REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 345 OF 2012

IN THE MATTER OF THE ESTATE OF THE LATE HANNAH NYAMBURA NGARI alias ANNA NYAMBURA NGARI-DECEASED

Christopher Maina Kimaru.....Applicant

VERSUS

Josephine Wairimu Ngari.....1st Respondent

Daniel Gitonga Gikonyo.....2nd Respondent

RULING

Christopher Maina Kimaru (herein after referred to as the applicant) seeks to revoke the grant of letters of administration issued to **Josephine Wairimu Ngari** and **Daniel Gitonga Gikonyo** (hereinafter referred to as the Respondents) on grounds that the proceedings leading to the issuance of the grant were defective in substance, that the grant was obtained fraudulently and by concealment of material facts, that the grant was obtained by means of untrue allegations of essential facts, that the proceedings leading to the issuance of the grant were undertaken secretly without the applicant's consent though he was equally entitled to apply for the grant, that the deceased's will dated 11th June 2011 did not provide for the applicant and that the Respondents have not administered the estate diligently.

The applicants case is that he is a son of the deceased, and that at the time of her death owing to the nature of her illness and age she was incapable of making a will, that he only learnt of this cause after he undertook a search on title number **Nyandarua/Ndemi/736** so as to commence the succession proceedings, that the respondents have already sub-divided the above parcel of land and are in the process of disposing it, that he only learnt about the will after perusing the court file, that the deceased died approximately one month after she allegedly made the alleged will, and at or about the said time she was incapable of signing a document.

The background information relevant to this cause is that the deceased died on 20th September 2002 at the age of 52 years and on 13th April 2012 the Respondents herein petitioned for probate of written will and annexed a copy of a will dated 13th June 2011. Also annexed is a letter from the chief which named the parties herein as the persons surviving the deceased.

On 29th September 2015, the Respondent filed a joint Replying affidavit in which they stated *inter alia* as follows, that it is not true that the deceased suffered the alleged mental disability, that she was a woman of sound mind, intelligent and was always conscious of what she wanted in life and no one was capable of influencing her, that it is not true that she was incapable of executing legal instruments as alleged, that the applicant studied and worked in the United States of America and knows very little

about the deceased who lived in Kenya. They also averred that the applicant knew about the deceased's will and that he was aware of the institution of this case and that he is only feigning ignorance. They also averred that the applicant was aware of the deceased will, hence that is the reason he did not institute succession proceedings for four years after her death.

The Respondents also averred that they subdivided the land as per the deceased grant and the deceased's will, but nevertheless denied that they have any intention of selling the land. In their view, the applicant was not a beneficiary under the will, hence his consent was not necessary. They also swore that the deceased was mentally fit at the time she executed the will. Further, the applicants averred that the applicant was notified about these proceedings. They stated that the deceased will did not provided for the applicant because during her life time the deceased transferred to the applicant as a gift plot number **L.R. 127**, Kiawara Estate in Nyeri Town and annexed the requisite supporting documents.

Also on record in a Replying affidavit filed by **Mwangi Kariuki** Advocate who swore *inter alia* that he knew the deceased for about fifteen years prior to her death as she variously consulted him as her lawyer, that at no time during his interaction with her did he observe her to be mentally unsound, absent minded, forgetful, or in any manner mentally incapacitated as not to know what she was doing. He also averred that he prepared the deceased's will dated 13th June 2011 at the deceased's instructions, that she thump printed in the presence of two witnesses.

The applicant filed a further affidavit on 27th November 2015 and averred *inter alia* that the deceased was also survived by grandchildren from their elder deceased sister **Catherine Wambui Tawuo.** He reiterated that the deceased may have executed the will out of mental illness owing to old age and illness. He attributed the said position to his interaction with her personal doctor. Other averments in the said affidavit are attacks directed to the first respondent which to me are not material to the application before me.

In a supplementary Replying affidavit, the first Respondent averred that **Catherine Wambui Tawuo** is their late sister, that she was married and that none of her children were dependants of the deceased. Other averments in the said affidavit are responses to the personal attacks referred to earlier which to me are of little help to the issues at hand.

At the hearing the applicant testified that he was not aware of the deceased's will, that he used to visit Kenya every year the last being in 2010 and that the deceased never mentioned the alleged will and that he was never involved at the time of filing these proceedings. He insisted that the deceased's intention was to divide his land among all his children in equal shares and that he was not included in the will. He also insisted that the deceased was sickly, aged and illiterate and was not in a position to understand the content of the will. He also stated that he has never had differences with the deceased. He denied that the deceased gave him land elsewhere. Instead he described it as a joint effort in that he build an apartment for her and she transferred the plot to him as a gift.

