



Case Number:	Succession Cause 264 of 1996
Date Delivered:	07 Oct 2010
Case Class:	Civil
Court:	Court of Appeal at Nyeri
Case Action:	Judgment
Judge:	Joseph Kiplagat Serгон
Citation:	In Re Estate of Kihagi Kahuthu – Deceased [2010] eKLR
Advocates:	Mr. Waruinge for the Petitioner and Mr. Kioni holding brief K. Wachira for the Respondent.
Case Summary:	..
Court Division:	Family
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**IN THE COURT OF APPEAL OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE 264 OF 1996**

IN THE MATTER OF THE ESTATE OF KIHAGI KAHUTHU – DECEASED

MUTHON KIHAGI ALIAS

MUTHON MUNDIA.....PETITIONER/APPLICANT

VERSUS

JAMES KABIRU MATHENGE.....1<sup>ST</sup> OBJECTOR

PAUL MATHENGE KIHAGI.....2<sup>ND</sup> OBJECTOR

JUDGMENT

On 27<sup>th</sup> July 2008, a grant of Letters of Administration intestate in respect of the Estate of Kihagi Kahuthu (deceased) was made to Muthon Kihagi alias Muthon Mundia, Paul Mathenge Kihagi and James Kabiru. MUTHON KIHAGI alias MUTHON MUNDIA hereinafter referred to as the 'Petitioner' applied for the grant to be confirmed vide the summons dated 27<sup>th</sup> July 2008. JAMES KABIRU MATHENGE and PAUL MATHENGE KIHAGI hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> 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. Evidence was given to prove the Petition and the answers to Contentions of Court' 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. 81/ANINGATUNDUST to be shared equally between her and Paul Mathenge Kihagi, the 2<sup>nd</sup> Objector. In his affidavit of Protest, the 2<sup>nd</sup> Objector proposed for the above said land to be shared in equal portions between her and Irene Wambui Moina, the deceased's daughter-in-law. According to the 2<sup>nd</sup> 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 2<sup>nd</sup> Objector that there was an oral will executed through his supplementary affidavit.

On his part, James Kabiru Mathenge, the 1<sup>st</sup> 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 Wangari Kihagi, deceased. She was blessed with the following children: Muthon Mundia (Applicant), An Wangi and Catherine Ngidi Ngidi. The second wife was called Shalimbi Muthon Kihagi (deceased). The second wife was blessed with the following children: Paul Mathenge Kihagi (2<sup>nd</sup> Objector), Richard Mwangi Kihagi and Harrison Moina Kihagi, deceased (survived by Irene Wambui Moina). It is obvious that each of the deceased's wives had three children. Under Section 45 of the Law of Succession Act, the Estate should be shared in equal measures between the spouses. The law therefore supports the proposed distribution made by the Applicant. The law does not discriminate against married daughters hence the proposal by the 2<sup>nd</sup> 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 case by the 1<sup>st</sup> Objector is made through one Mathenge Kahuthu, deceased. There is no evidence that the 1<sup>st</sup> Objector has taken up issues 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. He cannot mount that claim.

In the end the Protests are dismissed and the grant is confirmed as prayed in the summons dated 27<sup>th</sup> July 2008. Since the parties i.e. the Applicant and the 2<sup>nd</sup> Objector are members of the same family, I direct that each party meets his or her own costs.

Dated and delivered at Nyeri this 7<sup>th</sup> day of October 2010.

J. K. SIKOO

JUDGE

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



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