



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2419 OF 2001**

**IN THE MATTER OF THE ESTATE OF PETER CEGE KANGORO (DECEASED)**

**LOISE WAMBUI NJOROGE.....APPLICANT**

**VERSUS**

**ALBERT THUO CEGE.....1<sup>ST</sup> RESPONDENT**

**JULIE MUTHONI CEGE.....2<sup>ND</sup> RESPONDENT**

**REBECCA CEGE.....3<sup>RD</sup> RESPONDENT**

**AND**

**ALBERT KANGORO CEGE.....1<sup>ST</sup> INTERESTED PARTY**

**TONY CEGE.....2<sup>ND</sup> INTERESTED PARTY**

**BENSON MUKURIA.....EXECUTOR**

**JUDGMENT**

1. The deceased Peter Cege Kangoro died on 31<sup>st</sup> August 2001. He left a written Will dated 31<sup>st</sup> May 1999 and a Codicil dated 5<sup>th</sup> October 1999. The Executors and Trustees of the Will and Codicil were Barclays Trust Investment Services Limited and Ben Mukuria (the Executor). On 3<sup>rd</sup> October 2001 the Executor petitioned this court for the grant of probate of Written Will. Barclays Trust investment Services Limited had renounced the right to probate. On 23<sup>rd</sup> June 2004 a limited grant *ad colligenda bona defunct* was granted.

2. During his lifetime, the deceased married twice. His first wife was Cecilia Cege (now deceased). She had three children:- Albert Thuo Cege (1<sup>st</sup> respondent), Julie Muthoni Cege (2<sup>nd</sup> respondent) and Rebecca Cege (3<sup>rd</sup> respondent). The second wife was Loice Wambui Njoroge (the applicant) who had only one child, Albert Kangoro Cege (1<sup>st</sup> interested party). On 10<sup>th</sup> November 2011 the 1<sup>st</sup> interested party was appointed a co-administrator of the estate of the deceased.

3. On 28<sup>th</sup> January 2002 Tony Cege (2<sup>nd</sup> interested party) filed an application under **sections 26, 27, 28 and 29 of the Law of Succession Act (Cap 160)** seeking that such reasonable provision be made to him as a dependant out of the deceased's net estate as the court thinks fit. He claimed to be the eldest child of the deceased. His mother did not marry the deceased. Mr. Mbindyo for the applicant and 1<sup>st</sup> interested party informed the court that they acknowledged the 2<sup>nd</sup> interested party as a son of the deceased. M/S Odero for the respondents gave a similar acknowledgement. Mr. Mbindyo's clients did not agree to any provision being made to the 2<sup>nd</sup> interested party. However, according to the written submissions filed on behalf of the respondents on 20<sup>th</sup> February 2015, they agreed to provide for him. He was represented in the proceedings by Mr. McCourt. The Executor was represented by M/s Musyimi & Co. Advocates.

4. The deceased's Will provided for the applicant, 1<sup>st</sup> interested party, 2<sup>nd</sup> interested party and other people. In the Codicil the deceased revoked what he had provided for the 2<sup>nd</sup> interested party. The only benefit left for him was Kshs.500,000/= proceeds from the deceased's Personal Accident Policy. In the Will and Codicil the deceased declared that he had not made any provision for the respondents because he adequately provided for them during his lifetime. In the instant cause, the respondents applied to be reasonably provided for in application dated 19<sup>th</sup> December 2001.

5. In the summons dated 15<sup>th</sup> April 2013 the Executor sought the confirmation of the grant of probate with Will annexed. In the supporting affidavit he stated that although the respondents were children of the deceased, they had been provided for during the deceased's lifetime. In the submissions for distribution, he asked for provision for liabilities, Executor's costs and legal fees arising from the administration of the estate of the deceased.

6. It is material to point out at this stage that the deceased and the late Cecilia Cege divorced in **High Court Divorce Cause No. 111 of 1992**. The divorce was on 3<sup>rd</sup> February 1998. Cecilia then filed a matrimonial property suit, **HCCC No. 306 of 1992 (OS)**. The dispute was settled by a consent in the following terms:-

**“1. That the Defendant do transfer to the plaintiff the properties listed below:-**

**(a) Echuka Farm LR No. 55/20 Limuru;**

**(b) Transfer all shares to the plaintiff/nominee of Ndarakwa Limited being registered owners of Gilgil Farm LR 3777/111;**

**(c) Transfer to the plaintiff jointly with Thuo Cege, Julie Cege and Rebecca Cege all the shares in Echuka farm Ltd the registered proprietors of Ngobit Farm Title No, Ngobit/Supuko/Block 1/5792 LR No. 2622; and**

**(d) Transfer to the plaintiff and the children Mbuyu Farm Plot No. 99 absolutely.**

**2. Upon signature by the parties of this settlement agreement the parties hereto do hereby renounce all claims present and future howsoever and whatsoever arising against each other on any matter whatsoever arising in connection with their present and future properties.”**

7. To appreciate the extent of the settlement, the properties were as follows:-

a) Echuka Farm LR No. 155/20 Tigoni/Limuru – 40 Acres;

b) Gilgil Farm LR 3777/111 – 25 Acres

c) Ngobi/Supuko/Block 1/5792 – LR No. 2622 – 50.1 Acres; and

d) Mbuyu Farm Plot No. 99 – 126 Acres.

