



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 2974 OF 2005

IN THE MATTER OF THE ESTATES OF ROBERT MUCHUNU MUMBURA AND MILKA NDUTA MUCHUNU (DECEASED)

LEAH WAMBUI KURIA ROBERT MUCHUNU KURIA PETER NJOROGE KURIA ALL APPLYING IN THEIR CAPACITIES AS CO-ADMINISTRATORS OF THE ESTATE OF THE LATE ROBERT MUCHUNU MUMBURA (DECEASED)APPLICANTS

- VERSUS -

1. JANE MUCHUNU ALIAS JANE WAHU KAMAU ALIAS JANE MUCHUNU KAMAU ALIAS JANE MUCHUNU ADAMS EXECUTOR OF THE ESTATE OF ROBERT MUCHUNU AS WELL AS EXECUTOR OF THE WILL OF MILKA NDUTA MUCHUNU (DECEASED) IN NAIROBI SUCC CAUSE NO. 214 OF 2006

2. KIAMBU DISTRICT LAND REGISTRAR.....RESPONDENTS

R U L I N G

1. The two deceased persons to whose estates these proceedings relate are Robert Muchunu Mumbura who died on 2nd March 2005 his widow and Milka Nduta Muchunu who died on 24th July, 2005. A grant of Probate of Written Will was made to the Executrix Jane Wahu Kamau, alias Jane Muchunu Kamau alias Jane Muchunu Adams (hereinafter the Respondent) in respect of the estate of Robert Muchunu on 18th January 2006, and confirmed to her on 30th October, 2006, in Nairobi Succession Cause No. 2974 of 2006. A second grant of probate of written will was issued to the same Executrix on 18th April, 2006 and confirmed to her in Succession Cause No. 214 of 2006 in respect of the Estate of Milka Nduta Muchunu.

2. On 30th July 2010, Leah Wambui Kuria, Robert Muchunu Kuria and Peter Njoroje Kuria (hereinafter the Applicants) filed an application by way of Summons for Revocation and/or annulment of Grant in respect of the two Estates above, under **section 76 Laws of Succession Act, Rules 44 of Probate and Administration Rules and Order XI Rule 2** of the **Civil Procedure Act**.

3. In the application they seek orders that this cause be consolidated with Nairobi High Court succession Cause No. 214 of 2006 for purposes of this application. That the Grants of Probate of Written Wills made to the Respondent on 18th January 2006 in respect of the estate of Robert Muchunu Mumbura and on 18th April 2006 in respect of the Estate of Milka Nduta Muchunu, his widow respectively, be revoked.

4. The Applicants also pray that the Court do order that the Respondents maintain the status quo as at the

date of this order in respect of the Lands L.R. No. Kiambaa/Kihara/1023 and L.R. No. Kiambaa/Kihara/878. That the Respondents be restrained from selling, transferring, subdividing, alienating, or in any other way dealing with the Estate pending the hearing and final determination of this application.

5. The application is premised on grounds that the first Respondent caused the second Respondent to transfer the titles of two parcels of land namely **L.R. No. Kiambu/Kihara/1023** - 0.62 Ha. and **L.R. No. Kiambu/Kihara/878 – 2.8 Acres** in to her name, Jane Muchunu Adams, from the name of the deceased in execution of the Will of the deceased. That both wills were fake and were not made by the alleged testators of their free will, or were otherwise made under undue influence on the testators by the Respondents.

6. The Applicant further alleges that the Testators, aged 98 years and 86 years respectively in 1992, were not in their right minds to make the wills. That the Certificate of Confirmation of Grant of Probate in P&A No. 2974 of 2005 is fraught with ambiguities as to render it void and unenforceable. That the Applicant's father had a right to inherit from his parents Robert Muchunu Mumbura and Milka Nduta Muchunu.

7. The application is supported by the affidavit of Robert Muchunu Kuria the second Applicant sworn on 30th July 2010, in which he reiterates the grounds of the application and deposes that the Respondent has threatened to distribute the two parcels of land excluding the Applicant's family.

