



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 308 OF 2002

IN THE MATTER OF THE ESTATE OF

NJAGI MUTHANGATO.....DECEASED

AND

JAMES MUIKAMBA NJAGI & 14 OTHERS.....APPLICANTS

VERSUS

1. NORBERT NJUE NJAGI

2. JOSEPH KANGANGI NJAGI.....RESPONDENTS

RULING

The fifteen (15) applicants filed this Chamber Summons dated 11/10/2013 under Rules 49, 63 & 73 of the Probate and Administration Rules and Order 45 Rule 1(1) of the Civil Procedure Rules for review and/or variation of the order dated 8/7/2010 in that:-

- a. *The “life interest” of the widow be ascertained and quantified on the basis of what is reasonable for the life needs of the two very senior surviving widows.*
- b. *That the needs of the widows be paid out of the annual rent of the plot 1112/80 which currently stands at Kshs.1,860,000.00.*
- c. *That the balance be equally shared among the applicants and any other beneficiaries and survivors of the deceased's beneficiaries to be ascertained.*

Alternatively

- d. *The 2 properties Plot No. 9 KIBUGU MARKET and EMBU TOWNSHIP 1112/80 be sold and the proceeds thereof be shared out among the following:-*
 - (i) *The two widows*
 - (ii) *The applicants*
 - (iii) *All the other beneficiaries to be identified.*
 - (iv) *Survivors of the deceased beneficiaries to be ascertained.*

The application is supported by grounds on the face of the application and an affidavit by SALESIO

KINYUA NJAGI a son of the deceased and one of the administrators. In the affidavit Salesio explains why he thinks the order of 8/7/2010 should be reviewed and/or varied.

The 2nd Respondent filed 3 grounds of objection. Viz

- a. ***That the purported application for Review is indeed an appeal against a judgment of the honourable Court.***
- b. ***That there are no new grounds that were not in the Applicant's knowledge to warrant a review of the Court Judgment.***
- c. ***That the application is otherwise an abuse of this Court's process.***

When the application came for hearing Mr. Njage addressed the court on the 3 grounds of objection saying the application was properly before the Court and raised sufficient grounds for review. And that no abuse of the Court process had been shown by the Respondents. He highlighted paragraph 6 & 8 of the affidavit saying ten (10) of the deceased's sons predeceased the widows and one widow has since died.

The application was opposed by Mr. Mwangi for the Respondents. He said a judgment had been delivered after a protracted hearing. And the 1st respondent appealed which appeal was dismissed. To the respondents there are no compelling reasons to warrant a Review.

I have considered the grounds, affidavit and counsels submissions. I have also considered the record herein. Order 45 of the Civil Procedure Rules which was previously Order XLIV of the Civil Procedure Rules is among the Provisions of the Civil Procedure Rules which are applicable under the Law of Succession Act. The Applicants have made their application pursuant to Rules 49, 63 & 73 of the Probate and Administration Rules and Order 45 of the Civil Procedure Rules. Under order 45 of the Civil Procedure Rules, one may file for Review in a circumstance where an appeal is allowed but has not been filed. The Applicants say they elected not to appeal but file for review.

In his submissions Mr. Mwangi told this Court that the 1st Respondent appealed against the Ruling of 8/7/2010 and his appeal was dismissed. I have perused this file and have not found a copy of the judgment from the Court of Appeal. However there is all the evidence that an appeal was filed. It was not disputed that the said appeal had been dismissed. Without that judgment it would be difficult for this Court to start imagining the issues that were being challenged before the Court of Appeal and what was decided.

Be it as it may, the issue that this Court will deal with is whether there are any compelling or sufficient reasons to make this Court review or vary the Court's orders of 8/7/2010. I have read through the Ruling and the reasons that made the Hon. Judge arrive at the decision she did. This is what the Hon. Judge stated:-

“I will therefore order that the 3 widows have a life interest in the 2 properties in question jointly and/or severally”.

To my mind she foresaw a situation where the number of the widows would start diminishing as has started happening. And inspite of the diminishing number the order on the life interest would still remain and thats why she stated ***“jointly and/or severally”***. I would therefore not consider the diminishing number of widows as an unforeseen circumstance. Secondly the Court directed that the widows could nominate a person to collect and manage the income. The respondents are nominees of the surviving widows. This life interest is specific to these two ladies. They have no obligation of giving an account to the rest of the beneficiaries on what they get. All they need to do is ensure that the properties are maintained in all manner in order to remain income generating projects. Its upon the death of the last widow that the property can be sold.

From the record it is clear that the deceased had distributed his properties to the children before his death. It was only the 2 properties the subject of this application that were left undistributed. It would

really not be fair to ask this Court to start determining the monthly needs of each widow to know what they should get from the income of these two properties. These widows were the wives of the deceased and they have the right to enjoy the proceeds. If the nominees are taking advantage of the age of the widows and swindling them they should know that God is watching. The nominees were appointed by the widows themselves and not by Court. They can discharge them and appoint others if need be.

Finally I would state that the surviving beneficiaries have a rare opportunity now to sit down as a family (including the widows) and agree to sell the property and share the proceeds equally. Its only upon such an agreement of all family members that the order of the Court may be reviewed as I find no new grounds which have arisen. I also do not find any sufficient reason to make me interfere with the orders dated 8/7/2010.

The application is therefore dismissed with costs. The money deposited in Court will be shared out between the surviving widows.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF FEBRUARY 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Njage for Applicants

Mr. Mungai for both Respondents

Respondents

Parties

Njue CC