



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 561 OF 2005

IN THE MATTER OF THE ESTATE OF SUSAN CHAKI GITHITHO (DECEASED)

MARY WANJIKU.....APPLICANT

VERSUS

MONICA MUTHONI GITONGA.....PETITIONER

J U D G M E N T

Susan Chaki Githitho, the deceased to whose estate these proceedings relate died on 29th December 2004. On 4th April 2005, Monica Muthoni Gitonga (the Petitioner), petitioned this court to be issued with a Grant of Probate of written Will. The Petitioner annexed in the affidavit in support of the petition to be issued with the Grant of Probate a Will which was alleged the deceased wrote on 23rd July 2004 bequeathing a property known as Plot No. B4829 Dandora (the suit property) to the Petitioner. In paragraph 3 of the said Will, the deceased is said to have appointed the Petitioner to be the executrix of the Will. In paragraph 6 of the said Will, the deceased is said to have described the Petitioner as “*my friend and neighbour.*” The suit property contains eight (8) rental units erected thereon. In a further affidavit, the Petitioner deponed that, although she was not related to the deceased, she had taken care of the deceased until her death. According to the Petitioner, this was because “*no relative ever came forward to assist her until her death on 29th December 2004*”. The Petitioner further deponed that the deceased “*never got married and she had no children even up to her old age and constantly informed me of this.*” The Petitioner deponed that in recognition of the support that she had accorded to the deceased during her illness, the deceased voluntarily executed the Will bequeathing her the property.

The Grant of Probate of written Will was issued to the Petitioner on 18th July 2005. On 10th March 2006, the Petitioner applied for the Grant of Probate that was issued to her to be confirmed. The same was confirmed on 12th June 2006. The court decreed that the estate of the deceased be distributed in accordance with the deceased’s last written will dated 23rd July 2004.

On 16th June 2006, Mary Wanjiku, (the applicant) claiming to be the deceased's niece, applied to this court seeking to have the Grant of Probate that was issued to the Petitioner revoked. It was the Applicant's case that the alleged last Will of the deceased could not stand as it was in fact false and fraudulent, because the deceased could not have written the Will as the time it was claimed that she did. According to the applicant, this was because the deceased was at the time admitted at Kenyatta National Hospital and was in extreme pain. The applicant further contends that the deceased was senile and confused at the time she was alleged to have written the Will and therefore she could not have written a valid Will. The applicant finally stated that she had purchased the suit property from a third party to whom the deceased had sold the same to for a throw away price. The applicant thus stated that she was the owners of the suit property because the same had been sold to her by the deceased. In support of this assertion, the applicant annexed an assignment to the affidavit in support of the application in which the deceased is said to have transferred the suit property from herself so that the suit property could be owned jointly by the deceased and the applicant.

In effect therefore, the Applicant is contending that the suit property was jointly owned between herself and the deceased prior to the death of the deceased. The applicant claimed that she was the one who had constructed rental houses (units) in the suit property and therefore she was entitled to the same. The petitioner filed a replying affidavit denying the applicant's claim that she (the applicant) was entitled to inherit the suit property. She reiterated that the deceased had legally bequeathed the suit property to her in her last Will. She urged the court to dismiss the application for revocation of grant with costs.

Prior to the hearing of the summons for revocation of grant, the respect counsel for the petitioner and for the applicant agreed by consent to file written submissions in support of their respective clients' cases. The said written submissions were duly filed. At the hearing of the petition, counsel for the parties indicated to the court they were in agreement that the court delivers its judgment on the basis of the said written submissions. This judgment is therefore written on the basis of the written submission filed by respective counsel for the disputing parties. Having carefully read and considered the pleadings and the written submissions filed by the parties herein, it was evident to this court that the issue for determination by this court is, firstly, whether the suit property, that comprises the only asset of the estate of the deceased belonged to the deceased at the time of her death, and if the first issue is determined in favour of the petitioner is whether the deceased wrote a valid will which should be upheld by this court.

As regard the first issue for determination, upon evaluating the facts of this case, it was evident that the suit parcel of land i.e Plot No. B4829 Dandora is unregistered parcel of land. The land in which the suit property is part of was allocated to Wakulima Dandora Squatters Self Help Group to which the deceased was a member. The deceased was allocated the suit parcel of land by the Nairobi City Council. The records kept by the Nairobi City Council reflect this fact. Contrary to assertion by the applicant, the suit parcel of land was not registered under the **Registered Land Act**.

The applicant established that she had purchased half a share in the suit parcel of land from the deceased. This was evidenced by an agreement which was entered between the Applicant and the deceased on 19th February 1992. The deceased executed on assignment transferring the half share portion to the applicant. She paid the stamp duty to enable the said assignment to be registered. Unfortunately, because the parcel of land in question is unregistered, the transaction was not reflected in any official register kept at the Lands Registry. However, the Nairobi City Council, the authority which issued the letter of allotment, acknowledged the transaction in its records. The deceased could not therefore bequeath the half a share portion that she had already sold to the applicant.

The applicant is only interested in the portion of land that she had purchased from the deceased. She is not interested in the other half a share portion which she indicted could devolve to other beneficiaries of the deceased. The applicant made this indication in the further affidavit that she swore on 2nd August 2006. At paragraph 8 of the said affidavit, she stated as follows;

"I have no interest in the deceased property as she was in fact my dependant and I only claim what is mine and that the rest should be distributed in line with the deceased's verbal wishes that they go to her nephews Peter Wachira, Joseph Kinyua and Ngaina Chaki (annexed herewith and marked MW7

are copies of the sale agreement and letters dated 17th July 2006 and 24th July 2006).”

In the premises therefore, this court holds that the deceased owned half a share of the suit property whilst the applicant owned the other half share. In light of the developments on the suit property, the applicant shall be entitled to four of the eight rental houses in the property. The remaining four rental houses belonged to the deceased and is therefore available to be inherited by the deceased’s beneficiaries.

Is the Will that the deceased is purported to have executed on 23rd July 2004 valid? Under **Section 11** of the **Law of Succession Act**, for a Will to be valid it must be, *inter alia*, signed by the testator in the presence of two or more competent witnesses. The alleged Will of the deceased was prepared by an advocate and attested to by the testor in the presence of two competent witnesses. In the opinion of this court, the said Will was valid and set forth the clear intention of the deceased to bequeath her portion of the suit property to the petitioner. This court did not find any evidence to support the applicant’s contention that the deceased was not in control of her mental faculties when she executed the said Will. The deceased did not have children. There was no evidence to support the contention by the applicant that she took care of the deceased during the time that the deceased was terminally ill before she met her death. The petitioner established that she took care of the deceased during that time to an extent that the deceased made the decision to bequeath the portion of the suit property to her. The deceased made this intention known to several people including the area chief. This court therefore finds no merit with the thrust of the applicant’s case that the Grant of Probate issue to the Petitioner should be revoked.

In the circumstances therefore, this court holds that the certificate of confirmation of the Grant of Probate issued to the petitioner shall be rectified so as to reflect the fact that the petitioner is only inheriting half a portion of the suit parcel of land i.e Plot No. B4829 Dandora which contains four (4) rental houses. The applicant, as the owner of a half a share in the said parcel No. B4829 Dandora shall only be entitled to the other portion on which is erected four (4) rental houses. There shall be no orders as to costs. Each party shall bear her own costs. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2011.

L. KIMARU
JUDGE