



REPUBLIC OF KENYA



In re Estate of Mbusya Lai Kamweli (Deceased) (Succession Cause 108 of 2010) [2023] KEHC 18728 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18728 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 108 OF 2010**

MW MUIGAI, J

MAY 31, 2023

N THE MATTER OF THE ESTATE OF MBUSYA LAI KAMWELI (DECEASED)

BETWEEN

SAMMY M MBUSYA ADMINISTRATOR

AND

CHARLES MBUSYA PROTESTOR

RULING

Background

1. The petition was filed on 9th February, 2010, in which the petitioners Naomi Mulundu Mbusya and Sammy M. Mbusya, petitioned this Court for grant of Letters of Administration intestate of the estate of Mbusya Lai Kamweli (deceased) who died on 12th July, 2008 domiciled in Kenya at Kyawango Sub-location.
2. Pursuant to the Affidavit in support of Petition for Letters of Administration Intestate, the deceased died intestate and left the following surviving him; -
 - a. Ngo'ndu Mbusya 65 years
 - b. Charles Mbusya 56 years
 - c. David Mbusya 42 years
 - d. Ben Mbusya 37 years
3. The Affidavit in support of Petition for Letters of Administration Intestate mentioned property left by the deceased at the date of his death is Yatta/Mathinga/1449.



4. The Chief's letter dated 18th January, 2010 confirmed that Mbusya Lai Kamweli (deceased) hailed from Kyawango Sub-location and that he (deceased) was survived by two wives, Naomi Mutondu with 4 daughters and 1 son and Ngondu Mbusya with 2 daughters and 3 sons.
5. Chief's Letter further stated that the deceased Mbusya Lai Kamweli left behind 5 parcels of land being: -
 - a. Mwala/ Kyawango/251
 - b. Mwala/ Kyawango/257
 - c. Mwala/ Kyawango/247
 - d. Mwala /Kyawango/260
 - e. Yatta/Mathingau/1449, which the Chief in his letter claims to be in dispute in terms of distribution in which one of the deceased sons claims it should not be divided into two claiming that their late father had said it should not be divided into 2 equal parts. That what Sammy Mbusya (son of the deceased) wants is the land be sub-divided as in the case of other parcels of land.
6. Pursuant to Chief's Letter the rightful heirs to the estate of the deceased are; -
 1.
 - a. Naumi Mutondu Mbusya----- Wife/widow
 - b. Milcah Wandii Kitema----- Daughter- married
 - c. JOsphine Syowia Mbusya----- Daughter- married
 - d. Sammy Mutinda Mbusya ----- Son 52- years- married
 - e. Elizabeth Kaseve----- Daughter- married
 - f. Miriam Syombua Njiru----- Daughter-married
 - g. Mwongeli Makali ----- Daughter- married
 2.
 - h. Ngondu Mbusya -----Wife/widow
 - i. Alice Mwikali Muia----- Daughter- married
 - j. Charles Mutinda Mbusya----- Son 54 years- married
 - k. Benjamin Mutuku Mbusya----- Son 52 years- married
 - l. David Mbusya-----Son 48 years- married
 - m. Munyiva Mbusya-----Daughter- married
7. The Gazette Notice dated 29th October, 2010, Sammy M. Mbusya and NAomi Mulondu Mbusya both of P.O Box 124 Mwala in Kenya the deceased's Son and Widow were respectively gazetted for grant of Letters of Administration intestate to the estate of Mbusya Lai Kamweli, of Kywango who died there on 12th July,2008.



