



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 587 OF 2012

IN THE MATTER OF THE ESTATE OF WILSON WAITHANJE THUKU ALIAS WAITHANJE THUKU (DECEASED)

RAHAB NYAKANGU WAITHANJI.....APPLICANT

VERSUS

FREDRICK THUKU WAITHANJE.....RESPONDENT

RULING

1. The deceased person to whose estate these proceedings relate died on 3rd September, 2009 domiciled in Kiambu County, Kenya. A Grant of Probate with a written will annexed was made to Fredrick Thuku Waithanje, the Respondent herein, on 21st January, 2013 and consequently confirmed on 19th December, 2005.
2. On 18th February, 2014 the Applicant herein presented an application before this court by way of summons for revocation of grant seeking an order that the Grant of Probate made to Fredrick Thuku Waithanje, the Respondent herein, be revoked. The application was brought under a certificate of urgency and premised on the grounds that the grant was obtained fraudulently by the making of a false statement and concealment of material facts.
3. The summons is supported by an affidavit sworn by the Applicant, Rahab Nyakangu Waithanji, on 18th February, 2014 in which she deposes that she is a widow of Wilson Waithanji Thuku alias Waithanje Thuku, the deceased whose estate is in issue herein. She annexed a copy of their Marriage Certificate No. [xxxx] which indicates that she and the deceased, then a widower, got married on 4th June, 1988 at PCEA Ting'ang'a Church in Kiambu County.
4. Rahab avers that Fredrick Thuku, the Respondent herein, fraudulently obtained the Grant of Probate on 20th January, 2014. That in paragraph 3 of his undated affidavit filed in court in support of his application for Grant of Probate, the Respondent indicated that she is deceased. She urged that the Respondent consequently obtained a grant in his favor to the exclusion of herself and her children all of whom were dependants of the deceased.
5. Further that some of the properties named in the grant namely Nyandarua/Matindiri/74, LR No. 7785/411 and Ndumberi/Ting'ang'a/1805 did not vest in the deceased absolutely.
6. On 19th February, 2014 Kimaru J certified the matter urgent and ordered that the taking effect of the Certificate of Confirmation of Grant issued to the Respondent on 20th January, 2014 is stayed pending the hearing of the application *inter partes*.
7. In response to the application, Fredrick Thuku, the Respondent herein, filed a replying affidavit sworn by himself on 12th May, 2014 in which he deposes that he is the executor of the last will and testament of Wilson Waithanje Thuku alias Waithanje Thuku, the deceased whose estate is in issue herein. He admitted that the Applicant is a widow of the deceased but denied the allegations that he had intimated that the Applicant was deceased and thereby obtained the grant without her knowledge. That he legally and procedurally obtained a Grant of Probate in the deceased's estate on 20th January, 2014, and that the Applicant was privy to every step undertaken in relation to the deceased's estate.
8. The Respondent contended that the deceased left a written will and that the Area Chief convened a meeting with all family members on 5th May, 2014 for the reading of the will at the request of Advocate Wambui Ng'ang'a who was the custodian of the will. The Applicant was present during the reading of the will and never protested the will. He urged the court to dismiss the application stating that it is an abuse of court process.
9. The Applicant filed a further affidavit dated 20th May, 2014 in which she stated that the Advocate known as Wambui Ng'ang'a alias Rose Wambui Njuguna could not validly draw a will as alleged as she did not have a practicing certificate at the material time. She annexed a copy

of a letter dated 7th March, 2014 by the Law Society of Kenya which indicates that they did not have any record of an advocate known as Wambui Ng'ang'a. That the closest name to that as per their records is an advocate known as Njuguna Rose Wambui who last held a valid practicing certificate in the year 1996. Further that when the fraudulent will was read, the Applicant protested its authenticity.

10. Rahab contended that the deceased had distributed land to the children of his first wife *inter vivos* and left the property known as Ndumberi/Ting'ang'a/1805 as their matrimonial home where she and the deceased lived until the time of his demise.

