



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 1550 of 2002

IN THE MATTER OF THE ESTATE OF GEORGE GICHURA GATURU (DECEASED)

RULING

The Petition for grant of probate for written will in the estate of the deceased herein was filed by the Public Trustee on 2nd August 2002. The deceased died on 16th March, 2001 at A.I.C. Githumu Hospital.

The petition mentions that the deceased left two widows named Jane Wangari and Joyce Wanja with their nine children respectively.

In the will annexed to the Petition, Paragraph 4 mentions his wishes concerning the distribution of his three properties, namely;

- 1) Land Parcel No. Loc 16/Kigaro/518 to be shared by Jane Wangari Gichuru to have 2 acres and Joyce Wanja to have 2.00 acres but the second wife i.e. Joyce to get the remaining 1.71 acres for taking care of him when he was sick.
- 2) Land Parcel Kibwezi Plot No. 525 Kikambulya was given to Joyce Wanja and
- 3) Land Parcel No. Syumile Makindu Loc. 86 was given to his wife Jane Wangari.

The will is shown to have been executed on 14th March, 2001.

It is to be noted that the will was executed two days before the death of the deceased and shown to have been signed by the Advocate Mr. P. Musila who has also drawn the will and Samuel Kariuki Gikaria the appointed Trustee in the will, who renounced his executorship and hence the Petition by the Public Trustee.

Jane Wangari filed a summons to revoke the grant and subsequent certificate of confirmation made to the Public Trustee dated 17th October 2002 and 15th July, 2003 respectively. She alleged that the will was a forgery as the deceased was incapable of executing the will due to his health and that the other beneficiaries have not been involved in the process of obtaining grant and certificate of confirmation.

This case passed through hands of three Judges and hence the delay in hearing of this objection proceedings. The parties filed affidavits in support and in apposition and called witnesses to support their respective contentions.

As per the evidence of the objectors following facts were placed before the court.

The first witness is a clinical officer at the Hospital wherein the deceased was admitted on 14th March, 2001, on the day the will was alleged to have been executed at about 10.p.m. He reviewed him at 10.30p.m. and as per the history given by his relatives, it was mentioned in his report that the deceased was unable to talk, had not eaten for one day had vomited and was treated for hypertension for a period of ten years.

On examination he found that the deceased looked unwell and confused. The blood pressure, temperature and sugar level was normal. He was unable to communicate with the deceased. On examining his abdomen he found that the deceased had a big spleen. He was disoriented. The witness did not see the patient thereafter as the doctor on duty took over the treatment. The patient died on 16th March 2002. He admitted in the cross-examination that the patient can be in good condition before admission though I must confess I could not understand that part of cross-examination.

2nd witness was the document examiner Assistant commissioner of Police Emmanuel Kenga. He gave his report and formed an opinion after examination of relevant documents that the signature on the will does not agree/match with those the known signature of the deceased.

In his cross-examination nothing much changed.

Last witness called was Jane Wangari the objector herself. She gave introductory evidence in respect of the deceased having married two wives both of whom had nine children each and that the deceased and two wives with their children lived on Loc 16/Kigoro/518.

I may also note that her main objection is the unequal distribution of this parcel which admeasures roughly 6 acres. According to her the deceased before his death called the two wives and their families plus two brothers and divided the land equally so that each of them to get one parcel at Ukambani.

She objected as regards validity of the will. She testified that on the day i.e. on 14th March, 2001 she saw the deceased in the house of Joyce at around 4.00 p.m. groaning and he did not answer her calls. After 30 minutes she went back and found his son Maina dressing him and that the deceased was unable to talk. He did not even recognize her. She denied having neglected the deceased but in cross examination by Joyce she said that she did not live with the deceased for about three years because he was beating her. But even in her absence, she has through his children, sent the money for his treatment and clothing. When the deceased was taken to the hospital she accompanied him. She also testified that when she asked Joyce about his condition the latter responded that the deceased vomited when she gave him a banana and had been sick.

In the cross examination earlier she had agreed that the deceased had been sick for ten years but in her final version of the cross examination she denied that the deceased was sick for such long period of time. She also agreed that Joyce used to cook for him and to take the deceased to the hospital. She also lamented that the deceased did not look after her and her children when they were young but when they grew up and started earning they used to send him money and clothing.

This in short was the evidence for the objector's case.

The Petitioner gave evidence and stated that she saw the deceased going out to Thika by telling her that he want to see Samuel Zakaria and he came back home and later became sick. He was then admitted and died in the hospital on 16th March, 2001.

After the death Samuel informed them about the will and the same was sent to the Area Chief who read it in absence of the objector Jane and her children. The public Trustee then took over the matter. In my view as the advocate Mr. Musila gave evidence, I shall not dwell much on the evidence by Joyce. In any event she agreed that she was not present when the will was executed.

Mr. Musila testified that on the material date i.e. 14th March, 2001, when he was returning to his office

after court's work was finished, he met his court clerk accompanied by two elderly person on the stairs. The clerk informed him that he had drafted a will for the elderly man and have also caused them to be executed. When he perused the will (which is before the court) he testified that the signature appended on his name and the stamp was not his. He further testified that he then asked the two men to come back to the office with him. He took details which corresponded to what was mentioned in the will. He also confirmed that he was giving more to one wife as she was looking after him in his later days. However, as the document was not properly prepared, he asked them to come back within a week's time. But he was informed by this court clerk that the deceased had expired.

He also explained that he handed over the document left with him to the public Trustee as it was the last document left by the deceased. He again confirmed that the document does not bear his signature.

With these facts before me, I need not go much further to state that the purported will produced as a will and on the basis of which the grant and certificate of confirmation were issued, was not a valid will as per section 11 of the Law of Succession Act. Thus I have no option but to declare the will as an invalid and illegal will.

As per the evidence of Mr. Musila (DW 2), it is evident that the deceased declared his wishes to him which were similar to what was reduced into writing in the document produced in the court as aforesaid. However even if, I would like to declare it as an oral will, I do not have evidence that the same was made before two or more competent witnesses. Mr. Musila's evidence did not clarify that position.

With this difficulty I shall have to revoke the grant of probate and certificate of confirmation of grant of probate issued to the public Trustee.

Due to the unnecessary time which this cause has taken, in my inherent power and in the interest of justice I direct that a grant of confirmation be issued to the Public Trustee for the estate.

I am also given a mandate to distribute the estate which consist of three properties.

I thus further direct that the properties mentioned in the paragraph 4 (d) and (e) of the alleged will be distributed as mentioned therein.

The land parcel no. loc. 16/Kigaro/518 be divided in equal share between the two widows who shall hold the respective shares of their houses in life interest and in trust for their children in equal shares. I shall not make an order on cost.

Dated, Signed and Delivered at Nairobi this 30th day of **September 2009**.

K.H. RAWAL

JUDGE

30.9.2009