



**In re Estate of Waziri Mohamed Sudi alias Waziri Mohammed Sudi (Deceased)
(Succession Cause 43 of 2016) [2022] KEHC 14397 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 43 OF 2016
JN ONYIEGO, J
OCTOBER 21, 2022**

BETWEEN

VICTORIA NYAMVULA MAPENZI OBJECTOR

AND

SADAH KASUDI GUMBA 1ST RESPONDENT

DEDAN HASSAN MWALIMU 2ND RESPONDENT

JUDGMENT

1. The deceased herein died intestate on August 7, 2015 while domiciled in the United Kingdom. Consequently, the respondents in their capacity as widows to the deceased petitioned the Kadhi's Court Kilifi on October 25, 2016 vide Succession Case No 10 of 2016 seeking determination of the estate, legal heirs of the deceased, their shares and distribution of the deceased's estate in accordance with the Islamic law.
2. Upon discovery of the said proceedings, the Objector herein who claimed to be the 1st widow to the deceased moved this court vide a miscellaneous application seeking; stay of proceedings in the succession case before the Kadhi's Court, Kilifi; the succession case to be heard by this court and in the alternative; to transfer the Kadhi's Succession case to the high court for hearing and determination.
3. Through its ruling delivered on July 14, 2017, this court withdrew the matter from the Kadhi's Court and transferred the same to this court for hearing and determination. Vide a consent dated September 26, 2018, the respondents agreed to jointly file a formal petition in respect to the estate of the deceased in their capacity as widows of the deceased. The same was then filed on November 19, 2018 indicating the parties herein as the joint petitioners.
4. They then listed the following as the beneficiaries of the deceased;
 - a. Victoria Nyamvula Mapenzi – Widow



- b. Sadah Kasudi Gumba -Widow
 - c. Dadani Hassan Mwalimu-Widow
 - d. Mwanakombo Nimuranga Waziri-Daughter
 - e. Mohamamed Mumo Waziri-Son
 - f. Saumu Wayua Waziri –Daughter
 - g. Jumaa Nzuki Waziri-Son
 - h. Leila Wayua Waziri-Daughter
 - i. Aisha Waziri-Daughter
5. The following were listed as assets comprising the estate
- a. Title deed-title number LR No xxxx
 - b. Three storey matrimonial house at xxxx
 - c. House Plot No xxxxx City,UK
 - d. Plot bordering xxxx Secondary
 - e. Parcel of land –Kilifi xxxx
 - f. Land at xxxx
 - g. Unsurveyed plots in Lamu
 - h. Motor Vehicle Registration Number xxxx
 - i. Motor Vehicle Registration Number xxxx
 - j. Motor Vehicle Registration Number xxxx
 - k. Motor Vehicle xxxx
 - l. Motor Vehicle xxxx
 - m. National Bank Account No xxxx
 - n. Diamond Trust Bank Account No xxxx
 - o. Cooperative Bank Account No xxxx
 - p. HSBC Bank in UK Account No xxxx
 - q. Life Insurance Cover with UAP Insurance
 - r. Pension and terminal benefits at Technical University Mombasa
 - s. Mpesa account with Safaricom (xxxx) With liabilities of Kshs 1,000.000 being a balance of purchase of house on plot no xxxx
6. Subsequently, a grant of letters of administration intestate was issued to the three widows on September 25, 2020. However, due to some disagreements on the list of assets and individual party's entitlement, the respondents who are the 2nd and 3rd widow respectively, filed summons for



confirmation of grant on June 17, 2021 with a schedule of distribution of properties and copies of ownership documents annexed to the affidavit in support of the summons.

