



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**SUCCESSION CAUSE 1067 OF 1991**

**IN THE ESTATE OF MOSES KAPOYA OLE MOSIRO (DECEASED)**

**RULING**

This is the application dated 23.12.91 and amended on 12.2.92. The application which is brought by Kireru Kapoya seeks prayers that;-

- (a) The grant of probate given to Grace Nasieku Kapoya and Ruth Wanjiku Kapoya on 2.12.91 be revoked or annulled.
- (b) The confirmed grant of Probate of the estate of Moses Kapoya ole Masiro be granted to Kireru Kapoya and Grace Nasieku Kapoya and Ruth Wanjiku Kapoya jointly.

The application is supported by the affidavit of Kireru Kapoya sworn on 23.12.91. She deposes for the grounds she has stated in paragraph 9 (a) c) the alleged will is a forgery.

The probate of the will of the deceased Moses Kapoya Ole Mosire was given to Grace Nasieki kapoya and to Ruth Wanjiru Kapoya on 2.12.91. the deceased had three wives - the applicant and the two executrix of the will.

The application is opposed. As I understand the applicants case, all what she is saying that deceased did not have a will as the alleged will is a forgery. She is therefore not asking for revocation of the grant of probate on account of defect in proceedings to obtain the grant on the account of concealment of the material facts or on account of untrue allegations made by the petitioners she is infact praying that the grant be annulled as there is no will to back it.

Mr. Charles Gatonye Waweru (PW1) an advocate of the High Court of Kenya testified inter alia; that deceased gave him oral instructions to prepare a will and that he also gave him documents containing his wishes; that he went away with the documents and prepared a draft which he took to the deceased and after explaining the draft, deceased used to make amendments until deceased approved a final draft which deceased executed on 10.3.91 in the presence of Mr. Gatonye and Mr. Patrick Muchira Muthungu (PVV2) a Senior lecturer at Kenya Polytechnic Mr. Gatonye then took away the original will and deposited it in court on 25.4.91. Both agree that deceased was suffering from prostate cancer during the period they had known him but he was mentally sane. Dr. KC Patel (PW3 who was treating him since April, 1990 who diagnosed the disease testified that deceased mental faculty was good throughout the time he was under treatment. His medical report dated 30.1.92 (Ex( 10) shows that deceased's last admission was for the period from 24.4.91 to w7.4.91 and that deceased was conscious and alert during

the last admission.

Catherine Kiriru Kapoya (DW3) gave evidence in support of the application. Her sons Elijah Kapoya Misoro (DW1) and Raphael Sendero Kapoya (PW4) also gave evidence in support of the application. Each of them has given evidence why each believes that deceased did not make the will. Those reasons range from the fact that deceased was illiterate; deceased was not fluent in Kikuyu or in Kiswahili; deceased did not distribute the estate to all the beneficiaries; that deceased could not have made a will without informing his family and before people who had known him for only a short time; deceased was sick, deceased bequeathed some properties which do not belong to him.

Both Mr. Charles W. Gatonye and Patrick Muchira Mathagu swore Gatonye to prepare a will and that deceased later on 10.3.91 executed the will. they have in addition given sworn testimony to verify the fact that deceased made a will and executed it. the will is on the face of valid as it has a thumb print which PW1 and PW2 identified as that of the deceased and is witnessed and is witnessed by two attesting witnesses by two attesting witnesses. Both PW1 and PW2 gave evidence of their association of the deceased and disclosed that deceased wanted to sell part of his land to pay his medical bills and that PW1 had been asked to look for buyers.

Both of them have identified the thumb print of the deceased in the will. the applicant and her two sons do not say as a fact that the thumb print on the will is not of that of the deceased. They merely suspect that from their association with the deceased, deceased's sickness and the contents of the will, deceased may not have made the will.

Although deceased was sick, there is ample evidence that though he was physically sick he was however mentally all right up to the time of his death. None of the witnesses have disputed that. In particular none has disputed the evidence that at the time the deceased gave instructions to Mr. Charles Gatonye and at the time he executed the will he had no disposing capacity, the will was executed on 10.3.91 before deceased's last admission in late April, 1991 and before his death on 15.5.91 As S. 5(3) of the law of succession Act provides there is a rebuttable presumption that a person making or purporting to make a will is of sound mind and the burden of proving otherwise is on the person who alleges so (S5(4)). The applicant and her witnesses have not regutten the presumption and the evidence that deceased was of sound mind.

The question of illiteracy in Kiswahili does not hold water because it is admitted that deceased was a retired Game Ranger; that his three wives Kikuyus and that deceased would communicate in Kiswahili; kikuyu and kimaasai.

The will shows the reason why deceased did not give applicant and some of her sons as much as he gave his other two wives and sons. It has been admitted that deceased had a problem with the applicant arising from the fact that she was opposing sale of some land by the deceased. Indeed DW4 had lodged a caution against the sale.

Deceased has also a case with applicant in court. there was a case between them before the elders. Moses Lanet Nkoiliko (DW2) form Assistant chief of Ongata Rongai produced the decision of the elders regarding the land at Kiserian. The elders gave each of the three wives of the deceased 8 acres in the will. It is the evidence of DW2 that elders decided that deceased would keep the rest of his properties.

The applicant and her witnesses do not say that either Mr. Charles Gatonye or Patrick Muchira Mathagy influenced the deceased. Both have sworn that they have no interest in the estate. Being strangers in the deceaseds family they had no knowledge of the beneficiaries or the properties of the deceased and they would not have possibly concocted a will.

There is no claim by the applicant or her witnesses that any of the deceased's other two wives exerted undue influence of the deceased.

Where a testator bequeathes property which does not belong to him at the time of his death, the gift fails

by the principle of ademption (see para 8 (1) of the second schedule - page 49 of the law of succession Act. If testator bequeaths a gift to a person to whom that property belongs the principle of election applies (see paragraph 1(1) of the Third schedule to the law of succession Act) where the gift is adeemed or where the principle of election applies, that fact alone does not make the will invalid. The above answers the evidence of Raphael Sendere Kapolya (DW4) that in 20 acres bequeathed to him in the will belong to him and that some of the properties bequeathed in the will belong to other people.

Having considered all the evidence I am satisfied that the deceased made and executed the will already propounded. The application for revocation/annulment of the Grant is therefore dismissed with costs.

**E. M. Githinji**

**Judge**

24.3.99

Mr. Ragi present

Mr Magikoyo absent (served).