

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Succession Cause 17 of 2009**

**IN THE MATTER OF THE ESTATE OF WAIGWA KIBINGA ALIAS JOSHUA
WAIGWA KABINGA – DECEASED**

**JANE WANGARI WAIGWA.....PETITIONER
VERSUS
ERASTUS NDERITU KABINGA.....1ST OBJECTOR
LABAN KAGONDU WERU.....2ND OBJECTOR**

JUDGMENT

The grant of letters of administration intestate in respect of the Estate of Waigwa s/o Kabinga alias Joshua Waigwa Kabinga, deceased were granted to Jane Wangare Waigwa hereinafter referred to as the “Petitioner” on 29th December 2006. She thereafter applied to the aforesaid grant to be confirmed vide the Summons for Confirmation of Grant dated 22nd April 2008. Erastus Ndiritu Kabinga and Laban Kagondu Waru, hereinafter referred to as the “Objectors”, filed an affidavit of Protest they jointly swore to oppose the summons for confirmation of grant. The Petitioner filed the affidavit of Joseph Gathogo Mbuthia and a further affidavit she swore to respond to the allegations in the affidavit of protest. The Objectors were also granted leave to file further affidavits. This court gave directions to have both the summons for confirmation of grant to be determined by affidavit evidence and by written submissions.

I have considered the averments made in the affidavits and the submissions filed herein by both sides. There is no dispute that the parcel of land known as **L. R. NO. KIRIMUKUYU/MUTATHINI/159** was registered in the name of Waigwa s/o Kabinga, deceased. The Petitioner is before this court seeking to succeed the deceased as the legal representative. The Objectors being brothers of the deceased, have alleged that the deceased was registered as the proprietor of the aforementioned parcel of land as a trustee for himself and the Objectors. This court has been urged to determine the question of trust. According to the Objectors, the land should be shared in equal portions between them and the Petitioner as the legal representative of the deceased. The Petitioner acknowledged that Erastus Ndiritu Kabinga was a brother to her deceased husband. She, however, alleged that Laban Kagondu Waru was not related to the deceased. I have agonized over the issue and I think the question of trust cannot be determined through these proceedings. It can only be determined under *Order XXXVI rule 1* of the Civil Procedure Rules. Pursuant to the provisions of *rule 41 (2) and (93)* of the Probate and Administration Rules, I hereby stay further proceedings in this cause and direct the parties to seek for the appropriate remedy as aforesated. Costs of the application and protest to be in the cause.

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

J. K. SERGON

JUDGE

In open court in the presence of:-

Kiminda for Applicant and

Mr. Kingori holding brief Maina for the Protestor.