



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE 319 OF 2007

IN THE MATTER OF THE ESTATE OF M M'MUGAMBI M'TWARUCHIO - (DECEASED)

MURITHI M'MUGAMBI.....PETITIONER

VERSUS

HARUN BUNDI M'MUGAMBI.....1ST PROTESTER

LILIAN KABURO M'MUGAMBI.....2ND PROTESTER

MARY NYOROKA M'MUGAMBI.....3RD PROTESTER

MARGARET GAKII MUGAMBI.....4TH PROTESTER

MOSES NTEERE MUGAMBI.....5TH PROTESTER

RULING

1. M'Mugambi M'Twaruchio died on 7th February 2007 aged 82 years and was domiciled at Kathita Sub-Location in Meru County.
2. The deceased was survived by:-
 - a) Ruth Karegi – widow
 - b) Murithi Mugambi – son
 - c) Nteere M'Mugambi –son
 - d) Harun Bundi – son
 - e) Gitonga M'Mugambi –son
 - f) Kajuju M'Mugambi –daughter
3. As per form P&A he left behind a vast estate approx. valued at Kshs. 1.5 millions. Although petition filed sought for letters of Administration intestate, a will dated 31st January 2007 was annexed.
4. Grant of letter of Administration intestate was made to Murithi M'Mugambi on 8th September 2008.
5. By an application dated 30th March 2017, Harun Bundi M'Mugambi sought that grant made t Murithi M'Mugambi be revoked for reasons that the petitioner had not been diligent in the Administration of the estate as it was over 5 years since grant was issued and had not taken any other step.
6. The applicant was supported by the affidavit of applicant sworn on 30th March 2017 in which it was stated among others that the petitioner had omitted names of some of the children of the deceased when filing the cause and the applicant gave the name at paragraph 8.

7. Harun Ndubi wanted grant to be made to him in another affidavit sworn on 30th March 2017. Harun Bundi M'Mugambi protested distribution of the estate as per the Will dated 31st January 2007 for reasons that the deceased did not have the mental capacity to make a Will since he was sickly and did not have the testamentary capacity.

a) That the distribution as proposed in the will did not adequately provide for all the children.

b) That the distribution of the estate was made suspiciously, to benefit one child namely. Murithi M'Mugambi to the detriment of other children.

c) That the deceased was under coercion or endure influence of the child namely Murithi M'Mugambi when the purported will was made hence it is in his favour.

8. The affidavit in protest was in response to summons for confirmation of grant dated 18th April 2017 seeking that distribution be done as per paragraph 4 of the affidavit supporting confirmation of grant sworn on 12th April 2017.

9. Murithi M'Mugambi vide Replying Affidavit sworn on 2nd May 2017 averred that he prepared an application for confirmation in line with deceased persons written will after the lapsing of 6 months but protester declined to sign consent on distribution stating he was going to challenge the will.

10. That all the other beneficiaries agreed to sign consent or distribution that called family meetings on 3 occasions to resolve the discontent by the applicant but the applicant became adamant and insisted he was going to challenge the will in court but he failed to take steps. He said delay in applying for confirmation was occasioned by the applicant who became unco-operative and indicated that he was going to challenge the will in court.

11. Lilian Kaburu M'Mugambi, Harun Bundi, Mary Nyoroka, Margaret Gakii and Moses Ntere filed a joint affidavit in protest of summons for confirmation and distribution saying the deceased didn't have capacity to make a will since he was sickly and the distribution in alleged will did not adequately provide for all the children of the deceased.

12. That the distribution was made suspiciously to benefit one child namely Murithi M'Mugambi to the detriment of other children.

13. It was also argued that a stranger by the name Gitonga M'Mugambi had been introduced as a child of the deceased when he was not. The deponents said that other properties have not been mentioned in the will and it is indicated such properties will be left in the name of Murithi M'Mugambi. They gave list of properties whose particulars are omitted from the list of assets – 15 in number.

14. The deponents said the purported will was never read by a lawyer who had custody of the documents to the children of the deceased not delivered to them. The protest was heard by way of viva voce evidence.

15. Moses Nteere relied on his affidavit sworn on 18th September 2017 as his evidence and said that he has never seen a will and it was never shown and read to them. He said the deceased was sick for years and could not have written.

16. Moses Nteere said that a father could not forget his children and could also not forget some of his properties. He said his sisters Mary Nyoroka and Margaret Gakii were left out of the alleged will. Moses Nteere said that Parcel no. Abothuguchi/Katheri/80 had already been subdivided on the ground and shared out to the deceased persons sons who occupy the same. He said a 5th portion out of LR No. 80 had remained for the benefit of his sisters in case they were send away from their matrimonial homes.

17. Moses Nteere said that LR. Abothuguchi/Katheri/1585 was acquired by their parents jointly. Nteere pleaded that will be set aside so that an administrator of the estate is appointed. 2nd protester – Mary Nyoroka also testified relying on her affidavit sworn on 18th September 2017 denouncing the purported will.

18. Harun Bundi also relied on his affidavit sworn on 9th July 2018 to protest against the application for confirmation and proposed mode of distribution alleged to have been made in a will by the deceased. He said some properties were not included in the alleged will. He said Murithi brought a copy of the alleged will from the office of the advocate.

