



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2634 OF 2014**

**IN THE MATTER OF THE ESTATE OF PETER MBURU ECHARIA (DECEASED)**

LISH KIBUI ECHARIA.....1<sup>ST</sup> APPLICANT

STEPHEN NGIGE ECHARIA.....2<sup>ND</sup> APPLICANT

CATHERINE WANJIKU ECHARIA.....3<sup>RD</sup> APPLICANT

VERSUS

DR. DOROTHY KANYIVA ECHARIA.....RESPONDENT

**RULING**

1. The deceased Peter Mburu Echaria died on 21<sup>st</sup> July 2014. He was survived by a widow Dorothy Kanyiva Echaria (the respondent/executrix). Prior to marrying the respondent, the deceased had another wife Priscilla Njeri Echaria whose marriage with him was dissolved on 27<sup>th</sup> September 1990. This first marriage had children Lish Kibui Echaria, Stephen Ngige Echaria and Catherine Wanjiku Echaria (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants, respectively). It is worth noting that between the deceased and the applicants' mother there was a dispute over matrimonial property. The dispute was finally resolved by the Court of Appeal which shared the property between them.

2. There is no dispute that on 29<sup>th</sup> September 2014 the respondent through Kamau Kuria & Co. Advocates petitioned this court for the grant of probate of written Will. This was on the basis that the deceased had left a written Will signed and witnessed on 27<sup>th</sup> April 2010. Of significance to this matter is a clause in the Will which provided as follows:-

**“5. Again for the avoidance of doubt, I declare that neither my former wife, Priscilla Njeri Echaria, nor my children by her, shall inherit my property since they have already taken some of my property and have severed all contact with me since 1987.”**

3. Following the deceased's death, the applicants through Mwaura Shauri & Co. Advocates wrote to the respondent's advocates on 4<sup>th</sup> August 2014 to inquire whether the deceased had died testate or intestate. The respondent's advocates wrote back to say that they would not divulge communication between them and their clients.

4. When the respondent petitioned for the grant on 29<sup>th</sup> September 2014, on 4<sup>th</sup> October 2014 the applicants filed a caveat dated 17<sup>th</sup> October 2014 under **rule 15 (2)** of the **Probate and Administration Rules** of the **Law of Succession Act (Cap 160)** asking that nothing be done in the estate of the deceased without notice to them. On 24<sup>th</sup> January 2015 they fled summons for the provision of dependants under **section 26** of the **Law of Succession Act**. They were asking for 2/3 of the estate of the deceased on the basis that they were children of the deceased who had not been provided for in the Will. In the affidavit sworn by the 3<sup>rd</sup> applicant it was deponed that the alleged Will which had not provided for them had no legal basis. In paragraph 9 of the affidavit it was deponed that the alleged Will was not valid because it had been prepared not by the deceased but by the respondent; and that at the time the Will was made the deceased was in poor health with no mind of his own, but that he had been coerced by the respondent to make the same; and so on. On 5<sup>th</sup> March 2015 the applicants filed a citation to propound the document as a Will. The 3<sup>rd</sup> applicant swore an affidavit in verification of proposed citation to propound the document as a Will. She asked the respondent to propound the Will and that in default letters of administration of the estate of the deceased as having died intestate be issued to the applicants. On 7<sup>th</sup> September 2015 the applicants filed a similar summons for provision of dependants under **section 26** of the **Act** on the same grounds.

5. On 24<sup>th</sup> March 2017 the applicants filed notice to withdraw the summons for provision to dependants dated 19<sup>th</sup> January 2015 (and filed on 24<sup>th</sup> January 2015) and dated 4<sup>th</sup> September 2015 (and filed on 7<sup>th</sup> September 2015). They had on 7<sup>th</sup> February 2017 filed summons under **section 76** of the **Act** and **rule 73** of the **Probate and Administration Rules** to revoke the grant of probate. The summons was on the grounds that:-

(a) the deceased had died intestate and that the alleged Will had not been voluntarily made as the deceased was neither in good health nor of sound mind;

(b) the grant of probate was irregularly issued because at the time it was issued the applicants had filed a citation challenging the validity of the Will and had called upon the respondent to prove the same; and

(c) the issuance of the grant of probate had compromised the applicants' right to challenge the validity of the Will.

The applicants asked that, jointly with the respondent, they be appointed as administrators of the estate.

6. In the replying affidavit the respondent stated that, through the applications dated 19<sup>th</sup> January 2015 and 4<sup>th</sup> September 2015, the applicants had accepted that the deceased had left a Will, and that the only complaint was in regard to its contents; the fact that they had not been provided for in the Will. She stated that their exclusion from the Will was due to the fact that they had abandoned and abused the deceased during his lifetime. Further, that there was no evidence that they depended on the deceased during his lifetime.

