REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 923 OF 2013

IN THE MATTER OF THE ESTATE OF ETETE MASAKHALIA (DECEASED)

JUDGMENT

1. According to the certificate of death on record, serial number 650304, dated 19th August 2002, the deceased herein, Etete Masakhalia, died on 18th May 2002. According to the letter from the Assistant Chief of Kochwa Sub-Location, dated 18th December 2013, the deceased was said to have had been survived by children, said to be Nashon Wafula Etete, William Ngao Mwombe, Kennedy Wekalao Etete, James Nato Etete, Phanice Nawire Wasike, Anne Nasenya Nanguo, Ester Mukhwana, Emily Wanyonyi, Esinah Wamalwa, Mary Simiyu, Tuteya Khalayi and Branice Namenge Etete. The property he died possessed of is described as Bunyala/Sidikho/311, Bunyala/Nambacha/665, Bunyala/Nambacha/666 and Bunyala/Nambacha/998. Representation to the estate of the deceased was granted to Nashon Wafula Etete, one of the sons, of the deceased, on 17th April 2014, and a grant was issued, dated 28th April 2014. I shall hereafter refer to Nashon Wafula Etete as administrator.

2. What I am called upon to determine is a summons for confirmation of grant, dated 21st September 2016, filed herein on 28th October 2016. It is brought at the instance of the administrator. It is founded on an affidavit that the administrator swore on 21st September 2016. The persons listed as survivors are the same as those listed in the petition and in the letter by the Assistant Chief that I have referred to above, and the assets proposed for distribution are the same as those set out in the petition and the Chief's letter.

3. The said summons provides for a schedule for distribution of the property as follows: -

a) Bunyala/Sidikho/311 -

(i) 0.6 hectare, to Emily Wanyonyi

(ii) 0.8 hectare, to Esinah Wamalwa,

(iii) 0.8 hectare, to Mary Simiyu,

(iv) 0.8 hectare, to Tuteya Khalayi,

(v) 0.8 hectare, to Branice N. Etete,

(vi) 0.95 hectare, to Kennedy Wekalao Etete,

(vii) 0.95 hectare, to William Ngao Mwombe,

(viii) 0.95 hectare, to James Nato Etete,

(ix) 0.95 hectare, to Nashon Wafula Etete, and

(x)1.2 hectare, to Juma Baraza;

b) Bunyala/Nambacha/665 -

(i) 0.8 hectare, to Phanice Nawire Wasike and

(ii) 0.1 hectare, to Anne Nasenya Nanguo;

c) Bunyala/Nambacha/666 -

(i) 0.7 hectare, to Anne Nasenya Nanguo,

(ii) 0.8 hectare, to Ester Mukhwana, and

(iii) 0.2 hectare, to Emily Wanyonyi; and

d) Bunyala/Nambacha/998 -

To William Ngao Mwombe absolutely.

4. A consent on distribution, in Form 37, dated 21st September 2016, was filed, on 28th October 2016, under Rule 40(8) of the Probate and Administration Rules, duly signed by nine of the surviving children, and by Juma Baraza. It is not indicated in the papers who Juma Baraza was to the deceased. Anne Nasenya Nanguo, Esinah Wamalwa, Kennedy Wekalao Etete and William Ngao Mwombe did not sign the papers.

5. An affidavit of protest was lodged herein on 15th December 2016, by Kennedy Wekalao Etete, vide an affidavit that he swore on 15th December 2016. He avers that the deceased had shared out his estate before he died, and the beneficiaries had already put up permanent homes and settled on their respective portions. He states that Nashon Wafula Etete and James Nato Etete were settled on Bunyala/Nambacha/665, which he proposed they ought to share equally. He says that he and William Ngao Mwombe were settled on Bunyala/Nambacha/666, which they should share equally. He further says that all his sisters had been given Bunyala/Nambacha/998 to share equally. He states that a daughter of the deceased known as Tuteya Khalayi was unmarried, and was entitled to a share in Bunyala/Sidikho/311. He adds that the deceased had sold three acres out of Bunyala/Sidikho/311 to Juma Baraza. He proposes that the balance of Bunyala/Sidikho/311 should be shared equally between the four sons of the deceased. I shall refer to Kennedy Wekalao Etete as the protestor.

6. The distribution proposed by the protestor works out as follows:

(a) Bunyala/Sidikho/311 -

(i) 0.8 hectare, to Tuteya Khalayi

(ii) 1.2 hectares, to Juma Baraza,

(iii) 1.7 hectares, to Kennedy Wekalao Etete,

(iv) 1.7 hectares, to William Ngao Mwombe,

(v)1.7 hectares, to James Nato Etete, and

(vi) 1.7 hectares, to Nashon Wafula Etete;

(b) Bunyala/Nambacha/665 -

To Nashon Wafula Etete and James Nato Etete, to share equally

(c) Bunyala/Nambacha/666 -

To Kennedy Wekalao Etete and William Ngao Mwombe, to share equally; and

(d) Bunyala/Nambacha/998 -

To Phanice Nawire Wasike, Anne Nasenya Nanguo, Ester Mukhwana, Emily Wanyonyi, Esinah Wamalwa, Mary Simiyu, Tuteya Khalayi and Branice Namenge Etete, to share equally.

7. Another affidavit was filed by Mary Everlyn Simiyu, on 15th September 2017, sworn on 12th September 2017. She avers that the deceased had left a will made on 10th March 2002, in which he had distributed his property. According to her, the said will distributed all the four assets as follows:

(a) Bunyala/Sidikho/311 -

(i) 5 acres, to Nashon Wafula,

(ii) 5 acres, to William Ngao, and

(iii) 5 acres, to Kennedy Wekalao;

(b) Bunyala/Nambacha/665 and 666-

To James Nato Etete, absolutely; and

(c) Bunyala/Nambacha/998 -

To Phanice Nawire Wasike, Anne Nasenya Nanguo, Ester Mukhwana, Emily Wanyonyi, Esinah Wamalwa, Mary Simiyu, Tuteya Khalayi and Branice Namenge Etete, to share equally.

