



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

PROBATE CAUSE NO. 44 OF 2017

IN THE MATTER OF THE ESTATE OF THE LATE TIMOTHY KATHUMA KASYOKI (DECEASED)

RULING

1. The deceased, **Timothy Kathuma Kasyoki**, passed away on 23rd September, 2017. On 5th October, 2017, **Aiter Mbula Kathuma, Josephine Mwikali Timothy, John Nzomo Kathuma** and **Athanas Muisyo Kathuma**, in their capacities as the deceased's widow, daughter and two sons, petitioned for Grant of Probate with Will Annexed. According to them the deceased died leaving a valid will dated 10th August, 2006 and a codicil of the same date. According to the petition the deceased was survived by **Aiter Mbula Kathuma**, his widow, daughters, **Josephine Mwikali Timothy, Alice Kavete Mutua, Hellen Nduku Mutuku, Julian Mutave Kaputa** and **Virginia Nzisa Kathuma** and sons, **Nicholas Mbatha Kathuma, John Nzomo Kathuma** and **Athanas Muisyo Kathuma**.
2. They also disclosed that the deceased's assets comprised of Kimiti Co-operative Society Shares Certificate No. 22 for Plot No, 36A (3 acre coffee farm) valued at Kshs 7,500,000/=, Plot No. 59B (5 acre Homestead) valued at Kshs 7,500,000/=, Plot No. 93C (7 acres for the late Boniface) valued at Kshs 10,500,000/=, Plot No. 29 (Kisukioni Market) valued at Kshs 8,500,000/=; Beer Wines Stock in Plot No. 29 Kisukioni Market valued at Kshs 800,000/=; Matuu Kwale Plot No. 165 valued at Kshs 500,000/=; Steel Senator Beer Tanks valued at Kshs 36,000/=; Monies in Equity Bank Ltd Tala Branch Account No. 060xxxxxxx in the sum of Kshs 609,816.80. According to them the assets totalled Kshs 32,945816.80 in value.
3. In answer to the petition, **Christina Mukonyo Kathuma** on 23rd April 2018 who alleged to be the deceased's first wife and the mother to four Protestors objected to the said petition. According to them, the alleged will and codicil were forgeries; the petition excluded the Protestors who were wife and children of the deceased; the deceased had distributed some of the named properties to his two wives and subsequent thereto, plot no. 93C was transferred to her; the assets listed included some assets which the deceased had sold to third parties and omitted two vehicles.
4. In a rejoinder to the Protestors' contentions, the petitioner filed a further affidavit in which they denied that the Protestor was the wife of the deceased by the time of the deceased's death because by then she was divorced in 1953 and the only issue of the first marriage, **Kalekye**, died. After that the Protestor returned back to her father where she buried the said child without the deceased's consent. After the said divorce, it was alleged that the Protestor committed adultery with other men from which her other children were born. In 1959 after the deceased divorced the Protestor, he got married to the 1st Petitioner and from that union 11 children were born. It was therefore the petitioner's position that the Protestor and her children are not and have never been the deceased's dependants and are therefore not beneficiaries to his estate and are not in a position to know the deceased's assets.
5. It was averred that in 1987, the Protestor filed Maintenance Cause No. 4 of 1987 in the District Magistrate's Court, Machakos – **Christine Kathuma vs. Timothy Kathuma Kasyoki** in which it was held that she had already divorced under Kamba Customary Law in 1953 and the said Cause was dismissed with costs.
6. Apart from the petition, the petitioner vide a Notice of Motion dated 19th June, 2018 sought orders that one **Albanus Mutua Kathuma** be arrested and prosecuted under section 45(2) of the **Law of Succession Act** for intermeddling with the property of the deceased; that the said person be restrained from interfering with the deceased's property and that he be compelled to pay Kshs 80,000/= for the destruction caused on the said property; that the said person be directed to move out of Plot No. 93C and to restore the same; that the said person be directed to pay damages for trespass. It was contended that the said person without the knowledge or consent of the administrators encroached upon the said Land Parcel No. 93C and has remained thereon since 12th November, 2017 to date notwithstanding that he is not a beneficiary of the estate of the deceased.
7. The Protestor however contended that the orders being sought against the said **Albanus Mutua Kathuma** cannot issue as she is the one in possession of the said land which belongs to her by virtue of an agreement dated 1st December, 2015 by which the deceased distributed his property amongst his wives and children. By the said agreement it was stated that the Protestor would get parcel no. 93C while the 1st petitioner would get plot no. 53B while the deceased would retain 3 acres for his own use. Accordingly, each party has continued to cultivate respective and contrary to the petitioner's allegations, it is the family of the 1st petitioner that has intermeddled in the estate of the deceased.

Further, it was agreed that the balance would after he deceased's death be divided equally among the wives. Subsequently the said parcel No. 93C was transferred to her and she was issued with a certificate of ownership. She therefore contended that it was untrue for the petitioner to alleged that the said **Albanus** went into occupation of the said land on 12th November, 2017 when she has been in possession thereof and has cultivated the same since when the deceased was alive.

8. The Protestor explained that the said maintenance Cause was filed following her separation with the deceased in 1980 and had nothing to do with divorce as she never divorced the deceased. She explained that they later came together and continued living together as husband and wife till the deceased's death hence the agreement dated 1st December, 2015. She contended that she and the deceased with their children attended family functions as a family and that their marriage under customary law was never terminated. It was her case that it was the said **Albanus Mutua Kathuma** who took the deceased's body to the mortuary and attached the death notification and that it was her children who were the first to collect the body from the mortuary. To support this position, she annexed a family photograph evidencing her presence at the burial of the deceased.

The Petitioner's Case

9. The 1st Petitioner, **Aiter Mbula Kathuma (PW1)**, in her statement stated that she was the only widow of the deceased having gotten married to the deceased in 1959 after the deceased divorced his first wife, **Christine Mukonyo**, the Protestor herein, whom he had married in 1952, in 1953. After the said divorce, the Protestor, together with her only child, **Kalekye**, returned to her father's home where the said child died and was buried in her father's homestead contrary to Kamba Customary Law hence that was the end of the relationship between the deceased and the Protestor.

10. As a result of her relationship with the deceased they had 12 children, the first born son being **Boniface Mutuku Kathuma** who the deceased settled on Plot No. 93C while the rest settled on Plot 59B having sold Plot 53B. According to her since her marriage to the deceased she never saw the Protestor. She disclosed that in 1987, the Protestor filed a maintenance suit from the deceased being Cause No. 4 of 1987 which was dismissed on 22nd October, 1978 on the ground that the Protestor had divorced from the deceased in 1953 and no appeal was lodged against the said decision. She stated that when the deceased passed away on 23rd September, 2016 a lot of people went to condole with her and in that confusion, the Protestor took advantage, sneaked into the home and forced herself and her children into the family photographs so as to appear as a member of the deceased's family.

