



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**SUCCESSION CAUSE NO. 120 OF 2015**

**RE ESTATE OF KK alias WK (DECEASED)**

**MWPK.....PETITIONER**

**VERSUS**

**LWM.....PROTESTOR**

**JUDGMENT**

1. KK also known as WK (hereafter *the deceased*) died intestate on 16<sup>th</sup> May 1978.
2. His estate comprises of a parcel of land known as Loc. 11/Gikandu/\*\*\* measuring 3.4 acres.
3. His widow, MW (hereafter *the petitioner*), applied for letters of administration on 18<sup>th</sup> February 2015. A grant was issued to her on 13<sup>th</sup> July 2015.
4. She then applied for confirmation of the grant on 11<sup>th</sup> September 2017. However, an affidavit of protest was lodged on 28<sup>th</sup> September 2018 by her daughter in law, LWM (hereafter *the protestor*).
5. The petitioner had proposed that the land be shared as follows:
  - (a) MWPK - 0.48 acres
  - (b) JMK - 0.48 acres
  - (c) FM - 0.48 acres
  - (d) NNM & LWM - 0.48 acres
  - (e) MMK- 0.48 acres
  - (f) HKK - 0.48 acres
  - (g) TTK - 0.48 acres
6. The protestor is a widow of FMK, one of the sons of the deceased in this cause. She only objects to item (d) above requiring her to share the portion of 0.48 acres with NNM, a former wife of her husband.
7. The core of the protest is that she was the only wife of FMK. She argued that NNM is a stranger and is not entitled to any share of the estate.
8. On 22<sup>nd</sup> October 2020, I directed that the protested summons be determined by *viva voce* evidence.
9. The protestor (PW1) relied largely on her affidavit of protest. She testified that she married FMK on 26<sup>th</sup> June 1996 under customary law. He died on 26<sup>th</sup> February 2007. She brought one child into the marriage, SG, and bore three others; CK, SM and IM.

10. She said that she had a strained relationship with her mother-in-law, the petitioner; and, that one of her sisters in law hinted that she (the protestor) would not get any share of the land.

11. She stated that after the death of her husband, her brothers in law became hostile. In 2014, they beat her up and injured her son, CK (PW2). She claimed that is when her in-laws brought her alleged co-wife into the picture. She testified that she left the land for her own safety but registered a caution.

12. Her evidence was re-affirmed by her son (PW2). He said that he and his mother resided on the suit land and never knew of a previous marriage by his father to NN or of any children from that marriage.

13. The petitioner's case on the other hand is that her son, FM, was initially married to NN with whom they had three children. They separated before the marriage to the protestor. She said it was not her duty to disclose to the protestor about her son's earlier marriage.

14. Her version was supported by her daughter, IW (DW2). She claimed that she disclosed to the protestor about the earlier marriage.

15. NNM testified as DW3. She said that she married Francis Mwangi in 1985. They separated before her husband married the protestor. They had three children, PKM, BM and FM. She claimed that one of her sons, M, had resided on the suit land since the year 2008.

16. I take the following view of the matter. First and foremost, this succession cause relates to the estate of KK also known as WK. He was the father of FM (now also deceased and the husband to the protestor). This is *not* the succession cause for FM.

17. From my re-appraisal of the evidence, I find that FM was first married to NN in 1985 and that the two separated in 1994. That was well before the second marriage to the protestor in 1996. It is possible but highly improbable that the new bride never learnt of the previous union for all those years. Her husband may have kept the secret but it was in plain sight: Her sister in law (DW2) claimed she told her about it. The protestor told me that she suspected something was amiss from the way her mother in law treated her. At one point, the latter would face the opposite direction and show her back to her whenever the protestor tried to speak to her.

18. Notwithstanding the separation from NN, section 29 of the **Law of Succession Act** still recognizes former wives or children of a deceased husband. But I must reiterate that this is *not* the succession cause for the late FM but that of his father. The point to be made however is that his children from his two wives would be entitled to a share of their father's portion.

19. Having found that the protestor and NN were his wives, I find that the protest by LN fails. It must follow that the caution she placed on the title on 28<sup>th</sup> August 2014 claiming a "*licensee's interest*" should be removed.

20. Furthermore, section 27 of the **Law of Succession Act** as read with Rule 73 of the **Probate and Administration Rules** imbue the court with *complete discretion* and power to ensure that the ends of justice are not defeated.

21. My final orders are as follows-

i) That the entire protest is dismissed.

ii) That Loc. 11/Gikandu/\*\*\* shall be distributed as follows-

(a) MWPK - 0.48 acres

(b) JMK - 0.48 acres

(c) FM - 0.48 acres

(d) NNM & LWM - 0.48 acres (Each to hold a half share in trust for the children of FMK (Deceased)).

(e) MMK - 0.48 acres

(f) HKK - 0.48 acres

(g) TTK - 0.48 acres

iii) That the caution placed on the title by the protestor on 28<sup>th</sup> August 2014 claiming a "*licensee's interest*" be and is hereby removed to allow distribution of the estate.

22. The grant shall be confirmed in terms of this judgment.

23. Costs follow the event and are at the discretion of the court. In the interests of justice, each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A this 11<sup>th</sup> day of February 2021.**

**KANYI KIMONDO**

**JUDGE**

***Judgment read in open court in the presence of:***

Petitioner (in person) present.

Protestor (in person present.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.