11. On 21st January, 2015 the court directed that the matter proceed by way of *viva voce* evidence.

12. Rahab Nyakangu Waithanje, the Applicant gave sworn testimony and stated that she is the 2nd wife of the deceased and they have four (4) children: Rose Wakoyo Waithanje, Titus Kigotho Waithanje, Onesmus Thuku, and Jane Wanjiku Waithanje, all of whom are adults. She urged that the Respondent did not inform any of them that he had obtained a grant and she only learnt of the same through other family members. That instead, the Respondent told the court that she was dead.

13. On cross-examination by Mrs. Fundi learned counsel for the Respondent, Rahab admitted that the deceased died while at the Respondent's house but denied the allegations that the chief had referred the deceased to the Respondent's house because of ill treatment claims. She urged that the deceased had sustained a fall and been taken to Nazareth Hospital. Upon his discharge from the hospital, the deceased went to the Respondent's home in order to take medication.

14. Rahab reiterated that the deceased had shared his property amongst the children of the 1st wife *inter vivos* and each one of them was issued with a title deed of their portions. That it is she and her children who were left on the property known as Ndumberi/Ting'ang'a/1805.

15. Stephen Mwaura Thuku, PW2 gave sworn testimony in support of the Applicant's case and stated that he is a step-brother of the deceased and that the deceased had two wives: Nyokabi Waithanji and Rahab Nyakangu Waithanji. He stated that the deceased died in the year 2009 but he only learnt that the deceased had left a will in the year 2011 when they wanted to file a succession cause.

16. PW3, Mwaura wa Muiru, born in 1920 testified that the deceased was his cousin. He asserted that the deceased and the Applicant herein got married after the death of the deceased's 1st wife. He was the Master of Ceremony at their wedding. That during his lifetime, the deceased subdivided his land among his sons from the 1st wife on one hand and himself and his 2nd wife, the Applicant herein, on the other hand. He urged that the deceased's sons obtained title deeds of their portions from the mother title and the remaining portion was left for Rahab and the deceased. This is where Rahab lives to date.

17. Fredrick Thuku Waithanje, the Respondent herein, testified as DW1 and stated that the deceased was his father, and that he had eleven (11) children: seven (7) girls and four (4) boys. The deceased's 1st wife Josephine Nyokabi Waithanje died in 1986 after which he married Rahab Nyakango, the Applicant herein in 1988. Rahab has four (4) children one of whom she sired with the deceased.

18. The Respondent contended that sometime in the year 2011, their Area Chief summoned them to his office and informed them that there was a lawyer known as Wambui Ng'ang'a present to read their late father's will. That it was the lawyer who had prepared their late father's will. The lawyer distributed the copies of the will to everyone who was present none of whom raised any concerns or comments.

19. The Respondent asserted that the will listed all of the deceased's property and how each property was to be distributed. The property known as Nyandarua/Matindiri/74 was given to Rahab the Applicant herein and her children. That the property is registered solely in the deceased's name and he only came to learn that there were other people who were shareholders in that land when they visited the Area Chief's office.

20. The Respondent stated that any document indicating that the Applicant had died is alien to him as he did not sign any such document. He asserted that all the documents used in petitioning for the grant of probate were prepared by an advocate known as Wambui Ng'ang'a. He however stated that he would not know if there was no such advocate in the Law Society of Kenya database.

21. On cross-examination by Mr. Thuo for the Applicant/Objector, the Respondent stated that the deceased's property known as Ndumberi/Ting'ang'a/1805 measured 4.3 acres. That the deceased distributed the property among his three sons from the 1st wife's house and left 1.3 acres for himself. There are therefore four (4) titles in relation to the land.

22. The Respondent contended that all his family members knew that he had petitioned for a grant of probate. He admitted that he did not serve them with the documents but informed them of the proceedings verbally.

23. Ngugi Ruitimi Mwae testified as DW2 and stated that he knew the deceased herein since the deceased visited his shop regularly. He stated that he knows the deceased's home but does not know who his children are or recall who his wife was.

