IN THE HIGH COURT OF KENYA AT MILIMANI

SUCCESSION CAUSE NO. 2065 OF 2005

IN THE MATTER OF THE ESTATE OF HANNAH KIRUI – DECEASED

RULING

1. These proceedings relate to the estate of Hannah Kirui who died on 30th August 2004. It is alleged that prior to her death, she had executed a document titled "last will and testament of Mrs. Hannah Kirui," on 10th June 2004. The document had been drawn by B.N. Kiptoo & Co. Advocates, and was purportedly by executed by the deceased in the presence of Joan Ng'eno and Magdalene Keiytany, in four of Nelson K. Mutei, Advocate.

2. This cause commenced on 28th July 2005, when an affidavit sworn on 26th July 2005 by Harrison Kirui was filed asking that a citation do issue upon Phelister Kirui. The said citation issued on 5th August 2005 requiring the said Phelista Kirui to propound, jointly with Hilda Chelimo and Moses Ngetich, the purported will of Hannah Kirui.

3. There is nothing on record to indicate whether the said citation was ever served on the citee, but a petition for grant of probate was filed on 17th October 2005 by Hilda Chelimo Kirui and Moses Rico Kipruto Ngetich, the purported co-executors of the will with the citee. A grant of probate of the written will of Hannah Kirui was made on 2nd May 2006 to the said Hilda Chelimo Kirui and Moses Rico Ngethei. The personal representatives appointed under the grant made on 2nd May 2006 filed a summons dated 23rd November 2007 for confirmation of the grant. The said application is yet to be disposed of.

4. On 4th April 2008, the cite, Phelister Jerotich Kirui, filed a summons of even date seeking revocation of the grant of probate made in the matter on 15th March 2006. She complained that the proceedings to obtain the grant were defective, that there was fraud and reliance on false statements and that the personal representative of the deceased were wasting the estate.

5. In her affidavit in support of the application, the citee alleges that the grant was obtained on the basis of an invalid will as at the time of the making of the alleged will the deceased did not have testamentary capacity to make a will as she was gravely ill. She also challenges the signature on the alleged will on the basis that she was familiar with the deceased's signature, and the signature on that document purported to be that of the deceased was not infact that of the deceased. She also argues that if the deceased did indeed sign the document, then the circumstances of execution must have be attended by undue influence or the execution was procured by fraud. She further states that the will did not appoint executors.

6. The applicant further argues that the properties listed in the cause as belonging to the estate of the deceased did not infact form part of that estate but rather the estate of Samuel Kirui. Samuel Kirui was the deceased husband of both the applicant and the deceased. The latter two had been appointed administrators of the estate of the said Samuel Kirui in **Nairobi HCSC No. 1654 of 1992,** the said grant

was confirmed on 12th November 1993 and the assets distributed in the will of the deceased in this cause were actually those listed in the certificate of confirmation of grant dated 12th November 1993. She further states that the rest of the assets were purchased with funds from the estate of Samuel Kirui, the said assets still formed part of the estate of Samuel Kirui and were not available for willing away by Hannah Kirui. It is argued that Hannah Kirui was just a trustee of their husband's estate and as trustee she had no dispositive powers over the said assets.

7. Her further argument is that she was never served with the citation, nor was she notified of the intention by the personal representatives to bring the proceedings. She further states that the personal representatives are not children of the deceased as Hannah Kirui had no children. She mentions that Hilda Chelimo, the first personal representative was a niece of the deceased, a daughter of a sister of the deceased called Zera Tigogo.

8. In support of the application, there are filed affidavits sworn by the children of the applicant, that is to say Joan Chemtai, Doris Chepkoech, Jackline Cherono, Dinah Chepchumba, Winny Chepkorir and Victor Kiptanui Ngetich. Their affidavits are uniform. There is also an affidavit sworn by Edwin Langat on 13th June 2009, where the deponent merely associates himself with the sentiments expressed by the applicant in her several affidavits.

9. A brother of the deceased husband of the applicant swore an affidavit on 13th February 2009. He is called John Kirui. He confirms that Hilda Chelimo and Moses Rico Kipruto were not the children of Samuel Kirui. Hilda Chelimo is infact said to have been the child of Hannah Kirui's sister, Zera Tigogo, who got pregnant while still in school, and the child was taken in by her sister Hannah Kirui to obviate her being humiliated. He states that the relationship between the two wives of Samuel Kirui was very cordial even after their husband died. He explains that problems only arose after the burial, when it transpired that Zera Tigogo had removed original documents from the house of the deceased and that her brother Dr. Yabs started to allege that his deceased sister had left a will which purported that most of the assets left behind by Samuel Kirui actually belonged to her. He says that the two personal representatives of the deceased went to court discreetly and that that act was disrespectful to Phelister Jerotich Kirui. His averments are supported by Obot Samuel Keter in his affidavit of 13th February 2009.

10. The respondents, the personal representatives of the deceased swore an affidavit on 20th April 2008. They aver that the will was made voluntarily by the deceased in their absence. They invite document examiners to scrutinize the signature on the document to confirm whether or not it is that of the deceased. They state that most of the assets were jointly owned in equal shares. They further state that the funds were shared equally between the two widows. They aver that the deceased recognized them as her children and supported and raised them. They also allege that there has been intermeddling with the estate.

11. The applicant responded to the personal representatives affidavit vide hers sworn on 25th May 2008. She denies the allegations made against her in the said affidavit and reiterates the averments made in her various affidavits.

