



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**PROBATE AND ADMINISTRATION CAUSE NO. 2600 OF 2000**

**IN THE MATTER OF THE ESTATE OF JOSEPH NJOROGE KUNG'U (DECEASED)**

**JUDGMENT**

The deceased Joseph Njoroge Kungu died surviving two widows namely Alice Wangi Kungu Njoroge (also now deceased) and Rebecca Wambui Njoroge.

After the grant of administration to both the co-widows was granted, they could not agree on the distribution and hence the applicant deceased co-widow filed the application for confirmation of the grant letter of Administration dated 21<sup>st</sup> February, 2005.

The protestor has twelve children and applicant has seven children.

The protestor co-widow did not agree to the proposed distribution and filed Affidavit of Protest sworn on 17<sup>th</sup> March, 2005.

The hearing of the proceedings for confirmation was heard by way of oral evidence.

The applicant co-widow responded to the proposal by the Protestor by Supplementary Affidavit sworn by her on 22<sup>nd</sup> June, 2005 alleging *inter alia* that the deceased during his life time had gifted *inter vivos* several properties to the house of the protestor. She also averred that during the acquisition of the properties so devolved during the life time of the deceased, neither the protestor nor her sons were in gainful employment. The alleged plots given *inter vivos* were specified in paragraph 5 of her Supporting Affidavit. They are:-

- 1. Plot No. 4/206 situate at Kayole Estate, Nairobi. The deceased also constructed 10 single rooms for rent and the protestor has been collecting the rental proceed and the plot is also allocated to her.***

2. *Plot No. 5/484 also at Kayole Estate was allocated by the deceased after acquiring to John Gatungu Njoroge (now deceased) a son of the Protestor. There are 17 rooms for rent and the protestor is collecting and using the rental income.*

3. *Plot No. 5/394 at Kayole Estate. The deceased caused it be allocated to Wainaina Njoroge a son of the protestor.*

4. *Share No. 1030 of Kiganjo Location Ranching Company – 10 rooms constructed by the deceased and then given to Stephen Kungu Njoroge a son of the protestor.*

5. *A farm of 2½ acres (bearing No. 12202 in the same Ranching Company was bought by the deceased and given to the son Stephen Kungu Njoroge. A purport agreement of sale was annexed between the deceased and the said Stephen.*

6. *Share Certificate No. 684 at Ndungu Farmers Co-operative Society Ltd. Situated at Kamuru – East of Nairobi – admeasuring 5 acres was acquired by the deceased and caused to be allocated to the protestor which is occupied by Paul Ndichu Njoroge a son of the Protestor.*

It was further averred by the applicant that during the life time of the deceased, the income derived from all the aforesaid properties were collected by him and used for the whole family. The applicant has then explained the reasons behind the proposals made by her and which are according to her justified equitable and as per law.

The protestor and her children including Jacinta Waithira, the widow of her son John Gatungu Njoroge have filed the affidavit on 17<sup>th</sup> January, 2008 controverting the contents of Supplementary Affidavit and averring that the properties mentioned therein are not the estate properties.

It is not in dispute that apart from a plot in Ruiru the applicant's house (family) did not have any plot which is registered in the name of members of her house. The plot in Ruiru has not been identified. On the other hand, the house of the protestor has many plots allocated in the names of the protestor and her sons.

The proposals of the Applicant are as under:

<b>NAME PROPERTY</b>	<b>DESCRIPTION OF</b>	<b>SHARE OF HEIRS</b>
Alice Wagikuyu Njoroge	<b>(A)</b> Title No. Loc 4/Nguthuru/429	Half Share for herself and on trust for all her children
Rebecca Wambui Njoroge ontrust for all her children	“	Half share for herself and
Alice Wagikuyu Njoroge	<b>(B)</b> Title No. Loc. 4/Gakui/95	Half share for herself and ontrust for all her children
Rebecca Wambui Njoroge	“	Half share for herself and ontrust for all her children
	<b>(C)</b>	

