



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

SUCC CAUSE NO. 1 OF 2017

IN THE MATTER OF THE ESTATE OF JOSEPH KITHOME KISILU (DECEASED)

MARY KITHOME.....APPLICANT

-VERSUS-

JOSEPHINE WAVINYA KITHOME.....1ST RESPONDENT

JANET NDUNGWA KITHOME.....2ND RESPONDENT

JUDGMENT

1. The deceased married the Applicant in 1986 after the death of his 1st wife in 1985. He died on 07/10/2016 at the ripe age of 80 years and a grant of letters of administration intestate was issued to the Respondents, (*his daughters*) with the deceased 1st wife, on 16/01/2018. The Applicant has three children from her previous marriage and two with the deceased. The 1st wife had six children but three are deceased.

2. On 05/07/2018, the grant issued to the Respondents was revoked (*Kariuki J.*) at the Applicant's instance on grounds of concealment and material non- disclosure. The court re-issued the grant jointly to the Respondents (*representing the first house*), the Applicant & Robert Musembi Kithome (*representing the second house*).

3. The Applicant's summons for confirmation of grant is dated 09/08/2018 and filed on 15/08/2018 while that of the Respondents is dated 14/09/2018 and filed on 17/09/2019. Basically, there was no consensus on distribution of the estate and the court directed that the matter be canvassed by way of *viva voce* evidence. The respective statements by the parties are also on record.

The Proposed modes of distribution

The Applicant's Proposal

	Property	Mode of Distribution
1.	L.R No. 26329/IR No. 123820 Mavoko/Mlolongo, 1 acre with a grant Title deed, which was in the process of sale valued at Ksh 4,000,000 Sale agreement dated 2014 to Gilbert Ndambuki Mutuku and Ann Mukuria	Consideration Ksh.4,000,000/= paid Ksh.2,010,000 outstanding balance of kshs 1,990,000 to offset liabilities of; i. Payment of Ksh.140,000 to Kiangi for plot Annex 2 ii. Payment of kshs 400,000 to Margaret Munyao for plot Annex 2 iii. Mary Munyao Kshs.950,000 The balance of kshs 500,000 to be shared in the ratio1:2 i.e Ndola 1/3 & Mary 2/3

2.	Plot measuring 25 x 100 Ziwani Makindu	1 st House
3.	Plot No. 55 Annexes (2)	1 st House 1/3 2 nd House 2/3
4.	A plot in Makindu(Ngukuni) 25 x 100	2 nd House
5.	Quality Estate rental houses located at Makindu town on plot No. 55 with 16 houses and two stores	1 st House 6 houses 2 nd House 10 houses
6.	Quality 18 Guest House (Muka Mukuu) & Muthama Hall on Annex 1	1 st House
7.	Makindu Sunrise Academy on Annex 2	2 nd House
8.	Nguuni village, Makindu town 1.6 acres	1 st House 1/3 2 nd House 2/3
9.	Kisingo town plot 50 by 100 feet	1 st House
10.	Masamba village family homestead comprised of 5 parcels of land each with a title deed.	Distributed by the late Mr. Kithome as follows; i. 606-Mary Munyao & her children ii. 607-Jones Muinde (son) iii. 608-Respondents iv. 620-Joshua Muthama (son)

		v. 622-Janet Ndungwa
11.	KCB Shares (Bank Accounts x 2 Trustees)	1 st House 1/3 2 nd House 2/3
12.	Safaricom shares (500)	1 st House 1/3 2 nd House 2/3
13.	M/V Reg. No. KBM 195E valued at ksh 500,000/=	2 nd House 2/3
14.	Money in KCB Account	1 st House 1/3 2 nd House 2/3

The Respondents' Proposal

	Property	Mode of Distribution
1.	Machakos L.R No. 26329	1 st House
2.	KIS/ADJ/Plot/606	1 st House
3.	KIS/ADJ/Plot/607	1 st House
4.	KIS/ADJ/Plot/608	1 st House
5.	KIS/ADJ/Plot/620	1 st House
6.	KIS/ADJ/Plot/622	1 st House

7.	Kisingo Town plot 50 by 100	1 st House
8.	Makindu Town plot 55	1 st House
9.	1 developed plot next to St. Teresa Calcutta girls Secondary School Makindu	2 nd House
10.	2 parcels of land measuring 4 acres at Mwambani village	2 nd House
11.	1 developed plot at Makindu A Primary School	2 nd House
12.	1 plot Kiboko Town next to St. Anne's Secondary School	2 nd House
13.	1 acre Makongeni village	2 nd House
14.	Quality Estate	1 st House
15.	Quality Guest House	1 st House
16.	Makindu Sunrise Academy	1 st House
17.	Safaricom shares	1 st House 50% 2 nd House 50%
18.	KCB shares	1 st House 50% 2 nd House 50%

19	KCB Makindu A/C 1116057042	1 st House 50% 2 nd House 50%
20.	A/C 017130066567	1 st House 50% 2 nd House 50%
21.	Postal Box No. 73 in Makindu	1 st House
22.	M/V Reg. No. KBM 195E	1 st House
23.	Grey Nissan Van	2 nd House

Debts	Mode of payment
1. Michael Musyoki Kshs.600,000	To be offset from sale of Machakos L.R No. 26329

NB: For ease of reference, the items in the Applicant's proposal will have the prefix **(A)** while those in the Respondents' proposal will have the prefix **(R)**.

The Applicant's case

4. **Pw1** is the Applicant. She testified that she got married to the deceased on 23/12/2016 at All Saints Cathedral. She produced the marriage certificate as **PEXB-1** and a letter from the Makindu Deputy county commissioner, confirming the list of dependants, as **PEXB-2**. She produced a bundle of family photos as **PEXB-3** to show that the family was living happily. They lived in Kileleshwa and moved to Kisingo-Makindu after the deceased's retirement. The deceased was in good health and was the Deputy Director of Education.

5. On 12/08/2012 they were in church and the deceased was giving a report as the treasurer when the book in his hands fell. He was rushed to Makindu Nursing home and thereafter to the Intensive Care Unit (ICU) in Nairobi West. The 2nd Respondent (*Janet*) was present. She produced a bundle of hospital documents as **PEXB-4**. After discharge, she took him to stay with her son, Robert Kithome, in South B. Her daughter, a nurse, was also with them.

6. The deceased was confined to a wheelchair and could not speak due to stroke. She used to pay Kshs.1,750/= per day for a full time nurse and Kshs.1,200/= per day for a physiotherapist. Eventually, they took him home and would stay in Makindu from Monday to Friday and then Kisingo Friday to Sunday. At the end of 2012, he had tube and catheter. Janet would take him without her (Applicant) knowledge and the deceased would miss his doses. They took him to a witchdoctor in Tanzania.

