



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
SUCCESSION CAUSE NO. 172 OF 2013

IN THE MATTER OF THE ESTATE OF JOHN KARABU GICHURU – (DECEASED)

RULING

The citation herein issued at the instance of James Gichuru Gitiha. He is the father of the deceased, John Karabu Gichuru. The citees are the children of the deceased and the grandchildren of the citor.

The case is that the deceased died testate having left a will. He says the children should apply jointly with him for grant of letters of administration with the will annexed. They have refused to sign the relevant documents. He cites them so that they can take letters or refuse to do so. If they fail then he will be entitled to take out the letters himself.

The citees were served, and they entered appearance through counsel. They have also sworn a joint affidavit on 19th April 2013, filed in court on 9th May 2013. They deny the allegations made against them, and make several of their own. They do not express interest to seek or refuse to take the letters of administration.

Citations are governed by Part VI of the Probate and Administration Rules. The relevant provisions are Rule 22(1) and (7). Under these provisions a person may issue a citation on any person who would himself be entitled to a grant in the event of the person cited renouncing his right to apply for grant. Under Rule 22(7), if the citee enters appearance but fails within 30 days after his appearance to apply for a grant, the citor may petition the court for the grant himself.

The citees appeared on 4th April 2013 by a Memorandum of Appearance dated 27th March 2013. Thereafter they swore an affidavit on 19th April 2013 and filed it in court on the 9th May 2013. They did not indicate in the affidavit whether they will petition for grant or not. The matter was mentioned in court on 28th May 2013 for directions. By then 30 days had not yet expired. The matter was put off for directions on 3rd July 2013, by which time the citees had not petitioned for grant. Under Rule 22(7) the citor has become entitled to petition for grant of representation and should proceed to do so.

But what sort of grant should he petition for? The citor alleges that the deceased died testate. There are three documents attached to the affidavit he swore on 18th January 2013. They are annexed as a bundle. They are all headed ***“Will of John Karabu Gichuru”***. One was allegedly made on 12th January 2010, while the other was made on 8th February 2011. The third one was allegedly made on 20th September 2011.

The documents dated 12th January 2010 and 20th September 2011 bear the name of the writer and what

appears to be a finger print, but it is not indicated whose print it is. The one dated 8th February 2011 bears the names of the writer and of two persons who are described as witnesses. It has a finger print against the name of the writer but not against the names of the witnesses.

The validity of a will is tested on the basis of the provisions of **Section 71** of the Law of Succession Act. It must be signed by the maker. The signature of the maker must be witnessed by or acknowledged to two or more witnesses, who must append their signatures to the document to authenticate that of the maker of the document.

The document dated 12th January 2010 and 10th September 2011 bear a finger print which I presume of the writer. This would amount to a signature so long as it is a mark of the maker of the document intended to be his signature. However, there is no evidence that it was witnessed by any one. No witnesses signed as attesting witnesses. The two documents are therefore not valid in the context of **Section 11** of the Law of Succession Act.

The document made on 8th February 2011 bears the names of persons who are described it as witnesses. Their names appear just after that of the writer. This appears to satisfy the requirements of **Section 11(c)** of the Law of Succession Act, that the document is signed by the maker in the presence of two or more witnesses. However, **Section 11(c)** further requires that the witnesses, apart from being witnesses to the testator signing the document or acknowledging his signature on the document, should append their signatures to the document to authenticate the signatures of the maker. The purported witnesses did not affix their signatures to the document, and therefore it is not a valid testamentary instrument.

As these documents alleged to be the wills of the deceased are not validly attested and therefore they are not valid wills, the deceased did not die testate, but intestate, unless the said documents can be construed to be oral wills in terms of Section 9 of the Law of Succession Act, and the decisions in *Re Rufus Ngethe Munyua* (deceased) *Public Trustee -vs- Wambui* (1977) KLR 137 and *Wambui and Another -vs- Gikonyo and others* (1988) KLR 445.

Under **Section 9** of the Law of Succession Act, an oral will is valid if it is made in the presence of two or more competent witnesses and the testator dies within a period of three months from the date of the making of the will. It was held in the two cases mentioned above that if the witnesses present make a record of the terms of the oral will, so long as it meets the requirements of **Section 9**, of being made in the presence of two or more competent witnesses and the maker dies within three months.

The last document was made on 20th September 2011. It is not clear who recorded it, but the document will be valid if it was recorded in the presence of two or more competent witnesses and the maker died within three months. According to the certificate of death on record the deceased died on 28th December 2011. This was outside the three months period required by Section 9 of the Law of Succession Act. The document dated 20th September 2011 cannot pass as the oral will of the deceased. The deceased therefore died intestate.

The citor in this cause is at liberty to petition for a grant of letters of administration intestate. He should however endeavour to reach an understanding with his grandchildren.

There will be no order as to costs.

SIGNED DATED and DELIVERED in open court this 15th day of August, 2013.

W.M. MUSYOKA

JUDGE