



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 526 OF 2006

IN THE MATTER OF THE ESTATE OF FRASIAH WANJIKU MWANGI (DECEASED)

JUDGMENT

1. The deceased herein died on 5th October 2003.
2. This cause commenced on 14th March 2006 when a petition was lodged herein for grant of probate in respect of the estate of the deceased. The petition was at the instance of one of the beneficiaries named in the purported will of the deceased, Fredrika Mukonui Muchiri. She alleged that the deceased had died testate for she had made a written will on 22nd September 2003, where she and Simon Ngige Kariuki, Grace Gathoni Muongi, Leonard Mwaura Muingi and Patrick Munyui Njoroge had been named as beneficiaries. She alleged further that the will had appointed Wilson Mbugua Mungai as executor thereof, but she did not know of his whereabouts and expressed the view that he was unwilling to act as such.
3. Citations were issued by the court on 26th April 2006 for service upon the persons named in the alleged will as beneficiaries. There is on record an affidavit of service sworn on an unknown date in 2006, but filed in court on 21st June 2006, alleging that the citations had been served on the citees on 17th and 23rd April 2006. Another citation was issued by the court on 6th November 2006 for service upon the executor named in the will. An affidavit of service sworn on 9th January 2006, and filed in court on 23rd January 2007, indicates that the said executor was served with the citation on 6th November 2006 through his sister in law, Christine Wanjiru.
4. The citees did not enter appearance, and the court consequently made a grant of letters of administration with the will annexed to Fredrika Mukonui Muchiri on 1st October 2007.
5. There is another cause filed in another court for representation intestate. That was in Kiambu CMCS No. 162 of 2007. The petition in that cause was by Leonard Mwaura Muongi and Patrick Munyui Njoroge in their alleged capacities as children of the deceased. The deceased was expressed to have been survived by eight (8) individuals namely Beatrice Wanjiru Mbugua, Esther Wambui Kamiri, Leonard Mwaura Muingi, Fredrika Mukami Muongi, Elizabeth Waringa Njau, Patrick Munyui Muongi, Irene Njeri Muruga and Grace Gathoni Muongi. The Acting Chief of Ruaka Location, in a letter dated 10th August 2007, identified the eight (8) as children of the deceased. The deceased was said to have died possessed of four (4) assets, being Kiambaa/Ruaka/1633, 1635, 1636 and 1637.
6. As the deceased had been said to have died intestate, a grant of letters of administration intestate was made to the petitioners on 8th October 2007. The grant has not been confirmed, but there is a pending application for its confirmation dated 19th May 2008.

7. The administrators appointed in Kiambu CMCS No. 162 of 2007, that is to say Leonard Mwaura Muongi and Patrick Munyui Njoroge, moved the court in this cause on 23rd April 2008, by a summons dated 24th December 2007, seeking revocation of the grant made herein on 1st October 2007. They alleged that the grant was obtained secretly as they had not been served with citations. The applicants concede that they had filed Kiambu CMCS No. 162 of 2007 but after informing the administrator in the instant cause but she declined to cooperate. They sought to have the instant grant revoked.

8. The administrator herein, hereinafter referred to as the respondent, replied to the application through an affidavit sworn on 9th May 2008. She avers that the proceedings leading up to the grant herein were proper and not defective in any way. She asserts that she had properly served citations on the beneficiaries and executor named in the will. She further avers that one of the applicants had in fact collected a copy of the will from her advocates, adding that the cause had been gazetted in keeping with the law. She further avers that she had not had prior knowledge of the Kiambu cause.

9. Directions on the disposal of the revocation application were made by Kimaru J in the following terms:-

‘By consent, directions are hereby issued that the issue to be determined by the court in the first instance, is the validity of the will. To that effect, the advocate who drew the will and the witnesses named in the will shall be called to testify in court. The said witness shall depone to the facts relating to the circumstances the dispute was written in an affidavit. Thereafter, they shall be cross-examined on the contents of their affidavits.’