8. She explains that Bunyala/Sidikho/311 measures 22 acres, or 8.8 acres, out of which the deceased distributed 15 acres to the sons, leaving a balance of seven acres, out of which three he sold to Juma Baraza, which should be made available to the said buyer. She adds that 4 acres had been given to the wife of the deceased, and following her demise the same ought to be given to the daughters of the deceased to share at ½ acre each. She attach a copy of the alleged will of the deceased, saying that the property ought to be shared out as per that will, failing which the estate ought to be shared equally.

9. There is another affidavit on record filed by Esinah Wamalwa, on 14th November 2017, sworn on 30th October 2017. She avers that she had no interest in the estate of the deceased, which comprised, according to her, of Bunyala/Sidikho/311, Bunyala/Nambacha/665, and Bunyala/Nambacha/666.

10. The other affidavit was filed by Emily Wanyonyi, on 13th December 2017, sworn on 11th December 2017. She too avers that the deceased had shared out his property to all his children before he died. She states that Bunyala/Nambacha/998 was to be equally shared amongst the eight daughters of the deceased, namely Phanice Nawire Wasike, Anne Nasenya Nanguo, ester Mukhwana, Emily Wanyonyi, Esinah Wamalwa, Mary Simiyu, Tuteya Khalayi and Branice Namenge Etete. She states further that she has no interest in Bunyala/Sidikho/311, Bunyala/Nambacha/665, and Bunyala/Nambacha/666.

11. The other filing in the matter was by William Ngao Mwombe. He did not swear an affidavit, but filed what he called a witness statement. No directions had been given for filing of any such document. The same was filed on 7th March 2017, dated 6th March 2017, and in it he principally supports the position taken by the protestor.

12. The protestor filed a list of documents on 22nd February 2017, dated 22nd February 2017, being the purported will of 10th March 2002, a copy of which is annexed.

13. Directions were given on 2nd March 2017, for disposal of the confirmation application by way of *viva voce* evidence.

14. The hearing happened on 13th November 2018, when the protestor took to the witness stand. He stated that he opposed the proposals made by the administrator. He testified that the deceased had left the administrator and James Nato on Bunyala/Nambacha/665, and the administrator built a house there after both their parents died. James Nato did not build a house, but lived in their mother's house. He stated that all of them were born on Bunyala/Nambacha/665. He said that the deceased moved both he the protestor and William Ngao Mwombe to Bunyala/Nambacha/666, after both of them married, after which of them put up houses on the land, and farm the land. He said that after Bunyala/Nambacha/666 was given to them, none of their siblings used it. He said that he was not opposed to the distribution of Bunyala/Nambacha/665, his problem was with the proposal on Bunyala/Nambacha/666. He further said that Esinah and Emily had indicated they were not interested in taking shares in the estate. On Bunyala/Sidikho/311, he said that Juma Baraza was not a child of the deceased, but he had bought a portion of that property, and farmed there. On Tuteya Khalayi, he said that she was unmarried, and, therefore, she was entitled to a share of the estate he proposed that Bunyala/Nambacha/998 be shared out between the daughters of the deceased. He said that Emily had told him that the deceased had given the land to them. He said that he did not agree with the Mary that Bunyala/Nambacha/665 and 666 be given to James Nato, according to him, James Nato had signed Form 37, signifying that he was getting 0.95 hectares out of Bunyala/Sidikho/311, and there was nothing to indicate that he was interested in in Bunyala/Nambacha/665 and 666. His proposal is that Bunyala/Sidikho/311 be shared out equally between the four sons. He said that no one lived there, and that the same was used for farming. He said he would be exposed to loss if moved out of Bunyala/Nambacha/666, adding that they should be allowed to stay where they are living currently, and should share the land equally. He asked that the estate be distributed as per his proposals since that was how the deceased had distributed the property.

15. During cross-examination, he said that he had not given any property to the daughters of the deceased. He said they could all have Bunyala/Nambacha/998. He conceded that the administrator had considered the daughters of the deceased in his proposals, but said that that was contrary to the wishes of the deceased. He said he did not know how the daughters ought to share Bunyala/Nambacha/998, saying that it was them who were saying that the deceased had given it to them. He said the deceased had three farms, he distributed only one but not the rest, and that he had not said that the daughters were not to get a share of the land. He said that the alleged will was in two parts, he only saw Part 2 which distributed Bunyala/Nambacha/998 to the daughters, and that he did not know what Part 1 of the will provided. He said that he did not know that the law of succession envisaged equal distribution. He said that he had seen Form 37, and noted that the same had been signed by some of the daughters of the deceased. He said that the deceased had shown them where to build but he had not given them title deeds. He said that the lands all belonged to the deceased. He said he was not aware that all the children were entitled to equal share. He said that the clan had ruled on equal distribution. He said the clan had distributed the livestock, but not the lands. He said that he had not provided evidence that he had put up a structure on Bunyala/Nambacha/666.

16. William Ngao Mwombe testified next on the side of the protestor. He supported the proposals made by the protestor, saying that he did not agree with the proposals by the administrator. He said Bunyala/Nambacha/998 was given to the daughters. He said that the administrator had given Bunyala/Nambacha/998 to him, yet the deceased had already given it to the daughters. He said that the administrator

had given the daughters other parcels of land, but that was not how the deceased had shared out of his property. He said that each of them had their own parcels of land and homes, and boundaries had been fixed. He said that Emily and Esinah had told the truth when they said that the deceased had distributed his estate before he died. He testified that Mary had said that the deceased had made a will, where he gave the daughters Bunyala/Nambacha/998. He said that the will did not mention any other parcel of land. He said that the deceased had said that his wishes be respected, yet the administrator was not respecting those wishes.

17. During cross-examination, he said that the deceased had shared out his land during lifetime. He said that they were not given title deeds. He said that the proceedings before the court were not succession proceedings, but an attempt to re-do or re-visit what the deceased had done. He said that he heard of the will from his sister. He stated that the deceased had shared out all his land, and there were boundaries. He said that he was on Bunyala/Nambacha/666, with the protestor; while James and the administrator were in occupation of Bunyala/Nambacha/665. He said that out of the eight daughters of the deceased, two of them, Emily and Esinah, had renounced their share in the estate. He said that they were not disinheriting the daughters of the deceased, adding that they were only doing what the deceased wanted. He said that the deceased had distributed the property in the manner that that he and the protestor were proposing. He said that Bunyala/Nambacha/998 was 0.98 hectare and was to be shared between six of the daughters of the deceased. He said that it was the only land given to the daughters, and that they were not entitled to a share in the other three parcels of land. He said the deceased fixed boundaries, and had not given them title deeds. He said Bunyala/Nambacha/998 was in the Navakholo town centre, while the rest of the parcels of land were farmland.

