



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 361 OF 2009

In The Matter Of The Estate Of Stanley Mugambi M' Muketha (Deceased)

MORRIS MUTEEMBEI MUGAMBI.....PETITIONER

-VS-

EVANGELINE NKATHA MUGAMBI.....RESPONDENT

JUDGMENT

1. The deceased herein Stanley Mugambi M' Muketha died on 13<sup>th</sup> April 2008 and as per the letter of introduction by the Area Chief Baigitu Location where he was domiciled left behind; *Evangeline Nkatha Mugambi, (wife) Bernard Mwenda, Anthony Muriuki, Kenneth Muthoni, Doreen Gakii, Geodfrey Mutuma, Felista Kathambi, Mary Muthoni (wife-deceased), John Mutua Mugambi, Joseph Kimathi, Agnice Nkatha, Munene Mugambi, Peter Mwitii, Fridah Kagwiria, Patrick Mutuma, Morris Mutembei, Susan Kathure.*
2. The petitioner herein petitioned for letters of administration allegedly with the consent of all the beneficiaries on 7<sup>th</sup> July 2009 and listed the following to be the assets of the deceased:- **L.R. Nkuene/Uruku/863(0.81HA), L.R.Nkuene/Uruku/1714(0.63HA), L.R.Nkuene/Uruku/1020(2.27HA), L.R. Nkuene/Uruku/1711(0.101HA), L.R. Ngobit/Supuko Block 5 /359 (0.2813HA), L.R. Ngobit/Supuko Block 5 /339 (0.9690HA), L.R. Ngobit/Supuko Block 5 /764(7.583HA), L.R. Ngobit/Supuko Block 5 /764(7.583HA).**
3. The petition was gazetted on 27<sup>th</sup> November 2009. Letters of Administration were issued to the petitioner on 10<sup>th</sup> February 2016. Summons for Confirmation of grant was filed on 21<sup>st</sup> December 2012 and was consented by the children of the 1<sup>st</sup> wife of the deceased, It sought to distribute the estate to the children of the 1<sup>st</sup> wife of the deceased. Confirmation was allowed by Makau J. and a Certificate of Confirmation of grant issued on 15<sup>th</sup> March 2013.
4. The Objector herein filed an application dated 27<sup>th</sup> January 2014 premised on Section 47 and 76 of the Law of Succession Act and basically praying for revocation and Annulment of Grant dated 15<sup>th</sup> March 2013.
5. The application was supported by the sworn affidavit of Evangeline Nkatha Mugambi. The major grounds cited were: (1) that the Proceedings were defective as the Deceased did not die intestate. They stated that the deceased left behind a written will; (2) that the petitioner filed the succession cause secretly and did not seek the renunciation of right to apply by the objector or the executor; (3) that the petitioner has disinherited the rightful beneficiaries of the estate.
6. The Application was opposed by the petitioner through his Affidavit dated 14<sup>th</sup> May 2014. He disputed the validity of the will. He also averred that the objector had transferred to herself land belonging to the deceased during the lifetime of the deceased and specifically mentioned parcels No. L.R.No.NKuene/Uruku/12, 0.63 Ha. to Bernard Mwenda, L.R.No. Nkuene/Uruku/1713 0.63Ha to Anthony Muriuki, L.R.No. NKuene/Uruku/1715 to Evangeline Nkatha Mukami, L.R.No. NKuene/Uruku/1716 1.19ha to Kennedy Murithi, L.R.No. NKuene/Uruku/1021 2.227 Ha to Felista Kathambi(minor) and Geodfrey Mutuma, L.R.No. NKuene/Uruku/1090 0.95 Ha. To Doreen Gatwiri. He also averred that the objector was fully aware of the petitioner's intention to file FOR the grant since he was summoned by the Area Chief and the District Commissioner. He also averred that between the years 2001 to 2008 the deceased was seriously ill hence could not have made the will as averred.
7. On 30<sup>th</sup> January 2014 Makua J. issued Orders staying the Operation of the confirmed grant dated 15<sup>th</sup> March 2013. The Court also gave directions on 26.05.2014 that the matter to proceed by way of viva voce Evidence.

