



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MERU**

**Succession Cause 259 of 2002**

**IN THE MATTER OF THE ESTATE OF ELIJA alias M'ARACHI M'MUGUU (DECEASED)**

**KAMBURA M'ARACHI ..... PETITIONER**

**VERSUS**

**MUTHOMI M'ARACHI ..... INTENDED OBJECTOR**

**JUDGMENT**

Kaburu Arachi, petitioned for grant of letters of administration intestate in respect of her deceased husband's estate. The only property of the deceased is Ntima/Ntakira/1039. The petitioner's summons for confirmation, received the protest of Muthomi M'Arachi. The evidence that was tendered at the hearing of the protest revealed that the deceased was married to a lady called Gachoga who bore 4 children with the deceased who included the protestor Muthomi. Gachoga died living behind those children who were young. Those children were brought up by the petitioner. The petitioner got married to the deceased after the death of the 1<sup>st</sup> wife. The petitioner was blessed with 4 children with the deceased. In her proposed distribution, the petitioner proposed that 5 children of the deceased do get 0.8 acres each and the balance of the land to be given to her. It should be noted that some of the children of the deceased are now dead. The protestor proposes that the division of the property be in two equal parts one representing his deceased mother and the other for the petitioner. The evidence tendered by the protestor was contradictory for he stated that the division into two equal portions was in accordance with the deceased wishes. He however could not say when the deceased made his wishes known neither could his witnesses. All that his witnesses could say was that it was a long time ago. One of the witnesses, DWII stated that the protestor had developed the portion shown to him by the deceased. DWII yet later said that the protestor had not moved to his portion even after the death of the deceased. That was a clear contradiction of his evidence. Deceased died on 4<sup>th</sup> June 1980 and by then the operations of the Succession Act had not commenced. The Act commenced on 1<sup>st</sup> July 1981. By virtue of section 2 (2) the deceased estate is subject to written law and the deceased customs that applied. That section provides:-

***“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless, the administration of their estate shall commence or proceed so far as possible in accordance with this Act.”***

None of the parties addressed themselves to the customs which applied to the deceased as at his death. For that reason, as I consider this case, I will, where possible give effect to the Succession Act and also bear in mind what is equitable. The proposal of the protestor in my view is not equitable. It came out very clearly in evidence that for all intents and purposes the deceased children, all of them, looked upon

the petitioner as their mother. That is even the children of Gachoga deceased. There is no reason shown why any one of those children including the protestor should be in a more favourable position than the other. For that reason, the protestor's proposal is rejected. On the other hand, the petitioner's proposal in my view is fair and just. She made provision for all the children and provided for them equally. I find that it is the most equitable distribution that can be considered in this case. I therefore have no hesitation in adopting that mode in the judgment of this court. A confirm grant shall issue in the following terms:-

**(a) Muthoni M'Arachi alias Imathiu Muthoni - 0.80 Acres**

**(b) Judith Naitore (wife to Nkunja M'Arachi) - 0.80 Acres**

**to hold in trust for the children of Nkunja M'Arachi**

**(c) Zipporah Karainto alias Zipporah M'Arachi - 0.80 Acres**

**(d) Late Abel Mutwiri alias Abel M'Arachi - 0.80 Acres his share to be registered in the name of his wife in trust for the children to be identified by affidavit of petitioner.**

**NTIMA/NTAKIRA/1039 to be distributed as follows:-**

**(a) Muthoni M'Arachi alias Imathiu Muthoni - 0.80 Acres**

**(b) Judith Naitore (wife to Nkunja M'Arachi) - 0.80 Acres**

**to hold in trust for the children of Nkunja M'Arachi**

**(c) Zipporah Karainto alias Zipporah M'Arachi - 0.80 Acres**

**(d) Late Abel Mutwiri alias Abel M'Arachi - 0.80 Acres his share to be registered in the name of his wife in trust for the children to be identified by affidavit of petitioner.**

**(e) A confirmed grant will not be issued up and until the petitioner files a further affidavit to state the exact names of the wife of the late Able Mutwiri and the children. Similarly, the petitioner shall confirm in that affidavit names of the children of Judith Naitore.**

**(f) At the reading of this judgment, a mention date will be given to confirm that the affidavit as ordered by this judgment has been filed by the petitioner. On being filed the court will be final orders.**

**(g) There shall be no orders as to costs.**

Dated and delivered at Meru this 5<sup>th</sup> day of November 2009.

**MARY KASANGO**

**JUDGE**