



REPUBLIC OF KENYA



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**Nzove & another v Nzove & another (Succession Cause 265 of 2013)  
[2022] KEHC 13115 (KLR) (26 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13115 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 265 OF 2013  
MW MUIGAI, J  
SEPTEMBER 26, 2022**

**BETWEEN**

**DANIEL WAMBUA NZOVE ..... 1<sup>ST</sup> PETITIONER**

**FRANCIS KIVUITU NZOVE ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KIVINDYO NZOVE ..... 1<sup>ST</sup> OBJECTOR**

**FRANCISCAH NZOVE ..... 2<sup>ND</sup> OBJECTOR**

**RULING**

1. Nzove Muu, the deceased herein died on May 2, 2020.
2. According to the Muthetheni Chief's letter dated October 11, 2012, the deceased herein was survived by the following three wives;
  - a. Muthio Nzove-First wife
  - b. Syondenge Nzove-Second wife
  - c. Kalondu Nzove-Third wife
3. And the following dependants;  
First wife's family  
Mukonyo Mbithuka- Adult-Daughter-Married  
Mumbua Kinyili-Adult-Daughter-Married  
Mbithe Mwailu-Adult-Daughter-Married  
Kivindyo Nzove-Adult-Son



Second wife's family

Munyiva Mbithi-Adult-Daughter-Married

Francis Kivuitu Nzove-Adult-Son

Lydia Makau-Wife to Boniface Nzove Makau(Deceased)

Daniel Wambua Nzove-Adult-Son

Luisa Norman Mbithuka-Adult-Daughter-Married

Third wife's family

Nduku Nzove-Adult-Daughter

Nthenya Nzove (Deceased) married under the Kamba Customs by third wife Kalondu Nzove who had two daughters.

Nthenya Nzove had the following children;

Veronica Ndinda Nzove-Adult

Catherine Mbaika Nzove-Adult

John Mutinda-Adult

Joseph Mutua Nzove-Adult

Stephen Kyalo-Adult

4. A full inventory of all the assets of the deceased at the date of his death are;
  - a. Muthetheni/Kionyweni/332
  - b. Muthetheni/Kionyweni/704
  - c. Muthetheni/Kionyweni/333
  - d. Muthetheni/Kionyweni/762
  - e. Muthetheni/Kionyweni/179
5. The beneficiaries' consents dated April 29, 2013 in support of the Petition for letters of administration Intestate were not signed by all the beneficiaries.
6. Daniel Wambua Nzove and Francis Kivuitu Nzove both from the 2<sup>nd</sup> house petitioned for the grant of letters of administration Intestate in the estate of the deceased on April 30, 2013 and gazetted on July 10, 2013. The Grant was issued to them on July 11, 2013.

#### **Summons For Confirmation Of Grant**

7. Vide the summons for confirmation of grant filed on August 27, 2014 Daniel Wambua Nzove and Francis Kivuitu Nzove sought for the confirmation of the grant. They filed a Schedule of Distribution and Consent Form which was not signed by all beneficiaries in support of the confirmation.
8. The Objectors have contested the Petitioners proposed Schedule of distribution dated August 15, 2014 which provides as follows;

SCHEDULE



NO.	DESCRIPTION OF PROPERTY	APPORTIONED
1.	Muthetheni/Kionyweni/762	To be shared as per the Will as follows; i. Kivindyo Nzove-5.23 ha ii. Kivindyo Nzove-0.1425 iii. Francis Nzove -0.1425 iv. Lydia Makau Nzove-0.1425 v. Daniel Nzove-0.1425
2.	Muthetheni/Kionyweni/179	To be shared as per the Will as follows i. Francis Nzove-4.8 ha ii. Lydia Makau Nzove-4.8 ha iii. Daniel Nzove-4.8 ha
3.	Muthetheni/Kionyweni/333	To be shared as per the Will as follows; i. Francis Nzove-0.43ha ii. Lydia Makau Nzove-0.43 ha iii. Daniel Nzove-0.43ha
4.	Muthetheni/Kionyweni/332	To be shared as per the Will as follows; i. Francis Nzove-01.ha ii. Lydia Makau Nzove-0.1ha iii. Daniel Nzove-0.1ha
5.	Muthetheni/Kionyweni/704	To be shared equally as per the Will as follows; i. Francis Nzove-0.2ha ii. Lydia Makau Nzove-0.2ha iii. Daniel Nzove-0.2ha

### Affidavit In Protest

9. Kivindyo Nzove and Francisah Nzove from the 1<sup>st</sup> and 3<sup>rd</sup> house filed a joint affidavit in protest on November 11, 2014 to the confirmation of the grant and the mode of distribution made by the Petitioners who are from the 2<sup>nd</sup> house. They averred that the proposed distribution was made by the 2<sup>nd</sup> house and to benefit the 2<sup>nd</sup> house only. According to protestors, the deceased had distributed his



properties equally among the three houses on October 14, 1996 which distribution the Petitioner have never complained of or challenged. They averred that the Petitioners herein want to redistribute the estate against the wishes of their father, clan and Kamba custom.

### **Affidavit In Response To The Protest**

10. In response to the Protest, vide an affidavit sworn on October 5, 2015, Daniel Wambua denied that they want to redistribute the deceased estate and asserted that the deceased never distributed his estate equally but as per attached copy of bequest inter vivos dated December,10 and the Schedule of distribution dated August 10, 2014 filed together with the summons for confirmation of grant. He urged the court to dismiss the affidavit in protest and proceed to confirm the grant as per the schedule of distribution.

### **Further Affidavit In Protest**

11. Vide an affidavit sworn on March 14, 2016, Kivindy Nzove averred that a copy of the bequest inter vivos and schedule of distribution are fraudulently obtained because;
- i. Executor of the Will not named
  - ii. Date of making the Will not clear
  - iii. 4 parcels are shared to one House (2<sup>nd</sup> House) where the petitioners belong to.
  - iv. Only the 2<sup>nd</sup> House who are the beneficiaries to the estate witnessed the purported Will.
  - v. No independent witness was involved
12. According to the 1<sup>st</sup> objector, it is clear that the Petitioners are actuated by greed and that by an application dated August 27, 2013, the petitioners wanted to evict the beneficiaries/objectors. He averred that the deceased distributed his estate in 1996 to his three wives before and in the presence of the clan.

### **Summons**

13. Vide the Summons dated July 12, 2016 and filed on July 14, 2016, the 1<sup>st</sup> objector sought for review or setting aside of the orders made on June 29, 2016 directing to dispose off this matter by way of written submissions. The summons was premised inter alia on grounds that the Will is forged hence forgery cannot be disposed off by way of written submissions. According to the 1<sup>st</sup> objector, the Will was not part of the initial proceedings when the petitioners filed the petition for grant of letters of administration.

### **Viva Voce Evidence**

14. OB PW1, Joseph Kinyanzui Mwando relied on his witness statement filed August 15, 2018 as his evidence. He stated that the deceased was his step brother while the petitioners and the objectors are children of the deceased. According to PW1, the deceased had three wives and five parcels of land which should be shared equally between the three houses at the time of the lifetime of the deceased. He stated that the issue of the Will did not materialize or even feature during the funeral. He stated that he knew nothing about the Will which does not have the signature of the testator or even witnessed or attested to. He stated that the beneficiaries in the Will only came from the Second House while none from the other houses and that they did not sign or witness the alleged Will.



15. In cross-examination by Nthiwa, PW1 stated that he saw the deceased three months before he died and was of good sound mind. He stated that the deceased died of natural causes in the year 2000. According to PW1, in Kamba customs, property is shared between the wives' households. He stated that the deceased did not show them the Will dated December 10, 1999. According to PW1, the land had already been subdivided in 1996 as per the clan. He stated that he has seen the Will has a thumbprint but stated that the deceased must have thumb printed his ID Card. He stated that he cannot tell if the thumb print on the Will was made by the deceased but stated that it was signed by Francis Kivuitu Nzove, Boniface Makau Nzove and Daniel Wambua Nzove and a signature by Muteti Mungata Advocate. According to PW1, Kivindyo Nzove who was bequeathed 5.8 Ha in the Will is from the 1<sup>st</sup> House. He stated that Mutati Kalili who supervised the sub-division in 1996 which was reduced in writing was the Clan Chairman. According to PW1, the Chairman had been warned by the deceased through his lawyers not to interfere with the family property.
16. He denied that the clan had forced the deceased to participate in the subdivision of his property. According to PW1, all the three wives assisted the deceased in creation of his wealth. He stated that a complaint was raised by the deceased over the subdivision. It was his testimony that he did not know whether the deceased executed any transfer of property to beneficiaries before he died. He stated that he did not know that an oral will expires after six months.
17. In cross-examination by court, PW1 stated that he wanted the properties distributed as per the clan deliberations of 1996 and not as per the Will of the deceased.
18. In re-examination, PW1 stated that the deceased died in 2000 while the Will was made in 1999. He stated that the ID Card of Kivindyo is not indicated on the Will. According to PW1, all the widows are dead but the children are there.
19. OB PW2, Kimiti Mbobu relied on his witness statement filed August 15, 2018 as his evidence. He stated that the deceased directed him to convene a clan meeting on October 12, 1999 to share out his land. According to PW2, the deceased had three wives. He stated that the deceased had already divided his land and there is no point in the need for another sub-division.
20. In cross-examination by Nthiwa, PW2 stated that he was chairman of the clan in 1996 in place of the former Chairman Mutoki Kaleli who had passed on. According to PW2, Mutoki Kaleli was still alive during the subdivision. He stated that he had seen the deceased three months before he passed on and that the deceased had no mental illness before he died. According to PW2, the clan deliberations were minuted by Munyoki Kivui who is now deceased but they did not manage to recover the said minutes. He stated that the minutes were left with Francis Kivuitu and Kivindyo Nzove. According to PW2, it was Kivuitu who picked ballot of the 1<sup>st</sup> Houses while Kalondu picked for the 2<sup>nd</sup> House and Kivindyo was the 3<sup>rd</sup> one to pick. He stated that Kivuitu was the first one to sign the document followed by Kivindyo and Kalondu while the Chairman Mutaki Kaloki followed and Munyoki, Muthini Mua. He stated that he could not recall whether he signed the document.
21. It was PW2 testimony that he was not aware of any Will made by the deceased. He stated that he did not chair the clan deliberations in 1996 since Mutaki Kaleli was in-charge. He stated that he did not know when the deceased died. He stated that he disputed the Will of the deceased.
22. In cross-examination by court, PW2 state that he called the clan meeting because the deceased's wives and the children had disagreements over the division of the land.
23. In re-examination, PW2 stated that he saw the Will in court and not all the witnesses signed the Will. He denied that they assaulted the deceased.



24. OB PW3, Kitetu Ngomela Mwanja adopted his witness statement as his evidence. She stated that she has been involved in the land issue since 1996. According to PW3, they subdivided the land among the three wives after the deceased had invited them to do so. She stated that they celebrated by slaughtering a cow. She maintained that the land had been subdivided by the deceased during his lifetime amongst the three wives and it was not forcefully done since the Chief had sanctioned it hence there is no need for another subdivision. She stated that every house is occupying their portions.
25. In cross-examination by Muumbi, PW3 stated that she is the clan Vice Chairman but 1996 she was just a clan member. It was her testimony that the Chairman Mulu Mutaki called them in 1996 as requested by the deceased over the issue of subdivision of his land. She stated that the sub division took place in 1996 at the deceased place while he was still alive but they were not accompanied by surveyors. She stated that she was not aware that by then the deceased had already obtained plot reference for his land. According to PW3, there was nothing like balloting over two parcels of land.
26. She stated that he did not sign anywhere after the subdivision exercise. She stated he did not know which parcel of land number was the 1<sup>st</sup> objector was to occupy. It was her testimony that only the surviving wife Kalondu was present during the subdivision of the land as well as the sons of the deceased wives representing their houses. She denied that the deceased made a Will over his land.
27. In re-examination, PW3 stated that each house was given copies of the minutes while another was kept by the clan officials.
28. PET PW1, Daniel Wambua Nzove adopted his witness statement dated June 12, 2018 and rely and produce as exhibits his list of documents dated on even date.
29. In cross-examination by Tamata, PW1 stated that his father had three wives who ought to benefit from the estate but not equally. He stated that they filed summons for confirmation of grant dated August 15, 2014 but the house of Alice Kalondu is not factored in the schedule of distribution as she is deceased. He confirmed that the 1<sup>st</sup> and 3<sup>rd</sup> Houses are not included in these distribution. He stated that he is a witness as well as his three brothers in the Will. According to PW1, all those witnesses are beneficiaries of the properties and there was no other independent witness apart from the advocate. He stated that Kivindyo Nzove is from the 1<sup>st</sup> House but not sign the Will. According to PW1, the court should rely on the Will and the deceased's estate should be distributed in accordance with it. He stated that the Will show that parcels of land No 179 and 333 should be shared by the 2<sup>nd</sup> house. It was PW1 testimony that parcel No 333 and 704 were to remain in the name of the deceased as per the Will. However, it was PW1 testimony that during the filing of the petition for letters of grant they did not introduce the will to the court.
30. It was PW1 testimony that the clan members came in 1996 to sub-divide the land by force yet his father never wanted them and he was not happy with the clan's interference. He stated that he has been farming on parcel No 179 since 1984 He maintained that his father never invited the clan members. He stated that the deceased had already shared his land before he died. According to PW1, they are ready to have the deceased's assets shared as he wished.
31. In re-examination, PW1 stated that Kivindyo deliberately refused to sign the Will. According to PW1, it was Kivindyo who invited the clan members and not the deceased. He stated that it was his advocate who wrote a demand letter to Kivindyo to stop interfering with the deceased and his land. According to PW1, if the two parcels of land were retained by the deceased, then they will shared equally. He stated that the Petition was prepared by his advocate hence mistake should not be attributed to him.



32. PET PW2, Francis Kivuitu Nzove adopted his witness statement dated June 12, 2018 as his evidence. He stated that his father's properties should be distributed according to the will but the 3<sup>rd</sup> House should be given land as proposed.
33. In cross-examination by Tamata, PW2 stated that his father was not literate and could not write but had good memory despite his old age. He stated that the deceased died due to natural causes. He stated that the Will made in 1999 is written in English language on behalf of the deceased by his advocate in the advocates office. According to PW2, they escorted their father to the advocates' office. He stated that the deceased had already shared the parcels of land to the houses and children in 1996. According to PW2, the 2<sup>nd</sup> House was given parcel No 179. PW2 urged the court to rely on the Will.
34. In re-examination, PW2 stated that the will is a reflection of the 1996 subdivision by his father.
35. PET PW3, Bernard Muteti Mungata who is an advocate stated that he prepared the Will on behalf of the deceased on December 10, 1999. According to PW3, the deceased made the Will freely, subconsciously and executed the same on the particular date. He stated that he duly witnessed the Will. He produced the Will as Pet Exh 1-A.
36. In cross-examination by Tamata, PW3 stated that the Will he prepared is dated December 10, 1999 which captured the wishes of the deceased. He stated that he does not know from which the sons bequeathed plots 179 and 333 hailed from. He confirmed that Francis Kivuitu Nzove, Boniface Makau Nzove and Daniel Wambua Nzove are witnesses in the Will and he was an independent witness. He stated that he can't tell the reasons why Kivindyo did not sign the document. He maintained that the maker of the Will was in good health at the time making the Will. He stated that he speaks fluent kamba language hence able to understand the instructions of the deceased.

