REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 106 OF 2014

(CONSOLIDATED WITH CIVIL APPEAL NO. 40 OF 2014)

(SUCCESION CAUSE 246 OF 2014 KIAMBU CHIEF MAGISTRATES COURT)

IN THE MATTER OF THE ESTATE OF NGUGI GITHINWA ALIAS GEOFFREY NGUGI GITHINWA (DECEASED)

DAMARIS NYAMBURA NGUGI.........1ST APPELLANT

MILKAH WANJIRU NGUGI...............2ND APPELLANT

VERSUS

FRANCIS MUTUA NGUGI...............1ST RESPONDENT

JOYCE NYOKABI NGUGI...............2ND RESPONDENT

(**Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kiambu by the Hon. C. C. Oluoch (Mrs) S.P.M dated 7th May, 2014 in Kiambu C.M's Succession Cause NO. 246 of 2004)**

JUDGMENT

INTRODUCTION

Ngure Githinwa alias Geoffrey Ngugi Githinwa, the deceased whose estate is in issue herein died intestate on 5th August, 2004. Damaris Nyambura Ngugi, the 1st Appellant, in her capacity as widow of the deceased petitioned the Magistrate's Court at Kiambu for a grant of letters of administration intestate which grant was issued to her on 21st April, 2005. After the lapse of the prescribed **six (6) month** period, Damaris applied for confirmation of the grant vide summons dated 24th October, 2005.

The application proceeded by way of *viva voce* evidence and written submissions. Judgment in the matter was delivered on 7th May, 2014. In determining the application, the Trial magistrate cited two (2) main issues for determination namely the ownership of the properties known as **Marmanet Block 1/Limunga 1/50** and **Loitoktok/Olkaria/316** and how they were occupied during the deceased's lifetime. The learned Magistrate evaluated the evidence tendered by the parties and came to the conclusion that the property known as Marmanet Block 1/Limunga 1/50 is exclusively for the first house and that the property known as Loitoktok/Olkaria/316 was a gift *inter vivos* to Damaris. The learned Magistrate confirmed the grant in the terms that:

> **a. L.R. No. Kiambaa/Kihara/444 (1.44 Ha/ 3.5 acres) and Kiambaa/Kihara/T.298 (0.084Ha/ 0.207 acres) would each be divided into two equal portions and shared between the first and second house;**
>
> **b. Loitoktok/Olkaria/928 (0.162 Ha/ 0.4 acres) be registered in the name of Milkah Wanjiru Ngugi in trust for the fourth houses.**
>
> **c. Marmanet Block 1/Limunga/1/50 be registered in the name of Francis Mutua Ngugi to hold in trust for the first house.**

Being aggrieved by the decision of the Principal Magistrate at Kiambu, in Kiambu **Succession Cause No. 246 of 2004** Damaris Nyambura Ngugi and Milkah Wanjiru Ngugi, the Appellants herein, each lodged an appeal in the High Court being **Civil Appeal No. 106 of 2014** and **Civil Appeal No. 40 of 2018.** The two appeals were consolidated by an order of this court on 18th June, 2015.

PLEADINGS

The 1st Appellant lodged a Memorandum of Appeal and Record of Appeal dated 8th December, 2014 and listed eight (8) grounds of appeal condensed as follows:

a. The certificate of grant is illegal and unlawful and contravenes the provisions of the Law of Succession Act and the Constitution as it completely disinherits the 1st Appellant Damaris Nyambura Ngugi and her eleven (11) children who are beneficiaries of the estate of the late Ngugi Githinwa alias Geoffrey Ngugi Githinwa, the deceased whose estate is in issue herein. That the Trial Court therefore occasioned prejudice and denied her justice.

b. The Trial Magistrate erred in confirming the grant knowing that the assets comprising the deceased's estate were way above the Court's jurisdiction under **Section 48** of the **Law of Succession Act**. That by determining a Succession Cause in which she had no jurisdiction, the Trial Court acted in abuse of due process of the court and the Certificate of Confirmation of grant should therefore be revoked and declared null and void.

