



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO 137 OF 2014

[FORMERLY NAIROBI HC SUCCESSION CAUSE NO. 1317 OF 1996]

RE ESTATE OF SILA NDUNG'U MARIRA, DECEASED

JONAH WAMUTITU NDUNG'U.....APPLICANT

VERSUS

PETERSON NDUNG'U MARIRA.....RESPONDENT

RULING

1. Sila Ndung'u Marira (hereafter *the deceased*) died testate on 26th May 1990. His written will and annexed memorandum are dated 22nd February 1986. There is also a first and only codicil executed on 6th August 1987. The current executor of the will is his grandson, Peterson Ndung'u (hereafter *the respondent*).
2. The applicant prays for annulment or revocation of the grant of probate of the written will and codicil issued to the respondent on 6th March 2012. The summons is dated 18th March 2014 and was originally lodged by the applicant and his brother, Allan Kang'ea Ndung'u (now also deceased). It is supported by their joint affidavit of even date.
3. The applicant avers that the grant was issued fraudulently and through concealment of material facts. He argues that the petition was presented by Zephania Gichure Ndung'u (the father of the respondent and now also deceased) in secret and without the requisite consent of all the heirs.
4. He also takes up cudgels on the order for substitution of the respondent granted on 6th March 2012 and the ensuing rectified grant. He submitted that the latter was done without notice.
5. The applicant also disputes the validity of the will on two fronts: that it was forged; and, that it did not make sufficient provision for some of the beneficiaries and in particular his sister, Isabella Nyambura Maina.
6. The application is opposed by the respondent. There are a number of affidavits in that regard. Two are by the respondent sworn on 3rd June 2014 and 3rd October 2014 respectively; two are sworn by Isabella Nyambura Maina and Talitha Wangechi Ndung'u on 4th June 2014; and, there is a supplementary affidavit by Charles Waweru Gatonye, Advocate dated 23rd September 2014.
7. The respondent had also presented a Notice of Motion dated 30th August 2015 to strike out the summons for revocation of the grant. That Notice of Motion did not break any new ground and largely regurgitated the averments in the two replying affidavits by the respondent. In a word, it ran against the grain of the overriding objective of the court by cluttering the court with unnecessary interlocutory proceedings. I would have no hesitation in striking it out *in limine*.
8. The applicant was initially represented by counsel. The last one was granted leave to withdraw on 27th January 2021. I granted the applicant 60 days to appoint new counsel. At the next mention on 12th April 2021, the applicant had still not secured the services of a lawyer. The cause was fixed for hearing on 28th April 2021.
9. On that date, the applicant confirmed he would act in person. He prayed to make fresh oral submissions. For the avoidance of doubt, he abandoned the written submissions made by his former advocate, *L.M. Kinuthia*, on 27th June 2017. I allowed him to do so and he addressed me at length on the instant summons.
10. The respondent's learned counsel on the other hand relied entirely on his written submissions dated 25th May 2015.

11. According to the applicant the deceased distributed his property in two stages. The first time was in 1963 during consolidation when he gave his two adult sons, Zephania Gichure and Marira Ndung'u Dathan, 3 acres each. The deceased retained 8 acres, and 2 plots. There was also another portion of 3½ acres which was part of Zephania Gichure's land.

12. The applicant said that in 1986, the deceased, who was then 98 years, divided the remainder of the land among the other three children as follows: Talitha Wangechi – 3 acres; Allan Kang'ea - 2 acres plus a plot; and, Jonah Wamutitu (the applicant) - 2 acres and one plot. The deceased was still left with the 3½ acres in Zephania Gichure's land in Nyagitugu Scheme.

13. The applicant beseeched the court to do justice by invalidating the will. In his own words-

I pray that the court to pursue justice because the alleged will fronted by Peterson Ndung'u Marira; Gatonye Advocate gave the will to Zephania Gichure when my father died. It was not read. I do not know why Gichure stayed with it for 10 years as executor before handing it over to Peterson Ndung'u Let the court remove the people making false claims on my property. I am suffering and my strength is fading. They are claiming their grandfather's estate and fighting me.

14. My take of the matter is as follows. The claims by the applicant revolve around the validity of the will. Although the applicant contends that the will and codicil are forgeries, it remained a bare statement unadorned by any evidence. I have in particular paid heed to the supplementary affidavit by Charles Waweru Gatonye, Advocate of 23rd September 2014. He confirms that he drafted the will and codicil upon instructions of the deceased and that he read them and explained them to him. The deceased executed the instruments by affixing his thumbprint. Mr. Waweru and his secretaries attested to the will and the subsequent codicil in the presence of each other.

