



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 464 OF 2016**

**ALICE WANGUI.....APPLICANT**

**VERSUS**

**FRANCIS GACHAU FLAVIAN.....OBJECTOR**

**RULING**

1. The objector herein GACHAU FRANCIS FLAVIAN filed the Summons for revocation of grant dated 9.11.2018 seeking revocation of the grant made to CECILIA MUTHONI MIIRI on the grounds that the grant was made without the knowledge of the objector and further that the Will annexed was fraudulently made and signed by the same person who is not the deceased.
2. The Objector also stated in the summons for revocation that the petitioner ALICE WANGUI the last born of the family appointed an advocate of her own choice and filed this Petition secretly without the knowledge or consent of the objector who is the first born and only surviving son of the deceased.
3. The parties gave viva voce evidence and filed written submissions dated 6.6.2019 and 14.7.2019 respectively.
4. In his submissions, the objector said it was not possible for the deceased who was 87 years old to write a will since she might have been senile and therefore she had been misled through fraudulent misrepresentation of facts.
5. The Objector said he lived on the parcel of land being No. LR KIAMBU/GATUANYAGA (hereafter referred to as the suit property) and took care of the deceased while the Petitioner lived in California USA and now seeks to disinherit him from the suit property using a fake will which the objector has never heard of.
6. The objector submitted that the Petitioner also proceeded and transferred the tenancy of the Municipal Council House-Thika from the name of the deceased to her names without consulting the objector and she evicted the family of the Objector's deceased brother and left them to be squatters.
7. The objector is now seeking for orders that the grant of probate be denied and that the property be shared by the three children of the deceased and that each to occupy where he or she belongs.
8. The Petitioner Alice Wangui called two witnesses and also gave oral evidence. She said the deceased left a Will dated 30.4.2015 in which she appointed her as the executor of the Will.
9. On 16.6.2016, she obtained grant of probate and sought for confirmation of grant through summons for confirmation dated 3.8.2018. On 9.11.2018, the objector filed a summons for revocation seeking to revoke the grant.
10. The Petitioner called two witnesses one of them said he wrote the Will at the direction of the deceased.
11. I have considered the submissions by the parties together with the oral evidence and Affidavits filed herein. I find that it is not in dispute that the deceased died on 26<sup>th</sup> June 2015 and that on 16.6.2016, the petitioner herein was issued with grant of probate with Written Will.
12. The Will dated 30.4.2015 appointed the Petitioner as executor and stated that the suit property be shared equally between FRANCIS MWANGI GACHAGUA, EDWARD MAINA MWANGI and ALICE WANGUI GACHAU.
13. The issues for determination in this Ruling are as follows:

(i) Whether the Will dated 30.4.2015 is valid.

(ii) Whether the Grant of Probate issued to the Petitioner should be revoked.

(iii) Who pays the costs of this application.

14. On the issue as to whether the Will dated 30.4.2015 is valid, the objector says the same is a forgery and was not signed by the deceased.

15. James Thuo who witnessed the Will, stated that the deceased instructed him to write the Will and he witnessed the signing by two witnesses and the deceased.

16. The objector contends that the deceased was 87 years old and she could not have written the Will.

17. The deceased died on 26.6.2015 barely 2 months after writing the contested Will. I find that the witness is a son of the executor who is also a beneficiary of the Will.

18. The deceased died shortly after she wrote the Will, her testamentary capacity is doubtful. There was need to have a doctor certify that she was in her sound mind.

19. The essentials of testamentary capacity were laid out in the case of **BANKS Vs. GOODFELLOW [1870] LR 5 QB 549** as cited with approval in the case of **VAGHELLA Vs. VAGHELLA-**

*“a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made.”*

20. IN **RE ESTATE OF GATUTHU NJUGUNA (DECEASED) [1998] eKLR** where it quoted an excerpt from Halsbury's Laws of England, 4th Edition vol 17 at page 903-904-

*“Where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity.”*

21. If the circumstances under which a will is made are suspicious, and can lead to the will being rendered void, where the person who writes or prepares the will or plays a central role in its making takes a substantial benefit under it. There is abundant case law on this, represented by such local cases as **Vijay Chandrakant Shah vs. The Public Trustee CA No. 63 of 1984, Mwathi vs. Mwathi and another (1995-1998) 1 EA 229 and Wanjau Wanyoike and four others vs. Ernest Wanyoike Njuki Waweru and another HCCC No. 147 of 1980**, and the English cases of **Tyrell vs. Painton (1894) 1 P 151, Barry vs. Butlin (1838) 2 Moo PC 480** and **Wintle vs. Nye (1959) All ER 552**.

22. I find that the person who wrote the Will is not an independent witness as he is the son of the executor who is also a beneficiary of the Will.

23. I therefore find that the Will dated 30.4.2015 is not valid. I accordingly revoke the grant of probate issued to ALICE WANGUI on 16.6.2016.

24. The said grant was issued secretly without the knowledge of the objector. The objector said the Petitioner did not disclose to him that he was filing the Petition of grant of probate.

25. The grant be and is hereby revoked and Letters of Administration issued jointly to the objector and the petitioner to administer the estate jointly in accordance with the rules of intestate succession.

26. The Objector GACHAU FRANCIS FLAVIA and the Petitioner ALICE WANGUI to be issued with letter of administration in respect of the estate of the deceased.

27. The two to apply for confirmation of grant within 30 days of this date.

28. This being a family dispute, each party to bear its own costs of this Application.

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2019**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.**