The 2nd Appellant lodged a Memorandum of Appeal dated 5th June, 2014 and a Record of Appeal dated 1st August 2014 and listed eight grounds of appeal condensed as follows:

a. The Trial Magistrate failed to appreciate that the declared value of the deceased's estate was patently understated and conclude that she had no jurisdiction to hear and determine the matter and the same should therefore have been filed before the High Court.

b. The Trial Magistrate proceeded with the issuance and confirmation of grant without proper and full disclosure of all beneficiaries entitled to the estate as required by law and who were not cited to appear in the proceedings and did not consent to the issuance of the grant.

c. The learned Magistrate erred in failing to apply the mode of distribution for polygamous estates provided under **section 40** of the **Law of Succession Act**. Instead, the learned magistrate arrived at an unfair mode of distribution which in effect disinherited some of the beneficiaries without a legal basis. Further, that the learned Magistrate erred in law and fact in finding that **L.R. Kiambaa/Kihara/444** was incapable of being subdivided further and that Title Number **Marmanet Block 1/Limunga/1/50** should go to the first house without proof that the widow of the first house bought it or that the deceased had held it in trust for her.

The Appellants sought that:

a. The judgment delivered by the Trial Magistrate on 7th March, 2014 be quashed and set aside and the Certificate of Confirmation of Grant and all consequential orders be set aside.

b. A fresh Grant do issue to the beneficiaries of the deceased's estate and the fresh grant be confirmed with such mode of distribution as the court may find appropriate.

c. In alternative to prayer (b), the court order fresh succession proceedings before the High Court.

HEARING

The appeal proceeded with taking of additional evidence as granted under Section 78 (d) of Civil Procedure Act 2010.

1. The hearing of the matter commenced on 7th June, 2016 with the case of the 1st Appellant Damaris Nyambura Ngugi who gave sworn testimony in support of her case and relied on her witness statement filed on 12th May 2016. She told the court that she is the third wife of the deceased herein having been married to him in 1968. Their union bore them eleven (11) children. They lived in Gachie village for about three (3) weeks before relocating to Shinyanga in Tanzania, where the deceased had businesses. In 1971, they bought a 12 acre piece of land at Loitoktok on which they settled in 1972 upon their return to Kenya. Damaris contended that she contributed money for buying six (6) acres out of the land parcel. That even though the land parcel was registered solely in the deceased's name, it was bought and owned by both of them. The Deceased built a house for her on the land. The deceased sold 4 acres and the remaining 2 acres be settled with the 4th wife Grace Njambi whom they had 5 children. She died in 1993. This is the property which the Trial court held that Damaris received from the deceased as a gift *inter vivos*.

According to Damaris, she is entitled to a quarter of a portion of the deceased's land at Gachie Kiambu and Nyahururu Limanga by virtue of having been married to the deceased. Damaris contended that since the deceased had not left a will, his net intestate estate should be shared equally between the four houses. The Appellant called four witnesses who gave sworn testimony in support of her case. These were four of her children being Hannah Njeri Muchai, Francis Mutua Ngugi, Eliud Njaga Ngugi and David Munga Ngugi who testified in this appeal as **PWII, PWIII, PWIV and PWV** respectively. All four witnesses stated that their mother Damaris is entitled to a ¼ share of the land at Gachie and to a ¼ share of the land at Nyahururu. Damaris stated that when they lived in Shinyanga, Tanzania, they had businesses land lorries and shops but they left them and relocated back to Kenya. The deceased had allocated her land in the Gachie properties which the 1st wife withheld and also the property in Nyahururu. All these properties ought to be shared equally between the 4 houses.

