



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 796 OF 2007

IN THE MATTER OF THE ESTATE OF BERNARD NJENGA HINGA (DECEASED)

RULING

1. On 15th October 2016, the court was invited to consider distribution of the property known as LR No. 214/149. I was informed that most of the estate had been distributed save for LR No. 214/149 and LR No. 11478. LR No. 214/149 had been bequeathed to a child of the deceased who subsequently died after the deceased's demise, while the other property was subject to ongoing proceedings at the Environment and Land Court (ELC). I am asked to determine the matter on the basis of written submissions on record filed in 2011.
2. The deceased herein died on 27th December 2006. He died testate, having made a will on 17th September 1986. According to clause 5(viii) of the will, LR No. 214/149 Harrison Lane, Muthaiga, was willed to the deceased's son called William Njenga Hinga, absolutely.
3. The record reflects that on 24th March 2010 a consent was recorded where it was directed that the parties were to file skeletal submissions on the disposal of LR No. 214/149 and LR No. 11478. The said directions were made upon a summons for confirmation of grant dated 22nd June 2009. In the affidavit in support it is deposed that LR No. 214/149 had been bequeathed to William Njenga Hinga, but the latter predeceased the deceased, having died in 2003. It is proposed that the property ought to be divided amongst the two survivors of the house of William Njenga Hinga's mother, that is to say Elizabeth Njeri Hinga and Anthony Lawrence Hinga. William Njenga Hinga was said to have had died without spouse or issue. There is an affidavit of protest sworn by one of the other administrators, Isabella Muthoni Njenga, on 1st December 2009. She argues that the death of William Njenga Hinga prior to that of his father caused the subject property to lapse, and thereby remove it from the ambit of the will of the deceased. She does not see any reason why the said asset cannot be distributed equally between the all the survivors of the deceased.
4. I have scrupulously perused through the record before me and noted that the written submissions on record are from only one side of the divide, Elizabeth Njeri Hinga and Anthony Lawrence Hinga. There is no record of written submissions having been filed by Isabella Muthoni Njenga. I shall proceed to determine the matter on the basis of the material before me. Regarding LR No. 214/149, it is submitted by the applicants that the same was intended to be a gift to the first house of the deceased. It is argued that the protestor had earlier conceded that the property should go to the first house, and what she pleads in her protest is a negation of her earlier position. It is submitted that the will disposed of assets according to classes, and Clause 11 of the will identified the classes. Section 2(2) of the Second Schedule of the Law of Succession Act, Cap 160, Laws of Kenya, was cited as stating what should happen upon the demise of a member of a class.
5. It is common ground that the person named as the beneficiary of LR No. 214/149 predeceased the

deceased. The question then that arises is whether the bequest made to a beneficiary who predeceases the testator is effective. Elizabeth Njeri Hinga and Anthony Lawrence Hinga argue that in the circumstances of the instant case it ought to remain intact, while the protestor argues that such a gift lapses.

6. Lapse of gifts is dealt with in paragraphs 1 to 7 of the Second Schedule to the Law of Succession Act. Paragraph 1(1) states the general rule. There are exceptions to that general rule. These are stated in paragraph 2. There are two categories of exceptions. The first category is where the gift is meant to discharge a moral obligation and where it is expressed to be indeterminable upon the demise of the beneficiary and such beneficiary is survived by issue. The second category is where the gift falls into what is known as a class gift. Paragraph 1(1) thereof states as follows: -

'Save as is provided in this Schedule no gift or disposition shall confer any benefit on any person who predeceased the testator, and where a gift or disposition fails on this account it is said to 'lapse.'

7. The applicants concede that the issue of lapse of the gift to William Njenga Hinga arose following his predecease of the testator, but argue that the circumstances were subject to the exception stated in paragraph 2(2) of the Second Schedule. They submit that the gift to William Njenga Hinga was a class gift, in the sense that it was made to person falling with a certain class or category of persons, so that upon demise of one of the class members the gift passes on the remainder.

8. Clause 5(viii) of the will states as follows:-

'I GIVE DEVISE AND BEQUEATHE the following specific legacies:

(viii) Property comprised in LR No. 214/149 on HARRISON LANE MUTHAIGA in Nairobi to my son WILLIAM NJENGA HINGA.'

9. Clause 11 of the same will reads as follows:-

'In these presents the expression 'my children' shall mean and include ANTHONY LAWRENCE HINGA, ELIZABETH NJERI HINGA, and WILLIAM NJENGA HINGA who are my children from former marriage now dissolved, and NYOIKE MUGO HINGA who is my child with my beloved wife MUTHONI NYOIKE HINGA and hereafter any children I may beget with my said beloved wife.'

10. The applicants argue that the gift in clause 5(viii) was a class gift in view of clause 11. The deceased was said to have intended the gift in clause 5(viii) to have been a gift in favour of the first house, so that in the event that a gift to a member of that house lapsed the same would then pass under paragraph 2(2) to the surviving members of that house. A gift to a class is meant to be made not to an individual but to a group of persons who fall into a certain class or category, such as nephews or nieces or sons or children. The gift in clause 5(viii) of the will is to an individual not a class. It was not expressed to be a gift to "my children" or "my children in the first house", nor is it stated that in the event it lapsed for any reason it would pass on the survivors of the beneficiary named in the will. There is nothing in the will to indicate that the gift was intended to be a class gift.

11. Paragraph 1(1) of the Second Schedule should be read together with paragraph 7 thereof, with respect to what should happen to a gift that has lapsed. Paragraph 7 reads as follows: -

'Subject only to the foregoing provisions of this Schedule, if a gift or disposition lapses, the property or interest in the subject thereof shall pass under any residuary bequest which, but for the gift or disposition would have applied to the property or interest: Provided that, if there is no residuary bequest, or if the lapsed gift or disposition is itself a share of the residuary bequest and there is no ulterior residuary bequest under which it can pass, then there shall be intestacy in respect of the property or interest.'

12. Going by the provision in paragraph 7, a gift that lapses either falls into the residue of the testamentary estate or to the intestate of the deceased. It will fall into the residue where the will has residuary provisions, and the property would fall for distribution in accordance with the said provisions. Where there is no provision for a residue and disposition thereof or the failed gift is itself a residuary gift then the property forms part of the intestate estate of the deceased.

13. The will of 17th September 1986, provides for a residue of the estate and its disposal at clause 6. The said residue is for disposal at the discretion of the executors, or administrators for that matter, to settle estate debts, and funeral and administration expenses, and to distribute equally amongst the surviving widow and children of the deceased. The conclusion to draw from the above is that upon the lapse of the gift to William Njenga Hinga, the same fell into the residue, to be disposed of in accordance with clause 6 of the will of the deceased. LR No. 214/149 shall be distributed equally between Isabella Muthoni Njenga, Elizabeth Njeri Hinga, Anthony Lawrence Hinga and Nyoike Mugo Hinga. It is so ordered.

DATED and SIGNED at NAIROBI this 3RD DAY OF MAY, 2017.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE