



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

SUCCESSION CAUSE NO. 161 OF 2015

IN THE MATTER OF THE ESTATE OF NDIRITU

WAITITU alias NDERITU WAITITU (DECEASED)

MARY NJOKI NDERITU.....1ST ADMINISTRATOR

ISAAC MAINA NDERITU.....2ND ADMINISTRATOR

AND

MARY WAMBUI NDERITU.....3RD ADMINISTRATOR

NDERITU KIARIE NDERITU.....4TH ADMINISTRATOR

RULING

1. A Grant of Letters of Administration was issued on 16th June 2017 to the present Administrators , namely, **Mary Njoki Nderitu, Isaac Maina Nderitu, Mary Wambui Nderitu** and **Nderitu Kiarie** (1st to 4th Administrators respectively) in part, to accommodate the 3rd and 4th Administrators who had protested their exclusion in these proceedings. The 1st and 3rd Administrators are the 1st and 2nd wives/widows of the deceased herein, while the 2nd and 4th Administrators are their respective sons.

2. In spite of a consent order recorded by the parties on 27th February, 2017, the Administrators appeared unable and/or unwilling to agree on how to manage the estate pending determination of the matter. There was acrimony concerning the collection and distribution of income from rental properties which comprise the estate of deceased, as well as the true value of the property.

3. Consequently , the court directed that valuations be carried out by valuers appointed by the respective disputants. Eventually, counsel representing the parties proposed that the question of distribution of the estate be dealt with as a way out of the stalemate. Pursuant to the directions given in that regard, all the Administrators filed affidavits proposing their preferred mode of distribution. The 3rd, and 4th Administrator, as well as a beneficiary **Nderitu Miguongo Waititu**, a son of the 3rd Administrator filed submissions. I do not see any submissions filed by the 1st and 2nd Administrators.

4. Due to the court's involvement in presiding over **Narok Election Petition No. 3 of 2017 Nkoidila Ole Lankas and Another V IEBC and Others**, and the subsequent transfer of the Judge, the present ruling has been delayed.

5. The court has now reviewed the material placed before it by the different parties. The 1st and 2nd Administrators relied on their own valuation of the property constituting the estate and proposed distribution as follows:-

1. Land Parcel No. **DAGORETTI/KANGEMI/509** measuring 0.10. Ha (developed) and valued at Shs 20,600,000/=, to the **family** of **1st and 2nd Administrators**

2. Land Parcel No. **DAGORETTI/KANGEMI/678** measuring 0.10. Ha (developed) and valued at Shs 13,500,000/=, to devolve upon the **family** of the **3rd and 4th Administrators**.

3. Land Parcel No. **NYANDARUA/SOUTH KINANGOP/285** (undeveloped) measuring 5.0 Ha and valued at Shs 900,000/=, to be **shared equally** by the **two houses** and the **widows** to share the one plot previously reserved for the deceased.

4. Land Parcel No. **NYANDARUA/NDARAGWA URUKU BLOCK 1 (SUMBEGO)/112** (undeveloped) measuring 2.21 Ha and valued at Shs 2,000,000/=, to devolve upon **all the daughters** of the deceased in **both families**.

5. Land Parcel No. **MAHIGA/KAMOKO/1177** planted with tea bushes, measuring 0.25Ha and valued at Shs. 950,000/= be **shared equally between the houses**.

6. Two market stalls described as **F205 Upper** and **F205 Lower** at Kangemi market to be **shared** by the **widows**.

6. The 1st and 2nd Administrators have referred to a property comprised of two plots described as **Kiambaa Kawaida** in Kiambu but no particulars or value proffered.

7. The 1st and 2nd Administrators dispute the assertions made by the 3rd and 4th Administrators to the effect that the deceased left a will setting out the manner in which his property ought to devolve. The 3rd and 4th Administrators relied on the said disputed documents dated 3rd December 1983 and 15th February, 2014 which they claim to contain the last wishes of the deceased and the minutes of alleged family meetings after the deceased's death.

8. The 2nd widow (3rd Administrator) her son (4th Administrator), her daughters, a brother to the deceased, **Joseph Kariuki Waititu**, two cousins to the deceased **John Waititu Ndirangu** and **Evanson King'ori Ndirangu**, three sons of the deceased, namely **Kiarie Nderitu Waititu**, **Wachira Nderitu** and **Waititu Miguongo Nderitu**, a nephew to the deceased, **Samuel Njau Wachira**, and a son of the 1st Administrator, **Samuel Mugi Nderitu** all swore affidavits. These affidavits substantially support the 3rd and 4th Administrators' proposed mode of distribution which is based on the alleged wishes of the deceased.

