



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1670 OF 2004

IN THE MATTER OF THE ESTATE OF DAVID WAHINYA MATHENGE (DECEASED)

MARY NJUKI NJENGA.....OBJECTOR

VERSUS

FESTUS MATHENGE NAMARU.....RESPONDENT/EXECUTOR

JUDGMENT

1. The deceased David Wahinya Mathenge died on 5th January 2003. He left a written Will dated 26th December 2002 in which he appointed his father Festus Mathenge Namaru as the executor. In the Will he indicated his property as follows:-

- (a) L.R. No. Ngong/Ngong/21730;
- (b) motor vehicle registration number KZY 542 Nissan pick-up;
- (c) timber yard at Ngong;
- (d) two cows at Ngong;
- (e) cows at Ndaragwa; and
- (f) account number [particulars withheld] at Barclays Bank of Kenya, Karen Branch.

The executor filed a petition for the grant of probate of written Will on 7th June 2004. A grant of probate was made to him on 9th October 2006.

2. On 8th December 2006 the executor filed summons to have the grant confirmed. He filed a brief supporting affidavit sworn on 6th December 2006 to state that he had identified the assets and beneficiaries of the estate of the deceased, and that there was no pending application for provision of dependency. He attached to the affidavit the "Estate of David W. Mathenge (Deceased) State of Affair as at 30th November 2006." From the statement, the cows had died and the vehicle had been taken by a creditor to settle a debt owed to her for the supply of timber to the deceased's yard. The only money at hand was Kshs.8,000/=

3. The objector Mary Njoki Njenga was the mother of Grace Nyambura Wahinya and Salome Wamaitha Wahinya whom the deceased had acknowledged in his Will as his daughters and beneficiaries. She had lived with the deceased for some time. During that time, the two daughters had been born. She contested the application for the confirmation of the grant on several grounds. Her case was that the affidavit that the executor swore to support the application for confirmation did not list the assets of the deceased, did not list the beneficiaries, and did not propose how the assets were going to be distributed. Further, the statement of account did not materially and substantially account for how the executor had dealt with the estate of the deceased as had been ordered on 9th October 2006. The order of 9th October 2006 had asked him to file an affidavit accounting for how he had dealt with the estate since the death of the deceased, and then file a monthly account of his dealings with the estate.

4. The summons for the confirmation of the grant was heard through oral evidence and written submissions. Because the executor was old and sick, it was agreed that this evidence be taken by the Deputy Registrar at the High Court at Nyeri which was done. This court then took

the evidence of Stephen Githinji Nderitu (PW 2) who on 2nd August 2011 bought the deceased's LR No. Ngong/Ngong/ 21730 from the executor for Kshs.2,500,000/= The objector testified. It was her case that since LR No. Ngong/Ngong/21730 was still in the name of the deceased it should be given to her two daughters. The parcel, although sold, has not been transferred to PW 2. She stated that her daughters had not at all benefitted from the estate of the deceased. The deceased had benefits at NSSF which the objector admitted to have collected and spent on herself. The objector's case was that the executor had no authority to sell LR Ngong/Ngong/21730. That was also the submissions of her counsel Mr. Odhiambo.

5. There was no dispute that LR No. Ngong/Ngong/21730 had rental rooms. The objector stated that they were 12. They had tenants. According to her, each fetched 2,500/= per month. It was not in dispute that the executor's daughters had always collected the rent. The objector stated that the executor had not accounted for them. The executor's case was that he did not know how his daughters spent the rent. It is clear that the timber yard business had collapsed. The money at Barclays Bank account was apparently ploughed in the timber yard.

6. The executor was under the Will authorised to manage the timber yard business. Proceeds from it were to be used to educate the two daughters of the objector and the children of the deceased's brother Gatheru. All that was going to be possible if the business was successful. No money had been shown to have been used on the objector's daughters.

7. Both the executor and PW 2 agreed that the Will did not authorise the former to sell LR No. Ngong/Ngong/21730. It was the submissions of Mr. Mutitu for the executor that under **sections 79, 82 and 83** of the **Act** the executor had legal authority to manage the estate of the deceased, and that included selling LR No. Ngong/Ngong/21730 whose proceeds he had used to pay the estate's debts. Further, that the executor had used part of the purchase price to buy land parcels Nyandarua/Muruai/26 and Nyandarua/ Ndaragwa Block 2 (Kahutha)/16 which could benefit the objector's daughters. The executor was opposed to the two daughters of the objector getting LR No. Ngong/Ngong/21730 because, first, it had been sold to PW 2 and, secondly, the Will did not bequeath it to them.

8. According to the evidence of PW 2, LR No. Ngong/Ngong/21730 was not transferred to him because the executor –

“had no capacity to transfer it to him until this temporary grant is confirmed by the court.”

He wanted the court to order that the executor transfers the land to him.

9. It is evident that on 3rd August 2011 one Daniel Mathenge Warugongo sold Nyandarua/Ndaragwa Block 2 (Kahutha)/16 for Kshs.900,000/= to the executor. The money came from the sale of LR No. Ngong/Ngong/21730 to PW 2. It was the evidence of the executor and PW 2 that he later helped identify Ndaragua/Muruai/26 which the executor bought for Kshs.1,250,000/= which were, again, proceeds from the sale of LR No. Ngong/Ngong/21730. If PW 2 bought LR No. Ngong/Ngong/21730 for Kshs.2,500,000/= and Kshs.900,000/= of it was used to buy Nyandarua/Ndaragua Block 2 (Kahutha)/16, the balance was Kshs.1,600,000/=. If Kshs.1,250,000/= of the balance was used to buy Nyandarua/ Muruai/26, that left Kshs.350,000/= which the executor says he used to pay outstanding debts of the estate.

10. The power and duties of the executor are provided under **sections 82 and 83** of the **Act**. Under **section 82(ii)(b)** of the **Act** it was clear that:

“no immovable property shall be sold before confirmation of the grant.”

The executor could not sell LR No. Ngong/Ngong/21730 before the grant was confirmed. He did not seek the authority of the court to sell the property. Luckily, the title to the property was not transferred to PW 2. I declare the transaction null and void.

11. The executor and PW 2 did not provide the title documents for Nyandarua/Muruai/26 and Nyandarua/Ndaragwa Block 2 (Kahitha)/16. The court did not know in whose names the parcels were. I find that now that the parcels were bought using the money from PW 2 he will have them. They will be surrendered by the executor to him. This is because LR No. Ngong/Ngong/21730 belongs to the estate of the deceased.

12. There was no dispute that the deceased had a wife called Nyawira who, according to the Will, left him before he died. They had no children together. He asked in the Will that she gets nothing from the estate.

13. That leaves only his two daughters Grace Nyambura Wahinya and Salome Wamaitha Wahinya. I find that the executor mismanaged the deceased's estate, and had failed to provide a full and accurate account of how he had dealt with it. He will not get any further benefit from the estate.

14. In conclusion, I find the LR No. Ngong/Ngong/21730 shall go to Grace Nyambura Wahinya and Salome Wamaitha Wahinya in equal shares. In those terms the grant of probate of written Will that was issued to the executor Festus Mathenge Namaru on 9th October 2006 shall be confirmed

15. Each side shall pay own costs.

DATED and SIGNED at NAIROBI this 2ND day of OCTOBER 2018

A.O. MUCHELULE

JUDGE