



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**SUCCESSION CAUSE NO 883 OF 2013**

**IN THE MATTER OF THE ESTATE OF DANIEL KISELI NGUVA *alias* NGUVA KISELI (DECEASED)**

**JOSEPH MUTUA NGUVA.....1<sup>st</sup> ADMINISTRATOR/APPLICANT**

**KELVIN KILUU NGUVA.....2<sup>nd</sup> ADMINISTRATOR/APPLICANT**

**VERSUS**

**NELSON MUNGUTI NGUVA.....3<sup>rd</sup> ADMINISTRATOR/PROTESTOR**

**RULING**

1. By Summons for Confirmation of Grant dated 23<sup>rd</sup> October, 2018, the 1<sup>st</sup> and 2<sup>nd</sup> Administrators/Applicants herein seek the following orders:

**a) That the grant issued to Joseph Mutua Nguva, Kelvin Kiluu Nguva and Nelson Munguti Nguva on 23<sup>rd</sup> October, 2018 (sic) be confirmed as proposed.**

**b) That the costs of this application be costs in the Cause.**

2. it is agreed by the parties that the deceased herein, **Daniel Kiseli Nguva *alias* Nguva Kiseli**, died intestate on 23<sup>rd</sup> October, 1986 and had Three (3) wives and Fourteen (14) children whose particulars he set out as hereunder:-

**A) Mbelelu Nguva - 1<sup>st</sup> Wife (Deceased)**

i) Musyoki Nguva -son (Deceased)

ii) Gabriel Mbiti Nguva -son (Deceased)

iii) Joseph Mutua Nguva -son

iv) Peter Kiseli Nguva -son

v) Muthee Nguva -daughter

vi) Kaswii Nguva -daughter

**B) Mbula Nguva - 2<sup>nd</sup> Wife (Deceased)**

i) Nelson Munguti Nguva -son

ii) Kamene Nguva -daughter (Deceased)

**C) Nthambi Nguva - 3<sup>rd</sup> Wife (Deceased)**

- i) Samson Kioko Nguva -son(Deceased).
- ii) Kelvin Kiluu Nguva -son
- iii) Ruth Kalondu Nguva -daughter
- iv) Ndunge Nguva -daughter
- v) Diana Kalekye Nguva -daughter
- vi) Nduku Nguva -daughter

### **1<sup>st</sup> and 2<sup>nd</sup> Administrators/Applicants' Case**

3. The Summons for Confirmation were supported by an affidavit sworn by **Joseph Mutua Nguva**, the 1<sup>st</sup> Administrator herein who swore the same on behalf of the 2<sup>nd</sup> Administrator/Applicant. According to him, the earlier confirmed grant which was issued to the 3<sup>rd</sup> Administrator/Protector herein was revoked on 18<sup>th</sup> September, 2017 and parties ordered to agree on whom to be the administrators and on distribution. According to the Applicants, the above named dependants have consented to the making of this application and there is no application for provision of dependants is pending.

4. It was deposed that the deceased left the following properties:

- a. Athi-River/Athi-River Block 1/159 (*Plot Number 1606*)
- b. Plot No. 1606 and 2786 at Kyumbi.
- c. Shares number 2170 at Katelembo Athiani Muputi Farming & Ranching co-operative ltd
- d. Two shares at Kyanzavi Farmers Co. Ltd
- e. Agricultural Block Number 37 At Kyanzavi Farmers Co. Ltd (*Plot Number 49*)

5. According to the Applicants, the identification and shares of all persons beneficially entitled to the said estate have been ascertained and should be distributed as per the annexed schedule of distribution as there is no estate duty payable in respect of the estate of the deceased. According to the proposed mode of distribution, the said properties are to be sold and the proceeds shared equally amongst the beneficiaries.

