REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 96 OF 1986

IN THE MATTER OF THE ESTATE OF JOSIAH NJONJO (DECEASED)

JUDGMENT

PLEADINGS

The deceased herein died on 1st November, 1985. On 6th October, 1983 the deceased had drawn a Will where he named Kenya Commercial Bank Limited as the first Executor and Charles Mugane Njonjo as the second Executor.

On 5th February 1986 the 1st Executor Kenya Commercial Bank Ltd renounced its right to apply for Probate of Written Will through Messrs Waruhiu & Muite, Advocates. Charles Mugane Njonjo, 2nd Executor sought representation to deceased's estate vide a petition dated 5th February, 1986 and filed herein on 7th February, 1986. In his Petition, the Executor named the following as the survivors of the deceased:-

a) Charles Mugane Njonjo (son of the deceased)

b) Ema Wambui Njonjo (daughter of the deceased)

c) Susan Karungari Njonjo (daughter of the deceased)

He also named the following as dependants of the deceased:-

a) Mrs. Edmund Muthemba Njonjo

(Deceased's daughter-in-law)

b) Mugane Chege (deceased's grandson)

c) Kuria Chege (deceased's grandson)

d) Waitara Chege (deceased's grandson)

e) Njonjo Chege (deceased's grandson)

f) Sophie Wairimu (deceased's grand-daughter)

g) Rosalind Wairimu Njonjo (deceased's grand-daughter)

A grant of probate of the said will was granted on 20th March, 1986 to the petitioner. The said grant was confirmed on 23rd January, 1987 on an application dated 15th January, 1987, and a certificate of confirmation to that effect was issued, of same date.

What I am tasked with determining is a Summons for Revocation and/or annulment of Grant dated 22nd March, 2018, filed herein on 11th April, 2018 by Mrs. Rose Wairimu Muthemba seeking revocation of the said grant premised on the following grounds:-

a) That the Grant was obtained fraudulently by concealment from the court of material facts.

b) That the Applicant and her children are entitled to a share of the estate of the deceased by virtue of being daughter-in-law and grand-children of the deceased.

c) That the Grant was obtained by concealment from court matters that were crucial to the case.

d) That the Grant was obtained by concealment of the fact that the Applicant and her children are a daughter-in-law and grand-children of the deceased and indeed beneficiaries of the deceased's estate.

e) That the costs of this application be provided for.

The affidavit in support filed with the application; the Applicant deposed; she is widow of the deceased's son Edmund Muthemba Njonjo who predeceased his father Josiah Njonjo. The Executor is also son to the deceased and brother of the Applicant's late husband. The Applicant deposed that their children depended on the deceased. Since 2016, she tried to negotiate with Executor/Respondent, Charles Njonjo on how she and her children would benefit from the deceased's estate and the Respondent disclosed that there was a Will by the deceased. The Respondent concealed the existence of the Will of the deceased. The Applicant deposed that she was shown the copy of the Will and the Deceased's advocate's affidavit on how the Will was written down. The Applicant deposed that the deceased had given lion share of the estate to the Executor; she does not believe that the Will is genuine or that the deceased could have failed to provide for her family adequately.

On 27th June 2018 a further affidavit in support of Summons for Revocation and/or annulment of Grant was filed stating as follows:-

a) That the deceased; father in law had given them a share of the land which is part of the Kiambu/Kabete/Kibichiku/92 land and a house on the same piece of land.

b) That after the Applicant husband's death, they were chased away from the land and their house was demolished by Charles Mugane Njonjo.

c) That the Executor later built his own house on the same piece of land.

d) That the deceased was of unsound mind and too old to understand what was happening.

e) That they went to live in the land where her husband had just been buried comprised of Title No. Kiambu/Kabete/Lower Kabete/526.

