



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE 2699 OF 2013

IN THE MATTER OF THE ESTATE OF GLADYS WANJIKU GITHINJI (DECEASED)

PERMINUS MUKURIA GITHINJI.....1ST APPLICANT

DAVID NJOROGE GITHINJI.....2ND APPLICANT

VERSUS

JULIUS NGANGA GITHINJI.....RESPONDENT

RULING

PLEADINGS

The deceased Gladys Wanjiku Githinji died on 20th August, 2013. The death certificate No. 3411443 was issued to this effect.

Julius Nganga Githinji the Petitioner and executor of the Will filed summons for confirmation of grant of probate with Will annexed on 9th December, 2014. He listed the beneficiaries as;

- | | | |
|------------------------------|---|-----------------|
| 1. Julius Nganga Githinji | - | son |
| 2. Mercy Wangui Mungara | - | daughter in-law |
| 3. Geoffrey Wangure Githinji | - | son |
| 4. Perminus Mukuria Githinji | - | son |
| 5. David Njoroge Githinji | - | son |
| 6. Nelson Njenga Githinji | - | son |
| 7. Rose Gathoni Mwaura | - | grand daughter |
| 8. Beth Wambui Kamau | - | daughter |
| 9. Francis Githinji Wairimu | - | grandson |

The proposed mode of distribution is as per the Will of the deceased of 18th July, 2008.

On 22nd December, 2014, the Respondents/Applicants Perminus Mukuria Githinji and Julius Nanga Githinji filed summons for revocation of grant **under Section 44(1) of Probate & Administration Rules.**

The application sought the grant issued to Julius Nganga Githinji be revoked and /or altered and amended to include the applicants name as co-administrator of the estate. The grant be altered to include the applicant as beneficiaries of the estate of the deceased.

The reasons for the application are;

The 1st and 2nd Applicants Perminus Mukuria Githinji and David Njoroge Githinji respectively are sons of the deceased and beneficiaries of the estate of the deceased.

The execution of the Will of the deceased Julius Nganga Githinji did not confirm them and obtain written consents in writing for grant of probate of the Will. He is also accused of not disclosing that the Applicant/Respondents are sons of the deceased and beneficiaries of her estate and therefore entitled to grant of representation. The executor is up to some mischief and intentionally left out the applicants.

The Petitioner/Executor deponed in the Replying Affidavit of 2nd February, 2015 that the deceased left a written Will annexed "JNG1". The contest was that he was appointed executor of the Will and the distribution was Muguga/Kahuho/449 be divided amongst the younger siblings Nelson Njenga Githinji, Francis Githinji Wairimu and Geoffrey Wangure Githinji.

The deceased prior to her death called a family meeting with all family members and she said; James Mungara lived in Gitaru, Julius Nganga lived in Limuru, David Njoroge lived in Kahuho and Perminus Mukuria in Kiserian. She informed them that since they did not live on the said land, they were to allow the younger siblings to benefit from and share the land as the parcel of land was too small and not economically viable to subdivide among all the children of the deceased. None of the children and members of the family raised any objection.

After the funeral of the deceased, the Pastor of St. John Orthodox Church Kahuho announced the deceased left a Will with the church. All family members met on 28th August, 2003 at the church and the Will was read out. The Applicants did not agree with the content of the Will. The Petitioner invited all parties to the Chief's Office, the Applicants declined to attend the meeting. They went to D.O's office where they were informed that the matter was in Court.

ORAL HEARING

Perminus Mukuria Githinji on behalf of David Njoroge Githinji informed the Court that they are sons of the deceased who was their mother. The land in question is ancestral land belonging to the clan left by their grandfather to their father and then to their mother. Infact at one time, their late father wanted to sell the land and Perminus Mukuria Githinji and their late brother James Mungara lodged a caution to stop any sale. Finally the father divided the land equally among the three (3) wives. This land is what their mother was allocated to hold in trust for the children of the deceased.

Secondly, he contested the fact that their late mother who was old and illiterate was able to write a Will yet she did not understand English or Kiswahili. They were of the view that the deceased did not write the Will.

ISSUES

1. The Court is called upon to determine the validity of the Will of the deceased.
2. The distribution of the estate of the deceased is it fair, just and equitable to all beneficiaries?