7. They proposed the estate to be shared out as follows;
 - a. Three storey building xxxx- 100% to Victoria 1st widow with her four children namely;Mwanakombo, Mohamed,Saumu and Jumaa
 - b. House in UK-10% -to Victoria 1st widow and her four children
 - c. Business premises building on plot No xxxx Mariakani -In equal share between the six children comprising the four children from the 1st widow's house and two children from the 3rd widow's house namely; Leila and Aisha
 - d. 10 acres at xxxx – in equal shares between the first 1st widow and her four children.
 - e. All M/Vs xxxx, xxxx, xxxx, xxxx and xxxx – To be shared equally amongst the deceased's six children
 - f. Plot No xxxx -100% to Sadah Kasudi Gumba the second widow
 - g. Plot at xxxx secondary -100% to Dadan the 3rd widow and her two children (Lela and Aisha)
 - h. APA life insurance – To be shared equally amongst the three widows
 - i. Pension, Sacco and terminal benefits – to be shared equally amongst the three widows
 - j. M-pesa No xxxx and NSSF- 100% to the 2nd and 3rd widow equally
 - k. Unsurveyed land in Lamu – To be shared equally between the three widows(petitioners)
 - l. Monies in Bank accounts diamond; national Bank; cooperative and HSBC Bank UK to be shared equally
8. Dissatisfied with the suggested mode of distribution, the objector (1st widow/1st petitioner) herein lodged a replying affidavit sworn on September 15, 2021 and filed on September 30, 2021 in response to the summons for confirmation of grant. She also filed an affidavit in protest against confirmation of grant sworn on September 15, 2021 and filed on October 14, 2021.
9. She stated that she was not in agreement with the mode of distribution proposed by the respondents herein on the grounds that they had included properties that were non-existent and one property that belongs to the deceased's extended family. She listed properties not belonging to the estate as; UK House No xxxx Hull City, United Kingdom which she stated that it does not belong to the deceased nor is it registered in the deceased's name; business premises building on Plot No xxxx Mariakani Township alleged to belong to the deceased's father and thus not an asset of the estate; xxxx plots alleged to be 7 acres and not 10; unsurveyed Lamu plots alleged to be unknown to her.
10. The objector further stated that her co-administrators omitted some properties for their own benefit which include; a house in Miritini in which the 1st respondent has possession/control and or is a beneficiary since the demise of the deceased and a house in Kilifi similarly in the possession/control of the 2nd respondent. The objector further stated that the pension, Sacco and terminal benefits of the deceased should be distributed as per the deceased's wishes to whoever he indicated as the next of kin or nominee.
11. She attached a copy of her proposed mode of distribution as follows;
 - a. Xxxx house – full share to Victoria 1st widow



- b. Tototo-xxxx-equally between mwanakombo and Mohamed 1st widow's children
 - c. xxxx-equally between Saumu and Jumaa 1stwidows children
 - d. Xxxx house – full to Sadah 2nd widow
 - e. Xxxx house – full to Dadani 3rd widow
 - f. Xxxx 1901 –to Leila and Aisha 3rd widow's children in equal share
 - g. Xxxx –in equal share to Leila and Aisha 3rd widow's children in equal share
 - h. Monies in National Bank; Diamond trust - to the deceased's six children at 12 % each
 - i. Cars to be sold and proceeds to be shared at 12% each to the six children
12. The respondents in response filed an affidavit sworn on October 7, 2021 and filed on same day. They termed the objector's allegations as baseless and unfounded.
 13. On the properties in dispute, the respondents stated as follows; the UK House No xxxx, Hull City, United Kingdom and Plot Number LR xxxx Kilifi(Tototo) belong to the deceased as per the ownership documents annexed in their affidavit in support of the summons for confirmation; the unsurveyed plots in Lamu are unregistered and as such have no titles hence no prejudice to the objector as it's their proposal to have the same equally distributed; the allegation of Kibao Kiche land being 7 acres and not 10 acres is unproven.
 14. That in any event, it was inconsequential as it is their proposal that the same be distributed amongst the objector and her four children. On the house in Miritini, they alleged that it was a lifetime gift to the 1st respondent and not registered in the names of the deceased thus not forming part of the estate of the deceased; that Plot Number LR No xxxx was a lifetime gift to the 2nd respondent as per the letter dated September 1, 2014 thus not forming part of the estate of the deceased.
 15. On the objector's request to have the pension, Sacco, terminal benefits and life assurance cover dues distributed as per the deceased's wishes, the respondents stated that the same was not viable as the deceased died intestate thus forming part of the estate of the deceased.
 16. The respondents further stated that the objector had raised similar issues in court on October 29, 2018 and the court asked her to provide evidence on the same but failed to do so. Both parties filed witness statements on December 7, 2021. They also agreed to canvass the matter by way of viva voce evidence.
 17. During the hearing, PW1 being the objector told the court that she was the first wife of the deceased whom she got married to in the year 1985 and that they were blessed with four children. It was her evidence that they used to stay in Mariakani Mwareni together with her parents in law before moving to their residence and later to the United Kingdom.
 18. It was further her evidence that she was aware of a property in Kilifi which was registered in trust for the family. That it is registered in the name of her father in-law hence it's not a subject of this estate. That the property in Fozo Mariakani was donated for construction of a mosque. Regarding the three storey building, it was her evidence that it was built in 1994 long before the respondents got married to the deceased. Further, she stated that the land in Kibao Kiche was bought through her joint effort with the deceased. She claimed that the land in Mariakani Secondary was bought in 2007 while the land in Kilifi/Kadzonzonzo belonged to the deceased.