### **The 3<sup>rd</sup> Administrator/Protector's Case**

6. The 3<sup>rd</sup> Administrator/Protector however swore an affidavit of protest in which he averred that the proposed mode of distribution is not in line with the Deceased's wishes. The Protector averred that in the said Mode of Distribution, the 1<sup>st</sup> & 2<sup>nd</sup> Administrators have concealed material facts and failed to disclose some properties which form part of the Deceased's Estate. It was averred that the deceased's properties were as hereunder:-

#### **A) Land**

- i) Plot No. 1606. Kyumbi (P/No Athi River/Athi River Block1/159)
- ii) Plot No. 2786 Kyumbi. (1 Acre)
- iii) Agricultural Plot No. 37 Kyanzavi Farmers Co. Ltd).
- iv) Plot No. 49 Kyanzavi Farmers Co. Ltd.
- v) Plot No. 600 Kyanganga –Inyooni.
- vi) Plot No.1583 in Kiimani
- vii) Plot No. 134 in Mithini Katelembo ( $\frac{1}{2}$  acre)
- viii) Plot No. 749 in Limba
- ix) Plot No. 1051 in Kaembe
- x) Plot in Kyandani.

xi) Plot in Mulumya

## **B) Shares**

i) 2 shares in Kyanzavi Farmers Co. Ltd.

ii) 3 shares (M/NOs. 2170, 2618 & 82) in Katelembo Athiani Muputi Farming and Ranching Co-operative Society Ltd.

7. It was averred that the Deceased that based on the annexed Plot Allocation Certificate, the Deceased shared the Three (3) Shares/Land in Katelembo Athiani Muputi Farming & Ranching Co-operative Society Ltd to his three wives as follows:-

i. Mbelelu Nguva (1<sup>st</sup> Wife) -1 share/Plot M/No. 2618.

ii. Mbula Nguva (2<sup>nd</sup> Wife) -1 share/ Plot M/No. 2170.

iii. Nthambi Nguva (3<sup>rd</sup> Wife) -1 share/Plot M/No. 82.

8. According to the Protestor, the deceased gave him M/NO. 2170 because his mother had died and he applied to have her share No.2170 transferred to him, being the next of kin. It was averred that when the 1<sup>st</sup> wife **Mbelelu Nguva** passed on, the 1<sup>st</sup> Administrator herein **Joseph Mutua Nguva** balloted for her share NO. 2168 because he was the next of kin. It was the Protestor's case that properties under the **Co-operative Societies Act** (Laws of Kenya) and **The Rules** thereunder are not subject to Succession proceedings.

9. It was further averred that the Deceased shared Plot NO. 2786 Kyumbi to Two (2) Wives/: **Mbula Nguva & Nthambi Nguva** while the Plot No. 134 in Mithini-Katelembo to Mbelelu Nguva. While **Joseph Mutua Nguva** and the family of **Gabriel Mbiti Nguva** do practice farming in the plot at Kyandani, **Joseph Mutua Nguva, Peter Kiseli Nguva** and the family of **Musyoki Nguva** do practice farming in the Plot at Mulumya.

10. According to the Protestor, the deceased gave him the Plot No. 1583 in Kiimani and transferred the same to him and the title Deed issued to him to that effect.

11. It was therefore his position that the Deceased's Assets should be distributed as per the Deceased's wishes as shown in his Schedule of Distribution which he attached.

12. It was further averred that no single wife to the Deceased bought any share and/or Plot at Katelembo Athiani Muputi Farming & Ranching Co-operative Society Limited and that it is the Deceased who bought the above mentioned Shares/Plots and shared the same to his Three (3) wives. In his view, the 1<sup>st</sup> and 2<sup>nd</sup> Administrators are bitterly complaining about him on issues which were heard and determined by this Court vide the Ruling delivered on 18<sup>th</sup> September, 2017 with a view of revisiting the same.

13. In view of the foregoing, the Protestor was of the view that the 1<sup>st</sup> and 2<sup>nd</sup> Administrators are merely settling scores with him hence he implored this Court to confirm the Grant in terms of his Schedule of Distribution dated 1<sup>st</sup> April, 2019 because, according to him, it reflects the Deceased's wishes.

## **Reply to the Protest**

14. In opposing the Protest, the 1<sup>st</sup> Administrator swore an affidavit in which he deposed that the protestor is dishonest, he cannot be trusted and his ambition has always been to disinherit every other beneficiary and whatever he says should be treated as lies. It was disclosed that the Protestor had initially petitioned for letters of administration, obtained a confirmed grant and sold properties of the estate after misleading the Court he was the only beneficiary of the estate. Upon discovery of the said activities, the Applicants moved the Court to have the grant revoked and properties revert to the estate and the Court allowed the same vide ruling delivered on 18<sup>th</sup> September, 2017.