EVALUATION

From the evidence on record the Will of the deceased is in compliance with **Section 5 & 11 of Law of Succession Act Cap 160** which provides that;

Section 5 provides;

1. ***Subject to the provisions of this Part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any***

- disposition by reference to any secular or religious law that he chooses.*
2. *A female person, whether married or unmarried, has the same capacity to make a Will does a male person.*
 3. *Any person making or purporting to make a Will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the Will, in such a state of mind, whether arising from any other cause, as not to know what he is doing.*
 4. *The burden of proof that a testator was, at the time he made any Will, not of sound mind, shall be upon the person who so alleges.*

Section 11 provides;

No written Will shall be valid unless;

- a. *The testator has signed or affixed his mark to the Will, or it has been signed by some other person in the presence any by the direction of the testator.*
- b. *The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a Will;*
- c. *The Will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other*
- d. *The Will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the Will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the Will in the presence of the testator, but it shall not be necessary that more than one witness to present at the same time, and no particular form of attestation shall be necessary.*

If as alleged by the Respondents/Applicants that their late mother was not literate could not read or write and speak English or Kiswahili, it is upon them to show she did not write the Will as provided by **Section 5(3) Law of Succession Act Cap 160** and produce medical evidence to prove that due to her age and health she was not of sound mind to write a Will.

A part from alleging that their late mother did not write the Will, they did not provide evidence to this effect. The evidence would be inform of medical records to shed light that at the time of writing the Will she did not have sound mind and mental capacity to write the Will. In the absence of such evidence by the Applicants/Respondents to disclose the deceased's state of mind and discharge the burden of proof I find the deceased had the requisite mental capacity to make a testamentary disposition on 18th July, 2008 when she put her thumb print on the Will.

With regard to the distribution of the estate is it fair, just and equitable?

In the instant case; the land in question is Muguga/Kahuho/449 about 1 acre and the children of the deceased are 7 children. 1 daughter, 6 sons and 2 grand children. Logically and economically the parcel of land is too small to subdivide amongst the children of the deceased. The most fair, just and equitable way is to divide whatever little land there is amongst the children of the deceased. It is not practical and not economical viable. If they all have a share then it will mean those already living elsewhere will displace and render homeless those on the land.

This Court is persuaded by the following reasons that the distribution according to the Will is best option, reasonable and practical distribution in the circumstances.

- a. The Applicants/Respondents and all other siblings were disclosed to the Court in the petition and summons for grant of probate of 15th October, 2013 and 9th December 2014. There was no concealment of medical and the grant was not obtained fraudulently.
- b. The Will was read to the family after the funeral at the church as per the annexed attachment; to the Respondents application

- c. The deceased had in June 2008 called the family members and explained to them that the land was too small to subdivide and it is better left to the younger siblings who lived on the land . They were all settled elsewhere and therefore they were to leave the land to the 2 last sons. Geoffrey Wangui Githinji and Nelson Njogu Githinji and Francis Githinji the grandson of the deceased and son of the deceased father, James Mungara.
- d. If this land is to be subdivided further it will mean those residing on the land currently are displaced rendered homeless while the other siblings who reside in their home elsewhere have an added advantage. They will have their homes and further another parcel of land at the expense of those who have nowhere else to reside in; apart from the land in question.
- e. There are siblings who have agreed to forgo and give up their share of the inheritance for the sake of the other siblings.
 - i. Julius Nganga Githinji - the executor
 - ii. Beth Wambui Kamau - daughter
- f. In paragraph 10 of the affidavit of the executor, Julius Nganga Githinji; it is deponed that each of the other sons were assisted by their parents to settle where they reside;
 - i. James Mungare Githinji through the assistance of his parents acquired a plot at Gitaru
 - ii. Julius Nganga Githinji through the assistance of his parents acquired land in Limuru.
 - iii. David Njoroge Githinji through the assistance of his parents acquired land in Kahuho.
 - iv. Perminus Mukuria Githinji through the assistance of his parents acquired a plot in Kiseriani.
- g. The last Will of the deceased was kept in the church St. John Orthodox Church.

“ On 28TH August, 2013 Father Wallace Njuguna opened a sealed envelope, removed the Will and read the same to all those that were present”

The Will was not tampered with or interfered with; it was opened in the presence of all family members as the Will of the deceased and read to all present.

For these reasons the Court finds that the Will of the deceased of 18th July, 2008 valid and the mode of distribution fair, just and equitable in consideration of the circumstances of the case.

The Petitioner/Executor to proceed with the application for confirmation of grant of probate within 30 days from today.

No orders as to costs

READ AND SIGNED AT NAIROBI THIS 10TH MARCH, 2015

M. MUIGAI

JUDGE

In the absence of; Parties