



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO.385 OF 1989**

**IN THE MATTER OF THE ESTATE OF JOEL KIMONGO WARURUNGA (DECEASED)**

**JOEL IRUNGU MAINA.....APPLICANT**

***VERSUS***

**DAVID MWANGI KIMONGO**

**MOSES MAINA JOEL.....RESPONDENTS**

**RULING**

Joel Kimongo Warurunga, the deceased to whose estate these proceedings relate died on 25<sup>th</sup> November 1969. David Mwangi Kimongo and Stephen Irungu Joel petitioned the court to be issued with a grant of probate of written Will. The petition was filed on 5<sup>th</sup> April 1989. The deceased's Will that was annexed to the petition is dated 22<sup>nd</sup> December 1965. In the Will, the deceased declared the following to his dependants:

- I. Irungu Joel
- II. Nicholas Mwangi Joel
- III. Moses Maina Joel
- IV. Kagu Joel

The above were his children by his then deceased wife Njeri Joel.

- V. Irungu Joel
- VI. Mwangi Joel
- VII. Wangui Joel
- VIII. Maina Joel
- IX. Nyambura Joel

The above were his children by his wife Mercy Wanjiku Joel.

In the Will, the deceased bequeathed the properties that comprise his estate to his then surviving wife and his children. He directed that the properties be divided into two (2) equal shares and distributed to the beneficiaries according to the two houses (wives).

This court issued the grant of probate on 8<sup>th</sup> June 1989. The grant of probate was confirmed on 14<sup>th</sup> September 1990. On 24<sup>th</sup> September 2013, Joel Irungu Maina (the Applicant) filed summons seeking to have the grant of probate revoked on the grounds that the Respondents had fraudulently obtained the said

grant by concealing from the court the fact that the deceased had other dependants. The Applicant was apprehensive that the Respondents were intent on selling two (2) properties that comprised the estate of the deceased *i.e.* LR.No.36/3/98 Eastleigh Section 3 Nairobi and LR. No.Loc.15 Kigongo/218 so as to deprive the excluded dependants from benefitting from the estate of the deceased. In the affidavit in support of the summons, the Applicant stated that the deceased was his grandfather *i.e.* he was his paternal grandfather. He deponed that the deceased married his grandmother on 3<sup>rd</sup> of May 1921. He annexed a copy of a marriage certificate which indicated that Joel Kimongo married one Robecka Wanjeru. The Applicant stated that the Will that was used to secure the grant of probate was not valid because it was fraudulent.

In essence, the Applicant is saying that in so far as the Will did not recognize the existence of his grandmother, who was the first wife of the deceased together with his children, then the Will ought to be nullified. In a further affidavit sworn on 14<sup>th</sup> March 2014, the Applicant stated that the Will that was allegedly written by the deceased was not valid as it did not recognize Rebecca Wanjiru, the first of the deceased together with her children. He stated that the deceased could not write, did not understand English, and was sick at the time the Will is alleged to have been written. He deponed that the two persons who witnessed the Will were unknown as their names were not indicated in the Will. He therefore urged the court to nullify the Will, because in the Applicant's view, it was not genuine.

David Mwangi Kimongo, one of the Respondents, swore a replying affidavit in opposition to the application. He stated that the Applicant had not provided any evidence to support the allegation of fraud to warrant the court to nullify the Will. He deponed that all the properties belonging to the estate of the deceased were administered in accordance with the last Will of the deceased. He stated that the Applicant had failed to establish that he was a dependant of the deceased prior to his death and therefore entitled to be considered as such. He accused the Applicant of being guilty of laches, inordinate and unexplained delay. He further deponed that the Applicant had failed to establish that the transfer of the parcel of land registered as Loc.15 Kigongo/218 was either obtained by fraud or otherwise to justify this court to nullify or annul the grant. He stated that the parcel of land registered as of LR.No.Loc.15 Kigongo/218 was inherited by Mercy Wanjiku Kimongo *alias* Mercy Wanjiku Joel. Upon her death, the Respondents had petitioned the court in **Thika CM Succession Cause No.127 of 2005**. The said Court issued a grant of letters of administration intestate to the Respondents. The grant was confirmed on 21<sup>st</sup> June 2006. The certificate of confirmation of grant provided that the said parcel of land would be inherited by Danson Maina, Joel Maina Kimongo, Catherine Wahu and Muritu Kimongo in equal shares. In essence, the Respondents were saying that if the Applicant had an issue with the inheritance of the said parcel of land, he should ventilate the same in the succession cause related to the estate of Mercy Wanjiku Joel (deceased). The Respondents urged the court to consider the period that had passed from the time the deceased died to the time the Applicant made the present application. In the Respondents' view, the application was mischievous and abuse of the due process of the court.

During the hearing of the application, this court heard rival submission made by Joel Irungu Maina (the Applicant), who was acting in person, Mr. Mwaniki for the Respondents and by Mr. Sirima who was acting for some of the beneficiaries. The Applicant reiterated the contents of his application together with the supporting affidavit. He added that his grandmother Rebecca Wanjiru was married to the deceased. The deceased and his grandmother were blessed with four (4) children, namely Michael Mwangi Joel (his father), Peter Wanjagi Joel, Cyrus Maina Joel and Rachel. All the children of the deceased by his grandmother are deceased. He reiterated that the Respondents had petitioned the court without informing members of his family. He urged the court to annul the grant.

