



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE 1790 OF 2003**

**IN THE MATTER OF THE ESTATE OF EDWIN MWAURA KIMARI (DECEASED)**

**WILLINGSTONE TIMOTHY MUCHIGI MBURU.....APPLICANT**

**VERSUS**

**GLADYS NUNGARI KIMARI.....RESPONDENT**

**RULING**

**INTRODUCTION**

The deceased Edwin Mwaura Kimari died on 24<sup>th</sup> March, 2003 as evidenced by death certificate No. 727084. He died testate the last Will and testament of the deceased is dated 22<sup>nd</sup> February, 1995. The executor was his wife Gladys Nungari Kimari who was also bequeathed properties and the other properties allotted to their son Muchigi Kimari Nungari on attaining 39 years old.

The widow of the deceased obtained the Grant of Probate of written Will on 17<sup>th</sup> November, 2003. On 22<sup>nd</sup> March, 2010, the son of the deceased obtained the grant of probate as the executor of the estate of the deceased after his mother's death on 28<sup>th</sup> April, 2009.

**PLEADINGS**

On 28<sup>th</sup> June, 2011 the applicants Willingstone Timothy Muchigi Mburu and Pauline Wangui Mburu filed summons for revocation or annulment of grant against the grant of probate issued to Gladys Nungari Kimari of 17<sup>th</sup> November, 2003 and Muchigi Kimari Nungari of 22<sup>nd</sup> March, 2010 as the grants were obtained fraudulently by making a false statement and concealment of material facts from the Court.

The 1<sup>st</sup> applicant deposed in the supporting affidavit that he is the biological son of the deceased through his mother Pauline Wangui Mburu. His mother had a relationship with the deceased but they did not get married. However, he lived with his mother while the father visited him. Later he moved and lived with his auntie Olive Wairimu Kinyanjui (his father's sister) at Woodley Estate Nairobi. He lived with her from 1978 – 1983 when he left and joined college.

The Applicant further deposed that the deceased participated in his marriage arrangements as his father, he participated in all Kikuyu customary rites and attended his wedding on 21<sup>st</sup> December, 1996. In 1999, the deceased met his family especially his grandchild. He visited the deceased in hospital and he later passed on that night.

After the deceased's death the Applicant tried to communicate with his step mother, widow of the deceased and the son; the executor of the deceased's estate on the way forward and there was no information. He pursued the matter independently and realized the deceased had written a Will in which he was disinherited; he was referred to amongst the relatives to inherit if the widow and son of the deceased died. The Applicant attached the birth certificate No. 478294 which shows the deceased as his father. The Applicant's mother Pauline Wangui Mburu also deposed in her affidavit filed on the same date that she got the applicant with the deceased.

The executor Muchigi Kimari filed the Replying Affidavit on 9<sup>th</sup> September, 2011 and deposed that the deceased married his late mother Gladys Nungari Kimari on 31<sup>st</sup> March, 1973 as per the attached marriage certificate "MK1". He was born on 15<sup>th</sup> April, 1973 as only child as per the annexed birth certificate "MK2" and he is therefore the rightful heir to the estate of his late father and mother as per the Will.

The executor stated the deceased did not inform him that the objector is a half brother and his biological son. He came to hear of this fact later on. His father, the deceased wrote a Will which was in the custody of Mbuthi Gathenji Advocate annexed as "MK3". The said Advocate also deposed in an affidavit filed on 9<sup>th</sup> September, 2011 to this effect.

The executor stated that from 2003, with the demise of the deceased no one objected to the Grant of Probate or confirmation of grant until the widow of the deceased died in 2009. When he took over after the grant of probate in 2010; that is when the applicant filed the present application contesting the Will. At no time was there any objection until the advent of the instant application.

The executor indicated that he and his mother implemented the wishes of the deceased as per the Will attached to the application. He did not conceal any facts in applying for the grant. He was out of the country pursuing studies, and he came back to Kenya in 2010. The applicant did not seek him out to discuss the estate of the deceased. The validity of the Will is not contested and it is further verified by the affidavit filed by the advocate Mbuthi Gathenji. The Will was written and signed on all pages by the deceased.

Olive Wairimu Kinyanjui deposed in an affidavit filed on 9<sup>th</sup> September, 2011, that the deceased did not marry or pay dowry for the applicant's mother. She lived with the applicant on a friendly and separate arrangement with his mother who was expecting a second child and as friends she agreed to take care of the applicant in her house. The deceased was not part of this arrangement and he did not support the applicant. During the applicant's marriage arrangements the deceased attended the ceremony and gave a token contribution as the applicant's grandfather refused him to participate as the father as he had not paid dowry for his mother. They helped the applicant and his mother as they were friends and were from the same village but the deceased did not play any role in the applicant's life.

