REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 774 OF 1999

IN THE MATTER OF THE ESTATE OF KIMANI KAHEHU (DECEASED)

JUDGEMENT

1. The application for determination is dated 15th April 1999. It seeks revocation of a grant made in Thika CMCSC No. 421 of 1997, on grounds that the same had been obtained fraudulently by the making of false statements and concealment of matter from court, and that the grant was obtained through a defective process.

2. According to the record in Thika CMCSC No. 421 of 1997, the deceased died on 15th April 1986. Representation was then sought in that cause in a petition lodged therein on 3rd December 1997 by Joseph Kamau J. Kimani in his capacity as son of the deceased. The deceased was said to have been survived by two other sons, Mbugua Kimani and Kagundu Kimani. His widow and another son, Wamiti Kimani, were said to be deceased. He was expressed to have died possessed of a property known as House No. 13/11 (A) Pumwani Re-Development Account Number xxxx. Representation was made to the petitioner on 1st April 1998, and a grant of letters of administration intestate was duly made. The said grant was confirmed on 8th March 1999, on an application dated 6th October 1998, and a certificate of its confirmation was duly issued. It is the said grant that is sought to be revoked.

3. The revocation application referred to in paragraph 1 was brought at the instance of Benard Kamau Kimani. In the affidavit in support it is averred that the petitioner did not disclose some survivors, neither did he obtain their consents before seeking representation. They aver that that suggested deceit, dishonesty, falsity and non-disclosure. They also challenge the allegation that the deceased had left a valid will; which will they claim was a forgery. He discloses that the deceased was a polygamist who had married four times, and had nineteen (19) children.

4. I have scrupulously perused through the record before me and I have been unable to find any response to the application by the administrator.

5. The matter was heard orally. The hearing commenced on 25th July 2017. Kahehu Kimani was the first on the witness stand. He said that the deceased left fourteen (14) children. He distributed his land at Mang'u before he died, but his property at California, Nairobi, was not distributed. He said that the deceased did not leave a will, and did not bequeath the Nairobi property to anyone, including Joseph Kimani. The next on the stand for the applicant was Daniel Kagundu Kimani. He said his father had a house and a farm. He shared out both on his death bed to all his children equally. He stated that Joseph Kimani had been entrusted with the house to collect rent for the deceased. He said he was not aware of the will and he did not understand how Joseph Kimani got the house.

6. The original administrator had died, and had been substituted. His substitute testified. His name was Zachary Gitau Kamau, a son of Joseph Kamau Kimani. He said that his father had been sued by his uncles. He said the Nairobi property was passed to his father by the deceased through a will. He said the will was read to the family at a sitting before the local Chief.

7. At the close of the oral hearing, the parties filed written submissions. I have perused through the written submissions, together with the authorities relied on, and I have noted the arguments made therein.

8. The primary challenge to the grant appears to me to be the matter of the will. The applicants are saying that the deceased did not make a will or if he did make one then the same must be a forgery. Paragraphs 6 and 7 of the supporting affidavit summarize the applicant's case with respect to the will. He says –

> '6. That I together with the deceased's entire family do not accept that our father left any will and the one relied on by the petitioner is a forgery.
>
> 7. That even if the said will was made by our father the same is invalid for seeking to disinherit defendants (sic).'

9. The applicant's case appears to be two-pronged. The one case is that the deceased died intestate and the will on record is a forgery. The second argument is that even if the deceased had indeed left a will the same was still invalid for it had not made provision for all the children of the deceased. In the oral testimony of the applicant and his witness, the applicant did not address himself to the two issues. His position

was that the deceased had not made a will. He made no effort to demonstrate that the will on record was a forgery, neither did he seek to show that the failure to make provision for some family members renders a will invalid.

10. It is the applicant who alleges that the will was a forgery. The burden is on him to establish that fact to the required standard. Forgery is a criminal act, and facts to establish it must make out a case beyond balance of probability and towards proof beyond reasonable doubt. See the decision of the Court of Appeal in *Elizabeth Kamene Ndolo vs. George Matata Ndolo* Nairobi Court of Appeal civil appeal number 128 of 1995. A charge of forgery would be that the signature on the document was not that of the deceased. To establish forgery, it is usually necessary to subject the impugned document to testing of the impugned signature or signatures by a document or handwriting expert. That was not done in this case. No material was placed before me by way of evidence that the signature on the document purported to be that of the deceased was forged.

11. The other argument is that the will, even if properly signed by the deceased, would be invalid to the extent that it failed to provide for some beneficiaries. This assertion is intended to be a legal argument. The applicant has not cited any statutory provisions or case law that supports the contention that a will would be rendered invalid where it fails to make provision for some persons. To the best of my knowledge of the law, that is not the legal position. There is freedom of testation. A person can dispose of their property by will as they please. There is no law which commands the testator to provide for any class of persons. The only remedy available to persons not so provided for is to be found in Part III of the Law of Succession Act, Cap 160, Laws of Kenya, such persons can move the court under section 26 for reasonable provision.

12. From the material that has been placed before me the applicant has not established that the deceased died intestate, or did not make a will or that the will on record was forged. It cannot therefore be said that the proceedings to obtain grant were defective for relying on an invalid will.

13. I note that the administrator did not call evidence to establish that the will was valid. Possibly by calling the lawyer who drafted the will or the witnesses who attested its execution. However, that failure is not fatal, as the burden of proof lies not with the propounder of the will but with the person alleging that the will was not valid.

14. The other argument by the applicant is that he and other family members were not notified of the initiation of the probate proceedings in Thika CMCSC No. 421 of 1997. That appears to be the case. But this was a case of a will; the procedures attending to the same differ from those where the deceased died intestate. In any event, the fact that it has not been established that the will was not valid renders the said argument academic.

15. In the end I shall make the following final orders: -

a) that I find that the application dated 15th April 1999 is without merit and I hereby dismiss the same;

b) that the original court file in Thika CMCSC No. 421 of 1997 shall be returned to that court for finalization of the distribution of the estate;

c) that the instant cause is exhausted as it was limited to determination of the revocation application dated 15th April 1999; and

d) that the respondent shall have costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 20TH DAY OF APRIL, 2018.

W. MUSYOKA

JUDGE