



In re Estate of the Late William Muasya (Deceased) (Succession Cause 212 of 2009) [2022] KEHC 13111 (KLR) (26 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13111 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 212 OF 2009
MW MUIGAI, J
SEPTEMBER 26, 2022**

IN THE MATTER OF THE ESTATE OF THE LATE WILLIAM MUASYA (DECEASED)

BETWEEN

**JIMMY WAMBUA KIIO OBJECTOR
BEING THE ADMINISTRATOR AD LITEM FOR THE ESTATE OF KAMENE
KIIO**

AND

**ALBERT MUASYA 1ST ADMINISTRATOR
DAVID MUASYA 2ND ADMINISTRATOR**

RULING

1. The summons for annulment or revocation of grant dated October 14, 2021 brought under section 45 & 76 of the [Law of Succession Act](#) and 44(1) (2) and 73 of the [Probate and Administration Rules](#), the applicant seeks the following orders, that;
 - a. A declaration be and is hereby made that the children /survivors of Loise Lamene Kiio (deceased) are entitled to a share of their grandfather, William Muasya's (deceased) estate.
 - b. Grant of letters of administration intestate and confirmation of grant dated February 15, 2018 be and are hereby revoked/annulled under provisions of section 76 (a) (b) and (c) of the [Law of Succession Act](#) cap160
 - c. New/ fresh grant in respect of the estate of William Muasya (deceased) be issued in the joint names of Jimmy Wambua Kiio, Albert Muithya Muasya and David Wambua Muasya



- d. All titles to the properties of the estate of William Muasya (deceased) transferred / transmitted be and are hereby cancelled and revert to the estate of William Muasya (deceased) for fresh distribution.
 - e. Pending confirmation of grant in respect to the estate of William Muasya, Albert Muithya Muasya, David Wambua Muasya and any other beneficiary of the deceased be and are hereby restrained from selling, offering for sale, disposing, transferring, transmitting, evicting the applicants and his siblings and /or in any manner interfering with the parcel of land known as title No Nairobi block 118/747 and all other properties belonging to the estate of William Muasya (deceased).
 - f. Costs of this application be in the cause.
2. The application is supported by the affidavit of Jimmy Wambua Kiio deposed on October 14, 2021 wherein he stated that Loise Kamene Kiio (deceased) (hereinafter referred to as “the mother”) was the first born daughter of William Muasya (deceased) who passed on July 17, 2007 and Rebecca Kalondu (deceased) and therefore a beneficiary to her deceased parents estate. It was deposed that Loise Kamene died on October 10, 2010 after her deceased father. He said that she was survived by;
- a. Christine Nthenya Wambua -daughter
 - b. Jimmy Wambua Kiio -son
 - c. Josephine W. Ndambuki - daughter
 - d. Daniel Mweu Wambua - son
 - e. Elizabeth Mumbua -daughter
 - f. Jane Wanza Ngunga (deceased) survived by Teddy Kiio - grandson
 - g. Florence Nduku Wambua(deceased)
 - h. David Wambua -son
 - i. Rosemary Kavinya (deceased) survived by Brian Kiio
 - j. Patrick Mulwa Kiio -son
3. The applicant contends that he and his siblings are beneficiaries of this estate by virtue of their mother but they noticed that they were left out by the administrators, Albert Muithya and David Wambua Muasya who are their late mother’s brothers. He contended that the administrators are selling but of the estate and have threatened to evict David Wambua, his brother, from Nairobi block 118/747 (hereinafter referred to as “the subject property”), any time from now, a property he has lived on for 15 years. He opines that the property was gifted to their mother by her father during her lifetime and he contends that it is well known that the property will pass on to his siblings and himself and the coming generations.
4. The applicant deposed that when he investigated the unwarranted threat, he learnt that the succession cause herein had been filed and his mother and her children had been left out, that the grant had been confirmed on February 15, 2018. He holds the position that the grants were obtained fraudulently by making of false statement and concealment of material facts.
5. The applicant deposed that a family meeting was convened to address the inheritance issue of his mother but to date they are yet to reach a consensus on the property that the children of Loise



Kamene Kiio (deceased) will inherit as well as amend the certificate of grant. Instead, he opines that the administrators have persisted with threats to reclaim the subject property, an action he says will deny him and his siblings' inheritance from their grandfather. He deposed that the current administrators cannot be trusted with sole administration for those reasons.