11. As regards the alleged meeting of 2nd December, 2015, she stated that the said meeting was meant for the family members to give the deceased permission to sell three acres of his land and pay off a debt he had borrowed and thereafter remain with four acres leaving the rest to the family. According to the 1st petitioner, being a personal friend to the chief, the chief tipped the Protestor of anything that was happening in the family so as to enable her sneak in and appear to participate as a family member which is what she did on that occasion. After the death of the deceased, **Albanus Mutua Kathuma**, sneaked into the funeral home under the pretext that he was a son of the deceased and the burial permit was released to him and his mother and family members appeared at home as mourners and members of the deceased's family members in the group photograph by deceit and misrepresentations.

12. In her oral testimony, she added that after the death of Boniface, his son, the Plot which had been given to him by the deceased was taken away by **Albanus Kioko**, the son of the Protestor who separated from the deceased before she got married to the deceased. She was however unable to tell whether **Albanus** was a son of the deceased though she had never seen any children born after the Protestor left. It was her prayer that the Court issues grant of probate with will annexed and disallows the protest.

13. In cross-examination by **Mr Muthami**, learned counsel for the Protestor, PW1 stated that the Protestor who left before she was married had 4 daughters but denied that the Protestor buried a child on the disputed land. According to her she had never seen the Protestor and the deceased live as husband and wife and never saw the deceased educating **Albanus** and Bernard. Referred to the Will, she stated she did not know how to write and used to thumbprint in similar way as the deceased. She recalled the meeting of 1st December, 2015 at the DO's office, Kisukioni, Machakos where the Protestor was trying to take away the land but she refused. She admitted that the deceased was there and people including herself were forced to append their signatures though she was not sure if the deceased signed the document. In her evidence they used to cultivate the land together and the deceased did not curve any for himself. She denied that the deceased disclosed that he had subdivided his land or that he had transferred plot no. 93C to the Protestor. According to her the Protestor was the one using the said land claiming to own the same. She however admitted that the deceased had one vehicle though she did not disclose its existence and sold it for her upkeep but was unable to recall either the purchase price or the purchaser.

14. She clarified that in re-examination that the reason she did not want the land sold was because, her daughter in law was still staying on the said land and that the deceased only had one car.

15. PW2, **Magdaline Mutio Mutuku**, the widow of **Boniface Kasyuki Kathuma**, in her statement stated that her late husband was the first born son of the deceased. She explained that Mutuku was her father's name. According to her, she got married in 1993 and between they got 5 children. Soon after their marriage, her husband settled her on LR Plot No. LR 2709/7447 Plot No. 93C in the Society which he was given by his late father, the late **Timothy Kathuma Kasoki**, the deceased herein, with her children since their marriage. They lived on that plot throughout their 22 years of marriage wherein they brought up and educated all their children from the farm produce from the land in which her deceased husband was buried leaving her still cultivating the land being her husband's share of the deceased's estate leaving the rest to be shared between the other siblings of her husband based on the deceased's Will.

16. However, son after the deceased's death **Albanus Mutua Kathuma** forcibly set upon the said land claiming that it was his and that he would settle her on an alternative piece of land. Though she reported the said action both to the Chief and the Police nothing was done forcing her to go back to her mother in law's homestead where she was settled temporarily before being settled on Plot 93c. It was her evidence that due to the good relationship she had with the deceased, the deceased informed her that after divorcing the Protestor in 1953, he got married to the 1st Petitioner, **Aita Mbula**, in 1959 who gave birth to 12 children including her late husband. According to the information received from the 1st Petitioner, after the said divorce, the deceased herein had no sexual relationship with the Protestor and never cohabited

with her at all since 1953 and that all her six children were born out of relationship with other men, their only biological child having died one year after their divorce and return of the Protestor back to her father's home. It was disclosed that by the time of the filing of this petition, the said **Albanus Mutua Kathuma** had temporarily vacated the land but returned in November, 2017 hence the application for his eviction and reinstatement to the said land.

17. In her oral testimony, she stated that after she complained to the Chief and to the police, she was assured that the land would be returned but it was never done. At the time that her father in law allocated her the land, she was not informed that the same belonged to his former wife.

18. In cross-examination, she stated that at the time of her marriage she neither knew **Albanus** nor the Protestor or Bernard. However, her father in law informed her that he had another wife but chased the family away. He however did not disclose to her the first wife's children. She admitted that she attended the meeting at Matuu Chief's Office with her mother in law, her children, the 1st Petitioner and her children as well as the deceased. However, there were no elders. According to her some papers were prepared and she was forced to sign by **Timothy**, her father in law. She was however unaware whether **Timothy** was similarly forced to sign the same. In her evidence what was being discussed was how to take away her land though she did not know whom they wanted to give the land to. However, the deceased was saying that he would sell the said land though she was unaware of what was resolved. She however stated that it was at that meeting that the deceased gave her the land. Though she signed the document after being forced to do so, she never read it.

19. **PW3, John Nzomo Kathuma**, the 9th born child of the 1st Petitioner, in his statement reiterated the averments made by the 1st Petitioner and stated that following the death of his elder brothers, he became quite close to the deceased who entrusted him with some of his affairs and wrote two wills which he was told to keep custody of and only release as and when requested by the deceased. He disclosed that he was the one who translated the documents from Kikamba to English languages. According to him, whenever the deceased wanted to discuss any family matter, he would be involved and his opinion sought including the distribution of the deceased's plots in Kimiti Co-operative Society Ltd. It was his statement that the deceased settled his elder brother, Boniface's family on Plot No. 93C Kimiti Co-operative Society Ltd where his wife and his children were living even after the death of her husband in 2015. He stated that after his death, when the family was in the middle of finalising the funeral, **Albanus Kioko** took advantage of his absence when he was in Nairobi, collected the deceased's burial permit under the pretext that he was the deceased's son, gave the same to his mother, the Protestor for collection of the deceased's remains from the funeral home after which the Protestor attended the deceased's funeral notwithstanding the deceased's wishes. As far as he was aware the Protestor has never been a member of the deceased's family after their divorce in 1953 when she returned to her father and the only child of the said union died and was buried there.

20. He stated that the said **Albanus** has always interfered with the deceased's estate and even expelled his sister in law (PW2) from her husband's land in Plot 93C Kimiti Co-operative Society Ltd.