24. Mr. Mwae stated that at one time, the deceased asked him to accompany him to visit a lawyer. When they got to the lawyer's office, he sat at the reception and waited for the deceased who went into a room to discuss his business with the lawyer. He could not however recall the lawyer's name or gender. That all he did was escort the deceased to the lawyer's office but he did not inquire about the purpose of the visit. He could also not recall signing any document during the visit to the lawyer's office. He only learnt that the deceased had visited the lawyer to write a will when he was summoned to the Chief's office for the reading of the deceased's will.

25. On cross-examination, Mr. Ngugi stated that he and the deceased were not close friends but merely acquaintances. The deceased used to frequent Mr. Ngugi's shop on his way to and from the hospital. He could not however testify as to whether Kimani wa Gachinga who was also present at the lawyer's office signed any documents.

26. Joseph Njihia Wangai testified as DW3 that he is the Area Chief of Ting'ang'a location in Tin'gang'a ward, Kiambu County. He has been the area Chief in the location since 1997 to date. He asserted that he knows the deceased's family since they live in his jurisdiction. He however only came to know the family well when the deceased began to ail. After the deceased's death, he wrote a letter for the deceased's children to enable them file a succession cause.

27. Mr. Wangai stated that a lawyer known as Wambui Ng'ang'a visited his office after the deceased's death and asked him to summon the deceased's family so that she could read the deceased's will. He also summoned the attesting witnesses indicated in the will. The will was read to the entire family but Mr. Wangai was not present at the time of the reading and does not therefore know its contents.

28. Mr. Wangai urged that before Ms. Wambui Ng'ang'a visited his office, he had seen her at the Kiambu Law Courts practicing as a lawyer. He however stated that he could not assist in locating Ms. Ng'ang'a as he had not seen her at Mappa House where she was based or within the court premises in the recent past.

29. He could not tell whether the will was genuine or not, as the authenticity of a will is a matter to be determined by the court. He pointed out that whereas he had indicated in his statement that the will was genuine, he only did so because DW2, Ngugi Ruitimi Mwae, informed him that he had escorted the deceased to the Advocate's office to write a will. He asserted that the will presented by Ms. Ng'ang'a bore a seal and after its reading, none of the deceased's family members contested its contents.

30. Mrs. Fundi for the Respondent intimated her intention to call Wambui Ng'ang'a, presumed to be an advocate having drawn the deceased's will in such capacity, to testify in support of the Respondent's case. The said Wambui Ng'ang'a however did not get to testify in court. On 23rd March, 2017 Mr. Ombura holding brief for Mrs. Fundi for the Respondent informed the court that Mrs. Fundi had located Ms. Ng'ang'a whose whereabouts were previously unknown.

31. When the matter came up for further hearing on 18th September, 2017 Ms. Ng'ang'a was present in court but stated that she was unwell and in great discomfort and could therefore not testify. The court gave an adjournment and asked Mrs. Fundi, the Respondent's counsel, to supply the Applicant with a copy of Ms. Ng'ang'a's Identity Card (ID). To date however, Ms. Ng'ang'a's ID card has not been supplied to the Respondent nor has she appeared before the court to testify as to the authenticity of the will which she allegedly prepared. Attempts to locate Ms. Ng'ang'a thereafter to attend court proved futile. She is said to be the custodian of all the title deeds of the properties which comprise the deceased's estate.

32. Learned Counsel Mr. Thuo filed written submissions dated 8th October, 2018 on behalf of the Applicant and submitted that the Grant of Probate in relation to the deceased's estate was obtained through defective proceedings, the making of false statements and concealment of material facts. He urged the court to revoke the will in line with the provisions of **section 76 of the Law of Succession Act**.

33. Mr. Thuo contended that in allowing the Petition for the Grant of Probate, the court relied on an unsigned affidavit whose contents were false thereby rendering the proceedings defective. Further that the Respondent had concealed from the court the fact that the property known as Nyandarua/Matindiri/74 did not belong solely to the deceased and could therefore not be bequeathed as held in **Jamleck Maina Njoroge vs. Mary Wanjiru Mwangi [2015] eKLR**.

