



In re Estate of Robert MuchunU alias Robet Muchunu Mumbura (Deceased) (Succession Cause 2974 of 2005) [2023] KEHC 17638 (KLR) (Family) (15 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17638 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2974 OF 2005
MA ODERO, J
MAY 15, 2023
SUCCESSION CAUSE NO. 2974 OF 2005
IN THE MATTER OF THE ESTATE OF ROBERT
MUCHUNU ALIAS ROBET MUCHUNU MUMBURA
(DECEASED)
IN THE MATTER OF THE WILL OF THE LATE ROBERT
MUCHUNU DATED 08 TH SEPTEMBER, 1992

BETWEEN

ERIC KIMANI MUCHUNU 1ST APPLICANT
NELLY NJAMBI WAINAINA 2ND APPLICANT

AND

JANE MUCHUNU 1ST RESPONDENT
KIAMBU LAND REGISTRAR 2ND RESPONDENT

JUDGMENT

1. Before this Court for determination is the Originating summons dated 11th May 2022 by which the Applicant Nelly Njambi Wanaina seeks the following orders:-
 1. Spent.
 2. Spent.
 3. Spent.



4. Spent.
 5. That the Honourable court be pleased to declare that assets not covered under the will were unlawfully and irregularly acquired by the 1st Respondent.
 6. That the Honourable court be pleased to order the annulment of the distribution of any asset not covered under the will of the late Robert Muchunu alias Robet Muchunu Mumbura dated 8th September, 1992.
 7. That adequate provision for the applicants from the net estate of the deceased be made in such a way that the applicants and the other beneficiaries receive equal share of the estate of the deceased.
 8. That costs be provided for.
2. The summons which was premised upon Order 40 Rule 1 and 2 of the Civil Procedure Rules, Section 73 of the Probate and Administration Rules and Sections 26 and 27 of the *Law of Succession Act* was supported by the Affidavit of even date sworn by the 1st Applicant.
 3. The 1st Respondent Jane Muchunu filed a Replying Affidavit dated 26th January 2023 opposing the summons. The matter was canvassed by way of written submissions.

BACKGROUND

4. This Succession Cause relates to the estate of the late Robert Muchunu alias Robet Muchunu Mumbura (hereinafter 'the Deceased') who died at MP Shah Hospital on 2nd March 2005. A copy of the Death Certificate Serial Number 885658 is annexed to the Petition for Grant of Probate dated 27th October, 2005. The Deceased died testate having left behind a written Will dated 8th September 1992. The Deceased was survived by the following persons:-
 - (i) Milka Nduta Muchunu - Widow (Deceased)
 - (ii) Rachel Wambui - Daughter
 - (iii) William Kuria Muchunu - Son
 - (iv) Damaris Njoki Muchunu - Daughter
 - (v) Christopher Njoroge Muchunu - Son
 - (vi) Charles Thuo Muchunu - Son
 - (vii) Elizabeth Wanjiru Kaguongo - Daughter
 - (viii) Katherine Muthoni - Daughter (Deceased)
 - (ix) Lillian Njeri Schmidt - Daughter
 - (x) Jane Wahu Kamau - Daughter
5. Following the demise of the Deceased a grant of Probate of written Will was on 18th January 2006 made to the Executrix Jane Wahu Kamau. This Grant was thereafter confirmed on 30th October, 2006. The estate was to be distributed in accordance with the written will left behind by the Deceased.
6. The Applicants aver that the estate of the Deceased comprised of the following three (3) properties:-



