



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 421 OF 2014**

**IN THE MATTER OF THE ESTATE OF CHESIMBILI SINDANI (DECEASED)**

**JUDGMENT**

1. According to the certificate of death on record, serial number [particulars withheld], dated 19<sup>th</sup> March 2014, the deceased herein, Chesimbili Sindani, died on 26<sup>th</sup> December 2006. According to the letter from the Chief of Chesero Location, dated 2<sup>nd</sup> April 2014, the deceased was survived by children, said to be Elijah Chesimbili, Aineah S. Chesimbili, Abraham Chesimbili, Edward Chesimbili, Sarah Nanzala Chesimbili, Rose Lichuma Chesimbili, Melsa Chesimbili and Gladys Naliaka Chesimbili. One of the sons of the deceased is also dead, his name is not disclosed, but he is said to have been survived by his widow, Esther Lunyolo Philip. Harrison Mutonyi Ingutia is listed as a buyer. The property he died possessed of is described as South Kabras/Chesero/1173.

2. Representation to the estate of the deceased was sought, in a petition filed herein on 26<sup>th</sup> May 2014, by Gladys Naliaka Chesimbili. In it she disclosed the persons listed in the Chief's letter as the survivors of the deceased, and expressed him to have died possessed of South Kabras/Chesero/1173, and Harrison Mutonyi Ingutia as a buyer. Letters of administration intestate were made to Gladys Naliaka Chesimbili, one of the daughters, of the deceased, on 18<sup>th</sup> November 2014, and a grant was issued, dated 11<sup>th</sup> December 2014. I shall hereafter refer to Gladys Naliaka Chesimbili as the administratrix.

3. The administratrix filed a summons for confirmation of grant, dated 26<sup>th</sup> April 2016, on even date. It is founded on an affidavit that the administratrix swore on 26<sup>th</sup> April 2016. The persons listed as survivors are the same as those listed in the petition and in the letter by the Chief that I have referred to above, and the proposed for distribution is South Kabras/Chesero/1193. Although the administratrix proposes that asset be shared amongst all the survivors, that is to say the four sons, three daughters and one daughter-in-law, and the purchaser, the actual shares to be taken by each of them are not indicated. There is a consent on distribution, in Form 37, which is undated and unsigned, listing all the nine persons said to be beneficially entitled to the property, but does not propose any shares.

4. On 18<sup>th</sup> November 2016 a consent on distribution, in Form 37, was filed in the cause, by Elijah Chesimbili, proposing that South Kabras/Chesero/1193 be shared out between the four sons, the daughter-in-law, the buyer and another person, Festus Kanga Muhere, duly signed by all the individuals listed in the form. No provision is made in the consent for the administratrix and her sisters. The said summons provides for a schedule for distribution of the property as follows: -

- (a) 1.68 hectares, to Elijah Chesimbili,
- (b) 1.92 hectares, to Aineah Shireandula Sindani,
- (c) 2.07 hectares, to Abraham Juma Chesimbili,
- (d) 1.96 hectares, to Esther Lunyolo Chesimbili,
- (e) 1.611 hectares, to Edward Sindani,
- (f) 0.201 hectare, to Festus Kanga Muhere, and
- (g) 0.408 hectare, to Harrison Mutonyi Ingutia.

5. On 22<sup>nd</sup> November 2016, a handwritten document, addressed to whom it may concern, was lodged in the registry in this cause. It is purported to be signed by four clan elders, namely: Wellington Memeti Mmasi, William Amtala Mutoro, Wilson Recha Munyokole and Daniel Machoni. It is purported that the clan elders had sat and distributed the estate asset amongst the sons of the deceased and the buyers in the manner reflected in the consent on distribution that I have referred to in paragraph 4, foregoing, of this judgment. It is stated that part of the land was sold for the education of the administratrix, and that, therefore, meant that she had taken her shares did not qualify for another portion.

6. The administratrix filed another affidavit on 23<sup>rd</sup> May 2017, sworn on 2<sup>nd</sup> December 2016, where she proposes how the subject land ought to be distributed. Her proposal is that the four sons and the daughter-in-law should take 1.5625 hectares; the four daughters 0.8 hectares; and the buyer, Harrison Mutonyi Ingutia, 0.04 hectares.