The applicants witness sat in court though out the time the applicant was giving evidence, a fact that attracted objections from the Respondents counsel, but I allowed her to testify and recorded that while considering her evidence I will bear the above in mind. She testified that she was granddaughter to the deceased. Her evidence was that the deceased brought her up, that she was not aware that the deceased wrote a will, that she was not able to write during her last years. She claimed that she had a right to inherit the decease's estate. Upon cross-examination she admitted that she was married in 1998, that she lives at Muranga and studied at Ngong and Narok and that her fees was paid by her mother and father but the deceased paid for her last year.

The Respondents called **Mwangi Kariuki** advocate who prepared the will. His evidence was he has been in practice for 37 years, that he knew the deceased for about 15 years, that she consulted him on numerous legal issues, that she was mentally alert with a sharp memory and during the interaction he never noted any signs of mental problem and that she was always mentally sound. He recognized the will as the one prepared by him. He recalled that she came to instruct him alone and that he acted in accordance with her instructions which she signed and was witnessed as required and he attested it. He

produced the will as an exhibit. He only came to know the deceased's children after her death.

The first Respondent testified that the deceased was her mother, that the deceased owned properties at Nyahururu being plot number 736 measuring about 20.2 acres and also Nyeri Municipality Block 11/96 and 11/909. That she transferred 11/909 to the applicant on 2 December 2009. She produced documents in support of the transfer. She confirmed she participated in the transfer process. She produced the transfer document done at the Municipal council. She stated that the applicant paid nothing for the property. She also stated that the applicant demolished the temporary structures on the land and put up permanent ones. She stated that the deceased did not have mental incapacity prior to her death and that she is the one who took her to hospital the last time and that most of the time she lived with her, that the applicant came home 10 days after the deceased's death.

She testified that prior to her death she did not know the existence of the will, but the deceased used to say that all her things were with her advocate. That after the burial she informed the applicant and her co-Respondent and the applicant asked her to go to the advocate and she went and took the will and the applicant had a copy of the will before he went back to the U.S.A. and that at that point he had no problem. Subsequently, she told the petitioner about the case and he denied ever signing the consent, hence it is not true that the case was filed secretly. In the will the deceased was not given any property, but the deceased gave him a plot as stated above during his life time.

As for her sister, the first born, she confirmed that she died before the deceased, that she was married at Ngong, Kajiado and that her children were living with their father and that the said children are grow ups now and none of them lived with the deceased. She denied influencing the deceased while writing the will and insisted that she did not know that the deceased was writing a will.

In their submissions, counsel for the applicant citing authorities submitted that the will did not conform to the provisions of section 5 and 11 of the Law of Succession Act[1] hence the same is suspect and void for want of attestation and urged the court to revoke the will.

The Respondents counsel submitted that failure to include the applicant in the will is not a ground to vitiate the will, that the alleged incapacity was not proved by medical evidence.

I have carefully considered the affidavit and oral evidence by both parties and also the relevant law and authorities and in my view, the issues for determination are **(i)** whether or not the applicant has demonstrated sufficient grounds to warrant this court to revoke the deceased's will and **(b)** whether or not the applicants have demonstrated sufficient grounds for court to revoke the grant as provided for under Section **76** of the Law of Succession Act.[2]

I have in several decisions among them *Lewis Karungu Waruiro Vs Moses Muriuki Muchiri*[3] *Reginah Nyambura Waithatu vs Tarcisio Kagunda Waithatu & 3 others**[4]* citing authorities held that:-

> *"All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in Rhesa Shipping Co SA vs Edmunds[5] remarked:-*
>
> > *"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."*
>
> *Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd[6]* ***:-***
>
> > *"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"*
>
> *With the above observation in mind, the starting point is that whoever desires any court to give*

judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person."

I reiterate that it is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed.[7] The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions,*[8]**Lord Denning** said the following about the standard of proof in civil cases:-

'The …{standard of proof}…is well settled. It must carry a reasonable degree of probability…..if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

It is important to mention that there is a rebuttable presumption under Section **5 (3)** of the Law of Succession Act[9] that a person making a will is of sound mind and that the will has been duly executed. I am not satisfied that in the present case it has been demonstrated that the deceased did not had the requisite capacity to make the will in question.

The essentials of testamentary capacity were laid out in the case of *Banks vs. Goodfellow**[10]*** as cited with approval in the case of **Vaghella Vs. Vaghella-**

"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 prevent 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 burden of proof in the first instance lies upon the person alleging lack of capacity. Once it is established to the satisfaction of the court that in fact the testator was not of sound mind then the onus is shifted to the person propounding the will to prove the existence of mental capacity. This was the holding of the court in the case of *In Re Estate of Gatuthu Njuguna (Deceased)*where it quoted an excerpt from *Halsbury's Laws of England*

"where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity."

As pointed above, the applicant raised the issue of lack of capacity of the deceased and claimed to have been friends with the Doctor who was attending the deceased but carefully failed or omitted to call the

said doctor or any other doctor to shed light on the issue by enlightening the court on the nature of illness that was afflicting the deceased and the extent if any it had incapacitated or impaired her mental capacity. Such evidence could have assisted the court in concluding whether the will was properly made and that the deceased knew what she was doing at the material time.

