REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

SUCCESSION CAUSE NO. 15 OF 2018

IN THE MATTER OF THE ESTATE OF GODANA SONGORO GUYO (DECEASED)

AHMED GODANA SONGORO.....APPLICANT

AND

HELLEN SAFOO GODANA.....RESPODENT

Coram: Hon. Justice R. Nyakundi

Chepkwony Advocate for the applicant

S. Ruwa Advocate for the respondent

JUDGEMENT

The instant matter was brought before me by way of a Notice of Motion Application dated 27th? January, 2020 seeking the following orders:

> ***(a). That the Court be pleased to order Hellen Safoo Godana the co-administrator to produce and deposit to the court title deed documents for number Kilifi/Tezo/Madukani/12 and Title deed number Kilifi/Ngerenyi/443 currently held in her possession.***
>
> ***(b). That the court be pleased to issue special citation to Hellen Safoo Godana for refusing to execute the documents and consent for confirmation of grant.***
>
> ***(c). That the cost of the application be provided.***
>
> ***(d). That the Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.***

Background

The dispute in the instant application touches on the distribution of the **Estate of the late Godana Songoro Guyo (deceased)** stated to have died on 19th? April, 2017. The deceased was survived by a total of 9 beneficiaries, who include the widow **Aroyi Godana Songoro,** four sons namely, **Ahmed Godana Songoro, Godana Songoro, Songoro Godana, Sampuli Godana** and **Abalon Godana Guyo** and daughters **Hellen Safoo Godana, Jannet Guyatho Godana, Annet Kashida Godana** and **Edna Haganda Godana.**

The objector and the respondent applied for the letters of administration intestate before the high court which were subsequently issued by consent on 8th? ? July, 2019. The deceased's estate is comprised of the following assets:

> ***(a) Title deed number TEZO/MADUKANI/12 measuring 4.5 hectares.***
>
> ***(b) Title deed number KILIFI/NGERENYI/443 measuring 5.0 hectares.***
>
> ***(c) Title deed number GEDE/KIREPWE 1357 'B'/remembering 2.40 hectares.***
>
> ***(d) Bank Account at Kilifi and Mombasa branch:***

(i) Kshs. 5,198.75 held by Barclays Bank Kilifi in the deceased's name.

(ii) Kshs. 4, 819, 745.40 held by Barclays Bank Kilifi in the deceased's name.

The beneficiaries in their affidavit and evidence have taken issue with the mode of distribution of the said estate and the same has delayed the confirmation of the grant. The proposed mode of distribution is as follows:

(a) Title deed number TEZO/MADUKANI/12 measuring 4.5 hectares to be given to the mother and the daughters as well as a half an acre to be set aside as a family grave yard.

(b) Title deed number KILIFI/NGERENYI/443 measuring 5.0 hectares. To be shared equally between Ahmed Godana Songoro and Songoro Godana. It is claimed that this property was allocated by the deceased during his lifetime.

(c). Title deed number GEDE/KIREPWE 1357 'B'/remembering 2.40 hectares. To be shared equally amongst all heirs.

(d). Unregistered property belonging to the late grandfather Songoro Guyo. The said property said to have been given to two children Abalon Songoro and Sampuli Godana Songoro to build and bring up their family and that is where they reside.

The objector's Position

The applicants contend that the deceased bequeathed property number **LR. KILIFI/NGERENYI/443** to **Ahmed Godana Songoro** and **Songoro Godana Songoro** prior to his demise and that the deceased also that the rest of the estate ought to be distributed equally among the beneficiaries. Further that the unregistered parcel was also given to his sons **Sampuli Godana** and **Abalon Godana Guyo**. Hence the proposed mode of distribution was as per the wishes of the deceased, should take effect.

During the hearing, the applicant and his witnesses gave evidence in support of his position in which he postulated that prior to the deceased's death, he called two elders, the chief **(PW1) Baraka** to whom he expressed his wishes with regard to **Kilifi/Ngerenyi/443**. In addition, by virtue of the principles of intestate estate. It was the applicant's contention the rest of the estate be distributed equally to all the beneficiaries. It was also proposed by the applicant that the residual cash at bank be appropriately shared in accordance with the provisions of the Succession Act.

