



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 599 OF 2009

**IN THE MATTER OF ESTATE OF SUSAN NYAMBURA KAMAU
DECEASED**

AND

**JOHNSON KAMAU GACHOKA
APPLICANT**

**PETER GITURO KAMAU
PROTESTOR**

RULING

A grant of letters of administration intestate in respect of the estate of Susan Nyambura Kamau, deceased was made to Johnson Kamau Gachoka on 19th October 2009. Johnson Kamau Gachoka hereinafter referred to as the Applicant took out the summons for confirmation of grant dated 6th January 2010 in which he applied for the grant to be confirmed. Peter Gituro Kamau, hereinafter referred to as the Protestor opposed the summons for confirmation of grant by filing two affidavits of protest. Learned counsels appearing in the matter recorded a consent order with the approval of this court to have the dispute determined by affidavit evidence.

I have considered the grounds set out on the face of the summons plus the facts deponed in the affidavits filed for and against the summons. In the affidavit of protest the protestor raised two pertinent issues. First is that the parcel of land known as L.R. No. Githi/Kirerema/142 was registered in the joint names of David Mwangi Kamau and the deceased as trustees for: Johnson Kamau Gachoka, Peter Gituro Kamau, Rose Wambere Kamau and Eddah Nyaguthii Kamau.

It is the submission of the Protestor that the aforesaid property cannot be treated as the assets of the estate of Susan Nyambura Kamau, deceased because she was merely registered as a trustee.

Secondly, the Protestor further proposed that the available assets be distributed in equal measure between the Petitioner, the Protestor and the deceased's children .

Thirdly, it is said that the Petitioner has failed to meet the requirements of a dependant in that he was not maintained by the deceased during her lifetime as he was a polygamous man and that he was on gainful employment. The Protestor further suggested that the available property be shared equally between the deceased's children. The Petitioner on his part did not respond to the Protestor's allegations made on oath. In the affidavit he swore in support of the summons for confirmation of grant, the Petitioner

identified the following properties to be the deceased's assets available for distribution:

(i) Kshs. 503,000/- at K.C.B. account.

He proposed the amount to be shared as follows:

(a) Kshs. 300,000/- to be shared in equal amount between David Mwangi Kamau, Peter Gituro Kamau, Stephen Njeru Kamau, Rose Wambere Kamau,

(b) Kshs. 203, 000/- to be given to Johnson Kamau Gachoka (petitioner).

(ii) Shares with K.C.B.

(iii) Gema Holdings Plot.

(iv) L.R. No. Githi/Kirerema/142.

The Petitioner proposed for (ii) and (iii) to be given to him.

In respect of L.R. No. Githi/Kirerema/142, the Petitioner proposed for it to be shared in equal portions between himself and the children.

Let me begin with the first issue raised by the Protestor. The question is whether or not the parcel of land known as L.R. Githi/Kirerema/142 forms part of the assets of estate. There is clear evidence in form of the official search attached to the affidavit of protest which shows that L.R. No. Githi/Kirerema/142 was registered in the joint names of the deceased and David Mwangi Kamau as proprietors in the trust for deceased's children. With respect, I agree with the submissions of the Protestor that L.R. No. Githi/Kirerema/142 does not form part of the deceased's assets hence the same is not available for distribution. The protest succeeds to that extent. Let the parties take the appropriate proceedings to establish the trust .

The Protestor has made two contradictory proposals. In his first affidavit of protest sworn on 10th February 2010, he proposed for the deceased's assets to be distributed in equal proportions between the Petitioner and the deceased's children. In his second affidavit of protest, the Protestor averred that the Petitioner is not entitled to benefit from the deceased's estate because he was not a dependant of the deceased since he was a polygamist and was engaged in gainful employment. The later submission cannot stand in view of the clear provisions of section 35 of the law of succession Act which defines the right of a surviving spouse. The Petitioner has filed these proceedings in his capacity as a spouse and not as a dependant. It is apparent that the mode of distribution proposed by both the Petitioner and the Protestor do not conform with the provisions of section 35 of the Law of Succession Act. I hereby postpone the confirmation of grant and direct either the Petitioner or the Protestor to file and serve the other another affidavit showing the distribution of the estate in accordance with S.35 of the Law of Succession Act within 30 days. Mention on 28th January 2011 for further orders and directions.

Dated and delivered this 25th day of November 2010.

J.K. SERGON
JUDGE

In open court in the presence of Kingori holding brief A. Kariuki for Applicant. No appearance for Muthigani.