



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**SUCCESSION CAUSE NO. 308 OF 2002**

**IN THE MATTER OF THE ESTATE OF NJAGI MUTHANGATO (DECEASED)**

**SALESIO KINYUA NJAGI.....APPLICANT**

**VERSUS**

**JOSEPH KANGANGI NJAGI.....RESPONDENT**

**AND**

**CLEMENT MUNENE NGOROI.....PROTESTOR**

**R U L I N G**

**A. Introduction**

1. This ruling pertains to the summons dated 13<sup>th</sup> February 2019 in which the applicant seeks the interpretation of the second order in a ruling dated the 8<sup>th</sup> July 2010 issued by this court. The order aforementioned states,

***“That upon their death the properties be sold as suggested by the objector and proceeds thereof be shared equally among all the surviving beneficiaries in accordance with section 40 of the Law of Succession Act.”***

2. It is the applicant’s case that he and the respondent who are joint administrators of the deceased’s estate have failed to agree on who are the surviving beneficiaries of the deceased who are to share in Kshs. 43,000,000/= deposited in court pursuant to consent orders issued by this court on the 5<sup>th</sup> December 2018 after the sale of part of the deceased property Plot No. 1112/80 Embu Municipality.

3. The applicant further puts forth the case that his interpretation of the order is that it applies to 27 surviving children of the deceased at the time of the sale of the property in issue. The applicant further states that he and the respondent are agreeable on the advocate fees to be paid to each of their advocates, the amount payable as rent, rates and taxes to both levels of government over the conveyance in respect of the said plot leaving the net proceeds of Kshs. 39,700,000/=.

4. The respondent on his part deposes that the applicant’s interpretation of only 27 surviving beneficiaries of the deceased is flawed as it locks out 20 other rightful beneficiaries of the deceased including grandchildren of the deceased whose mothers/fathers are deceased.

5. The respondent further deposes that contrary to the consent order issued on the 5<sup>th</sup> December 2018, due diligence reveals that all outstanding dues in terms of rent and other taxes arising from sale of the suit property amount to Kshs. 2,400,000/= and not Kshs. 2,000,000/= as agreed between the parties and further that the protestor’s advocate legal fees should be borne by the protestor and not out of the proceeds of the sale of the suit property. The respondents deposes so on the basis that the payment to his and the applicant’s advocate arises out of services rendered in the sale of the suit property of which the respondent’s advocate is a stranger.

6. The protestor on his part deposes that he represents beneficiaries to the deceased’s estate and that he is in agreement with the respondent on the number of beneficiaries to sale from the proceeds of the sale of the deceased’s aforementioned property. The protestor however deposes that the respondent needs to table before court the evidence revealing that all outstanding dues in terms of rent and other taxes arising from sale of the suit property amount to Kshs. 2,400,000/= and not Kshs. 2,000,000/= as agreed between the parties.

7. The protestor further deposes that there is no reason why his advocate should not be paid its legal fees from the proceeds of the sale of the deceased’s aforementioned property.

**B. Analysis & Determination**

8. I have considered all the rival arguments by the parties as well as the law. There's no specific section of the Law of Succession that provides for a probate court to interpret or clarify its own orders as is sought by the applicant herein. However, the most important aspect of this issue, in my view, the Law of Succession Act like section 3 of Civil Procedure Act has a saving provision as to the court's inherent jurisdiction. **Section 47 of the Law of Succession Act** provides: -

***“47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”***

9. **Rule 73 of the Probate and Administration Rules** goes further to affirm the court's powers in the following words: -

***“Nothing in these Rules shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

10. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.

11. Turning to the matter beforehand, the bone of contention as between the parties herein is whether the proceeds of the sale of Plot No. 1112/80 Embu Municipality totalling Kshs. 43,000,000/= should be shared between 27 surviving beneficiaries of the deceased at the time of the sale of the suit property or 47 beneficiaries of the deceased's widows, both dead and alive. The protestor herein also seeks to have his advocate's fees settled from the proceeds of sale of the deceased's property.

12. Regarding the settlement of the protestor's advocate's fees, I do note that firstly the protestor was not a party to the consent entered between the applicant and respondent and given as an order on the 5<sup>th</sup> December 2018. Further paragraph 6 of the aforementioned consent order is clear on whose advocate's fees is to be settled from the proceeds of the sale of the deceased's property.

13. On the weightier issue of the number of beneficiaries to share the proceeds of the sale of the deceased's property, I have perused the ruling by the Honourable Justice W. Karanja. The ruling is quite clear, it states,

***“I will therefore order that the 3 widows have a life interest in the 2 properties jointly and/or severally. Upon their death, the properties be sold as suggested by the objectors and the proceeds thereof be shared equally among all surviving beneficiaries in accordance with Section 40 of the Law of Succession Act.”***

14. The deceased who had three wives and children who survived him died intestate.

15. **Section 3 of the Law of Succession Act** defines “house” as follows: -

***“a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife.”***

16. It follows then that the applicable law in the distribution of the estate of the deceased herein is in accordance to **Section 40 of the Law of Succession Act**. That Section provides;

***“40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects intestate 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.”***

17. The provision is clear that what the ruling of Justice W. Karanja meant was that proceeds from the sale of Plot No. 1112/80 Embu Municipality would be divided amongst all children of the deceased among the houses according to the number of children in each house both living and dead.

18. The protestor in his affidavit prays that his advocate's fees be settled from the fee for the firms of Njeru Ithiga. The pleadings show Irungu Mwangi & Co. attended to a conveyancing of a property in the estate of the deceased. It was therefore agreed by the beneficiaries that the advocates fees be settled from the proceeds of the sale of the property.

19. The firm of Wairimu Rugaita & Co. did not take part in the conveyancing and cannot be roped by the protestor to benefit from an arrangement that did not concern her law firm. The protestor is obligated to pay his advocates fees in my considered opinion.

20. Each party to meet their costs.

21. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 17<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muriuki for Ithiga for Salesio Njagi (administrator) and**

**for Irungu Mwangi for Joseph Kangangi Njagi the 2<sup>nd</sup> administrator**

**Protestor present**