



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO 245 OF 2006

IN THE MATTER OF THE ESTATE OF PETER MUNYAO MUU-DECEASED

SHANDRACK KISILU MUNYAO.....PETITIONER

-VERSUS-

FRANCIS MUU MUNYAO AND OTHERS.....PROTESTORS

RULING

1. The deceased herein, **Peter Munyao Muu**, died on 16th January, 1999. He was married to two widows namely **Eva Mukenyi Munyao** (**Eva**) being the 1st wife and **Grace Ngina Munyao** (**Grace**), the 2nd wife. **Eva** was blessed with two daughters, **Esther Mbeneka** and **Lydia Kavesu Munyao** and four sons namely **Isaiah Musau Munyao**, **Joshua Mwanzia Munyao**, **Josephat Ngotho Munyao** and **Timothy Kioko Munyao**. On the other hand, **Grace** had seven (7) children three sons and four daughters namely **James Kilonzo Munyao** (deceased), **Shadrack Kisilu Munyao** (the Petitioner), **Francis Muu Munyao**, **Rose Ndinda Munyao**, **Joyce Wandii Munyao**, **Francisca Mueni Munyao** and **Dorcias Mbithe Munyao**. While **Grace** passed on 11/11/2002, **Eva** passed on during the pendency of the hearing of this cause.

2. On 18th December, 2006, a grant of letters of administration intestate was issued to the petitioner herein and on 25th July, 2011, a consent regarding the distribution of part of the deceased's estate was recorded in the following terms:

- 1) The property known as Title No. Athi River /Athi River Block I/2301 goes to **Eva Mukenyi Munyao** and her family.
- 2) The property known as Title Donyo Sabuk.Kiboli Bolck I/760 goes to **Grace Ngina Munyao** and her family.
- 3) The property known as Title No. 2053 Mbee Adjudication section be shared equally between **Eva Mukenyi Munyao** and **Grace Ngina Munyao** and their immediate families.
- 4) That the property known as plot No. 3338 Mbee Adjudication section be left wholly to the **Grace Ngina Munyao** and her family.
- 5) That the property known as plot No. 3340 Mbee Adjudication section be shared equally between **Eva Mukenyi Munyao** and **Samuel Ngei Munyao** and their respective families.
- 6) The property known as Title No. Mitaboni.Mutituni/138 be apportioned as follows:
 - (a)That the portion with coffee plantation be shared equally between **Eva Mukenyi Munyao** and **Sara Ngina Munyao** and their immediate families.
 - (b)That the portion with maize plantation and the homestead be left wholly to **Eva Mukenyi Munyao** and her family.
- 7) That the property known as title No. Mumbuni/Kasinga/580 be left wholly to **Eva Mukenyi Munyao** and her family.
- 8) That the parties do adduce oral evidence on distribution of plot Nos. 68 and 70 in Mutituni Market, plot No. 3339 Mbee Adjudication section and plot No. 391 Mbee Adjudication section.

3. However, on 11th May, 2012 Summons for revocation of the said grant was filed and on 13th July, 2012 the following consent was

recorded:

- 1) **Francis Muu Munyao, Isaiah Munyao, Joseph Ngotho Munyao** together with **Shadrack Kisilu Munyao** are appointed co-administrators of the estate.
- 2) A fresh grant to issue.
- 3) A consent on distribution dated 25/7/2012 to remain valid.
- 4) Viva voce evidence shall be taken in respect of the four properties in dispute.
- 5) The application for confirmation of grant and the protest already filed shall be deemed as having been filed after the issuance of the fresh grant and will be dealt with that way.

4. On 20th November, 2013, **Shadrack Kisilu Munyao**, the Petitioner, applied for the confirmation of the Grant while **Isaiah Musau Munyao** filed an affidavit of protest.

5. The Petitioner further filed an application dated 27th January, 2014 seeking to have the consent recorded on 25th July, 2011 on distribution be reviewed in so far as it related to the distribution of Land Parcel No. 3339 and 3340, Mbee Adjudication Section, Machakos County (currently Mitamboni/Mbee/3339 and currently Mitamboni/Mbee/3340). According to the Petitioner, at the time the consent was recorded, there was an honest but mistaken believe on his part that Land Parcel No. 3339 (currently Mitamboni/Mbee/3339) and Land Parcel No. 3340, Mbee Adjudication Section, Machakos County (currently Mitamboni/Mbee/3340) were both swampy areas/wet land (Kyanda). He however subsequently established that Land Parcel No. 3339 is the swampy area/land whereas Land Parcel No.3340, comprises of the dry land (high land). In his view, Land Parcel No.3340 should be given to the house of **Grace** as a whole whereas Land Parcel No. 3339 should be divided between the houses of **Eva** and **Grace** in equal shares contrary to the said consent since it was intended that Land Parcel No. 3339 which is a swamp or wet land, be shared between the houses of **Eva** and **Grace** in equal shares hence a review or the varying of the consent aforesaid will give the true intention of the parties, the meaning and effect to the consent. That application was however opposed. It was directed that both the Summons for Confirmation of Grant and the said application be disposed of by way of oral evidence.

6. In support of his case the Petitioner relied on the supporting affidavit to the summons for confirmation of grant sworn on 20/11/2013 and filed in court on 20/11/2013, statement by the Petitioner dated 25/1/2016 and filed in court on 3/2/2016, his further affidavit in support sworn on 3/2/2016 and filed in court on 3/2/2016, list of documents dated 3/2/2016 and filed in court on 3/2/2016, a supplementary affidavit sworn on 29/6/2016, the summons dated 29/6/2016 and filed in court on 29/6/2016 seeking to set aside, vary and/or review the consent made on 25/7/2011, a supplementary affidavit sworn on 28/9/2016 and filed in court on 5/10/2016, the further statement dated 28/9/2016 and filed in court on 5/10/2016, statement by Musyoka Mutua dated 25/4/2017 and filed in court on 26/4/2017 and the Petitioner's supplementary list of documents dated 26/4/2017 and filed in court on 26/4/2017.