On 3rd May 2018 the Executor filed Grounds of Opposition opposing the Summons on the following grounds:-

a) The Summons is bad in law and incompetent by virtue of the provisions of **Section 30 of the Law of Succession Act Cap 160 Laws** of Kenya. The same ought to be dismissed in *limine.*

b) The Summons is also bad and incompetent for seeking to claim or assert interest in land outside the 12 year period limitation in **Sections 7** as read together with **Section 9 of the Law of Limitation of Actions Act** to the extent that the Summons seek orders relating to or affecting any interest in land bequeathed under the will dated is incompetent and should be dismissed in *limine.*

c) The Summons is speculative and intended for the ulterior purpose of harassing and/or embarrassing the respondent. That amounts to abuse of the court process.

d) The Summons does not disclose any grounds recognized in law for revocation and/or annulment of the Grant. In particular the Summons does not satisfy any of the grounds set out in **Section 76 Law of Succession Act Cap 160 Laws of Kenya.**

e) The Summons violates the mandatory provisions of **Rule 44 of the Probate and Administration Rules, 1980.**

f) The Applicant has benefited under the grant under challenge and as such is stopped from challenging it.

g) The Applicant has deliberately failed to disclose all material facts or has disclosed them in a misleading manner so as to secure an unfair advantage. Such conduct should be deprecated by dismissal of the Summons.

h) The Applicant is guilty of laches and gross indolence in presenting the Summons and;

i) The Summons is presented in bad faith and is an abuse of the court process.

HEARING:

APPLICANT'S CASE:

Relying on her Witness statement filed on 29th July 2018, the Applicant Mrs Rose Wairimu Muthemba stated that;

a) She is widow of Edmund Muthemba Njonjo, who was son of the deceased and died on 6th July 1983 predeceased the deceased father.

b) Their children depended on their grandfather Josiah Njonjo

c) They were left on the land in dispute comprised of 112 acres in title number Kiambu/Kabete/Kibichiku/92 which belonged to deceased.

d) The deceased left them on a share of the suit property Kiambu/Kabete/Kibichiku/92 land where they had a house on the said piece of land.

e) After deceased's death, they were chased away from the home and land; their home was demolished by Executor Charles Mugane Njonjo.

f) They went to live on land Title Number Kiambu/Kabete/Lower Kabete/526, where her husband was buried.

g) They were denied access to the suit property Kiambu/Kabete/Kibichiku/92

h) The Executor Charles Mugane Njonjo built his own home on the said pieces of land.

i) Until deceased's death, he regularly visited and checked on his late son's family and always seemed annoyed about the issue during his visits.

j) The Executor concealed from the Applicant that the deceased left a Will but later disclosed the said Will naming him as Executor.

k) The deceased was of unsound mind and too old to understand what was happening.

l) The Applicant and her family do not believe that this was a genuine Will.

PW2 Charles Mugane Maina relied on Witness Statement filed on 29th June 2018 and testified thus;

a) He is son to Sylvia Wambui Maina; sister to the deceased. The Applicant and Respondent are family of the deceased; widow to cousin Edmund and Cousin Charles Mugane Njonjo.

b) The suit property in question; Kiambu/Kabete/Kibichiku/92 was inherited by the deceased from their grandfather Mugane Njonjo. It was divided equally between the family of his grandfather.

c) The land is now distributed to only 1 of the deceased's children Charles Njonjo, leaving out all other children.

d) He was present when the deceased told Applicant's late husband. Deceased's son that he would give him a portion of the land and a house to live in.

e) After, deceased's death; the Applicant's family was chased away, their home destroyed and the Executor built his house and kept all the land to himself.

f) His Uncle was too old to understand what was going on. He seemed confused. PW2 did not understand the reason why the deceased failed to adequately provide for Applicant's family and gave such a huge piece of land to only 1 child.

DW3 Esther Wairimu Njonjo relied on statement filed on 29th June 2018. She deposed that that she is widow of Edmund Njonjo Maina cousin to Edmund Muthemba Njonjo Applicant's late husband andclose friend of the Applicant. She deposed that she visited the Applicant's family as they resided on the suit property Kiambu/Kabete/Kibichiku/92 until they were chased away and their home demolished by Charles Mugane Njonjo and she witnessed the same. As far as she knows, the land belonged to Edmund Muthemba Njonjo and his family. When all this was happening the deceased was too old to understand and he seemed confused.

