



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1285 OF 2012

IN THE MATTER OF THE ESTATE OF BETHWELL MUYA GAKURU (DECEASED)

RULING

1. The deceased herein died on 4th August 2011.
2. Representation to his estate was sought through a petition for probate of written will lodged in court on 19th June 2012 by one Grace Wambui Muya, who alleged that the deceased had made a will on 10th March 2004. A notice of the filing of the petition was published in the *Kenya Gazette* of 25th January 2013, being Gazette Notice No. 881.
3. Grant of probate was not issued after expiry of the thirty (30) days of the notice in Gazette Notice No. 881, for Deputy Registrar called for more details from the executor through a letter dated 5th April 2013 addressed to the firm of Messrs. Gachoka & Co. Advocates.
4. The letter of 5th April 2013 said in part:-

“This is to kindly advice (sic) that you avail (sic) the consents of all the beneficiaries named under the will that are not applying for the Letters of Administration.”
5. In securing compliance with the request on the said letter Messrs. Gachoka & Co, Advocates lodged at the registry a consent to letters of administration dated 24th April 2013 signed by some of the beneficiaries.
6. The registry thereafter on its motion caused to be issued, dated 23rd May 2013, citations to be served upon seven individuals. The seven entered appearance through Messrs. Mwangi Chege & Co, Advocates.
7. Subsequently, the seven (7) filed a Summons dated 5th August 2013 seeking that signatures on the will purported to be of the deceased filed in court on 19th June 2012 be scrutinized by the government document examiner and the said will be declared invalid.
8. On the basis of the said Summons Kimaru J. ruled on 11th February 2014 that the said will be availed to the government examiner at CID Headquarters to determine whether the deceased signed it. The parties were directed to furnish the CID with further documents bearing purported signatures of the deceased for comparison purposes. The matter was to be mentioned thereafter for further directions.
9. The report of the document examiner was presented to court on 30th July 2014, and Kimaru J.

availed it to the parties. The parties were given time to study the same and the matter was to be mentioned thereafter for further directions. When they appeared before me on 6th October 2014, the parties indicated to me that they wished to submit on the contents of the report, which they did on 25th November 2014.

10. The letter by the Deputy Registrar of 5th April 2013, was no doubt in keeping with Rule 7(6) of the Probate and Administration Rules for the petition on record was for a grant of letters of administration with the will annexed as the petitioner was not the executor named in the will.

11. Rule 7(6) states as follows:-

“Where the grant sought is one of letters of administration with a written will annexed the applicant shall satisfy the court before the issue of the grant that every executor appointed by the will who is living at the time of the application he has consented in writing to the issue of the grant to the applicant, or has renounced the executorship, or has been issued with a citation calling upon him either to renounce his executorship or to apply for a grant of probate of the will.”

12. The Deputy Registrar however did not fully comply with rule 7(6). The entire rule concerns the executor named in the will who has not applied for probate. The will in question appoints Evanson Mburu Wanjohi as executor, yet the petition for letters of administration with the will annexed is by Grace Wambui Muya. The citation envisaged in rule 7(6) should have been addressed to the said Evanson Mburu Wanjohi so that he could indicate whether he had renounced probate before a grant is made to the petitioner.

13. The Summons dated 5th August 2013 was premised on rule 16(1) of the Probate and Administration Rules, which states as follows:-

“Any person who wishes to bring to the notice of the court any matter as to the making or contents of the will of a deceased (whether written or oral); the rights of dependents or of persons who might be entitled to interests on the intestacy of the deceased, or any other matter which might require further investigation before a grant is made or confirmed, may file in any registry in which the application for a grant to the estate has been made or in the principal registry an affidavit giving full particulars of the matter in question.”

14. Clearly rule 16(1) does not provide for filing of applications for determination by the Judge or the court. It only envisages filing of affidavits for consumption by the Deputy Registrar. Such affidavits are not for purpose of asking the Deputy Registrar to make a ruling on any matter, but to assist her in making certain decisions – whether she can go ahead and process the grant, or she needs to issue further citations or ask for investigations on some aspect or other of the succession process.

15. If the applicants in the application dated 5th August 2013 intended to raise objections relating to the validity or otherwise of the will on record, then they should have availed themselves the opportunity granted to them by Gazette Notice 881 of 25th January 2013, by filing an objection, answer to the petition and petition by way of cross-application for grant. The application dated 5th August 2013 is in my view misconceived.

16. To move the matter forward, I hereby give the following directions-

- a. **The Deputy Registrar shall forthwith issue citations upon Evanson Mburu Wanjohi in terms of Rule 7(6) of the Probate and Administration Rules;**
- b. **Should the said Evanson Mburu Wanjohi fail to respond to the citation within the time that the Deputy Registrar shall give him or should he renounce executorship, the Deputy**

Registrar shall proceed to process a certificate of grant of letters of administration with the will annexed in terms of the petition lodged herein on 19th June 2012; and

- c. **The applicants in the application dated 8th August 2013 shall be at liberty to move for revocation of the grant to be made under (b) above once the same is made, if they are so minded, where they shall present the arguments that they raised before me on 25th November 2014 and in their application of 5th August 2013.**

DATED, SIGNED and DELIVERED at NAIROBI this 2ND DAY OF OCTOBER, 2015.

W. MUSYOKA

JUDGE