7. According to the Petitioner, **Shadrack Kisilu Munyao (PW1)**, he was from Lita sub location in Kathiani sub county, Machakos County and he was for the 2nd house of **Grace**. It was his evidence that the deceased died before **Grace** who died on 11/11/2012. Though the parties agreed on the distribution of the estate on 25/7/2011 and he had no problem with the same save for plot 3340, there was no agreement as regards Parcel No. 391/Mbee Adjudication Section in Machakos County, Parcel number 3339 in Mbee Adjudication Section, Plot 69 in Mutituni Market and Plot 70 in Mutituni Machakos County. He however had issues with the manner in which Plot No. 3340 was distributed.

8. Regarding plot 68 Mutituni, it was his evidence that the same had been sold to **Nelson Mulinge Kiva** by the deceased based on an agreement dated 29-2-1996 which he exhibited. He however admitted that none of the family members was present during the transaction including himself. He also exhibited demand notice for rates dated 20-3-1998. Before the deceased sold the said plot, he went to the clan and was written a letter dated 29th February, 1996 which he exhibited. According to him, since **Nelson Mulinge** did not pay for the plot due to the objection by **Eva** to the said transaction, the same ought to be divided between the two houses of the deceased as the buyer is only interested in the refund of his money. According to the Petitioner, it is only this plot that is in the name of the deceased as the other properties in the deceased's name are farms.

9. As regards Plot No. 70, the Petitioner testified that the deceased had sold the same to him while he was alive and marked a letter dated 3/12/1993 allegedly written by the deceased to the Town Clerk, Machakos County Council through the Assistant Chief and the Area Councillor which according to him was attested by both the deceased's wives though the deceased did not sign it. It was his evidence that they went to the Council and the transfer was done on 3rd December, 2013 and he marked the receipts for the same. According to him, he sold the said plot to **Jonathan Mutua** on 30th May, 1998 and since he was a long distance driver, that transfer was done by the deceased. It was therefore his evidence that there is no plot 70 that can be distributed. Referred to the Protestors' witness statements he stated that they were referring to plot no. 71 as opposed to plot no. 70. Referred to the demand notices for plot no. 71, which were in the names of **Veronicah Muthu Kalei**, he stated that he did not know the said person. Based on the foregoing, the transfer was done on 3/12/2013 and a receipt issued. He marked both the letter and the receipt.

10. As for Plot No. 3339 and plot 3340, he reiterated that there was a mistake during the distribution. According to him, Plot 3340 is on highland where there is no water and that is where the deceased and his family had a home while plot 3339 is on wet land with a river running through it. Plot 3340 is where **Grace Ngina's** family is settled. Though in the consent they entered into on 25/7/2011 they had agreed that it be divided between the houses of **Eva** and **Grace** in equal shares, he discovered there was a mistake when he bought a map and found that the plot they had agreed to divide between the two houses was the one on wetland which is registered as plot 3339. While he had no issue with dividing plot 3339 between **Eva** and **Grace**, his problem was with dividing 3340. According to him, since the deceased wrote a will dated 10/2/1997 and the distribution is what they agreed on in the consent dated 25/7/2011, he prayed the deceased property be distributed according to the deceased will.

11. In cross-examination, it was his testimony that at the time he was born the said **Eva** was living in plot 3340 and that when **Grace** was married she found **Eva** staying in the said plot 3340 and the home was built by the deceased as his matrimonial home and who died in 1999 before **Grace** who died in 2006. However, by the time of the death of the deceased, only the deceased and **Grace** were living there since **Eva** had, due to family disagreement with the deceased, and after clan meeting, asked by the deceased to move to plot 138 in 1995 and built a house with her children. He however could not recall the year since he did not attend the said clan meeting. According to the Petitioner, he was staying with deceased in plot 3340 since 1992 and he was the one who used to take care of him.

12. While he insisted that plot no. 70 was sold to him by the deceased, he said there was no sale agreement for the same. He however insisted that the family of the deceased was there when the deceased sold the land to him on 30th December 1992. The transfer form (MFI 7), he confirmed had no receipt stamp of the council but insisted that the one at the council had. In his evidence, the current registered owner of plot 70 is **Jonathan Mutua** and he is the one who sold it to him. He however denied having sold any land to Pauline Peter.

13. According to the Petitioner, the pieces of land owned by the deceased which have water/swampy are 3339, 3338 & 580 while Plot 3340 has no wetland or water. In his view, plot 3340 should be given to **Grace** as that is how the deceased wrote in his will. However, if **Eva** is given 3340 she will have a large portion of land than **Grace** contrary to what the deceased's intention that the properties be divided equally. He reiterated that in the consent of 25/7/2011, **Grace** was given plot 3338, there was ½ of 3340, Donyo Sabuk 1/760, ½ of 138 which has coffee, ½ of 548, 3339, ½ of 2053. **Eva**, on the other hand, was given ½ of 3340, 580 and the part of the plot 138 which had no coffee, ½ of 138 with coffee, ½ of 548, 2053 and 391 and Athi River 1/230. That, according to him. means each house was given 7 portions.

