



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
SUCCESSION CAUSE NO. 205 OF 2015

IN THE MATTER OF THE ESTATE OF NYAMAI MWANIKI DECEASED)

MUENI NYAMAI.....PETITIONER

VERSUS

MUTISYA KIVAKU NYAMAI

MUSANGI NYAMAI

JOHN KATIWA NYAMAI

DAMARIS NYAMAI

JEREMIAN NYAMAI

TOM NYAMAI

SAFARI NYAMAI

CHARLES MUTISYA NYAMAI.....PROTESTERS

R U L I N G

1. **Nyamai Mwaniki** (Deceased) died domiciled in **Kitui Kenya** on the **17th February, 2013**. Letters of Administration Intestate in respect of his Estate were issued to **Mueni Nyamai** on the **7th day of January, 2015** by **Hon. Lesootia Senior Resident Magistrate** in the Lower Court. It turned out that the Estate of the Deceased which had been indicated as valued at **Kshs. 100,000/=** was actually valued in millions. As a result the matter was transferred to the High Court for disposal.

2. The Deceased was married to 5 wives, **Mueni Nyamai, Musangi Nyamai** who survived him and **Katongu Nyamai, Katilo Nyamai, Kethi Nyamai** who are deceased. He had several children:

1. *Teresia Muthei Nyumu.*
2. *Fredrick Mutio Nyamai.*
3. *Jackline Wanza Nyamai.*
4. *David Nganga Nyamai.*

5. *William Kieu Nyamai.*
6. *Peter Nyamai.*
7. *Lydia Nyamai.*
8. *Kaindi Mbuna.*
9. *Mutisya Kivaku Nyamai.*
10. *Jeremiah Nyamai.*
11. *Damaris Nyamai.*
12. *Nthoki Nyamai.*
13. *Safari Nyamai.*
14. *Charles Mutisya Nyamai.*
15. *Nguli Nyamai.*
16. *Rael Nyamai.*
17. *Mulwa Nyamai.*

3. His Estate comprises of the following assets:

- a) *Yatta/Ndunguni/2126.*
- b) *Yatta/Ndunguni/476.*
- c) *Yatta/Ndunguni/1221.*
- d) *Yatta/Ndunguni/1219.*
- e) *Yatta/Ndunguni/1220.*
- f) *Yatta/Ndunguni/1223.*
- g) *Yatta/Ndunguni/1218.*
- h) *Yatta/Ndunguni/2127.*
- i) *Yatta/Ndunguni/2124.*
- j) *Yatta/Ndunguni/1022.*
- k) *Yatta/Ndunguni/1222.*
- l) *Yatta/Ndunguni/616.*
- m) *Yatta/Ndunguni/2384.*
- n) *Yatta/Ndunguni/542.*

- o) Yatta/Ndunguni/854.***
- p) Mandongoi Adjudication Section No. 1779.***
- q) Syomunyu Adjudication Section 1204.***
- r) Unsurveyed Land at Ilengi Village in Kamutei Location.***
- s) Plot No. 16 Kaw'ongo.***
- t) Plot No. 22 Kaw'ongo.***
- u) Plot No. 26 Nthongoni.***
- v) Funds Held At Kenya Commercial Bank A/C No. 1114478865.***
- w) Funds Held At Standard Chartered Bank A/C No. 01/2/01/41225/00/2.***
- x) Funds Held At Post Bank Kitui A/C No. KKIK 27904-9.***
- y) Funds Held At K-Rep Bank Fixed A/C No. 009.***
- z) Funds Held At K-Rep Bank Savings A/C No. 0703.***

And liabilities:

- a) A portion of Yatta/Ndunguni/616 measuring 1.78 Ha sold to Peninah Katongu King'uyu.***
- b) A portion of Kanyangi/Mandongoi/1779 measuring 2.381 Ha sold to Mwanzi Munuve.***
- c) Yatta/Ndunguni/2126 (whole) sold to James Mutua Mutio.***
- d) Yatta/Ndunguni/542 (whole) sold to James Mutua Mutio.***
- e) Yatta/Ndunguni/854 (whole) sold to Africa Wood Grow Limited.***
- f) Kshs. 250,000 legal fees and costs for the Succession Case No. 205 of 2015.***

