



**In re Estate of Robert M'marete alias Marete Muketha alias Marete  
s/o Marete M'muketha (Deceased) (Succession Cause 217 of 2006)  
[2023] KEHC 21954 (KLR) (30 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21954 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 217 OF 2006  
EM MURIITHI, J  
AUGUST 30, 2023**

**IN THE MATTER OF THE ESTATE OF ROBERT M'MARETE ALIAS MARETE  
MUKETHA ALIAS MARETE S/O MARETE M'MUKETHA (DECEASED)**

**BETWEEN**

**CHARLES BUNDI MARETE ..... PETITIONER**

**AND**

**DAVID KIUMBE MARETE ..... PROTESTOR**

**JUDGMENT**

**Introduction**

1. The Petitioner filed an application for confirmation of Grant dated 29<sup>th</sup> October 2020 seeking the confirmation of Grant made on 1/7/2020 proposing to distribute the estate of the deceased among his heirs listed in paragraph 4 of the supporting affidavit, as shown in paragraph 6, as follows:
  - “2. That Grant of Temporary Letters of Administration Intestate to the Estate of Robert Marete (Deceased) was issued to me on 1<sup>st</sup> July 2020, and directed by the court to have the same confirmed immediately.
  3. That the Deceased died on 11th February 2003 and I am related to the deceased by the reason of being his son.
  4. That the deceased is survived by the following Heirs:
    - (a) Rebecca Mwarania Marete Daughter - adult
    - (b) Lydia Marete Daughter- adult
    - (c) John Kinoti Marete Son - adult



- (d) David Kiumbe Marete Son - adult
  - (e) Phineas Kithinji Grandson adult
  - (f) Charles Bundi Son - adult
  - (g) Susan Kagwiria Marete Daughter adult
  - (h) Solomon Mwenda Marete Son adult
5. That there is no objection pending before the Court.
  6. That the Identification and shares of all persons entitled to the Estate of the Deceased has been ascertained and determined as follows:
    1. Land Title No. Nyaki/Kithoka/108 comprising by measurements Five Decimal Eight Zero Three (5.803) hectares equivalent to 14.34 acres or thereabouts.
      - (a) Rebecca Mwarania Marete 1.25 Acres Absolutely.
      - (b) Lydia Marete 0.25 Acres Absolutely.
      - (c) John Kinoti Marete 2.25 Acres Absolutely
      - (d) David Kiumbe Marete - 2.25 Acres Absolutely.
      - (e) Phineas Kithinji - 2.25 Acres Absolutely.
      - (f) Charles Bundi - 2.25 Acres Absolutely.
      - (g) Susan Kagwiria Marete - 1.25 Acres Absolutely.
      - (h) Solomon Mwenda Marete - 2.25 Acres Absolutely.
    2. Land Title No. Ruiru/Rwarera/1388 comprising by measurements Six Decimal Zero seven Zero (6.070) hectares equivalent to 15 acres or thereabouts.
      - (a) Solomon Mwenda Marete 5 Acre absolutely
      - (b) Phineas Kithinji 5 Acre absolutely
      - (c) John Kinoti Marete 5 Acre absolutely
    3. Land Title No.Ex- Lewa Settlement Scheme/440 comprising by measurements two Decimal Two (2.2) hectares equivalent to 5 acres or thereabouts to be registered to.
      - (a) Charles Bundi - Two and half acre absolutely
      - (b) David Kiumbe Marete - Two and half acre absolutely Plot o. Title No.Ntima/Igoki 3378 to be registered to.
        - (a) Lydia Kanini Marete – ½ share
        - (b) ½ share to be registered to the eight (8) beneficiaries in equal common shares.



4. Plot Title No. Ntima/igoki 2112 to be registered to as
  - (a) Rebecca Mwarania Marete to registered as the trustee for the eight (8) beneficiaries and share the rent collected in equal common shares among the eight (8) beneficiaries.
5. Plot Title o. Serega Serega 12110 to be registered to.
  - (a) To be registered to Rebecca Mwarania Marete as the trustee for the eight (8) beneficiaries.”

