



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.279 OF 1995

IN THE MATTER OF THE ESTATE OF PENINA GEORGE MACHARIA (DECEASED)

GEORGE NYAGA1ST APPLICANT

BOBBY MAINA.....2ND APPLICANT

VERSUS

SOPHIA WANGARI NJIIRI.....RESPONDENT

R U L I N G

Penina George Macharia, the deceased to whose estate these proceedings relate died on 30th August 1991. Prior to her death, she had written a Will by which she bequeathed her properties to the beneficiaries. In Clause 2(a) of the Will, the deceased made the following bequest:

“Upon trust to give to my grandson Victor Nyaga son of Edwin Njoroge LR.No.209/5389 Bahati Estate on condition that he returns to my son’s homestead and should he fail to return to my son’s homestead that is the homestead of Edwin Njoroge I bequeath the same to my son Joshua Kariuki George Macharia land reference number 209/5389 situate in Bahati Estate in Nairobi aforesaid subject to the nett rental income of the said property known as land reference number 209/5389 for a period of five (5) years being divided on equal basis among the following:-

Priscilla Wairimu Kiragu

Sophia Wangari Njiiru

Joshua Kariuki George

Joyce Wairimu George

Emily Njeri Nyaga

Victor Nyaga son of Edwin Njoroge.”

The grant of probate of written Will in respect of the estate of the deceased was issued to Priscilla Wairimu Kiragu on 18th April 1995. In the said grant, power was reserved for the other Executor, namely Sophia Wangari Njiiru to prove the Will. The said Executor made an application to confirm the grant on 18th June 2007. She asked the court to confirm the grant of probate and make an order to the effect that

the estate of the deceased to be distributed in accordance with the written Will of the deceased save that the bequest to Victor Nyaga under Clause 2(a) (cited above) be declared to have failed on the ground that the said Victor Nyaga had failed to return home and had not been heard of since the 1980s when he converted to Hinduism and emigrated to India.

The Executor made the proposal that the share of the estate that was to be inherited by the said Victor Nyaga be in the circumstances be divided equally between Priscilla Wairimu Kiragu, Sophia Wangari Njiiru, Joyce Wairimu George and Emily Njeri Nyaga. The proposal was objected to by Amy Njeri Nyaga. It was her case that the proposal made by the Executor in relation to the portion of the estate that was to be inherited by Victor Nyaga was unacceptable because in her view there was no justification to exclude the said Victor Nyaga because he was still entitled to inherit from the estate of the deceased. George Nyaga, the 1st Applicant in this case weighed in with his objection. He prayed that the court refuses the proposal made by the Executor and instead declare that the bequest to the said Victor Nyaga having failed, then the court should abide by the wishes of the deceased in the Will by directing that the suit property be inherited by Joshua Kariuki George Macharia. George Nyaga is a son of the said Joshua Kariuki George Macharia who is now deceased.

The hearing of this cause was by submission. This court heard oral rival arguments made by Mr. Kiplagat for the 1st and 2nd Applicants, by Lydia Kithaka for the Respondents and by Amy Nyaga who was acting in person. Mr. Kiplagat reiterated the case of the Applicants. He submitted that the bequest which was made to Victor Nyaga had failed. Because of this, he proposed that the property should be inherited by the person who was to inherit it in accordance with the Will. He explained that the said Joshua Kariuki George was deceased. The 1st Applicant as the son of Joshua Kariuki George should inherit the property. He stated that the property was currently being managed by the administrator. Miss Kithaka for the Respondents agreed with the applicants that the bequest to Victor Nyaga had failed because the said Victor Nyaga had not been seen since the burial of the deceased. She urged the court to apply **Rules 44 and 45** of the **1st Schedule** of the **Law of Succession Act**. She was of the view that the bequest that was given to Victor Nyaga was a conditional gift which became void when Victor Nyaga did not return to his father's home. She submitted that because of the failure of the conditional gift, the property should be returned to the estate and be considered as residuary estate to be distributed among the beneficiaries. She urged the court to find accordingly. Amy Nyaga submitted that the bequest of Victor Nyaga did not fail because the said Victor Nyaga returned to his father's home and in fact even attended the funeral of the deceased. She however conceded that Victor Nyaga was last seen in Kenya in 1991. Since then no one had seen him. She was however adamant that the bequest to Victor Nyaga should be upheld by the court.

