



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1728 OF 2000

IN THE MATTER OF THE ESTATE OF MWANGI KIMANGA (DECEASED)

ALICE WANJIKU MWANGI.....1ST APPLICANT

MARY WAIHERA MWANGI.....2ND APPLICANT

JANE WAMAITHA KIMANGA.....3RD APPLICANT

VERSUS

PRISCA WANJIKU KIMANGA.....1ST RESPONDENT

STEPHEN MAINA KIMANGA.....2ND RESPONDENT

AND

GERALD IRUNGU.....1ST INTERESTED PARTY

ALICE WANJIRU.....2ND INTERESTED PARTY

JUDGMENT

1. The deceased Mwangi Kimanga died on 17/11/99. On 15/8/00 his widow Prisca Wanjiku Mwangi (1st respondent) and his son Stephen Maina Kimanga (2nd respondent) petitioned this court for the grant of letters of administration intestate. The other beneficiaries disclosed in the petition were his two other sons Fredrick Njora Mwangi and Moses Kimanga Mwangi. A grant was issued on 19/3/01 and confirmed on 20/12/04. It is admitted by the respondents that before the grant was confirmed they came to know through an advocate known as Mr.Githogo that the deceased had infact left a will dated 27/6/94 indicating how he wished his estate to be shared. They decided to share the estate in accordance with the contents of the will. This is reflected in the certificate of confirmation, they say.
2. Alice Wanjiku (1st applicant), Mary Waithera Kimanga (2nd applicant) and Jane Wamaitha Kimanga (3rd applicant) filed this summons dated 8/9/15 seeking, among other orders, the

- revocation of the grant. In the alternative, they asked that the grant be rectified to provide for them as beneficiaries of the estate of the deceased. Their case was briefly that, the deceased had two wives (houses), the 1st applicant being the 1st wife and the 1st respondent being the 2nd wife. The 1st applicant's children are the 2nd and 3rd applicants. The other children were Loise Nyambura Kimanga (deceased) and Esther Njeri Kimanga (deceased). The 1st applicant was married under Kikuyu customary law. Somewhere along the line, there was a dispute in the family which led to the 1st applicant leaving the matrimonial home with her children. The 2nd family, however, was always aware of the existence of the 1st family.
3. The respondents denied that the deceased had any other family. In the replying affidavit sworn by the 2nd respondent it was stated that the 1st respondent was the only wife of the deceased, and that the two had married in 1981 under the African Christian Marriage and Divorce Act (Cap 151). It was denied that the applicants were beneficiaries of the estate of the deceased.
 4. The applicant's case is that they had not been informed about the petition, and stated that they had subsequently only come by it. They stated that they were beneficiaries of the estate of the deceased who had been excluded from the estate.
 5. Mr. Wangalwa for the applicants and Mr. Njuguna for the respondents filed written submissions, each to support his client's case. I have considered the same.
 6. I have stated in the foregoing that after the respondents had obtained a grant of letters of administration intestate they became aware that the deceased had in fact written and left a will; he had died testate. Yet, the petition was on the basis that the deceased had died intestate. Under section 51(2) (e) of the **Law of Succession Act (Cap 160)** and **Rule 7(1)(c) of the Probate and Administration Rules**, a petitioner has to disclose whether the deceased died testate or intestate. The respondents may not have known that the deceased had left a will, but they concede that before the grant was confirmed they became aware of the existence of the will. The grant was therefore confirmed on the basis that the deceased had died intestate. It matters not that they may have used the contents of the will to propose how the estate should be shared. They did this without letting the court know that there was a will. There was intentional non-disclosure of the fact that there was a will. Secondly, in proceeding on the basis that this was an intestate succession when there was in fact a will, the proceedings were defective in substance (**IN THE MATTER OF THE ESTATE OF WACHIRA KIORE MANYETU alias SAMUEL WACHIRA KIORE (Deceased) [2015] e KLR**).
 7. Once the respondents became aware that the deceased had left a will, they ought to have withdrawn the petition and filed a fresh petition for grant of probate. The result is that the grant that was issued to the respondents on 19/3/01 and confirmed on 20/10/04 is revoked. Any transactions that were carried out in respect of any of the assets of the deceased are hereby cancelled and the ownership of each asset ordered to revert into the name of the deceased. The executors appointed as per the will are hereby directed to immediately file petition for grant of probate wherein the applicants shall file the necessary objection. I allow the application with costs.

DATED and DELIVERED at NAIROBI this 11th December 2015.

A.O. MUCHELULE

JUDGE