7. After returning from Tanzania, she went to see him and noticed a wound on one foot. Janet tried to stop her from accessing the deceased and hurled insults at her. The deceased had lost his speech but a word or two would come from him. He later escaped from Kisingo and went to the Applicant's home in Makindu. They took him for a second time and denied her access.
8. They were asking for his clothings, car keys, title documents etc. The Respondents and relatives interfered with the marriage and she was being evicted from Kisingo. She was forced to file Divorce Cause No. 08/2016 in order to deal with the properties. The deceased died before the case could be heard. The notice of divorce was produced as **PEXB-5**.
9. With regard to *A-1*, she testified that it was acquired on 01/03/1997 and title issued in 2010. She produced the lease certificate as **PEXB-6a**. That in 2014, the deceased decided to sell it and she got buyers Gilbert and Ann who deposited Kshs.380,000/= in the deceased's account and gave him Kshs.20,000/= cash. The consideration was 4 million. On 9/09/2016, the land was sold again to Michael Musyoki Mbithi by Janet for kshs 2.5 million. A sale agreement was produced as **PEXB-6b**. A caveat filed in Court by the 2nd buyer was produced as **PEXB-7** and an affidavit sworn by the buyer stating that Janet received Kshs.600,000/= on behalf of the deceased was produced as **PEXB-8**.
10. The sale of *A-1* was sanctioned by the clan in 2014 when it decided that she should leave the 1st wife's house and build her own house. The deceased's hospital bill was Kshs.563,000/= and Kshs.490,000/= was deposited into the Applicant's account by Ann and Gilbert and the same was to be used in settling the hospital bill. Ann took possession of the plot.
11. As for *A-2*, she agreed that the same can go to the 1st house.
12. With regard to *A-3*, she said that she had the relevant documents and produced an allotment letter as **PEXB-9**. Further, she testified that when she entered the marriage, the property was in existence and had 12 units. The deceased kept on increasing it by buying more land. There are 17 houses including where she lives as well as Janet. Janet collects rent from the rest of the units. In 2000, they could collect 50-60,000/= per month. She produced photos of the guest house as **PEXB-10**. Muthama hall is also on *A-3* and it used to be rented out for Kshs.6,000/=. The construction of the hall started in 2008. A photo of Muthama hall was produced as **PEXB-11**.
13. Further, she testified that Makindu Sunrise Academy was set up in 2008 and she has been running it since inception. She produced a certificate of school registration as **PEXB-12** and a sketch of the whole area as **PEXB-13**. She was a teacher by profession and said that she was earning a gross pay of Kshs.90,997/= in 2014 when she retired.
14. She produced P9 forms as **PEXB-14** and photos of her professional life as **PEXB-15**. Evidence of loans taken was also included in **PEXB-15**. She said that the class rooms were constructed with a loan which she took from Barclays Bank. Pay slips were produced as **PEXB-16** and documents of Makindu Sunrise Academy as **PEXB-17**. She produced receipts of land rates paid by the deceased as **PEXB-18**. She said that the account was run by the deceased but she was the one collecting the fees.
15. The funds of constructing Muthama hall, she said, came from the school. A breakdown of income and expenses was produced as **PEXB-19**. She produced photos of school activities as well as photos of school trips as **PEXB-20**. Photos of Muthama hall were produced as **PEXB-21**.
16. As for *A-4*, she said that the plot is not developed and the same should go to her. She produced a sale agreement as **PEXB-22**. She pointed out that the property is not included in the Respondents' proposal.
17. She replaced the mode of distribution in *A-3* with the one in *A-5*, 6 and 7 as the former had been subsumed in the latter.
18. She testified that she bought *A-8* with the deceased but it was sold by Janet to one Nzuki. The deceased had given it to her daughters, Caroline and Ann.
19. She said that the deceased had given *A-9* to his sister but also said that it could go to the 1st house.
20. She said that *A-10*, 11 and 12 should be distributed according to her proposal. She produced the titles to the separate plots as **PEXB-23**.
21. As for *A-13*, she said that she was in possession of the motor vehicle and should retain it as it was bought with money accrued from the school during her marriage. She produced the log book as **PEXB-24**.
22. She said that the money in KCB account (*A-14*) should be shared according to her schedule.
23. Further, it was her evidence that she has been paying for the Post Office box in Makindu (*R-5*) and produced receipts as **PEXB-25**.
24. She said that *R-10* was not part of the estate as she bought the 2 acres of land from Patricia Kiamba for Kshs.150,000/=. She produced the sale agreement as **PEXB-26**. She said that the extra
2.3 acres at the same place belonged to Robert Musembi and not her. She produced two sale agreements as **PEXB-27** and **PEXB-28**.
25. She also said that *R-13* is not part of the Estate as the land was bought by her second born daughter, Ann Loko, from Bernard Kisoi for a consideration of Kshs.300,000/=. She produced the sale agreement as **PEXB-29**.
26. Further, she said that *R-11* was not part of the estate as the same was bought by her third born daughter, Caroline Nduku Kithome for a

consideration of Kshs.150,000/=. She produced the sale agreement as **PEXB-30**.

27. It was her further evidence that the deceased entered into an agreement for the purchase of a plot next to A-3 in order to extend the school. The consideration was Kshs.1,310,400/= and on 07/03/2016, the balance was Kshs.110,400/= which, she said, she cleared in installments of kshs Ksh.15,000/=. She produced the sale agreement as **PEXB-31**.

28. Further, she said that a classroom and library were put up on that land. She also testified that there was a land exchange with her sister, Margaret Syukau, for extension of school and produced **PEXB-32** as evidence. The land was incorporated as playground and is a liability (Kshs.400,000/=) because Syukau was not paid for it.

29. **PEXB-33** was a letter from the senior assistant chief Manyatta sub-Location acknowledging a complaint by the Applicant with regard to Nguuni plot. **PEXB-34** is a receipt for a plot at Ziwani Market.

30. She testified that the plot in Makongeni measuring 69 by 81ft (R-13) was not part of the estate and produced a sale agreement as **PEX-35**. She was not aware of the elders' role but knew of their existence. They went to the deceased on 21/08/2013 and he was told that there was a clan meeting but she did not attend. The clan ordered her to move out of the 1st wife's properties and stay away from the deceased to enable him recover.

31. She produced the minutes as **PEXB-36** and a judgment by the Akitutu Clan as **PEXB-37**. She was told to stop staying in deceased's house and have her own constructed by the deceased. Further, she was told to take two million from the sale of Mlolongo land and construct a house. She was also allowed to continue managing the Academy and keep the car keys.