2. One of the beneficiaries, David Kiumbe Marete filed an Affidavit of protest sworn on 24/11/2021 alleging that their mother and two sisters had been omitted from the distribution and proposing a different mode of distribution as set out paragraph 8 of his affidavit, as follows:

- “2. That the petitioner filed this succession secretly without involving all the family members and or the beneficiaries to the estate of the deceased.
3. That we only came to know about it when the same come up for confirmation.
4. That the administrator has omitted Salomenkonge Marete (Deceased) our mother, and our two sisters; Joyce Kathambi (deceased)but survived by three children Fridahkendi, Mercykanyiri And Petermwirigi And Sarah Kinanu.
5. That our mothers share shall be shared between Sarah Kinanu, The Children To Joyce Kathambi And Myself.
6. That in total the beneficiaries of the deceased estate should tally to 11 and not 8 as indicated by the petitioner.
7. That John Kinotimarete agreed to transfer 1 acre of his share in parcel no Ruiru/Rwarera/1388to Solomon Mwenda Marete (annexed is a copy of the agreement marked DKM-1)
8. That my preferred mode of distribution is as follows;
  - a. Nyaki{Kithoka}{1} 08
    1. Rebecca Mwarania Marete -1 Acres
    2. John Kinoti Marete-2 Acres
    3. Da Vid Kiumbe Marete -3.33 Acres
    4. Phineas Kithinji -2 Acres
    5. Charles Bundi - 2 Acres
    6. Susan Kagwiria Marete - 1 Acres
    7. Sarah Kinanu -1/2 Acre
    8. Fridah Kendi  
Mercy Kanyiri  
Petermwirigi.....½ Acre Jointly



- b. Ruiru/Rwarera/1388
  - 1. Solomon Mwenda Marete - 6 Acres
  - 2. Phineas Kithinji - 5 Acres
  - 3. John Kinoti Marete - 4 Acres
- c. Ntima/Igoki 3378
  - 1. Solomon Mwenda Marete – ½ Share
  - 2. Charles Bundi
  - 3. Phineas Kithinji ... ½ Share Jointly
- d. Ntima/Igoki/2112
  - 1 John Kinoti Marete
  - 2 David Kimbe Marete ... To Be Registered jointly
- E. Serega Serega /2110 To Be Registered equally Among All Beneficiaries.”

3. In response to the Protest, the petitioner Charles Marete filed an affidavit in response to protest sworn on 10/3/2022 contesting that the two persons named as sisters by the protesters were in fact, respectively, niece and sister to the deceased and not beneficiaries of the deceased, and that their mother’s share had been equally divided among all the children each getting ¼ acre, as follows:

- “ 1. That I am the petitioner herein and I swear this affidavit is response to the protest dated 24<sup>th</sup> November 2021.
- 2. That Joyce Kathambi (now deceased) was a daughter of M’Mbui who was the brother of the deceased. She was therefore not a beneficiary of the deceased.
- 3. Similarly, Sarah Kinanu is a daughter of Rebecca Kaimuri who is a sister to the deceased. She is also-not a "beneficiary of the deceased as per the provisions of the Law of Succession Act.
- 4. That Salome Nkonge is our mother and upon her demise, her share in the estate which was 2 acres was redistributed equally to all the eight children of the deceased each getting ¼ acre.
- 5. That it is true John Kinoti Marete was to compensate Solomon Mwenda Marete with one acre from his interests in L.R. Ruiru/Rwarera/1388, as captured in the agreement dated 13th November 2017. As such, the proposal by the protestor in respect of L.R. No. Ruiru/Rwarera/1388 is correct.
- 6. That Lydia Kanini Marete was bequeathed ½ share in L.R. No. Ntima/Igoki/3378 which is developed during the lifetime of the deceased yet it is the estate which is highly contested by the protestor since Solomon Mwenda Marete solely benefits from the proceeds thereof at the exclusion of the rest of the family. The court should therefore disregard the protestor’s proposal as the same is self centred.