**Parties Testimonies**

8. **Pw1 Evangeline Nkatha Mugambi** testified that she is the 2<sup>nd</sup> wife of the deceased and has six (6) children with the deceased whereas the First House has seven (7) children. She averred that she only knew of these proceedings when she was served with a letter from the M/s Mbaabu Inoti & Co. Advocates praying for the release of the title deeds belonging to the deceased. She disputed the signatures in the consent to petition for letters of Administration and averred that it is forgery. Her signature is as affixed in the supporting affidavit herein. She averred that the deceased made a will with the firm of Mithega & Kariuki Advocates dated 1<sup>st</sup> December 2003 but she only became aware of the will in the year 2009 when she was informed of it by John Mutua Mugambi. She averred that the will was read out to them by John Mutua Mugambi though she also opined that the same was read out by an advocate who she averred she never became familiar with. She also stated that the petitioner herein was invited to the reading of the will but he failed to attend. She alleged to be familiar with Ziverino M'Mworia who she sought to call as a witness. She lastly stated that both the children of the 1<sup>st</sup> and 2<sup>nd</sup> wife were given land by the deceased during his lifetime.

9. **Rw1, the Petitioner** relied on his replying affidavit as his evidence in examination in chief. In cross-examination he admitted that he did not obtain consent from the objector and their children when he filed for the confirmation of grant. He also averred that no share was allocated to the objector and her children in the grant and that he only distributed the estate that was in the name of the deceased. In re-examination he averred that at the time of the objector's marriage to the deceased in 1980 she already had children.

#### **Submissions**

10. Both parties have filed written submissions basically restating the averments made by the parties and I have considered them.

#### **ANALYSIS AND DETERMINATION**

11. From the arguments presented by the parties, I should determine:-

**a. Whether the deceased left a valid will; and**

**b. Whether or not the Grant should be revoked.**

#### **Validity of the Will**

12. The provisions on the validity of a written will are found in section 11 of the law of section Act which provides;

**11. 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 acknowledgement of his signature or mark, or of the signature of that other 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.**

13. On the face of the will alleged to be made by the deceased, it appears to be valid for it has been attested by two witnesses and was allegedly signed by the deceased. However, although the objector claimed familiarity with Ziverino M' Mworia, one of the attesting witnesses of the will, she did not call him as one of the attesting witnesses and also to prove that he was present and saw the deceased sign the written will. The objector did not also call the advocate who drafted the written. These witnesses are most crucial in of proof written will.

14. Another important lapse; the will seeks to disinherit Mary Muthoni, wife to the deceased. As no lawful reason was provided, such is an act of prohibited discrimination against women. Notably, the alleged will would inflict injustice upon the beneficiaries of the estate of the deceased.

15. In the upshot, I find the will does not satisfy the threshold of Section 11 of the Law of Succession Act and therefore invalid. I will treat the deceased as having died intestate.

#### **Revocation of the Grant**

16. Is there one or more of the circumstances set out in **Section 76 of the Law of Succession Act** for which this grant should be revoked or annulled? The section provides as follows:

**s76 Revocation or annulment of grant 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;**

**d.....**

17. Applying the test, **Rw1, the Petitioner** relied on his replying affidavit as his evidence in examination in chief. In cross-examination he admitted that he did not obtain consent from the objector and their children when he filed for the confirmation of grant. He also averred that no share was allocated to the objector and her children in the grant and that he only distributed the estate that was in the name of the deceased. In re-examination he averred that at the time of the objector's marriage to the deceased in 1980 she already had children. These averments confirmed the complaint by the objector. Accordingly, this grant is a perfect candidate for revocation. I revoke the grant herein.

18. Corollary to the revocation of grant, I issue the following directions and or orders:

**1. That a grant is now issued in the names of the Objector and the petitioner as joint administrators of the estate.**

**2. The Petitioner shall file and serve within 21 days, a Summons for Confirmation of Grant and an affidavit giving details of all assets of the deceased, the dependants of the deceased and mode of distribution of the estate of the deceased. In default thereof, the Objector shall file pleadings foregoing within 14 days of default.**

**3. The party served in (2) above, shall, within 14 days of service, file and serve an affidavit giving details of all assets of the deceased, the dependants of the deceased and mode of distribution of the estate of the deceased.**

**4. No orders as to costs.**

**Dated, signed and delivered in open court this 5<sup>th</sup> day of March 2019**

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**F. GIKONYO**

**JUDGE**

**IN PRESENCE OF**

**Muthuri for respondent**

**Muchiri for Kariuki for applicant**

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**F. GIKONYO**

**JUDGE**