32. Further, she testified that she constructed her house with money from the Mlolongo plot and has been staying there since 2016. She produced **PEXB-38(a) & (b)** to show that the deceased had allowed her to construct the house on the plot along Wote road, opposite Catholic dispensary. **PEXB-39** was a document showing that the deceased had allowed Janet to take over the guest house and Muthama hall and use the income for her personal needs and also take care of their homestead.

33. She produced minutes of a meeting held by the Akitutu clan on 16/06/2016 as **PEXB-40** which she said were contradictory to **PEXB-36 & 37**. She referred to an affidavit sworn by the deceased on 19/09/2016 which outlined the properties of both houses. She said that the deceased, who was very sick, died in her arms on 15/09/2016. She produced the Affidavit as **PEXB-41**.

34. On cross examination, she agreed that the deceased had several properties when she got married to him and proceeded to purchase others after marriage. The ones they purchased together, she said, were the plot at Kalkata Girls and another one next to Makindu primary school. She said that there were other properties which she purchased on her own.

35. She agreed that there were some documents which caused the deceased to take her to Court and that she filed for divorce in July 2016 as a reaction for being sued by the deceased. She said that the deceased was given a grant (*Mlolongo*) by the Government for long service and she was in the marriage at the time.

36. She said that she attended one meeting called by the deceased but did not attend the final meeting that distributed the property. She said that according to Kamba customary laws, property is distributed among the wives.

37. In re-examination, she said that plot 55 is comprised of rental houses, a guest house and Makindu Sunrise Academy which they built together. The guest house was incomplete. She said that there was a lot of hostility during the meetings. Further, she said that the divorce was a reaction to many things happening and she withdrew it.

38. In answering questions from the Court, she said that she got two children with the deceased and that there can never be an agreement on anything between her and her step-children.

39. **PW2** was **Jackson Kili Maithya**, a retired teacher from Makindu. He adopted his statement filed on 14/02/2019 (*not on record*) as his evidence in chief.

40. On cross examination, he said that he went to Makindu in 1975 and that quality estate was being managed by the Applicant while Janet was in Nairobi. That it was the deceased who transferred the Applicant to Makindu. He was always with the deceased who was his friend and mentor and never saw Janet. He (Pw2) would also supervise the manager of the estate. He said he was informed by the deceased that Janet was divorced and she returned with two children and was staying with the Applicant.

41. He said that the deceased built a house for the Applicant and agreed that no one marries a wife without building a house. He denied that the problems in the family were brought by the Applicant. He also said that he was present when the Applicant was given a house in Kisingo. Though the deceased did not call him when distributing his property, he told him everything.

42. In answering questions from the Court, he said that he was only aware of two plots, Kisingo and the estate. The deceased did not tell him about the rest.

43. **PW3 Jimmy Musyimi Mumo**. He said that he lived in Makindu between 1962 and 1995. He adopted his statement dated 11/02/2019 (*not on record*) as his evidence in chief.

44. On cross- examination, he said that the parents of the 1st wife were known to him but not those of the deceased. He knew quality estate

because some of his colleagues lived there. He was an elder in the Akitutu clan but the deceased did not call him when distributing his property. He was not aware as to whether a house had been built for Janet on plot No. 55. He was also not aware of the owner of the plot.

45. In re-examination, he said that the deceased and Applicant stayed in Kisingo and quality estate. That they were building a school at quality estate and he also saw them build Muthama estate and the guest house. He was not aware of the number of clan members and said that only part of the clan attends meetings.

The Respondents' case

46. The 2nd Respondent testified on behalf of the 1st Respondent. She adopted her statement filed on 10/07/2019 as her evidence in chief. She said that they were following their father's will which was part of the documents they had brought to court.

47. In her statement, she stated that at the time of her mother's death, there were four surviving children out of six. A photo is attached and marked **JNK-1**. Further, she stated that at the time of her mother's demise in July 1985, her parents had accumulated the following properties;

- a) Kis/Adj/Plot/606/7/8/20/22
- b) Kisingo town plot 50 by 100
- c) Makindu town plot 55
- d) A saloon car
- e) Various household items
- f) Machakos L.R No. 263219, a retirement gift to the deceased from the Government for his years of service.

48. Further, she stated that after the deceased's retirement, they supported him financially in the development of the above properties and part of the financial support was compensation from firestone Kenya for the fatal shooting of their brother Joshua Muthama. Muthama Hall was built in his memory.

49. The properties which the Applicant entered the marriage with were listed as follows;

- a) Plot No 838 Matungulu Location
- b) Plot No 2138 Matungulu Location
- c) Plot No 2046 Matungulu Location
- d) A saloon car
- e) Various house hold items
- f) Matrimonial home in Kangundo

50. She stated that according to the deceased, the 2nd household acquired the following property;

- a) One developed plot next to St. Teresa Calcutta Secondary Girls Makindu which is the Applicant's homestead.
- b) 4 acres of land at Mwambani village.
- c) One plot near Makindu A Primary School
- d) One plot in Kiboko town near St. Annes Sec. School
- e) A plot in Makongeni village
- f) A Nissan van.

51. She stated that their proposal was based on the last two family meetings held by the deceased on 28/05/2016 and 16/06/2016. The minutes are marked **JNK- 2 & 3**.

52. She also stated that the deceased swore an affidavit to confirm division of his properties in anticipation of the upcoming divorce. The

affidavit is marked **JNK- 4** and **JNK- 5** is their proposal on distribution.

53. Further, she stated that after the deceased's confinement to a wheel chair, he left the Applicant three times on account of mistreatment and each time he left, he would be under the care of the 1st wife's children.

54. The other supporting documents were;

- a) **JNK-6**: A document signed by the deceased and Applicant giving her land to build her homestead.
- b) **JNK-7**: Letter from the assistant chief suspending the clan meeting and division of the deceased's property.
- c) **JNK-8**: Chief's letter allowing the deceased to hold the clan meeting.
- d) **JNK-9**: Chief's letter to the Applicant informing her to attend the clan meeting.
- e) **JNK-10**: document from the family clan giving notice of the meeting held on 28/05/2016.
- f) **JNK-11**: A document showing the personal items dropped at the deceased's lawyer's office by the Applicant after being ordered by court to return the deceased's personal effects.
- g) **JNK-12**: Allotment letter offering the deceased a grant of land.
- h) **JNK-13**: letter referring to Cause No. 45 of 1985-estate of the Applicant's 1st husband.
- i) **JNK-14**: documents for Makindu Civil Suit No. 262 of 2016 where the deceased was seeking a court order to get back his property from the Applicant.
- j) **JNK-15**: pleadings in divorce Cause No. 8 of 2016.
- k) **JNK-16**: Pleadings of Machakos Civil Suit No. 21 of 2013 where the Applicant wanted the deceased to be declared mentally incapacitated and Janet to be barred from all properties.
- l) **JNK-17**: Pleadings in Nairobi High Court Case No. 5 of 2016 where the Applicant stopped the deceased's burial.
- m) **JNK-18**: Note written by the Applicant's youngest son, Noah Muema, after they unwillingly relinquished the guest house.
- n) **JNK-19**: Document by the deceased allowing Janet to use proceeds from the guest house for her personal needs.
- o) **JNK-20**: Extract of abusive SMS and WhatsApp chat sent by Noah Muema to Janet and Josephine.

