



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
SUCCESSION CAUSE NO. 565 OF 2009

**IN THE MATTER OF THE ESTATE OF MARGARET NYARANGI MORAGWA –
(DECEASED)**

RULING

1. Margaret Nyarangi Moragwa died on 25th October 2008. Representation to her estate was sought on 10th March 2009 by Ratemo Nyarangi Moga and Jepther Osos Opande in their capacities as the executives of the will of the deceased made on 15th February 2008.
2. She is expressed have died possessed of various assets, namely-
 - (a) LR No. [particulars withheld] – Othaya Road, Lavington, Nairobi.
 - (b) LR. No. [particulars withheld] - Woodley Estate, Nairobi.
 - (c) LR. No. [particulars withheld] - Nakuru Municipality, Milimani.
 - (d) Plot No. [particulars withheld] - Rongai Scheme, Nakuru.
 - (e) LR No. [particulars withheld] – Kericho Municipality.
 - (f) LR No. Nyaribari Masaba/Bonya Masicho/[particulars withheld].
 - (g) LR No. Nyaribari Masaba/Bonya Masicho/[particulars withheld].
 - (h) Plot No. D. – Kisii Municipality.
 - (i) IR No. [particulars withheld] Karen Nairobi.
 - (j) Agricultural Land at Molo.
 - (k) 2 Commercial Plits at Molo.
 - (l) Plot at Mwembe, Kisii town, Kisii Central.
 - (M) Plot at Bogeka, Masocho, Kisii Central.
 - (n) Plot at Bogusero, Moroacho, Kisii Central

- (o) Plot at Kiingo, Njoroge, Nakuru.
- (p) Plot at Lower Subukia, Nakuru
- (q) Plot at Kiti, Nakuru.
- (r) Plot at London, Nakuru.
- (s) Plot [particulars withheld], at Nakuru Section 58, Nank Estate.
- (t) Plot at Lunga Lunga slums, Nairobi.
- (u) Plot at Kenyasa slums, Nairobi.
- (v) Treasury Bond Issue No. **[particulars withheld]**.
- (w) HFC Bond A/Cs Nos. **[particulars withheld]**.
- (x) Development Bonds **[particulars withheld]**.
- (y) Commercial Union Assurance Policy No. **[particulars withheld]**.
- (3) British India General Insurance Ltd. Policy No. **[particulars withheld]**.
- (aa) Alan May (F&A) Ltd Policy No. **[particulars withheld]**.
- (bb) East African Breweries Ltd
- (cc) Centrium Investments Ltd. Shares
- (dd) Nation media group shares
- (ee) Barclays Bank of Kenya Ltd shares, A/C No. **[particulars withheld]**
- (ff) Total Kenya shares, A/C No. **[particulars withheld]**.
- (gg) Standard Bank (k) Ltd shares, A/C No. [particulars withheld]
- (hh) Kenya Commercial Bank Ltd Shares, A/C No. **[particulars withheld]**.
- (ii) Pension and death gratuity.
- (jj) Cash at Bank.
- (kk) Posho Mill.
- (ll) [particulars withheld] – Peugeot 504 saloon
- (mm) [particulars withheld] – Peugeot 504 pick up
- (nn) [particulars withheld] - Peugeot 404 pick up

3. These assets are the subject of disposal in the will executed by the deceased on 15th February 2008.

4. Before grant the petition could be gazette, an application by of summons in general form was lodged at

the court registry, on 28th May 2009, dated 27th May 2009, at the instance of the administrations of the estate of James Onyiego Nyarangi, appointed in Nairobi **HCSC No.1093 of 1991**. The administrators sought three main orders:-

- (a) That the assets listed in the petition for grant of probate in respect of the estate of Margaret Nyarangi be expunged as they did not form part of the said estate;
- (b) That the executors of the will of Margaret Nyarangi do surrender any property titles, letters of allotment share certificates documents of title, logbooks, bonds bank account records, pass books and other documents relating to the assets listed in the petition filed herein, to the administrators; and
- (c) That the court do find that the administrators, together with Anthony Nyarangi are the only heirs and beneficiaries of the estate of James

4. Onyiega Nyarangi and Margaret Nyarangi Maragwa. Their case is founded on the ground that Margaret Nyarangi has will away property belonging to the estate of James Onyiego Nyarangi, the subject of HCSC No. 1092 of 1991.

5. There are record one replies to the said application. The same take the affidavits sworn by Edsons Nyamunga Nyarwe. On 19th July 2009 and Japhther Osoro Opande on 18th May 2012. He depones that he is one of the executors named in the will of the deceased Margaret Nyarangi. He says that the will came as a surprise to him and it would appear that it is intended to strip the lawful heirs to the estate of the late James Nyarangi of their rights. He asserts that he does not support the petition for grant of probate of the said will.

6. On his part, Jephther Osoro Opande states that the deceased Margaret Nyarangi freely and willingly disposed of her estate by testament dismiss on her own instructions. He asserts that the said will is valid. He avers that IR No. [particulars withheld], Karen, Nairobi is a property that was at all times registered in the name of the deceased, Margaret Nyarangi.