19. The petitioner also testified. He said in cross-examination he got the largest share out of the estate as per the deceased persons will. He said the deceased died within one week of making the will. He said the deceased was sickly and had been treated for bronchitis at Milimani hospital as well as Mombasa. He said that Gitonga M'Mugambi was adopted by the deceased. He said that Gitonga was not employee but oversees the picking of tea that was given to him by the deceased. He confirmed the will was never read to other members of the family. He said will was read to him and Harun Bundi in the advocate's office and he was given the original will. He said he made copies of will to all his siblings and explained the content to his mother and she understood.

20. The petitioner said the will was made when deceased was healthy and didn't have any disease of the mind.

21. The 2nd petitioners witness John Gituma testified that he was present when the will was made by the deceased and he witnessed it in the advocate's office. He said he witnessed the deceased thumbprint the document. He said they were with Henry Kathurima M'Mbijiwe when the document was thumb-printed. He said Kathurima had since died. He said the deceased didn't die soon after signing the will. He said the deceased was not sick when will was signed.

22. He said that Mureithi got the lion-share in the deceased person's estate. He said the deceased loved his children equally but knew better why he preferred to give more properties to Murithi. He said the deceased willed his residual properties to Murithi. He said the deceased was of sound mind.

23. The 3rd petitioner's witness Mr Martin Mugambi Mithiga advocate testified that he is the one who prepared will on instructions of the deceased on 31/1/2007.

24. He said there were 2 witnesses when he drew the will alive – PW2 John Gituma – and Henry Kathurima who was deceased. He said after drawing the will, the deceased thumb-printed in the presence of the 2 witnesses. The advocate said he read the will to Murithi and his brother in the office and gave them a copy of the will.

25. He said the deceased was not an ordinary client; he was his friend and a member of their clan.

26. He said he and the 2 witnesses to the will called a meeting of the deceased person's family to see if they could reconcile and respect the will but Harun was adamant. He said disputes arose in the family that led to delay in determining succession cause.

27. Upon consideration of the evidence adduced herein in regard to whether the will dated 31st January 2007 is valid. This court found it suspicious that 7 days after the deceased made his will he died. The protesters herein have said that the deceased had been sick for long and didn't have testamentary capacity. The fact that the advocate who prepared and attested the signatures of the deceased as well as his 2 witnesses was a family member and/or relative of the deceased clouds the mind of the court as to the validity of the will.

28. The advocate – PW3 did say during the burial that the deceased had left a will in his custody but instead of convening a meeting of family members or reading the will to them, the petitioner herein who is the executor and the beneficiary of majority shares of the estate went with applicant to the advocates office and the advocate gave them a copy of the alleged will.

29. The will does not contain the names of all the beneficiaries; the will doesn't contain particulars of all the deceased person's assets. This makes the court doubt if the deceased had a sound memory to enable him have a recollection of the properties of which he was disposing and remember the persons he is morally bound to provide for having regard to their relationship to him.

30. The petitioner admitted the deceased was sickly and he died 7 days after allegedly making the will. He didn't attempt to prove that at the time he made the will, the deceased was having a lucid moment and that his mind was sufficiently clear about what he was doing; that he knew the property he had and the names of the dependants. When the petitioner filed this petition it was brought as an intestate succession cause.

31. The petition was brought in Form P&A80 so instead of P&A 79. Affidavit in support of petition was filed in form P&A 5 instead of P&A 3. The original will was never attached to the petitioner together with 2 copies as required.

32. The letter of introduction of the petitioner/Executor and the beneficiaries to the estate of the deceased was not filed. The letter dated 27th February 2007 is addressed to M/S Mithiga & Company Advocates and confirms that the deceased was known to the chief of Katheri central and was a resident of his location. It is not explained why the Chief was giving the confirmation to the advocate who allegedly prepared the Will that is being contested herein. Grant of Letters of Administration Intestate were consequently issued to Murithi M'Mugambi on 9th September 2008.

33. This court finds that the will is invalid for reasons raised above. This cause will be treated as an Intestate estate. The grant of Letters of Administration Intestate is therefore made to Murithi M'Mugambi and Mary Nyoroka jointly.

34. Grant that was made to Murithi M'Mugambi on 9th September 2008 is hereby revoked. The joint Administrators to hold a meeting with beneficiaries to agree on mode of distribution and file application for confirmation and distribution of the estate within 30 days from 23.5.2019.

35. Mention 16.7.2019 to confirm summons of confirmation filed and for directions to be taken.

36. In the event that the Administrators do not agree on mode of distribution any one of them can file summons for confirmation and serve the other together with all the beneficiaries. Upon service of such mode of distribution those who do not agree should file affidavits of protests.

37. No orders as to costs.

HON A. ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON 23rd DAY OF MAY 2019.

In the presence of :

C/A: KINoti

Petitioner : Mr Kariuki M advocate for petitioner - present

1st protester:-

2nd protester:-

3rd protester:- Mr Kaimenyi Advocate for protesters No appearance

4th protester:-

5th protester:-

Mr Kariuki to serve mention notice to Mr Kaimenyi.

HON A. ONG'INJO

JUDGE