



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2398 OF 2009

IN THE MATTER OF THE ESTATE OF TIMOTHY NJONJO KAMAU (DECEASED)

RULING

1. The deceased herein died on 9th July 2009. The letter from the Chief of Nyathuna, Kikuyu, dated 17th August 2009, indicates that he was survived by three individuals, being Anne Wambui Theuri, Rebecca Wachinga Njonjo and Robert Kamau Njonjo, widow and children, respectively of the deceased. He was said to have died possessed of Kabete/Nyathuna/2531, Kabete/Lower Kabete/2316, money in various bank accounts and company shares. A grant of letters of administration intestate was made to the widow of the deceased, Ann Wambui Theuri, and his parents, Robert Kamau Njonjo and Margaret Wanjiru Njonjo on 16th March 2010.
2. On 14th June 2012, the father of the deceased filed a summons dated 13th June 2012 for the confirmation of the grant. He proposed that the estate of the deceased be distributed between himself and the widow of the deceased, where the widow would take the money in the banks, the company shares and the terminal benefits, while Robert Kamau Njonjo would have the landed assets, without it being indicated whether the Robert Kamau Njonjo was the son of the deceased or his father.
3. The father swore a further affidavit on 19th September 2012, which he filed in court on 24th September 2012, alleging that the deceased had another wife called Beatrice Wanjiru Mburu with whom he had begat two children, Robert Kamau Njonjo and Margaret Wanjiru Njonjo. He was also said to have had another child outside wedlock, called Cyndie Grace Wandia, whom he used to provide for. He also alleges that the first administrator had had a child after the deceased died, named Timothy Theuri Njonjo, who should not be regarded as a child of the deceased for inheritance purposes. He explains that he is only interested in having the three other children catered for. He also explains that he was the one who had gifted the deceased with the landed assets on the understanding that he would refund to him some moneys, which the deceased did not refund before he died. He states that the widow has solely benefited from the terminal dues from the deceased's former employer, as well as the money in the banks and the sale of the deceased's car.
4. He has attached to his affidavit copies of several documents to support his case. There are copies of certificates of birth dated 7th March 2007 showing the deceased as the father of Robert Kamau Njonjo and Margaret Wanjiru Njonjo. There are also copies of court proceedings in Kiambu Children's Court Case No. 12 of 2006 between the deceased and Beatrice Wanjiru Mburu over Robert Kamau Njonjo and Margaret Wanjiru Njonjo. There is also correspondence with the employers of the deceased over the pension benefits, which the deceased had nominated to the widow and her children, and which the pension scheme managers decreed should be paid as per the nomination.
5. The widow then swore an affidavit on 27th September 2012 in reply. She asserts that when the deceased died on 9th July 2009, he left her pregnant with their third child, who was born on 26th February

2010. She states that she is ready for a paternity test to resolve that dispute. On Beatrice Wanjiru Mburu, she states that the latter was never married to the deceased, as she was only a girlfriend and her relationship with the deceased terminated after he married the widow. She concedes that if it is established that the deceased had other children, known as Robert Kamau Njonjo and Margaret Wanjiru Njonjo, she would be willing to have them accommodated in the distribution. She asserts that the only assets available for distribution are the landed assets, as the deceased had bank loans and his bank balances were debited to those bank loan accounts and she did not benefit from the balances. On the car, she avers that the car was not in the deceased's name, and that the same was repossessed after his death on grounds that he had not completed payments therefor.

6. The father of the deceased swore a supplementary affidavit on 19th October 2012, filed in court on 22nd October 2012. He asks the widow to produce paternity results showing that the deceased was the father of the child born after the deceased's death. He proposes that the deceased's landed assets ought to be distributed equally between the house of the widow and the other three children of the deceased. He insists that the widow should account for the car, the terminal benefits, the pension, Sacco benefits and the shares. He also states that the widow should provide proof of the loans the deceased allegedly had with the banks. He has attached to that affidavit, copy of records for motor vehicle KAY 602J, which shows that the same is registered in the joint names of the deceased and his former employer.

