



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 2416 OF 2014
IN THE MATTER OF THE ESTATE OF BERNARD NJOROGE MACHARIA (DECEASED)

GRACE NDONGA NJOROGE.....APPLICANT

VERSUS

SALOME WANGUI NJOROGERESPONDENT

JUDGMENT

1. The deceased Bernard Njoroge Macharia died intestate on 19th May 2014. During his lifetime, he had two wives: Virginia Wanjiku Njoroge (now deceased) and Salome Wangui Njoroge (the respondent). The house of Virginia Wanjiku Njoroge had the following children:-

- (a) Jane Wandithia Njoroge;
- (b) Joyce Njambi Njoroge;
- (c) Lydia Mukami Njoroge;
- (d) Emma Njeri Njoroge;
- (e) Grace Ndonga Njoroge (the applicant)
- (f) Peris Mumbi Njoroge;
- (g) Margaret Wambu Njoroge; and
- (h) Mark Macharia Njoroge

Salome Wangui Njoroge (the respondent) has one child, Diana Njoroge.

2. On 4th September 2014 the applicant petitioned the court for the grant of letters of administration. In the affidavit in support of the petition, she swore that the deceased's estate comprised the following assets:-

- (a) Kiambaa/Waguthu/2922;
- (b) Mavoko Town Block 2/2339;
- (c) Ngong/Ngong/38215;
- (d) Kiambaa/Waguthu/2930;
- (e) Mavoko Town Block 2/2239;

- (f) Ruiru/Ruiru East Block 3/2749;
- (g) Nairobi/Block 113/137
- (h) Kiambaa/Waguthu/2920;
- (i) account with Equity Bank A/C No. [particulars withheld];
- (j) Faida Investment Bank/Safaricom;
- (k) shares with Safaricom Ltd;
- (l) life policy with Britam Insurance Company Ltd; and
- (m) shares with NIC Bank.

It was further indicated that the estate had the following liabilities:-

- a) bank loan with Family Bank Ltd;
- b) Safaricom shares Kshs.60,000/=; and
- c) debt owed to Lydia Mukami Njoroge of Kshs.800,000/=.

3. The respondent filed an objection to the application for grant and a petition by way of cross-application for the grant. In the affidavit that she filed in support she stated that the deceased had left only the following assets:-

- (a) Kiambaa/Waguthu/2922;
- (b) Mavoko Town Block 2/2339;
- (c) Ngong/Ngong/38215;
- (d) Kiambaa/Waguthu/2930;
- (e) Mavoko Town Block 2/2239;
- (f) Ruiru/Ruiru East Block 3/2749;
- (g) Nairobi/Block 113/137;
- (h) Plot No. A 44 certificate of ownership No. 125 from Kware Mukuru Kwa Njenga Jua Kali Association;
- (i) account with Equity Bank No. [particulars withheld];
- (j) Faida Investment Bank/Safaricom;
- (k) Life Policy Britam.

The estate had no liabilities.

4. In answer to the petition by the applicant the respondent swore that petition had been filed without her involvement and consent. Further, that the deceased had before his death distributed some of the property to his beneficiaries, and that the applicant had deliberately failed to mention this in her petition. The said properties had been given to members of the applicant's house as follows:

- (a) Ngong/Ngong/38202 (that was the homestead of Virginia Wanjiku Njoroge) had been given to the applicant and her siblings;
- (b) Ngong/Ngong/38205 and 25833 had been given to Mark Macharia Njoroge;
- (c) Ngong/Ngong/38214 had been given to Margaret Wambui Njoroge;
- (d) Ngong/Ngong/38210 had been given to Lydia Mukami Njoroge;
- (e) Ngong/Ngong/38209 had been given to Joyce Njambi Njoroge;

(f) Ngong/Ngong/38213 had been given to Peris Mumbi Njoroge;

(g) Ngong/Ngong/38212 had been given to the applicant;

(h) Ngong/Ngong/38211 had been given to Emma Njeri Njoroge;

(i) Ngong/Ngong/38208 had been given to Jayne Wandithia Njoroge;

(j) Kiambaa/Waguthu/2911 and 2920 had been given to Mark Macharia Njoroge who had also been given Loitokitok/Lolarash-Olgulului/728, and A44 Kware – Mukuru Kwa Njenga Jua Kali Association comprising one storey building with 22 residential rooms on condition that he refunds the construction costs to the respondent who had previously co-owned the property with the deceased.

5. The respondent further stated that Mavoko Town Block 2/2239, Ruiru/Ruiru East Block 3/2749 and Nairobi/Block 113/137 had been given to her by the deceased, whereas Ngong/Ngong/38216 was jointly owned between her and the deceased and, upon his death, the property had gone to her and was therefore not part of the estate; that Ngong/Ngong/38215 had been given to Diana Njoroge; account No. [particulars withheld] at Family Bank was a joint account between her and the deceased and, upon his death, the account had gone to her.

6. On 2nd November 2015 the applicant and the respondent (through their counsel) recorded a consent for the two to be appointed joint administrators, and that the applicant files an application for confirmation to which the respondent would respond.