34. Mr. Thuo invited the court to find that the will is fraudulent. That the will was not attested to as required and further that the alleged advocate who purported to prepare the will and who was not availed in court for cross-examination is a fraudster. Counsel urged the court to revoke the grant and certificate of confirmation dated 20th January, 2014 issued to the Administrator/ Respondent.

35. Learned counsel Mrs. Fundi filed written submissions dated 22nd October, 2018 on behalf of the Respondent and submitted that the will used to Petition for the Grant of Probate which the Applicant seeks to revoke is valid. That the will was duly executed by the deceased and attested to by two (2) competent witnesses in line with **section 11 of the Law of Succession Act**.

36. Mrs. Fundi contended that the Applicant failed to provide statutory provisions or authorities which require an advocate who drew a will to testify during the probating of the will. To buttress her arguments, she relied on the case of **Re Estate of Veronica Njoki Mungai (Deceased) [2017] eKLR** in which Musyoka J held that the omission to call the advocate as a witness is a matter of little value so long as one of the other key players in the alleged making of the will came to court and testified. Counsel urged that the fact that the advocate did not hold a valid practicing certificate at the time of drawing the will does not render the will invalid.

37. Mrs. Fundi stated that failure of a deceased to make provision for a dependant in his will does not invalidate the will as the court is empowered under **section 26 of the Law of Succession Act** to make reasonable provision for such dependant. Counsel invited the court to find that the will is valid and admit it to probate, and further that the deceased died testate and his estate ought to be disposed of in accordance with his will.

38. I have carefully considered the pleadings, the oral testimonies of the witnesses, the rival submissions of the Counsels on record and the entire proceedings of this cause. While the parties have advanced various arguments, these can be summed up into two issues for determination: whether there is sufficient evidence to warrant the annulment of the disputed will and whether the confirmed grant made to the Respondent with respect to the deceased's estate should be revoked.

39. On the question of validity of the will, I find guidance in **section 11 of the Law of Succession Act** which provides for the requirements of the validity of a written will as follows:

“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 acknowledgment of his signature or mark, or of the signature of that 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.”

40. From **section 11** cited above, it is evident that for a will to be valid, it must have been duly executed by the testator and attested by two competent witnesses. The evidence of execution of a will can be found in the testimony of the attesting witnesses or that of any other person present at the time the will was executed.

41. The Applicant did not take issue with the manner of execution of the will and I will therefore not belabor this issue other than to note that the disputed will bears the Testator’s signature at a place which leaves no doubt that it was intended to give effect to the will. Whereas the Applicant did not dispute the signature of the deceased, she took issue with the manner of the attestation of the will and stated that the will is fraudulent and invalid since it failed the test of attestation.

42. In his written submissions filed on behalf of the Applicant, Mr. Thuo asserted that the alleged will was not attested as required by **section 11(c)** of the **Law of Succession Act**. Counsel pointed out that Ngugi Ruitimi Mwae, one of the alleged attesting witnesses, denied ever witnessing the signature of the deceased at the Advocate’s office as alleged. That Mr. Mwae having not been in the room where the deceased allegedly signed the will as he was left waiting at the reception, he was therefore not privy to what the deceased discussed with the advocate or whether the deceased prepared a will.

43. To buttress his argument, Mr. Thuo referred to the case of **Re Colling [1972] 1 WLR 1440** in which it was held that if a witness left the room before the testator completed his signature, the attestation will be invalid.

44. Indeed, Ngugi Ruitimi Mwae testified as DW2 that he accompanied the deceased to a lawyer’s office, but that he was left seated at the reception as the deceased went into a room to discuss his business with the lawyer. Mr. Mwae urged that all he did was escort the deceased to the lawyer’s office but he did not inquire about the purpose of the visit. Mr. Mwae could also not recall signing any document during his visit to the lawyer’s office, or if Kimani wa Gachinga who was also present signed any documents. On cross-examination, Mr. Mwae testified that he and the deceased were merely acquaintances and not close friends.