### **Objectors Submissions**

37. According to the objectors, the deceased had distributed his properties on November 9, 1996. It has been submitted that the petitioners admitted and confirmed vide an application dated September 20, 2016 at paragraph (b) of the grounds of the application that the land had been distributed before the death of the deceased. Reference was made to the letters dated August 12, 1997 and November 1, 1996 from B M Mungata Advocates which according to the objectors confirm that there was distribution of the estate in 1996. According to the objectors, no objection was raised in 1996 apart from the letters which emanated from the petitioners' advocate.
38. It has been submitted that it is in the interest of justice that an order be made for the estate to be jointly administered by the three administrators appointed from each of the house as the current administrators are only from the 2<sup>nd</sup> house who intend to disinherit the other two houses as indicated in the mode of distribution. According to the objectors, the petitioners stand to suffer nothing if the estate is administered jointly hence their affidavit of protest should be allowed as prayed and the three administrators be appointed representing each house.
39. According to the objectors, the petitioners have not brought any independent witness to back up their averments. It has been submitted that the participation of B M Mungata, the author of the Will in the hearing is a clear conflict of interest. That it is more shocking that this cause was commenced as intestate. It has been submitted that the only people present were the petitioners/beneficiaries hence the Will purports to disinherit other houses. According to the objectors, the transfer of land to the petitioners were not effected. The objectors have asserted that they have called and availed independent clan witnesses who gave a true position on the ground, evidence that has not been successfully challenged by the petitioners.



40. The objectors urged the court to decline the confirmation as proposed by the petitioners and the estate be divided equally.

### **Petitioners Submissions**

41. According to the petitioners, the dispute is basically about distribution. On behalf of the petitioners, three issues proposed for determination are;
- a. Whether the deceased left behind a valid will
  - b. How the estate should be distributed
42. Regarding the first issue, it has been submitted that PW3 stated that the deceased was of sound mind and capable of making a testamentary document. That PW3 attested to the will as an independent witness hence the will is valid. According to the petitioners, the objectors did not challenge the validity of the Will. On the validity of the Will, reliance was placed on the case of *re Estate of Julius Mimano (Deceased)* [2019] eKLR. The Petitioners urged the court to find that the Will is valid.
43. As to how the estate should be distributed, it has been submitted that according to the deceased and his Will, the land should be sub-divided as follows;
- a. Muthetheni/Kionyweni/179(4.4 ha)
  - b. Muthetheni/Kionyweni/333(1.3 ha)  
To be shared equally between Francis Kivuitu Nzove, Boniface Makau Nzove and Daniel Wambua Nzove.
  - c. Muthetheni/Kionyweni/762(5.8 ha)  
Kivindy Nzove to get 5.23 ha and the remaining 0.57 ha to be shared equally among the four sons of the deceased.
  - d. Muthetheni/Kionyweni/332 and 704  
My father retained the two parcels of land for his 3<sup>rd</sup> wife and himself and since they are all deceased, they should go to the children Francisca Nduku Nzove who is also deceased.
44. The petitioners urged the court to distribute the estate as they have proposed and as per the deceased in his Will.

### **Determination**

45. The court has considered the pleadings, exhibits and *viva voce* evidence and Submissions filed on behalf of the respective parties.
46. The central issue for determination revolves around the document dated December 10, 1999 which has been described by the Petitioners as a Will and the proposed mode of distribution by the petitioners. The petitioners have urged the court to distribute the deceased's estate based on the said document. The objectors assert that the deceased had already subdivided his parcels of land in 1996 through the clan but no minutes have been tendered in court for reference purposes despite OB PW1 stating that the subdivision was reduced into writing.



