



REPUBLIC OF KENYA



**In re Estate of Njenga Kibuika- (Deceased) (Succession Cause
166 of 2017) [2022] KEHC 11250 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 166 OF 2017**

RB NGETICH, J

MAY 26, 2022

IN THE MATTER OF THE ESTATE OF THE LATE NJENGA KIBUIKA- (DECEASED)

BETWEEN

HANNAH WANJIKU NJENGA 1ST PETITIONER

GODFREY GETHUDI NJENGA 2ND PETITIONER

AND

JAMES NJUGI NGENGA 1ST PROTESTOR

DANIEL KIARIE NJENGA 2ND PROTESTOR

HARRISON KIHKA NJENGA 3RD PROTESTOR

JUDGMENT

1. Hannah Wanjiku Njenga and Godfrey Gethudi Njenga filed petition dated 29th September 2017 for a grant of letters of administration intestate in their capacity as widow and son of Njenga Kibuika who died 20th April 2013.
2. In the petition, they listed the beneficiaries from the 2 houses and several properties comprising the estate of the deceased. The consent in support of the petition was signed by the beneficiaries from the 2nd house only. The matter was gazette on 29th September 2017.
3. A grant of representation was issued on 30th October 2017. The petitioners thereafter filed for the summons for confirmation of the grant dated 23rd May 2018.
4. Aggrieved by the mode of distribution, the protestors filed an affidavit of protest against the mode of distribution of the estate dated 17th October 2017.
5. The protestors averred that the mode of distribution as proposed in the summons for revocation is objected to by the 1st house for being discriminatory and for failure to include all beneficiaries from



- the 1st house. They further averred that Solai/Ndungiri Block 6/608 (Banita) and Marmenet/ Ol Jabet block 1/348 do not form part of the deceased estate.
6. They averred that the deceased left behind two houses with the first house having 12 units while the second house consists of 9 units.
 7. They listed deceased's assets as hereunder: -
 - i. Elburgon/ Arimi/ Ndoshwa Block 4/303,
 - ii. Elbourgon /Elburgon Block 9/277,
 - iii. Molo south/ Lwangenda block 6/28,
 - iv. Molo south Langwenda Block 18/83,
 - v. Marmenet Ol/Jabet Block1/ 348 1acre,
 - vi. Solai/Ndungiri block6/609 (Banita),
 - vii. Plot No. 8 site
 - viii. & Services Elburgon,
 - ix. Banks proceeds and Timesales 3390 shares
 8. They proposed equal distribution among the two houses. They stated that the 1st house allocated itself 1/3 share Plot No. 7172/21 Elbourgon Township, and 1 acre of Elbourgon/ Arimi/Ndoshwa block 4/312 on the grounds they were more than the second house.
 9. In response to the protest, the petitioner Hannah Wanjiku Njenga filed a reply dated 5th February 2019 and averred that Parcel No. Solai/Ndungiri block 6/608 (Banita) belongs to the deceased and the deceased owned 2 acres out of Marmenet/Ol Jabet block 1/348. She averred that the proposed mode of distribution by the protestors is unjust as the deceased had wished all his properties to be shared equally among the two houses.
 10. She further stated that Parcel No. Elbourgon/Arimi Ndoshwa Block4/303 is not available for distribution as she purchased the same with her money and attached an acknowledgement from the deceased.
 11. She filed a notice of motion dated 18th January 2019 seeking Harrison Kihika and James Ngugi to be restrained from collecting rent from Plot No. 7172/21 Elbourgon Town and Parcel No. 8 Sites & service Elburgon. The application was opposed through replying affidavit dated 4th March 2019.
 12. Directions were taken that the matter proceeds through viva voce evidence.

Protestor's Case

13. PW1 James Ngugi stated that he is the deceased's son and adopted his witness statement dated 13th February 2019 evidence. He also adopted his affidavit of protest sworn on 17th October 2018 on the mode of distribution. He also adopted the statement of account dated 6th November 2019. He stated that the administrator has not administered the estate property well as some properties included do not belong to the deceased. He reiterated the averments of the affidavit of protest sworn on 17th October 2018 on how he wishes the property to be distributed.
14. He further stated that there is no evidence adduced to show the 1st administrator purchased the property. He said the 1st administrator is also utilizing Parcel No. 312 and is not sharing the proceeds



