



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 MUNDLA PETITIONER/APPLICANT

VERSUS

JAMES KABIRU MATHENGE 1ST OBJECTOR

PAUL MATHENGE KIHAGI 2ND OBJECTOR

JUDGMENT

On 20th July 2008, a grant of Letters of Administration (interim) in respect of the Estate of Kihagi Kahuthu (deceased) was made to Muthoni Kihagi alias Muthoni Mundla, Paul Mathenge Kihagi and James Kabiru MUTHONI KIHAGI alias MUTHONI MUNDLA herein after referred to as the "Petitioners" applied for the grant to be confirmed vide the summons dated 20th July 2008. JAMES KABIRU MATHENGE and PAUL MATHENGE KIHAGI herein after referred to as the 1st and 2nd Objectors' each filed an affidavit in 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 Petition 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. 8194/NGATUNDUST) to be shared equally between her and Paul Mathenge Kihagi, the 2nd Objector. In his affidavit of Protest, the 1st Objector proposed for the deceased's estate to be shared in equal portions between him and here Wambui Mairu, 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 buying 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 Shingiri Kihagi, deceased. She was blessed with the following children: Muthoni Mundla (Applicant), Ann Wangari and Catherine Ngini Ngeti. The second wife was called Shaimbi Muthoni Kihagi (deceased). The second wife was blessed with the following children: Paul Mathenge Kihagi (2nd Objector), Richard Mwangi Kihagi and Herman Mairu Kihagi, deceased (survived by here Wambui Mairu). It is obvious that each of the deceased's wives had three children. Under Section 46(1) of the Law of Succession Act, the Estate should be shared in equal measures between the spouses. The law does not discriminate against married daughters based on 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 Objector is made through one Mathenge Kahuthu, deceased. There is no evidence that the 1st Objector 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 Petition was dismissed and the grant is confirmed as prayed in the summons dated 20th 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 Nairobi this 7th day of October 2010.

J. K. SERSON

JJSC

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



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