7. On 23rd June 2016 the applicant filed an application for the confirmation of the grant in which she proposed that parcels Nairobi Block 113/137, Mavoko Town Block 2/2339, Ngong/ Ngong/38215, Mavoko Town Block 2/2239 be each shared equally among the ten (10) beneficiaries; Ruiru/Ruiru East Block 3/2749 be shared equally among all beneficiaries except the respondent; Kiambaa/Waguthu/2922 be given to Mark Wachira Njoroge; Kiambaa/Waguthu/2930 be given to the respondent; the proceeds at Equity Bank, Faida Investment Bank/Safaricom, Life Policy at Britam, shares at Safaricom Ltd and shares at NIC Bank be each shared equally to all the ten (10) beneficiaries; and Kiambaa/Waguthu/2920 goes to Mark Macharia Njoroge.

8. On 28th July 2016 the respondent filed her own application for the confirmation of the grant. In her supporting affidavit, she asked that Kiambaa/Waguthu/2922 be shared equally among the applicant and all her siblings; Mavoko Town Block 2/2339, Kiambaa/ Waguthu/2930 and Kiambaa/Waguthu/2920 be shared equally among the applicant and her siblings except for mark Macharia Njoroge; Ngong/Ngong/38215 goes to Diana Njoroge; Mavoko town Block 2/2239, Ruiru/Ruiru East Block 3/2749 and Nairobi/Block 113/137 goes to the respondent; the applicant and her siblings (except for Mark Macharia Njoroge) to equally share the proceeds of Equity Bank Account; all the beneficiaries (except Mark Macharia Njoroge) to equally share the proceeds from shares in Safaricom Ltd and NIC Bank; and Mark Macharia Njoroge to have the life policy at Britam. In the affidavit sworn to support the application for confirmation, the respondent repeated that the deceased had given most of his property to his family members and indicated so in writing.

9. The applicant's case was that the deceased left no Will, and that whatever document that the deceased had left did not amount to a Will. Therefore, the estate should be shared on the basis that the deceased had died intestate.

10. The applicant and the respondent each testified by basically adopting their respective affidavits. Mr Njengo for the applicant and Mr Keli for the respondent filed written submissions each.

11. It is certain that the deceased did not leave a Will. He did not make a legal declaration of his wishes or intentions regarding the disposition of his property after his death, duly made and executed in accordance with provisions of the **Law of Succession Act (Cap 160)**.

12. It is also trite that a person can distribute his properties during his lifetime. Under **section 42** of the **Act** it is stated that:-

“42. 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, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

There are gifts given during the lifetime of the deceased. These are gifts *inter vivos*, and the deceased must have done everything which according to the nature of the property comprised the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do. In **Dan Ouya Kodwar –v- Samuel Otieno Odwar & Another [2016]eKLR** it was stated that –

“For gifts *inter vivos*, the requirements of the law are that the said gifts may be granted by deed, an instrument in writing of by delivery, by way of declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts *inter vivos* must be completed for the same to be valid. In this regard it is not necessary for the donee to give his express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee.”

13. The conditions in regard to a gift *inter vivos* are that, the person actually intends to make a gift; it must be demonstrated the donor's

objective was to make a gift when he or she transferred the property; and that the deceased signed the transfer documents and consented to the transfer of the said parcel of land. Secondly, for the gift *inter vivos* to be complete the donee has to accept the gift made to him or her; the donee must agree to the transfer of the property that the donor made in his or her favour. The other condition is the delivery of the property to the donee. Lastly, the donor has to divest himself or herself of the property; he or she has to place the property in the possession of the donee.

14. The other issue that arose in this cause, and which was stated by the respondent without being controverted by the applicant, was that the deceased was in a habit of documenting every conversation he had with the family. He kept a notebook, which the respondent produced, of his interaction with the family. It was the respondent's case that, in the book, the deceased distributed his property to the family while he was alive. He indicated what he was giving to each house, and to each beneficiary. According to the applicant, these notes did not amount to a Will, and neither did they amount to gifts *inter vivos*. According to her, the deceased died intestate and therefore his property should be distributed in accordance with **section 40(1)** of the **Act** as follows:-

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and residue of the net 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.”

Under **section 35(5)** of the **Act** the division of the net estate among the children shall be equal.

15. It is now settled that, although what a deceased indicated in his regard to his property during his lifetime may or may not have amounted to a Will or a gift *inter vivos* in the strict sense, his expressed wish in regard to how his property will be distributed or shared upon his death should be given due regard and respect, unless it can be shown that the wishes were illegal, unfair and discriminatory to the beneficiaries. Or that, the wishes cannot, owing to the nature of the estate and its circumstances, be given effect to. In **Paul Kiruhi Nyingi & Another –v- Francis Wanjohi Nyingi [2009]eKLR**, the High Court indicated as follows:-

“To my mind however the black book remains an uncontroverted expression of the deceased wishes. I do not think that the black book was tendered in evidence as a Will. Nay, it was to show that the deceased had intentions on the way his estate should be distributed. Unless it can be demonstrated that those wishes of the deceased as captured in the black book were illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected in my view. Nothing has been brought to my attention that remotely suggests that the deceased was biased, unfair and or discriminatory against any of the beneficiaries in the manner he wanted his estate shared out on his demise. In any event, it would appear that some of the beneficiaries were aware of the contents of the black book during the deceased's lifetime. If they were disenchanted with the distribution they should have taken it up with him.”