21. In his oral testimony, he stated that the deceased had barred the Protestor from attending his funeral or taking his property and collecting the deceased's body was contrary to the deceased's wishes. Referred to the Will he confirmed that the same was signed by both his mother and his late father but the mother later changed to thumb printing. Referred to the booklet, he confirmed that it had his father's name and not his signature. He however confirmed that the document had no other signature such as by a neighbour. While he reiterated that he was very close to his father, he admitted that he did not accompany his father to the DO's office in 2015. He however stated that the dispute was that the deceased was selling the remaining land without contacting them. According to him, they did not take the deceased there but were called though he could not tell who reported. He confirmed that he attended the meeting and that the deceased sold approximately 3 acres from Plot No. 93C and they agreed as a family present to allow the deceased to dispose of the land and he signed as a present member. There were 23 members present including the deceased, the Protestor, **Hilda, Albanus**, Josephine his sister, Timothy his brother as well as Alphonse, the Chairman of the family all of whom signed. There were also other elders such as **Mr Kitoila** who passed away. The deceased sold some acres of Plot 93C while the remaining portion was occupied by his step mother. He admitted that the deceased divided the land but denied that the Protestor was given land.

22. He however insisted that the deceased divorced the first wife though by then he was not born. In his evidence the two sons of the Protestor were illegitimate since the deceased informed him that the only child he had with the Protestor, **Kalekye**, died and was buried in 1953.

23. In re-examination he explained that though the Protestor was not invited to the meeting she signed. According to him, they called each other and went as a clan. According to him the signature was to confirm attendance and had nothing to do with land though **Albanus** signed as a present member just as the others. According to him **Kitoila** was one of the elders who were called by the deceased and what was discussed was to allow the deceased dispose of the land having taken money from the buyer. He reiterated that **Albanus** removed PW2 from Plot 93C and brought his mother without their permission. Referred to both Wills he confirmed that they were both dated the same day and signed by the deceased and his mother and in both of them no land was given to the Protestor.

24. In cross-examination, he stated that when they went to the Chief for a letter he declined to do so saying that there was a co-wife involved. He therefore filed the matter with the Will annexed.

25. There was a further affidavit sworn by the Petitioners herein in which they jointly reiterated the foregoing and averred that the Certificate relied upon by the Protestor was a forgery and they attached what in their view was the genuine one. According to them, the Chief's letter relied upon by the Protestor was written in ignorance of the fact of the existence of the will in anticipation of succession proceedings. To them since the Protestor is not a beneficiary of the estate of the deceased, she has no claim over his estate.

Protestor's Case

26. According to the Protestor, **Christina Mukonyo Kathuma (DW1)**, she got married to the deceased by Kamba Customary Law. It was her statement that both herself and the deceased worked for Kimiti Cooperative Society (the Society) as a labourer and messenger respectively. As part of their compensation they were given Land Block 36A, 53B and 93C and in 1977, the deceased planted 3 acres of

coffee on Block 36A which she used to water with a guard. According to her, she built Kisukioni Plot in Kisukioni Market in Matungulu Subcounty by providing water for construction using a guard. It was her case that they were blessed with six children namely **Katunge, Wayua, Mutua**, late **Mueni**, Late **Syombua** and **Mutinda**.

27. According to the Protestor, she and the deceased had a misunderstanding in June 1980 but later reunited and was given Plot 93c to farm to date. It was her position that she and her co-wife, the Petitioner, **Hyder Mbula**, lived well with the deceased who distributed part of his land to the 1st Petitioner while she was allocated the remaining 6 acres out of 12 acres in Block 93C which were transferred to her while the 1st Petitioner was allocated the a5 acres in Block 53B where she has her homestead, the deceased allocating to himself 3 acres of coffee plantation which he was to till but was eventually to be divided into two equal portions.

28. In her oral testimony, she stated that she was staying in Matuu on the deceased's land given to her.

29. In cross-examination by **Mr Gaturu**, learned counsel for the Petitioners, she stated that she was the deceased's first wife under Kamba Customary Law and they did not divorce. She insisted that she stayed with the deceased all those years till he died. Initially she used to stay in the deceased's house but moved out normally after some time. According to her they were initially living in Matuu Ya Muitu and not Matuu in Yatta. She however moved to her house still within Matuu on the deceased.

30. The Protestor confirmed that she filed the said Maintenance Cause No. 4 of 1987 in Machakos against the deceased seeking that the deceased should maintain the children but never sought separation. She denied that the deceased abandoned her and that she got married to one Marcella and insisted that the deceased maintained the two children. She stated that she was unaware that the Court found that she abandoned the matrimonial home for 34 years and stated that the Court did not dismiss her case but ordered the deceased to educate the children. She therefore maintained that he was still the deceased's wife.

31. In the Protestor's evidence, they used to work at Kimiti with the deceased and for his retirement the deceased was given 3 pieces of land though she had not evidence to that effect. On Plot 36A, they planted 3 acres of coffee and she was the one who used to fetch water for the workers carrying out construction works. She insisted that the 7 children she had, she got with the deceased though she had no birth certificate with her in Court. The Protestor however admitted that though they had a misunderstanding with the deceased, in 1980 they reunited and was given Plot 93C to farm to date and they lived together with the Petitioner well together with their husband. According to her, Plot 93C was transferred to her before the deceased died when he subdivided the land. Referred to the Certificate bearing the deceased's name, she stated after the said transfer she was issued with another certificate and denied that her certificate was fake. She denied that she left her matrimonial home in 1953 but admitted that she did not lodge an appeal against the decision in the Maintenance Cause but discussed the matter with the deceased and they agreed.

32. In re-examination, she insisted that what she field was not a divorce cause but only sought to be given her children. However, after the judgement, the deceased continued educating the children till they completed their studies. While she admitted they were separated she insisted it was not for long and by then **Albanus** and **Barnabas Mutinda** had already been born since they were born when they were staying together in Matuu. She insisted that none of her children were born outside the wedlock. She therefore denied that they were separated in 1953 and insisted that she was given Plot 93C by the deceased when he was still alive in the presence of witnesses and he was issued with a certificate.

33. **DW2, Bernard Kinandu**, testified that he was from Matuu Yatta in Machakos County and the deceased was his father's younger brother hence the deceased was his uncle. According to him the deceased had two wives, the Protestor and the 1st Petitioner and in his view there was no divorce. However, in 1980, the deceased and the Protestor had a disagreement but they later reunited since they saw her children being taken care of and they stayed together and carried out developments. He testified that he knew all the deceased's properties being Plot 93A where there was coffee, Plot 53B here the Protestor constructed and where the 1st Petitioner was married. In is evidence the deceased gave the Protestor Plot 93C while he remained with 93A after which the Protestor started cultivating her land. In his evidence the deceased had a plot at Kisukioni Market measuring 40 x 100 and had two vehicles, Nissan Wingroad and Mitsubishi Lancer which were left in the 1st Petitioner's home.