RESPONDENT'S CASE

DW1 Paul Kibugi Muite swore an affidavit and relied on it during his testimony where he stated:-

a) He confirmed that none of the beneficiaries of the estate of the deceased was involved in the process of preparing the will and to the best of his knowledge, none of the beneficiaries under the will was aware of the manner in which the Deceased proposed to bequeath his properties under the will. Having interacted with the deceased for many years, he confirmed that to the best of his knowledge the Deceased was not under the influence of any of the beneficiaries under the will or any other person or persons at the time he was writing his will.

b) They had several meetings with the deceased where the deceased instructed him on how he wanted his estate distributed. He confirmed that the Deceased was fully aware of the extent of his assets and the manner in which he wanted them distributed. He dictated to him with great clarity of mind the manner in which he wished to distribute his assets and physically pointed out to him the specific assets he was bequeathing each of the beneficiaries. He confirmed that he was fully briefed and shown by the deceased his assets and the manner in which he intended to bequeath them at the time of taking instructions from the Deceased for purposes of preparation of the will.

c) After he drew the Will of the deceased on his instructions on 6th October 1983, the deceased signed the Will and he attested to his signature with one of the lawyers at the firm of Waruhiu & Muite Advocates; Mr. H.N. Gathuru.

d) He confirmed that after the deceased passed on, he wrote to all the beneficiaries' in1986 and gave each of them a copy of the Will. He filed the Petition for Grant of Probate of Written Will on 15th January, 1987 in this Succession Cause. The petition was duly advertised and published in the Kenya Gazette of 14th February 1986, a copy annexed, in accordance with the law before issuance of the Grant of Probate of Written Will.

e) He further applied for Confirmation of Grant on 15th January,1987 Upon receipt of instructions from the Executor of the Will, he thereafter proceeded to effect the distribution of the assets of the Estate in accordance with the terms of the will.

f) He interacted with the Executor and kept all the beneficiaries fully informed of the terms of the will and the above steps. None of the beneficiaries ever raised objection against the will or the Petition for Grant of Probate. The Grant of Probate of Written Will and the Confirmation of Grant and distribution were carried out in accordance with the terms of the will and the then applicable law.

g) In the Will; the Applicant herein was bequeathed the property known as **Kiambu/Kabete/Lower Kabete/526**, which is where her late husband and the deceased's son Edmund Muthemba Njonjo was buried.

h) That it is clear from the record that the Grant of Probate of Written Will was issued on 20th March 1986 followed by confirmation and distribution of the estate shortly thereafter. It follows that the process of distributing the estate of the deceased was completed more than thirty years ago. In the circumstances the summons herein have been filed way too late. Even if there was a *bonafide* ground of challenge, and there is none in this case, the delay in filing the Summons is inordinate, undue and inexcusable.

APPLICANT'S SUBMISSIONS

The Applicant through her counsel filed her written submissions on 11th September 2018. She stated that it was the contention of the Applicant that the Executor, Charles Mugane Njonjo applied for probate letters without informing her. She testified that she came to learn of the Succession Cause in 2016 while she was negotiating about her entitlement with the Executor. She also came to learn that the deceased had purportedly left a will which the Executor used to secure the grant of the probate. She told the court that Charles Njonjo had been promising that he would give them the share that they are entitled to. She told the court that the deceased had wanted to give her and her children 20 acres of land in L.R. No. Kiambu/Kabete/Kibichiku/92.

She submitted that she was surprised when she learnt that Charles Njonjo was the absolute owner of the land. The above land is comprised of 112 acres. She stated that a house had been constructed for her and the children on the said land. In her testimony she and her children were chased out of the land by Charles Njonjo who constructed a house for them in L.R No. Kiambu/Kabete/Lower Kabete/525 where her husband was buried.

She stated that the deceased was too old. He was in his nineties and was senile. They told the court that he could forget a lot of things including his own people. This leads to her conclusion that the deceased had been rendered a person of unsound mind. **Section 5 of the Law of Succession** carried the principle of testamentary freedom. Any person is capable of disposing all or any of his property by will so long as he is of sound mind and not a minor. He should be able to understand what he is engaging in, his properties and beneficiaries.