The 2nd Appellant Milkah Wanjiru Ngugi gave sworn testimony in support of her case and relied on her statement filed on 6th June 2016. Milkah is a daughter of the deceased and his fourth wife the late Grace Njambi. She is the last born in her mother's house amongst five children. In her testimony, Milkah told the court that the deceased had bequeathed her the property known as **Kiambaa/Kihara/T.298** *inter vivos* in consideration of the fact that she dropped out of school to take care of him during the period when he was hospitalized at Oloitoktok

Hospital. She was aged twelve (12) years at the time. Milkah contended that the deceased left an oral will stating how he wished his estate to be distributed upon his death. This she says was in the August 2002. The deceased died on 5th August, 2004. She asked the court to distribute the deceased's estate in accordance with his oral will as follows:

a. Kiambaa/Kihara/444 – House of Grace Njambi (4th house)1¼ acres – Remaining portion to be shared equally between the 1st and 2nd house.

b. Kiambaa/Kihara/T298 – Milkah Wanjiru Ngugi absolutely

c. Marmanet Block 1/Limungai/1/50 to be shared equally between the 1st, 2nd and 4th house.

d. Oloitoktok/Olkaria/928 - House of Grace Njambi

The oral will was allegedly made in the presence of among others Godfrey Njuguna, Esther Nyambura, Githua, Benard Muigai, Onesmus Njuguna Munga. After her mother's death, she remained with her father. Her father fell sick and was admitted at Oloitoktok Hospital and moved to isolation ward with him for 2 months. Thereafter, Francis his eldest son came and moved their father to Gachie and they lived for 4 years and the deceased was taken to Nyahururu. She was sent away from Gachie.

Bernard Muigai, the 2nd Appellant's maternal uncle gave sworn testimony stating that he was present when the deceased made the oral will in August 2002. He affirmed the mode of distribution stated by Milka and reiterated that the deceased gave the property known as Kiambaa/Kihara/T298 to Milkah for taking care of him during his illness.

After the close of the Appellant's case on 29th June, 2016 the Trial Court directed the Hon. Deputy Registrar of the Family Division to visit the scene of the Kiambaa properties: **Kiambaa/Kihara/444** and **Kiambaa/Kihara/T298** and file a report. The scene visit was conducted on 21st July, 2017 in the presence of the 1st Appellant, the 1st Respondent, the 2nd Respondent and their respective Advocates.

According to the report, the parcel **Kiambaa/Kihara/444** sits next to the main road and is divided into two (2) portions separated by an earth road. One portion is occupied by the first house and the other portion by the second house. The portion occupied by the first house has shops, houses and maize crop. It is also divided into plots of varying sizes which have several occupants: four 90 by 90 plots, one 70 by 90 plot with a grave yard and four 30 by 90 plots. The portion occupied by the second house has six (6) plots with beacons showing the subdivisions.

The Gachie plot is a 100 by 100 plot with a wooden structure and maize plantation. The plot also has a shop which is occupied and used by the 2nd Respondent's daughter.

In opposition to the two appeals, the 1st Respondent called two witnesses, James Mucendu Ngugi (DW3) and Samuel Ngari Ngugi **(DW4)** both of whom are children of the deceased and his first wife the late Peris Nyakio Ngugi.

According to James Mucendu who relied on his statement filed on 31st May 2016, the deceased had during his lifetime distributed his estate amongst the four houses. The 1st and 2nd houses were apportioned land at Kihara and the 3rd and 4th houses at Loitoktok. The first and second house both occupy the Kihara property being **Kiambaa/Kihara/444** and **Kiambaa/Kihara/T.298.** He urged that the two houses have lived on the Kihara property for a period of over 50 years and the children in each house have their assigned portions on the property.

For the property in Loitoktok, James stated that it was bought by the deceased in 1967. According to James, the deceased bequeathed **Loitoktok/Olkaria 393 and 394** to the third house but which the third wife willfully disposed the land. The third and fourth houses reside on LR. Loitoktok/Olkaria/928. That the first wife the late Peris Nyakio bought

Marmanet Block Limunga 1/50 but it was registered in the name of the deceased as at the time women were not issued with Identity cards.