7. L.R. No. NtimalIgoki12112 is similarly a developed property deriving income as such all beneficiaries should receive a share of the proceeds. Rebecca Mwarania Marete was favored by majority of the family members to be registered as the trustee for herself and the rest of the beneficiaries.”
4. The Protestor filed a further affidavit of Protest sworn on 30/5/2022 and made proposals for distribution of the estate as follows:

“Further Affidavit In Protest To Summons For Confirmation Of Grant

1. ....
2. That the petitioner filed this succession cause secretly without involving all the family members and or beneficiaries to the deceased.
3. That we only come to know about it when the same came up for confirmation.
4. That the petitioner has omitted Salome Nkonge Marete (Deceased) - our mother and Two sisters; Joyce Kathambi (deceased) but survived by three children Fridah Kendi, Mercy Kanyiri & Amos Mwirigi & Sarah Kinanu
5. That the identification and share of all persons beneficially entitled to the said estate has been ascertained and determined as follows:-

1. L.r No. Nyaki/Kithoka/108
  1. Rebecca Mwaranla 1 Acre
  2. John Kinoti Marete 2 Acres
  3. David Kiumbe Marete 2 Acres
  4. Charles Bundi 2 Acres
  5. Susan Kagwiria Marete 1 Acre
  6. Solomon Mwenda Marete 2 Acres
  7. Phineas Kithinti 2 Acres
  8. Salome Nkonge Marete 2.34 Acres
2. L.r No. Ruiru/Rwarera/1388
  1. John Kinoti Marete 4 Acres
  2. Solomon Mwenda Marete 6 Acres
  3. Phineas Kithinji 5 Acres
  4. Ex-lewa Setilement Scheme/440 (measuring 5 acres)
  5. Dayid Kiumbe Marete 2.5 Acres
  6. Charles Bundi 2.5 Acres
3. Segera/Segera/2110 (measuring 5 acres)



Salome Nkonge Marete Whole

4. Ntima/Igoki/2112 (measuring 20 by 100 feet)

Whole Family Of The Deceased

5. Ntimalig0kl/337840 by 100 feet)

1. Lydiah Kanini Marete 1/2 Share

2. Solomo Mwenda Marete 112share”

5. The following beneficiaries attended court on 27/9/2021 and confirmed their support to the confirmation of Grant for distribution of the estate as proposed by the Petitioner:

1. Phineas Kithinji

2. Susan Kagwiria Marete

3. Rebeccah Mwarania Marete

4. Lydia Marete

5. John Kinoti Marete and

6. Charles Bundi Marete.

6. The Court then heard the Protest and Witness Statements were exchanged and oral testimony on cross-examination of the witness taken before the court.

### **Summary of evidence**

8. The Objector testified principally objecting that the petition which was filed in secrecy had omitted to include and provide for two persons who he described as sisters, one who was living and the other deceased but had left children, and the proposed distribution which he based on the deceased's written will sought to make provision for them. In examination in chief, the objector relied on the affidavit of Protest of 24/11/2021 and further Affidavit of 31/5/2022, set out above, and produced in exhibit a copy of the Last Will of the Deceased dated 13/8/2003 and Eulogy of Salome Nkonge Robert. On cross-examination the Objector (OW1) said:

“Joyce Kathambi is our sister, I found them in our home. She is elder than me. I have known John M'Mbui. I do not know whether Joyce is his daughter. I was told that Joyce is my sister.

Sarah Kinanu is my sister. She is the daughter of Rebecca Kaimuri who is the sister of my father. I was told she was my sister. I found her when I was born and she schooled there. I was old that she is my sister.

Proposal that Salome Nkonge gets 2.34 acres for Nyaki/Kithoka/108. I agree. Salome is not alive. She had written documents as to who should take her share.

I do not have the documents.

Shop at Makutano Igoki/2112. The rent has been received by Rebecca Mwarania since the death of the deceased. She shares it out to her beneficiaries. I do receive rent for a part of the shop.

The front shop is leased to Rebecca Mwarania.



Ntima/Igoki/ 3378 is at Makutano in the way to Kaaga near Teachers College. The plot is operated by Solomon Mwenda. He is also the one who has leased the rest of the property to the tenants. He receives rent of the property. He does not share the rent with any other person. He has been on the plot even before the death of his father. My father died in 2003. It is about 20 years.”

