REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 351 OF 2002

IN THE MATTER OF THE ESTATE OF MUKONO KANGARU (DECEASED)

JEDIDA NJUTHE MUKONO..... PETITIONER/APPLICANT

VERSUS

NYAGA MUKONO……..……. 1ST PROTESTER

SINFRONZA WAKINA NJERU……..2ND PROTESTER

AND

KENNEDY SAMUEL NWIGA)

PETER NYAGA M'TATHI)…….....……INTERESTED PARTIES

NDWIGA MBUTHIA)

R U L I N G

This is a ruling on an application dated 24/4/2015 brought under Rules 43(1) and 73 of the Probate and Administration Rules and Article 159(1)(d) of the Constitution seeking for the following prayers:-

1. *That the grant of letters of administration issued to the applicant Jedida Njuthe in this matter on the 20/4/2005 be rectified in the following respect:-*

   The grant to be changed from "letters of administration intestate" to "grant of probate of the will of the deceased dated the 30th May 1990".

2. *The costs of this application be provide for.*

The application is supported by the affidavit of Jedida Njuthe Mukono. She states that she is the administrator of the estate of the deceased who died on 26/7/1994. The Grant of letters of Administration was made on 20/4/2005 and cannot be confirmed as she discovered that the deceased had made a will before his death. She applies to the court to convert the intestate succession to testate.

The 1st protestor filed grounds of opposition against the application. He argues that under Rules 43(1) and 74 of the Probate and Administration Rules, an intestate grant cannot be convert into a grant of probate. The provisions relied on are only applicable if there is an error in the grant as to names or description. The alteration sought does not amount to a technicality under Article 159. The estate of the deceased is fully administered and distributed to third parties as per the confirmation of grant made in

1996. This application has been overtaken by events. The document annexed to the application does not constitute to a valid will.

The 2nd protester opposed the application relying on her replying affidavit. She states that the applicant had all along been in possession of the will and ought to have introduced it in the succession cause before it was finalized. The will was not witnessed as required by the law and is therefore not valid. The application is an afterthought meant to defeat justice.

The 1st, 2nd and 3rd interested parties also filed joint grounds of opposition in which they argue that the will is not valid for failure to comply with the law. The intestate succession proceedings have been finalized and cannot be converted into a grant of probate.

The application came for hearing on 16/6/2015 when the court directed the parties to file written submissions. It is only the protestor who filed his submissions on 26/6/2015. She states that she is the wife of one Angelo Kakorua Kangaru who was the younger brother of the deceased. The deceased was registered as the proprietor of Kagaari/Weru/527 which he had sub-divided into 4 parcels LR. Kagaari/Weru/3232, 3233, 3234 & 3235. The 2nd protester states that she is only claiming parcel No. 3235 which is her late husband's share. The original parcel No. 527 was given to the deceased by the clan to hold in trust for himself and his brothers.

The issues for determination in this application are whether an intestate succession can be converted into a testate succession and whether the purported will is valid.

Section 11 of the law of Succession Act provides for the requirement of a valid will as follows:-

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.

The document annexed to the application and marked "JNM 1" was purportedly signed by one Mukono Kangaru on 30/5/1990. It lists the assets of the deceased as parcels Nos. Kagaari/Nthagaiya/3232, 3233, 3234 & 3235. The dependants of the deceased are also listed as Jedidah Mukono (wife) who is the petitioner followed by five sons who are named therein. The will does not distribute any of the properties listed therein. Neither has it been witnessed by any person.

According to the provisions of Section 11(c), a valid will must be attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark on the will. The purpose of a will is to distribute the testator's properties to his beneficiaries. The document annexed does not distribute or bequeath any of the properties listed to any beneficiary. The document does not comply with the requirement of Section 11 of the Act and is therefore void for all intents and purposes. The grant was confirmed on 9th of December, 1997 and the estate has been fully distributed. It would be futile to disturb the intestate proceedings which have been finalized.

In view of the invalid will, it follows that the intestate proceedings in this case are appropriate. I reach a conclusion that the application is not merited and is hereby dismissed.

Each party to meet their own costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF SEPTEMBER, 2015.

F. MUCHEMI

J U D G E

In the presence of:-

The Petitioner/Applicant

Both Protesters