



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2000 OF 2013

IN THE MATTER OF THE ESTATE OF RUFUS RAGUI KIGERA

(Consolidated with Succession Cause No. 998 of 2006 on 2nd December 2015)

JANET MUTHONI KIGERA.....APPLICANT

-VERSUS-

MUKURIA RAGUI

JOHN MUCHENE RAGUI

SALOME MUTHONI NJOROGI

GRACE MINGINA GICHUKI ADMINISTRATORS/FIRST...RESPONDENTS

SARAH WANJIKU RAGUI.....SECOND RESPONDENT

ESTHER MUMBI MUKIRI.....THIRD RESPONDENT

ALICE WAHI GITHU.....FOURTH RESPONDENT

JOHN MUCHENE RAGUI.....FIFTH RESPONDENT

SALOME MUTHONI.....SIXTH RESPONDENT

MUKURIA RAGUI.....SEVENTH RESPONDENT

GRACE MINGINA GICHUKI.....EIGHTH RESPONDENT

MUKURIA RAGUI.....NINTH RESPONDENT

JUDGMENT

Rufus Ragui Kigera, the deceased herein, died on the 5th of November 1995. The Applicant, Janet Muthoni Kigera, a daughter in-law to the deceased, filed summons for revocation of grant on the 4th of May 2016 under **section 76(e) of the Law of Succession Act and Rule 44(1) and (2) of the Probate and Administration Rules**. The Applicant sought to have the grant of letters of administration made to Mukuria Ragui, John Muchene Ragui, Salome Muthoni and Grace Mingina Gichuku, on the 10th of December 2013 revoked or annulled as it has become useless and inoperative through subsequent circumstances.

The Applicant’s case is premised on the grounds that the deceased had written down on paper how he wished his estate to be distributed after his death but the same was disregarded as the document was not witnessed by two witnesses. However, the executor that had been appointed by the deceased, in a replying affidavit to a citation filed by the Applicant, stated that the document, which was written in the deceased’s own handwriting, was intended to guide the court and that he was willing to take responsibility if the Court could agree or accept that this is a written will/wish.

The summons was opposed by Alice Wahu Githu, the 4th Respondent herein through a replying affidavit dated 30th May 2016. She deponed that the deceased died without having left a valid will as it did not satisfy the conditions of a valid will as provided for in the Law of

Succession Act and therefore his estate should be distributed as per the laws on intestacy. Further, the distribution of the estate according to the will was discriminatory against her and another beneficiary.

On the 25th of May 2016, the 8th Respondent filed a Replying Affidavit on behalf of the 2nd, 3rd, 6th Respondents. She deponed that the deceased did not have a valid will and therefore his wishes cannot be enforced although written by the deceased. She further contended that since the will is not valid, there cannot be an executor. It was therefore her averment that the grant was properly issued with consent of all beneficiaries and the administrators have been discussing with the beneficiaries on how the estate of the deceased will be fairly distributed among them.

HEARING

The matter proceeded for hearing on the 5th of December 2016. There was only one witness. The Applicant (PW1) stated that when the succession matter was first filed in this Court, the family did not state that there was a written will and therefore she asked the Court to rely on the will and the grant issued be revoked. During cross-examination, she testified that she had lived with the deceased for a long time and confirms that the will was written and signed by him. She however agreed that the property was not proportionally distributed as the husband, son of the deceased, was allocated more property and one of the deceased's daughters, although deceased, was not allocated any portion. She further agreed that the will was not witnessed by any witness. During re-examination, she stated that some of the parts were however not in the deceased's handwriting. In conclusion, she asked the Court to allow the distribution of the estate as per the wishes of the deceased. After the hearing, the original will was availed to this Court.

WRITTEN SUBMISSIONS

APPLICANT

The Applicant filed written submissions dated 26th May 2017. Counsel, on behalf of the Applicant and stated that the will was brought to the attention of the deceased's family, 8 years after his death by the firm of Waweru Gatonye & Company Advocates. The will, dated 3rd May 1994, was then read out to them and they were later allowed to take copies. The will was signed by the deceased 14 times and survey maps annexed to it. Counsel who was in possession of the will however stated that the deceased had given instructions of the contents of a will which he went ahead and wrote but died before he had written some additional information and signed his will. It was Counsel's submission that the deceased by his conduct intended that the will be complied with.

In 2013, the family agreed to apply for letters of administration which was not opposed and therefore grant was issued on 10th December 2013. The Applicant then sought to have the will; relied on but the family has vehemently denied. It is therefore the Applicant's prayer that the Summons for revocation be allowed, the executor be allowed to distribute the deceased's property as per the will and that the will of the deceased is allowed so as to implement the wishes of the deceased.