14. PW2, **Musyoki Malei Mutua**, the assistant chief of Nduu sub location in Mutituni location in Machakos County testified that the deceased hailed from his clan and that the sub location of Nduu has 5 villages. While confirming that the deceased had two wives, **Eva** and **Grace**, it was his evidence that contrary to **Eva**'s statement that she hailed from Mbee sub location, **Eva** was staying in Mbukone village in Nduu sub location where he is the assistant chief and that she had a permanent home in his sub location where she had been staying long before PW2 was employed as an assistant chief from about 1995. According to the witness, Mbee is in Kathiani Sub County while Nduu is in Machakos Sub County and they are far apart. Previously, **Eva** used to live in Lita sub location which neighbours Nduu sub location and the two sub locations are divided by a road. Lita sub location where the deceased lived, is in Kathiani location and that is where **Shadrack** (PW1) stays. However, even before the death of the deceased **Eva** was already staying in Nduu sub location but he did not know why **Eva** moved to Nduu sub location.

15. PW3, **Mwikali Muthoka**, the Chief Officer for Lands and Urban Development testified that she had the records in relation to plot No. 70 which was in the name of **Mwanza Mutua** as the current owner while the original owner was **Peter Munyao Muu**, the deceased. According to her vide a letter dated 3/12/1993 addressed to the Town Clerk, Municipal Council of Machakos, the predecessor of the county government through the area councillor Mutituni Ngelani ward and area chief of Mutituni location, the owner of the plot indicated that he had agreed with his family to transfer the plot to **Shadrack Kisilu Munyao**, the Petitioner. The letter was received by the Municipal Council of Machakos on 14/12/1993 and bore the thumbprints and ID Nos. of **Grace** and **Eva**. The author of the said letter was **Peter Munyao Muu**-ID 6132369/69. According to the witness, the said letter was part of the county records and she produced it as petitioner's exhibit. According to the said records plot 70 no longer belongs to **Peter Munyao Muu** as the current owner of the plot is **Jonathan Mwanza Mutua**.

16. She also had the file for plot 68 it is in the name of **Peter Munyao Muu**. According to her, the land was intact and there had been no attempt to transfer the same. With respect to plot 71 she stated it was in the name of **Veronica Muelu Kaleli** and therefore does not belong to **Peter Munyao Muu**. She did not however have the file for plot 71 with her in court.

17. In cross-examination she stated that Plot No. 70 was transferred to **Jonathan Mwanza** by a letter date 5/7/1998 written by **Peter Munyao Muu**. The plot had however been given by the owner to **Shadrack Kisilu** by his letter of 3-12-1993. She did not have a transfer to **Shadrack Kisilu** or any transfer form from **Peter Munyao Muu** to **Jonathan Mwanza Mutua** on the file. There was also no transfer form from **Peter Munyao Muu** to **Shadrack Kisilu** Munyao. She admitted that the proper person to transfer to **Jonathan Mwanza** should have been **Shadrack Kisilu**, but no transfer was affected. She was however shown MFI 7 (transfer form) which she indicated she did not have a copy of in the file. However, the letter dated 3/12/1993 was stamped by the council as having been received on 14/-12/1993.

18. As regards plot 68, she disclosed that there was a letter dated 5/7/1998 in file from **Mrs Eva M. Munyao** objecting to the sale of the plot to any person though there was no request for transfer of the plot on file.

Protestors' Case

19. On their part, the objectors relied on an affidavit in protest by **Isaiah Musau Munyao** on 27/1/2014 and filed in court on 27/1/2017, statements by **Eva Mukenyi Munyao** (OW1), **Teresia Nduku** (OW2), **Isaiah Musau Munyao Munyao** (OW3), **Joshua Mwanza Munyao** (OW4), **Timothy Kioko Munyao** (OW5) and **Josephat Ngotho Munyao** (OW6).

20. According to **OW1, Eva Mukenyi Munyao**, the deceased had two wives and she was the first wife. When she was married a house was built for her at Mutondoni and when the 2nd wife **Grace** was married she went to live in her home. It was her evidence the said **Grace** was at first residing at Mutituni at a shop which **Eva** had built and that they did not live with her at Mutondoni where she was residing with her children to date. She added that she voluntarily decided to go and live with her children at Mutondoni because she was alone and not that the clan was the one that decided to move her to Mutondoni.

21. According to her, the deceased had two plots at Mutituni. One of the plots was used for vegetables which earlier belonged to **Kimango** and was bought from **Musyoka** and the deceased bequeathed it to **Grace**. The other plot belonged to her even before **Grace** was married had already been developed. One shop was given to **Grace** and the other one she had built with her husband belonged to her. However, the deceased he had other farms which were shared among his family members, including coffee farm and he had already divided his property including, the land and at Mutondoni (3340) which he divided equally.

22. In cross-examination she stated that she was staying with her children at Kiboko Kivuko though she was from Mbukoni where her

biological parents were. Though she knew the sub chief of Kivuko, she has forgotten his name due to old age and could not say whether PW2 was the one. According to her, before moving to Kivuko she was staying at Kathiani where she gave birth to all her children. After she moved from Mutituni where she was married, she moved to Mutondoni also known as Kithima and it is named after their farm. She admitted that she moved from Mutondoni after the death of the husband but when **Grace** was still alive.

23. She stated that most of her children were staying at Mutondoni while only **Shadrack Kisilu, Grace's** son was living in Mutondoni. It was her testimony that the deceased told her that he sub divided all the land. He had sub divided coffee at Kivuko and gave her a portion. In her testimony, there was no dispute between them as the deceased sub divided the plots during his lifetime. She however recalled having stopped the deceased from selling one of the plots because she told him that he had two wives.