55. On cross examination, she agreed that the Applicant was the deceased's widow and the deceased did not marry another wife thereafter. She confirmed that the divorce filed in court by the Applicant was not determined. She agreed that in 1986, she was not working but the Applicant was. She said that she listed the property acquired as given to them by the deceased. She agreed that she did not contribute a penny in the acquisition.

56. She was not aware if the Applicant contributed anything for the School and said that it was the deceased who did everything for the school. The Applicant took over when the deceased got a stroke and locked them out. She disagreed that the Applicant was a co-founder of the school which lies on plot 55. She was not aware whether rates were paid.

57. When referred to PEXB-10 & 11 she said that the photos were not of the school and PEXB-17 were documents which she took from the deceased's house. She agreed that according to PEXB-18, rates were paid to comply with the law. She said that motor vehicle KBM 195E was registered in the deceased's name but she (*Janet*) was the one who bought it. That property was one of the issues discussed at the clan meetings but the decision was made by the deceased and not the clan. She agreed that the decisions kept on changing.

58. She agreed that chief Anderson wrote JNK-7 and that JNK-6 does not show the owner's meeting. When referred to JNK-19, she disagreed that the deceased took back properties for himself. She said that they were for his income. She denied selling plot 6239 in Machakos and said that it was sold by the deceased. She agreed that the deceased owned shares in KCB and had a post office box in Makindu. She said that there are other children in the family and the Applicant's list was incomplete. She added that the deceased's will was customary.

59. **Rw1** was **John Bosco Ngwili** from Wote-Makueni. He adopted his witness statement dated 09/07/2019 as his evidence in chief. He stated that he was an official of the Akitutu clan and had been delegated to appear in court on their behalf.

60. He stated that the deceased called the clan to witness the division of his property between his two households. That from 2013 to 2016, the clan held nine meetings in total and from the very beginning, the 2nd household disrespected the clan and deceased by refusing to attend the meetings until the clan gave them an ultimatum on 28/05/2016. According to him the 2nd household was told that failure to attend the

meeting of 16/06/2016 would result in the clan allowing the deceased to make his final decision.

61. He said he personally witnessed the final division of the deceased's property and the deceased orally stated that whatever he had put aside for his personal use would revert to the 1st household because the 1st wife was the founder. He said that while showing them where to be buried.

62. On cross examination, he said that he was the chairman of Akitutu clan which is registered and whose members are Kenyans. The clan is aware that there are laws in Kenya which they abide by. He agreed that JNK-7 was a letter stopping their meetings but they continued with them. That the deceased's mind was perfect when he made his final decision and distributed his property. That when they met on 16/06/2016, they did not divide anything as they were waiting for the 2nd family.

63. He said that the stamp on JNK-19 was for their clan but the meeting was with the village clan. He took responsibility for that. He said that he was present in the meeting of 16/06/2016 and that the deceased divided his property into 3 portions; 1st house, 2nd house and his portion. He agreed that the Applicant was the deceased's wife.

64. In re-examination, he said that during the clan meeting, the deceased and Applicant were not living together and when the final decision was made, the 2nd family was not present. That they proceeded with the meeting after getting permission from the ministry of interior-JNK-8.

65. **Rw2 Patrick Ndilango** from Makindu. He adopted his statement dated 09/07/2019 as his evidence in chief. He stated that he met the deceased who was a close friend and neighbor in 1975. He met the deceased and his 1st wife in Elijah Mbinda's shop in Makindu while on their way to purchase plot 55 from Shadrack Kyalo wa Muasya. They passed at the shop on their way back and confirmed that they had struck a deal. They immediately began fencing and constructing the houses. The deceased requested him to go and see the work he was doing on plot 55 and also requested for space in his shop to keep the work tools till he built his own store. The deceased also introduced him to the foreman, Jonathan Manywele.

66. When the deceased suffered a stroke and disagreements started in his family, he would confide in him. On his last visit to Rw2, the deceased bitterly explained how his wife would bang his injured leg on the ground, pull his ears and slap him. He also told him that they bought 3 plots, one near Ngukuni, one at Manyatta and another one at Kiambani. He also told him that his wife had filed for divorce.

67. On cross examination, he said that no construction happened on plot 55 after the deceased married the Applicant, since the building was complete before he married the Applicant. He agreed that there is a guest house and that the estate had been there since 1975. There was also a motor vehicle for the 1st wife but could not recall the registration number.

68. **Rw3 Wilson Kavera Nyamai** from Makindu. He said that the Applicant and Respondents were known to him. He knew that the deceased bought a parcel of land in Kisingo from Mwakali Nguli. He adopted his witness statement dated 09/07/2019 as his evidence in chief.

69. It was his evidence that the deceased was his first cousin and they grew up together in Masamba village. He was part of the bridal party during the deceased's 1st marriage in 1961. He also accompanied him when he went to pay dowry for the 2nd wife. He stated that the deceased and 1st wife purchased the property in Masamba Kisingo between 1961 and 1970. There was a *shamba* given to the 1st wife by her mother in law and their house was constructed on land bought from *Mzee Benjamin Kithuku*. They amalgamated the land bought from from *Makau wa Munywoki*, *Muluki wa Malua*, *Mute wa Ithathi* and *Elijah wa Mbinda*. The deceased also had a land which he cleared and claimed as a young boy.

70. Further, he stated that they bought the plot in Kisingo town in 1970 and plot 55 in 1975 and he was one of the masons who built the first houses. He was aware that the deceased and Applicant purchased properties in Makindu but he did not know their location or whether they were developed. He also attended all the clan meetings at the deceased's request and was a witness in the final meeting held on 16/06/2016.

71. On cross examination, he said that the Applicant became the deceased's wife after the death of the 1st wife and they got two children. He did not know whether the deceased and Applicant bought property together. What he was aware of was that the deceased and 1st wife bought property. He was aware that the Kisingo property had title in the deceased's name.

