



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT NAIROBI

#### SUCCESSION CAUSE NO. 47 OF 2001

#### IN THE MATTER OF THE ESTATE OF MARY WAITHIRA NJOROGE (DECEASED)

#### JUDGMENT

##### PLEADINGS

The deceased Mary Waithera Njoroge died testate on 17th July 1999. She was survived by Stephen Mwangi Njoroge and Margaret Wambui Kiaro and left one asset **L.R. Kiambaa/Kanunga/59**.

Elijah Njoroge Kiaro petitioned this court for a grant of probate of written will and the same was granted on 23rd March 2001. On 16th March 2001, Stephen Mwangi Njoroge raised an objection to making of the said grant of probate on grounds that the alleged will was not properly executed as required by law. He subsequently on 14th June 2001 filed an application seeking revocation of grant. The Respondent; Elijah Njoroge Kiaro raised t objection in replying affidavit dated 6th July 2001 that the will was valid and expressed true wishes of the deceased and she was able and in good health at the time she executed the Will. Justice Rawal as she then was in her ruling dated 11th November 2008 revoked the grant so issued and ordered a joint grant be issued in the names of the objector and the executor and directed parties to file summons for confirmation with proposal of equal distribution between the objector and Margaret Wambui. A grant was issued by this court on 11<sup>th</sup> November 2008.

On 30th November 2009, Stephen Mwangi Njoroge applied for confirmation of the said grant. The said application stated that the deceased was survived by 2 children Margaret Wambui Kiaro and Stephen Mwangi Njoroge with a proposal that each gets 0.25 acres and 1.15 acres respectively.

Elijah Njoroge Kiaro in his replying affidavit dated 1st November 2010 denies any knowledge of the issuance of a grant of letters of administration adding that the will was not challenged in open court. He refuted the mode of distribution and denied having given his authority to the administrator to apply for confirmation of the said grant. It was averred that the application was brought to court prematurely and the same lacked merit. That no consent for distribution of assets was sought. He filed Further Grounds of Replying Affidavit on 21<sup>st</sup> May 2015, stated that the Co administrator failed to consult him on proposal on distribution of the deceased's estate, instead he proceeded on his own to ascertain and determine the same. He reiterated that the mode of distribution ought to be as the deceased wished in her Will inspite of the revocation of the Will as follows;

- i. Stephen Mwangi Njoroge – 0.5 acres
- ii. Margaret Wambui Kiaro- 0.5 Acres
- iii. Elijah Njoroge Kiaro- 0.4 acres

Stephen Mwangi Njoroge died on 22nd February 2016 and the beneficiaries of his estate sought by application dated 14th February 2017 sought to substitute him with Teresiah Wanjiku Mungai as co-administrator of the deceased's estate and the application was granted.

##### HEARING

Teresiah Wanjiku Munga (PW1) daughter of Stephen Mwangi Njoroge testified that the deceased was wife/widow of her paternal grandfather and they were parents of their father Stephen Mwangi Njoroge who died on 22/2/2016 while the case was still in court and he was one of the administrators. She applied for substitution and was substituted by the brother.

Her father owned the parcel of land **L.R. Karinga/Kiambaa/59** and her auntie, Margaret Wambui Kiaro used to stay on ¼ acre of the said parcel of land. She testified that the land was owned by her grandfather, Elijah Njoroge Kiraki and after his demise, the same was transferred to their grandmother Mary Waithera Njoroge. That her auntie was using the land before her grandmother died. That the land was to be given ¼ to her auntie and the rest to be shared between her and her brother as their late father's share. That there was Rebecca/Regina Wanjiru paternal grandmother her and her grandmother were stepbrothers.

Stephen Kagiri Njau a stepbrother to Njoroge Kiraki the deceased's late husband stated by his statement that the deceased had distributed his property amongst his two children. That he had given Wambui ¼ acre and the rest to his son Mwangi adding that Wambui should be satisfied with that as that was the wish of the family and denied any knowledge of the existence of a will by the deceased herein.

Rebecca Wanjiku in her statement stated that the deceased was a wife to her brother in law Njoroge and she had two children Mwangi and Wambui. That she had given Wambui a plot, which is about ¼ acre and the rest, was to go to Mwangi as their father had said.

Margaret Wambui Kiaro (PW2) testified that the deceased had 2 children, herself and Stephen Mwangi Njoroge. Stephen neglected and failed to support their aging mother and finally moved out of family land and left their mother helpless with no one to take care and support her. He left and went and married another woman and his wife and children left their home too. He came back after their mother's death. Due to the prevailing circumstances, she took charge and moved their mother to her house and provided the necessary and required care and she was assisted by her son Elijah Njoroge Kiaro. As time went on, their mother on her own volition and in the presence of 2 independent witnesses made a Will and bequeathed Elijah Njoroge 0.4 acres of the suit property Kiambaa/Kanunga/59 and the rest was bequeathed to herself and brother equally.

