



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 522 of 2001

**IN THE MATTER OF THE ESTATE OF KAMAU WANDAKA ALIAS GEOFFREY KAMAU
WANDAKA (DECEASED)**

EVALYNE WAGITIE KAMAU.....1ST APPLICANT

ROSEMARY NYAMBURA KAMAU.....2ND APPLICANT

Versus

JANE WANJIRU KAMAU.....RESPONDENT

RULING

By an order made on 15th December 2003 by Hon. Waweru J. this Succession case No. 522 of 2001 was consolidated with Succession Cause No. 276/01. The issue for determination is the Summons for Revocation dated 5th June 2002 that makes the validity of the will of the deceased dated 16th July 1998.

Prior to this it is clear from the records that the Principal Magistrate's Court in Succession Cause No. 135 of 2000 had issued a grant of Letters of Administration intestate by consent to Evelyn Wagitie Kamau, Rosemary Nyambura Kamau and Jane Wanjiru Kamau on 15th December 2000.

It would appear by an order made by consent by Hon. Osiemo J. on 5th June, 2001 and pursuant to the application of Jane Wanjiru Kamau the Muranga Principal Magistrate Succession Cause was recorded and the subsequent directions were to the effect that both application for the revocation of the grant by the Principal Magistrate's Court and the application for revocation challenging the will be heard together.

I will therefore deal with the earlier application for the revocation of the grant by the Muranga Court.

The applicant and her children applied for the revocation of this grant issued to the three widows on two main grounds namely:

- a) The deceased died intestate leaving a valid will
- b) That the Principal Magistrate's Court had no jurisdiction to deal with the estate.

During the hearing the applicant Jane Wanjiru Kamau testified that she was not part of the proceedings at Muranga. I have perused the Muranga Court Proceedings and it is not clear to me how the consent was recorded without the participation of Jane Wanjiru the third wife. The petitioners in that Succession

Cause did not offer any explanation to this anomaly and were on the issue of the jurisdiction of the court bearing in mind the provisions of Section 48 of the Law of Succession that clearly sets out the limit of the monetary jurisdiction of the Resident Magistrate's Court in matters of Probate and Administration.

Considering the above, I would therefore set aside the order and revoke the grant that was issued by the Principal Magistrate Court in Muranga in Succession Cause No. 135 of 2000.

I now turn to the application for revocation by Evelyne Wagitie Kamau dated 5th June 2002. The grant of Probate of written will of the deceased was issued to Jane Wanjiru Kamau on 6th May 2001. The deceased in this matter the late Geoffrey Kamau Wandaka died on 9th November 1999.

The applicant applied for the grant of Probate in her capacity as a beneficiary and widow of the deceased as the will did not name the executor.

The will was challenged by the objectors on the following grounds.

- a) The proceedings to obtain the grant were defective as the applicant did not disclose to the court the existence of the objectors nor were the objectors notified.
- b) The will was not properly attested to or the witnesses did not understand the meaning of the will. Lastly the deceased did not make reasonable provision for his two wives namely Rosemary and Evelyne.

During the hearing, the objectors gave evidence in support of their application for revocation. They also relied on the testimony of Esther Nyambura Kamau. The facts that cut across all these witnesses evidence can be summarized as follows:

The deceased was married to 3 wives, the objectors are the 1st and 2nd wives of the deceased respectively. They complained that the deceased did not make adequate provisions for them. A matter that was raised in the Local Land District Tribunal but their claim was dismissed. They contributed to the acquisition of the deceased Estate and the applicant/executor and her children have been allocated the lion share while they have been given only 1 acre each. In the case of Evelyne this 1 acre is grossly inadequate and unfair since in the course of her marriage with the deceased they had conducted a Kikuyu traditional marriage where by they brought into their family Esther Nyambura Kamau as their child who has 5 children who all depended on the said objector and in turn the deceased children are all named in accordance with the Kikuyu Customary Practice as if the said Esther Nyambura was the child of the deceased.

The other issue that is worthy of mention is the allegation by the objectors that the deceased did not have capacity to make testamentary dispositions. They contended that the deceased was frail, in bad health due to chronic diabetes and was virtually blind. Similarly they alleged the deceased was under the undue influence of the 1st wife who had excluded the objectors from seeing the deceased.

On the other hand the applicant/Executor defended the grant of Probate issued to her. She proposed the will by calling the two attesting witnesses who witnessed the signing of the will namely John Njomo Kamau and Stephen Gicheru Mwangi.

The advocate who drew the will M/s Mary Wangari also testified all these witnesses confirmed that the deceased signed the will in their presence by affixing his thumb print after the contents of the same was explained to him. All these witnesses were subjected to intense cross-examination on the mental capacity of the deceased and his ability to see. They were all categorical in their evidence that the deceased was of sound mind and understood what he was signing.

This is the summary of the evidence.

