REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT EMBU

Civil Appeal 46 of 2005

FRANCIS GACHOKI MURAGE……..……APPELLANT

VERSUS

JULIA WAINOI KINYUA…….…….1ST RESPONDENT

JUDITH NYAGUTHI……2ND RESPONDENT

JUDGMENT

This appeal arises out of Succession proceedings. The Judgment complained of was in a protest against confirmation of a grant already issued in Succession No. 230 of 1996. The Judgment is dated 9/10/2001. A perusal of the record shows that on 29/11/1996 Juliana Wainoi Kinyua petitioned for grant of letters of Administration intestate concerning her deceased father Murage Ngari. The grant of letters of Administration intestate were granted and issued on 4/6/1997. Later Administrator took out a summons for confirmation of grant on 3/12/1997. It is then that Francis Gachoki Murage first petitioner filed an affidavit against confirmation on ground that the proposed distribution was against wishes of deceased, the land was held by deceased in trust for his family Francis proposed distribution as follows:-

1. himself - 3 acres

2. Joseph - 3 acres

3. Juliana - ¼ acre

4. Judith - ¼ acre

5. Susan - ¼ acre

6. Francis Nyaga - ¼ acre

7. Njeru Murage - ¼ acre

Judith Nyaguthi also filed an affidavit in protest on 9/6/1998, in which affidavit disclosed deceased died testate and that she was not in agreement with the distribution as proposed as opposed the terms of deceased will. She also appointed M/s Muchiri & Co. Advocates to act for her. It is this advocate who

gave evidence of the will and produced the same as Exhibit A. That document was properly admitted in evidence and two witnesses to the will gave evidence. It was agreed by all parties that the document was deceased will and the court made a finding as to its validity and confirmed the grant in terms of the will.

However it is to be noted that Form 62 P &A rule 14 (1) was not filed to indicate the amendment necessary on the discovery of the valid will and the compliance with Section 61 of the Act. The administration of estate should have been handed over to the named executors in the will.

On the grounds of Appeal the appellant submitted that at the time of making the will (which he admits) his father was of advanced age, poor health and therefore suffering from senile decay and therefore unable to understand things.

From his death certificate his age is stated at 66 years. It cannot be said that is too old to know what he was doing and his illness is recorded as cough with long illness (more than one month). There is no evidence that his mind was affected or that he did not know what he was doing. I do not find fault in the conclusion Trial Magistrate arrived at.

On ground two of appeal, the will was proved. There were two attesting WITNESSES and the advocate who prepared the will. The petitioner agreed to adopt the will in the distribution of Estate as if she had been granted letters of administration with will annexed.

On ground numbered 3 the Trial Magistrate clearly stated that he was not influenced by the allegation of the relationship of first protester with deceased (his father).

On ground 4 thereof once a valid will is in existence the court has to follow the intentions expressed by the deceased therein. It does not matter how the will was discovered or who is opposing the provisions of the will- see Section 26 of Chapter 160 grounds for application for dependency.

On ground five the grant intestate had already been issued to the petitioner. However there are different persons named in the will as executors. I have already pointed this fact. But the administrator/petitioner did not oppose the will. Her grant should have been revoked and a grant of probate be issued to the executors. However there was no objection to this omission and the wishes of deceased were followed. No one was prejudiced. It is clear the decision of the learned Magistrate was reached when he pronounced the will valid. This is what was the weight of evidence in this case. Both parties have referred to authorities. For Appellant the High Court decision in the ***Re Estate of Ngetich (2003) KLR***. However this is different in that the will was in existence from the beginning. In this case will was disclosed after grant had already been issued. For Respondent the two decisions of Court of Appeal:-

1. Mzamil – Vs – Ansari 1983 KLR 219

2. Municipal Council of Kitale Vs Fedha 1983 KLR 307 were concerning the rules of Court of Appeal and extension of time.

The grounds of appeal did not complain about the extension of time in this appeal. It is my finding that the validity of will was not in doubt and the Trial Magistrate was correct in following the intentions of the deceased. I find this is in accordance with law. I therefore find no merit in this appeal which I hereby dismiss with costs to Respondent.

Dated this 16th January, 2008.

J. N. KHAMINWA

JUDGE

16/1/2008

Khaminwa – Judge

Njue – Clerk

M/s Wanjiru

Read in open court.

J. N. KHAMINWA

JUDGE