Though **PW1 – Enock Baraka** and **PW2 – Songoro Godana** never referred to any minutes, its obvious that the cumulative effect of the evidence in chief and cross-examination was to give credence to the gift *inter vivos* or gift *causa mortis* seemingly by the deceased.

The Respondent's case

The respondents **Hellen Godana** and **Aroyi Godana** questioned the mode of distribution specifically on the contested asset **LR. KILIFI/NGERENYI/443**. The respondents denied the allocation of the said parcel of land to the co-administrator **Ahmed Godana Songoro** and his brother **Songoro Godana** to the exclusion of all the other beneficiaries to the estate. The respondents sought to displace the argument peddled by the Applicant that his brother **Ahmed**, were gifted the property by the deceased prior to his demise. The respondents argued that there is no evidence whatsoever produced before court to substantiate this assertion.

According to the evidence adduced by **Aroyi Godana** and **Hellen Safo** the surviving children regardless of gender are entitled to the estate in equal shares. On the issue of **Kilifi/Ngerenyi/443** being allocated to **Ahmed Godana** and **Songoro Godana (DW1)** – **Hellen Safo and (DW2)** – **Aroyi Godana** contended in their evidence on oath that the aforesaid parcel of land was never bequeathed to them by the deceased. The position taken by **(DW1)** and **(DW2)** was for the estate of the deceased to be shared equally with the surviving children and part of it be apportioned to the widow **(Aroyi Godana).**

The second issue in contention is as regards the allegation by the respondents that there are also undeclared assets that form part of the estate. The respondents fears that the deceased may have other properties known to her co-administrator but however the same may have been deliberately and/or conveniently left out. They alleged that being aware of land located opposite **Kilifi/Tezo Maadukani/12** that measures about 12 acres which her co-administrator deliberately removed from the schedule of assets. It was further argued that the allegation by the applicant that the parcel of land in question was the main one to be distributed amongst **(DW1) (Aroyi Godana)** and her daughters would be inequitable.

The respondents argued that the proposed mode of distribution is out rightly discriminatory as it seeks to unfairly give advantage to the sons against their mother and the sisters.

Determination

I have carefully considered the competing submissions by the parties and the proposed modes of distribution by the parties. I have also considered the authorities relied on, and the relevant provisions of the law cited. In my view, three main issues arise for determination:

1. Whether the deceased made gifts inter vivos or gift causa mortis to some beneficiaries and whether those gifts should be taken into account in determining the ultimate entitlement of the beneficiaries in this intestate estate.

2. Whether the proposed mode of distribution of the estate is fair and equitable.

3. How the estate of the deceased shall be distributed?

The determination of the manner in which this property will be distributed will depend on the answer to the question whether the deceased had distributed some of his properties to some of his beneficiaries *inter vivos*? or gift *causa mortis* as alleged by the applicant. If indeed the deceased had indeed bequeathed some of his assets to some of his beneficiaries by way of gift *inter vivos* or *causa mortis*, the court will be compelled to honour the wishes of the deceased. Section 42 of the Law of Succession

Act provides that:

42. Where-

(a) an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate. That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house.

From the evidence on record, the applicants claims that the deceased bequeathed two parcels of land for their benefit prior to his demise, property number **LR. KILIFI/NGERENYI/443** and the other property in question is which unregistered. The authenticity of its existence and ownership by the deceased or whether or not it forms part of the assets belonging to the deceased's estate is not in dispute. However, the court is tasked to investigate whether the applicant's claim suffices to be gift *inter vivos or causa mortis.*?

What is the requirement of law as far as a gift *inter*? *vivos* is concerned? I find useful guidance in **Nyamweya J** in her decision in the case of **Re**? **Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR,** where she stated as follows:

"In? law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the Law of Succession Act provides as follows with respect to gifts made in contemplation of death:

…For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid."?

In **Halsburys? Laws of England? 4th? ? Edition Volume 20(1) at paragraph 67** it is stated as follows with respect to incomplete gifts**:**?

"Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do."

It may be noted that the concept of gifts is divided into two categories. First gifts intervivos and gifts causa mortis. Gifts intervivos as contemplated in the Law of Succession are such that the owner of the property or asset donates it to another without expectation of death. In any event the person who makes such a gift must have the capacity and competency to gift the property and the gift must be perfected. In the case of intervivos the gift must go into immediate and absolute effect. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts. Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee.

