



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

SUCCESSION CAUSE NO 3421 OF 2014

IN THE MATTER OF THE ESTATE OF PETER NJENGA KINUTHIA ALIAS PETER NJENGA (DECEASED)

JOSEPH KINUTHIA NJENGA 1ST APPLICANT

ELIZABETH WANGUI NJUGUNA2ND APPLICANT

-VERSUS-

MONICAH NJERI THANDI..... RESPONDENT

RULING

1. Before the court for determination is the Notice of Motion dated 4th February 2021 filed under **rule 49 of the Probate and Administration Rules**. In the application, the applicants sought an order of the court directed at Monicah Njeri Thandi, ex-wife of Joseph Kinuthia Njenga to produce the original title of Dagoretti/Ruthimitu/587, being estate property, to enable an application to be made for the consent for the Land Control Board and registration of beneficiaries. The Applicants also prayed for removal/ withdrawal of a caution lodged by the respondent against the estate property.

2. The application was supported by the grounds on the face thereof and the affidavit sworn by the 2nd Applicant/Administrator on a similar date. It was her deposition that the respondent is the former wife of her co-administrator, Joseph Kinuthia Njenga, and had illegally lodged a caution against the deceased's estate. That the Respondent had refused to surrender the original title to the property, even though the property does not belong to the 1st Applicant/Administrator.

3. In response to the application the Respondent filed an affidavit dated 19th July 2021. She averred that the application came as a surprise to her because they were in the process of negotiation and that the parties had agreed to subdivide the estate to benefit herself and her children, consent of which had been signed by the applicants.

4. It was her contention that she was married to the 1st applicant and that together they have two issues. She stated that she lived with the 1st applicant in their matrimonial home, which she built, located in the estate property but that the 1st applicant had chased her away and brought another woman into their matrimonial home.

5. She deposed that the 1st Applicant's sisters, Elizabeth Wangui Njuguna and Sophia Wangari Njenga surrendered the original title of the estate property to her as they were opposed to the 1st applicant selling the property.

6. She refuted claims that she refused to release the title and stated that she was apprehensive because the 1st applicant was intent on disinheriting the children of his deceased sisters as they had not been specifically mentioned in the proposed mode of distribution dated 9th September 2019 and further that she and her children would be rendered destitute if they are not included as beneficiaries in the estate.

7. The 1st applicant swore a further affidavit in response thereto dated 5th August 2021 pursuant to leave of court given on 26th July 2021. He averred that there were no negotiations between the parties and that the Respondent had refused to hand over the original title to the estate, which she had taken from his possession without permission. He stated that the respondent was not a beneficiary and neither were his children.

8. He refuted claims that he was intent on disinheriting his deceased sisters children and indicated that they were included in the summons for confirmation of grant.

9. The application was canvassed by way of written submissions. The applicants submitted that the deceased was survived by his children;

- i. Joseph Kinuthia Njenga
- ii. Elizabeth Wangui Njuguna
- iii. Jane Njoki Njenga (deceased)
- iv. Rose Wanjiru (deceased)
- v. Lucy Wanjiru Njenga (deceased)
- vi. Mary Wangari Njenga
- vii. Sophia Wangare Njenga

The 1st Applicant argued that neither the respondent nor his children have any claim to the property of the deceased herein because they are not direct beneficiaries in the estate. It was on this basis that they came to the court seeking orders of removal of the caution and the release of the original estate title to allow for administration of the estate.

10. In rebuttal, the respondent submitted that the certificate of confirmation of grant dated 9th September 2021 offends **section 71(2) of the Law of Succession Act**, as it did not specifically mention the names of the 1st Applicants deceased sisters' children and their shares. She stated that to rectify this, she drew up a mode of distribution in which she specifically provided for the deceased's children, herself and her children in the following terms;

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| i. Joesph Kinuthia Njenga | -0.3Ha |
| ii. Monicah Njeri Thandi, John Njenga & Peter Thandi Kinuthia | - 0.150Ha |
| iii. Elizabeth Wangui Njuguna | -0.075Ha |
| iv. Children of Jane Njoki (deceased): Elizabeth Njoki & Peter Njenga | - 0.075Ha |
| v. Mary Wangare Njenga | -0.075Ha |
| vi. Sophia Wangare Njenga | -0.075Ha |
| vii. Children of Rose Wanjiru (deceased); Kevin peter & Alice Njeri | -0.075Ha |
| viii. Children of Lucy Wanjiru (deceased); Peter Okwilwa & Johnson Wanda | 0.075Ha |

11. She further submitted that she did not trust the 1st applicant to provide for her and her children and that she improved their matrimonial home in the estate property. She relied on **Rule 41(3) and 73** of the Probate and Administration Rules and urged the court to make reasonable provisions for her and her children in the interest of justice.

12. Having considered the pleadings and the submissions filed by the learned counsel, it is my view that the substantive issues for determination are;

- a) *Whether the respondent and her children are dependents/beneficiaries in the estate of the deceased*
- b) *Whether the applicants are entitled to the orders sought*

13. The record before this court indicates that the grant of letters of administration intestate was confirmed on 9th September 2019. The mode of distribution approved allowed Joseph Kinuthia Njenga to inherit half of the property while the other half was shared equally among Elizabeth Wangui Njuguna, Mary Wangare Njenga, Sophia Wangare Njenga, the children of Jane Njoki Njenga, the children of Rose Wanjiru and the children of Lucy Wanjiru Njenga respectively. It is therefore clear that the children of the deceased dependents were catered for in the distribution.

14. The Respondent in this matter did not file any protest against the confirmation of grant and the proposed mode of distribution.

15. The deceased to whom this estate proceedings relate died intestate and was survived by seven children, three of whom are now deceased. In this case the succession cause devolves under **Section 35** of the Law of Succession Act which provides that, "subject to the provisions of **Section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-**

- a) *The personal and household effects of the deceased absolutely; and*

b) A life interest in the whole residue of the net intestate estate. Provided that, if the surviving spouse is a widow, that interest shall determine upon her marriage to any person.

c) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death or in the case of a widow, remarriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

In accordance with the above provision, where a deceased person is survived by a spouse and/or children, the spouse and the children are entitled to the estate in exclusion of all other relatives.

16. The Respondent maintains that she ought to be considered as a beneficiary of the estate of the deceased by virtue of being the estranged wife of the 1st Applicant, a son of the deceased. She states that she is apprehensive that the 1st applicant will sell the property on which their matrimonial property is situated. **Section 29** of the Law of Succession Act provides that:

For the purpose of this part dependent means;

a) The wife or wives or former wife or wives and children of the deceased whether or not maintained by the deceased immediately prior to his death.

b) Such of the deceased’s parents, step parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half-sisters as were being maintained by the deceased immediately prior to his death and

c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

17. It is not in dispute that the Respondent is not a child of the deceased or directly related to him. The Applicants in their testimony stated that the respondent was indeed the estranged wife of the 1st applicant and they had been living apart for years. After their separation, the 1st applicant married another woman and sired eight children with whom he lives on the deceased’s property.

18. The principle of the law of succession is that it regulates transmission of a deceased person’s estate to his dependents. In the instant case, the Respondent is neither a beneficiary nor a dependent of the deceased according to the law of succession. Nothing on record supports her claim of being a dependent of the deceased

19. As far as the 1st Applicant’s children go, the Law of succession act is clear on the priority in inheritance matter. Section 29 requires that grandchildren provide proof of dependency to benefit from the estate of their deceased grandparent directly. In the case of **Re Estate of Joshua Orwa Ojodeh (2014) eKLR**, it was held that, **“the law ensures that widows and orphans are given first priority in terms of access to the property of a dead husband and father. The other relatives, including parents are relegated to a secondary position, and can only access the estate upon sufficient proof of dependency.** The Respondent has not produced any evidence in support of dependency of her children to the deceased.

20. The Respondent has approached this matter as if it were a dispute concerning distribution of matrimonial property and not a succession cause. The 1st Applicant is still alive and entitled to the deceased’s estate as a matter of priority against his own children. The Respondent, the wife and all the Children of the 1st Applicant share in the portion that will devolve to the 1st Applicant, and are not entitled to separate shares in the estate.

21. Consequently, it is clear that the Respondent has no interest in the estate of the deceased. She however, has an interest in the share due to the 1st Applicant, which she can claim before an appropriate forum. The notice of motion application dated 4th February 2021 is therefore allowed and, this court orders as follows;

- i. Monica Njeri Thandi do submit the original title of Dagoretti/Ruthimitu/587, to the court within 7 days for.
- ii. The Caution against Dagoretti/Ruthimitu/587 is hereby removed.

DATED SIGNED AND DELIVERED ON THIS 22nd DAY OF FEBRUARY 2022

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L.A. ACHODE

HIGH COURT JUDGE