Julie Cege sold a Kibera Highrise shop for Kshs.700,000/= before the deceased died.

8. It was the Executor's case that the settlement was not just between the deceased and Cecilia, but was between him and the household of Cecilia. The settlement was in 1997. When the deceased wrote his Will on 31<sup>st</sup> May 1999 and Codicil on 5<sup>th</sup> October 1999, the Executor continued, he stated that he had already provided for Cecilia and her children, and therefore did not provide for them. The Executor stated, and it was not disputed, that when Cecilia died in 2001 her estate (the property that was given to her by the deceased) was inherited by her children (the respondents).

9. There were apartments Nos. E233, E234 and E236 at Kibera Highrise and shops Nos. F44, G542K and G435K at Kibera Highrise. They were in the name of the deceased. According to the Executor these were some of the properties that went to the respondents. However, it was the respondents' case that the initial deposits for the purchase of these properties were paid by the deceased, but that the balance of the purchase prices were paid by them; and that this was confirmed in **HCCC No. 1275 of 1994** which they successfully filed against the deceased. Regarding the settlement above this is what the respondents submitted:

**“The fact that the consent order read in part, that the parties to the said suit would not pursue any claims against each other for property it did not in any way extinguish the 1<sup>st</sup> to 3<sup>rd</sup> respondents' right under section 26 of the Law of Succession Act. The respondents were not party to the matrimonial property suit nor were they signatories to the said consent. The suit was between their deceased mother and their deceased father in relation to division of matrimonial property, and the transfers to the Respondents were to ensure they were maintained as a result of the divorce and separation. We submit that this was neither adequate nor sufficient.”**

10. The property in the name of the deceased at his death were Flats Nos. E36, E234 and E235 and shop No. G543K at Kibera Highrise; Tiga Ciene Limited; Halfort Investments Limited; Pest Farm Plot 872 Mbuyu Scheme; Parcel Kikuyu LR No. 8236/2; and the Personal Accident Policy No. 07/8900074 issued by Trident Insurance Brokers. The deceased declared that all the shares, debentures, stock and debts, etc, of the capital nature of Tiga Ciene Limited and Halfort Investments Limited were to be used as follows:-

- (a) 15 % of the gross income to be used for the education of the 1<sup>st</sup> interested party;
- (b) the applicant to be given for life an annuity of Kshs.960,000/= free from all duties and taxes payable by equal quarterly instalments; and
- (c) upon the 1<sup>st</sup> interested party attaining the age of 24 or completing education the residue of income from the two properties (after deducting the annuity to the applicant) to go to him for life.

The deceased bequeathed Pesi Farm Plot 1872 Mbuyu Scheme to his brother's sons Thuo, Kimani and Mungai as tenants in common. He had given the Kibera Highrise apartments and shops to the 2<sup>nd</sup> interested party but revoked it in the Codicil. He then gave out the proceeds of the insurance policy as follows:-

- a) his brother Fred Mwithiga – Kshs.1,000,000/=
- b) 2<sup>nd</sup> interested party – Kshs.500,000/=
- c) Samuel Muthee – Kshs.520,000/=
- d) Thuo, Kimani and Muigai – Kshs.500,000/= in equal shares; and
- e) applicant Kshs.2,500,000/= to be used first to pay his debts, funeral and executor expenses and the residue to go to her absolutely.

11. The court has considered the estimated values of the properties that were settled to Cecilia and the respondents which were as follows:-

- (a) Echuka Farm LR No 155/20 – Kshs.800,000,000/-;
- (b) Gilgil Farm LR No. 3777/111 – Kshs.3,000,000/=;
- (c) Ngobit/Supuko/Block 1/5792 – Kshs.33,000,000/=; and
- (d) Kibera Highrise Flats E233, E234 and E236 and shops F44, G542K and G435K – Kshs.19,500,000/=.

12. These values should be compared to the properties that the deceased was left with which were:-

- a) Halfort Investments Ltd – Ksh.250,000,000/=;
- b) Tiga Ciene Limited plots (67 and 68) – Kshs.35,500,000/=);
- c) Machakos Town Block 3/1328 – Ksh.20,000,000/=;
- d) Machakos 3/1331 Plot 67 – Kshs.19,500,000/=;
- e) Pegi River Farm Plot No. 872 – Kshs.7,000,000/=;
- f) Flat Nos E36, E234 and E235 and shop No. G543K at Kibera Highrise – Kshs.13,500,000/=.
- g) Kikuyu Farm LR 8236/= - Kshs.17,857,142/=;
- h) All cash held in bank accounts; and
- i) Personal, household effects and motor vehicles.

13. **Section 5 of the Law of Succession Act** provides that a person of sound mind may dispose of all or any of his free property by Will. However, he has the responsibility to his dependants under **section 26 of the Act (Elizabeth H. Kameme Ndolo –v- George Matata Ndolo, Civil Appeal No. 128 of 1995 at Nairobi).**

14. I have considered all the evidence available, the amount of property that was given to Cecilia and the respondents, what the deceased was left with and the rest of his family that he had to accommodate. I have come to the conclusion that the deceased sufficiently and reasonably provided for the respondents.

