REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 400 OF 2002

IN THE MATTER OF THE ESTATE OF PIUS TEMBETE KWAYIYA alias TEMBETE KWAYIYA (DECEASED)

JUDGMENT

1. I am called upon to determine an application for confirmation of grant, dated 17th April 2015. It is brought by Desterio Salamba Tembete, Dismas Munyovi Tembete and Eliakim Tembete, some of the administrators of the estate of the deceased. I shall refer to them as the applicants. The applicants state that the persons who survived the deceased to be themselves and Kurispinus Simiti Tembete. They indicate that the deceased died possessed of a property known as Butsotso/Ingotse/212, and propose that the said property be shared between the four survivors; in uneven portions. There is a consent to distribution executed by the three applicants, but not Kurispinus Simiti Tembete.

2. There is an affidavit by Eliakim Lusava Tembete, sworn on 4th May 2017. He has listed the four sons as the survivors of the deceased, but states that the deceased daughters who were married and not interested in the estate of the deceased. He stated that he had distributed his property on the ground in the manner set out in the affidavit. He states that the sons had been occupying their respective shares of the land, and there were existing boundaries on the land which indicated the shares. He states that the sons had agreed with the sharing of the land by the deceased and none of them had objected to the same. He avers that he had devolved his share, but accused his brothers, Desterio Salamba Tembere and Dismas Munyovi Tembete had attempted to interfere with the existing boundaries. He mentions that Kurispinus Simiti Tembere did not live on the land as he had sold the portion allocated to him by the deceased and moved to another piece of land at a place called Manda. He accuses the said Kurispinus to be a trouble-maker.

3. Desterio Salamba Tembete swore his affidavit on 4th May 2017. He supports the proposal made in the summons for confirmation of grant. He mentions that Kurispinus had sold his share of the land allocated to him and he was no longer living on the land. He asserts that Kurispinus had never had a case with their uncle Philip Shitika Kwayiya to entitle him to a larger share of the estate. He asserts further that the three applicants were entitled to a larger share because they had incurred expenses in filing and prosecuting the revocation application.

4. Crispinous Simiti Tembete filed a document dated 8th May 2017 purported to be an affidavit, but since it is not sworn, it cannot pass for one, and it shall be disregarded. Most of the parties are unrepresented and they have filed multiple documents that I need not recite here.

5. Directions were given on 3rd February 2016, to the effect that the application would be disposed of by way of *viva voce* evidence.

6. The oral hearing happened on 11th October 2018. Eliakim Lusava Tembete was the first on the stand. He described the deceased as his father. He supported distribution as proposed in the application. He stated that the deceased had distributed his land before he died. He stated that he did not hold any number to any portion of the land, and said that the green card was in the name of the name of Crispinous Tembete as administrator of the estate. He stated that the succession had not been done, and asserted that they preferred distribution in the manner the deceased desired.

7. The second witness was Testerio Salamba. He supported distribution as per the schedule attached to the application. He stated that the farm was for five people, and each person had been given their portion, adding that he was satisfied with what was given to him, and he did not wish to have the property distributed afresh. He stated that he was not interested in the land of his uncle. He stated that the land had been divided into four parts, and was distributed by his parents and there was no need for it to distribute afresh.

8. Dismus Munyovi Tembete followed. He too supported distribution as per the conformation application. He also stated that the deceased had distributed his land before he died, saying that he was satisfied with what he had been given, he confirmed that he had not been given a reference number for his portion. He stated that the land was still intact, adding that the court would decide on distribution.

9. Kurispinus Simiti Tembete took to the stand on 24th September 2019. He stated that the deceased had only one wife, who bore him six children, being two daughters and four sons. He died possessed of Butsotso/Ingotse/212. He mentioned that he had a case over land with their uncle, but the applicants had refused to assist him. He also said that they had also refused to support him initiate the succession cause, saying that it was their late mother who gave him permission to file the same. He stated that the two sisters were not interested in the estate, for if they were interested they would have come to court. He stated that he was unaware that his grant had been revoked and that other administrators had been appointed to join him. He stated that he was opposed to the proposed distribution by the applicants. He stated that the deceased was using four acres as at the time of his death, while he had given each of the sons one acre each. He stated that he had case

with their uncle, Philip Shitika, whose land was Butsotso/Ingotse/212, which he won, and whose papers were in the court file. He estimated his expense on the case at Kshs. 220, 000.00. He stated that Stanley Mangara had been leasing his land, then Mangara began to claim that he had bought it when that was not actually the case. He confirmed that he did not live on the land, but asserted that he farmed it. He stated that the deceased had not sold his land. He said that he himself had not sold any portion of the land to Mangara, that his mother had consented to him applying for the grant.

