



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 507 OF 2007

IN THE MATTER OF THE ESTATE OF GATHURI MURATHE – DECEASED

GATHIRWA GATHURI MURAITHE.....PETITIONER/APPLICANT

VERSUS

CRISPUS WACHIRA NDEGWA.....1ST PROTESTOR

EUNICE WANGUI MUGO.....2ND PROTESTOR

RULING

A grant of Letters of Administration intestate in respect of the Estate of Gathuri Murathe, deceased, was made to Gathirwa Gathuri Muraithe on 9th September 2008. **GATHIRWA GATHURI MURAITHE**, hereinafter referred to as “the Applicant,” has now applied for the grant to be confirmed vide the summons for confirmation of grant dated 20th January 2009. The summons is supported by the two affidavits of the Applicant and that of Kuhia Wa Thinjii. **CRISPUS WACHIRA MUGO** and **EUNICE WANGUI MUGO** each filed two affidavits of Protest to oppose the Summons. Directions were given to the effect that the dispute be determined by affidavit evidence and by written submissions. At the time of writing this ruling the Protestors were the only parties who had filed their submissions.

I have considered the grounds set out on the face of the summons for Confirmation of Grant and facts deponed in the affidavits filed in support plus the facts deponed in the affidavits of Protest. I have also considered the Protestors’ written submissions. There is no doubt that the only Estate asset which is available for distribution is the parcel of land known as **L.R. NO. AGUTHI/GATHAITHI/220**. The Applicant has proposed that the aforesaid land be shared as follows:

Gathirwa Gathuri Muraithe 1.8 acres

Crispus Wachira Gathuri..... 0.8 acres

Eunice Wangui Mugo..... 0.8 acres

The protestors are of the view that the Applicant has proposed to take a larger share of the land yet they should have shared the same in equal proportions under *Section 38* of the Law of Succession Act. The Protestors also claimed that the deceased had shared out his land *intervivos*. The applicant refuted the Protestors' contention and stated that he had bought 1¼ acres from one Michael Muraya Muchuche. The aforesaid portion is said to have been consolidated with the deceased's land. He secured the affidavit evidence of Kuhia Wa Thinjii and Luceta Waruti Muraya to buttress his claim. When Crispus Wachira Ndegwa was confronted with the aforesaid affidavits, he dismissed the contents as of people who are strangers to the deceased's life time. He claimed that the issues were not raised during the deceased's Estate. I have carefully considered the rival submissions. The only issue which is in dispute is in respect of the portion measuring 1 ¼ acres which the applicant claims he bought. Basically the Applicant is saying that the deceased was registered as proprietor of 1¼ acres in trust for the Applicant. The issue relating to trust can competently be determined under *Order 37 rule 1* of the Civil Procedure Rules. If it turns out that the Applicant did not purchase the aforesaid 1 ¼ acres, then it automatically means that the protest shall succeed and vice versa. A fair order in the circumstances is stay further proceedings in this cause pending the hearing and the determination of the proceedings to be taken out pursuant to the provisions of *rule 41 (3)* of the Probate and Administration Rules and under *Order XXXVI rule 1 (1)* (now Order 37) of the Civil Procedure Rules. I direct the Applicant to take out the aforesaid proceedings within 90 days. Costs shall abide the outcome of the cause.

Dated and delivered at Nyeri this 11th day of February 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Kingori for the 1st Protestor and Gitibi holding brief Mabu for Respondent.