19. She further told the court that she sold motor vehicles registration xxxx and xxxx, and that the Canter reg xxxx was not in use while xxxx has an issue with the DTB bank as it has a loan and that KBD was sold by the deceased.
20. It was her further evidence that the deceased fell sick in 2015 resulting to her coming back to Kenya to see him. That it was during that visit that she discovered of the two respondents as co-wives.
21. Touching on the Mwareni House, she told the court that it was the only property she had but she had no objection with the same being distributed if it was her late husband's wishes. On the mode of distribution, she referred the court to paragraph 35 of her witness statement which she invited the court to adopt.
22. In cross examination, it was PW1's evidence that motor vehicle Regn No xxxx had a pending case at the police station. Further, that she had no objection with the properties mentioned in paragraph 23-24 of her witness statement being given to the respondents and the pension scheme to go to the persons appointed as the next of kin by the deceased.
23. RW1 (the 1st respondent) told the court that she was the second wife of the deceased. That she was aware that the deceased had given out properties as gifts before his death being house without land in Miritini given to her and a house without land in Kilifi given to the third wife.
24. On the Mwareni Mariakani property, RW1 told the court that she was aware of the same as a matrimonial property built by the deceased. That the same was three floors with the first objector having the 1st floor, her the 2nd floor and, the 3rd respondent the 3rd floor.
25. On the UK house, she told the court that the same should be given to the objector. In cross examination, she stated that when the deceased married her, he had one house in the UK. That they were not blessed with any child but she had two children from another relationship.
26. It was also her evidence that the deceased had an account with Co-operative Bank. Further, that she did not make any contribution to the acquisition of the building at Mwareni Mariakani. That she was given the house in Miritini as a gift in respect of which a transfer was done before an advocate.
27. She further testified that the objector was married to the deceased for 30 years while she got married in the year 2010. That it was her wish to have the wishes of the deceased respected. RW2 the 2nd respondent in her evidence told the court that she was the third wife to the deceased married in 2013 and that they were blessed with two children. She basically adopted the evidence of RW1.
28. In cross examination, it was her evidence that she was gifted the house in Kilifi by the Deceased. That the deceased had a house in the UK which they suggested it be allocated to the objector. Upon closure of each party's case, parties agreed to file written submissions.

Objector's Submissions

29. The objector through her advocates Mjeni Mwatsama & Company Advocates filed her written submissions dated May 20, 2022 and submitted on three issues namely; whether shares, deposits and interests are subject to the *Law of Succession Act*; whether the three storey building at Mwareni-Mariakani should be considered the objector's matrimonial home together with the plot at xxxx and one plot in Madzimbandi; which mode of distribution is fair.
30. On the first issue, counsel submitted that shares, deposits and interests are not subject to the Law of Succession but to the doctrine of nomination. That nomination is one of the ways through which a



person bequeaths his assets. That where a person nominates another to be his /her nominee, the funds from that policy or scheme would be due to the nominee and not to the deceased's estate.

