



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1397 OF 2008

IN THE MATTER OF THE ESTATE OF NJUGUNA KAGUAI (DECEASED)

JOSEPH NGUGI NJUGUNA

HANNAH WAMAITHA NGUGI

MWAURA NJUGUNA.....APPLICANTS

VERSUS

GEORGE WAINAINA NJUGUNA.....PROTESTOR

RULING

1. Nuguna Kaguai, the deceased herein died way back on 4.8.03 at the ripe old age of 90 years. The deceased, a polygamous man had wives. A letter from the assistant chief of Mutuini location indicated that the deceased was survived by 7 sons, 1 daughter, 2 daughters in law and 3 grandchildren. The estate of the deceased comprised of Title No. Dagoretti/Mutuini/xxx together with the sum of Kshs. 2,151,700/= being compensation for land acquisition for construction of the Southern Bypass from Mombasa Road to Nairobi Nakuru Highway at Gitaru.

2. On 10.7.08, a grant *ad colligenda bona* was issued to the deceased's daughters in law, Jane Njoki Mumira and Hannah Wamaitha Ngugi, his son Geoffrey Kamau Njuguna, and his grandson John Ndichu Wainaina. The grant was limited for the purpose of collecting the said compensation amount and for paying outstanding land rates on the property. By his application dated 27.10.08, George Wainaina Njuguna, a son of the deceased (the Protestor), sought the revocation of the grant on grounds *inter alia* that he and other children of the deceased were not involved in the process of obtaining the same.

3. Prior to the foregoing, 2 sons of the deceased Joseph Ngugi Njuguna and Mwaura Njuguna did on 28.11.07 petition this Court for a grant of letters of administration in respect of the estate of the deceased in Succession Cause 3247 of 2007. The matter was gazetted on 7.3.08 prompting George to file an objection on 18.3.08. The matter did not however proceed to hearing.

4. Eventually, a grant was on 2.2.16 issued in this cause, to Joseph Ngugi Njuguna, George Wainaina Njuguna, Hannah Wamaitha Ngugi and Mwaura Njuguna.

5. By their Summons dated 26.5.17, Joseph Ngugi Mwaura, Hannah Wamaitha Ngugi and Mwaura Njuguna, the Applicants, sought confirmation of the Grant. In the affidavit in support of the Summons, the Applicants listed the following as dependants of the deceased:

First House:

- i. Joseph Ngugi Njuguna - son
- ii. Jane Njoki Mumira - daughter in law
- iii. Mary Muria Njuguna - daughter
- iv. Wainaina Njuguna - son

- v. Geoffrey Kamau Njuguna - son
- vi. Sammy Mumira Njuguna - grandchild
- vii. Damaris Wanjiku Kangi - grandchild

Second House:

- i. Hannah Wamaitha Njuguna - daughter
- ii. Ndungu Njuguna - son
- iii. John Ndichu Wainaina - grand child
- iv. Mwaura Njuguna - son
- v. Mbiri Njuguna Kaguai - son

6. The Applicants proposed that the estate of the deceased be distributed as follows:

Name	Plot No.	Acreage
i. Mwaura Njuguna	A	0.7
ii. John Ndichu Wainaina	B	0.7
iii. Hannah Wamaitha Ngugi	C	0.7
iv. Ndungu Njuguna	D	0.7
v. Mbiri Njuguna Kaguai	E	0.7
vi. Geoffrey Kamau Njuguna	F	0.9
vii. Mary Muria Njuguna	G	0.9
viii. Sammy Mumira	H	0.125
ix. Damaris Wanjiku	H	0.125
x. George Wainaina Njuguna	J	0.25
xi. Jane Njoki Mumira	K	0.9
xii, Joseph Ngugi Njuguna	L	0.9

7. The proposed mode of distribution according to the statements of the beneficiaries filed, is in accordance with the wishes of the deceased. It is claimed that the deceased had prior to his demise obtained a land control board consent to subdivide his land into 11 portions. The consent dated 6.8.97 together with a subdivision plan were exhibited.

8. The Applicants further proposed that the compensation sum held in Equity Bank, Kikuyu Branch A/c No. xxxxxxxxxxxxxx be distributed equally amongst the named beneficiaries.