She averred that the Testator was coerced into making a will or some part of the will that he would not otherwise have made. This is common where the Testator is weak or of impaired mental capacity or in failing health. Josiah Njonjo cannot be said to have had the mental capacity so as to avoid coercion by the Respondent Charles Njonjo. Suspicious circumstances occur where a person who writes or prepares a will takes substantial benefit under the will. In this case though denied by Mr. Muite (SC) the hand of the executor Charles Njonjo is too long not to be noticed. Njonjo is the executor and has taken almost everything.

On the issue of conditional gift she stated that late Muthemba had been given land parcel No. 525 by the father representing his share from his grandfather's land. As per the will the deceased has urged the Applicant to give out parcel No. 525 and surrender it to Charles Njonjo. This is in exchange with parcel No. 526 which is lesser in acreage. The issue is whether the condition is capable of being fulfilled by the Applicant. The land parcel 525 was not in the name of the deceased Josiah Njonjo but in the name of Muthemba. The parcel No. 525 had been given as a gift to Muthemba by the deceased. This is tantamount to saying that the Applicant was given absolutely nothing by the deceased. The Applicant contends that she was in very good terms with the deceased and that the deceased used to tell her that she had 20 acres together with her children. She said that she was not aware of the will or its conditions and Charles Njonjo kept promising that he would curve out the 20 acres. Charles Njonjo and Mr. Muite had taken the title deed to parcel 525 and stayed with it for years without disclosing to her that she was supposed to transfer the land to Charles Njonjo.

RESPONDENT'S SUBMISSIONS

The objection by the Respondent is that the applicant has no capacity to institute these proceedings on behalf of the estate of Edmund Muthemba because she failed to establish that she has letters of administration in respect of that estate. The law is settled that for one to bring a claim on behalf of a deceased person, they must first obtain letters of administration. This position was emphatically asserted by the Court of Appeal in ***PARESH PRANJIVA V SAILESH CHUDASAMA [2014]EKLR*** as follows:-

> ***"… the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in cases of intestate succession. In Otieno v Ougo (supra) this Court differently constituted rendered itself thus:-***

"an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception."

And further;

"… no locus standi means he cannot be heard, even on whether or not he has a case worth listening to."

"… the Respondent's petition having been filed without locus standi was a nullity ab initio …"

The Applicant alleged that the deceased was old and appeared confused. It was on the basis of those allegations that she made the blanket assertion that the deceased was of unsound mind. She did not either in her pleadings or oral testimony lead evidence on the circumstances that would displace the statutory presumption of the Deceased's testamentary capacity. The applicant did not produce medical evidence to show that the deceased suffered from a disease which affected his cognitive functions and therefore his testamentary capacity.

The upshot of the above is that not a single iota of evidence was led in support of the allegation that the deceased lacked testamentary capacity. In any event, by the Applicant's own admission, she was not aware that the deceased had made a will. She therefore cannot purport to speak to his state of mind when he executed the Will.

ISSUES

This Court considered the application filed in Court, affidavits deposed, list of documents filed by Respondent, witness statements filed by the witnesses who testified and filed submissions. The key issues the Court is called upon to determine are as follows;

1. Is the will of Josiah Njonjo valid last will and Testament of the deceased?

2. Was the deceased of sound mind and had requisite testamentary capacity to direct how his will would be written by his own free will?

3. Was there coercion, fraud, mistake in preparation of Will of deceased?

4. Was the grant of Probate and confirmed grant obtained fraudulently and/or through concealment of material facts contrary to Section 76 of Law of Succession Act Cap 160?

5. Is the Applicant adequately provided for in the Will?

ANALYSIS & DETERMINATION:

In order to determine the validity of the deceased's will a 3 pronged approach is employed; whether the deceased was of sound mind and had legal capacity to write or cause to be written his last will and testament, that the deceased exercised free will without undue influence, coercion, fraud or mistake in writing his Will and that it was/is properly executed as legally required; signed or thumb-printed by deceased in the presence of 2 independent and competent witnesses. To the instant Will of the deceased the applicable law governing the prerequisites of the Will are;

LAW

Section 5(1) Law of Succession Act Cap 160 prescribes the testamentary freedom of the testator as follows;

"Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses."