- (a) Kiambaa/Kihara/878
- (b) KIAMBAA/KIHARA/T1023
- (c) Kiambaa/Kihara/T413

7. The Applicants further aver that only Kiambaa/Kihara/T413 was mentioned in the will, whilst the remaining two (2) properties were not bequeathed to any beneficiary.
8. The Applicants complain that the 1st Respondent Jane Wahu Kamau an Executrix of the Will arbitrarily bequeathed to herself the property known as Kiambaa/Kihara/878 (hereinafter the 'suit property'), whilst she later subdivided into eight (8) parcels being Kiambaa/Kihara/4727, Kiambaa/Kihara/4728, Kiambaa/Kihara/4729, Kiambaa/Kihara/4730, Kiambaa / Kihara/4731, Kiamba/Kihara/4732, Kiambaa/Kihara/4733 and Kiambaa/Kihara/4734 without consulting the other beneficiaries. That the 1st Respondent selfishly took for herself the biggest portion being Kiambaa/Kihara/4727.
9. It is alleged that the 1st Respondent attended the Land Control Board meetings alone falsely claiming that she had no siblings. The Applicant depones that on 14th March 2021 he was given the Title Deed for Kiamba/Kihara/4732 notwithstanding the fact that he had not signed any document in relation to the same. He surmises that the 1st Respondent must have forged his signature in order to facilitate issuance of the Title Deed.
10. The 1st Applicant claims that in the year 1996 in accordance with Kikuyu tradition the Deceased bequeathed to him parcel No. Kiamba/Kihara/4732 measuring 28 metres x 28 metres. That the 1st Respondent independently instructed a surveyor to survey the mother title being Kiambaa/Kihara/878 resulting in a demarcation which cut across the 1st Applicant's parcel of land.
11. The 1st Applicant complain that the 1st Respondent has leased out land to a car wash vendor who keeps threatening the 1st Applicant with demolition as his house has encroached into the leased area. That he and the other beneficiaries are being subjected to harassment and are unable to quietly enjoy their bequests.
12. The Applicants claims that the written will left behind by the Deceased is ambiguous as it made no mention of either Kiambaa/Kihara/1023 or Kiambaa/Kihara/878. They claim that the 1st Respondent took advantage of this ambiguity and transferred to herself properties not mentioned in the Written Will and is now the sole proprietor of Plot 1023. They pray that the court intervene and interpret and/or clarify the will.
13. Finally the Applicants urge that the trust created under the will be voided and that the residue of the estate be distributed be distributed amongst all the beneficiaries.
14. The 1st Respondents opposed the Application. She asserted that she was the Executrix of the estate appointed under the written will dated 8th September 1992. The 1st Respondent confirms that at the time of writing the will the Deceased owned Kiambaa/Kihara/T413 Kiambaa/Kihara/878 and Kiambaa/Kihara/1023.**
15. That Kiambaa/Kihara/T413 was transferred to Lilian Njeri Schmidt in accordance with the terms of the written will. The 1st Respondent states that in her Petition for Probate she did indicate the two (2) other properties left behind by the Deceased. That Kiambaa/Kihara/878 was subdivided and distributed in accordance with the terms of the written will. That the said subdivision was done with the knowledge and participation of all the beneficiaries.



16. The Executrix states that the Deceased expressly stated that the 2nd Applicant was not to receive any property. She denied that the will was ambiguous. The 1st Respondent complained that the numerous applications being filed by the beneficiaries have left the estate with great debts rendering her unable to fully distribute the estate. She prays that this application be dismissed in its entirety.

Division -Analysis and Determination

17. I have carefully considered the Originating summons filed herein, the Reply filed thereto as well as the written submissions on record.
18. It is common ground that the Deceased herein passed away on 22nd March 2005. The identity of the beneficiaries to the estate is not in any doubt. It is also conceded by all parties that the Deceased died testate having left a written will dated 8th September 1992. The issues which now arise for determination are:-
- (i) Whether the will is Ambiguous
 - (ii) Whether adequate provision ought to be made to the Applicants

(i) Whether the written will dated 8th September 1992 is ambiguous

19. The Applicants contend that the written will left behind by the Deceased dated 8th September 1992 is ambiguous and is incapable of being interpreted and/or implemented. They pray that the trust credited under that written will be voided and that the residue of the estate be distributed amongst all the beneficiaries.
20. The Respondents on their part deny that the will is ambiguous. They assert that the will is clear and properly represents the wishes of the Deceased regarding how his property was to be distributed after his demise.
21. The requirements of a valid written will are set out in Section 11 of the *law of Succession Act* Cap 160 Laws of Kenya which provides as follows:-

“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 to attestation shall be necessary.”