10. In compliance with those directions, Stephen Wanyoike Kinuthia, swore an affidavit on 22nd October 2010, which was filed in court on 27th October 2010. He avers in that affidavit as to the circumstances that led to him coming to know the deceased, that was when her sons were disposing of specified parcels of land and the deceased came along and signed the sale agreements as a witness. Regarding the will, he avers that he was approached by a daughter of the deceased, called Grace Gathoni Muongi, sometime in early in September 2003, who informed him that the deceased was sick and wished to make a will. He was then taken by the daughter to the deceased at the daughter’s premises where he took instructions. He went back to his office and prepared the will, and on the afternoon of 22nd September 2003 he went back to Githurai, in the company of Grace Gathoni Muongi and explained the contents of the will to the deceased, who confirmed them to be correct. The deceased then thumb-printed the will in the presence of two (2) witnesses, being Wilson Mbugua Mungai and Joseph Kariuki Ndungu, who also signed the will. Other than the witnesses who signed on the document, the deponent, Grace Gathoni Muongi and Christine Wanjiru, daughter of Grace Gathoni Muongi, were also present and saw the deceased append her signature on the document.

11. The oral hearing commenced on 7th May 2013. Stephen Wanyoike Kinuthia was the first to take the witness stand. He stated that he was the advocate who drew the disputed will on the instructions of the deceased. He took the document for execution by the deceased at her daughter’s residence at Githurai. He saw her sign the document, and he also watched as two (2) of the witnesses signed after the deceased.

12. The next person to testify was the petitioner herself. She described herself as a daughter in law of the deceased, being the widow of one of the deceased’s sons. She stated that the deceased had prior to her death mentioned to the family, at a time when she had been admitted in hospital, that she would make a will. She said the deceased called another meeting at Githurai a week to her death to announce that she had made a will where she gave directions about the children booking a meeting with the Land Control Board. The witness testified that she learned that the will of the deceased was in the custody of Mwicigi, Advocate. She approached the said advocate after the deceased’s death and she was shown the will, which she identified in court. She was advised by the advocate to follow the right procedure by going to court.

13. On cross-examination, the petitioner stated that prior to her death; the deceased had been staying with her daughter, Grace Gathoni, at Githurai. The witness said that she used to visit them after every two (2)

days. She described the deceased as having been sickly, and had even lapsed into a coma, but recovered. She said she could talk, but not walk properly. Her health was said to have had improved significantly before her demise. She stated that at the meeting that she had called at Githurai all her children were present; she did not talk about the will, but about booking a meeting with the land control board.

14. Joseph Kariuki Ndungu was the first witness on the objector's side. He said that the deceased was the mother of his mother-in-law, Grace Gathoni. He confirmed that he had signed the will. He confirmed too that the deceased was living with his mother in law at Githurai, whose house was not far from his, as she was ill. At the time she was brought to Githurai, the deceased was said to have been talking and in fair health, but her health deteriorated, and she was even admitted in hospital and even lapsed into a coma. On the events of 22nd September 2003, he testified that he went to where the deceased was to administer medicine to her, and found her with Mr. Mwicigi, Advocate, and Grace Gathoni, his mother in law. He alleged he was given a piece of paper by his mother in law which he signed, although he had not seen its first page. He said that he signed the document as he trusted his mother in law for they had done many things together prior to that date. He stated that there were no other persons present except the three (3) of them. He said that the deceased was in bad shape at the time and could not possibly call a family meeting.

15. The objectors did not call any other witnesses, although they had been allocated the 14th July 2015 as the next hearing date. Neither the applicants nor their advocate attended court on that day. It was deemed that the applicants had closed their case, and the parties were directed to file written submissions. In the end only the petitioner filed written submissions. I have perused the same and noted that they do not raise any points of law.