Section 5(3) Law of Succession Act Cap 160 prescribes the testator's Testamentary capacity to draw a valid written Will and provides;

"Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing."

Section 5(4) Law of Succesion Act Cap 160 prescibes the burden of proof as follows;

'The burden of prof that a testator was, at the time he made any will. Not of sound mind, shall be upon the person who so alleges.'

Section 7 Law of Succession Act Cap 160 outlines factors that vitiate validity of the Written Will and provides;

> ***"A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void."***

Section 11 of Law of Succession Act Cap 160 describes attestation of a valid contract as follows;

> ***"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 person 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 acknowledgement of his signature or mark, or of the signature of that 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."***

In **RE ESTATE OF GATUTHU NJUGUNA (DECEASED) [1998] EKLR** which included quote from Halsburys Law of England 4th Edition Vol **17** and was cited in **JAMES MAINA ANYANGA vs LORNA YIMBIHA OTTARO & 4 OTHERS [2014]** as follows**;**

> ***"Where any dispute or doubt or sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of a testator's capacity is one of fact to be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on scientific or legal definition. It seems that if the objector produces evidence which raises suspicion of the testator's capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof, and the burden shifts to the person setting up the will to satisfy the court that the testator had necessary capacity."***

From the above provisions applied to the instant case; the deceased's Will was written on deceased's instructions by his lawyer DW1 SC Paul Muite and he signed and Gathuru Advocate also signed; after deceased signed. The Applicant; the deceased's daughter in law claimed together with other witnesses DW2 & DW3 that the deceased was too old and senile and/or confused and was not in the legal frame of mind to exercise testamentary freedom in writing his Will.

This allegation or claim was not substantiated by any evidence; medical records from a doctor(s) on the deceased's state of physical and/or mental health at the time. He who alleges must prove is the legal standard of proof by virtue of **Section 107 of the Evidence Act Cap 80**.

In the absence of the Applicant discharging the burden of proof; the deceased is found to have been of sound mind at the time of writing his Will.

The Applicant also alleged that the deceased was coerced into making the Will or some part of the Will that he would not have otherwise made. This would be common where the deceased had impaired mental capacity of failing health. The Respondent's advocate DW1 stated that he obtained instructions to write the Will from the deceased himself, he visited him several times, obtained details of the Will reduced the same in writing and took to him a copy which he left with him to read at his leisure. When he was satisfied, the deceased signed and he countersigned and Gathuru Advocate also witnessed the Will by signing the same. The Respondent's Advocate DW1 stated that at no time was the deceased with any of his children as he instructed him on the details of the Will. The fact that the deceased's Will was typed /prepared by another person; his advocate SC Paul Muite DW1, who testified in Court that the deceased instructed him and he wrote down his wishes, which he read over, does not invalidate the Will so long as he signed the same acknowledging the typed Will as containing his wishes.

In the case of ***JAMES MAINA ANYANGA VS LORNA YIMBIHA OTTARO SUCCESSION CAUSE 1 OF 2002 HIGH COURT NAKURU;*** on the allegation by the Applicant among others, that the deceased was unduly influenced by Violet Amisi and Jennifer Wamwona to distribute his assets in favour to the 2 beneficiaries and to the detriment of other beneficiaries; Justice J. Anyara Emukule said;

> ***"Undue Influence connotes an element of coercion or force, that the deceased did not exercise his free Will in writing his Will and was pressured by other forces. Such external pressure must be forceful and intended to coerce him into acting out of fear or involuntarily. The onus is on the person who alleges the existence of undue influence to prove the same."***

Once again, the Applicant ought to prove by cogent evidence coercion by the Respondent except to state that he is the Executor of the deceased's estate and from the distribution of the estate of the deceased he had /has the lion's share. From the Applicant's pleadings and testimony, there was no evidence to disclose coercion by the Respondent on his father so as to obtain a lion's share of his estate to the detriment of his other family.

