



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1285 OF 2012

IN THE MATTER OF THE ESTATE OF BETHWELL MUYA GAKURU (DECEASED)

LYDIA WANJIRU MUYA.....1ST APPLICANT

KEZZIAH WANGARI MUYA.....2ND APPLICANT

LUCY WANJIRU MUYA.....3RD APPLICANT

VERSUS

GRACE WAMBUI MUYA.....RESPONDENT

RULING

1. Before the Court is an Application dated 20th March, 2017 brought under **Section 26** of the **Law of Succession Act** and **Rules 45 & 49** of the **Probate and Administration Rules**. The Application seeks orders for the making of a reasonable provision for the Applicants from the net estate of the deceased and the appointment of Kezziah Wangari Muya as co-administrator.

2. The Application is supported by the joint Affidavit of the 1st, 2nd and 3rd Applicants sworn on 20th March, 2017 wherein it is contended that the Applicants were all dependants of the deceased at the time of his death but have not been provided for in his Will. The Applicants deponed that during his lifetime, the deceased had three wives: Gladys Wairimu Muya, Grace Wambui Muya and Alice Wambui Muya. Gladys Wairimu Muya had no children while Grace Wambui Muya who is the Respondent herein had five children; and Alice Wambui Muya, now deceased, had seven children. 1st, 2nd and 3rd Applicants are the daughters of Alice Wambui Muya.

3. The 1st, 2nd and 3rd Applicants argue that they were dependants of the deceased at the time of his death and have not been provided for in the Will. Further, that the deceased had made no gift nor did he make any advancement to the Applicants before his death. It is the Applicants contention that all the sons of the deceased in both houses have been provided for, however, none of the daughters have been provided for.

4. The Applicants further raise issue with clause 5(4) of the Will which states as follows:

“Should any of my daughters fail to get married, or should any one of them get married and then leave their matrimonial home and require to return back to my fold, I decree that any such daughter of mine will receive provision and a place on which to put up a shelter for herself and any of her offspring from the biological mother.”

5. The Applicants argue that this clause is riddled in suppositions based on future events and cannot therefore be said to be provisions. It was submitted that the said clause cannot be considered a reasonable provision for the applicants.

6. The Applicants also seek an Order to appoint the 2nd Applicant, a child in the house of Alice Wambui Muya, as Co-Administrator. The Applicants have contended that when the executor of the Will, one Evanson Mburu Wanjohi passed away, the Respondent was appointed by the Court *ex parte* without the consent of Applicants. It is the contention of the Applicants that because the three houses are in conflict as a result of the contested Will, it cannot be expected that the Respondent will administer the estate without bias. The Applicants urge that it is only fair and just that the 2nd Applicant be appointed as an administrator to represent them in the cause, further, that all beneficiaries of the house of Alice Wambui Muya have consented to the appointment.

7. The application is opposed by the Respondent in an affidavit sworn on 15th May, 2017, wherein she averred that the Applicants had been adequately provided for through their mother, Alice Wambui Muya. It was the Respondent’s assertion that the deceased had exercised his right to testamentary freedom and urged the Court not to alter his wishes.

8. The Respondent further opposed the appointment of the 2nd Applicant as an administrator and argued that the Applicants intention was to delay the cause of justice and referred the Court to the case of **Re Estate of George Ragui (Deceased) 2016 eKLR** wherein this Honourable Court refused to cancel letters of administration granted to one of the Respondents.

9. The Respondent also cited the case of **Gulzar Abdul Wais v Yasmin Rashid Ganatra & Another [2014]** wherein the Court held that the failure to provide for a beneficiary in a Will does not invalidate a Will. The Respondent argued that the Applicants had not been disinherited owing to the fact that the deceased had bequeathed the Applicants property through their mother, Alice Wambui Muya, who was bequeathed shares held at Kiambaa Tea Factory and at the Mapa House. Their mother was also bequeathed land parcel L.R. No. Gatamaiyu/Kagaa/9.

10. It was the Respondent's submission that the deceased's Will dated 10th August, 2004 had passed all the tests concerning its validity under the law, further, that the Applicants had not properly brought an application for the revocation of the Will before the Court. The Respondent urged the Court to disallow the Application in its entirety.

Analysis and Determination

11. Based on the Parties' respective cases, as I have reproduced above, the key issues that emerge for determination are;

- a) Whether the deceased made reasonable provisions for all his dependants in his Will?
- b) Who should administer the Estate of Bethwell Muya Gakuru?

12. It is not contested that the applicants herein are the daughters of the deceased. It is their belief that they were not properly or adequately provided for by the deceased's Will. The deceased, Bethwell Muya Gakuru died on 4th August, 2011, leaving behind a Will dated 10th August, 2004. The authenticity of the Will is not contested. It is trite law that a testator has power to dispose of the rights to their property as they so please but this freedom is not absolute; the testator is expected to make reasonable provision for his children.

13. It is obvious from the Applicants' averments that they are not happy with the wishes of their late father in as much as he did not adequately provide for them as daughters and instead seemed to have favoured his sons. The Court however observes that the Applicants have not out-rightly contested the deceased's Will in the instant Application.

14. **Section 26** and **section 27** of the **Law of Succession Act** allow the Applicants to move the court the way they have since they are dissatisfied with the mode of distribution of the estate property as prescribed in the deceased's written Will. The said Will is annexed to the Applicant's Supporting Affidavit dated 20th March, 2017 and it is for all practical purposes a valid Will and remains uncontested in that regard.

15. An examination of the Will by this court reveals that the deceased was mindful of the welfare of his entire family composed of the houses of his three wives: Gladys Wairimu Muya, Grace Wambui Muya and Alice Wambui Muya. It is notable that the Will makes adequate provision and expressly provides for the sons, however the daughters of the deceased are not accorded the same treatment.

16. The only mention of the daughters in the deceased's Will is contained in clause 5(4) of the Will which states as follows:

“Should any of my daughters fail to get married, or should any one of them get married and then leave their matrimonial home and require to return back to my fold, I decree that any such daughter of mine will receive provision and a place on which to put up a shelter for herself and any of her offspring from the biological mother.”

17. **Section 29(a)** of the Law of Succession Act in recognizing 'children' of the deceased as dependants, does not provide for any classification of children as sons, daughters, married or unmarried. In the case of **Re Estate of Solomon Ngatia Kariuki (deceased) (2008) eKLR**, Makhandia J stated as follows:

“The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.”

18. **Article 27 of the Constitution of Kenya (2010)** further condemns and prohibits all forms of discrimination against women on account of gender and status. **Article 27(3)** specifically provides that:

“Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”

19. It follows then, that this court has a duty, being a court of law and equity, to find and hold that while the deceased was entitled to dispose of his property as he pleased, he was not entitled to leave the daughters without any reasonable provision from his estate. Clause 5(4) of the Will is ambiguous and cannot be considered to be a reasonable provision for the daughters of the deceased. In this regard this court finds

good reason to interfere with the deceased's freedom to dispose of his property and is satisfied that there is sufficient reason to vary the Will to make express and reasonable provision for the daughters including the three applicants herein.

20. Clause 5(2) of the Will of the Deceased reads as follows:

“I bequeath my farm Gatamaiyu/Kagaa/1381 (1.494ha) Munanda-ini to my wife Alice Wambui Muya to hold for herself and in trust for all her children.” (Emphasis mine)

21. Alice Wambui Muya has since died. The farm Gatamaiyu/Kagaa/1381 (1.494ha) Munanda-ini was held in trust by Alice Wambui Muya for the benefit of all her children, including the three Applicants herein. It is my considered view that all the children of Alice Wambui Muya, including the three Applicants, are entitled to benefit from this property whether married or not. To deny a daughter inheritance merely because of her marital status flies in the face gender equity and equality as provided by our Constitution.

22. On the issue of who should administer the estate of the deceased in the present case, Evanson Mburu Wanjohi who was appointed by the deceased as Executor has since died. A grant of Letters of Administration was issued to the Respondent on 6th July, 2016. The Applicants have contested the said appointment and argue that the house of Alice Wambui Muya and that of Gladys Wairimu Muya did not provide consent. The Respondent on the other hand contends that as an administrator, she would be relying solely on the deceased's Will and not her own judgment as to the mode of distribution. No evidence has been put forth by the Applicants demonstrating the Respondent's incapacity as an administrator that would render her incapable of administering the Estate.

23. The Court however notes that the relationship amongst the three houses of the deceased is strained and this may hamper the effective administration of the Estate by Grace Wambui Muya alone. In the interest of justice and proper administration of the Estate, and in balancing the interests of the Applicants and the Respondent, the Court concludes that it is prudent that all houses be included in the Administration of the deceased's Estate.

24. The Applicants have proposed that the 2nd Applicant herein be appointed as co-administrator. Annexed to their Supporting Affidavit dated 20th March, 2017 is a signed Consent by the beneficiaries in the House of Alice Wambui Muya. The Court is therefore inclined to appoint the 2nd Applicant to be co-administrator with the Respondent to administer the deceased's Estate jointly.

25. For the afore-going reasons this court makes a finding that the applicants are dependants of the deceased and are entitled to directly benefit from the deceased's estate and orders as follows:

- i. Reasonable provision for the three (3) applicants be made by vesting and transmitting their interest to be excised from the property known as Gatamaiyu/Kagaa/1381
- ii. I hereby appoint Kezziah Wangari Muya as a co-administrator of the estate of the deceased in addition to Grace Wambui Muya
- iii. The parties be at liberty to apply for further directions
- iv. Each party shall bear their own costs.

It is so ordered.

SIGNED DATED and DELIVERED in open Court this 9th day of April, 2019.

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L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Applicant

In the presence ofAdvocate for the Respondent