



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 69 OF 2009

IN THE MATTER OF THE ESTATE OF PAUL KARIUKI IRUKU BACHIA (DECEASED)

JEROTH WANGUI GITONGA.....APPLICANT

VERSUS

MARY NYAWIRA MWANGI.....RESPONDENT

JUDGMENT

Paul Kariuki Iruku Bachia (deceased) died on 8th October, 2008. Jerioth Wangui Gitonga (hereinafter the applicant) took out a citation dated 13th February, 2009 requiring Mary Nyawira Mwangi (hereinafter the protestor) to accept or refuse letter of administration in respect of the estate of the said Paul Kariuki Iruku Bachia.

In a replying affidavit to the citation and specifically at paragraph 12 thereof the protestor indicated that she would not take out the letters of administration in respect of the estate of the deceased as she had already taken out letters for the administration to her husband's estate. She added that it had been agreed that the letters be taken out by a brother of the deceased jointly with a son of the deceased.

By an order of this court dated 17th November, 2009, the applicant was allowed to apply for the letters of administration and ordered to include all parties.

The applicant proceeded to take out a summons for confirmation of grant on the 6th day of March, 2012. This summons elicited an affidavit of protest from the protestor.

On the 7th day of June, 2012, directions were given that the protest be disposed off by way of *viva voce* evidence.

On the 25th November, 2015, the parties elected to dispose the protest by way of written submissions indicating that the issue is controversy was only distribution. This was in a complete departure from the averment in the protestor's affidavit denying that the applicant was a wife and that her children were the children of the deceased. The inference drawn from this turn of events is that those allegations were abandoned.

Strangely, in counsel's written submissions, the protestor seems to revive those issues. That situation is not tenable in law as submissions by their very nature are not evidence.

In any event, the protestor ought to have raised an objection and not a protest to canvass the issues

now raised in submissions.

It is also evident that in an earlier affidavit sworn in the proceedings in Nakuru CMCC 1025 of 2008, the protestor had deposed in paragraph 6 that:

“6. The deceased had married three wives under Kikuyu Customary Law namely:

- 1. Susan Wamucii**
- 2. Jerioth Wangui Gitonga**
- 3. B W K.”**

The protestor can not approbate and reprobate having accepted earlier that the applicant is a wife.

On the material before me, it is clear that the deceased was survived by 2 wives. These are B W K (said to be insane) and Jerioth Wangui Gitonga. Beatrice had SEVEN (7) children with the deceased while Jerioth had seven (7) children. The protestor is a wife of the only child of the deceased wife Susan Wamucii.

The only asset in the Estate of the deceased is parcel of land LR Nyandarua/Wanjohi/489.

The deceased having died after the commencement of the Law of Succession Act (Cap 160 Law of Kenya), the applicable Law on distribution of this estate will be found in **Section 40** thereof which makes provision for the distribution of the net estate to the *“house according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.”* A house is defined in Section 3 of the Act as a *“family”* unit comprising of a wife and the children of that wife.

The net estate herein is 4.5 hectares. These are three (3) family units with two (2) surviving wives. The distribution will thus be as hereunder:

- a) First House: 0.5 hectares to Mary Nyawira Mwangi being the only child of this unit, the mother having died.
- b) The remainder of 4 hectares to be shared out equally between the house of B W K and Jerioth Wangui Gitonga.

This being a family matter each party is to bear its own costs.

Dated, Signed and Delivered at Nakuru this 3rd day of March, 2016.

A. K. NDUNG'U

JUDGE