15. It was averred that the Court already made a finding vide the said ruling that the land number **Athi River/ Athi River Block 1/159** and Plot Number 2786 at Kyumbi belong to the deceased and it's not open for determination again. It was deposed that the protestor was ordered to file a statement of account how he misappropriated the funds he got from the fraudulent sales and he filed an affidavit on 4<sup>th</sup> May, 2018 sworn on the same date which is not sufficient. It was contended that from the purported affidavit of account, it is shocking that the protestor hurriedly sold land number Athi River/ Athi River Block 1/159 for meagre Kshs. 4,800,000/=, when it is worth more than Kshs. 20,000,000/= merely to disinherit the other beneficiaries, clearly confirming the greed and bad faith on part of the protestor. The deponent reiterated that the deceased left the following properties.

i. Plot number 1606 at Kyumbi now Athi River/Athi River Block 1/159

ii. Plot number 2786 at Kyumbi

iii. Plot at Kyanzavi Farmers co ltd block 37/49

iv. Plot number 600 Kyanganga Inyooni

- v. Plot number 1583 in Kiimani
- vi. Plot number 1051 at Kaembe
- vii. Plot at Kyandani
- viii. Two plots in Mulumya

16. According to the deponent, the share at Kyanzavi gave rise to the one plot namely block 37/49. On the other hand, the shares in Katelembo were purchased and owned as follows:

- a. Share number 2170 was bought and owned by the deceased
- b. Share number 2618 was bought and owned by **Mbelelu Nguva** and not the deceased.
- c. Share number 82 was bought and owned by **Nthambi Nguva** and not the deceased.

17. The deponent deposed that while share number 2618 belongs to the estate of **Mbelelu Nguva** and not available for distribution, the following properties were shared by the deceased as follows:-

- a. Plot number 1583 in Kiimani – given to the 2<sup>nd</sup> house where the protestor comes from.
- b. Plot in Mulumya – given to his mother and she has a title deed and thus not part of the estate.
- c. Plot at Kyandani- given to his mother and was shared between himself and his two brothers and each has a title hence not part of the estate.
- d. Plot no. 600 Kyanganga Inyooni- the deceased shared it to all his children as per the boundaries on the ground and there is no dispute at all.
- e. The alleged plot number 749 at Limba is not known to him and the other beneficiaries and the protestor should provide ownership documents.

18. It was averred that the following properties were not shared out by the deceased:-

- a. Plot number 1606 at Kyumbi now Athi River/Athi River Block 1/159
- b. Plot number 2786 at Kyumbi
- c. Plot at Kyanzavi Farmers co ltd block 37/49
- d. Plot number 1051 at Kaembe

19. Plot number 134 (measuring 50 X 100 FT and not ½ acre) at Katelembo which was just given on 6<sup>th</sup> March, 2018 is, according to the deponent, not owned by the deceased alone but it is owned by 6 different shareholders/people who were joined by Katelembo for purposes of winding up of the society and their particulars were given as:

- a. Daniel Nguva Kiseli –Member number 2170
- b. Esther Jane Mbula –Member number 83
- c. Mbelelu Nguva –Member number 2618
- d. Nthambi Nguva –Member number 82
- e. Francisco N Kavila –Member number 22783
- f. Kennedy M Mulwa –Member number 429

20. According to the said Administrator, the issue of property being in a cooperative society and not subject to succession as stated in paragraph 11 in the affidavit of protest does not arise because the property in the society is still in the name of the deceased and other persons, some dead and others still alive. He denied that plot number 2786 at Kyumbi was given to the two families and asserted that the same was never shared and is in the name of the deceased hence available for distribution.

21. The deponent admitted that the contents in paragraph 13, 14 and 15 are true and further that all persons including the protestor already

have title deeds obtained during the lifetime of the deceased.

22. The deponent therefore, subject to what he deposed to, opposed the proposed mode of distribution by the protestor because, in his view, it is self-serving, is not equitable and wants to take greater and the prime properties of the estate alone. According to him, that proposal is merely meant to protect what he fraudulently misappropriated and his actions should be condemned in the strongest terms possible.

