



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1892 OF 1993

IN THE MATTER OF THE ESTATE OF JAMES NJUGUNA KIONGO (DECEASED)

RULING

1. The applications for determination are dated 7th February 2013, 24th April 2013 and 6th August 2014. They are to be disposed of simultaneously.
2. The summons dated 7th February 2013 is premised on Rules 49 and 73 of the Probate and Administration Rules. It seeks several principal orders: release of title documents relating to LR Sigona 1735, 1742, 1743, 1744 and 1745 (now subdivided into LR Sigona 1893 and 1894) and execution of transfer documents relating thereto, release of Kshs. 600,000.00 in respect of share of sale proceeds of the one (1) acre plot excised from LR Sigona 454 and respondent be compelled to complete distribution of the estate of the deceased. There is an alternative general prayer that the respondent be removed as administrator.
3. The said application is brought at the instance of David Kinyanjui Njuguna B, who swore an affidavit on 7th September 2013. He is one of the administrators of the estate of the deceased, and he represents the fourth house. He accuses the respondent second administrator of refusing to release transfer documents relating to 1/8 of LR Sigona 454 due to the fourth house as per the court order of 12th September 2012.
4. He further avers that it had been ordered that the balance of the sale proceeds from the sale of the one acre plot from LR Sigona 454 of Kshs. 3, 000, 000.00 be distributed equally amongst the five houses, meaning that the fourth house was entitled to a sum of Kshs. 600,000.00. The respondent second administrator is said to have refused to release the money to the fourth house.
5. There is a reply on record by Eliud Mwaniki Kiongo, who is the administrator representing the first house. He swore an affidavit on an unknown date, but the same was filed in court on 12th March 2013. The deponent asserts that the accusations against the respondent second administrator are false, stating that it was in fact the applicant and his counsel who were responsible for the delays in the matter. He states that the plot that the applicant is claiming is more than the 1/8 plot they are claiming.
6. The respondent, second administrator, David Kinyanjui Njuguna A, swore an affidavit on 18th March 2013 in reply to the said application. He states that the fourth house is entitled to 1/8 acre from LR Sigona 454, but asserts that the responsibility of facilitating the transfer is on all the administrators and not just himself. Regarding LR Sigona 1769, he states that it measures 0.063 hectare while the 1/8 acre should measure 0.039 hectare. He proposes that LR Sigona 1769 should be sold and its proceeds shared amongst all the beneficiaries, and that the fourth house should get its 1/8 acre entitlement from LR Sigona 1745. He adds that the court did not specify that the fourth house should get LR Sigona 1769. He states that the administrators do not intend to take away the

fourth house's entitlement to the 1/8 acre and that the said house should just be patient.