7. It was submitted on behalf of the respondent that the applicants had, instead of filing an objection to the petition, prayed that the court does make reasonable provision for them from the estate by giving them 2/3 of the estate. In doing this, they had admitted that the Will was valid and that, in the circumstances, they could only get a share of the Will through an order of provision under **section 26** of the **Act**. Through the two applications, it was submitted, the applicants were engaging in an exercise of lottery; that they could not be allowed to probate and reprobate, which was not allowed as was held in **Dr. Sunny Samuel –v- Simon M. Mbwika & Another [1998]eKLR**.

8. Counsel for the respondent emphasized the provisions of **section 5** of the **Act** that give a person unfettered testamentary freedom (**Ndolo –v- Ndolo [2008]IKLR (G&F) 742**).

9. In response, the applicants' case was that the summons that the respondent was making reference to were withdrawn following agreement on 31<sup>st</sup> January 2017. It was following the withdrawal that the applicants filed the instant application.

10. Secondly, the applicants' position was that during the filing of the caveat and the citation to propound the Will there was no way a grant could have been issued; that the proceedings leading to the issuance of the grant were, in the circumstances, defective in substance, and therefore revocation under **section 76** should follow.

11. There is no dispute that following the filing of the petition, the applicants filed a caveat and a citation to propound the Will. Under **rules 15(8)** and **15(9)** of the **Rules** the deputy registrar was required to notify the respondent that a caveat had been lodged. Further, the deputy registrar ought not to have allowed any grant to be made to the respondent until the issue of the caveat had been dealt with.

12. Further, there was filed a citation under **rule 23(1)** to propound the Will. The applicants swore an affidavit to support the citation. In doing this, the applicants were calling upon the respondent to prove the validity of the Will. They were asking for a determination to show that:

(a) the deceased had capacity to make the Will;

(b) the formal requirements in making a Will were complied with;

(c) this was the deceased's last Will; and that

(d) the Will was made without duress, undue influence or mistake.

The deputy registrar was required to serve the citation upon the respondent, indicating the period within which she was to appear to prove the validity of the Will.

13. It is clear that neither the caveat nor the citation were served on the applicants. No action ought to have been taken by the deputy registrar to issue the grant or any further action without reference to the applicants. It follows that the issuance of the grant of probate was irregular. The proceedings leading to the grant were defective in substance under **section 76(a)** of the **Act**.

14. I have anxiously looked at the instant application dated 6<sup>th</sup> February 2017 and filed on 7<sup>th</sup> February 2017. The grounds were that:-

(a) the deceased died intestate and the alleged Will was not the deceased's Will voluntarily made while in good health and sound mind;

(b) the grant of probate was issued irregularly as at the date of the grant the applicants had filed a citation challenging the validity of the Will and had called upon the respondent to prove its validity; and

(c) the grant of probate had prejudiced the applicants' interest in the estate as it had denied them the opportunity to challenge the validity of the Will.

In the supporting affidavit, the existence of the caveat and the citation was referred to, and it was deponed that the Will was not valid, and the reasons for this were given including the claim that the deceased was neither in good health nor of sound mind at the time of making the same. It was claimed that the Will contravened the law, and that this was not a voluntary Will.

15. The respondent, in pushing the point that the applicants had in fact accepted that there was a valid Will but that all that they were seeking was provision, made reference to the withdrawn applications for provision under **section 26** of the **Act**. However, there was on record a notice of withdrawal filed on 24<sup>th</sup> March 2017 in respect of the two applications. On 16<sup>th</sup> May 2017 the respondent filed summons to strike out the notice of withdrawal. The request to file was allowed, and on 16<sup>th</sup> May 2017 the application was filed. However, it does appear the application was abandoned. This is because on 14<sup>th</sup> June 2017 counsel agreed to pursue the instant application for the revocation of the grant. I find that reliance cannot be placed on the withdrawn applications.

16. It follows that the applicants have made a case for the revocation of the grant of probate. I allow the application dated 6<sup>th</sup> February 2017 and filed on 7<sup>th</sup> February 2017 and revoke the grant of probate of written Will that was issued to the respondent on 27<sup>th</sup> March 2015. This is with costs.

17. So that this dispute does not linger on for long, and given its age, I direct that, within 30 days from today, the parties shall file and exchange affidavit evidence and documentary evidence on the issue as whether or not the deceased left a valid Will. This issue will be determined by oral evidence. The matter shall be mentioned on 11<sup>th</sup> June 2018 to give a hearing date.

**DATED and DELIVERED at NAIROBI this 7<sup>TH</sup> day of MAY 2018.**

**A.O. MUCHELULE**

**JUDGE**