24. In her evidence, one of the plots that was subdivided by the deceased while he was alive was a portion with water at Kithima in Mutondoni that was sub divided. The water is at the valley below and the houses and the home is at the top of the hill. She also knew that there was land at Kikuvani on which there is a road going to Katumi. There is a market and shops there.

25. OW2, **Teresia Nduku Munyao**, testified that she knew the deceased who had two wives and two plots at Mutituni, on which he used to do business, one for the company and one personal one. One of the wives was **Eva**. According to her, her husband, **Wambua Mukau**, was living in one of the said plots and the only wife she found at the plots was **Eva Mukenyi**. It was her evidence that the plot for the company was given to **Eva Mukenyi** and the other one to the younger wife.

26. In cross-examination she disclosed that both herself and **Eva** were from Nduu sub location but a bit far from her home. According to her, **Eva** was staying at Lita Kile before she moved to Nduu and that the sub chief of Lita location is not the same as the one of Nduu. According to her, the sub chief for Nduu is called **Musyoki Mutua** (PW2) and is also the same sub chief for **Eva Mukenyi**. She reiterated that when **Grace** was married she found **Eva** had a shop on the plot for the company. The shop was built by **Eva** together with the company. According to her, the deceased gave the shop to **Eva** and **Eva** built the shop.

27. According to PW3, **Isaiah Muasu Munyao**, the first born son of **Eva**, the deceased used to live at plot 3340 with his two wives. The said plot has portion of water at three places and is the main water supplier to Mitaboni. It was his evidence that **Shadrack Kisilu**, the Petitioner is the fourth born. Before **Eva** went to live with them, she was staying at plot 3340 where they built their house in 1947. After the deceased died **Eva** was left alone and she had no child who was staying with her at the time. She was now staying with her children in different homes of her choice. He however denied that it was the clan that moved **Eva** to where they stay.

28. It was his evidence that he was staying on plot number 138 while **Shadrack** was on plot number 2053 with their younger brother called **Timothy Kioko**. According to him, their deceased father had two plots at Mutituni. There was plot No. 68 which was initially owned by six people who sold it to him and he later bought plot 70 and not plot 71 as was erroneously indicated in his statement. The error, according to him, was caused by a relative who misled them when they went to check at the county council where it was indicated as plot 71 but they later got to know it was plot 70. He however was unaware that plot 70 was given to **Shadrack** as neither himself nor the other children were involved in the alleged transaction. He also denied that plot 3340 was given to **Grace** as it was his mother's matrimonial home built by the deceased 16 years before he married the other wife. According to him, the deceased stated that plot 3339 be divided into two, one half for **Grace** and the other for **Eva**. However, plot 391, was not to be divided but was to be given to **Eva** as she was the first wife and she was given as a gift in appreciation by the deceased because they had acquired properties together before the second wife was married. It used to be a forest, though it had been offered to the said **Shadrack** by the deceased he refused because it was a forest.

29. According to OW3, Plot 3340, 3339 and 580 also have water and Plot 580 was given to **Eva**, Plot 3338 was given to **Grace**. It was his evidence that Plots 3340 and 3339 be divided equally so that each family gets from portion of water. As regards the alleged will, he stated that he had never seen the same and only saw it for the first time in court.

30. According to him, there were no grounds to set aside the consent they agreed, filed and was adopted by court since **Shadrack** knew where 3340 was and the deceased used to involve all of them in his affairs and said that his wives should be buried in plot number 3340 and that is where **Grace** and the deceased are buried.

31. In cross-examination, he stated that when his father died, the Land Parcels did not have registration number or title numbers. He confirmed that he was from Nduu sub location, whose sub chief was PW2, **Musyoka Mutua**. It was his evidence that his mother was only on a visit and her home was on plot 138 where she is currently staying. She last stayed in plot 3340 in 1999 and that when their father died, she had a house there. While he was aware that the deceased divided his properties before he died, he insisted that he had not read the will produced by **Shadrack Kisilu** and did not know that the will divided the land by their names. According to him, plot 70 is still in the deceased's name and the plots with water are 3340, 3339 and 3338 and they are separated from and do not adjoin each other since there is land between 3340 and 3339 which belong to his father's brothers. There is a river that supplies 3340 with water and also supplies Mitaboni with water. The river is on both sides of 3340 and meets at the front. It has traversed plot 3340 and 3339 while 3338 which is bigger is far from the two plots and is not adjoining them.

32. According to him, Plot number 3339 was given to two widows/wives. On Plot 3340, the deceased constructed for the 1st wife and the 2nd wife was married there. It is also divided into two. He prayed the same be divided equally as already done.

33. OW4, **Joshua Mwanzia Munyao**, a son of the deceased testified that he was from Lita Machakos and the deceased had two wives. **Shadrack** Munyao the Petitioner was his step brother. He corrected his statement by indicating that he meant plot 70 and not plot 71 Mutituni which was owned by the deceased.

34. According to him, Plot number 3340 is settled by both wives of the deceased and they have permanent houses there. It has a swampy and a dry part and should be shared equally same as Plot number 548 Kaewa adjudication section. According to him, Plot number 68 Mutituni was given to **Eva** since **Eva** built it with the deceased, **Theresia Nduku Wambua** and others before the 2nd wife was married while plot

number 70 was given to **Grace** Ngina. After the 2nd wife was married, the deceased purchased plot number 70 which was given to the said 2nd wife. In his evidence, Plot 3339 should be shared equally, since plot number 3338 Mbee adjudication section given to **Grace** Ngina which is bigger and has both a swampy area and another big section while **Eva Mukenyi** was given Mitaboni/Mutituni/138 which is dry section and plot number Mumbuni/Kasinga/580 which is a swampy area as compensation for she did not get any share in 3338.