RESPONDENTS

The 2nd, 3rd, 6th and 8th Respondents filed written submissions on the 25th of May 2017. Counsel submitted that the deceased did not have a valid will and therefore his wishes cannot be enforced. On the issuance of the grant, it was submitted that the grant was properly issued by a court of competent jurisdiction and that it has not become useless of inoperative as the administrators have been performing their duties according to the law. Counsel concluded by stating that the applicant's application should be dismissed as the will cannot be enforced and the administrators are holding meetings to ensure the property is distributed fairly. They filed further submissions dated 18th July 2017. They agreed that they have been living on their inherited parcels of land for the last 30 years but the land is still registered under the deceased's name. Further they stated that the applicant has not given a conclusive reason on why the grant is inoperable.

ISSUES FOR DETERMINATION

- a) Did the deceased leave a valid will and should his wishes be enforced?
- b) Is the grant inoperable/useless?

DETERMINATION

The issue that arises in this matter is whether the wishes of the deceased, as indicated in the will, should be enforced. The Law of Succession Act provides the following:

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.

A valid will therefore has to satisfy the above criteria. The will has to be signed by a testator or somebody else in the presence and direction of testator. The original will was signed 13 times in the document and at the end (in pencil) and dated 3rd of March 1994. This therefore satisfies the first condition.

The second condition is that the signature has to signify that the testator intended to give effect to the will. Testamentary intent has been further explained in the case of *Vaghella vs Vaghella (1999) 2 EA 351* which provides as follows:

“ a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or pervert the exercise of his natural faculties- that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made.”

The deceased appended his signature beside almost all the paragraphs. The beneficiaries have not contested the assets listed in the will and therefore it is presumed that the deceased listed all his assets. Further, since no proof of mental incapacity has been provided, the deceased is presumed to have been of sound mind at the time of making the Will. In my opinion, the deceased signed the document with the intention of giving effect to the wishes and was of sound mind at the time thus satisfying the condition stated in **Section 11(b) of the Law of Succession Act**.

Section 11 (c) of the Law of Succession Act, requires that the will be signed by the maker in the presence of two or more witnesses, to acknowledge his signature on the document, and they should append their signatures to the document to authenticate the signatures of the maker. The two witnesses however do not need to be present at the same time. The witness has to be a person of sound mind and full age as provided by **Section 3(1) of the Law of Succession Act**. It is in agreement that the will was signed by the testator only. The will does not contain any other signature evidencing the presence of the independent witnesses. The will was therefore not attested by the two independent and competent witnesses in accordance with the law. It is for the foregoing reason that this Court is satisfied that the will is not valid as it does not comply with all the mandatory provisions of **Section 11 of the Law of Succession Act**.

The letter of 6th March 2017 of Mr. Waweru Gatonye Counsel is detailed and of importance states the following;

“However, we need to explain the documents in our possession and the circumstances under which documents were given to us.

Just before he died, the deceased consulted the writer with a view to writing a will for him. The writer explained to the deceased the information required for making such a will and it is pursuant to the discussion that the deceased wrote the document that is now being said to be a will. The deceased was asked to give some further information to facilitate drafting of the Will. Unfortunately, he died before he could provide this additional information.

It must be evident that the documents we have can only be referred to as the last wishes of the deceased but not a formal Will.”

On the issue on whether the grant is inoperable/ useless, **Section 76 of the Law of Succession Act** provides that:-

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

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

The Applicant sought orders that the grant be revoked as it has become useless and inoperative through subsequent circumstances. This was because she was of the view that the wishes of the deceased as to how his property ought to be distributed should have been considered and therefore the executor should have applied for the grant of probate instead of the beneficiaries applying for the letters of administration. However, as seen from the above analysis, since the will is not a valid testamentary instrument, the beneficiaries were right in applying for the letters of administration intestate. Therefore, the grant of letters of administration is not useless/ inoperative and the administrators alongside the beneficiaries should agree on the most appropriate mode of distribution so as to ensure the deceased's assets are divided equally and fairly among all the beneficiaries.

DISPOSITION

On the basis of the foregoing, this Court finds as follows:-

- a) The Summons for Revocation application dated 4th May 2016 is hereby dismissed.**
- b) The administrators to agree with the beneficiaries on the preferred mode of distribution of the deceased's properties and file in Court within 30 days Summons for Confirmation of Grant.**
- c) In default of agreement, each beneficiary to file protest with proposed mode of distribution to the Court for the Court to**

determine which among them is the most suitable.

d) There shall be no order as to costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH DAY OF OCTOBER, 2018.

M.W.MUIGAI

JUDGE OF THE FAMILY DIVISION OF THE HIGH COURT

IN THE PRESENCE OF:

MR KARANJA FOR THE APPLICANT

MS KAREITHI FOR THE 2ND, 3RD, 6TH AND 8TH RESPONDENTS

MR MSHWESHWE FOR THE 4TH RESPONDENT

7TH AND 9TH RESPONDENT IN PERSON