7. Elijah Chesimbili swore and filed an affidavit on 5<sup>th</sup> October 2017. He avers that the deceased had four married daughters and four sons. Before he died, he located the sons and demarcated the land to them in 1983, in the presence of an elder, one Daniel Machoni. He was also said to have had sold 1½ acres of the land to Harrison Mutonyi Ingutia, to raise money for the university education of the administratrix. It is averred that the administratrix and the other three daughters were married and dowry had been received, and under Luhya customary law they ought to be satisfied with what they have. It is averred that the marriage of Melsa Chesimbili had collapsed, and for that reason he had called upon Daniel Machoni to work with him to have her settled on the estate. He asserts that he was appointed by the family, at a meeting held on 7<sup>th</sup> April 2007, to be the administrator of the estate, on grounds that the sisters, who were older, were far away. He avers that the administratrix had ignored that resolution, and purported to be the administrator, ignoring the persons who were in actual occupation of the property. He alleges that she fraudulently caused herself to be registered as the proprietor of the estate property, South Kabras/Chesero/1193. He accuses the administrator of being unwise, for leaving out Edward Sindani, a son of the deceased, from her proposed mode of distribution. He asserts that the property was distributed by the deceased in 1993, working together with Daniel Machoni. He urges that the grant be confirmed to him, instead of the administratrix.

8. He has attached to that affidavit two documents. One of the documents appears to be minutes of a meeting that was allegedly held on 7<sup>th</sup> April 2007. The document does not indicate who attended the meeting, and it is not signed by anyone, including its maker, Edward Chesimbili. It makes five points. One, it identifies the sons and daughters of the deceased. Two, it identifies the property that the deceased died possessed of. Three, it indicates that the family had identified Elijah Chesimbili as the person to apply for representation in the estate. Four, it indicates that the deceased had sold part of the property to Harrison Mutonyi Ingutia to enable the administratrix complete her education. Five, it states that the deceased had distributed the land to his sons only, and he had allocated the land and demarcated it on the ground. Six, the four daughters of the deceased were married. Seven, each son was given a daughter for support whenever need arose.

9. The second document is an affidavit that Elijah Chesimbili swore on 4<sup>th</sup> July 2016, purportedly in support of a summons for confirmation of grant. The persons listed as survivors of the deceased are four sons and a daughter-in-law. Two individuals are listed as liabilities. South Kabras/Chesero/1193 is listed as the property that the deceased died possessed of, and, therefore, available for distribution. It is proposed for distribution in the manner narrated in paragraph 4 of this judgment.

10. The only person who has filed documents in response to the summons for confirmation of grant, dated 26<sup>th</sup> April 2016, is Elijah Chesimbili, and I shall treat him, for the purpose of the confirmation proceedings, as the protestor.

11. The summons, dated 26<sup>th</sup> April 2016, was placed before the Judge, on 7<sup>th</sup> September 2016, for hearing. After interviewing the persons who attended the session, the court was persuaded that there was no agreement on confirmation of the grant and distribution of the estate, and directed the parties to file their papers on the confirmation application. Directions were taken, on 2<sup>nd</sup> October 2018, that the summons for confirmation of grant be canvassed by way of oral evidence.

12. In compliance with the directions, the administratrix filed a witness statement on 22<sup>nd</sup> March 2019, of even date. She disclosed that the deceased had three wives, but she curiously disclosed only two of them, the second and third, Ziporah Ameyo Chesimbili and Loice Chesimbili. It is not disclosed whether the said two wives survived the deceased or not, and whether they were alive or not as at the date of the filing of the witness statement. The children in the second house are listed as Rose Lichuma, Sarah Nanzala, the late Philip Shitanda, Gladys Naliaka, Edward Barasa Sindani and Ibrahim Chesimbili. The children in the third house are listed as Melsa Chesimbili, Elijah Chesimbili and Aineah Chesimbili. She avers that before filing the petition she had approached her siblings on the filing of the cause, but they were adamant. They were summoned by national government administrators, but declined the invitation. She denies that land was sold to raise money for her education, and asserts that the deceased had educated all his children. She avers that she had consulted her siblings when she sought representation and when she was preparing the summons for confirmation of grant, but they refused to cooperate. She denies omitting the name of Edward Sindani, saying that she had referred to him as Edward Chesimbili. She asserts that all the children of the deceased were entitled to a share in the estate, and adds that the protestor was intent of disinheriting some of the children of the deceased. She states further that the deceased had died before he demarcated the land. She proposes distribution as follows: that the four sons and the daughter-in-law got 1.322 hectares each; the four daughters got 0.8 hectares each and Harrison Mutonyi Ingutia 0.4 hectares.

