



**Kamandura (Suing as personal representative of Zuhura Wangare Omar
alias Zuhura Wangare Kamandura - Deceased) v Chege (Civil Appeal
385 of 2018) [2024] KECA 971 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 971 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 385 OF 2018
MSA MAKHANDIA, P NYAMWEYA & JM MATIVO, JJA
JULY 26, 2024**

BETWEEN

**FATUMA WAITHIRA KAMANDURA APPELLANT
SUING AS PERSONAL REPRESENTATIVE OF ZUHURA WANGARE OMAR
ALIAS ZUHURA WANGARE KAMANDURA - DECEASED**

AND

MARIAM NJOKI CHEGE RESPONDENT

*((An appeal from the ruling of the High Court of Kenya at Nairobi (R.
Ougo J.) dated 5th February 2016 in Succession Cause No. 1399 of 2003))*

JUDGMENT

1. On 5th February 2016, the High Court of Kenya at Nairobi (R.E. Ougo J.) delivered a ruling in Succession Cause No. 1399 of 2003 upon an application dated 18th August 2015 made by Mariam Njoki Chege, the Respondent herein, in which the learned trial Judge ordered Zuhura Wangare Kamandura, who was the original Appellant herein and executrix of the estate of Kamandura Ali (herein after “the deceased”), to distribute all assets remaining after payment of expenses and debts according to the respective beneficial interest therein under the will of the late Kamandura Ali within the next 40 days. In default, the Appellant was to surrender the original title deed to the Lands Registrar at Nairobi to enable the process of sub-division of the said property as per the wishes of the deceased to proceed at the estate’s cost.
2. th April 2015, found that the Respondent was entitled to inherit the deceased properties as willed in a will dated 15th September 2002, which was found to be valid. The said will bequeathed to the Respondent Plot 3/Dagoretti/Riruta/329 on which her matrimonial property with her late husband, who was a son to the deceased, was situate. However, despite the said ruling, the Appellant who



was the widow of the deceased had refused to distribute all assets remaining after the payment of expenses and debts according to the terms of the will, and in particular retained the original title deed of Dagoretti/Riruta/329 that needed to be changed to ensure all the beneficiaries got their respective titles. PARAGRAPH 3.

3. The Appellant opposed the application filed by the Respondent in the High Court in a replying affidavit dated 2nd September 2015, wherein she stated that the ruling by the High Court of 17th April 2015 conflicted with previous proceedings, as it treated the matter as a Probate and Administration Cause: that it relied on the will of her deceased husband and directed that she distributes the estate in accordance with the will which was impossible, and that it treats the estate as testate whereas the same is intestate. Further, that the will was found to have mistakes in that the property the subject matter of distribution was described as Riruta/Kawangware/329 instead of Dagoretti/Riruta/329; and her own property Gituamba/Thigio Block/1/52 Kiambogo was erroneously included as part of the estate of the deceased husband whereas she has been the sole registered proprietor of the same.
4. Musyoka J. approved the mode of distribution of the estate as intestate as there was no will annexed or probate, and the previous grant was revoked and a new grant issued in which the Appellant was appointed an Administratrix intestate. The Appellant then applied to the High Court for variation of the distribution of the portions given to the Respondent so that the Respondent's step children could get a share directly instead of being at the mercy of the Respondent, and she averred that the estate should proceed as intestate and reference to the will be avoided.
5. The trial Judge (R. Ougo J.) found that there is no dispute that the deceased left a will dated the 15th September 1992, which had not been contested in Court as being invalid, and that the Appellant could not on her own and her advocate nor could the Public Trustee decide that the will was invalid. It was also held that the Appellant had not applied for a review of the ruling of 17th April 2014 to address the alleged contradiction with the previous rulings and proceedings, and the fact still remained that there exists a valid will which has not been challenged.
6. Being aggrieved by this ruling of the High Court, the Appellant has now appealed to this Court and has raised six (6) grounds of appeal in a Memorandum of Appeal dated 8th October 2019 and lodged on even date, namely:
 1. The Learned Trial Judge erred and misdirected herself in delivering a ruling and making orders which were not only against the weight of evidence but also impossible to enforce. QUOTE
 2. The Learned Trial Judge erred and misdirected herself in failing to appreciate the fact that the Cause in the High Court related to an intestate estate and not a testate one because the will therein had been discarded as the same was defective and unenforceable.
 3. The Learned Trial Judge erred and misdirected herself when she failed to appreciate that the Certificate of confirmation of grant made by William Musyoka J. on 23rd September 2018 which approved the mode of distribution of the estate as intestate
 4. The Learned Judge misdirected herself in law and fact when she failed to appreciate that in view of the Honourable Judge's orders the Appellant was to distribute the Estate as the Administratrix of the Estate and not the executrix.
 5. The Learned Judge erred and misdirected herself in holding that by treating the Estate as Intestate was an attempt to 'rewrite' or alter the will of the Deceased when in fact there was no will to be executed.



