



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 1001 OF 1993**

**IN THE MATTER OF THE ESTATE OF WILFRED KIHARA KARIUKI (DECEASED)**

LILIAN WANJIRU KIHARA ..... 1<sup>ST</sup> PROTESTER

PHYLIS WAMBUI MAINA ..... 2<sup>ND</sup> PROTESTER

VERSUS

TABITHA WAITHIRA KIHARA ..... 1<sup>ST</sup> ADMINISTRATOR

AMOS MAINA KIHARA ..... 2<sup>ND</sup> ADMINISTRATOR

**JUDGMENT**

1. The Petitioner herein filed an application dated 1<sup>st</sup> August, 2003 on 16<sup>th</sup> September, 2013 seeking confirmation of the grant made to her in this matter on 22<sup>nd</sup> December, 1994. The affidavit in support of the application sworn by the Petitioner indicates that the deceased, who died intestate on 22<sup>nd</sup> February, 1993 was survived by the Petitioner and nine (9) children namely:

- i) Priscilla Njeri Kihara
- ii) Amos Maina Kihara
- iii) Nancy Wanjiru Kihara
- iv) John Wainaina Kihara
- v) Beth Wanjiku Kihara
- vi) Naomi Waruchu Kihara
- vii) Felix Njuguna Kihara
- viii) Joyce Nyambura Kihara
- ix) Mercy Wangeci Kihara

2. On 27<sup>th</sup> November, 2013 one of the listed beneficiaries, Amos Maina Kihara, swore and filed a supplementary affidavit. In it he states that he is the first born son of the deceased, and that his family members have consented that he should be an administrator with his mother, the Petitioner herein. On 20<sup>th</sup> February, 2004 the beneficiaries filed a consent dated 16<sup>th</sup> February, 2004 in support of Amos Maina Kihara being appointment as co-administrator.

3. The application for confirmation of grant came up for hearing before Kamau, J on 2<sup>nd</sup> June, 2004. The court issued orders appointing Amos Maina Kihara as co-administrator of the estate. The application for confirmation was however stood over pending the presentation of letters from the chief on the lawful heirs.

4. On 10<sup>th</sup> June, 2005 the 1<sup>st</sup> Petitioner filed a letter from the Chief of Kangari location, Charles Muhoi, dated 23<sup>rd</sup> May, 2005. The letter lists sixteen (16) people who include the Petitioner and her children, the 1<sup>st</sup> Protester and her four children, and the deceased's sister, Phylis

Wambui Maina as the lawful heirs. Attached to the letter are minutes of the clan meeting in which the beneficiaries and their shares were established by the clan elders.

5. There were previously two files in relation to the estate of the deceased herein, namely Succession Cause No. 1001 of 1993, which is the current suit and a Succession Cause No. 759 of 1993 which was filed by the 1<sup>st</sup> Protester, Lilian Wanjiku Kihara. On 15<sup>th</sup> March 1995, a consent order was made before Githinji, J (as he then was), consolidating the two files. Succession Cause No. 1001 of 1993 was made the running file.

6. Lilian Wanjiru Kihara, the 1<sup>st</sup> Protester, filed an affidavit of protest dated 25<sup>th</sup> August, 2008 on the 29<sup>th</sup> August, 2008. The 2<sup>nd</sup> Protester, Phylis Wambui Maina, filed an affidavit of protest dated 13<sup>th</sup> October, 2008 in objection to the application for confirmation of grant. Phylis filed a further affidavit dated 23<sup>rd</sup> November, 2009 in support of the mode of distribution proposed by the Petitioners, save to state that the land parcel known as Loc.2/Kanderendu/685 be registered in her name as agreed before the elders.

7. The 1<sup>st</sup> Administrator, Tabitha Kihara filed a replying affidavit dated 20<sup>th</sup> November, 2008 and a further affidavit on 2<sup>nd</sup> October, 2009 in response to the affidavits of protest.

8. On 11<sup>th</sup> May, 2011 the 1<sup>st</sup> Protester, Lilian Wanjiru, filed witness statements in support of her case. There are five witness statements recorded by Lilian and four other witnesses namely: William Ng'ang'a Kariuki, Benson Kaniaru Ayub, Christopher Kimani Kihara and Njoroge Karaya. All the statements are dated 3<sup>rd</sup> May, 2011.