8. Grant for Letters of Administration issued on 23rd April, 2013 and dated 10th May,2013 was issued by this Court to Naomi Mulundu Mbusya and Sammy M. Mbusya as personal representatives of the deceased's estate to render a just and true account thereof as required by law.
9. The application for Summons for Confirmation of Grant dated 5th December, 2013 the personal representatives sought orders for the grant of letters of administration issued on 23rd April,2013 made to Naomi Mulundu Mbusya and Sammy M. Mbusya be confirmed.
10. There was no confirmation of the Grant as one of the Administrators Naomi Mulundu Mbusya died on 18th May,2014 and vide Notice of Motion dated 19th November,2014 the Applicant therein (Sammy M. Mbusya) sought orders that the Court to amend or rectify the grant issued to the petitioners on 23rd April, 2013 and the said grant of letters of administration intestate be confirmed accordingly on the grounds that Naomi Mulundu Mbusya (1st petitioner) had passed away hence her name was to be removed from the grant and amended to reflect the name of Sammy M. Mbusya (2nd Petitioner)only.
11. The Application was opposed by the Respondent. Charles Mutinda Mbusya vide Replying Affidavit dated 24th October,2016, stating that the deceased herein had two wives Naomi Mulundu Mbusya and Kalondu Mbusya whom the deceased married in accordance with the Kamba Customary law; that the petitioners herein conducted the proceedings in the absence of the said Kalondu Mbusya who is the Respondent's mother and a wife to the deceased; that he objected the 2nd petitioner being retained and prayed that the name of Kalondu Mbusya be substituted as a petitioner to take care of the interest of their family. Depositing that the said grant was issued erroneously by leaving out the Respondent's family.
12. The matter was canvassed by way of written submissions of the parties and Ruling delivered by Hon. DK Kemei J on 17th July,2017 in which the petitioner's application dated 19th November, 2014 was allowed and the petitioners grant issued on 23rd April, 2013 and dated 10th May,2013 was rectified and fresh grant was ordered to be reissued in the names of Sammy M. Mbusya. The said Sammy M. Mbusya was ordered to file fresh Summons for Confirmation of the Grant within the next 30 days.
13. Vide application for Summons for Confirmation of Grant dated 19th July, 2017 the personal representative sought orders for the grant of letters of administration issued on 23rd April,2013 to Sammy M. Mbusya be confirmed.
14. Vide Summons for Revocation of Grant dated 20th July,2017 the 1st Applicant sought orders that pending determination of this summons the orders made on 17th July, 2017 by this Court be stayed; that grant of letters of administration made to Sammy M. Mbusya on 10th May, 2013 be revoked on the ground that grant issued to Sammy M. Mbusya and Naomi Mulundu Mbusya and rectified on 17th July, 2017 to be issued to Sammy M. Mbusya was obtained fraudulently by making false statement and a concealment from this Court material facts on the particulars of the beneficiaries.
15. Vide Supporting Affidavit of the 1st Applicant, she deposed that the deceased was survived by the family that consisted of 2 houses/wives/widows and their children as listed in the Chief's Letter above.
16. Depositing that only some of these beneficiaries were named in the Petition of Sammy M. Mbusya and his mother (deceased) which action was tailored to deceive the Court; that her deceased husband was the sole registered proprietor of the following Assets at the time of his death and remains so to date:
 1. LR.No. Yatta/Mathingau/1449
 2. LR.No. Mwala/ Kyawango/247