Secondly, the test on a gift causa mortis is defined as a gift made in expectation of death. The donor causes the property or goods in his possession to be delivered to another. The general distinction between a gift causa mortis and a gift intervivos is that its revocable by the donor and the capacity must meet the requirements under Section 11 of the Law of Succession in the making of a Will.

The instant case the deceased was the registered owner of **Kilifi/Ngerenyi/443** it is alleged by **PW1 Enock Baraka** and **Songoro Godana** that the deceased gifted the property during his lifetime sometimes in 1980 to his two sons namely **Songoro Godana** and **Ahmed Godana Songoro;** in exclusion of other beneficiaries. There is also contrary evidence from **DW1 – Hellen Godana** and **Aroyi Godana** that there was no such donation of the title Ngerenyi 443 as a gift to **Songoro and Ahmed Godana**.

In construing whether the deceased dealt with the property as a gift inter vivos or a gift causa mortis the evidence leading to establish such gifts must be clear and convincing. In order to assess the credibility of the evidence it is helpful as far as possible to avoid unscrupulous beneficiaries to seize opportunities when the deceased persons are on their death bed or languishing in mortal illness to entirely fabricate a case set up for making a gift.

Regarding the issues surrounding the elements of a donation. Mortis causa, the threshold of proof should in principle be as stipulated in the comparative precedent in **Cain v Moon {1896} 2 QB 283 Lord Russell** held that:

"for effectual donation mortis causa three things must combine. First, the gift or donation must have been made in contemplation, though not necessarily in expectation, of death, secondly, there must have been delivery to the donee of the subject matter of the gift, and thirdly, the gift must be made under such circumstances as slew that the thing is to revere to the

donor in case he should recover."

Therefore, the Law requires of the beneficiary that the deceased relinquished dominion over the title to land reference **Kilifi/Ngerenyi / 443** in their favour. The evidence must also show that the deceased intended to make the gift of this particular property by taking steps to perfect delivery of it to the sons in exclusion of anyone else. Sometimes looked at from customary Law perspective the father as the head of the family under parental executive order can permit any of his children use of the Land, without the necessity of giving up the title to pass to the user. The mere delivery for use is therefore not sufficient to qualify the property as a gift causa mortis or gift intervivos. Very much the same I think applies to gift intervivos as illustrated by **Nyamweya J in Gedion case (supra).**

In the present case we are told that the gift on Kilifi – Ngerenyi/443 was made between the deceased during his lifetime and his two sons **Songoro and Ahmed**. It is inconceivable that from 2015 when the purported meeting was held in the presence of **(PW1),** the deceased though still alive until his death on 19.4.2017 but did not voluntarily transfer possession to aforesaid sons with an intention of never to leave it as free property of the Estate as defined in Section 3 of the Law of Succession.

When someone makes a gift to another with the intention of vesting it wholly on that other person and will not be expected to revert back to himself, then such disposition arising there to ought to be validated. Notwithstanding the evidence by the applicants attempt to persuade this Court to admit such evidence on gift intervivos or gift causa mortis there is no such gift over this disputed title in the legal sense.

Male authority assumes that husbands are the heads of housholds, or legal representatives of households and possess the authority to make decisions on behalf of the family or excessively administer property without consulting or seeking spousal consent. All the same the irony of the situation before me is that although the deceased was still married to **Aroyi Godana** she had denied being involved in the decision making process of gifting part of the estate to the sons without her consent.

Under our Constitutional and Customary Law setting she is automatically entitled to property that she may have assisted the deceased in acquiring through her labour, even through financial contribution is considered as a predominant factor. I cannot help but to observe that although the deceased was aware that there were other lawful beneficiaries, he chose not to involve in the decision making on the sharing of land reference **Kilifi/Ngerenyi/443.**

Considering what happened in this transaction the property in question was registered in the name of the deceased. I am of the view that a gift of the legal Estate must be made by a registered transfer, the same fashion as on a transfer for value and consideration. A gift *inter vivos* or *causa mortis* in favour of the applicants fails because the deceased did not provide the means for putting the land under the two sons effective control. They would require further authority from the administrator of the estate to effect the donation and vest it in their actual possession.

