



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2345 OF 2004

IN THE MATTER OF THE ESTATE OF WANGARI WAWERU (DECEASED)

JUDGMENT

1. The deceased herein died on 15th March 2004. A letter from the Chief of Muruka Location dated 28th June 2004 indicates that she was survived by Ziporah Wanjiru, Jacinta Wambui Kaberia, Teresia Nyambura Njenga and Grace Muthoni Kambo.
2. A petition was lodged in court in this cause by Ziporah Wanjiru Kuria, in her capacity as executor of the will of the deceased, for grant of probate. She has listed all the persons named in the Chief's letter, all daughters of the deceased, as the persons who survived her. She died possessed of Loc 4/Kiranga/876. A grant of probate of the said will was made to the alleged executor on 14th January 2005. The said grant is yet to be confirmed.
3. Another petition was lodged in court in Thika CMCS No. 72 of 2005 by Grace Muthoni Kambo, in her capacity as daughter of the deceased, for grant of letters of administration intestate. She has listed all the persons named in the Chief's letter, all daughters of the deceased, as the persons who survived her. The deceased was said to have died possessed of Loc 4/Kiranga/876. An objection was lodged on 25th April 2005 against the making of the grant by Zipora Wanjiru Kuria claiming that the deceased had died testate and that she had in fact filed another cause at the High Court being HCSC No. 2345 of 2004. An answer to the petition for grant of probate was filed herein on 17th May 2005, alleging that the deceased had made a will on 19th May 1989 willing away everything to her. No grant is yet to be made in the cause.
4. The petitioner in Thika CMCS No. 72 of 2005 then moved the court in this cause by way of Summons for Revocation of grant dated 6th July 2005. She alleges that the deceased had died intestate, for the alleged will was invalid and a nullity. She complains that the will had allegedly named her, the applicant as executor, yet the respondent had not informed her about it.
5. Ziporah Wanjiru Kuria swore a reply on 30th November 2005. She asserts that the deceased did not die intestate for she had left a valid written will. She alleges that the applicant was always aware of the will as the family had discussed it at the Chief's office. She filed a further affidavit on 29th January 2009 explaining that she was variously referred to as Sipora and Zipora, and that there was a small error in the way the identity card number of the deceased was reflected in the will. Ziporah Wanjiru Kuria died on 6th January 2013 and she was substituted by her son, John Ng'ang'a Kuria. A grant of letters of administration intestate was made to him dated 6th May 2014.
6. Directions were given on 19th November 2008 that the application would be disposed of by way of oral submissions, the sole issue for determination being the validity of the will of the deceased. For some reason when the matter came up for hearing on 16th May 2016, the parties chose to adduce oral evidence.

7. The hearing started on 4th July 2016. The first on the stand was John Ng'ang'a Kuria. He testified that the deceased was his grandmother who had made a will where she devolved the entire estate to his mother. He stated that the person named as executor was his aunt, who refused to take up that duty. He mentioned that when they were summoned by the Chief and they went there but the will was disputed.

8. The next on the stand was Joseph Muchiri Ng'ang'a. He said he was the one who procured the advocate who prepared the will. He allegedly did so with instructions from the deceased. He said that she had indicated that she wanted to give land to his daughter. At the sitting with the advocate, was the deceased, two of her daughters, Grace and Wanjiru, and another person. The deceased alleged gave instructions to give the land to Wanjiru. The will was allegedly prepared, and when ready, it was read over to them. The deceased signed it first by affixing her thumbprint on it. Mburu and the witness thereafter signed it as attesting witnesses. The applicant was allegedly present when all that was happening. He testified that she did not sign the will as a witness. He said that the land in question previously belonged to the deceased's husband who had bought it. The will was drafted in English, although it was read over in Kikuyu. No certificate was signed that the will was read over to the deceased. He could not recall the building where they met the advocate.

9. The next witness was Mburu Kinuthia Wangai. He stated he was called by the deceased to go and execute her will as an attesting witness. He said that they travelled together by public transport from Kandara to the advocate's office at Thika. He mentioned those present as Wangari, Ziporah Wanjiru, Muthoni (representing the other sisters), Joseph Muchiri and Ziporah's husband. The deceased then pointed out that she wanted to give her land to Wanjiru. The deceased gave out her original identity card and copy of title deed to the advocate. They waited in the advocate's offices until the will was prepared. When ready the will was read out to them they left the lawyer's office, and he could not recall whether they signed the will, although he could recall giving out his identity card to the advocate. He pleaded that he was old at 94 years of age. He mentioned that Grace Muthoni was present.

