



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2004 OF 2015

IN THE MATTER OF THE ESTATE OF NELSON NGARUIYA NJOROGE (DECEASED)

JULIET WANGARI GATHAGU.....1ST PROTESTOR
RUTH ELIZABETH WANJIKU NGARUIYA.....2ND PROTESTOR
NELSON NJOROGE NGARUIYA.....3RD PROTESTOR
DENNIS GATHAGU NGARUIYA.....4TH PROTESTOR

VERSUS

LUCY WAIRIMU NJENGA.....PETITIONER

RULING

1. The deceased Nelson Ngaruiya Njoroge died intestate on 5th July 2015. At the time of his death he was married to Lucy Wairimu Njenga (the petitioner) under Kikuyu customary law since 2005. With her he got two children: Natasha Ruth Wanjiku Ngaruiya and Emily Njeri Ngaruiya. There is no dispute that prior to this marriage, the deceased had married the 1st protester Juliet Wangari Gathagu. He had married her under Kikuyu customary law in 1984, and thereafter the marriage was solemnized in church on 4th September 2004. The two got the following children: Ruth Elizabeth Wanjiku Ngaruiya (2nd protester), Nelson Njoroge Ngaruiya (3rd protester) and Dennis Gathagu Ngaruiya (4th protester). On 20th March 2012 the deceased filed a Divorce **Petition No. 120 of 2012** at the Milimani Chief Magistrate's Court against the 1st protester. The ground was that the 1st protester had wilfully deserted him on 19th October 2002. It does not appear that the petition was defended. The marriage was dissolved on 9th June 2014 and *decree nisi* issued.
2. The petitioner and another petitioned this court on 22nd October 2015 for the grant of letters of administration intestate in respect of the estate of the deceased. The 2nd, 3rd and 4th protesters were served with a citation. The 1st protester formally objected to the grant on their behalf. On 20th November 2017 the court issued a joint grant to the petitioner, 2nd protester and 3rd protester.
3. The petition filed an application dated 13th April 2018 to confirm the grant and filed a supporting affidavit proposing how the estate of the deceased should be distributed to the beneficiaries. The protesters opposed the application. They stated that that the deceased left only one family, and they did not recognise the petitioner or her children. They asked that the petitioner and her children should not benefit from the estate of the deceased. Their further case was that all the property left by the deceased was matrimonial property between him and the 1st protester, and that it was up to the petitioner to prove that upon her marriage to the deceased they had acquired any property together. The 1st protester stated that she was not aware of the divorce proceedings and did not recognise them. She did not, however, go to the subordinate court to challenge them. She did not dispute that she had deserted the deceased by the time of the proceedings. She stated that by the time the deceased died they had differences and had separated. She further stated that the deceased never told her that he was married to the petitioner. It is evident that the deceased was living with the petitioner as husband and wife. The deceased's eulogy recognised both the 1st protester and the petitioner as his widows. It was the uncontroverted evidence of the petitioner that the deceased had married her and they had the two children. Indeed, the 2nd protester's evidence was that the deceased had rented an apartment for the petitioner and her family. It follows that the petitioner's relationship with the deceased was known to the first family. I find that the deceased had two families: the petitioner's family which was the younger family and the first house which had three children (the 2nd, 3rd and 4th protesters) whose mother (the 1st protester) had been divorced.
4. When the deceased entered into a Kikuyu customary marriage with the petitioner, he was still legally married to the 1st protester. The

marriage to the 1st protester was a monogamous marriage and therefore the deceased had no capacity to enter into another marriage. However, under **section 3(5) of the Law of Succession Act (Cap 160)** the petitioner was a wife, and both her and her children are beneficiaries of the estate of the deceased under the **Act. Section 3(5) of the Act** provides that: -

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless, a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”

5. The 1st protester had been divorced by the deceased at the time of his death. She acknowledged that she had separated from the deceased owing to differences. There was no claim that she was being maintained by the deceased at the time of his death. She cannot benefit from the estate of the deceased because she was neither a beneficiary nor a dependant.

6. The protesters' case was that the deceased and the 1st protester each contributed to the acquisition of the property that now forms the estate of the deceased. Because of that contribution, they argued, the 1st protester was entitled to benefit from the estate. This was indeed the contention of the protesters' counsel Mr. Gitau. Quite unfortunately, the 1st protester has not brought any claim under the **Matrimonial Property Act, No. 49 of 2013** to enable the court determine her claim over the property that was acquired while the two were married. Even after the death of the deceased, she could have brought such a claim against the administrators of the estate. She did not. She cannot benefit under the **Law of Succession Act**, having been divorced by the deceased at the time of his death.

