



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1399 OF 2003

IN THE MATTER OF THE ESTATE OF KAMANDURA ALI (DECEASED)

**RULING**

1. The deceased died testate on 5th November 1992 at Nairobi leaving a valid written will. In the said will the deceased had nominated Zuhura Wangare Kamandura as the executrix. Subsequently the executrix vide her application dated 29th October 2002 renounced her executorship in favour of the public trustee. The public trustee subsequently applied for grant of representation on 9th April 2003 to the deceased's estate and subsequently applied for confirmation of the same on 8th September 2001. On 12th May 2009 Zuhura Wangare Kamandura sought revocation of the said grant on grounds that the public trustee had failed to proceed diligently with the administration of the deceased's estate. The same was revoked on 30th May 2012 and a fresh grant was issued to Zuhura Wangare Kamandura. The said administrator applied for confirmation of the said grant of administration on 13th May 2013 the same was accompanied by schedule of distribution and consent by the deceased's children dated 6th May 2013. The grant was finally confirmed on 23rd September 2013 to the effect that;

**1. Plot No. 2 Dagoretti/Riruta/329 be shared equally between Hawa Wanja Kamandura, Halima Wanjiru Kamandura, Amina Wanjiku Omar, Zainab Wahu Kamandura, Twaha Kuria Kamandura and Fatuma Waithira Kamandura.**

**2. Plot No. 1 Dagoretti/Riruta/329 to go to Zuhura Wangare Kamandura**

**3. Plot No. 3 Dagoretti/ Riruta/329 to go to Mariamu Njoki and Twaha Kuria Kamandura.**

**4. Farm in Laikipia Kiambogo F.C.S Ltd. 2 acres to go to Mariamu Njoki and 1 acre to go to Twaha Kuria Kamandura**

**5. Ongata Rongai plot to be shared equally between Hawa Wanja Kamandura, Fatuma Waithira Kamandura, Halima Wanjiru Kamandura, Amina Wanjiku Omari, Mariamu Wambui Kamandura.**

**6. Riruta Muslim village plot to go to Mariamu Wambui Kamandura**

2. Via an application dated 22<sup>nd</sup> September 2014 the executrix sought an amendment of the grant of letters of administration issued on 23<sup>rd</sup> September 2013 be amended in terms of the draft certificate of confirmation of Grant annexed to the said confirmed as the same had minor errors of omission which needed to be corrected to avoid disputes between the beneficiaries and wastage of the Estate. This court in its ruling dated 17<sup>th</sup> April 2015 found that the orders sought touched on

addition of other beneficiaries and removal of other properties from the list of properties as declared by the deceased in his written will and declined to make the said changes.

3. The applicant filed the notice of motion dated 18<sup>th</sup> August 2015 which was later amended on the 27<sup>th</sup> of August 2015, under Section 3A of the Civil Procedure Act, Section 47, Section 83(f) of the Law of Succession Act, Judicature Act Cap 8, the High Court and Practice and procedure Rule part 1 Rule 3 and all enabling provisions of the law and rules seeking the following orders;
  - i. That the Respondent as executrix of the estate of Kamandura Ali (deceased) be ordered to distribute all assets remaining after payment of expenses and debts according to the respective beneficial interests therein under the will of the late Kamandura Ali within the next 14 days or such time as this court may direct, failure to which the applicant be at liberty to pursue the above process in respect of ***L.R. Dagoretti/Riruta/329***.
  - ii. That in the alternative the Respondent be ordered to surrender the original title deed to the Lands Registrar at Nairobi or to the applicant to enable the process of subdivision of the said property as per the wishes of the deceased to proceed at the estates costs.
  - iii. That the Respondent bears costs of this application
4. The application is premised on grounds that the this court in its ruling of 17<sup>th</sup> April 2015 dismissed the respondent's application seeking correction of errors on a confirmed grant and in essence gave effect to the fact that the applicant was entitled to inherit the said property as willed by the deceased in his will dated 15/9/2002 which bequest the applicant ***Plot 3/Dagoretti/Riruta/329*** where her matrimonial property with her late husband who was son to the deceased. That despite the said court ruling the respondent has refused to distribute all assets forming the deceased's estate and has threatened to distribute her said share to other beneficiaries and the only way she can inherit her portion is if this court intervenes. The applicant in her replying affidavit reiterated the grounds as set out in her application.
5. The respondent in her replying affidavit dated 2<sup>nd</sup> September 2015 states that the ruling of 17<sup>th</sup> April 2015 conflicts the previous proceedings as it treats the matter as a Probate and Administration Cause, that it relies on a Will of the deceased and directs that the Will must stand and that it means that she distributes the estate in accordance with the Will which is impossible and that it treats the estate as testate whereas the same is intestate. That the will was found to have mistakes in that;
  - a. **The property the subject matter of distribution was described as Riruta/Kawangware/329 instead of Dagoretti/Riruta/329.**
  - b. **That her own property Gituamba/Thigio Block/1/52 Kiambogo was erroneously included as part of the Estate of my deceased husband whereas she has been the sole registered proprietor of the same.**
6. That because of the said mistakes it was decided between her previous advocates and the Public Trustee that the Will be abandoned as unenforceable and the Estate be treated as intestate and that is when it became a succession cause and Justice Musyoka approved the mode of distribution of the estate as intestate as there was no Will annexed or probate, that the previous grant was revoked and that is why she was appointed an Administratrix intestate and not the executor and the grant issued to her. That on the said basis she applied to the court for variation of the distribution of the portions given to the applicant so that her step children her grandsons can get a share directly instead of being at the mercy of the applicant. That this court was of the erroneous view that she would be rewriting or altering the Will of the deceased and that the court's decision of a non-existent Will be followed has made distribution of the Estate impossible. That she is of advanced age and sickly and she has no personal interest in the Estate and her only wish is to have the same distributed in a manner that brings peace to the family particularly between her daughter in law the applicant and her stepsons who are her grandchildren since the parents are long dead and she has to protect their interests. Lastly she avers that the estate should proceed as intestate and reference to the Will be avoided, that the properties that don't belong to the deceased's estate be removed from the schedule of distribution and that the step sons of the applicant be given half the