35. He prayed the court does distribute the property as proposed in his statement according to my father's wishes.

36. In cross-examination, he stated that the deceased had distributed his properties and he had written his wishes. According to him, the deceased had not sold plot No. 70 as there was no evidence to that effect. He reiterated that the deceased's lands with a river passing through are 3340, 3339, 3338 and 580. According to him, part of 3340 where his mother house was constructed neighbours the river. That portion of 3339 was given to **Grace** because there is part neighbouring water and part of it which does not. He stated that **Eva** had no portion in plot 3339. Plot 3340 also has a portion with water and portion without. That plot is divided into two and it is now occupied by all of them.

37. It was his evidence that though **Isaiah, Mwanzia** and himself do not stay there, they were cultivating it. The people staying there are Francis, the son of **Grace** and his brother, **James Kilonzo**. He insisted that his mother is deceased but she never vacated 3340 and that at the time of her death she was staying in 3340 and that she did not vacate the said plot in 1999 as alleged. She was however buried in plot No. 138 which belongs to her son despite the fact that she died while staying in 3340.

38. According to him, Plot 3339 was given to **Grace** while the others were sub divided and it was his wish to have the plots sub divided as proposed in his statement.

39. The rest of the Protestors' witnesses reiterated the above testimonies.

The Petitioner's Submissions

40. On behalf of the Petitioner, it was submitted that Land Parcel No.3340, Mbee Adjudication Section, Machakos County should be given to the house of **Grace** as a whole whereas Land Parcel No. 3339, Mbee Adjudication Section, Machakos County should be divided between the houses of **Eva** and **Grace** in equal shares contrary to the consent made on 25/7/2011. It was the petitioners case that it is intended that Land Parcel No. 3339, Mbee Adjudication Section, Machakos County, which is a swamp or wet land, be shared between the houses of **Eva** and **Grace** in equal shares hence a review or the varying of the consent aforesaid will give the true intention of the parties, the meaning and effect to the consent made on 25/7/2011.

41. According to the Petitioner, based on the cases of **Martha Wanjiru Kimata & Anor vs. Dorcas Wanjiru & Anor [2015], and CA No. 12 of 1979 – Apeli vs. Buluku (2008) 1KLR**, the wishes of a deceased, though not binding must so far as practicable, be given effect, so long as the same is not contrary to custom or the general law or policy. In the instant case the deceased had died testate having made a valid will dated 15/2/1997, where he expressed his wishes. The will has never been revoked, nullified or invalidated. Moreover, the objectors did not place any caveat to demand proof of the will. The objectors/protestors further have never challenged the validity and/or the authenticity of the deceased's will aforesaid. No necessary action has been taken in the requisite jurisdiction to challenge the will. Moreover, there was no evidence that was led by the objectors to suggest that the said will was fabricated and/or the lack of the capacity of the testator (the deceased) to make the will at the material time and/or on non compliance with the formal requirements for the making of a will. Indeed, the issue of testamentary capacity of the deceased was never raised. The testator (the deceased) was of age and of sound mind at the material time.

42. It was submitted that the deceased made the will by himself, it was executed by him and reflect his will or wishes or intentions. He bequeathed and shared his property to his two wives in the manner stated in the will. The will reflects a true representation of the final testament of the wishes and intentions of the deceased. Indeed, the consent recorded on 25/7/2011 is in tandem with the intentions of the deceased as contained in the will dated 15/2/1997. The cases of **In Re Estate of Margaret Njambi Thuo (deceased [2019] eKLR** which cited with approval the case of **John Kinuthia Githinji vs. Githua Kiarie and Others Civil Appeal Number 63 of 1984** and **Karanja and another vs. Karanja (2002) 2 KLR 22** were quoted for the position that where, on the face of it, a will appears to have been properly executed by a person of age and sound mind, a presumption of due execution arises.

43. It was submitted that OW1, **Eva Mukenyi**, who was a widow of the deceased confirmed during cross-examination that she was aware that the deceased subdivided his property during his lifetime. Further OW3 **Isaiah Musau Munyao** during cross-examination also confirmed that the deceased distributed his property before he died. Indeed, he testified during cross-examination that "the deceased divided his land by name as they did not have numbers". The foregoing buttresses the will of the deceased dated 15/2/1997, since according to the said will, the deceased distributed his property by names. The foregoing was also confirmed by OW5 **Timothy Kioko Munyao** during cross-examination who stated that he was aware that the deceased had distributed his property before his demise by writing a will. It is thus explicit that the objectors/protestors are aware that the deceased left a valid will. The court was therefore urged to therefore distribute the property in dispute as per the wishes of the deceased as contained and expressed in the will dated 15/2/1997.

44. Nevertheless, the Court was urged to confirm the grant issued on 13/7/2012 as proposed by the petitioner. According to the submissions, based on the evidence on record, Plot No. 68, Mutituni Market should be sold and the proceeds therefor be subdivided between the houses of **Eva** and **Grace** in equal shares after a refund of the deposit on the purchase price to **Anderson Mulungye Kivuu**.

