



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 701 OF 2011

IN THE MATTER OF THE ESTATE OF WANGOI MUTONGA (DECEASED)

RULING

1. The cause herein is in respect of the estate of Wangoi Mutonga who died on 18th November 2010.
2. The deceased died testate having left a valid will made on 15th July 2010. On 31st January 2014 a grant of probate of the said written will was made to Annah Wanjiku Kamori.
3. The Summons dated 20th August 2014 seeks that the gift made to the executor and the sole beneficiary named in the will of 15th July 2010 be declared to have adeemed partially in respect of the developed portion of Plot. Occ. Ind. 16/Kware/OR/Res/Loa/Vol.1/740 Kwale. It also seeks appointment of administrators in respect of part of the estate that is unadministered.
4. The applicant deposes in an affidavit sworn on 20th August 2014, that the will of 15th July 2010 only attempts to dispose of the property described as Plot. Occ. Ind.16/Kware/OR/Res/LOA/740 Kwale, yet there are other assets owned by the deceased that were not disposed of by the will. He claims to have had owned one half of Plot. Occ. Ind.16/Kware/OR/Res/LOA/Vol.1/740 Kwale with the deceased. Accordingly, the deceased could only dispose of only one half of the said property.
5. He has attached to his affidavit copies of several documents. There is copy of a title deed in respect of Kajiado/Kitengela/4028 registered in the name of the deceased in 1992. Documents from the City Council of Nairobi indicating the deceased to be the owner of House/Flat No. 313/3 (A/C No. 73268) Mathare Valley Tenant Purchase Scheme. There are several documents from the County Council of Olkejuado regarding Plot No. 740/Residential – Kware Ongata Rongai T. Centre, which depicts the deceased as co-owner with the applicant. There is an affidavit allegedly sworn by the two co-owners of Plot No. 740/Residential – Kware Ongata Rongai sometime in 2011 alleging that the original allotment letter was lost, but curiously the affidavit is signed by only one of the deponents. Then there is copy of title deed in respect of Kjd/Kitengela/2367, which is in the name of the deceased and three others.
6. The executor of the will dated 15th July 2010 has responded to the application vide her affidavit sworn on 16th September 2014. She asserts that the deceased was the sole owner of Plot No. 740/Residential Kwale Ongata Rongai. She dismisses the documents attached to the applicant's affidavit, depicting him as a co-owner of the plot with the deceased, to be forgeries and attempts by the respondent to unlawfully add his name as co-owner with the deceased. She cites correspondence from the County Council of Olkejuado dated 26th May 2011 as proof that the deceased was sole owner of the property in question. She says that if there are other assets belonging to the deceased, and which are not disposed of by will, then the applicant should be at liberty to apply to have them disposed of in a separate cause in intestacy.

7. Attached to the affidavit of the executor are several documents meant to demonstrate that Plot No. 740/Kware-Ongata Rongai belonged to the deceased. There is a letter from the deceased to the Clerk of the County Council of Olkejuado, dated 21st September 2010, where she complains of changes having been made to the ownership of the plot without her knowledge. A letter of allotment from the County Council, dated 24th January 2000, mentions the deceased as the sole allottee of the said property.
8. I directed on 23rd September 2014 that the application dated 20th August 2014 be disposed of by way of written submissions. Both sides have filed their respective submissions.
9. The instant cause commenced on the basis that the deceased died testate, and as a consequence a grant of probate of written will was made on 31st January 2014 to the person named in the will made on 15th July 2010 as executor thereof. The said will disposed of two assets – House No. 1313/3 account No. 73268 Mathare Estate, Nairobi and Plot. Occ. Ind.16/Kware/OR/Res/Loa/Vol.1/740 Kwale. The two are to devolve upon the executor of the will. The wording of the will is such that it does not dispose of any other property, and any other property owned by the deceased cannot pass under the terms thereof.
10. The applicant alleges that the deceased owned other assets, quite apart from the Kware and Mathare properties. It is in respect of these that he asks for appointment of administrators to deal with the assets that are not disposed of in the will.
11. The present cause only deals with the assets that are specifically mentioned as disposed of in the will of the deceased. It is not capable of disposing of or dealing with any other assets not so mentioned. Consequently, if the deceased died possessed of any other property, then he died intestate with respect to those assets. The administration of such assets cannot be done within a testate cause, but separately in an intestate cause. I cannot therefore in the instant testate cause make any orders relating to the intestate administration of any assets that the deceased died intestate in respect of. The survivors of the deceased ought to commence a separate cause in intestacy to administer such assets.
12. On whether there was partial ademption of the gift in the will relating to the Kware property, I doubt whether the applicant has legal standing to mount an application of the nature of the one before me. He is not the executor named in the will, and I doubt whether he should be the right person to ask me to give a particular construction to the will on record.
13. Be that as it may be, he alleges that he co-owned the said property with the deceased, and he has placed before me documents to support his claim. He has exhibited a letter from the County Council of Olkejuado to the effect that the said plot had been allocated to him jointly with the deceased in 2000. There is also an official search to that effect from the same local authority. There is too copy of her affidavit allegedly sworn by the two purported allottees sometime in 2011 to the effect that original allotment letter was lost.
14. The counter evidence is that the allotment of 2000 was to the deceased alone. The applicant is alleged to have tried in 2010, or thereabout, to have his name inserted into the record as co-owner with the deceased. Letters from the local authority confirm that the property was in the name of the deceased alone.
15. I cannot in the face of the allegations from the two rival sides, and especially in view of the conflicting correspondence from the County Council of Olkejuado, to find one way or the other. One of the two sets of documents from the County Council of Olkejuado must be forgeries. I cannot tell them apart unless I hear from officers of the said local authority.
16. There would have been no basis of hearing this application orally and therefore the only place where such oral evidence can be taken is during the hearing of the summons for confirmation of grant dated 4th August 2014 where either of the parties may call officers from the County Council

of Olkejuado as their witnesses.

17.I shall therefore direct the applicant to file an affidavit of protest to the application dated 4th August 2014. The said application shall be disposed of by affidavit and oral evidence, where the Clerk to the County Council of Olkejuado, or the equivalent officer from the equivalent entity or authority, shall testify on the ownership of Plot No. 740/Res. Kware – Ongata Rongai.

18.In the meantime the application dated 20th August 2014 is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 30TH DAY OF OCTOBER, 2015.

W. MUSYOKA

JUDGE