16. I have indicated in the foregoing that the applicant did not challenge the evidence that the deceased kept the record that the respondent produced. None of her siblings challenged it. It can only mean that they were aware of the record and the contents, and did not raise any issue with the deceased about it.

17. There is no dispute that in the respective affidavit of the applicant and the respondent to support her application for confirmation it was their common ground that the deceased, while alive, gave and transferred plot No. 44 in Mukuru Kwa Njenga Jua Kali Association to the applicant's brother Mark Macharia Njoroge, and neither side has any issue with the transfer being taken into consideration as the deceased's gift *inter vivos* to him. The only condition that was attached to it was that he refunds the money he had spent on the construction of the rental rooms thereon to the respondent. This gift and condition are reflected in the notebook. There was no indication how much the amount that was used on the construction was. I confirm the gift, but have no way of assessing the refund.

18. The notebook shows that the deceased subdivided his parcel Ngong/Ngong/10554 into various plots, and got the surveyor to draw a mutation form (which the respondent produced in evidence). In the notebook and in the mutation form he indicated to whom the plots were going to go. He allocated Ngong/Ngong/38205 to Mark Macharia Njoroge, Ngong/Ngong/38208 to Jayne Wandithia Njoroge, Ngong/Ngong/38209 to Joyce Njambi Njoroge, Ngong/Ngong/32210 to Lydia Mukami Njoroge, Ngong/Ngong/ 38211 to Emma Njeri Njoroge, Ngong/Ngong/38212 to the applicant, Ngong/Ngong/38213 to Peris Mumbi Njoroge, Ngong/ Ngong/38214 to Margaret Wambui Njoroge, Ngong/Ngong/38215 to Diana Njoroge, Ngong/Ngong/38202 to the applicant and the members of the house of Virginia Wanjiku Njoroge (as this was where her house was), Ngong/Ngong/38216 left for the deceased and the respondent, and that left Ngong/Ngong/38201, 38203, 38204, 38206 and 38207 which the deceased sold and gave the money to Mark Macharia Njoroge to use to develop plot No. 44 Mukuru Kwa Njenga Jua Kali Association. I accept this evidence and therefore these properties shall go to the indicated beneficiaries.

19. Mark Macharia Njoroge was, according to the respondent, given Loitokitok/Lolarash – Oldulului/728 which was transferred to him by the deceased during his lifetime. There was no contest from the applicant about this. I consider this to be a gift *inter vivos* to him.

20. Both the applicant and the respondent agreed that the deceased had given to Mark Macharia Njoroge parcel Kiambaa/Waguthu/2920 although he had not transferred it to him. The respondent and the applicant each swore that the deceased further gave him Kiambaa/Waguthu/2920 which, again, had not been transferred. I will allow the two parcels to go to Mark Macharia Njoroge as was wished by the deceased to the knowledge of all the parties.

21. Further, both the applicant and the respondent agreed that the deceased gave the respondent Kiambaa/Waguthu/2930. I allow the property to go to the respondent as the deceased wished.

22. According to the respondent the deceased gave her Mavoko Town Block 2/2239 and gave the applicant Mavoko Town block 2/339 to be shared equally between her and her siblings. According to the applicant the two parcels should be shared equally to all the ten (10) beneficiaries. She made no reference to the deceased's wishes regarding the two parcels. The evidence of the respondent in this regard is supported by the record. I will give Mavoko Town Block 2/2239 to the respondent to share equally with Diana Njoroge. Parcels Mavoko

Town Block 2/2339 shall be shared equally between the applicant and her siblings, but to the exclusion of Mark Macharia Njoroge whom the deceased substantially provided for.

23. The notebook indicted, and the respondent testified, that the deceased gave her Nairobi Block 113/137 and Ruiru/Ruiru East Block 3/2749. The applicant asked the court to consider these parcels to be part of the deceased's intestate property, and made no reference to the deceased's wishes or the contents of the notebook. I consider that the deceased wished the two parcels to go to the respondent's house, and therefore the respondent and Diana Njoroge will equally share each of them.

24. Lastly, in bid to be fair, I direct that the proceeds of A/C No. [particulars withheld] at Equity Bank, shares at Safaricom Ltd, Life Policy at Britam Insurance Company Ltd, shares at NIC Bank Ltd and proceeds of Faida Investment Bank/Safaricom shall each be equally shared among all the ten (10) beneficiaries of the deceased.

25. In those terms, the grant issued jointly to the applicant and the respondent on 2nd December 2015 shall be confirmed.

DATED and SIGNED at NAIROBI this 12TH day of JULY 2018

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 16TH day of JULY 2018

J. N. ONYIEGO

JUDGE