Section **11** of the Law of Succession Act, provides for the formal requirements of a valid will. It states:-

> *11. 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.*

There is nothing before the court to show that the above section was not complied with. There are four main requirements to the formation of a valid will:-

> *a. The will must have been executed with testamentary intent;*
>
> *b. The testator must have had testamentary capacity;*
>
> *c. The will must have been executed free of fraud, duress, undue influence or mistake; and*
>
> *d. The will must have been duly executed.*

Testamentary intent involves the testator having subjectively intended that the document in question constitute his or her will at the time it was executed. There is nothing before me to show that the deceased never intended the said document to be her will. In addition to testamentary intent, the testator must have the testamentary capacity, at the time the will is executed. Generally, it takes less capacity to make a will than to do any other legal act. As guidance, a four-prong test is often used. The testator must:-

> *a. Know the nature of the act (of making a will);*
>
> *b. Know the "natural objects of his bounty";*
>
> *c. Know the nature and extent of his property;*
>
> *d. Understand the disposition of the assets called for by the will.*

After evaluating the law, the authorities and the facts of this case, I find that the deceased's will satisfies the above four requirements. Secondly I find that the applicant has not sufficiently demonstrated any valid grounds to challenge the validity of the deceased's will. Accordingly, I find that the deceased will was valid. My view on this is point is fortified by the clear evidence of the advocate who prepared the will. It has not been shown that the deceased was influenced in any manner at the time of writing the will.

It is on record that the deceased transferred a plot to the applicant during her life time but omitted to provide for him in the will. I find that the deceased made reasonable provisions for all his children

including the applicant herein by transferring a plot to him *inter vivos* and provided for the Respondents in the will. I also fin that there is nothing on record to show that the children of the deceased's first born were dependants of the deceased.

A observed above, testamentary intent involves the testator having subjectively intended that the document in question constitutes his or her will at the time it was executed. I find nothing in the testimony of the applicant to demonstrate that the deceased never intended the contents in the will to constitute her wishes. As stated above, I also find that the deceased made reasonable provisions for all his children, first during her life time, and also in the will.

The other issue for determination is whether or not the applicant demonstrated any grounds to enable the court to revoke the grant as provided under section 76 of the Law of Succession Act which 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* ***an 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 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 untrue allegation of a fact essential in point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently;*
>
> *d. .....*

The above provision was judicially construed by the court of appeal in the case of *Matheka and Another vs Matheka* where the court of appeal laid down the following guiding principles.

> *i. A grant may be revoked either by application by* ***an interested party*** *or* ***by the court on its own motion****.*
>
> *ii. Even when revocation is by the court upon its 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 the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.*

The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds. A close look at Section **76** shows that the grounds can be divided into the following categories:- the propriety of the grant making process; mal-administration or where the grant has become inoperative due to subsequent circumstances.

It is trite law that if a grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled.

The provisions of section 76 cited above were construed by the court of appeal which laid down the following guiding principles; namely; A grant may be revoked either by application by **an interested party** or **by the court on its own motion** *and* Even when revocation is by the court upon its 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 the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point

of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.

The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the grounds stipulated is section 76 of the act. The grounds laid down in section **76** can be divided into the following categories:- the propriety of the grant making process; mal-administration or where the grant has become inoperative due to subsequent circumstances.

It is trite law that if a grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently, or if the proceedings are defective in substance such a grant can be revoked or annulled.

The expression "defective in substance" has been judiciary construed to mean that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. I have examined the process through which the grant was obtained and I find that it cannot be said to have been defective in substance.

A grant can also be revoked on account of false statements and concealment of vital matters or on grounds that the applicant deceived the court as was held in *Samuel Wafula Wasike vs Hudson Simiyu Wafula.* As stated above, I find that there was no deliberate non-disclosure of relevant materials. There is nothing to show that there was a deliberate omission of any relevant information. **Koome J** summarised the grounds for revocation of a grant under Section **76** as follows, *when the procedure followed in obtaining the grant is defective in substance, when the grant is obtained fraudulently by making a false statement, making an untrue allegation of fact essential in point of law to justify the grant and or when the person who has the grant has failed to proceed diligently with the administration of the estate.*

A grant whether confirmed or not can be revoked on the grounds enumerated under Section **76** of the Act which I find **not** to have been proved in this case. I find that the applicant has not established sufficient grounds for the court to annul or revoke the grant as provided under section **76** of the Act.

Accordingly, I hereby dismiss the application dated 31st March 2015 with no orders as to costs.

Right of appeal 30 days

Signed and Dated at **Nyeri** this **24th** day of **November 2016**

John M. Mativo

Judge

Delivered at Nyeri this **24th** day of **ovember 2016**

Hon. Justice Jairus Ngaah

Judge