3. LR.No. Mwala/ Kyawango/257
4. LR.No. Mwala/ Kyawango/251
5. LR No. Mwala /Kyawango/260
17. Stating that the petitioner and his Mother now deceased listed only one asset which was deceptive; that at the commencement of suit there was no family meeting of two houses of Mbusya Lai to discuss and agree; deposing that the planned application for certificate of confirmation of grant be stopped.
18. Petitioner in his Replying Affidavit dated 22nd November,2017 opposed the 1st Applicant stating that he had only one asset registered in the Deceased name being Yatta/Muthingau/1449 which was duly captured during the filing of the petition; that there was a family meeting annexed minutes marked SMM2 (translated from Kamba to English);that the 1st Applicant's allegation that he fraudulently obtained the grant herein is defamatory and scandalous; deposing that the application dated 20th July, 2017 is frivolous, vexatious and an abuse of court process.
19. Vide, Ruling delivered by Hon. D.K.Kemei J on 5th February, 2019 the Court revoked the grant made to Sammy M. Mbusya on 10/5/2013 and rectified 7/7/2017 and fresh grant was ordered to issue in the joint names of the Petitioner and to Martha Kalondu Mbusya. That any of them to file for confirmation of the fresh grant within 21 days.
20. Grant for Letters of Administration issued on 8th February, 2019 and dated 5th ,2019 were issued by this Court to Martha Kalondu Mbusya and Sammy M. Mbusya as personal representatives of the deceased's estate to render a just and true account thereof as required by law. The said grant issued was followed by Application by way of summons for confirmation of grant dated 8th July, 2019 and filed 17 July, 2019.
21. Pursuant to application to Amend Summons for Confirmation of Grant dated 18th January, 2021 in which the 1st administrator pursuant to orders issued on 15th December,2020 sought orders that grant of representation to the estate of the deceased Mbusya Lai be confirmed. In his supporting Affidavit he stated that grant having been issued to him and Martha Kalondu Mbusya on 8/2/2019 and the said Martha Kalondu Mbusya, the 2nd Administrator passed on and was substituted by Charles Mutinda Mbusya vide court order issued 15th November,2020; that the deceased left behind Yatta/Mathigau/1449(copy of official search annexed marked ('DWM1'); deposing that the land be shared equally between the two houses of the deceased being houses of Naomi Mulondu Mbusya and Martha Kalondu Mbusya In accordance with the wishes of both houses of the deceased and clan deliberations(annexed and marked 'SMM2'); that he be registered to hold the share of the 1st house and while the 2nd administrator herein Charles Mutinda Mbusya should be registered in trust to hold the other equal share for the other house.

Protest

22. The Affidavit of Protest to Amended Summons for Confirmation of Grant, dated 23rd September 2021, the Protestor (Charles Mutinda Mbusya) deposed that in or about 1987 during the lifetime of the deceased, he was gifted a portion of land measuring 10 acres to be excised of Title No Yatta/mathigau/1449 approximately 26.9 HA (annexed and marked CM-1 is Chief's letter confirming the same and the witnesses who were present);
23. That indeed the deceased left vast estate of which full inventory of his properties was never rendered to the Court. The Protestor was opposed to the said Summons for Confirmation of Grant that Yatta/ Mathingau/1449 is to be shared equally according to the two houses, as those were not the wishes of



the deceased. The Protestor wants his portion measuring 10 acres to be registered into his names and the remainder be distributed as per the houses.

24. The matter was canvassed by way of written submissions.

Submissions

Protestor's Submissions for Affidavit in Protest Dated 23rd September, 2021.

25. The 1st Administrator filed his Submissions dated 17th January, 2023 in which he raised the issue of whether the purported gift of 10 acres to the Protestor by the deceased is legally valid and submitted that the purported gift of 10 acres to the protestor fall under the classification of gift *inter vivos* because the protestor avers that he was gifted the land by the deceased in the year 1987 during his lifetime and was not in contemplation of death. Reliance was made on [Re Estate of Godana Songoro Guyo \(Deceased\)](#) (2020) eKLR, where the court held that; -

“Gifts *inter vivos* as contemplated in the Law of Succession are such that the owner of the property or asset donates it to another without expectation of death”

26. It was submitted that there are certain elements which must be satisfied in order for gift made during the lifetime to be deemed legally valid. He relied on the cases of [Re Estate of late Gedion Manthi Nzioka](#) (Deceased) (2015) eKLR where the Court stated that: -

‘For gifts *inter vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts *inter vivos* must be complete for the same to be valid.

27. It was submitted further that Protestor had not adduced any deed or instrument in writing as evidence to show that the deceased conferred the interest of 10 acres of the subject land in his favor. He quoted Section 38 of [Land Act](#) which provides that: -

38.

- (1) No suit shall be brought upon a contract for the disposition of an interest in land unless
 -
 - (a) the contract upon which the suit is founded
 - (i) is in writing;

28. [In Re Estate of Etete Maskhalia \(deceased\)](#) (2021) eKLR Musyoka J held *inter alia* that: -

‘64. I trust that the principles above are quite clear. Principally any gift *inter vivos* should be backed by some memorandum in writing...’

