



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Succession Cause 426 of 2009

IN THE MATTER OF THE ESTATE OF GATHU MUTIA ALIAS NYAGA S/O

MUTIA - DECEASED

PETER MWAI GATHU.....PETITIONER/APPLICANT

VERSUS

MWANGI NYAGA.....OBJECTOR/PROTESTOR

RULING

The grant of Letters of Administration in respect of the Estate of Gathu Mutia alias Gathu s/o Mutia was made to **PETER MWAI GATHU** and **MWANGI NYAGA** on 1st August 2007. Through the firm of M/S Kinyua Kiama & Co. Advocates, Peter Mwai Gathu, hereinafter referred to as the applicant, filed the summons for Confirmation of Grant dated 9th April 2008. **MWANGI NYAGA**, hereinafter referred to as the Respondent opposed the Summons filed by the Applicant by filing an affidavit of protest. The dispute which was pending before the Principal magistrate's Court was referred to this Court to determine it. The parties and their counsels recorded a consent order with the approval of this Court to have the dispute determined by written submissions. I have perused those submissions plus the affidavit evidence. The only asset available for distribution is **L.R. NO. KONYU/BARICHO/559**. The Applicant is of the view that he should get 1.14 H.a. The basis of the aforesaid proposal is that the Applicant is a son of the deceased while the Respondent is a nephew. The Respondent was of the view that the land be shared between him and the Applicant because the land was jointly owned in equal shares by their fathers who were brothers.

Having considered the affidavit evidence and the submissions, I think the following issues arose for my determination:

First, who ranks on priority between the Applicant and Respondent?

Secondly, How should the Estate asset be distributed?

On the first issue, the answer can be traced by examining the evidence tendered before the Karatina Principal magistrate's Court. In the ruling of J. N. Nyagah, learned Senior Resident Magistrate vide Karatina S.R.M. Succ. Cause 54 of 2002 delivered on 8th October 2003, the learned Senior Resident Magistrate formed the opinion that Gathu Mutia and Nyaga Mutia were two different individuals. In fact the duo were brothers. It would appear the Applicant was not candid when he purported to regard Gathu Mutia to be the same as Nyaga Mwangi whereas he knew that they were brothers. The Applicant and the Respondents are therefore cousins. It would appear the green card in respect of **L.R. NO. KONYU/BARICHO/589** attached to the affidavit filed in support of the Petition for Letters of Administration indicates that the land was registered in the joint names of Gathu s/o Mutia and Nyaga s/o Mutia. The Applicant is a son of Gathu Mutia whereas the respondent is a son of Nyaga Mutia. In my considered view the Applicant and the respondent cannot rank as equals to succeed the Estate of Gathu Mutia, deceased.

Having come to the above conclusion, it is not difficult to determine the second issue in respect of the distribution of the Estate. The Submissions by the Applicant that he offered the Respondent 0.68 acres out of his own free will as a gift cannot therefore be true. The

Respondent was entitled to inherit the share entitled to his deceased father Nyaga Mutia. The Applicant and the Respondent should share the land in equal measure since the two brothers, that is, Gathu Mutia, deceased and Nyaga Mutia, deceased, appear to have held the land in equal share.

In the end I find the Protest to be well founded. The Grant is confirmed on condition that the parcel of land known as **L.R. NO. KONYU/BARICHO/589** be subdivided into equal portions between the Applicant and the Respondent. Each party to bear his own costs.

Dated and delivered at Nyeri this 7th day of April 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Mugo holding brief for K. Kiama for the Petitioner and no appearance Mr. Mutahi for the Protestor.