Adherence to the rule based-model on transfer of immovable property involves an inquiry on the Law of gifts *inter vivos* or *causa mortis* featuring in **Odunga's Digest on Civil Case Law and Procedure Vol (III) Page 2417 at paragraph 5484 (d) e – 1** thus:

> ***"Generally speaking the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate the gift. (See in Re Fry Deceased {1946} CH 312 Rose: and Trustee Company Ltd v Rose {1949} CL 78 Re: Rose v Inland Revenue Commissioners {1952} CH 499 Pennington v Walve {2002} 1WLR 2075 Maledo v Beatrice Stround {1922} AC 330 Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If, on the otherhand, the done has under his control everything necessary to constitute his title completely without any further assistance from the donor, the done need no assistance from equity and the gift is complete. It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the done has within his control all those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor.*** **(See Shell's Equity 29ED Page 122 paragraph 3)"**

As one surveys the terrain the procedural history between the process of gifting the disputed property and the substance of the rights being claimed by the applicants, the ultimate form of gift *inter vivos* or *causa mortis* had not ripened for this Court to grant that particular right. It must be said that it is difficult to escape the logic of **Odunga J's (supra)** reasoning. This criterion has the following implications. ***"The donor is no longer the owner of the property conveyed in gift inter vivos or mortis causa. It is essential to its validity that the donor has actual and irrevocably divested himself or herself of the property conveyed as a gift."*** The plausibility of this criteria is that property cannot be both given and retained.

Generally, a gift in form of a parcel of land ought to be effected by way of a written memo or a transfer or declaration of trust in writing showing that the land was gifted to the sons of the deceased *inter*? *vivos*? *or causa mortis*. But, if a gift rests purely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. ??From the evidence placed before me, the applicant's claim of gift *inter*? *vivos* ?is merely based on a promise and or unfulfilled intention by the deceased since no written memo, declaration or transfer was placed before the court to show that the gift was indeed effected.

Therefore, for a gift *inter*?*vivos or causa mortis* to be completed or perfected, it must be ascertained on the part of the applicant that there were circumstances where the donor's succeeding conduct provides the done with a right to enforce the promise or unfulfilled intention. One of the suit lands still stands in the name of the deceased as the registered proprietor and the other parcel which was unregistered has not been registered yet. The fact that two of the deceased's sons are already residing on the unregistered land does not make the gift complete. Mere occupation of the estate property does not in itself amount to gift ?*inter vivos or causa mortis*? by the deceased or give the person in

occupation any or exclusive right of entitlement to the particular estate property. To my mind, it is apparent that in the absence of a transfer of the suit lands to the four son of the deceased, there is a lack of intention by the deceased to make gifts *inter vivos or causa mortis* ?to his sons. ?Therefore, there is absolutely no evidence that the deceased intended to make or made gifts *inter*? *vivos*? *or causa mortis* of the suit land to any of his sons including the Applicant. Therefore, property **LR. KILIFI/NGERENYI/443** and the unregistered property also in question forms part of the deceased's estate which is liable to equal distribution to all his beneficiaries.

The constraint which exist on the exercise of discretionary power as I understand the facts of this case is the norm which fashions equity:

> ***"See Rose, Re {1952} Pelington & Another v Waine & Ors {2002} ALL ER. In Lubberts Estate Re {2014} ABCA 216 the Court emphasized that " An intervivos gift exists if the donor, while alive, intends to transfer unconditionally legal title to property and either transfers possession of the property to the donee or some other document evidencing an intention to make a gift and the done accepts the gift."***

The onus was on the applicants to prove on a balance of probabilities that the gift of the subject parcel of land was intended by the deceased to be transferred to the two of them for their gain and not the rest of the siblings. Based on the oral evidence from the spouse **(DW2)** and the sister to the applicants **(DW1)**, I am of the strong view that the intended specific gift is declared void for want of intention as no valid transfer occurred during the lifetime of the deceased.

In the instant application and protest, the court understands that it is not clear or there is no sufficient evidence given by the applicant to pinpoint as to when the alleged gifts were made by the deceased to his sons. The only shred of evidence placed before me was that the gifts were made by the deceased to his sons, in the presence of the Chief **(PW1**) and some elders. This has been vehemently disputed by the Respondent as termed as a blatant lie.