13. The hearing commenced on 23<sup>rd</sup> January 2020. The administratrix, Gladys Naliaka Chesimbili, national identity card number xxxxxxxx, was the first on the stand. She gave the names of the wives of the deceased as Paulina Nasiche, Ziporah Ameyo and Loise Akatsa. She confirmed that they were all dead. Paulina had the late Moses Munialo, Agnes Khasandi, Jane Nasimiyu, Gaudencia Anyona, Lydia Isabella and Alfred Musee. The children of Ziporah were said to be Rose, Sarah, the late Philip, Edward and Ibrahim. The children of Loise were named as Mellissa, Elijah and Aineah. She stated that the late Moses and the late Philip were married, and had been survived by children. She stated that the second and third house was settled on South Kabras/Chesero/1193, while the first house was settled on another parcel of land, and that that house had completed the succession process to that property. She, however, did not know the succession cause number. It was her case that the deceased had distributed the property occupied by the first house before he died, and it was in respect of the second property, where the second and third house resided, that the deceased had not distributed before he died. She stated that the first house occupies land at Fuvale, while the second and third houses occupy land at Guvuli. She stated that the members of the first house do not utilize the land at Guvuli; while none of the members in the second and third houses utilize the land at Fuvale. She testified that the deceased had sold 1½ acres, to be hived off South Kabras/Chesero/1193, to Harrison Mutonyi Ingutia, in 1991/1992, but the property was never transferred to him. She said that she did not know why the deceased sold the land, for he never told her why it happened. She sought distribution in terms of the proposals in her witness statement. She said that she had not allocated any portion of South Kabras/Chesero/1193 to the first family because that family had already been settled on another piece of land. She said she was unaware of any distribution in 1992. She said there were boundaries on the ground, to indicate where those in occupation were farming, but not for distribution purposes.

14. The protestor, Elijah Chesimbili, national identity card number xxxxxxxx, took to the witness stand next. He confirmed that the deceased had three wives and children that the administratrix had named. He also confirmed that the deceased had two parcels of land, at Fuvale and

Guvuli. He explained that the Fuvale property was occupied by the first house, and was registered in their names. The Guvuli property, South Kabras/Chesero/1193, was still in the name of the deceased. He said he occupied four acres within South Kabras/Chesero/1193. He said he opposed the proposals by the administratrix, on the basis that the distribution of the Fuvale property was to sons only, excluding the daughters. He said that he did not know what the law said on distribution. He said that the share meant for the administratrix went to the buyer, Harrison Mutonyi Ingutia. He said that the deceased said that he sold the land so that he could pay university fees for the administratrix. He conceded that the deceased had also spent money on his education. He said he was satisfied with what the deceased gave him. He said that the administratrix was educated up to university level, while he went up to Standard Eight. His view was that the administratrix was using her university education to harass them.

15. Only the administratrix and the protestor gave oral evidence, the rest of the survivors made unsworn statements on their respective positions on the proposed distribution. Ainea Chesimbili said that the deceased had distributed the land amongst the sons before he died, and they planted sisal to mark the boundaries. Ibrahim Chesimbili said he did not understand the proposals made in court. He said that the deceased distributed the land when he was in Standard Six, and he was satisfied with the share that was given to him. Edward Barasa said that the deceased had made certain proposals before he died. He had fixed boundaries. He took the view that the court should go by the proposals by the deceased, so that the property was shared out between Elijah, Edward, Philip, Abraham and Harrison. He said that the share due to Gladys went to Harrison. He invited the court to visit the land to see the boundaries and the developments. Esther Lunyolo Philip said that the deceased had showed them their portion, and that was where she was left by her husband when he died. Rose Lichuma and Sarah Nanzala agreed with the administratrix. Rose said she was not present when the deceased allegedly shared out the land; while Sarah said that the deceased had only shown the sons where to put up homes, but he did not distribute the land. Melsa Chesimbili supported the case by the protestor, asserting that the deceased had shared out the land amongst the sons, and did not give any portion to the daughters. She stated that the deceased had assigned each daughter to a son, so that if their marriages failed, she would be taken care of by the son assigned to her. She stated that sisals were planted to mark the boundaries. She said she did not want a share in the estate, saying that the sons of the deceased were weak, and that she was in fact providing for them.

16. At the conclusion of the oral hearings, I directed that the Deputy Registrar of the court visits South Kabras/Chesero/1193, as requested by some of the parties, for the purpose of ascertaining who were in occupation of the land, and identify any highlights or markings on the land. That visit happened on 30<sup>th</sup> April 2021. The Deputy Registrar complied a report dated 30<sup>th</sup> April 2021. She observed that the land had been subdivided into six portions. Five portions were occupied by the sons – Elijah, Ainea, Abraham, Edward and the family of the late Philip. The sixth portion was occupied by Festus Kanga, who was said to be a purchaser. She further observed that there were clear markings on the ground to separate each portion from the other on the ground. Each of the occupants had established a homestead, and grew crops and planted trees. All the daughters of the deceased had not been allocated portions on the ground.

17. 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.”*

18. The protestor has raised issue with the appointment of the administratrix as such, and the court has a duty, even without anyone raising it, to consider whether the administratrix was properly appointed, whether she has administered the estate in accordance with the law and whether, upon being confirmed, should be confirmed would continue to administer the estate in accordance with the law. I shall, therefore, have to probe into the matter.

