



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA TA NAIROBI**

**SUCCESSION CAUSE NO. 2469 OF 2007**

**IN THE MATTER OF THE ESTATE OF KAMAU NGARI (DECEASED)**

**RULING**

1. The application before this court is dated 2<sup>nd</sup> August 2016, being an application by the applicant for orders that;

- i. The grant of probate for letters of administration with will annexed made to the applicant on 20<sup>th</sup> June 2016 be confirmed.
- ii. The cost of this application be in the cause.

2. The applicant filed a supporting affidavit stating that the deceased died on the 17<sup>th</sup> day of July 2003 leaving behind a Will. The deceased was survived by the following dependents;

- a. Boniface Mukuha Kamau -son
- b. Jefferson Isaiah Irungu Kamau – son
- c. Patrick Kareri Kamau – son
- d. George Moses Mwega Kamau – son
- e. Monica Wambui Kamau- Daughter
- f. Anastacia Nyambura Kinuthia – Daughter
- g. Deborrah Waiyego -Daughter
- h. Esther Waruinu Mucheru – Daughter
- i. Jane Wangui Kamau – Widow

Brief facts leading up to the current application are as follows.

3. The deceased died on 17<sup>th</sup> July 2003 leaving behind a written will. The testator had named his two sons as the executors of his will. The executors failed to file for letters of administration forcing the applicant to file an application for a note to be entered against the rights of the executors to executorship. The executors in turn filed an application seeking to extend the time required to file for execution. The parties by consent disposed of the two applications and agreed that the executors were to file the petition within 7

days. The executors did file the petition but failed to serve the applicant with a copy of the will annexed with the petition. The executors in turn filed an application for confirmation dated 21<sup>st</sup> April 2010 where they annexed an invalid will. The application was struck out via a ruling dated 28<sup>th</sup> May 2012. The applicant further filed an application for the revocation of the grant issued to the executors but the same was dismissed and an order issued directing that the executors were to initiate proceedings for the determination of the validity of the will. They however failed to do so and as a result the court appointed the applicant as the administratrix to the deceased estate on the 20<sup>th</sup> of June 2016.

4. The applicant in her current application dated 2<sup>nd</sup> August 2016, filed her supporting affidavit dated 2<sup>nd</sup> of August 2016 where she has submitted a list of the proposed mode of distribution in accordance to the will of the deceased. She submits that she made the application in good faith and in the interest of justice. The applicant attached an affidavit in support of the proposed distribution where all the beneficiaries failed to sign the consent to the confirmation of the distribution of the deceased estate. The applicant list of assets of the deceased as per her affidavit are as follow;

- a. Plot No. 108 Block C Langata Development Co. Ltd to Jefferson Isaiah Irungu Kamau
- b. Plot No. 109 Block G Langata Development C. Ltd to George Moses Mwenga Kamau.
- c. Plot No. 180 Mwiki Company Ltd to Jane Wangui Kamau.
- d. Title No. Loc/10Kahuti/2543 to Jane Wangui Kamau.
- e. Title No. Nyandarua/ Kahati/527 to Jefferson Isaiah Irungu Kamau, George Moses Mwega Kamau, Monica Wambui Kamau and Jane Wangui Kamau in equal shares.
- f. Plots in Kibera Nairobi, House/ Kiosk to Jefferson Isaiah Irungu Kamau, George Moses Mwega Kamau, Monica Wambui Kamau and Jane Wangui Kamau in equal shares.
- g. Balances i/ Monies in bank accounts to Jefferson Isaiah Irungu Kamau, George Moses Mwega Kamau, Monica Wambui Kamau and Jane Wangui Kamau in equal shares.

5. The Beneficiaries in turn filed grounds of objection to the application for confirmation of grant and the mode of distribution. They opposed the application on the following grounds;

- i. Some properties owned by the deceased namely -;

Plot No. 0447 (certificate No. 4/787 Langata Development Co. Ltd)

Plot No. C 133 Phase 11 (certificate No. 1942) Langata Development Co. Ltd are not included in the application for confirmation of grant.

- ii. Some beneficiaries namely Boniface Mukuha Kamau and Partick Kareri Kamau are not mentioned in the list of beneficiaries.

- iii. The said properties that are not included in the application for confirmation ought to be included and shared out as follows,

- a. Plot No. C 447 to Boniface Mukuha Kamau

- b. Plot No. C 133 to Patrick Kareri Kamau

- iv. Land Parcel L.R Nyandarua/Kahati/527 does not exist. It is not part of the deceased estate. The said parcel of land belonged to Boniface Mukuha Kamau who has since sold it to a third party. The same is therefore not available for distribution.

v. Land Parcel L.R Loc 10 Kahuti/2543 is the only ancestral land known to the deceased and the beneficiaries. The beneficiaries fear that in case it is given to Jane Wangui Kamau wholly, she may dispose it off. However, she can hold the same in trust for the other beneficiaries.

vi. The Will at paragraph 6 thereof does not mention the names of the two sons that are to share the Kibera Plots.