9. On re-examination, the Objector (OW1) called for distribution in accordance with his proposal as follows:

“Joyce Kathambi was there before I was born. I found her at home and I know her as my sister. Sarah Kinanu also lived with us.

Our father took us as children of the same family.

Salome Nkonge should be given a share as she had said how her property should be divided.

Ntima/Igoki/3378 Kaaga. Solomon said the land before the deceased died there was never been a problem at all. Makutano/Ntima/Igoki/2112 on this plot all members of the family should have a share.

The case was filed in 2006. I got to know about it in November, 2021 when I was called to attend court.

We pray the court to adopt the distribution set in the Affidavit of protest dated 24/11/2021 and further Affidavit of 30/5/2022.”

10. The Petitioner testified as PW1 and said that the distribution of the estate of the deceased had been effected by the deceased’s own Written Will, and although the persons claimed to be daughters of the deceased by the Objector had been brought in by the deceased to live with them, no provision had been made for them in the will:

“Affidavit of 29/10/2020 [in support of application for confirmation]. I list the beneficiaries, Joyce is a child of the brother to the deceased. She is not daughter of the deceased. Sarah Kinanu is a daughter to sister to our father, she is Rebecca Kaimuri.

David Kiumbi the objector is my brother. Joyce and Sarah lived at our home. Joyce’s father died and she was taken by our father. Sarah mother was married by a person other than her father and he refused to take her up and our father decided to take up and educated her.

Joyce and Sarah do not live with us today.

Copy of the last will. It is dated 13/08/2003. It is the same will relied on by objector. The will does not mention the said Joyce and Sarah as given any property to them,

I have distributed the property in accordance with the will. Of his beneficiaries, only our mother Salome Nkonge is deceased. I have proposed that her share be given equally to all the beneficiaries as set out in the Affidavit in support of confirmation.

Agreement between Solomon Mwenda and John Kinoti that 1 acre of Ruiru/Rwarera/1388 be excised for Kinoti and be transferred to Solomon Mwenda. I pray that the court amends the distribution in accordance with the agreement so that Kinoti has 4 acres and Mwenda 6 acres.



Shop at Meru Teachers Plot 3378 is to be shared ½ Lydia Kanini in accordance with the will. Lydia has not been granted any other property. It is only the ½ share of plot No. 3378 Lydia has agreed to take the ½ share as given by the deceased.

The property of our mother which is to be shared equally shall also include 1/4/ acre for Lydia Marete. This we have agreed after the death of our mother. I pray for the distribution according to proposed schedule.”

11. On cross-examination PW1 said-

“It is not true that I concealed the case from my brothers, the case was filed in 2006. I was appointed administrator in 2020. I am not the eldest. David the objector is the elder.

Joyce Kathambi, I found Joyce at our home when I was born. I have never seen her father. I do not know him. I was born and I found her at our home. I have not given Joyce any share. My father was helping her but in his will she is not mentioned.

We lived with Joyce since childhood.

Will of 13/08/2003. It is true that the will left out person who the deceased was helping during his life.

Plot 3378 Meru Teacher’s College property. The person using the property is Solomon Mwenda. He started using the property when our father died.

Solomon Mwenda should use the property together with other beneficiaries. The will does not state that the property should be used by all beneficiaries

[Witness is referred to the will] The will does not show that the property should be shared.

Eulogy of Solome Nkonge

We are not the once who prepared the Eulogy. It shows that Kathambi and Sarah are children.”

12. PW1 was re-examined and he emphasized the contents of the Will with regards to shop on parcel no. 3378 -

“Will of 13/8/2003.

Mwithumwiru plot is the parcel 3378. The will indicates that ½ shop should go to Lydia Kananu and the ½ to the family.”

13. PW2 was a sister to the objector and the petitioner who, while acknowledging the two persons presented as sisters by the objector as cousins who had lived with them under the care and provision of the deceased, supported the distribution mode proposed by the petitioner in strict compliance with the written will of the deceased. On cross-examination, she said:

“I am aware that my late father left a will. By the will, my mother Salome Marete was provided for.

