



REPUBLIC OF KENYA



**In re Estate of John Karuma Mbiyu (Deceased) (Succession Cause
837 of 2017) [2024] KEHC 8114 (KLR) (Family) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8114 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE 837 OF 2017

HK CHEMITEI, J

JULY 4, 2024

IN THE MATTER OF THE ESTATE OF JOHN KARUMA MBIYU (DECEASED)

BETWEEN

MARGARET WANJIRU KARUMA APPLICANT

AND

HOTTENSIAH WANJIRU GAUTURU 1ST RESPONDENT

BERNICE WANAGARI KAIRU 2ND RESPONDENT

RULING

1. This ruling relates to the application dated 20th May, 2019 filed by Margaret Wanjiru Karuma, the Applicant, seeking for orders that:
 - (a) Orders made during the confirmation of grant made on 12th February, 2019 be reviewed and the distribution be changed and the estate to be distributed as per the mode of distribution stated in paragraph 11 of the Supporting Affidavit.
2. The application is supported by affidavit sworn by Margaret Wanjiru Karuma on 20th May, 2019. She avers, inter alia, that at confirmation of grant, land parcel numbers LOC.15/Gathukeini/285, LOC. 15/Gathukeini/1357 and LOC. 15/Geitwa/398 were given to the first house represented by Kane Njeri Mwangi (to hold in trust for the others) and Land parcel number LR/209/11358/218 was given to the second house represented by Margaret Wanjiru Karuma (to hold in trust for others).
3. That Land parcel number LR/209/11358/218 had previously been allocated to them by the deceased and this has been evidenced by a letter dated 22nd January, 1988. She went on that LR/209/ 11358/218 is for the 2nd house and there is no dispute on this.



4. She deponed that there were other plots that were allocated to the two houses by the deceased and they are not a part of the instant proceedings. LOC.15/Gathukeini/285, LOC.15/Gathukeini/1357 and LOC. 15/Geitwa/398 should be shared equally between the two houses.
5. That land allocated to the deceased under Share Certificate Numbers 141, 142 and 143 were left out of the instant proceedings because of Nairobi ELC Case No. 614 of 1998: *Mathare United Traders & Farmers Co. Ltd versus Wambui Maina & 22 others* which was decided in favour of the plaintiff where the deceased had three shares – the share certificate numbers aforementioned. She has proposed a mode of distribution at paragraph 11 of the supporting affidavit.
6. The application is opposed vide notice of preliminary objection and grounds of opposition dated 27th June, 2019 and replying affidavit sworn 15th July, 2019.
7. The notice of preliminary objection is based on the grounds that the purported will relied upon by the Applicant is not a valid will and enforceable will as envisaged by the provisions of Section 11 of the *Law of Succession Act* (Cap 160) and the Applicant cannot seek to rely on the contents of a will to alter and or rectify a grant obtained through intestate succession proceedings.
8. The grounds of opposition has reiterated the content of the notice of preliminary objection aforementioned and further added that the Applicant has not obtained the written consent of all the deceased's beneficiaries to present and/ or file the application. That the Applicant voluntarily signed all the documents relating to the confirmation of grant as she was represented by the firm of Kimaru, Kiplagat & Company Advocates.
9. In the replying affidavit, they aver, inter alia that the deceased died intestate and there is no valid will that he left behind which is why the matter proceeded as an intestate cause. It was unanimously agreed at a family meeting that the first house shall have the rural land parcel numbers LOC.15/Gathukeini/285, LOC. 15/Gathukeini/1357 and LOC. 15/Geitwa/398; and the second house shall the Nairobi land parcel number LR/209/ 11358/218.
10. That this court is only legally empowered to revoke a grant and/or rectify it to correct omissions, mistakes or errors in it. The omitted land parcel numbers Share Certificate Numbers 141, 142 and 143 to be included in the grant and shared equally between the two houses.
11. The Applicant has filed written submissions dated 28th July, 2023.
12. The respondents have not filed submissions.

Analysis and Determination

13. Having gone through the application before this court, the responses and submissions filed by the parties. The substantive issue is whether what the Applicant is calling a will is one within the meaning of section 11 of cap 160.
14. The said section provides as follows;

“Written wills

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 direction of the testator;



- (b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a 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, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

- 15. I have read the same as well as the translation thereof and respectfully do not agree with the Applicant. The document though allegedly signed by the deceased was not witnessed by two other witnesses as required in the above cited portions of the law.
- 16. Curiously and as submitted by the respondents the Applicant who was well represented by a law firm during the entire exercise was well aware of the said document but she kept silent. Whatever it was worth, it was necessary that she brings it forward before the grant was confirmed.
- 17. Needless to state that the said document probably expressed deceased wishes and nothing more.
- 18. In the premises I do not find merit in the application and the same is dismissed with no order as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 4TH DAY OF JULY 2024.

H K CHEMITEI
JUDGE