34. In cross examination, **DW2** admitted that he was not living in the deceased's home but only knew the deceased because he was his uncle and he was staying nearby. According to him, while the Protestor was married around 1955, the 1st Petitioner was married in 1959 and he was born in 1950 and only came to know of the year when the two were married later. He admitted that he did not know how long the deceased and the Protestor were separated before reuniting though he confirmed that in his statement he stated that the deceased was educating the Protestor's children during the period of their separation. He clarified that the vehicles that the deceased left behind were registration numbers KBQ 614S and KAY 539E and that it was the deceased who informed him that these two vehicles were his. He stated that he used to see the Protestor in Kisukioni Market where he was staying with his father but could not tell whether she just used to go there and go away though she was staying there. He reiterated that it was the deceased who informed him that Plot No. 93C was given to his first wife. According to him, The Protestor's house where the 1st Petitioner was taken upon marriage was on Plot 36 where there was coffee.

35. **DW3, Peter Munyao Kunulu**, stated that I was called by **Hydah Mbula Kathuma** the second wife at the Matungulu Subcounty DO's office to witness **Kathuma**, the deceased, distributing his land. At that place, the DO handed the matter to **Chief Julius Mbai**. They listened to the deceased and visited the portions he distributed on 1st December, 2015 and thereafter visited the site on 21st December, 2015. According to him, the deceased was to till 3 acres block 36A which later was to be distributed to his two wives equally. It was his evidence that Block 53B was given to his second wife, **Hydah Mbula Kathuma**, where she has her homestead while the remaining 6 acres in Block 93C was given to his first wife, **Christina Mukonyo Kathuma**. On 1st December, 2015, the panel agreed to visit the land on 21st December, 2015 and final order given the same day with all parties signing the agreement.

36. In cross-examination he stated that he was called by the 1st Petitioner. He reiterated that Plot 53B had not been sold and that he was unaware that the Protestor was divorced in 1953. According to him, he was 63 years old based on his ID Card having been born in 1953 and hence was unaware of the said divorce because according to him, when he was in standard 7 the Protestor was there. He was similarly

unaware of the death of a child in 1953 and that the 1st Petitioner was married in 1959. He admitted that the meeting was called to permit the deceased sell three acres of land to pay a debt. According to him, he was not related to the family and was just a church elder called to bring peace.

37. In re-examination, he insisted that the deceased had two wives and he never heard of any divorce of the 1st wife. He stated that he was present when the deceased died at which time the 1st wife was staying with him at the shop. He explained that the meeting of 1st December, 2015 was chaired by the Chief to distribute the deceased's properties to his wives who were present which was done in the presence of the sons. He reiterated that he was called by the 2nd wife, the 1st Petitioner and that the meeting ended amicably.

38. **DW4, Alphonse Mutunga Kilonzo**, in his statement stated that he was the Chairman of Kasyuki Family which included the deceased's family and that he knew the deceased's wives, Mukonyo being the first and Mbula being the second. He also knew the deceased's children who were his cousins and he was in the panel which was distributing land on 1st December, 2015 after which a consent was signed by the said wives and the children. On 21st December, 2015 he visited the lands which were being distributed and as the Chairman wrote the outcome in the letter dated the same day which was forwarded to Kimiti Cooperative Society.

39. In cross-examination he stated that paragraph 6 relating to the visit of the lands was not correct. He stated that he was born in 1972.

40. In re-examination he reiterated that on 1st December, 2015 there was a meeting at Kiskouni DO's office where he was present as the chairman of the family having been called by the deceased. He stated that on 25th December, 2015 they had another meeting at the deceased's home.

41. **DW6, Albanus Mutua Mbithi Kathuma**, on his part stated in his statement that he was a biological son of the deceased born in 1971 at Matuu Ma Mwitua at Block 36A at the time when both her mother, the Protestor and the deceased were living together. At that time the 1st Petitioner was married by the deceased as his second wife. Later, the deceased transferred Plot No. 53b where the 1st Petitioner was living to them but in different homesteads. He stated that in 1977 he entered class 1 at Matuu Estate Primary School which was paid for by his father, the deceased. In 1979, his younger sister, **Mary Syombua**, who was born in 1974 passed on and was buried in Block 53B in 1979.

42. He stated that in 1980 his mother separated with the deceased and they left with their mother to the mother's homestead. However, the deceased educated him up to class 8 but upon joining Form 1 in 1987, the deceased refused to pay for him provoking the said Maintenance Cause. However, upon his parents' reunion in 1988 the deceased resulted paying fees for him at Tala High School till completion. By the time of the said reunion, his mother had built the plot at Kisukioni Market where he lived with the Protestor whose Plot No. 53B had fallen down. Accordingly, the Protestor was shown Plot No. Block 93C where they started cultivating to date. When he got employment he bought an adjacent land where he constructed a house for himself and his mother and they were joined there by the deceased. He explained that the reason for not building on plot 93C was because it is swampy.

43. When the deceased was killed by thugs, he was informed and he drove to Kangundo where the deceased passed on in his presence. He then took the body to Kenyatta University Mortuary and he was issued with the disposal permit from Kangundo Sub County Hospital S/N 1104967. However, his step brothers took away the deceased's ID Card and two vehicles and hid them forcing them to move Kangundo Law Courts in Case No. 98 of 2017 for release of the said ID for purposes of getting a death certificate. A consent was however entered into for release of the disposal permit to his step brothers to facilitate the application of the death certificate and letters of administration. However, upon getting the death certificate, the said step brothers applied of the said letters to the exclusion of the first family.

44. In cross-examination he stated that he was born in 1971 and denied that his mother, the Protestor, was divorced by the deceased in 1953. He was however aware of the Maintenance Cause No. 4 of 1987 but denied that the court stated that his mother had been divorced 34 years earlier though he confirmed that the case was dismissed. Referred to his statement he confirmed that his mother separated in 1987 and he left with her to her father's homestead. He however denied that by the time of the said Cause her mother was in her father's homestead.

45. In re-examination, he stated that the Maintenance Cause was for his fees and that the judgement was in 1987 during which time his mother and father were living together and he never heard of any divorce.

46. In their submissions, the Petitioners reiterated the evidence on record and noted that though the Protestor insisted that her land certificate was genuine and that she would call the chairman of Kimiti Farmers Co-Operative Society as a witness to come and give evidence in her favour and confirm that it was not a forgery, she never called him to prove that the said non-member certificate No. K0964 of 3rd February 2016 was genuine and was issued by the said Society, and was hence the only presumption to make is that it was a forgery as the petitioner was saying in her evidence.

