



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**IN THE MATTER OF THE ESTATE OF RUFUS RUGUI KIGERA (DECEASED)**  
**SUCCESSION CAUSE 2000 OF 2013**

**RULING**

The deceased died on 5<sup>th</sup> November 1995.

The Petitioners/Respondents filed petition for grant of letters of administration intestate on 8th August 2013 and obtained the grant on 10th December 2013. On 11th September 2015, the Applicant Janet Muthoni Kigera, widow of David Rufus Kigera (deceased) son to the deceased Rufus Ragui Kigera filed Citation to propound a document as a Will. Mukuria Ragui one of the administrators filed Replying Affidavit on 15th October 2015. The Court file went missing.

On 4th May 2016, the Court file had been reconstructed on the application of Counsel for the Applicant Mr. Karanja and the Applicant filed Summons for revocation of grant issued on 8th August 2013 as it has become useless and inoperative through subsequent circumstances.

Alice Wahu Githu 4th Respondent filed Replying Affidavit on 27th May 2016 and stated that the deceased did not leave a written will as prescribed by **Section 11 of Succession Act Cap 160** as the document was not attested by 2 or more competent witnesses.

Secondly, that the attached case, **Succession Cause 998 of 2006** copy attached did not uphold the Will therein as it was not in compliance of **Section 11 of Law of Succession Act** as it was not attested by 2 or more competent witnesses.

She reiterated that the distribution in the said document is discriminatory to her and she proposed equal distribution of the deceased's estate amongst all beneficiaries.

Grace Mingina also filed Replying affidavit on behalf of 2nd 3rd and 6th Respondents and contended that the deceased wrote a document but it was not attested by 2 witnesses and therefore did not amount to a Will. The deceased died intestate. The executor of the written document and one of the administrators Mukuria Ragui submitted himself to Court to determine validity of the said document whether it is a valid will or not.

She stated the grant issued should not be revoked as the administrators were appointed with consents of all beneficiaries including the Applicant. There have been held several meetings and given time they shall agree on the mode of distribution.

The hearing *inter partes* commenced on 5th December 2016, the Court heard PW1 Janet Muthoni Kigera; the Applicant's testimony that the deceased left a document which he wrote his intention of distributing his property to his family. All family members were called by Counsel Mr. Waweru Gatonye, he opened a sealed envelope and read its contents to the family of the deceased. She relied on a copy of the said

document referred to as the Will.

The Respondents' Counsel Mr. Wandabwa and Mr. Msheshwe respectively objected to the document's production as exhibit and sought the original to be produced in Court.

Mr. Ragui informed Court that he talked to Counsel Mr. Waweru Gatonye who informed him that he would testify on 27th February 2017 and produce the document called Will of the deceased.

On 27th February 2017, Mr. Ragui informed Court that he spoke to Mr. Waweru Gatonye and he did not turn up in Court. In the absence of any information or circumstances relied to Court to consider with regard to Counsel's absence, this Court granted the option to Counsel to deposit the Will with Deputy Registrar Family Division within 1 week, 7days.

Counsel wrote to Deputy Registrar Family Division on 6th March 2017 and explained in detail the circumstances that made Counsel have the document and retain possession of the same.

The Applicant's Counsel applied that the Court grants Counsel opportunity to explain the circumstances of the said document.

The Respondents' Counsel objected to the application as the fact that the document produced is conceded by Counsel as wishes of the deceased. Secondly, what was sought to be produced was the original document the said document, no application was made to have Counsel to testify on the production of the document.

Thirdly, the message relied by Mr. Ragui on 24th January 2017 was that Mr. Waweru Gatonye asked to be allowed to come to court on 27t February 2017 which the Court obliged. The Applicant was to avail the witness and the Court allowed the same but he did not appear nor give any information.

The Court considered the application to have Counsel Mr. Waweru Gatonye attend Court and considered the following factors;

- a) When PW1 testified she relied on a copy of the Will, the Respondents objected to its production through Counsel and the copy was marked for identification and awaited the original document to be availed.**
- b) After the testimony of PW1, Mr Karanja sought that the original Will be availed to Court at which point Mr. Ragui informed Court that Mr. Waweru Gatonye would come to Court on 27th February 2017 and bring the original document.**
- c) On 27th February 2017, Mr. Ragui confirmed that he spoke to Mr. Waweru Gatonye Counsel but he was not in Court.**
- d) Without further information on what may have happened or circumstances for the Court to consider, this Court could not give a further date.**
- e) Instead since what was sought was the original Will, the Court found it expedient to rely on Rule 24(1) of Probate and Administration Rules that allow the Will to be deposited in Court, hence the orders.**
- f) The letter of 6th March 2017 of Mr Waweru Gatonye Counsel is detailed and of importance is the following;**

*However, we need to explain the documents in our possession and the circumstances under which documents were given to us.*

*Just before died, the deceased consulted the writer with a view to writing a will for him.*

*The writer explained to the deceased the information required for making such a will and it is pursuant to the discussion that the deceased wrote the document that is now being said to be a will. The deceased was asked to give some further information to facilitate drafting of the Will. Unfortunately, he died before he could provide this additional information.*

*It must be evident that the documents we have can only be referred to as the last wishes of the deceased but not a formal Will.*

Let the Court confirm that no aspersions are cast on Counsel Waweru Gatonye. The letter is detailed and self explanatory and not contested. Therefore, the Court finds no reasonable ground to have Counsel testify unless at his request. The letter confirms legal submission the document does not constitute a valid Will due to the explained circumstances. The information on record from Counsel is sufficient for hearing and determination of the instant application.

It is for the above reasons that this Court declines to summon Counsel Mr. Waweru Gatonye to come and testify in this matter as he complied with the request to avail the contested original document referred to as Will of deceased.

The matter shall proceed for further directions.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH MARCH 2017.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

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