10. At the close of the oral hearing the parties filed written submissions which I have read through and noted the arguments made.

11. In confirmation applications, there are two principle factors for the court consider, appointment of the 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."*

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

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

13. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? There is a letter on the record from the Assistant Chief of Ingotse Sub-Location, dated 20th April 2002, which indicates that deceased was survived by the four sons named in the summons for confirmation of grant. These four individuals are listed in the petition for letters of administration intestate, which was filed herein on 26th August 2002, as the survivors of the deceased.

14. It is clear from the filings that the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules were not complied with. Some of the survivors of the deceased were left out. It was mentioned by the sons that the deceased had two daughters. The names of the two daughters have not been disclosed in the application, nor in the petition. It is alleged that they were not interested in taking shares in the estate, yet they have not filed any documents to waive or renounce their interests in the estate. Neither were they brought to court at the hearing of the matter to state their position. The distribution proposed by both sides, only provides for the sons, and leaves out the daughters, who have not even executed the consent document in Form 17. There was not compliance at the confirmation process with the said provisions to the extent that the administrators had not disclosed the daughters of the deceased. it meant that the administrators had not fully ascertained all the persons who were beneficially entitled to the estate of the deceased, for all the children of a dead person are his survivors, who are beneficially entitled to shares in his estate, and that should include daughters.

15. What comes out very clearly to me, from the material before me, is that the deceased was survived by other children apart from the four sons. Going by the proviso to 71(2) of the Law of Succesion Act and Rule 40(4) pf the Probate and Administration Rules, the administrators had not ascertained those individuals, and therefore the matter was not ripe for confirmation. They misled the court into believing that they had ascertained all the persons who were beneficially entitled to the estate, and then went on to allege that the daughters of the deceased, whose names they did not even disclose, were not interested in the estate, yet they provided no evidence, by way or renunciations or other documents, where they had signed away their rights. Confirmation of grant cannot be allowed under the circumstances.

16. What emerges from the above, is that the administrators had not, since their appointment, not administered the estate in accordance with the law. The proviso to section 71(2) of the Law of Succession Act, requires administrators to satisfy the court as to the identities of and shares of all the persons beneficially entitled to the estate of the deceased. The effect of this provision is that the administrators have a duty, before they seek distribution of the estate, and indeed solely for that purpose, to ascertain the assets of the estate and the persons who are beneficially entitled to a share in the estate. It is the persons who are beneficially entitled to a share in the estate, who ultimately get to be allocated shares in the estate. Those persons include daughters. They should be listed in the application as survivors of the deceased. If they are not taking a share in the estate it should be shown in the distribution schedule that they were not taking a share, supported by renunciations of their shares or by a consent in Form 17. In the absence of that it would be mean that the application was premature.

17. The said proviso, by way of repetition, for emphasis sake, says:

> "*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."*

The said provision is reinforced by Rule 40(4), which, again I shall hereby repeat for emphasis, which says, by way of imposing a duty on the administrator, that:

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

18. By ascertaining persons who are beneficially entitled means identifying the persons who are entitled to a share in the estate of the intestate. Under Part V, the persons who are entitled to the estate of an intestate are the survivors, that is to say the persons mentioned in sections 35, 36, 38 and 39 of the Law of Succession Act, meaning surviving spouses, children, parents and siblings of the deceased, and other relatives of the deceased up to the sixth degree. The persons, who the administrators herein omitted from the petition and the application for confirmation of grant, are daughters of the deceased, who are, for purposes of Part V of the Law of Succession Act, survivors of the deceased, and, therefore, persons who are beneficially entitled to a share in the estate of the deceased.

