



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLENEOUS 160 OF 2016**

**(CONSOLIDATED WITH MISCELLANEOUS APPLICATION 150 OF 2016)**

**IN THE MATTER OF THE ESTATE OF PROF. DINGURI MWANIKI (DECEASED)**

**RULING**

**PLEADINGS**

The deceased died on 15th August 2016.

In Miscellaneous Cause 150 of 2016; by an application filed on 8th November 2016 Kwame B. Mwaniki eldest son of the deceased brought under Rules 19, 24 & 73 of Probate & Administration Rules; Law of Succession Cap160 and other enabling laws sought the following orders;

**1) Spent**

**2) The Court to compel Mr.Fred Ngatia & Associates to release the original last Will and testament of Prof. Dinguri Mwaniki (Deceased), the deceased's pre- nuptial Agreement with Ms Juliet Mwaniki and video recording of the opening of the deceased's Will documents sealed envelope and reading of the content contained therein which are in his custody, be released to the Applicant.**

**3) The Court to issue preservatory orders with regard to all properties of the deceased pending the hearing and determination of the application.**

The Application is based on the following grounds;

**1) The Applicant is named in the deceased's last Will and testament as one of the executors of the deceased's estate.**

**2) The deceased's brother Peter Muchami Mwaniki handed over the deceased's Will and Testament in a sealed envelope alongside other documents to the Mr. Fred Ngatia, Respondent herein.**

**3) The Respondent's obligation was to open the sealed envelope and read the contents to family of the deceased, the deceased's last Will and Testament and not to remain in possession of the said Will and Testament.**

**4) The Respondent Law firm has declined release of the deceased's Will and testament until and unless with the Court order.**

In Miscellaneous Cause 160 of 2016, the Applicant Ms Juliet Kiwanuka Mwaniki filed a similar application against the Respondents; namely Ngatia & Associates Advocates; 1st Respondent, Kwame Mwaniki; 2nd Respondent, Mabel Mwaniki; 3rd Respondent and Messu Mwaniki 4th Respondent respectively.

The Applicant sought orders;

**1) that the 1st Respondent provides the Applicant and/or any other willing executor/executrix with a copy of the last Will and Testament of the deceased.**

The Applicant sought orders;

**2) directing the 1st Respondent release the deceased's Will and testament and/or the same be removed from the 1st Respondent's possession and the same be deposited in Court for safe-keeping pending application for grant of probate.**

The Application is based on following grounds;

**1) the Applicant was married to the deceased on 1st November 2003 under Ugandan customary law and on 16th September 2006 solemnized their wedding in New York USA. They lived as man and wife until his death on 15th August 2016. They had 2 children of the marriage namely Thabo Chwa Mwaniki and Thetu Namuli Mwaniki.**

**2) Following the deceased's death, Peter Muchami Mwaniki, the deceased's brother gave the 1st Respondent the sealed envelope.**

**3) The 1st Respondent called a family meeting on 30th August 2016 held from 6pm at St Andrews Apartments Boardroom Rhapsa Road Westlands Nairobi. The 1st Respondent read in their presence content of the deceased's Will and testament.**

**4) The deceased's last Will and testament appointed Kwame Mwaniki, Mabel Mwaniki, Juliet Kiwanuka Mwaniki, Peter Muchami Mwaniki, Elizabeth Chege and Elizabeth Magondu as executors and executrices to the deceased's estate.**

**5) The Executors and executrices disagreed on the way forward, the Applicant insisted that the Will shall be implemented as it is while the Applicant in Misc Cause 150 of 2016 and the 2nd and 3rd Respondents herein refused and demanded a distribution plan .**

The 1st Respondent Mr. Fred Ngatia filed Replying Affidavit filed on 16th December 2016 to both Applications herein and stated as follows with regard to the allegations that he refused to release the Last Will and testament of the deceased to the executors.

Mr. Peter Muchami Mwaniki brother to the deceased brought him the deceased's Will and asked him to take possession and read it to the deceased's family.