23. The deponent averred that the deceased did not leave any will with respect to the properties which were not shared out and they are subject to be distributed as per section 40 of the **Law of Succession Act**. It was his position that all the unshared parcels of land should be sold and proceeds shared equally between all the beneficiaries as per the applicable law.

### **1<sup>st</sup> and 2<sup>nd</sup> Administrator/Applicants' Submissions**

24. It was submitted on behalf of the applicants that the 3<sup>rd</sup> administrator/protestor, who is from the 2<sup>nd</sup> house had initially obtained letters of Administration of the deceased's estate and had the same confirmed by misrepresenting to the court that he was the only child of the deceased and left all the other beneficiaries out. Upon the discovery of this, the other beneficiaries filed summons for revocation of grant and by a ruling delivered on 18<sup>th</sup> September, 2017, **Nyamweya, J** revoked the said grant and issued a prohibition against any dealing in respect of title numbers Athi River/Athi River Block 1/159, Plot Number 1606 and 2786 at **Kyumbi** until determination of this succession cause. That the Court further ordered the 3<sup>rd</sup> Administrator/protestor to give an account of all dealings and monies received with respect of the said properties and directed the parties to agree on who to be administrators. Further, it was ordered that the status quo do remain as regards all properties of the deceased.

25. It was further submitted that the proprietor later filed and served an affidavit showing the sale of plot number 1606 and Athi River/Athi River Block 1/159 for Kshs 4,800,000/= and plot number 2786 at Kyumbi for Kshs. 400,000/= so the protestor gobbled a total of Kshs 5,200,000/= alone belonging to the estate. According to the Applicants, the protestor's proposal is thus an attempt to cover up and protect what he had illegally sold.

26. It was submitted that the deceased had three houses listed and that Sections 38 and 40 of the **Law of Succession Act** provides how estates should be divided depending on the circumstances of each case. In this case it was submitted that the estate is not survived by any spouse but only children hence the applicable law is section 38 whereby the net estate is to be divided equally among the surviving children. In this regard the Applicant relied on the Court of Appeal decision **Stephen Gitonga Muriithi vs. Faith Ngira Muriithi Nyeri CA No. 3 of 2015 (UR)**.

27. It was therefore submitted that section 38 calls for equal distribution among all children of the deceased and not the houses. According to the Applicants, the estate is comprised of the following properties:-

- i. Plot Number 1606 as Athi River/Athi River 1/159
- ii. Plot now registered as 2786 at Kyumbi.
- iii. Plot at Kyanzavi Farmers Company Limited Block 37/49.
- iv. Plot Number 600 at Kyanganga Inyooni
- v. Plot number 1583 in Kiimani
- vi. Plot number 1051 at Kaembe
- vii. Plot at Kyandani
- viii. Two plots at Mulumya
- ix. Share number 270 at Katelembo

28. They contended that since share number 2618 Katelembo was bought and owned by **Mbelelu Nguva**, the 1<sup>st</sup> wife, it does not form part of the estate of the deceased but is part of the estate of **Mbelelu Nguva**. Similarly, share number 82 Katelembo was bought and owned by **Nthambi Nguva** hence forms part of the estate of **Nthambi Nguva**. It was submitted that the deceased had shared only the following properties before his death.

- a) Plot number 1583 in Kiimani- was given to the 2<sup>nd</sup> house where the protestor comes from.
- b) Two plots at Kyandani given to **Mbelelu Nguva**, the 1<sup>st</sup> wife
- c) Plot at Kyandani given to **Mbelelu Nguva**, the 1<sup>st</sup> wife. The same was shared between the 1<sup>st</sup> administrator and his brother, they have obtained title and it's not part of the estate.
- d) Plot number 600 at Kyanganga Inyooni which the deceased shared out to all his beneficiaries as per the boundaries on the ground.

There is no dispute over this property.