8. He also deposes that the deceased's Will does not bear the Testator's identity Card number and that the two Wills were read 40 days after the deceased's widow's death. The Applicant avers that the certificate of Confirmation of Grant with Will attached was issued to three persons Jane Wahu Kamau, Jane Muchunu Kamau and Jane Muchunu Adams, yet the Kiambu District Registrar transferred the two pieces of land to Jane Muchunu Adams only.

9. The Applicant wondered how his grandparents could disinherit their children who survived the deceased as hereunder:

- a. Rachael Wambui
- b. William Kuria Muchunu (deceased)
- c. Damaris Njoki
- d. Christopher Njoroge Muchunu (deceased)
- e. Charles Thuo Muchunu
- f. Mary Wanjiru Kaguongo
- g. Nelly Njambi Wainaina
- h. Eric Kimani Muchunu
- i. Katherine Muthoni (deceased)

He asserted that the deceaseds could not have only intended to give properties to the two daughters, Jane Wahu Kamau and Lillian Njeri Schmid (a German Citizen)

10. The application was opposed by both the Respondent and Interested Parties. In the Respondent's replying affidavit sworn on 1st October, 2010 they deposed that the application had been brought in bad faith, having been filed almost four years after the 1st Respondent was issued with certificates of

Confirmation of Grants in the two estates and after the death of William Kuria Muchunu (hereinafter William), who was the son/dependant of the two deceased persons. Further that after Robert and Milka made their wills, they were read back to each of them respectively in both Kikuyu and English languages which they understood. Lastly that the Execution of the Wills was witnessed by Njeri Kairuki and P.D.B. Walker Advocates, who confirmed that the Testators had understood the contents of the will and that they were of sound mind.

11. The Respondent asserts that it is not true that the Applicants are Co-Administrators of the Estate of Robert as indicated in their summons for revocation. That she was duly appointed as the sole Executrix to the Estates of both deceased persons in the said Wills and confirms that all the three names that appear in the Grant are one and the same person who is herself, contrary to what the Applicants indicated that the Grant was issued to three people.

12. Counsels on record filed written submissions. Mr. Nabutete for the Applicant highlighted his submissions on 24th March, 2014 before Kimaru J. Mr. Githuka for the Respondent opted to rely on his submissions as filed rather than have the matter delayed further because of the non-availability of Mr. Nabutete when the matter subsequently came before me on 22nd February, 2016.

13. The questions for determination are whether there is sufficient evidence to warrant the annulment of the two Wills in issue and whether the two confirmed grants in the two Estates in issue should be revoked.

14. On the question of the validity of the two Wills the Applicant's main complaints are first, that the two Wills in Succession Causes No. 2974 of 2005 and 214 of 2006 respectively, are fake and were not made by the alleged Testators of their free will. Alternatively, that these wills were made under undue influence on the Testators by the Respondent. Secondly, the applicants allege that the Testators aged 98 and 86 years respectively in 1992 were not in their right minds to make the Wills.

15. Section 5 of the Law of Succession Act places the burden of proving that a testator was, at the time he made the will, not of sound mind upon the person so alleging. **section 5(10)** of the **Law of Succession Act** embodies the principle of testamentary freedom by providing that any person is capable of disposing of all or any of his free property by will, so long as he is of sound mind and not a minor. There is no evidence that the testators were not of right mind, or were suffering from a disease of the mind, or drunkenness or were affected by any incapacity of the mind.

16. The court agrees with the views of Kuloba, J in the Matter of the Estate of Sadhu Singh Hunjan (deceased) Nairobi High Court Succession Cause Number 107 of 1994, to which this court has been referred. Kuloba, J stated that **Section 5(1)** of the **Law of Succession Act** technically gives a testator total freedom, to make a will disposing of any of his property by will to whomsoever he wishes.

17. The court notes that of the two Wills in question, the Testators affixed their respective marks at a place which leaves no doubt that it was intended to give effect to the Wills. Both documents indicate that they were attested to by two (2) competent witnesses who saw the Testators sign and affix their marks on the respective Wills. The said witnesses also appended their signatures to the Will in the presence of the Testators.

