



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 585 OF 2016**

**IN THE MATTER OF THE ESTATE OF IBRAHIM MUCHERU WAHOTHI (DECEASED)**

**OBADIAH MBURU MUCHERU.....APPLICANT**

**VERSUS**

**ANNE NYATHIRA MUCHERU.....1<sup>ST</sup> PETITIONER/1<sup>ST</sup> RESPONDENT**

**JOHN WARUI JOAKIM KAGWATHI....2<sup>ND</sup> PETITIONER/2<sup>ND</sup> RESPONDENT**

**RULING**

1. The deceased Ibrahim Mucheru Wahothi died on 5<sup>th</sup> September 2013 at Gatukuyu in Kiambu. On the basis that he had left a written Will executed on 6<sup>th</sup> December 2005, on 31<sup>st</sup> March 2016 the named executors Anne Nyathira Mucheru and John Warui Joakim Kagwathi (the respondents) petitioned this court for the grant of probate of written Will. The grant was issued on 6<sup>th</sup> June 2016. There is a pending application for the confirmation of the grant.

2. It does not appear disputed that, the deceased married five times during his life. The 1<sup>st</sup> respondent was his last wife. In all he had 23 children.

3. The applicant Obadiah Mburu Mucheru is the eldest son of the deceased. He filed the present application dated 7<sup>th</sup> September 2016 seeking the revocation of the grant issued to the respondents. He further sought that the respondent do provide accounts in respect of the estate of the deceased. The grounds on which the application was based were that the proceedings leading to the grant were defective in substance as the Will subject of the grant was forged and the consents of the beneficiaries were not obtained; that the grant was obtained fraudulently; that the grant was obtained by means of untrue allegation of a fact essential in point of law; and that it was only fair and just that the grant be revoked.

4. The applicant swore a supporting affidavit. He stated that following the death of the deceased, there was a burial dispute in **HCCC No. 25 of 2013** at Nairobi in which he was one of the plaintiffs. They had sued the 1<sup>st</sup> respondent. They wanted the deceased buried at his ancestral home at Gakoe and the 1<sup>st</sup> respondent's case was that the deceased had indicated in his Will that he wanted to be buried at Gatukuyu. The court asked that the deceased be buried at Gakoe. The 1<sup>st</sup> respondent appealed to the Court of Appeal in **Civil Appeal No. 68 of 2015**. The Court of Appeal allowed the appeal and the deceased's body was ordered to be buried at Gatukuyu. The applicant also made reference to **CM Criminal Case No. 5460 of 2013** at Makadara in which the 1<sup>st</sup> respondent was charged with forgery contrary to **section 350** of the **Penal Code** in relation to the Will. The applicant's case was that in all these three cases the Will was questioned. He therefore stated that such a Will should not have been the basis of the grant. His second complaint was that the respondents had not sought the consent of the beneficiaries in seeking the grant. Neither had they sought the participation of the beneficiaries in the filing of the petition. Thirdly, the 1<sup>st</sup> respondent had proceeded to dispose some of the deceased's assets from the grant. Fourthly, the respondents had left out certain properties (whose particulars he gave) when they petitioned for the grant.

5. The respondents opposed the application. They swore a joint affidavit on 1<sup>st</sup> November 2016 to state that following the death of the deceased, a copy of the Will was given to the applicant's advocates before the petition was filed, and therefore there was no concealment of the issue. Regarding the status of the Will, they stated that both the High Court and the Court of Appeal declined to address its validity and the criminal court had acquitted the 1<sup>st</sup> respondent. Therefore, they stated, the Will had not been found to be a forgery. The respondents made reference to the allegations that they had either sold part of the estate property or left out other properties. They stated that the deceased had sold some of the properties under reference, and that some of the properties in question belonged to the 1<sup>st</sup> respondent. The

other properties referred to were in the Will and were subject of the intended distribution.

6. Esther Wanjiku Mucheru was the second widow of the deceased. She opposed the application, and sought its dismissal to allow the matter to proceed to confirmation so that the estate can be distributed to the respective beneficiaries.

7. The application was brought under **section 76** of the **Law of Succession Act (Cap 160)** and **rules 44(1)** and **73** of the **Probate and Administration Rules**. Under **section 76** of the **Act**, a grant may be revoked, either on the application of an interested party or on court's own motion, where there is evidence that the proceedings to obtain the grant were defective in substance, or the grant was obtained fraudulently by the making of a false statement, or by the concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law. A grant may also be revoked if the grantee has failed to apply for confirmation or proceed diligently with the administration of the estate. Lastly, the grant may be revoked if the person to whom the grant has been issued has failed to produce to the court such inventory or account of administration as may be required.

