



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 445 OF 2015

IN THE ESTATE OF THE LATE NGUGI NJOROGE

ALIAS GEORGE ALEX NGUGI NJOROGE (DECEASED).

DAMARIS NJERI NGUGI.....1ST PETITIONER

FRANCIS NJOROGE NGUGI.....2ND PETITIONER

-VERSUS-

RUTH NJERI NGUGI.....OBJECTOR

JUDGMENT

BACKGROUND

1. The deceased herein died on 1st June 2014 and was survived by the following beneficiaries: -

1st house:

- a) Samuel Njoroge Ngugi - son;
- b) Mary Nyambura Ngugi - daughter;
- c) David Njega Ngugi - son;
- d) Sally Nduta Ngugi - daughter.

2nd House

- a) Damaris Njeri Ngugi - Wife
- b) Cecilia Wanjiru - daughter
- c) Eunice Wairimu - daughter
- d) Francis Njoroge - son
- e) Lydia Nyambura - daughter
- f) Hannah Wambui – daughter

2. He left behind the following assets;

i. Njoro/Njoro Block 3/58 (Mwigitio);

ii. Rare/Teret Block 1/175;

iii. L.R. No. 12849/56

iv. Safaricom Kenya Limited Shares

v. Amount in Kenya Commercial Bank Limited A/C No. 1101878851;

vi. Shares in Kenya Commercial Bank

3. Grant of letters of administration intestate dated 4th April 2018 was issued on 1st February 2017 to **Damaris Njeri Ngugi, Francis Njoroge Ngugi** and **Samuel Njoroge**. The 1st and the 2nd administrators filed application for confirmation of the grant.

4. The 1st and 2nd administrators proposed mode of distribution and signed consent as follows: -

i. Njoro/Njoro Block 3/58 (Mwigitio) was to be shared in equal shares among **Samuel Njoroge Ngugi, Mary Nyambura Ngugi, David Njenga Ngugi and Sally Nduta Ngugi**;

ii. Rare/Teret Block 1/175 in equal shares among **Damaris Njeri Ngugi, Cecilia Wanjiru, Eunice Wairimu, Francis Njoroge, Lydia Nyambura and Hannah Wambui**;

iii. L.R. No. 12849/56 in equal shares among **Damaris Njeri Ngugi, Cecilia Wanjiru, Eunice Wairimu, Francis Njoroge, Lydia Nyambura and Hannah Wambui**;

iv. Safaricom Kenya Limited Shares in equal shares among **Samuel Njoroge Ngugi, Mary Nyambura Ngugi, David Njenga Ngugi and Sally Nduta Ngugi**;

v. Amount in Kenya Commercial Bank Limited A/c No. 1101878851 in equal shares among **Damaris Njeri Ngugi, Cecilia Wanjiru, Eunice Wairimu, Francis Njoroge, Lydia Nyambura and Hannah Wambui**.

5. **Ruth Njeri Ngugi** filed an affidavit of protest dated 4th August 2018 opposing the mode of distribution proposed by the 1st and the 2nd administrators in the affidavit dated 29th March 2018. Her proposed mode of distribution was that her and her children should inherit land parcels Njoro/Njoro Block 3/58 (Mwigitio) and L.R. No. 12849/56 as this is where her two matrimonial homes are and also benefit from the Safaricom shares. She proposed that the petitioner and her children to inherit land parcel Rare/Teret Block 1/175 and the amount in Kenya Commercial Bank and shares in Kenya Commercial Bank.

6. The case proceeded by way of viva voce evidence, with the protestor and 1st petitioner testifying. They never called any witness.

PROTESTOR'S EVIDENCE

7. The protestor **Ruth Njeri Ngugi** reiterated the averments contained in the affidavit of protest; testified she was not living with the deceased at the time of his death as they had divorced and had 4 children namely, **Samuel Njoroge Ngugi, Mary Nyambura Ngugi, David Njenga Ngugi and Sally Nduta Ngugi** but before their divorce they had built their permanent matrimonial home and some rental houses on land parcel No. 12849/56, IR 74705 South of Njoro township and after the divorce, the deceased retained all the properties they had acquired together which include; land parcels Njoro/Njoro Block 3/58 (Mwigitio) where they lived before they moved to L.R. No. 12849, L.R. No. 12849/56, Rare/Teret Block 1/175 and Rare/Teret Block 1/615 was sold before divorce proceeding.

8. The protestor testified that **Damaris** and her family stays in Njoro town at Huruma Estate where she stayed with the deceased. Her proposed mode of distribution was as per the affidavit of protest. During cross examination she stated that she separated with the deceased in the year 1993 and divorce was granted in the year 2000. She said the deceased was not maintaining her and her children after divorce and she did not make a follow up of division of properties. She further confirmed that the 1st petitioner has children in college and that the deceased was buried on land parcel L.R. No. 12849/56.

1ST PETITIONER'S EVIDENCE

9. The 1st petitioner **Damaris Njeri Ngugi** testified that she got married to the deceased in the year 1993 and lived together for 22 years. She said they initially lived on land parcel No. 12849/56 but due to the post elections violence, they moved out of the said land in the year 2008.

10. She further testified that she was left with two university going students while the protestors children were all adults who had completed school. She confirmed that during the subsistence of her marriage to the deceased, they did not purchase any property with the deceased and that she found the properties she listed at the time she got married.

11. The 1st petitioner stated that she lives in her own property in Njoro which she didn't include in the petition as the same was registered jointly in her name and her late husband, the same having been purchased in the year 1994. She further stated Land Parcel No. Rare/Teret Block 1/175 was sold during the subsistence of her marriage but the deceased used all the money.

