



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**SUCCESSION 669 OF 1987**  
**IN THE MATTER OF THE ESTATE OF MUHURI WATHUNGU – DECEASED**

**RULING**

I have before me a summons dated 9<sup>th</sup> March, 2006 for orders for dependency under Section 26 of the Law of Succession Act (Cap 160 Laws of Kenya). It is filed by two applicants.

It was directed that the said summons be heard by oral evidence due to the fact that the parties are relying on documents. The grounds on which they seek the order of dependency and reasonable provision from the estate of the deceased are:

- (1) They are the sons of the deceased.**
- (2) They have been given by the deceased inter vivos a land bearing LR.No. Fort Hall/Muthithi/239 comprising of 2.8 acres to be shared equally.**
- (3) The Executrix who is their sister had been married since 1949 and have other properties from her earlier husband and at present lives with one Mr. Lasker since 1953.**
- (4) They live on the said land given to them by the deceased in their names.**

However, during the hearing it came out in light that Mwaura Gikuru has a land bearing Title Loc.VI/Muthithi/841 and there was a case filed by the deceased against him to claim the proprietorship of the said. The deceased lost it.

From the evidence led from both the side, it was disclosed that the deceased had one wife who died after the deceased and in the will she has not provided for the applicants which is not will relied by the Executrix. It is not disputed that the deceased had four children. Two girls (including the Executrix) and two sons (the protestors), that the Executrix was married in 1949 and her husband died during independence struggle. That she has remarried since 1963 and lives at Thika. That even though questions were asked to PW.1 Mwaura Gakuru, on the validity of the issue of his being a son to the deceased, the Executrix admitted that he was a son of the deceased and a brother to her. That both the sons have lived on the property bearing Fort Hall/Muthithi/239 with their families. That the Executrix has no objection to the 2<sup>nd</sup> protestor Mungai Wa Muchiri taking the portion of the said land which he has been occupying. That she objected to the same treatment because there was a suit between the deceased and him, and that is why he was very bad to the deceased.

The Executrix confirmed the testimony of PW.1 Mwaura Gakuru that she owns other pieces of land and is happily married to Mr. Lasker Singh whose name she had acquired. She agreed that their mother was alive when the will was made and she was the only one who accompanied the deceased to the Advocate's

office. One of the witnesses Joyce Wanjiru named by who attested the will her as per her evidence has neither been shown nor has attested the will. She also agreed that other witness was her neighbour.

When I am on the issue of will, I do note that no reason of disinheriting other three children is put forth in the will. On the other hand the Executrix also has agreed that the deceased had no problem with the other son.

More importantly I do note that the will has been drawn and filed by M/s G. Kamonde the Advocate and the same Advocate has also signed and attested as a witness.

In the circumstances, there is more to the will than is shown.

However, as the protestors have withdrawn their application to question validity of the said will, I shall not make any further observations thereon.

There can not be any opposition to the fact, from the evidence before this court, that the protestors are the sons of the deceased, that each son of the deceased, has been living on the half portion of land bearing Fort Hall/Muthithi/239. That the protestors have raised their respective families on the said land, that they have not asked any share from the other piece of land on which the Executrix is living.

It could be that the Executrix had looked after the deceased more than others but that should not be the only reason for disinheriting other heirs. Both the protestors have testified that they have looked after the deceased in their own way, and their evidence is not satisfactorily traversed.

I therefore believe the evidence led by the protestors/Applicants.

I shall not agree to the contention of the Learned Counsel of the Executrix that the summons are not proper in form. These are the rules of procedure and absence of its strict compliance, even if it is true, cannot be fatal. The application is filed by way of summons which is the usual method of coming before the court. Looking at Form No.106 of the Probate and Administration Rules, I do not see any non-conformity thereof in the summons before me.

I am aware that I am not entitled to rewrite the will, but Section 26 of the Act has empowered me to make reasonable provisions for the dependants who are not mentioned in the will.

The Applicants' being sons of the deceased, are obviously dependants of the deceased as per Section 29 of the Act.

I have considered the oral evidence and submissions made thereon and under the guidance of the provisions of Section 27 and 28 of the Act, I do not find any good reason to disturb the position on the ground existing since the life time of the deceased.

I thus allow the application dated 9<sup>th</sup> March, 2006 and direct that:

**1. The land bearing title Forthall/Muthithi/239 comprising of 2.8 acres be shared in equal shares between.**

**(a) Mwaura Gakuru and**

**(b) Mungai Muhuri.**

**2. Each party to bear its own costs.**

**3. The estate be confirmed as per the directions in order No.1.**

Dated and signed at Nairobi this 14<sup>th</sup> May 2007.

**K. H. RAWAL**

**JUDGE**

**14.5.07**