6. The applicant contended that the proceedings to obtain the grant are defective in substance and that grandchildren can inherit directly from their grandparents where the parents die before inheriting their share of their parent's estate. He stated that they are apprehensive of losing their mother's gifted property as well as her share in the estate property herein. He stated that his siblings have consented to him being appointed as a co-administrator and he is fully conversant with the duties expected of him as an administrator. He deposed this in support of the application sought to restrain further intermeddling.

Grounds of Opposition

7. In opposition of the summons, the administrators/respondents filed a grounds of opposition dated October 22, 2021 on the following grounds;
 - a. That this court lacks jurisdiction to entertain the summons as the same became *functus officio* the time this cause was marked as fully settled.
 - b. The deceased estate was long distributed among the beneficiaries of the estate who are now in possession of their respective title documents.
 - c. That the only recourse available in law to the applicant, if at all, is as against the said administrators as individuals and not against the estate.
 - d. That as such the said summons is thus bad in law, incompetent and abuse of the process of court and improperly before this court.

Replying Affidavit

8. The administrators/ respondents filed a replying affidavit dated November 22, 2021 in which they deposed that the summons is riddled with falsehood in so far as it alleges that the grant of letters of administration were obtained fraudulently through concealment to court of material facts. It was admitted that Loise Kamene (deceased) was their sister and the daughter of William Muasya (deceased) who passed on July 17, 2007 and prior to his death the deceased, their father, personally communicated his intentions with regard to division of his estate, individually and collectively to his children and beneficiaries. In particular, they referred to the property known as Donyo/Sabuk/Komarock/block 1/587 which was to be distributed as follows;
 - i. Charles Mulwa Muasya -20 acres
 - ii. David Wambua Muasya - 20 acres
 - iii. Hillary Katua Muasya -20 acres
 - iv. Albert Muithya Muasya -20acres
 - v. Mary Mutio Muasya -10 acres
 - vi. Mary Wavinya Muasya -10 acres



9. It was their contention that their late father had directed them that should any issues arise pertaining distribution of the estate, they should consult their brother in law Major Wilson Kiio Wambua (deceased) who was the objectors father.
10. They convened a family meeting upon the demise of their father which was attended by his children and the beneficiaries of the estate championed by kinship and blood ties, thus there are no minutes, and it is from those deliberations and the wishes of their father that distribution was done. They contend that the process of succession was merely to regularize their father's intention. They contend that the applicant's mother without coercion or duress relinquished her interest in the said estate owing to the fact that she was already married to one Major Wilson Kiio (deceased) and on different occasions at their late father's home stated that she did not wish to inherit from the estate of their father as she already had her own property.
11. It was deposed that Mary Wavinya could attest to the above statements and it is not true that they acted to defeat the applicant's interest in the estate herein. They said that there was no bad blood between them and their sister, Loise Kamene (deceased) and upon the request of Daniel Mweu, the applicant's brother, the 1st respondent dealt with and condoled the objector's family through the demise of their parents. Further that the deceased sister raised the 1st respondent who lived with her in her matrimonial home when he was pursuing his studies and it is unfathomable that he would want to disinherit his sister.
12. It was their position that the applicants are not direct beneficiaries and the chief who authored the letter when they initiated the succession process of the estate herein was David Wambua, the applicant's brother and their deceased sister's son. Therefore, there is no way he left out his mother but a decision made in full knowledge and furtherance of the mother's intention.
13. The respondents were suspicious about the timing in that the application was brought after the demise of both parents, Loice Kamene and major Wilson Kiio who died in 2010 and 2018 respectively. The applicants have filed this application 11 years after the grant was applied for and this is treachery according to the respondents. The court was asked to give light weight to the allegation that the sister was gifted the subject property in the absence of evidence to support the same, *viva voce* or otherwise. They contend that the subject application is vexations, driven by greed and ill motive and was informed by the respondent's action of looking for a buyer where David Wambua had been given temporary residence by the owner.
14. As regards the minutes of the meeting, it was deposed that they are peddling falsehood and that they learnt later that the meeting was a mere sham intended at coaxing the respondents while buying time for the applicants to get the grant *ad litem* required for the purpose of filing this suit. It was their position that it would be a travesty to revoke the grant issued on February 15, 2018.