12. In her submissions, the protestor relied on **Section 26 and 29** of the **Law of Succession Act** to prove her dependency in the estate of the deceased in the position of a former wife.

13. The 1st Petitioner, **Damaris Njeri Ngugi**, reiterated the averments contained in the affidavit in support of the application for confirmation.

14. The petitioner in her submissions relied on **Section 3(1) of the Law of Succession Act** which defines a wife to include a separated wife and doesn't include a divorced wife; and **Section 40** of the **Law of Succession Act** determine the number of units, dependants.

15. She further submitted that **Section 29** defines who is a dependant and such a dependant has to make an application for provision out of the estate of the deceased pursuant to **Section 26 of the Act** and submitted that the protestor did not make any application. She argued that the 1st house has 4 units.

16. The Petitioners quoted "**The law of succession**" by **Justice William Musyoka** where he states at page 100 as follows: -

"For the purpose of the rules of intestacy, a divorced spouse has no rights to the intestate's estate; a judicially separated spouse is, however, entitled. This applies to all legal marriages whether contracted under statute or customary law. Customary law marriages include the woman-to-woman marriage arrangements. Under Section 3(1) of the Law of Succession Act, a separated wife is considered a wife for succession purposes. The divorced spouse may make a claim under the family provisions in Section 26 of the Law of Succession Act for reasonable provision from the estate. The definition in Section 29 of a dependant for the purpose of Section 26 includes a former wife or former wives recognized as such and protected under Section 3(5) of the Law of Succession Act."

17. The petitioner further submitted that the applicable section of the law is **Section 40** since the deceased died intestate and had a polygamous family, the mode of distribution thus should be distributed as per the units of each household. The petitioner supported their mode of distribution as per the supporting affidavit in the application for confirmation of grant.

ANALYSIS AND DETERMINATION

18. I have considered evidence adduced by the parties herein and submissions filed. There is no dispute that the deceased had married the protestor as the first wife but separated with her in 1993 and that they were formally divorced in the year 2000. In her testimony, the petitioner married the deceased in 1993 and at the time of his death, he had lived with her for 22 years.

19. I note that in the proposed distribution, the petitioners have not included the protestor as one of the units in the first house. The 1st petitioner is added as a unit in the second house making the total units 5. It is not disputed that the protestor's children are deceased's children and are entitled to inherit his property. Upon considering averments by the parties and evidence adduced in Court, I consider the following to be in issue: -

20. I have perused the affidavit in support of confirmation of grant filed by the administrators who include 1st petitioner herein, and note that the protestor is added as one of the units in the first house. That confirms that she is recognised as one of the units in the first house and the submissions in respect to that issue amounted to be submitted against the petitioner own stand in respect to the issue. How else would she be entitled to property she is proposing if she is not considered as a dependant? If in her averments she recognised her as a unit then she should not have argued otherwise in her submissions. From the foregoing, I do not therefore consider that as an issue for determination by this Court.

21. What I consider to be in issue is whether plot number 12849/56 should go to the protestor. It is not in dispute the deceased left behind the following properties land Parcels; Njoro/Njoro Block 3/58 (Mwigitio), L.R. No. 12849/56, Rare/Teret Block 1/175, Kshs. 212, 593.75 in Kenya Commercial Bank as per statement ending 29th June 2018 and Shares in Kenya Commercial Bank and shares in Safaricom.

22. The protestor confirmed that she has no issue with the petitioner getting money in Kenya Commercial Bank and shares in Kenya Commercial Bank and her getting Safaricom shares. This is in agreement with petitioner's proposal.

23. The petitioner and the protestor have both agreed in their evidence that land Parcel No. Njoro/Njoro Block 3/58 (Mwigitio) measuring approximately 1.16Ha should go to the 1st house. Land parcel No. Rare/Teret Block 1/175 measuring approximately 0.895Ha should go to the 2nd house, Kshs. 212, 593.75 in Kenya Commercial Bank as per statement ending 29th June 2018 and dated 13th July 2018 the same should go to the 2nd house to facilitate the education of the children still attending college and university and Shares in Kenya Commercial Bank and shares in Safaricom.

24. In respect to land parcel no. L.R. No. 12849/56 a prime plot near Egerton University which is developed with rental income the petitioner and protestor each feel entitled to inherit. The protestor testified that she moved to plot in 1992 and moved out in 1993 when she separated with the deceased. She stated that she treated it as her matrimonial home and that she would like to inherit the property and live there with her children.

25. The petitioner confirmed that the protestor lived in parcel L.R. No. 12849/56 before separating with the deceased and that she was taken to live in the plot in 1993 when she got married to the deceased and they lived there up to year 2008 when they moved out due to post-election violence. It is the 1st petitioner's testimony that while living in the plot together with her late husband, they processed title deed and added 4 rental units. Further that her husband was buried in the plot and that she would want to be given the plot as she would not want to give out her husband's grave; further that they also get rental income from it and she will not deny protestor's children right to visit the grave.

26. From the evidence adduced by both the protestor and the petitioner both lived on Land Parcel No. 12849/56 at different times and treat it

as their matrimonial home during marriage with the deceased. Each is not living in the plot now but each claim to be giving the plot as they lived in it as matrimonial property at different times and that is where the deceased was buried;

27. **FINAL ORDERS**

1. Plot Land Parcel No. 12849/56 be shared equally between the protestor and the petitioner.
2. Each party to bear own costs for the succession cause.

Judgment dated, signed and delivered via zoom at Nakuru this 18th day of December, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Mr. Mbiyu holding brief for Mr. Mutonyi counsel for the 1st and 2nd Administrator

Ms. Nancy Njoroge counsel for the protestor