29. It was however submitted that the deceased did not share out the following properties:-

- i. Plot number 1606 now registered as Athi River/Athi River Block 1/159
- ii. Plot number 2786 at Kyumbi
- iii. Plot at Kyanzavi Farmers Company Limited Block 37/49
- iv. Plot number 1051 at Kaembe

30. According to the Applicants, the measurements for the plot number 134 at Katelembo is 50 X 100ft and not ½ an acre as claimed by the Protetor and is not owned by the deceased alone but by six (6) shareholders/people who were joined by Katelembo Society for purposes of winding up of the society and the said people are:

- a. **Daniel Nguva Kiseli** –Member number 2170
- b. **Esther Jane Mbula** –Member number 83
- c. **Mbelelu Nguva** –Member number 2618
- d. **Nthambi Nguva** –Member number 82
- e. **Francisco N Kavila** –Member number 22783
- f. **Kennedy M Mulwa** –Member number 429

31. It was submitted that the plot number 2786 was never shared between two families contrary to what the protestor alleges and that the said plot is still in the name of the deceased and available for distribution. According to the Applicants, the protestor has not presented any evidence to show that it was shared out by the deceased. The Applicants asserted that all persons including the protestor already have title deeds which were obtained during the life time of the deceased. In their view, the protestors' mode of distribution is self-serving and inequitable, and that he wants to take the prime of the estate alone and to protect what he illegally sold.

32. Since the deceased did not leave a will, it was submitted that the properties not shared should be shared as per sections 38 and 40 of the **Law of Succession Act** as proposed by the 1<sup>st</sup> and 2<sup>nd</sup> administrators.

### **3<sup>rd</sup> Administrator/Protetor's Submissions**

33. On his part, the Protetor submitted in answer to the question whether the Deceased distributed some properties during his lifetime, that that was the agreed position. It was however submitted that the 1<sup>st</sup> & 2<sup>nd</sup> Administrators had suppressed that material fact from this Honourable Court whilst filing the aforesaid Summons for Confirmation of Grant, but only conceded when the 3<sup>rd</sup> Administrator filed his Protest.

34. According to the Protetor, the Deceased herein owned the following Assets and/or properties:-

### **Land**

- i) Plot No. 1606 Kyumbi (Now Land Parcel No. AthiRiver/AthiRiver Block1/159)
- ii) Plot No. 2786 Kyumbi. (1 Acre)
- iii) Agricultural Plot No. 37 Kyanzavi Farmers Co. Ltd).
- iv) Plot No. 49 Kyanzavi Farmers Co. Ltd.
- v) Plot No. 600 Kyanganga - Inyooni.
- vi) Plot No.1583 in Kiimani
- vii) Plot No. 134 in Mithini- Katelembo (1/2 Acre)
- viii) Plot No. 749 in Limba
- ix) Plot No. 1051 in Kaembe

x) Plot in Kyandani.

xi) Plot in Mulumya

### **Shares**

i) 2 Shares in Kyanzavi Farmers Co. Ltd.

ii) 3 Shares (M/Nos. 2170, 2618 & 82) in Katelembo Athiani Muputi Farming and Ranching Co-operative Society Ltd.

35. It was noted that each of the above mentioned shares in Katelembo Athiani Muputi Farming and Ranching Co-operative Society Ltd had a Plot as shown hereunder;-

i) Membership Share No. 2618 bore Plot No. 134 Mithini- Katelembo.

ii) Membership Share No. 2170 bore Plot No. 1606 Kyumbi (Now Land Parcel No. AthiRiver/AthiRiver Block1/159)

iii) Membership Share No. 82 bore Plot No. 134 Katelembo.

36. During his life time, it was submitted that the Deceased shared the aforementioned Three (3) Shares (M/NO. 2618, 2170 & 82) in Katelembo Athiani Muputi Farming and Ranching Co-operative Society Ltd to his aforesaid Three (3) wives as shown below:-

i) Mbelelu Nguva (1<sup>st</sup> Wife) – M/No. 2618/Plot No. 134 Mithini- Katelembo

ii) Mbula Nguva (2<sup>nd</sup> Wife) – M/No. 2170/Plot No. 1606 Kyumbi (Now Land Parcel No. AthiRiver/AthiRiver Block1/159).

iii) Nthambi Nguva (3<sup>rd</sup> Wife) – M/No. 82 /Plot No. 134 Katelembo.

