REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
H.C.SUCCESSION CASE NO.2340 OF 1996

IN THE MATTER OF THE ESTATE OF R W K (DECEASED)

HW N …….. APPLICANT/OBJECTOR

G M K ……..…….. 1ST RESPONDENT

H N K ……... 2ND RESPONDENT

R U L I N G

By a summons dated the 7th November, 1996, supported by an affidavit sworn on the 11th November, 1996, **H W N**, (referred to as " the applicant) seeks revocation or annulment of a grant of letters of administration interstate issued by the Senior Resident Magistrate's court, Kiambu, in succession Cause No.230 of 1996 on the 20th September, 1996 to **G M K** (referred to as " first Petitioner") and H N (referred to as Second Petition") It is filed under section 76 of the Law of Succession Act Cap 160 laws of Kenya essentially on the grounds that the proceedings to obtain the said grant were defective in substance. It is contended by the applicant that these defects include the gazettement of this succession cause No.17th May, 1996 before consent from all person entitled to apply for grant of letter's of administration instate, either in priority or in equality to the first and second Petitioners, had been obtained; the purported subdivision or distribution of land Reference **[particulars witheld]** (referred to as "the suit estate") before the said grant had been obtained and before the applicant had been informed and shown her proposed share; the making of a false statement to the effect that the applicant had consented to the first and second Petitioners to Petition for the said grant; and the value of the estate which is in excess of **Kshs.500,000/=** hence the said Senior Resident Magistrate lacked jurisdiction.

In support of this summons the applicant has given sworn evidence and has called **G M M (P.W.2) M W M (P.W.3) E N M (P.W.4)** as witness. Each of the Petitioners has also given evidence on oath and have called **J N N** (DW3) **P M K** (D.W.4) and **G G G** (D.W.5) in support of their opposition to revocation and/or annulment of this grant.

Evidence given before me has established the following details. The suit estate was originally the property of **K M** who died in 1948. As the time of his death Kimani Mbuthia was survived by his wife **R W K** (referred to as "the deceased" in this ruling) and **G N K.** The only known property of **K M** at the time of his death on 1948 was the suit estate, and the only beneficiaries to that who was surviving were the deceased, the first Petitioners and **G N KI.**

After the death of her husband **K M** in 1948, the deceased produced three other children, about daughters, with other men to whom she did not formally enter into marriage. By so doing she did not disentitle herself from his estate.

These daughters are **A N** (Not called to give evidence) **H N** (The second Petitioner) and **J W** (also not called to give evidence). It is instructive that, other than the second Petitioner, both A N and **J W**have not put up a claim to a share of their father's estate. This could be explained off by the fact, given in evidence by the applicant, that all the deceased's daughters are now married woman. It is Kikuyu customary law that married daughters are not entitled to the estate of their father upon marriage; they became entitled to their husband's estate. The second Petitioner has conceded that **A N** is a married woman and is not entitled to a share of the suit estate. She has denied, however, that she and **J W** are married. I have already observed that **J W** has neither given evidence nor put up a claim for a share of the suit estate. She is said to be living in Mombasa. I have therefore we credible evidence to rebut the applicant's averments that **J W** is a married woman. She may very well be.

The second Petitioner denied to be a married woman. She however conceded that she was married ones in 1981 to **S G** but separated from him in 1986. She and Simon Gitao got two children, one of whom is called **B G** named after her father in-law. The other is **C W** named after her mother. While under cross-examination the second Petitioner told the court that Mr. Simon Gitao did not pay dowry to her parents through her parents had accepted this marriage. I find this so to be a contradiction. A marriage under Kikuyu customary is deemed to be duly contracted and acceptable when dowry, not necessary all of it, is paid. Consequent upon acceptance of that marriage, children born within that marriage are then named in accordance with Kikuyu customary law. The search Petitioner has conceded that her children have been named in accordance with Kikuyu customary requirements. It is blatantly clear all these that the applicant, on a balance of probabilities, has sufficiently proved that the second petitioner is the deceased's married daughter, and by the operation of Kikuyu Customary law, would not be entitled to the deceased's estate. The second Petitioner is not, however claiming a share of the suit estate under Kikuyu customary law. She is placing this claim under a written will which she insists, as does the first Petitioner, was made by the deceased on the 11th October, 1993. The said alleged WILL has been tendered into evidence by the Petitioner as Defence Exhibit 1. It read as follows:-

> Kerwa Primary
>
> P.O. Box 118
>
> KIKUYU
>
> 11/10/1993
>
> To: Te Chief
>
> Kikuyu Location
>
> Thor"
>
> The Area Assistant chief
>
> Kerwa Sub-Location

Dear Sir,

RE: MY WILL ON PLOT NO.377

I, R W K, have willingly said that my above plot will be divided as follows:-

> 1. One acre to the wife of my deceased son G N K
>
> 2. G M K to get two acres
>
> 3. One acre to H Ni K if only her husband will come for her.