Further Affidavit

15. The applicant filed a further affidavit dated January 31, 2022 in response in which he stated that the replying affidavit was full of deceit aimed at unjustly denying his siblings and himself their rightful share of inheritance from their deceased grandfather. He deposed that he was aware of the meeting that was held and that his mother had confided in himself, David Mweu Wambua and Patrick Mulwa Kiio, his brothers, that their grandfather had promised her a piece of land from the Komarock 100 acres being title number Donyo Sabuk/ Komarock block 1/587.
16. The applicant opined that his mother did not relinquish her interest in the deceased estate herein and the administrators and Mary Wavinya's word cannot be trusted on this issue as they have joined hands



to disinherit their mother. That they have not explained why the name of their mother was excluded in the letter from the chief, Kakuyuni location dated September 1, 2008 that was used to obtain the grant and this amounts to obtaining grant by concealment of facts and through fraud. It was deposed that relinquishing interest does not preclude one from participating in the succession cause and that all the beneficiaries ought to consent to appointment of administrators and the mode of distribution of the deceased's estate regardless of the shares thereof.

17. It was the applicant's contention that the letter dated September 1, 2008 was written for the purpose of closing the bank account only to which his mother was not a contributing member and not for purposes of filing a Succession as explained in the meeting by Daniel Mweu Wambua. It was deposed that the letter was written by Daniel Mweu Wambua and not David Wambua.
18. He contended that the *Law of Succession Act* does not discriminate when it comes to sharing out the estate and one gender is not given preference over the other and the allegation that Mary Wavinya received a considerably less portion to their father's estate should not be used as bias to deny their mother her rightful share. It was opined that there is no limitation of time for seeking revocation of fraudulently acquired grants. Their father major Wilson Kii Wambua (deceased) never mentioned to him or his siblings about the succession cause and the allegation that he was aware is a lie.
19. The applicant said he falls under section 29 of the Act and as per section 76 of the Act, a grant of representation whether or not confirmed can be revoked or annulled at any time if it was obtained fraudulently by making false statement or by concealment of something material to the case and/or if the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding the allegation was made in ignorance or inadvertently.
20. It was his contention that oral wills should be proven by competent independent witnesses and none of the beneficiaries listed in the certificate of conformation of grant issued on February 15, 2018 fall under this category as their intention was to deny the applicant's mother her inheritance. He opined that the estate is yet to be transmitted to the beneficiaries listed in the certificate of confirmation of grant issued on February 15, 2018 and the deceased properties remain part of the deceased estate.
21. The summons was canvassed by way of written submissions.

Applicant's Submissions Dated February 1, 2022

22. The applicant submitted on four grounds. Firstly, as to whether Loise Kamene Kii (deceased) relinquished her right to a share of inheritance the deceased's estate herein, while reiterating the contents of the affidavits and making reference to section 29 (a) of the *Law of Succession Act* (hereinafter referred to as "the Act") that a dependent is defined to mean;

"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"
23. Reference was also made to section 38 of the Act that provides; where an intestate has left a surviving child or children but no spouse, the net estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving children, if there be only one, or shall be equally divided among the surviving children.
24. It was submitted that there is no proof tendered to confirm that his mother relinquished her interest in this succession cause and that there is no written communication affirming her lack of interest. To buttress this point reliance was placed on the *Estate of Manase Otieno Eshitubi* [2020] eKLR case.