7. Beatrice Wanjiru Mburu swore an affidavit on 19th October 2012 in protest to the proposed distribution. She asserts that she was also married to the deceased and that they had children together. She also alleges that she had acquired certain assets, being land and cars, jointly with the deceased. She proposes that the landed assets and the money in the banks should devolve upon her, with the terminal dues to be shared between her, the father of the deceased and the widow. She has attached several documents to her affidavit to support her case.

8. The widow swore an affidavit on 15th February 2013. She discloses that the terminal dues were shared between her, Beatrice Wanjiru Mburu and their children. She has exhibited a letter from the deceased's employer which is to that effect. On the cars alleged by Beatrice Wanjiru Mburu, she asserts that she was only aware of KAY 602J, which she acquired against her shares in the terminal benefits. She states that the money from the bank was never paid to her. On the landed assets, she avers that the deceased could not have acquired the same together with Beatrice Wanjiru Mburu as the former alleges that she and the deceased had been having differences as at the time the assets were acquired, and in any event the father of the deceased had said that he had gifted the property to the deceased.

9. Beatrice Wanjiru Mburu swore another affidavit on an unknown date in 2015, filed herein on 13th October 2015, whereat she made more averments, covering the developments allegedly carried by her jointly with the deceased on the landed assets, the shares they bought in named listed companies, NSSF contributions and the motor vehicles.

10. Beatrice Wanjiru Mburu then filed a summons, dated 22nd April 2013, for revocation of the grant made on 16th March 2010, on the grounds that she had been concealed as a survivor of the deceased. The application dated 22nd April 2013 was resolved by consent on 21st July 2015, when it was agreed that Beatrice Wanjiru Mburu be enjoined as administrator of the estate of the deceased. It was also agreed that the parties file proposals on distribution. The grant of letters of administration intestate on record was amended on 21st July 2015 to accord with the said consent.

11. The parties complied with the consent to file proposals on distribution. The proposal by Beatrice Wanjiru Mburu is that the two landed assets - Kabete/Nyathuna/2531 and Kabete/Lower Kabete/2316 – be shared equally between her and the widow, with each of them holding the portion allotted to them for the benefit of their respective children. She also proposes that all the motor vehicles devolve solely upon her, while the rest of the assets would devolve upon her and five (5) children – Cyndie Wandia, Robert Kamau Njonjo 'A' and 'B', Margaret Wanjiru Njonjo and Rebecca Wachinga Njonjo.

12. The father of the deceased proposes that the landed assets, Kabete/Nyathuna/2531 and Kabete/Lower

Kabete/2316, be shared equally among five (5) children of the deceased - Cyndie Wandia, Robert Kamau Njonjo 'A' and 'B', Margaret Wanjiru Njonjo and Rebecca Wachinga Njonjo – with Beatrice Wanjiru Mburu and Anne Wambui Theuri holding the share due to their respective children in trust for them, while the father of the deceased would hold the share due to Cyndie Wandia in trust for her. He also proposes that motor vehicle KAY 602J devolve upon Beatrice Wanjiru Mburu, with the rest of the assets being shared equally between Cyndie Wandia, Robert Kamau Njonjo 'A' and 'B', Margaret Wanjiru Njonjo and Rebecca Wachinga Njonjo.

13. The father swore an affidavit on 29th February 2016 responding to the distribution proposed by the widow, although the said proposal is not in the file of papers before me. He insists that the only children who should share in the property are Cyndie Wandia, Robert Kamau Njonjo 'A' and 'B', Margaret Wanjiru Njonjo and Rebecca Wachinga Njonjo, saying that the widow's third child was not a child of the deceased. He also states that Cyndie Wandia is now of age.

14. The only matter for determination here is distribution of the estate of the deceased. For purposes of distribution, there are three matters to be determined. These are identification of the assets, identification of the survivors of the deceased who ought to share the assets and the mode of distribution of the assets amongst the survivors.