72. In re-examination, he said that when the 1st wife died, titles of Kisingo had not been given. The deceased did not show him any title deeds but he told him about plot 606,607 etc.

The Applicant's submissions

73. The Applicant was represented by learned counsel Mr. Chigiti who filed submissions on her behalf. With regard to the clan meetings, the Applicant submits that the Respondents continued reference to a 'customary will' is contra statute as the Law of Succession Act (*The Act*) recognizes only two types of wills; the oral and written will.

74. She submits that in 2016 when all the clan meetings were held, the deceased was in poor health and had difficulties in communicating as he had lost his speech. She contends that he was not capable of making any sound decision. It's also her submission that the inconsistency of the decisions indicates that either the deceased was not in his right state of mind or the decisions were being made for him by the elders. She also submits that the inequality in the division is unfair as she was greatly involved in development of the properties and some of them were built long after the 1st wife's death.

75. She also submits that failure to attend the clan meetings cannot be used against her as issues were being addressed from a biased point of view. She illustrates the biasness by referring to the letter written to court, by the assistant chief of Kamboo location and one of the clan members, confirming that the only heirs of the deceased were the Respondents. She submits that the clan's actions and behavior was clearly repugnant and showed a lot of compromised decisions to the extent of accusing her of having a hand in the death of the 1st wife.

76. She submits that her alleged cruelty towards the deceased is baseless, malicious, scandalous and only meant to taint her name. She questions the credibility of Rw3 and contends that his statement was written to suit the Respondent's case.

77. With regard to the applicable law, she submits that customary law is recognized as part of the laws of Kenya as long as it is not repugnant to justice and morality. She however submits that the deceased's estate is subject to the Act as he died after commencement of the Act.

78. With regard to distribution of the estate, she submits that the estate should be dealt with according to Part V of the Act as the deceased did not leave a will and was survived by a widow and children from both households. Further, she submits that being the only legal wife of the deceased, the Act dictates that she should be given priority to administer the estate. She cites inter alia the case of **Teresa Wangui Ngara –vs- Kiama Gathuri Ngara & Another (2016) eKLR** where the Court stated that;

“Under section 66, the Court has a final discretion as to the person or persons to whom a grant in the best interests of all concerned shall be made but the guiding principle is the order of preference provided in the said section and top on the list is the surviving spouse or spouses with or without association of the other beneficiaries. The Respondents are brothers to the deceased. I find no reason for this Court to deviate from the order of priority provided under the said section and the Applicant being the widow of the deceased tops the said order of priority.”

79. Further, she submits that from the evidence tendered, it is clear that some properties were acquired during subsistence of her marriage and that she contributed much to the development of the ones that were in existence. She has urged the court to distribute the properties in accordance with the law and in a manner that upholds the principle of equality and equity.

Respondents' submissions

80. The Respondents submit that the Applicant's list of dependants is incomplete as it excludes the deceased children from the 1st wife as well as the deceased's grand children under the care of the deceased. They submit that the Applicant's list does not differentiate the properties which were in existence when she entered the marriage and the ones which they bought after marriage. They submit that motor vehicle KBM 195E is the last in a long line of vehicles which the deceased bought, sold and replaced since 1962 after he married the 1st wife. As for the liabilities, they submit that the deceased did not share such information with the first household.

81. As for the clan meetings, they submit that the clan elders were called by the deceased to witness the division of his property and did not in any way influence or change his decision. They submit that if the deceased was not of sound mind, the Makindu Magistrate's Court would have ordered a psychiatric exam from the hospital before accepting to hear any case involving him. They submit that there is no proof of communication from the deceased's eldest son concerning the clan meetings or the deceased's health.

82. As for the applicable law, they submit that they have not studied law and cannot argue along those lines. Their understanding as lay people is that the Akamba governing council of elder's constitution 2013 edition was put under scrutiny and passed by the Judiciary as being in line with the law and Constitution.

Accordingly, they submit that the deceased's oral and written will, witnessed by the Akitutu clan and family members, is legal.

83. On distribution of the properties, they submit that the deceased persons in the cases cited by the Applicant died intestate whereas the deceased in this case made an oral and written will under customary law. They contend that they do not have authority to redistribute the property of the deceased. They submit that according to Akamba customary law, any properties purchased with the 1st wife belong to her and her children including any additions.

84. Further, they submit that the properties of the 1st household belong only to the 1st wife and her children but those of the 2nd household should be divided in such a way that one third goes to the 1st household and two thirds to the 2nd household.

85. It's their that the Applicant's assumption is that the 1st wife's death equaled the end of her contribution in development of her properties and refused to acknowledge the continued development by the head and children of the 1st household. They contend that no one with the Applicant's background and education would purposely contribute to another wife's property without a written affirmation that it would belong to her in the end.

86. Having considered the modes of distribution proposed by the parties, the evidence adduced, the rival submissions and the entire record, the law and the decisions cited, it is my considered view that the following issues arise for determination.

- a) Whether the deceased died testate or intestate.
- b) What are the assets and liabilities of the estate?
- c) What is the applicable law?

d) How should the estate be distributed?

Issue (a) Whether the deceased died testate or intestate.

87. The Respondents filed this cause on 14/02/2017 leading to issuance of the grant that was subsequently revoked. In the petition, they indicated that the deceased died intestate but have now jumped ship and are seeking to convince the court that the deceased left a 'customary' will. Their assertion is based on a meeting held by the Akitutu clan on 16/06/2016. Obviously, by the time of filing this cause, the said meeting had been done but they still followed the intestate way. The Respondents have relied on the 'lay man' card but it has been held time and again that ignorance of the law is not a defence.

88. Be that as it may, the medical documents (PEXB-4) show that the deceased was taken ill in August 2012. In her statement, Janet acknowledged that the deceased was confined to a wheelchair from the day he got a stroke on 12/08/2012 till his death on 07/10/2016. On the other hand, RW1 testified that the clan held nine meetings from 2013 to 2016. It is therefore evident that all the clan meetings were held in a period when the deceased was in poor health. The following is an extract from the clan meeting of 28/05/2016 (JNK-2);

“The members have noticed with a lot of concern about Joseph Kithome’s state of health. He can now understand what is being said and can give a response whether in Kikamba, English or Kiswahili. He has dramatically improved his health at the care of his daughter Janet. He is not willing to go back to Mary because of being harassed and mistreated by his wife (he has confirmed this by his gestures and has also confirmed that he is hearing and understanding what is being said) this could not happen when he was under Mary’s care. He has also shown us where he was hit with stick by Mary, on his remaining functional left hand.”