7. The application dated 23rd April 2013 is at the instance of David Kinyanjui Njuguna B. He seeks to have dealings on LR Sigona 1745 prohibited pending hearing and disposal of the application and that the second administrator be compelled to surrender the title documents relating to the said parcels of land. He further seeks that the disposal of the application dated 7th February 2013 be given priority and the second administrator compelled to account for his dealings with the property of the estate. He prays that the subdivision and registration of LR Sigona 1893 and 1894 be deemed illegal and be reverted to the original LR Sigona 745.
8. The grounds upon which it is predicated are set out on the face of the application and in the facts deposed to in the affidavit sworn on 23rd April 2013 in support of the application. The second administrator is accused of taking over the administration of the estate to the exclusion of the other administrators, and that he is proceeding with administration in a manner that is opaque and lacking in transparency. He alleges that some of the activities of the said administrator border on criminality, and he should in the circumstances account for his dealings with regard to the estate.
9. The applicant deposes that after the confirmation of the grant, it was agreed that all the beneficiaries should get a portion of LR Sigona 454. The said asset was subsequently subdivided into forty and a half (40½) plots each measuring a quarter acre. The plots were then distributed amongst the beneficiaries, leaving five (5) plots unallocated. The five being LR Sigona 1735, 1742, 1743, 1744 and 1745 (now subdivided into LR Sigona 1893 and 1894). It was agreed that the five would be sold and the proceeds of sale shared out as proposed in the certificate of confirmation of grant. After survey work was done to subdivide the same, balloting followed.
10. The deponent's complaint is that the fourth house had been allocated the half plot, the same was, however, not surrendered to them, instead the other administrators are said to be engaged in acts designed to make sure that the same is not surrendered to them. He avers that rather than surrender the portion to his side of the family the administrators have caused the same to be registered in their own names. He states that there is an application pending asking for surrender of the said plot to the fourth house.
11. He asserts that the plot comprising the remainder of LR Sigona 1745 has been subdivided under the supervision and directions of the second administrator, saying that he had obtained the forms used for the subdivision. He complains that his consent to the subdivision was not obtained. He states further that some of the administrators did not have the capacity to conduct a subdivision on grounds of ill-health, alleging that she is virtually under the control of the second administrator. He claims that he reported the alleged acts of forgery of the documents used to facilitate the subdivision at the Kikuyu Police Station. The second administrator is alleged to be in possession of the title documents for the subdivisions and the applicant fears that the second administrator may proceed to dispose of the subdivisions.
12. There is on record an affidavit in reply to the applications dated 7th February 2013 and 24th April 2013, as well as another dated 2nd May 2013, sworn on 7th May 2013 by Eunice Njoki Kiongo. She is the 4th administrator and the fifth wife of the deceased. She claims that the applicant in all three applications was a stumbling block to the completion of administration. She accuses him of hiding relevant documents making it difficult for the members to distribute the estate. She disassociates herself with the claims by the administrator from the fourth house, and defends the second administrator against the allegations made against him by the said administrator from the fourth house.
13. The other replying affidavit on record was sworn by David Kinyanjui Njuguna A on 6th May 2013. He is the second administrator who is the target of the applications the subject of this ruling. He says that most of the assets have been distributed and title deeds issued. He states that the fourth house was entitled to a 1/8 acre plot, which they were given, being LR Sigona 1893 which

- is registered in the name of the administrator from the fourth house and two of his brothers. The remaining assets were to be sold, that is to say LR Sigona 1735, 1742, 1743, 1744, 1769 and 1894. The plots have not, however, been sold for the parties have not been able to agree on the mode of disposal. Three of the administrators of like mind met and agreed that the said plots be distributed amongst the five houses, so that thereafter each house could sell their respective plot and distribute the proceeds of sale amongst themselves. The subsequent distribution would then not involve all the administrators for each would dispose of the plot due to their family. He states that any prohibitory order would make it difficult for any house which wishes to dispose of the plots allocated to it.
14. The other replying affidavit was sworn by Eliud Mwaniki Kiongo on 17th June 2013. He avers that the fourth house was entitled to only 1/8 acre plot from LR Sigona 454 that had been indicated in the deed plan that had also indicated the 40½ plots. He states that the fourth house should be given the 1/8 plot now registered as LR Sigona 1769 as the court had directed at confirmation. After the subdivision 35 out of the 40 ½ plots were balloted and titles issued to their respective owners. Only 5 ½ plots remained. He blames the second administrator for the delay in distributing the 5 ½ plots by his non-cooperation, and accuses him of even forging his signature, and that of the administrator from the fourth house, to assist him fraudulently transfer plots numbers LR Sigona 1735, 1742, 1743, 1744, 1769, 1893 and 1894, in a manner contrary to the directions of the court. He is said to be holding on to a sum of Kshs. 3,000,000.00 that ought to have been shared out between the five houses. He asserts that the second administrator could not have spent Kshs. 7, 000,000.00 on administration as he claims.
 15. The application dated 6th August 2014 seeks orders against the first and fourth administrators, Eliud Mwaniki Njuguna and David Kinyanjui Njuguna B, seeking to have them compelled to execute transfer documents in respect of LR Sigona 98 in favour of Peter Njoroge Waweru. The alternative prayer is that the deputy registrar signs the relevant transfer forms.
 16. The applicant, Peter Njoroge Waweru, swore an affidavit on 6th August 2014. He acquired an interest in LR Sigona 98 through assignment from a person who had bought the property from the estate. At confirmation of the grant it had been directed that the said property be sold and its proceeds distributed in a manner specified in the certificate of confirmation of grant. He complains that the transfer of the property to his name has been frustrated by the refusal by Eliud Mwaniki Njuguna and David Kinyanjui Njuguna B to sign the relevant documents.
 17. Attached to that affidavit are copies of several documents. Certificate of confirmation of grant is exhibited as evidence that LR Sigona 98 was to be sold. Copy of a sale agreement is attached as indication that the estate sold the property to one Elizabeth Muthoni Ndungu. An assignment dated 18th December 2012 is meant to establish that the applicant did acquire the interest bought by the said Elizabeth Muthoni Ndungu.
 18. The only reply to the said application is by the administrator from the fourth house. He complains that he was not party to the said sale, asserting that the sale agreement ought to have been signed by all four administrators. Indeed, he says there was a no sale at all for it is all a scheme by the second administrator to freeze the assets of the estate. He states that the applicant should have commenced a separate suit and pursue his claim there.
 19. Directions were given on 10th December 2014 that the three applications – dated 7th February 2013, 24th April 2013 and 6th August 2014 – be disposed of by way of written submissions. I have on record six (6) sets of written submissions.
 20. The applicant in the applications dated 7th February 2013 and 24th April 2013 submits that his case stems from the order comprised in the certificate of confirmation of grant, which distributed the estate. The core property is said to be LR Sigona 454 and most of the disputes in the estate revolve around it. According to the applicant it was agreed in the judgment of the court of 12th