9. The 1<sup>st</sup> Protester, Lilian Wanjiru, testified that the deceased was her husband. They met in the year 1981 while they both worked at Kenya Tea Development Agencies (KTDA). They began to cohabit as man and wife in the year 1985 when they moved in together in Lilian's house in Getora. In the year 1986, Lilian and the deceased moved to the land parcel known as Loc.2/Kanderendu/415, into a house the deceased had built for her on the far western side of the land. Tabitha's house was to the east side of the land.

10. Lilian Kahara asserted that the deceased visited her home, accompanied by one Njoroge Karaya, who has since died, and met her mother and paternal uncle in the year 1985. The deceased visited her home on three different occasions, during which only the elders were present since under Kikuyu customary law, she was not allowed to attend the meetings.

11. Lilian stated that she has four children namely: Christopher Kimani Kihara, Martin Nguyai Kihara, Eric Kamau Kihara and Vicky Priscilla Njeri Kihara, all of whom bear the deceased's name. That even though she bore Martin and Christopher while still in her mother's house, the deceased wished to adopt them and so he did. She urged that the deceased legitimized and educated all her children.

12. It was Lilian's contention that when she entered a relationship with the deceased, she was well aware that he had another wife known as Tabitha Waithera who is the 1<sup>st</sup> Petitioner herein. She however denied having knowledge of the system under which the two were married. She urged that when she married the deceased, she had already divorced her previous husband, Maina Mwalili.

13. The 1<sup>st</sup> Protester asserted that after the deceased's death the burial permit was issued in her name and that of Tabitha Kihara. Both of them participated in the burial ceremony and the 1<sup>st</sup> Protester was recognized as a wife in the funeral announcements.

14. It is the 1<sup>st</sup> Protester's testimony that she does not currently live on the land parcel known as Loc.2/Kanderendu/415 out of fear for her own safety. That whereas the deceased had demarcated boundaries, after his death Tabitha Kihara incited her children to attack the children of the 1<sup>st</sup> Protester. To keep the peace, the 1<sup>st</sup> Protester opted to leave the property.

15. William Nganga Kariuki PW1, testified on behalf of the 1<sup>st</sup> Protester that the deceased was his step-brother, and the 1<sup>st</sup> Protester was the deceased's wife. He came to know Lilian when she came to their home officially in the year 1986.

16. Mr. Kariuki confirmed that Njoroge Karaya accompanied the deceased to Lilian's home for the marriage rights as is the Kikuyu custom. He asserted that even though he is a member of '*mbari ya wairegi*' (wairegi's clan), it was not mandatory for him to accompany his late brother and Karaya when they visited Lilian's home.

17. PW2, Benson Kaniaru Nguyai alias Benson Kaniaru Ayub, testified that Lilian Wanjiru is his niece through his late half-brother Jonathan Kimani who died in the year 1968. He urged that Lilian was married to the deceased who visited them in the year 1985 to ask for Lilian's hand in marriage. The deceased brought with him '*mwate*' and '*harika*' which are goats of significance in marriage in the Kikuyu tradition. The deceased also brought a third goat called '*ndurume ya miruru*' to enable him take the 1<sup>st</sup> Protester's two children as his own. All the goats were brought in the form of cash. The deceased later brought a fourth goat called '*ngemira*' which allows them to bring dowry.

18. PW3, Christopher Kimani Kihara, stated that the deceased was his father and the 1<sup>st</sup> Protester herein is his mother. They lived together as a family in a rented accommodation in Gatura market and later moved to their rural home in Kimotho where the deceased built a house. At school, he was registered under the deceased's name. While his ID card acquired in the year 1994 after the deceased's death bears the name Kihara, his birth certificate bears the name Christopher Jonathan Kimani.

19. The 2<sup>nd</sup> Protester, Phylis Wambui Maina, testified that the deceased was her only brother, there having been only two children in their mother's house. Their father's second wife had eight children. During her late father's lifetime, he gave her a portion of land measuring 1.5 acres out of a parcel of land known as Loc.2/Kanderendu/685 which measures 2.5 acres in total and is registered in the name of the deceased.

20. In opposition, Tabitha Waithera testified that she and the deceased got married in a church wedding on 8<sup>th</sup> November, 1975. She

produced a copy of their marriage certificate in support of her testimony. Their marriage was blessed with nine children one of whom has since died. She urged that Lilian Wanjiru is a schemer who merely wants to benefit from the deceased's estate.

21. Tabitha Kihara asserted that the deceased left behind two parcels of land, Loc. 2/Kanderendu/415 and Loc.2/Kanderendu/685. Both parcels are registered in the deceased's name. Lilian Wanjiru had at one point subdivided and sold part of Loc.2/Kanderendu/415 but the transaction was cancelled by the court. Tabitha admitted that William Nganga, PW1, is a step brother of the deceased, but asserted that he is a child in her eyes and cannot therefore testify in this cause.

22. The 2<sup>nd</sup> Administrator, Amos Maina Kihara, testified that he is a son of the deceased and the 1<sup>st</sup> Administrator, Tabitha Waithera Kihara. He confirmed that the deceased left behind two parcels of land, stated above, and expressed his support of the 1<sup>st</sup> Administrator's proposed distribution.

23. Learned Counsel M/s Nyambura, filed written submissions dated 7<sup>th</sup> December, 2017 on behalf of the 1<sup>st</sup> Protester. Counsel submitted that even though the deceased died before fulfilling all the formalities of a customary law marriage, the court should take judicial notice of the fact that the rites of a customary marriage are a process and not an event, and the process can take years and sometimes lifetimes. That in the circumstances at hand, the court is entitled to presume a marriage between Lilian Wanjiru and the deceased.

24. To buttress her argument, counsel cited numerous authorities including:

1) **Busia HC P & A Cause No. 55 of 2002, Matter of the Estate of Joakim Makokha Ochieng (deceased)** where it was held that pursuant to section 3(5) of the Law of Succession Act, a woman who contracts a marriage under a system of law that permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of the Law of Succession Act.

2) **Nakuru HC Succession Cause No. 330 of 2002, In the Matter of the Estate of Joseph Njuguna Mwaniki (deceased)** where Kimaru, J held that where parties had made tentative steps to be married under Kikuyu Customary Law but never did complete the ceremonies required under the custom, a common law marriage is presumed between such parties.

3) **Nairobi HC Succession Cause No. 573 of 2003, Matter of the Estate of Gerald Kiragu Gatheru**, in which Koome, J (as she then was) reiterated the concept of presumption of marriage and cited with approval the case of Hortensia Yawe vs. The Public Trustee CA Civil Appeal No. 13 of 1976.

25. Counsel submitted that they had proved that the 1<sup>st</sup> Protester was a wife of the deceased and her four children, are children of the deceased, and urged the court to grant the 1<sup>st</sup> Protester an equal share of the deceased's land Loc.2/Kanderendu/415 in accordance with the number of dependants in each house.

26. M/s Wanyoike and Macharia Advocates filed written submissions dated 21<sup>st</sup> December, 2017 on behalf of the 2<sup>nd</sup> Protester and reiterated the contents of their pleadings and the 2<sup>nd</sup> Protester's witness testimony. Counsel urged that the 2<sup>nd</sup> Protester is entitled to the land parcel known as Loc.2/Kanderendu/415. Counsel pointed out that Tabitha Kihara was only opposed to the land devolving to the 2<sup>nd</sup> Protester out of spite, and had not given a cogent reason why the land should devolve to Amos Kariuki in place of his mother, the 2<sup>nd</sup> Protester herein.

27. Mr. Macharia submitted that the 2<sup>nd</sup> Protester supports the 1<sup>st</sup> Protester's submissions as to her entitlement and reiterated that the 1<sup>st</sup> Protester was married to the deceased. Counsel urged that both the 1<sup>st</sup> and 2<sup>nd</sup> Protester had proved their case, and are therefore entitled to share in the deceased's estate.

28. Learned counsel M/s Kamiro filed written submissions dated 2<sup>nd</sup> January, 2018 on behalf of the Administrators. Counsel submitted that Tabitha Waithira and the deceased contracted a monogamous marriage under Cap. 151 Laws of Kenya and there has never been divorce, separation or any proceedings pertaining to the marriage. That the deceased therefore lacked capacity to contract a subsequent marriage without dissolving the former. Counsel urged that in the circumstances, Lilian Wanjiru and the deceased merely had a clandestine adulterous affair, and Lilian cannot therefore be referred to as a wife of the deceased.

29. I have considered the pleadings on record, the testimony given by witnesses in this cause and the written submissions filed by the Counsels in support of each party's case, and framed these three main issues for determination;

(a) Whether Lilian Wanjiru, the 1<sup>st</sup> Protester herein, is a wife of the deceased.

(b) Whether Lilian Wanjiru's children qualify as children of the Deceased.

(c) Whether Phylis Wambui Maina is entitled to a portion the land parcel known as Loc.2/Kanderendu/685.

