REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 299 OF 1999

(IN THE MATTER OF THE ESTATE OF JIDRAFF GATHURA GITHIGI(DECEASED))

JAMES GICHUKI GATHURA.....EXECUTOR/APPLICANT

-VERSUS-

MARGARET WANGECHI GATHURA.....PROTESTOR

JUDGMENT

The late Jidraff Gathura Githigi died on 11 May 1999 at Gaaki location in Nyeri county. He was domiciled in Kenya at the time of his demise.

Eunice Njeri Gathura, the elder of his two wives, petitioned for grant of probate of written will on 8 July 1999.

On 8 February 2000 the protestor who is the deceased's second wife filed a petition by way of cross application for grant of letters of administration intestate of the deceased's estate. In her petition, she acknowledged that the petition by the applicant had been published but she contested the will, the basis upon which that petition was made.

The record shows that the grant of probate of written will was made to Eunice on 3 February 2000 5 days before the protestor filed her version of the petition.

Eunice eventually died on 20 May 2006 and by reason of her death the protestor filed a summons dated 5 June 2007 seeking revocation of the grant made to Eunice. She sought to be appointed the administratrix of the estate now that her co-wife had died. The application was opposed by the present applicant on the ground that it had been provided in the will that Eunice was its executor and that if she died her descendants would appoint the next executor. In line with the wishes of the deceased, the said descendants had appointed the applicant as the executor of the will.

In its judgment delivered in court on 27 January 2009, the court (Kasango, J.) revoked the grant and made a fresh grant to the present applicant.

Subsequently, the applicant proceeded to file summons for confirmation of grant dated 10 March 2010 and proposed the estate to be distributed in accordance with the will.

The protestor filed an affidavit of protest protesting against the scheme of distribution proposed by the applicant. She contended that the estate of the deceased must be distributed equally between his two houses. She also swore that the land, Title No. Naromoru Block 2 (Aguthi) 187 which is purportedly bequeathed to her house in the contested will already belongs to her and thus cannot form part of the deceased's testamentary bequests.

Parties chose to give oral evidence with regard to the rival positions they adopted and by and large reiterated their respective depositions in their affidavits. From all they said in their evidence, the central question appears to me to be whether the deceased died testate; if he did, then, everything else being equal, his wishes ought to be respected and the estate be distributed accordingly. If on the other hand he died intestate, then the intestacy provisions of the Law of Succession Act cap. 160 would come into play and will dictate how the estate should be distributed.

When I look at the judgment of this court which, as earlier noted, was delivered upon the protestor's summons for revocation of grant I am left with no doubt that the question of whether the deceased died testate was addressed conclusively. The judgment is relatively short and perhaps to understand why I am of this view, it is imperative that I reproduce it here in its entirety; this is what my learned sister said:

JUDGMENT

> ***Eunice Njeri Gathura now deceased petitioned for grant of probate of written will of Jidraff Gathura Githigi deceased. The court record shows that Margaret Wangechi Gathura cross-petitioned but there is no record that her cross petition was heard. Eunice was issued with a grant on 3rd February 2000. She died on 20th May 2006. Margaret has now filed a summons dated 5th June 2007 which is the subject of this judgment. By that summons she seeks that the grant issued to Eunice be revoked because it had become useless and inoperative following her death. She deponed in her affidavit that it had been more than a year since the death of Eunice and as a consequence the grant is now useless. Margaret described herself as the widow of the deceased and therefore was of the view that she is the appropriate person to be appointed as administratrix. The application was opposed by James Gichuki Gathura. In the replying affidavit he stated that the deceased left a written will and that according to clause No. 2 of that will it was provided that on the death of Eunice who was the named executor of the will the executor was to be appointed by the descendants of Eunice. The respondent stated that the said descendants had appointed him to be the executor. When the matter came before court it was ordered to be heard by way of affidavit evidence. The applicant's counsel argued that James Gichuki was not a party in this action. That argument however is a nonstarter because he had stated in which capacity he appears in this matter. He is after all a beneficiary of the deceased estate and he is therefore entitled to participate in the matter. It is clear that Eunice petitioned for grant of probate of written will. In the present application by Margaret the validity of that will is not questioned at all. Accordingly the court in reaching a decision to whom the grant should be issued will be guided by that will. The deceased in his will provided if Eunice died her descendants would appoint the executor. James Gichuhi has been appointed by the descendants of Eunice. That being so the judgment of this court is:***
>
> > ***1. That the grant herein dated 3rd February 2000 issued to Eunice Njeri Gathura is hereby revoked.***
> >
> > ***2. The court orders that the grant of probate of written will be issued to James Gichuki Gathura.***
> >
> > ***3. There shall be no orders as to costs in respect of summons dated 5th June 2007.***

It is apparent from this judgment that the learned judge was alive to the fact that the protestor had filed a petition by way of cross-application but that this petition was never heard. The protestor filed the petition on the understanding that the deceased died intestate and thereby contesting the petition for grant of probate of written will. However, she filed her petition five days after the grant had already been made; hers is classic case of closing the stable door after the horse has bolted.