7. The estate of the deceased was stated in the affidavit in support of the petition for the grant of letters of administration intestate to comprise the following property: -

- (a) Land – Title No. Nyandarua/Muruaki/1148;
- (b) Land – Title No. Nyandarua/Muruaki/4865;
- (c) Land – Title No. Nyandarua/Njambini/3808;
- (d) Plot. No. Ngong/Ngong/4480/172;
- (e) Plot. No. Ngong/Ngong/12302;
- (f) Motor Vehicles Registration No. KBK 764A;
- (g) Motor Vehicles Registration No. KBB 970G;
- (h) 2 Chissel plough triple 6, 2 harrow and 2 planters;
- (i) Rain gauge survey machine;
- (j) livestock-19 sheep and 10 cows;
- (k) Tractors Registration No. KTCA 962B ;
- (l) Tractors Registration No. KTCA 963B;
- (m) shares in Barclays Bank of Kenya Ltd;
- (n) shares in Kenya Commercial Bank Ltd;
- (o) shares in Nairobi Security Exchange;
- (p) shares in Ngaruiya Enterprises Ltd;
- (q) money in NBK 01080002903000-Harambee Branch Account;
- (r) money in NBK Hill Branch Account Company Acc. 01020032967100;
- (s) money in KCB Account 1104329255-Naivasha Branch;
- (t) benefits from County Government of Nyandarua; and
- (u) Pension in Panafric Insurance.

8. The deceased was polygamous, and therefore his estate shall devolve in accordance with **section 40** of the **Act** that provides as follows:

“(1) 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.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

9. The petitioner asked that because her children were young and school going, they should benefit more compared to the 2nd, 3rd and 4th protesters who were adults and employed. Reliance was placed on the decision in **Rono –v- Rono and Another [2005] I EA 363** where the Court of Appeal observed that equal sharing by the children of a deceased as provided by **sections 35, 38 and 40** of the **Act** may sometimes lead to inequality and injustice especially in the case of young children left by the deceased; children who still require maintenance and education. I will attempt to be both equal and equitable to the beneficiaries.

10. There is a limited liability company known as Ngaruiya Enterprises Limited in which the deceased and members of the first family had shares. C12 was not made available to indicate the number of shares that the deceased held therein. A limited liability company is a corporate entity with a personality that is different from the shareholders or directors. The property of the company does not belong to the shareholders or to the directors. LR No. Ngong/Ngong/4480/172 on which are rental shops and rental apartments, for instance, belong to the company and are not available for distribution as part of the estate of the deceased. Consequently, the deceased’s estate in the company is limited to the shares that he held therein. When the shares of the deceased become known, the petitioner, each of her two children, and the 2nd, 3rd and 4th protesters shall equally share those shares.

11. The deceased had 15000 shares in Barclays Bank of Kenya Limited, 566 shares at Kenya Commercial Bank and 700 shares in National Security Exchange. In respect of each company, the shares shall be shared equally among the 6 (six) beneficiaries.

12. If the deceased had not nominated the beneficiaries of his benefits from the County Government of Nyandarua, retirement benefits of the National Bank of Kenya and the pension in Panafric Insurance, the benefits and the pension shall be equally shared by the six beneficiaries.

13. There appears to be no dispute that the matrimonial home between the deceased and the 1st protester was on LR No. Ngong/Ngong/12302 which measures 0.10 Ha. This is where the 2nd, 3rd and 4th protesters were brought up. I ask that this property be shared equally among the 2nd, 3rd and 4th protesters.

14. The deceased left LR No. Nyandarua/Muruaki/1148 and LR No. Nyandarua/Njambini/3806. Each shall be shared equally among the six beneficiaries.

15. The money at National Bank of Kenya A/C No. 0108002902000 Harambee Branch and Kenya Commercial Bank A/C No. 1104329255 Naivasha Branch shall be shared equally among the six beneficiaries.

16. The motor vehicles KBK 764A and KBB 970G, the tractors KTCA 962B and KTCA 963B, the ploughs, harrows and planter, and the rain gauge and survey machine shall all be sold and the proceeds used to defray the personal loans that the deceased had incurred at the banks and the other creditors. Any balance after such payment shall be shared equally among the six beneficiaries.

17. Any land allocated to Natasha Ruth Wanjiku Ngaruiya and Emily Njeri Ngaruiya (both minors) shall be registered in the name of the petitioner and the Deputy Registrar of this court to be held in trust for them until they are of age. Similarly, any money due to them shall be deposited into an interest earning account in a reputable bank to be opened and operated jointly by the petitioner and the Deputy Registrar and shall be released to them when they are of age.

18. This was a family dispute. Each side shall pay own costs.

DATED and DELIVERED at NAIROBI this 19TH day of JULY 2021.

A.O. MUCHELULE

JUDGE