



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

P & A NO.16 OF 2017

(FORMERLY HC NAKURU SUCC 442 /2011)

IN THE MATTER OF THE ESTATE OF FRANCIS GICHURE MACHARIA -DECEASED

JOHN GICHINGA MACHARIA 1ST APPLICANT

JACKSON KAMAU 2ND APPLICANT

JACKSON KARANJA MUCHIRI 1ST APPLICANT

PHYLLIS WAMBUI WANGARI 2ND APPLICANT

FRANCIS GICHURE MUTHONI 1ST APPLICANT

ELISIBA NYAMBURA MAINA 2ND APPLICANT

VERSUS

TERESIAH WANJIRU GICHURE 1ST RESPONDENT

JAMES KARANJA GICHURE 2ND RESPONDENT

RULING

This matter relates to the estate of **Francis Gichure Macharia (the deceased)** who passed away on 28/3/2011. Representation of his estate was sought on 19/8/2011 by Teresiah Wanjiru Gichure and James Karanja Gichure in their capacities as widow and son of the deceased respectively (the respondents herein). The deceased was expressed to have died intestate and survived by the widow, 5 daughters, two sons and six grand children.

At the time of death, he possessed the following properties **Nyandarua/Kitiri/5972, 5873, 5974, 5975, 5977, 5979, 5981 and 2400**. Representation was issued to the petitioners on 3/11/2011.

On 8/2/2012, summons for revocation of the grant was lodged by six applicants namely:

1. **John Gichinga Macharia**
2. **Jackson Kamau**
3. **Jackson Karanja Muchiri**
4. **Phyllis Wambui Wangari**
5. **Francis Gichure Muthoni**
6. **Elisiba Nyambura Maina,**

in which they sought orders inhibiting any dealings with the deceased's estate by the respondents and revocation of the grant of letters of

administration. The grounds upon which the orders were sought are that the grant was obtained fraudulently by the respondents making false statements and concealment of material facts that the deceased died intestate while they knew that there was a written will which had been validly executed and signed by witnesses; that the respondents forged the signatures of the 4th and 5th applicants purporting to consent to grant of letters of administration; that the respondents lied to the court when they represented to the court that the deceased died intestate whereas the written will was read to the family soon after the deceased's death.

The summons was supported by the affidavit dated 8/2/2018 sworn by the 1st applicant John Gichinga Macharia, a brother to the deceased who claims to have been appointed as executor of the will.

The application was opposed and James Karanja Gichure, the 2nd petitioner/respondent swore an affidavit dated 25/2/2013 in which he deposed that the 1st applicant is an intermeddler and not a beneficiary to the estate; and that the deceased died intestate.

On 6/2/2014, directions were taken that the matter proceed by way of viva voce evidence. The matter proceeded to hearing with the objector's case, followed by the respondent case. The objector called a total of five witnesses while only the 2nd respondent testified.

PW1 John Gachinga Macharia a younger brother to the deceased, produced a copy of a death certificate of the deceased. He confirmed that the property, **Nyandarua/Kitiri** was formerly plot 334 but before his death, the deceased had sub divided it into several parcels **Nyandarua/Kitiri/5972, 5873, 5974, 5975, 5977, 5979, 5981 and 2400**; that he had sold parcels 5977 and 5980 before his demise. PW1 also produced mutation forms for the land (P. Exhibit 2). He also produced a copy of the will in which he was named as the sole executor. He stated that his brother was murdered whereby his house was set ablaze when he was inside and though the 1st respondents and one of her sons were suspects, no arrests were made; that the respondents went ahead to obtain letters of administration without informing him or the other beneficiaries despite the fact that they knew of the existence of the deceased's will which was read during the funeral.

PW2 Phyllis Wambui, a granddaughter of the deceased denied knowing when the respondents went to court and denied signing any affidavit in support of filing this succession cause. PW2 further stated that her mother, who was a daughter to the deceased died and was a single mother; that she became aware of the will during the funeral when the chief read the will and she had been provided for in the will.

PW3 Elishiba Nyambura, a daughter of the deceased denied that the signature on the consent to confirmation dated 18/7/2011 was hers.

PW4 T W told the court that she was 14 years when her grandfather, the deceased died. She heard of the will after the death of the deceased

PW4 T W W is also a grandchild of the deceased. She denied having attended the grandfather's funeral but was aware of the will.