9. The proposed mode of distribution of the estate was opposed by George by his affidavit of protest sworn on 29.6.2018 for himself and for Sammy Mumira Njuguna alias Sammy Mumira Njoki, also a beneficiary. George contended that the proposal favours some of the beneficiaries in the 1st house as opposed to the 2nd house which is equally shared. That the 60 meters portion of the property that was cut off by the Southern Bypass from Mombasa Road to Nairobi Nakuru Road at Gitaru ought to be taken into account in the distribution of the property.

10. George contended that the deceased died intestate leaving 2 houses and that it was only fair that the property be distributed equally between the 2 houses and again equally within each house. George proposed that the estate be distributed as follows:

- i. As regards the property, that 0.6310 ha acquired for purposes of the Southern Bypass be removed from the total acreage of the land and the remaining portion be vertically subdivided into two (2) equal portions. The portion for the 1st house be subdivided into 6 equal portions as per number of beneficiaries and the 2nd house to be divided into 5 equal portions according to the number of

beneficiaries. He exhibited a proposed subdivision plan.

ii. As regards the compensation sum, that the same be utilized for sub-division of the property and processing of the titles, payment of rates and the legal costs and whatever remains be shared equally between the two houses.

11. The protestor states that his elder brother, Joseph Ngugi Njuguna who is also a co-administrator from the 1st house opposes their house to distribute equally, and has allocated himself and his two sisters, Mary Muria Njuguna, Jane Njoki Mumira and a brother, Geoffrey Kamau Njuguna bigger portions of 0.9 acres while the Protestor's share is 0.25 acres and 0.125 acre for Sammy Mumira Njuguna alias Sammy Mumira Njoki and Damaris Wanjiku Ngugi. He therefore proposes that since the deceased died intestate, and had two wives, it would be fair that the estate be distributed between the two houses and each house to share their portion equally.

12. The matter was referred to mediation on 6.8.18. The mediator, Dr. Charity Waithima filed a mediation report dated 4. 9.2018 indicating that the parties failed to agree on how to distribute the property and the same was referred back to Court. As regards the compensation sum, it was agreed that the Administrators place the funds in an interest earning account and the same be used for payment of rates and legal fees.

13. Parties filed submissions in support of their respective positions, which I have duly considered.

14. The Applicants' case is that the deceased had indicated how the property would be distributed among his children and had obtained the land control board to subdivide the property into 11 portions. They claim that the deceased gave each beneficiary specific portions in accordance with the exhibited subdivision plan and each beneficiary remains on their respective portion. To the Protestor, the deceased gave Plot J, measuring 0.25 acres. They relied on Section 42 of the Law of Succession Act.

15. The Protestor submitted that the property should be divided into 2 equal portions between the 2 houses in accordance with Kikuyu Customary Law. The Protestor submitted that the beneficiaries in the 2nd house have no problem as each gets an equal portion. The problem is however in the 1st house where there is no equality. 4 beneficiaries get 0.9 acres each, 2 get 0.125 acres each, while the Protestor gets 0.25 acres. The Protestor contends that no reason has been given for this disparity. To the Protestor therefore, since the deceased died intestate, the principle of equality and equity should be applied in the 1st house as in the 2nd house. The Protestor urged the Court to distribute the property in accordance with his proposed subdivision plan.

16. The Applicants have relied on Section 42 of the Law of Succession Act which provides:

Where—

a. an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

b. property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

17. Section 42 seeks to protect settlements effected by an intestate in his lifetime and I concur with Mabeya, J. in the case of Timothy Simiyu Wakapisi Wanjala & 3 others v John Wachana Wanjala Kimawachi & 3 others [2014] eKLR where he stated:

In my view this Section of the law sought to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. There are to be honoured and effected.

18. In that case, the deceased had openly divided his land and gave to all his sons equal portions and left some for himself. All signed a distribution agreement and each continued to use his portion until the demise of the deceased. He did this in the presence of elders. A year later he called the elders and children and allocated some more acreage to some beneficiaries to equalize the 3 houses. This is not what transpired in the present case where it is not indicated exactly when the distribution took place. It also appears that there were no witnesses.