22. I have carefully perused the written Will dated 8th September 1992. The Will was signed by the Testator (Deceased) and is witnessed by two (2) persons as required by law.



23. The Applicants argue that in his written will the Deceased only bequeathed Kiambaa/Kihara/T413 to Lilian Njeri Schmidt. That the two properties known as Kiambaa/Kihara/878 and Kiambaa/Kihara/T1023 are free property belonging to the Deceased which ought to be distributed equally among the beneficiaries.
24. However the 1st Respondent confirms that at the time of writing his will the Deceased was the owner of Kiambaa/Kihara/878 and Kiambaa/Kihara/T1023. Indeed in the Petition for Grant of Probate dated 27th October 2005 the 1st Respondent did include the two properties as assets belonging to the estate. The 1st Respondent avers that she distributed all the properties belonging to the Deceased in accordance with his wishes and that there has been no complaint from the beneficiaries.
25. Paragraph 5 of the written Will dated 8th September 1992 provides as follows:-
- “I have sold my plot known as Kiambaa/Kihara/T413 to my daughter Lilian Njeri Schmidt but the title has not been transferred to her Now I Declare that in the event of the said title not being transferred to my said daughter at my death I Give the plot to her so that such transfer can be effected.
6. My Trustee shall hold the residue of my estate UPON TRUST to pay for my debts and testamentary expenses and thereafter as follows;
- (a) for my said wife during her lifetime.
- (b) subject to the above for such of my daughters Damaris Njoki The Said Jane Muchunu and Lilian Njeri Schmidl as shall survive me and if more than in such proportions as shall have been decided by me and shall be known to my trustee at my death and if I shall not have communicated my wishes to my trustee in such proportions as she may in her absolute discretion decide.” [own emphasis]
26. From the above it is manifestly clear that the Deceased bequeathed Kiambaa/Kihara/T413 to his daughter Lilian Njeri Schmidt. The residue of his estate which included Kiambaa/Kihara/878 and Kiambaa/Kihara/T1023 were to be held by the 1st Respondent as Trustee and shared out in terms of paragraph 6 (b) following the demise of his widow.
27. The will cannot be deemed to be ambiguous merely because the testator did not list the specific properties to be held in trust. The wishes of the Deceased are clearly discernible – that the 1st Respondent as Trustee hold all the properties belonging to the Deceased. That said properties to be distributed after the death of the widow by the Trustee “as she may in her absolute discretion decide.”
28. The Deceased left it to the discretion of the Trustee on how to distribute his estate. There is nothing ambiguous about this as this was clearly stated in the written will. There is no uncertainty regarding the wishes of the Deceased. There can be no other interpretation that can be given to the Deceased’s written will.
29. Accordingly I find that the 1st Respondent acted squarely within the mandate provided to her by the written will. She did not unlawfully or irregularly acquire any assets belonging to the estate. The 1st Respondent in her discretion distributed the said properties as provided for in the will. There is no room for this court to interfere with and/or adjust the wishes of the Deceased as clearly stated in his written will. The testamentary freedom of the maker of a will ought not be interfered with. I therefore dismiss prayers (5) and (6) of this application.



(ii) Adequate provisions from the estate

30. The Applicants submit that they are elderly and have no sources of income. They pray to be given land out of the estate to build their homes. The Applicants state that the assets not specially described in the written will ought to be divided amongst the beneficiaries who were not mentioned in the will. A perusal of the written will reveals that the Deceased made no provision in his will for:-

- William Kuria Muchunu
- Damaris Njoki Muchunu
- Nelly Njambi Wanaina

31. The 1st Respondent however maintains that the Deceased indicated how he wished his property to be divided and what asset was to be given to whom.