47. Based on the decision in *Machakos Maintenance Cause No. 4 of 1987. Christina Mukonyo Kathuma –vs- Timothy Kathuma Kasyoki*, delivered on 22nd October 1987, it was submitted that after the Protestor's divorce in 1953, there is no evidence that she ever lived with the deceased thereafter. In that Judgment, the Protestor admitted that she had left the matrimonial home of her husband in 1953, whom she had married in 1952 with the first and only child of the marriage, known as "**Kalekye**" in November 1953, and went to live with her father, and after the child died, she buried the child on her father's land contrary to kamba customary law, without her husband's consent, and that act of burying a child of the marriage on her father's land sealed her divorce with her husband, once-and-for-all. Accordingly, and thereafter, after the death of that child, she remained permanently at her father's home and they have never re-united as alleged ever since 1953. It was submitted that since the Court found that she had been divorced 34 years earlier, the question of a non-cohabitation order did not arise, since in any case, she had abandoned her husband's matrimonial home more than 34 years ago, and he could not be ordered to maintain her in old age, while she has spent most of her lifetime at her parent's home against the husband's will.

48. It was submitted that the Petitioners attached Two (2) Wills annexed to the Petition which they filed on 5th October 2017, and in the Wills, there was no mention of the protestor and her children whom she had given birth to with other men, since she was not a "beneficiary,"

as known in the **Law of Succession Act**, Cap 160, having been divorced in 1953 and she had been away from the family of the late “Timothy” for more than sixty three (63), years who had divorced her in 1953 and she could not come and start claiming that she is a beneficiary as a “widow” of the deceased when she was not.

49. According to the petitioners, the famous meeting held on 2nd December 2015 was strictly a family meeting. But the local chief being a personal friend of “Christine,” tipped Christine to sneak into the meeting and allege that the deceased was distributing his property and that was why she was in the meeting which was not the case because it was “a *“Timothy Kathuma Kasyuki Family’s,” Meeting,*” and strangers should not have been in the meeting but they intruded into the meeting, alleging that the meeting was to distribute the deceased’s property but the meeting was for the deceased to seek permission from his family to sell three (3) acres and pay off a pressing debt he had borrowed from somebody else, and the lender was threatening violence, in which case the family allowed him to sell three (3) acres of his land and pay off the debt and keep four (4) acres for himself leaving the rest of his land to all the family members.

50. It was submitted that the inter-meddling with the estate of the late “Timothy” by “Christine Mukonyo” and her son **Urbanus Mutua**, should be Punished under Section 45 of the **Law of Succession Act** Cap 160, because they are using their illegal acts of inter-meddling with the estate, to claim that they are beneficiaries of the estate, thus benefitting from their illegal acts contrary to the **Law of Succession Act**, Cap 160 of the Laws of Kenya, which is not allowed by the Law.

51. It was submitted that though the Protestor insisted that her children were fathered by the deceased, she had no evidence to prove that, and she had no single birth certificate for any of her children, showing the name of the children father as “Timothy Kathuma Kasyuki” or any of them or at all and so they were not fathered by the deceased. According to the Petitioners, it was it is also very unusual for the Protestor to claim that after she was divorced in 1953, she had re-united with the deceased in 1980 (27 years later) and then separated in 1987, and then apply for maintenance in 1987, thirty four (34 years) after the divorce and then tell the Machakos Court in 1987, that she had left her husband’s matrimonial home in 1953 and had all the time been living with her father ever since 1953; in 1987, when she had sued him for maintenance, thirty four (34) years after the divorce; and conveniently forgot to tell the court in Machakos such a material bit of evidence (of re-uniting) in 1980, when seeking maintenance seven (7) years later?

52. According to the petitioners, the Protestor’s five (5) witnesses did not advance her case any further in that **Bernard Kinandu DW2**, told the Court that he was born in 1953 but knew that the deceased got married in 1956 when he was only two (2) years old. how could he know about her uncle’s marriage to his second wife, when he was only two (2) years old? DW3, **Peter Munyao Kimilu** told the Court that the protestor was living in the shop while she had said she was living on one of the properties of the deceased. DW4 **Alphonse Mutunga Kilonzo**, told the Court he was in the distribution meeting,” but no chairman signed the agreement. it was clear he did not know anything about the estate of the late “Timothy” and the family of the deceased, and was just a busy-body trying to help DW1 to inter-meddle with the estate. It was therefore submitted that quite clearly, their Evidence was a fabrication and they did not give evidence that could help the Protestor to prove her claim that she was a beneficiary of the estate.

53. It was submitted that when the Petitioners’ evidence is weighed against the Protestors’ evidence, the evidence of the Petitioner and her two (2) witnesses, far out-weighs the evidence of the Protestor, who could not prove that she was a beneficiary as provided by Cap 160 of the Laws of Kenya and her evidence has failed the test. On the other hand, the Petitioner’s evidence is credible, consistent and within the provisions of the **Law of Evidence Act**, and **Law of Succession Act** and the two (2) wills and documentary evidence coupled with parol evidence which has proved her case on a balance of probabilities and is good enough to prove the petitioners’ case on a balance of probabilities, and the court to grant her the grant of probate sought by her. The Petitioners, therefore prayed that the protestors’ claim against the estate of the late **Timothy Kathuma Kasyuki Deceased**, has failed the test and it is incompetent and misconceived, frivolous and vexatious and is an abuse of the due process of the court by making a claim which has no basis at all and should be struck out from record, and the Protestor and **Urbanus Mutua**, be ordered to move out of the land of the late **Timothy Kathuma Kasyuki**, as he has no claim at all either in law, equity and/or Kamba Customary Law.

54. It was submitted that the Petitioners have made out a good case for grant of probate of the estate of the late **Timothy Kathuma Kasyuki Deceased** to them, and the whole estate should be distributed as was the wish of the deceased among all the beneficiaries of his estate, as provided in the **Law of Succession Act**, with the Petitioner being a trustee of the whole estate who shall enjoy a life tenancy over the whole estate, which she will hold in trust for all the beneficiaries, as was the wish of the deceased. They urged the Court to dismiss the Protest with Costs, after the Grant of Probate is granted to them.

55. On behalf of the Protestors it was submitted that the petitioner’s evidence is only of family members that is a mother, a son and a daughter in law and not a single evidence from either a neighbour, a village mate or an administrator to support the petitioner’s claim. The Court was urged to pose and ask why the petitioners could not bring an independent witness to support their claim or at least one person from the larger family of the deceased and find that the petitioners are not truthful and are hiding the truth banking their hope on the erroneous judgment in Maintenance Cause No. 4 of 1987.

