



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**SUCCESSION CAUSE NO. 237 OF 2009**

**IN THE MATTER OF THE ESTATE OF STEVENSON NJARO – DECEASED**

**MOLLINE OTIENO OMOLLO.....PETITIONER**

**VERSUS**

**BETH NJERI KAMAU.....1<sup>st</sup> PROTESTOR**

**NJARO WAIRATU.....2<sup>nd</sup> PROTESTOR**

**NANCY WAITHIRA NJARO.....3<sup>rd</sup> PROTESTOR**

**EDWARD IRUNGU NJARO.....4<sup>th</sup> PROTESTOR**

**JUDGMENT**

This judgment is the result of the Summons for confirmation of grant dated 14<sup>th</sup> January 2011 taken out by Molline Atieno Omollo, the Petitioner and the affidavits of Protest one each by Edward Irungu, Njaro Wairatu, Beth Njeri Kamau and Nancy Waithira Njaro, the Protestors herein. When the dispute came up for hearing, this Court recorded a consent order which was to the effect that the same be disposed of by affidavit evidence.

I have considered the facts deponed in the affidavits filed in support of the Summons and those in Protest. The Petitioner has identified herself and her two children namely Jephtha Njaro and Jehoshaphat Kanyoro Njaro to be the only dependants surviving the deceased. She identified the following to be assets of the Estate:

- (i) Cash in account number 0090100144912, Equity Bank – Thika.
- (ii) Cash in Account No. 349-044051019 K.C.B. – Thika.
- (iii) royalty Payments from Music and Video recordings.
- (iv) Pension and benefits from Teachers Service Commission.

The Petitioner proposed for the aforesaid assets to be transmitted to her. In her affidavit of Protest, Beth Njeri Kamau, the 1<sup>st</sup> Protestor herein, claimed she was a co-wife of the Petitioner hence she was entitled to share the deceased's Estate. She claimed that she was married under the Kikuyu Customary Law and

had one issue with him namely Jephthah Njaro. She attached to her affidavit of Protest letters from the area chief and the District Officer Muranga showing her as a wife to the deceased. She accused the Petitioner of failing to indicate that she will hold the property in trust for the minors. In her schedule of distribution this Protestor proposed for the property to be shared as follows:

- (a) Cash in Equity and K.C.B. to be shared between the Protestors in equal measure.
- (b) Royal payments to be shared equally between the Protestors and the two minors to enjoy life interest thereon.
- (c) Pension and benefits from T.S.C. to meet the education expenses of the minors.

Edward Irungu Njaro the 4<sup>th</sup> Protestor claimed he was the brother of the deceased. He alleged that the deceased married the 1<sup>st</sup> Protestor as his first wife under the customary law. The 4<sup>th</sup> Protestor confirmed that Jephtha Njaro was an issue out of the relationship between the 1<sup>st</sup> Protestor and the deceased. He claimed that the child is under the care of the deceased's parents i.e. 2<sup>nd</sup> and 3<sup>rd</sup> Protestors. He adopted the proposal of sharing by the 1<sup>st</sup> Protestor. Njaro Wairatu, the 2<sup>nd</sup> Protestor also opposed the schedule of distribution proposed by the Petitioner. He acknowledged that the children named by the Petitioner were the deceased's children. He too adopted the mode of distribution proposed by the 1<sup>st</sup> Protestor. Nancy Waithira Njaro, the 3<sup>rd</sup> Protestor, the deceased's mother too adopted the schedule of distribution proposed by the 1<sup>st</sup> Protestor. She claimed that Jephthah Njaro is under her care as opposed to the claim by the Petitioner.

After a careful consideration of the rival averments, I think certain facts have remained undisputed. First, the assets of the Estate have been identified to be as per the affidavit of the Petitioner. Secondly, it is no longer in dispute that the deceased was married to the Petitioner and that the deceased was blessed with two sons namely:

- (i) Jephthah Njaro.
- (ii) Jehoshaphat Kanyoro Njaro

Thirdly, it is also not in dispute that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> protestors are father, mother and brother respectively to the deceased. Critical questions have emerged for this Court to provide the answers namely:

- (i) Whether Beth Njeri Kamau should be regarded as the deceased's wife:
- (ii) Whether or not the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Protestors are entitled to inherit from the deceased's Estate?
- (iii) How should the Estate be distributed?