29. He averred that the 10 acres were not transferred to the protestor by the deceased during his lifetime which is a requirement the gift must be transferred by the donor to the recipient. He further relied in [Re Estate of Etete Maskhalia \(deceased\)](#) *supra* in which he referred to paragraph 63, 64, (case attached to this Submissions). He contended that this Court adopts the mode of distribution outlined in the amended Summons for confirmation dated 18/1/2021.



30. On the issue that should the purported gift be taken in consideration during the distribution of the net estate reliance was made to Section 42 of the Law of Succession Act which provides: -

Where—

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
 - (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35,
31. Contending that in the event that the Protestor gets the purported 10 acres the same should be considered by the Court in the distribution which should be subtracted from the equal share which the protestor was to get and it be shared among other beneficiaries of the estate. Reliance was made on the case of Micheni Aphaxard Nyaga & 2 Others v Robert Njue & 2 Others (2021) eKLR that: -

‘The characteristics of the gifts *inter vivos* are that they are made and settled during the lifetime of the deceased and have been identified, awarded and settled for the person to whom it has been given.

It is a gift made to a beneficiary when the deceased was alive and is considered when distributing the net intestate estate so that person who received it may be considered as having received his share and may reduce or diminish any entitlement to the net intestate estate. The gift which is transferred and settled for the beneficiary during the life-time of the deceased, will not form part of his estate but it will be taken into account in determining the share of the net intestate estate finally accruing to that beneficiary.’

32. Finally, it was opined that Protestors claim ought to suffer the fate of dismissal.

The 2nd Administrator’s Submission in Support of the Affidavit In Protest to the Amended Summons For Confirmation of the Grant Dated 18/1/2021.

33. The Protestor herein filed his submissions dated 30th January, 2023 in which he raised an issue that does the Protestors affidavit have merit? On this issue it was submitted that the Protestor was gifted the land the 10 acres in the year 1987 and there were key witnesses to support the claim.

34. It was contended on behalf of the Protestor that the deceased had invited him to settle on the said land together with his wife in which they took care of the deceased till his demise in 2008. That there was no contention from other beneficiaries of the decease. Reliance was placed on the case of Micheni Aphaxard Nyaga & 2 Others v Robert Njue & 2 Others (2021) eKLR, it was observed that: - Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

In

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised



in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”

35. Adherence to the rule based-model on transfer of immovable property involves an inquiry on the Law of gifts *inter vivos* or *causa mortis* featuring in [Odunga's Digest on Civil Case Law and Procedure](#) Vol (III) Page 2417 at paragraph 5484 (d) e – 1 thus:

“Generally speaking the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate the gift. (See in *Re Fry Deceased* {1946} CH 312 Rose: and *Trustee Company Ltd v Rose*{1949} CL 78 Re: *Rose v Inland Revenue Commissioners* {1952} CH 499 *Pennington v Wulfe* {2002} 1WLR 2075 *Maledo v Beatrice Stround* {1922} AC 330 Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee need no assistance from equity and the gift is complete. It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor. (See Shell's Equity 29ED Page 122 paragraph 3)”

It is evident that where there is an imperfect gift having regard to the requirements, of the necessity for the same must be by way of written memorandum, registered transfer and or declaration of trust in writing, the gift may nonetheless be perfected by the conduct of the parties.

36. It was averred that there are family members who happened to have been gifted property *inter vivos*, such as the Protestor and the protestor's key witnesses in these proceedings are part of the beneficiaries who affirm the same save the 1st Administrator.
37. Contending that the [Law of Succession act](#) gives this court discretion to make provision for the dependants. Reliance was made to Section 27 [Law of Succession Act](#) which provides: -

“In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the defendant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.”

