



IN THE COURT OF APPEAL OF KENYA

AT NYERI

SUCCESSION CAUSE 264 OF 1996

IN THE MATTER OF THE ESTATE OF KIHAGI KAHUTHU – DECEASED

MUTHONI KIHAGI ALIAS

MUTHONI MUNDIA.....PETITIONER/APPLICANT

VERSUS

JAMES KABIRU MATHENGE.....1ST OBJECTOR
PAUL MATHENGE KIHAGI.....2ND OBJECTOR

JUDGMENT

On 25th July 2008, a grant of Letters of Administration intestate in respect of the Estate of Kihagi Kahuthu (deceased) was made to Muthoni Kihagi alias Muthoni Mundia, Paul Mathenge Kihagi and James Kabiru. **MUTHONI KIHAGI** alias **MUTHONI MUNDIA** hereinafter referred to as the ‘Petitioner’ applied for the grant to be confirmed vide the summons dated 26th July 2008. **JAMES KABIRU MATHENGE** and **PAUL MATHENGE KIHAGI** hereinafter referred to as the ‘1st and 2nd Objectors’ each filed an affidavit to protest against the confirmation of the grant. Parties involved in this dispute were given leave to file various affidavits which are available on record. Directions were given to have the Protest and the summons for Confirmation of Grant disposed of by affidavit evidence and by written submissions.

I have considered the affidavit evidence and the submissions. The Applicant has proposed for the deceased’s Estate i.e. **L.R. NO. IRIAINI/GATUNDU/57** to be shared equally between her and Paul Mathenge Kihagi, the 2nd Objector. In his affidavit of Protest, the 2nd Objector, proposed for the aforesaid land to be shared in equal portions between him and Irene Wambui Maina, the deceased’s daughter-in-law. According to the 2nd Objector, the Applicant and her sisters should not share the estate because they are married daughters of the deceased. There is also an allegation by the 2nd Objector that there was an oral will introduced through his supplementary affidavit.

On his part, James Kabiru Mathenge, the 1st Objector, claimed that the land registered in the name of the deceased was ancestral land and that it belonged to their grandfather. He alleged he was laying his claim through his adopting father Mathenge Kahuthu, deceased.

After a critical examination of the evidence and the submissions I have formed the following view of this dispute. There is no dispute that the deceased was married to two wives. The first wife was called Wanjira Kihagi, deceased. She was blessed with the following children: Muthoni Mundia (Applicant), Ann Wanja and Catherine Njoki Ngatia. The second wife was called Shelmith Muthoni Kihagi (deceased). The second wife was blessed with the following children: Paul Mathenge Kihagi (2nd Objector) Richard Mwangi Kihagi and Harrison Maina Kihagi, deceased (survived by Irene Wambui Maina). It is obvious that each of the deceased’s wives had three children. Under *Section 40* of the Law of Succession Act, the Estate should be shared in equal measures between the houses. The law therefore supports the proposed distribution made by the Applicant. The law does not discriminate against married daughters hence the proposal by the 2nd Objector is unacceptable. There is an allegation that there was an oral will. I must state from the outset that there was no evidence to establish the oral will in accordance with the provisions of the Law of Succession Act. The claim by the 1st Protestor is made through one Mathenge Kahuthu, deceased. There is no evidence that the 1st Protestor has taken up letters of administration in respect of the Estate of Mathenge Kahuthu, deceased, to enable him mount his claim either as a beneficiary or as the legal representative of the Mathenge

Kahuthu, deceased. His protest must therefore fail.

In the end the Protests are dismissed and the grant is confirmed as prayed in the summons dated 26th July 2008. Since the parties i.e. the Applicant and the 2nd Objector are members of the same family, I direct that each party meets his or her own costs.

Dated and delivered at Nyeri this 7th day of October 2010.

J. K. SERGON
JUDGE

In open court in the presence of Mr. Waruinge for the Petitioner and Mr. Kioni holding brief K. Wachira for the Respondent.