



**In re Estate of Kariuki Kangau (Deceased) (Succession Cause 563 of 2012)  
[2024] KEHC 15378 (KLR) (Family) (17 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 15378 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 563 OF 2012  
EKO OGOLA, J  
SEPTEMBER 17, 2024  
IN THE MATTER OF THE ESTATE OF KARIUKI KANGAU (DECEASED)**

**BETWEEN**

**MICHEAL KIBE PETER KARIUKI ..... 1<sup>ST</sup> APPLICANT  
MOSES KANGAU WANGARI ..... 2<sup>ND</sup> APPLICANT  
MARY KANYI NJERI (FOR THEMSELVES ON BEHALF OF) ... 3<sup>RD</sup> APPLICANT  
MKK (A MINOR) ..... 4<sup>TH</sup> APPLICANT  
KKJ (A MINOR) ..... 5<sup>TH</sup> APPLICANT  
KK (A MINOR) ..... 6<sup>TH</sup> APPLICANT**

**AND**

**PETER KANGAU NJENGA ..... RESPONDENT**

**JUDGMENT**

1. This matter relates to the estate of Kariuki Kangau (deceased) who died testate on 8<sup>TH</sup> February, 2009 leaving a contested will dated 21<sup>st</sup> January, 2009.
2. What is before court is summons dated 01/03/21 and 14/02/2023. A petition for confirmation of grant with a written will was filed by the executor, Peter Kangau Njenga dated 10<sup>th</sup> July, 2023.
3. What the Applicants/Protestors are seeking is reasonable provision as dependants out of the deceased's net estate. The said Summons is supported by the Affidavit sworn on 01/03/21 by Michael Peter Kibe Kariuki, the 1st Applicant hereof.



4. The Executor/Respondent opposed the said Application and filed a Replying Affidavit sworn on 12/07/22.
5. The Executor on his part filed a Summons for Confirmation of Grant dated 12/07/22 in which he sought that the Grant of Probate to be confirmed in accordance with the Will.
6. The Protestors in opposing the said Summons for Confirmation filed an Affidavit of Protest sworn on 14/02/23.
7. Both Parties relied on their respective Affidavits and adduced oral evidence and called one witness each in support of their respective cases. Viva voce evidence was taken in court on 11<sup>th</sup> December, 2023 for the objectors' case where Micheal Kibe Peter Kariuki testified. The executor/Respondent one Peter Kangau Njenga also gave oral testimony on the same day.
8. The Protestors/Applicants claim that they relate to the deceased in the manner as follows;
  - a. Michael Kibe Peter Kariuki - Son
  - b. Moses Kangau Wangari - Grandson
  - c. MKN - Granddaughter
  - d. MKK - Granddaughter (a minor)
  - e. KKJ- Grandson (a minor)
  - f. KK- Grandson (a minor)
9. It is further stated that the Executor/Respondent in the cause hereof relates to the deceased by virtue of being his nephew.
10. It is further contended that 1st Protestor/Applicant was born of the deceased and his then wife namely Mary Kanyi Mbugua. It is claimed that the deceased married the said Mary Kanyi Mbugua in the year 1970 and the two bore the following children who also have their respective nucleus families;
  - a. Leonard Kangau Kariuki - Son, born in 1972 (now also deceased)
  - b. Mercy Wangari Kariuki unmarried daughter, born 1973 (now also deceased)
  - c) Hannah Njeri Kariuki - unmarried daughter, born in 1974 (now also deceased)
  - d) Michael Kibe Kariuki - Son, born in 1975 married with 1 child.
11. It is noted from the testimonies that out of the 4 of the deceased's children only the 1st Applicant is presently surviving. The named grandchildren are sons and daughters of the respective three (3) deceased children of the deceased person hereof.
12. From the testimony of DW 1 it is noted that by the time of the deceased's death he was long separated from his said wife. The deceased never remarried. The deceased died on 08/02/09. Upon the deceased's death the Executor/Respondent obtained Grant of Probate in the cause hereof on the strength of a Will dated 21/01/09 made 18 days before the death of the deceased. It is averred that the said Will gave and bequeathed all the deceased's immovable and movable assets to the Executor/Respondent to the exclusion of all other persons and beneficiaries entitled to the estate of the deceased. The protestors claim that the said will did not make any reasonable provision for the deceased's rightful dependants and/or heirs.