6. The Objectors also filed a supporting affidavit with regard to the objection on the mode of distribution. The affidavit dated 7<sup>th</sup> November 2016 was deposited by Jefferson Isaiah Irungu Kamau on behalf of the other objectors. He reiterates what is the grounds of objection which I need not repeat again. In addition he states that L.R No. Loc 10 Kahuti/2543 is their ancestral home and that the said piece of land is their final resting place and hence it should be preserved and never sold. That it should be held by Jane Wangui Kamau in trust for the beneficiaries. The objectors proposed that Plot No. 180 Mwiki Company Limited can be shared by Jane Wangui Kamau and that they have no problem with the other mode of distribution as proposed by the administratrix.

7. The applicant and objectors filed written submissions. The objector submitted as follows; that they oppose the mode of distribution as proposed by the Administratrix in the application dated 2<sup>nd</sup> August 2016. That the main issue is the lack of inclusivity in the will attached to the Administratrix application as well as exclusion of some properties by the deceased. That there is the exclusion of Boniface Mukuha Kamau and Patrick Kareri Kamay from the list of beneficiaries of the deceased's estate without any explanation/ reason. That according to them this was an oversight on the part of the deceased unless he had explained the reasons for omitting his two sons. That the other omission by the deceased is the failure to include land parcels plot no. C446 and C133 as part of his properties. The failure is also not explained and they seek that the said properties be shared by the omitted beneficiaries as the rest have been adequately provided for in the Will. That L.R Nyandarua/Karati/527 does not form part of the deceased's estate. The same must have been included in the Will by mistake and they pray that it be expunged from the list of properties belonging to the deceased. The said property belonged to Boniface Mukuha Kamau has since sold the two parcels to a third party. The search certificates and the green card demonstrate the same. It would not be prudent for any of the beneficiaries to really get does not belong to the estate of the deceased. That the court will notice that there are plots in Kibera that are given to two (2) sons yet the said sons are not mentioned by their names. Probably this explains the state of mind of the deceased in leaving out some properties and beneficiaries and the objectors sought to have the court partially disregard the proposed mode by the administratrix and adopt the mode proposed by them.

8. The applicant submits that with regard to the omission of Boniface Mukuha Kamau and Patrick Kareri Kamau in the list of beneficiaries of the estate of the deceased, the deceased had explicitly excluded the two in the Will as he had provided for them prior to his demise and he gave them gifts in contemplation of his death. That Boniface Mukuha Kamau did benefit from a portion of the deceased estate in land parcel number Nyandarua/Karati/527 which the deceased bought from a third party. That the two beneficiaries have not sought to be included as dependents but it is the objector who is seeking to muddle issues that are clear. The applicant further submitted that with respect to the omission of land parcels Plot No. C446 and C133, the said properties had been provided for in the Will as the plots in Kibera. That land parcel Nyandarua/ Karati/527 was bought by the deceased and was later sub divided by Boniface Mukuha Kamau who later sold it after the demise of the deceased and hence shows that Boniface Mukuha Kamau was well provided for. The land parcel No. Loc 10 Kahuti/2543, being termed as ancestral land by the objector is not ancestral land as the deceased is not interred on the land. The applicant submitted that it was an attempt by the objector to curtail the applicant's interest in the land. The applicant thus submitted that the issues before the court for determination are;

a. Whether there are valid grounds to deny the confirmation of the grant?

b. Whether the contents and last wishes of the will should be tampered with by the objectors?

9. The applicant relied on Sections 26, 28 and 29 of the Law of succession Act which provided that;

Section 26, “where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate”.

Section 28, “In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

- (a) the nature and amount of the deceased’s property;
- (b) any past, present or future capital or income from any source of the dependant;
- (c) the existing and future means and needs of the dependant;
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
- (e) the conduct of the dependant in relation to the deceased;
- (f) the situation and circumstances of the deceased’s other dependants and the beneficiaries under any will;
- (g) the general circumstances of the case, including, so far as can be ascertained, the testator’s reasons for not making provision for the dependant”.

Section 29, “For the purposes of this Part, “dependant” means—

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death”.

10. The applicant also relied on Succession Cause No. 2355 of 2013, **in the matter of the estate of Pratik Ramesh shah (in the estate of Pratik Ramesh Meghji shah 2015 Eklr)** where the court cited and relied on the case of *in the matter of the estate of the late Sospeter Kimani Waithaka, Succession Cause 341 of 1998* where the court held that, “The will of the departed must be honoured as much as it is reasonably possible. Re-adjustments of the wishes of the dead by the living must be spared for only eccentric and unreasonably harmful testators and weird wills. But in matters of normal preferences for certain beneficiaries or dependents, maybe for their special goodness to the testator, the court should not freely intervene to alter them”.

