



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2071 OF 2011

IN THE ESTATE OF MATTER OF PAUL MBUGUA KIBE-(DECEASED)

RULING

1. Njagi J on 13th December 2012 directed the parties in this matter to agree on the mode of final distribution the funds of held in the estate account. In default of agreement, the parties were to file affidavits on their proposed mode of distribution.
2. The parties apparently did not agree on final distribution, except for the withdrawal a sum Kshs. 1,127,082.85 lying at Barclays Bank Muthaiga current account number [particulars withheld], and on 19th March 2013 they agreed by consent to file their respective affidavits and submissions on the residue of the estate of Kshs.22,899,193.00, held by the Standard Chartered Bank, Kiambu Branch. This figure was later raised on 16th March 2013 to Kshs.32,989,193.00.
3. The administrators complied with the consent order by filing their respective affidavits and written submissions. Rose Nyawira Kibe swore her affidavit on 27th March 2013 and filed it in court on 28th March 2013, and swore another affidavit on 20th June 2013 and filed it in court on 26th June 2013. Catherine Njeri Nduati also swore two affidavits – one on 13th June 2013 and the other on 11th July 2013. Rose Nyawira Kibe's submissions are dated 30th April 2013 and were filed in court on the same date. Catherine Njeri Nduati filed hers, on 11th July 2013, on the same date.
4. According to Catherine Njeri Nduati, as deponed in her affidavit, the deceased was survived by five (5) individuals – being
 - (i) Catherine Njeri Nduati – widow
 - (ii) Cynthia Mumbi Mbugua – daughter
 - (iii) Philip Kibe Mbugua – son
 - (iv) David Allan Kibe Mbugua – son
 - (v) Brian Joel Gatungo Mbugua – son

She asserts that Rose Nyawira Kibe was not a widow or surviving spouse of the deceased as at the time of the deceased's death, since she had been divorced. The deceased died on 30th November 2009 and Rose Nyawira had been divorced on 11th August 1992. A copy of the certificate making the decree *nisi* absolute is attached to the affidavit of Catherine Njeri Nduati. She avers that Rose can only access the estate through an application under Section 26 of the Law of Succession Act. Her proposal is that the

estate should be shared equally between the five (5) survivors of the deceased named in her affidavit.

5. On her part, Rose Nyawira Kibe states that she is a former wife of the deceased, and the mother of two of his children – David Allan Kibe Mbugua and Brian Joel Gatungo Mbugua. Her proposal is that the division of the sum of Kshs.32,989,193.00 should take into account the amount of Kshs.19,385,000.00 alleged to have been received by Catherine Njeri. That would leave a balance of Kshs.13,604,193.00 for distribution which should be divided between the two families in the ratios set out in her affidavit.

6. The submissions by the parties are along the same lines as the facts set out in the affidavits, although they make various legal arguments.

7. There are only three issues, in my view, for determination by the court:-

- a. Whether Rose Nyawira Kibe was a survivor of the deceased and therefore a person who is entitled to a share in the estate;
- b. Whether the Kshs.10,000,000.00 released to Catherine Njeri Nduati on the strength of the Special Limited Grant made to her on 20th January 2012 should be taken into account in the distribution of the sum of Kshs.32,989,193.00; and
- c. How the sum of Kshs.32,989,193.00 is to be distributed among the survivors of the deceased.

8. It is not in dispute that Nyawira Kibe was divorced in 1992. The deceased died intestate and under the provisions of Part V of the Law of Succession Act, in particular **Section 35**, the persons entitled to a share in the estate of an intestate are his surviving spouse and children. The term “*surviving spouse*” is not defined in the Act, and therefore the said term should be ascribed its ordinary natural meaning. This would mean a person who was a legal spouse of the deceased as at the date of the deceased’s death. This would include a separated spouse but not a divorced one. Going by the above, Rose Nyawira Kibe is not a surviving spouse of the deceased and she is therefore not entitled to a share in his estate.

