**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 289 OF 2012**

**IN THE MATTER OF THE ESTATE OF JACOB GICHUNGE MUCHIRI (DECEASED)**

**HELLEN KARIMI NJURE.....1ST APPLICANT**

**SUSAN NKIROTE.....2ND APPLICANT**

**ANN KARIUKI.....3RD APPLICANT**

**PURITY KARAMBU.....4TH APPLICANT**

**MARY KANANU.....5TH APPLICANT**

**DAMARIS NKATHA KINOTI.....6TH APPLICANT**

**VERSUS**

**REGINA MUKIRI GICHUNGE.....1ST PETITIONER/RESPONDENT**

**FRIDAH KANINI GICHUNGE.....2ND PETITIONER/RESPONDENT**

**SAMWEL MUTWIRI.....3RD PETITIONER/RESPONDENT**

**JUDGMENT**

1. The deceased herein died on 18th January 2012 leaving behind a written will dated 21st June 2011. The petitioners herein petitioned for letters of Administration with will annexed on 17th May 2012. Grant was confirmed on 31st March 2014 by Makau. J.

2. The applicants herein filed Summons for revocation and/or annulment of grant on 5th December 2017. The said application was opposed by the 1st Petitioner and the 3rd Respondent.

3. On 18th February 2019 and by the Consent of the parties the Court ordered that affidavits and statement of the parties filed are admitted in evidence without calling the makers. The court also directed the parties to file their submissions.

**Applicants' contention**

4. The applicants herein are daughters of the deceased. They filed their statements on 4th July 2018. They challenged validity of the will. Their major borne of contention was that the will did not make and asked the court to make reasonable provision for them in the estate. They averred that the deceased factored in Plot No. **Meru Municipality/ Block I/38** which did not belong to him but belonged to **Elizabeth Gichunge (deceased)**(wife to the deceased herein) and that the will failed to disclose and distribute the following properties; M/V Reg. Nos. KAP 231W, KAP 964D, KAL 916B, KAP 027K and Plot in Kianjai (2 acres), 200 shares in Jacob Gichunge & Family Ltd.

5. They also stated that the petition for letters of Administration failed to disclose the amounts in the Bank accounts and that the Certificate of Confirmation of grant sought to distribute bank accounts that were not factored in the will i.e. Bank A/c's in Kenya Commercial Bank. C.I.C. bank, National Bank, Consolidated Bank & Barclays Bank. They stated that the amounts in these bank accounts were enormous and were illegally distributed amongst some of the beneficiaries of the estate.

6. They averred that it is over three (3) years since the certificate of Confirmation of grant was issued hence the grant issued is by law inoperative.

**Response by petitioners**

7. **Thuranira Atheru**, advocate of the High Court of Kenya Currently practicing at Thuranira Atheru & Co. Advocates stated that on 26th June 2011 he was practicing at the firm of Kiautha Arithi & Co. Advocates and was approached by the deceased who sought to draft a written will to his estate. That on the same day he proceeded to their offices located at Kcb Building 2nd Floor where he drafted the written will in the presence of **Stephen Titia Ruruma and Jeremiah M'Itimbiu M'Ithiaru**. He also stated that upon learning of the death of the deceased he called upon the executors and beneficiaries of the estate and read to them the written will in the presence of four (4) elders.

8. The averments made by Thuranira Atheru were confirmed/corroborated by **Jeremiah M'Itumbui M'Ithiaru** and **Stephen Titia Ruruma** in their statements wherein they stated that they hail from the same neighborhood as the deceased therefore childhood friends of the deceased. They asserted that they were present when the deceased herein attested/signed the written will and that the will was read to the deceased and the terms explained to them before he signed. They confirmed that the deceased was of sound mind and disposition at the time of executing the will.

9. **Samuel Mutwiri** and **Regina Mukiri Gichunge** also responded to the applicant's averments of reasonable provisions and the intestate properties through affidavits dated 15th February 2018 and 27th February 2018 respectively and statement dated 24th August 2018. They stated that Plot No. Meru municipality Block I/138 belonged to their mother but his father got the same in Succession Cause No. 184 of 2005. They however acknowledged that the same was not transferred to deceased at the time of making the will. They indicated that they called for a family meeting on 8th June 2012 where they deliberated as to the filing of the Succession Cause and all the beneficiaries signed a consent to this effect. They claimed this was replicated when all the beneficiaries were present during the confirmation of grant on 31st March 2014. They further stated that it is in this meeting that they also agreed as to the distribution of the properties that had been excluded in the will as follows; **M/V Reg.Nos. KAP 231W to go to Regina Mukiri, KAP 964D to go to Fridah Kanani**, **KAL 916B to go to Sammy Mutwiri, KAP 027K to go to Faith Kathure**, **Airtel Container to go to Damaris Nkatha**, **Soda Business to go to Faith Kathure**, **Petrol Business to go to Sammy Mutwiri**, **2 houses in Mwonge Estate to go to Faith Kathure & Sammy Mutwiri**, **Two parcels of land in Kianjai to go to Samwel Mutwiri**

10. They also submitted that the ground of reasonable provision under **Section 30 of the Law of Succession Act** can only be relied upon before confirmation of grant. They however conceded that monies in the Bank accounts have already been distributed amongst the beneficiaries. They aver that they have requested for transfer documents from the applicants herein to no avail and that that is what has precipitated the delay in distribution of the estate. They relied on **copies of the minutes of the family meeting, copy of the consent to mode of distribution, copy of the confirmed grant, copy of the grant in Succession Cause No. 184 of 2005.**

**Submissions**

11. Both parties have filed written submissions basically restating the averments made by the parties and I have considered the same.

**Analysis and Determination**

12. The challenge herein is not only the validity of the will but also that the petitioners acted contrary to the will and have failed to administer the estate. Claim that the will does not make reasonable provisions for the daughters is also a prominent argument. Based on these allegations, the applicants seek revocation or annulment of the grant herein. These matters constitute the issues for determination.

**Validity of the Will**

13. The provisions that relate to the validity of a written will are found in section 11 of the law of section Act. The same provides;

**11. No written will shall be valid unless -**

**(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;**

**(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;**

**(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.**

14. At the face of the will made by the deceased, there is nothing that substantially detracts from the law as shall be seen later. The will seems to be valid since it has been attested by two witnesses and was allegedly signed by the deceased. The evidence of Thuranira Atheru, Jeremiah M'Itumbui M'Ithiaru and Stephen Titia Ruruma also points out that the witnesses were present when the same was being made. The testator's state of mind was also not challenged thus the presumption that he was of requisite mental capacity to make the will settles.

15. The only challenge however is that *the will did not make reasonable provision for all the beneficiaries"*

**Intestate Properties**

16. I find it profitable to settle the issue of property not covered in a will first. Such property is intestate properties and is governed by the law on intestacy. See Nyamweya J. **In re Estate of Philip Nthenge Mukonyo (Deceased) [2018] eKLR** that;

**"……there may have been properties of the Deceased that were either not included in the will and codicil, or were acquired after such will and codicil had been executed. It must in this respect be emphasized that the grant of probate will only be made with respect to the property that the will and codicil provides for, and where the will or codicil did not dispose of all of the Deceased's properties, then the Petitioners and Objectors will have to proceed by way of intestacy with respect to any outstanding properties by way of a separate application or proceedings."**

17. From the record, the motor vehicles and the properties of the deceased which were not in the will were transferred to the respective beneficiaries during the family meeting. The properties form part of the deceased estate and ought to have been distributed by court after consideration of an application specific to the said properties albeit in these proceedings. This way the court will consider the requirements of the law that all parties have been involved and also take into account the bequests made in the will. Therefore, distribution of the intestate estate in a family meeting is not justified. Such is intermeddling with the estate of the deceased- an action frowned upon by this Honourable Court.

**Monies in the Bank Accounts**

18. Looking at the Summons for Confirmation of Grant and the resultant grant confirmed, clauses 48 to 67 gives the accounts that were not in the will. The further affidavit dated 19th March 2014 by the 1st petitioner sought to distribute the funds in the bank

accounts. It seems distribution was not disputed. However, the petitioner did not mention that the accounts were not listed in the will so as to bring them under the rules of intestacy. The distribution of the funds was obscure. This matter becomes grave given that there was a will which made bequests to some beneficiaries and not others; and now claims of lack of reasonable provision has been made.

