

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION CAUSE NO. 520 OF 1992

IN THE MATTER OF THE ESTATE OF SALOME NYAKIRIMA NG'ANG'A – (DECEASED)

J U D G M E N T

The application of grant for Probate of written will filed by Mary Wanjiku Kimaru was opposed by George Itotia Nga'ng'a who also filed a cross-petition for such grant. The directions were given to hear the petition by oral evidence.

The will was prepared by the firm of M/S Hamilton Harison and Mathew Advocates and Sekou Owino an advocate in the Probate Division of the said firm adduced evidence from the record of the file kept in respect of the will in question. According to him the will was prepared and the testatrix, the deceased in this cause, executed the will by affixing the left thumb print in the presence of two witnesses who were a clerk and a secretary in the firm and have since left the employment. He also said that from the minutes or remarks on the file the contents of the will were explained to the deceased. The Petitioner Mary Wanjiru Kimaru also gave evidence and stated that the deceased wanted to prepare a will because of the trouble caused to her by George Itotia the Cross-petitioner. She gave details of the visits of the deceased at the Advocate's office when she accompanied her during the visits and when she gave instructions and executed the will. She also said that Mr. Watson a partner of the said firm of Advocates was present during both the visits. According to her the Cross-petitioner is her step-brother and her mother did not want to give her land to anyone outside her blood relations. I need not go into other details of the distribution of the properties by her father between the two homes. She asserted that George and the deceased were arch enemies and she could not have given anything to him during the meeting alleged by him. According to her the meeting of the clan was called on the complaint by George's mother that he had beaten her. It was held at his mother's home and not at the deceased's home. The meeting was according to her mother, to warn him to desist from being cruel to his mother. Neither her nor any sisters was present in the said meeting. She agreed that all the sisters i.e daughters of the deceased are married. The deceased's brother-in-law (her husband's brother) was not called to attend any meeting where it is alleged that the deceased left property to George.

Cross-Petitioner gave evidence and called one Joseph Kiratu Karanja who said he was present in a meeting. He gave details of participants and stated that the deceased gave her properties to George Itotia and produced the minutes of the meeting with translations. He agreed that nobody was present from the family of the deceased. Even the brother or step father or an uncle to her husband was not there and that the meeting was not at the house of the deceased. George Itotia the Cross-petitioner in his short testimony reiterated the oral will.

There was no submission made by the counsel of the Cross-Petitioner although the date for submission was fixed when both the counsel were present.

Section 18 (2) of the Succession Act is very clear in his short simple wordings. If I am satisfied that there was a valid written will the fact of oral will become absolutely insignificant.

P.W.1 the Advocate from the firm of M/S Hamilton Harisson & Mathew gave a very open and forthwith version of the execution and attestation of the will and the Petitioner reaffirmed the same by giving the names of persons who were present during the execution and attestation. I am thus satisfied that on the balance of probability the written will of the deceased is proved to have been properly executed and attested and I find the same to be the valid will of the deceased.

The petitioner has been named as the executor of the will by the deceased and M/S Hamilton,

Harrison and Mathew withdrew from the executorship. I therefore find that the Petitioner Mary Wanjiku Kimaru is the executor of the deceased's will and the grant of probate of the will be given to her.

The Cross-Petitioner shall pay her costs for these proceedings.

Dated and delivered at Nairobi this 31st day of October, 2000.

K. H. RAWAL

JUDGE.