16. The only issue for determination is whether or not the deceased had made a valid will.

17. The deceased died in 2003, long after the Law of Succession Act, Cap 160, Laws of Kenya, came into force on 1st July 1981. The law on validity of wills executed after 1981 is Part II of the said Act. The specific provisions relevant for our purposes are sections 5 and 11 of the Act, which deal with testamentary capacity of the testator and formalities surrounding the making of the will.

18. Section 5 states as follows:-

'(1) Subject to the provisions of this Part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.

(2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.

(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

(4) The burden of proof that a testator was, at the time he made the will, not of sound mind, shall be upon the person who so alleges.'

19. At the time the alleged will was made the deceased met, on the face of it, one key testamentary requirement. She was an adult female. The only issue that is contested in this case is as to her mental capacity, or, put differently, soundness of mind as at the material time. Section 5(3) creates a rebuttable presumption with respect to wills, that the maker was of sound mind at the time of making the will, until the contrary is established. Burden of proving lack of mental capacity is cast on the maker of the allegation by section 5(4).

20. I have noted that in the affidavit sworn in support of the application that the applicant asserts that the deceased did not make any will, implying that she could not make one as she was elderly and very sick.

21. I have seen and perused through document that has been put herein in evidence by the respondent as the will of the deceased. It is professionally drawn by an advocate. There is a thumb print which is purported to be that of the deceased. There are also signatures of the three witnesses. The advocate who drew the will testified to having had received instructions from the deceased to prepare the will. One of the witnesses also attested to having signed the document and to having seen the advocate at the scene together with the person who had brought the advocate to where the deceased was. The evidence of all three witnesses' tallies. The common thread being that a will was executed on 22nd September 2003 by the deceased. There cannot be any basis for alleging that the deceased did not make a will. She did make one, perhaps the question to flow from that could be whether the same was valid.

22. Although it is alleged by the applicants that the deceased was elderly and sickly at the time, the applicants themselves did not attend court to support those assertions. The person who testified as the applicants' witness did not allude at all as to the deceased's state of mind at the time. He only said she was in bed and could not get out of bed. He did not venture to testify as to her soundness of mind at the material time. The applicants are the ones alleging that there was no valid will; it was incumbent upon them to adduce evidence to support that assertion. No such evidence has been adduced so as to displace the presumption of soundness of mind stated in section 5(3) of the Act and to controvert the evidence adduced by the advocate who drew the will.

23. Section 11 of the Act states the formal requirements for a written will. I have perused through the document filed herein as the will of the deceased. As noted earlier it bears what is said to be the signature of the testator, which is supported by the signatures of the attesting witnesses. I was satisfied by the evidence of the advocate who drew it that he was present when it was executed by the deceased and her signature attested by two of the witnesses. I am therefore satisfied that the said will complies with the requirements of section 11 of the Act so far as the formalities are concerned.

24. In view of what I have stated above, it is my conclusion that the deceased did leave a valid will executed on 22nd September 2003. It would appear from the material before me that the person named in the papers as the executor of the will has not come forward to obtain probate to the will, neither has he formally renounced probate.

25. I am moved in the circumstances of this case to make the following orders:-

(a) That the two causes herein in respect of the estate of the deceased, that is to say this cause and Kiambu CMCS No. 162 of 2007, are hereby consolidated, and the lead file shall be HCSC No. 526 of 2006;

(b) That the grants of representation made in both causes are hereby revoked;

(c) That the deceased herein died testate and her the estate shall be distributed in terms of her will made on 22nd September 2003;

(d) That I shall grant representation to the estate of the deceased to the persons who had been granted representation in in this cause and in Kiambu CMCS No. 162 of 2007, that is to say Fredrika Mukoniri Muchiri, Leonard Mwaura Muongi and Patrick Munyui Njoroge;

(e) That a grant of letters of administration with the will annexed shall accordingly issue to them;

(f) That the estate comprises of assets situated at Kiambaa of Kiambu County, I shall therefore accordingly order that this matter be transferred to the High Court of Kenya at Kiambu for disposal; and

(g) That there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH DAY OF NOVEMBER, 2016.

W. MUSYOKA

JUDGE