The Respondent did not testify in court only the deceased's advocate DW1 testified as to the process of drawing the Will of the deceased.

There is no evidence on record that the Respondent was with the deceased at any time during the drawing of the Will. He is accused of evicting the Applicant's family from the suit property and demolishing their home but on the Applicant's admission, he built them a home on the present suit property. This is according to the Will.

The law on revocation of grants of representation is stated in **Section 76 of the Law of Succession Act, Cap 160, Laws of Kenya**. **Section 76 of the Law of Succession Act** states-

> ***"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-***
>
> > ***a) that the proceedings to obtain the grant were 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 as made in ignorance or inadvertently;***
> >
> > ***d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either:-***
> >
> > > ***i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or***
> > >
> > > ***ii) To proceed diligently with the administration of the estate; or***
> > >
> > > ***iii) To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or***
> >
> > ***e) That the grant has become useless and inoperative through subsequent circumstances."***

Under that law, a grant may be revoked on three general grounds – where there were problems during the process of the making of the grant, where there were challenges or problems after the making of the grant and during administration, and where the grant has become useless or inoperative.

In the instant case, the Executor, Charles Njonjo petitioned for grant of Probate on 7th February 1986 and listed beneficiaries of deceased's estate and included in the supporting affidavit at paragraph 3; Mrs Edmund Muthemba Njonjo the Applicant; 4 grandsons; Mugane Chege, Kuria Chege, Waitara Chege, and Njonjo Chege; 2 granddaughters Sophie Wairimu and Rosalind Wairimu Njonjo.

The process of obtaining grant was legitimate and transparent; all beneficiaries were listed and disclosed. The Petition was gazetted for requisite 30 days and copy of Kenya Gazette was annexed in Respondent's List of Documents filed on 23rd July 2018. The Executor applied for confirmation of grant of Probate on 15th January 1987 which was issued. Throughout the process, the Applicant did not and even thereafter raise any objection to the Will of deceased until now.

The Respondent's advocate DW1 stated that he notified all beneficiaries of the Will and gave them a copy of the same. On the other hand, the Applicant stated that she was not informed, made aware or consulted on the Will until 2016 when the Executor gave copy of the Will to the Applicant. Secondly, that the title documents of suit properties were withheld by the Executor.

The Respondent's advocate annexed a letter dated 7th April 1986 from Waruhiu & Muite Advocates addressed to Mr. Njonjo Chege, Mr.Waitara Chege, Mr. Kuria Chege and Mr.Mugane Chege informing them that the grant of Probate of deceased's Will was granted by the High Court at Nairobi. A copy of grant with Will annexed was enclosed for their information and record and the law firm awaited comments/views on the contents and particularly Clause 3. This letter confirms that the Will of deceased was disclosed as at 1986 and not revealed in 2016 as alleged.

Secondly, considering the Applicant's testimony that she was evicted from suit property Kiambu/Kabete/Kibichiku/92 and her home demolished by the Executor/Beneficiary Charles Njonjo who by her admission built her another house; when this issue took place the Applicant did not report to local administration, law enforcement agencies or pursue her rights in a Court of law. At least no such evidence was tendered in Court. If the action by Executor was legally wrong and a breach of her rights; why did she not raise and pursue the same at the time? It means she was aware that the deceased's Will stipulated thus;

Paragraph 2:

> ***"I devise my land comprised in Title Number Kiambu/Kabete/Kibichiku/92 together with all buildings and improvements erected or being thereon to my eldest son absolutely. This is the land on which stands the house in which I now live and measures approximately one hundred and twelve (112) acres. This is the land which the Nairobi Wangige Road runs through."***

Paragraph 4

"(i) I DEVICE a portion of one (1) acre of my said piece of land comprised in Title Number KIAMBU/KABETE/LOWER KABETE/526 to my grand-daughter.

(ii) I DEVICE the reminder or my said piece of land comprised in Title Number KIAMBU/KABETE/LOWER KABETE/526 to my daughter in law the widow of my late son EDMUND MUTHEMBA NJONJO absolutely."

