REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 76 of 2004

IN THE MATTER OF THE ESTATE OF SIMON MUTURI MUGAI …….. (DECEASED)

BILHA WAHITO MUTURI …….....…….. PETITIONER

versus

MIRIAM NJOKI MUTURI …….....…..…….. OBJECTOR

JUDGMENT

The petitioner BILHA WAHITO MUTURI petitioned for grant of Letters of Administration and in her petition stated that she was the only widow of the deceased and named four of her children as beneficiaries. Her summons for confirmation of grant dated 15th March 2006 received the protest of Miriam Njoki Muturi. In that affidavit of protest it was stated that the said Miriam was a co-wife of the petitioner. That Bilha was the first wife and she was the second one. That the issues of her marriage to the deceased were eight. Her protest was on the basis that she and her children had been left out of the distribution of the estate. At the beginning of the hearing of the protest counsels appearing for the petitioner and protestor entered into a consent that the only issue for determination was whether the protestor was a wife of the deceased. The protestor in her evidence first stated that she entered the deceased house in 1984. She did however later on in evidence state that she got married to the deceased in 1994. She said that she was married according to the Kikuyu custom. She did not elaborate which custom was fulfilled in her marriage. She said that dowry was taken to her father in 1994. In 2008 the deceased brother and clan members took dowry to her father. She said that they had eight children with the deceased. When she got married to the deceased he had separated with his first wife. The first wife returned to the home four days after his death. On being cross examined it transpired that her name was Miriam Njoki Kaigi. She stated that Kaigi was her father's nickname. She denied that it was her former husband's name. Although she was married according to her in 1994 she said that one of her children Susan Wanjugu was born in 1979. Another child Mercy Wangari who was the last born was born in 2002. She was unable to provide evidence of the surname of those children. On being shown the marriage certificate of the marriage between the first wife and the deceased she said that she was unaware of that marriage. PW 2 was the brother of the deceased. The deceased was a younger brother. He stated that Bilha was the first wife whilst Miriam was the second wife. He said they got married but not through the church. They became friends in 1994 and in which year they got married. Another brother of his went with others to Miriam's family. In the year 2008 when a daughter of Miriam wished to get married they could not receive the dowry until they had finished the dowry of Miriam. He stated that both Miriam and Bilha live together in the deceased property. Bilha has five children and Miriam has eight children. In being cross examined he confirmed that he was not present when Miriam's dowry was paid. In support of her case Bilha stated that she got married to the deceased in 1976 under Kikuyu Custom. In 1994 they did a church wedding. She produced the certificate of marriage. They were blessed with 5 children. She produced their birth certificates. She was chased away by her husband in 1997 with a view to Miriam coming into the house. She left behind her children who were later chased away by Miriam. She said that Miriam's children's names do not follow the Kikuyu pattern of naming children after the parents. She said that Miriam's children were not the deceased's children. DW 2 was the son of Bilha. At the time of giving evidence he was 26 years old. In 1995 he was 16/ 17 years old. At that time his deceased father retired. His deceased father used to assault them and assault his mother because he was a drunkard. He would come home with lady friends. On such occasions he would assault their mother and at one time their mother was issued with a P3. The chief advised their mother to return to her parents in view of the assaults. He said Miriam was one of the lady friends his father used to have. After his mother left the home Miriam used to visit. At one time she came into the home with one child. They quarreled with the deceased and she left. She later returned. This witness however said that his deceased father did not have two wives but that he used to have girlfriends. That when he was left behind by his mother, Bilha, his deceased father did not introduce any other lady as a wife to him. At the time of the death of his father Miriam was at their home and she thereafter went away and came back with all her children even the mature ones. As I stated previously the only issue the parties require determination upon is whether Miriam was a wife of the deceased. There was no clear evidence of marriage between Miriam and the deceased. Neither she nor her witness was able to state clearly the customary rights that were undertaken. They both mentioned dowry being paid but they did not state the amount. PW 2 talked about his family paying the balance of the dowry in 2008 but failed to state how much it was. There is no evidence of marriage. Accordingly the protestor's claim is rejected. She also failed to prove that her children were the children of the deceased. For that reason the affidavit of protest dated 29th May 2006 is dismissed with costs to Bilha Wahito Muturi. A confirmed grant shall issue as follows:

(a) TETU/KARAIHU/865 to Bilha Wahito Muturi for her lifetime and thereafter to her children.

(b) TETU/ KARAIHU/ 932 and 933 to Bilha Wahito Muturi for her lifetime and thereafter to her children.

(c) NYERI MUNICIPAL COUNCIL PLOT No. 2 GITHAKWA to Bilha Wahito Muturi for her lifetime and thereafter to her children.

(d) Death gratuity to Bilha Wahito Muturi absolutely

MARY KASANGO

JUDGE

Dated and delivered this 14th day of May 2009.

M. S. A. MAKHANDIA

JUDGE