89. The clan meeting appears to suggest that the Applicant was mistreating and even beating the deceased. These are very serious allegations. These meetings are said to have been attended by the Respondents plus several elders including administrators. Such alleged actions are purely criminal and one would expect the same to be reported to the relevant authorities. There is no evidence to show that there was any such report made or even an attempt to make such a report.

90. As correctly submitted by the Applicant, it is evident that the deceased could not speak and in my view, that was an indication that his health had deteriorated. The fact that he died approximately three months after this meeting shows that his health was on a downward spiral instead of improving. It is important to note that the final meeting where he allegedly divided his property was held during the downward spiral of his health.

91. There is a rebuttable presumption under section 5(3) of the Law of Succession Act that a person making a will is of sound mind. The essentials of testamentary capacity were laid out in the case of **Banks Vs. Goodfellow [1870] LR 5 QB 549 as follows;**

“a testator shall understand the nature of the act and its effects, shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties-that no insane delusion shall influence his will in disposing property and bring about a disposal of it which if the mind had been sound, would not have been made.”

92. Looking at the alleged will *vis a vis* the totality of the evidence on record as well as the prevailing circumstances at the time of making it, I am not convinced that the deceased was in the right frame of mind to understand what he was doing or what was being done. Accordingly, my considered view is that the deceased died intestate.

Issue (b) What are the assets and liabilities of the estate?

93. PEXB-26 is an agreement for sale of 2 acres of land between the Applicant (buyer) and Patricia Kiamba for a consideration of Kshs.150,000/=. The parcel is located in Makindu-Kisingo sub-location and according to the Applicant, it is property R-10 in the Respondents proposal. This evidence was not rebutted and as such, the R-10 is not part of the deceased’s estate. Through exhibits 27 and 28, the Applicant managed to show that her share was only 2 acres and not 4 as indicated by the Respondents.

94. PEXB-30 is an agreement for sale of 1 acre of land between Musa Salim Sila and Caroline Nduku Kithome (buyer) for a consideration of Kshs.150,000/=. According to the Applicant this is property R-11 in the Respondents’ proposal and the purchaser is her daughter. Again, the evidence was not rebutted and as such, the property does not form part of the estate.

95. PEXB-39 is an agreement for sale of land measuring 150ft by 100ft between Bernard Kisoi Daudi & Beatrice Mwikali Daudi on one hand and Anne Loko Kithome (buyer) on the other for a consideration of Kshs.300,000/=. According to the Applicant this is property R-13 in the Respondents proposal and the purchaser is her daughter. She also produced PEXB-35 to show that she had also purchased a plot measuring 69ft by 81ft at the same area. The evidence was not rebutted and as such, the property does not form part of the estate

96. After eliminating the above properties and looking at the evidence on record, the deceased’s assets are as follows;

a) Plot No. 55-Makindu comprising of: Quality Estate, Quality Guest House, Muthama Hall, and Makindu Sunrise Academy.

b) Machakos L.R No. 26329

c) Makindu/ Kisingo/606 (11.23 Ha)

- d) Makindu/ Kisingo/607 (6.08 Ha)
- e) Makindu/ Kisingo/608 (2.88 Ha)
- f) Makindu/ Kisingo/620 (2.74 Ha)
- g) Makindu/ Kisingo/622 (2.81 Ha)
- h) Kisingo town plot: 50 by 100
- i) One plot next to Calcutta Girls Secondary School- Makindu
- j) Nguuni Plot (1.6 acres)
- k) Ngukuni Plot-Makindu (25 x 100 ft)
- l) Ziwani Plot-Makindu (25 x 100ft)
- m) Safaricom shares
- n) KCB shares
- o) Post Office Box No. 73-Makindu
- p) M/V Reg. No. KBM 195E

97. As for the liabilities, the Applicant testified that Machakos L.R No. 26329 was sold by the deceased in 2014 in order to generate income to construct her own house after she was ordered to leave the 1st wife's house by the clan. She also testified that the same property was fraudulently sold for a second time by Janet. (2nd Respondent).

98. The Applicant's proposal alludes to a sale agreement dated 2014 with regard to the sale to Gilbert and Ann but the agreement was not exhibited. However, the 'judgment' by the clan (PEXB-37) corroborates the said sale and the uncontroverted evidence of the Applicant was that Ann was already in possession. In my view, the sale to Gilbert and Ann has been proved on a balance of probability.

99. Having opined that the property had already been sold, the second sale as shown by PEXB – 6b, is of course fraudulent. The affidavit sworn by the 2nd buyer (PEXB – 8) shows that he only paid an instalment of Kshs.600,000/= which was received by Janet (2nd Respondent) on 17th October 2017. First of all, the alleged sale agreement (PEXB6b) was entered into on 19th September 2016 between the deceased and Michael Musyoki Mbithi. The deceased died on 7th October 2016. From the evidence on record, the deceased was too ill by June 2016 and could not even speak. Where did he get the energy to enter into this agreement? Secondly the first grant was issued on 16th January, 2018. It follows that as at 17th October 2017 when the 2nd Respondent received Kshs.600,000/= from Michael M. Mbithi she was acting in her own personal capacity and not on behalf of the deceased's estate. There is no evidence to suggest that the amount was appropriated for the benefit of the estate. As such the amount of Kshs.600,000/= cannot be considered as a liability of the estate. It is a personal liability of the 2nd Respondent.

100. In her evidence, the Applicant stated that there was kshs 400,000/= due to Margaret Syukau Munyao whose land was incorporated as a playground for Makindu Sunrise Academy. It was also her evidence that there was a land exchange with her sister. My understanding of the Applicant's evidence is that Margaret was given an alternative plot in exchange for the one that was converted into a playground. The document produced in support was PEXB32, dated 24/05/2000, whose contents are as follows;

“ I, Joseph Kithome Kisilu, have resold the plot I bought from Mr. Joshua Mailu Lundi, along the Nairobi/ Mombasa road next to Ministry of works Depot at Makindu town, at a price of ksh 125,000/=. I have transferred the document I had signed with Mr. Mailu to the new buyer Miss Margaret Syukau Munyao. Since the plot was surveyed just after I had finished buying, I will transfer the allotment document when I receive it from the Ministry of Lands.”

101. The above extract neither shows that there was a land exchange nor the alleged debt of Kshs.400,000/=. Accordingly, my view is that this debt was not proved on a balance of probability.