In his sworn testimony in support of the Respondents' case, Samuel Ngari Ngugi relied on his statement filed on 3rd June 2016. He reiterated the testimony of James Mucendu and asserted that the deceased had during his lifetime distributed his properties between the four houses.

He stated that he lives on Kiambaa/Kihara/444 where both 1st and 2nd families have resided for 50 years.

Loitoktok/Olkaria/928 was hived off from **Loitoktok/Olkaria/168** which was subdivided into **297,298. Plot 298** was sold while 297 was subdivided into 3 parcels 315,316& 317.Parcel 317 was sold and 316 (5.4 acres) was transferred to the3rd wife Damaris Nyambura as a gift.

Loitoktok/Olkaria/316 was subdivided into 927 & 928 each 0.4 acres formally transferred to 4th House.

Marmanet block 1/Limunga1/50 belonged to his late mother but was registered in their late father's name.

The 2nd Respondent Joyce Nyokabi Ngugi testified in opposition to the appeal on 13th November, 2013. She relied on her Witness statement filed on 7th June and Replying Affidavit of 18th January 2016.She is daughter of the deceased and the first wife the late Peris Njoki Ngugi. Joyce reiterated the sentiments of James Mucendu and Samuel Ngari that the deceased had during his lifetime granted the Kihara properties to the 1st and 2nd houses and that each house and beneficiary has their assigned portions thereon. She urged that with more than eighty (80) beneficiaries from the 1st and 2nd houses, the Kihara properties cannot be subdivided further to accommodate the 3rd and 4th house. Further

that the beneficiaries in the 1st and 2nd house have for years been cultivating their respective portions on the properties and rely on the proceeds therefrom for their sustenance.

Joyce denied the allegations by the 1st Appellant that she had resided in Kiambu with the deceased and that the deceased had informed her that he had a **5½** acre plot in Kiambu. She pointed out that the Kiambu property actually measures **3½** acres and not **5½** acres as alleged by the 1st Appellant. She contended that the 1st Appellant has no claim over the properties having received her share of the deceased's estate *inter vivos* but which she willfully chose to dispose. Joyce urged that the deceased ensured that each family resided separately and had their defined shares of his property. Joyce asserted that both Appellants and their families were fully catered for in the judgment of the trial court and no beneficiary was disinherited as alleged.

SUBMISSIONS

Learned Counsel Mr. Gaturu of Evans Thiga Gaturu Advocates filed written submissions dated 27th November, 2018 on behalf of the 1st Appellant Damaris Nyambura Ngugi, in which he reiterated the contents of the 1st Appellant's pleadings and oral testimony. Counsel observed that from the report of the Deputy Registrar it is clear that there are no eighty (80) people on the land parcels Kiambaa/Kihara/444 and Kiambaa/Kihara/T.298 as alleged, but rather that there were few "*mabati*" houses which were let out to a few tenants. Counsel urged that the Appellant had proved that she had been unfairly left out of inheriting a ¼ share of her husband's estate. He urged the court to nullify the grant made by the lower court and issue a fresh grant ordering that the four (4) assets of the deceased's estate be shared equally between the four (4) houses.

Learned Counsel Mr. Ndumu Kimani of Ndumu Kimani & Company Advocates filed written submissions dated 27th November, 2018 on behalf of the 2nd Appellant. Counsel submitted that whereas the trial court correctly cited the provisions of **section 40** of the **Law of Succession Act**, the court failed to properly apply the law in distributing the estate of the deceased. Counsel pointed out that the Trial court held that the property known as Marmanet Block 1/Limunga/1/50 belongs solely to the first house when there was no evidence to support this finding.