45. Unfortunately, Kimani wa Gachinga the alleged second attesting witness was never called to testify as to the attestation. The advocate known as Wambui Ng’ang’a, who allegedly prepared the disputed will, also never testified in this cause. The only evidence in regard to validity of the will is found in the testimony of DW2 Ngugi Ruitimi Mwae, one of the alleged attesting witnesses, who denies signing any document during his visit to the lawyer’s office, or seeing the deceased sign any document purported to be his will. He in fact did not know the purpose of the visit altogether.

46. In the premise therefore, I find that the disputed will fails to meet the formal requirements as to attestation, as stipulated under **section 11** of the **Law of Succession Act**. The evidence of Ngugi Ruitimi, one of the attesting witnesses, suggests that he was not present when the deceased signed the disputed will, nor did he sign thereon as a witness. I therefore find that the will fails the attestation test and declare it invalid. The result is that the proceedings through which the Grant of Probate was made to the Respondent are defective as they were founded on an invalid will.

47. Having so found, I will now deliberate on whether the Applicant has made out a case for revocation of the grant. The law on revocation of grants is set out in **section 76** of the **Law of Succession Act Cap 160** as follows:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;....”

It is upon any party seeking the revocation or annulment of a grant to demonstrate the existence of any, some, or all of the grounds set out in **section 76** as outlined above.

48. The Applicant invited the court to revoke the Grant of Probate made to the Respondent stating that it was made on a fraudulent will and further that the proceedings to obtain the grant were defective and based on false statements and concealment of material facts.

49. To support her claims, the Applicant referred to paragraph 3 of the Respondent’s undated affidavit filed in court in support of his application for Grant of Probate, in which he indicated that the Applicant is deceased.

50. Indeed, the record shows that the affidavit in support of the summons for confirmation of grant filed on 19th December, 2013 is undated. While it shows that it has been commissioned, it is also not signed. As rightfully pointed out by the Applicant, under paragraph 3 of the affidavit, the Respondent indicates that Rahab Nyakangu Waithanji, the Applicant herein is deceased. The proceedings indicate that the grant was confirmed by Majanja J on 20th January, 2014 based on the summons dated 19th December, 2013.

51. Having found that the affidavit in support of the summons was undated and unsigned, and further that the Respondent indicated to the court that the Applicant herein was deceased, I find that the grant was obtained fraudulently by the making of a false statement, concealment of material facts and untrue allegations of fact.

52. Additionally, I find the Respondent's contention that he informed all his family members that he was petitioning for a grant of probate suspect since there is no evidence that he issued notices to the Applicant and the rest of his family members. While the Respondent states that he verbally informed all family members that he was petitioning for a Grant of Probate, the Applicant denied receiving any such information. I wish to point out that giving verbal notice in relation to court proceedings is not an acceptable practice.

53. From the record, there is nothing to show that the Respondent gave notice to the Applicant, who is a widow of the deceased herein, or to her children when applying for the grant. The identities of beneficiaries and their interests are material facts and once it is established that their interests were concealed from the court, the grant of representation issued was flawed.

54. Accordingly, the defective nature of the proceedings to obtain and procure confirmation of the grant is patently evident since no notice was given to the beneficiaries.

55. I have deliberately left out the question of properties in the will whose ownership is disputed. This issue, together with that of the properties which are said to have been adeemed, will be interrogated further during the hearing of the Summons for Confirmation of Grant to determine how the deceased's estate should be distributed.

56. Based on the foregoing, I find that the Applicant has established a case for the revocation of grant as prayed. In the premise therefore, I allow the application for revocation of grant filed by way of summons dated 18th February, 2014 and order as follows:

- a. The will of the late Wilson Waithanji Thuku alias Waithanje Thuku dated 19th December, 2005 be and is hereby declared to be invalid and is therefore a nullity.
- b. The Grant of Probate to the estate of Wilson Waithanji Thuku alias Waithanje Thuku (deceased) made to Fredrick Thuku Waithanje on 21st January 2013 and confirmed on 20th January 2014 is hereby revoked.
- c. There shall be no orders as to costs.

SIGNED DATED and DELIVERED in open court this **19th day of February, 2019.**

L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicant.

In the presence ofAdvocate for the Respondent.