45. As regards Plot 70, Mutituni Market, Machakos. It was submitted that based on the evidence on record, that Plot currently belongs to **Mwanza Mutua** after he sold the plot to him. Hitherto the said plot had been sold and transferred to your petitioner by the deceased during his lifetime in the year 1993 and does not belong to the deceased. The protestors confirmed that they have to-date not challenged, either in court or otherwise, the sale and transfer of Plot no. 70 to the petitioner herein or the sale and transfer of Plot no. 70 to the said **Mwanza Mutua**. Even if the transfer of Plot No. 70, Mutituni Market to the Petitioner and the current owner was done fraudulently, which was not, the sale and transfer thereof cannot be challenged vide the succession proceedings herein. It was noted that the deceased never mentioned of plot No. 70 in his written wishes as contained in the will dated 15/2/1997 since he had sold it to the petitioner. According to the Petitioner since the deceased did not own Plot No. 70, Mutituni Market, Machakos County at the time of his death, the said plot was and is not

available for distribution to the dependants of the deceased as proposed by the protestors.

46. Regarding Land Parcel No. 3339, Mbee Adjudication Section, Machakos County (currently Mitamboni/Mbee/3339), it was submitted that the wishes of the deceased as contained in the will dated 15/2/1997 should be given effect. The deceased in the will dated 15/2/1997 at paragraph vi stated as follows “*the meadow (swamp) land which is below the homestead should be divided into two portions so that the upper side I have given **Mukenyi** and the lower side I have given **Ngilesi**”*. The land thereto referred, according to the Petitioner, is Land Parcel No. 3339, Mbee Adjudication Section, Machakos County. According to the petitioner, a swampy area or a wet land is a land near a river where sugar cane, arrow roots, vegetables and bananas are grown and that the deceased had three (3) swampy areas or wet land lands, namely Land Parcel No Mumbuni/ Kasinga/580; Machakos County; Land Parcel No. 3339, Mbee Adjudication Section, Machakos County and Land Parcel No. 3339, Mbee Adjudication Section, Machakos County. As per the consent recorded on 25/7/2011, the house of **Eva** has Land Parcel Mumbuni/Kasinga/580, Machakos County as a swampy area/wet land whereas **Grace** has Land Parcel No. 3338, Mbee Adjudication Section, Machakos County as a swampy area/wet land in accordance with the deceased’s will. In the circumstances if Land Parcel No. 3339, Mbee Adjudication Section, Machakos County was to be subdivided in the manner as proposed by the 2nd administrator, the house of **Eva** will have three (3) swampy areas whereas the house of **Grace** will only have two (2) swampy areas to their disadvantage. To the contrary if the said property is distributed as proposed by the Petitioner, each house shall have two (2) swampy areas/wet areas. Indeed, even to-date, each house utilizes its portion of the swampy area/wet area (syanda) as hereinabove elucidated. According to the submissions, both the petitioner and the objectors have confirmed that a swampy area is such an important land according to the Kamba tradition and customs. It was therefore submitted that as per the deceased written wishes as contained in the will dated 15/2/1997, Land Parcel No. 3340, Mbee Adjudication Section, Machakos County (currently Mitamboni/Mbee/3340) was bequeathed to the house of **Eva Mukenyi Munyao** and **Grace Ngina Munyao** to subdivide in equal shares and this honourable court should give a meaning and effect to the deceased’s will dated 15/2/1997.

47. It was reiterated that at the time the consent was recorded on 25/7/2011, there was a honest but mistaken believe on the part of the petitioner that Land Parcel No. 3339 and 3340, Mbee Adjudication Section, Machakos County were all swampy areas and/or wet lands(Kyanda). That there was a mistake at the time of recording the consent on 25/7/2011 since title deeds in the said adjudication section had not been issued. That title deeds were issued subsequent thereto, just before the hearing of this cause and after your petitioner purchased the area map wherein he established that Land Parcel No. 3339, Mbee Adjudication Section, Machakos County was the swampy area/land or wet land with water whereas Land Parcel No.3340, Mbee Adjudication Section, Machakos County comprised of the highland where there is no water.

48. Based on the evidence relating to where the widows were staying, their burial places and who was in occupation of 3340 and 158, it was submitted that Land Parcel No.3340, Mbee Adjudication Section, Machakos County, which is a dry land with no water, should be given to the house of **Grace Ngina Munyao** as a whole contrary to the consent made on 25/7/2011 based on the deceased’s will at paragraph iv where he stated that “*the land which is here I reside at Kithusi I have given to **Ngilesi alone**”*

49. As regards Land Parcel No. 391, Mbee Adjudication Section, Machakos County (currently Mitamboni/Mbee/391), it was submitted that the deceased expressed his wishes in writing on 15/2/1997 on how he wished Plot No. 391, Mbee Adjudication Section, Machakos County (currently Mitamboni/Mbee/391), which comprises of commercial plots to be distributed between his two houses. Accordingly, the court was urged to order that Land Parcel No. 391, Mbee Adjudication Section, Machakos County (currently Mitamboni/Mbee/391) be subdivided in equal shares between the house of **Eva** and **Grace**.

Protestors Submissions

50. It was submitted on behalf of the Protestors that the above consents were recorded with the knowledge of all the parties and they were even present in court on 25/7/2012. The same consent for was confirmed a year later on 13/7/2012 when the 2nd consent was recorded and adopted. According to the Protestor, the petitioner /4th applicant **Shandack Kisili Munyao** is the only person who is challenging the consent and all parties are satisfied with it. He has not adduced any evidence to show that there was fraud, undue influence mistake or any valid reason whatsoever. While his only ground is that he later realized plot number 3339 and 3340 Mbee adjudication section were swampy, he has not called any evidence or report to show that the both piece of land are not swampy. To the contrary the objector and all the witnesses have informed the court that the two portions of land namely plot number 3339 and 3340 Mbee adjudication section have both swampy and dry areas. They also informed the court that the house of the petitioner was also given other lands being Mumbuni/Kasinga/580 and Title No. Mitaboni/Mutituni/138 all of which are swampy. That notwithstanding, it was submitted that there was no mistake at all to warrant the setting aside of the consent judgment or order. They relied on the cases of **S M N -vs- Z M S & 3 Others [2017] eKLR**, and **Mursal Guleid & 2 Others vs. Daniel Kioko Musau [2020] eKLR** and submitted that all the facts were within the knowledge of the petitioner before and as at the time the consent was recorded and confirmed again, a year later. Similarly, it was submitted based on the case of **National Bank of Kenya Limited vs. Ndungu Njau [1997] eKLR** that there is no clear ground for review in this matter to warrant the court setting aside the consent order. According to the Objectors, there was no mistake and the portions of land he alleges are not swampy other than his word, there is nothing else to support.