With regard to Loitoktok/Olkaria/316 Mr. Ndumu Kimani submitted that the trial court correctly found that the property was a gift *inter vivos* to Damaris Nyambura Ngugi, the 1st Appellant and the said position should therefore be taken into account when distributing the deceased's estate. Counsel asked the court to distribute the estate between all the beneficiaries and in doing so take into account the number of beneficiaries in each house.

In opposition to the appeal, learned Counsel Mr. Njogu Gachoka of Gachoka & Co. Advocates filed written submissions dated 16th January, 2019 on behalf of the 1st Respondent in which he asked the court to uphold the decision of the lower court and dismiss the appeal with costs.

It was Mr. Gachoka's submission that the mode of distribution by the lower court was not dependent on the number of children per house but rather the number of houses. Further that the lower court took into account that the property known as Loitoktok/Olkaria/316 was bequeathed to the 1st Appellant *inter vivos*, and the property known as Marmanet Block 1/Limuunga/1/50 was registered in the name of the deceased as trustee for his first wife.

Mr. Gachoka contended that the 1st and 2nd house have always been in occupation of the two parcels of land at Kiambaa while the 3rd and 4th houses were settled in Loitoktok. Counsel urged the court not to dismantle the living arrangements stating that the deceased had intended that the families live separately.

Mr. Gachoka noted that whereas the report filed by the Deputy Registrar indicates that there were a few "*mabati*" houses on the Kiambaa Property, this does not mean that the 1st and 2nd houses are not in occupation of the land neither does it indicate the number of people living on the land and who are reliant on it as their only known abode.

Mr. Gachoka observed that since the 4th house was in exclusive occupation of Loitoktok/Olkaria/928 during the deceased's lifetime and none of the beneficiaries had laid claim to it during the proceedings in the lower court, the property should go to the 4th house.

In his written submissions dated 23rd January, 2019 and filed on behalf of the 2nd Respondent, learned Counsel Mr. Irungu Waiganjo of J.M. Waiganjo & Co. Advocates asked the court to dismiss the appeals stating that the learned magistrate applied the law and exercised her discretion judiciously in achieving the most fair and equitable way to distribute the estate.

On whether the lower court lacked jurisdiction, Mr. Waiganjo pointed out that it is the 1st Appellant, Damaris who filed the petition at Kiambu and subjected herself to the jurisdiction of the court. Counsel noted that during the proceedings in the lower court, the question of jurisdiction was never raised, and it is therefore mischievous and utterly in bad faith for the Appellant to question the jurisdiction at the appeal stage. Counsel asserted that it is the duty of litigants to provide evidence to enable the court make a decision. In the instant case, none of the parties questioned the lower court's jurisdiction and there was no valuation of the properties comprising the deceased's estate to enable the court determine whether or not it had jurisdiction to determine the matter.

On the issue that the grant is illegal by disinheriting the 1st Appellant, Mr. Waiganjo submitted that the court found that the property known as Loitoktok/Olkaria/316 was a gift *inter vivos* and considered it during distribution of the deceased's intestate estate in line with **section 42** of the **Law of Succession Act**. Counsel contended that the claim by the 1st Appellant that she purchased the property is without basis having failed to provide proof of her contribution monetary or otherwise. That the 1st Appellant's testimony with regard to the circumstances surrounding the purchase of the property was marred with inconsistencies.

With regard to the 2nd Appellant's claims, Mr. Waiganjo submitted that the evidence on record demonstrates that the deceased had during his lifetime distributed his properties to his wives; each wife had her house and her parcel of land on which to cultivate. Counsel asserted that for the court to order otherwise would amount to disregarding the wishes of the deceased. Counsel pointed out that all of the properties were acquired before the deceased married his fourth wife and it is therefore callous for the fourth house to demand a share of the remainder of the estate. This he says is in light of the fact that Loitoktok/Olkaria/928 is exclusively for the fourth house.