Let me start with the first question. I have already stated that on a balance of probabilities that the petitioner managed to convince me that she was duly married by the deceased. Some minutes in respect of an engagement meeting held on 8<sup>th</sup> April 2000 at Suna-Central Location, Ngege Sub-location, Migori District, were produced. Their marriage was blessed with one child namely Jehoshaphat Kanyoro Njaro. The Couple took care of Jephthah Njaro, whom they alleged was abandoned by the 1<sup>st</sup> Protestor at the age of 3 months. Though the 1<sup>st</sup> Protestor had previously deposed that the Petitioner was not married to the deceased, I found her allegations to be untrue. I found as a matter of fact that the 1<sup>st</sup> Protestor did not even attend the funeral of the deceased. I also found that the 1<sup>st</sup> Protestor had not controverted the averments of the Petitioner that the 1<sup>st</sup> Protestor had abandoned Jephthah Njaro at the age of 3 months and that she was married to one Timothy Wamae and that the couple had five children. It is important to

note that the 1<sup>st</sup> Protestor has not appealed against this Court's decision delivered on 17<sup>th</sup> September 2010. In my considered opinion I do not think the 1<sup>st</sup> Protestor was married to the deceased. She did not deem it fit to tender any credible evidence to establish her status as the widow of the deceased. She did not even tender evidence to prove that she was a dependant of the deceased. It is therefore abundantly clear that she cannot be regarded as a beneficiary nor a dependant of the deceased's Estate.

Having disposed of the first question, let me now turn my attention to the second question. Strictly speaking, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Protestors are not entitled to share the deceased's Estate save if there is evidence that they were dependants of the deceased. I have carefully looked at the affidavits of each of the Protestors and there is no iota of evidence to show that they depended on the deceased for their upkeep. In paragraph 22 of the affidavit of Protest of Njaro Wairatu, it is alleged that Jephthah Njaro is in the custody of the 2<sup>nd</sup> and 3<sup>rd</sup> Protestors having escaped the prolonged and cruel mistreatment of the Petitioner. The allegations made by the 2<sup>nd</sup> Protestor are so grave that I expected him and the other Protestors to have filed a complaint with the relevant authorities. The question which has remained unanswered is: If it is true that the 1<sup>st</sup> protestor was married to the deceased then why is it that her biological son has not gone to live with her? In fact in her affidavit of Protest, Beth Njeri Kamau does not mention the alleged mistreatment by the Petitioner of her son. The Petitioner has been able to show that the 1<sup>st</sup> and 2<sup>nd</sup> Protestor have always attempted to forcibly take custody of the deceased's children. Their actions forced the Petitioner to obtain orders of injunction to restrain the duo from taking away those children vide Nairobi Children Case No. 394 of 2008. It is said the 2<sup>nd</sup> and 3<sup>rd</sup> Protestors forcefully and without her knowledge forcefully took possession of Jephthah Njaro in the month of December 2010. The Petitioner has stated that she has taken up the issue with the children's court. In my view, I think the 2<sup>nd</sup> and 3<sup>rd</sup> Protestors have decided to take custody of the child for purposes of using him to inherit the deceased's Estate's assets. In my view I do not think they i.e. 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Protestors are entitled to get anything from the Estate. I would have considered them as dependants but they failed to establish such a claim.

The third question is how should the Estate be shared? The law is very clear under *Section 35(1)* of the Law of Succession Act that the Estate shall be shared as follows: That where an intestate has left one surviving spouse and children, the surviving spouse shall be entitled to:

- (a) The personal and household effects of the deceased absolutely.
- (b) Life interest in the whole residue of the Estate intestate.

The whole or residue of the net intestate Estate shall on the death or in the case of a widow, remarriage of the surviving spouse, devolve upon the surviving children in equal measure. It is therefore obvious that the Protest must be dismissed. The grant is ordered confirmed in terms of the schedule of distribution set out in the affidavit of the Petitioner filed in support of the Summons save that the Petitioner should avail the name of one person to be appointed as a joint administrator and as trustee for the minors. I direct that each party meets his or her own costs.

***Dated and delivered at Nyeri this 18<sup>th</sup> day of November 2011.***

**J. K. SERGON**

**JUDGE**

In open court in the absence of the parties with Notice.