In addition counsel for the applicant and objectors filed written submissions and made very extensive

oral submissions which I have given due consideration and formulated the following issues for determination.

- 1) Whether the deceased was possessed with the mental and physical ability or capacity to make the will on 16th July 1998
- 2) Did the will fail to provide for the deceased dependants or to make reasonable provisions for dependants.

Section 11 of the Law of Succession Cap 160, provide for the formalities and what constitutes a valid will as follows:

”No written will shall be valid unless:

- a) **The Testator has signed or affixed his mark to the will or it has been signed by some other person in the presence and by the directions of the testator.**
- b) **The signature or mark of the Testator or the signature of persons signing for him is so placed that it shall appear that it was intended thereby to give the effect of the will.**
- c) **The will is attested by two or more competent witnesses: each of whom must have seen the testator sign or affix his mark to the will.....”**

The evidence by the objectors especially the two widows of the deceased show that the deceased was in very poor health.

According to the provisions of Section 5(3) of the Law of Succession which provides:

“Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this Section unless he is at the time of executing the will in such a state of mind, whether arising from mental or physical illness, drunkenness or from any other course, as not to know what he is doing.”

Section 5(4)

“The burden of proof that a testator was, at the time he made any will, not of sound mind shall be upon the person who alleges”.

The burden of prove in respect of this allegation lies with the objectors and in my humble view they failed to discharge this burden. There was no medical evidence to support the allegation, there was also no hand writing expert to controvert the evidence by the applicant’s witnesses.

In this case I would uphold the will of the deceased and the grant of probate of written will that was issued to the applicant.

It is the humble view that the leaving out the matter of adequate provision would not serve the interest of justice.

The issue is raised in the Summons for revocation, it is cross-cutting in the evidence of the objectors and there is even a formal application for provision of reasonable dependency.

Apart from the above, Section 47 of the Law of Succession Act and Rule 73 of the P & A rules sufficiently empower this court to make such orders for ends of justice and to prevent the abuse of the court process.

I have also taken into account these proceedings begun in the year 2000, and it is not convenient both to the parties and to the court to leave out the issues of reasonable provisions.

It is not disputed that the deceased was survived by 3 widows. The first two widows had no children but the second widow had “adopted” or married under the Kikuyu Customary Law Esther Nyambura to beget children to permeate the name of the deceased. In deed Esther Nyambura was brought to the household of the deceased and more specifically under the care of Evelyne Wagitie the second widow.

In my humble view I do not think the relationship of the deceased and this Esther Nyambura was repugnant to law and morality. She remained in the deceased household and continue to live there with her five children.

The deceased should have made provision for Esther Nyambura as a child of Evelyne Wagitie just as he made provisions for the children of Jane Wanjiru and the objectors are entitled to make their application under Section 29 of the Law of Succession.

I have made reference to a leading authority by the Court of Appeal in the case of **John Kinuthia Githinji – vs – Githua Kiarie & Others CA No. 99/98 (Nairobi)** especially the reference to the observations of Cockburn, CJ as in the case of **Banks - vs – Goodfellow 1870 LR** as follows:

“The Law of every civilized people concedes to the owner of property the rights of determining by his last will either in whole or part, to whom the effects which he leaves behind him shall pass.....A moral responsibility of no ordinary importance attaches to the exercise of the right given. The instincts and affections of mankind, in the vast majority of instances, will lead men to make provisions for those who are dearest to them in kindred and who in life have been the object of their affection..... The same motive will influence him in the exercise of the right of disposal when secured to him by Law. Hence arises reasonable and well warranted expectations on the men’s kindred surviving him that on his death effects shall become theirs, instead of leaving to strangers.

To disappoint the expectations created and disregard the claims of kindred to the inheritance is to mock the common sentiments of mankind and to violate what all men..... Deeming an obligation in normal Law “

I agree with the sentiments expressed in this great passage that the testator has power to dispose of his property but that freedom is not absolute.

I have taken into consideration all the conditions laid down under Section 28 of the Law of Succession including the deceased attitude to his 1st and 2nd wife and Esther Nyambura. However, the deceased even if it is land did not recognize Esther Nyambura as his child or wife of his “son”, he did not expel her from his household.

Instead children were born and named after him and his 2nd wife. Both objectors recognize Esther as part of their household and in my view she cannot be thrown out at this eleventh hour, that would occasion injustice to her and her children who have always considered themselves as the part of the deceased household.

Thus considering the extent of the deceased estate and considering that the deceased first two widows were only given one acre it would be met just that I make an order that the Executrix do make provision of one acre of land to be made available and Loc 15/Kimathe /477 for the deceased following dependants

- 1) Esther Nyambura: 1 acre
- 2) Evelyne Wagitie 1 acre
- 3) Rosemary Nyambura 1 acre.

This being a family matter each party to bear their own costs.

It is so ordered.

Ruling read and signed on 3rd February 2006.

MARTHA KOOME

JUDGE