8. The main issue raised by the applicant was that the Will relied on by the respondents to obtain the grant of probate was forged. He alleged that the deceased had not signed the Will, and that the Documents' Examiner had in his report confirmed this position. I note that the alleged forgery formed the basis of the charge against the 1<sup>st</sup> respondent in **CM Criminal Case No. 5460 of 2013** at Makadara Court. In the case, however, the 1<sup>st</sup> respondent was acquitted under **section 202** of the **Criminal Procedure Act** when, following several adjournments, the complainant failed to attend to testify.

9. It is also notable that the High Court and the Court of Appeal had declined to address the issue whether or not the Will was forged and whether or not the Will was valid, saying that this was a matter for the court dealing with succession dispute under the **Law of Succession Act**. Indeed, this is now the court seized of the issue regarding the forgery or the validity of the Will dated 6<sup>th</sup> December 2005.

10. **Section 7** of the **Act** provides that:-

**“7. A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void.”**

11. Under **section 109** of the **Evidence Act (Cap. 80)**, the applicant having alleged that the Will was not signed by the deceased and that it was a forgery, had the duty to prove these claims. He made reference to the report by Chief Inspector Alex Mwongera, Forensic Documents Examiner, who testified in the High Court and whose report stated:-

**“In my opinion the signatures were not made by the same author.”**

This meant, according to the Documents Examiner, that the Will was not signed by the deceased. Before the same High Court, an advocate Mr. Leo Masore Nyang'au was called by the 1<sup>st</sup> respondent to testify that he had known the deceased for a long time as his client, and that on the day in question at his office he drew the Will which the deceased executed, as did his two witnesses. The advocate had witnessed these signatures.

12. The applicant did not seek to call witnesses before this court to establish his contention that the Will was a forgery because either because it had not been signed by the deceased, or at all. He sought to rely on what had transpired in the High Court, in the Court of Appeal and before the criminal court at Makadara. My considered view is that, the issue has to be resolved on the basis of the recorded testimonies of the Documents Examiner and the advocate in the High Court. In doing so, the court has to consider that the 1<sup>st</sup> respondent was acquitted by the criminal court on the charge of forging the said Will.

13. The evidence of the advocate was direct evidence of a person who saw the deceased sign the Will in his presence, a Will that was witnessed by two people who had executed it at the same time. The advocate had known the deceased for long, and as a client. The Documents Examiner merely expressed an opinion on the signature on the Will, after comparing it with the deceased's known signatures. In **Elizabeth Kamene Ndolo –v- George Matata Ndolo [1996]eKLR**, the Court of Appeal reiterated that the evidence of handwriting expert is only opinion evidence. Such evidence, the Court said, has to be considered along with all other available evidence. It is ultimately up to the court to decide whether to believe or not to believe the handwriting expert's evidence, and to give reasons for the decision. Lastly, the Court observed that, usually eye witness evidence of attesting witnesses is superior to that of handwriting experts.

14. On the evidence available to me, I find that the deceased signed the Will that formed the basis of the grant of probate. Under **section 11** of the **Act**, I find that the deceased signed the Will before the advocate, and the Will was attested by two competent witnesses during the same occasion. There is therefore no legitimate basis to challenge the validity of the Will.

15. In reaching this decision, I am mindful that the deceased had the testamentary freedom under **section 5** of the **Act** to dispose of his property through the Will. The burden of disproving the Will was on the applicant and required cogent and tangible evidence. The burden was certainly higher than what would normally be required in a civil case (**In re Estate of Njonjo Ngunjuro Kihiga (Deceased) [2018]eKLR**). The burden was not discharged.

16. Now that the deceased left a valid Will, it was up to the executors to move to court by way of a petition to obtain the grant of probate. This is what the respondents did. They did not need the consent of any of the beneficiaries (**In re Estate of Abdulkarim Chatur Popat (Deceased) [2019]eKLR**). A look at the petition shows that the respondents complied with **section 51** of the **Act**.

17. I further consider that, the evidence received by the High Court, and also that contained in the affidavits herein, show that all along, even before the petition was filed, the applicant knew that the deceased had left a Will.

18. Lastly, the Will filed in court along with the petition contained the property that the deceased was disposing. The powers of the respondents, as executors, were limited to the property contained in the Will. If there is property that the deceased owned that he did not include in the Will, such property shall be the subject of intestate succession.

19. The allegation that the respondents have sold the deceased's estate was not particularised. Which was this property, and to whom was it sold, and when? Was the property the subject of the Will? These did not come out clearly in the affidavits by the applicant.

20. In conclusion, I find that the application for revocation is not merited. I dismiss it with costs.

21. I direct that the application dated 16<sup>th</sup> January 2019 for the confirmation of the grant of probate issued to the respondents be heard on **28<sup>th</sup> June 2021**.

**DATED and DELIVERED electronically at NAIROBI this 8<sup>TH</sup> APRIL 2021.**

**A.O. MUCHELULE**

**JUDGE**