



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**SUCCESSION CAUSE 1834 OF 2001**

**IN THE MATTER OF THE ESTATE OF GIBSON KAMAU WAIRIRE (DECEASED)**

**JUDGMENT**

Elizabeth Wambui Kamicha filed the petition of grant of representation intestate for the estate of the deceased herein, on 11<sup>th</sup> March, 1998.

Objection to the said petition was filed by Emily Nyambura Kamicha claiming her right of a widow and filed Answer and cross-petition on 27<sup>th</sup> March, 1998. It is further averred by her that the said Elizabeth is a married daughter who was not a dependent of the deceased during his life time.

Thereafter it seems that a joint grant of representation of the estate was issued on 31<sup>st</sup> May, 2005.

Elizabeth thereupon filed a summons dated 29<sup>th</sup> January, 2008 for confirmation of grant.

In her supporting affidavit to the summons she has mentioned all the beneficiaries including married daughters, all the properties left by the deceased and mode of distribution (see paragraphs 2, 5 and 6 of affidavit sworn on 29<sup>th</sup> January, 2008).

Emily Nyambura Kamicha filed her affidavit of protest against the said proposal and detailed the beneficiaries in paragraph 3 and 4 of her affidavit on 16<sup>th</sup> May, 2008.

It is averred that four beneficiaries named in the summons for confirmation namely Eston Mwea, Nelson Ndungu, Esther Wahinya and Margaret Wanjiru are not the children of the deceased as Elizabeth Wanjiru Kamicha begot them after she was divorced by the deceased. She also stated that (para.9) the shares at Kaganda Maendeleo Bar and Restaurant and shop No.J659 at Jamhuri Market, Thika were transferred to herself and her son Paul Mwaniki. Annexure ENK 1 (Minutes of meeting of partnership of 21<sup>st</sup> June, 1996) was annexed. I do note the minute No.4 which talks only about next of Kin representing in future and do note that names **“of either the deponent (Protestor) or Paul Mwangi”** were mentioned as proposed by the deceased. I am not told how the deceased proposed their names posthumously! Thus, I do not accept that the minutes prima facie evinced the wish of the deceased of transferring his share absolutely to either of them.

However, I do accept the averment by the protestor that shop No.J659 at Jamhuri Market, Thika was transferred to Paul Mwaniki as per the deceased’s affidavit annexed as ENK 2.

I find as above as the co-Administrator/Applicant has not responded to those averments. She also did not participate in the hearing although she was duly served.

The Protestor then testified. According to her the mother of the co-Administrator/Applicant left the matrimonial home when her four children were very young. According to her she has not seen the co-wife since then. She left her four children, Nganga, Elizabeth (Co-Administrator/Applicant), Maina and Nduta. The first born Nganga is not alive and is survived by her widow Jane Njeri Macharia.

She talked about the wishes of the deceased which were written in his hands in a family meeting called on 16<sup>th</sup> May, 1991.

In that meeting he gave his share of ‘**Mutithi**’ (item No.f) in paragraph 7 of her affidavit to Elizabeth. His plot at Thika Municipal Housing Co-operative Society. (item No.c) and his share at Maendeleo which was not mentioned by her but has been mentioned by me), as well as share of Barclays Bank (Item g) to Mwaniki, his share at Gikono (not mentioned) to Nganga his share at Breweries to Maina, and his share at Nation Newspaper to Nganga.

I may reiterate that share of Nganga (deceased) shall have to go to his widow Jane Njeri as per law.

Similarly the plot at Kaguthi Market is also shared amongst three sons Mwaniki, Nganga and Maina.

However, in the last paragraph of the said written wish he has specifically stated and I quote:

**“The above written things will not happen when I am alive or when my wife is alive until we depart from this world. When I go I leave it with Emily or if she goes she leaves it to me. That is when you will use the properties”.**

Although the English translation of the said wishes is not certified by the person who is alleged to have translated the said wishes, none of the parties have objected to its contents or admission of the said document. Though I hasten to add that the same was produced when the co-Administrator/Applicant did not appear though served and has not responded as regards its authenticity. I say so because the same was annexed to the affidavit in protest.

Thus if I rely on the said wish, I am not supposed to distribute the estate in life time of the co-Administrator/Protestor. But she herself has proposed the distribution as per the wishes of the deceased which is not objected by any one.

At this juncture, I also pause to consider whether that written wishes of the deceased is established as being a will of the deceased?

Exhibit 4 does not mention presence of any other member of the family and seems to have been addressed to his three sons only. It is also not dated and not witnessed by any witnesses. Although in balance of probability it does seem to have been written by the deceased.

In the circumstances, and reiterating that the widow herself, despite the deceased has left everything to her and, in any event, has the life interest in the estate at least for her home, has decided to obey the wishes of the deceased.

I thus direct that the certificate of confirmation shall be issued as per the proposals in the affidavit of the protestor sworn by Emily Nyambura Kamicha. I shall however add that share at Kagamba Maendeleo be divided equally amongst the beneficiaries mentioned in the affidavit in protest.

I shall not make any order on cost.

**Dated, Signed and Delivered** at Nairobi, this 14<sup>th</sup> day of July, 2009.

**K.H. RAWAL**

**JUDGE**

**14.7.09**