56. As regards the said judgement, it was noted that the cause was not a divorce case but maintenance case and hence the Protestor **Christina Mukonyo Kathuma** was not divorced either in Court or under Kamba Customary Law and to date she remains a widow of the deceased and hence a dependant under Section 29 of the **Law of Succession Act** Cap 160. According to the Protestors, the petitioners under the law cannot use the maintenance case in respect of Protestor no. 2,3,4 and 5 as they were not parties to that case and the said judgment cannot be used now to affect children who were not party to the suit. It was further submitted that the said judgment for maintenance cannot be used in this case as the same is stale and cannot be enforced.

57. It was submitted that the evidence by the 2nd wife of the deceased, her son and a daughter in law was just lies on oath and mere denials of the truth of the matter as opposed to the evidence of the Protestor and her several witnesses who are not beneficiaries of the estate of the deceased and hence the Protestors’ evidence weighed against the petitioners’ evidence, the weight tilts towards the evidence of the Protestors.

58. As regards the alleged Will, it was submitted that since it does not have a certificate of translation so the Court cannot know who

translated it should be expunged from the record. Further, the alleged Wills are alleged to have been signed by the deceased but a look at the signatures on both documents shows that they are completely different and hence a forgery. It was further submitted that a Will is a legal document governed by the **Law of Succession Act** Cap 160 to be specific part II thereof sec.11 sub section (c) reads that “the will is attested by 2 or more competent witnesses each of whom must have seen the testator sign or affix his mark to the Will.....” In this case it was submitted that both documents are not valid under the law, leave alone the signatures of the testator being completely different hence the Protestors point that the Will(s) if any are forgeries. It was noted that this petition was filed with annexed Will dated 10th August 2006. The said Will is alleged to have been signed by 2 people i.e the testator and the one of the petitioners **Hyder Mbula Kathuma** yet the petitioner on cross examination said she does not know how to write and hence she can only sign by thumb printing. The upshot of the above is that the petitioners are liars and have lied in Court and their evidence in its entirety is a lie and should be disregarded and evidence of the Protestor accepted.

59. It was further contended that from the petition itself the petitioners have decided to conceal material facts regarding two motor vehicles belonging to the deceased i.e. M/V KBQ 614S Nissan Wingroad and KAY 539E Mitsubishi Lancer.

60. Regarding the Notice of Motion filed on 22nd June 2018, it was submitted that the same cannot be granted at all. The evidence in support is shown by the petition confirming matters which are only within the knowledge of **Magdalene Mutio Mutuku** who was not evicted from parcel 93C as she still stays there and on examination, she confirmed **Albanus** as a son to the deceased **Kathuma**. According to the Protestors, for the affidavit to be of value, the averments in the said affidavit can only be done by the said **Magdalene** if they were true.

61. It was submitted that the Protestor annexed several documents which stand unchallenged. She states that parcel no. 93C was allocated to her by her husband and 1st petitioner and her children given plot/parcel no. 53B. The said agreement dated 1st December 2015 was signed by all wives and their witnesses, the deceased as no. 1 while the two wives signed by thumb printing. The 2nd petitioner **Josephine Mwikali Timothy** signed see no. 5 on the list while the 3rd petitioner **John Nzomo** signed the document as no. 6 on the list. It was also signed by the 4th Petitioner **Athanas Timothy** as no. 7 as well as **Juliana Mutave** daughter to the petitioner signed and the children of the 1st wife. It was noted that in the said agreement the deceased only allocated himself plot/Parcel 36A, 3 acres which he said will be shared among his 2 wives if he dies.

62. It was submitted that the petitioners accepted a meeting which was held on 1st December 2015; that it was attended by both wives of the deceased and their children; and that there was a family chairman who took notes one **Alfonse Kilonzo** who also testified. To the Protestors, the fact is they were present because they were recognized as wife and children and signed. Further, the local chief, elders and other family members were there and from the said agreement the deceased was given 3 acres in plot/parcel 36A for himself and it was stated very well that should he die / unable to till, the 3 acres be divided equally among his two wives. To the Protestors, the importance of this agreement is that the wish and the purpose of the meeting was to distribute his estate to his 2 wives and not children; the agreement also shows in 2015 before he died he acknowledged he had 2 wives; the deceased intention of the meeting was to distribute and he distributed among his two wives all his estate and the only remaining property which was not distributed was the plot/parcel 36A, 3 acres he allocated himself in that meeting.

63. Regarding the non-member certificate issued by Kimiti Co-operative Society Ltd on 3rd February 2016 before the deceased passed on, it was contended that the onus was upon the petitioners to prove that indeed it was a forgery which they never did. The only thing they did was to produce the original member certificate of the deceased for all the parcels of land he had with the said society which was different because the original one was for the original shareholders like the deceased and all the other certificates issued thereafter either through sale or gift are different because they are non-member certificates.

64. It was further noted that the burial permit serial no. 1104967 was issued to **Albanus Mutua Mbithi Kathuma** the son to the 1st wife. While it was alleged that Albanus stole the permit it was not said from who either in the affidavit or their evidence in-chief. Apart from that the Protestor introduced a bundle of photos for the burial specifically CM7 showing the 2 wives at the burial of the deceased, that of both children of both wives and relatives. The Protestor posed the question as to why they photographed as wives and sons if the Protestors gate crashed like any other neighbour. Further, the Protestor introduced a letter from the local chief showing the deceased had 2 wives. To them the chief knows the family very well and his letter shows the 2 wives and all the children of the 2 wives. In addition, the Protestor testified and called several witnesses. She testified in her statement how she and her late husband acquired parcels nos. 36A, 53B and 93C which are part of the properties her co-wife intends to take to herself alone. She told the Court they separated in 1980 and later re-united and the judgment is wrong on the time of separation due to her illiteracy and lack of legal representation. She called several witnesses including PW2 **Benard Kinandu** who confirmed the separation was in 1980 and later re-united. DW5, **Peter Munyao Kunulu** was also in the meeting dated 1st December 2015 no. 21 in the list and is not a beneficiary to the estate of the deceased. He testified that in the said meeting he had been called by the 1st petitioner **Hyder Mbula** as her witness. He testified that plot/parcel no. 93C was given to the Protestor and block 53B was given to the 1st petitioner. He further testified that the deceased remained with 3 acres in plot no. 36A which he said upon his death it be distributed among his 2 wives equally. This was echoed by all the other witnesses as the truth.

65. According to the Protestors, the Protestors have attached copies of the national identity cards to show they belong to **Mr. Kathuma** the deceased hence did not require the birth certificates then as it is not a requirement in the current proceedings and if it was then the children of the 2nd wife i.e. the petitioner ought to have attached the same.

