



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 519 OF 2007**

**IN THE MATTER OF THE ESTATE OF NGURE KIMOTHO – DECEASED**

**WAIRIMU MWATHA GACHIHI.....1<sup>ST</sup> PETITIONER**  
**DAVID MURIUKI GACHIHI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**MILKAH WANGU NGURE.....PROTESTOR**

**JUDGMENT**

A grant of letters of administration intestate in respect of the Estate of Ngure Kimotho, deceased, was made to Wairimu Mwatha Gachihi and David Muriuki Gachihi (1<sup>st</sup> and 2<sup>nd</sup> petitioners) on 11<sup>th</sup> September 2009. The duo have now taken out the Summons dated 23<sup>rd</sup> March 2010 in which they seek to have the grant confirmed. That application has attracted two affidavits of Protest from Milkah Wangu Ngure (Protestor) and one from Wanjohi Ngure. This Court gave directions to have the dispute disposed of by affidavit evidence and by written submissions.

I have considered the grounds set out on the face of the Summons and the facts deponed in the affidavits filed in support and against the application. I have further considered the written submissions filed by learned counsels from both sides. The Protestor, Milkah Wangu Ngure avers that she is the only widow of the deceased hence she is the only person entitled to inherit his estate. She claimed that the Petitioners herein had filed **Kerugoya S.R.M.SUCC.CAUSE NO. 284 OF 2007** over the same Estate which was later dismissed because the Protestor was not involved. It is stated that the 1<sup>st</sup> petitioner is a sister-in-law to the deceased and married to one Mwatha Gachihi. The 2<sup>nd</sup> Petitioner is a brother to the deceased. In view of the aforesaid facts the Protestor avers that as the widow of the deceased, she ranks in priority to succeed the deceased against the petitioners. The 2<sup>nd</sup> Protestor has averred on oath that the land in question was purchased by the deceased hence it is not clan land. It is therefore the Protestor's submission that the Petitioners have no right to inherit the deceased's Estate. The Protestor however, admits that the deceased had given the 2<sup>nd</sup> Petitioner a ¼ acre to be excised from the land in dispute. It is the contention of the Petitioners that the 1<sup>st</sup> petitioner i.e. Wairimu Mwatha Gachihi and the 2<sup>nd</sup> petitioner i.e. David Muriuki Gachihi are sister in-law and nephew to the deceased respectively. They are of the view that the parcel of land known as **L.R. KIINE/KIANGAI/157** should be shared in equal measure between the Petitioners on one side on behalf of the children of Gachihi Ngure and the Protestor on the other side. The Petitioners are of the view that the aforesaid parcel of land was registered in the name of Kimotho Ngure, deceased, in trust for the family of Kimotho Rukanga, the father of Ngure Kimotho and Gachihi Ngure.

Having carefully considered the arguments presented to this Court by both sides, it is quite clear that the claim by the Petitioners against the deceased Estate is a claim based on trust. It is said that Kimotho Ngure was registered as proprietor of **L.R. NO. KIINE/KIANGAI/157** to hold in trust for himself and others. The Protestor is of the view that the deceased bought the land hence the same was not clan land. It is obvious that the issue touching on trust cannot be determined through these proceedings. A fair order in

the circumstances is to postpone the confirmation of grant until the parties take up the necessary proceedings to determine the issue based on trust pursuant to the provisions of *rule 41 (3) and (4)* of the Probate and Administration Rules. In essence the Protest has succeeded to that extent. Costs shall abide the outcome of the aforesaid proceedings.

***Dated and delivered at Nyeri this 19<sup>th</sup> day of November 2010.***

**J. K. SERGON**

**JUDGE**

In open court in the presence of Mr. Macharia for Protestor and Kiminda holding brief Muthigani for Petitioner.