9. It is proposed by the said Administrators therefore that:

1. Land Parcel No. **DAGORETTI/KANGEMI/509** (developed) valued at Shs 20,000,000/= devolve upon the 3rd Administrator **for life** and thereafter to her children.

2. Land Parcel No. **DAGORETTI/KANGEMI/678** (developed) valued at Shs 14,000,000/=, to devolve upon the **sons** of the deceased equally.

3. Land Parcel No. **NYANDARUA/SOUTH KINANGOP/285** being made up of **16 equal portions** and valued at Shs 15 million by the deceased's **13 sons** and the **widows** in the proportions **shared out** by the deceased prior to his death.

4. Land Parcel No. **NYANDARUA/NDARAGWA URUKU BLOCK 1 (SUMBEGO)/112** valued at Shs 1.4 million be **shared equally** by the **daughters** of the deceased.

5. Land Parcel No. **MAHIGA/KAMOKO/1177**, with tea bushes, valued at Shs 700,000/= to be **shared equally** by the deceased's **13 sons**.

10. The 3rd and 4th Administrators did not make reference to the market stalls but the beneficiary **Waititu Miguongo Nderitu** stated that the stalls were operated by his mother the 3rd Administrator, and that these should, together with the deceased's shop at Kangemi, devolve upon the 3rd Administrator. His other proposals in his affidavit filed on 13th November, 2017 are similar to the 3rd and 4th Administrators' proposals, save that he proposes that he and 2nd Administrator be entrusted to hold the **Kangemi Plot 678**, and **Mahiga/Kamoko** plot for the benefit of the two families, and that the land in Kinangop be distributed equally among the **sons** of the deceased and his widows. The beneficiary's submissions restate this position.

11. Although the 3rd and 4th Administrators acknowledge in their submissions that the documents tendered by them do not constitute a will, the wishes of the deceased as therein contained amount to gifts *inter vivos* under the Law of Succession or effective *inter vivos* distribution under Kikuyu Customary law. For this position, they relied on the decision of **Mativo J** in **Nyeri Succession Cause No. 475 of 2013 In the Estate of Waitathu Kagwai alias Waitathu Kagwai [2013] eKLR**, and **Re Estate of Ruth Nyakanini Rukwaro (Deceased) [2016] eKLR**.

12. The court has considered the affidavits filed by the parties as well as their submissions. For starters, it is necessary to point out that at this stage, no application has been made for the confirmation of the letters of administration issued on 16th June, 2017. That notwithstanding, the parties deemed it prudent to proceed by first identifying the shares due to each beneficiary, in a sense, putting the cart before the horse. Not altogether unexpected in light of the acrimony surrounding the management of the estate, a good portion of which generated a fair amount of income, which admittedly was in the exclusive control of the second house.

13. Section 71 of the Law of Succession Act states that:

“(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may-

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

14. And the proviso thereto states:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.

15. Thus, the identification of beneficiaries and shares due to them is a condition precedent to the confirmation of a grant where the deceased died intestate. I use the word intestate advisedly as the deceased did not leave any testament capable of being construed as a will. Although the 3rd and 4th Respondent initially insisted that there was a valid will, in their submissions they back-peddled on this position. The argument that the deceased distributed his estate in his lifetime in accordance with Kikuyu Customary law was raised in the submissions of the 3rd and 4th Administrators but it has no factual basis for the following reasons.

16. The documents dated 3rd December, 1983 and 15th February, 2014 which are in a language other than English or Swahili were not translated. There is no evidence as to the circumstances in which the documents were made or who witnessed the same. There is no evidence that the deceased distributed his property under kikuyu customary law, either.

17. In my view therefore, the deceased died intestate. However there is no dispute regarding the distribution of certain properties of the estate, namely, **NYANDARUA/NDARAGUA BLOCK 1/112**, and **MAHIGA/KAMOKO/1177**, and in many respects, the land parcel **NYANDARUA/SOUTH KINANGOP/285**.

18. There is no evidence of the existence of two plots in **Kiambaa Kawaida** allegedly purchased in the name of the 3rd Administrator by the deceased. The greatest controversy centres around the two high value plots in Kangemi, and to some extent, the two stalls at the Kangemi market. It was not in dispute that while the deceased worked and lived at the **Kangemi Plot 509** with the 3rd Administrator's family, the 1st Administrator lived at **Nyandarua** occupying a portion of the land parcel **NYANDARUA/SOUTH KINANGOP/285**. Thus each widow had her own home.