19. Of greater concern is that even the Will only appointed mandatory signatories to the accounts stated in the will. Parties submitted on this issue upon invitation by the court in its ruling of 20th May 2019 as those terms occupied prominent space of importance in these proceedings. The golden rule is that words are to be construed in their ordinary natural sense so as to give it their primary meaning. However, the general principle may be departed from where the testator has set up his own dictionary (discretionary principle), or where the ordinary meaning does not make sense (the surrounding circumstances principle), or where the word has more than one meaning and testator has not specified the meaning intended, or where technical or special words have been used. The dictionary meaning of a specific term may be used also. See eminent literally work, **William Musyoka**, ***Law of Succession*****, Law Africa Publishing (K) Ltd, Pg. 129-131.** The terms mandatory signatories when made in relation to a bank account bears a particular connotation. I find help in ***Blacks Law Dictionary*** **9th Edition pg 1507** which defines signatory as;

**A person or entity that signs a document, personally or through an agent and thereby becomes a party to an agreement.**

20. Accordingly, appointment of mandatory signatories to accounts in the will does not mean they are mandatory beneficiaries of those accounts. As such, the mandatory signatories needed to sign documents on all transactions relating to the said accounts. I am aware that argument was advanced that these accounts held huge amounts of money which were transferred by the petitioners without the knowledge of the applicants. I am also aware that the petitioner argued that involving the mandatory signatories when administrators have been appointed would raise problems of practicality. I don't think so. My view is that complaints such as the ones in this application would have been averted had the mandatory signatories been involved. Although the applicants herein also signed consent to the confirmation of the grant I do not think the anomaly herein is a mere technicality which can be wished away or cured under article 159 of the Constitution.

21. To date, it is not clear the amount of money held in the accounts herein or the accounts to which the funds were disbursed if at all. The administrator is under a statutory obligation under section 83(e) and (h) of the Law of Succession Act to produce full and accurate accounts of all dealings with the estate properties, and of completed administration of the estate respectively. These issues raised call for accounts. In any case, for the court to come to a proper determination of the matter, I do find there is a need for the petitioners to provide an account of how the amount of funds in each account and how much was disbursed and to which beneficiaries and when. All bank documents to support all such transactions shall also be provided.

**Inclusion of inherited property**

22. It has been stated that the deceased herein was granted the property in **Meru Municipality Block I/38** in **Succession cause No. 184 of 2005 In the matter of the estate of Elizabeth Gichunge**. The only fault is that he never transferred the property into his name. The law is that once beneficiaries of and their respective shares in of the estate are ascertained, and the grant is confirmed by court, such share becomes beneficial interest of the particular beneficiary. The interest is now identifiable and registerable as such and may be sold or charged or exchanged or transmitted in will or given as a gift by the respective beneficiary. Failure to register it in his name did not take away his beneficial ownership of the property. In any event, the grant through which the property was granted to him has not been revoked or annulled. Accordingly, challenges on the property cannot be raised in these proceedings. I therefore find that the testator had the right and power to transmit the said property through a will. Nothing turns on this point.

23. In sum, recapitulation of the above matters justifies review of the certificate of Confirmation of grant to the extent that all intestate properties shall be distributed afresh by the court after parties file submission on distribution thereof. Similarly, the accounts which have been mentioned in the will were not assigned to any beneficiary. They shall also be distributed by the court after parties file submission on distribution as may be directed by the court. This task will not be completed without the accounts of properties listed in clauses 48 to 67 of the Certificate of confirmation of grant being rendered.

**Orders**

24. Accordingly, I order:

**a. That the intestate estate as well as the bank accounts mentioned in the will but were not testamentary transmitted shall be distributed by the court after the parries have filed submissions on distribution thereto. The Certificate of Confirmation of grant shall be accordingly amended.**

**b. That the petitioners shall in 30 days of today provide and file a full and accurate account stating the amount of funds in each account as at the date of death of the deceased, how much was disbursed and to which beneficiaries and when. They shall also file all transfer and or bank documents to support all such transactions within 30 days of today.**

c. **In light of the position taken by the court on the foregoing issues, the quest for reasonable provision shall be decided during distribution of the intestate estate. Parties shall address this issue in their submission**s. It is so ordered.

**Dated, signed and delivered in open court this 2nd day of July, 2019**

**F. GIKONYO**

**JUDGE**

IN PRESENCE OF

M/S Muriithi for petitioner

Nyenyire for 1st interested party

Nyenyire for Nyamu for applicant

M/S Kiome for 5th interested party.

F. GIKONYO

JUDGE