12. I note that there is on record a summons to dismiss the revocation application. The said summons is dated 8th October 2008 and has been responded to by the applicant in the revocation application together with her children.

13. It was directed on 12th June 2013 that the application dated 4th April 2008 be disposed of by way of written submissions. Both sides have filed written submissions. Those by the applicant are dated 25th July 2013 and were filed in court on 26th June 2013. Those by the respondent are dated 24th August 2013 and were filed in court on 26th August 2013.

14. The submissions by the applicants raise two main issues – on appointment of executors and on whether some of the assets disposed in the will were available for testamentary disposal by the deceased.

The applicants submit that the purported will of the deceased did not appoint executors and therefore there was no legal basis upon which the respondents could have been appointed legal representatives of the deceased as executors. On the assets, it is submitted that some of the assets were not available for distribution as they no longer existed as they had adeemed, where the deceased's interest in them had united with that of the applicant by virtue of the principle of survivorship. The applicant's case is that since the will disposed of assets which did not exist, it was not valid and it could not form a basis for the making of a grant of probate.

15. The respondents on their part submitted that they had been properly appointed as executors, and so had the applicant. They state that they had no objection to the applicant being added to the grant as a co-personal representative. It is submitted that there was no material availed to the court to demonstrate that the deceased had no capacity to make the will. I note that the greater part of the written submissions by the respondents dwell on matters of fact that are not averred to in the affidavits on record.

16. The application dated 4th April 2008 is for revocation of the grant made in this cause. The law on revocation of grants is Section 76 of the Law of Succession Act. The instant application challenges the process in which the grant was made. Under Section 76, where the process of grant–making is defective in substance or the grant is obtained fraudulently or by reliance on misrepresentation or concealment of important and material matter, then that the grant become amenable to revocation.

17. The applicant argues that the process was flawed in two respects – one, that it was founded on an invalid will, and, two, that even if it the will was valid, the persons appointed as legal representatives were not named in the will as executors.

18. I should first consider whether or not the will was valid. The applicant, in a rather jumbled way, puts forward three propositions proportions - one, she argues that the deceased lacked testamentary capacity, two, that signature on the purported will was not that of the deceased and three, the will disposed of assets that did not belong to the deceased.

19. On the first proposition, the law governing testamentary capacity is ***Sections 5 and 7*** of the Law of Succession Act. The testator ought to be of a sound and disposing mind at the time of execution. He ought to be aware that he is making a will, where he is disposing of his own property, which he should know, to the persons that he is bound morally to provide for, which persons he ought to know. Any person alleging that the person executing the will did not have a sound mind ought to lead evidence to support that contention. No such evidence was led in this case.

20. A person may be of sound mind at the material time, but his soundness of mind may be compromised by undue influence, duress or mistake. This is the subject of *Section 7* of the Law of Succession Act. Again, no material was placed before me to convince me that the alleged will was obtained by fraud or undue influence or by mistake.

21. On the second proportion, *Section 11* of the Law of Succession Act is relevant. It requires that the will of the testator be executed by the testator or by someone else by his direction and in his presence. The purported signature of the testator in this case is challenged by the applicant. She says the signature on the purported will is not that of the deceased. Yet she provided no evidence to support that contention. She alleges forgery and fraud. These two are criminal acts that are outlined by the Penal Code. She ought to have reported the matter to the police, who would have subjected the signature to examination by handwriting experts. She did not do so and therefore there is nothing on record to prove that the said signature was a forgery. He who alleges must prove. It was incumbent on the applicant to prove her allegations against the respondents. It is my finding that she did not do so

22. On the gifts, that the deceased had disposed of property which did not belong to her, the legal position is that a will will not be invalid merely because it disposes of assets which did not belong to the deceased. Such will is not invalid, unless such assets are the only property distributed in the will.

23. I have perused the purported will. I have noted that it classifies the assets being disposed of into four

categories. Category 1 is of assets acquired jointly by the deceased and her husband before the applicant was married, category 2 is of the assets acquired by the deceased, the applicant and their husband, category 3 is of the assets acquired by the deceased with the applicant after their husband died and category 4 is of the assets that were acquired exclusively by the deceased. No doubt the deceased was justified in willing away property that she owned exclusively, but she could not in similar manner dispose of assets that she did not own exclusively such as that in categories 1, 2 and 3. Whether the property in these three categories was not exclusively owned by the deceased is a matter that I cannot determine in this ruling, for sufficient evidence has not been placed before me on both the ownership and mode of acquisition.

24. The conclusion then that I would make in the circumstances is that there is insufficient material upon which I can invalidate the purported will made on 10th June 2004. I hasten to add that if the applicant seriously wished to contest the validity of the will, she ought to have asked for trial of the facts through an oral hearing, for a determination in that respect cannot properly be made on the basis of affidavit evidence only.

25. On whether the respondents are named in the alleged will as executors, I have carefully and cautiously read through the said documents and I have not seen any clause where executors have been appointed. Consequently, there is no legal basis upon which a grant of probate of a written will could be made to the respondents. Quite clearly the process of obtaining the grant was defective to the extent that a grant of probate was made to persons who were not named as executors in the purported will.

26. In the end, I will make the following orders:-

a. That the grant of probate of written will made on 2nd May 2006 to Hilda Chelimo Kirui and Moses Rico Kipruto Ngetich is hereby revoked;
b. That the appointment of administrators shall be undertaken by court in a process involving all the members of the family on a date to be given at the delivery of this ruling.
c. That the costs of the application shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd DAY OF October 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Mukele advocate for the applicant.