April 2011 that the said property would be subdivided into quarter plots to be distributed equitably amongst all the beneficiaries. The subdivision resulted in forty (40) plots measuring quarter acre, and another measuring an eighth of an acre. The court directed that each beneficiary get one plot to own individually and absolutely. There being thirty-four (34) beneficiaries, 34 plots were given out, leaving a balance of six (6) one quarter plots and one eighth plot.

21. It is submitted that out of the six quarter acre plots, the fourth house was given one quarter plot to compensate for loss of LR No. 3614 which had been earlier allocated to them but was discovered to be in occupation of third parties. It is also submitted that the fourth family is entitled to the one eighth acre plot. The said one eighth acre plot is described as LR Sigona 1769. The remaining five quarter acre plots were to be sold and the sale money shared amongst the male beneficiaries. The five that remained were LR Nos. 1735, 1742, 1743, 1744 and 1745.
22. The dispute relates to the five quarter acre plots and the one eighth plot that remained after the distribution. It is submitted that the respondent has frustrated the sale of the five (5) and has refused to surrender the eighth acre plot to the fourth house. It is stated that instead of surrendering the eighth acre plot, the respondent had caused the subdivision of LR Sigona 1745 and purported to give the fourth house an eighth acre from the said subdivision. The original eighth acre, LR Sigona 1769, was then allocated to someone else. It is submitted that the subdivision of LR Sigona 1745 was done without the consent of the relevant Land Control Board. The second administrator is accused of acting in bad faith.
23. The applicant has also submitted on the need for accounts. He emphasizes that rendering accounts is a statutory requirement under section 83 of the Law of Succession Act. It is also submitted that there had been an order that the fourth house be paid Kshs. 600, 000.00, being their share of the balance of the sale price of Kshs. 3, 000,000.00 arising from the sale of a one acre plot to Peter Ndichu Komu.
24. On his part, the second administrator respondent submits that it is in fact the fourth house that is being difficult in the matter by insisting that it is entitled to LR Sigona 1769 as a matter of right. He argues that the court did not order that the extra eighth acre must be LR Sigona 1769, but rather an eighth acre from LR Sigona 454. He submits that LR Sigona 1769 is larger than one eighth, and that is why the administrator have given the fourth house an eighth from a subdivision of LR Sigona 1745. He submits that the five plots that were to be sold and the money raised distributed have been distributed, so that LR Sigona 1735 was given to the first house, LR Sigona 1742 to the fourth house, LR Sigona 1744 to the third house, LR Sigona 1743 to the second house and LR Sigona 1894 to the fifth house. On the money that was to be paid to the fourth house from the sale of the one acre of LR Sigona 454, it is submitted that the same was utilized in the administration of the estate and there was no surplus, meaning that there was no money to be paid to the fourth house.
25. On LR Sigona 98, it was submitted that the same was sold with the consensus of four of the houses, and the proceeds shared among the beneficiaries. It is urged that the property be transferred to the purchaser. It is submitted that the fourth house was to be, and was in fact, compensated with an extra plot, and the other houses were to share proceeds of sale of Kijabe/Kijabe Block 1/3614, but it transpired that that property had been sold by the said fourth house. He submits that the administration of the estate was joint and therefore there is no basis for requiring accounts by only one of the four administrators.
26. The orders sought in the applications for determination stem from orders that were made by Rawal J. on 12th April 2011, in a judgment on an application dated 27th March 2009 which sought confirmation of the grant made on 25th February 2009.
27. The contest appears to revolve around the distribution of LR Sigona 454. It was noted in the judgment that one acre out of LR Sigona 454 had been sold to Peter Kamu by agreement of the majority of the family, except the fourth house. 0.22 of an acre was noted to have been sold too by the widow in the fourth house. The deceased, prior to his death, had sold one acre from the same

property to Elizabeth Wanjiru Ndungu.