25. It was submitted that David Wambua son to the deceased 's daughter of the deceased herein, who has been in possession and occupation of one of the estate properties for over 15years and it seems unlikely that his parents failed to mention to him the fact that the property was part of a succession cause and that the mother had relinquished her rights to inheritance which implied possible eviction by beneficiaries. He contended that rule 26 of the *Probate and Administration Rules* requires all the beneficiaries to give consent to obtaining a grant.
26. The applicant submitted that the spirit of part v of the Act especially section 35,38 and 40 of *Law of Succession Act* requires equal distribution of the intestate estate amongst the children of the deceased. This is regardless of the age, gender and financial status of the children. Further reliance was placed on article 27(3) of the *Constitution* of Kenya, 2010 and the applicant contended that the onus was on the administrators to prove that their mother relinquished her interest to inherit her father's estate and they have failed to do so.
27. The second issue was whether the grandchildren have a right to inherit their grandfather estate, while relying on section 29 and 38 of the Act, it was submitted that upon the demise of their mother, they have a right to inherit a share of their grandfather's estate that ought to have been inherited by their deceased mother. Reliance was placed on the High Court succession cause No 457 of 2005, *In the matter of the estate of Joseph Namayi Lukungo a.k.a Yusufu Namayi (deceased)*[2015] eKLR and succession cause No 77 of 2013- Kisumu, *In the Matter of the Estate of Obed Aburili Otenyo (deceased)* [2017]eKLR
28. The applicant placed reliance on section 31 of the Act and submitted that Nairobi block 118/747 was a gift to their late mother from William Muasya (deceased) where their brother has been living for 15 years until the administrators threatened him with its disposal. He also contended that oral wills upon which the administrators based their distribution of the estate must be proved by competent and independent witnesses.
29. Thirdly, as to whether the objector has established sufficient cause for revocation of grant, it was submitted that the grounds under section 76 (b) and (c) of the Act had been satisfied. He submitted that section 51(2) of the Act had not been satisfied as not all the survivors were listed thus offending section 52 of the Act that criminalizes making of willful or reckless statements that are false in material whenever one is seeking for grant of letters of administration.
30. Further reliance was placed on rule 26 (1) and (2) of the *Probate and Administration rules*, High Court succession cause No 36 of 2017- Kajiado, *In the matter of the estate of Ibrahim Hassan Alias Sheikh Ibrahim Hassan (deceased)* and *Al- Amin Abdulrehman Hatimy v Mohamed Abdulrehman Mohamed & another* (2013) eKLR and it was submitted that the administrators did not approach the court in good faith and failed to take his mother's share into consideration thus proving to be untrustworthy and intent on disinheriting the objector and his siblings.
31. The applicant submitted that he is entitled to the orders sought and buttressed this point by stating that this court had inherent powers to grant the same as per rule 73 of the *Probate and Administration Rules*. He also relied on *re estate of Hellen Wangari Wathiai (deceased)* [2021] eKLR and *re estate of Magangi Obuki (deceased)* [2020]eKLR and article 159 of the *Constitution*. The court was urged to grant the orders sought and embrace the maxim that "equity will not suffer a wrong without a remedy"

Respondent's Submissions Dated June 10, 2022

32. It was submitted that at times during the succession process, the applicant's mother was aware and involved in the process as indicated in the minutes of the meeting and the succession cause was done



in consensus with all the beneficiaries of the estate. The respondents reiterated the contents of their replying affidavit and placed reliance on the matter of *the estate of Veronica Njoki Wakagoto (deceased)* [2013] e KLR.