102. The Applicant's proposal also shows a debt of Kshs.140,000/= owing to Kiangi for plot annex 2. The agreement relating to this transaction is part of PEXB-32 and is dated 04/07/2006. The relevant clauses state as follows;

“Whereas the parties above named are desirous of exchanging their plots. Michael Nzoli Kiangi to possess the undeveloped plot along Mombasa Road Highway plot No. 1 allocated under Joseph Kithome and Joseph Kithome to possess the undeveloped isolated plot situated at Makindu lower market which belongs to one Michael Nzoli Kiangi measurement 9311 SQF.

3. That Michael Nzoli Kiangi has measured the plot No. 1 situated at Mombasa Road Highway measuring 9311 SQF and is desirous of possessing the said plot at the condition and place it is.

4. That Joseph Kithome has measured the isolated plot situated at Makindu lower market measuring 9311 SQF and he is desirous to possess the said plot at the condition and place it is.”

103. It is therefore evident that Kiangi and the deceased exchanged plots of similar size and there is no indication of an outstanding balance to Kiangi.

104. The other document is PEXB-31 which is a sale agreement showing that the deceased purchased the land from Kiangi at a cost of Kshs.1,310,400/=. The Applicant’s evidence however was that she cleared the balance of Kshs.110,400/= in installments of Kshs.15,000/=. No evidence was placed before this court to confirm such payments. Accordingly, the debt of Kshs.140,000/= has not been proved on a balance of probability.

105. As for the land rates, the Applicant should have approached the relevant authorities for computation of any outstanding balances otherwise, this court has no way of knowing what the outstanding balance is, if any.

106. The law is that he who alleges a fact MUST prove it. It was the Applicant’s duty to prove the existence of these liabilities. I find the alleged liabilities to be non-existent.

107. **The applicable Law Section 2** of the Law of Succession Act provides as follows;

“1. Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

2. The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the time of death, but nevertheless the administration of their estates shall commence or proceed as far as possible in accordance with this Act.”

108. The deceased died on 07/10/2016 and as such, the distribution of the estate is governed by the provisions of the Law of Succession Act.

109. It is not in dispute that the Applicant was the only known legal wife of the deceased and as such, **section 66** of the Act dictates that she has priority in administration of the estate with or without association of other beneficiaries including the Respondents. It is also on record that the Respondents had excluded the Applicant’s family in the initial grant and cannot therefore be said to have the best interests of all beneficiaries at heart.

Issue (c) What is the applicable Law?

110. From the evidence, there are properties which were acquired during the 1st marriage and others which were acquired during the 2nd marriage. Further, there are some which were acquired during the 1st marriage and improved during the 2nd marriage.

111. **Section 6** of the Matrimonial Property Act, 2013 defines a matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage. Accordingly, any property acquired during the subsistence of a marriage constitutes matrimonial property.

112. Further, **section 14** provides that:

“Where matrimonial property is acquired during marriage-

(a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and

(b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

113. **Article 45** of the constitution of Kenya, 2010 provides that:

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

114. A reading of these provisions together with the decisions in the cases of Estate of George Ragui Karanja (supra), Teresa Wangui Ngaru (supra) and Re Santayia Ntutu (supra) clearly shows that where a marriage is dissolved by death, the matrimonial property must as a matter of law vest absolutely.

115. It therefore follows without saying that all the property acquired during the subsistence of the Applicant’s marriage constitutes matrimonial property and should go to her household. I however note that she has ceded some portions to the Respondents and I find it to be very noble.

Issue (d) How should the estate be distributed?

116. I will now proceed to analyze the individual properties;

a. Plot No. 55-Makindu comprising of: Quality Estate, Quality Guest House, Muthama Hall, and Makindu Sunrise Academy

117. This is the property that has raised a lot of rubble in the estate. PEXB-9 shows that the plot was granted to the deceased in 1975 and it is therefore not in dispute that it was in existence when the Applicant entered the marriage. Her case however is that she contributed immensely to its development and is therefore entitled to a share.

118. **Section 9** of the Matrimonial Property Act also provides as follows:

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in property equal to the contribution made.”

119. PEXB-10 constitutes photos showing that in 1992 and 1998, the guest house was still under construction. There is also a photo taken in 2012 showing the completed guest house. It was also her evidence that when she entered the marriage, the estate had 12 units but currently, there are 17. This has not been rebutted.

120. PEXB-12 is a certificate showing that Makindu Sunrise Academy was registered in 2008 and the Applicant testified that she has been running it since inception. PEXB-31 is a sale agreement made in 2014 showing the acquisition of a plot adjacent to the school which in my view lends credence to the Applicant’s testimony that indeed, the deceased kept on acquiring property for extension of the school. It was also her testimony that the land for the school playground was acquired from her sister Margaret Syukau (PEXB-32). As for Muthama hall, the Applicant testified that its construction started in 2008 and was funded by income from the school.

121. The documents from the school (PEXB-17) show that the Applicant was involved in its affairs as the director and that apart from tuition fees; the school was involved in other income generating activities such as school trips. There is also evidence to show that the rates for plot 55 were being paid (PEXB-18).

122. Further, the Applicant produced pay slips (PEXB-16) to show that she was in gainful employment as a teacher and was therefore in a position to make monetary contribution for the developments. She also produced evidence of loans (PEXB-15) which, she said, were used in construction of the classrooms.

123. Looking at the totality of the Applicant’s evidence, it was actually baffling for RW2 to testify that no construction ever took place on plot 55 after the deceased married the Applicant. He was an untruthful witness and his evidence is of no probative value.

124. **Section 2** of the Matrimonial Property Act, 2013 states that; “Contribution means monetary and non-monetary contribution and includes a) domestic work and management of the matrimonial home; b) child care; c) companionship; d) management of family business or property; and e) farm work.” It is therefore my considered view that apart from monetary contribution, the role played by the Applicant as a wife and mother in all her married years cannot be ignored.

125. The Respondents have chosen to spite and belittle the Applicants obvious and immense contribution. Being the legal wife of the deceased, the Applicant had every right to undertake joint ventures with her husband and it is not a question of her background or education as put by the Respondents. She did not need any written affirmation to do what she did. Assuming that such a requirement was even tenable, legally or otherwise, who would give it in light of the fact that the 1st wife was already deceased?

126. It is clear that the Applicant did not contribute to the construction of the first twelve (12) houses on this plot. However, its clear she has contributed in maintaining them and will get something for that. Her share will be seven (7) houses. The rest will be as per her proposal.

b. Machakos L.R No. 26329

127. As discussed above, this lease was granted to the deceased for a term of 99 years with effect from 01/03/1997 and is therefore part of the Applicant’s matrimonial property as she got married to the deceased on 23/12/1986.