My above mentioned piece of land comprised in Title Number KIAMBU/KABETE/LOWER KABETE/526 is the land where my late beloved son EDMUND MUTHEMBA NJONJO is buried.

Paragraph 5

"I direct that the widow of my late son EDMUND MUTHEMBA NJONJO or the heir/beneficiary of the piece of land comprised in Title Number KIAMBU/KABETE/LOWER KABETE/525 which land is registered in the name of MUTHEMBA NJONJO my late son, shall Transfer this piece of land to my eldest son CHARLES MUGANE NJONJO absolutely IF the widow of my late son EDMUND MUTHEMBA NJONJO or such heir/beneficiary of Title Number KIAMBU/KABETE/LOWER KABETE/525 is to take any BENEFIT under this my will."

This Court is satisfied that the deceased provided for all beneficiaries as stated in his Will, he properly executed the Will and appended his signature; there is no evidence of impaired state of mind or physical health that hindered the deceased disposing of his estate by his free Will, he provided for the Applicant in his Will which the Respondent executed as stipulated.

The only issue pending is whether the deceased failed to make reasonable provision for dependents?

In James Maina vs Lorna Yimbiha Ottaro & 4 Others [2014]eKLR Emukule J went on thus;

'A testator has power to dispose of his property as he please and the Court is bound to respect those wishes as long as they are not repugnant to the law and he does not leave out some dependents and beneficiaries…….. Failure to make provision for a dependent by a deceased person in his Will does not invalidate the Will as the Court is empowered under Section 26 LSA to make reasonable provision for the dependent.'

With regard to the Applicant she was/is provided for in the Will of the deceased. Any oral statements alleged to have been made by the deceased with regard to gifts *inter vivos* do not meet the threshold of a valid oral Will and is superseded by the Valid Written Will.

This Court notes with concern why it took from 1985 to 2018 to lodge revocation of grant application.

IN ELIZABETH KAMENE NDOLO VS GEORGE MATATA NDOLO CIVIL APPEAL 128 OF 1995 **Gicheru Omollo & Tunoi JJA stated thus;**

'We are cognizant of the fact that Section 76 of the Act does not set any time Limit within which a summons for revocation or annulment of a grant can be taken out. But the delay by the Respondent in the circumstances of this appeal gives to this court the clear impression that the Respondent was merely fishing for some plausible excuse upon which he could have the grant to the Appellant revoked or nullified'

In the absence of reasons why the application took this long and after distribution was done as per the Will; except that they did not know of The Will; this Court finds there has been inordinate delay in prosecuting the matter.

The thrust of the Applicant's submission seems to be why the deceased bequeathed lion's share of the estate to the Executor/beneficiary and not equally to other children. The Will of deceased bequeathed specific portions to the grandsons and granddaughters of his children who predeceased him and specifically bequeathed the Applicant Kabete/Lower Kabete/526. The fact that it was not equal distribution does not warrant revocation of grant as the deceased's Will is valid and he catered for all beneficiaries and dependents.

In *RONO VS RONO & ANOTHER (2005) 1 E.A. 363* held that inequity in equal distribution has often caused disquiet.

In *RE ESTATE OF JOHN MUSAMBAYI KATUMANGA (DECEASED) [2014]* eKLR Musyoka J held that equal distribution does not always work justice.

A full reading of these authorities indicate that the fact of unequal distribution alone cannot by and of itself be the basis for revocation of grant. Therefore, this Court finds the Will of deceased valid Will of the deceased and the Applicant was/is catered for in the Will; she was disclosed as beneficiary of deceased's estate in the Petition and distribution was done as per the Will. For those reasons, the application is dismissed without costs as it is a Family matter. Each party may exercise their right of appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 1st DAY OF NOVEMBER, 2018.

M.W.MUIGAI

JUDGE –FAMILY DIVISION –HIGH COURT

IN THE PRESENCE OF:

MR. KINYANJUI FOR THE APPLICANT

MR.KAMAU FOR THE RESPONDENT