



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**SUCCESSION CASE NO. 125 OF 2017**

**IN THE MATTER OF THE ESTATE ROBERT IRUNGU MWANGI (DECEASED)**

**J U D G M E N T**

1. The deceased herein **Robert Irungu Mwangi** died on 15<sup>th</sup> June 2010, subsequent to which **Rose Wachuka Mwangi** and **Mary Kabura Waichigo** (the Petitioners) successfully petitioned for a grant of letters of administration intestate. The grant was issued on 15<sup>th</sup> February 2011. On 27<sup>th</sup> August 2013, the Petitioners filed a summons to confirm the grant.
2. The summons was met with a protest by **Joseph Mwangi Irungu** a son of the deceased, through the Protest filed on 22<sup>nd</sup> October 2013 opposing the proposed distribution in the summons. For reasons that his mother **Grace Wakiyu Harris** had been left out and yet she too, like **Rose Wachuka Mwangi** was a wife to the deceased. He proposed equal sharing of the sole asset of the estate, namely **LOC. 10/GATHERU/1470** between the two houses. The protest was heard by way of viva voce evidence, the protagonists adopting their respective affidavits.
3. The evidence by the Protestor and his mother **Grace Wakiyu Harris (Grace)** is to the effect that the deceased married Grace in 1979 under Kikuyu customary law but for long periods the couple lived separately as they worked in different towns, that the protestor lived in the matrimonial home under the care of the deceased's mother; that in 1989 the deceased wed the Petitioner **Rose Wachuka Mwangi** through a civil ceremony; that the deceased and **Grace** had two children, one of them the protestor.
4. For her part **Rose Wachuka (Rose)** asserted that she was the only wife to the deceased and that the two underwent a civil ceremony of marriage in 2007 under the marriage Act and that she cohabited with the deceased at Muranga; that though she learned that the deceased had a son (**Joseph Mwangi Irungu**) – the protestor she did not know of existence of a first wife. She stated that she had two children with the deceased and preferred that the property be distributed in the manner she proposed in her application, rather than equally as proposed by the Protestor.
5. The Court has considered the Petition material, the parties' affidavits and evidence. Two questions require determination. Firstly whether the deceased had two wives and secondly, how the estate ought to be distributed.
6. In the Petition filed by **Rose** and a sister-in-law **Mary Kabura Waichigo** the Petitioners indicated that the deceased was survived by **Rose**, the Protestor (aged 30 years), **Harris Nganga** (aged 27) years and two minors **DW** and **DM** aged 10 and 4 years respectively. These details are also included in the chief's letter dated 19<sup>th</sup> August 2010. Evidently the Protestor and **Harris Nganga** were the children of the deceased with **Grace** and the former lived in the deceased's home at Murang'a.
7. Although **Grace** admitted that she and the deceased worked and lived separately most of the time, she emphasized that she was married to him in 1979. She recognized **Rose** as a co-wife. For her part **Rose** relies on the civil marriage conducted in 2007 to claim that she was the sole widow to the deceased.
8. On a balance of probabilities, the inclusion in the Petition of the deceased's oldest sons by the Petitioner's tends to support the Protestors evidence that **Grace** was the deceased's first wife. This fact did not change merely because the couple lived separately for the most part and the deceased subsequently contracted a civil Marriage under the marriage Act. It may well be that the deceased and **Grace** became estranged over time, but there is no evidence of a divorce Under Section 3(1) of the Law of Succession Act a "wife" includes a wife who is separated from her husband.
9. I accept the evidence by the Protestor and his mother that **Grace** was the first wife of the deceased with whom he sired two sons, but that he subsequently married a second wife, **Rose** under the Marriage Act. Thus he had two houses at the time of death and his situation was not unlike that of a polygamous man, the civil marriage notwithstanding.
10. In my considered view, the land parcel **N0. LOC. 10/GATHERU/1470** ought to be distributed equally between the deceased six beneficiaries namely, **Grace Wakiyu (widow)**, **Joseph Mwangi Irungu (son)**, **Harris Nganga (son)** **Rose Wachuka Mwangi (widow)**, **DW (daughter)**, and **DM (son)**.

11. Moreover, the justice of the situation requires that the share to Rose Wachuka Mwago (Mwangi) ought to be located where the matrimonial house is situate, as she has lived there since her marriage to the deceased.

Parties will bear own costs.

**DELIVERED AND SIGNED AT KIAMBU THIS 4<sup>TH</sup> DAY OF JULY 2019.**

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**C. MEOLI**

**JUDGE**

**In the presence of:**

Mr. Oyugi holding brief for Mr. Njiraini

Protestor - Present