18. The administrator testified next. He asked the court to distribute the estate as per his proposals. He stated that Bunyala/Nambacha/665 should go to Phanice and Anne, while Bunyala/Nambacha/998 should go to the daughters of the deceased, since they wanted it, as William Ngao Mwombe had refused to accept it. He said that it was six daughters who were interested in Bunyala/Nambacha/998. He said that all the daughters of the deceased had agreed with his proposals by signing Form 37. He said the boundaries on the land were fixed by the Chief, and that it was not the deceased who had fixed them. The boundaries were fixed in 2013, and the deceased had died in 2002. He said he and James Nato had one care each, while the other sons had five acres, while the daughters had nothing. He said that the will presented by Mary only talked of only one property, Bunyala/Nambacha/998, it did not deal with the other assets.

19. During cross-examination, he said that the protestor and William Ngao Mwombe said that the daughters would only get Bunyala/Nambacha/998. He said that the unmarried daughter, known as Tuteya, had been allocated Bunyala/Sidikho/311. He stated that Anne and Esinah did not sign Form 37. He said Mary had not renounced her right to a share in the estate. He said that his house was on Bunyala/Nambacha/665 and so was that of James. He said that he did not have a house on Bunyala/Nambacha/666, where the protestor and William had houses. He said that they, except James, built their houses on the land before the deceased died. He said that he knew that the deceased had intended that the daughters get Bunyala/Nambacha/998, for them to sell and share the proceeds. He said that he farmed on Bunyala/Sidikho/311 and Bunyala/Nambacha/665. He said that James utilized Bunyala/Nambacha/665. He concluded that when the daughters signed Form 37 they had bound themselves to take Bunyala/Nambacha/998. He said that the daughters of the deceased remained the children of the deceased despite having gotten married, and were entitled to a share in the estate.

20. After both sides closed their respective cases, I heard the views of the daughters of the deceased. Phanice Nawire Wasike stated that she supported by the proposals made by the administrator. Anne Nasenya Nanguo also supported the administrator. Esther Mukhwana also supported the administrator. Tuteya Khalayi was also in support of the administrator. Branice N. Etete also agreed with the administrator.

21. The parties were given time to file written submissions, and they did comply. I have read through their submissions and noted the arguments made therein.

22. In confirmation applications, there are two principal factors for the court to consider: appointment of administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

> "*Confirmation of Grants*
>
> *71. Confirmation of grants*
>
> *(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.*
>
> *(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—*
>
> *(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or*
>
> *(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or*
>
> *(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or*
>
> *(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:*
>
> *Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as*

to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares."

23. It would appear that there are no issues with the appointment of the administrator as such, and equally no issues have arisen with respect to his administration of the estate. Consequently, I find that there is no impediment to his confirmation as administrator.

24. The principal purpose of confirmation of grant is distribution of the assets. The proviso to subsection (2) of section 71 requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4) as follows:

"*Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all person entitled to the estate have been ascertained and determined."*

25. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? On the first limb of the proviso, as to whether the administrator has properly identified all the beneficiaries of the estate, I am persuaded that he has. It is common ground that the deceased was survived by twelve children, being four sons and eight daughters. The sons are the administrator, the protestor, William Ngao Mwombe, and James Nato Etete. The daughters are Phanice Nawire Wasike, Anne Nasenya Nanguo, Ester Mukhwana, Emily Wanyonyi, Esinah Wamalwa, Mary Simiyu, Tuteya Khalayi and Branice Namenge Etete.

26. There is also Juma Baraza. He is identified as a buyer in the summons for confirmation of grant, and is allocated 1.2 hectares out of Bunyala/Sidikho/311. There is no averment as to when he bought the same and from whom, and for what consideration. The protestor also recognizes him as a buyer of 3 acres, which he says was sold to him by the deceased, and to which he says the alleged buyer is entitled. Two of the daughters filed affidavits, they did not raise any issue about the alleged buyer. William Ngao Mwombe filed the unauthorized document which he called a witness statement. He supported the position taken by the protestor on all issues, including that of the alleged buyer. Mary Everlyn Simiyu also swore an affidavit where she averred that the deceased had sold 3 acres out of Bunyala/Sidikho/311 to Juma Baraza. At the oral hearing all the survivors who addressed the court, whether from the witness box or otherwise, did not raise any issue at all about him. Indeed, the daughters who addressed the court at the close of the oral hearing made unsworn statements to the effect that they fully supported the proposals by the administrator. That would mean that there is consensus by both sides that the Juma Baraza had bought property, a portion of Bunyala/Sidikho/311, which measured 1.2 hectares or 3 acres, from the deceased, and they were not in contention as to his entitlement.

27. To that extent, the administrator has properly ascertained the persons beneficially entitled to a share in the estate, being the four sons, eight daughters and one purchaser.

28. As to whether the shares of the persons identified as beneficially entitled had been ascertained, there is a contest. The administrator has largely distributed the estate equally between the children of the deceased, after giving the buyer his entitlement of 1.2 hectares. The eight daughters have each been given 0.8 hectare, while the sons are given 0.95 hectare each, which translates to 1.977 acres and 2.348 acres, respectively, out of the farmland, that is to say Bunyala/Sidikho/311, Bunyala/Nambacha/665, and Bunyala/Nambacha/666. He proposes to give Bunyala/Nambacha/998, which is described as a town plot, wholly to William Ngao Mwombe. This proposal is supported by two of the sons and a majority of the daughters. Only Anne Nasenya and Esinah Wamalwa did not sign Form 37. At the oral hearing, on 29th September 2020, Anne Nasenya indicated her support for the administrator's proposal.

29. Two of the sons do not support the administrator's proposals, and it would appear that they have the support of one or two of the daughters. The case in opposition was stated by the protestor. His view is that the bulk of the estate ought to go to the four sons, meaning that they share between themselves the three farmlands, while the daughters share the commercial plot. He makes one exception for the unmarried daughter, who he allocates 2 acres out of Bunyala/Sidikho/311, while the sons take 1.7 hectares each. 1.7 hectares translates to 4.201 acres. The general view by the protestor is that daughters are not entitled to a share in their father's estate, and it is little wonder that, in his affidavit sworn on 12th February 2015, he swore that the deceased had been survived by five children, the four sons and the unmarried daughter. To him, the daughters did not exist, did not feature and did not inherit. Although he acknowledges the right of the unmarried daughter, he imagines that it ought to be lesser than that of the sons. That appears to be his mindset, and he is supported in that thinking by William Ngao Mwombe.

30. Whereas in his affidavit of 2015, the protestor thought the married daughters were not entitled to a share in the estate, he appears to have had changed his position in 2016 when he filed his protest. He mentioned in the protest that the unmarried daughters existed, and he proposed that they should allocated the smaller parcel of land, Bunyala/Nambacha/998, measuring 0.09 hectare, or 0.222 acre, to be shared equally among the seven of them. It is said to be a town plot, but it is not being said that the so called town is a rural trading centre.

31. The allocation of the 0.09-hectare piece of land to the daughters is pegged on an alleged will. The protestor did not refer to it in his protest affidavit of 15th December 2016, to support his proposals. He filed it on 22nd February 2017 in his list of documents of even date. Thereafter Mary Everlyn Simiyu filed her affidavit 15th September 2017, where she averred that she knew that the deceased had made a will, in which he distributed his four parcels of land. She averred that the will was in two parts, but she attached only one part, the same one that the protestor had filed as his document on 22nd February 2017.

32. The third proposed distribution is by Mary Everlyn Simiyu, vide her affidavit sworn on 12th September 2017. She asserts here that the deceased had made a will, and shared out his four pieces of land. Bunyala/Sidikho/311 was given to the administrator, the protestor and William Ngao Mwombe to share equally. Bunyala/Nambacha/665 and Bunyala/Nambacha/666 were given wholly to James Nato. Bunyala/Nambacha/998 was given to the eight daughters equally. Regarding Bunyala/Sidikho/311, she averred that the same measured 22 acres. 15 acres were given to the three sons, leaving a balance 7. Then 3 acres were sold to Juma Baraza, leaving a balance of 4 acres, which

she proposes should be shared equally amongst the eight daughters.

33. These proceedings were initiated on the basis that the deceased died intestate, and the grant made was in intestacy. It follows that the proposed distribution, made by the administrator, is with that in mind. In assessing whether the administrator has proposed a sharing that conforms with the law, I will have to look the relevant provisions of the Law of Succession Act on intestacy, for the deceased herein died in 2002, long after the Law of Succession Act came into force in 1981. However, before I do that, by comparing what is proposed by both sides, I will have to consider whether the will that has been placed before me is a valid document, for if it is then distribution of the estate herein would have to be in accordance with that will, and not in intestacy. That would mean that I would have to ignore the proposals made by the administrator and the protestor, and go by the terms of the will, revoke the grant made to administrator in intestacy, and make a fresh grant with the will annexed, and appoint fresh administrators guided by sections 63, 64 and 65, rather than section 66 of the Law of Succession Act.

34. The alleged will was initially placed on record by the protestor on 22nd February 2017. Curiously he had made no reference to it, or its existence at all, when he filed his affidavit of protest in 2016. When he gave his oral testimony, although he appeared to rely on it to have Bunyala/Nambacha/998 devolved to the daughters, he made no effort to have it proved, in terms of having its validity established before the court places reliance on it. He merely told the court that he was unaware of its making or existence, until Mary Everlyn Simiyu told him about it. His principal, and perhaps only, supporter, William Ngao Mwombe, also said he was unaware of the will, and had heard Mary talk about it. The two appeared to take the view that the will was valid so long as it provided for the distribution of Bunyala/Nambacha/998 to the daughters, but made no effort to prove the will, so as to displace the process that the administrator had initiated in intestacy.

35. As stated elsewhere above, it is Mary Everlyne Simiyu, who appears to hold the view that the deceased had died largely testate, for his will had disposed of all the four assets he had. In her affidavit of 15th September 2017, she urges the court to dispose of the estate as per that will, saying that the only area of intervention, available for the court, was with respect to the balance of 7 acres in Bunyala/Sidikho/311, which remain after the three sons take their five acres each. She proposes that out of the 7, 3 acres should be given to the buyer, and the balance of 4 acres shared out equally between the daughters. Her case appears to be that the 7 are form the residue of the estate, and since the deceased had not disposed of the residue, then the same ought to be disposed of in the manner that she is proposing. According to her, the will was in two parts. The document that she placed on record, which is also the part that the protestor filed in court, was Part 2 of the said will. He said Part 2 only disposes of Bunyala/Nambacha/998. It is not clear what Part 1 of the said will deals with, and why the same has not been placed on record by the parties who are placing reliance on it.

36. From what I have stated above, it is Mary Everlyn Simiyu who appears to rely wholly on that alleged will. She is the only one saying categorically that the deceased died testate, having made a will, and asserting that distribution of his estate ought to follow the terms of that will. Curiously, Mary Everlyn Simiyu did not testify. Yet, if she intended, by filing her affidavit of 12th September 2017, that the court dispose of the estate according to the terms of that will, rather than applying the intestacy provisions of the Law of Succession Act, then she should have taken the witness stand to prove the will that she was inviting the court to apply instead of applying the intestacy provisions of the Act. It would appear that all the other parties, including the protestor and William Ngao Mwombe, were of the view that the deceased died intestate, for the fact of intestacy was not raised in the protest. So if Mary was seriously taking the position that the deceased had not died intestate, for there was a valid will in existence, it behooved her to take the witness stand to prove that the will was valid. It was not enough for her to just simply file a document in court, which contradicted the proceedings conducted thus far. More was required. She should have led evidence on the making of the alleged will, on the circumstances of its making, who was present and the state of mind of the deceased at the time. She had the burden of proving that the deceased did not die intestate, and she could only do so by proving the will. She would have done so by calling the alleged three attesting witnesses, or any of them, who purportedly signed the will as witnesses. I am talking about Fanice Nawile Wasike, Emily Wanyonyi and Joseph Wanyonyi. She did not do so. I have, therefore, no basis upon which I can decide on the validity of the alleged will.

