



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION NO. 430 OF 1999

IN THE MATTER OF THE ESTATE OF ROBINSON MUTUKU JOSEPH (DECEASED)

SERAH MBITHE MUTUKU.....PETITIONER

VERSUS

REGINAH WAVINYA MUTUKU.....OBJECTOR

RULING

1. By a summons dated 25th November, 2009, the applicant sought to have the grant of letters of administration intestate issued on 14th August, 2000 confirmed.

2. In her affidavit in support thereof, she stated that the deceased was only survived with two wives and children namely:

- i. Serah Makau - 1st wife
- ii. Eric Mutua Mutuku - son
- iii. Irene Mwikali Mutuku - Daughter
- iv. Regina Wavinya Mutuku - 2nd wife
- v. Victor Kania Mutuku - Son
- vi. Fridah Nthenya Mutuku – Daughter

3. She further identified the deceased property which she stated was distributed as follows among the beneficiaries:

- i. Motor vehicle registration number KUY 476 – already sold to the objector.
- ii. A two-door plot at Kasing market – to be shared equally by the applicant and respondent.
- iii. Death gratuity from armed forces – the unpaid balance to go to the applicant since the objector has already withdrawn some substantial sum and also utilized all the proceeds from Harambee Sacco where the deceased was a member.
- iv. Bank Account with Barclays Bank of Kenya, Machakos Branch – Proceeds to be shared equally.

4. The objector opposed the summons vide a replying affidavit filed on 18th February, 2010. She contended that the 2nd respondent was not living with the deceased by the time she got married to the deceased having separated in the year 1989. That the deceased did not at the time have any property and was then employed with Kenya Army. That the only estate that remains are the terminal dues which she agreed could be shared by half. That the said vehicle is hers and she has disposed of it due to old age as it was going to waste. That there is no bank account or plot in Kasinga Market and that the plot known to her in Kasinga is her property. She stated that the only known asset is the death gratuity that can be apportioned in half and the proceeds of Harambee Sacco were used to meet the burial expenses and other incidentals as the applicant was not available.

5. Ann Mbithe Muia and Ryan Bonface Wambua Muindi swore affidavits in support of the objection to the confirmation of the grant. They confirmed that Ann Mbithe and her husband who were owners of **Plot No. Iveti/Mung'ala/1489 at Kainga Market** sold the property to the objector with Ryan Mbithe being the witness in the transaction.

6. The Applicant failed to attend court for hearing. The objector and Ann Mbithe gave viva voce evidence in which they reiterated the averments in their affidavits. I have anxiously considered the application and the evidence tendered herein. I am minded of the fact that the applicant never tendered any response to the objector's contentions either by a supplementary affidavit or by way of oral evidence to exonerate herself. In the circumstances, her allegations in the supporting affidavit remain just that, mere allegations. I am on the issue guided by the Court of Appeal decision in **Mohamed & Another v. Haidara (1972) E.A. 166** where the court observed that uncontroverted facts on oath must be taken to be admitted. The said decision has been adopted by the courts. In the circumstances, I confirm the grant in the following terms:

a. The terminal dues of the deceased with the Armed forces be shared equally between the two households.

b. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 24th day of May, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

No appearance for Sarah Mbithe - the Petitioner

Munguti for Nthiwa - for Objector

Josephine - Court Assistant