One other important thing that can be noted from this judgment is the conclusion by the learned judge that there not only exists a will but also that the will had not been challenged. It is apparent that the judge proceeded on the understanding that the will was valid and enforceable. It is for this reason that the learned judge was emphatic that her decision to appoint the applicant as the executor was informed by the will. I do not read any other meaning in the words:

> ***It is clear that Eunice petitioned for grant of probate of written will. In the present application by Margaret the validity of that will is not questioned at all. Accordingly the court in reaching a decision to whom the grant should be issued will be guided by that will.***

And with that the learned judge proceeded to effect one of the clauses in the will relating to appointment of the executor.

Although the protestor's apparent objection to the petition for grant of probate of written will and her own petition for grant of letters of administration intestate had obviously been overtaken by events, there was still a window for challenge of the grant to Eunice if the protestor was of the firm view that the deceased died intestate and the grant made to her co-wife was not viable for any of the grounds stipulated in section 76 of the Law of Succession Act. That section reads as follows:

> ***76. 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) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—***
> >
> > > ***(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or***
> > >
> > > ***(ii) to proceed diligently with the administration of the estate; or***
> > >
> > > ***(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or***

(e) that the grant has become useless and inoperative through subsequent circumstances.

Although the grant of probate of written will was made to Eunice on 3 February 2000 it was not until 7 June 2007, seven years later, that the protestor filed summons for revocation of grant. It is worth noting that even then, the revocation was sought, not because the will upon which it was obtained was vitiated in any way but because the grantee, Eunice had passed on and therefore, in the words of section 76 (e) of the Act, '*the grant had become useless and inoperative through subsequent circumstances'*.

One would suppose that other than the demise of Eunice, if the protestor had any or any valid ground to challenge the grant made to Eunice, either because, as she alleges, there was no will or the will filed in court was not valid, she ought to have challenged it on that ground as soon as it was made.

All in all, the question of whether there was a will and whether that will was valid is, in my humble view, a question that was addressed conclusively by my learned sister in her judgment of 27 January, 2009; to that extent it is an issue that can properly be said to be res judicata.

Much of what I heard from the protestor is her house was given less than what she thinks she is entitled to. Her argument would be tenable if the deceased died intestate in which event this court would be entitled to apply the intestacy provisions of the Act, particularly those relating to the distribution of the estate where the intestate was polygamous, and distribute the estate accordingly. Again, if it is her view that what she got was not sufficient, then, being a dependant, the appropriate application should have been for a reasonable provision of the estate under section 26 of the Act rather than file an affidavit of protest.

On the question of registration of the protestor as the absolute proprietor of Title No. Naromoru Block 2 (Aguthi) 187 and therefore this particular property could not be willed away, the law is this; where property bequeathed does not belong to the testator, the gift cannot take effect but that, in itself, does not render the will invalid; it is so provided in Section 23 of the Law of Succession Act and Rule 8(1) in the Second Schedule to the Act. Section 23 provides as follows:

> ***23. Failure of testamentary dispositions***
>
> ***Testamentary gifts and dispositions shall fail by way of lapse or ademption in the circumstances and manner and to the extent provided by the Second Schedule.***

And on its part Rule 8(1) in the Second Schedule states as follows:

8. Principle of ademption

> ***(1) If property which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the gift cannot take effect, by reason of the subject thereof having been withdrawn from the operation of the will; and where a gift fails on this account, it is said to be "adeemed".***
>
> ***(2) There must be a substantial change in the subject of a specific legacy to cause ademption and a merely nominal change shall not have that effect.***

The point is, the will is not invalidated merely because a testator has purported to bequeath a property that is not his; of course, where the property purportedly bequeathed is the only bequest in the will, the will would thereby be rendered inconsequential and it does not matter that it may have been valid in every other respect; such will is, in my humble view, as good as void.

However, where there are other properties that the testator was rightly entitled to bequeath, as was the present case here, the will cannot be defeated by a bequest of a gift that did not belong to the testator in the first place. It would still be a good will except that the testamentary gift relating to the property that does not belong to the testator fails in terms of section 23 of the Act and rule 8(1) of the Second Schedule.

When one narrows this to the present case, it can reasonably be concluded that if Title No. Naromoru Block 2 (Aguthi) 187 was registered in the name of the protestor, and indeed there is evidence on record to that effect, then that part of the will relating to the disposition of this property cannot take effect; it has simply failed by reason of lapse or ademption.

In the ultimate, except of the failure of the gift relating to this particular property, I do not find any merit in the protestor's protest and it is hereby dismissed. For avoidance of doubt, the deceased's estate shall be distributed in accordance with his will save for Title No. Naromoru Block 2 (Aguthi) 187 which, as noted, belonged to the protestor at the time of the deceased's demise.

Dated, signed and delivered in open court this 19th day of July, 2019

Ngaah Jairus

JUDGE