4. An application for Confirmation of the Grant was filed by the Administratrix of the Estate. In the affidavit in support of the application she identified the entitlement of all beneficiaries as follows:

- a) Yatta/Ndunguni/2126 to James Mutua Mutio – Whole.***
- b) Yatta/Ndunguni/476.***
 - i) Mueni Nyamai.***
 - ii) Mbithi Nyamai.*** To hold in equal shares
 - iii) David Nganga Nyamai.*** in trust for other family
 - iv) Mutisya Kivaku Nyamai.*** members.
 - v) Musangi Nyamai.***
- c) Yatta/Ndunguni/1221.***

- i) Mueni Nyamai.**
- ii) Mbithi Nyamai.** To hold in equal shares
- iii) David Nganga Nyamai.** in trust for other family
- iv) Mutisya Kivaku Nyamai.** members.
- v) Musangi Nyamai.**
- d) Yatta/Ndunguni/1219.**
- i) Mueni Nyamai.**
- ii) Mbithi Nyamai.** To hold in equal shares
- iii) David Nganga Nyamai.** in trust for other family
- iv) Mutisya Kivaku Nyamai.** members.
- v) Musangi Nyamai.**
- e) Yatta/Ndunguni/1220.**
- i) Mueni Nyamai.**
- ii) Mbithi Nyamai.** To hold in equal shares
- iii) David Nganga Nyamai.** in trust for other family
- iv) Mutisya Kivaku Nyamai.** members.
- v) Musangi Nyamai.**
- f) Yatta/Ndunguni/1223.**
- i) Mueni Nyamai.**
- ii) Mbithi Nyamai.** To hold in equal shares
- iii) David Nganga Nyamai.** in trust for other family
- iv) Mutisya Kivaku Nyamai.** members.
- v) Musangi Nyamai.**
- g) Yatta/Ndunguni/1218.**
- i) Mueni Nyamai.**
- ii) Mbithi Nyamai.** To hold in equal shares
- iii) David Nganga Nyamai.** in trust for other family
- iv) Mutisya Kivaku Nyamai.** members.

v) *Musangi Nyamai.*

h) Yatta/Ndunguni/2127.

i) *Mueni Nyamai.*

ii) *Mbithi Nyamai.*

To hold in equal shares

iii) *David Nganga Nyamai.*

in trust for other family

iv) *Mutisya Kivaku Nyamai.*

members.

v) *Musangi Nyamai.*

i) Yatta/Ndunguni/2124.

i) *Mueni Nyamai.*

ii) *Mbithi Nyamai.*

To hold in equal shares

iii) *David Nganga Nyamai.*

in trust for other family

iv) *Mutisya Kivaku Nyamai.*

members.

v) *Musangi Nyamai.*

j) Yatta/Ndunguni/1022.

i) *Mueni Nyamai.*

ii) *Mbithi Nyamai.*

To hold in equal shares

iii) *David Nganga Nyamai.*

in trust for other family

iv) *Mutisya Kivaku Nyamai.*

members.

v) *Musangi Nyamai.*

k) Yatta/Ndunguni/1222.

i) *Mueni Nyamai.*

ii) *Mbithi Nyamai.*

To hold in equal shares

iii) *David Nganga Nyamai.*

in trust for other family

iv) *Mutisya Kivaku Nyamai.*

members.

v) *Musangi Nyamai.*

l) Yatta/Ndunguni/616.