37. Secondly, the will was said to be in two parts. The document placed on record appears to be the second part of the will. It would mean that the complete document was not placed on record. A will in two parts is complete when the two parts are together. The two parts of the will ought to have been placed on record by those who sought to rely on the alleged will. Indeed, the bulk of the property appears to have been disposed of in Part 1, if one goes by what is averred in the affidavit of Mary Everlyn Simiyu, of 12th September 2017. Since the portion that disposes of the bulk of the property is not on record, I wonder how Mary Everlyn Simiyu expects the court dispose of those assets in the manner proposed without that portion of the will. Secondly, a will is not presented in court in part, it must be presented in whole. A court can admit part of a will to probate, and omit the other part, after declaring it either invalid or revoked, but the entire document has to be presented for the court to determine which part to admit, and which one is not to be admitted. It is unprocedural, and the process would be defective, to accept an incomplete will and admit it to probate.

38. James Nato Etete did not file an affidavit, either to support the confirmation application, or the protest. He did not testify at the oral hearing. He did not address the court when the daughters did. He did, though, sign the Form 37, dated 21st September 2016, and that is the only demonstration of where he stands on the proposed distribution. I have perused the record and noted that he had filed an application, dated 2nd February 2015, where he had sought injunctive relief against the protestor. In his affidavit in support of the that application, he deposed to facts that are similar to those deposed by Mary Everlyn Simiyu on 12th September 2017, with regard to the alleged distribution by the deceased of Bunyala/Nambacha/665, Bunyala/Nambacha/666 and Bunyala/Sidikho/311. He does not mention the will, but the distribution he talks about appears to tally with the distribution deposed to by Mary Everlyn Simiyu, and alleged to be how the deceased had distributed his estate by will.

39. In view of what I have stated above, I find that Part 2 of the alleged will of the deceased cannot be admitted to probate without Part 1, and I cannot, therefore reckon, the provisions in the said will to dispose of the estate of the deceased. I shall, accordingly, proceed to determine the matter purely on the basis that the deceased died wholly intestate.

40. Before I look at both proposals, I need to say something about the entitlement of daughters to the intestate estate of their deceased parent. I say so as I nave noted from the record that the protestor appears to assume that the daughters of the deceased herein are not entitled to a share in the estate, and he appears inclined to consider them only because the deceased had purportedly made a will, wherein he provided for

them. The deceased herein died on 18th May 2002. That was long after the Law of Succession Act came into force on 1st July 1981. According to section 2(1) of the Law of Succession Act, the provisions of the Act applied, effective from that date, to estates of persons dying after that date. That would mean that since the deceased herein died after the Act had come into force, his estate was subject to the provisions of the Act. Since he died intestate, his estate was available for distribution in accordance with the intestacy provisions of the Act, which are stated in Part V of the Act. As at the date the petition was filed and distribution proposed, the only survivors of the deceased were his children. According to section 38, in Part V of the Law of Succession Act, where an intestate is survived only by children and no spouse, the property is shared out equally amongst the children.

41. Section 38 states as follows:

> *"38. Where intestate has left a surviving child or children but no spouse*
>
> *Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."*

42. So, section 38 envisages equal distribution of the estate where the deceased was not survived by a spouse, but by children. In this case the deceased had been survived by children only, and, therefore, his estate ought to be shared equally amongst the children.

43. It would appear to the protestor that reference to children in section 38 of the Law of Succession Act means male children, and so it is the male children who are entitled to share the estate equally. It could also be the case that the protestor has distribution under the customary law of intestate succession, where daughters generally did not count, with only the unmarried ones getting a life interest in the land they occupied. I will have to address that so that the same is clear to all.

44. The term "children" as used in the Law of Succession Act is defined or interpreted in section 3(2)(3), but not in terms of sons and daughters, or male and female, or gender, but in other respects. That would mean that the Act is gender-neutral in its reference to "children", and "children" as used in the Act, refers to children of both gender. Which would mean that the equal distribution in section 38, is as between both sons and daughters.

45. For avoidance of any doubt, section 3(2)(3) says:

> *"(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.*
>
> *(3) A child born to a female person out of wedlock, and a child defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock."*

46. The effect of section 38 of the Law of Succession Act is that all the children of the deceased, whether male or female, whether married or not, are to be treated equally when it comes to the intestate distribution of the estate of the deceased parent. The law does not discriminate as between children of different gender.

47. The non-discrimination principle, inherent in section 38 of the Law of Succession Act, has been given force by the Constitution 2010, which outlaws discrimination based on gender. Under Article 27, persons of either gender are to be treated equally in all respects, including succession. Previously, the retired Constitution allowed for application of African customary law, which permitted discrimination of daughters. There is no such provision in the current Constitution. The only provision which allows limited discrimination is Article 24(4) of the Constitution, with respect to persons who profess the Muslim faith. The deceased did not die a Muslim, and, therefore, Article 24 is of no application to these proceedings.

48. The relevant provisions of Article 27 say as follows:

> *"27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.*
>
> *(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*
>
> *(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*
>
> *(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*
>
> *(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*
>
> *(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.*

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."

49. International law is also relevant. Kenya is a signatory to many international instruments, which urge equal treatment of men and women. Article 3(2) of the Constitution has made these international instruments part of Kenyan law, and the principles stated in them are of application in Kenya without the necessity of their being domesticated through local legislation. The Charter of the United Nations reaffirms the faith in the equal and inalienable rights of all members of the human family, meaning men and women; while the Universal Declaration of Human Rights affirms the inadmissibility of discrimination generally, and proclaims that all human beings are born free and equal in dignity and rights, and everyone is entitled to all these rights and freedoms without distinction of any kind, including that based on gender or sex.

