



SUCCESSION

- When it is alleged an objector was not a wife of the deceased the burden to prove otherwise lies on the objector.
- Distribution, the wishes of deceased can be taken into regard on distribution.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 437 OF 2007

IN THE MATTER OF THE ESTATE OF JOSPHAT GICHUNGE MWITHIMBU (DECEASED)

SABERA KAGWIRIA GICHUNGE.....1ST PETITIONER
SAMUEL KIRERA RINTARI 2ND PETITIONER

VERSUS

CECILIA KANANA JOSPHATPROTESTOR

JUDGMENT

The succession cause in this matter was filed by Sabera Kagwiria Gichunge the widow of the deceased. She sought letters of administration of her deceased husband's estate who died intestate. When she filed her application dated 4th July 2008 seeking confirmation of grant a protest was filed by Cecilia Kanana Josphat. Cecilia described herself in that protest as the first wife of the deceased. She stated in her affidavit that they were blessed with four children. She therefore sought that she and her four children would obtain portions of the deceased land as beneficiaries. The matter was heard by way of *viva voce* evidence. The facts of this case are very straight forward. The petitioner in her evidence which was supported by her witnesses PW1, 3 and 4 was that Cecilia was married to the deceased according to the Kimeru custom. During their marriage they were blessed with two children namely:- Joseph Kiambi and Cathrine Kanario. During the absence of the deceased from his matrimonial home, Cecilia conceived a child who the deceased denied was his. This child was called Julius Mwititi. It is because of that unfaithfulness that they separated with Cecilia. Thereafter, the deceased lived with another woman but they separated without being blessed with any children and finally he married the petitioner. They were blessed with two daughters. PW1 was a step brother of the deceased. He gave evidence that the deceased

in his lifetime called him and informed him that he only recognize two children that were born between him and Cecilia. He stated to PW1 that he had shown Kiambi the portion of land he would inherit. That he had told Kiambi if he wished he could share that portion with his brother Julius Mwiti. PW1 confirmed that Kiambi and Julius had indeed settled on that land. The protestor's case was that she was the first wife of the deceased and had never been separated from him. She stated that she used to reside at her place of work that is Consolata Mission Hospital. Her witness DW2 was also a step brother of the deceased. His evidence in my view was not believable. I had the opportunity to observe him as he gave evidence and even at one time I warned him from looking at the protestor with a view to her assisting him to answer questions put to him. He too stated that the protestor had never been separated or divorced by the deceased. He stated that there had been a maintenance cause in the lower court between the deceased and the protestor and due to that cause the deceased had demolished the house of the protestor. That despite that demolition, they continued to be together and that he would visit her at her place of work. This witness was unable to recall the names of the children of the protestor. It should be noted that the petitioner Sabera was married by the deceased in church under statute. I have had an opportunity to consider the evidence tendered before me. I have also had the opportunity to consider the submissions made by learned counsel. As stated before, the evidence of the witnesses of the protestor was not credible in my view. Similarly, the evidence of the protestor was also not credible because had it been, the petitioner, when being cross examined by counsel for the protestor would have been questioned with regard to the contention that the protestor was still residing on the deceased land. This question was not put to the petitioner and can only therefore be regarded as an afterthought of the protestor. I should mention that the protestor relied on an agreement allegedly made between the family members on how the deceased land was distributed but the documents being in Kimeru language did not assist the court. The protestor did not provide an interpretation of that document. I find that although the deceased was at one time married to Cecilia that marriage was terminated and she therefore cannot be regarded as a wife as defined by S. 3 (5) of the Law of Succession Act. The petitioner having pleaded that the marriage between deceased and Cecilia had ended the burden to prove otherwise lay on Cecilia. She did not satisfy that burden. In the end, I find the evidence of the petitioner and her witnesses to be credible and I accept that the deceased in his lifetime indicated how his land was to be shared. It is for that reason that the deceased subdivided his land into six portions and obtained separate titles for each portion which portions represented the entitlement of various beneficiaries he desired that they should inherit the same. It is for that reason that I find that the mode of distribution provided in the affidavit of the petitioner Sabera to be the credible and fair one which can be adopted by this court. The judgment of this court is that:-

1. The grant issued by this court on 10th December 2002 is hereby confirmed as follows:-

(i) L.R. No. Kiirua/Ruiri/1904

- Solomon Mwiti Mwangi - Absolute

(ii) L.R. No. Kiirua/Ruiri/905

- Joseph Kiambi M'Igweta - Absolute

(iii) L.R. No. Kiirua/Ruiri/3351

- Sabera Kagwiria Gichunge - Absolute

(iv) L.R. No. Kiirua/Ruiri/3352

- Agnes Kithira Gichunge - Absolute

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(v) L.R. No. Kiirua/Ruiri/3353

- Priscilla Kendi Gichunge - Absolute

(vi) L.R. No. Kiirua/Ruiri/3354

- Cathrine Kanario Gichunge - Absolute

2. *The costs of the protest shall be paid by Cecilia Kanana Josphat.*

Dated, signed and delivered at Meru this 17th day of February 2011.

MARY KASANGO
JUDGE