19. The administratrix and the protestor are siblings, and both have equal right to administration under section 66 of the Law of Succession Act. The protestor appears to have the illusion that he has a stronger claim to administration, compared with the administratrix, principally because the administratrix is a married daughter of the deceased. It is important to debunk the myth that sons have a superior claim to

administration and to inheritance compared with daughters. That is not the law in Kenya. The deceased herein died in 2006, long after the Law of Succession Act had come into force in 1981. His estate, therefore, fell for distribution under the provisions of the Law of Succession Act, specifically under Part V of the Act, as he died intestate. Under the Law of Succession Act, distinction is not made between male and female children. The law is gender neutral. That would mean that a son has no superior right over daughter to administration of their parent's estate. There also no provision in the Act to the effect that marriage is a disentitling fact to administration.

20. The only thing, over which the process of applying for administration by the administratrix can be faulted, is that she did not comply with Rules 7(7) and 26 of the Probate and Administration Rules, which require that where a petitioner who has an equal right to others, who are not themselves applying, ought to either ask for citations to issue to those others to apply or refuse to apply for probate, or to have them renounce or waive their right or entitlement to apply, or consent to the petitioner applying. From the material before me, it is evidence that, although the administratrix did disclose all the persons who were beneficially entitled to a share in the estate, she did not comply with Rules 7(7) and 26 of the Probate and Administration Rules. Under section 76(a) of the Law of Succession Act, a grant can be revoked where the process of obtaining it was defective. Failure to comply with procedural requirements, such as those in Rules 7(7) and 26 of the Probate and Administration Rules, would amount to a defect in the process, and a grant obtained under those circumstances would not have been made rightly to the administratrix. However, section 71(2) is in permissive terms, the court may or may not give much weight to such defects. The same permissiveness is discernible in section 76. The court may, despite the defects, go ahead and confirm the administratrix as administrator, or make such other orders, with regard to her appointment, as may suit the interests of the case.

21. 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 administratrix 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.”*

22. 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 administratrix has properly identified all the beneficiaries of the estate, there has not been full disclosure. The deceased had married three times, and had children with each of the three wives. The administratrix did not disclose that information. Indeed, she did not disclose that the deceased had married more than once. Yet, that fact is critical in distribution in intestacy whether under the Act or under customary law. The rules that govern distribution of the estate of a polygamist differ, to a certain extent, to those governing distribution of the estate of a monogamist. It is critical, therefore, that there be full disclosure of that fact, for the estate of a polygamist is distributed in terms of section 40, while that of a monogamist is governed by sections 35 and 36.

23. The administratrix, from what has emerged from the hearing and the filings after the confirmation application was lodged at the registry, only disclosed the children of the deceased from the second and third families, and omitted the first family. The explanation given was that the deceased had settled the first family, on a piece of land separate from that occupied by the second and third families, and which the subject of these proceedings, South Kabras/Chesero/1193. It was also said that the first family had subjected the land where they were settled to succession. No concrete evidence was provided, by way of documents, to show that such proceedings were ever conducted.

24. The cause herein relates to the estate of the deceased, the late Chesimbili Sindani. The law expects that all the survivors of the said person ought to be disclosed in the cause. Succession ought not be done piecemeal, in phases, where different assets and different sections of the family are subjected to different succession causes. There should be only one succession cause relating to his estate. All the survivors of the deceased ought to have been disclosed, whether or not they were to get a share in the estate, and whether or not the share due to them had been distributed, and whether or not the first house had been settled. In any event, members of the first house were not involved in the process, and did not file any papers, and there is no knowing whether what the administratrix was telling the court was the whole truth. I do not understand what would have been so difficult as getting one of them to attend court or to swear an affidavit to confirm what the administratrix was saying. The court ought not proceed to contemplate distribution of the estate before all the survivors of the deceased are brought on board.

25. The matter of the shares allotted to the persons disclosed as survivors is also disputed. The argument is that the deceased had distributed his estate amongst his sons, and not the daughters, who were not, in any event, entitled on account of customary law, and on account of their having gotten married. This raises several issues, which I should address in this judgment. One, that the deceased had distributed his estate prior to death, and, therefore, the matter could not be revisited. Two, the daughters of the deceased were not entitled to a share in the estate on account of their having gotten married, and also on account of their being women. There was also the argument that the administratrix got her share of the estate during the life time of the deceased, when a portion of the land was sold to raise money to cater for her education. These multiple arguments, to an extent, betray the fact that the protestor could be clutching at straws, trying to get some argument to latch on.

26. I will start by considering the first argument, that the deceased had distributed his property prior to his death. He is said to have shared out the property amongst his sons, to the exclusion of the daughters. Firstly, no documents were presented to support that contention. Secondly, the person, who was alleged to have acted together with the deceased, one Daniel Machoni, did not file any documents, and was not presented as a witness to corroborate the story by the protestor. Thirdly, the said distribution was allegedly done when the sons were largely young, with some being minors. Anyhow, what the protestor is saying is that there had been what is called an *inter vivos* distribution of the property, through gifting that the deceased made prior to his death.

