



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1670 OF 2015

IN THE ESTATE OF BETHUEL KURIA KAMUIRU (DECEASED)

PAUL KARANJA KURIA.....1ST OBJECTOR

ALICE WATHIRA NJUGUNA.....2ND OBJECTOR

NANCY WANGARI NGARI.....3RD OBJECTOR

IRENE WAMBUI RUGANO.....4TH OBJECTOR

VERSUS

DANSON NDAU KURIA.....RESPONDENT

JUDGMENT

1. The Objectors had placed before court two applications dated 21st October, 2016 and 2nd December, 2016 both seeking for revocation and annulment of the grant of probate issued to Danson Ndaou Kuria on 23rd October, 2015 and confirmed on 26th October, 2016.
2. At the hearing of the matter the Objectors' counsel withdrew the 2nd application and proceeded on the application of 21st October, 2016.
3. In His written submissions the Respondent's counsel alluded to an application dated 28th June, 2018, however no evidence was led in regard to the same. Equally the second is clear on the applications that were to be heard.
4. This judgment therefore is confined to the issue of revocation of the grant of probate. And having considered the evidence of the parties, documents before court and submissions the issues for consideration are whether or not the deceased left a valid will and whether the grant issued to the Respondent be revoked or not.
5. The Objectors' case is that the Respondent produced a copy of an alleged will as opposed to the original will, and that he also failed to bring before court the witnesses alleged to have witnessed the deceased sign the same. Thirdly, that he concealed to the court that the deceased left behind other dependants, fourth, that the deceased could not have bequeathed his property to the Respondent as the relationship between the two was bad. Lastly, the purported will was written when the deceased was ill.
6. On the other hand, the Respondent's case is that the Objectors failed to prove the alleged forgery as they did not adduce any expert evidence in support of the allegation, further he averred that the will was properly executed and all those who had witnessed the same had unfortunately passed on.
7. Section 5(1) (3) of the Law of Succession Act provides as follows:

“(1)Subject to the provisions of this Part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.

(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.”

8. The onus of proving that the will before court is a forgery squarely lay with the Objectors. In proving their allegation they did not provide the evidence of an expert witness but instead relied on circumstances prevailing at the time to show that the deceased could not have left his only property to a son he did not get along with as alleged leaving out all his other dependants. Secondly that the deceased did not have the capacity to draw, or instruct or even sign the will as alleged. **Section 5 (4)** provides that:

“(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.”

OBW1 – Nancy Wangari Ngari, testified that his brother, the Objector was abusive to the deceased, stole the deceased ID and while the deceased was sick took his finger print; the same evidence was repeated by **OBW2 Irene Wambui, OBW3 Alice Waithera, OBW4 David Mburu** the assistant chief who testified that he arbitrated on the issue of the purported will when the deceased complained to him that the Respondent had taken his ID card and had alleged that the deceased had written a will in which he had bequeathed the property in question yet. He further informed the court at the time the matter came to his attention the deceased insisted on the Respondent vacating the premises. And he was present when the Respondent moved out.

9. In his evidence the Respondent stated that while his father lived with him in Nakuru, the deceased asked him in the presence of the other people to write for him his will and take the same to Bahalal advocate and the deceased went before the said lawyer and signed the same.

10. Two sets of the ‘will’ were produced in evidence. One is hand written and one typed. Both are signed and have thumb prints. However even without one being an expert it is obvious that the signatures on both differ tremendously. Secondly both sides allude to the sickness of the deceased at the time though the Respondent’s position is that the deceased was not very sick.

11. **PW4** the Assistant Chief affirmed that the deceased was angry with the Respondent’s allegation that he had bequeathed the only property he had to him. It was also his evidence that the Respondent apologised to his father, returned the father’s ID card and was made to vacate the premises which he did. Notable is that the evidence of the assistant chief was not negated by the Respondent.

12. I am convinced that though there was no expert witness to prove the allegation of forgery the circumstances surrounding the will are suspect coupled with the fact that the will purports to disinherit all other beneficiaries of the estate.

13. It is my view that on a balance of probabilities the Objectors succeeded in establishing that if at all the will was executed it was executed in suspicious circumstances and while the deceased was ill and therefore the Objectors discharged their burden as required. In **Wanjau Wanyoike & 4 others vs Ernest Wanyoike and Another HCCC No. 147 of 1980** the court stated:

“The burden of proving the suspicious circumstances exists lies on the person challenging the validity of will. Where it is proved that there are circumstances exciting the suspicion of the court.....the burden of removing the suspicion lies on the person propounding the will.”

In **Civil Appeal No. 126 of 2016** the Court of Appeal reiterated the same point when it stated inter alia,

“.....It seems that, if the Objector produces evidence which raises suspicion of the testator’s capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he has discharged his burden of proof and the burden then shifts to the person setting up the will to satisfy the court that the testator had the necessary capacity”.

14. The Objectors succeeded in raising the suspicion of this court as to whether the deceased had the capacity to make the will at the time alleged; the burden therefore shifted from the Objectors to the Respondent and he failed to satisfy the court that the testator had capacity. Secondly the circumstances generally appear suspicious in that there is evidence that remains undisputed that the deceased was so annoyed by the actions of the Respondent after he recovered from his sickness and that he chased Respondent from home.

15. Based on the above I find that there is every reason to revoke the grant of probate that was issued to the Respondent. I further find that the deceased left no valid will and he therefore died intestate.

16. I grant the cost of the suit to the Objectors.

DATED, SIGNED and DELIVERED at NAIROBI this 17th DAY OF JANUARY, 2019.

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ALI-ARONI

JUDGE