dated 28/5/2013, (the objection) proceed by way of viva voce evidence.

***Objector’s case:***

**Pauline Njambi (PW1)** the objector is the daughter of the 2<sup>nd</sup> petitioner Cecilia Wanjiru, the 2<sup>nd</sup> wife of the deceased and the deceased was her father. She reiterated the contents of her affidavit that when her father was very sick, he called the family together and gave instructions on how his property was to be shared amongst the family members; that she was given land Wayumereri 83 because she had returned home after her marriage failed and the father wanted her to live away from the brothers; that the said information was recorded in a will which she produced as an Exhibit (P.Ex.No.1); that it was recorded by her brother Amos Maina(B) (PW5); the objector was not present when the will was written; that the will was not read to the family after the deceased’s death but the Chief, Josphat Maina (PW2) was aware of it; that the confirmation was also done when she had an eye complication and did not attend court. When the record of the court was read to her, she was surprised to find that the Wiyumereria land had been subdivided into 3 with her getting an acre while her mother and step mother got ½ acre each. She wants the court to order that she gets what her father left for her, the whole of Wiyumereria land.

**PW2 Josphat Maina Mburu**, Senior Chief of Ngorika Location recalled that the deceased hailed from his location and when he died, there was no contest over his estate; that the family went to his office and they all agreed that he writes a letter introducing them to court for purposes of succession, which he did; that before confirmation, an issue arose that the objector was claiming to have been given the whole of Wiyumereria land; that they held another meeting where it was agreed that the objector be given part of the land and each of the widows to

get part of it also. PW2 then referred the family to their younger uncles; that thereafter the grant was confirmed; that the objector was in the meeting and mentioned the existence of a will whereas the other beneficiaries did not.

**PW3 Cecilia Wanjiru** told the court that the deceased distributed his property and his brother Gerald Njau and other family members including herself, were present; that Amos Maina (PW5) recorded the deceased's wishes; that Gerald Njau DW2 asked the deceased why he had not distributed three plots including Wiyumereria and he said it was his secret; that Gerald asked about Wiyumereria land and that the deceased said it was for Pauline Njambi, the objector; that when they went to court, Maina (1) DW1 said that if Wiyumereria land was not shared, nothing would take place. PW3 called another meeting where the 1<sup>st</sup> petitioner, Maina wrote down his mother to be a beneficiary of Wiyumereria and she declined to vote for who would get the land; that the land was subdivided into three, for 1<sup>st</sup> wife, her and the objector but she declined to accept her portion. She admitted having been present at the confirmation of grant in 2009 but did not raise any objection but, that the objector was unwell. She confirmed that she did not know if the land at Wiyumereria was given to the objector alone.

**PW4 Gerald Njau Ndungu** a son to the deceased and son to Cacilia, 2<sup>nd</sup> petitioner, recalled that when the father was very ill, he called the children and his wives and distributed all his property except two plots which he said was his secret – Wiyumereria and Ngorika plots; that their mother PW3 asked if the objector was given anything and the deceased said he would give her something but did not mention what it was; that after the deceased died, the two houses sat and agreed to give the objector one acre of land and the balance be shared between the two mothers. He said that when the father spoke, no notes were taken and that the objector was never given the said land. He said that both the objector and PW3 were present at the confirmation and nobody raised objection and that PW3 did understand what was taking place.

**PW5 Amos Maina**, a son to PW3, brother to the objector and step brother to 1<sup>st</sup> petitioner, confirmed that their father called a meeting of the family to distribute his property; that by then the objector was married but used to have problems and regularly came home; that the deceased said he would give the objector some land but did not specify how much; that after the deceased's death, the two houses had a meeting and they agreed to give the objector half of Wiyumereria land while the widows shared half of the balance; that PW3 decided to give her portion to the objector. He also said that the objector and PW2 were in court on 9/3/2009 for confirmation of grant and did not object to the distribution.

He admitted recording the document produced in court as a will and said that their father said that the objector gets part of the Wiyumereria land but did not say how much.