27. Gifts *inter vivos* are not defined in the Law of Succession Act, for the Act only provides for gifts in contemplation of death. The only mention of lifetime gifts or gifts *inter vivos* is 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. The gifts that the protestor says the deceased made to him and his brothers were immovable in nature, and were lifetime gifts or gifts *inter vivos*. As said

above, the Law of Succession Act does not define a lifetime gift, and there was really no need for such definition or provision, since such gifts do not form part of the estate of the deceased.

28. To understand what a gift *inter vivos* or a lifetime gift entails, a fall back to case law is critical. In *In re Estate of Gedion Manthi Nzioka (Deceased)* [2015] (Nyamweya J), the court defined gifts *inter vivos* as gifts between living persons, which, for them to be effective, have to 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. The court stated that gifts *inter vivos* must be complete for them to be valid. It was said, in *Lucia Karimi Mwamba vs. Chomba Mwamba* [2020] eKLR (Gitari J), that properties which the deceased gave to beneficiaries during lifetime no longer formed part of his estate, so long as they were given and settled for the beneficiaries. The court stated that there ought to be evidence that the gifts were granted by deed, payment or execution of a transfer. On the facts of that case, the court held that the deceased had not given his estate to his sons during his lifetime. The evidence on record showed that he had applied for subdivision of his land, but never transferred the land to the sons, and, although he had pointed out, on the ground, where each of the sons could occupy the land, the property remained in his name. The court concluded that the land was, therefore, not gifted to the sons, and it remained the free estate of the deceased, available for distribution in intestacy.

29. In *In re Estate of Nyachio Osindi (Deceased)* [2019] eKLR (Ougo J), the court found that there was sufficient proof of a gift *inter vivos*, where the deceased had given possession of a piece of land to another, and signed a transfer form in his favour, but died before the transfer was registered. In *In re Estate of Muchai Gachuika (Deceased)* [2019] eKLR (Gikonyo J), 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 *In re Estate of Phylis Muthoni M'Inoti (Deceased)* (2019) eKLR (Gikonyo J), 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. The court further found that none of the alleged beneficiaries had claimed to have had been put in possession of the subject property by the deceased, nor to build or built on the subject property.

30. The principles relating to *inter vivos* gifts have been stated in very many cases, which include, but not limited to *In re Estate of Godana Songoro Guyo (Deceased)* [2020] eKLR (Nyakundi J), *William M'Arimi M'tuambae vs. Rosemary Karamuta for estate of George Gatimi* [2017] eKLR (Gikonyo J), *In re Estate of Monicah Wambui Nguthiru (Deceased)* [2020] eKLR (Ongeri J), *In re Estate of Osoro Motari (Deceased)* [2020] eKLR (Ougo J), *In re Estate of M'Raiji Kithiano (Deceased)* [2017] eKLR (Gikonyo J), *Evans Onguso & 2 others vs. Peter Mbuga & 4 others* [2020] eKLR (JM Mutungi J), *Margaret Mumbi Kihuto vs. Peter Ngure Kihuto & another* [2017] eKLR (Onyiego J), *In re Matabo Sabora (Deceased)* [2019] eKLR (Mrima J), *Naomi Wanjiru Njoroge & 2 others vs. Winston Benson Thiru* [2018] eKLR (Muigai J) and *In re Estate of Japhet M'tuamwari M'ikandi (Deceased)* [2019] eKLR (Gikonyo J).

31. From the case law above, the principle that emerges is that any gift *inter vivos* should be backed by some memorandum in writing, and the gift would be complete once title to the subject property is transferred to the name of the beneficiary of the gift. Difficulties arise where transfer is not effected to the beneficiaries before the death of the deceased, in which case such property would remain the free property of the deceased, available for distribution at confirmation, the argument being that such gift was founded on a mere promise which the deceased did not carry through prior to his death. Where some preliminary steps were taken towards effectuating his promise, so that all what remained after the death of the deceased was mere registration of the property in the name of the beneficiary, it would be presumed that the deceased intended to make a gift *inter vivos*. That would be the case where the deceased has 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 of an owner, but a mere licensee. The death of the deceased would not upgrade the licence to ownership, if anything the death of the proprietor could mean that the license comes to an end, and the licensee continues to occupy and work the land at the mercy of the administrator.