10. The respondent's case opened 17th August 2016. The applicant testified first. She stated that the deceased had not made a will. She asserted that the deceased, Zipora, Muchiri and Mburu never visited any advocate at Thika. She testified that she, the deceased, Zipora, Muchiri and Mburu did meet the advocate in question, but not for the purpose of making a will, but rather to find ways of securing the land given that the deceased did not have male children. They wanted the advocate to write a letter. She did not understand that the letter to be written was a will. She alleged that whatever the advocate wrote was not read over to them. She said that she was not appointed executor under the will, nobody ever told her of the appointment. She stated that the property ought to be shared equally between the four daughters of the deceased. She alleged that the letter prepared by the lawyer was to be taken to the bank, but it would appear that its terms were subsequently changed.

11. The next on the witness box was Teresiah Nyambura Njenga. She said she was not aware of any will. She alleged that the deceased had divided the land between the four daughters in what she called an oral will. She said that she was unaware that the deceased and Zipora had gone to Thika to see a lawyer there. She denied sending Grace to a meeting at Thika to represent her there. The last witness was Rev. Peter Githire Waweru. He said he was not aware of any written will, and that he only heard of it after the cause at Thika was initiated.

12. At the conclusion of the proceedings, it was directed the parties file written submissions. There was compliance with the direction for the parties hereto have filed their respective submissions, which I have had time to read through and note the arguments advanced therein.

13. The only issue for determination is the validity of the alleged will. I have had occasion to peruse through copy of the said will. It was allegedly made on 9th May 1989. There is a thumbprint above the writing testator, Wangari Waweru. There are also signatures against the names of the witnesses, Joseph Muchiri and Mburu Kinuthia Wangari.

14. The validity of a will is predicated on two general considerations, the capacity of the testator and the formal requirements. The provisions on form are stated in sections 5, 6 and 7 of the Law of Succession

Act, Cap 160, Laws of Kenya. The formal requirements are set out in sections 8, 9, 10 and 11. The critical provision for the purposes of this judgment is section 11 which provides for a written will.

15. The applicant has not raised any issues as to the testamentary capacity of the deceased as at the time when it is alleged she made the will. I shall therefore not tax on that point. She asserts that the deceased did not make a will. That ideally is the question that I have to determine here.

16. The document was allegedly prepared by Macharia & Njore, Advocates. The personal representative's side called two individuals who were privy to its making. They allegedly witnessed its execution, and themselves appended their signatures to the document as attesting witnesses. The applicant's testimony appears to corroborate that of the personal representative. She concedes that there was a meeting at the chambers of Macharia & Njore, Advocates involving the same persons mentioned by the attesting witnesses. She concedes too that the advocate was to draft a certain document, but she asserts that the document to be prepared was not a will but a letter. The evidence before me clearly places her at the scene of the making of the will and I do not find any basis upon which she can deny it.

17. An issue was raised about a certificate that the will was read over to the parties. Issues were also raised concerning the illiteracy of the parties involved. I see nothing in Rule 54 of the Probate and Administration Rules which suggests that such a certificate is necessary. All what is required is for the court to be vigilant and be satisfied that there was due execution of the will.

18. Having examined the alleged will, I am satisfied that the same superficially complies with the requirements of section 11, in the sense that it was signed by the deceased, for no one has alleged that the thumbprint was not hers. The document was also countersigned by witnesses. On the face of it, the document is valid.

19. The final orders that I shall make in the circumstances are:

- (a) That the application for revocation of grant dated 6th July 2005 is hereby dismissed;**
- (b) That the grant of letters of administration intestate made on 6th May 2014 to John Ng'ang'a Kuria shall be amended to read grant of letters of administration with will annexed;**
- (c) That the cause in Thika CMCS No. 72 of 2005 is hereby struck out and the court file in the subject matter shall be returned to the Thika Chief Magistrate's Court registry;**
- (d) That the estate comprises of Loc 4/Kiranga/876 situate at Murang'a County, consequently, the cause herein shall transferred to the High Court of Kenya at Murang'a; and**
- (e) That the personal representative shall have the costs of the suit.**

DATED, SIGNED and DELIVERED at NAIROBI this 12TH DAY OF MAY, 2017.

W. MUSYOKA

JUDGE