



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 2374 OF 2013

IN THE MATTER OF THE ESTATE OF ISABELLA NYAMBURA MBUTHIA – (DECEASED)

RULING

1. This cause commenced on 16th September 2009 as Limuru Senior Principal Magistrate Court's Succession Cause No. 113 of 2009. On 10th September 2013 the lower court stated that it had jurisdiction to hear the matter on the ground that its value exceeded Kshs.1,000,000.00 and therefore in excess of the pecuniary jurisdiction fixed by Section 48 of the Law of Succession Act. The lower court referred it to the High Court for further handling. The same was then assigned number High Court Succession Cause No. 2374 of 2013 at the High Court registry.
2. The deceased herein died on 13th February 2005. Representation to the estate was sought – vide a petition filed on 16th September 2009 - by James Mbuthia, David Maina Mbuthia and Alice Wanjiru Mbuthia, described as sons and daughters of the deceased. The three were described as the sole survivors of the deceased. The deceased is said to have died possessed of several assets set out in the petition. A grant of letters of administration intestate was duly made to the petitioners on 16th March 2010.
3. On 24th November 2010 one of the administrators, Alice Wanjiru Mbuthia, filed a summons dated 22nd November 2010 seeking confirmation of the grant made on 16th March 2010. She also sought distribution of the estate in terms of the schedule of distribution attached to her affidavit in support of the application. The property is distributed to among others, Njoroge Mbuchucha. It is not explained who Njoroge Mbuchucha is and why he is given a share in the estate.
4. The other administrators did not support the proposed distribution, and in response to the application they filed an affidavit of protest proposing their own mode of distribution. They state that the applicant, Alice Wanjiru, is a married woman. They also propose to devolve an asset to Njoroge Mbuchucha who is their cousin and they state that it was the desire of the deceased that he be provided for.
5. The applicant filed a further affidavit on 16th December 2010 seeking to give the rationale behind her proposed distribution. She followed this up with another affidavit sworn on 14th January 2011, where she proposes a new mode of distribution. This prompted replies from the respondents, who swore and filed separate affidavits on 9th February 2011. They have a proposed distribution of their own.
6. Both sides have filed detailed written submissions to support their respective positions.
7. The deceased herein died intestate after the Law of Succession Act had come into force. Distribution of her estate is therefore subject to Part V of the Act. She was survived by three (3) Children, there is also mention of a nephew. The relevant part of part V of the Act which applies to the estate is Section 38 of the Act, which provides as follows:-

“38 Where an intestate has left a surviving child or children but no spouse, the net intestate shall, subject to the provisions of Sections 41 and 42, devolve upon the surviving child, if this be only one, or be equally divided among the surviving children.”

8. The surviving children of the deceased, who are also the administrators of the estate, have failed to agree on the mode of distribution of the estate. In absence of agreement mode the estate ought be divided in terms of Section 38 of the Act, by being divided equally between the three surviving children of the deceased.

9. The male survivors suggest that the sole female survivor get a smaller share because she is married with children. The language of Part V of the Act does not permit discrimination when it comes to the sharing out of an intestate estate as between male and female children, and between married and unmarried children. All the children of the intestate ought to be treated equally regardless of their gender and marital status.

10. There is also the issue of the survivors' cousin. Both sides have provided for him in their proposals. Their argument is that the deceased had expressed a wish to provide for him. The position on this is that the said cousin, Njoroge Mbuchucha, is not a child of the deceased. He does not fall under the category of heirs set out in Section 38 of the Act, which is in mandatory term. He cannot therefore be provided for in intestate succession. If the deceased intended that the said Njoroge Mbuchucha gets a share out of the estate, she should have written a will and provided for him. The only way this court can cater for him is if he has obtained orders under Section 26 of the Act. No such orders have been availed, and none were made going by the record before me. I find no basis at all upon I can make provision for him.

11. The orders that I am disposed to make are:-

- (a) That the grant made herein is hereby confirmed.
- (b) That the estate of the deceased shall be shared equally between Alice Wanjiru Mbuthia, James Mbuthia and David Maina Mbuthia; and
- (c) That costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 28TH DAY OF November 2014.

W. MUSYOKA

JUDGE