



REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION CAUSE 211 OF 1997

IN THE MATTER OF THE ESTATE OF NDIRANGU S/O GACHAGI.....DECEASED

JOSEPH KIMARU GACHAGI.....PETITIONERS

PATRICK KARIUKI GACHAGI

AND

WENCELAUSE GACHAGI HUMBU & 4 OTHERS.....OBJECTORS

JUDGMENT

When this matter came up for hearing for protestors case against confirmation of the grant, the parties failed to explain to the court where the Will exhibited by the objector had been all the while when this matter was before court. Why the court says so is because the protestors petitioned for Grant of Letters of Administration on the basis that the deceased died intestate. They cited the objector and when she filed her objection in making grant, she filed an answer to petition. In her affidavit in support which was sworn and filed on 22nd January 2003, the Objector Serafina Nyaruai Ndirangu stated in paragraph 4 that the deceased died intestate. In that affidavit she then proceeded to list the number of beneficiaries who survived the deceased. When the matter came up for hearing of the protest by the petitioner to an application for confirmation by the Objector, the Petitioner presented evidence as follows: That the deceased had two wives namely Lydia Wandia and Serafina Nyaruai. Lydia was deceased but had three children, two daughters and one son. The son John Gachagi Humbu, who is now deceased, is the father of the Petitioners. The Petitioners therefore are grandchildren of the deceased herein. The Petitioners denied that the deceased had left a Will. He in his evidence said that the suit property should be divided equally between the two wives of the deceased. He said that that was the wish of the deceased. He had seen the purported Will which had a thumb print. He said that the deceased knew how to read and write and he questioned why he chose to thumb-print the Will. The Objectors' case is that the deceased had written the Will providing how his property **THEGENGE/KARIA/30** was to be inherited. That Will provided as follows:

- 1. I BEQUEST my house at THEGENGE/KARIA/30 and all there is therein, my livestock, furniture and every other assortment of household goods to my wife, SERAFINA NYARUAI HUMBU ID/0583402/63.**
- 2. I BEQUEST my Land parcel NO. THEGENGE/KARIA/30 measuring 6.9 Acres to my family in the following shares:**

(a) To my son WENCESLAUSE GACHAGI HUMBU ID/4858026/67 5.1 Acres of the 6.9 Acres of THEGENGE/KARIA/30 to be held in TRUST for himself, my wife SERAFINA NYARUAI HUMBU and MAGDALENE NYAWIRA HUMBU my unmarried daughter and her children.

(b) To my son JOHN GACHAGI HUMBU, 1.8 Acres only of the 6.9 Acres for himself alone.

3. I BEQUEST my coffee plantation and macadamia trees and all other fruit trees to my wife SERAFINA NYARUAI HUMBU.

The Objector called Pius Linus Kimondo who was one of the witnesses to the above Will. He said that the deceased called him in 1993 and asked him to take him to an advocate to write a Will. He took him but he was unable to say which advocate they went to see. He also confirmed that the exhibited Will did not reflect the name of any advocate.

It ought to be noted that on later going through the previous documents filed in this matter, I did find that the objector had filed an objection on 14th November 1997 when she alleged that the deceased had left a written Will. Such Will was not attached to that application and having alleged that the deceased had left a written Will it is not clear why by her affidavit of 2003 she stated that the deceased had died intestate. It was not denied by the objector that the deceased had two wives. In other words that he had two houses. The objector was from one house and the Petitioners were from the other house. It does seem that the alleged Will has not made provision for the house where the Petitioners come from. That is the house that belongs to the wife Lydia Wandia.

The evidence of the Petitioner which was not contradicted by the objector was that the grand children of that house lived on the land the subject of this succession except one who is in Nairobi. He stated that they were on that land even at the time of death of their grandfather the deceased herein. That being the case the court finds that the Petitioner and his siblings were dependants of the deceased during his life time. The court has power under *Section 26* of the Law of Succession Act to make provisions for the dependants of the deceased who are not adequately provided for by the Will. The gift that was given to John Gachagi Humbu fails because was said to have died before the deceased.

The just decision would be that the court would make provision for all those dependants. Accordingly the judgment of this court is that the suit property should be divided equally amongst the following:

SERAFINA NYARUAI NDIRANGU

WENCESLAUSE GACHAGI NDIRANGU

MAGDALENE NYAWRIA NDIRANGU

TERESIA WANJIKU WAIRIA

OPTUNE WAGUTHI

JOSEPH KIMARU GACHAGI

ANTHONY GICHUKI GACHAGI

PATRICK KARIUKI GACHAGI

SIMON MUNGE GACHAGI

PRISCILLA WANGECI GACHAGI

There shall be no orders as to costs.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 15th day of November 2007.

By: M. S. A. MAKHANDIA

JUDGE