Mr. Waiganjo argued that granting the fourth house an additional share of the estate would amount to netting injustice on the 1st and 2nd widows who had put all their efforts and sweat towards the acquisition of the properties. To buttress his argument, Counsel referred to the decision of Lady Justice Mumbi Ngugi in ***Re Estate Of The Late George Cheriro Chepkosiom (Deceased) Succession Cause No. 16 Of 2010 [2017]eKLR***. In her judgment, the learned Judge held that to equate a widow to children, or the first wife widow to widows who enter the home decades later, who may be the age of the first widow's children and made no contribution to the acquisition of the estate registered in the name of the deceased, is to perpetrate injustice against women that cannot be justified under any circumstances.

DETERMINATION

I have considered the pleadings filed hereto, the oral testimonies of the parties and the rival arguments advanced in the submissions filed by the parties in support of and in opposition to the appeal. This is an appeal against a judgment and decree of the Chief Magistrates Court at Kiambu. **Section 50** of the **Law of Succession Act** provides that an appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.

Three (3) issues for determination come to the fore:

i. Whether the Trial Magistrate had jurisdiction to entertain the suit and make a determination.

ii. Whether the Trial Magistrate erred in law and fact in identifying the assets of the deceased.

iii. Whether the Trial magistrate erred in law and in fact in proceeding to issue the confirmation of grant and distribute the estate in the manner that she did.

JURISDICTION

While submitting on behalf of the 1st Respondent, Mr. Gachoka stated that the jurisdiction of Magistrates' Courts in succession matters was initially provided by **section 48(1)** of the **Law of Succession Act, Cap. 160 Laws of Kenya** but that the section has since been repealed by **Section 23** of the **Magistrates' Courts Act No. 26 of 2015**which provides thus:

> **"The Law of Succession Act (Cap 160) is amended by repealing section 48(1) and substituting therefore the following new subsection-**
>
> **1. Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates' Courts Act, 2015."**

Mr. Gachoka urged that it was the 1st Appellant who petitioned for letters of administration in the lower court and proceeded to apply for confirmation of grant and at no point did the 1st Appellant raise the issue of jurisdiction. Counsel contended that the assertion by the 1st Appellant that the lower court lacked jurisdiction is an afterthought actuated by malice after getting an unfavorable judgment. His arguments found support in the submissions of the 2nd Respondent.

From the record, it is evident that at the time of petitioning for a grant of probate, Damaris informed the court that the only available asset of the deceased's estate was L.R. Kiambaa/Kihara/444 and that the estimated value of the property was Kshs. 100,000/-. This is indicated in the affidavit sworn by Damaris on 21st December, 2004 in support of the Petition for Letters of Administration Intestate.

At the time of petitioning for grant, the estate of the deceased was approximated to be valued at Kshs. 100,000/- and was therefore properly before the Magistrate's Court. The deceased's first wife Peris Nyakio Ngugi, now deceased, filed an affidavit of protest against the confirmation of grant sworn by herself on 5th December, 2005. Peris contended that the Petitioner (who is the 1st Appellant herein) had left out some of the deceased's properties and failed to consult the deceased's beneficiaries. Consequently, Damaris filed a Notice of Amendment of Application for Grant dated 16th December, 2005 seeking to amend the application to include the properties known as Kiambaa/Kihara/T.298 and Loitoktok/Olkaria/928 which according to the annexed Certificates of Official Search measure 0.084 Ha and 0.162 Ha respectively.

The record further indicates that when the matter came up for mention on 20th July, 2006, the court adopted the consent orders granted on 25th May, 2006 to the effect that Francis Mutua, Nyathika Ngugi, Wanjiru Ngugi and Damaris Nyambura Ngugi be confirmed as co-administrators of the deceased's estate and the properties known as Kiambaa/Kihara/T.298, Marmanet Block 1/Limunga/1/50 and Loitoktok/Olkaria/928 be included in the schedule of assets. The values of the three (3) properties were however not provided.