32. 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 sons? As stated elsewhere, the protestor merely stated orally that the deceased had made a lifetime gift to the sons in 1992. He did not describe the occasion which necessitated that. He said that the deceased was helped by Daniel Machio, but he did not provide any affidavit by that person to corroborate his story, neither did he present the said Daniel Machio as a witness at the oral hearing. I have before me oral testimony that the deceased showed the sons places where they could put up houses and farm, and that they did, in fact, move into the land, occupied it, put up structures and farmed it, as evidenced by the report from the Deputy Registrar. However, no documents were placed before me with the narrative that they were prepared by the deceased, or at his behest, on the occasion of the gifting the subject lands to his sons, to take effect immediately. No evidence was adduced that the deceased took any steps towards perfecting or completing those alleged gifts, by way of moving the relevant local land control board, given that the land in question was agricultural, for consent to subdivide it amongst his sons, and for the transfer of the subdivisions to their names. 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 way their registration in the names of the deceased. Clearly, the sons have no provided any evidence of gifts *inter vivos*. The interpretation of that would be 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. The gifting was allegedly done in 1992, and the deceased died in 2006. No evidence was presented of what the deceased did between the two dates to perfect and complete the gifts. No explanation was given for his failure to complete the gifts, given that there was a lapse of fourteen years between when he allegedly showed the sons the land when he died. If he intended to make lifetime gifts to them, he would have had had the land subdivided and titles processed and transferred to the sons within the fourteen years. There is no evidence that he took any single step in that direction, besides showing the sons where to build and farm. In any event, some of the sons were school boys in 1992, when this was allegedly happening, which ought to raise eyebrows, as to why the deceased would do such a thing, show teenagers their inheritance, when his death was not imminent, for he went on to live till 2006.

33. The conclusion to make in the circumstances is that as at the time of death, the property in question did not belong to the sons or children, but to the deceased. 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 have been 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. The process of succession is not intended to sanction or perfect gifts that the deceased had made during his lifetime, which he left incomplete or imperfect. It is not meant to rubberstamp his acts, for it only deals with free property, in respect of which the deceased had not made any gifts. Where parties 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, except for the limited purpose of section 42 of the Law of Succession, of being taken into account as the court distributes the estate. A party who finds themselves placing such matter before a probate court, asking that they be allocated the alleged gift *inter vivos* at distribution, ought to understand that they are either at the wrong forum or that the alleged *inter vivos* gifts were not in fact gifts of that character. The said gifts ought to be perfected or completed in processes that ought not involve succession, for such gifts are meant to take effect during the lifetime of the deceased.

34. The second argument, by the protestor, is that daughters of the deceased are not entitled to a share in the estate. The deceased herein died on 26<sup>th</sup> December 2006. That was long after the Law of Succession Act had come into force on 1<sup>st</sup> July 1981. According to section 2(1) of the Law of Succession Act, the provisions of the Act apply effectively from that date to estates of persons dying after the 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. As at the date the petition was filed and distribution proposed, the survivors of the deceased, as listed in the petition and the summons for confirmation, 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.

35. 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.”*

36. It would appear to me that the protestor, in his filings and the testimony he gave in open court, is interpreting the reference to children in section 38 of the Law of Succession Act to mean the male children, so that it is the male children who are entitled to share the estate equally, to the exclusion of the female children. The protestor expressly argued that the estate herein was for 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. Indeed, he stated that when the deceased distributed his property to his sons, he assigned a daughter to each of the sons to take care of, in the event the marriages of the daughters collapsed, forcing the daughters to go back to their father's home.

37. The term children, as used in the Law of Succession Act, is defined in section 3(2)(3), not in terms of sons and daughters, or male and female, or gender, but in other respects. From the language in the Act, it would mean that the law is gender-neutral, in its reference to children, and children, as used in the Act, refers to children of both gender. The effect of that would be that the equal distribution contemplated in section 38 would be equal distribution of the property as between both the sons and daughters of the deceased.

38. 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.”*

39. The conclusion to make from the discussion above, is that, under section 38 of the Law of Succession Act, 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.

40. The non-discrimination principle stated in section 38 of the Law of Succession Act is 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 old Constitution allowed for the application of laws that were discriminatory. African customary law, which permitted discrimination of daughters, was one such law. The Constitution promulgated in 2010 does not carry similar provisions. The only provision which allows limited discrimination is Article 24(4) of the Constitution, but the same is limited to persons who profess the Muslim faith. The deceased did not die a Muslim, and, therefore, Article 24(4) is not relevant to these proceedings.

41. The pertinent provisions of Article 27 provide 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 realization 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."

42. International law applies in Kenya, and it is relevant to this discussion. Kenya has signed many international instruments, which provide for 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. 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.

43. The most important international convention or treaty, for the purpose of this matter, is the Convention on the Elimination of All Forms of Discrimination against Women. Kenya signed the said Convention, by which it has condemned discrimination against women in all forms, and committed itself to eliminate discrimination against women. 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 their 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 ...”

44. Under the international legal regime, discrimination of individuals based on their sex or gender no longer has a place in modern society. Most of the instruments that I have discussed above are not new, for they have been in place for many years. 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.

45. The substance of these international instruments has been domesticated in Kenya through a number of pieces of legislation, including the Law of Succession Act, 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. To that extent, in this day and age anyone who believes that daughters can be treated in a way that suggests that they do not count at all in any manner, in cases 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, and 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.