66. It was submitted that the chairman one **Alfonse Kilonzo** testified that he was the chairman of the deceased family and distribution was done as per the agreement dated the 1st December 2015 and he forwarded the same to Kimiti Co-operative society for transfer on 21st December 2015 and the non-member certificate produced in Court by the Protestor. **Albanus Kathuma** equally testified in Court and his evidence stands unchallenged as stated in the statement adopted. His unchallenged evidence was that he was born in 1971 at Block/parcel 36A belonging to the deceased; that at the time of his birth and his young brother, the father and the mother were living together; that the late father was paying his fees in primary school and only refused to pay fees when he joined form 1 leading to the maintenance cause of 1987; though the deceased refused to pay fees in 1987 when the parents were separated he continued to pay fees at Tala High School in 1988 when they re-united since separation in 1980; that he had a sister born in 1974 and who passed at a tender age and buried in block/parcel 53B in

1979 was not at all challenged her name was **Mary Syombua**; also unchallenged is another sister who was buried in plot/parcel no. 36A called **Mueni Kathuma**. To the Protestors the fact that in 1979 a daughter to the Protestor **Mary Syombua** was buried in plot/parcel no. 53B confirms that the separation was actually in 1980 as stated by the Protestor and her witnesses.

67. **Albanus Kathuma** further testified that he is the one who took his late father's body to Kenyatta University mortuary and a burial permit was properly issued to him. He also further testified unchallenged evidence that his step brothers took the deceased identity card and 2 vehicles and hid them leading to a case at Kangundo Law Courts case no. PMCC 98 of 2017. His evidence is also unchallenged that a consent was filed that he hands over the burial permit for the deceased to his step brothers so that a death certificate can be gotten for both to apply for letters of administration only later to learn that his step brothers applied for grant and excluded the 1st family hence this case.

68. It was therefore the Protestor's case that all the agreements and evidence and also documentary tilts in their favour and they urged the Court to so find and order that the estate of the deceased be divided equally among his two widows and costs be awarded to the Protestors.

Determination

69. I have considered the issues raised in this protest. Broadly, the issues that fall for determination are: whether there is a valid will left by deceased; whether the Protestor was at the time of the deceased's death his wife and whether there are children from that union; who are the deceased's dependants; how should the deceased's estate be distributed?

70. This cause is grounded on the fact that the deceased left a valid will. That calls for a determination as to what constitutes a valid will. Section 11 of the **Law of Succession Act** which sets out the formal validity of written wills as follows:

No written will shall be valid unless-

(a) The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

71. In this case the two documents that are alleged to constitute the deceased Wills are both dated 10th August, 2006. In the first document, the deceased is alleged to have distributed all his plots to his sons. That document has two signatures which are alleged to be the deceased's and the 1st Petitioner respectively. The second document alleges that the deceased distributed his properties to his sons and daughters. Similarly, that document is allegedly signed by the deceased and the 1st Petitioner. In **Sarah Nabaggala & Another vs. Joyce Nakku & Another Kampala HCCS No. 7 of 1992** the Court noted that:

“The evidence of the plaintiffs proved that the deceased did not sign the will in their presence as is required by law. Nor is there evidence by the witnesses to show that the testator agreed to the truth of his own signature before them since he signed the will in their absence. It cannot just be assumed. A will must be in writing and signed by or on behalf of the testator and his signature must be made or acknowledged in the presence of two witnesses at one point...The rule is imperative in the case of wills and other testamentary instruments. The witnesses in the case of wills are witnesses of the court and can be cross-examined by the party calling him as to any evidence he gives tending to negative execution...As the evidence of the plaintiffs proved that the deceased did not sign the will in their presence nor did the plaintiffs receive personal acknowledgement of the testator's signature, the will was invalid and hence not enforceable by court and therefore it is assumed that the deceased died intestate.”

72. It is therefore clear that even assuming that the signatures in the said documents were those of the persons to whom they were designated, the documents in question do not amount to legally valid wills. Apart from that the 1st Petitioner in her evidence stated that she did not know how to use a pen and used to thumbprint. That being the position one wonders whose signature was appended in the said document.

73. It follows that the first issue must be answered in the negative. There is no evidence on record that the deceased left a valid will and it follows that the deceased's estate must be distributed in the manner provided for distribution of an intestate estate.

74. Was the 1st Protestor, **Christine Mukonyo**, married to the deceased as at the time of the deceased's death or had the two been divorced. It is not in doubt that the 1st Protestor, **Christine Mukonyo** and the deceased **Timothy Kathuma Mukonyo**, were married under Kamba Customary Law in 1952. According to the Objector they lived together with the deceased and the Petitioner till June 1980 when she had a misunderstanding with the deceased leading to their separation. According to DW6, the two reunited in 1988. On the other hand, the Protestor's evidence was that by the time the 1st Protestor got married to the deceased in 1959, the 1st Objector had already left for her father's homestead never to return during the lifetime of the deceased.

75. In the judgement in the said Matrimonial Cause, the Court stated that the 1st Protestor, in her evidence admitted that she left the matrimonial home of the deceased with her first child, **Kalekye**, in November, 1953 and went back to her parents' home where the said child

died and was buried without the deceased's consent. Since then she had never returned to the matrimonial home, a period which according to the court was some 34 years. This position seems to have been confirmed by the deceased who in his evidence stated that the reason the 1st Protestor left was the belief by her parents that if she remained at her matrimonial home, her said child would die and she would never be able to get another child for the rest of her life. In the meantime, the deceased got married to the 1st Petitioner herein and together they got 11 children. His evidence was supported by his step-mother.

76. In his judgement the learned trial magistrate found that the 1st Protestor abandoned the matrimonial home and went to live permanently at the home of her parents where she was for a period of 34 years during which time she committed adultery with other unknown men and got four children outside the matrimonial home. The Court found that in accordance with the Kamba Customary Law, adultery by a married wife outside the matrimonial home is a ground for divorce and based on desertion and adultery, he found that the marriage between the two must be declared a nullity. In his judgement, all the four children of the 1st Protestor were not legitimate children of the deceased and the Court could not make any order for their maintenance.

77. It is true that the matter before the learned trial magistrate was a Maintenance Cause and not a Divorce Cause. It follows that any comments he made regarding the marital status of the 1st protestor and the deceased can only be termed as obiter. In **Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi and Another Nairobi HCCC No. 473 of 2006 [2008] 2 EA 311, Rawal, J** (as she then was) held that:

“Obiter dictum is a judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive). Strictly speaking, an obiter dictum is a remark made or opinion expressed by a judge, in his decision upon a cause, “by the way” – that is, incidentally or collaterally and not directly upon the question before the court; or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy or suggestion. In the common speech of laws, all such extrajudicial expressions of legal opinions are referred to as ‘dicta’ or ‘obiter dicta’ these two terms being used interchangeably. Ratio decidendi are the principle or rule of law on which a court’s decision is founded many poorly written judicial opinions do not contain a clearly ascertainable ratio decidendi. It is the rule of law on which a later court thinks that a previous court founded its decision; a general rule without which a case must have been decided otherwise – often shortened as ratio... What is binding is ratio decidendi and it shall be a pedantry to state that the decisions of the Court of Appeal is absolutely binding on the High Court, but not their opinions stated by the way which are officially termed as obiter dictum.”

