



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

Succession Cause 10 of 2009

IN THE MATTERS OF THE LATE SAMMY HOSEA NJOROGE - (DECEASED)

JUDGMENT

Although this matter was brought as an intestate cause, it is the position of the petitioners that the deceased left a will in which he directed that all his assets be shared between the two houses represented by the two administrators respectively.

The surviving widow, Alice Nyambura Njoroge (Alice) has two sons and one daughter while the first wife, Lydia Muthoni, who predeceased the deceased, had two daughters and one son. The two daughters, Rebecca Njoki (Rebecca) and Elizabeth Njeri (Elizabeth) brought an application for the confirmation of the grant before the expiration of six months, even though the administrators in this cause are their brother, Peter Wario Hosea and their step mother, Alice. In that application, the applicants proposed that Nos. NJORO/NGATA 4/174 (RUMWE), 4/144 and 4/74 be shared equally between the two houses and that the shares of the 1st house be held jointly by the applicants. They also proposed that motor vehicle No. KLS 895 be sold and proceeds of sale shared between the two houses and further that the funds with Nakuru Teachers Sacco be similarly shared equally.

In their summons for confirmation the administrators made similar proposals, save for funds in Nakuru Teachers Sacco Limited (Account No.5020310738400), which are said to have been withdrawn and distributed to the dependants. The so-called will provides for equal sharing of the estate.

The contention in this matter relates to rents that have accrued and received from the leased rooms and agricultural land since the death of the deceased, the proceeds realized from the sale of the pickup No. KLS 895, funds from Nakuru Teachers Sacco Limited and the matrimonial house. These differences with regard to distribution of the estate led this court (Maraga, J – as he then was) to order the issue of distribution be resolved by calling *viva voce* evidence.

For the applicants, only Rebecca testified. Apart from insisting in the equal sharing of the estate, Rebecca would like Alice (her step mother) to vacate the house which she (Rebecca) claims belonged to her late mother, Lydia.

Alice for her part maintained that in making the proposal for the distribution of the estate, they (the administrators) were simply implementing the wishes of the deceased as expressed in the “will”. She further explained that instead of distributing the rental rooms into equal shares to the two houses as instructed in the “will” she decided to give the 1st house 10 rooms while she retained only 7 for her house. She explained also that the rent from the rooms was expended on the school fees of the children of the deceased; that the pickup was sold at Kshs.100,000/= half of which was given to Peter for the 1st house while the other half was retained by Alice for the 2nd house.

Peter in his evidence argued that since Rebecca is married and the deceased bequeathed the half shares of the properties to him; that his two sisters were not entitled to the estate.

Finally, Samuel Njoroge, a bosom friend of the deceased witnessed the deceased's "will" and stated that the deceased in distributing his estate in his lifetime explained to him that he did not want court battles after his death. It is apparent from the pleadings and the foregoing evidence that the deceased distributed his estate in his lifetime. The so-called will does not constitute considering that the deceased summoned his family and his friend, Samuel Njoroge to witness how he was distributing his property. The fact that the deceased distributed his property *inter vivos* is not disputed by the applicant, who in her evidence acknowledged that:

“The will was written by the deceased, but it is different from what he told us. But the will is in his own handwriting..... I do not agree with it..... We were not satisfied.”

In his lifetime, the deceased had the liberty to deal with his properties as he wished. The applicant could not direct or dictate to the deceased who to get what property. In his wisdom, the deceased shared his properties equally between the two houses, notwithstanding that in terms of **Section 40** of the **Law of Succession** the surviving widow (Alice) ought to have been considered an independent unit separate from her three children.

I reiterate that the controversy in this cause relates to the properties set aside for the 1st house, the rent, the Sacco funds and the proceeds of sale of the pick up. It is Peter's position that the 1st house shares belonged to him as the sisters were not entitled. The deceased expressed his wishes in writing thus:

“I Sammy Hoseah Njoroge.....do hereby sub-divide my shamba..... and to my wife ALICE NYAMBURA NJOROGÉ.....and to my late wife, LYDIAH MUTHONI NJOROGÉ..... equally. The shamba which belongs to Lydiah Muthoni is for Mr. Peter Wario”

(Emphasis added)

The two diagrams representing the Nos.4/144, 4/174 and 4/74 are divided into half with one half in the name of ALICE N. NJOROGÉ and the other half in the name of LYDIAH M. NJOROGÉ.

The deceased also directed that the vehicle Registration No.KLS 895 be sold and cash shared equally between Alice N. Njoroge and “Lydiah N. Njoroge.” Likewise the Sacco funds were to be shared in the like manner. The words

“The shamba which belongs to Lydiah Muthoni is for Mr. Peter Wario”

in the “will” must have given Peter the impression that the deceased intended that the share for the 1st house devolved upon him.

It could not have been the intention of the deceased to disinherit his daughters. His decision was perhaps informed by the fact that Peter's sister, Rebecca and Elizabeth were married. I will return to this aspect of the dispute shortly but it suffices to observe that the Kshs.50,000/= share from the sale of the motor vehicle was appropriated by Peter.

According to Alice, Kshs.400,000/=, the only funds in the Sacco account was distributed to Rebecca, Peter and Elizabeth, with each receiving Kshs.100,000/= with Alice receiving Kshs.100,000/= for herself and her children.

Alice, in my considered view, has been more than magnanimous. Instead of sharing 50:50, the rental rooms as directed by the deceased, neither did she insist on being considered an additional unit for purposes of distribution. Again on the distribution of the Sacco funds, she retained Kshs.100,000/= for

herself and her 3 children, translating to only Kshs.25,000/= for each while each member of the 1st house got Kshs.100,000/=.

Alice discharged her responsibility as a co-adminstratrix. She has provided a plausible explanation on the expenditure of the rent from the time the deceased died. The rent went towards medical expenses of the deceased and on the education expenses of his children.

The 10 rental rooms allocated to the 1st house are held by peter in trust for her sisters. Even though Rebecca is married, she is entitled to a share of the 10 rooms. There is evidence that Elizabeth has separated from her husband and is in occupation of one room.

For the foregoing reasons, it is ordered that Peter will:

- i) pay to Rebecca and Elizabeth Kshs.16,600/= each, being the proceeds of sale of the motor vehicle;
- ii) share the ten (10) rooms and the agricultural land equally with his sisters.

I award no costs.

Dated, Signed and Delivered at Nakuru this 30th day of July, 2012.

W. OUKO
JUDGE