47. PET PW1 admitted during cross-examination that at the time of filing the petition for grant of letters administration Intestate, the Will was not introduced to court. The Will was brought to the court's attention for the first time vide the 1<sup>st</sup> Petitioners response to the objectors affidavit in protest filed on October 6, 2015. The court notes that the proposed distribution attached to the Summons seeking confirmation of the grant is premised on the Will supported by the petitioners. The court notes that the consents in support of the petition for grant of letters of administration as well as summons seeking confirmation of the grant are not signed by all the beneficiaries contrary to Rule 26 of the [Probate & Administration Rules](#).
48. Under Rule 26 it is provided that;
- 1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
  - 2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.
49. The Petitioners have attached five title deeds to the summons seeking confirmation of the Grant which is sufficient evidence to conclude that the deceased was the registered owner of the five parcels of land. The Petitioners had listed the parcels of land in the Petition for letters of administration as properties of the deceased as well as all the beneficiaries of the deceased. The same information appears as well in the supporting affidavit of the 2<sup>nd</sup> Petitioner in support of the summons for confirmation of the grant but in the Schedule of distribution, only the 2<sup>nd</sup> house will share the five parcels of land amongst themselves. It is not in dispute that the deceased had three wives with each having children. The names or the number of children has not been disputed.
50. The document described as a will by the petitioners show that the deceased bequeathed gifts inter vivos the five parcels of land to only the children of the 2<sup>nd</sup> house. In his oral evidence, PET PW3, an advocate stated that he prepared the document on behalf of the deceased on December 10, 1999. According to the advocate, the deceased was in good health at the time of making the document.
51. Section 42 of the [Law of Succession Act](#) states that:
- “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.”
52. Section 28 of the Act provides that:
- “In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—



...

- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;..”

53. Gitari J in *Micheni Aphaxard Nyaga & 2 others vs. Robert Njue & 2 others* [2021] eKLR stated;

“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..”

54. In *Halsburys Laws of England* 4th Edition Volume 20(1) at paragraph 67 it is stated 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.”

55. It is stated 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 Wulve* [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)”



56. Sections 5-13 of Law of Succession Act prescribe content process and effect of a valid will. In the instant case although witnesses testified before the Trial Judge Hon D KKemei that the deceased was of sound mind in December,1999 and was able to state his wishes to his advocate who wrote them down, the Will was not witnessed as required by Section 11& 13 of Law of Succession Act which provide in part as follows;

Section 11 (c) LSA 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...

Section 13 (2) LSA provides;

A bequest to an attesting witness (including any direction as to payment of costs or charges) or a bequest to his or her spouse shall be void, unless the will is also attested by at least two additional competent and independent witnesses, in which case the bequest shall be valid.

57. The Will referred to was not witnessed by 2 competent witnesses but by the beneficiaries and now administrators. The effect of their gifts/allocations are not valid in law as 2 additional and competent witnesses did not sign the Will. Secondly, if the Will was in existence and valid, why did the administrators herein who were beneficiaries in the said Will and witnesses not file petition for grant of probate with Will annexed instead of petition for letters for administration intestate?

58. Why did the Administrators not disclose the Will to the rest of the deceased's family until confirmation of grant stage? Why was the Will not read to family of the deceased upon his death? Who was appointed Executor (s) of the Will? Why is the purported Will referenced 'Request for *Inter Vivos* Gift in Life of Another and not Will as referred to in the pleadings? All these factors vitiate the Court 's approval and endorsement of the Will and/or *Inter Vivos* Gift(s).

59. All the titles of properties were and are in the names of the deceased and from the evidence of record all 3 houses comprising of children of the deceased from the 3 wives reside on demarcated portions as was done by the clan as shown by evidence of the objector's witnesses who testified in court.

60. Thirdly, Article 27 of Constitution of Kenya provides that all persons are equal before the law and enjoy equal benefit and protection of the law. Sections 35 ,38 and /or 40 of Law of Succession Act Cap 160 mandates equal distribution of estate of the deceased amongst the children, where there is a surviving spouse or no surviving spouse or in a polygamous setup.

61. In the case Elizabeth Kamene Ndolo v George Matata Ndolo Ca 128 of 1995, it was held,

“ This court must however, recognize and accept the position that under provision of section 5 of the Act every adult Kenyan has unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given under section 5 must be exercised with responsibility and a testator exercising the freedom must bear in mind that in enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible for during his or her lifetime.”