Having seen and heard both the applicant and the respondent and further having observed the demeanor, I do not find the applicant to be a credible witness. His evidence as to when and the prevailing circumstances which went into isolating this particular parcel of land from the rest of the estate was conflicting and materially unreliable. While the deceased lawful wife **(DW2)** was still alive. Its intriguing no such mention was made to her in respect of the subject reference property or otherwise being given to his sons.

I therefore find that the gift envisaged in terms of Section 31 of the Law of Succession Act is not applicable in the instant matter as no material has been put before me to establish that the deceased made the said gift *inter vivos* or *causa mortis*. The bequeathing may therefore be treated as invalid for it fails to meet the requirements of the law as regards such gifts.

On whether the mode of distribution proposed by the applicant was fair. Intestate succession applies to estates of persons who die intestate or leave no valid Will disposing of their property, thereby requiring the descent and distribution of their property in accordance with the provisions under the Law of Succession Act.

I shall decide as follows. As I have mentioned elsewhere, gift does not form part of the estate property for distribution to other beneficiaries, for, it is no longer the free property of the deceased.

The Constitution of Kenya 2010 as well as the Law of Succession Act frowns upon the discrimination of women as far as their entitlements are concerned in inheritance matters. I also find useful guidance from the work of **W. M. Musyoka, Law? of Succession at page 118?** in relation to reference to children in the Law of Succession Act that:-

> ***'Non-discrimination of daughters' reference to children does not distinguish between sons and daughters, neither is there distinction between married and unmarried daughters'***

Apart from the foregoing, I'm inclined to cite Article? 27(3) of? the Constitution which ? specifically provides that:?

> ***'women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres'****?.*

The same was also buttressed in **the Matter of the Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti (Deceased) [2017] KLR** as? follows**:-**?

> *Discrimination of daughters in inheritance*
>
> ***From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when RONO vs. RONO [2008] 1 KLR 803deliveredthe downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement the Constitution- which state categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and the Constitution. More specifically I am content to cite the proclamation by the Court of Appeal in the case of STEPHEN GITONGA M'MURITHI vs. FAITH NGIRAMURITHI [2015] eKLR that: -***

> ***"Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried…''***
>
> ***Therefore, a son will not have priority over a daughter of the deceased simply because he is male; all- male and female siblings- are equal before the law and are entitled to equal protection of the law. See article 27 of the Constitution. Accordingly, the 3rd? ? Administrator and her children who are claiming the inheritance of late Festus K. M'Ngaruthi, the son of the deceased are only entitled to the share of their late father. They are not, in the circumstances of this case entitled to more share than the distinct share of each of the two daughters of the deceased simply because the late Festus M'Ngaruthi was the son. The three children of the deceased are entitled to share the net intestate estate of the deceased equally.***

I would of course have agreed with the applicant contention on inequality of distribution but the persuasive holding in **Mojekwu v Mojekwu {1997} 7 NWLR 283** dishes better legal principles that adopt in which **Justice Tobi** said:

> ***"All human beings male and female are born into a free world and are expected to participate freely, without any intention on grounds of sex, and that is constitutional. Any form of societal discrimination on ground of sex apart from being unconstitutional, is antithesis to a society built on the tenets of democracy which we have freely chosen as a people. Accordingly, for a custom or customary Law to discriminate against a particular sex is to say the least an affront on the Almighty God himself. Let nobody do such a thing….."***

In my mind unless stated otherwise, the distribution of the deceased's estate should be at par between his sons and daughters. The application on record offends the principles of natural justice, equity and good conscience if the method proposed was to be adopted by this Court.