On 7<sup>th</sup> October, 2011, the applicant filed another affidavit seeking to restrict intermeddling of the estate as required under **Section 45 of Law of Succession Act Cap 160** until the summons for revocation of grant application was heard and determined. He alleged the executor had disposed properties in an attempt to waste the estate of the deceased.

The Respondent filed a replying Affidavit on 14<sup>th</sup> October, 2011 and deposed that the properties outlined in the Respondent's application had been sold by the deceased during his life time and his mother later. He was only effecting the necessary transfers. Some of the properties in question had already been bequeathed to him in the Will and registered in his name. All these processes were undertaken while no objection had been raised until 8 years elapsed when the applicant raised an objection to the distribution of the estate of the deceased.

The applicant by an affidavit filed in 2<sup>nd</sup> May, 2012 deposed that he was supported by the deceased in school, during his marriage and also to put up his own home. He claimed since the executor is younger than him by 8 years, so it is possible he did not understand the relationship he had with the deceased.

He struggled to be what he is today with the support of both maternal and paternal relatives. He reiterated that the executor was intermeddling with the estate of the deceased.

On 30<sup>th</sup> July, 2014, the applicant and the executor amicably agreed on the mode of distribution of the state of the deceased by a Consent order vide the letter to the Court of the same date. The content of the letter outlines the remaining properties of the deceased's estate which are divided equally between the applicant and the executor. The properties already disposed of during the life time of the deceased and of the widow/mother of the executor are excluded. Each party is to bear its own costs of the cause and each beneficiary to bear his own costs of transmissions to itself and costs of subdivisions and other related costs.

The orders issued by the Court to maintain status quo on 8<sup>th</sup> May, 2012 were vacated.

### ISSUES

What remains for the Court to determine is the instant application of revocation/annulment of the grant of 29<sup>th</sup> June, 2011 is as follows;

- a. Should the grant of probate issued to Mrs. Gladys Nungari Kimari be revoked?
- b. Should the grant of probate issued to Mr. Muchigi Kimari be revoked?
- c. Should the grant of the deceased Edwin Mwaura Kimani be set aside?
- d. Should the Will of the deceased be distributed as per the Will of the deceased or administrator intestate?
- e. Should the applicant and executor be just administrator of the estate of the deceased?

### EVALUATION

The Court is guided by the provisions of **Law of Succession Act Section 3** or the definition of a child of the deceased and **Section 26 Law of Succession Act Cap 160** on the definition of the dependant of the deceased or beneficiaries. The Court is satisfied by the evidence on record that the applicant is the biological son of the deceased by one Pauline Wangui Mburu. Therefore under the Law of Succession the applicant is entitled to a share in the distribution of the deceased's estate.

The petition for grant of Probate and subsequent confirmation of grant of Probate by the 1<sup>st</sup> executor Mrs. Gladys Nungari Kimari was in accordance with the Will of the deceased of 22<sup>nd</sup> February, 1995. The Will's validity was not contested as required under **Section 5 of the Law of Succession Act Cap 160**. The affidavit of the advocate Mr. Mbuthi Gathenji is clear as to the process and effect of the Will and it is validity under **Section 11 of the Law of Succession Act Cap. 160**.

Therefore the revocation of the grant Probate to Mrs. Gladys Nungari Kimari cannot be revoked as it was in accordance with the Will of the deceased Secondly, the grant of probate to the 1<sup>st</sup> executor was spent after her death in 2009.

With regard to the grant of probate to the 2<sup>nd</sup> executor, the Court finds once again it was in accordance with the Will of the deceased where its validity was not challenged. The Court noted from the affidavits filed by the applicant and the 2<sup>nd</sup> executor, the 2<sup>nd</sup> executor is accused of concealing material facts or obtaining the grant fraudulently by not disclosing and concealing that the applicant was his half brother. The Court notes with concern from the contents of affidavits filed that the 2<sup>nd</sup> executor has been very candid, accommodating and conciliatory in this instant matter. Whereas he is not to blame for the applicant's situation, he bore the ordeal. Upon realization that the applicant is half or step brother, he disclosed the properties of the deceased's estate.

The Court did not find any evidence to show that the 2<sup>nd</sup> executor was formally introduced to the applicant as his half brother or told that this was the fact by his parents or relatives. He may have

interacted with the applicant and met him in family gatherings but it is possible in the absence of formal and direct introduction and information that he did not know the exact relationship between himself and the applicant until later.

Yet despite bearing the brunt of the accusations from the applicant's family for the omission and non disclosure by the deceased; he finally disclosed the property comprising of the estate of the deceased and agreed to distribute the remaining property equally with the applicant.