6. As a result of the said erroneous ruling of the Learned Trial Judge it had become impossible to distribute the estate of the deceased by the Appellant who is the Administratrix of the estate.
7. We heard the appeal on this Court's virtual platform on 20th December 2023. Learned counsel Mr. Mutemi appeared for the Appellant, while learned counsel Ms. Akinyi Odhiambo appeared for the Respondent. The two counsel highlighted their respective written submissions dated 14th December 2023 and 15th December 2023. In commencing determination of the Appeal, the duty of this Court is reiterated as was set out in the decision of *Selle & Another vs Associated Motor Boats Co. Ltd & Others* (1968) EA 123 which is to reconsider the evidence, evaluate it and draw our own conclusion of the fact and law, and only depart from the finding by the Trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as held in *Jabane v Olenja* (1968) KLR 661 or where its discretion was exercised injudiciously as was held in *Mbogo & Another vs Shah* (1968) EA 93. PARAGRAPH 8.
8. The Appellant's counsel reiterated that the Appellant sought a rectification of the grant in order to effect fair distribution of the share of her son Ali Chege Kamandura, so as to accommodate the children of the Respondent's deceased co-wife, one Sofia Suleiman, and also sought to include her other son's wife one Asha Waithira Twaha in the distribution. It was her submission that the High Court misapprehended the key facts and law in the matter and failed to appreciate the previous rulings and finding in the matter, and that the trial Judge's decision to have the estate treated as testate when the grant of administration issued to the deceased Appellant had not been revoked was unreasonable and placed the estate in limbo.
9. Learned counsel for the Respondent on her part, while citing the decision on testamentary capacity in the case of *Banks vs Goodfellows* (1870) LR 5 QB 549 submitted that the will of the deceased was not challenged throughout the proceedings and it met both the formal and essential validity *Curryian Okumu vs Perez Okumu & 2 Others* [2016] eKLR that failure to provide for a beneficiary in a will does not invalidate a will as section 5 (1) of the Act gives the testator testamentary freedom; and in the decision in the case of *James Maina Anyanga vs Lorna Yimbiha Otarro & 4 Others* [2014] eKLR that in such circumstances the Court is empowered under Section 26 of the *law of Succession Act* to make reasonable provision for the dependent.
10. Counsel asserted that the law contemplated that the estate of a deceased would be subjected to the rules of intestacy in the absence of a will, and having found that the deceased left a valid will which was confirmed by the Court, the estate should be distributed according to the wishes of the deceased in his last will and testament dated 15th November 1992. Lastly, counsel urged that the Respondent be granted costs of and incidental to the appeal since she had to undergo expenses both monetary and in terms of time and energy as a result of the appeal and the accompanying applications filed.
11. It is prudent to clarify the proceedings in the High Court and the legal effect of the various rulings referred to in this appeal. The suit originated from a written will by the deceased who died testate on 5th November 1992 at Nairobi, which nominated Zuhura Wangare Kamandura as the executrix. Subsequently the executrix by her application dated 29th October 2002 renounced her executorship in favour of the public trustee. The public trustee was appointed on 1st April 2003 to the deceased's estate and subsequently applied for confirmation of the same on 8th September 2001. On 12th May 2009 Zuhura Wangare Kamandura sought revocation of the said grant vide their Summons for Revocation of Grant dated 12th May 2009, on grounds that the public trustee had failed to proceed diligently with the administration of the deceased's estate. The grant was revoked on 30th May 2012 and a fresh grant was issued to Zuhura Wangare Kamandura. The said administrator applied for confirmation of the said grant of



administration on 13th May 2013 the same was accompanied by schedule of distribution and consent by the deceased's children dated 6th May 2013.

- 12 The grant was finally confirmed on 23rd September 2013 to the effect that:
1. Plot No. 2 Dagoretti/Riruta/329 be shared equally between Hawa Wanja Kamandura, Halima Wanjiru Kamandura, Amina Wanjiku Omar, Zainab Wahu Kamandura, Twaha Kuria Kamandura and Fatuma Waithira Kamandura.
 2. Plot No. 1 Dagoretti/Riruta/329 to go to Zuhura Wangare Kamandura
 3. Plot No. 3 Dagoretti/ Riruta/329 to go to Mariamu Njoki and Twaha Kuria Kamandura.
 4. Farm in Laikipia Kiambogo F.C.S Ltd. 2 acres to go to Mariamu Njoki and 1 acre to go to Twaha Kuria Kamandura
 5. Ongata Rongai plot to be shared equally between Hawa Wanja Kamandura, Fatuma Waithira Kamandura, Halima Wanjiru Kamandura, Amina Wanjiku Omari, Mariamu Wambui Kamandura.
 6. Riruta Muslim village plot to go to Mariamu Wambui Kamandura
13. nd September 2014 seeking an amendment of the grant of letters of administration issued on 23rd September 2013, so as to correct “minor errors of omission” to avoid disputes between the beneficiaries and wastage of the estate. The High Court delivered a ruling dated 17th April 2015 on the application, in which it was held that the orders sought by the Appellant would have the effect of adding other beneficiaries and removing some properties from the list declared by the deceased in his written will, and declined to make the said changes for this reason. The Respondent thereupon filed the application dated 27th August 2015 which gave rise to the ruling that is the subject of this instant appeal.
- 14 We therefore find no inconsistency between the impugned ruling delivered by the High Court with previous proceedings and rulings, and on the contrary we find that the Appellant’s intention was to unlawfully effect changes to the deceased will by obfuscating the process of grant of probate with that of grant of letters of administration, and to benefit from non- disclosure of the existence of the will in the process. We also reiterate the legal position, as correctly found by the trial Judge, that a will remains valid unless legally revoked in the circumstances envisaged in section 18 and 19 of the [Law of Succession Act](#), namely by express revocation or alteration by a subsequent will or codicil to the will, by destruction of the will by the testator, and by the subsequent marriage of the testator.
15. In the premise, we find this appeal not to have merit and it is hereby dismissed. As the appeal arises out of a family dispute, each party shall bear its own costs of the appeal.

16 Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL



J MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original Signed

DEPUTY REGISTRAR