15. Regarding the 2<sup>nd</sup> interested party, I consider that he is a son of the deceased. The deceased had provided for him in the Will but, inexplicably, wrote the Codicil and revoked the provision. All that the 2<sup>nd</sup> interested party was left with was Kshs.500,000/= from the Personal Accident Policy. In my view, this was neither adequate nor reasonable. There was no evidence that the deceased made any advancement or other gifts to the 2<sup>nd</sup> interested party during his lifetime. The deceased made substantial provision to the rest of the family. He did this either in the Will or in the provisions to the respondents as has been shown in the foregoing. The estate of the deceased was, by any standards, quite substantial. Once again, the deceased enjoyed freedom of testator, and this freedom could only be interfered with by the court where there was evidence of unreasonable provision to a dependant (**John Gitata Mwangi & Others –v- Jonathan Njuguna Mwangi & Others, Civil Appeal No. 213 of 1997 at Nairobi).**

16. In this case there was no dispute as to the validity of the Will.

17. I consider that the deceased had 999 shares in Halfort Investments Ltd. The company owns parcel LR

No. 209/386/6 which is situated in Hurlingham in Nairobi, and on which are 50 apartments. Having regard to all the circumstances of this case, I order that the 2<sup>nd</sup> interested party shall get ten (10) of these apartments. Further, he shall get Flats Nos. E36 and E234 at Kibera Highrise.

18. There is a creditor Esther Wangu Kamau who swore that she bought LR No. 8236/31 and paid Kshs.340,000/= for it but it has not been transferred since. This was not challenged. I order that the plot be transferred to her.

19. Under **section 83(b), (c) and (d)** of the **Act**, the Executor has the duty to get in all the free property of the deceased, including debts owing to him and the money payable to his personal representative by reason of his death; to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, all other reasonable expenses of administration (including estate duty, if any), and to ascertain and pay, out of the estate of the deceased, all his debts. The Executor asked for Kshs.8,000,000/= being his costs for filing application for grant, representing the estate, presenting evidence on gifts given during the deceased's lifetime, drafting and filing proposal on the distribution of the estate, and convening several meetings to try and resolve outstanding issues. On what was appropriate compensation for him, he relied on the case of **Laing Estate –v- Hines 41 O.R.(3<sup>rd</sup>) 571 [1998] O.J. No. 4169** in which the court set out the following factors to be used in determining such compensation:-

- a) the magnitude of the estate;
- b) the care and responsibility involved;
- c) the time occupied; and
- d) the skill and ability displayed.

The Executor used the Tysons Valuers valuation of the estate as at June 2014 to be Kshs.950,000,000/= and asked for Kshs.8,000,000/=. He then asked for Kshs.17,983,250/= being the legal fees arising from the administration of the estate of the deceased. The amount included advocates/client fees, in-house disbursements, court attendance costs, drafting of various pleadings, filing, service, travels, and incidentals. He relied on **Schedule 10B** as read with **Schedule 10A** of the **Advocates Remuneration Order 2014**. The compensation and legal fees were not challenged.

20. However, under **section 83(e)** the Executor was supposed to produce to court a full and accurate inventory of the assets and liabilities of the deceased, and a full and accurate account of all dealings therewith up to the date of the account. He completely, and without explanation, failed to honor this fundamental legal and fiduciary obligation.

21. On 17<sup>th</sup> April 2004 the respondents and the Executor recorded a consent to enable the Executor to temporarily manage the properties that comprised the estate of the deceased pending the hearing and determination of this dispute. Subsequently, the respondents filed an application in which they sought that the Executor's limited grant be revoked; he be restrained from dealing with the properties of the estate; and that the Executor be compelled to provide accounts for the period he had managed the estate. The court, in its Ruling dated 10<sup>th</sup> November 2011, found that the Executor had not provided any accounts and he that had disposed off some of the assets of the estate of the deceased. The court observed that:-

**“.....it was clear that the respondent (Executor) will not perform this task unless compelled to do by court.”**

22. It was therefore evident that the Executor had not exhibited the requisite care, responsibility, skill and ability in managing the estate of the deceased. This lapse and failure will reflect in the kind and amount, of compensation that he and the advocates will get. These are the reasons why the Executor shall get

Kshs.3,000,000/= (Three Million Shillings only) and the legal fees shall be Kshs.5,000,000/= (Five Million Shillings only). The amounts shall come from the cash the deceased held in various bank accounts and the income from Halfort Investments Limited. If for any reason the money shall not be enough, shop No. G543K Kibera Highrise shall be sold. Any money in excess of the Kshs.8,000,000/= above shall go to the estate.

23. It is on the basis of this distribution that a grant of probate of written Will shall issue and be confirmed in the name of the Executor.

**DATED AND DELIVERED at NAIROBI this 21<sup>st</sup> JUNE, 2017.**

**A.O. MUCHELULE**

**JUDGE**