33. It was the administrators contention that since the mother relinquished her share in the estate, the objector and his siblings have no share to claim from the estate in the first place as they are not directly entitled to any share. He referred to the minutes of the meeting held on October 6, 2019 that he said supported this position.
34. Further, the administrators submitted that the objectors had not provided proof that any property was given as a gift in contemplation of death and neither had he indicated how he came across that information. That all the division of the estate was done in line with the father's wishes and in agreement of all the beneficiaries who are also in consensus that no gifts were made to the objectors mother. Reliance was placed on the case of *Wood Bridge Spooner* (1819) 3 B and *Aldo* 233 106 ER and the case of *Craven's estate* 1937 Chancery 423, where the conditions for donation mortis causa were discussed.
35. The court was urged to see through the objectors estate who it was contended was only interested in specific property in the estate and that there were no qualms when the parents were alive. It was submitted that all beneficiaries must consent in attaining the grant of letters of administration, this point was supported by the case of *Ngaii Gathumbi alias James Ngaii Gatumbi (deceased)* succession cause 783 of 1993.

Determination

36. I have considered the summons, the responses in opposition and the submission of the parties.
37. I note that it is not in contention that Loise Kii Muasya was the first born daughter of William Muasya (deceased) herein as per the chief's letter dated October 17, 2019 and by admission of the parties in their pleadings. It is also not in contention that Loise Kii Muasya's name was not included in the chief's letter dated September 1, 2008 and that she is survived by the following;
 - i. Christine Nthenya Wambua
 - ii. Jimmy Wambua Kii
 - iii. Josephine W. Ndambuki
 - iv. Daniel Mweu Wambua
 - v. Elizabeth Mumbua
 - vi. Jane Wanza Ngunga (deceased)
 - vii. Florence Nduku Wambua(deceased)
 - viii. David Wambua
 - ix. Rosemary Kavinya (deceased)
 - x. Patrick Mulwa Kii -
38. What is in contention is whether Loise Kii Muasya was entitled to a share of the estate, whether she was part of the succession process and whether the objector and his siblings are entitled to inheritance from the estate herein through their mother and whether their late mother was bequeathed a gift *inter vivos* by the deceased.



39. Section 51 of the Act is a proviso on application of grants, it provides that;
application for grant
- (1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.
 - (2) An application shall include information as to -
 - (a) the full names of the deceased;
 - (b) the date and place of his death;
 - (c) his last known place of residence;
 - (d) the relationship (if any) of the applicant to the deceased;
 - (e) whether or not the deceased left a valid will;
 - (f) the present addresses of any executors appointed by any such valid will;
 - (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;
 - (h) a full inventory of all the assets and liabilities of the deceased; and
 - (i) such other matters as may be prescribed.
 - (3) Where it is alleged in an application that the deceased left a valid will -
 - (a) if it was written, the original will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either -
 - (i) an authenticated copy thereof shall be so annexed; or
 - (ii) the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;
 - (b) if it was oral, the names and addresses of all alleged witnesses shall be stated in the application.
 - (4) No omission of any information from an application shall affect the power of the court to entertain the application.
40. A perusal of the court record indicates that the petition filed on March 24, 2009 was for letters of administration intestate and the consents filed on March 24, 2009 were signed by Rose Mumbua Mulwa, Peter Muasya, Hillary Katua Muasya And Mary Wavinya Muasya.
41. The affidavit in support of petition for letters of administration intestate names the beneficiaries who signed as David Wambua Muasya, Hillary Katua Muasya, Albert Muithya Muasya Mary Wavinya Muasya, Rose Mumbua and Peter Muasya
42. The consent to certificate of confirmation dated November 18, 2009 and the consent on mode of distribution of estate are signed by Hillary Katua Muasya, Peter Muasya, Rose Mumbua and Mary Wavinya Muasya.



