



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO.330 OF 2013

[FORMERLY NYERI HIGH COURT P&A CAUSE 1164 OF 2011]

RE ESTATE OF MARTHA NYAMBURA NJOROGE (DECEASED)

EUNICE WANJIKU MWANGI.....1ST PETITIONER

LYDIA NJERI NJOROGE.....2ND PETITIONER

VERSUS

WILLIAM KANG'ETHE NJOROGE.....1ST OBJECTOR

CHRISTOPHER NJUGUNA NJOROGE...2ND OBJECTOR

JUDGMENT

1. Martha Nyambura Njoroge (hereafter *the deceased*) died *intestate* on 22nd January 2002. A dispute has arisen over the *distribution* of her free estate.

2. The deceased was survived by the following dependents:-

- a) Ephantus Mwangi Hezekiah – Son
- b) William Kangethe Njoroge – Son
- c) Christopher Njuguna Bjoroge – Son
- d) Virginia Nyambura Maina – Daughter-in-law
- e) Tabitha Nyambura Gutu – Daughter-in-law
- f) Eunice Wanjiku Mwangi – daughter
- g) Lydia Njeri Njoroge – daughter

3. It is not disputed that the deceased left behind the following three assets:

- (a) 34,180 shares with Barclays Bank Limited as at 2nd September 2011.
- (b) Kahuhia Farmers Co-operative Society Share No. 49.
- (c) Kshs 121,970 in Murata Farmers Sacco Society Limited Account Number 007-0690-001-00049.

4. However, the *objectors* dispute that deceased *owned* the land known as *Loc.10/Kirogo/393*. They claim that the *proprietor* was their father Hezekiah Njoroge Guchua (now also deceased).

5. The petitioners applied for a grant on 5th December 2011. Before a grant could be made, the objectors lodged an objection on 13th June

2012.

6. The objectors raised *legitimate* concerns. For example, only the *consent* of Ephantus Mwangi Hezekiah was obtained. To be fair to the petitioners, there are *affidavits of service* filed on 4th November 2011 showing that the original *citation* at Nyeri High Court was served upon *all* their siblings or in-laws. But the petition for letters of administration in this court *omitted* some properties belonging to the deceased.

7. On 19th March 2014, the parties recorded a *partial consent*: that the grant be made *jointly* to Eunice Wanjiku Mwangi and Christopher Njuguna Njoroge. On 5th May 2015, the court directed that the contested summons for confirmation of grant be determined by *viva voce* evidence.

8. The objector subsequently filed an *affidavit of protest* on 19th November 2014. The primary pleading for the petitioners was the affidavit in support of the summons filed on 24th September 2014.

9. At the hearing, the 2nd protestor relied largely on the *affidavit of protest*. He produced the copy of the title for Loc.10/Kirogo/393 (exhibit 1); an official search; the death certificate of Hezekiah Njoroge Guchua; the grant issued to the administrators of the estate of Guchua; and, the decree in Nairobi Miscellaneous Civil Case 780 of 1989 (exhibits 2 to 5).

10. His position is that Loc.10/Kirogo/393 is the subject of other succession proceedings in *Nairobi High Court Succession Cause No. 80 of 1985*. The grant has not been confirmed.

11. He testified that the deceased in the instant cause, Martha Nyambura Njoroge, was the *widow* of Hezekiah Njoroge Guchua. She could not thus inherit Loc.10/Kirogo/393 from her husband *absolutely*: She could only retain a *life interest*.

12. He also referred to an “opinion” issued by the court in 1989 in *Nairobi High Court Miscellaneous Application No. 780 of 1989* regarding the estate. It is in fact a *decree* (exhibit 3).

13. He testified that his two sisters *Eunice Wanjiku Mwangi* and *Lydia Njeri Njoroge* were married; and, could not inherit their father’s land under *Kikuyu* customary law. He said their father died *intestate* on 5th March 1980. He opined that the two sisters were only entitled to share in the three assets itemized in paragraph 3 of this judgment.