19. The provisions that I have referred to above, say as follows:

> "*35. Where intestate has left one surviving spouse and child or children*
>
> *(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—*
>
> *(a) the personal and household effects of the deceased absolutely; and*
>
> *(b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.*
>
> *(2) …*
>
> *(3) …*
>
> *(4) …*
>
> *(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.*
>
> *36. Where intestate has left one surviving spouse but no child or children*
>
> *(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—*
>
> *(a) the personal and household effects of the deceased absolutely; and*
>
> *(b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and*
>
> *(c) a life interest in the whole of the remainder: Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to*
>
> *(2) The Minister may, by order in the Gazette, vary the amount specified in paragraph (b) of subsection (1).*
>
> *(3) Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the*

order of priority set out in section 39.

37. Powers of spouse during life interest

A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the consent of all co-trustees and all children of full age, or with the consent of the court shall, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:

Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.

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.

39. Where intestate has left no surviving spouse or children

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares."

20. The deceased died a monogamist, therefore, section 35 of the Law of Succession Act, applied to the distribution of his estate, that is if his widow were alive, and by section 38 if he was survived only by children, if the widow had also died by the time of distribution. From the affidavits and oral evidence it was made clear that the widow had passed on. That then means that sections 35 (5) and 38 would apply with respect to distribution of the estate herein. If the surviving spouse were still alive, the effect of section 35 would be that the property devolves upon her during life interest, and upon determination of the life interest, whether upon her death or remarriage, the property would devolve upon the children in equal shares. That is the purport of section 35(5) of the Law of Succession Act. Where the widow has since passed one, then, according to section 38, the property would be shared out equally between the children. Sections 35(5) and 38 are of the same effect. It should be emphasized that children refers to both male and female children, without any discrimination, based on gender, or age, or marital status. There is no provision at all in the Law of Succession Act, which states that the use of "child" or "children" in the Act refers only to male children.

21. The administrators knew about the daughters of the deceased. They knew that for a fact, and there was nothing for them to ascertain so far as daughters were concerned. They knew them since they were born of the same mother, and they were raised together with them. The fact of their non-disclosure can only be described as fraudulent and designed to mislead the court as to the true status of the estate and the family of the deceased. The court was misled, lied to and hoodwinked. There was mischief. I reiterate that the proviso to section 71(2) and the provision in Rule 40(4) of the Probate and Administration Rules were not complied with, and, therefore, the confirmation application was fundamentally flawed.

22. Rule 40(8) of the Probate and Administration Rules, is also relevant. It requires administrators, when applying for confirmation of their grants, to file a consent in Form 17, contemporaneously with the application, signed by all dependants and other persons who may be beneficially entitled. Such survivors or dependants include daughters of the deceased. It says as follows:

"*Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 17 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions un chambers on notice if Form 74 to the applicant, the protestor and such other person as the court thinks fit."*

23. Rule 40(8) envisages that a consent, in Form 17, be signed by all the persons beneficially entitled to the estate of the deceased. All such persons include the survivors of the deceased as identified in sections 35, 36, 38, 39 and 40 of the Law of Succession Act, being surviving spouses and all the surviving children of the deceased, whether they would be taking a share in the property or not. Rule 40(8) is in mandatory terms. Form 17 must be signed by all the survivors of the deceased. In this case the application for confirmation of grant was not supported by the consents in Form 17.

24. Rule 40(8) of the Probate and Administration Rules, does not declare so in loud language, but it quietly requires administrators, when applying for confirmation of their grants to file a consent in Form 17, contemporaneously with the application, signed by all dependants and other persons who may be beneficially entitled. Under that provision, a confirmation application may be disposed of by the court without

hearing any party, so long as no affidavit of protest has been filed and all the persons beneficially entitled have executed consents in Form 17. However, where there is an affidavit of protest on record or where any person who is beneficially interested in the estate has not signed the consent in Form 17, then the court should not proceed to give orders on distribution before it has heard such persons. That is the purport of Rule 40(8).

