



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2014 OF 2007

IN THE MATTER OF THE ESTATE OF CAXTON MUKIRI MUCHENE (DECEASED)

LYDIA MUMBI WAIYAKI.....OBJECTOR/APPLICANT

VERSUS

RACHAEL NDUTA MWAURA....1ST ADMINISTRATOR/RESPONDENT

NANCY NJERI MUKIRI.....2ND RESPONDENT/ADMINISTRATOR

JUDGMENT

1. The Application coming for consideration is the objector's summons for revocation and annulment of the grant issued to the 1st Respondent on 2.2.2009 in respect of Dagoretti/Uthiru/451/48 (hereafter referred to as the suit property).
2. The deceased CAXTON MUCHENE MUKIRI died on 8.1.2007 leaving a Will dated 10.9.2004.
3. The deceased was survived by the following children:
 - (i) JAMES KIHARA – SON
 - (ii) JUDY WAMBUI – DAUGHTER
 - (iii) GODFREY MUCHENE –SON
 - (iv) LYDIAH MUMBI – DAUGHTER
 - (v) RACHAEL NDUTA MWAURA
4. The Objector Lydiah Mumbi Waiyaki avers in the Summons dated 3.10.2018 that the grant issued to the 1st Respondent was issued based on fraudulent information adduced by the 1st Respondent.
5. She also avers that the Will upon which the grant was issued is invalid and had been revoked by a subsequent Will dated 18.1.2006 which revoked all previous Wills.
6. The first Respondent filed a Replying Affidavit to the Summons for revocation dated 3.10.2018 and stated that the deceased gifted her with the suit property.
7. The case proceeded by viva voce evidence. The objector who called three witnesses stated in her written statement which she adopted as her evidence in chief that the deceased who was her father owned the suit property with a Mr. Leonard Makumi (Deceased) and one Mr. NjauMukiri.
8. Further that the grant issued to the 1st Respondent on 23.11.2007 and confirmed on 2.2.2009 was obtained fraudulently without her knowledge and through misrepresentation and non-disclosure of material facts.
9. The Applicant also stated in her written statement that the applicant has been collecting and misappropriating the deceased's share of

rental income from the suit property amounting to Kshs.3,000,000/-.

10. In cross examination the objector said she is not contesting the Will of the deceased and that the suit property was not disposed off by any of two Wills and that the Suit Property is leased to Total Kenya Limited.

11. The applicant said she was not aware of any power of attorney given to the 1st Respondent. She said the 1st Respondent used to stay in Nairobi while their father stayed at Ol-Kalou.

12. The objector's first witness (OW1), Mr Charles Gakuhi Chege wrote the Will dated 18.1.2006. He said the deceased instructed him to write the said Will and OW1 asked his colleague Mr. Joel Kipkorir Sigilai (OW2) to attest the Will since the deceased had one witness.

13. OW3 said he attested the Will with OW2. He said the deceased asked him to go with him to OW1's Office where he witnessed the deceased signing the Will.

14. The 1st and 2nd Respondent also testified as RW 2 and RW3. The 1st Respondent called one witness RW1, Mr. Benson Ndungu Kimani who wrote the Will dated 10.9.2004. He said Will was witnessed by two witnesses, Tom Kuria and James Kiharu.

15. RW1 also said he prepared a power of attorney in favour of the 1st Respondent upon being instructed by the deceased. RW2, the 1st Respondent said the deceased gifted her the suit property.

16. The 2nd Respondent who testified as RW 3 said she used to live with the deceased at Olkalou. She was the 4th wife of the deceased and he adequately provided for her and she was not claiming any of the properties in Nairobi.

17. I have considered the evidence adduced in this case. I find that it is not in dispute that the deceased left two Wills, one dated 10.9.2004 and the 2nd dated 18.1.2006.

18. The issues for determination in this case are as follows:

(i) Did the Will dated 18.1.2006 revoke the earlier Will dated 10.9.2004?

(ii) Did the deceased gift the 1st Respondent with the Suit Property?

(iii) Should the grant made to the 1st Respondent on 8.1.2007 and confirmed on 2.2.2009 be revoked?

19. On the issue as to whether the Will dated 18.1.2006 revoked the first Will, I find that although it is not expressly stated a subsequent Will revokes all earlier Wills to the extent of any inconsistency. Although, pursuant to the provisions of **Section 18(1) of the Law of Succession Act**, a second or subsequent Will revokes all former Wills.

20. I find that the Will dated 18.1.2006 states that it revokes all former dispositions and therefore the Will dated 10.9.2004 is revoked to the extent of any inconsistency.

21. On the issue as to whether the 1st Respondent was gifted the Suit Property by the deceased, I find that the deceased did not bequeath the Suit Property to the 1st Respondent.

22. In her decision in **Re Estate of The Late Gedion Manthi Nzioka (Deceased) [2015] eKLR** relied on by the petitioners, Nyamweya J stated as follows:

“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the Law of Succession Act provides as follows with respect to gifts made in contemplation of death:

...For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”

23. In addition, gift *inter vivos* must be established by evidence. See the case of **In re Estate of The Late Gedion Manthi Nzioka (Deceased) [2015] eKLR** where it was held that:

For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 32 to 51.

In Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”

23. If the deceased wanted to give the 1st Respondent the suit property, he would have said so in his will or he would have transferred the said property to the 1st Respondent.

24. I find that the other properties belonging to the deceased were not contested except the suit property.

25. There is evidence that the deceased gave the 1st Respondent power of attorney to manage the said property but there is no evidence that the deceased gave the said property to the 1st respondent.

26. There is evidence that the deceased owned the suit property jointly with others.

27. I find that deceased’s share in the suit property should revolve under intestate Succession to all beneficiaries of the deceased.

28. I accordingly find that the grant issued to the 1st Respondent was issued fraudulently as the 1st Respondent did not disclose all material facts.

29. I accordingly revoke the grant and set aside the certificate of confirmation.

30. I direct that letters of Administration be issued jointly to the objector and the 1st Respondent to administer the deceased’s share in the suit property since the 2nd Respondent said she is not interested in the suit property.

31. The 1st Respondent and the objector are directed to apply for confirmation of grant 30 days upon being issued with the letters of administration.

32. Failure to comply with directions of this court the estate shall revert to the public trustee for administration in respect of the suit property.

33. The Summons for revocation dated 8.10.2018 is allowed in the following terms:

(i) THAT the grant of Probate issued to the 1st Respondent on 23.11.2007 and confirmed on 2.2.2009 be and is hereby revoked and the Certificate of Confirmation is Cancelled.

(ii) THAT the suit property namely Dagoretti/Uthiru/451/48 shall revolve under intestate Succession since it was not disposed of by the deceased in his Will.

(iii) THAT Letters of Administration to issue to the following to administer deceased’s share of the Suit Property;

1. RACHAEL NDUTA MWAURA

2. LYDIA MUMBI WAIYAKI

(iv) THAT the two Administrators to apply for Confirmation of grant within 30 days of the issue of Letters of Administration.

(v) THAT failure to comply with the directions of this Court, the Suit property to revert to the Public Trustee to administer the deceased’s share of the Suit Property to all the beneficiaries of the deceased.

(vi) This being a family matter, each party to bear its own Costs of this Application.

(vii) Mention on 24.10.2019 for compliance and for further directions.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 20TH DAY OF SEPTEMBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.