37. However, since the Protessor's mother by the name **Mbula Nguva** (2<sup>nd</sup> wife) had already passed on, the deceased gave the Protessor the aforesaid M/No. 2170/Plot 1606 Kyumbi (Now P/No. AthiRiver/AthiRiver Block1/159) and the Protessor accordingly applied to have the said Share/Plot transferred to him as the Next of Kin or Nominee. Similarly, when the 1<sup>st</sup> Administrator's mother, **Mbelelu Nguva** (1<sup>st</sup> Wife) passed on, the 1<sup>st</sup> Administrator, **Joseph Mutua Nguva** balloted for the same because he was the Next of Kin/Nominee. It was submitted that the above mentioned Transfer and Balloting were done in pursuance of **The Co-Operative Societies Act, the Co-operative Societies Rules** and **The Katelembo Athiani Muputi Farming and Ranching Co-operative Society Ltd By-Laws**. Therefore, in the Protessor's view, by virtue of Section 76 as read with sections 39 and 81 of the **Co-operative Societies Act**, the aforementioned properties can never be subject to Succession Proceedings and that any dispute regarding the aforesaid Assets should be heard and determined by The Co-operative Tribunal and any Appeal therefrom should only be lodged at the High Court.

38. It was further submitted that the Deceased herein distributed Plot No. 2786 Kyumbi equally to **Mbula Nguva** (2<sup>nd</sup> wife) and **Nthambi Nguva** (3<sup>rd</sup> wife) during his lifetime and bequeathed the Protessor herein Plot No. 1583 Kiimani, transferred the same to him and a Title Deed processed and issued to him to that effect, a decision which none of the 1<sup>st</sup> & 2<sup>nd</sup> Administrators challenged during the deceased's lifetime; and thus the Deceased's wishes should be respected and/or upheld.

39. The Protessor relied on Section 42 of the **Law of Succession Act** as well as the case of **Joseph Wairuga Migwi vs. Mikielina Ngina Munga [2016] eKLR**.

40. It was therefore submitted that the said assets should be shared under the latter as embedded under Part V of the **Law of Succession Act**. It was emphasised that the following assets were never distributed by the Deceased during his lifetime.

i) Agricultural Plot No. 37 Kyanzavi Farmers Co. Ltd).

ii) Plot No. 49 Kyanzavi Farmers Co. Ltd.

iii) 2 shares in Kyanzavi Farmers Co. Ltd

iv) Plot No. 600 Kyanganga - Inyooni.

v) Plot No. 749 in Limba

vi) Plot No. 1051 in Kaembe

vii) Plot in Kyandani.

viii) Plot in Mulumya

41. Though the Protestor was aware of the provisions of Section 40(1) of *The Law of Succession Act* he submitted that it is important to state that the 1<sup>st</sup> Administrator herein and the family of **Gabriel Mbiti Nguva** do practice agricultural activities in Plot at Kyandani whilst the 1<sup>st</sup> Administrator herein, **Peter Kiseli Nguva** and the family of **Musyoki Nguva** do practice farming at the Plot at Mulumya. Accordingly, the above mentioned properties should be distributed as captured in the Protestor's Schedule of Distribution dated 01/04/19 on the authority of the case of **In Re Estate of M'Muthamia Mwendwa (Deceased) [2016] eKLR**.

42. It was therefore submitted on behalf of the Protestor that the distribution should be in the manner proposed by him since that mode of distribution reflects the Deceased's wishes and the prevailing set up on the ground. In any case, the 1<sup>st</sup> & 2<sup>nd</sup> Administrators herein had not disclosed some properties of the Deceased nor had they disclosed the fact that the Deceased had shared some of his properties during his lifetime in their Summons for Confirmation of Grant dated 23/10/18 and only revealed those glaring facts after the 3<sup>rd</sup> Administrator filed his Affidavit of Protest on 01/04/19. In the Protestor's view, the actions of the Applicants were premised on greed and intended unfair enrichment.

43. As regards the costs, it was submitted that in Pursuance of Rule 69 of *The Probate and Administration Rules* Costs of all proceedings shall be in the discretion of the Court. However, since the 1<sup>st</sup> & 2<sup>nd</sup> Administrators have manifested high levels of dishonesty and deceit, the Protestor prayed that costs be awarded to him.

