



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 289 of 2007

IN THE MATTER OF THE ESTATE OF ALEXANDER MATHENGE NJERU
ALIAS MATHENGE S/O NJERU – DECEASED
MARY NJERI MATHENGE.....PETITIONER

VERSUS

STEPHEN NJERU MATHENGE.....1ST PROTESTOR
MARY WANJIKU MATHENGE.....2ND PROTESTOR
ROBERT MATHAI MATHENGE.....3RD PROTESTOR

JUDGMENT

The Grant of Letters of Administration intestate in respect of the Estate of Alexander Mathenge Njeru alias Mathenge s/o Njeru, deceased, was given to Mary Njeri Mathenge on 16th December 1988. She has now come before this court seeking for the grant to be confirmed vide the Summons for Confirmation of Grant dated 9th December 2009. **STEPHEN NJERU MATHENGE** and **ROBERT MATHAI MATHENGE** filed an affidavit of protest they jointly swore to oppose the application for confirmation of grant. The protest and application for confirmation of grant were directed to be determined by affidavit evidence and by written submissions.

I have considered the affidavit evidence and the written submissions. It is not in dispute that the deceased was survived by the following children:

- (i) Mary Njeri Mathenge
- (ii) Stephen Njeru Mathenge
- (iii) Mary Wanjiku Mathenge
- (iv) Robert Mathai Mathenge
- (v) Ann Njoki Weru
- (vi) Agnes Muthoni Wang'ombe.

It is also not in dispute that the parcel of land known as **L.R. NO. THEGENGE/KARIA/209** is the only Estate asset which is available for distribution. What is in dispute is the mode of distribution. According to **MARY NJERI MATHENGE**, hereinafter referred to as the 'Petitioner', the land should be shared in equal portions between Mary Njeri Mathenge, Stephen Njeru Mathenge, Robert Mathai Mathenge and Mary Wanjiku Mathenge. The Objectors i.e. Stephen Njeru Mathenge and Robert Mathai Mathenge are of the view that the land be shared according to the wishes of the clan elders. It is the Objectors' submission that the deceased had expressed his wishes as to the devolvement of his estate. It is averred that the clan put to practice the deceased's wishes in their deliberations of 26th December 1997. It is

said the Petitioner participated in those proceedings which led to the sub-division of the land and each party shown his or her own portion. I have critically looked at the clan's deliberations which resolved the dispute. It would appear the elders met the deceased's children and even visited the land where they fixed boundaries. The annexure attached to the joint affidavit of the Objector indicates that the beneficiaries bound themselves by the decision of the elders by appending their signatures approving the elders' mode of distribution. The Petitioner has gone behind the elders' agreement. In fact she clearly stated that the elders intermeddled with the Estate of the deceased under *Section 45* of the Law of Succession. A careful consideration of the Objectors' averments is that it would appear they are heavily relying on the elders' decision and the belief that the deceased left an oral will. The law is on the side of the Petitioner. The elders' decision is like a gentleman's agreement. It has no backing of law. Perhaps Parliament should be provoked to reconsider amending the Law of Succession Act so that clan elders can be given a role to play in determining such disputes in future. It is sad in this case because the clan elders spent a considerable number of hours trying to solve the dispute between the children of the deceased. Those children participated and bound themselves to respect the elders' decision. But the Petitioner has denounced those deliberations though they were assisted by the elders to reach at an amicable settlement. I agree with the Petitioner that the elders' input cannot override the provisions of the Act. There is an indirect claim that the deceased may have made an oral will which the elders came to actualize. It is unfortunate because the material placed before me does not meet the requirements need to establish an oral will. The evidence tendered shows that two children namely Ann Njoki Weru and Agnes Muthoni Wang'ombe by conduct may have renounced their claim over the deceased's Estate. They are therefore excluded from sharing the Estate.

The deceased's widow has passed on. It means the deceased is now survived by the children without a spouse. Under *Section 38* of the Law of Succession Act, the Estate shall be shared equally amongst the surviving children. In the end it is clear that the protest must be dismissed which I hereby order. The grant is confirmed on condition that the parcel of land known as **L.R. THEGENGE/KARIA/209** be shared in equal measure between the following beneficiaries:

- (i) **Mary Njeri Mathenge**
- (ii) **Stephen Njeru Mathenge**
- (iii) **Robert Mathai Mathenge**
- (iv) **Mary Wanjiku Mathenge**

Each party to meet his or her own costs.

Dated and delivered at Nyeri this 28th day of May 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Kingori for the Applicant and the Respondent in person.