15. The applicant's claim of invalidity seems to question why Mr. Gatonye and his two secretaries attested to the will and the subsequent codicil yet the deceased had other relatives. That may raise some *suspitions* but there is no requirement in the **Law of Succession Act** that those attesting to the will be relatives of the testator.

16. Under section 7 of the Act, a will made by *fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake*, is void. In the present case, there is no tangible evidence that the deceased lacked capacity or did not freely will his property. There is no cogent evidence either that the will or codicil was tampered with.

17. The originals of the will and codicil were delivered and received by the High Court Registry in Nairobi in Succession Cause 1317 on 3rd October 2016. The Court, being satisfied as to the form and legal requirements of the will and codicil annexed found that they were proved. It issued a grant to the executor Zephania Gichure Ndung'u on 19th September 1996 and confirmed it on 11th February 2004. A certified copy of the will and codicil under the hand of the Registrar of the court is annexed to the grant.

18. The history of the line of executors is relevant. In paragraph 2 of the original will, the deceased appointed his son, Dathan Marira, to be the executor. In paragraph 10, he provided that if the said executor was unable to perform, then the executor would be Zephania Gichure Ndung'u.

19. Dathan Marira pre-deceased the testator which partly explains the first and only codicil. In paragraph 2 of the latest instrument, the testator appointed Zephania Gichure Ndung'u as executor and stated further that if the new executor pre-deceased him or was unable to perform his duties, then the executor would be his grandson, Peterson Ndung'u Marira (the respondent here).

20. Clearly, the testator expressly appointed the respondent as a reserve executor. When his father Zephania Gichure died the respondent was entitled to assume the duties of the executor. I thus find no fault in his substitution and the issuance of a rectified grant on 6th August 1987.

21. The applicant claims that some beneficiaries and in particular his sister Isabella Nyambura Maina were not provided for. Section 26 of the Act imbues this court with power, *if it is of the opinion that the disposition of the deceased's estate effected by his will does not make reasonable provision for a dependant*, to order such reasonable provision as it thinks fit.

22. The protestations by the applicant on that point fail for two main reasons. Firstly, I find that the will made provision for him being half a share of Murang'a District/Rwathia/T.314. It may not be adequate as urged by the applicant, but I cannot say that it is not reasonable. Secondly, there are the two affidavits sworn by Isabella Nyambura Maina and Talitha Wangechi Ndung'u on 4th June 2014. The two do not challenge the will and are disinterested in any further share of their father's estate.

23. Lastly, I will turn to the question whether the grant was obtained in secret. In all this it is important to keep in mind that the deceased died testate. Where there is a valid will, the identity of the shares of beneficiaries would largely be pre-determined by the deceased. And so would be the executors. The hands of the executors would be tied by the will. The applicant's two sisters that I mentioned earlier admit to the knowledge of the proceedings. That would leave the applicant and his late brother on one side.

24. But it is not lost on me that despite the existence of proceedings in *Succession Cause 1317 of 1996* at Nairobi High Court, the applicant proceeded to file separate proceedings at the *Principal Magistrates Court at Muranga in Cause Number 78 of 2000*. That was nearly 10 years after the death of his father and six years since the grant was obtained. The respondent avers that at some point, the applicant had applied in the High Court to be made a joint executor. This has not been controverted by the applicant. Granted all the circumstances in this case, I am not persuaded that the applicant was completely unaware of the succession proceedings.

25. For all those reasons I *decline* to invalidate the will or revoke the grant of probate. Before I leave the subject, I note that there was no love lost between the deceased and the applicants. In paragraph 4 of the memorandum to the will, the testator indicates that the two abused him by employing the derogatory insult of "*gati*" and by claiming that they would automatically inherit his land upon his demise. He was also

unhappy with them for “*forcefully taking over [his] tea small holdings*”. He accordingly willed that the two applicants would “*not benefit in sections 5 to 10 of [his] will*”.

26. I empathize with the applicant but in the end, I find there are no sufficient grounds to invalidate the will or to remove the executor. It follows as a corollary that there is no plausible reason to revoke the grant or to re-open the distribution of the estate. The applicant’s summons dated 18th March 2014 is hence devoid of merit and is hereby *dismissed*.

27. Costs follow the event and are at the discretion of the court. In the interests of justice, each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG’A THIS 6TH DAY OF JULY 2021.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Applicant (in person) present.

Mr. Kinyanjui for the respondent instructed by Gitonga Kinyanjui & Company Advocates.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.