51. According to the protestors, the evidence on record was that Plot number 68 Mutituni was given to **Eva Mukenyi Munyao** who is he first wife. The reason was that she is the one who developed it longtime ago before the 2nd wife was married. **Eva Mukenyi Munyao**, the first wife of the deceased, narrated how the plot was acquired. She explained how this plot and plot 70 were shared by the deceased for each family. The deceased had attempted to sell plot number 68 but she objected by writing a letter to the municipal counsel and that is how it was salvaged. The reason why she objected is because the she had been allocated the plot and the 2nd wife had been allocated Plot number 70 and thus he could not sell the plot for the first family. Petitioners witness 3, **Mwikali Muthoka**, an officer from the county told the court that the plot number 68 was still in the name of the deceased and confirmed that she had a letter on file from Mrs **Eva Mukenyi Munyao** dated 5/7/1998 objecting to the sale of the plot to any person. The alleged sale agreement, it was submitted was a mere forgery and the alleged process of transfer was doubtful. According to the Protestors, the petitioner used crafty and illegal ways to change ownership of plot number 70 to defraud the rest of the family members. Since the plot was allocated to the Petitioner’s family and he sold it, it was submitted that the 1st family should not be disadvantaged due to his actions.

52. Regarding Plot No. 3339 Mbee Adjudication section, it was submitted that the protestors' evidence is that plot number 3339 is also swampy and should be shared equally between the two houses. The petitioner alone told the court the plot does not have a swampy area which is false. It cannot go to his house alone and should be shared.

53. As for Plot No. 391 Mbee Adjudication section, it was submitted that according to the evidence of the protestors, the plot was given to **Eva Mukenyi** and should go to her. It was to be given to **Eva Mukenyi** as she was the first wife and she was given a gift of appreciation by the deceased because they had acquired properties together before the second wife was married. It used to be a forest, and it is not market. It is only that people have built on their plots. The said **Shadrack** had even been given the plot by their father and he refused because it was a forest. In the absence of any evidence that deceased did not give the plot to **Eva**, it was sought that the same be given to **Eva** exclusively.

54. Regarding the existence of a will, the Protestors relied on section 11 of the *Law of Succession Act*.

55. According to the Protestors, there is also an additional requirement that the will be registered under the section 4 of the *Registration of Documents Act*. The alleged will, it was submitted, is not even executed by the maker and on that ground alone it is just a mere paper. Further, no person who was present when the will was allegedly made was called as a witness. Reliance was placed on section 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya.

56. In this case it was submitted that the Petitioner did not prove the alleged will existed, or it was executed by the deceased or even register as required by the law hence the only conclusion is none existed at all.

57. The Protestors therefore prayed that the application for setting aside consent order of 25/7/2011 be dismissed with costs because the petitioner is acting in bad faith and the protest be allowed and the disputed four properties be distributed as proposed by the protestors in the interest of justice.

Determination

58. I have considered the issues raised herein.

59. The Petitioner seeks to have the consent recorded on 25th July, 2011, regarding the distribution of part of the deceased's estate set aside on the ground that he was mistaken as regards the true status of Land Parcel Nos. 3339 and 3340, Mbee Adjudication Section, Machakos County (currently Mitamboni/Mbee/3339 and Mitamboni/Mbee/3340 respectively). The consent order that is sought to be set aside in these proceedings was, no doubt, entered into by counsel who were duly instructed to act in the matter generally for their respective clients. In such circumstances the general rule was laid down by the Court of Appeal **Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another Civil Appeal No. 276 of 1997** where it was held that:

“A solicitor has a general authority to compromise on behalf of a client, if *bona fide* and not contrary to express negative direction; and it would seem that a solicitor acting as an agent for the principal solicitor has the same power. No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice...A consent order can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be settled which are not carried out.”

60. The locus classicus in applications for setting aside consent orders or judgements is the Court of Appeal decision in **Flora N. Wasike vs. Destimo Wamboko [1988] KLR 429; [1982-88] 1 KAR 625**. In that case the Court expressed itself as hereunder:

“It is well-settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out. If a consent is to be set aside, it can only really be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent persons...Prima facie a consent order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement...A court cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between the parties...In the instant case, while the Judge did not in terms record the parties' 'or their advocates' consent to the consent judgement he entered, nevertheless the original record shows that both parties were represented by advocates and that the consent judgement was recorded in their presence. The universal practice is to record that a judgement or order is by consent, if that be the case, and it is difficult to believe unless demonstrably shown otherwise that the court would so head the judgement if it were not the case, at least so far as the Judge was aware. Furthermore, a solicitor or counsel would ordinarily have ostensible authority to compromise suit so far as the opponent is concerned...But it would be no mean task for a party to a decree by consent to prove that the decree is invalid on the grounds referred. It is abundantly clear that the appellant was a ready and willing party to the material judgement by consent and that the terms and consequences of the judgement were explained to her.”