14. Under cross examination, he conceded that he had not annexed the order removing the Public Trustee from *Nairobi High Court Succession Cause No. 80 of 1985*. He also admitted that the decree issued in *Nairobi High Court Miscellaneous Application No. 780 of 1989* has not been set aside. Under that decree, he and his brother Joseph Maina were to receive 1.33 ha each in Loc.10/Kirogo/393 while their late mother was to get 0.95 ha.

15. The petitioners’ case was straightforward: that all the siblings are entitled to a share of *all* the assets. They proposed that Loc.10/Kirogo/393 be distributed as follows-

(i) Lydiah Njeri Njoroge and Eunice Wanjiku Mwangi (1.5 acres each from the share of their late mother, Martha Nyambura Njoroge)

(ii) Christopher Njuguna Njoroge – 3 acres

(iii) Virginia Nyambura Maina – 3 acres

16. The petitioners proposed further that the shares in Kahuhia Farmers’ Co-operative Society be shared *equally* between Eunice Wanjiku Mwangi; and, Lydiah Njeri Njoroge.

17. In cross examination, the 1st petitioner conceded that she and the 2nd petitioner got married before the death of their father. She also stated that the size of Loc.10/Kirogo/393 has not been ascertained. But she insisted that the petitioners are entitled to 1.5 acres each. She clarified that the petitioners were claiming the portion that devolved to their late mother.

18. She also conceded that the petition for letters of administration omitted some assets: The shares in Barclays; Kahuhia Farmers Co-operative Society; and, funds at Murata Farmers Sacco Society Limited.

19. Both learned counsel filed written submissions. Those for the petitioners were filed on 30th October 2018; those by the objectors on 28th November 2018.

20. I find that there is no dispute about the heirs. They are-

a) Ephantus Mwangi Hezekiah – Son

b) William Kangethe Njoroge – Son

c) Christopher Njuguna Njoroge – Son

d) Virginia Nyambura Maina – Daughter-in-law

e) Tabitha Nyambura Gutu – Daughter-in-law

f) Eunice Wanjiku Mwangi – daughter

g) Lydia Njeri Njoroge – daughter

21. It is also common ground that *Martha Nyambura Njoroge* (the deceased in this cause) was the widow of *Hezekiah Njoroge Guchua* (now also deceased). *Guchua* died *before* his wife, *Nyambura*.

22. The distribution proposed by the petitioners runs into serious legal headwinds. For starters, *Martha Nyambura* never owned the *entire* land known as Loc.10/Kirogo/393. The *registered* proprietor remains her husband *Hezekiah Njoroge Guchua* (also deceased). To the extent that the petitioners propose to subdivide all the 9 acres, the claim is *untenable* in fact and law.

23. It is not disputed that the *Hezekiah Njoroge Guchua* was a *Kikuyu*; and, that he died *intestate* on 5th March 1980. That was well before the **Law of Succession Act** came into force.

24. The Act *commenced* on 1st July 1981. Section 2 (1) expressly provides that it *shall* apply to the estates of persons dying *after* commencement of the Act. I thus readily find that the Act could not apply retrospectively to the estate of *Hezekiah Njoroge Guchua*.

25. Section 2 (2) further provides that estates of persons who died *before* commencement of the Act are subject to the written laws and customs applying at the date of death.

26. The two petitioners Eunice Wanjiku Mwangi and Lydia Njeri Njoroge freely conceded that they were *married* at the time their father died. Under *Kikuyu* customary law, they were locked out of inheriting their *father's* land.

27. But that is to be too simplistic. The 1st objector admitted that the decree issued by the High Court in *Nairobi High Court Miscellaneous Application No. 780 of 1989* has *not* been set aside. Those proceedings were initiated by the *Public Trustee* under section 11 of the **Public Trustee Act**.

28. Under that decree Joseph Maina (or his family); Christopher Njuguna (2nd objector); and, their mother *Martha Nyambura* were to share Loc.10/Kirogo/393 “*in the manner demarcated and shared to them by the deceased [Hezekiah Njoroge Guchua]*”. The interests of Joseph Maina are now represented by Virginia Nyambura Maina.

