REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)

SUCCESSION CAUSE NO. 2299 OF 2012

IN THE MATTER OF THE ESTATE OF SALOME MUKAMI KARIUKI – (DECEASED)

RULING

Salome Mukami Kariuki died testate on 10th May 2012. Her will, made on 31st October, 2008, disposed of only one asset, being LR No. 4885/16/7 measuring 5.7 acres, to all her nine (9) children. She appointed Humphrey Kinyanjui and Wathi Mungai executors of her will.

Humphrey Kinyanjui, as executor, has come to court, by his application dated 10th September 2012, asking to be allowed to treat the reference in the will of property LR No:4885/16/7 as referring to LR NO: Muguga/Kanyariri/196. In his affidavit sworn on 31st August 2012, he avers that the will disposes of a property which the deceased did not own at the time of the execution of the will as the same did not in fact exist. He avers that LR NO: 4885/16/7 did exist at some point, owned by his late father, but it leased to exist as it was later was later subdivided. He says the deceased died possessed of only one asset, LR Muguga/Kanyiriri/196, measuring 5.7 acres. He has attached a title deed relating to Muguga/Kanyariri/196 to buttress this point.

The will dated 31st October 2008 was executed before an advocate, Ms. Lilian A Machio. The will specifically disposes of a property described as LR NO: 4885/16/7. The question that arises is whether the testatrix could go into the trouble of making a will before an advocate, to dispose of property she did not own or which did not exist. What would have been her intention in doing so?

The golden rule of construction of wills is as stated by Ether MR in *Re Harrison* (1885) 30 chD 390, that where a will is executed in solemn form, it is to be assumed that the maker did not intend a solemn farce and that he did not intend to die intestate when he had in fact gone through the process of making a will. The application of this rule to the matter of Salome Mukami Kariuki means that the testatrix was not merely trifling but intended to make a will and to dispose of her estate by that means.

One of the cardinal rules of construction of wills, and indeed of all documents, is that it must speak for itself. The testator's intention should be ascertained as expressed in the will itself. In other words, the meaning of the will is to be gathered from will itself. The will in question disposes of a property that the deceased did not own at the time of execution of the document. The application of the rule that the will speaks for itself would render the will in this cause meaningless. The provision ***" I direct my executors and trustees to pass my interest in the land known as LR NO: 4885/16/7 measuring 5.7 acres to my nine children of marriage...,"*** is really a meaningless provision, to the extent that it disposes of an asset that does not exist. The testatrix cannot possibly have intended to make such a meaningless provision.

The modern approach to construction of wills is the intentional or purposive approach, which tends towards discovering the purpose or intention of the testator in expressing himself in the manner that he does in a will. The purposive approach is hardy in dealing with meaningless provisions. The meaning of a meaningless provision can only be discovered by means of extrinsic evidence. Extrinsic evidence is permissible for the purpose of exposing the circumstances in which a testator was situated at the time he made the will. Evidence can be led to assist the court ascertain the meaning he intended in the said circumstances to give to his chosen wording. *Re Smalley* (1929) 2 Ch.112 demonstrates that extrinsic evidence is admissible to ascertaine the property that the testator refers to in his will.

The testatrix in this matter no doubt had an intention or purpose in making the will in the first place. As mentioned earlier, she cannot have been trifling or joking around. She must have had an intention to

dispose of her estate by will. It would appear that while doing so she made a mistake in describing the property she intended to dispose of. To ascertain the property the testatrix intended to dispose of, the executor has placed before the court evidence which shows that the testatrix owned property LR No: Muguga/Kanyariri/196. There is also evidence that LR NO: 4885/16/7 existed at one point, owned by the husband of the testatrix. I also note that LR NO: Muguga/Kanyiriri/196 measures 5.7 acres just like the property she intended to dispose of. From this evidence I am prepared to hold that the testatrix intended to dispose of LR NO: Muguga/Kanyariri/196 and that she made reference to LR NO: 4885/16/7 in her will by mistake.

I will allow the application dated 10th September 2012. The executors of the will of the deceased, Salome Mukami Kariuki, shall

deal with the asset LR NO: Muguga/Kanyariri/196 as if it is the property that the testatrix disposed of in her will made on 31st October 2008 and shall distribute the said property in the manner stated in clause 4. a of the will of the deceased.

DATED, SIGNED and DELIVERED at NAIROBI this 16th DAY OF May, 2013.

W. Musyoka
Judge