i) *Mueni Nyamai* – Half Share ($\frac{1}{2}$) – **84.20 Ha**

ii) *Mbithi Nyamai.*

- iii) *David Nganga Nyamai.* **84.20 Ha** to hold in
 - iv) *Mutisya Kivaku Nyamai.* equal shares in trust
 - v) *Fredrick Mutiso Nyamai* for other family members.
 - vi) *Musangi Nyamai.*
 - vii) *Peninah Katongu Kinguyu*
- m) Yatta/Ndunguni/542 to James Mutua Mutio.**
- n) Yatta/Ndunguni/854 to Africa Wood Grow Limited.**
- o) Mandongoi Adjudication Section No. 1779.**
- i) *Mueni Nyamai.*
 - ii) *Mbithi Nyamai.* To hold in equal shares
 - iii) *David Nganga Nyamai.* in trust for other family
 - iv) *Mutisya Kivaku Nyamai.* members.
 - v) *Musangi Nyamai.*
 - vi) *Mwanthi Munuve*
- p) Syomunyu Adjudication Section 1204.**
- i) *Mueni Nyamai.*
 - ii) *Mbithi Nyamai.* To hold in equal shares
 - iii) *David Nganga Nyamai.* in trust for other family
 - iv) *Mutisya Kivaku Nyamai.* members.
 - v) *Musangi Nyamai.*
- q) Unsurveyed Land at Ilengi Village in Kamutei Location.**
- i) *Mueni Nyamai.*
 - ii) *Mbithi Nyamai.* To hold in equal shares
 - iii) *David Nganga Nyamai.* in trust for other family
 - iv) *Mutisya Kivaku Nyamai.* members.
 - v) *Musangi Nyamai.*
- r) Plot No. 16 Kaw'ongo.**
- i) *Mueni Nyamai.*

- ii) **Mbithi Nyamai.** To hold in equal shares
 - iii) **David Nganga Nyamai.** in trust for other family
 - iv) **Mutisya Kivaku Nyamai.** members.
 - v) **Musangi Nyamai.**
- s) **Plot No. 22 Kaw'ongo.**
- i) **Mueni Nyamai.**
 - ii) **Mbithi Nyamai.** To hold in equal shares
 - iii) **David Nganga Nyamai.** in trust for other family
 - iv) **Mutisya Kivaku Nyamai.** members.
 - v) **Musangi Nyamai.**
- t) **Plot No. 26 Nthongoni.**
- i) **Mueni Nyamai.**
 - ii) **Mbithi Nyamai.** To hold in equal shares
 - iii) **David Nganga Nyamai.** in trust for other family
 - iv) **Mutisya Kivaku Nyamai.** members.
 - v) **Musangi Nyamai.**
- u) **Funds Held At Kenya Commercial Bank A/C No. 1114478865.**
- i) **Mueni Nyamai.** To hold their shares in
 - ii) **Mbithi Nyamai.** trust for other family
 - iii) **David Nganga Nyamai.** members.
 - iv) **Mutisya Kivaku Nyamai.**
 - v) **Musangi Nyamai.**
- v) **Funds Held At Standard Chartered Bank A/C No. 01/2/01/41225/00/2.**
- i) **Mueni Nyamai.** To hold their shares in
 - ii) **Mbithi Nyamai.** trust for other family
 - iii) **David Nganga Nyamai.** members.
 - iv) **Mutisya Kivaku Nyamai.**
 - v) **Musangi Nyamai.**

w) Funds Held At Post Bank Kitui A/C No. KKIK 27904-9.

- i) Mueni Nyamai.** To hold their shares in
- ii) Mbithi Nyamai.** trust for other family
- iii) David Nganga Nyamai.** members.
- iv) Mutisya Kivaku Nyamai.**
- v) Musangi Nyamai.**

x) Funds Held At K-Rep Bank Fixed A/C No. 009.

- i) Mueni Nyamai.** To hold their shares in
- ii) Mbithi Nyamai.** trust for other family
- iii) David Nganga Nyamai.** members.
- iv) Mutisya Kivaku Nyamai.**
- v) Musangi Nyamai.**

y) Funds Held At K-Rep Bank Savings A/C No. 0703.

- i) Mueni Nyamai.** To hold their shares in
- ii) Mbithi Nyamai.** trust for other family
- iii) David Nganga Nyamai.** members.
- iv) Mutisya Kivaku Nyamai.**
- v) Musangi Nyamai.**

5. Subsequently, **Mutisya Kavaku Nyamai** filed a protest against the proposed mode of distribution of the Estate and made a proposal thus:

a) Yatta/Ndunguni/2126 to James Mutua Mutio – Whole.

b) Yatta/Ndunguni/476.

- i) Mbithi Nyamai.**
- ii) Mueni Nyamai.** To hold in equal shares
- iii) David Nganga Nyamai.** in trust for the family
- iv) Mutisya Kivaku Nyamai.** members.
- v) Musangi Nyamai.**

c) Yatta/Ndunguni/1221.

- i) Mbithi Nyamai.**

- ii) **Mueni Nyamai.** To hold in equal shares
- iii) **David Nganga Nyamai.** in trust for the family
- iv) **Mutisya Kivaku Nyamai.** members.
- v) **Musangi Nyamai.**

d) Yatta/Ndunguni/1219.

- i) **Mbithi Nyamai.**
- ii) **Mueni Nyamai.** To hold in equal shares
- iii) **David Nganga Nyamai.** in trust for the family
- iv) **Mutisya Kivaku Nyamai.** members.
- v) **Musangi Nyamai.**

e) Yatta/Ndunguni/1220.

- i) **Mbithi Nyamai.**
- ii) **Mueni Nyamai.** To hold in equal shares
- iii) **David Nganga Nyamai.** in trust for the family
- iv) **Mutisya Kivaku Nyamai.** members.
- v) **Musangi Nyamai.**

f) Yatta/Ndunguni/1223.

- i) **Mbithi Nyamai.**
- ii) **Mueni Nyamai.** To hold in equal shares
- iii) **David Nganga Nyamai.** in trust for the family
- iv) **Mutisya Kivaku Nyamai.** members.
- v) **Musangi Nyamai.**

g) Yatta/Ndunguni/1218.

- i) **Mbithi Nyamai.**
- ii) **Mueni Nyamai.** To hold in equal shares
- iii) **David Nganga Nyamai.** in trust for the family
- iv) **Mutisya Kivaku Nyamai.** members.
- v) **Musangi Nyamai.**

h) Yatta/Ndunguni/2127.

- i) Mbithi Nyamai.**
- ii) Mueni Nyamai.** To hold in equal shares
- iii) David Nganga Nyamai.** in trust for the family
- iv) Mutisya Kivaku Nyamai.** members.
- v) Musangi Nyamai.**

i) Yatta/Ndunguni/2124.

- i) Mbithi Nyamai.**
- ii) Mueni Nyamai.** To hold in equal shares
- iii) David Nganga Nyamai.** in trust for the family
- iv) Mutisya Kivaku Nyamai.** members.
- v) Musangi Nyamai.**

j) Yatta/Ndunguni/1022.

- i) Mbithi Nyamai.**
- ii) Mueni Nyamai.** To hold in equal shares
- iii) David Nganga Nyamai.** in trust for the family
- iv) Mutisya Kivaku Nyamai.** members.
- v) Musangi Nyamai.**

k) Yatta/Ndunguni/1222.

- i) Mbithi Nyamai.**
- ii) Mueni Nyamai.** To hold in equal shares
- iii) David Nganga Nyamai.** in trust for the family
- iv) Mutisya Kivaku Nyamai.** members.
- v) Musangi Nyamai.**

l) Yatta/Ndunguni/616.