I note that contrary to the Respondent's arguments, the jurisdiction of Magistrates' courts with regard to probate and administration matters is provided under **section 48** of the **Law of Succession Act** which before the amendment effected under the **Magistrates' Court Act No. 26**

of 2015 provided Kshs. 100,000/- as the pecuniary limit. The **Magistrates' Court Act** came into force on 2nd January, 2016 almost two (2) years after the matter was concluded. The amended **section 48** which enhances the pecuniary jurisdiction in line with **section 7(1)** of the **Magistrates' Court Act** does not therefore apply in the instant case as the law does not act retrogressively.

Bearing in mind that one of the assets being Kiambaa/Kihara/444 was approximated to be valued at Kshs. 100,000/- there is no doubt that upon inclusion of three (3) additional properties, the gross value of the deceased's estate exceeded the pecuniary limit of Kshs. 100,000/- as provided at the time.

The landmark authority on the question of jurisdiction is ***Owners Of Motor Vessel "Lillian S" vs. Caltex Kenya Limited (1989) KLR 1*** and in which the late Nyarangi, J.A. stated as follows**:-**

> **I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction…**
>
> **It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. A party who fails to question jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during proceedings. As soon as that it is done, the court should hear and dispose of that issue without further ado.**

A court of law cannot purport to confer jurisdiction upon itself where the jurisdiction is ousted by statute as in the present case. This was the position held in the case of **Samuel Kamau Macharia vs. Kenya Commercial Bank Limited & 2 Others, Civil Application No. 2 of 2011 [2012] eKLR** in which the Supreme Court stated thus:

> **"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law…the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings."**

The undisputed facts herein are that the petition for grant of letters of administration intestate was filed by the 1st Appellant herein who indicated the approximate value of the deceased's estate as Kshs. 100,000/- and that during the lower court proceedings, the 1st Appellant failed to raise the issue of jurisdiction and neither did the other parties.

The record indicates that during the hearing of the matter the acreage of the additional three (3) properties which were to be included in the schedule of assets as directed on 25th May, 2006 came to the fore and the acreage was applied by the Learned Magistrate in her judgment of 7th May, 2014. There is however nothing on record to show that the Petition for grant of letters of administration was amended to reflect the three (3) properties and their approximate values. Instead, the parties went ahead to file summons for confirmation of grant which reflected the four (4) ascertained assets of the deceased's estate. Bearing in mind that at the time of filing the petition the deceased's sole asset listed in the schedule was valued at approximately Kshs. 100,000/- it was imperative that the court direct the parties to file an amended petition reflecting all four (4) properties and their approximate values. Unfortunately, this was not done.

Based on the foregoing, I am inclined to conclude that the Magistrate's Court lacked jurisdiction to hear and determine the succession cause in relation to the intestate estate of the deceased herein. By dint of this finding, I will not belabor the next issues namely whether the Trial Court ascertained the assets of the deceased as the assets listed in the Petition the Petitioner failed to disclose all the assets that comprised of the deceased's estate. The Trial Court dealt with the properties in contention and later as the parties amended their pleadings.

With regard to the mode of distribution, this Court shall rely on the following provisions of law that guide distribution of the estate.

a. **Section 9 of the Law of Succesion Act** – no oral WILL shall be valid unless it is made before 2 or more competent witnesses and the testatator dies within a period of 3 months from the date of making the Will. Therefore, the 2nd Appellant's appeal to the extent that she alleged that her late father left her a portion of Kiambaa/Kihara/T 298 it is not borne out by law and evidence.

b. **Gifts intervivos are prescribed under Section 42 of Law of Succesion Act. Where an intestate has during his lifetime or by will , paid, given or settled any property to or for the benefit of a child, grandchild or house; or**

Property has been appointed or awarded to any child or grandchild under the provisions of Section 26 of 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

In **Re Estate of John Musambayi Katumanga – (Deceased) [2014]eKLR** the court stated as follows;

c. **Under *Section 40* of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their**

