



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO. 355 OF 2009

In the Matter of the Estate of Ayub Kinoti M'Angaine (Deceased)

CHARITY KABURU.....PETITIONER

AND

PHILIP KAGIRU KINOTI.....1ST PROTESTER

PURITY MPINDA KINOTI.....2ND PROTESTER

DOROTHY KARWITHA KINOTI.....3RD PROTESTER

RULING

Will not making reasonable provision for dependant

[1] On 9th March 2016, Philip Kagiru Kinoti, Purity Mpinda Kinoti and Dorothy Karwitha Kinoti filed an Affidavit of Protest against Confirmation of grant. The affidavit was sworn on 7th March 2016. And on 15th March, 2016, by way of directions, the court ordered that the Protest herein shall be canvassed through written submissions of the parties. Parties filed their respective submissions which I shall consider in my determination of the issues in controversy.

Quarrels by Protesters

[2] In a nutshell, the quarrels by the Protestors who are the son and daughters of the deceased are:-

- (1) That the will herein was not read to the family members and was made 8 months before his death, so they doubt its authenticity;**
- (2) That the will does not make reasonable provision for them as children of the deceased**
- (3) That the Petitioner has not distributed the estate as per the will and has given to herself all pension and gratuities as well as the South Imenti Tea Growers Sacco (Bank) Society Ltd Account number 10-02935-5, thus, the mode of distribution by the Petitioner is unfair and prejudicial to the Protesters**
- (4) That the Petitioner secretly filed this cause without informing the Protesters.**
- (5) That the Petitioner intends to transfer 1 acre from the estate property to David Munene Nkanata who is not a beneficiary.**

And, after all said and done, the Protesters proposed that the estate property be shared equally among all beneficiaries of the estate of the deceased. They argued that the Sacco account had already been given to the 2nd Protester to educate the other children.

[3] The Petitioner on the other hand argued that the will is legal and binding and should be upheld. And as such, distribution should be as per the will. She also urged that she is entitled to gratuity, pension and the Sacco account belonging of the deceased. She asked the court to give effect to the will.

DETERMINATION

[4] Despite all the quarrels the protesters have against the Petitioner, none asked for removal of the Petitioner as an administrator. Accordingly, I will only deal with the issues on the will and provision for dependants. Having considered the protest and the will herein questions which arise are:-

(1) Whether the will is valid;

(2) Whether the will is a disposition of all the estate properties; and

(2) Whether the will makes reasonable provision for the dependants herein.

The will; partial disposition

(5) The authenticity of the will herein has been challenged. Upon perusal of the will and arguments by the Petitioner, I find that it satisfies all the formalities of a will under Part II of the Law of Succession Act, and more specifically section 11 thereof. The testator has signed the will, the signature is so placed that it appears it was intended to give effect to the Will as a will and the will is attested by two witnesses. The evidential burden now shifts to the protesters to provide evidence to rebut the presumption of the validity of the will. Except merely stating that the authenticity of the will is doubted for; they were not aware of its existence; that the will was not read to them and was made 8 months before the death of the deceased, there is absolutely no proof to rebut the validity of the will herein. Accordingly the will is valid and as it does not appoint an executor, grant of letters of administration with will annexed were accordingly issued to the widow of the deceased who is entitled in order of preference to apply for such grant. Nonetheless, the will only made a bequest to the Petitioner, that is 1 ½ acres to be excised from L.R NKUENE/URUKU/131 and the whole of undeveloped plot NO 257 NKUBU MARKET. Therefore, the will makes a disposition of and applies to only part of the estate as stated in the will. This court's duty is to give effect to the testator's written will by ensuring that any construction of the will accords with that principle and avoid re-making the will. I shall so deal with this will.

Distribution of Gratuity, Pension and Sacco Account

[6] I should remove one thing out of the way. Of course the will does not dispose of the gratuities, pensions and the Sacco account. This may not be an omission since disposition of these type of properties is ordinarily governed by specific statutes which make such benefits subject of statutory nomination and are thereby excluded from the free property of the deceased. Although the protesters averred that the Sacco Account was given to the 2nd Protester before the death of the deceased, there was no evidence which brings conviction this court that the deceased settled the account to the 2nd Protester, or that a particular person was the nominee for these benefits. I will, therefore, treat them as part of the estate and distribute them accordingly. Thus, I order that the gratuities, pension and Sacco Account shall be shared equally amongst the Petitioner and all the children of the deceased.

Provision for dependants

[7] I turn to the thorny issue of provision of dependants in the will. Looking at the will as a whole, I find that the will made a bequest only to the Petitioner. Paragraph 4 of the will is, however, ambiguous and is not clear whether the life interest of the Petitioner was on the entire estate properties or only on the bequest. That paragraph does not help at all even though it states that after life interest, the properties

shall revert to the estate of the deceased. Another twist emerges from paragraph 6 of the will which states;-

“THAT my said wife shall not claim any other interests in the rest of my estate whatsoever”.

When I consider the two provisions, the disposition to the spouse was not intended to follow after section 35 of the Law of Succession Act. Therefore, paragraph 4 of the will is ambiguous and not capable of being assigned a particular meaning. It is, thus, of no effect. That notwithstanding, I am aware the Court of Appeal has favoured each dependant including the surviving spouse getting a distinct share of the estate rather subjecting the entire estate to the life interest of the surviving spouse. For, that reason, I am convinced that the will makes distinct bequest to the Petitioner, that is to say; 1 ½ acres to be excised from L.R NKUENE/URUKU/131 and the whole of undeveloped plot NO 257 NKUBU MARKET absolutely. However, the will does not make provision for all the dependants and beneficiaries of the estate. I will, therefore, proceed on the basis of section 26 of the Law of Succession Act. I, therefore, direct:

(1) That the Petitioner being the surviving spouse shall take; (1) 1 ½ acres to be excised from the NKUENE/URUKU/131 in the manner described in the will; the whole of undeveloped plot NO 257 NKUBU MARKET; and (3) all livestock and households, absolutely;

(2) That the balance in NKUENE/URUKU/131 shall be shared amongst the children of the deceased in equal shares.

(3) David Munene Nkanata is not a beneficiary of the estate and so he will get nothing from the estate.

(4) The gratuities, pension and Sacco Account Number 10-02935-35 shall be shared equally among the Petitioners and the all the children of the deceased.

(5) I confirm the grant herein in the above terms.

Dated, signed and delivered in open court at Meru this 28th day of February 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Mwanzia advocate holding brief for Mr. Kiogora advocate for Protestors

All Protestors present

Mr. B.G. Kariuki advocate for petitioner

Petitioner - present

F. GIKONYO

JUDGE