32. Section 26 and 27 of the Law of Succession Act authorizes a court to make adequate provisions to a dependant out of the net estate of the Deceased.

33. It is not in dispute that the three who were children of the deceased are dependants in terms of Section 29 of the Act. Section 28 of the Law of Succession Act provides as follows:-

“In considering whether any order should be made under this part, and if so what order, the court shall have regard to-

- a. The nature and amount of the deceased’s property;
- b. Any past, present or future capital or income from any source of the dependant;
- c. The existing and future means and needs of the dependant;
- d. Whether the deceased had made any advancement or other gift to the dependant during his lifetime;
- e. The conduct of the dependant in relation to the deceased;
- f. The situation and circumstances of the deceased’s other dependants and the beneficiaries under any will;
- g. The general circumstances of the case, including, so far as can be ascertained, the testator’s reason for not making the provision for the dependant.

34. The factors to be considered in determining the nature and extent of the order to be made for adequate provisions, were set out in the case of John Gitata Mwangi & 3 Others – Vs – Jonathan Njuguna Mwangi 7 4 Other [1999] eKLR, where the Court of Appeal stated:-

“In order that the court may be enabled to come to a proper conclusion as to what order it should make, a dependent has the duty to give satisfactory evidence as to his past, present or future capital or income and his existing and future needs. Without this, the court will not be able to make any sensible order. Whether the deceased has made any advancement to the dependant and the circumstances of the deceased’s other dependants are also factors to be considered. The general circumstances of the case including the deceased’s ascertainable



reasons for not providing for the dependent must also be considered. Which of these factors will play a vital role in their combined effect, depends on each particular case”

35. The 1st Applicant was by his own admission given a portion of land out of the estate of the Deceased. However he complains that there is an issue regarding the boundary of the land he was given. The boundary issue does not negate the fact that he 1st Applicant did in fact benefit from the estate of the Deceased. He cannot therefore claim that he has not been provided for.
36. There is no evidence that the two Applicants were being maintained by the Deceased. The 2nd Applicant did not advance any evidence in terms of her present and future income or her existing and future needs to enable the court determine the merits of her prayer for adequate provision.
37. As stated earlier the court is required to recognize and uphold the testamentary freedom of the Deceased. The Deceased had the discretion to dispose of his estate as he wishes.
38. In “Linutations of the Power of Testamentary Disposition [1907 – 8] commonwealth Law Review 97, J.R. Jordan wrote as follows:-

“Limitations of the power of testamentary disposition [1907 – 8] 5 Common Wealth Law Review 97 writing for the court stated:

“Children emboldened by the confidence that some share is assured to them in absence of a flagrant misconduct, may be tempted to defy parental authority. Any limitation upon a testor’s power to dispose of his earnings as he thinks fit tends to weaken one important incentive to industry and thrift. A testator may be prevented from excluding an utterly worthless member of his family except at the risk of exposing a grave family scandal, which it is perhaps strongly in the interests of innocent members to conceal. The system relegates to a court of justice discretionary powers in a matter as to the merits of which the testator must in nearly every case be a much better Judge than the court can possibly be. Complicated questions of fact may arise regarding provisions advancements of the claimant. An opportunity is given for speculative and black mailing actions on behalf of persons who have been properly excluded.”
39. In the same vein the court of Appeal stated in Kamene Ndolo -vs- George Matata Ndolo [1996] eKLR thus:-

“This court must, however, recognize and accept the position that under the provisions of Section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she see fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by Section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is expressly recognized by Section 26 of the Act...”
40. The Applicants herein have not placed before this court persuasive material to show that they are entitled to an order of adequate provisions. The will of the Deceased ought to be given effect. I therefore dismiss prayer (7) of the Application.



Conclusion

41. Finally I find no merit in the summons dated 11th May 2023. The same is hereby dismissed in its entirety. Each party will bear its own costs.

DATED IN NAIROBI THIS 15TH DAY OF MAY, 2023.

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MAUREEN A. ODERO

JUDGE

