



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.452 OF 2011

IN THE MATTER OF THE ESTATE OF THE late KIBE WACHIRA – (DECEASED)

MARY WANGECHI KIBE.....PETITIONER/RESPONDENT

VERSUS

PETER WACHIRA KIBE.....APPLICANT

RULING

1. Kibe Wachira Kibe (deceased) died on 2nd May, 2011 intestate. He was survived by Peter Wachira Kibe (son) Teresia Nyakio Kibe, Flora Nyambura Kariuki and Mary Wangeci Kibe (daughters)
2. Mary Wangeci Kibe petitioned and was issued with a grant of letters of administration in respect of the deceased herein on 10th October, 2012.
3. She subsequently moved the court vide a summons for confirmation of grant dated 11th April, 2013 for confirmation of the said grant.
4. That summons elicited a protest from Peter Wachira Kibe (beneficiary son) who swore an affidavit of protest on 3rd December, 2013 and filed on the same day.
5. At the outset it is worthwhile to note that beneficiaries Teresia Nyakio Kibe and Flora Nyambura Kariuki have through their conduct even after summons by this court demonstrated that they have renounced their rights to a share of the available asset of the deceased. It has been explained that they have other parcels of land.
6. The tussle, thus, is between the petitioner Mary Wangeci Kibe and Peter Wachira Kibe over the only asset being Plot No.Bahati/Kabatini Block 1/888 measuring 0.65 hectares.
7. The petitioner proposes that Plot No.Bahati/Kabatini Block 1/888 be distributed to her in whole.
8. Peter Wachira Kibe states that this property was bequeathed to him in writing by the deceased during his life time in presence of witnesses and documented in a written document.
9. Both parties have filed written submissions which I have considered together with the affidavit evidence.
10. The protagonists being siblings, the Law applicable is clear save that now we have to interrogate the

evidence before court to establish whether proper grounds are laid to enable this court depart from the provisions of **Section 38** of the **Law of Succession Act**.

11. This brings me to the issue for determination and that is - Did the deceased make any wishes as far as this property is concerned and if in the affirmative is this court enjoined to enforce the same?

12. The beneficiary Peter Wachira Kibe has annexed in his affidavit a purported written wish of the deceased Joseph Kibe Wachira. He asserts that there were four (4) witnesses to this occurrence namely Joseph Wachira, Teresia Nyakio, Mwangi Mwaniki, Joseph K. Maigwa.

13. The petitioner denied this in her replying affidavit stating that her father did not write any letter or note indicating how parcel No. Bahati Kabatini Block 1/888 was to be shared out. The deceased died while the petitioner was taking care of him and he never wrote a will.

14. **Section 3(4)** of the **Evidence Act** provides that a **fact is not proved when it is neither proved nor disproved.**

15. The petitioner asserts that the deceased left behind some written wishes on how the subject property would be shared out.

16. I have had occasion to look at the purported document. The same is a copy written in a local language, not translated and not certified as a true copy of the original.

17. The petitioner denies the existence of such a document made by the deceased stating that the deceased died while she took care of him, and the deceased made no will.

18. This is a classic example of a situation where a fact is neither proved nor disproved thus it is not proved.

19. Consequently there are no proved wishes of the deceased to rely on.

20. In the distribution of this estate therefore, I shall have to take refuge in the law applicable in the circumstances of the parties herein.

21. That Law is **Section 38** of the **Law of Succession Act** which provides:

38 "Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children."

22. As noted earlier only the petitioner and the petitioner are interested in the subject asset.

23. Following the provision of Section 38, I find and hold that property described as Bahati/Kabatini Block 1/888 shall be divided equally between Mary Wangeci Kibe and Peter Wachira Kibe.

24. With the result that the grant herein is confirmed in terms as set out in paragraph 23 hereinabove.

Dated, Signed and Delivered at Nakuru this 20th day of July, 2017.

A. K. NDUNG'U

JUDGE