



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 846 OF 2011**

**IN THE MATTER OF THE ESTATE OF MAGAYU ALIAS PETER MAGAYU KIAMA (DECEASED)**

**BETWEEN**

**JOSEPH KIAMA MAGUYU**

**MIRRIAM WANGUI**

**IDA WANGARI.....APPLICANTS**

**AND**

**PETER MWANGI MUTHONI.....RESPONDENT**

**JUDGMENT**

1. The succession cause herein relates to the **ESTATE OF MAGAYU ALIAS PETER MAGAYU KIAMA (DECEASED)** who died on the 27<sup>th</sup> October, 2010 at Gatitu Sub-Location; the deceased left a written **WILL** dated the 25<sup>th</sup> January, 2006 and appointed one Peter Mwangi Muthoni as the Executor of his **WILL**; who then petitioned this court for a Grant of Probate of the written **WILL**;

2. On the 27<sup>th</sup> August, 2013 the applicants herein filed this application which is premised under the provisions of Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules; the applicants seek a Revocation of the Grant made to the petitioner on the grounds that;

a. The proceedings to obtain the Grant were defective in substance;

b. The Grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the cause;

c. The Grant was obtained by means of an untrue allegation of a fact essential in a point of law to justify the grant.

3. The applicants also relied on the grounds on the face of the application and on the Supporting Affidavit made on the same date by **Joseph Kiama Maguyu** with the authority of the other applicants; for those reasons given therein they sought to have the **WILL** declared invalid;

4. On the 27/08/2013 the applicants obtained a temporary order prohibiting alienation or dealings with the properties constituting the estate of the deceased; namely parcel numbers **AGUTHI/GATITU/559** and **MARMANET/NORTH RUMURUTI/BLOCK 2/1228**.

5. Directions were taken on the 18/07/2014 that the matter was ready for hearing and that viva voce evidence be tendered; the issues were drawn and the rival parties testified and were subjected to cross-examination; after the full hearing the parties filed brief written submissions; hereunder is a summary of the evidence tendered;

**THE APPLICANTS CASE**

6. The evidence of one of the applicants that is Joseph Kiama Magayu (**PW1**) was that the estate relates to his father the late Peter Magayu Kiama (deceased) who died on the 27<sup>th</sup> October, 2010; the deceased had two (2) wives namely Loise Wachera Magayu (deceased) who was the first wife and that she died on the 7<sup>th</sup> June, 1986; and the second wife is Naomi Wachehu Magayu and is still alive; and that the deceased was survived by the widow and the children as set out hereunder;

### 1<sup>st</sup> House

- i. Joseph Kiama Magayu – son -applicant
- ii. Mirriam Wangui – daughter - applicant
- iii. Ida Wangui – daughter - applicant

### 2<sup>nd</sup> House

- i. Naomi Wachehu Maguyu - widow
- ii. Josphat Kiama - son
- iii. Lucy Muthoni - daughter
- iv. Agnes Wanjiru - daughter
- v. Mary Wambui - daughter
- vi. Rose Ngima - deceased
- vii. Alfred Muriithi - son
- viii. John Maina –son

7. That all the deceased's children were born and brought up on one of the identifiable properties of the estate that is the parcel of land known as **AGUTHI/GATITU/559**; and they all still live there to date with no alternative abode; the children had developed their respective portions;

8. Upon conducting a search at the Lands Registry Joseph was shocked to learn that his step brothers and sisters had surreptitiously filed and concluded the succession proceedings herein and had transmitted the deceased's estate to themselves and had totally excluded the members of the first house and made no provisions for them; that this was done pursuant to a **WILL** purportedly made by the deceased which was dated the 25/01/2006; the existence of the **WILL** was unknown to them;

9. The **WILL**'s validity is questionable as when it was purportedly made the deceased was aged 113 years; that the deceased lacked the capacity to make such a **WILL** as he was also sickly due to his advanced age and lacked the requisite disposing mind and memory;

10. During the deceased's lifetime he had expressly exhibited his wish that his estate be shared by his two houses; and in furtherance to that he had put all of them into exclusive possession of their respective portions;

11. The respondent was aware that he and co-applicants were related to the deceased and that they were dependants of the deceased; yet the consent of the applicants was neither sought or obtained before the proceedings were commenced; they were also not cited and had no knowledge of the proceedings; they were challenging the **WILL** and/ or applying for reasonable and equitable distribution of the deceased's estate.

12. The case law relied upon was **James Maina Anyanya vs Lorna Yimbiha Ohara & 4 others (2014) eKLR; and Re: JNM (deceased) (2005) eKLR**.

13. The applicant prayed that the confirmed Grant be revoked and prayed that the respondent be directed to make reasonable provision for the applicants who ought to have been treated equally in disposition of the deceased's property.