#### ***The petitioner's case:***

The 1<sup>st</sup> petitioner Amos Maina Ndungu (DW1) is a son of the deceased from the 1<sup>st</sup> house. He confirmed that the deceased summoned family members, that is:

1. ***Gerald Njau (1)***
2. ***Amos Maina (1)***
3. ***Amos Maina (2)***
4. ***Gerald Njau (3)***
5. ***Grace Wanjiku (1)***
6. ***Cecilia Wanjiru (2)***

His wife, Ruth Nyambura attended in his absence. After the deceased's death, they sat as a family to decide on the two assets that the deceased had not distributed and they dealt with it; that the other beneficiaries said that the deceased had said they give the objector something small and they agreed that she gets an acre of Wiyumereria land while the other acre was to be shared equally between the two widows ½ acre each; that the 2<sup>nd</sup> petitioner decided to give her ½ acre to the objector. DW1 said that the deceased's wishes were written down by Amos Maina but he never showed anybody.

**DW2 Gerald Njau**, brother to the deceased confirmed that the deceased called his family members when he was unwell, two times. The first time, he was not present. At the second sitting, he was present and the deceased's wishes were written down; that the deceased never mentioned the objector but a question was asked why he had not given anything to the girls of the 2<sup>nd</sup> house; that the deceased said he would give the objector something but did not say what it was. They decided to give the objector the portion of land where she had built a house and where the chief had told her to reside. DW2 said that when this cause was filed, all beneficiaries were in agreement and even on the day of confirmation, the objector was present but did not raise any objection. DW2 said that there was no will because what was written was incomplete, was not signed by the deceased or witnessed by any witness.

**DW3 David Njoro** a son of the deceased corroborated DW1 and 2's evidence that the objector was not given any specific land but the father told the family that he would give her something which he did not specify.

**DW4 Ruth Nyambura**, a daughter to the deceased from the first house was present when the deceased distributed his property; she repeated what the deceased told them in the presence of DW2; that the deceased claimed to have left something for the objector but did not specify which one. She said that Amos Maina wrote the deceased's wishes but he did not complete because the deceased got tired and nobody signed the document.

I have reviewed all the evidence tendered before this court. This application was brought under Section 76 of the Laws of Succession Act. The said Section provides:

***“A grant of representation, whether or not confirmed, may at anytime be revoked, or annulled if the court decides, either on application by any interested party or of its own motion:***

***(a) that the proceedings to obtain the grant were defective in substance;***

***(b) that the grant was obtained fraudulently by the making of false statement or by the concealment from court of something material to the case;***

***(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding, that the allegation was made in ignorance or inadvertently;***

***(d) that the person to whom the grant was made has failed after due notice and without reasonable cause either;***

***(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or***

***(ii) to proceed diligently with the administration of the estate; or***

***(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs € and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or***

***(e) that the grant has become useless and inoperative through subsequent circumstances.”***

It is the duty of the objector to bring himself within the confines of Section 76 and to demonstrate that material facts were concealed or that the court was given false information by the petitioner.

I think that the issues that have arisen that need to be considered are:

***(1) Whether the deceased died intestate or he left a will;***

***(2) Whether the objector attended the confirmation of grant;***

***(3) Whether the proceedings were defective or material facts were withheld from the court;***

***(4) Whether the grant was obtained fraudulently;***

***(5) Whether the grant can be revoked.***

When the petition was filed, it was indicated that the deceased died intestate. It is the objector who came up with the allegation that the deceased left a will and produced the purported will when she filed her objection on 28/5/2013. This was six years after this cause was filed and four years after the grant was confirmed.

It is common ground that the deceased called his family members on unknown date, before he died where he distributed his property. From the testimonies of PW4, PW5, DW1, DW2, DW3 and DW4, the objector was not present when the father made his wishes known. According to them, the deceased talked to the family on two occasions.

DW5 Amos Maina (B) admitted having authored the document produced in evidence by the objector and which she refers to as a will. The question is whether the said document is a valid will. Section 11 of the Laws of Succession Act provides for the formal requirements of a valid will.