[Witness is referred to paragraph (6) of Affidavit in support of the confirmed application] Nyaki/Kithoka/108.

According to the will, Salome was to get 2.34 acres from Kithoka/108.

Will list of documents of 31/5/2022.



The said Salome is now deceased. She should have been provided for under Kithoki/108.

Statement of witness at Paragraph 4 that Kathambi and Kananu are my cousins. I am aware of the Eulogy of my mother Salome.

I am not lying. The said Kathambi and Kananu are my cousins. The Eulogy is showing, the late Joyce Kathambi is the daughter of my late mother who was a sister to my father.

I am the eldest in his family, when they joined the family. I was the eldest and they were older than me. I saw them when they were being dropped at home.

Kananu and Kathambi were children. They were brought up by my parents since they were small.

Is it why you want to get a share from your father's estate the person they knew as father?

I do not agree that they should get a share. They were not provided for in the will.

[Mode of Distribution by David Kiumbe Marete proposes that they get a share of Salome].  
I cannot go against the will. Salome's share should be distributed against her children."

14. She was re-examined to reiterate compliance with the deceased's Will as follows:

"Eulogy is not correct as regards in statement of Kathambi and Kananu.

My name is shown as Frida Mwarania. My correct name Rebecca Mwarania Marete No. 3481135.

The Eulogy is defective.

Salome's share should go to all her children all the 8 of them.

Proposal by Charles Marete distributed the share of Salome equally in all the 8 children the share is equal respective of relating they are male or female.

Joyce is deceased, she is survived by 3 children. The children have not, to my knowledge, claimed any share of the estate. They are not party to these proceedings. Sarah Kananu is alive. She has not tried to seek any permission or became party to these proceedings. The two do not feature in my father's will."

## Submissions

15. Counsel for the parties, M/S Kaumbi & Co Advocates for the Petitioner/Administrator and M/S Otieno C. Advocates for the Protestor, filed respective submissions dated 27/4/2023 and 9/5/2023, and judgment was reserved.
16. The Protestor objected the non-inclusion of his sisters and treated the issue as one of revocation of grant urging in his Counsel's Written Submissions dated 9/5/2023 to exercise inherent powers as follows:

"Issues for Determination

Whether the petitioner deliberately omitted some of the beneficiaries of the estate of the deceased?

My lord, to confirm that the protestor had omitted his mother and his two sisters, after the demise of the deceased wife one Salome Nkongwe Marete who died on 17/09/2018, her eulogy (which was filed in court on 31/05/2022 as the objector's list of documents) recognized the following as the children of the deceased namely:- the late Joyce Kathambi,



Sarah Kananu, Fridah Mwarania, Lydia Kanini, John Kinoti, David Kiumbe, The Late Joseph Muriki, Charles Bundi, Susan Kagwiria And Solomon Mwenda.

My lord, before the demise of the deceased, the deceased had shown each of his children where to settle and each has settled on their respective portions for a long time and have developed the same extensively save to add that the portion of the deceased's wife (deceased) was to be shared between Susan Kinanu, the three

children of the late Joyce Kathambi and the protester as per her written will during her life time filed in court on 31/05/2022 as the objector's list of documents.

My lord/we humbly pray that the status quo should not be disturbed by the petitioner's application for confirmation of grant.

My lord/apart from the disparity on the mode of distribution the petitioner indicated that there were only 8 beneficiaries to the estate of the deceased when he knew very well that the estate did comprise of 11 beneficiaries.

The Law

My Lord. Section 76(a), (b) and (c) of the *Law of Succession Act*...

Conclusion

My lord, it is our humble submissions that we pray this honourable court to proceed and invoke its inherent powers under Article 159 of the *Constitution*, Section 76 of the *Law of Succession Act* and Section 73 of the *Probate and Administration Rules* and make declaration that Joyce Kathambi but survived by three children- Fridah Kendi, Mercy Kanyiri & Amos Mwirigi who are her heirs and her other sister one Sarah Kinanu are beneficiaries of the estate of the deceased and are therefore entitled to a fair share of the estate.

My lord, further we humbly urge the honourable court to dismiss the petitioner's application and allow the objector's further affidavit dated 30.05/2022."

