



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

(FAMILY DIVISION)

SUCCESSION CAUSE NO 2410 OF 2014

IN THE MATTER OF THE ESTATE OF SAMMY KIRAGU WAMBURA (DECEASED)

JUDGMENT

1. The deceased herein **Sammy Kiragu Wambura** died on the 25th February 2014 and on the 4th September 2014 **Jane Wanjiru Kiragu and Susan Wambui Maira**, widow and advocate respectively petitioned this court for Letters of Administration with written will annexed.
 2. In the said Petition, **Jane Wanjiru Karagu** and **Mary Anne Wambui** were named as widows. 7 children were also listed as survivors of the estate estimated at Kshs.30,000,000/=.
 3. The said Petition attracted an answer to the Petition dated 8th December 2014 and a Petition by way of Cross-Application for a grant dated the same day by **Ann Mary Wambui Kiragu**.
 4. In the Cross Petition the Applicant contended that the deceased died intestate, the list of assets was not exhaustive and most properties were acquired before the 21st Respondent came into the picture.
 5. By consent of the parties, on the 1st of February 2016; **Jane Karagu, Susan Wambui Maina and Anne Mary Wambui Karagu** were appointed as administrators. Parties also agreed that the issue of validity of the will would be pursued first before getting to distribution of the assets.
 6. The matter proceeded by way of oral evidence, each side testifying and calling witnesses and the evidence maybe summarised as hereunder;-
 7. The **Ann Mary Wambui Kiragu** (hereinafter referred to as 'the 1st wife') testified that she was married to the deceased customarily in 1981 and thereafter celebrated a civil marriage in September, 1994. They had 4 children. The two around 24th of January 1998, however they kept a cordial relationship. That her children would visit the deceased who would in turn visited their schools and participate in important family matters. An example was given of the deceased participation in dowry negotiations for their first-born son.
 8. Further the 1st wife contended that during the 27 years of their marriage they Had acquired several properties.
 9. Further she stated that the document being referred as a will simply states who would manage the properties and was therefore not a will. She urged the court to disregard the alleged will and have the estate distributed as an intestate estate taking into consideration that all properties acquired after 1998 were her jointly acquired with the deceased and ought not to be shared with the 2nd wife.
- PW2-4 were children of 1st wife and they supported supported the testimony of their mother.
10. The **Jane Wanjiru Kiragu** (hereinafter referred to as the '2nd wife') informed the court that she got married to the deceased customarily in 2009 and together they sired two children.
 11. She further informed the court that she learnt of the will, and was shown a journal the deceased had signed by Susan **Maira** (hereinafter referred to as 'the advocate').
 12. It was her contention that upon being married the two put up an additional 2nd floor on Plot No. 16848 Juja, which they occupied as a matrimonial home. That she had found rental houses on the other floors.
 13. On cross examination the 2nd wife confirmed that when she met the deceased, he several properties but contended that she assisted

develop some of the properties.

14. **DW2** was **Antony Njoroge**, a nephew of the deceased. He recalled receiving a call from the deceased on the 30th of November 2012 requesting him to go sign a document, since he was busy on the said day he met the deceased the following day to Thika Nursing Home where he met the deceased; who requested him to witness a document. Further that the deceased explained that he had made the document as he was not sure of his health and wanted the 2nd wife to manage his properties.

15. **DW3** was **Susan Maira** (the advocate). She informed the court that the deceased was a long-time client & friend. She further stated that the deceased had taken to her a diary containing his wishes and same witnessed. And that from the content of the diary She prepared a will and forwarded to the deceased on 7th December, 2013, however the deceased never got to sign the same.

16. **DW4 Samuel Njuguna Ngige** was a friend of the deceased. On his part he informed the court that the deceased called him to go and witnessed a document while the deceased was in hospital. He obliged and went to signed the same as requested. At the time the deceased had already appended his signature.

17. I have considered the pleadings, evidence on record, submissions by counsel and authorities cited. The single issue for determination for now is whether the will attached to the petition filed on 4th September 2019 is valid or not.

18. It was submitted on behalf of the 1st wife that several versions of the will have been placed before court including reference to a flash disk and a laptop. However, the will being referred to does not meet the required legal threshold, as it is undated, not attested nor witnessed. Further the alleged will in a diary, makes reference to properties referred to in the flash disk a which property were to be “managed and controlled” and no disposition of the same done.

19. It was submitted further that the advocate in her evidence was clear that the deceased died before signing the will she had prepared.

20. It was submitted on behalf of the 2nd wife that the deceased left a valid will, a journal dated 30th November 2012 and the same complies with the requirements of the law as stipulated in Cap 160 of the Laws of Kenya. Further that the said journal and a list of properties deposited with the advocate were wishes of how the deceased desired to have his properties dealt with by his the 2nd wife in order to educate the deceased young sons.

21. **Section 5(1) of Law of Succession Act Chapter 160** of the **Laws of Kenya** (hereinafter referred to as ‘The Act’) provides as follows:

“Subject to the provisions of this part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law.”

22. On its part **Section 11** of the Act deals with attestation and execution of a will. It requires the testator to sign or affix a mark or have the will signed under his direction. The said will must also be attested by two or more competent witnesses, who witness or if not, who receive a personal acknowledgement from the testator that he has signed the document.

23. The will that was annexed to the Petition for Letters of Administration with written will annexed, was neither attested nor witnessed.

24. During the course of proceedings, a photocopy of a handwritten document witnessed by two people was said to have contained the wishes of a deceased. It is what the advocate refers to as a journal.

The said states inter alia that it overrides any will and that all properties listed in the maker’s flash disk/laptop are to be managed and controlled by the maker’s only wife of 3 years.

25. **Black’s Law Dictionary, 10th Edition**, defines a will as:

“The legal expression of an individual’s wish about the disposition of his or her property after death, ... a document by which a person directs his or her estate to be distributed upon death.”

26. **Section 5(1)** the Act provides that;

“Subject to the provisions of this part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law.”

27. **Black’s Law Dictionary(supra)**, defines **disposition** as;

“The act of transferring something to another’s care or possession; the relinquishing of property.”

28. The handwritten document does not dispose of any property; secondly the contents referred to be in a laptop and/or flash disk were introduced to court without any certificate as required under section 78A of the Evidence Act. Neither the flash disk nor lap top were produced in evidence which raises suspicion as to whether the list produced in court is the actual list referred to in the document.

29. In my considered opinion the handwritten statement/ document/journal does not qualify as a will, in that it does not make any disposition, secondly the same fails to list assets forming part of the estate such that one cannot tell which properties the deceased intended to deal with. Thirdly even if one were to refer to the list in the flash disk/laptop none of the two items were made available for the court's consideration. Fourthly, the said document was not produced as the will of the deceased with the Petition of 4th September, 2012 and was introduced in court as an afterthought in the course of proceedings.

30. For the above reasons I have formed the opinion that the deceased did not leave any valid will, he died intestate.

31. In the circumstance, the deceased having remained married to his two women at the time of his death and having died intestate his estate will be distributed in accordance with **Section 40** of the **Law of Succession Act**.

32. The administrators be at liberty to move the court accordingly for confirmation of the grant and distribution.

33. Each party will bear their own costs.

Dated and Delivered in Nairobi on this 14th day of November, 2019.

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ALI-ARONI

JUDGE