



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
SUCCESSION CAUSE NO. 794 OF 2007

**IN THE MATTER OF THE ESTATE OF THE LATE ROSE WANJIKU NJOROGE
(DECEASED)**

RULING

This Ruling relates to an application dated 14th December 2011 for confirmation of the Grant of Letters of Administration made to the Applicants on 21st February 2011.

This matter has a chequered history, and it is necessary to set out, though briefly ROSE WANJIRU NJOROGE (*the deceased died on 4th July 2006, and was survived by her husband, Charles Njoroge Kihunya (the 1st Applicant)*) and the following children -

1. Joyce Wanjiku born in 1974 – married
2. Anthony Kariuki born in 1978 – adult and married
3. Kennedy Mbugua born in 1982 – adult married
4. Naomi Njoki born in 1984 (has two children) – the 2nd Applicant, and
5. Serah Njeri born on 1988 – adult and married.

The First Applicant was the husband of the deceased and the 2nd Applicant is the daughter of the deceased with the First Applicant. There is no dispute that the deceased was the registered owner of the only properties of her estate -

1. Plot No. 52 Upper Solai Trading Centre, which property is developed and is said to be worth shs 3.5 million,
2. Plot No. B162 in Ongata Rongai which is undeveloped.

A consent order to have the two properties sold and the proceeds thereof distributed was set aside by order of court made on 18th January 2013, and read on 29th January 2013. That order having been set aside the only question to be determined in this Ruling is the distribution of the deceased's estate.

As the Hon. Maraga J (*as he then was, now Judge of Appeal*) stated in his Ruling (*revoking the Grant to the First Applicant*), Section 35 of the Law of Succession Act is clear -

“Where a deceased person is survived by a spouse and children, such spouse has only a life interest in the whole residue of the deceased's estate. A life interest also known as a life estate, is an interest that the surviving spouse enjoys during his or her life time.”

The proviso to Section 35 of the Act qualifies the right of the surviving spouse if she is a widow that the life interest or life estate shall determine immediately upon her re-marriage to any person.

That provision is in my view inherently discriminatory in the situation where the surviving spouse is

a widower and he remarry's. There is no plausible reason why a widow's interest should determine upon her remarriage, while that of widower (*would apparently survive*) upon his re-marriage. Article 27(1) of the Constitution of Kenya 2010 provides inter alia that every person is equal before the law and has the right to equal protection and equal benefit of the law.

And Article 27(3) expressly states that -

3. ***Women and men have the right to equal treatment, including equal right to opportunities in political, economic, cultural and social spheres, and***
4. ***that neither the State or any person shall discriminate directly or indirectly against any person on any ground, including marital status (Art. 27(4) & (5)).***

The First Applicant has since re-married since the death of the deceased. In fact they were separated from each other, and a divorce cause which abated by virtue of her death had been filed. Like the widow, he too loses his right to a life interest or life estate upon his re-marriage. His life interest having determined; the property subject of the interest is to devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

In terms of the law the two properties are to be divided equally among the the surviving children without regard to their marital status.

It appears from the submissions of counsel for both parties that the applicants cannot be trusted to work together and distribute the estate equally. It also appears to me to be unjust to exclude the First Applicant from any share of the deceased's estate, having lost his life interest upon remarriage. In the circumstances therefore, I make the following orders -

1. ***that the two properties namely -***

(a) ***Plot B162 Langata Development Co. Ltd and***

(b) ***Plot Number 52 Upper Solai***

be sold and the proceeds thereof divided in the ratio, 10% to the First Applicant, Charles Njoroge Kihunja and the balance thereof be divided equally among the other beneficiaries, that is to say -

1. ***Joyce Wanjiku born in 1974 - 18%***
2. ***Anthony Kariuki born in 1978 - 18%***
3. ***Kennedy Mbugua born in 1982 - 18%***

(4) ***Naomi Njoki - 18%***

(5) ***Serah Njeri - 18%***

Any of the beneficiaries shall be at liberty to purchase both or any of the properties at open market price, or price agreed to by all the beneficiaries.

Each of the parties shall bear its own costs.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 27th day of May, 2014

M. J. ANYARA EMUKULE

JUDGE