Elijah Njoroge Kiaro testified that the deceased was his grandmother and lived with her since she was born. He helped to take care of her and took her to hospital and paid for her medical expenses and upkeep. One day, she told him that he suffered taking care of her after her son left home. She went to Ms Wambui Nganga Advocates and drew her Will.

When the Will was read in front of all members of the family and her uncle Stephen Mwangi Njoroge went to the Chief who summoned them and they were told to resolve the dispute and come back after 1month. Stephen Mwangi Njoroge filed the Succession Cause in Kiambu Law Courts and he came and filed Succession Cause in the High Court. He reiterated that the distribution ought to be as per the wishes of the deceased, the intended distribution in the Will that was revoked.

## **DETERMINATION**

I have considered the parties pleadings, testimony and submissions and find as follows. Reference is made to the will alleged to have been made by the deceased prior to her demise. This issue was finally determined by Rawal L J in her Ruling dated 11th November 2008. I note that no appeal has been preferred against the said ruling hence the same stands. The estate of the deceased as it stands devolves through the grant of letters of administration issued by this court on 22/4/2006 with the only issue for determination being the distribution of the deceased's estate.

The applicant proposes that the deceased's estate devolves to the two children surviving the deceased Margaret Wambui Kiaro and Stephen Mwangi Njoroge. The Green card attached to the petition for grant of Probate confirms that Land Parcel Kiambaa/Kanunga/59 was registered in 24<sup>th</sup> May 1958 in the name of Njoroge Kiraki (deceased). On 2<sup>nd</sup> June 1982 Mary Waithera Njoroge was then registered as owner of the suit property pursuant to Succession Cause filed after the demise of her husband and as such, she held the same in trust for her children.

It is submitted by the Co administrator that Elijah Njoroge's claim cannot be sustained as he can only derive interest from his mother who is still alive.

**Section 38 of the Law of Succession Act** provides;

***“Where an intestate has left a surviving child or children but no spouse the net estate shall subject to the provisions of Section 41 and 42 devolve upon the surviving child, if there be only one or shall be equally divided among the surviving children.”***

However, in the instant case; the facts are slightly different, the deceased was abandoned by her son the Respondent; Stephen Mwangi Njoroge who left and his family left the homestead. The daughter Margaret Wambui Kiaro and her son, the Applicant Elijah Njoroge Kiaro attended to her and in the process she decided to bequeath her grandson a share of the suit property Land Parcel Kiambaa/Kanunga/59. Her son objected on the basis that the deceased was left the suit property in trust for their children, she could not distribute to anyone else.

Although the Will of the deceased was revoked by the Ruling of LJ Rawal, the basis for revocation is that the Will named David Mwangi who did not exist. Other than that, the intention of the deceased was to gift a portion of the suit property to her grandson in gratitude of his selfless and committed effort in taking care of her. The fact of the son of deceased deserting her ailing and aged mother is not denied, and consequently, that a helping hand was at hand from her grandson is not in doubt. It is only fair and reasonable that he deceased's gratitude as she attempted to show in the revoked Will is fulfilled.

Secondly, the witnesses who deponed affidavits Stephen Kagiri Njau & Rebecca Njau did not testify in Court to test the veracity of their testimony through cross examination and their credibility as witnesses. They did not present themselves in Court to testify, no reasons were advanced for their absence of circumstances for the Court to consider. Their evidence cannot confirm on a balance of probability the claim that deceased's husband left a Will and bequeathed the suit property largely to his son the whole property save for daughter's ¼ acre.

The Court is inclined to rely on the oral evidence on record, PW1 daughter of deceased and her son who stated they are entitled to the larger portion of the land, the daughter of the deceased claimed ½ share and her son, ¼ that was bequeathed to him for taking care of the deceased.

## **DISPOSITION**

**a. The Grant of letters of administration issued on 22<sup>nd</sup> April 2006 is confirmed as follows;**

i. Stephen Mwangi Njoroge – 0.5 acres

ii. Margaret Wambui Kiaro - 0.5 Acres

iii. Elijah Njoroge Kiaro - 0.4 acres

b. Any aggrieved party to lodge appeal in Court of Appeal.

**DELIVERED, DATED & SIGNED IN OPEN COURT ON 3<sup>RD</sup> DAY OF DECEMBER, 2018.**

**M.W.MUIGAI**

**JUDGE –FAMILY DIVISION –HIGH COURT**