REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

PROBATE & ADMIN. APPEAL 3 OF 2005

WAITHIRA MWANGI ……..……APPELLANT

Versus

BETH WAIRIMU MWANGI

JANE WAITHERO MWANGI ……..……RESPONDENTS

JUDGMENT

The appellant and respondents are the widows of the late **Mwangi Kirega.** When the late Mwangi Kirega passed on the appellant petitioned for the grant of letters of administration. Her co-wives who are the respondents in this appeal objected. On 14th March, 2001, **L. Nyambura** learned Resident Magistrate ordered that letters of administration be issued jointly to the three co-wives, that is, the appellant and the respondents. By an application dated 2nd January, 2007 the appellant sought for the confirmation of grant and proposed that the estate of the deceased comprising land parcels **Loc.2/Gacharage/504, 505 and 517** be shared as follows:

1. Loc 2/Gacharage/504

Appellant - 4.71 acres

Wangari Kamau Waitathii - 2.80 acres

Richard Thuku - 2.80 acres

2. Loc. 2/Gacharage/505

Daniel Waiti Mwangi - 2.15 acres

Jane Waitherero Mwangi - 2.10 acres

3. Loc. 2/Gacharage/517

Daniel Waiti Mwangi - 1.10 acres

Jane Waitherero Mwangi - 1.10 acres

The respondents were not amused by the appellant's scheme of distribution aforesaid. Accordingly they filed an affidavit of protest. In their affidavit of protest they proposed that **Loc. 2/Gacharage/504** be shared equally between themselves and the appellant. **Loc.2/Gacharage/505** be shared as proposed by the appellant. Whereas **Loc. 2/Gacharage/517** should again be shared equally between the appellant and respondents.

Because of this stalemate the cause proceeded to hearing. The learned magistrate having carefully evaluated the evidence tendered came to the conclusion thus "… ***The undistributed estate now comprises of 11/16 acres and shares in different estates. The court finds that the above acreage should be shared equally among the three houses…"*** the appellant was not happy with this decision. She accordingly lodged this appeal. In the amended memorandum of appeal, the appellant has faulted the decision of the learned magistrate on two grounds to wit:-

"1. ***THAT the learned Resident Magistrate erred in law and in fact in failing to consider that as the eldest wife of the deceased Mwangi Kirega, the appellant was entitled to a slightly bigger portion of the deceased's estate than the two respondents who are co-wives of the appellant.***

2. THAT the learned Resident Magistrate erred in law and in fact in failing to appreciate that the deceased had made an Oral Will and had granted 4.7 acres of his estate to the appellant.

When the appeal came up for hearing **Mr. Njuguna,** learned advocate for the appellant and **Mr. Wahome,** learned advocate for the 2nd respondent agreed that the appeal be argued by way of written submissions. Earlier on, the 1st respondent by a letter dated 3rd February, 2009 and addressed to this court had indicated that she supported the decision of the learned magistrate. However because of her failing health she was in a position to attend court for ht hearing of the appeal.

Written submissions were subsequently filed by respective parties which I have carefully read and considered.

I must state from the onset that two grounds of appeal have no merit at all either in tact or law. The major complaint of the appellant is that as a first wife she was entitled to a slightly bigger portion of ht estate of the deceased than her co-wives since that was the intention of their deceased husband. In her own words she stated "… **my husband had said that I would get 4.7 acres. He left an oral will and not a written will. He told me to take care of his property…"** it is principally because of her seniority coupled with what the deceased told her, that she is claiming a portion of 4.7 acres of the suit premises. The estate of the deceased was and subject to the law of succession Act. The said Act does not discriminate nor recognize the concept of a senior or Junior wives. It treats wives equally. Indeed it talks of …."**where an intestate has married more than once…."** There is therefore no basis for me to interfere with the learned magistrate's judgment and the alleged seniority of the appellant in terms of the marriage to the respondents.

The appellant also talks of the deceased having made an oral will that she should be granted 4.70 acres. The evidence led by the appellant in his regard was to say the least, wanting. It was not credible. In any event even if such evidence had been credible it would still have fell short of the requirement of section 9(1) of the law of Succession Act. It was not made before two or more competent witnesses and neither did the testator die within a period of three (3) months from the date of making of the alleged oral will.

For the foregoing reasons, I find that the appeal lacks merit and is accordingly dismissed with costs to the respondent.

Dated and delivered at Nyeri this 11th day of May 2009.

M.S.A MAKHANDIA

JUDGE