30. On the first issue as to marriage, the 1<sup>st</sup> Administrator asserted that the deceased lacked the capacity to contract another marriage during the subsistence of his earlier marriage. The Petitioner presented a certificate of marriage no. 296271 which indicates that she and the deceased contracted a marriage under the African Christian Marriage and Divorce Act (CAP. 151) on the 8<sup>th</sup> Of November, 1975. The Act has since been repealed by the **Marriage Act No. 4 of 2014**.

31. M/s Kamiro contended for the Administrators that the law on presumption of marriage is very clear as stated by Bosire, J, (as he then

was) in **M.W.G vs. E.W.K. [2010] eKLR**, that a marriage cannot be presumed in favour of a party, in a relationship in which one of them is married under a statute. Counsel urged that the 1<sup>st</sup> Protester's claim is legally misguided and ought to be dismissed with costs.

32. Under **section 6(2)** of the **Marriage Act**, a Christian, Hindu or civil marriage is monogamous. **Section 6(3)** of the Act provides that a marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous. A marriage under CAP. 151 is a Christian marriage by virtue of its **section 3(1)** which states that the Act applies to marriages of Africans, one or both of whom profess the Christian religion. **Section 9(3)** stipulates that such a marriage can only be dissolved by a valid judgment of divorce and if one illegally contracts another marriage while it remains undissolved, they shall be guilty of bigamy.

33. The evidence presented before the court clearly demonstrates that the deceased lacked the capacity to contract a marriage having contracted a monogamous union with Tabitha Waithira, the 1<sup>st</sup> Administrator herein. With this finding, the issue of presumption of marriage dissipates.

34. M/s Nyambura for the 1<sup>st</sup> Protester submitted that the 1<sup>st</sup> Protester is a wife for the purposes of succession and cited **section 3(5)** of the **Law of Succession Act** which provides thus:

**“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”**

The question that follows then is whether Lilian Wanjiru, the 1<sup>st</sup> Protester herein, is a wife for the purposes of succession and therefore entitled to share in the estate of the deceased.

35. In the case of **Irene Njeri Macharia vs. Margaret Wairimu Njomo & Another [1996] eKLR**, Omolo, Tunoi, & Bosire JJ A held that:

**“Our understanding of section 3(5) of the Act is that it was expressly intended to cater for women who find themselves in the situation in which Josephine found herself. Mutua, previous to his union with Josephine, had contracted a statutory marriage which remained undissolved at the time of his death. But subsequent to that marriage, he purported to marry Josephine under Kamba Customary law. Kamba customary law recognizes polygamy and Josephine was telling the court that she was a woman married under a system which recognizes polygamy...**

**...Josephine was, nevertheless, a wife for the purposes of the Law of Succession Act, and in particular sections 29 and 40 of the Act.**

**In the appeal before us, we have said we do not know whether the first respondent and the deceased ever went through any ceremony of marriage; we are also not certain if the concept of a presumed marriage could be applied to their circumstances. In the absence of such evidence, we are unable to say whether she could qualify as a ‘wife’ under the provisions of section 3(5) of the Law of Succession Act.”**

36. The facts of the case cited above lend themselves to the circumstances of the present case. It was the 1<sup>st</sup> Protester's testimony that the deceased commenced marriage rites in a bid to marry her under Kikuyu customary law. Customary law marriages have essential ingredients which must be fulfilled and it is important to determine if the deceased fulfilled them in the present case.

37. **Eugene Cotran's “Case Book on Kenya Customary Law”** sets out the essentials of a Kikuyu Customary marriage at page 30 as follows:

- 1) Capacity: the parties must have capacity to marry and also capacity to marry each other.
- 2) Consent: the parties to the marriage and their respective families must consent to the union.
- 3) *Ngurario*: no marriage is valid under Kikuyu Customary Law unless the *Ngurario* ram is slaughtered.
- 4) *Ruracio*: there can be no valid marriage under Kikuyu customary law unless a part of the *ruracio* (dowry) has been paid.
- 5) Commencement of cohabitation: the moment at which a man and a woman legally become husband and wife is when the man and woman commence cohabitation. That is under the capture procedure when the marriage is consummated after the eight days' seclusion, and nowadays when the bride comes to the bride grooms home.

38. The requirements outlined in the book were restated by the Court of Appeal (Nambuye, Kiage & Murgor, JJ A) in the case of **Eva Naima Kaaka & Another vs. Tabitha Waithera Mararo [2018] eKLR**. The appellate court further observed that:

**“When the particulars of the alleged ceremony are compared with the ‘essentials of a Kikuyu customary marriage’ as described by Eugene Cotran, and Gituanja vs. Gituanja [1983] KLR 575 it is plain to see that certain basic elements necessary for a Kikuyu customary marriage were absent.**

For instance, the *ngurario* is an integral part of the ceremony that signifies the existence of a Kikuyu Customary Marriage. But our reevaluation of the evidence does not point to a *ngurario* having taken place. This is because a fundamental component of *ngurario* is the slaughtering of a ram or goat.