43. The rectified grant was issued on November 14, 2009. Subsequently the grant was amended and a rectified grant issued on February 17, 2012. The rectified grant was further rectified on May 16, 2016 and further rectified on March 3, 2018.
44. Section 29 of the Act defines a dependent as follows;
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.
45. There is no doubt at this point that Loise Kiio Muasya (deceased), a child of this estate, was not part of the succession process, she never signed any document neither did she get any provision from the estate of the deceased.
46. The reasons advanced for this by the administrators is that she relinquished her right to inheritance from the estate but no evidence has been tabled or presented to support the same therefore it remains and allegation. Nonetheless in the event one has relinquished their right to an estate, the same must be done in writing and filed in court.
47. In *re estate of the Late George Cheriro Chepkosiom (deceased)* 2017 eKLR the court observed;
.....However, as there is no evidence before me in this regard, it is necessary that any beneficiary not interested in the estate of the deceased files an affidavit renouncing such interest, such affidavit to be filed within the next 30 days from today to enable the court issue final orders with respect to the distribution of the estate.
48. Section 42 of *Law of Succession Act* provides for previous benefits to be brought into account 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 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.
49. If as alleged by the objector/applicants that by virtue of section 31 of the Act Nairobi block 118/747 was a gift to their late mother from William Muasya (deceased) where their brother has been living for 15 years until the administrators threatened him with its disposal, then by virtue of section 42 of *Law of Succession Act*, that inter vivos gift would taken into account in their mother's share in the distribution of the deceased's estate. However, since the *inter vivos* gift is challenged by the respondents, then their deceased sister was excluded in the distribution of the deceased's estate.
50. In the absence of any evidence, I find that Loise Kiio Muasya (deceased) is a beneficiary of the estate and was entitled to a share of the deceased estate. It is now trite that all children of the deceased are



entitled to a share of the parent's estate regardless of gender, age, marital status *inter alia* as provided in article 27 of the [Constitution](#) of Kenya, 2010. Article 27(3) specifically provides that:

'women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres

51. This principle was also discussed [in the matter of the estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti \(deceased\)](#) [2017] KLR as follows:-

discrimination of daughters in inheritance

From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when *Rono v Rono* [2008] 1 KLR 803 delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement the [Constitution](#)- which state categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and the [Constitution](#). More specifically I am content to cite the proclamation by the court of Appeal in the case of *Stephen Gitonga M'murithi v Faith Ngiramurithi* [2015] eKLR that: -

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”

Therefore, a son will not have priority over a daughter of the deceased simply because he is male; all- male and female siblings- are equal before the law and are entitled to equal protection of the law. See article 27 of the [Constitution](#). Accordingly, the 3rd administrator and her children who are claiming the inheritance of late Festus K M'Ngaruthi, the son of the deceased are only entitled to the share of their late father. They are not, in the circumstances of this case entitled to more share than the distinct share of each of the two daughters of the deceased simply because the late Festus M'Ngaruthi was the son. The three children of the deceased are entitled to share the net intestate estate of the deceased equally.

52. Also see re: [estate of Solomon Ngatia Kariuki \(deceased\)](#) 2008 eKLR, where the court said:

“The [Law of Succession Act](#) does not discriminate between the female and male children or married and unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu customary law. Like most other customary laws in this country, they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and punitive customary law demand appears to be that



such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.”

53. Therefore, since it is not denied that the applicants/objectors late mother was the eldest daughter of the deceased and was alive as the succession cause was lodged in court and her name in the list of surviving children of the deceased and/or beneficiaries was left out and omitted, in the absence of tangible and cogent evidence presented in court of her relinquishing her right to inherit from her father's estate, she was unlawfully omitted.

54. The next issue is whether the omission of the applicant's late mother name in the list of beneficiaries to the deceased's estate will result in the annulment of the grant herein. Section 76 of the Act is a proviso on annulment and revocation of grants, it provides as follows;

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) at the grant has become useless and inoperative through subsequent circumstances.

55. The failure to include the objector's mother in the succession cause amounted to concealment of material information to the court that was necessary. In the event that there was relinquishing of any rights, the same would have been put down in writing and/or the applicant's mother presenting such evidence in court as she was alive at the time. Nonetheless, all the beneficiaries have to be listed in the petition for grant of letters of administration, they ought to be part of the process. If the administrators intended that she be part of the beneficiaries of the estate, then they ought to have informed the chief that a name had been erroneously omitted. It is not clear why the chief left out one name of the family member that was well known to him, what is clear is that this is an error that would have easily been rectified by the administrators before petitioning the court for a grant.