50. The States signatory to the International Covenant on Civil and Political Rights undertake to respect and ensure to all individuals, within their territories and subject to their jurisdiction, the rights recognized in the Covenant, without distinction of any kind, including sex. One such right is stated in Article 26 of the Covenant, to the effect that all persons are equal before the law, and are entitled, without discrimination, to the equal protection of the law, and, in which case, the law should prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground, such as race, colour, sex, among others. Similarly, the States signatory to the African (Banjul) Charter on the Human and Peoples' Rights are enjoined to ensure that all individuals within their territories and jurisdictions enjoy the rights recognized and guaranteed in the Charter. Under Article 3 of the Charter, every individual is entitled to enjoyment of those rights and freedoms without distinction based on sex, among others. Of particular relevance are those stated in Articles 3 and 18, relating to every individual being equal before the law and the entitlement to equal protection before the law, and the State having a duty to ensure elimination of every discrimination against women, and to ensure that the protection of rights of women as stipulated in international declarations and conventions.

51. For the purpose of this judgment, the Convention on the Elimination of All Forms of Discrimination against Women is particularly important. Kenya is signatory to the said Convention, by which it has condemned discrimination against women in all forms, and committed itself to eliminate it. The relevant Articles of the Convention on the Elimination of All Forms of Discrimination against Women state as follows:

"*Article 1*

For the purposes of the present Convention, the term "discrimination against" women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of the ire marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2 …

State Parties condemn discrimination against women in all forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women …

Article 3…

Article 4…

Article 5

State Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) …

Article 6…

Article 7…

Article 8…

Article 9…

Article 10…

Article 11…

Article 12…

Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits …

(b) …

(c) …

Article 14…

Article 15

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

Article 16 …"

52. Clearly, based on what I have set out above, discrimination of individuals based on their sex or gender has no place in modern society. Most of the instruments that I have discussed above are not new. The Charter of the United Nations dates back to 1945, while the Universal Declaration of Human Rights was adopted by the United Nations in 1948. The International Covenant on Civil and Political Rights dates back to 1966, the Convention on the Elimination of All Forms of Discrimination Against Women to 1979 and the African Charter on Human and Peoples Rights to 1981. Kenya has ratified all these instruments: The International Covenant on Civil and Political Rights in 1972, the Convention on the Elimination of All Forms of Discrimination Against Women in 1984, and the African Charter on Human and Peoples Rights in 1992.

53. The substance of the international instruments has been domesticated in Kenya through a number of pieces of legislation. The Law of Succession Act is one of them, to the extent that it provides for the equal treatment of members of both gender with respect to matters of succession, ranging from administration to distribution. The principles have also been embraced through the Constitution, 2010. The Constitution has gone further and provided for the direct application of such instruments without having them domesticated. The principles and standards around how women should be treated in such matters as succession are not just subject to municipal law, they are global. In this day and age anyone who believes that daughters can be treated in the manner that suggests that they do not count, in matters relating to succession or inheritance, is living in the past. The international instruments place an obligation on the State to eliminate discrimination against women and to ensure the protection of their right to equal treatment. I am alive to the fact that the court is part of the State, the obligation stated above, therefore, falls upon me also, to ensure that the women who have a right to the estate herein are not discriminated against and to ensure that that right is protected in any event.

54. For clarity, the relevant portions of Article 2 of the Constitution say as follows:

"2(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) …

(3) …

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

55. The point that I am making in all the discussion above is that sons of a deceased person ought to understand that the property of their dead parent is not theirs. It does not accrue to them exclusively. Daughters are entitled to it in equal measure with them. The sons should not assume that by the mere fact of being sons or males gives them a superior right or entitlement to that property over the daughters of the deceased. There is nothing in the law that applies to the instant estate that says so. I have not been pointed to any. The property of a dead parent is not there for the sons to dole out to the daughters of the deceased as they please or at their will or whim. The daughters access to their dead parent's property is not available to them as charity from the sons. The sons of the deceased in the instant matter must have that prime in their minds as we move forward to distribute the estate herein.

56. One running argument emerging throughout the case of the protestor, and his supporters, is that the deceased had distributed his property during his lifetime, to both the sons and the daughters. In other words, they say that the deceased had made gifts of the property to the sons and daughters when he was alive. Lifetime gifts are either gifts in contemplation of death, also known as *donatio mortis causa*; or simple lifetime gifts, also known as gifts *inter vivos*. Gifts in contemplation of death are provided for in section 31 of the Law of Succession Act. My understanding of the concept, from section 31 and the common law, is that it does not apply to gifts of an immovable nature, as it is designed for gifts that are movable. Gifts *inter vivos* are not addressed in the Law of Succession Act in the manner that gifts in contemplation of death are. They are, however, mentioned in section 42 of the Law of Succession Act, where it is provided that where an intestate had during his lifetime made gifts or by will paid or settled any of the survivors, then such gifts, whether by will or during lifetime, should be taken into account when determining the share of the net intestate estate that should ultimately accrue to such a survivor. Both classes of gifts do not form part of the estate of the deceased, and they are not subject to administration, except in the manner mentioned in sections 26 and 42 of the Law of Succession Act.

57. The gifts that the protestor say the deceased made were immovable in nature, and, therefore, the principle of gifts in contemplation of death would not apply to them. It would appear that what the protestor has in mind are lifetime gifts or gifts *inter vivos*. As said above, the Law of Succession Act does not define a lifetime gift, and there was no need for it to since such gifts do not form part of the estate of the deceased. That would then mean that we have to fall back to case law for a definition of what it entails, and its contours.

58. There is ample case law in Kenya where the courts have addressed their minds to *inter vivos* gifts. In *In re Estate of Gedion Manthi Nzioka (Deceased)* [2015] eKLRthe court defined gifts *inter vivos* as gifts between living persons. It was stated that for such gifts to be effective, the law required that they be granted by deed or an instrument in writing, or by delivery, or by way of declaration of trust by the donor, or by way of resulting trust or presumption of gifts of land by registered transfer, or by a declaration of trust in writing. It was declared that gifts *inter vivos* must be complete for them to be valid. It was said, in *Registered Trustees, Anglican Church of Kenya Mbeere Diocese vs. David Waweru Njoroge* (2007) eKLR, that the moment in time when a gift took effect depended on the nature of the gift, the statutory provisions governing the type of gift and the steps taken by the donor to effectuate it.