31. To Support her contention, counsel relied on the case of *in re estate of Carolyn Acheng Wagh (Deceased) [2015] eKLR* paragraph 6 and the case of *Benson Mutuma Muriungi v CEO Kenya Police Sacco & Another [2016] eKLR* Paragraph 14 where the court upheld the position that funds in cooperative societies, provident fund or pension scheme due to the deceased are payable to the deceased's nominee or in his absence the legal representative/s in accordance with the applicable law e.g the *Co-operative Societies Act* .
32. Learned counsel opined that nominations operate under the rules of a particular scheme and the person to whom the money ought to be paid is designated. That they only fall for distribution under the Law of Succession where the nomination has been revoked by the subsequent marriage of the nominator or by the death of the nominee before that of the nominator. That the subsequent marriage of the nominator in a polygamous set up does not revoke the nomination of the 1st wife as the marriage subsists. To support this argument, counsel relied on the case of *In Re Estate of Faith Muita (Deceased) [2016] eKLR* paragraph 5, 8 and 9.
33. Counsel further submitted that the efforts by the objector to access the deceased's pension and terminal benefits at Technical University of Mombasa, Life Insurance Cover and other benefits have been futile for the reasons that the respondents have given orders that she should not access the details without their consent and referred to the letter of September 26, 2019. That it has been impossible to establish who the nominee of the deceased is. Counsel urged the court to issue orders compelling the University to furnish the court with documents evidencing the nominees of the deceased. That the funds from the schemes should accrue and be payable to the nominee. That the court can only distribute the same in case there is no nomination.
34. On the second issue, counsel reiterated the objector's evidence on the acquisition and development of the said properties and submitted that there has been consensus that the implications of Section 40 of the Law Of Succession are unfair to a wife married for decades or more before a second or third wife ,yet she is required to share the estate of the deceased equally with the subsequent wives, as well as the children of the deceased regardless of whether or not she had contributed to the acquisition of the property comprising the estate.
35. Counsel relied on the *Succession Cause No 1033 of 1996 –in the matter of the Estate of Mwangi Giture (deceased)*, Koome J (as she then was) and the case of *In Re Estate of the late George Cheriro Chepkosiom (Deceased)[2017] eKLR* where the court awarded a higher share to the first wife in recognition of her contribution in acquiring the subject property before the other wife got married.
36. Further, counsel relied on Section 42 of the *Law of Succession Act* and submitted that since the deceased during his lifetime had allocated a house each to the first and second wife with the objector being the only one with no inheritance of a matrimonial home from her husband's estate, it would only be fair, just and equitable that the Mwareni-Mariakani house be left to the objector.
37. On the third issue, counsel submitted that the house in the UK xxxx, Hull City, business premises building on Plot No xxxx Mariakani Township and the unsurveyed plots in Lamu did not belong to the deceased.
38. On liabilities, counsel submitted that no documentary evidence had been adduced to support the same hence must fail. In conclusion, counsel urged the court to allow the objector's protest dated September 15, 2021 as prayed.



Respondents' submissions

39. The respondents on the other hand through their advocates KM Karimbhai filed their written submissions dated May 11, 2022. Counsel reiterated the content in the respondent's affidavit and further affidavit in support of the application on the mode of distribution of the estate of the deceased. It was further submitted that the proposed mode of distribution by the respondents was fair and the objector was the main beneficiary of the same.
40. In conclusion, counsel urged the court to find that the 3rd co-administrator has minor children who may not find justice on equal distribution approach.

Determination

41. I Have considered the protest and the responses therein, the evidence tendered in court and rival submissions by both counsel. Issues that emerge for determination are;
- a. What property constitutes the estate;
 - b. Whether the house in Miritini and house in Kilifi were given to the respondents as gifts *inter vivos*.
 - c. Which mode of distribution is Suitable.
42. In this case, there is no dispute on the list of beneficiaries nor is the fact that the deceased was a polygamous man. What is in dispute are the assets that form part of the estate of the deceased. The parties herein listed the following properties as the assets comprising the estate of the deceased;
- a. Title Deed-Title Number LR No xxxx)
 - b. Three Storey Matrimonial House at xxxx
 - c. House Plot No xxxx Hull City, UK
 - d. Plot Bordering xxxx Secondary
 - e. Parcel of Land xxxx
 - f. Land at Kibao Kiche
 - g. Unsurveyed Plots in Lamu
 - h. Motor Vehicle Registration Number xxxx
 - i. Motor Vehicle Registration Number xxxx
 - j. Motor Vehicle Registration Number xxxx
 - k. Motor Vehicle xxxx
 - l. Motor Vehicle xxxx
 - m. National Bank Account No xxxx
 - n. Diamond Trust Bank Account No xxxx
 - o. Cooperative Bank Account No xxxx
 - p. HSBC Bank in UK Account No xxxx



- q. Life Insurance Cover with UAP Insurance
 - r. Pension and Terminal Benefits at Technical University Mombasa
 - s. Mpesa Account with Safaricom xxxx)
43. The properties that are contested as to whether they comprise the estate or not are;
- a. House No xxxx, Hull City, United Kingdom
 - b. Business premises building on Plot No xxxx Mariakani Township
 - c. Kibao Kiche Plots
 - d. Unsurveyed Plots in Lamu
 - e. Pension, Sacco Shares and Terminal Benefits.
44. The objector's argument is that these properties do not form part of the assets of the estate of the deceased.
45. On the question regarding the assets of an estate of a deceased person, Section 3 of the law of succession is clear. It provides that a deceased person's estate entails free property in relation to a deceased person which property such person was legally competent freely to dispose during his life time in respect of which his interest has not been terminated by his death. In the case of *Benson Mutuma Muriungi v CEO Kenya Police Sacco & another* [2016] eKLR the court held as follows;
- According to the *Law of Succession Act*:
- 'Estate' means the free property of a deceased person;
- And:
- ' 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;
46. Regarding the UK House, the objector argued that it did not belong to the deceased and it is also not registered in the name of the deceased thus it does not form part of the estate of the deceased.
47. On the other hand, the respondents argued that the property in the UK belonged to the deceased and produced a portfolio from the Land Registry Kingston Upon Hull City Council, a copy of the map dated June 15, 2005, a Tenancy Agreement from January 8, 2011 to January 8, 2013 and a search dated July 14, 2005, all for property No xxxx, Hull, HU3 1DA.
48. It's unfortunate that the description issued by the respondents and the objector in respect to the said property in their affidavits does not match the description on the evidence adduced as they are referring to House No xxxx Hull City United Kingdom while the documents refer to property no xxxx. However, the details on the exhibits matches the details in the affidavit in support of the petition for grant of letters of administration. Since none of the parties is claiming the property, I will distribute it just like any property whose distribution has not been agreed upon.
49. The objector did not produce any documentary evidence to prove the contrary. The claim by the objector that the house was on mortgage and that it was repossessed by the bank was not substantiated. Therefore, this ground must fail hence the property is part of the estate



50. On property no xxxx Mariakani Township, the objector argued that it is a family property registered in the name of the deceased's father.
51. On the other hand, the respondents produced a search dated October 9, 2015 which showed the deceased as the registered owner. The objector did not produce documentary evidence to prove otherwise and thus it's my finding that the respondents have proved that the property belongs to the deceased hence forming part of the estate of the deceased.
52. For Kibao Kiche property, it was the objector's argument that the measurements were not correct as it is 7 acres and not 10 acres as alleged by the respondent. This is a fact that is unproven and one that does not go into the root of the issue of confirmation of the grant. This is a fact that can only be proved once a survey is done. The property is therefore classified as part of the estate the status of the measurements notwithstanding.
53. On the unsurveyed plots in Lamu, the objector argued that she was not aware of the same and that there was no evidence of the same. No evidence was adduced before court to prove ownership of the said properties as and thus it's difficult for this court to establish their existence. I will therefore hold that the property does not form part of the estate. However, once ownership is ascertained, parties shall be at liberty to apply for review of the certificate of the confirmed grant to include the property and share it out.
54. Regarding the property referred to as Mariseko by the objector, its existence was disputed. There was no evidence to prove that it exists. Accordingly, this court cannot distribute non-existent property. When the parties find evidence, they shall be at liberty to apply for inclusion and subsequent amendment of the confirmation certificate.
55. Torching on pension, Sacco shares and terminal benefits, the objector argued that the same should be given to the nominee of the deceased as they are not subject to distribution under the [Law of Succession Act](#).
56. On the other hand, the respondents argued that the same should be distributed equally as the deceased died intestate. They produced a form of discharge from Technical University of Mombasa to APA Life Assurance Limited for settlement of the last expense under the Technical University of Mombasa Staff Group Life Assurance Scheme dated September 9, 2015 and a Provisional Member Statement of Account from National Social Security Fund on the Pension Scheme dated September 27, 2018 all in the name of the deceased to prove the existence of the same.
57. While dealing with a similar issue, the court in the case of *In re Estate of Carolyn Acheng' Wagah (Deceased)* (supra) stated that;

' It is the law that the funds the subject of a nomination do not form part of the nominator's estate, and therefore such funds cannot pass under the will of the deceased or vest in his personal representative. Such funds are not subject to the succession process, and should be dealt with in accordance with the law governing the nomination. Nominations are statutory, in the sense of them being specifically provided for by a particular statute.'
58. Further, the court in the case of *Benson Mutuma Muriungi v CEO Kenya Police Sacco & another* (supra) stated,

' As a general rule, discretionary pension schemes may allow the contributor to nominate a third party who will receive the member's benefits on the death of the contributor. However, such nomination is merely indicative of the deceased's contributor wishes; it neither gives



property rights to the nominee nor legal ownership of any part of the Trust to the deceased contributor so as to form part of the deceased's estate. Similarly, the trustees are not bound to pay the nominated funds to the nominee. The reason is because the trustees are the legal owners of the Trust property. Nevertheless, the discretion of the Trustees is guided at first instance by the nomination which is taken to be the wishes of the deceased contributor. And where the trustees exercise their discretion in favour of the nominated person, they pay the lump sum or pension directly to the third party. See for example rule 19 of the Retirement Benefits (Individual Retirement Benefits Schemes) Regulations 2000, which provide that upon the death of a member, the benefits payable from the scheme should be paid to the nominated beneficiary, and if the deceased had not named a beneficiary, then the trustees should exercise their discretion in the distribution of the benefits to the dependants of the deceased.'

59. Regarding the life insurance benefits, the court was again referred to the case of *In re Estate of Carolyn Acheng' Wagah (Deceased)* (supra) where the court stated that;

' Life insurance policies, whether group or personal, are governed by the [Insurance Act](#), Cap 487, Laws of Kenya. Section 111(1), of the said Act provides for nomination of life policies. It states:-

'The holder of a policy of life assurance on his own life may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of death.'

60. Similar position was held in the case of *Kenya commercial bank vs Isaac Ingati Abong'oŃ another(2020) e KLR* where the court of appeal held that money already debited from the deceased's pensions' account is subject to distribution under the law of succession unlike money still held by the pension scheme. In William Musyoka book on law of succession at pages 235 and 236, he specifies categories of assets which do not vest in the deceased's personal estate representatives as follows; property held by the deceased as joint tenant; sums payable under a discretionary pension scheme; property subject matter of a donation mortis causa; and property of the deceased which is the subject of a statutory nomination made by the deceased.