28. The distribution proposed in the application the subject of the judgment was that each beneficiary gets a quarter plot from LR Sigona 454, with the fourth house getting an extra quarter plot instead of Kijabe/Kijabe/Block 1/3614. In the end the court awarded each beneficiary a quarter acre out of LR Sigona 454. Seven other plots out of the said property (identified in the judgment as plots numbers 1, 16, 17, 18, 19, 20 and 40) were to be balloted on and shared between individuals identified in the judgment. A certificate of confirmation of grant in the terms of the judgment of 12th April 2011 was issued on even date duly signed by Rawal J.
29. The position above was altered by the ruling of the court on 10th September 2012. According to the ruling, out of the 40 ½ quarter acre plots in LR Sigona 454, each of the thirty six (36) beneficiaries was to get one plot each, with the fourth house getting one and half (1 ½) plots in addition to the one plot each. The plots remaining were to be sold and the proceeds of sale divided equally amongst the male beneficiaries of the estate. A draft amended certificate of confirmation of grant along those lines was placed before the court, and the court approved the same on 27th September 2012.
30. The dispute now before me relates to what became of the plots that Rawal J had ordered to be sold and shared equally between the male beneficiaries, the distribution of 1 ½ plots to the fourth house and the fourth house's share of the sale proceeds of the one acre plot sold to Peter Ndichu Komo. From the affidavits before me, it is plan that the remaining plots have not been sold and the proceeds of sale distributed as earlier ordered. It is averred that there have been squabbles on how to dispose of them. There is also a dispute as to the ½ plot entitlement of the fourth house, which appears to have rejected the plot offered to them. The fourth house complains that they have not received their share of the sale of the one acre sold to Mr. Komo.
31. Regarding the plots to be sold, the second administrator is giving mixed signals. He says that the parties have not agreed on the disposal of the said plots by sale on the one hand, and on the other he says that it has been agreed that the remaining plots be allotted to each house so that each can then dispose of their entitlement. What I gather from this is that is that the plots are still intact; it is only that the parties are unable to agree on their disposal. It would appear that the inability to agree on the disposal of these plots has created uncertainty, which, in turn, has engendered a measure of mistrust amongst the parties. It is on that basis that the applicant is asking for a surrender of the title documents relating to those plots.
32. Regarding the ½ plot, the applicant asserts that the fourth house is entitled to LR Sigona 1769. The other side argues that the order of 10th September 2012 did not allot any particular ½ plot to the fourth house; it merely said that that house was entitled to a ½ plot out of LR Sigona 454, which could come out any corner of the said plot.
33. I have scrutinized the ruling dated 10th September 2012. It is confirmed in the ruling that there were 40½ plots admeasuring quarter acre each in respect of LR Sigona 454. The court confirmed them to be in existence. It was ordered that all the beneficiaries, irrespective of gender, each get one plot out of the 40½ plots. The fourth house was to get 1 ½ plots, and the remaining unallotted plots were to be sold and the proceeds shared. As of 10th September 2012, there was a ½ plot available and identified. The court did not talk about a ½ plot to be created as there was one already in existence. In my understanding, that ½ plot is what the fourth house should have got, and from what is before me, that plot is identified now as LR Sigona 1769.
34. For avoidance of doubt, the relevant portion of the ruling reads as follows –

“(1) The parties agree that it was a factual error when the court was informed by all concerned that there were 43 plots available for distribution on the piece of land bearing title No. Sigona/454. However, all the parties now confirm that there are 40

½ plots admeasuring ¼ acre each in existence on the said property.

(2) The said plots be distributed as under by consent of all the parties: -

(a) 36 beneficiaries of the estate of the deceased shall have 1 plot each; while 4th house shall be given extra 1 ½ plots in addition to their shares of 1 plot each.

