



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**SUCCESSION CAUSE NO. 112 OF 2011**  
**IN THE MATTER OF THE ESTATE OF THE LATE FRANCIS NGIGE MUCHIRI**  
**(DECEASED)**

**MARY WANJIRU**

**JOHN GATHOKO NGIGI.....APPLICANTS**

**ALICE NJERI**

**VERSUS**

**NAOMI WANJIKU NGIGI.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. Mary Wanjiru, John Gathoko Ngigi and Alice Njeri have moved this court for orders;

- i) **THAT** this Honourable Court be pleased to revoke and cancel the grant of probate of written will issued to Naomi Wanjiku Ngigi.
- ii) The property of the deceased be distributed in an equitable way.
- iii) **THAT** cost of this application be provided for.

2. The application is based on the following grounds;

1. **THAT** the will allegedly drawn by the deceased discriminates other beneficiaries.
2. **THAT** the administratrix was given over  $\frac{3}{4}$  of the property of the estate.
3. **THAT** the property was not equitably distributed to the Objectors.

and the Supporting Affidavit of Alice Njeri Ngugi sworn on the 12/8/2013.

It is the applicant's case that the grant of probate of written will issued to Naomi Wanjiku Ngugi (respondent) should be revoked as the said will discriminates other beneficiaries.

It is stated that the administratrix was given  $\frac{3}{4}$  of the property of the estate or distribution was not equitable.

3. Alice depones that initially they took out a citation against the respondent. They learnt that this case had been filed with a will annexed. The applicants were not properly provided for in the will. Mary Wanjiku (1st wife of the deceased) was not provided with anything. It is suspected that the said will was written in hospital when the deceased was in critical condition.

4. The application is opposed and Naomi Wanjiku Ngigi has sworn a replying affidavit. She avers that the applicants were all along aware of the proceedings herein. Indeed the will had been read to them shortly after the death of the deceased.

5. It is the respondent's case that the application herein fails to meet the requirements of **Section 76** of the **Law of Succession Act (Cap 160 Laws of Kenya)** and **rule 44** of the probate and administration rules.

6. Both parties filed written submissions.

7. I have had occasion to consider the application, the affidavit evidence and submissions on record.

8. Of determination is whether the applicants have met the threshold for the revocation of a grant within the meaning of **Section 76** of the **Law of Succession Act**.

9. That (**Section 76**) provides as follows;-

**“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-**

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

**(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the 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 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 (e) 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.**

10. To begin with the application is brought under a “Chamber Summons” premised under **Section 26** of Succession (sic) and **Section 73** of **Probate and Administration rules** (Cap 160 Laws of Kenya).

11. The casual approach in the drawing of the application herein is one that this court takes a very dim view of. What is **Section 26** of **Succession**? Did the drawer of application mean **Section 73** of the **Law of Succession Act** or **rule 73** of the **Probate and Administration rules**? This Court urges for more diligence on the part of officers of court when drawing/preparing pleadings before court. I however, hold that these indiscretions are technicalities which I can ignore. What is clear is that before me is an application for revocation of grant and I proceed to consider it as such.

12. **Section 76** of the **Law of Succession Act** (Cap 160 Laws of Kenya) does not as seen above deal with challenge on wills. That section clearly sets out the grounds upon which a grant can be revoked. Failure of the deceased to provide adequately for a beneficiary is not one of them.

13. The applicants were well aware of the alleged will as the proceedings progressed.

14. Part 4 of the Law of Succession Act (Cap 160 Laws of Kenya) adequately provides for wills.

15. Specifically Section 26 provides the evidence to seek provision for defendants not adequately provided for by will or intestacy.

16. This is the provision that was available to the applicants and it was an issue that ought to have been canvassed ever before the grant was confirmed through an appropriate challenge to the will referred to.

17. In paragraph 8 of the affidavit of Alice Njeri Ngigi in support of the application she states;

**“8. That upon perusal of Court documents we discovered that the petitioner has filed a will purported to have been written by the deceased.**

**9. That in the said will we were not properly provided for.”**

18. **Section 76** of the **Law of Succession Act** provides the grounds on the basis of which a grant can be revoked. These grounds are;

1. The proceedings to obtain grant were defective in substance.
2. Fraud or making of false statement or by concealment from the court of something material to the case.
3. The grant being obtained from untrue allegation of fact.
4. Failure to confirm grant within 1 year of its issue.
5. Failure to diligently administer the estate.
6. Failure to account.

19. Unequal distribution in a will is no ground for a revocation of grant.

As stated earlier, it was open to the applicants' to invoke **Section 26** of the **Law of Succession Act** for a remedy. Seeking revocation of grant on this ground is misconceived and not supported by law.

20. Even assuming for a moment that a challenge on a will or any other basis other than the grounds 1-6 listed above can be legally entertained at this stage, there is no concrete evidence that either the deceased was incapacitated by illness as to be unable to make a will or that the purported will offends any of the requirements under **Section 11** of the **Law of Succession Act**.

21. The feeble challenge to the will found in the application is to be seen at paragraph 13 of the affidavit of Alice Njeri Ngige where she states;

**“13. That we suspect that the said will was written when the deceased was in hospital in critical condition.”**

Can this averment be taken seriously as a piece of evidence in support of the application herein? Certainly not. A suspicion is not prove of anything. There must be concrete evidence proving the suspicion as true and which is lacking in this case.

22. Strangely, it is counsel for the applicants who in his submission is categorical that;

**“We humbly submit that the will filed herein was written (if at all it was written) by the deceased when he was so sick and hence cannot be said to have been written when he was in a fair state of mind.”**

23. Such a submission from the bar not supported by the affidavit evidence available is hollow and of no consequence.

24. There has to be clear legal grounds for a court to interfere with the wishes of the deceased person. I concur with counsel for the respondent that without any evidence whatsoever, a suspicion(as by Alice) and a bald statement by counsel from the bar that the deceased was seriously ill cannot suffice to convince the Court to interfere with a deceased person's will.

25. Cockburn CJ in Banks V. Goodfellow, 1870 LR sums up the position as follows;

**“The law of every civilised people concedes to the owner of property rights of determining by his last will either in whole or part, to whom the effects which he leaves behind him shall pass.....A moral responsibility of no ordinary importance attaches to the exercise of the right given. The instincts and affections of mankind, in the vast majority of instances, will lead men to make provisions for those who are dearest to them in kindred and who in life have been the object of their affection..... The same motive will influence him in the exercise of the right of disposal when secured to him by law. Hence arises a reasonable and well warranted expectations on the men's kindred surviving him that on his death effects shall become theirs, instead of leaving to strangers.”**

26. I need to reiterate again that the current application is as stated earlier not the right forum in which to challenge the validity of a will.

27. For the above stated reasons, I find and hold that the Chamber Summons application dated 12/8/2013 is completely without merit. I dismiss the same. Counsel for the respondent urges for costs. Noting that this is a family matter, and even though the applicants appear to have acted '*mal fides*', I will order that each party bear its own costs.

**Dated, Signed and Delivered Nakuru this 30th day of March, 2017.**

**A. K. NDUNG'U**

**JUDGE**