46. 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.”*

47. The point that I am making, in all the discussion above, is that the paradigm shifted a long time ago, with respect to the inheritance rights of daughters, from what customary law provided to what is envisaged under the Constitution, statute and international law. 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. The daughters are entitled to it in equal measure with the sons. The sons should not, then, assume that the mere fact, of their being sons or male, gives them a superior right or entitlement or claim to that property over the daughters of the deceased. There is nothing in the law that applies to the instant estate that says so, and I have not been pointed or directed to any by the protestor. The property of a dead parent is not there for the sons to give out to the daughters of the deceased as they please or at their will or whim. Daughters are entitled to a share in the estate of their late father as a matter of right, and they should not, at all, be ashamed of asserting their right to it.

48. With respect to the application of customary law to the distribution of the estate of the deceased, which envisages daughters not taking a share in the estate, ideally because their entitlement, at least for the married ones, did not lie in the estate of their father but rather in the estate of their husband. See *Wambugi w/o Gatimu vs. Stephen Nyaga Kimani* (1992) 2 KAR 292 (Masime and Kwach JJA, with Hancox CJ dissenting). The protestor appears to assume that that is the law applicable to the estate herein. I have already dealt with aspects of this elsewhere, but for clarity, I will address it once again. The short of it is that the deceased herein died in 2006, after the Law of Succession Act had come into force on 1<sup>st</sup> July 1981. According to section 2(1), the Act applies to estates of persons that died after that date, that is to say 1<sup>st</sup> July 1981, which would mean that it ought to govern distribution to the estate herein. Section 2(2) provides that the law that ought to apply to the estate of a persons who died before 1<sup>st</sup> July 1981 is the law that governed the matter as at the date of the death. For Africans who died intestate, that is without a will, the applicable law to such estates was customary law. That would mean, that since the deceased died after 1<sup>st</sup> July 1981, the law applied by section 2(2), that is to say African customary law, did not apply to his estate. Section 2(1) has been interpreted by the courts as ousting the application of African customary law to estates of African intestates dying after the 1<sup>st</sup> July 1981. See *Rono vs. Rono and another* [2005] 1 EA 363 (Omolo, O’Kubasu and Waki JJA).

49. The Law of Succession Act does provide for certain exceptions, where customary law would apply to estates of Africans dying after 1<sup>st</sup> July 1981, but none of these exceptions apply to the instant matter. Section 5(1) allows application of African customary law through the will of the deceased. In the instant case, the deceased did not leave a will through which he had made customary law apply to his estate. Sections 32 and 33 apply customary law to property in certain parts of the country, with respect to property exempted from the provisions of the Law of Succession Act. A gazette notice was issued, by Legal Notice number 94 of 1981, to indicate the areas envisaged, but Kakamega was not one of them, and, therefore, property situated within Kakamega was not exempted from the Act, so as to pave way for application of Luhya customary law to it. Luhya customary law, therefore, is of no application whatsoever to distribution of the estate herein, which should be exclusively governed by Part V of the Law of Succession Act.

50. The third issue is that the administratrix is not entitled to a share in the estate because she got her share during the lifetime of the deceased when part of the land was sold to raise money to pay for her university education. Firstly, this argument contradicts the other arguments, that daughters were not entitled to a share because they were women and they had gotten married; and that the deceased had distributed his property during lifetime, when he did not make any provision for the daughters. Either he made provision for his daughters or one of them, or he did not. Secondly, paying school fees is a statutory obligation on the part of a parent to his children. It is not an act of distributing wealth, and it ought not to be equated to making a gift *inter vivos*, neither should it be used to deny a child his or her rightful share to the estate of the departed parent. Each child is entitled to education, and the parent is under an obligation to ensure that each child accesses the same. The fact that one child leaves school at nursery school, while the other studies up to university, should not be taken to mean that the one for whom the parent expended a lot more for their education lost their right to inheritance. There is nothing in the law that disentitles such child to a share in the estate.

51. I believe I have said enough. 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 only 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.

52. The administratrix has placed before me three proposals on distribution, in the confirmation application, the further affidavit and in the written submissions. In all these proposals, she makes provision for all the children of the deceased, both sons and daughters. In his proposals, the protestor only shares out the estate amongst the sons. The estate shall be distributed amongst all the children, regardless of their gender and marital status. There is no consent or consensus amongst the children on distribution, and, in the circumstances, I shall follow the position stated by the Court of Appeal in *Justus Thiora Kiugu, & 4 Others vs. Joyce Nkatha Kiugu & Another* [2015] eKLR (Visram, Koome and Otieno-Odek JJA), that where the parties filed consents on distribution, the court would have no reason not to endorse the distribution proposed, so long as the same had the concurrence of all the persons beneficially entitled, even if the proposed distribution departed from what the law provided on distribution. However, where there is no consensus, the court strictly applies the law. See also *Mercy Maggie Kaunda vs. Elisha Mugabe Kaunda & 3 others* [2016] eKLR (Mbeya J), *In re Estate of MM (Deceased)* [2020] eKLR (Gikonyo J) and *In re Estate of Juma Shiro-Deceased* [2016] eKLR (Mwita J). Only one child renounced or waived her entitlement to a share in the estate, I am talking about Melsa Lichuma Chesimbili. She is within her rights to say that she shall not be taking her share in her father’s estate, and she shall, accordingly, be excluded from the distribution.