The 1st Respondent contacted all family members of the deceased and sought suitable venue. On 30th August 2016 in the presence of Applicants and Respondents herein and the deceased's brother, they verified the envelope given to him by Mr. Peter Muchami Mwaniki was sealed. He opened it in their presence and inside was the deceased's Will and Pre-nuptial Agreement between the deceased and Ms Juliet Mwaniki.

The 1st Respondent read the Will of the deceased to the parties. He did not read the pre-nuptial agreement.

Thereafter both families of the deceased were at variance; by email dated 27th September 2016 annexed **FN1**, Ms Juliet Mwaniki informed him not to release the Will unless with agreement from her.

On 17th October 2016 he wrote to all concerned parties in light of their disagreement and informed them that each party was to appoint a lawyer to engage on their behalf how this matter would proceed going forward. The letter is **marked FN2**

By letter dated 25th October 2016 **marked FN3**, on behalf of Ms Juliet Mwaniki, they appointed advocates Messrs Makhanu Odhiambo & Co Advocates who sought release of copy of the Will of the deceased to their client and the original Will be retained until Executors agree who is to take possession of the Will.

On 28th October 2016 Mr. Kwame Mwaniki demanded release of the Will to him as per letter **marked FN4**.

On the same date similarly Mr. Messu Mwaniki concurred the Will be released to Kwame Mwaniki.

On 31st October 2016 Ms Mabel Mwaniki sought the Will to be released to her son Kwame Mwaniki as shown by letter **marked FN5**

Due to contradicting and parallel instructions on release of the Will of the deceased; the 1st Respondent relied on the case of **SUPERIOR COURT OF JUSTICE-ONTARIO:**

**HOPE VS MARTIN IN THE ESTATE OF ALEXANDRA BRUCE BION (DECEASED) 2011 ONSC5447 COURTFILE NO 06-011/11** where the Court considered the release of original Will in light of Solicitor client privilege and confidentiality.

The court held;

*Where a Solicitor is faced with conflicting demands, he can legitimately require conflicting parties to obtain a Court order.*

From the above facts, 1st Respondent sought that the release of the Will be resolved by order of the Court.

Secondly, the Will be released upon payment of his Fee Note; from reading of the Will of the deceased to the deceased's family to his being joined to the current and present litigation.

### **HEARING**

On 14th February 2017, the Court consolidated both Causes and relevant parties were represented by their respective Counsel who reiterated the contents of their pleadings as outlined above.

### **ISSUES**

- 1. Who are beneficiaries/executors of the deceased's family and Last Will and testament?**
- 2. Who should have custody of the Original Will of the deceased and pre nuptial Agreement and video recording of the Will opening and reading session?**
- 3. Who will apply for grant of Probate of the deceased's estate?**
- 4. What is the role and responsibility of the 1st Respondent in this matter?**

### **DETERMINATION**

Wills are protected by Part 2 of **Law of Succession Act Cap160** and **Part 4, 5 & 6 of Probate and**

## **Administration Rules.**

In the instant case from the evidence on record the family of the deceased consists of the following beneficiaries;

**Mabel Mwaniki**

**Kwame Mwaniki**

**Messe Mwaniki**

**Juliet Mwaniki**

**Thabo Chwa Mwaniki and**

**Thetu Namuli Mwaniki.**

The Executors of the deceased Last Will and Testament are

**Kwame Mwaniki**

**Mabel Mwaniki**

**Juliet Kiwanuka Mwaniki**

**Peter Muchami Mwaniki**

**Elizabeth Chege and**

**Elizabeth Magondu**

The above named Executors and Executrix are not contested. However, the dispute revolves around the release of the Will by the Advocate; 1st Respondent, to Kwame, Mabel and Messe on one hand and Juliette Mwaniki on the other hand and each group to file for grant of Probate.

The second aspect of the dispute is distribution of the deceased's estate; Ms Juliette Mwaniki agrees the Will be implemented as is written. Kwame, Mabel & Messe disagree and demand new distribution plan due to new developments since the Will was written by the deceased.

At the outset, the Court must state clearly that custody of the Will does not automatically allow or deny a beneficiary beneficial interest to the deceased's estate.