13. The executor on his part states that the deceased was his uncle and they lived in the same compound. He contends that the protestor who testified did not live with the deceased. He stated in his testimony that the deceased's wife left in 1973 and OW1 was born in 1980. He contests that there was therefore no possibility that OW1 was sired by the deceased.
14. The Applicants admitted validity of the Will in so far as it met the formal requirements under the Law of Succession Act. They however made note that the said Will was made at the time when the deceased was very vulnerable and that the said Will totally disinherited the Applicants/Protestors hereof. Other than the Applicants/Protestors hereof and the 1st Applicant's/Protestor's siblings who are now deceased, the deceased person had no other dependants and/or beneficiaries. It is further divulged that the Executor also had no priority over any of the Applicants on matters kinship.
15. The 1st Applicant testified that during the deceased's lifetime, him and his siblings and by extension the deceased's grandchildren were dependant upon the deceased and looked upto him.
16. Further contentions are made that though the deceased was separated from the 1st Applicant's/Protestor's mother for a long time, the Applicants/Protestors had a good relation with the deceased during his life time and took care of him according to their respective abilities. That in the deceased's later years of his life however, the Executor/Respondent and his mother made concerted efforts to alienate the deceased from his children and deny the Applicants/Protestors access to the deceased who was then terminally ailing and had resulted to alcohol abuse. They proceed to aver that the 1st Applicant/Protestor and his siblings had to seek the intervention of the local administration and elders in an attempt to resolve these differences during and after the deceased's life time. That during the intervening period the 1st Applicant was forcefully evicted from the residential premises where he lived with the deceased by the Executor.
17. The 1st Applicant maintained that the disposition of the deceased's estate effected by his Will completely disinherited the deceased's children and grandchildren who are his dependants and rightful heirs.
18. This court notes from the pleadings and testimonies that the deceased's sole administrable asset is a one-third (1/3) share in Title No. Kiambaa/Thimbigua/1746 measuring 2.80 Acres registered in the names of the deceased and his deceased brothers who are Kamundi Kangau who died in 1993 and John Njenga Kangau (deceased, 2007), a copy of the official search was annexed as annexure in the Supporting Affidavit sworn on 01/03/21. A simple computation will show that the deceased hereof is entitled to a 0.93 Acre portion out of the said property.
19. It is submitted that the 1st to 3rd Applicants/Protestors are poor with no stable incomes from their odd and menial jobs, indigent and have no land of their own while the 4th to 6th Applicants are minors and the said property is adequate enough to accommodate the Executor/Respondent and all the Applicants/Protestors hereof. The Executor/Respondent is on the other hand amply provided for as he already has his share of inheritance of the said property through his deceased father the said John Njenga Kangau (deceased).
20. The Applicants concluded that it will be in the interest of justice that a reasonable provision for the Applicants/Protestors being the deceased's lawful dependants be made in the manner that this Honourable Court deems fit and just out of the deceased's estate.
21. The Executor had pleaded that Application for provision herein must fail because none of the applicants qualify as children of the deceased. He testified that Mary Kanyi Mbugua, who had been married to the deceased left and/or abandoned her marriage on or about the year 1975 and then married a man known as Mbugua. He further pleaded that the Applicants were born at least 5 years after



their mother had abandoned her marriage to the late Kariuki Kangau (deceased) and therefore biology dictates that the deceased herein could not have sired those children and that in any event, Kikuyu culture is such that children parenthood follow their mothers and therefore Mbugua who married the former wife of Kariuki Kangau took both the mother and her children.

22. It is noteworthy that in cross examination the executor conceded that he knew that the deceased had sired 4 children with the said Mary Kanyi Mbugua and also stated that he was of very tender age when the deceased's wife left.

### **Determination**

23. I have considered the objectors application, the affidavits in support and against the summons together with submissions by both parties. The issues for determination are as follows;
- i. Whether the deceased left a valid will and whether it should be admitted to probate.
  - ii. Whether the applicants/protestors are entitled to the estate as per the will.

### **Whether the deceased left a valid will and whether it should be admitted to probate.**

24. Part II of the Law of Succession Act lays out provisions on Wills, among them: the 'persons capable of making wills and freedom of testation'; 'forms of wills' and 'revocation, alteration and revival'. Section 5

“5.

- (1) Subject to the provisions of this Part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.
- (2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.
- (3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.
- (4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.”

5 So is Section 11:-

“11. 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.”

25. It is noteworthy that the will in the present case has not been contested. No party has laid a claim that the deceased lacked the testamentary capacity to make the will in accordance with the provisions cited above. Neither has any party cited any elements of discrimination as per the distribution under the will. It can be deduced that the will has never been altered and was executed in presence of two witnesses as required by law. Though none of the witnesses testified to foster the veracity of the will, the will being not contested as invalid, stands valid.

**Whether the grant dated 11<sup>th</sup> December should be revoked.**

26. Does the Applicant’s application meet the threshold for the revocation of a grant within the meaning of Section 76 of the Law of Succession Act?
27. Revocation of grant is premised on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The said provision states as follows:

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- a. that the proceedings to obtain the grant were defective in substance;
- b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d. That the person to whom the grant was made has failed, after due notice and without reasonable cause either—



- i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
- ii. to proceed diligently with the administration of the estate; or
- iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

28. The court finds that the respondent has failed to prove any of the grounds for revocation under Section 76 of the Law of Succession Act.

**Whether the applicant is entitled to the estate as per the will.**

29. It is ordinary purview that a Will provides certainty to the surviving members of the deceased's family, by distributing the property of the deceased according to his/her wishes. It prevents or minimizes family disputes that are likely to arise during division of property.

30. Githinji J (as he then was) in *Karanja & anor v Karanja* (2002) 2 KLR 22 stated as follows:

“Where the will is regular on the face of it with an attestation clause and signatures of attesting witnesses and the signature of the testator, there is a rebuttable presumption of due execution (Omnia esse riteatta).”

31. This court finds no reason or ground not to allow execution of the will as made by the deceased.

32. The protestors claim has not been supported by any evidence that they were children of the deceased. From the record I could not detect any birth certificates. I also agree with the finding by Muchelule J vide his judgment delivered on 28<sup>th</sup> January, 2020.

33. In light of the foregoing, I am not persuaded to allow the applications by the protestors.

34. In the end, the court makes the following orders;

- a. Summons for Revocation or Annulment of grant dated 4<sup>th</sup> April, 2017 is hereby dismissed.
- b. The Petition for Probate of the deceased’s written will dated 20<sup>th</sup> March, 2012 is found to have merit and is allowed with the following orders:
  - i. That the Will executed by the deceased herein dated 21<sup>st</sup> January, 2009 be and is hereby declared to be valid will of the deceased.
  - ii. That distribution of the deceased’s estate be and is hereby ordered to be in terms of the deceased’s will dated 21<sup>ST</sup> January, 2009 and summons for confirmation of probate dated 12<sup>th</sup> July, 2022.
  - iii. Each party shall bear their own costs.



Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

.....

**E.K. OGOLA**

**JUDGE**

.....For Applicant

.....For Respondent/Protestor

Gisiele - Court Assistant