59. In *Lucia Karimi Mwamba vs. Chomba Mwamba* [2020] eKLR, it was stated that properties which the deceased gave to beneficiaries during lifetime no longer formed part of his estate. Such a gift was given and settled for the beneficiary, and it did not accrue to the estate. It was added that there ought to be evidence that the gift was granted by deed, payment or execution of a transfer. On the facts, the court held that the deceased had not given his estate to the sons during lifetime. He had applied for subdivision of his land, but never transferred the land to them, and although he had pointed out where each of the sons could occupy the land the value remained in his name. The same, therefore, was not a gift *inter vivos* to them, and the property remained the free estate of the deceased, available for distribution in intestacy.

60. It was said, in *In re Estate of Godana Songoro Guyo (Deceased)* [2020] eKLR, that gifts *inter vivos* are made without expectation of death. The person making them must had the capacity and competence to make them, and the gifts must be perfected, and must go into immediate and absolute effect. It was also stated that where the gift has been made, there must be delivery of it to the beneficiary, for it to be consummated. It would also be fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee. Where a gift rested merely in promise, whether oral or written, or in an unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the subsequent conduct of the donor gives the donee the right to enforce the promise. A promise made by deed was binding, however, even though it was made without consideration. If a gift was to be valid the donor must have done everything which, according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.

61. Signed a transfer form in his favour, but died before the transfer was registered. In *In re Estate of Muchai Gachuika (Deceased)* [2019] eKLR, it was established that the deceased had registered three assets in the names of some of his sons during his lifetime, and it was held that those gifts were complete and the assets in question did not form part of the estate of the deceased. It was said, in *re Estate of Phylis Muthoni M'Inoti (Deceased)* (2019) eKLR, that a person claiming that the deceased had made a gift *inter vivos* to them, but the titles were not deduced during his lifetime should show such conduct of the donor which would give the intended donee the right to enforce the gift. On the facts of that case, the court found no evidence of gifts *inter vivos* for there were no consents to transfer the property, duly signed by the deceased, or any evidence that the subdivision of the land by the deceased was intended to benefit the persons claiming. None of the alleged beneficiaries had claimed to have had been put in possession of the subject property by the deceased, nor permitted to build or built on the subject property.

62. There is overwhelming case law on gifts *inter vivos*, where the principles stated above have been explained and applied. See *William M'Arimi M'tuambae vs. Rosemary Karamuta for estate of George Gatimi* [2017] , *In re Estate of Monicah Wambui Nguthiru (Deceased)* [2020], *In re Estate of Osoro Motari (Deceased)* [2020] eKLR, *In re Estate of M'Raiji Kithiano (Deceased)* [2017] eKLR , *Evans Onguso & 2 others vs. Peter Mbuga & 4 others* [2020] eKLR, *Margaret Mumbi Kihuto vs. Peter Ngure Kihuto & another* [2017], *In re Matabo Sabora (Deceased)* [2019] , *Naomi Wanjiru Njoroge & 2 others vs. Winston Benson Thiru* [2018] eKLR and *In re Estate of Japhet M'tuamwari M'ikandi (Deceased)* [2019] eKLR.

63. Often at distribution, property is placed before the court, registered in the name of the deceased, but claimed by the survivors or beneficiaries, on grounds that the deceased had made lifetime gifts of it to them. This usually happens with respect to land, where the deceased, during lifetime, had shown portions of his land to his children, especially sons, to put up houses, and to till or graze their animals, without transferring title in such property to them. It could also be done with respect to commercial properties, where the deceased permits his children, upon coming of age, to carry on trade from business premises that he owns, again, without conveying title in such property to the children. In most cases when he dies, the children then claim that they had been gifted those assets during the lifetime of the deceased, and argue that the said assets ought not to be made available for distribution to anyone but themselves.

64. I trust that the principles above are quite clear. Principally any gift *inter vivos* should be backed by some memorandum in writing, and the gift is complete once title to the subject property is transferred to the name of the beneficiary of the gift. Problems arise where such transfer is not effected prior to the death of the deceased. The ideal situation is that such property would remain the free property of the deceased, available for distribution at confirmation. The argument would be that such gift was founded on a mere promise which the deceased did not

carry through prior to his death. If, however, he had taken preliminary steps towards effectuating his promise, so that all what remained after his death was mere registration of the property in the name of the beneficiary, then it would be presumed that that was a gift *inter vivos.* That would be the case where the deceased had complied with the Land Control Act, Cap 302, Laws of Kenya, where the land is subject to that law, by applying for consent to transfer the property from the name of the deceased to that of the beneficiary, the consent had been granted, and he had signed a transfer form to facilitate registration of the property in the name of the beneficiary. That would mean practically everything had been done to perfect or complete the gift were it not for the demise of the deceased. The mere fact of being shown a piece of land, and given permission to occupy and use it, without more, is not adequate proof for a gift *inter vivos*. The deceased, as registered proprietor of the land in question, would have the right to licence a person to occupy the land and use it. A child who has been shown a piece of land to build on and to till is not in the shoes an owner, but a mere licencee. The death of the deceased would not upgrade the licence to ownership. If anything the death of the proprietor would mean that the license comes to an end or is terminated, and the licencee would continue to occupy and work on the land at the mercy of the administrator.

65. The question that I have to answer, in view of the principles that I have discussed above, is whether, in this case, the deceased had made any lifetime gifts to his children? That was the case made by the protestor. Did he lead any evidence to establish the claim beyond merely pleading it? I do not think so. Neither he nor his supporters presented any evidence to show that the deceased made any such gifts of the land to them. All what I have before me is oral testimony to the fact that either the deceased or the clan showed the sons places where they could put up houses and farm, and that they did in fact did move into the land, occupied it, put up structures and farmed. I was not told when this happened, who was present at the event, and whether whatever was done was reduced into writing. Indeed, no documents were placed before me with the narrative that they were prepared by the deceased, or at his behest, on the occasion of gifting the subject lands to his children to take effect immediately. There is no evidence that the deceased took any steps towards perfecting or completing those alleged gifts, by way of moving the local land control board, given that the land in question was agricultural, for consent to subdivide amongst his sons and for the transfer of the subdivisions into the names of the sons. No documents were presented of an application to the local land control board in that respect, nor of any consents obtained from such local control board, nor of any transfer forms duly signed by the deceased, nor of any title deeds of the said lands duly issued in the names of the sons. There is no evidence that there was any complete lifetime gift of the lands to the children, nor of documents that show that the deceased had done everything that needed to be done to perfect or complete the gifts by was their registration in the names of the deceased, which was cut short by his death. Clearly, the sons have no provided any evidence of gifts *inter vivos*. That would mean that the deceased merely showed them land to occupy and use, but he did not intend, by doing so, to make a gift of the lands to them. He had merely licensed them to occupy and use the land, and no more. If he had intended more, then he would have taken steps towards having the title in the lands in question move from his name to that of his sons.