- of the sale with other beneficiaries. He confirmed that in Plot No. 8 Site and Services he ejected the squatters, repaired the houses and put tenants who pay Kshs. 100/= per month.
15. PW1 further he stated that Plot No. 7172/21 Elburgon was given to the 1st wife by the deceased and though the plot is co-joined with 2 other people, the same was developed upon purchase. He said the children in the first house occupied the house as they attended school and the house was allocated to James Ngugi who vacated it when he acquired his property and the same was left under the care of Harrison.
 16. PW1 said they have never paid rent for the premises but used to send their parents some monthly maintenance from their own business as their parents had no source of income. He said the money in the bank and the shares be divided equally between the 2 houses.
 17. On cross-examination by counsel Nancy Njoroge, he testified that he purchased the property known as Solai/Ndungiri Block 6/608 and paid a total sum of Kshs 1,500/= for 1 share. He said 1 share was equivalent to 2 ½ acres. He also said his name was misspelt as James Ngigi in the share certificate. He said he obtained the title deed on 16th April 2015 after the death of the deceased.
 18. PW1 confirmed that the Oljabet farm was inherited by the deceased who held the property in trust for the other beneficiaries and the deceased share is 1 acre which should be distributed equally amongst the 2 houses.
 19. He further testified that plot 7172/21 was gifted to his mother the 1st widow and where they lived. He stated it has a shop in the front and 2 rooms and a store behind. The amount collected by the 1st widow from the rented rooms is Kshs. 1500/=.
 20. PW2 Harrison Kihunya Njenga adopted his affidavit of protest dated 17th October 2018, the protestors' bundle of the document dated 13th February 2019, and the Statement of Account sworn on 6th November 2019 and his evidence.
 21. On cross examination, he stated that the deceased wished to have most of his properties divided equally between the two houses. He said Plot No. 7172/21 should not be divided among the 2 houses but should be retained by the 1st house. He also said that the Oljabet farm was inherited and the deceased held it in the trust for the other beneficiaries. He proposed that the other beneficiaries be allotted their share and the remainder be shared between the 2 houses.
 22. PW2 said Parcel No. Solai 609 belongs to the deceased and was not gifted to Godfrey Gethudi and it should therefore be distributed equally between the two houses.
 23. On re-examination, he confirms Solai 608 belongs to James Ngugi and Plot No. 7172/21 was utilized by the 1st house since 1984 as a matrimonial home and is not therefore subject to distribution.
 24. PW3 Nganga Kibuika testified that his father was Nganga Kibuika and the deceased was his uncle by the virtue of being a brother to his father. He testified he was claiming a share of the portion held in trust by the deceased on behalf of his father.
 25. On cross-examination, he said he did not know where the land was but was informed by his deceased father the deceased was taking care of the land which was inherited and he needed a part of his share. He said he was 25 years old when his father died.

Petitioners' Case

26. DW1 Hannah Wanjiku testified she is the second wife of the deceased and the 1st wife Milcah Muthoni is deceased. She said the deceased built two matrimonial houses on plot Arimi/Ndoshwa 403. She



- further said she purchased the Kahingo plot and has been utilizing the same to the exclusion of the 1st house.
27. She proposed to have Molo South Langwenda Block 628, and Molo South Langwenda Block 18/83 be divided equally between the two houses and each house to retain the portion they have been utilizing.
 28. She testified that Mau Marmanet Ol Jabet Block 1/348 is 2acres. Which was inherited by the deceased. She proposed it be divided equally between the 2 houses.
 29. She further stated that the deceased purchased Solai Ndungiri block 608 and 609 but she could not tell how Block 608 came to be owned by James Ngugi. She added that the deceased gifted his son block 609 while 608 was given to the 1st son of the 1st house and thus both properties are not available for distribution.
 30. DW1 further stated that she assisted the deceased acquire plot no 7172/21 which was developed at the time of purchase. She said it is utilized by the 1st house but court to divide it among the 2 houses and shares and monies in the various banks to be distributed equally between the 2 houses.
 31. DW2 David Kuria Njenga adopted his witness statement dated 8th June 2020. He stated that Elburgon/ Arimi/ Ndorishwa block 4/312 was purchased by her mother the 2nd wife. He stated that most properties are utilized by the two families and wished the same to be confirmed as the mode of distribution. He said Ol Jabet farm measuring 2 acres was inherited and proposed that the 2 acres be distributed equally between the 2 houses. He also said Parcel No. 608 and 609 belonged to the deceased but had gifted them to James Ngugi from the 1st house and Godfrey Gethudi from the 2nd house respectively.
 32. He further said plot no. 7172/21 currently being utilized by Harrison from the 1st house belongs to the deceased and proposed to have it divided equally between the 2 houses.