James Karanja Gichure, the 2nd respondent admitted that when the father died, the will was read during the funeral; that the chief invited them to go to his office and he went with his uncle John Gichinga Macharia, Elishiba, Jackson Karanja, Jackson Kamau and they were told to file succession; that the chief told them not to involve Gichinga (PW1) in the cause because he has his own home and property; that they included all the deceased's children and grand children as the beneficiaries. He admitted that Jackson Kamau and Karanja had bought part of the deceased's land; that Elishiba signed the consent forms and so did Phyllis.

Having given due consideration to the pleadings and the rival submissions by both counsel, the issues that lend themselves for determination are:-

- 1. Whether there was an existing valid will;**
- 2. Whether there was concealment of facts by the petitioners;**
- 3. Whether the grant issued to the petitioners on 3/11/2011 should be revoked in other words, whether the objector has satisfied this court in terms of section 76 of the Laws of Succession Act. (LS Act).**

On the first issue, whether there exists a valid will, **Section 11 of the Law of Succession Act** provides for the formal requirements of a valid will. It provides:-

“No written will shall be valid unless:-

(a) The testator has signed or affixed his mark to the will or it has been signed by some other persons in the presence and by the direction of the testator;

(b) The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark or the signature of the other person; and each of the witnesses must sign the will in the presence of the testator; but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

The applicants have produced the purported will of the deceased, dated 14/3/2011 as Ex No.2. It bears a signature which is supposed to be the deceased's and is witnessed by three witnesses in the presence of an advocate, Njihia Njoroge. On the face of it, it is a valid will representing the deceased's wishes on how he wanted his estate distributed. The 2nd respondent (DW1) testified and admitted that indeed the will was read to the family after the death of the deceased. In fact he blamed the chief for telling them not to let the appointed executor, John Gichinga, proceed with executing the will; that the said chief urged them to file the succession cause which they did. DW1's testimony however differs from the contents of his replying affidavit dated 28/2/2013 where he termed the will as being null and void. If at all the chief advised the respondents to ignore John Gichinga (PW1), but they were represented by counsel when they filed the petition. The counsel should have advised them otherwise, that it is the court to determine whether or not the will was valid. In the petition, the respondents never disclosed that there existed a will, whether it was forged or otherwise. They described the deceased as having died intestate when they well knew that not to be true. I will agree with the finding of Judge Ougo in the Estate of **Kamandura Ali (deceased) 2016 eKLR** where she held **"that the will remains valid so long as it was not challenged by either party."**

The will produced by the objectors is valid so long as the petitioners did not challenge it and it should have been filed before the court for the court to determine its validity, in any event, DW1 has actually admitted that there existed a will and he never alluded to there having been a challenge to it. I find that the will is valid.

Whether there was concealment of material facts by the respondents

I have already found above that the petitioners failed to disclose in their pleadings that there existed a will and in fact they had no capacity to file the proceedings but the executor. At Para 3 of the will, PW1 John Gichinga was appointed as the executor and since the will was read to the family, I believe the respondents must have been told that fact.

Further to the above, although the 4th and 6th objectors purportedly appended their signatures to Form 38 **"consent to making a grant of administration intestate"** both of them denied that they ever signed the said consent nor were they aware of the succession proceedings having been filed. Although PW1 denied that they signed the consent form before the chief, in light of what I have considered above, I satisfied that the objectors were truthful. It means that the signatures on the consent were a forgery thus concealing the true position of the status of the beneficiaries.

As to whether letters issued to the petitioners should be revoked

This application was brought pursuant to **Section 47 and 76 of the Law of Succession Act. Section 76 Laws of Succession** provides for instances when a grant may be revoked. It reads as follows:

"76 a grant of representation whether or not confirmed, may at anytime be revoked or annulled if the court decides, either on application by an interested party or on its own motion

- (a) That the proceedings to obtain the grant was 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."**

In the instant case, I have found that the deceased left a valid will and that the petitioners made false statements/representations to the court that the deceased died intestate and concealed from the court the fact that the deceased had a will. For the foregoing reasons, I find that the conditions **Under Section 76 of the Laws of Succession Act** exist for revoking a grant. I hereby revoke the grant issued to the petitioners on 3/11/2011. I order that the deceased's estate be distributed in accordance with his wishes which are contained in the will.

The petitioners will bear the costs of this application.

Dated, Signed and Delivered at Nyahururu this 10th day of July, 2018.

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R.V.P Wendoh

JUDGE

Present:

N/A - Counsel for the appellant

Soi - Court Assistant

Ms. Wanjiru holding brief for Mr. Karuga - the respondent/s