***“Section 11:***

***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.”***

From the above provision, it is required that the testator must append his signature on the will with an intention of giving it effect as his last will and testament.

The four main requirements to the formation of a will are therefore:

- (1) The will must have been executed with testamentary intent;
- (2) The testator must have testamentary capacity;
- (3) The will must have been executed free of fraud, duress, undue influence or mistake; and
- (4) The testator dies within a period of three months from the date of making of the oral will.

The deceased did not sign the purported will nor was it signed on his behalf on his instructions. The court was told that by then, the deceased was very sick but it seems his mind was still good enough for him to make clear decisions on his property. Lastly, no witness executed the said will. In any case, all those present were beneficiaries of the deceased’s estate and not competent witnesses.

Although none of the witnesses were able to remember when the deceased called his family members to distribute his property, the document shown to court is dated 16/6/2005. The deceased died on 17/6/2005. However, the witnesses told the court that the deceased died either a month or two after making his wishes known. The date on the document is obviously manipulated because it is dated a day before deceased’s death.

This court has no idea when the will was made. If the will is oral, it is a mandatory requirement that the deceased dies within 3 months of making of it. The date of making the oral is therefore material.

In the end, I find that the deceased merely expressed his wishes on how his estate was to be distributed to his beneficiaries. He neither left a written nor an oral will. The deceased died intestate.

There is over whelming evidence on record that the deceased said he would make some provision for the objector, but did not specifically say whether she should get the whole or part of Wiyumereri land. PW3 admitted that fact. PW5, who wrote the wishes of the deceased down, DW2, 3, 4 and 5 all attested to that. The objector was not present and the people present were better placed to tell the court what the deceased said.

According to the witnesses, PW2, PW3, PW4 and PW5, the decision to allocate the objector one acre out of Wiyumereri parcel was made when the family met after the deceased’s death and agreed that the two plots that the deceased had not distributed Ngorika and Wiyumereri. This was before this case was filed in court. Apart from PW1 & PW3, all the witnesses said that they agreed that one acre be given to the objector whereas the other one was to be subdivided equally between the two widows. At that stage, PW3 decided to give her ½ acre to the objector. It means that the objector knew all along that she had been given 1½ acres of the Wiyumereri land even when they came to court. The objector misled the court in alleging that she was unwell when the confirmation was done and was surprised at what she was given. The court record speaks for itself. On 9/3/2009, the judge recorded that all beneficiaries except one, that is, Elizabeth Wanjiku, who lived in Kitale was absent, though she was aware of the distribution.

The court must have looked at the record of the beneficiaries given in the affidavit in support of the application for confirmation and schedule of distribution which included the objector. The objector attached some treatment notes to show that she was unwell but that does not tell the court much. This court will be guided by the court record and find that the objector was present in court on 9/3/2009 when confirmation of grant was done and was aware of what she had been allocated as her inheritance by then. The question that lingers in my mind is why the objector did not object to the distribution at that time? The objector and PW3 are not truthful. PW3 was a petitioner and aware of all that took place. This application was made 4 years after the confirmation of grant. It is an afterthought. Even if the court were to sympathize with the objector that she was given little from the estate, yet, at the time, she did not object. The beneficiaries took possession of what they were given in 2007. It is over 10 years since. Some beneficiaries have built homes, like PW5, or developed their portions or disposed of the properties.

The objector and her mother PW3 are insincere to allege that there was fraud or that material facts were withheld from the court. She was aware of the distribution, did not challenge it then. PW1 cannot wake up 4 years later to come and disturb the status quo as it is unfair and oppressive to the other beneficiaries.

In the end, I find that the objector has not demonstrated that the 1<sup>st</sup> petitioner withheld any material facts from the court or committed any fraud. The objection lacks merit and it is hereby dismissed. The objection was not brought in good faith. This being a family matter, each party will bear its own costs.

**Dated, Signed and Delivered at NYAHURURU this 30<sup>th</sup> day of April, 2019.**

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Both Petitioners – present

Pauline Nyambi – Objector – present

Soi – Court Assistant