Determination

38. The Court considered the pleadings and submissions by parties' through their respective Counsel and the issue for determination is whether the Protest by Protestor of a *inter vivos* gift is proved or not.
39. The Petitioner, Sammy M.Mbusya filed Summons for Confirmation on 17/7/2019 and proposed distribution of the deceased's estate of Yatta /Mathingau/1449 shared equally between the 2 houses of the deceased and both houses wishes and the clan deliberations.



Gift Inter Vivos

40. The Protest by Protestor, Charles Mbusya filed 12/2/2020 is to the effect, that he objected to distribution of the deceased's estate equally between 2 houses as he was bequeathed 10 acres from the suit property Yatta /Mathingau/1449 by their/his late father, Mbusya Lai Kamweli (deceased). He annexed the Chief's letter confirming the same as was witnessed by witnesses who were present and who went and reported to the Chief that they witnessed the allocation of land by deceased to the Protestor.

Both parties have extensively submitted on the law of inter vivos gifts as outlined above. This Court relies on the case-law and legal provisions aptly outlined in the written submissions save to add the case of;

41. In *Re Estate of the Late Gedion Mantbi Nzioka (Deceased)* [2015] eKLR, the Court explained gift *inter vivos*:

“In law, gifts are of two types. There are the gifts made between living persons (gifts *inter vivos*), and gifts made in contemplation of death (gifts *mortis causa*). Section 31 of the *Law of Succession Act* provides as follows with respect to gifts made in contemplation of death:... For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”

42. Applying the law on the facts presented through Affidavit by the Protestor, Section 107 -112 of the *Evidence Act* provides for the burden and standard of proof in civil/succession cases within one's knowledge.

43. In the instant case, the Protestor's claim of the inter vivos gift by the deceased of 10 acres of Yatta / Mathingau/1449 in 1987 is not backed by oral evidence of any witness(es) who was present when the Deceased gave/allocated the Protestor 10 acres. When was this done, how and where? Secondly, there is no documentary evidence to the effect of gift inter vivos to the Protestor by the deceased, either wishes, agreement or letter written by or on behalf of the deceased declaring such allocation of 10 acres to the Protestor. Thirdly, in a family of 5 siblings in their house/wife/widow Ngondu Mbusya, the Protestor is the eldest son of 3 sons and 2 daughters, the siblings did not/have not confirmed one way or the other the bequest /gift inter vivos of 10 acres that the deceased gave the Protestor 10 acres of the suit property. Fourthly, the Letter by the Chief /Kiinyaata location of 25/4/2019 indicates Beatrice Mutisya, Mutiso Kyule & Muia Kisoii went to the Chief's office and confirmed to the Chief to have witnessed the late Mbusyai donating or giving to his son Charles Mbusya & his wife and piece of land Mathingau/Yatta in 1987 and Charles Mbusya has been in actual possession and use of the land.

44. The Court finds it difficult to accept reported information by the witnesses to the Chief of what they witnessed and reduced in writing by the Chief is evidence of the inter vivos gift by the deceased to the Protestor. This is because the evidence is not sufficient evidence of proof of the gift inter vivos in the absence of oral or documentary evidence subjected to cross examination to test its veracity and the demeanor of the witnesses. Fifthly, the letter by the Chief did not indicate the size of land bequeathed was /is 10 acres so where was it derived from?

45. This Court is alive to Kamba customary law where, sons who marry, their fathers allocate land to these married sons to build their homestead, till/farm the land and/or graze livestock. Be that as it may, it



would amount to gift *inter vivos* gift only if a transfer of the property is made through registration of title, the land allocated contained in deceased's Will, Agreement or Deceased's wishes or confirmation by the family/Clan and/or any other legal way /process and/or document to complete the gift *inter vivos* to be valid.

In *Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 others* [2021] eKLR, Hon LJ Gitari observed of gift *inter vivos*, thus,

“The characteristics of the gifts *inter vivos* are that they are made and settled during the lifetime of the deceased and have been identified, awarded and settled for the person to whom it has been given. It is a gift made to a beneficiary when the deceased was alive and is considered when distributing the net intestate estate so that person who received it may be considered as having received his share and may reduce or diminish any entitlement to the net intestate estate. The gift which is transferred and settled for the beneficiary during the life-time of the deceased, will not form part of his estate but it will be taken into account in determining the share of the net intestate estate finally accruing to that beneficiary.”