53. There appears to be consensus that the deceased had sold 1½ acres of the subject land to Harrison Mutonyi Ingutia. No documentary evidence was placed before me to support the sale, but I shall uphold it as there is no contest on it.

54. The protestor introduced another alleged buyer, Festus Kanga Muhere. There was no consensus on this one. He does not appear to have had transacted with the deceased, but with a son of the deceased. No documents were produced to support the sale, and, therefore, I cannot tell from whom he bought a portion of the property. The report by the Deputy Registrar places him in occupation of the property. However,

inheritance is not based on occupation, but on the relationship between the persons claiming and the deceased. The relationship between Festus Kanga Muhere and the deceased has not been defined, and, therefore, until such relationship is provided, he shall be treated as having been put in occupation of estate property by a child of the deceased, and that it should be to such child of the deceased that he should look up. I say so because the only non-survivor of the deceased who should have a legitimate claim to a share in estate property should be he to whom the deceased sold the property, or he to who the administratrix sold the property, subject to section 82 of the Law of Succession Act. Where a person bought estate property from a person other than deceased or the administrator, he or she acquired no valid claim against the estate, and should, after confirmation, look up to the person who purported to sell the land to him.

55. I was informed that the administratrix had caused South Kabras/Chesero/1193 to be transferred to her name. There is nothing wrong with that. It accords with the land legislation, the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The fact that the administratrix has filed a summons for confirmation of grant, seeking to distribute that said property, means that she does not regard it as her property absolutely, but that of the estate, available for distribution to the persons that she has listed in her application. It was transferred to her name as administratrix, to hold the same in her representative capacity, for the benefit of the survivors of the deceased, so as to facilitate its distribution to the said survivors at confirmation.

56. The relevant provisions in the Land Registration Act state as follows:

*“Transmission on death of joint proprietor.*

*60. If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate.*

*Transmission on death of a sole proprietor or proprietor in common.*

*61. (1) If a sole proprietor or a proprietor in common dies, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative’s name of the words “as executor of the will of ..... [deceased]” or “as administrator of the estate of ..... [deceased]”, as the case may be.*

*(2) Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission—*

*(a) any transfer by the personal representative; and*

*(b) any surrender of a lease or discharge of a charge by the personal representative.*

*(3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.*

*Effect of transmission on death.*

*62. (1) Subject to any restriction on a person’s power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but enforceable and subject to which the deceased proprietor held the land, lease or charge, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor of the land lease or charge with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.*

*(2) The registration of a person as provided in section 61, shall relate back to and take effect from the date of the death of the proprietor.”*

57. The provisions in the Land Act state as follows:

*“49. Transmission on death of joint proprietor*

*If one of two or more joint proprietors of any land, lease or charge dies, the Registrar shall, on proof of the death, delete the name of the deceased from the register by registration of the death certificate.*

*50. Transmission on death of a sole proprietor or proprietor in common*

*(1) If a sole proprietor or a proprietor in common dies, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative’s name of the words “as executor of the will of ( ) [deceased]” or “as administrator of the estate of ( ) [deceased]”, as the case may be. (2) Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission—*

*(a) any transfer by the personal representative; and*

*(b) any surrender of a lease or discharge of a charge by the personal representative.*

*(3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.*

*51. Effect of transmission on death*

*(1) Subject to any restriction on a person’s power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor thereof with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.*

*(2) The registration of any person as aforesaid shall relate back to and take effect from the date of the death of the proprietor.”*

58. As stated here before, the process that the administratrix used to obtain the grant was defective, but since she disclosed all the persons beneficially entitled to the estate, I shall overlook that and confirm her as administratrix, but I shall not distribute the estate at this stage, before she places on record documentation, from members from the first house of the deceased, showing that they are making no claim to South Kabras/Chesero/1193.

59. The final orders are as follows:

**(a) That Gladys Naliaka Chesimbili is hereby confirmed as the administratrix of the estate of the deceased;**

**(b) That distribution of the estate is hereby postponed to allow the administratrix file documents, by way of affidavit, or Form 37, showing that members of the first house of the deceased had no claim to South Kabras/Chesero/1193;**

**(c) That Festus Kanga Muhere shall take advantage of the postponement to place on record documents that demonstrate that the deceased sold to him 0.201 hectare out of South Kabras/Chesero/1193;**

**(d) That (b) and (c), above, shall be complied with in the next forty-five days;**

**(e) That the matter shall be mentioned thereafter for further orders or directions;**

**(f) That the final orders on distribution shall be made only after there has been compliance with (b), above;**

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

**(h) 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 28<sup>TH</sup> DAY OF MAY 2021**

**W MUSYOKA**

**JUDGE**