



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

Succession Cause 1670 of 2004

IN THE MATTER OF THE ESTATE OF DAVID WAHINYA MATHENE (DECEASED)

RULING

Festus Mathenge Namaru, petitioned for a Grant of Probate of written will dated 26th December 2002 in P & A Succession Cause No. 1670 of 2004.

Prior to this Succession Cause, the Objector Mary Njoki Njenga had issued a citation to the Petitioner herein requiring him to produce a certain document purporting to be a will in which he was appointed as the sole executor of the estate of the late David Wahinya Mathenge. This was in Succession Cause No. 1556 of 2004. On 25th November 2003, the Petitioner had petitioned for the Grant of Letters of Administration intestate but it would appear the Objector also filed a petition in High Court Succession Case No. 3352 of 2003. The petitioner withdrew his petition and the Court ordered a stay of proceedings, in that particular file and this leaving the petition under P & A Succession Cause NO. 1670 of 2004 as main cause of action in these proceedings.

The deceased herein, the late David Wahinya Mathenge died on the 5th January 2003. He left a will and the Petitioner was construed to be the executor therein named will.

The Petition for the Grant of Probate of written will was filed in the June 2004 and was gazetted on 9th July 2004. The Objector, Mary Njoki Njenga filed an objection on 4th August 2004 she also filed an Answer and cross-petition. The grounds upon which the objection is predicated are as follows:-

- 1) The deceased is the objector's husband and they have (5) children.**
- 2) The proposed Administrator has started misusing the deceased estate whereas the children are suffering**
- 3) There is a written will**
- 4) There are three Succession matters regarding the deceased estate i.e. P & A 3352 of 2003, P & A 1556/04 and the Objector needs to have them consolidated.**

Directions were given that these matters be determined by way of oral evidence but Counsel for the Petitioner reserved his right to raise a preliminary objection at the hearing.

Thus when this matter came up for hearing on 25th October 2005 Counsel for the Petitioner argued that there was no point of calling oral evidence to support the objection as there is no valid objection on record. Counsel submitted that the grounds raised in the objection are not proper grounds as there is no

contention that the will is invalid. The grounds raised by the Objector are not proper grounds. There is for instance no evidence to support the allegation that the executor is misusing the assets of the deceased and even if there were, there is a proper procedure within the law of Succession of how a person who is found to be intermeddling with the estate of the deceased should be dealt with.

As regards the existence of other Succession Causes, P & A 3352 2003 was withdrawn when Counsel advised the Executor that the proper procedure to follow was to apply for probate of written will. Furthermore, the Court order of 28/4/04 duly stayed those proceedings.

Similarly P & A 1556 of 2004 was a citation issued and thus the proper proceedings are in P & A 1670 of 2004. In any event, all the files are placed together.

On the other hand, Counsel for the Objector contended that the Objection was proper and the Court should proceed to hear the same on merit.

I have carefully considered all the submissions, as well as the petition and the objection.

I agree with Counsel for the Petitioner that the grounds upon which the Objector relies upon to bring this objection are not proper grounds. The Law of Succession Cap. 160 is a wholesome Act of Parliament complete with substance and procedure.

If for instance the Petitioner as a named Executor is intermeddling with the estate there is procedure for seeking accountability.

If the Petitioner and her children were not provided for in the will there is a procedure for seeking for reasonable provisions for dependency. If the Petitioner claims the deceased left a will and it would appear this is the will as the Petitioner had been issued with citation by the Objector, then this is his opportunity to profound the will.

The only reason that would necessitate the calling of viva voce evidence is when the validity of the will is challenged on the grounds of fraud or coercion or even incompetence. None of the above are the cited grounds. In this regard I find that there is no reason for calling viva voce evidence and I hereby dismiss the objection.

Based on the fact that the will has named two girls, Nyambura and Wamaitha as Beneficiaries and the children of Gatheru, it is not clear to me the ages of these children but most likely, they are of the age of minority. In this respect, it is necessary to call for more information by way of affidavits to establish the ages and circumstances of the children and especially who is the mother of Nyambura and Wamaitha. The next issue to determine by way of further evidence is who else to appoint as a Co-Administrator of Co- Trustee as the law is clear that no grant of Letters of Probate shall be issued to one Executor when there are minor children who are Beneficiaries and when there is a continuing Trust. Upon the provisions of the above information this Court will be in a position to issue the grant of Probate of the written will.

Each party bear their own costs.

It is so ordered.

Ruling read and signed on 25/11/05.

MARTHA KOOME

JUDGE