29. At the hearing of this cause, the 2nd objector admitted that his late father identified their respective shares: The 2nd objector and his brother Joseph Maina (now represented by his widow Virginia Nyambura Maina) were to receive 1.33 ha each; while their late mother (the deceased in this cause) was to get 0.95 ha of Loc.10/Kirogo/393.

30. Their mother died on 22nd January 2002. Her estate clearly falls for distribution under the **Law of Succession Act**. The two petitioners and their siblings (*except* Ephantus Mwangi Hezekiah, William Kang’ethe Njoroge and Tabitha Nyambura Gutu, a daughter-in-law) are entitled to a share of their mother’s portion being 0.95 ha or thereabouts of Loc.10/Kirogo/393.

31. There is no cogent evidence that the portion given to their mother constituted only a *life interest*. I am fortified by the decree I referred to. Plot Karuri No. B12 was given to *Martha Nyambura* “*for her life*”. But the decree did *not* give such a condition for her share in Loc.10/Kirogo/393. Furthermore, at the time of *death* of her husband on 5th March 1980 the **Law of Succession Act** had not come into operation. Section 35 of the Act relied on by learned counsel for the objectors is thus inapplicable.

32. Under the decree I referred to earlier, the High Court found that *Ephantus Mwangi Hezekiah* inherited another property from his father, *Loc 10/Mukangu/461*. The decree expressly stated that he is “*is not entitled to share in the remaining landed property unless perhaps through his mother with other children on his mother’s death*”.

33. Granted the size of the remaining land I find that it would be *unfair* to the other children for Ephantus Mwangi Hezekiah to receive an additional share in Loc.10/Kirogo/393.

34. Under the aforementioned decree, the High Court also gave another property, *Loc 10/Gatheru/586* to Benson Gitu (or his family); and, William Kang’ethe (the 1st objector) “*in the manner demarcated and shared out to them by the deceased[Hezekiah Njoroge Guchua]*.”

35. Again, considering the size of the size of the remaining land, I find that it would be *unfair* for *Benson Gitu* (or his family); and, *William Kang’ethe* to receive an additional share in Loc.10/Kirogo/393.

36. I agree that the true size of the Loc.10/Kirogo/393 is disputed. The annexed search (exhibit 2) puts it at 9 acres. But that matter can easily be resolved by *re-surveying* of the land. Both parties concede that point.

37. The final orders shall be as follows-

(a) That land parcel number *Loc.10/Kirogo/393* shall devolve as follows-

i) Christopher Njuguna Njoroge – 1.33 hectares

ii) Virginia Nyambura Maina – 1.33 hectares

iii) The balance of 0.95 hectares (*inherited by Martha Nyambura, deceased*) shall be shared *equally* between Eunice Wanjiku Mwangi; Lydia Njeri Njoroge; Christopher Njuguna Njoroge; and, Virginia Nyambura Maina.

(b) The land shall be *re-surveyed*. In the event that it is greater or smaller than 3.61 hectares, then it shall be distributed *pro rata* with the shares in order (a) above.

(c) For the avoidance of doubt, Ephantus Mwangi Hezekiah, William Kang'ethe Njoroge and Tabitha Nyambura Gutu are *not* entitled to a share of *Loc.10/Kirogo/393*.

(d) Eunice Wanjiku Mwangi; Lydia Njeri Njoroge; Christopher Njuguna Njoroge; Virginia Nyambura Maina; Ephantus Mwangi Hezekiah, William Kang'ethe Njoroge and Tabitha Nyambura Gutu will get an *equal share* of the following three assets-

i) 34,180 shares with Barclays Bank Limited (as at 2nd September 2011) or such other number of shares allotted to the deceased.

ii) Kahuhia Farmers Co-operative Society Share No. 49.

iii) Kshs.121,970 in Murata Farmers Sacco Society Limited Account Number 007-0690-001-00049.

38. The grant shall be *confirmed* in terms of this judgment. In the interests of justice, there shall be *no* order on costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 13th day of December 2018.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

No appearance by counsel for the petitioners.

Mr. Mugambi holding brief for Mr. Chege for the objectors instructed by Mwangi Chege & Company Advocates.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.