- i) Mbithi Nyamai.**
- ii) Mueni Nyamai.** To hold in equal shares
- iii) David Nganga Nyamai.** in trust for the family

iv) *Mutisya Kivaku Nyamai.* members.

v) *Musangi Nyamai.*

vi) *Peninah Katongu Kinguyu*

m) Yatta/Ndunguni/542 to James Mutua Mutio – Whole.

n) Yatta/Ndunguni/854 to Africa Wood Grow Limited – Whole.

o) Mandongoi Adjudication Section No. 1779.

i) *Mbithi Nyamai.*

ii) *Mueni Nyamai.* To hold in equal shares

iii) *David Nganga Nyamai.* in trust for the family

iv) *Mutisya Kivaku Nyamai.* members.

v) *Musangi Nyamai.*

vi) *Mwanthi Munuve*

p) Syomunyu Adjudication Section 1204.

i) *Mbithi Nyamai.*

ii) *Mueni Nyamai.* To hold in equal shares

iii) *David Nganga Nyamai.* in trust for the family

iv) *Mutisya Kivaku Nyamai.* members.

v) *Musangi Nyamai.*

q) Unsurveyed Land at Ilengi Village in Kamutei Location.

i) *Mbithi Nyamai.*

ii) *Mueni Nyamai.* To hold in equal shares

iii) *David Nganga Nyamai.* in trust for the family

iv) *Mutisya Kivaku Nyamai.* members.

v) *Musangi Nyamai.*

r) Plot No. 16 Kaw'ongo.

i) *Mbithi Nyamai.*

ii) *Mueni Nyamai.* To hold in equal shares

iii) *David Nganga Nyamai.* in trust for the family

iv) *Mutisya Kivaku Nyamai.* members.

v) *Musangi Nyamai.*

s) *Plot No. 22 Kaw'ongo.*

i) *Mbithi Nyamai.*

ii) *Mueni Nyamai.* To hold in equal shares

iii) *David Nganga Nyamai.* in trust for the family

iv) *Mutisya Kivaku Nyamai.* members.

v) *Musangi Nyamai.*

t) *Plot No. 26 Nthongoni.*

i) *Mbithi Nyamai.*

ii) *Mueni Nyamai.* To hold in equal shares

iii) *David Nganga Nyamai.* in trust for the family

iv) *Mutisya Kivaku Nyamai.* members.

v) *Musangi Nyamai.*

u) *Funds Held At Kenya Commercial Bank A/C No. 1114478865.*

i) *Mbithi Nyamai.* To hold their shares in

ii) *Mueni Nyamai.* trust for other family

iii) *David Nganga Nyamai.* members according to

iv) *Mutisya Kivaku Nyamai.* the number of

v) *Musangi Nyamai.* dependants.

v) *Funds Held At Standard Chartered Bank A/C No. 01/2/01/41225/00/2.*

i) *Mbithi Nyamai.* To hold their shares in

ii) *Mueni Nyamai.* trust for other family

iii) *David Nganga Nyamai.* members according to

iv) *Mutisya Kivaku Nyamai.* the number of

v) *Musangi Nyamai.* dependants in the family

w) *Funds Held At Post Bank Kitui A/C No. KKIK 27904-9.*

i) *Mbithi Nyamai.* To hold their shares in

- ii) *Mueni Nyamai.* trust for other family
- iii) *David Nganga Nyamai.* members according to
- iv) *Mutisya Kivaku Nyamai.* the number of
- v) *Musangi Nyamai.* dependants in the family

x) Funds Held At K-Rep Bank Fixed A/C No. 009.

- i) *Mbithi Nyamai.* To hold their shares in
- ii) *Mueni Nyamai.* trust for other family
- iii) *David Nganga Nyamai.* members according to
- iv) *Mutisya Kivaku Nyamai.* the number of
- v) *Musangi Nyamai.* dependants in the family

y) Funds Held At K-Rep Bank Savings A/C No. 0703.

- i) *Mbithi Nyamai.* To hold their shares in
- ii) *Mueni Nyamai.* trust for other family
- iii) *David Nganga Nyamai.* members according to
- iv) *Mutisya Kivaku Nyamai.* the number of
- v) *Musangi Nyamai.* dependants in the family

6. All parties consented to the application being disposed off by way of *viva voce* evidence. And further, that each household be represented by one person for purposes of cross examination. Consequently, the representation was as follows:

1st household – Mbithi Nyamai.