**IN RE ESTATE OF NGETICH SUCCESSION CAUSE 29 OF 1996 HIGH COURT ELDORET**  
HON JUSTICE NAMBUYE held among other issues as follows;

*Section 26 of the Act (Cap 160) laws of Kenya stipulates that a Will is not absolute where there is contention, the Court can interfere and make provision for a dependant left out of inheritance. In exercising those powers given under Section 26 of the Act, the Court has to bear in mind the provision of Section 28 of the Act.*

Similar sentiments were expressed in the case of

**IN THE MATTER OF THE ESTATE OF WILFRED GEORGE MAKUNDA OTTARO**  
**SUCCESSION CAUSE NO1 OF 2002 BY HON JUSTICE EMUKULE.** as follows;

*The Will is not absolute although effect is given to the deceased's wishes, the Will maybe*

challenged on the following basis;

- a) *Whether the deceased had capacity to make the Will*
- b) *Whether the Will was properly executed*
- c) *Whether the Will failed to make reasonable provision for the deceased's dependants.*

The upshot of the above case-law is that since the dispute among the executors and executrixes is the custody of the deceased's original Will which is hinged on distribution of the deceased's estate, each beneficiary and or dependant is protected in law irrespective of who has custody of the Will of the deceased.

Having said so, the current stalemate and impasse should be unlocked so as to facilitate the deceased's family to embark on filing for grant of Probate, administration and distribution of the deceased's estate.

From the correspondence between the family members and Counsel 1st Respondent it is clear that it is not possible that all family members will be comfortable with any of the Executors or executrix retaining the Original Will to the exclusion of the others. To allay further acrimony in line with Rule 24 (1) of Probate & Administration Rules which provides;

*The court may, on application by summons supported by affidavit of any person claiming to be beneficially interested in the estate of a deceased, or of its own motion, **make an order requiring any other person, to bring into any High Court registry any document being or appearing to be a testamentary instrument executed by or in the direction of , the deceased which is shown to be in possession or under control of such other person.....***

This Court approves the 1st Respondent's conduct of opening and reading Will of the deceased to his family and concurs with Counsel's withholding of the Will in the midst of the contradicting and parallel instructions from different executors and executrixes on release and custody of the Will of the deceased.

The law as outlined above coupled with the above cited persuasive authorities confirm that the custody of the Last Will and Testament of the deceased shall be deposited in Court for safe custody. Each of the executor, executrix and beneficiary shall obtain a certified copy. Any/ some or all executor, executrix may file petition for grant of Probate over the deceased's estate. Rule 16 & 17 of Probate & Administration Rules provide for any of the executors, executrix and or beneficiary may contest and object to making of grant.

With regard to the 1st Respondent, the pleadings and proceedings do not disclose any wrongdoing on his part and in conduct of this matter. The Applications as filed ought not to have referred to him as Respondent as there is no claim against him except in light of various instructions from different members of the deceased's family as confirmed from annexed correspondence he could not release the original Will of the deceased to any of the warring parties and he advised them to seek Court intervention.

Therefore, since the Applicants had the option to file petition for grant of Probate and seek the Court to obtain the Will from the 1st Respondent without joining him as Respondent, the Applicants are subjected to pay costs to the 1st Respondent. Costs follow the event; the event in this instance being seeking orders of release of the Will which was rightfully held by the 1st Respondent.

**DISPOSITION:**

- 1. Both Applications by Applicants are allowed in that the Last Will and Testament of Ndinguri Ngugi Mwaniki (deceased) shall be released formally in writing to Court by 1st Respondent Messrs Ngatia & Associates to Deputy Registrar Family Division within 30days from today.**

**2. The Last Will and Testament of the deceased shall be kept in Strong room for safe custody. The Deputy Registrar shall provide each of the executor, executrix and /or beneficiary, a certified copy of the Will upon payment of requisite fees to procure copies and they shall be at liberty to file petition for grant of Probate.**

**3. The Applicants Juliette Mwaniki and Kwame B. Mwaniki shall pay costs of both Applications to the 1st Respondent Ngatia & Associates.**

**4. If there is any conflict of payment of Legal Fees or Costs, the same be taxed by Taxing Master Deputy Registrar Family Division.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 6TH MARCH, 2017.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

.....

.....

.....