18. The presumption of law is that both Robert Muchunu Mumbura and Milka Nduta Muchunu were deemed to be of sound mind at the time of executing their respective wills. The burden of proving otherwise rests with the Applicants who are alleging otherwise. No evidence has been adduced to support their assertions. Mere assertions however numerous or forceful, cannot suffice to shift the onerous statutory burden of proof.

19. There is no evidence before the court to lead to the conclusion that the said Testators were manipulated or coerced in any way by any of the beneficiaries, to write or sign the wills. Milka Nduta Muchunu seems to have considered carefully, to whom to leave her property which is said to have comprised only of a small shop and a butchery and which would not have been possible to distribute

among the fifty-two grandchildren. There is no legal requirement that she should have found a way to provide for all fifty- two of her grandchildren.

20. The grounds upon which the two wills have been challenged in the cause before me were discussed by the Court of Appeal in the case of **Wambui and anor v Gikonyo & 3 others [1988] KLR pg.445**, by Gachuhi Apaloo JJA and Masime Ag. JA who held *inter alia*, as follows:

“Even in cases where a person is very sick or mentally ill at the time of executing a will, it cannot be a ground for nullifying the will because there are lucid periods where the person becomes normal and capable of giving instructions for writing a will. There was no evidence to show that the deceased was not normal at the time he gave instructions to write the documents.

Though one of the documents did not comply with the requirements of a will as such, it expressed the deceased’s wishes and it was capable of being constructed as an oral will made under customary law. The other document was itself a valid will.”

In that case too there was no evidence that the wills were written under the coercion of the Applicants.

21. Both the wills of Robert Muchunu Mumbura and Milka Nduta Muchunu contain a declaration at paragraph 6 as to the soundness of their minds. They also declared their personal knowledge of what they were doing and that they understood the contents of the will. Until such matters are properly and sufficiently challenged, the law intends that a will should be considered as the last expression of the testator, as to the disposition of his/her property. The intent of the two wills should stand undisputed as both wills display clarity of intention.

22. On whether the Grant in this succession cause ought to be revoked. The circumstances that can lead to the revocation of grant have been set out in **Section 76 Law of Succession**. For a grant to be revoked either on the application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.

23. A grant may also be revoked if the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the Estate. See - **Matheka and anor v Matheka [2005] 1 KLR pg 456**. It may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.

24. 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. The Applicants herein represent the estate of William (deceased) who was the eldest son of the deceaseds herein. They further allege that the certificate of Confirmation of Grant of Probate in Succession Cause No. 2974 of 2005 is fraught with ambiguities as to render it void and unenforceable, and that the deceased’s son William also deceased had a right of inheritance from the estates of his late father and mother.

25. The Applicants at paragraph 12(d) of the Affidavit in support, admitted to having been aware of the Wills for at least five (5) years before their application was made but did not challenge them. From the record the Respondent followed the right procedure in obtaining the Grant of Probate of the Wills. She named all the dependants of the deceased persons including the said William (now deceased) and who was the husband of the 1st Applicant and the father of the second and third Applicants. The record also indicates that throughout the process of obtaining the two Grants and Confirmations, thereof, none of the parties raised any objection.

26. There seems to be no dispute that William (deceased) was present at the reading of the wills which was done in both English and Kikuyu languages. All parties present at the reading affirmed that they had

comprehended the contents. William died four years later without having raised any objection to the manner in which the wills distributed the estates of his parents. Indeed William executed the necessary consents in succession cause No. 2974 of 2005 to enable the appointment of Executor of his parents' estates and also agreed to the confirmation of grant.

Having perused both submissions, the grounds of application and the supporting affidavits, I am of the opinion that the application dated 30th July 2010 lacks merit and is accordingly dismissed.

SIGNED DATED and **DELIVERED** in open court this **20th day** of **June, 2016**.

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L. A. ACHODE

JUDGE

In the presence ofadvocate for the Applicants

In the presence ofadvocate for the Respondents

In the presence ofadvocate for the Interested Parties