In this matter, the arguments made by the Learned Counsel for the applicant is that the approach which had been alleged to have been adopted by the deceased was a practical and equitable one aiming at giving the sons an advantage of enabling the sons to retain the land where they have been living on and developed overtime. This view is apparently, untenable in law having in mind that the applicant's failed to prove that such an approach was ever vended by the deceased. I should make it clear in this Judgment that no child comes to the distribution table of the estate intestate with superior rights. Therefore, a situation whereby a male heir will be preferred to inherit more shares to a female heir of the same estate for purposes of inheritance can no longer withstand constitutional scrutiny. In the letter and spirit of the Constitution dependants daughters under Section 29 of the Law of Succession irrespective of age, or social status are entitled to inherit from their parents intestate equally like their brothers. The measure of differentiation on distribution that may occur should not be prejudicial or unjust along gender lines which Article 27 (4) of the Constitution specifically disallows. In the instant confirmation hearings granting the two sons **(Ahmed Godana and Songoro Godana)** a set of preferential share in **Kilifi/Ngerenyi- 443** and further devolve the entire estate to other heirs equally would amount to discrimination.

In other words of **Mill, principles of Political Economy (OP. CH N 41 BK11 CL2 Paragraph 3):**

> ***"The duties of parents to their children are those which are indispensably attached to the fact of causing the existence of a human being. The parent owes to society to endeavor to make the child a good and valuable member of it, and owes to the children to provide, so far as depends on him, such education, and such appliances and means as will enable them to start with a fair chance of achieving by their own exertions a successful life. To this every child has a claim, and he cannot admit, that as a child he has a claim to move. Further it's the duty of the Court so far as possible to place itself in all respects in the position of the deceased and to consider his moral obligation which is just towards his or her surviving spouse."***

Tinkering with the above principles, if any person dies wholly intestate his or her widow is left without adequate provision for her or his proper maintenance, the Court should also bear in mind that the children of the deceased may not be in a position to provide adequate spousal/ wife maintenance envisaged to be fair and just. In order to displace the statutory rule for equal interests as urged by the applicants and respondents to this confirmation of grant.

I take into considerations all the personal circumstances of the case made by and on behalf of the widow **(DW2)**. In substance, the question to be considered is how best should the moral obligation of the deceased to his or her spouse be defined and enforced, bearing in mind the principle of the marriage being a partnership of equals. In the case of the deceased who has left a Will there is one answer to that question.

In the second instance on intestate estate the spouse shall be entitled to a life interest in the remaining property of the deceased together with personal and household effects absolutely. The children will get the entire estate upon the termination of the life interest of the surviving spouse. Under Section 29 of the wife ranks high among the dependants of the deceased husband. Two important points are worth mentioning as provided for under Section 35 (1) of the Law of Succession Act. First, the Section duly provides for a life interest in the residue of the net intestate estate. For purposes of this Section a life interest grants the spouse the right to reside in the property of the deceased's property until his or her own death, without necessarily owning the land. In making reference to those rights which are acquired by one spouse as a continuing life interest, I must emphasize substantial benefit of it as whole if anything imports indirect discrimination against women.

The Law envisages that the spouse may use the property that is subject to life interest and may retain any house during his or her lifetime but prohibits him or her from selling the assets. This means that the family home left behind and all the deceased's personal chattels are to be transferred to the spouse **(DW2)** for the exclusive use during her life. The spouse must not be bruised or disadvantaged by the death of the deceased and made to be in a worse situation had the deceased not passed on.

The second part of this same Section is in regard to the differentiating features between widows and widowers around the question on the lapse of the life interest. Most certainly if the surviving spouse is a woman such interest shall determine on her remarriage to any person.

What is important to note is that whatever assets which fall within the provisions of Section 35, 36, 37, 38 and 40 of the Law of Succession

are matrimonial assets under the Matrimonial Property Act No. 49 of 2013. The legal framework governing division of matrimonial assets leans towards equal distribution taking into account the factors laid down in Section 7 of the Act. On this score one of the principle objects of the Law of Succession is to have regard to equal distribution of the intestate estate.

However, in the circumstances of this case, I would depart from equal sharing of the estate as between the spouse of the deceased and their children. There are extra ordinary circumstances making equal sharing of the assets amongst the children and the spouse repugnant to justice.

First, the property must have been acquired during the subsistence of the marriage before the demise of the deceased. Secondly, the (spouse) who is the mother to the heirs to this estate contributed or took all the responsibility for raising the children as the deceased was involved in wealth creation. Thirdly, the dependant adult children means of survival and provisions ought to be taken into account to give sufficient weight to the importance to the intangible benefits of the marital bond and its primacy before the death of the deceased. Fourth, as regards the spouse **(DW2),** the evidence and judicial notice taken by the Court she is fairly aged and may require constant medical attention and other basic rights. Be that as it may, the fact of widowed to **(DW2)** mandates this Court to exercise such discretion in appropriate cases to deserving cases such as the present one between the spouse and children of the deceased.

