



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 331 OF 2000

IN THE MATTER OF THE ESTATE OF LUCY WANGUI MURAGURI (DECEASED)

GRACE MUTHONI MURAGURI.....APPLICANT

VERSUS

SERAPHINE WANJIRA MURAGURI.....RESPONDENT

RULING

1. The deceased Lucy Wangui Muraguri died on 18th August 1999. She was survived by the following:

- a) Nicodemus Waite Muraguri– son (deceased, survived by Grace Muthoni Muraguri (applicant));
- b) Seraphine Wanjira Muraguri – daughter (respondent);
- c) John Ngunia Muraguri- son;
- d) Babius Muchiri Muraguri- son;
- e) Deodata Wanjiru Muraguri – daughter;
- f) Edith Wanjira Muraguri –daughter;
- g) Agnes Njeri Njoroge –daughter;
- h) Mary Muthoni Kiboi – daughter; and
- i) Pierina Njoki Mugo– daughter.

On 23rd February 2000 Nicodemus Waite Muraguri (deceased) and the applicant filed a petition for a grant of probate dated 1st February 2000. The petition was based on the fact that the deceased died testate having left a Will dated 11th September 1996 which named Nicodemus Waite Muraguri as the sole beneficiary of her estate. Nicodemus Waite Muraguri and the applicant were also named as the executors of the said Will. A grant of probate of written Will was made to them on 25th April 2000.

2. On 3rd June 2009 the respondent together with her siblings John Ngunia Muraguri, Babius Muchiri Muraguri, Deodata Wanjiru Muraguri, Edith Wanjira Muraguri, Agnes Njeri Njoroge, Mary Muthoni Kiboi, and Pierina Njoki Mugo filed an application for the revocation of the grant of probate made to the applicant and Nicodemus Waite Muraguri. The application was supported by the affidavit of the respondent in which she stated that at the time of her demise the deceased had been sickly and did not possess the capacity adequate for the making of the Will; that the contents of the Will suggested that the same had been obtained fraudulently or under undue influence; that the deceased was close to all her children and there was no way she could have omitted to provide for them; that Nicodemus Waite Muraguri was capable of exercising undue influence of the deceased or acting fraudulently; and that the deceased knew that the applicant was not the wife of Nicodemus Waite Muraguri and therefore it was suspicious that she named her an executor of the Will. The applicant swore an affidavit dated 16th July 2009 to oppose the application. It was her case that she was the second wife of Nicodemus Waite Muraguri and that the

deceased recognized her as such; that at the time of executing the Will the deceased was fully alert, robust in health, aware of her actions and prepared the Will voluntarily and that the process of obtaining the grant was lawful. This court in its ruling dated 25th September 2015 found that the Will was null and void on the grounds that the material presented before it suggested that the said Will was made under suspicious circumstances and that the applicant failed to prove that the testator knew and approved the contents of the said Will dated 11th September 1996 before the same was executed on her behalf. The court further found that the proceedings for obtaining the grant of probate were defective. The court revoked the Will

3. The applicant filed the present application dated 13th January 2016 seeking review of the orders made on 25th September 2015 and seeking preservation of Tetu/Unjiru/1288 until further orders of the court are made. The application was based on the grounds that the applicant's advocates have since established the circumstances under which the Will made by the deceased was signed on the 11th September 1996; and that the circumstances were not known to the applicant at the time of making the replies to the summons dated 3rd June 2009.

4. The application was supported by the affidavit of the applicant's advocate George Gitonga Muraguri dated 13th January 2016. He stated that upon establishing the grounds upon which the grant was revoked, he caused an extensive search among the closed and archived files in his office in a bid to establish further details on the circumstances under which the Will was made; that in the file he found the late Peter Le Pelley's handwritten note on why he had to execute the Will on behalf of the deceased and an attendance docket by one Esther Wairimu Karanja, one of the secretaries who witnessed the execution of the Will; that from the two documents, it was clear that the contents of the Will were clearly translated to the testator and she understood what the Will was all about after which she authorized Peter Le Pelley to sign the Will on her behalf; that the failure to produce these documents was not deliberate but was due to the fact that the old file was archived and not available at the time the earlier replies were filed; and that if there was any inadvertence on the part of the applicant's counsel, the same should not be visited upon the applicant personally.