17. The Petitioner maintained that the persons named as 'sisters' Joyce Kathambi and Sarah Kananu were not beneficiaries of the estate of the deceased and the property gifted to the mother by the will could be given effect as she had passed on and hence the distribution to all other beneficiaries in equal shares, as urged in Counsel's Written Submission dated 27/4/2023 as follows:

"The deceased prior to his death and in particular on 1st August 2003 had made a written declaration/will on how his estate would be distributed upon his demise. Accordingly. The petitioner duly filed the proposal for distribution under paragraph 6 of the Affidavit in support of the Summons for Confirmation dated 29th October 2020 as per the wishes of the deceased.

The only departure from the will of the deceased is the 2 acres in L.R. No. Nyaki/Kithokall08 which were to go to Salome Nkonge (now deceased). The same has now been re-distributed to all the 8 children equally with each getting  $\frac{1}{4}$  acres extra. The other amendment is the share of Solomon Mwenda Marete in L.R. No. Ruiriri/wareral1388 which increases by an acre and the share of John Kinoti Marete decreases by a similar margin. This was pursuant to their written agreement for compensation dated 13th November 2017.

The Protest.



The Protestor filed his protest dated 24th November 2021, and the pertinent issue raised therein is captured under paragraph 4 of the affidavit of protest, which is reproduced as hereunder:

4. That the administrator has omitted Salome Nkonge Marete (Deceased) our mother and our two sisters: Joyce Kathambi (deceased) but survived by three children Fridah Kendi, Mercy Kanyiri and Peter Mwirigi; and Sarah Kinanu.

In response thereof, the petitioner through his affidavit in response to the protest dated 10<sup>th</sup> March 2022, stated that Joyce Kathambi (deceased) was a daughter of M'Mbui who is the brother to the deceased. while Sarah Kinanu was the daughter of Rebecca Kaimuri who is a sister to the deceased, and therefore both are not beneficiaries of the estate.

On Law.

Section 22 of the [Law of Succession Act](#) provides that the construction of wills will be in accordance with the provisions of the first schedule.

Issues For Determination.

The sole issue which the court shall seek to determine is:

- a) Whether the deceased will is correctly construed as per the schedule of distribution.

Section 107 of the [Evidence Act](#) provides:

“Whoever desires any court to give judgment as to any legal right or liability dependent of the existent of facts which he asserts. must prove that those facts exists.”

In essence, the burden of proving that Joyce Karambu (deceased) and Sarah Kinanu are beneficiaries of the estate of the deceased. lay with the protestor. It shall be noted that the protestor did not furnish the court with any evidence how the said persons are beneficiaries. In as much as the protest or stated that Joyce has heirs and Sarah was alive. no one made any claim.

Rule 3 of the 1<sup>st</sup> Schedule [Law of Succession Act](#) provides that "Every will shall be construed with reference to the property comprised in it....

The said Jovce and Sarah do not appear in the will attached. and therefore no provision was made for them.

Rule 14 thereof provides that "Where for any reason effect cannot be given completely to the testator's apparent intention, effect shall nevertheless be given thereto so far as is possible".

The will expressly made a provision for Salome Nkonge in L.R. No. Nyaki/Kithoka/108.

Unfortunately. Salome died before the confirmation of grant of probate and implementation of the same. It is on this ground that the petitioner has equally shared Salorne's provision amongst all the other beneficiaries equally. The protestor's view that Salome ought to be provided for is far-fetched because succession proceedings can only apply to living persons and not those who have since died. The redistribution of Salome's share is the only plausible way of dealing with it in a succession cause.



We urge the court to confirm the summons dated 29th October 2020 as per the schedule of distribution set out under paragraph 6 of the affidavit in support of the said summons.”

## Issues

18. Upon considering the application for confirmation of Grant, the protest and the oral testimony adduced in support of the Protest and the application, the court considers that three issues arise for determination:

1. Whether there is a valid will.
2. Whether persons fronted by the protestors are beneficiaries or dependants.
3. What is the correct mode of distribution?