### THE PETITIONERS RESPONSE

14. Learned Counsel Peter Muthoni testified that the deceased called in at his offices in 2006 with a view to writing a **WILL**; the deceased came in the company of two friends cum elders; at the time the deceased looked well and had even climbed the stairs to his office; that he didn't delve into the issues of age or senility;

15. Counsel was informed that he had a wife by the name Wachehu Magayu and he was given a list of dependants and was instructed by the deceased on how he wanted the estate distributed; he never mentioned the existence of another family to counsel;

16. The client produced the original titles for **AGUTHI/GATITU/559** and **MARMANET/NORTH RUMURUTI/BLOCK 2/1282**; and counsel proceeded to draw the **WILL** and had it executed and witnessed by one of the deceased's friends and another independent witness; the deceased himself proposed counsel as the executor and being the executor of the **WILL** counsel kept the copy of the **WILL** a copy of the deceased's National Identity card and also kept the Original Titles in safe custody;

17. In 2010 the son of the deceased named Alfred called in at his offices and that is when he learnt of the demise of this client; that he was never alerted about the funeral and the information on his client's demise was brought after the deceased had already been buried;

18. Being unable to obtain the Chief's letter Counsel proceeded to file for Probate of the Will without it; the identity of the beneficiaries was confirmed that they were twelve (12) in number and this was indicated in the affidavit that supported the application.

19. The aggrieved applicants later called in at his offices but were told by counsel to seek representation elsewhere; having found that the parcel number known as **AGUTHI/GATITU/559** had already been apportioned to the 2<sup>nd</sup> house the applicants proceeded to place a restriction over this property which was then followed by a Prohibitory Order dated 30/08/2013; the other property that is **MARMANET/NORTH RUMURUTI/BLOCK 2/1282** had no issues and is still awaiting finalization of this matter;

20. His duties as an executor were to verify the contents of the **WILL** and to ensure distribution; that he did not send out any Notification of the deceased's death; he didn't inform or attempt to look for all the dependant's and only dealt with Alfred whom he believed had been sent by the other beneficiaries; that there were eight (8) beneficiaries cited by the deceased for the **AGUTHI** property and eight (8) for the **RUMURUTI** land which meant that the three (3) applicants were not catered for;

21. The witness reiterated that there was also no element of senility by the deceased when instructions were being taken; the contents of **WILL** were read out to the deceased in a language he understood, that is in Kikuyu and he confirmed that it was in accordance with his wishes; and he then proceeded to sign the **WILL** on the 25/01/2006; and that there was no element of coercion before execution;

22. The beneficiaries that were omitted in the deceased's **WILL** were outside his knowledge; and after confirmation of the Will his work was done; as for what happens to children left out of the **WILL** this he left to the court to decide.

### **ISSUES FOR DETERMINATION**

23. After the close of the proceedings the Counsels filed and exchanged written submissions; from the evidence tendered and upon reading the written submissions these are the issues framed by this court for consideration;

- i. Whether the **WILL** was valid;
- ii. Whether the applicants are dependant's of the deceased;
- iii. Whether the procedure of obtaining the Grant of Probate was by means of an untrue allegation of a fact rendering the resultant confirmed Grant defective;
- iv. Whether the **WILL** can be varied to provide for persons left out;

### **ANALYSIS**

#### **Whether the WILL was valid:**

24. The applicable law on the mental capacity of the testator is found at Section 5(3) of the Law of Succession Act which provides that the testator must have capacity to make a Will;

25. The applicants contend that the validity of the Will was questionable as at when it was purportedly made the deceased was aged 113 years; that he lacked the capacity to make such a **WILL** as he was also sickly due to his advanced age and lacked the requisite disposing mind;

26. The onus or burden of proof to such a contention lies with the applicants; it is note-worthy that the applicants adduced no evidence to controvert the petitioners evidence on the deceased's capability of comprehension and that the deceased was possessed of competent understanding; in summary the applicants called no medical expert nor did they produce any medico-legal report to prove their allegations on the deceased's mental infirmity at the material time to support the lack of testamentary capacity of the deceased at the time of making the **WILL**; nor was there any no evidence tendered by the applicants of the deceased having been coerced at the time of making the **WILL**;

27. On the validity of a will the applicable law is found under the provisions of Section 11(c) of the Law of Succession Act; which provides that no written will shall be valid unless it is attested by two or more competent witnesses each of whom must have seen the testator sign or affix his mark to the Will;

28. The evidence of the petitioner was that the **WILL** was attested by two competent witnesses; one of the witnesses was a friend of the deceased who had accompanied him to the lawyers offices on the material date; the other was an independent witness presumably an employee at the law firm;

29. There was no evidence led by the applicants to controvert the petitioners evidence to the effect that the **WILL** was not attested in accordance with the law; the applicants also failed to tender evidence on the lack of competence of these witnesses to the attestation; they also did not lead any evidence on how these two witnesses stood to benefit from the **WILL**;

30. It is for the forgoing reasons that this court is satisfied that the testator was possessed with the requisite testamentary capacity to make the testamentary disposition when he signed the **WILL** on the 25/01/2006; and is further satisfied that there are no valid grounds raised by the

applicants challenging the validity of the **WILL**;