From the above facts; the Court finds that there was no concealment of material facts by the 2<sup>nd</sup> executor and he did not obtain the grant of probate fraudulently. He did not know of the exact relationship with the applicant and when it was brought to his attention he conceded and apportioned the estate between them. The non disclosure of the deceased of the applicant as his half brother cannot be visited on the 2<sup>nd</sup> executor.

Secondly in line with the wishes of the deceased as shown in the Will, the 2<sup>nd</sup> executor was to take over all property upon the demise of the mother; 1<sup>st</sup> executor. The Will was not challenged and it remains intact as it was the basis of distribution of properties before the present application was filed in Court. The Will spells out the 1<sup>st</sup> executor who is deceased and the 2<sup>nd</sup> executor who is the respondent. Therefore the 2<sup>nd</sup> executor remains executor of the Will of the deceased.

The deceased' estate has been the subject of distribution since 2003 to date; so the Will has been instrumental. Since its validity has not been contested the property has remained with first heir and beneficiary the son of the deceased and 2<sup>nd</sup> executor of the estate.

After 8 years it was brought to light that the applicant is a child and son of the deceased. In light of the provisions of **Section 26 Law of Succession Act Cap 160** it is imperative that he inherits from his father; the deceased. The Court shall make provisions of the applicant to effect the legal requirement. The parties filed Consent on 30<sup>th</sup> July, 2014 which the Court adopts and amicably distributed the remaining estate of the deceased equally.

The same distribution of the deceased is included in the summons for confirmation of grant of 25<sup>th</sup> August, 2014. This Court shall give effect to the amicable settlement of the parties as provided by law. The grant of probate with written Will made to Muchigi Kimari made on 22<sup>nd</sup> March, 2010 is confirmed in terms of the mode of distribution of the Consent order of 30<sup>th</sup> July, 2014 so as to ensure fair, just and equitable distribution of the estate of the deceased to the beneficiaries.

The Court finds that the Will was valid and there was no concealment of facts or fraudulent act by the 2<sup>nd</sup> executor but non disclosure by the deceased of his son to the 2<sup>nd</sup> executor. To avoid further acrimony and tension and protracted litigation between the applicant and respondent and from the decent conduct shown by the 2<sup>nd</sup> executor so far, the Court exercises its discretion that the 2<sup>nd</sup> executor remains executor of the deceased's estate and distributes the estate in accordance of the varied terms of the Will of the deceased and the Consent order of 30<sup>th</sup> July, 2014.

The case of **James Ngengi Mugai (Deceased) Nairobi High Court Succession Cause 523 of 1996. Koome J**

When the Court found the Will was valid under **Section 5 and 11 of the Law of Succession Act Cap 160** but reasonable provision was not made for the beneficiaries and dependents, the Court invoked **Section 26 of the Law of Succession Act Cap 160 and Rule 73 of the Probate Administration Rules** to make reasonable provision for family members who were found to have not been reasonably provided for.

Therefore, in the instant case, although the Will of the deceased is valid, the Court will adopt the Consent of 30<sup>th</sup> July, 2014 to reasonably provide for the applicant as a member of the deceased's family his son.

## **FINDINGS**

The Court orders as follows;

1. The application for revocation and or annulment of the grant of probate of 17<sup>th</sup> November, 2003 and the one of 28<sup>th</sup> April, 2009 are varied to accommodate distribution of the estate of the deceased in terms of the Consent order of 30<sup>th</sup> July, 2014
2. The Will of the deceased remains valid and the 2<sup>nd</sup> executor remains as executor of the deceased's estate.
3. The Will is varied to make provision for the Applicant to inherit from his father, the deceased.
4. The applicant is the biological son of the deceased and as provided by **Section 26 of Law of Succession Act Cap 160** entitled to inherit from the estate of the deceased in terms of the Consent order of 30<sup>th</sup> July, 2014
5. The Court record has not shown evidence to prove on a balance of probabilities that the 2<sup>nd</sup> executor concealed material facts and obtained the grant fraudulently with intent to exclude the applicant. When the true facts were disclosed the 2<sup>nd</sup> executor conceded to the distribution of the deceased's estate to include the applicant and shared the property of the deceased equally with the applicant.
6. Each party to bear its own costs
7. Any of the party may apply.

**READ AND DELIVERED IN OPEN COURT IN THE PRESENCE OF;**

Ms Maina holding brief for Ms Mugambi for the applicant

Ms Okullu holding brief for Ms. Mugai for the administrator.

**DATED AT NAIROBI THIS 10<sup>TH</sup> DAY OF MARCH, 2015**

**M. MUIGAI**

**JUDGE**