2nd household – Petitioner.

3rd household – David Nganga Nyamai.

4th household – Mutisya Kivoku Nyamai.

5th household – Musangi Nyamai.

7. Basically the family was in agreement of the distribution of all properties as proposed except;

- (1) Land Title **Yatta/Ndunguni/616** measuring **168.40 Hectares.**
- (2) Funds held in various banks.

8. At the hearing, the Petitioner/Administratrix of the Estate stated that during adjudication Land Parcel **Yatta/Ndunguni/616** was registered in common having acquired it jointly with the Deceased. That she was entitled to half the share. She asked the Court to find that she was entitled to half the share while the

remaining share that belonged to the Estate of the Deceased could be shared amongst all the beneficiaries of the Estate, her inclusive. That they moved from the ancestral home in **Ndunguni** and acquired the property which was shared between her and the Deceased. Regarding funds that were left in various financial institutions she stated that they could be shared equally amongst all households.

9. Regarding liabilities that were introduced in the matter by an Amended P&A 5, she acknowledged the fact that **Peninah Katongu King'uyu** bought a portion of land being part of **Yatta/Ndunguni/616** measuring **1.78 Ha**, **James Mutio** bought **Yatta/Ndunguni/2126** and **542** then **Africa Wood Grow Ltd** bought **Yatta/Ndunguni/854**. She denied knowing **Mwanzi Munuve** who was stated to have purchased land parcel **Kanyangi/Mandongi/1779** measuring **2.381** though this was her averment in her affidavit.

10. The Petitioner called witnesses. **Fredrick Mutio**, her son who stated that **Yatta/Ndunguni/2124** had a typographical error as it ought to be **1224** and **Yatta/Ndunguni/2384** does not exist. That half of the parcel **Yatta/Ndunguni/616** is what is part of the Estate of the Deceased.

11. The Protestor, **Mutisya Kivaku** blamed the Administratrix of the Estate and her son for intermeddling with the Estate of the Deceased. He acknowledged people who had purchased land from the Deceased as **James Mutio**, **Peninah** and **Africa Wood Grow Limited**. He argued that the whole of **Yatta/Ndunguni/616** belonged to the Deceased, his father. It was after his demise that they saw a title deed bearing the two (2) names. He prayed that the parcel of land in dispute be distributed amongst all houses and the funds held in banks shared amongst all beneficiaries equally. On cross examination it turned out that some of the beneficiaries were minors namely:

- *Nguli Nyamai.*
- *Laeli Nyamai.*
- *Mulwa Nyamai.*

Musengi Nyamai's children.

12. **Mbithi Nyamai** concurred with the Protester.

13. **David Nganga Nyamai** opposed the sharing of the land in dispute between the Deceased and Petitioner. Regarding funds in various banks he proposed that it be shared amongst each household then the same be divided amongst children in each household. **Musangi Nyamai** the Deceased's 5th wife stated that she came to learn that the land in contention was registered in the names of the Deceased and the Administratrix of the Estate after his demise. She proposed that the money at the bank be shared equally amongst the children.

14. **Peter Matheka Wasinii** a Chairman of **Muini Clan** to which the Deceased belonged stated that they went to subdivide the land only to find that it was registered in two (2) names.

15. **Jeremiah Nyamai** son of **Musangi** stated that they had no knowledge that the land was in the name of the Deceased and **Mueni**. He proposed that the money in bank be distributed amongst all of them.

16. Regarding legal fees in the sum of **Kshs. 250,000/=** indicated as a liability, the Protester stated that the Deceased had no debt in legal fees. The Petitioner on the other hand left it to the Court to decide.

17. Both parties filed written submissions that I have taken into consideration.

18. A Search Certificate for Title No. **Yatta/Ndunguni/616** establishes that the parcel measuring **168.40 Ha** is registered in the names of **Nyamai Mwaniki** and **Mueni Nyamai**. The title deed in respect of the parcel of land was issued in **2007**.