Alice Wagikuyu Njoroge	Title No. Kiganjo/Nembu/1510	Half share for herself and ontrust for all her children	
Rebecca Wambui Njoroge	“	Half share for herself and ontrust for all her children	
Alice Wagikuyu Njoroge	<b>(D)</b> Title No. Loc. 4/Nguthuru/355	Whole share for herself & ontrust for her children	
George Kungu Njoroge	<b>(E)</b> Title No. Loc. Loc. 4/Nguthuru/667	Whole share	
Alice Wagikuyu Njoroge 24/486	<b>(F)</b> Thika/Municipality	Whole share for herself & ontrust for all her children	Block
Alice Wagikuyu Njogore	<b>(G)</b> Thika/Municipality Block 24/545	Whole share for herself & ontrust for all her children	
Alice Wagikuyu Njoroge	<b>(H)</b> Plot No. 28 Nguthuru Market	Half share for herself and ontrust for all her children	
Rebecca Wambui Njoroge	“	Half share for herself and ontrust for all her children	
Rebecca Wambui Njoroge	<b>(I)</b> Plot No. Kiganjo/Nembu/1105/8	Whole share for herself & ontrust for all her children	
Peter Gatungu Njoroge	<b>(J)</b> Title No. Kirimiri/Block/8/921	whole share	
Alice Wagikuyu Njoroge	<b>(K)</b> Plot No. 4/690 Kayole, Nairobi	Whole share for herself & ontrust for all her children	
Alice Wagikuyu Njoroge	<b>(L)</b> Motor vehicle Reg. No. KKZ 458	Whole share	
Rebecca Wambui Njoroge	<b>(M)</b> Motor Vehicle Reg. No. KVU 854	Whole share	

However, the bone of contention is as regards – properties listed as “D, E, F, G, I, J, K, and L”. The property listed at ‘D’, No. Location 4/Nguthuu/355 is a small plot of 0.1 acre and while the Applicant has suggested the same be given to her in trust of her house, she in turn has suggested a parcel No. Kiganjo/Nembu/1105/8 to be allocated to the protestor in trust for her home.

The property at 'E', title NO. Loc 4/Nguthuru 1667 admeasuring 1.6 acres is equated by the applicant to share No. 1220 at Kiganjo, comprising 2½ acres given to son of the protestor, Stephen Kungu Njoroge.

The property at 'F', which is Title No. Thika Municipality Block/24/2486 is equated with plot no. 4/206 situate at Kayole Estate which was given to protestor by the deceased.

Property at 'G', Thika/Municipality Block/24/545 plot at Makongeni Estate has 12 rooms, is equated with plot No. 5/484 at Kayole given to John Gatungu Njoroge, the deceased son of the protestor.

Property at 'J', title No. Kakuzi/Kirimir/Block 8/921 admeasuring 2.8.40 hectares, is compared with share No. 684 at Ngundu Farmers Cooperative Society – comprising 5 acres – given to Paul Ndichu Njoroge a son of the protestor.

Property 'K', plot No. 4/690 at Kayole estate, an undeveloped plot is equated with plot No. 5/394 has an unfinished construction work allocated to Wainaina Njoroge, a son of the protestor.

So far so good, but the question remains to be answered whether those properties which are allocated to several members of the protestor's house were in reality acquired and developed by the deceased.

The protestor testified that plot NO. 4/206 at Kayole were purchased by her by the sale of maize and beans at the parcel No. Loc 4/Nguthuu/429 which was a small parcel and that too cultivated by both the wives for subsistence farming. Peter Gatundu testified that the two families realized two bags of maize and one bag of beans to feed the large family. Thus according to him there was no surplus to be sold.

Moreover, in her cross examination the protestor did agree that she was given 5 acres of land at Kamaru by the deceased.

As regards share Nos. 120 at Kiganjo Farm and share No. 1030, Stephen Kung'u testified that as the deceased was his father he did not put the sale of the said share into writing but he paid the deceased shs.300,000/=. Then he changed his version by stating that the deceased did not sell those two properties to him but gave him those properties because he was looking after him and buying medicine etc. Though he agreed that the deceased was not a poor man. At this stage, I may also note that the protestor in her testimony stated that the deceased was not ailing and died a sudden death and that she was not even aware of the cause of his death.

