

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 560 of 2008

[IN THE MATTER OF THE ESTATE OF GAKURU KIMARU

alias GAKURU s/o KIMARI]

AND

ELIJAH MAHIGA GAKURU.....APPLICANT

VERSUS

MARY WAMBUI MACHARIA.....RESPONDENT

JUDGMENT

ELIJAH MAHIGA GAKURU, the Applicant herein applied for the grant Letters of administration intestate given to him in respect of the estate of Gakuru Kimaru alias Gakuru son of Kimari, deceased on January 2007 to be confirmed. Mary Wambui Macharia filed an affidavit of protest to oppose the summons for confirmation of grant dated 5th August 2007. On 28th January 2010 this court gave directions to hear the protest and the summons determined by affidavit evidence and written submissions.

According to the protestor the property known as **Kirimukuyu/Thui/167** measuring 0.5 acres was inherited from the deceased. LR No. **Konyu/Gachuku/163** measuring 2.9 acres is the only property available for distribution. In short, the entire land and property of the estate measures 3.4 acres. It is the protestors' view that the property be shared equally. The applicant is of the view that the protestor can only be given 0.5 of an acre from the parcel of land known as **Konyu/Gachuku/163**.

I have considered the affidavit evidence and the submissions of both sides. The following issues are not in dispute. First is that the protestor is a widow of Macharia son of Gakuru deceased who was a brother to the applicant herein. Secondly that LR No. **Kirimukuyu/Thui/167** was given to Macharia s/o Gakuru by the deceased. Thirdly, that the land available for distribution is LR **Konyu/Gachuku/163**. Fourth, those entitled are the beneficiaries the applicant and respondent herein. According to the applicant he is entitled to inherit 2.31 acres while as the protestor is entitled to 0.59 acres. The protestor is of the contrary view that she is entitled to inherit 1.2 acres to make it 1.7 acres. Under the Law of Succession Act the law requires that gifts given out *intervivos* should be taken into account when sharing out the intestate estate. Under section 38 the Law of Succession Act the two should share the property in equal proportions. Taken into account that the late Macharia son of Gakuru had received LR No. **Kirimukuyu/Thui/167** measuring 0.5 acres from the deceased then, his estate represented by the protestor is entitled to receive an additional 1.2 acres to be excised from LR No. **Konyu/Gachuku/163**. The remainder 1.7 acres to go to the applicant. This mode of distribution will make applicant and protestor to be at par. The protest is therefore found to be with merit. The grant is confirmed as proposed in the affidavit of protest. Since the dispute involves family members I order that each party bears its own cost.

Dated and delivered at Nyeri this 16th day of April 2010.

J.K. SERGON

JUDGE