



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 877 OF 2007

IN THE MATTER OF THE ESTATE OF JANE WAMBUI GATONYE (DECEASED)

HELLEN WANGARE WAMBUI.....OBJECTOR/APPLICANT

VERSUS

LUCY NYOKABI WAMBUI.....PETITIONER/RESPONDENT

RULING

1. The deceased Jane Wambui Gatonye died on 28th December 2006. She was survived by Susan Ann Wanjiku (daughter), Hellen Wangare Wambui (daughter) (applicant), Lucy Nyokabi Wambui (daughter) (respondent) and John Ngugi (son) (deceased) who was survived by his wife Jane Wanjiku Ngugi. Her estate comprised of the following assets:

- a) Dagoretti/Kangemi/T.378;
- b) Limuru/Kamirithu/2460;
- c) Limuru/Kamirithu/T.128;
- d) Kayole Resettlement Scheme Plot No. 332; and
- e) Kangemi Market Stall No. 376.

2. The deceased died testate having made a Will on 27th September 2005. According to the Will, she gave her estate to two of her children, the respondent and to John Ngugi (deceased). The Will also appointed the respondent as the executrix. The respondent filed a petition for grant of probate of written Will on 5th April 2007. On 19th June 2007 the applicant gave notice of intention to object to the grant of probate being made to the respondent. On 27th October 2007 she filed a petition by way of cross-application for a grant. On 16th May 2013 the court appointed both the applicant and the respondent to act as interim administrators pending the determination of the objection proceedings. The court further ordered that the pending objection proceedings be fixed for directions within 45 days from 16th May 2013, and that if the objection proceedings were not fixed within the 45 days they were to stand dismissed and a grant of probate was to be issued to the respondent. The applicant did not comply with the orders made on 16th May 2013 to fix the objection for directions. The said objection proceedings were therefore terminated and dismissed by a ruling made on 11th December 2014. The grant of letters of administration *pendent lite* made on 16th May 2013 to the applicant and the respondent was revoked. A grant of probate of the Will of the deceased was made to the respondent on 11th December 2014. The grant is pending confirmation.

3. The applicants brought the present summons dated 14th July 2015 under certificate of urgency seeking revocation of the grant made to the respondent on 11th December 2014 and re-instatement of the grant of letters of administration *pendent lite* made to her on 16th May 2013. The application was based on the grounds that her objection proceedings were not listed for directions within the 45 days as ordered by the court on 16th May 2013 due to the negligence of her former advocate; that the purported Will was a forgery and therefore void; and that the forgery was intended to disinherit some of the beneficiaries.

4. The application was supported by the affidavit of the applicant dated 14th July 2015. It was her case that on 16th May 2013 the court made orders appointing her an administrator jointly with the respondent and requiring that the objection proceedings be listed for directions within

45 days from the date of the order; that her advocate formerly on record P.K. Mathanjuki & Co. Advocates failed and/or neglected to fix the date for directions as ordered by the court; that consequently the court revoked her appointment as an administrator and dismissed the objection proceedings; that the failure to comply with the orders of 16th May 2013 was not deliberate but due to the mistake of her former advocate who was on record; that the mistake of her advocate should not be visited on her; that the objection proceedings raised triable issues touching on the authenticity of the Will and alleging that the will was a forgery intended to disinherit some of the beneficiaries from the estate; and that the purported Will does not indicate that witnesses were present, and witnessed the execution of the Will in the presence of each other.

5. The application was opposed by the respondent. She stated that through the ruling dated 16th May 2013 the court gave orders directing that if the objection proceedings were not listed for directions within 45 days, the same stood dismissed; that failure to list the matter for directions within the stipulated time automatically dismissed the matter; that the objector was trying to re-open matters which the court had made a decision on without preferring an appeal; that the applicant was applying for revocation of grant to impeach orders already made by the court instead of appealing against them and for that the application was fatally defective; that court orders are not issued in vain and all parties are bound to obey court orders; and that the present application was *res judicata* as it attempted to litigate over matters already settled.

6. I have looked at the ruling of this court made on 16th May 2013. I note that the applicant having been made a joint administrator with the respondent on interim basis, she was to fix the objection proceedings for directions within 45 days from 16th May 2013. She, however, failed to comply with the order, hence the ruling made on 11th December 2014 dismissing her objection proceedings. The applicant blamed the failure to set down the objection proceedings for hearing on her former advocate whom she had instructed to act on her behalf but did not. I am aware that a delay caused by the mistake of a legal adviser is considered a proper cause for the exercise of discretion (**Gatti vs Shoosmith [1939] 3 All ER 916, Transnational Bank Ltd v Jemimah Moraa Sobu, Civil Application No. 91 of 2002; [2002] LLR 5948 (CAK)**).

7. I note that the alleged advocates for the applicant P.K. Mathanjuki & Co. Advocates were still on record for the applicant in March 2014, almost one year after court made on 16th May 2013. They wrote to the court on 21st August 2013 pointing out errors made in the ruling of 16th May 2013. Through their letter dated 19th March 2014, P.K. Mathanjuki & Co. Advocates wrote to Nchoe Jaoko & Company Advocates requiring them to set a date to take inventory of the deceased's assets. On 14th April 2014 the applicant and Jane Wanjiku Ngugi jointly filed an affidavit in response to the petitioner's accounts through the same advocates P.K. Mathanjuki & Co. Advocates. On 2nd May 2014, they wrote to the respondent's advocates inviting them to the registry to fix a mutually convenient mention date. The applicant's former advocates were therefore on record for one year after the orders of 16th May 2013 were made, yet they did not comply with the said orders. The applicant was not prudent in complying with the orders and was guilty of delay for one and a half years.

8. Nonetheless, the applicant is a daughter of the deceased and therefore a beneficiary. She raised pertinent issues in her objection. It is clear that her and her sister Susan Ann Wanjiku had not been provided for in the Will. She stated that the Will was forged. **Section 5 of the Law of Succession Act** provides that a person of sound mind may dispose of all or any of his free property by Will. However, he has the responsibility to his dependants under **section 26 of the Act (Elizabeth H. Kameme Ndolo –v- George Matata Ndolo, Civil Appeal No. 128 of 1995 at Nairobi)**. These are pertinent and legitimate matters she wants interrogated.

9. In the interest of justice and so as to afford the applicant a fair hearing, I vary and set aside the ruling of 11th December 2014. The objection proceedings are reinstated. I direct that this matter be mentioned before this court on **28th November 2018** for directions on the disposal of the objection proceedings.

10. This order is made pursuant to **rule 73 of the Probate and Administration Rules** made under the **Law of Succession Act (Cap.160)** and **Article 159(2)(d)** of the Constitution of Kenya, 2010.

11. The applicant has been indulged. I order her to pay costs of the application.

DATED and DELIVERED at NAIROBI this 14TH day of NOVEMBER 2018.

A.O. MUCHELULE

JUDGE