Protestors' Submissions

33. The protestors submitted that the mode of distribution by the petitioners/administrators was unfair, unjust and discriminatory as only a few of the male children from the first house were given a share of the deceased property. They submitted that the estate of the deceased ought to be distributed in accordance with Article 40 of the [Law of Succession Act](#), considering the number of units in each house.
34. They submitted that plot no Elburgon/Arimi/ Ndoshwa 4/312 be divided equally between the 2 houses as the 1st administrator failed to adduced evidence to prove she acquired the same. With respect to plot no. Marmanet/ol Jabet 1/348 counsel contends the 3rd protestor Nganga Kibuika be given his share of 1 acre and the remainder be sub-divided equally between the 2houses.
35. On Plot No Solai/Ndungiri Block 6/608, the protestors submitted that it belongs to James Ngugi Njenga and was never owned by the deceased and does not therefore form part of the deceased's estate. They submitted that the Land Registrar who testified confirmed the parcel of land was registered in the name of James Ngugi and urged the Court to expunge the same from the deceased list of properties.
36. In respect to Plot Elburgon 7172/21 Elbourgon town, the protestors submitted that the same was gifted to the 1st widow by the deceased who lived with her family in the year 1967 in order to ease her movements; that the 1st widow later moved to her other matrimonial home in Elbourgon /Arimi / Ndoshwas block 4/303 in 1972, and the children of the 1st house continued utilizing the house as they attended school; to-date, the 1st house has been utilizing the plot; that the Elbourgon 7172/21 was the



first 2nd matrimonial home for the 1st wife and therefore not subject to distribution. The protestors further submitted that Elburgon 7172/72 is a 50*100 plot and is not therefore divisible.

37. The protestor's submitted that as the 1st house has agreed to have most of the properties divided equally between the 2 houses, the 1st house ought to retain Elburgon 7172/72 to have an equitable sharing of the estate.
38. In conclusion, the protestors submitted that the deceased had already settled the two houses in the different properties and urged the Court to uphold the same and distribute the estate as per section 40 of the *Law of Succession Act* and urged Court to distribute as per protestors mode of distribution which is in tandem with the deceased wishes.

Petitioners Submissions

39. The petitioners submitted that properties in contention are as follows: -
 - i. Elburgon/Arimi/Ndoshwa Block 4/312
 - ii. Solai/Ndungiri block 6/608 (Banita)
 - iii. Solai/Ndungiri block 6/609 (Banita)
 - iv. Parcel No. 7172/21 Elburgon township and Marment/OlJabet Block 1/348.
40. The administrators/petitioners submitted that Elburgon/Arimi /Ndoshwa Block 4/312 is not subject to distribution as the same was purchased by the 1st Administrator Hannah Wanjiku who gave the deceased Kshs190,000/= to purchase the plot; that it is evident by the fact that the property is utilized only by the 2nd house to the exclusion of the 1st house which is contrary to all other properties where they are utilized by the two houses in equal shares; and submitted that Elburgon/Arimi/Ndoshwa Block 4/312 be allocated to the 2nd house.
41. In respect to plot Solai/Ndungiri block 6/608 (Banita) the administrators submitted that it was purchased together with plot Solai/Ndungiri block 6/609 (Banita) by the deceased and they both form part of the deceased estate. They further submitted that since Solai/Ndungiri block 6/608 (Banita) was gifted to the James Ngugi by the deceased, parcel no Solai/Ndungiri block 6/609 (Banita) was also gifted to Godfrey Gethudi from the 2nd house and as such the same is not subject to distribution.
42. In respect to Parcel no 7172/21 Elburgon Township, the administrators submitted that it ought to be distributed between the two houses and further submitted that the plot was bought by the deceased jointly with 2 others and though it was utilized by the 1st house, they always paid rent to the deceased during his lifetime.
43. They submitted that Plot No. Marmanet/Ol Jabet Block 1/348 measuring 2 ½ acres inherited by the deceased ought to be distributed equally between two houses. She urged court distribute the estate as per the administrators' affidavit of distribution.

Analysis And Determination

44. I have considered evidence adduced and submissions filed. It is not disputed that the deceased died intestate and was a polygamous man who left behind two houses; the first wife Milcah Muthoni Njenga is deceased while the second wife Hannah Wanjiku Njenga is the 1st administrator herein.
45. The following were listed as properties comprising the deceased estate: -
 - a. Elburgon/ Arimi/ Ndoshwa Block 4/303,