19. I have looked at the proposed subdivision plan exhibited by Joseph and Mwaura in their replying affidavit sworn on 22.8.12 which is on record and on which the Applicants rely. The Applicants say the same was done by the deceased in 1997. This plan is neither dated nor signed, nor does it indicate the surveyor who did it. Also exhibited are what is referred to as "renewal" of the land control board consent dated 10.12.08 and 10.3.10. It is not clear why it was necessary to "renew" consents or in fact who renewed the same, given that the deceased had died several years before. Was the subdivision plan prepared in 1997 before the demise of the deceased or in 2008 or 2010 after his demise? It would have been helpful to this Court if the surveyor who prepared the subdivision scheme had recorded a statement confirming that he was indeed instructed by the deceased to do so. The identical statements of the beneficiaries are not helpful in this regard. Although they say the subdivision plan is of 1997, there is no evidence to confirm the same. Further, although Joseph and Mwaura averred that the Protestor was given a smaller portion than some of the other beneficiaries because he was a conman and had conned the deceased severally, no evidence was adduced to support this allegation. Further, no explanation was given as to why Sammy Mumira and Damaris Wanjiku, the children of Hannah Njoki Njuguna (deceased) got 0.125 acres each, a combined acreage of only 0.25 acres, while other beneficiaries got 0.9 acres and others got 0.7 acres. With these lingering questions for which no answers are available, my finding and I so hold is that there is no evidence that the exhibited subdivision scheme was prepared by the deceased or at his instance. It follows that I am not persuaded that the deceased distributed his property to his children in the manner alleged by the Applicants.

20. Section 40 of the Act makes provision for distribution of the estate of a polygamous intestate as follows:

Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

21. Under Section 40, the estate of a polygamous intestate is divided equally amongst all the children of the deceased with any surviving wife being added as an additional unit. It is not disputed that the deceased was polygamous and died intestate. The record shows that the **deceased was survived by 11 children.** The first house had 6 children while the 2nd house had 5 children. In the 1st house, Peter Mumira Njuguna and Hannah Njoki Njuguna are deceased while in the 2nd house, all the children, save for Mwaura Njuguna, are deceased. **There are no surviving widows. Accordingly, the property is to be divided equally, not between the houses, but between all the children of the deceased.**

22. The Court notes that as per the gazette notice dated 26.5.06, the portion of the property that was acquired for purposes of the Southern Bypass is 0.6310 ha. In order to achieve the principle of equality envisaged in Section 40 of the Act, this portion must be taken into account in determining the entitlement of each beneficiary of the estate of the deceased. Further, it is noted that some of the children of the deceased are themselves deceased. No evidence was placed before the Court to show how their estates are to devolve. Accordingly, the court is unable to apportion shares of these deceased children, to the persons indicated in the affidavits herein. On the compensation amount, the same shall be distributed to all the beneficiaries in equal shares after expenses.

23. In the end, I make the following orders which are necessary for the ends of justice:

i. Title Number Dagoretti/Mutuini/xxx shall be distributed in equal shares to the following beneficiaries of the estate of the deceased:

1st house

1. Joseph Ngugi Njuguna
2. George Wainaina Njuguna
3. Mary Muria Njuguna
4. Estate of Peter Mumira Njuguna
5. Estate of Geoffrey Kamau Njuguna
6. Estate of Hannah Njoki Njuguna

2nd house

1. Estate of Simon Peter Ngugi
2. Estate of Ndungu Njuguna
3. Estate of Mbiri Njuguna
4. Estate of James Wainaina Njuguna
5. Mwaura Njuguna.

ii. A government surveyor shall subdivide the remainder **Title Number** Dagoretti/Mutuini/xxx (after excision of the 0.631 ha acquired by the Government), into 11 equal shares, ensuring as far as possible that the parties and their families remain on the portions they currently occupy.

iii. The compensation amount held in Equity Bank, Kikuyu Branch A/c No. xxxxxxxxxxxxxx shall be applied towards payment or rates, subdivision and legal costs, and the balance thereof shall be divided equally amongst the beneficiaries listed in i) above.

iv. This being a family matter each party shall bear own costs.

DATED, SIGNED AND DELIVERED IN IN NAIROBI THIS 6TH DAY OF MAY 2021

M. THANDE

JUDGE

In the presence of: -

.....for the Applicants

.....for the Protestor

.....Court Assistant