#### **Determination**

44. I have considered the issues raised herein. I have considered the issues raised hereinabove.

45. In this case, there is no dispute as to the beneficiaries of the estate of the deceased. What is in dispute are the properties that ought to be distributed. According to section 3 of the Act "estate" means "the free property of a deceased person" while "free property", in relation to a deceased person, means "the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death." It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by that time his interests had not been terminated. In other words, it does not include the properties jointly owned by him and other people though his share therein may form part of his estate. It similarly does not include the properties he had disposed of before his death. It follows that if the deceased had, during his lifetime, expressed his wish as to the manner in which he wanted his properties or part thereof shared, his wishes ought to be considered. I therefore agree with the decision of **Mativo, J**, in the case of **Joseph Wairuga Migwi vs. Mikielina Ngina Munga [2016] eKLR** where he expressed himself as hereunder:

**"In my view this Section of the Law seeks to protect, respect and preserve the wishes and acts executed and undertaken by Deceased Persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustrations. They are to be honoured and effected.**

I have carefully considered the Affidavit and oral evidence adduced by the Parties and the submissions by both Advocates. I have also taken into account the provisions of the Law of Succession Act. [11] I have considering the justice of the case and taken into account that it is not always easy to achieve equality in all cases of this nature as was observed in the case of **Rono vs Rono**[12] and what may be fair in one case may not be fair or applicable in another case. In the present case the second wife is said to have ten children while the first wife has only three. That may be so, but the express wishes of the Deceased cannot be ignored. To me the Deceased was clear in his mind as to what he wanted and he freely bequeathed each of his two wife's a parcel of land during his lifetime, and lived for another 10 years after doing so and no one raised an objection...I find useful guidance and resemblance in the above quoted case of **Martha Wanjiku Waweru v. Mary Wambuia Waweru** where Onyancha J observed inter alia as follows:-

**"In this case the Deceased had in his lifetime distributed his estate as he wished. He had power to do so. His family members did not Protest or change his mode of distribution which they had opportunity to do during his lifetime. He fixed clear physical boundaries which no one interfered with at any stage even after his death. In my view his wishes should have been respected."**

I also find it necessary to reiterate with approval the above cited excerpt from the judgement of **Makhandia J (as he then was) in the case of Paul Kiruhi Nyingi & Another vs Francis Wanjohi Nyingi** where he upheld the wishes of the Deceased in circumstances similar to the present case. As Makhandia J observed above, it has not been demonstrated that the deceased's wishes were illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected in my view. Nor has it been shown that the Deceased was biased, unfair and/or discriminatory against any of the beneficiaries. In my view it would appear that some of the beneficiaries were aware of the distribution in question during the Deceased's lifetime. If they were disenchanted with the distribution they should have taken it up with him.

I find the facts of this case so clear that Section 40(1) of the Act on distribution as per the Number of the houses cannot apply without offending the express wishes of the deceased as provided for under Section 42 cited above. I have also considered that each case has to be determined on its peculiar facts and circumstances. I find that my answer to issue framed above is in the affirmative. After due consideration, I find that the protestor's protest has merits and I allow it..."

46. In this case it is agreed that the properties of the deceased comprised the following:

a. Plot Number 1606 as Athi River/Athi River 1/159

b. Plot now registered as 2786 at Kyumbi.

- c. Plot at Kyanzavi Farmers Company Limited Block 37/49.
- d. Plot Number 600 at Kyanganga Inyooni
- e. Plot number 1583 in Kiimani
- f. Plot number 1051 at Kaembe
- g. Plot at Kyandani
- h. Two plots at Mulumya
- i. Share number 270 at Katelembo

47. Amongst these properties, it is agreed that Plot No. 1583 was given by the deceased to the 2<sup>nd</sup> house where the Protestor comes from. It is also agreed that plot no. 2618 belongs to the 1<sup>st</sup> wife whether by purchase or by gift by the deceased and that plot no. 82 also belonged to the 3<sup>rd</sup> wife whether by purchase or gift. The Protestor however avers that Plot No. 1606 (Athi River/Athi River 1/159) emanated from Plot No. 2170 which was given by the deceased to the Protestor's mother and was eventually given to the Protestor following the death of his mother. While he has annexed documents in relation to Plot No. 2170, he has not shown any nexus between the said plot and Plot No. 1606 (Athi River/Athi River 1/159) which according to the documents exhibited by the Applicants belong to the deceased.