25. From the language of Rule 40(8), the court address the question as to whether the other persons beneficially interested in the estate have had a say to the distribution proposed. That is the utility of Form 17. The input of the other perons beneficially entitled to the estate to the proposed distribution is through Form 17. If it is found that they have not executed any consents in Form 17, then the court ought to arrange to hear them. Rule 40(8) is in mandatory terms, and should be read together with Rule 41(1), with respect to such persons being heard, which says as follows:

> “*At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall hear the applicant and each protestor and any other person interested, whether such person appear personally or by advocate or by a representative.*”

26. It is my finding that at the oral hearing conducted herein the other persons beneficially interested in the estate were not heard, such as the daughters of the deceased. They did not execute the consent form envisaged in Rule 40(8), in the nature of Form 17. Both Rules 40(8) and 41(1) of the Probate and Administration Rules are in mandatory language. Both provisions were not observed in these proceedings. It was only democratic, just and fair that all the persons beneficially entitled to a share in the estate of the deceased got to be heard on the distribution of the assets of their late father. That is what the law expects, and the process would be fundamentally undermined where opportunity to be heard was not afforded to all the persons beneficially entitled.

27. The second consideration should be whether the assets of the estate have been ascertained. This is critical as the succession cause is all about distribution of the property that the deceased died possessed of. Both sides are agreed on the assets that were left in the name of the deceased. I am satisfied, therefore, that the assets that made up the estate were ascertained, nothing has been concealed, nor omitted from the schedule.

28. The third consideration is how the assets of the estate should be distributed amongst the persons that have been identified as survivors of the deceased. It is common ground that the deceased was survived by children, the issue of the surviving spouse is not very clear. Under Part V of the Law of Succession Act, which governs intestate succession, where intestacy happens, like in the instant case, distribution would take several forms, depending on whether the deceased was survived by a spouse and children, section 35, or by a spouse without children, section 36, or by children but no spouse, section 38, or by no spouse nor children, section 39, or was a polygamist, section 40. I have addressed those provisions elsewhere.

29. In the instant case, it would appear that both sides take the view that the estate should be shared out only amongst the sons. The justification they have for that argument is twofold. One, is that the daughters are not interested in a share in the estate. Secondly, they claim that the deceased had shared out his land during lifetime. I have already dealt with the case of the daughters. The fact that they have not come forward to claim a share is not evidence that they are not interested. The evidence that I have before me is that they have not been included nor involved in the process. They were concealed in the letter from the Chief, and in the petition, and also in the application. All this was wrong. They should have been listed in all those instances. The right way to go about it is to involve them at all the stages of the process, and if they are not interested get them to sign consents to that effect. It should not be assumed that they would not be interested merely because they were women and they got married. There is nothing in the Law of Succession Act to the effect that the marriage of a daughter disentitles her to inheritance. It is also a myth that sons have a superior right to inheritance over the daughters. There is nothing like that in the Law of Succession Act. The Law of Succession Act treats both gender equally, and any approach to inheritance under the Law of Succession Act which subordinates the rights of daughters to that of sons is contrary to the Law of Succession Act.

30. These gender neutral provisions of the Law of Succession Act should also be read together with Articles of the Constitution of Kenya, on gender discrimination. These provisions direct that men and women be treated equally. Any process of inheritance that leads to discrimination of women is, therefore, contrary to the Constitution. See Article 27 which states as follows:

> “*27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.*
>
> *(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*
>
> *(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*
>
> *(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*
>
> *(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*
>
> *(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.*
>
> *(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.*

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

31. In addition, international law is in tandem with the Constitution and the Law of Succession Act. Indeed, the spirit of equal treatment of the genders in the Construction and the Law of Succession Act is drawn from international law. Article 2 of the Constitution has made international law part of the Kenyan law, so that every international convention or treaty that Kenya ratifies applies in Kenya without the necessity of domestication through local legislation. Article 2 also addresses customary law, and says where the same is inconsistent with the Constitution it would be void. Customary law is usually inconsistent with the Constitution when it comes to matters relating to gender discrimination, and especially in areas of personal law, and it is void to that extent.