share of the portion erroneously given to the applicant alone. That in the alternative the confirmed grant and schedule be set aside for the matter to proceed to full hearing.

7. The applicant response to the Respondent's was made in her supplementary affidavit filed on the 3<sup>rd</sup> September 2105 as follows; that she has been advised by her lawyer that the matters in the Respondent's affidavit are technical as it is taking the court back to issues raised and determined by the court and that the Respondent does not in any way object to her grounds, that this court after considering her application gave a sound ruling. That the Respondent's allegation that the deceased's Will of the had mistakes is unfounded as the same has not been contested by the Respondent and that's why she filed this succession cause 2003 to have the Will confirmed which the court did on the 23/9/2013 in the presence of the beneficiaries and no one raised objections. That it was not for the Respondent, her previous Advocated nor the Public Trustee to decide that a valid will be abandoned as enforceable and the Estate be treated as intestate. That this was unlawful and that Respondent's misguided Justice Musyoka, that it is not for the respondent to determine how to distribute the her share of the estate that was lawfully bequeathed to her by the deceased in the valid and uncontested Will and that the Respondent's' wish to the estate distributed in a manner that she pleases is against the wishes of the deceased, and that she should be left to decide how to deal with her share in **Plot 3 Dagoretti/Riruta/329**.
8. I have considered the facts as deponed by the parties , counsels oral submissions and the law as provided in the Law of Succession Act Cap. 160. There is no dispute that the deceased left a Will dated the 15<sup>th</sup> September 1992. This Will has not been contested in Court as being invalid. I do agree with the applicant's submission and averment that the respondent could not on her own and her advocate nor the Public Trustee decide that the Will was invalid, it was upon her to challenge the Will in court or seek the court's directions on the contents of the Will that do not tally with the description of assets of the deceased. The Will remains valid so long as it has not challenged by either party. I also note that step children the respondent refers to have not sworn any affidavit stating that they will get their share as beneficiaries. Lastly the respondent states that there is a contradiction in my ruling and that of Justice Muysoka yet she has not sought a review of my ruling dated he 17/4/2015 which she states conflicts with the previous proceedings. I do recognize that I have the powers to review my own ruling however in this matter it is my view that there exists a valid will which has not been challenged. I find that the applicant's application has merit and its allowed as follows;

**That the Respondent as executrix of the estate of Kamandura Ali (deceased) is ordered to distribute all assets remaining after payment of expenses and debts according to the respective beneficial interests therein under the will of the late Kamandura Ali within the next 40 days and in default the Respondent shall surrender the original title deed to the Lands Registrar at Nairobi to enable the process of subdivision of the said property as per the wishes of the deceased to proceed at the estates costs. Each party to bear its own costs. It is so ordered.**

Dated, signed and delivered this 5<sup>th</sup> day of **February 2016**.

**R. E. OUGO**

**JUDGE**

In the presence of:-

.....**For the**

**Applicant.....For the Respondent**

.....**Court Clerk**