61. The East African Court of Appeal on its part in **Brooke Bond Liebig (T) Ltd. vs. Mallya Civil Appeal No. 18 of 1975 [1975] EA 266** noted that:

“In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could have been no mistake or misunderstanding. None of the factors which give rise to the setting aside of a consent agreement existed.”

62. In this case, it is contended that the Petitioner was mistaken as regards the true status of the two aforesaid land parcels. It is therefore clear that the ground upon which it is sought to have the consent set aside is that of mistake. It follows that a consent being contractual in nature, the principles regarding setting aside a contract on the ground of mistake applies with equal force. In this case, there is no evidence that the Protestors were similarly mistaken. In fact, the existence of such a mistake is denied. The general rule is that unilateral mistake, as seems to be the case herein, is not a ground for setting or rescinding a contract. The Privy Council (**Lord Tucker, Lord Denning & L M D De Silva on 19/01/60**), in an appeal from the Court of Appeal for Eastern Africa in **Khatijabai Jiwa Hasham vs. Zenab D/O Chandu Nanji PCA No. 29 of 1957 (PC) [1960] EA 7** while dealing with the issue held that a plea of unilateral mistake can, in the absence of fraud, only afford ground for rescission if the mistake was induced by some innocent misrepresentation made by or on behalf of the plaintiff or by some misleading conduct on his part. It was therefore important for the Petitioner to prove that the alleged mistake was induced by some innocent misrepresentation made by or on behalf of the Protestors or by some misleading conduct on their part. In this case it is not so contended and there is no evidence on the basis of which this court can make such a finding. It follows that there is no basis upon which this Court can set aside the consent order recorded on 25th July, 2011.

63. That leaves only the issue of the distribution of plot Nos. 68 and 70 in Mutituni Market, plot No. 3339 Mbee Adjudication section and plot No. 391 Mbee Adjudication section. According to section 3 of the **Law of Succession Act**, “estate” means “the free property of a deceased person” while “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.” It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by the time of his death, interests had not been terminated.

64. In **Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others (2017) eKLR**, the Learned Judge observed that:

“This Court’s view before distribution of the estate of the deceased under Section 71 of the Law of Succession Act Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased’s estate and are available for distribution after settling all liabilities and having the net estate for distribution.”

65. It is therefore clear that any property which the deceased was not legally competent freely to dispose during his lifetime, and in respect of which his interest had been terminated by his death cannot form part of his estate and cannot be the subject of an application for grant or confirmation thereof.

66. As regards Plot No. 68, the parties are in agreement that the same belonged to the deceased. However, it is contended that there was an attempt to sell the same by the deceased which attempt was thwarted by **Eva**. Accordingly, that plot still belongs to the estate. The alleged buyer did not appear in court to adduce evidence and has not filed any protest. Since it is alleged by the Petitioner that the buyer is no longer interested in the said property, his interest, if any is purely contractual and cannot be the subject of these succession proceedings. Accordingly, I find that Plot 68 Mutituni Market was a property which the deceased herein was legally competent to dispose of during his lifetime and in which by the time of his death, his interests had not been terminated.

67. The Protestors however contend that the said property was given by the deceased to **Eva** based on the fact that the same was purchased and developed by her before the 2nd wife, **Grace**, was married. They have relied on the evidence of OW2, **Teresia Nduku Munyao**, who testified that the plot for the company was given to **Eva Mukenyi** and the other one to the younger wife. She did not however state how she came to know about this and where she obtained her information from. Section 109 of the **Evidence Act**, provides that: -

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.

68. In their submissions, the Protestors have contended that the Petitioner did not prove that the said property was not given to **Eva**. However, the burden was clearly on the Protestors to prove that the said property had been given by the deceased to **Eva**. I find that the evidence adduced does not prove that that was the position. Accordingly, I direct that the said property be divided equally between the two houses.

69. The same position applies to Plot No. 391 Mbee Adjudication section.

70. Regarding Plot 70, the evidence from PW3, **Mwikali Muthoka**, the Chief Officer for Lands and Urban Development was that from the records held by the County Government, plot No. 70 was in the name of **Mwanza Mutua** having been allegedly transferred by the deceased vide a letter dated 3/12/1993 addressed to the Town Clerk, Municipal Council of Machakos, the predecessor of the county government through the area councillor Mutituni Ngelani ward and area chief of Mutituni location. According to the said records plot 70 no longer belongs to **Peter Munyao Muu** as the current owner of the plot is **Jonathan Mwanza Mutua**. From that evidence, whether rightly or otherwise Plot No. 70 was, according to section 3 of the **Law of Succession Act**, not part of the deceased’s estate since it was not the free property of the deceased person as it was not the property of which the deceased was legally competent freely to dispose of during his lifetime, his interest therein having been terminated before his death whether lawfully and unlawfully. As long as the position remains as it is, this court cannot distribute that property unless and until the said property reverts to the estate. Accordingly, Plot No. 70 Mutituni Market is not available for distribution.

71. As regards Parcel No. 3339 Mbee Adjudication Section, Machakos County (Mitamboni/Mbee/3339), the Petitioner relied on the alleged will of the deceased. However, the said document does not clearly identify the plot that was to be given to **Grace** as being Parcel No. 3339 Mbee Adjudication Section, Machakos County (Mitamboni/Mbee/3339). In absence of that I hereby direct that the said plot be divided equally between the two houses.

72. There will be no order as to costs.

73. Those shall be the orders of this court.

Read, signed and delivered in open Court at Machakos this 20th day of January, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Nzili for Mr Muumbi for the 1st, 2nd and 3rd Administrators

CA Geoffrey