19. **Section 91(5)** of the **Land Registration Act (Act)** provides thus:

“If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased’s share shall be treated as part of their estate.”

20. At the point of acquiring the land the Deceased had other wives but chose to have the land registered in his and the Petitioner’s names. The two (2) individuals held the land on individual, undivided ownership interest in the property. Each one of them had the right of his/her specific ownership interest. There is no indication that they were joint tenants which would mean that the share owned by the Deceased should go to the Petitioner as the surviving tenant. What has been demonstrated is that all survivors of the Deceased lived and worked on that particular land. Therefore the property was owned by the Deceased and the Petitioner in common. As a result his share in the property passes to his heirs.

21. With this in mind, I find that the Deceased was entitled to half share of Land Parcel No. **Yatta/Ndunguni/616** while the Petitioner was entitled to the remaining share. The property measures **168.40 Ha**. It is admitted that part of the parcel measuring **1.78 Ha** was sold to **Peninah Katongu King’uyo** during the lifetime of the Deceased leaving **166.62 Ha**. The share of the Deceased stands at **83.31 Ha**. All his heirs, the Petitioner inclusive are entitled to the share of the Deceased.

22. In the premises the **83.31 Ha** being half share of Parcel of Land **Yatta/Ndunguni/616** shall be held by the persons proposed:

- 1. Mueni Nyamai.**
- 2. Mbithi Nyamai.**
- 3. David Nganga Nyamai.**
- 4. Mutisya Kivaku Nyamai.**
- 5. Musangi Nyamai.**

To hold in trust for other family members.

Peninah Katongu King’uyo will be entitled to her portion measuring **1.78 Ha**.

23. Regarding money held at the bank, the Deceased was polygamous. I am therefore guided by **Section 40** of the **Law of Succession Act** that provides that:

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

What this entails is that the net intestate Estate of the Deceased regarding the money left in various financial institutions shall be divided among the houses according to the number of children in each house with widows being added as units. In the instant case the Estate in respect of money will be divided into **19 units** which will enable each member of the family to get his/her entitlement.

24. It was disclosed that, some of the beneficiaries are minors. The grant ought to have been made to the Petitioner jointly with another person as a continuing trust arose. The grant was however made to one individual contrary to the Law (**See Section 58 of the Law of Succession Act**). This would have called for the revocation of the grant but since the parties are desirous to have the Estate distributed I will exercise my discretion pursuant to **Rule 73** of the **Probate and Administration Rules** and direct that the

mother to the minors be considered to be the second Administratrix of the Estate of the Deceased.

25. It is important to interrogate what exactly the Deceased held in various banks prior to his demise that will be shared amongst the beneficiaries of his Estate. I say so because the Administratrix was obligated to account for the Estate of the Deceased. This was well put in the case of **The Estate of Wainaina Waititu (Deceased) (2005) eKLR** thus:

“Section 79 of the Law of Succession Act vests the property of the deceased in the Administrators. That constitutes them legal owners of the property, yet they hold such property not for themselves, but as trustees for all those others interested in it, be they heirs or creditors. They therefore stand in a fiduciary position with regard to the property and in relation to the beneficiaries. As trustees they are accountable to the persons who are ultimately entitled to assets upon distribution....”

26. In the premises I make orders as follows:

(i) The grant issued herein be and is hereby cancelled. A fresh one shall issue in the names of:

(a) Mueni Nyamai.

(b) Musangi Nyamai.

(ii) The Administratrix of the Estate shall file in Court a detailed statement of the personal bank accounts stipulated held by the Deceased prior to his demise on the **17th February, 2013** within **30 days** hereof.

(iii) Mention on the **12th June, 2018** for further orders.

(iv) Costs shall be in the cause.

27. It is so ordered.

Dated, Signed and Delivered at Kitui this 19th day of April, 2018.

L. N. MUTENDE

JUDGE