

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE 49 OF 2003

KIMUNYE..... DCD

AND

1. ROBERT MAINA MUCHEMI)

2. JOSEPH GICHUKI MUCHEMI)

3. PETER MBAI MUCHEMI)..... PETITIONERS

VERSUS

GILBERT KANYEKI MUCHEMI..... PROTESTOR

JUDGMENT

This judgment relates to the affidavit of protest filed by Gilbert Kanyeki Muchemi protesting against the application for confirmation of grant filed by Joseph Gichuki Muchemi. In the affidavit of protest it is stated that the deceased had two wives. The protestor's mother died before the deceased herein. The other wife Pauline Wangari is still alive and is the mother of the petitioner. The protestor deponed that in the absence of a written will by the deceased his estate should be divided between the two houses equally as per the customary law. The protestor further stated that the beneficiary Lucy Wambui Maina had no locus in this estate and could not benefit from it. He stated that the deceased had divided his estate equally between the two houses during his life time and that he had been using his mother's portion of land uninterrupted for 30 years. The application was opposed by the petitioner. He stated in his affidavit in response that the property of the deceased should be divided in accordance with the Law of Succession. He stated that the protestor's attempts to include his married sisters should not be allowed by the court. The petitioner stated that the issue of distribution of the estate had been the subject of arbitration and that the award of the arbitrators was to the effect that the property should be shared equally be the sons of the deceased. That award was appealed against by the protestor in the High Court and that appeal was dismissed. The protestor sought the review of that dismissal and that too was dismissed. The petitioner annexed a document by Alifonza Nyamachohi Wachira who is a married daughter of the deceased whereby she stated that she and her married sisters were not interested in sharing the property of the deceased. The petitioner stated that Lucy Wambui Maina was the widow of one of the sons of the deceased namely Robert Maina Muchemi.

I have considered the protestors affidavit and I am inclined to accept the argument raised by the petitioner that distribution of the estate property should conform to the Law of Succession Act. Such distribution is provided under Section 40 of the Law of Succession Act. That section is in the following terms:-

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2)The distribution of the personal and household effects and the residue of the net intestate estate

within each house shall then be in accordance with the rules set out in sections 35 to 38.”

Accordingly the finding of this court is that the estate property Thegenge/Karia/484 should be shared equally between Joseph Gichuki Muchemi, Peter Mbai Muchemi, Gilbert Kanyeki Muchemi and Lucy Wambui Maina. There shall be no orders as to costs.

Dated and delivered at Nyeri this 16th day of October 2008.

MARY KASANGO

JUDGE