



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO: 2732 OF 2008

IN THE MATTER OF THE ESTATE OF EPHANTUS MUNYUTU WAIGI – (DECEASED)

RULING/DIRECTIONS

1. On 27th June 2013 I directed the executor/personal representative of the deceased to place before me the will made in 2004 together with the will made in 2000 and the codicil made in 2007.
2. This followed the application made by the personal representative dated 17th April 2013. He sought by that application to have the certificate of grant issued by the court on 4th December 2013 (the correct year should be 2012) rectified to reflect the testator's intention as set out in the will dated 12th January 2000.
3. The personal representative did on 29th October 2013 file herein a supplementary affidavit sworn on 29th October 2013. In that affidavit, he attached copies of the wills made on 12th January 2000, 24th November 2004 and the codicil signed on 12th July 2007. All three documents have evidence of execution by the testator. The 2000 will has a signature against the name of the testator, while the 2004 will and the 2007 testator have a thumb printed or embossed against the name of the testator. All three have the names, addresses and signatures of the attesting witnesses as required by the law.
4. The will executed in 2004 expressly revokes the will made in 2000. Its clause 1 reads as follows:-

“I revoke all other wills and testamentary dispositions hereto before made by me and declare this to be my last will.”

The “other wills and testamentary dispositions hereto before made by me” include the will made and executed in 2000. The will made in 2000 has therefore been revoked and it cannot form basis for distribution for the estate of the deceased.

5. The law on this is **sections 17 and 18** of the Law of Succession Act, which provide that –

“17. A will may be revoked or altered by the maker of it at any time when he is competent to dispose of his free property by will.

18.(1)... no will or codicil, or any part thereof shall be revoked otherwise than by another will or codicil declaring an intention to revoke it, or by the testator, or by some other person at his direction.”

6. Going by the above provisions, the 2000 will can only be upheld on evidence that the 2004 will was

not competent, either because the revocation was not by the testator or he was not competent at the time in 2004 to revoke the will or that he did not at the time have an intention to revoke the will. No evidence has been placed before me to demonstrate that the 2004 will was not valid; either on account of incompetence on the part of the deceased or on account of want of form. In the absence of proof, I find no basis upon which I can declare it invalid. The consequence of its being declared valid renders the 2000 will invalid, having been revoked by the 2004 will.

7. The codicil executed in 2007 deals only with the 2004 will. It is silent on the 2000 will as the said 2000 will was no longer effective having been revoked by the 2004 will.

8. A codicil may be described as a document which is supplementary to a will. It does not stand alone like a will. It is attached to some will. It does not have a life of its own, for it rides on a back of a will. It serves to revoke, alter, amend, subtracts to form, add to or connect a will. In the words of *Black Law's Dictionary*, Ninth Edition, 2009, a codicil is "*a supplement or addition to a will, not necessarily or addition to a will, not necessarily disposing of the entire estate but modifying, explaining or otherwise qualifying the will in some way.*" I would emphasize that a codicil never stands alone, but with the will it seeks to supplement or add to, and when admitted to probate, the codicil becomes part of the will it seeks to supplement or add to.

9. The opening paragraph to the codicil of 2007 declares it "*to be a first codicil to my last will made and executed on 24th November 2004.*" This would mean that the 2007 codicil was attached to the 2004 will. It was meant to stand together with the 2004 will. It also meant that without the 2004 will, the said codicil did not exist or was not valid. If the 2004 will was the last will of the deceased, then probate of the will of 2004 had to be sought for that will together with its codicil of 2007.

10. The codicil of 2007 did not revoke the will of 2004, but it revoked some of its clauses and introduced new matters. The clauses of the 2004 will that were revoked are 4,6,7,10 and 11. Those that remained unaffected are clauses 1,2,3,5,8,9,12,13,14 and 15. New matters were introduced into the will of 2004 through clauses 3 and 5 of the codicil of 2007.

10. When probate was sought in this matter, through the petition filed in court on 28th November 2008, the will deposited in the court was that made on 12th January 2000. In their affidavit sworn on 28th November 2013, to support the petition, the executors stated that the deceased died leaving a valid written will dated 12th January 2000. However, when the matter came up for confirmation of the grant, the testamentary instrument attached to the confirmation application was the codicil executed in 2007. Distribution was ordered on the basis of 2007 codicil rather than the 2000 will. It is that development that prompted the application dated 17th April 2013.

11. It is not clear why the executors decided to prove the 2000 will when they had in their possession the 2004 and 2007 instruments which had rendered the 2000 will ineffective. It was incumbent upon the executors to place the three instruments before the court and to ask the court to determine the validity of the three testamentary instruments if were in doubt. The executors should have moved the court under Rule 49 of the Probate and Administration Rules.

12. In view of what I have stated above, the valid testamentary instrument of the deceased was his last will and testament dated 24th November 2004 and its codicil dated 12th June 2007. The will made on 12th January 2000 was invalid having been revoked by the 2004 will. Consequently, distribution of the estate of the deceased should accord with the will dated 24th November 2004 and the codicil dated 12th July 2007. I hereby set aside the certificate of confirmation dated 4th December 2012 and vacate the confirmation orders made on the same date. The personal representative shall propose a fresh distribution, in a fresh summons for confirmation of grant, based on the will made on 24th November 2004 and the codicil dated 12th July 2007.

13. In the event to personal representative is the view that the said two testamentary instruments are not valid, he shall be at liberty to move the court appropriately to establish that fact.

14. Costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 21ST DAY OF MARCH, 2014.

W. MUSYOKA

JUDGE