



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Mary Wambui Kamau (Deceased) (Succession Cause 112 of 2017) [2023] KEHC 19551 (KLR) (23 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19551 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 112 OF 2017**

A MSHILA, J

JUNE 23, 2023

IN THE MATTER OF THE ESTATE OF MARY WAMBUI KAMAU (DECEASED)

ANTHONY KAMAU NYAGAPETITIONER/RESPONDENT

VERSUS

BERNARD KAMAU NYAGA.....OBJECTOR

BETWEEN

ANTHONY KAMAU NYAGA PETITIONER

AND

BERNARD KAMAU NYAGA OBJECTOR

RULING

1. The matter relates to the estate of Mary Wambui Kamau, who died testate on January 11, 2017. The Petitioner Anthony Kamau as the only surviving executor by a petition filed on August 1, 2017 petitioned for a grant of probate of a written will. He attached the deceased will dated October 1, 2008.
2. By a gazette notice of September 15, 2017 a notice of the said petition was gazetted. On October 6, 2017, the Respondent Bernard Kamau in the capacity of the grandson of the deceased filed an objection to the making of the grant of probate with will annexed to the Applicant and filed a cross-petition.
3. The grounds of the objection which mirror the grounds in the cross-petition are that the objector and his brother are entitled as a beneficiary of the deceased estate, by virtue that they are grandsons of the deceased. He states the purported will disinherits them, the action of the deceased in disinheriting the objector is due to the long protracted succession cause between the objector and deceased in Nairobi Succession Cause No 684 of 2012 and Civil Suit No 8 of 2008. he disputes the content of the will.



4. In response to the objection Anthony Kamau Nyaga filed an affidavit in reply to the objection sworn on November 10, 2017, he depones he and Kevin Kamau now deceased were appointed as the executors of the deceased estate. The deceased and the objector had fallen apart as the objector and his brother were insolent and lacking in respect. The objector always defied the orders of the deceased as the matriarch of the family. There is no basis for the objection since the will is not challenged.
5. The objection was canvassed through viva voce evidence, and thereafter the parties were directed to file and exchange written submissions.

Objectors Case

6. The objector Bernard Kamau in his oral evidence informed the court he wishes to inherit his deceased grandfather's estate through his deceased father. The properties distributed to the deceased belonged to his grandfather. He states he opposes the will as it bequeaths strangers the estate of the deceased at the expense of rightful beneficiaries. He states his stepbrothers have been apportioned where he resides and developed. He represents the first house of Nyaga Kamau. He states he has lived in the deceased estate for 16 years, the deceased allowed him to live in a plot at Muchatha while working in town. He denied he moved in as a caretaker.

Petitioner's Case

7. Anthony Kamau (PW1) testified that Mary Kamau was the mother to his father Francis Nyaga. He was named as an executor together with Kevin who is deceased. He told the court the objector was his stepbrother born out of wedlock. He denied the mother to the objector was married to Francis Nyaga. The objector used force to settle in Redhill land as there was no agreement.
8. In cross-examination he confirmed the objector is his brother. He denied the objector was raised by the deceased Mary Wambui Kamau. He states the objector was an employee of the deceased at Muchatha and he refused to move out.
9. Counsel submits the deceased Mary Wambui Kamau was the surviving widow of the Kamau Nyaga (deceased) and she had the right to petition the estate of the deceased and ranked first in priority to the objector. The objection raises the issue of distribution and thus is misplaced, premature, and ill-advised, the same having been raised before confirmation of the grant of probate. He urged the court to dismiss the objection.

Issues For Determination

10. This matter was fully heard by Meoli J. on February 26, 2019, when the matter came for mention on May 28, 2019 for compliance and for fixing a Ruling date, Mr. Gaita informed the court he wished to file an application to join new parties. The court granted him 21 days to file the application but the application has not been filed to date and the matter was placed before this court on March 21, 2023, for directions on compliance and for fixing a Ruling Date.
11. Only the Petitioner complied and filed Written Submissions; Having perused the evidence on the court record and also having read the submissions filed this court issues has only framed one issues for determination as follows;
 - i. whether the objector has established satisfactory grounds in the cross-petition as to his competence



Analysis

12. Section 6 of the [Law of Succession Act](#) grants the testator discretion over the appointment of the executor. Accordingly, the deceased did choose the Petitioner as his executor.
13. Section 11 of the [Law of Succession Act](#), provides for the formal requirements of a valid will. It states;
 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.
14. In this case, two witnesses are found to have duly executed the will, together with the deceased. the objector disputes the will as no provision has been made for him and his brother.
15. According to the Objector, the Petitioner is his stepbrother their father is the Late Francis Nyaga, he claims the inheritance through his late father on behalf of the 1st house. He states he is equally entitled to the estates of the deceased. the only issue that the deceased left them out from the inheritance is the long-protracted battle in court where he has been seeking a share of the estate of his deceased father.
16. The petitioner, on the other hand, denies the objector is entitled to inheritance. According to him, the objector was borne out of wedlock. He submits the objection is improper and should be dismissed. Sections 68 and 69 of the [Law of Succession Act](#) provide for the filing of objections.

“ 68. Objections to application:

- (1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.
- (2) Where notice of objection has been lodged under subsection (1), the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period.

69. Procedure after notice and objections



- (1) Where a notice of objection has been lodged under subsection (1) of section 68, or no answer or no cross-application has been filed as required under subsection (2) of that section, a grant may be made in accordance with the original application.
 - (2) Where an answer and a cross-application have been filed under subsection (2) of section 68, the court shall proceed to determine the dispute.
17. The main objective of objection proceedings is to determine whether the person who has petitioned for representation is competent. In the Petition filed on August 1, 2017, the Petitioner annexed a copy of the will dated 1st October 2008 in which Anthony Kamau Nyaga and Kevin Kamau Njoroge were appointed as executors of the will.
 18. The petitioner obtained authority to file the current petition from the will having been named as an executor.
 19. Under sections 53(a), and 60, of the Law of Succession Act where a will has appointed executors, the persons who qualify to apply for probate of the will or to prove the will, are the persons named as executors unless they have renounced probate. The said provisions state as follows:
 - “ 53. A court may –
 - (a) where a deceased person is proved (whether by the production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which the will applies, either –
 - i) probate of the will to one or more of the executors named therein;
 60. When several executors are appointed, probate may be granted to them all simultaneously, or at different times.”
 20. The objector claims he is a son of Francis Nyaga father and a half-brother to the Petitioner. the deceased failed to provide for him and his sibling. The objector claims that together with his brother both are entitled to a share of their deceased father’s estate. At this juncture the issue of distribution is found to be premature and the same cannot be canvassed at this stage; the issue of the validity of the will ought to be determined at full trial.
 21. The objector having not been appointed as an executor of the will cannot apply for the grant of probate to the purported will. Thus this court is satisfied that the objector has not established satisfactory grounds in the cross-petition as to his competence to be granted a Grant of Probate to the Written Will.

Findings And Determination

22. In the light of the foregoing this C ourt makes the following findings and determinations;
 - i. This court finds the Objection to be devoid of merit and the same is hereby dismissed;
 - ii. A Grant of the Probate with respect to the written Will be issued to the Petitioner.
 - iii. Each party to bear their own costs.



Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 23RD DAY OF JUNE, 2023.

A. MSHILA

JUDGE

In the presence

Mourice Court Assistant

No appearance by parties