In exercising broad discretionary powers regarding the distribution of the assets of this estate, the surviving spousal needs, who testified as **(DW2)** call on this Court to depart from the equality principle to the extent of money held in the Bank account of the deceased. This is to ensure that it helps the spouse ability to continue to live in the home while meeting her basic needs without over dependence or on account of the children.

Therefore, the Respondent and the other daughters of the deceased are justified in protesting the blatant discrimination exhibited by the mode of distribution proposed by the Applicant. I accordingly adopt her proposal that the deceased's assets be distributed equally among all the beneficiaries. That is the law in Kenya.

Distribution

For purposes of this application, the estate herein shall be distributed as follows: -

1. Title deed Number KILIFI/TEZOMDUKANI/12- (4.5) Ha

(a). Aroyi Godana Songoro 4.5 acres Life interest

The balance be shared in equal share amongst the children of the deceased, **Hellen Safo Godana, Douglas Songoro Godana, Abalon Godana Guyo, Ahmed Godana, Jannet Guyatho Godana, Edna Haganda Godana, Sampuli Godana Songoro, Kashida Godana, Lydia Godana, Mapenzi Godana.**

2. Title deed Number KILIFI/NGERENYI/443-5 Ha

(a). Hellen Safo Godana

(b). Douglas Songoro Godana

(c). Abalon Godana Guyo

(d). Sampuli Godana Songoro Equal shares

(e). Ahmed Godana

(f). Jannet Guyatho Godana

(g). Edna Haganda Godana

(h). Kashida Godana

(i). Lydia Godana

(j). Mapenzi Godana

3. Untitled Land Opposite KILIFI/TEZO MADUKANI/12 – 12

Acres

(a). Hellen Safo Godana

(b). Douglas Songoro Godana

(c). Abalon Godana Guyo

(d). Sampuli Godana Songoro Equal shares

(e). Ahmed Godana

(f). Jannet Guyatho Godana

(g). Edna Haganda Godana

(h). Kashida Godana

(i). Lydia Godana

(j). Mapenzi Godana

4. Title Deed Number GEDE/KIPWERE B 1357 – 2.40 Ha

(a). Hellen Safo Godana

(b). Douglas Songoro Godana

(c). Abalon Godana Guyo

(d). Sampuli Godana Songoro Equal shares

(e). Ahmed Godana

(f). Jannet Guyatho Godana

(g). Edna Haganda Godana

(h). Kashida Godana

(i). Lydia Godana

(j). Mapenzi Godana

5. Bank account at Kilifi and Mombasa branch:

(a). Kshs.5,198.75/= held by Barclays Bank Kilifi in the deceased's name. Account number: 2021660593

(b). Kshs.4,819,745.40/= held by Barclays Bank Kilifi in the deceased's name. Account number: 2036999279

(i). Aroyi Godana Songoro 3 Million Kenya Shillings. The rest of the money amounting to Kshs.1,825,604.5/= is to be shared equally amongst the children of the deceased.

(ii). 7 cows. – Equal share to the sons and daughters of the deceased.

(iii). Aroyi Godana – 2 cows

One other issue that bears emphasis counsel is for the parties who nuanced the argument that the cash held in the Bank account should be channeled through their respective accounts for distribution. To accede to such a suggestion would in effect empowering them to be co-administrators to the estate of the deceased which is entirely untenable. It is an attractive argument but not persuasive in the justice of the case.

The Learned counsels are entitled to legal fees to be met by the applicants and respondents respectively. In keeping with the principles

enunciated above, the estate shall be distributed in the scheme and model in terms of the orders outlined above which factored in the evidence by the parties. As such costs of this cause shall be borne by the deceased estate.

Those then are the orders of the Court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29th DAY OF JULY, 2020

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R. NYAKUNDI

JUDGE

In the presence of:

1. Chepkwony Advocate for the applicant

2. Otuoma Advocate for the respondent

3. The administrators and beneficiaries