Mr. Mwaniki for the Respondents reiterated the contents of the replying affidavit. He stated that the Applicant had not placed any grounds before this court to support his assertion that the Will of the deceased was invalid. He urged the court to disallow the application. As regard **Thika CM Succession Cause No.127 of 2005**, the Respondents stated that the father of the Applicant lodged objection in the cause. The objection was however found to be without merit and was dismissed. No appeal was filed to challenge the finding of the court in the said succession cause. He urged the court to take this into consideration because it amounted to the Applicant failing to disclose facts that are material to the determination of the case. Mr. Sirima for the beneficiaries associated himself with the submission made

on behalf of the Respondents. He urged this court to dismiss the application.

This court has carefully evaluated the facts of this case. It has also considered the submission made by the parties to this summons for revocation of grant. The issue for determination by this court is whether the Applicant laid sufficient basis for this court to nullify the grant of probate that was issued to the Respondents. It should be noted that the deceased in this case died in 1969. This was before the coming into operation of the **Law of Succession Act** on 1<sup>st</sup> July 1981. **Section 2(2)** of the **Law of Succession Act** provides as follows:

***“The estate of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”***

The Respondents petitioned the court to be issued with a grant of probate of the written Will of the deceased in 1989. The petition for grant of probate was therefore made after the coming into operation of the **Law of Succession Act**. The Applicant predicates his application on **Section 76** of the **Law of Succession Act** which grants this court jurisdiction to annul or revoke the grant if *inter alia*, it is established that the grant was obtained either by fraudulently making false statements or by concealing from the court something that is material to the case.

In the present application, the Applicant has challenged the Will of the deceased on the grounds that it did not provide for some of the beneficiaries of the deceased. These beneficiaries are allegedly children of the first wife of the deceased by the name Rebecca Wanjiru. It was the Applicant’s case that the Will that is alleged to have been written by the deceased could not be genuine because the deceased was illiterate and did not understand English. He also challenged the Will on the grounds that the persons who witnessed the Will did not provide their names as required by the law. The Respondents urged the court to find that the Applicant had established sufficient basis for this court to nullify the grant of probate.

Upon evaluating the rival argument made in that regard, this court holds that the Applicant failed to establish his claim that the deceased’s Will was not genuine. The Applicant did not provide any evidence to support his assertion that the deceased was sick at the time the Will was written. He did not provide any medical evidence to establish this fact. If the Applicant set out to establish the fact that the deceased lacked capacity to write the Will at the time, he was required to adduce evidence to establish, to the required standard of proof, that the deceased was so sick that he lacked the requisite mental capacity to write the Will. The Applicant also alleges that the deceased was illiterate. Other than his statement in court, he did not provide any evidence to support this claim. As regard his claim that the Will was not witnessed by two witnesses as required by the law, this court holds that that allegation is not supported by evidence. This court has perused the Will. The signature of the deceased was witnessed by two (2) witnesses. There is no requirement under **Section 11** of the **Law of Succession Act** that the persons witnessing the Will state their names. What is required is their signatures and confirmation of the fact that the two witnesses were present when the deceased signed the Will. However, it is good practice that witnesses to a Will of a testator provide their names so that in the event the Will is challenged, they can be called to testify. The difficulty in this case is that the Will was signed by the deceased on 22<sup>nd</sup> December 1965. In all probability, the witnesses may not be alive to attest to the fact that the deceased signed the Will.

This brings the court to an aspect of this case that tilted the decision against the Applicant. The deceased died on 25<sup>th</sup> November 1969. The Applicant claimed that the deceased was married to his grandmother, Rebecca Wanjiru. Rebecca had four (4) children, allegedly by the deceased. The four (4) children were presumably alive at the time of the death of the deceased. This court wondered, if indeed Rebecca Wanjiru was the wife of the deceased, why the children of the deceased made no claim to the estate of the deceased. The Applicant stated that all the four (4) children of Rebecca Wanjiru are now deceased. Why didn’t these children challenge the Will of the deceased if they were in fact the children of the deceased? Why did it take the Applicant forty-four (44) years from the death of the deceased to challenge his Will? Even if this court were to be generous on the issue of time, why did it take the Applicant twenty-four (24) years before he challenged the Will after the grant of probate was issued to the Respondents? There too

many gaps in the Applicant's story. The only decision that this court can reach given the paucity of evidence is that the Applicant failed to establish, to the required standard of proof, that he is a beneficiary of the estate of the deceased. He failed to establish that Rebecca Wanjiru, his grandmother was the same as Robecka Wanjeru who appears in the marriage certificate annexed to the affidavit sworn by the Applicant in support of the summons for revocation of grant.

In the premises therefore, this court holds that the Applicant failed to establish the grounds set forth in his summons seeking to revoke the grant of probate. The application lacks merit. It is hereby dismissed with costs to the Respondents. It is so ordered.

**DATED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JUNE, 2014.**

**L. KIMARU**

**JUDGE**