61. In the instant case, parties have not established whether the deceased had nominated a nominee in respect to the pension scheme and the life assurance cover. Therefore, it is difficult for this court to confirm who the beneficiary is. However, I have to make it clear that this money is not available for distribution as distribution will be governed under the relevant laws in this case the Retirement Benefits Authority Act in case of pension, cooperatives Act in the case of Sacco funds, NSSF fund under the NSSF Act and [Insurance Act](#) in the case of the insurance claim

62. On whether the deceased during his life time had gifted the respondents, the two properties being a house in Mirirtini and another in Kilifi xxx parties were in agreement. See [In re Estate of Godana Songoro Guyo \(Deceased\)\[2020\] eKLR](#) where the court stated;

' What is the requirement of law as far as a gift inter vivos is concerned? I find useful guidance in Nyamweya J in her decision in the case of *Re Estate of the Late Gedion Manthi Nzioka (Deceased)* [2015] eKLR, where she 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.'?

63. When someone makes a gift to another with the intention of vesting it wholly on that other person and will not be expected to revert back to himself, then such disposition arising thereto ought to be validated.
64. The respondents herein produced a transfer of house without land in Miritini dated November 5, 2013 to the 1st respondent and a letter dated September 1, 2014 for transfer of property no xxxx, Mtaani, Kilifi Township to the 2nd respondent.
65. The objector on the other told the court that she had no problem with the respondents keeping the said property. She also conceded to the said properties being gifts to the respondents from the deceased in paragraph 23 of her witness statement where she stated;
- ' That I have no issue with the second wife Sadah and third wife Dadani keeping the respective houses in Mirirtini –Mombasa and Kilifi as it was bought for them while married to Waziri Mohamed Sudi alias Waziri Mohamed Sudi (deceased) despite me doubting the authenticity of the signatures in the said letters.'
66. Accordingly, it's my finding that the said properties are gifts and do not form part of the deceased. See In re Estate of Godana Songoro Guyo (Deceased)[supra] where the court stated,
- ' As I have mentioned elsewhere, gift does not form part of the estate property for distribution to other beneficiaries, for, it is no longer the free property of the deceased.'
67. Regarding the three storey building at Mwareni mariakani, both parties agreed that it be given to the first wife the objector herein hence I have no reason to interfere with that arrangement.
68. Having isolated properties which do not constitute the estate and those that are not disputed, I am left with the following assets which are disputed for distribution;
- a. Uk house No xxxx
 - b. Building on plot no xxxx mariakani
 - c. 10 Acres at kibao kiche
 - d. Motor vehicles xxxx, xxxx, xxxx, xxxx and xxxx
 - e. Plot no xxxx
 - f. Plot at xxxx Secondary
 - g. Cash in various accounts
 - h. M-Pesa No xxxx
69. Which law is then applicable in distributing the properties identified above for distribution. The objector in her witness statement and schedule of proposed distribution urged the court to take into consideration her contribution into the acquisition of the properties of the estate of the deceased and the fact that she was married to the deceased for 30 years. In her proposed schedule of distribution,



she indicated that only a half of the share of the following properties was available for distribution to the other beneficiaries;

70. There is no dispute that the deceased in this case died a polygamous man. Although originally the suit was filed before the kadhi and distribution sought to be under Islamic law, none of the parties has invoked the application of Islamic law. Since the suit was freshly filed before the high court with the first petitioner arguing that she married the deceased under Christian marriage, I will apply the *Law Of Succession Act* to distribute the estate;
71. The deceased having died, a polygamous man, Section 40 of the *Law of Succession Act* which deals with the issue of polygamous families shall apply. For avoidance of doubt, Section 40 provides as follows;
Section 40 (1):-
'Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.'
Section 40 (2):-
'The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in sections 35 to 38.'
72. In this case, the 1st household has four children, the second none and the third two. The three surviving widows shall therefore be added as additional units to the six children making up a total of nine units in the ratio of 5;1;3 representing three houses respectively who shall then share the estate. The objector claims that only half of the estate is available for distribution as most of them were acquired during the subsistence of her marriage with the deceased and before the marriage of her co-wives.
73. Further, it is the objector's case that when they moved to United Kingdom she had to work extra hard to pay the bills and ease the burden of house expenses, and also assist the deceased with school fees as the deceased being a student could only work up to 16 hours a week thus she had to work more hours to enable them sustain the family, pay bills, support the family and childcare.
74. Further, she stated that through her savings with the deceased, they placed a deposit on the UK house and in 2005 she came back to Kenya and oversaw the construction of the first floor of the Mariakani House. That they also bought land and built houses as a plan for their retirement. These properties include the Kibao Kiche plot and plot in Madzimbandi bought before their relocation to the United Kingdom.
75. The question that then arises is whether the objector's contribution to the acquisition of the suit properties should be taken into consideration.
76. The court of appeal faced with a similar situation in the case of *Esther Wanjiru Gitathu v Mary Wanjiru Gitathu [2019] eKLR* had this to say:

' We would agree with the trial judge, that there was a resulting trust arising in favour of Mary, in regard to these properties. Mary having been an active participant in the acquisition of the properties, the apportionment of 50% interest adopted by the learned judge in accordance with the maxim equality is equity cannot be faulted.

We come to the conclusion that in addition to properties acquired by the deceased from 1985 to his death, it is only half of the properties acquired by the deceased between 1968 and 1984 that is available for distribution. Thus, we are in agreement with the finding of



the learned judge that only half of the immovable properties acquired by the deceased prior to 1984 and all the properties acquired by the deceased thereafter shall constitute the free estate of the deceased to be divided in accordance with the Law of Succession Act.'

77. The respondents did not dispute the fact that the objector was married to the deceased for 30 years and that most of the properties were acquired during the subsistence of the marriage between the deceased and the objector. Since there is no evidence that any of those properties listed under paragraph 75 above were acquired after 2010, I will hold that save for cash in the aforesaid safari-com account, only 50% of those immovable properties shall be shared out equally amongst the nine beneficiaries and the other half (50%) shall be shared out to the objector absolutely
78. Regarding cash in the safari-com account, I will use my discretion to award the same in equal share to Leila and Aisha being children although their age was not specified. Cash in the various specified bank accounts shall be shared equally amongst the nine beneficiaries in equal share. As to Motor vehicles which the objector said are no longer there, she is directed to account for the same within 45 days to enable the court determine on their fate and if she benefitted from their sale albeit illegally, the accrued benefit shall be taken into account when releasing funds from the bank
79. Regarding liabilities, nobody came up as a creditor to demand payment. To that extent I do not see any justifiable reason to support that claim. Accordingly, the following assets shall be shared as follows
- a. Three storey matrimonial house at xxxx in Mariakani to Victoria Nyamvula Absolutely
 - b. Uk house plot No xxxx to be sold and proceeds shared at 50% to Victoria Nyamvula Mapenzi absolutely and the balance of 50% to be shared out between the nine beneficiaries among them the six children and three widows in equal share.
 - c. Building on plot No xxxx mariakani. 50% share to Victoria Nyamvula Mapenzi absolutely and the remaining 50% share to the nine beneficiaries among them the six children and three widows (petitioners) in equal share.
 - d. 10 Acres at kibao kiche 50% absolutely to Victoria Nyamvula Mapenzi and the balance of 50% to the nine beneficiaries aforesaid in equal share
 - e. That the objector to account for Motor vehicles xxxx, xxxx,xxxx, xxxx and xxxx within 45 days of this ruling
 - f. Plot no xxxx to be shared at 50% to Victoria Nyamvula Mapenzi and the remaining 50% to be shared out equally amongst the nine beneficiaries among them the six children and the three widows
 - g. Plot at xxxx Secondary to be shared out at 50% to Victoria absolutely and the balance of 50% between the nine beneficiaries in equal share
 - h. M-Pesa No xxxx funds to be shared equally amongst Leila Waziri and Aisha Waziri
 - i. Funds in National Bank account No xxxx, Diamond Trust Bank No xxxx, Cop bank acc xxxx and HSBC bank in UK account no xxxx to be shared equally amongst the Nine beneficiaries
 - j. Pension, cash in Sacco account, NSSF funds and insurance policy to be governed under the relevant and applicable laws or statutes

DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA ON 21ST THIS DAY OF OCTOBER, 2022



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J.N.ONYIEGO
JUDGE