- b. Elbourgon /Elburgon Block 9/277,
 - c. Molo south/ Lwangenda block 6/28,
 - d. Molo south Langwenda Block 18/83,
 - e. Marmenet Ol/Jabet Block1/ 348 1acre,
 - f. Solai/Ndungiri block6/608 (Banita
 - g. Solai/Ndungiri block6/609 (Banita),
 - h. Plot No. 8 site & Services Elburgon,
 - i. 7172/21 Elbourgon Township – 1/3 share
 - j. Elbourgon/ Arimi/Ndoshwa block 4/312 1 acre
 - k. Equity Bank Account no. xxxx
 - l. Kenya commercial bank Account no. xxxx
 - m. Barclays Bank of Kenya Ltd Account no. xxxx
 - n. Timsales Share Certificate No. xxxx (1695 shares).
46. From evidence adduced parties are in agreement to equal distribution of the properties between the two houses save for the following properties: -
- i. Elburgon/Arimi/Ndoshwa Block 4/312
 - ii. Solai/Ndungiri block 6/608 (Banita)
 - iii. Solai/Ndungiri block 6/609 (Banita)
 - iv. Parcel No. 7172/21 Elburgon township and
 - v. Marment/OJabet Block 1/348.
47. Elburgon/Arimi/Ndoshwa Block 4/312 is registered in the name of the deceased. The petitioner alleged that she gave the deceased Kshs 190,000 to purchase the property and she utilized the estate in exclusion of the 1st family. Further, the petitioner attached an acknowledgement where the deceased had acknowledged the plot was purchased with the petitioner's funds. I find the assertion by the Petitioner to be credible, I have considered from the evidence adduced by the parties most of the deceased property has been shared equally between the two families save for the plot acquired in respect of the various wives.
48. Plot nos. Elburgon/Arimi/Ndoshwa Block 4/312, and Parcel No. 7172/21 Elburgon township are wholly utilized by the 2nd wife and the 1st wife respectively in exclusion of the other; this has been the position during the lifetime of the deceased. There was no interference by either house on this mode of utilization and occupation during the deceased lifetime. I therefore find the deceased intended for each family to own the property in exclusion of the other house.
49. For that reason, I proceed to distribute Parcel Nos. Elburgon/Arimi/Ndoshwa Block 4/312 to the 2nd house and 7172/21 Elburgon township to the 1st house.



Solai/Ndungiri Block 6/608 (Banita)

50. This property is registered in the name of James Ngugi (deceased). A title deed was issued in 2015 after the demise of the deceased as per the green card it is evident the first registered owner was James Ngugi. James PW1 testified how he paid for the plot and adduced evidence of payment receipt. Despite the assertion by the petitioners that the same was owned by the deceased, no evidence has been adduced to show the same belonged to the deceased. I therefore find that this property does not form part of the deceased estate.

Solai/Ndungiri Block 6/609 (Banita)

51. The protestor alleged that this forms part of the deceased estate, while the administrators allege the same was gifted to the Godfrey Gethudi by the deceased before his death. However, there is no evidence adduced to show the same was gifted to Godfrey by the deceased. The title document to the suit land is in the name of the deceased. The property therefore forms part of the deceased's estate and is subject to distribution according to Section 40 of the *Law of Succession Act*.

Marmet/OlJabet Block 1/348

52. There is no dispute that this is inherited property. The parties have no dispute on the mode of distribution. They both agree the same ought to be distributed equally between the 2 houses, however, the only contention is on the acreage that is available for distribution. The petitioners claim the parcel measures 2 ½ acres while the protestors argue it measures 1 ½ acre. The protestors availed PW3 a nephew to the deceased who alleged he is entitled to a portion of the estate by virtue of the fact that the deceased held the property in trust for them. This property is registered in the name of the deceased and if he was holding part of it in trust for his brother's children, that would have been indicated in the title deed. In the absence of that, PW3's claim of a portion has not been proved. The land to be divided equally between the two houses.

53. The deceased being polygamous, Section 40 of the Succession Act govern distribution of his estate but save for the 5 above assets whose distribution was contested, the beneficiaries agreed to have them shared equally between the two houses.

54. I therefore allow distribution of the estate of the deceased as hereunder: -

- 1) Plot Nos. Elburgon/ Arimi/ Ndoshwa Block 4/303, Elbourgon /Elburgon Block 9/277, Molo South/ Lwangenda block 6/28, Molo south Langwenda Block 18/83, Marmenet Ol/Jabet Block1/ 348 1acre, Solai/Ndungiri Block 6/609 (Banita), Plot No. 8 Site & Services Elburgon, together with the shares in Equity Bank Account No. xxxx, Kenya Commercial Bank Account No.xxxx, Barclays Bank of Kenya Ltd Account No. xxxx and Timsales Share Certificate No. xxxx (1695 shares) be distributed equally between the 2 houses.
- 2) Plot No. Solai/Ndungiri Block 6/608 (Banita), is not subject for distribution.
- 3) 7172/21 Elbourgon Township – 1/3 share to be allocated to the 1st house.
- 4) Elbourgon/ Arimi/Ndoshwa Block 4/312 1 acre to be allocated to the 2nd house.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT KIAMBU

THIS 26TH DAY OF MAY, 2022

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RACHEL NGETICH

JUDGE

In the presence of:

Kemboi - Court Assistant

Ms. Nancy Njoroge for administrators

Ms. Nganga for Objectors