15. Thus far there is concurrence regarding the women who survived the deceased as his widows, these are Beatrice Wanjiru Mburu and Anne Wambui Theuri. There is also concurrence on some of the children of the deceased. Those that the parties have agreed upon are Robert Kamau Njonjo 'A,' Robert Kamau Njonjo 'B', Margaret Wanjiru Njonjo and Rebecca Wachinga Njonjo. There is no agreement on two of the children, Cyndie Grace Wandia and Timothy Theuri Njonjo.

16. The father of the deceased asserts that Cyndie Grace Wandia is a child of the deceased born outside wedlock. It would appear that the child was born before the deceased married both Beatrice Wanjiru Mburu and Anne Wambui Theuri. The mother of the child is not disclosed, and the circumstances of her birth have not been given. However, the father of the deceased says that the child was being maintained by the deceased during his lifetime. Beatrice Wanjiru Mburu appears to regard her as a child, although she has not openly stated, so she has listed her in the proposed distribution. I would hazard the guess that she does so so as to align her case to that of the father of the deceased. It is Beatrice Wanjiru Mburu and the father of the deceased who contest the paternity of Timothy Theuri Njonjo, asserting that he is not a son of the deceased. Anne Wambui Theuri asserts that he is a child of the deceased, on the grounds that the deceased died living her heavy with the child. The deceased died on 9th July 2009, and she delivered on 26th February 2010. Her case appears to be that the deceased had impregnated her and therefore the said child is the deceased's.

17. Section 3(2) of the Law of Succession Act, Cap 160, Laws of Kenya, defines 'child' as follows -

'References in this Act to 'child' or 'children' shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, ...'

18. That definition would cover Timothy Theuri Njonjo, if indeed he was born seven (7) months or so after the deceased died. That would mean that the child was conceived two months or so before the deceased died. There would be justification to presume that he is a child of the deceased in the circumstances. I note, however, that the widow has not provided a certificate of birth to prove that the child was born on 26th February 2010. As matters stand I do not have basis for holding that that was the exact date of the child's birth.

19. Regarding the assets, I note that the parties are agreed on some of the assets. There is agreement on the landed assets, the shares and the money in the bank. There is, however, no consensus on the cars and the terminal benefits. On the terminal benefits, it would appear that there was nomination in favour of Anne Wambui Theuri and her children. The material before me appears to show that the same was altered after the deceased's death so as to include Beatrice Wanjiru Mburu and her children. In any event pension benefits are not subject to succession, and therefore the same ought not to be placed before the court for

distribution. They should be distributed directly by the scheme manager without resort to court action. On the vehicles, Beatrice Wanjiru Mburu asserts that the deceased died possessed of several vehicles, and would like all of them devolved upon him. Anne Wambui Theuri alleges that only one car was available as at the deceased's death, and the same did not even belong to the deceased, and had been repossessed. She did not provide proof of the repossession, and Beatrice Wanjiru Mburu on her part provided no proof that the other vehicles she refers to existed.

20. How are the assets that are found to be available for distribution to be so distributed? As mentioned here above distribution should only ensue after the survivors and the assets have been identified. In my view, the matter of the survivors and the assets has not been resolved for there are two children whose paternity is contested and the status of some of the assets has not been settled. Consequently, it is my holding that it would be premature to distribute the estate.

21. Before the grant herein is confirmed the administrators herein are ordered to do as follows –

(i) to carry out a deoxyribonucleic acid (DNA) test on the paternity of Cyndie Grace Wandia and Timothy Theuri Njonjo, using samples from Robert Kamau Njonjo 'A,' Robert Kamau Njonjo 'B', Margaret Wanjiru Njonjo and Rebecca Wachinga Njonjo, within thirty (30) days of the date of this order; and

(ii) to provide details on the status of the deceased's shares in the listed companies, the money in his bank accounts, the motor vehicles and the pension/terminal dues with the deceased's former employment

22. The matter shall be mentioned after thirty (30) days for compliance. As the landed assets are situated at Kabete, Kiambu County, the cause herein shall be transferred to the High Court of Kenya at Kiambu for disposal.

23. It is so ordered.

DATED and SIGNED at NAIROBI this 16TH DAY OF DECEMBER, 2016.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 20TH DAY OF DECEMBER, 2016.

R. OUGO

JUDGE