7. The matter was placed before me on 2nd October 2013. I directed that the said application be disposed of by way of written submissions. The applicants have filed two sets of written submissions, one on 21st April 2010 and the other on 7th October 2013. The 2nd and 3rd respondents filed theirs on 15th October 2013. The applicant's case is simple, the assets listed in the petition filed in this case do not form part of the estate of the deceased as the said property comprises the estate of late husband of the deceased, James Onyiego Nyarangi. The said assets are therefore available for distribution in the estate of James Onyiego Nyarangi but not in the estate of his widow and one of the administrators of his estate, Margaret Nyarangi. The respondents case is that the deceased property willed away assets that belonged to her.

8. To enable me properly determine the application dated 27th May 2009, I called for the court file in respect of HCSC No. 1092 of 1991, in the matter of the estate of James Onyiego Nyaranga. I have perused the file from it I have noted that Margaret Nyarangi is named in the petition filed in that case on 13th September 1991 as a widow of the deceased James Nyarangi and the petitioner. In her petition she listed the following as the assets making up the estate of the deceased James Nyarangi, that is to say-

- (a) Shares with East African Breweries
- (b) Shares with ICDC Investment Co. Ltd (now Centrum Ltd)
- (c) Shares with Nation Printers & Publishers Ltd.
- (d) Shares with Barclays Bank A/C **[particulars withheld]**
- (e) Barclays Bank A/C No. **[particulars withheld]**

- (f) Barclays Bank A/C No. **[particulars withheld]**
- (g) Housing Finance Mortgage A/C No. **[particulars withheld]**
- (h) Barclays Bank A/C No. **[particulars withheld]**
- (i) Barclays Bank – Queenway Current A/C No. **[particulars withheld]**.
- (j) Commercial Union Assurance Nos: **[particulars withheld]** and **[particulars withheld]**.
- (k) The British India General Insurance Ltd, Policy No. **[particulars withheld]**.
- (l) Treasury Bond issue No. **[particulars withheld]**.
- (m) Total Oil products A/N **[particulars withheld]** shares
- (n) Standard Bank A/C No. **[particulars withheld]** shares
- (o) Kenya Commercial Bank A/N. **[particulars withheld]**, shares
- (p) HFC Bonds A/N. **[particulars withheld]**
- (q) Development Bonds **[particulars withheld]**
- (r) LR No. [particulars withheld], Woodly Estate, Nairobi
- (s) Plot No. [particulars withheld] Rongai Scheme
- (t) Plot No. [particulars withheld], Eastleigh
- (u) Plot No. [particulars withheld] Eastleigh
- (v) LR No. [particulars withheld], Othaya Road, Lavington Road
- (w) Plot No. [particulars withheld], Eastleigh
- (x) Plot No. [particulars withheld] Nakuru
- (y) Plot No. [particulars withheld], Kericho
- (3) The Insurers Police No. **[particulars withheld]**
- (aa) Alan Mary (F&I) Ltd, Policy No. **[particulars withheld]**
- (bb) KPB [particulars withheld]
- (cc) Plot No. D, Kisii Township
- (dd) Nyaribari/Masaba/Bonyara/[particulars withheld]
- (ee) Nyaribari/Masaba/Bonyamasicho/[particulars withheld]
- (ff) Barclay's Bank A/C No. **[particulars withheld]**
- (gg) Plot 11 (Now LR. No. [particulars withheld], Karen, Nairobi

(ll) Pension and death gratuity.

9. There is also a cross-petition on record in HCSC No. 1092 of 1991. In it they listed the same assets as those in the list filed by the petitioner, Margaret Nyarangi, save that they have omitted the pension and death gratuity from their list, but included three assets which are not in the widows list, that is to say

(a) Residential Plot within Kisii Municipality at Daraja Mbili.

(b) Residential Plot within Kisii Municipality at Mwembe Tayari.

(c) Plot within Nakuru Municipality near Gk Prisons.

10. The grant intestate in the matter of the estate of James Onyiego Nyarangi was made on 28th January 1999 to the said widow, Margaret Nyarangi and a daughter of the deceased, Beckie Boyani Nyarangi. The duo shared the court on 18th June 1999 for a confirmation of the grant made to them and to the said application they attach a list of the assets set out in paragraph 8 herein above. The said grant was confirmed on 12th July 1999 and all the assets listed in petition, as set out in paragraph 8 above, were confirmed to be registered in the name of Margaret Nyarangi to hold in trust for the children.

12. I have carefully perused the lists of the assets purported to be the estate of James Onyiego Nyarangi and that of Margaret Moragwa Nyarangi, and I am satisfied that they are substantially the same assets. The list in the widow of the estate of Margaret Nyarangi is for all purposes a replica of the list in the matter of the estate of James Nyarangi, except for a few items. The following assets are not listed in the schedule of assets making up the estate of James Nyarangi-

- a. Agricultural land at Molo
- b. Two commercial Plots at Molo
- c. Plot at Bogeka, Morocho
- d. Plot at Bogusero, Mosocho
- e. Plot at Keingo, Njoro
- f. Plot at Lower Subukia, Nakuru
- g. Plot at London, Nakuru
- h. Plot 81882 Section 58, Nank Estate, Nakuru
- i. Plot at Lunga Lunga slums, Nairobi.
- j. Plot at Kayaba slums, Nairobi
- k. Posho Mill
- l. KYH [particulars withheld]
- m. KSA [particulars withheld]
- n. Plots at Kiti and London in Nakuru.