48. Although the Protestor claims that Plot No. 2786 Kyumbi was shared to the 2<sup>nd</sup> and the 3<sup>rd</sup> wives, he has not adduced any evidence in support of this contention. Similarly, there is no evidence the Plot No. 134 Mithini-Katelembo was given to the 1<sup>st</sup> wife, **Mbelelu Nguva**. According to the Applicants, this particular plot was jointly owned between the deceased and 5 other people.

49. From the material placed before me, it is clear that the only free property of the deceased are the following:

- a. Plot Number 1606 as Athi River/Athi River 1/159
- b. Plot now registered as 2786 at Kyumbi.
- c. Plot at Kyanzavi Farmers Company Limited Block 37/49.
- d. Plot Number 600 at Kyanganga Inyooni
- e. Plot number 1583 in Kiimani
- f. Plot number 1051 at Kaembe

50. Section 40 of the *Law of Succession Act* provides that:-

***“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the next intestate estate shall in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”***

51. Since it is disclosed that Plot No. 600 Kyanganga has already been shared equally, that position ought to be maintained in line with the decision of **Mabeya, J.** in **Re Estate of M’Muthamia Mwendwa (Deceased) [2016] eKLR** where he stated that:

***“According to Ms Kaaria, John Mutembei purchased a portion of 0.25 acres from Speranza Kaguri, while Francis Kithinji purchased a portion of 0.44 acres from Linus Mwiti. Of course both Speranza and Linus were neither the owners of the properties they were purporting to sell nor were they administrators of the Estate.***

***In view of the foregoing, I am inclined not to disrupt the social set up now obtaining within the estate of the Deceased. To insist on the Application of Section 38 might lead to chaos as the daughters themselves are against it. I am satisfied that notwithstanding what I have held as regards the alleged dependants and the purported purchasers. I would adopt the proposal made by the Protestors. Accordingly, the Protest succeeds and the Grant is confirmed in terms of paragraph 3 of the Affidavit of Janet Igoki sworn on 24<sup>th</sup> March, 2016.”***

52. Apart from the said property which has already been distributed, the remaining properties are to be distributed equally amongst all the children of the deceased in line with the position adopted by the the Court of Appeal in **Stephen Gitonga Muriithi .vs. Faith Ngira Muriithi Nyeri CA No. 3 of 2015 (UR)**, where the Court delivered itself as follows:-

***“The Appellants complaint against the above mode of distribution is that it failed to take into account the clear principles of law enshrined in section 38 and 40 of the law of Succession Act Cap 160 laws of Kenya. Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether***

**married and comfortable in their marriage or unmarried. Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each household of a polygamous deceased. Applying the above principles to both the learned trial judges reasoning and distribution, it is our finding that the learned trial judge fell into an error when he failed to accord equal distribution to all children of the deceased in violation of section 38 of the law of succession Act by discrimination against the married daughters of the deceased. See Rono versus Rono &another [2008] 1 KLR (G&F) 803.”**

53. It is however clear from the ruling of **Nyamweya, J** (as she then was) on 18<sup>th</sup> September, 2017 that some of the said properties were sold by the Protestor herein to third parties. From his own accounts, plot number 1606 and Athi River/Athi River Block 1/159 was disposed of for Kshs 4,800,000/= while plot number 2786 at Kyumbi was disposed of for Kshs. 400,000/=. In effect the Protestor received a total of Kshs 5,200,000/= on behalf of the estate. Since the purchasers of the said properties are not parties to this suit and contrary to the position taken by the Applicants, the Court did not nullify the said dispositions but only registered prohibitions thereon, I will not interfere with the said dispositions. However, in determining the shares due to the Protestor, he shall be deemed to have received a sum of Kshs 5,200,000/= from the estate which shall be deducted from whatever share is due to him from the proceeds of the sale of the net estate.

54. Accordingly, unless the parties agree to subdivide the said properties, the same shall be sold and the proceeds therefrom shared equally amongst all the beneficiaries of the estate of the deceased herein taking into account what I have stated about the Protestor's share hereinabove.

55. Liberty to apply granted

56. There will be no order as to costs. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 29<sup>th</sup> day of June, 2021.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Muumbi for the 1<sup>st</sup> and 2<sup>nd</sup> Administrators**

**Mr Mukula for the 3<sup>rd</sup> Administrator**

**CA Geoffrey**