46. In *re Estate of Eteke Masakhalia (Deceased)* [2021] eKLR Hon. W.Musyoka J made the following observations on gifts *inter vivos*:

“(63) Often at distribution, property is placed before the court, registered in the name of the deceased, but claimed by the survivors or beneficiaries, on grounds that the deceased had made lifetime gifts of it to them. This usually happens with respect to land, where the deceased, during lifetime, had shown portions of his land to his children, especially sons, to put up houses, and to till or graze their animals, without transferring title in such property to them. It could also be done with respect to commercial properties, where the deceased permits his children, upon coming of age, to carry on trade from business premises that he owns, again, without conveying title in such property to the children. In most cases when he dies, the children then claim that they had been gifted those assets during the lifetime of the deceased, and argue that the said assets ought not to be made available for distribution to anyone but themselves.”

47. In light of the legal provisions and case-law, what emerges is that for a gift *inter vivos* to be recognized in law the gifting process must be complete and the gift confirmed by the deceased to the donee and the same is hived off the rest of deceased's estate. The law requires evidence in form of writing confirming the same without any further probe into the claim or right of the gift by the donee and/or the rest of the beneficiaries.

48. In the instant case, the Protester filed Affidavit of Protest and claimed gift *inter vivos* by his father of 10 acres of Yatta /Mathingau/1449 but he did not call any witnesses to testify and confirm the gift and he did not produce any document to confirm completion of the process of gift *inter vivos*. The Court finds no evidence was presented to confirm to show the deceased made the said gift of land namely 10 acres of Yatta /Mathingau/1449 to the Protestor except that upon marriage the deceased should have land where he built and settled and took care of the deceased until his demise in 2008. This development shall be taken into account during distribution of the deceased's estate the permanent structures shall not be demolished or the Protestors moved away but it is not an *inter vivos* gift but the beneficiary's share of deceased's estate. In the absence of such evidence the Protest is dismissed.



49. The fact of the deceased showing his sons where to build their homes cultivate land and/or keep livestock, and they are settled and there are permanent structures and development will not be demolished but taken into consideration during distribution of the estate.

Distribution of Deceased's Estate

50. The administrator(s) Petitioners and beneficiaries are at liberty to proceed with the confirmation of grant vide the Summons of Confirmation of 17/7/2019 as pleaded and taking into account the other properties left over if confirmed to be part of the deceased's estate.
51. It is on record that the deceased's family comprised of 2 houses/wives/widows as follows; 1st house 1 son and 4 daughters and 2nd house 3 sons and 2 daughters and all spouses are deceased.
52. Therefore, being a polygamous family and only the children of the deceased are survivors of the deceased then Section 38 & 40 *LSA* apply unless the beneficiaries come to an amicable settlement on the mode of distribution and append names, identity card numbers and signatures to their signed Consents annexed to the Summons for Confirmation of Grant.
53. Section 38 of the *Act* provides that;

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

40. Where intestate was polygamous

- (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

54. *In Re Estate of John Musambayi Katumanga – deceased* [2014] eKLR the Court held as follows:

“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is ‘equally’ as opposed to ‘equitably’. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”

The parties/beneficiaries/Administrators may agree on the mode of distribution of the deceased's estate.

Disposition

1. The Protest filed on 12/2/2020 is dismissed.
2. The Summons for Confirmation of Grant of 17/7/2019 to proceed for distribution of the deceased's estate as per the written consents of all beneficiaries and Administrators.
3. Each party to pay its own Costs.



**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 31ST MAY, 2023
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

In the Presence/absence of:

Mr. D. M. Mutinda - for the Administrator

Mr. R. K. Mutua - For The Protestor

Geoffrey/Patrick - Court Assistant(s)