56. Having established that there was concealment of material information, the next question that begs is whether the objectors, being the grandchildren of the deceased herein are entitled to their mother's share of inheritance. 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.

57. Loise Kiio Muasya is deceased and there is no contention that she was daughter of the deceased, once the estate is divided and a share is allocated to her, it can only delve to her estate for further distribution in her estate in this case by her children.

58. In *Christine Wangare Gachigi v Elizabeth Wanjira Evans & 11 others* NKU civil appeal 221 of 2007[2014] eKLR where the court held;

Although sections 35 and 38 of the *Laws of Succession Act* is silent on the fate of surviving grandchildren whose parents' pre-deceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law on this is section 41. If a child of the intestate has pre-deceased the intestate then that child's issue alive or en ventre sa mere or that date of the intestate's death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate takes between them the share their parents would have taken had the parent been alive at the intestate's death.....

We affirm the learned trial judge's decision that the beneficiaries of the estate of the deceased herein comprised all the deceased's children surviving as at the time of distribution and the grandchildren of the deceased children of the deceased who had either predeceased her or died shortly after presentation of the succession proceedings to court

59. The next issue is that of the subject property, more specifically whether it was gifted to the objector's mother. If indeed the deceased had bequeathed some of his assets to some of his beneficiaries by way of gift *inter vivos* or *causa mortis*, the court will be compelled to honor the wishes of the deceased.
60. *Halsburys Laws of England* 4th Edition volume 20(1) at paragraph 67 states as follows with respect to incomplete gifts:

“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.”



61. In *re estate of the Late Gedion Mantbi Nzioka (deceased)* [2015] eKLR, it was stated as follows:

“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.”

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 Walve* {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)”

62. From the objector’s submissions, the subject property was gifted to the mother during the life time, thus making it appear *prima facie* a gift *inter vivos*. However, it appears that the gift was not complete. There is no deed or 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 by way of registered transfer, or registration of the land.
63. I have perused the draft minutes of the meeting held on Saturday September 1, 2020 but in the absence of *viva voce* evidence at this point, the court cannot conclude that this was a gift and whether those were the intentions of the deceased herein.
64. I note that the fact that David Wambua son to/of the deceased’s daughter of the deceased herein has lived on the suit property for 15 years and this fact has not been disputed. The administrators have



admitted that David Wambua is on the property but was given temporary residence. Fifteen years is a long time for temporary residency I must say.

65. I therefore find that no evidence has been tabled to show that the suit property was a complete gift to the objector's mother.

Disposition

66. In the circumstances after considering the totality of the evidence on record against the relevant law I find and issue the following orders;
- a. A declaration is granted that the children /survivors of Loise Kamene Kiio (deceased) are entitled to a share of their late mother's share of the estate of their grandfather, William Muasya's (deceased) estate.
 - b. The grant of letters of administration intestate and confirmation of grant dated February 15, 2018 be and are hereby revoked/annulled under provisions of section 76 (a) (b) and (c) of the [Law of Succession Act](#) cap160.
 - c. A fresh grant in respect of the estate of William Muasya (deceased) be issued in the joint names of Jimmy Wambua Kiio, Albert Muithya Muasya and David Wambua Muasya
 - d. All titles to the properties of the estate of William Muasya (deceased) transferred / transmitted be and are hereby cancelled and revert to the estate of William Muasya (deceased) for fresh distribution.
 - e. Pending confirmation of grant in respect to the estate of William Muasya, Albert Muithya Muasya, David Wambua Muasya and any other beneficiary of the deceased be and are hereby restrained from selling, offering for sale, disposing, transferring, transmitting, evicting the applicants and his siblings and /or in any manner interfering with the properties belonging to the estate of William Muasya (deceased).
 - f. This being a family matter there shall be no order as to costs and each party to bear own costs.

It is so ordered.

DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 26TH SEPTEMBER 2022 (VIRTUAL/PHYSICAL CONFERENCE)

M.W. MUIGAI

JUDGE

