



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

SUCCESSION CAUSE NO. 701 OF 2011

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

RULING

1. The deceased person whose estate is the subject of these proceedings died on 18th November 2010.

2. Representation to his estate was sought on 8th April 2011 by Anna Wanjiku Kamori through a petition for probate of written will dated 7TH April 2011.

According to the petitioner, the deceased died testate having made a written will on 15th July 2010.

3. The petition was gazetted on 22nd July 2011. Thereafter Stephen Wainaina Kamori objected to the petition and filed an answer to the petition and a petition by way of cross-application.

4. A number of issues were raised in the papers filed by the objector, these include:-

(a) that he is an beneficiary of the estate.

(b) that he was wrongfully excluded from the will.

(c) that no provision was made for him.

(d) that the will was silent on the distribution of the deceased's other property.

(e) that the deceased was in poor health at the time of making the alleged will which must have impaired his judgement.

5. At the hearing of the objection on 7th May 2013 counsel for the objector submitted that the objector was a rightful beneficiary of the estate who was wrongfully excluded from the will of the deceased. It was also submitted that the will was silent on the apportionment of the estate.

6. The parties filed written submissions. From the material before me it would appear to be the objector's case that the will is invalid because the deceased was in no state of mind to make it, or, alternatively that the will on record is valid but it excluded him from benefit in which case he ought to be provided for.

7. The objector cites *Section 5(3)* of the Law of Succession Act to support his claim that the deceased was not in the right state of mind to make a valid will. Whether or not the deceased was of requisite state of mind is a matter that can be resolved only on the basis of concrete evidence.

The material placed before me does not at all deal with the deceased's state of mind as at the time he executed the will. Needless to say that the best evidence on the state of mind of a testator can only be given orally. No oral evidence was presented before me. I have no evidence before me of the persons who were present when the will was signed to support the objector's contention that the deceased was not of the requisite state of mind.

8. *Section 5(4)* of the Law of Succession Act states:-

“The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.”

9. In this case it is the objector who alleges that the deceased did not have the requisite state of mind at the time she made the will. *Section 5(4)* of the Law of Succession Act, casts the burden of proof on him to establish that that was the case. In view of what I have stated above, that burden has not been discharged. It has not been proved that the deceased was not of the requisite state of mind at the time she executed her will on 15th July 2010.

10. The objector says that if his argument as to the invalidity of the will fails then the court ought to apply *Section 26* of the Law of Succession Act.

11. *Section 26* of the Law of Succession Act provides as follows:-

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may...”

12. From the wording of *Section 26* of the Act, it is clear that the discretion given by *Section 26* is unlocked following an *“application by or on behalf of a dependant.”* There is no application before me made under *Section 26* of the Law of Succession Act. The language of *Section 26* of the Act is to the effect that the discretion given under that provision is not to be exercised *suo moto* but upon an application in that behalf. That is so as there are matters that go into an application brought under *Section 26* of the Law of Succession Act. These matters are set out in *Section 28* of the Act. The application brought under *Section 26*, must deal with the matters set out in *Section 28* of the Act.

13. A court handling objection proceedings cannot properly exercise discretion under *Section 26* of the Act. Objection proceedings relate to the propriety of making a grant to the persons who have petitioned for such grant. These proceedings have nothing to do with reasonable provision to dependants. The evidence placed before the court in objection proceedings would be inadequate for the purpose of the exercise of discretion under *Section 26* of the Act. A party facing objection proceedings would be addressing themselves to the issues arising in these proceedings and no doubt would be unprepared to meet a case for or against reasonable provision. It would in my view be unjust for a court to purport to exercise discretion under *Section 26* of the Act in objection proceedings given that the material placed before it would not be geared to help the court in that respect.

14. It is imperative to point out that a will is not to be invalidated purely on the grounds it does not provide for some persons who were dependent on the deceased or on the ground that it does not dispose of all the assets. There is freedom of testation. If a will is valid, on account of having been executed in proper form by a person who was of the requisite state of mind, the same ought to be upheld. Where there are assets that have not been dealt with in the will or at any rate which cannot pass in the terms of the will, then such assets have to be dealt with as if the deceased died intestate with respect to them. A grant of letters of administration intestate ought to be obtained to deal with them. A person, who feels that he is entitled to an estate, but is not provided for as per the terms of the will of the deceased, has a remedy in *Section 26* of the Act. He ought to move the court appropriately under *Section 26* of the Act.

15. I have come to the conclusion that that there is inadequate material before me upon which I can allow the objection proceedings before me. The proceedings lack merit and are for dismissal and I hereby dismiss them.

16. I direct that a grant of probate of the written will of Wangoi Mutonga made on 15th July 2010 be made to the petitioner herein, Annah Wanjiku Kamori.

17. There shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 31st DAY OF January, 2014.

W. MUSYOKA

JUDGE