5. The affidavit annexed two further affidavits of Esther Wairimu Karanja and Rachael Lomosi, the alleged secretaries who witnessed the making and signing of the Will. In the affidavit of Esther Wairimu Karanja dated 13th January 2016 she stated that she worked as a secretary in the law firm of Hamilton Harrison & Mathews in the year 1996; that she worked in the office of the late Peter Le Pelley who was an advocate and a partner in the firm at the time; that on 11th September 1996 at the request of Peter Le Pelley she typed a Will prepared by Peter Le Pelley and also read the Will; that she was taken to the conference room where an old lady by the name Lucy Wangui Muraguri was introduced to her; that upon the instructions of Peter Le Pelley she introduced herself to the lady, informed her that the Will she had requested to be prepared was ready and that she was going to read the same to her; that the lady agreed and she read out the Will and translated everything that was written; that she agreed with the contents of the Will and consented to Peter Le Pelley signing the Will on her behalf; that she then saw Peter Le Pelley sign the Will on behalf of the lady as she witnessed together with her colleague Rachael Lomosi; and that she then prepared an attendance docket dated 11th September 1996, signed and placed it in the file. In the affidavit of Rachael Lomosi dated 13th January 2016, she confirmed that she was also employed as a secretary in the law firm of Hamilton, Harrison & Mathews where she worked in the office of Peter Le Pelley. She confirmed the occurrences as stated in the affidavit of Esther Wairimu Karanja and stated that having spoken with Lucy Wangui Muraguri on the material day of 11th September 1996 and explained to her the contents of the Will, she confirmed that the testator was indeed aware of what she was doing, understood everything and gave Peter Le Pelley the authority to sign the Will on her behalf.

6. The application was opposed through the replying affidavit of the respondent dated 17th September 2018. It was her case that there was no discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by the applicant at the time when the order was made; that there was no mistake or error apparent on the face of the court record to warrant the orders sought; that at the time of the ruling, the court was aware of and alluded to the fact that the Will had been made by the advocates acting for the applicant and her deceased husband Nicodemus Waite Muraguri and in the presence of the two secretaries who worked at the law firm representing the applicant and Nicodemus Waite Muraguri hence the suspicious circumstances; and that the attendance docket attached to the affidavit of Esther Wairimu Karanja revealed that the name of the client was Nicodemus Waite Muraguri who was also named the sole beneficiary of the purported Will and that the deceased was not the client hence the finding of the court that the circumstances of making the Will were suspicious.

7. The applicant filed written submissions in support of the application. It was her submission that **Order 45** of the **Civil Procedure Rules** allows the court to review its decision on the grounds of discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made; that the evidence now present before court was not available at the time of making the ruling because the file under which the Will was made was closed in 1997 and in line with the firm's policy the file was archived and was only made available after the ruling; that the circumstances under which the file was made have since been made clear through the two affidavits of Esther Wairimu Karanja and Rachael Lomosi who confirmed to the court that they witnessed the making and signing of the Will and from their assessment, there was nothing suspicious about the Will.

8. I agree with the applicant regarding the requirements set out by **Order 45** of the **Civil Procedure Rules**. I find useful guidance in the decision of **Kwach, Lakha** and **O'kubasu JJA** in the case of **Tokesi Mambili and others vs Simion Litsanga Civil Appeal 90 of 2001 – Kisumu** where they held as follows:-

i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

9. I note that Esther Wairimu Karanja and Rachael Lomosi have sworn affidavits regarding the circumstances under which the Will was made. They were secretaries in the firm of Hamilton Harrison & Mathews in 1996 when the Will was made. They worked in the office of

the late Peter Le Pelley who drew the Will. In the matter before judge Musyoka the issue of these two secretaries featured. In paragraph 23 of the ruling sought to be reviewed, the judge stated as follows:-

“It is a matter of common knowledge in the legal community that Peter Le Pelley died. I do not know of the whereabouts of the two witnesses.”

The validity of the Will had been challenged. The applicant had been called upon to prove it. The fact that she is bringing the two witnesses at this review stage means that she knew where they were all along. She had the opportunity to bring them at the time of proving the Will. She did not. She had no explanation for the failure to bring them, or get them to swear affidavits regarding the circumstances under which the Will was made. I find that their evidence is not new evidence. It is evidence that could have been reasonably obtained at the time of the hearing of the case.

10. Further, the court found that the Will was made under suspicious circumstances because it was made in the firm of Hamilton Harrison & Mathews, drawn by a partner of Peter Le Pelley, witnessed by secretaries working in the firm, and which firm was acting for the late Nicodemus Waite Muraguri (the husband of the applicant) who was the substantial beneficiary in the Will. These facts have not changed.

11. In short, I do not find that any basis has been laid to review and/or set aside the ruling that was delivered by Judge Musyoka on 25th September 2015. I dismiss the application with costs.

DATED and DELIVERED at NAIROBI this 10TH day of DECEMBER 2018.

A.O. MUCHELULE

JUDGE