66. It means that as at the time of the death, of the deceased, the property in question did not belong to the sons or children, but to him or his estate. It was free property, notwithstanding the occupation by the sons, available for distribution at confirmation of grant in intestacy. After all, if the property had been effectively gifted *inter vivos* it would not be available for distribution, and it would, therefore, not be in the schedule of the assets that I am now being invited to distribute. The very fact that am being asked to distribute it means that it is free property that I should distribute, for if it was not free property it would not be before me. In any case, the process of succession is not intended to sanction or perfect gifts that the deceased had made during his lifetime. It is not meant to rubberstamp his acts. The process is about free property, in respect of which the deceased had not made any gifts. Parties ought to know that where they believe that the deceased had made gifts to them *inter vivos*, which he had not perfected or completed, then the process of perfecting or completing those gifts would not be through a succession cause, but through proceedings before the Environment and Land Court, and other courts which have jurisdiction to exercise the jurisdiction reserved for that court Perfecting or completing gifts *inter vivos* to children of the deceased is not an exercise in succession, and, therefore, it ought not be placed before a probate court. A party who finds themselves placing such matter before a probate court ought to understand that they are either before the wrong forum or that the alleged *inter vivos* gifts were not in fact gifts of that character. Of course, where a transaction that the deceased was having with a third party was left incomplete, say a sale of property, it would be the responsibility of the administrator to carry it through, for there would be consideration involved, otherwise he would be required to refund the sale price received by the deceased. An incomplete gift of land *inter vivos* is not in the same footing with sale of land, for it is without consideration, and the administrator would have no obligation to perfect of complete it.

67. I believe I have said enough on the subject. There was no gift *inter vivos* to any of the children of the deceased, and, therefore, the entire estate of the deceased comprises of free property, available for distribution by the court in these confirmation proceedings. I am persuaded that the deceased had licensed the sons to utilize certain assets, and as a result they had put up structures on those assets; any distribution of the assets ought to take into account those assets, and ensure that the particular sons are allocated shares in the parcels of land where they have put up structures. The administrator and James Nato are said to have been in occupation of Bunyala/Nambacha/665, where the administrator put up structures, while James Nato occupied the house which belonged to the late widow of the deceased; while the protestor and William Ngao Mwombe occupied Bunyala/Nambacha/666, where they put up structures. It has not been disclosed where the unmarried daughter, Tuteya Khalayi stayed, given that she had no other home of her own save for that of her parents. In distributing the estate, I shall take these facts into account.

68. I shall share out the farmland first. Two of the daughters have indicated that they have no interest in sharing the farmland, that is to say Esinah Wamalwa and Emily Wanyonyi. Mary Everlyn Simiyu is of the view that she should get a share in Bunyala/Sidikho/311. Bunyala/Nambacha/665 measures 0.9 hectare or 2.224 acres; while Bunyala/Nambacha/666 is 1.3 hectares or 3.212 acres. Bunyala/Sidikho/311 measures 8.8 hectares or 21.745 acres. The total acreage of the farmland is 11 hectares or 27.181 acres. Since two of the daughters are not interested in the farmland, I shall share out the same amongst the four sons and six daughters. I note that there is a creditor, Juma Baraza, who is entitled to 1.214 hectares or 3 acres out of Bunyala/Sidikho/311. I shall divide the balance of the land, after taking out the share due to the buyer, amongst the 10 children equally, that is the four sons and six daughters. I shall distribute the land occupied by the sons, that is to say Bunyala/Nambacha/665 and Bunyala/Nambacha/666, amongst the four sons. Bunyala/Nambacha/665 shall be shared equally between the administrator and James Nato; while Bunyala/Nambacha/666 shall be shared equally between the protestor and William Ngao Mwombe.

69. Regarding the town plot, Bunyala/Nambacha/998, I note that the two daughters who had renounced their right in the farmland, had not renounced their entitlement to Bunyala/Nambacha/998. Since two of the pieces of the farmland are to be shared exclusively amongst the sons, with the daughters, willing to take a share, taking the other farmland equally with the sons, I hold that it would be fair and just that the town plot be shared exclusively amongst all the daughters of the deceased.

70. The final orders are as follows:

(a) That the application dated 21st September 2016 is hereby allowed;

(b) That Nashon Wafula Etete is hereby confirmed as the administrator of the estate;

(c) That Bunyala/Nambacha/665 shall be shared equally between Nashon Wafula Etete and James Nato Etete;

(d) That Bunyala/Nambacha/666 shall be shared equally between Kennedy Wekalao Etete and William Ngao Etete;

(e) That 3 acres, or 1.214 hectares, out of Bunyala/Sidikho/311 shall devolve upon Juma Baraza; and the balance shall devolve upon Nashon Wafula Etete, James Nato Etete, Kennedy Wekalao Etete, William Ngao Etete, Phanice Nawire Wasike, Anne Nasenya Nanguo, Esther Mukhwana, Tuteya Khalayi, Branice N. Etete and Mary Everlyn Simiyu, equally;

(f) That Bunyala/Nambacha/998 shall be shared equally amongst all the eight daughters of the deceased;

(g) That a certificate of confirmation of grant shall issue to the administrator in those terms;

(h) That each party shall bear their own costs; and

(i) That any party aggrieved by the orders that I have made herein has leave of twenty-eight (28) days to move the Court of Appeal appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 19TH DAY OF MARCH, 2021

W MUSYOKA

JUDGE