> **respective houses where *Section 35* of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of *Section 38* of the Law of Succession Act, the children would divide the estate equally amongst themselves. <u>*Section 40* was not designed for the circumstances of the instant estate, but it would appear more appealing for the purpose of distribution of the said estate than *Section 35.*</u>**

> **The spirit of Part V, especially *Sections 35, 38 and 40*, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in *Sections 35(5)* and *38* is "*equally*" as opposed to "*equitably*". This is the plain language of the provisions. The provisions are in mandatory terms – the property "shall … be equally divided among the surviving children." Equal distribution is envisaged regardless of the ages, gender and financial status of the children.**

In the instant case; it alleged by the 1st Appellant stated that she and the deceased bought 12 acres and she contributed money for her 6 acres and the deceased added money to buy the other 6 acres and the 12 acres were registered in his name although it belonged to both of them equally. She also admitted that the deceased built her a house on her 6 acres.

In the same breath the children of Peris Nyakio Ngugi 1st wife of the deceased testified that Marmanet Block 1/Limunga1/50 belonged to their mother as she also bought it and was registered in the deceased's name as women did not have identity cards then. In both cases the 1 st widow claims suit property Marmanent Block1/Limunga as the 1st Appellant 3rd widow claims the 6 acres of Loitoktok/Olkaria

So, if the Appellants claim a share of the Marmanet Property the 6 acres the 1st Appellants must also by the same stroke be available for distribution.

Secondly, it is also alleged that the children of the 4th wife (decease d) were left 2 acres. The 2nd Appellant claims to have been dispossessed by the 1st Appellant.

The evidence on record is that the 1st and 2nd widows were married earlier on during the deceased's lifetime. The 3rd widow went to Tanzania and lived with deceased and returned late to Kenya. Surely, as admitted by 1st and 2nd Appellant they found the 1st and 2nd houses settled in Gachie and kiambaa. The circumstances of the case do not depict equal but equitable distribution of deceased's estate.

Therefore, due to contradicting facts as per the evidence adduced by the parties; this Court shall order the following;

The upshot of the above is that the appeal is found to be meritorious and is consequently allowed with the following orders:

> a. The proceedings of the Magistrate's Court in relation to this cause and the resultant judgment delivered in the matter on 7 th May, 2014 are hereby declared a nullity for want of jurisdiction.
>
> b. The grant of letters of administration of all the intestate estate of Ngugi Githinwa alias Geoffrey Ngugi Githinwa (deceased) made to Francis Mutua, Nyathika Ngugi, Wanjiku Ngugi and Damaris Nyambura Ngugi on 20th July, 2006 and confirmed on 7th May, 2014 in the proceedings in the Magistrate's Court is declared a nullity and is hereby revoked.
>
> c. All consequential orders emanating from the judgment and the grant issued in the Magistrate's Court are hereby vacated and declared void.
>
> d. Each house shall appoint a representative to administer the deceased's estate on behalf of the respective house. The 4 representatives shall be issued with a fresh/new grant as administrators of deceased's estate.
>
> e. The administrators shall file summons for confirmation of grant and consult and seek consents from beneficiaries on the possible and equitable distribution of deceased's estate taking into account human settlement and developments and those who sold portions of land/benefitted from proceeds of sale and each party to have a reasonable share of deceased's estate.
>
> f. If there is any disagreements then protests shall be filed and heard and determined in the Family Division of the High Court.
>
> g. Each party shall bear their own costs.

It is so ordered.

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND NOVEMBER 2019.

M.W.MUIGAI

JUDGE

<u>IN THE PRESENCE OF;</u>

MR. GATURU FOR THE APPELLANTS

MR. GACHOKA FOR 1ST & 2ND RESPONDENTS ABSENT

MR. IRUNGU FOR 3RD RESPONDENT ABSENT

MS JASMINE-COURT ASSISTANT