Stephen Kungu (protestor, witness 2) at first stated that a plot of Kayole was given to the widow of John Gatungu but then changed by stating it was given to Peter Wainaina.

He also stated that the said properties are not yet in his name. He finally stated that no one else was given any property by the deceased and could not say whether any member of the applicant's house was given any property by the deceased.

I also have evidence, which is not disputed, that the construction on the plots were done by the deceased. It is also stated by Henry Kamau the applicant's witness No. 2 that he was working at the two construction sites at Kayole – Peter Gatungu brought the materials in the lorry. I may state, at this stage, that it shall be reversing the position accepted by the two families as to sharing of one lorry each by the two houses and thus I shall refrain from making any further observations thereon. There is also credible evidence, not controverted seriously, that the protestor or John Gatungu (the deceased son of the protestor) were never seen near the construction site of plots.

There is evidence before the court that the deceased used to collect the rents from the two properties at Kayole, and after his death two widows were collecting the same. But the protestor refused the applicant to collect and rent once she learnt that the property was in her names.

Considering the evidence produced by both the parties, I do find that there is sufficient evidence on balance of probabilities that plot No. 5/484 was given to the protestor's house *inter vivos* by the deceased.

Similar is the position as regards share No. 1030 and the share No. 1220 at Kiganjo location Ranching Co. Ltd. Thika District occupied by Stephen Kungu Njoroge. I have adequately dealt with his evidence in earlier part hereof.

Coming to plot No. 4/206 which is in occupation of Jacinta the widow of the deceased Son John Gatungu Njoroge, she testified that she bought the said plot and constructed thereon 14 rental rooms. According to her, the deceased husband acquired from the salary, he earned as a driver of one Mr. Gathu. The construction of 14 rooms were similarly done by him. On the other hand, the applicant's witness (Applicant WNo. 1), the late John was working as his father's driver and was transporting pineapples seeds to Delmonte Farm. The only time the late John worked for other person was for only four months prior to his death which occurred due to a road accident. This is the version by Applicant/Witness No. 2 Henry Kamau. He reiterated that late John never participated in any construction. According to the evidence, the deceased did not pay salary to his children working for him and they were paid just subsistence and clothing. The construction on both the plots i.e. 4/206 and 5/484 were done simultaneously by the deceased.

In my view, considering the evidence as whole, it is more probable that the deceased acquired and developed the two plots 4.206 and 5/484 and gave them to his wife and sons.

As regards plot No. 5/394, Peter Wainaina (PW5) said that he had document for the said plot but was stolen by the son of other house namely Peter Gatangu. No proof of alleged breaking in and theft of document was forthcoming.

It is also on record that when the said plot was acquired, Peter Wainaina was very young and could not have earned income from a bull and cultivation. This fact was not challenged. Moreover, the construction on the plot as at the time of evidence, was at a foundation level and nothing further is forthcoming that does not give support to the version of the applicant and I do find so.

Share No. 684 at Ngundu Farmers Co-operative Society is agreed to have been given to the protestor Rebecca. Similarly the applicant was also given a piece of land at Mwera admeasuring 2½ acres. The said share given to the protestor admeasures 5 acres.

It is thus submitted by the applicant that the said properties be taken into account as gift *inter vivos* as per Sec. 42 of the Law of Succession Act.

Considering what I have found hereinbefore, in my view the proposals made by the house of Alice, late co-widow is just and equitable. I say so because of the evidence in view of the gifts *inter vivos* to the house of Rebecca, the protestor, as well as the fact that those proposals shall not upset the occupations by the members of each house and that they are enjoying the rental income since the death of the deceased.

The only thing which I notice is the disparity in numbers of the beneficiary in both houses, but as both houses have proposed equal shares (considering their customs), I shall not make any observations thereon.

In the premises, the proposals of distribution made in the Summons Confirmation dated 21<sup>st</sup> February, 2005 be allowed and the estate be distributed according.

The certificate of confirmation in accordance with the aforesaid order be issued.

Each party to bear its own costs.

**Dated, signed and delivered** at Nairobi this 10<sup>th</sup> day of **May, 2011**

**K. H. RAWAL**

**JUDGE**

**10.05.2011**