REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS
Prob & Admin Cause 145 of 2001

PHOEBE NDINDI NZIOKI.....DECEASED

VERSUS

PITILISA MUNYIVA NGUI.....PETITIONERS

R U L I N G

Before me is an application seeking for revocation of grant which was issued to Munyiva Ngui the petitioner herein. It is expressed to be brought under Sections 47, 76 (a) (b) and (c) of the Law of Succession Act and Rules 44 and 73 of the Probate & administration Rules.

The application is based on grounds that the deceased Phoebe Ndindi Nzioki left a valid will and when applying for letters of administration, the petitioner concealed that fact and misrepresented to the court that the deceased died intestate. One of the applicants, Agnes Mbithe Ndunda depones that the deceased left a valid will dated 2/3/98 in which she appointed the applicant and one Japheth Mwangangi Ngui her brother in law to be the executors and trustees of her estate and that they learnt of the will upon the death of deceased and that she learnt from the deceased employers that the petitioner had been paid Kshs.213,564/80/= and Kshs.7,789/= for each of the children and it is her prayer that the court orders the same money and the sum of Kshs.456,227.25/= held by Machakos Co-operative Bank in the deceased's account be preserved pending the hearing of this application.

In opposing the application, the petitioner/Respondent who was the deceased's mother in law swore an affidavit in which she denies having been aware of any will made by the deceased and that what is annexed to the application as a will is not a valid will; that the applicants never took any steps to apply for grant of letters after deceased's death and that she has been taking care of the orphans of the deceased and that since she has only meagre means and is aged, she relies on the money paid to her on behalf of the estate. That the applicants were never interested in the estate and that this application is meant to delay and cause hardship to the beneficiaries.

Having considered the affidavits and submissions of both counsels, there is no doubt that the deceased died on 6/8/98. The Respondent did not petition this court for grant of letters of administration till 8/5/01 which is 3 years after the deceased's demise. Since the deceased's husband had died earlier, it means that the children left behind had no parent. It is obvious that they needed to be cared for. The petitioner claims to have been the one caring for them. The applicants do not deny that fact.

It is the applicant's case that the Respondent became aware of the existence of the will soon after the demise of the deceased. However, the court has no idea how that information was communicated to the Respondent as indeed the court has not been told how and when it was. Even if that were the case, the question is why the applicants took no steps at all towards application for grant of letters of administration as they were well aware that there were young children to be cared for. No explanation has been given for the delay of about 3 years. The allegation by the applicants that the Respondent concealed some evidence from the court in making her application is not sustainable as there is no evidence that she knew if the existence of the will and even if she had, those charged with that duty had sat back for too long whereas there were children to be cared for. What the Respondent did in applying for grant in my view was for the best interests of the children under the circumstances.

The Respondent argues that there is no valid will that is capable of being proved and given effect. I had a look at the annexed copy of the will and it is apparent that the deceased purported to bequeath to her

children property that belonged to her deceased husband which is irregular. She can only bequeath what belongs to her estate. Her husband's estate is being administered by the Respondent in Probate and Administration 323/00.

It is also the Respondent's submission that the purported will offends Section 11 of the Law of Succession Act in that, the mark or signature of the testator has not been so placed as to give effect to the contents of the will and that page 3 has no nexus with the other page. To some extent I do agree that the attestation on the will is done on its own page separate from the body of the will. That casts doubt on the regularity of the will.

From the foregoing, this court is satisfied that the grant cannot be revoked based on affidavit evidence as it is insufficient to prove the authenticity of the will. The court, therefore, directs that the applicants call vivo voce evidence to prove the will before the court can make its finding on whether or not the grant should be revoked.

It is further ordered that the Respondent will continue to administer the Estate pending the proving of the will by way of viva voce evidence.

Cost to be in the cause.

Dated at Machakos this 27th day of January 2005

R.V. WENDOH

JUDGE