19. Claims by the 3rd Administrator that she contributed solely to the acquisition of the **Kangemi plots** and land at **Nyandarua** were not supported by any evidence. Besides, it is evident that the 1st Administrator farmed on the land at South Kinangop. The deceased appears to have been an enterprising man and evidently earned good income from the shop he operated at Kangemi, albeit with the assistance of the 3rd Administrator.

20. The **Kangemi plots** carry the highest value not only in absolute terms but also based on the monthly rental income the plots generate. It is an undisputed fact that since the death of the deceased in 2014 the family of the second wife has benefited most from the rental income as they had control of the property. Indeed, it proved impossible to bring on board a manager to collect rents in the pendency of the suit. Both the first and second house had children, both sons and daughters. All are equally beneficially entitled to the estate of their father. (See Article 27 of the Constitution and Section 3 of the Law of Succession Act.)

21. It has therefore surprised me that none of the female children of the two households actively participated in these proceedings. Be that as it may it seems the main protagonists are content to allow the eight daughters of the deceased share five acres of the **Sumbego** land which is undeveloped and of relatively low value.

22. Section 40 of the Law of Succession Act provides as follows:-

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

23. No justification has been offered by the 3rd Administrator for her proposal to take the lion's share of the available property (**Kangemi plot 509**) for herself for life and subsequently to her sons. Moreover, if her proposal were accepted, her sons would benefit twice, as they would also have shared in **Kangemi Plot 678** in addition to substantial rental income collected in respect of both Kangemi plots by her house hitherto. Thus, considering the respective values of the properties, I do not think her proposals are equitable.

24. As for the 1st Administrator her proposal to have **Kangemi Plot 509** devolve upon her family disregards the undisputed fact that the 2nd household has always lived on that plot while she occupied her portion of the land parcel 285 at Nyandarua.

25. It is impossible to undertake distribution of an estate with surgical precision. The plumb line must always be to do equity between the beneficiaries. In **Rono –Vs- Rono ...** the Court of Appeal observed in this regard that:

26. The proposal by the beneficiary **Miguongo Nderitu** that some of the property be held in trust for the families appears sensible, especially in so far as the **Mahiga** land parcel is concerned. However, the frosty relations between the two families renders such an arrangement almost unworkable and portends more in- fighting between the two houses.

27. In view of all the foregoing it is my considered view that the properties ought to be apportioned so that each beneficiary's share is identified. There was no dispute as to the identity of the beneficiaries who comprise the two widows and their respective sons and daughters.

28. I therefore would identify the shares and apportion the properties of the estate in the following manner:-

1. DAGORETTI/KANGEMI/509 –

To the 2nd house of Mary Wambui Nderitu

2. DAGORETTI/KANGEMI/678 –

To the 1st house of Mary Njoki Nderitu

3. NYANDARUA/NDARAGWA BLOCK 1/112

To the daughters of the deceased from 1st and 2nd house

4. NYANDARUA/SOUTH KINANGOP/285

To be shared equally between the 1st and 2nd house

5. MAHIGA/KAMOKO/1177

To be shared equally between the 1st and 2nd house

6. Market stall at **Kangemi No. 205 Upper** to the 1st Household

7. Market stall at **Kangemi No. 205 Lower** to the 2nd Household

29. I hasten to add that the male and female children of each household are equally entitled to benefit from the property apportioned to their respective house. And unless all the female children of the deceased from both houses waive this right in writing prior to the confirmation of the grant, they are to be considered for purposes of distribution within their respective houses as anticipated under Section 40(2) of the Law of Succession. The four Administrators herein or any one of them is at liberty, after 30 days of today's date, to apply for the confirmation of the grant issued herein in terms of this ruling so that distribution can be effected.

30. Parties will bear own costs.

Dated and signed at Kiambu, this 26th day of June, 2018.

C. MEOLI

JUDGE

Delivered and signed at Naivasha, this 31st day of July, 2018.

R. MWONGO

JUDGE

In the presence of:-

Mr. Chege for the 1st and 2nd Administrators

No Representation for the 3rd and 4th Administrators

Mr. Chege holding brief for the Beneficiary Waititu Nderitu Miguongo

Court Assistant – Quinter Ogutu