

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause 204 of 2005

IN THE MATTER OF THE ESTATE OF DAVID MATHINI WAMBUGU ALIAS

MATHINI S/O WAMBUGU DCD

AND

SIMON RUBIA MATHINI PETITIONER

JUDGMENT

SIMON RUBIA MATHINI obtained a grant in this estate on 8th November 2005. He applied for confirmation of that grant by summons dated 16th May 2006. In that application for confirmation he proposed that the estate property be divided into two equal portions between the two houses of the deceased. Accordingly the property Aguth/Gaaki/1595 comprising of 12 acres he proposed that 6 acres would go to Esther Wambui representing one house. In respect of the house he comes from he proposed that 5 acres would go to him and one acre would go to his unmarried sister Monica Wanja. That proposal received protest from Monica Wanja. She was in agreement that the property be divided equally between the two houses. However in respect of the house where she comes from she stated that she was unmarried and accordingly should get a half share of the portion which was to go to her house. The protest proceeded for hearing by way of viva voce evidence. The evidence was very simple. The protestor stated that the deceased was her father. That she is an unmarried daughter and is therefore entitled to get half share of the entitlement of her house. The petitioner stated that the portion belonging to the house he comes from had been the subject of a discussion between the children of the deceased from that house. He stated that the deceased has other daughters who are married and it was agreed that their share of that property would be held by him in his name in case they were at any time separated from their husbands they would have a land for their use. He stated that he would hold their portions in trust. He produced notes taken at that meeting but those notes were in Kikuyu language and no translation was provided at the hearing. Those notes were therefore of no use to the court. I have considered that evidence adduced before court. The deceased died in 1969. That being so the Law of Succession Act does not apply to this estate. Accordingly one would have to fall back on the custom of the parties. This issue was not raised by the parties before me but it is clear that the parties were of the kikuyu tribe. Although the petitioner stated that the protestor was at one time married he did not dispute that she is presently on the estate property and that she is now single. In my view therefore the protestor is entitled to inherit her father's property as much as the petitioner is entitled. This is the position as stated in the book "**THE LAW OF SUCCESSION**" by Eugene Cotran that:-

"If however, a daughter remains unmarried, she may be allocated a piece of land by the Muramati for use during her lifetime."

The petitioner although he stated that he would hold portions of land on behalf of married sisters the Kikuyu Customary Law does not recognize inheritance in respect of married daughters. In the case of *JOSPINE WANJIRU AND OTHERS VS GICHO WATENE Civil Appeal No. 22 of 1980*. The Court of Appeal stated:-

"Customary Law in Kikuyu which governs this case gives certain rights to unmarried daughters of a

deceased but denies rights to married daughters.”

For that reason the judgment of this court is that the protest of Monica Wanja Mathini does succeed. The grant is hereby confirmed in the following terms:-

· *AGUTHI/GAAKI/1595 shall be shared as follows:-*

1. Esther Wambui 6 acres

2. Monica Wanja 3 acres

3. Simon Rubia 3 acres

· *There shall be no orders as to costs.*

Dated and delivered at Nyeri this 22nd day of October 2008.

MARY KASANGO

JUDGE