This court has carefully considered the matters in dispute in this case. As stated earlier in this Ruling, the issue for determination by this court is whether the bequest made to Victor Nyaga by the deceased still subsists, and if not, what should happen to that bequest. The deceased, in her written Will made a bequest of LR. No.209/5389 Bahati Estate to her grandson Victor Nyaga son of Edwin Njoroge on condition that the said Victor Nyaga returns to Edwin Njoroge's homestead. The deceased further stated that should the said Victor Nyaga fail to return to his father's homestead, she bequeathed the said property to her son Joshua Kariuki George Macharia subject only to the income from the said property being enjoyed by all her children for a period of five (5) year

According to the evidence placed before the court, it was clear that the said Victor Nyaga has never been seen or heard of since 1991. Amy Nyaga told the court that the said Victor Nyaga infact came back to his father's home before the death of the deceased. He even attended the burial of the deceased. This claim by Amy was not supported by any evidence. It was common ground that the said Victor Nyaga had not returned to his father's homestead since 1991 when he was last seen. Todate he has not been seen nor heard from. This court is of the view that the disposition made to the said Victor Nyaga had failed. The failure of that disposition therefore fell under **Section 23** of the **Law of Succession Act** which provides thus:

“Testamentary gifts and dispositions shall fail by way of lapse or ademption in the circumstances and manner and to the extent provided by the Second Schedule.”

Rule 7 of the **Second Schedule** under the heading “**Failure of Testamentary Dispositions**” provides as hereunder:

“Subject to the foregoing provisions of this Schedule, if a gift or disposition lapses, the property or interest in the subject thereof shall pass under any residuary bequest which, but for the gift or disposition, would have applied to the property or interest:

Provided that, if there is no such residuary request, or if the lapsed gift or disposition is itself a share of the residuary request and there is no ulterior residuary request under which it can pass, then there shall be intestacy in respect of the property or interest.”

“**General Residuary Bequest**” is defined under **Section 3(1)** of the **Law of Succession Act** to be a testamentary gift of all the property of the testator not otherwise disposed of.

In the present application, it is clear that the bequest that was made to Victor Nyaga failed. Upon failure of the bequest, the suit property was supposed to be inherited by Joshua Kariuki George Macharia subject only to all the beneficiaries of the deceased enjoying rental income from the said property for a period of five years. The said Joshua Kariuki George Macharia is not present to benefit from the bequest. He has since died. The Applicants are his children. According to the Applicants, upon failure of the bequest, the suit property ought to devolve to the beneficiaries of the estate of Joshua Kariuki George Macharia. The Respondents are of contrary view. They urge the court to make a finding that following the failure of the disposition, the suit property should revert back to the estate of the deceased and be distributed as if the deceased died intestate.

Having considered the applicable law, this court is persuaded by the position taken by the Respondents. It was not the intention of the deceased when she wrote the Will that any other person other than Victor Nyaga, and in case of failure of disposition to him, her son Joshua Kariuki George Macharia would benefit from the said property. It was not her intention that the estate of the said Joshua Kariuki George Macharia benefits from the disposition to the exclusion of her other children. This is a case where **Rule 7** of the **Second Schedule** of the **Law of Succession Act** applies. Once this court made the finding that there was failure of disposition to Victor Nyaga, then that property shall be considered as residuary estate of the deceased and shall be disposed of as if the deceased had died intestate. The suit property will therefore be distributed under **Section 38** of the **Law of Succession Act** which provides thus:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

In the present case, the deceased had six (6) children. Some of the children are now deceased. This court will not discriminate between the surviving and deceased children of the deceased if such deceased children had children who survived them.

The order that commends itself to the court is that the suit property registered as LR. No.209/5389 Bahati Estate shall be sold and the proceeds therefrom divided equally between the six (6) children of the deceased. Where such children are dead, their children shall benefit in their place. There shall be no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF APRIL, 2014.

L. KIMARU

JUDGE