



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2711 OF 2015

IN THE MATTER OF THE ESTATE OF KIMANI NG'ANG'A (DECEASED)

JUDGMENT

1. The deceased herein Kimani Ng'ang'a died on the 5th of July, 2015 and was buried in Ngong. According to the chief's letter dated 8th October, 2015 the deceased left two wives **Florence Mwatha Kimani** and **Judith Lusanji Kimani**. Although several children are named as surviving him it is acknowledge that each of the wives came with their own children to the marriage and each begot one daughter with the deceased.

2. The name of a third woman emerged, though she did not present herself to court. She is named as a beneficiary in the will and none of the other claim what was bequeathed to her. The contestation is between the two wives.

3. The 2nd wife Judith Lusanji Kimani filed for probate as the named executor of the last will and testament of the deceased which he is said to have executed on the 11th February 2015 and was witnessed by two Advocates, Mutembei Marete and Geoffrey Eric Wesonga. The grant of probate was issued on 24th of February, 2020.

4. On the 30th of October 2016 the executor filed for confirmation of the grant. The same was met by an affidavit of protest filed by Florence Mwatha Kimani the 2nd widow (protestor) on the 14th of November 2010).

5. The protest was based on grounds that the will is invalid as it did not include all the assets as one property in Ngong was left out, further it was claimed that the deceased failed to provide for all his dependants, and the will was not attested to by independent witnesses.

6. The matter proceeded by way of *viva voce* evidence and having considered the evidence before court and submissions made by the respective counsel the issues for determination are:-

i. Whether or not an asset belonging to the deceased left out of the will?

ii. Whether the deceased failed to provide for some of his dependants from the will?

iii. Whether the will is valid or not?

iv. Issue of costs.

7. The Protestor claimed that the deceased owned 3 properties in Dagorretti, Ruiru and Ngong. There appears to be no disputes as regards Ruiru and Dagorretti. The executor in her evidence informed the court that she was a teacher for a long time and saved her own money and bought the land in Ngong several years before settling down with the deceased in 2008.

8. The law requires that the person who asserts a fact must be able to prove the same by availing evidence in support. The mere fact that the deceased lived with the executor in Ngong and was buried there does not in itself bestow ownership of the property on the deceased.

9. The Protestor failed to produce any document or evidence of any nature to support her assertion. And therefore in the absence of any evidence having been placed before court the claim by the objector must fail.

10. The will was executed and attested in the presence of two advocates who testified to the fact. No evidence was produced in court to discredit the independence of the said witnesses nor impute any influence that they make have asserted towards the deceased.

11. It is therefore this court's view that the evidence before court has not in any way supported the allegations raised by the protestor.

12. In his will the deceased required the 1st widow to hold ½ of the property in Dagoretti in trust for Hanna Njoki Kimani his only child with her.

13. It is not lost to the court that the deceased herein and the Protestor had a protracted case before the Chief Magistrate's Court being Civil Case No.5307/03 wherein a court order issued on the 6th of October, 2020 as follows:

“.....out of 1 acre of property Dagoretti/Kangemi/1415 be shared out as follows. The Respondent Florence Mwatha be transferred ½ acre, Applicant, Kimani Ng'ang'a ¼ acre and Judith Lusanji Kimani be transferred one acre.”

14. The essence of the above order which was never reviewed or appealed from is that the deceased was only entitled to ¼ of the Dagoretti property as the effect of the court order is that ½ was transmitted to the protestor and ¼ to the executor. The deceased could therefore not purport to give away what was not his in the will. To that extent the will is faulted.

15. Therefore the deceased owned only ¼ of Dagoretti and the two plots in Ruiru which he bequeathed to one Mary Wangari and the second widow. None of his two daughters benefitted in the will. They have laid no claim and the court will say no more in this regard.

16. The trial Magistrates Order referred to above was as a result of an application by the deceased where he wished to share the Dagoretti property with his wives. The deceased gifted to his widows while alive as the lower court followed his wishes. The second/widow got a smaller share of Dagoretti and in gifting her a plot in Ruiru the deceased was merely being equitable and cannot be faulted.

17. The deceased is not said to have adopted children of the two wives. He gifted none. He was within his rights not to do.

18. Further, the ¼ acre of Dagoretti owned by the deceased was left for purposes of settling debts. It should be sold by the executor as directed in the will.

19. The upshot of this judgement is that the objection fails, and save for the fact that the deceased could not go against the court order to vary what was given to the 1st widow so that she would hold the same in trust for their child, the court find that the rest of the will is valid.

20. Each party to bare her own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 8TH DAY OF OCTOBER, 2020.

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ALI-ARONI

JUDGE