The Protestor sought to make premium of allegation that he was not notified of the petition. This matter being at the stage of final distribution rather than appointment of an administrator, such objection is misplaced. In any event, the Petition was filed by the deceased's widow for letters of administration with written will annexed and all the beneficiaries including the protestor are shown as surviving the deceased. The present petitioner/Administrator was appointed by the Court on 1/7/2020 upon an application for reinstatement following revocation of the grant made to the deceased widow for want of prosecution on 15/7/2015. No issue arises as to the manner of presentation or obtaining of the Grant made to the widow and the present administrator herein.

### Alleged Will

19. The formal validity of a written will is set out in section 11 of the *Law of Succession Act*, as follows:

“ 11. Written wills

No written will shall be valid unless-

- a. the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
- b. the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;
- c. the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

20. The Court has seen the copy of Will dated 13/8/2003 filed in this petition and it is formally drawn signed and attested and it is accepted as a valid will of the Deceased. The Petition presented by the Deceased's widow as a petition for probate of Written Will dated 18/7/2006. Following her death and



subsequent revocation of the Grant, the present petition was appointed administrator. Indeed, both the Petitioner and the Protestor seek to give effect to the will of the Deceased.

## **Eulogy**

21. The authors of the Eulogy are not disclosed. Eulogy is not evidence of the matters set out therein, and any rate it may only be evidence against the persons who prepared it who may be barred from departing from what they have set out in the written document. On any other matters set out therein suitable evidence/testimony to prove the facts should be independently given.
22. The court does not accept the contention that the person named as Joyce Kathambi and Kananu are daughters of Salome Marete, the deceased subject of the eulogy and widow of the deceased herein. The evidence of the eulogy may only indicate that the said persons were considered, at least by the family members, relatives or friends who wrote the eulogy, as the children of the person whose life-story is set out in the eulogy. It was not clear as to who wrote the eulogy, and it was pointed out that the PW2's name was misstated as Frida Mwarania rather than Rebeca Mwarania, and it may be evidence that the authors of the eulogy did not the close family members of the deceased's family well.
23. There was clear evidence, however, from across the witnesses that Kathambi and Kananu although being not biological children of the deceased, they had been taken by the deceased into his family since their childhood and childhood of his own younger children the Objector herein and the Petitioner PW1 and their eldest sibling Rebecca Mwarania, PW2, Indeed, Rebeca PW2 conceded in cross-examination that -

“I am the eldest in the family, when they [Joyce Kathambi and Sara Kananu] joined the family. I was the eldest and they were older than me. I saw them when they were being dropped at home. Kananu and Kathamb were children. They were brought up by my parents since they were small.”

24. PW1 himself said as regards Joyce Kathambi –

“Joyce is a child of the brother to the deceased. She is not a daughter of the deceased. Sarah Kinanu is a daughter to sister to our father, she is Rebecca Kaimuri.... Joyce and Sarah lived at our home. Joyce's father died and she was taken n=by our father. Sarah's mother was married by a person other than her father and he refused to take her up and our father decided to take her up and educate her. Joyce and Sarah do not live with us today. [On cross-examination] Joyce Kathambi, I found Joyce at our home when I was born. I have never seen here father. I do not know him. I was born and I found her at our home. I have not given Joyce any share. My father was helping her but in his Will she is not mentioned. We lived with Joyce since childhood. Will of 13/08/2003. It is true that the will left out persons who the deceased was helping during his life.s”

25. On the evidence, the Court must accept that the said Joyce Kathambi and Sarah Kananu were, if not children, at least dependants of the deceased, within the meaning of section 29 of the [Law of Succession Act](#).

Provision for the Dependants Joyce Kathambi and Sarah Kananu



26. The relevant provisions sections of the *Law of Succession Act* are section 26-30, which provide as follows:

“26. Provision for dependants not adequately provided for by will or on intestacy  
Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate. [Act No. 8 of 1976, s. 5.]

27. Discretion of court in making order

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 dependant, 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.

28. Circumstances to be taken into account by court in making order

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to-

- a. the nature and amount of the deceased's property;
- b. any past, present or future capital or income from any source of the dependant;
- c. the existing and future means and needs of the dependant;
- d. whether the deceased had made any advancement or other gift to the dependant during his lifetime;
- e. the conduct of the dependant in relation to the deceased;
- f. the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
- g. the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

[L.N. No. 256 of 1976, Sch.]