The applicant also relied on Succession Cause no. 445 of 2012 in the estate of Sarah Mumbi Kigwe (2015) eKLR deceased, in the court’s finding stated, “The upshot of the confirmation of probate and affidavit of protest should not interfere and stall the confirmation process, if confirmation of grant of probate is not granted; the transfer of shares will stall and the estate of the deceased wasted. The court will confirm grant of probate in the following terms;

## **DETERMINATION**

Having considered the affidavits in the submissions and law this court finds that the issues for determination are;

- i. Whether the court can interfere with the deceased’s Will
- ii. Whether the proposed mode of distribution as proposed by the objectors should stand.

The Law of Succession Act Cap 160 provides that the court can only interfere with the Will of a deceased under the provisions of section 26 of the Act. The section provides that;

*Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.*

11. The deceased did not bequeath any property to his two sons, Boniface Mukuha Kamau and Patrick Kareri Kamau. He also did not give any reason for the exclusion. The objectors proposed that the two Kibera properties should be given to the two sons who were excluded in the will. The objector's mode of distribution was consented to by all the beneficiaries to the estate of the deceased apart from the applicant, the step wife, who was opposed to the distribution as proposed by the objector. The Law of Succession Act defines a dependant under section 29,

*For the purposes of this Part, "dependant" means—*

*(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*

*(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;*

By virtue of the said section the two sons are entitled to the deceased estate as beneficiaries unless the contrary is proved that they were adequately provided for by the deceased during his lifetime. **M. J. ANYARA EMUKULE in the case of *James Maina Anyanga v Lorna Yimbiha Ottaro & 4 others* [2014] eKLR** stated that,

*A testator has power to dispose of his property as he pleases and the court is bound to respect those wishes as long they are not repugnant to the law and he does not leave out some dependents and beneficiaries.*

From the deceased Will, it is clear that two sons were left out in the distribution of the Will. This gives the court discretion to alter and provide for the left-out beneficiaries. The applicant contends that the excluded sons were adequately provided for by the deceased through gifts in contemplation of death. The Law of succession provides conditions that out to be met so that the gift can be successfully passed.

Section 31 of the Act provides as follows,

*A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if—*

*(a) the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and*

*(b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and*

*(c) there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and*

*(d) a person makes a gift in such circumstances as to show that he intended it to revert to him*

*should he survive that illness or danger; and (e) the person making that gift dies from any cause without having survived that same illness or danger; and*

*(f) the intended beneficiary survives the person who made the gift to him: Provided that—*

*(i) no gift made in contemplation of death shall be valid if the death is caused by suicide;*

*(ii) the person making the gift may, at any time before his death, lawfully request its return.*

12. The circumstances leading up to the gifting of land parcel L.R Nyandarua/ Karati/527 have not been pleaded and the same cannot qualify to be a gift in contemplation of death. The objector filed a list of documents to prove their case that L.R Nyandarua/ Karati/527 should not form part of the deceased estate. She relied on a letter where the deceased acknowledged receipt of title documents and the title document with regard to the land in question was not included in the list. Similarly, the objector also relied on land document that highlighted the flow of ownership of the disputed land. The deceased name is not part of the names that appear on the document. The applicant has not adduced any evidence to support her claim that the deceased was indeed the proprietor of the said piece of land and that the same was bequeathed to Boniface Mukuha Kamau. The applicant does not disclose how Patrick Kamau benefited from the estate of the deceased. The objector also contends that land Parcel L.R Loc Kahuti/2543 should be held in trust by the applicant on behalf of the beneficiaries of the estate of the deceased. The Will did give provisions that the same should be bequeathed to the applicant. It will be in the interest of justice that the same should be held by the applicant in trust for the beneficiaries. The provisions of section 26 of the Law of Succession Act allow this court to make provisions for beneficiaries not adequately provided for by the deceased. I therefore adopt the mode of distribution with regard to the inadequacy of the deceased will with regards to the two sons. The administratrix is Jane Wanjui Kamau and that the estate shall be determined as follows;

**i. Plot No. C 446 to Boniface Mukuha Kamau**

**ii. Plot No. C 133 to Patrick Kareri Kamau**

**iii. L.R No Loc 10 Kahuti/2543 to be registered in the name of Jane Wangui Kamau to hold on her behalf and in trust for the beneficiaries.**

**iv. Plot No. 108 Block G Langata Development Co. Ltd to Jefferson Isaiah Irungu Kamau**

**v. Plot No. 109 Block G Langata Development Co.Ltd to George Moses Mwenga Kamau**

**vi. Plot No. 180 Mwiki Company Ltd to Jane Wangui Kamau**

**vii. Balances In Bank Accounts to Jefferson Isaiah Irungu Kamau, George Moses Mwenga Kamau, Monica Wambui Kamau and Jane Wangui Kamau in equal shares.**

No order as to costs. It is so ordered.

Dated, signed and delivered this 4<sup>th</sup> day of August 2017

**R. E. OUGO**

**JUDGE**

**In the Presence of:**

Miss. Ombwegh holding brief For Mr. Enonda For the Petitioner

Mr. Kabiru For the Respondents

