



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

PROBATE & ADMINISTRATION APPEAL NO. 8 OF 2009

IN THE MATTER OF THE ESTATE OF RUBIRI GATHEGE - DECEASED

EMILIANA NYAMBICHI MACHARIA.....APPELLANT

VERSUS

JOSEPH GATHEGE V. MACHARIA.....RESPONDENT

(Being appeal arising from the judgment of J. Gathuku Principal Magistrate, in Senior Principal Magistrate's Succession Cause No. 202 of 2002 delivered on 20th April 2009 Murang'a)

JUDGMENT

This judgment is the outcome of the Appeal against the ruling/order of J. Gathuku, learned Resident Magistrate, delivered on 20th April 2009, vide Murang'a S.P.M. SUCC. Cause No. 202 of 2002. The background of the appeal appear to be short and straightforward. A grant of Letters of Administration intestate in respect of the Estate of Rubiri Gathege alias Vincent Rubiri Gathoge, deceased was given to Joseph Gathege v. Macharia, the Respondent herein on 24th February 2003. The respondent took out the Summons for Confirmation of the Grant dated 13th September 2003, in which he sought for the grant to be confirmed. Emiliana Nyambichi Macharia, the Appellant herein, opposed the Summons by filing an affidavit of Protest she swore on 8th October 2003. The dispute was heard by Honourable J. Gathuku, learned Resident Magistrate and on 20th April 2003, the learned Magistrate dismissed the Appellant's Protest and proceeded to confirm the grant as prayed. The Appellant being dissatisfied preferred this appeal.

On appeal, the Appellant put forward the following grounds in her Memorandum of Appeal:

1. ***The learned Resident Magistrate erred in law in finding that the appellant was properly and legally married in accordance with kikuyu customary law.***
2. ***The learned Resident magistrate erred in both law and fact in ignoring the glaring contradictions in the evidence of the respondent and his witnesses.***
3. ***The learned Resident Magistrate erred in fact and in law in his treatment of the evidence about the naming of the appellant's children and in regard to the significance thereto.***
4. ***The learned Resident Magistrate made an erroneous finding that the alleged husband of the appellant had property to which the appellant could revert despite the total absence of any documents supporting the existence of such property.***
5. ***The learned Resident Magistrate wrongly accepted the evidence of an alleged brother in-law of the appellant that he had reserved 2.5 acres of land for the appellant without any documentary evidence to that effect.***

6. ***The learned Resident Magistrate while very much alive to the grave consequences of doing so nevertheless discriminated against the appellant on the ground of her sex and alleged martial status in denying her the entitlement to her fathers estate. This discrimination was wrongly justified on the ground of the alleged property with the alleged in-laws of the appellant.***
7. ***The learned Resident magistrate erred in fact in tacitly providing for the eviction of the appellant from her father's land.***
8. ***The learned Resident magistrate was wrongly swayed by the large number of witnesses produced by the respondent and overlooked the law that provides that no particular number of witnesses shall be required to prove a case.***

When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order in which they agreed to have the appeal disposed of by written submissions. I have considered the rival written submissions. In the affidavit of the respondent sworn on 15th September 2003 and filed in support of the summons for confirmation of grant, the respondent identified the asset of the Estate which was available for distribution as **L.R. NO. LOC. 19/GACHARAGEINI/279**. He proposed the same to be shared as follows:

1. Sabastian Waithaka Macharia - 2.66 acres.
2. Enjidio Migui Macharia - 2.66 acres.
3. Joseph Gathege V. Macharia - 2.66 acres.

Apparently the trio are sons of the deceased. The Appellant is their sister. Her main complaint in the affidavit of protest is that the land should have been shared equally between her and her three brothers since their other sisters did not intend to claim anything from the Estate. The Respondent and his brothers were of the view that since their sister, the Appellant herein was married, she was not entitled to any share of the Estate. It is clear that the learned Resident Magistrate agreed with the Respondent. The learned Resident Magistrate was of the view that since the Appellant was married to one Simon Macharia, hence entitled to inherit 2.5 acres due to her late husband, then she would not be eligible to any share of her father's Estate. Though the Appellant listed 8 grounds of appeal, I think one main ground stands out, that is to say whether or not the appellant was disentitled to inherit her father's Estate because she was married? In my considered view, I think the learned Resident Magistrate fell into error when he locked out the Appellant on this ground. The provisions of *Section 38* of the Law of Succession Act does not bar married daughters from claiming their inheritance from their parent's Estate. The Act simply talks about children. On this ground, the appeal must succeed. Consequently, the ruling/order made on 20th April 2009 is set aside and substituted with an order confirming the grant in terms of the affidavit of protest. Since the parties are siblings, I direct that each party meets his or her own costs of the Appeal and the proceedings of the subordinate court.

Dated and delivered at Nyeri this 23rd day of September 2011.

**J. K. SERGON
JUDGE**

In open court in the presence of Chweya holding brief Kimwere for Respondent and Miss Mwai holding brief for Ngugi for the Appellant.