9. A divorced spouse though can access the intestate estate of her former husband if she moves the court under **Section 26** of the Act for the court to appoint a share in her favour. The definition of dependents, that is the persons entitled to move the court under **Section 26** of the Law of Succession Act, is given in **Section 29** of the Act. It classifies former spouses as dependents. Rose Nyawira ought to have taken advantage of this provision before shifting her claim in the estate. Since she has not moved the court under **Section 26** of the Act, she has no stake whatsoever in the estate.

10. On the second issue, whether in the distribution of the sum of Kshs.32,989,183.00 the amounts earlier received by Catherine Njeri should be taken into account. It is not in dispute that Catherine Njeri obtained a limited special grant on 20th January 2012. Under that limited grant she obtained a court order on 2nd February 2012 authorising her to release a sum of Kshs.10,000,000.00 from one of the bank accounts of the deceased. When she applied for the special limited grant she only disclosed her own two children with the deceased, Cynthia Mumbi Mbugua and Philip Kibe Mbugua. She concealed the other two children of the deceased, David Alan Kibe Mungai and Brian Joel Gatungo Mbugua. The sum of Kshs.10,000,000.00 was therefore utilized for the purpose only of Catherine Njeri Nduati and her two children. Quite clearly this amount of money must be taken into account in the distribution of Kshs.32,989,183.00.

11. This then brings me to the next issue – how the said sum of Kshs.32,989,183.00 is to be distributed. The survivors entitled to the sum are five. The sum of Kshs. 32,989,183.00 should be distributed in accordance with **Section 35** of the Law of Succession Act, and not **Section 40** of the Act, as the deceased had not married more than once in a system of Act, allowing polygamy. Ideally, under **Section 35** of the law Catherine Njeri Nduati should enjoy life interest over the money and thereafter the money should devolve equally between the four children of the deceased. Since the children are all adults it would be fair to capitalize the life interest. The money should therefore be shared between the five survivors.

12. The sum of Kshs.32,989,183.00 ought not be shared equally between the five survivors given that Catherine Njeri had earlier received Kshs.10,000,000.00 from the estate, which she no doubt spent on

herself and her children, Cynthia Mumbi Mbugua and Philip Kibe Mbugua; David Allan Kibe Mbugua and Brian Joel Gatungo Mbugua did not get a share at all of the Kshs.10,000,00.00. As mentioned earlier the sum of Kshs.10,000,000.00 must be taken into account in the distribution.

13. The available money for distribution is Kshs.32,989,183.00. An amount of Kshs.10,000,000.00 had been withdrawn by Catherine Njeri Nduati and utilized solely by her and her children. For purposes of distribution, I will treat the total disposable amount of money as Kshs.42,989,183.00 shared by five individuals equally. Equal distribution of Kshs.42,989,183.00 translates to Kshs.8,597,836.60 per person. Kshs.10,000,000.00 shared by three individuals translates to Kshs.3,333,333.00 per person. This means that the three individuals – Catherine Njeri and her two children are each entitled to Kshs.5,264,803.00 out of the balance of Kshs.32,989,183.00. Their entitlement to Kshs.15,794,409.00 David Allan Kibe Mbugua and Brian Joel Gatungo Mbugua are entitled to the balance of Kshs.17,194,774.00 which they shall share equally at the rate of Kshs.8,597,387.00 each.

14. The final order is that the sum of Kshs. 32,989,183.00 lying at Standard Chartered Bank Kiambu Branch shall be distributed as follows:-

- (a) Catherine Njeri Nduati – Kshs.5,264,803.00.
- (b) Cynthia Mumbi Mbugua – Kshs.5,264,803.00
- (c) Philip Kibe Mbugua – Kshs. 5,264,803.00
- (d) David Allan Kibe Mbugua – Kshs.8,597,387.00
- (e) Brian Joel Gatungo Mbugua –Kshs.8,597,387.00

15. It is ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 21ST DAY OF MARCH, 2014.

W. M. MUSYOKA

JUDGE