13. I have equally scrutinized the will purportedly made by Margaret Nyarangi on 15th February 2008. The said will purports to will away the assets that are the subject of the certificate of confirmation of grant dated 12th July 1999. The said property she purports to be distributed by her will is the same as that listed in the said certificate and which she should hold on behalf of the children of James Onyiego Nyarangi listed in the petition filed in **HCSC NO. 1092 of 1991**.

14. Confirmation of the grant in **HCSC No. 1092 of 1991** did not distribute the estate of James Nyarangi as much. Instead, it merely created a trust over the estate property, meaning that the said property was to be distributed later among the heirs. It constituted the widow of the deceased Margaret Nyarangi, a trustee of the estate. She was to hold the property on behalf of the children. The property did not pass to her absolutely. It was not her property to dispose of as she will. She had no title in it that she could will away to other persons. Quite the dispositions of the property the subject of the certificate of confirmation of grant made in **HCSC No. 1092 of 1991** on 12th July 1999 by will are clearly not valid and cannot pass. That is so as the said dispositions purport to dispose of property that did not belong to the purported testator. The said property was not available to Margaret Nyarangi to dispose of by will as

she purported to on 15th February 2008, for a testator can only dispose of by will property that belong to him.

15. The law on this is *Sections 3(1) and 5(1)* of the Law of Succession Act. *Section 5(1)* provides that any person of sound mind and who is not a minor may dispose of their free property by will, while *Section 3(1)* defines free property as property that a person can freely dispose of during their lifetime. For avoidance of doubt the said provisions state as follows:-

“5(1)...any person who is sound mind and not a minor may dispose of all or any of his free property by will...”

“3(1)...”free property. “relation to a deceased, means the property of which that person was legally competent freely to dispose of during his lifetime, and in respect of which his interest has not been terminated by his death.”

16. As mentioned earlier, the property the subject of the certificate of confirmation of grant issued on 12th July 1999 was subject to a trust, and the trustee, read Margaret Nyarangi, could not therefore dispose of it by will during her lifetime. The inherent she had over the said property was created by the trust and it terminated with her death. The said property was therefore not free property that she could lawfully freely dispose of during him lifetime. She could only deal with it in keeping with the terms of the trust. Since it was not free property, she could not deal with it as pleaded.

17. From the foregoing it is quite clear that there is merit in the application dated 27th May 2009. However, can I and should I grant it? I note that from the record the petition herein has not been gazetted. Ideally the matters raised in the application dated 27th May 2009 ought to have been raised in objections properly raised under Sections 68 and 69 of the Law of Succession Act and rule 17 of the Probate and Administration Rules. An objection is raised once the petition is gazette. That is not the case here.

18. I note that the summons dated 27th May 2009 in premised on *Section 76* of the Law of Succession Act. The said provision gives power to the court on its own motion or on application to revoke a grant. Grant has not been made in this case at this stage and therefore there is no basis for invoking that provision. *Section 47* of the Law of Succession Act states the jurisdiction of the High Court. The High Court is said to have jurisdiction to entertain any application and determine any dispute under the Law of Succession Act and to pronounce such decrees and make such orders as may be expedient. To my mind this merely says that High Court has jurisdiction to entertain applications and determine disputes that are brought in accordance with the prescriptions of the Law of Succession Act. I do not think it allows the court to entertain applications that are brought in a manner there is not envisaged under the Act.

19. The ideal situation is that the applicants ought to have either waited for the gazette of the petition and their file their objections on for the making of the grant and therefore apply for the revocation of the same. I am however cognizant of Article 159(2) (d) of the Constitution and rule 73 of the Probate and Administration Rules. Technically, the application is available for dismissal for it has been brought unprocedurally. However, it raises issues that can be dealt with at this stage. In the interests of justice I will overlook its technical challenges.

20. In the end I will make the following orders:-

(a) That the assets listed in the certificate of confirmation of grant issued on 12th July 1999 issued in **HCSC No. 1092 of 1991** and amended on 30th October 2002 do not form part of the estate of Margaret Maragwa Nyarangi and the same shall be removed from the schedule of the assets which make up the estate of the said Margaret Moragwa Nyarangi;

(b) That as the said property does not form part of the estate of deceased, the executors of the will of the deceased, made on 15th March 2008, shall in the next thirty (30) of the date of this ruling

surrender to the administrators of the estate of James Onyiego Nyarangi, appointed in **HCSC No. 1092 of 1991**, all the documents of title in their possession relating to the assets listed in the certificate of confirmation of grant dated 12th July 1999 and issued in **HCSC No. 1092 of 1991**;

(c) That there shall be a mention of this matter after thirty (30) days to monitor compliance with (b) above; and

(d) That the applicants shall have costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd day of May 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Ngeresa advocate for the respondent.