31. The written **WILL** dated the 25/01/2006 is therefore found to be valid as it complies with the mandatory provisions of Section 11 of the Law of Succession Act in that it bears the signature of the testator and was attested by two competent witnesses each of whom must have seen the testator sign or affix his mark to the **WILL**;

**Whether the procedure of obtaining the Grant of Probate was by means of an untrue allegation of a fact rendering the resultant confirmed Grant defective:**

32. Section 76 of the Law of Succession Act sets out the grounds upon which a Grant can be revoked; and reads as follows;

**“Section 76**

**a. The proceedings to obtain the grant were defective on substance.**

**b. The grant was obtained fraudulently by the making of false statements or concealment of something material the case.**

**c. The grant was obtained by means of untrue allegations of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.**

33. The applicants contention is that the proceedings to obtain the Grant were defective as the applicants who were admittedly children of the deceased were left out of the process; that at the time of applying for the Grant the petitioner was aware that the applicants were related to the deceased and that they were dependants of the deceased; yet their consent was neither sought or obtained before the proceedings were commenced; they were also not cited and had no knowledge of the proceedings;

34. It is this courts considered view that the applicants ought to have adduced evidence to support the allegation of fraud that the petitioner misrepresented specific factual material with the intention to deprive them of their interest in their late father's estate; the onus was upon the applicants to lead evidence on the intent of the petitioner;

35. It was the petitioner's evidence that when drawing the **WILL** he relied on the testators instructions as to who were his family members; that his instructions when drawing up the **WILL** was limited to the family of the 2<sup>nd</sup> house and that the deceased failed to disclose to him the existence of the first house; the petitioner therefore had no knowledge of this other house;

36. This court reiterates that no evidence of fraud was led by the applicants; and it is noteworthy that the threshold for proof of fraud is high; and finds that the applicants have placed no legal and or factual grounds before this court to warrant revocation of the Grant of Probate based on fraud;

37. The applicants grievance actually lies in their exclusion from the **WILL** and their pursuit for reasonable and equitable distribution of the deceased's estate; which then leads to the next two issues; whether the applicants are dependants of the deceased and whether the **WILL** can be varied.

**Whether the applicants are dependants of the deceased:**

38. From the evidence adduced and averments made by the Petitioner in which he stated that it proved difficult to obtain the Chief's letter; therefore he drew an affidavit that was sworn by the deceased's son Alfred Muriithi Magayu which listed all the beneficiaries; the affidavit was dated the 16<sup>th</sup> day of August, 2011 and the applicants names appear therein;

39. He however conceded that he had failed to notify all the dependant's and also did not obtain their consents as he was under the impression that the deceased's son Alfred had the mandate of all the dependant's; this court opines that had the petitioner taken the trouble of notifying and obtaining the consents of the persons listed in the affidavit during the process of probating the written **WILL** he would have been made aware of the existence of this other family;

40. Therefore by the very averments in the affidavit made by one of the deceased's son by the name Alfred Muriithi Magayu is an admission in itself that the applicants are children of the deceased; and this court is satisfied that the applicants are the children of the deceased within the meaning of Section 29 of the Law of Succession Act;

**Whether the WILL can be varied to provide for persons left out:**

41. The main issue which is the main bone of contention herein relates to the applicants exclusion by their late father and his failure to make provision for them in the **WILL**;

42. It is trite law that a testator has power to dispose of the rights to his/her property as he so pleases but this freedom is not absolute; the deceased is expected to make reasonable provision for his children;

43. The applicants evidence is that they were all born on the land known as **AGUTHI/GATITU/559** and that the deceased during his lifetime had sub-divided and given them their portions in the land;

44. Going by the applicants evidence their only interest is in the **AGUTHI/GATITU/559** property due to the developments they have made thereon; the petitioner stated that interest in this title(s) had already vested in the other beneficiaries but this court notes that no new titles or searches were produced as evidence in support; this court opines that the applicants got wind of the on-goings and nipped any alienation of the properties in the bud when they obtained the order of prohibition;

45. In this regard this court finds good reason to interfere with the deceased's freedom to dispose of his property and is satisfied that the **WILL** be varied to make reasonable provision for the disinherited children; namely the three applicants herein.

#### **FINDINGS AND DETERMINATION**

46. From the afore-going reasons this court makes the following findings that;

i. The Grant of the written **WILL** of the deceased to the Petitioner who is also the named executor in the deceased's **WILL** dated the 25/01/2006 is found to be valid;

ii. The applicants are found to be dependants of the deceased and are entitled to directly benefit from the deceased's estate;

iii. The distribution of parcel number **AGUTHI/GATITU/559** as set out in the Certificate of Confirmation is hereby revoked; the petitioner do make reasonable provision for the three (3) applicants by vesting and transmitting their interest to be excised from the property known as **AGUTHI/GATITU/559** only;

iv. The parties be at liberty to apply for further directions;

v. Each party shall bear their own costs.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 8<sup>th</sup> day of February, 2018.**

**HON.A.MSHILA**

**JUDGE**