62. In the case of the estate of *Francis Khaemba Lukhale (deceased)* Succession Cause No 13 OF 2009, the Court held;

“In considering this issue and addressing the needs of the dependants I will invoke the wide discretion donated to the court by Section 47 of the Act and Rule 73 of *Probate and Administration Rules* to make such orders as will ensure the ends of justice are met.”

63. It is not in dispute that the deceased died on May 2, 2000 while the document containing the gifts *inter vivos* was executed on December 20, 1999 hence the gifts qualify as such. The title deeds to the five parcels of land are still in the name of the deceased to date. OB PW3 stated that every house is occupying their portions. PET PW1 stated that he has been farming on parcel No 179 since 1984. The court’s view is that the fact of residing or farming on the parcels of land over the years does not qualify the gifts as gifts *inter vivos*.

64. Nyamweya J (as she was then) *in re Estate of the Late Gedion Mantbi Nzioka (Deceased)* [2015] eKLR stated as follows:

“...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.”

65. The court finds no evidentiary material such as consents to transfer or any signed transfer or any legal document before the court or on record to sufficiently conclude that the gifts were intended for the children of the 2<sup>nd</sup> house only.

66. The document does not show whether the deceased or the four children of the 2<sup>nd</sup> house bequeathed with the gifts were to do more than executing the document. The document shows that despite the deceased inviting all the four sons from the 2<sup>nd</sup> house to sign, one of the sons Kivindyo Nzoe did not sign the document. PET PW1 one of the sons accused Kivindyo Nzove of deliberately refusing to sign the document. He accused him of inviting the clan and not the deceased.

67. This evidence raises suspicion as to the authenticity of the document. The net estate of the deceased has only been bequeathed to the children of the 2<sup>nd</sup> house yet it is not in dispute that the deceased had 3 houses. The parcels of land are still in the name of the deceased.

68. I associate myself with Gikonyo J *In re Estate of the Muchai Gachiuka (Deceased)* [2018] eKLR where the Learned Judge held that:

“(7) The provisions in sections 28 and 42 of the *Law of Succession Act* embrace elegant principles of equity, equality and fairness in the distribution of the estate of the deceased to beneficiaries; it avoids double-portion syndrome and reins on greed of beneficiaries.”

69. The court finds absolutely no evidence to support the Petitioners claim that the deceased made gift *inter vivos*. This are imperfect gifts. Therefore, I find that the deceased made no gift *inter vivos* to his four sons from the 2<sup>nd</sup> house. If the five parcels of land qualified as gift *inter vivos* then they would not form part of the estate of the deceased for distribution to other beneficiaries.



70. Section 3 of the Act provides that “estate” means the free property of a deceased person while the “free property”, in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.
71. The court finds that the five parcels of land herein constitute assets that comprise of the estate of the deceased; property for distribution to the three houses hence the confirmation of the grant cannot proceed premised on the petitioners schedule of distribution dated August 15, 2014.

### **Disposition**

72. In the premises, the court finds as follows;
- a. That the affidavit in protest sworn and filed on November 11, 2014 has partially succeeded;
  - b. That the proposed mode of distribution in confirmation of the grant based on alleged Will and/or gift Inter vivos herein is set aside ;
  - c. That all the beneficiaries from the 1<sup>st</sup> and 3<sup>rd</sup> house each to meet and agree by consent on a person suitable from each house to be appointed as an administrator to act jointly with the current administrators;
  - d. That all the beneficiaries and administrators of the estate to meet and agree by consent in writing on the mode of distribution of the properties of the estate;
  - e. That all the beneficiaries to sign the consents in support of the mode of distribution;
  - f. That the five parcels of land shall be shared between the three houses;
  - g. That (c), (d) (e) & (f) to be complied within 90 days;
  - h. If any party is aggrieved the party may file Protest or move the court appropriately for hearing and determination of the dispute arising or
  - i. That the matter shall be mentioned thereafter 90days for further orders or directions;
  - j. The parties are members of one family, there shall be no orders as to costs.

It is so ordered

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**M.W MUIGAI**

**JUDGE**