128. It was however disposed off by the deceased and the outstanding balance due to the estate is Kshs.1,990,000/= as per the Applicant’s proposal. The Applicant proposed a ratio of $\frac{1}{3}$ and $\frac{2}{3}$ distribution. The Respondents proposed that it goes to the 1st house. This property was a gift to the deceased upon retirement and good service. Despite the fact that he got it during his married life with the Applicant, I find that the 1st wife also played a key role in his career. Secondly, the Kshs.1,990,000/= is a balance payment meaning some money had already been paid. The balance will be shared out equally.

c. Makindu/ Kisingo/606, 607, 608, 620 & 622

129. All these properties were acquired in 2007 during the subsistence of the Applicant’s marriage, in her proposal however, she has indicated that the deceased had distributed them and she has no objection to his distribution i.e.

i. Makindu/ Kisingo/606 (11.23 Ha)-Applicant & her children

- ii. Makindu/ Kisingo/607 (6.08 Ha)-Jones Muinde
- iii. Makindu/ Kisingo/608 (2.88 Ha)-Janet & Josephine
- iv. Makindu/ Kisingo/620 (2.74 Ha)-Joshua Muthama
- v. Makindu/ Kisingo/622 (2.81 Ha)-Janet Ndungwa

The Respondents have proposed that all these parcels go to the 1st house. No justification is given.

130. I note that the Applicant has included the Respondents' brother, Jones Muinde, yet the Respondents had not mentioned him anywhere in their entire proposal. I also note that Joshua

Muthama is deceased and as such, his share should be registered in the Applicant's name to hold in trust for Joshua's son. Accordingly, the Applicant's proposal is fair in light of the fact that she could have chosen to retain all the parcels.

d. Kisingo town plot: 50 by 100

131. It is not in dispute that this was the 1st wife's matrimonial home and it was also the place that the Applicant called home for many years until the clan decided that she had to move. She outlined a list of significant investments which she made towards its maintenance and improvement. The Applicant lays no claim to it. The Respondents have proposed it goes to the 1st house. It shall be as proposed.

e. Plot next to Calcutta Girls Secondary School

132. PEXB-38b shows that this plot was acquired by the Applicant and deceased in 1999. In 2015, the deceased allowed the Applicant to build her home there (PEXB-38a). Even the Respondents agree that the same should go to the 2nd house. It shall be so.

f. Nguuni Plot (1.6 acres)

133. This property is mentioned in JNK-2 and PEXB-33. The Applicant submitted that she acquired it together with the deceased in 1987. PEXB-33 is a letter from the senior assistant chief acknowledging receipt of a complaint from the Applicant regarding sale of the property by Janet. I doubt the Applicant would have bothered with it if she did not have proprietary interest in it. Accordingly, I am of the view that she has proved

its existence and status as matrimonial property on a balance of probability. She has proposed that the same be shared in the ratio of $\frac{1}{3} : \frac{2}{3}$ between the first and second houses respectively. The Respondents have not made any proposal on this. I find no reason to interfere with the proposal by the Applicant.

g. Ngukuni Plot in Makindu (25 x 100 ft)

134. PEXB-22 is a sale agreement showing that the plot was bought by the Applicant and deceased in 2008. Accordingly, the same should go to the 2nd house. The Respondents have no claim to it.

h. Ziwani Plot-Makindu (25 x 100ft)

135. PEXB-34 is a receipt dated 24/01/2011 for payment of rent for a plot at Ziwani Market. The Applicant proposes that the same should go to the 1st House. The Respondents have not made any proposal on it. It goes to the 1st house.

i. M/V Reg. No. KBM 195E

136. PEXB-24 constitutes a log book and sale agreement showing that the vehicle was bought by the deceased in 2010. Accordingly, this is matrimonial property and should be retained by the Applicant.

j. Motor vehicle – Grey Nissan van.

137. Nothing is said about it save for the proposal by the Respondents that it goes to the 2nd house. It will remain with the 1st house.

k. Safaricom shares (500)

138. It is in the public domain that Safaricom shares were offered to the public for the first time in 2008 and would ideally be in the realm of the Applicant's matrimonial property. The Applicant has however proposed to give $\frac{1}{3}$ of the shares to the 1st house. The Respondents suggested 50:50. I will balance this and do a 40:60 share to the two houses respectively.

l. KCB shares

139. There is no indication as to when they were acquired. Accordingly, I am of the view that they should be share equally.

m. Post Office Box No. 73-Makindu

140. PEXB-25 constitutes receipts showing that the Applicant has been maintaining the box and I do not see why it should be withdrawn from her. The Respondents can always open a new one if they so wish.

141. I finally find that the estate shall be distributed in the following manner:

Distribution of the Estate

	Property	Mode of Distribution
1.	Plot 55-Makindu	<p>a) Quality Estate:</p> <p>-1st house- 10 houses, plus 1 store</p> <p>-2nd house-7 houses, plus 1 store</p> <p>b) Makindu Sunrise Academy:</p> <p>-2nd house</p> <p>c) Quality Guest House & Muthama Hall:</p> <p>-1st house</p>
2.	<p>L.R No. 26329/IR No. 123820</p> <p>Mavoko/Mlolongo, 1 acre with a grant Title deed.</p>	<p>Sale to Gilbert & Ann upheld.</p> <p>Outstanding balance of kshs 1,990,000 to be shared as follows;</p> <p>a) 1st house: 50%</p>

		b) 2 nd house: 50%
3.	Masamba village family homestead comprised of 5 parcels of land each with a title deed.	a) 606-Applicant & her children b) 607-Jones Muinde c) 608-Respondents d) 620-Mary to hold in trust for Joshua's son e) 622-Janet Ndungwa
4.	Kisingo town plot (50 by 100ft)	1 st House
5.	Plot next to Calcutta Girls Secondary School	2 nd House
6.	Nguuni Plot-Makindu (1.6 acres)	1 st House 1/3 2 nd House 2/3
7.	Ngukuni Plot-Makindu (25 by 100 ft)	2 nd House
8.		

	Ziwani Plot-Makindu (25 by 100 ft)	1 st House
9.	Grey Nissan Van	1 st House
10.	M/V Reg. No. KBM 195E	2 nd House
11.	Safaricom share (500)	To be shared in the ratio of 40:60 -1 st House: 200 shares -2 nd house: 300 shares
12.	KCB Shares	1 st House: 50% -2 nd house:50%
13.	Post Office Box No. 73, Makindu	-2 nd house
14.	Cash in KCB Makindu Accounts:1116057042 and 01713066567	1 st House 40% 2 nd House 60%

Delivered, signed & dated this 29th day of April 2020, in open court at Makueni.

H. I. Ong'udi

Judge