

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2077 OF 2002

IN THE MATTER OF THE ESTATE OF DAVID MURAGE MUCHINA (DECEASED)

RULING

1. The deceased herein died on 8th May 2002. Representation to the estate was sought by Charles Nyaga Muchina, Grace Wambura Murimi, Nancy Wangechi Muchina and Nancy Nyambura Murage, vide a petition for grant of probate of written will lodged herein on 14th August 2002, on the basis that the deceased had died testate. A grant of probate of written will was accordingly made on 17th December 2002. The said grant is yet to be confirmed.

2. On 6th May 2003, a summons for revocation of the said grant was lodged at the registry by Sophia Nyambura Murage, on the grounds that the same was obtained on the basis of defective proceedings and concealment of matter from the court. In her affidavit in support the applicant asserts that she is the first wife of the deceased having had contracted a customary law with him in 1970, and that they had remained married until his death in 2002. She states that although she was not residing within the matrimonial home, she was still dependent on him, and now resided at the matrimonial home after his death. She asserts that the deceased never made a will, whether oral or written, and the one placed before court was a forgery and a fraud. She argues that the purported will was not valid as it does not comply with the mandatory requirements. Her case is that the purported executors had misled the court that the deceased had died testate while in fact the deceased had died intestate.

3. The response to the application is by one of the executors, Charles Nyaga Muchina. His affidavit was sworn on 28th July 2003. The deponent is a brother of the deceased. He avers that the deceased had called them to his sister's home, Grace W Murimi, on 23rd March 2002. At that event, the deceased read out his last will and testament and then signed the same. He then requested them to execute the same as his witnesses. The will was allegedly read out in the presence of Grace Murimi and the deponent, and the deceased executed it in their presence, who also signed as attesting witnesses in his presence. The deceased then took the will to his advocate, PM Muchira. After the deceased's demise, the said advocate read the will to deponent and all the deceased's children on 5th July 2002. He asserts that the will complies with the law. A copy of the alleged will is attached to the affidavit. The reply also dwells on the relationship between the deceased and the applicant. He states that the two had a strained relationship and as at the date of the deceased's death, the two were not living together. It is averred that she was returned to her parents in Murang'a in 1999 and remained there until she came back to the home after the deceased died, without the consent of the family. Her being sent away would explain why she was excluded by the deceased from his will. He accuses her of intermeddling with the estate by selling household items.

4. The reply elicited a response from the applicant, taking the form of an affidavit sworn on 22nd January 2004. She reiterates that the deceased died intestate. Secondly, she denies that she has disposed of estate assets. She asserts that she has been staying at the matrimonial home and fending for herself and her children alone.

5. On 7th December 2005 an order was made by Aluoch J. directing the Director of the Criminal Investigation Department (CID) to subject the purported will to examination by a handwriting examination. There is on record material showing that various documents, including the purported original will, were presented to the CID. There is on record a forensic document examiner's report signed by one Antipas Nyanjwa, dated 18th September 2012, which concludes that the signatures on the alleged will were those of the deceased. On 4th November 2013, Kimaru J directed that the question of the

validity of the will be determined on the basis of oral submissions. There has been compliance with the said directions, for both sides filed comprehensive written submissions, complete with the authorities that they relied on.

6. The validity of a will is dependent on two general grounds, the testamentary capacity of the maker of the will and the formal requirements relating to execution and attestation of wills. Capacity of testators is covered by sections 5 to 7 of the Law of Succession Act, Cap 160, Laws of Kenya, while sections 8 to 16 thereof provide for the formal requirements.

7. The applicant does not appear to altogether to be relying on any specific ground in attacking the validity of the will. She neither raises the issue of the deceased's capacity to make the will, nor point to any failure on the part of the deceased to comply with the formal requirements for a valid will. She says that he never made a will, and that the one presented to court was both a forgery and a fraud. The issue of lack of validity of the will is being raised by the applicant. It is incumbent upon her to prove these allegations. Regarding allegations of lack of capacity on the part of the deceased, section 5(4) of the Act is very clear, the burden of proof of lack of testamentary capacity lies with the person who so alleges. If the allegation is that the formal requirements have not been complied with is still upto the person alleging so to establish that fact. That is the standard or general principle applying to most civil proceedings.

8. I have already stated that the applicant does not raise questions of lack of capacity. Certainly, she has adduced no evidence in that direction. There is nothing to show that the deceased did not have the requisite state of mind to make a will on the date that he is said to have made it. I need not therefore tax my mind on this. The applicant does not also appear to be raising questions with regard to the formal requirements. There is no allegation that the will on record was not signed at all, or was signed improperly, or was not attested at all, or was attested imperfectly. No material to that end was placed before me. Consequently, again, I should not train my mind to that.

9. The case by the applicant is that the document before the court is a forgery or a fraud. In short it is a false document. It was neither made nor signed by the deceased; rather it was a creation of another or other persons. It was to that end that it was directed that the document be subjected to forensic examination. This was done. The report that came back says that the signature on the document is that of the deceased. There is nothing else on record to the contrary. The applicant did not, after the filing of the handwriting expert's report, seek another opinion. There is therefore nothing to contradict the opinion of the expert. There is no evidence that the document was contrived by anyone else apart from the deceased himself.

10. The only thing remaining for me to consider is whether there is full compliance with section 11 as to execution and attestation. Looking at the alleged will, I note that there is a signature purported to be of the deceased. There are also two other signatures under 'witnessed by,' which I presume were made by the persons who attested the deceased's signature. The affidavit sworn in reply to the application is by a person who claims to have been present at the event of the execution and attestation of the will. There is no evidence to show that that event did not happen, and that the document on record was not executed and attested as it purports on its face.

11. In view of what I have stated above, the inescapable conclusion has to be that the will allegedly made on 25th March 2002 is valid. There is therefore no basis for revocation of the probate granted upon it. The application dated 10th February 2003 must and is hereby dismissed. The next natural step would appear to be that the executors of the said will should apply for confirmation of their grant made on 17th December 2002, as the application for reasonable provision dated 4th July 2005 was withdrawn on 13th July 2005.

DATED and SIGNED at NAIROBI this 3RD DAY OF MAY, 2017.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE