



In re Estate of Mwangi Chege alias Peter Mwangi Chege (Deceased) (Succession Cause 432 of 2013) [2023] KEHC 20195 (KLR) (11 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
SUCCESSION CAUSE 432 OF 2013**

J WAKIAGA, J

JULY 11, 2023

**IN THE MATTER OF THE ESTATE OF MWANGI
CHEGE ALIAS PETER MWANGI CHEGE (DECEASED)**

BETWEEN

ANJELICA WANJIKU MWANGI PETITIONER

AND

JOSEPH MAINA MAINA OBJECTOR

JUDGMENT

1. The Petitioner on 18th March 2013 applied for grant of probate of the Will of the deceased herein and on the 3rd September 2013 the Objector filed an objection to the issue of the probate on grounds that he was a son of the deceased and beneficiary to the estate, entitled to petition for the probate of grant and as such opposes and objects to the Will.
2. On the 9th September 2015 the Objector filed summons by Dependent under Section 26 of the Law of Succession on the grounds that he had not been adequately provided for and was seeking an order for reasonable provision out of the net estate.
3. It was supported by an annexed affidavit in which it was deposed that he was the first born of the deceased whose net estate was approximately 12,000,000, and that he did not own any capital assets save for the four bed-roomed house constructed on Loc.17/Iganjo/740 where he lives and that the deceased had not made any gift to him during his life time.
4. It was stated that the relationship between them during his life time consisted principally of good father-son relationship without any break down. He contended that all the other sons of the deceased had been given land/space to cultivate and build during the life time of the deceased and therefore he did not know the reason why the deceased made up provision for him, reason whereof he was seeking the whole share for LOC.17/ Iganjo/740 which he had occupied for over 32 years.



5. In opposition the Respondent on 23rd October 2015 filed a replying affidavit in which she deposed that the Objector was married to two wives one who had a son and two daughters with whom he separated upon which the deceased noted that he did not properly cater for their welfare and in making his Will the deceased voluntarily gave his grandson (son of the Objector) a portion of 2 acres out of the said land as reflected in the Will and retained the remaining and that he had reasons for not giving the objector a share of his land.
6. Directions were issued that the objection be heard by way of oral evidence at which the objector stated that he had used the subject land which measures four acres, half of which was for farming while he resided on the other half and that in the Will his son was given two (2) acres while he was given nothing. He stated that he had bought for his children half an acre and therefore he should be given the entire land to share with his other children.
7. In cross examination he stated that his mother was the second wife of the deceased while the Petitioner was the third wife. In 1983 the deceased said he had given him the suit land which he began to utilize and that the deceased died while he was on duty in South Sudan and that the will was read in his absence. He confirmed that as per the Petitioner's statement he was born out of wedlock and that he had not denied any of his children with his wife with whom he separated but did not educate them, whereas the deceased educated him and help him secure a job in the military.
8. He stated that the deceased had many children whom he provided for in the will while his name was not in the will and therefore he was not happy with the mode of distribution
9. The Administrator Anjelica Wanjiku Mwangi stated that when she was married the Objector was ten years old and brought him up after his mother left and that the deceased in 2010 met the children of the Objector whom he had not educated at Maragua and when he came back, he told her that he had educated the objector who was not his biological child, yet he did not educate his own children and that might explain why he decided to give the son of the objector two acres. She stated that she was willing to give the objector the two acres which the deceased had retained for himself.
10. In cross examination, she stated that the deceased told them that he had adopted the Applicant and did not know the reasons why the deceased did not provide for him having given him the said land to utilize in his lifetime. She stated that the deceased used to think that he was taking care of his children until 2010 when he met them and that is why he gave the son land.

Submissions

11. On behalf of the objector it was stated that section 28 of the *Law of Succession Act* provides for circumstance to be taken into account by Court while making provisions which includes the nature and the amount of the property, past present and future capital from any source of the Dependant, any advancement or gift and the situation and circumstances of the deceased other Dependents and beneficiaries under any Will.
12. It was contended that the deceased had advanced the whole share of the land to the Applicant in his life time and that giving two acres to his son will only fuel family disagreement given that he will be living with his step mother. It was contended that there was no reason which the deceased did not make provision for the Applicant in support of which the case of Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR in which it was held that section 28 puts limitation on the testamentary freedom given by Section 5 and that though a man may have unfettered freedom to dispose of his property by will as he see fit he must make provision for his dependants .



13. It was submitted that the Applicant was entitled to the whole of Loc.17/Iganjo /740 and that his son who was given the same can be provided for from the vast estate.
14. On behalf of the Petitioner it was submitted that there was no dispute that the objector was a Dependant within the provision of section 29 of the Act and that the deceased had settled his dependents in his life time with the objector being given part of the suit where he assisted him put a house thereat and only changed when realized that the Applicant had abandoned his children which the Court has to take into account under section 28 of the Act. It was submitted that the two area which the deceased reserved for himself was an error which can be cured under the general rule for construction of wills under the First Schedule of the Act which the Administrator stated belongs to him.

Determination

15. In this cause there is no dispute that the deceased left a valid will which has not been challenged save that the objector contends that he was not provided for under the will yet he was a Dependent of the deceased. It is also not in dispute that the deceased in the said will bequeathed to his grandchild, a son of the deceased two acres from the said land while retaining 2 acres for himself which the Petitioner is willing to give to the Applicant.
16. It is also not disputed from the evidence tendered before the Court that the deceased had a valid reason for giving his grandson the 2 acres out of the disputed land, the Applicant having conformed that he did not educate them after separating with their mother a fact that did not please the deceased.
17. The only issue for determination is whether the objector has now been adequately provided for? In view of the evidence of the Petitioner I find and hold the Applicant's complaint has now been adequately answered as the same is provided with 2 acres while his son has equally been provided for by the deceased in Will.
18. The law on when a Court can interfere with the testamentary freedom of a testator is provided for under section 26 of the Act which provides that on an application by or on behalf of a dependant, the Court may , if it is of the opinion that the disposition of the estate affected by the will or by gift in contemplations of the death or the law relating to intestacy or the combination of the Will, the gift and the law is not such as make reasonable provision for that dependant, order that such a reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's estate .
19. This must be viewed from the lenses of section 5 of the Act which give the unfettered testamentary right and freedom to dispose of the property as he deems fit. In this cause it is not disputed from the evidence that the deceased had given the objector education and secured for him thereafter employment which to my mind was an adequate provision in his life time and the deceased had valid reasons to give the two acres to his grandchild, a right which the objector cannot limit or substitute with his claim that he has bought for him an alternative half an acre land, as it is not for this court to step into the shoe of the testator and substitute for the Will with what it thinks the testator should have done.
20. In this cause I have taken into account the fact that the objector now gets the two acres through the concession of the Petitioner and therefore find no merit on the objection herein which I hereby dismiss and confirm the grant of the probate herein as per the Will herein save that the Applicant is entitled to two acres of the disputed property. And it is ordered.
21. This being a family dispute each party shall bear their own cost.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 11th DAY OF JULY 2023



J. WAKIAGA

JUDGE

In the presence of:

Mr Oigo holding brief for Mr. Kariuki for Petitioner

Mr. T.M. Njoroge for Applicant

Court Assistant: Ms Jackline