32. The portions of Article 2 relevant to this ruling state 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."

33. Part of the international law that applies through Article 2 is the Convention on the Elimination of All Forms Discrimination Against Women, which Kenya ratified in 1984. By ratifying the Convention on the Elimination of All Forms Discrimination Against Women, Kenya committed itself to fight against gender discrimination, and to take all steps to eliminate it.

34. The relevant provisions of the Convention on the Elimination of All Forms Discrimination Against Women state as follows:

"*Article 1*

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

Article 2 …

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

Article 3…

Article 4…

Article 5

State Parties shall take all appropriate measures:

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

(b) …

Article 6…

Article 7…

Article 8…

Article 9…

Article 10…

Article 11…

Article 12…

Article 13

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

(a) The right to family benefits …

(b) …

(c) …

Article 14…

Article 15

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

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

Article 16 …"

35. The standards that are set by the Law of Succession Act, the Constitution of Kenya 2010 and the Convention on the Elimination of All Forms Discrimination Against Women on the Elimination of All Forms of Discrimination against Women require that women be treated equally with men in all spheres of life, including succession. They frown on women being treated as lesser beings. With respect to succession, it would be discriminatory and unfair for the daughters of the deceased, who are immediate blood relatives of the deceased, to be overlooked merely because they got married. It would be contrary to the law, as stated in the Law of Succession Act, the Constitution of Kenya 2010 and the Convention on the Elimination of All Forms of Discrimination against Women, to sanction a devolution that would sideline women.

36. The Convention on the Elimination of All Forms Discrimination Against Women is part of the Kenyan law by virtue of Article 2 of the Constitution, and the courts, being part of the Kenyan state, have an obligation to effectuate the provisions of the Convention on the Elimination of All Forms Discrimination Against Women by fighting against gender discrimination. The application before me, no doubt, displays glaring gender discrimination, to the extent that the daughters of the deceased were not disclosed in the principal papers filed in the matter, were not involved in the process at all, and it was generally assumed that they did not matter when it came to matters inheritance. That was and is contrary to the spirit of the Constitution and the Convention on the Elimination of All Forms Discrimination Against Women. I am enjoined to apply both the Constitution and the Convention on the Elimination of All Forms Discrimination Against Women to ensure that the daughters get justice by giving them a platform in the proceedings, to state their position on whether or not they are interested in getting a share in the estate of their dead father.

37. The sons made a lot of play about the deceased having had distributed his property before death, and that there were boundaries on the land. Neither of them produced any documents as evidence that he did so. They all confirmed that he did not transfer any of the portions that he had allegedly given them. A gift *inter vivos*, or during lifetime, of registered land can only be effected by transfer and registration of that land to the beneficiary. That would mean that the property be transferred to their names by the deceased prior to his death. It is only then that they can argue that the deceased gifted them any property before he died. That never happened. The deceased had merely showed the sons some land where they settled or which they tilled. That would mean that the gifts failed or were not perfected, and it would mean that the gifts were of no effect. That is the effect of the decisions in *In re Estate of The Late Gedion Manthi Nzioka (Deceased)* [2015] eKLR and *In re Estate of M'Ikunyua M'Muriith*i [2019] eKLR, cited in the matter by one of the parties. It would simply mean that the deceased merely showed them land to settle and work on, without giving it to them absolutely. That appears to be the position here. The property in question is available for distribution in accordance with Part V of the Law of Succession Act, and not in accordance with the alleged wishes of the deceased.

38. I believe that I have said enough. The orders that I am inclined to make at this stage on the application dated 17th April 2015 are as follows:

(a) That I hereby postpone confirmation of the grant herein in terms of section 71(2)(d) of the Law of Succession Act;

(b) That the administrators are hereby granted leave to file a further affidavit in which they shall give the names of the two daughters of the deceased, and make provision for the two daughters from the estate of the deceased;

(c) That should the two daughters be minded to waive or renounce their right to a share in the estate of the deceased, they

are at liberty to file an affidavit or affidavits in which they shall so renounce such rights;

(d) That the matter shall be mentioned after thirty days for compliance and further directions; and

(e) That the final orders on the summons for confirmation of grant dated 17th April 2018 shall be made only after compliance with the directions given above.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE