



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**SUCCESSION CAUSE NO.355 OF 2008**  
**IN THE MATTER OF THE ESTATE OF**  
**JOSEPH MACHARIA MAGWA**

**AND**

LUCY WARIMA MACHARIA.....CITOR

**AND**

JOHN GICHUKI MACHARIA & OTHERS.....CITEES

**RULING**

On 1<sup>st</sup> December 2008, a grant of letters of administration intestate in respect of the estate of Joseph Macharia Magua, deceased was made to Lucy Warima Macharia, hereinafter referred to as the petitioner. The petitioner has now taken up the summons for confirmation of grant dated 13<sup>th</sup> July 2009 which is supported by an affidavit she swore. John Gichuki Macharia, hereinafter referred to as the protestor filed an affidavit of protest to oppose the mode of distribution. This court directed the dispute to be sorted out by affidavit evidence and by written submissions.

I have considered the affidavit evidence plus the written submissions filed by both sides. Both the parties have identified the assets and beneficiaries of the deceased's estate. In paragraph 5 of the affidavit of the petitioner, it is proposed that

L.R. No. Sosian/Sosian Block 1/10267 (Mifugo)

L.R. No.Sosian/Sosian Block 1/10268 (Mifugo) and

L.R. No.Nyeri/Naromoru/25 be wholly transmitted to the petitioner. The protestor pointed out that the deceased was married to two wives hence the petitioner was not entitled to award herself the entire estate. When served with the affidavit of protest, the petitioner filed a replying affidavit in which she admitted that the deceased was married to two wives. She now revealed that the deceased had expressed his wishes to have the shared between the two families giving each individual an equal portion. She attached to her replying affidavit a copy of some handwritten understanding duly signed by the beneficiaries on who the assets should be shared. It is said the memorandum of understanding was conducted by Peter Gichuki Wambugu, the deceased's brother and Michael Kamau Ndimu an elder. The protestor did not deem it fit to file an affidavit to controvert the averments contained in the petitioner's

replying affidavit despite having been given leave to do so.

The protestor decided to respond to the issue touching on the distribution done by an agreement by the beneficiaries through his written submission. He did not deny the allegation that the family agreed on the mode of distribution. He simply stated that the proposed mode of distribution is inequitable, unjust and unfair. He claimed that the proposed distribution does not comply with the provisions of the Law of Succession Act. After a careful consideration of the material placed before me I am convinced the protestor has successfully challenged the petitioner's original mode of distribution. The issue which I must settle is which mode of distribution should the court adopt between the one proposed by the protestor in his affidavit of protest and that of the petitioner in the petitioner's replying affidavit. After weighing the proposals I am convinced that the deceased's family met on 22/11/2003 under the chairmanship of Peter Gichuki Wambugu the deceased's brother where they agreed to distribute the estate according to the wishes of the deceased. In short, I am satisfied that the deceased expressed his wishes *inter vivos* to his brother. Consequently I sustain the protest but direct that the grant be confirmed on condition that the distribution be done as proposed in paragraph 8 of the replying affidavit of Lucy Warima Macharia sworn on 17<sup>th</sup> March 2011. Each party to meet his or her own costs.

**Dated and delivered this...17th day of August, 2012.**

**J.K. SERGON  
JUDGE**