

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

SUCCESSION CAUSE NO: 2732 OF 2008

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

RULING

The executor has moved the court by the summons dated 17th April 2013 for rectification of the grant dated 17th April 2013 to reflect the testator's intentions as set out in his will made on 12th January 2000 instead of the codicil dated 12th July 2007. He prays that the codicil be disregarded as grant of probate was made based on the will made on 12th January 2000 instead of the codicil.

A codicil is defined as a document which is supplementary to a will. It adds to or subtracts from a will. Its principal effect is to alter or amend or change a will. It ought to be proved together with the will that it seeks to amend.

Reading through the codicil made on 12th June 2007, it is clear that there was another will made on 24th November 2004. It is telling that the codicil makes no reference at all to the will of 12th January 2000. It is not clear what has become of the will of 2004, which the codicil of 2007 seeks to amend. It would appear that the executor is being less than candid regarding the true intentions of the deceased. It is not for the executor to pick and choose which of the wills on record he is to prove. He is obliged to prove the last valid will of the deceased. In this case this appears to be the 2004 will as amended by the 2007 codicil. The executor would appear to be guilty of non-disclosure and concealment of matter from the court.

Going by the foregoing it is clear that the confirmation proceedings of 4th December 2012 did not have a firm foundation. I hereby set aside the said confirmation proceedings. The executor shall take steps to place the 2004 will and the 2007 codicil before the court for the court to determine which between the 2000 will and the 2004 will is valid and therefore the basis upon which distribution of the estate ought to be premised.

The executor prays that the codicil be disregarded. The court cannot do so. The court is obliged to execute the last wishes of the deceased. The last wishes of the deceased in this matter appears to be those expressed in the codicil. The court cannot disregard the codicil unless it is demonstrably invalid. The codicil is tied to the 2004 will, and therefore the last wishes of the deceased appear to be those in the 2004 will and the codicil to it. Needless to say that it is not for the executor to decide between the various testamentary instruments made by the deceased.

The application dated 17th April 2013 is for dismissal and I hereby dismiss it with costs. For avoidance of doubt, I reiterate that the executor is obliged to disclose and place before the court the will made in 2004, together with the will made in 2000 and the codicil of 2007 for construction purposes so that the court can determine which between the two instruments is the valid one.

It is so ordered.

DATED, SIGNED and DELIVERED AT NAIROBI THIS 27th DAY OF June 2013.

W.M. Musyoka

JUDGE