29. Meaning of dependant

For the purposes of this Part, "dependant" means-

- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;



- b. such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

30. Limitation of time

No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 71.”

27. The two persons Joyce Kathambi, deceased and leaving three children, and Sarah Kananu are dependants of the estate of the deceased. Their application could be made under section 26 of the Law of Succession Act in person or by another person on their behalf. The Court considers and deems that the Protest of the Objector in this regard is an application for provision within the meaning of section 26 of the Act, which has been brought consistently within the limitation of time set out in section 30 of the Act.

#### **Compensation by John Kinoti to Solomon Kithinji for assault**

28. It is common ground that the beneficiary John Kinoti had agreed via an agreement annexed to the Protestor's Affidavit of Protest agreed to give an acre of land from his share of inheritance as compensation for assault on his brother Solomon Mwenda Marete, and the two distribution proposals agree on the acre being incised from his 5 acre share of Ruiru/Rwarera/1388 so that he remains with 4 acres, while Solomon Marete gets 6 acres thereof.

#### **Deceased heir's share**

29. The Protestor suggested that the 2.34 acres gifted by Will to the widow should go the families of Joyce Kathambi and Sarah Kinanu. PW1 and PW2 do not agree and their main contention is that the deceased had not provided for the children in the Will, and therefore the mother's share should be divided among all her children. The petitioner's side also points that the children of Joyce who is deceased had not claimed any share in the estate and they were not party to the proceedings.
30. There is, therefore, no application for provision for dependency as contemplated under section 26 of the Law of Succession Act, and in the circumstances, should the court make any orders thereon? This Court considers that the wide discretion of the court under sections 26 and 27 of the Law of Succession Act is aimed at doing justice in the case having regard to the matters set out in section 28 of the Act and it may be exercised in a proper case on application by or for the dependant who qualifies under section 29 of the Act.
31. In this case, the court is being moved by the Protestor on behalf of the dependants and it also considers in its discretion that the order for provision should be made as it is common ground that the two dependants were being provided for by the deceased during his life, no evidence of any gift inter vivos to them and they are not provided for in the will and there is nothing to show that they are now independent and not in need of such provision, and size of the estate and the number of heirs allows for such provision to be made without impoverishing the heirs named under the Will.



## Verdict

32. The valid Will must be given effect to the extent possible. In view of the death of the widow of the deceased her bequeath cannot take effect. As the persons named as having been provided for by the deceased qualify as his dependants, provision shall be made for the two dependants Joyce Kathambi (to be taken by her children who have survived her) and Sarah Kananu in terms of section 26 of the [Law of Succession](#) from the 2.34 acre share of LR Nyaki/Kithoka/108 gifted by the Will to the deceased's widow of the deceased so as not to interfere with the freedom of testation to the living beneficiaries.

## Orders

33. Accordingly, for the reasons set out above, the Court makes the following orders
1. The distribution of the Estate of the Deceased shall follow, in respect of all surviving heirs, the valid Will of the deceased dated 13/8/2003, save that by subsequent agreement John Kinoti's share in Ruiru/Rwarera/1388 is reduced one acre and given to his brother Solomon Mwenda Marete who should, therefore, get 5 acre and 6 acre shares thereof, respectively.
  2. The Court makes an order for reasonable provision for dependants of the deceased who have not been provided for under the Will and, for that purpose, the share of 2.34 Acres in the parcel of land LR Nyaki/Kithoka/108 bequeathed under the Will to the Deceased's widow who is now since deceased shall go to the two dependants of deceased, namely two dependants Joyce Kathambi (to be taken by her children who have survived her) and Sarah Kananu, in equal shares of approximately 1.15 acres each.
  3. There shall be no order as to costs.

Order accordingly.

**DATED AND DELIVERED ON THIS 30<sup>TH</sup> DAY OF AUGUST, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Otieno. C Advocate for the Protestor.

Mr. Kaumbi Advocate for the Petitioner/Respondents.