(b) The remaining three plots be sold and the proceeds thereof be divided equally amongst male beneficiaries of the estate.”

35. It would appear that some of the remaining have been subdivided. It is not clear what purpose the subdivision was supposed to achieve, save to say that the alleged subdivision does not accord with the earlier orders of the court. The administrators who are bound to account for the subdivision have not breathed a word about it. Ideally, before the subdivision was embarked on the concurrence of all the administrators or of all the beneficiaries affected should have been sought. The office of administrator is one of trust. It is critical that the trust should be maintained at all times.

36. On the distribution of the sale proceeds from the sale of the one acre to Mr. Komo, I understand the applicant to be saying that the money has never been distributed, or, at any rate, the fourth house has never gotten its share. The respondent appears to me to agree with the applicant. He says the money was expended on the administration of the estate.

37. The judgment of 12th April 2011 said as follows regarding that money –

“I shall further direct that the balance of purchase price of 1 acre sold to Peter Ndichu Komo being Kshs. 3, 000, 000/- shall be shared equally amongst the five houses.”

38. To my mind that order was clear and specific; the money in question was to be shared out equally amongst the houses. I do not see any discretion being given to any of the parties regarding an alternative handling of the money. I have not come across any order, and none has been pointed to me, which reviewed the said order of 12th April 2011. The said money could only be expended otherwise only on the strength of a court order. If it has been expended in any manner contrary to the said order then the respondent should account for it, or if someone has spent the same he should account for it.

39. The second administrator alleges that he has spent over Kshs. 7, 000, 000.00 on the administration of the estate. That amount is alleged to include the amount that the fourth house was supposed to get from the sale in question. The figure of Kshs. 7, 000, 000.00 is disputed by the other party. It is in respect of such matters that accounts are called for. The beneficiaries no doubt are interested in knowing how such a huge amount of money was consumed in the administration of the estate.

40. Regarding the sale of LR Sigona/98, I have noted from the amended certificate of confirmation of grant dated 27th September 2012 that the same was to be sold and the proceeds shared. I note that the same has been sold by a majority of the administrators. The agreement of sale need not be signed by all the administrators, for the signature of one or two binds the rest. The fourth house has not sought nullification of the said sale, and I do not therefore find any excuse for stopping transfer thereof to the purchaser. The issue of the sharing of the proceeds of sale is an internal matter as between the administrators and the beneficiaries.

41. In view of everything that I have said so far I am moved to make the following orders –

a. That the second administrator, jointly with the other administrators, shall surrender to court, in the next thirty (30) days, for inspection by the court and the other beneficiaries, all

the documents of title relating to the plots that were to be sold and their proceeds shared equally amongst the sons, that is to say LR Sigona 1735, 1742, 1743, 1744 and 1745 (now subdivided into LR Sigona 1893 and 1894);

- b. That in the meantime there shall be no further dealings whatsoever by any of the administrators relating to either partition, sale or transfer of LR Sigona 1735, 1742, 1743, 1744 and 1745 (now subdivided into LR Sigona 1893 and 1894) until further or other orders of this court**
- c. That further directions shall be given thereafter on the final disposal of the said parcels of land;**
- d. That second administrator, in conjunction with the other administrators, shall cause LR Sigona 1769 to be transferred to the fourth house in the next sixty (60) days;**
- e. That the action in respect of (b) and (c) above to taken in sixty (60) days;**
- f. That the second administrator, in conjunction with the other administrators, shall in the next sixty (60) days cause to be paid to the fourth house its share of the proceeds of sale of the one acre to Peter Ndichu Komo;**
- g. That Eliud Mwaniki Njuguna and David Kinyanjui Njuguna B are hereby directed to sign transfer documents in respect of LR Sigona 98 to facilitate transfer and registration of that parcel of land in the name of Peter Njoroge Waweru, in the next thirty (30) days, in default of which the said documents be executed by the Deputy Registrar;**
- h. That the administrators shall in the next sixty (60) days of date hereof file accounts, either jointly or severally, of their administration from the date of their appointment to the date of the account, paying particular attention to the expense incurred with respect to the administration of the estate; and**
- i. That costs shall be in the cause.**

DATED, SIGNED and DELIVERED at NAIROBI this 4TH DAY OF MARCH, 2016.

W MUSYOKA

JUDGE