4. One acre to R W K and her unmarried daughter J W K

I hope you will take this seriously and acknowledge the receipt of it.

Yours faithfully

RUTH WANJIRU KINAI

(left hand thumb)

WITNESS

1. Joseph Ngugi Njuguna (signed)

2. Joseph Kinyanjui Mukunga (signed)

The process of petitioning for letters of administration in the Senior Principal Magistrate's court Kiambu Succession Cause No.230 of 1996 is based on the alleged **WILL** and the subsequent subdivision of title [particulars withheld]. The only issues for my determination are two

(a) Is this will valid

(b) Was the subdivision of the deceased's estate done in accordance with the law?

I will deal with the **WILL** first one **JOSEPH NGUGI NJUGUNA** (DW3) has testified that he wrote this WILL on the 11th October, 1993 upon the deceased's request. He said the deceased was taking in the Kikuyu Language and he wrote down in the English language everything, which the deceased told him.

From the **WILL** annexed to this application, it shows that it is thumb-printed by a person said to be the deceased, whose thumb-printing was witnessed by **JOSEPH NGUGI NJGUNA** (DW3) and **JOSEPH KINYANJUI MUKUNGA** (who has not given evidence). In my view **JOSEPH KINYANJUI MUKUMGA** was a crucial witness to call because he is the only who appeared to be independent, **JOSEPH NGUGI MJUGUNA** (DW3) having been the one who wrote down what the deceased allegedly said. Peter Mbugua Karwa (DW4) was instead called to testy and he conceded that he was not present when the deceased made this will. His testimony is that he was only present when the ***WILL*** was read out, and tat a goat had been slaughtered and eaten on that occasion.

The **WILL** is addressed to the Chief Kikuyu Location through the Area Assistant – chief of Kerwa Sub location. The applicant called **GEOFFREY MBUGUA MUTURA (P.W.2)** the chief of Kikuyu Location as her witness. It was the evidence of the P.W.2 that he did not see the deceased's alleged **WILL** before the 9th June, 1999 when he was shown a copy in this court. He said he went back to his office with a view to checking if the original could have been filed there. He said he did not find it.

P.W.2 recalled that; in the month of May, 1996 the applicant went to his office and complained that her child had been beaten by the Petitioner. On 11th May, 1996 he summoned the applicant and first petitioner to his office to find out what the problem between then was.

It transpired that the applicant's trees had been out by the first petition who proceeded to burn charcoal out of them. He thus established that the real dispute was about the land on which they were living on. He also established that none of them had a grant of letters of administration to administer the estate of the deceased. He accordingly advised them to call all the family members and to decide how the land of the deceased was to be sub-divided. He also advised them that they would be no such sub-division before they had obtained that grant. He said he appointed one elder called EVANS NDUNGU MURIU to look into the dispute over the charcoal. As regard the deceased WILL P.W.2 said the applicant and the first Petitioner did not made any reference to it at that meeting of 11th May, 1996. He denied, while under cross-examination, to have even discussed how the deceased's estate was to be sub-divided.

P.W.2 conceded while under cross-examination that the deceased's alleged **WILL** now before Court is dated 11/0/1993 when he was not then a chief. The Chief then was **KENNETH MBUGUA WAKORI** (who has since died) but he checked in his office for it. He neither found such a **WILL** not a file for R W K.

M W M (P.W.3) the deceased's stepmother- in-law and confident testified that, to her knowledge, the deceased did not made a **WILL**. She said if the deceased had made a **WILL** she would have said so, more so because she used to visit the deceased's in Hospital before her death.

EVANSION NDUNGU MWAIU (P.W.4) gave evidence of the event of 11/5/1996 when he accompanied the parties to this cause to the Chief's Office for a land dispute between the 1st Petition and applicant. He recalled the dispute was initially over trees on that 1st Petitioner's land, which the applicant had cut and burnt charcoal from. The real dispute between them was the deceased's land, which the applicant wished to be divided properly. On the issue of the subdivision of the land P.W.4 recalled that the dispute was referred to the deceased's family. On the issue of the **WILL** P.W.4 recalled that the deceased did not made any will and that the first petitioner did not also talk to him about it. I have given the above evidence serious consideration. I have further noted that Mr. Oyatta has conceded in his cubmissions that there was no valid will made by the deceased. He termed this **'WILL**" as expression of the deceased's intentions only. This is what Mr. Oyatta recorded in his submissions:

"The issue of the '**WILL**" was first an expression of the deceased's intention, which intention was manifested in the sub-division. Although the same cannot be classified as a **WILL**, it is our submission that the same can reflect the intention of the deceased before her demise" It is no wonder, then, that the petitioner applied for a grant of letters of administration in testate, for there was indeed no valid WILL which the deceased made on 11th October, 1993.

The then takes me to the seemed issue of the sub-division of the deceased's land. The Kiambu District Land Registrar Mr. George Gachihi 9D.W.I) testified that, accordingly to the records available in his office, on the 20th January, 1993 the deceased applied to the Kikuyu Land Control Board for consent to subdivide her land and that consent was given and a letter of consent dated 21st January, 1993 was issued. He was however unable to trace the original documents relating to the Kikuyu Land Control Board deliberation. He was however only able to produce certified copies of the Green Card as Defence exhibit 8 showing that [particulars withheld] was subdivided on 24th May, 1996 and new title issued in the deceased's name as follows: [particulars withheld] measuring 0.80 HA, [particulars withheld] measuring 0.40 HA and [particulars withheld] measuring 0.40 HA. It is instructive that none of the deceased's surviving beneficiaries have been registered as proprietors of any of these parcels.

It is however the evidence of the Kiambu District Land Registrar that usually after a land control Board gives its consent to a sub-division, an applicant is required to contact a licensed surveyor or a Government surveyor to draw up mutation Form which are then forwarded to the District Surveyor for purpose of issuing new parcel number. The application for consent, the letters of consent and the mutation Forms are all forwarded to the Land Registrar for purposes of canceling the old parcel numbers and the opening up of new register for the new numbers. In this case the mutation forms are thumb-printed on 21st January, 1993 and were presentation for registration by persons he could not say.

The real issue is whether this subdivision of the deceased's land was done by the deceased or by the Petitioners. It is clear from the evidence of the first Petitioner, the deceased did not process any subdivision of her land through the Land Control Board. It is his testimony that the deceased called them to her home on 11/10/1993 and expressed her intentions of how her shamba was to be subdivided. Her intentions were then recorded down into a WILL. It is the evidence of the first Petitioner that the deceased' s **WILL** was recorded on the same day (11/1/1993) and read tot hem on the same day. Therefore the basis of the subdivision of this shamba was the purported **WILL**. It was soon after the reading of the **WILL** that the deceased died on 27/10/1993. It means therefore that the whole exercise of the subdivision, preparation of the documents to effect that subdivision was done by the first petitioner. This he did before he obtained a grant of letters of administration from a Court of law. He had therefore no authority to do so.

I have perused the petition for grant of letter of administration filed on 14/5/1996 by the petitioner. It is supported by an affidavit, which shows that the deceased was survived by only two people namely Hannah Wanjiru- Daughter –in-law and J W- daughter. It also dhows that the deceased had four properties namely [particulars withheld] when in fact, by that 14/5/1996 the deceased's estate was [particulars witheld] only, with no subdivision having been registered. The latter were registered on 24th May, 1996. Quite obviously therefore this petition is supported by a defective affidavit. The applicant has thus sufficiently demonstrated that the proceedings to obtain grant of letters of administration on 20th September, 1996 were defective in subdivision, and the purported sub-division of land defence [particulars withheld] was unauthorized and illegal. For these reasons I hereby revoke the grant of letters of administration issued to the two petitioners on the 20th September,1996 and do hereby cancel the purported subdivision of parcel No. [particulars withheld] into [particulars withheld].

It is so ordered.

Dated this 27th August, 2001

A.G.A. ETYANG

JUDGE

27/8/2001

Delivered this 27th August, 2001 in the presence of Mrs. Ndegwa for applicant, Mr. Odera holding brief for Mr. Oyatta for Respondents and Miss Hellen.

Wanja C/Clerk In attendance are H W N (applicant)

George Mbuthia Kimani (1st Petitioner) and H N K (2nd Petitioner)

A.G.A. ETYANG

JUDGE

27/8/2001

Mrs. Ndegwa:

I ask that a temporary grant he issued to G M K and H W N.

They will then apply for confirmation of this grant after six months.

A.G.A. ETYANG

JUDGE

27/8/2001

Mr. Odera: I have no instructions but I would concede to a temporary joint administration provided that the interests of the respondents are taken care of.

A.G.A. ETYANG

JUDGE

ORDER: A temporary grant of letters of administration do issue in the joint names of G M K and H W N, to be confirmed upon application, at the expiry of six months.

A.G.A. ETYANG

JUDGE

27/8/2001