78. However, the learned trial magistrate was well within his power to find that due to the long period when the deceased and the 1st protestor stayed separately, the children born by the 1st Protestor were not born during the time when the two cohabited as husband and wife and therefore the deceased was not under any obligation to maintain them. In the absence of an appeal, that finding still stands and this Court cannot ignore the same. The children born by the 1st Protestor are clearly therefore not dependants of the deceased and cannot claim any interest in his estate.

79. The 1st Protestor's position is however not necessarily the same as that of the children since there is no evidence of divorce. Section 29 of the **Law of Succession Act** provides as follows:

For the purpose of the Part “dependant” means-

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

80. Under the said section, it is clear that such proof of maintenance is only required where the applicant falls within the category contemplated in section 29(b) and (c) of the Act and these are the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death and husband. In other words, as held in **Beatrice Ciamutua Rugamba vs. Fredrick Nkari Mutegi & 5 Others [2016] eKLR**:

“...a dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts.”

81. In the case of **R N M vs. R M N [2017] eKLR** it was held that:-

“Proof of dependency is thus a condition precedent to the exercise of the discretion in section 29(b) cited hereinabove. In addition, while considering the meaning of a dependant under section 29 of the Act, the court held as follows in the case of Beatrice Ciamutua Rugamba .v. Fredrick Nkari Mutegi & Others, Chuka Succ. Cause No. 12 of 2016 :-

"From the foregoing, a dependent under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency."

I note in this regard that the Applicant did in her affidavits admit that the subject children were not the Deceased's biological children, and did not provide any additional evidence of how the Deceased maintained the children, and the responsibility he undertook with respect to the said children. This Court cannot in the circumstances make any conclusive findings as to the said children's dependency on the Deceased at this stage, which finding will have to await the confirmation proceedings."

82. In this case the 1st Protestor was the deceased's wife and there is no evidence that they were divorced. There is nothing in law barring people who have separated however long from reuniting. The question then is: Was there any such reunification? It is not in doubt that on 1st December, 2015, there was a meeting which was held at the DO's office. It is also not in doubt that the meeting was attended by the deceased, the Petitioner and her children, the 1st Objector and her children, the family chairman and the elders. It is also agreed that there was a document to which the parties appended their signatures. What is not agreed is the agenda for the said meeting and whether the said signatures were appended voluntarily. According to the Petitioners they were forced to sign the said document since the meeting was called not to distribute the deceased's properties but to authorise the deceased to dispose of part of his properties to a person to whom he was indebted. It was however not disclosed who compelled the signing of the said document. To the contrary one of the witnesses, **Peter Munyao Kunulu**, DW3, who was unrelated to the family and who testified that being a church elder he attended the meeting on the 1st Petitioner's invitation, in his statement which was adopted as evidence stated that at the said meeting the deceased distributed his properties. That meeting was followed by the site visits to the said parcels and that everybody was in agreement and signed the same. Being an independent witness, I find his evidence more credible than that of the other witnesses more so as he was called to the meeting by the 1st Petitioner.

83. From the minutes of the said meeting it is stated that the dispute was referred to the Deputy County Commissioner by the 1st Petitioner and her children who were contesting the sale of land complaining that the same was unprocedural. The dispute was referred to the Area Chief with a panel of elders two from the clan and two neutral ones. At the meeting were the Clan Chairman, his two members, a pastor and two other neutral members. According to the minutes the deceased claimed that his children were not taking care of him hence the reason he was selling land.

84. It is therefore my view and I find that there was a meeting of the deceased's family members on 1st December, 2015 at the DO's office, Kisukioni, Machakos where the deceased disclosed how he wished to have his properties distributed amongst his wives as opposed to the children. Consequently, the 1st Protestor had her portion transferred into her name. Although the Petitioners alleged forgery of the certificate, no evidence was called to prove that the document was actually forged. It would have been easier for them to call witnesses from the Cooperative Society to do so. Accordingly, that document, together with the minutes of the meeting of 1st December, 2015 and the oral evidence of the witnesses who were present at that meeting prove to the required standards of the balance of probabilities that that meeting took place and that the deceased distributed his properties accordingly. According to the said agreement, the 1st Protestor, **Christine Mukonyo Kathuma**, was to get Plot 93C while the 1st Petitioner, **Aiter Mbula Kathuma**, was to get Plot 53B. The petitioners has however disclosed that the deceased's assets comprised of Kimiti Co-operative Society Shares Certificate No. 22 for Plot No, 36A (3 acre coffee farm) valued at Kshs 7,500,000/=, Plot No. 59B (5 acre Homestead) valued at Kshs 7,500,000/=, Plot No. 93C (7 acres for the late Boniface) valued at Kshs 10,500,000/=, Plot No. 29 (Kisukioni Market) valued at Kshs 8,500,000/=; Beer Wines Stock in Plot No. 29 Kisukioni Market valued at Kshs 800,000/=; Matuu Kwale Plot No. 165 valued at Kshs 500,000/=; Steel Senator Beer Tanks valued at Kshs 36,000/=; Monies in Equity Bank Ltd Tala Branch Account No. 06001920523 in the sum of Kshs 609,816.80. According to them the assets totalled Kshs 32,945,816.80 in value.

85. Taking into account the finding by this Court that the children of the 1st Objector were, as per her own evidence, born after her separation with the deceased and as the 1st Petitioner had 11 children with the deceased I direct that apart from Plot No. 93C which is hereby confirmed to the 1st Objector, **Christine Mukonyo Kathuma**, all the other properties of the deceased are hereby confirmed to the 1st Petitioner, **Aiter Mbula Kathuma, otherwise known as Hyder Mbula Kathuma**. Consequently, the Notice of Motion dated 19th June, 2018 fails.

86. There will be no order as to the costs of both the Protest and the said Motion as the dispute pits members of a family.

87. It is so ordered.

88. This ruling has been delivered online to the respective parties' email addresses with concurrence of both advocates for the parties due to the prevailing restrictions occasioned by COVID 19 pandemic.

Read, signed and delivered online at Machakos this 29th day of May, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

CA Geoffrey