During the visit to Nyeri in 2011, no slaughter of a *ngurario* ram was evident...From the above it becomes apparent that, no ram or goat was slaughtered to mark the coming into existence of a marriage. Without the presence of the central feature of the *ngurario* ceremony, it cannot be said that a valid Kikuyu customary marriage came into existence between Waithera and the deceased.

It is also worth noting that Waithera did not provide any description or particulars of the alleged ceremony; her evidence is clear, "...there was no marriage..." Essentially, her testimony was limited to 2008 when the deceased, together with one Joseph and Karanja, who are elders and his friends, visited her parents to introduce the deceased as the person who intended to marry her. It would seem that it remained just that: an intention, to marry. The learned judge erroneously concluded that Waithera was married to the deceased under the Kikuyu-Maasai Customary Law, despite the cogent evidence that the essentials of such a marriage were not satisfied. In our view, this omission negated the existence of a Kikuyu customary marriage, and we so find."

39. PW2, Mr. Kaniaru, stated in his testimony that under their clan's custom, dowry negotiations are always recorded and since the deceased did not bring any dowry, there is no record thereof. Lilian did not tender any evidence to show that the "*ngurario*" ram or goat was slaughtered to signify the contracting of a Kikuyu customary marriage. A common law marriage can also not be presumed since the deceased lacked capacity to marry.

40. Consequently, the 1<sup>st</sup> Protester cannot benefit from the provisions of **section 3(5)** of the **Law of Succession Act** since she did not contract a marriage to the deceased under Kikuyu customary law. By failing to satisfy the requirements needed to be recognized as a wife for the purposes of succession, I find that Lilian Wanjiru is therefore not entitled to inherit from the deceased's estate as a wife.

41. The second issue was whether Lilian Wanjiru's children qualify as children of the deceased. This is with regard to three of the children with the exemption of Vicky Njeri Kihara whose father was the deceased and paternity is not disputed. **Section 3(2)** of the **Law of Succession Act** states that a child in relation to a male person shall include any child whom he has expressly recognized, or in fact accepted as a child of his own, or for whom he has voluntarily assumed parental responsibility.

42. Lilian Wanjiru, the 1<sup>st</sup> Protester herein, and her witnesses testified that the deceased took a goat known as '*ndurume ya miruru*' to her home in order to claim her two children as his own. Christopher Kimani, PW3, further testified that even though the deceased was not his biological father, it is the deceased that raised him, took him to school and hospital, and did everything for him as a father would.

43. PW3 stated that the deceased treated him in the same manner he treated his own biological children. Lilian stated that the deceased attended the children's school parents' meetings where he would indicate that he was their father. She produced a letter from the Deputy Principal of Kimandi Primary School and school leaving certificates of her children to support her assertion.

44. To rebut the 1<sup>st</sup> Protester's assertion that the deceased adopted her children, all Tabitha Waithera did was to state that the deceased was not the children's biological father. She however failed to recognize that one need not be bound by blood to qualify as a person's father. All that one ought to demonstrate is that the deceased took parental responsibility over the children as his own, and maintained them during his lifetime.

45. In the case of **E.M.M vs. I.G.M & another, Civil Appeal No.114 of 2012**, the Court of Appeal at Nairobi (Karanja, M'noti & Murgor JJ.A) while dealing with a similar issue, observed thus:

**"The next issue is whether the appellant proved on a balance of probabilities that he was a child of the deceased whom the deceased had taken into his family as his own and was being maintained by the deceased immediately prior to his death...**

**We would have expected some form of evidence to show support from the deceased towards the appellant while he was a pupil in Nairobi Primary and when he was a student at Nairobi School...**

**Additionally the definition of a 'child' in section 3(2) of the Law of Succession Act includes a child whom the deceased has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility. We agree with the respondent that the appellant has to show a reasonable degree of permanency in the responsibility that the deceased is alleged to have voluntarily assumed over the appellant"**

46. From the evidence tendered by the parties, it is evident that the deceased did take responsibility over the Protester's children and raise them as his own. The Protester presented different photographs taken with the children and the deceased and both the 1<sup>st</sup> and 2<sup>nd</sup> Administrators on different occasions. The administrators admitted to being in the photographs and even recognized the 1<sup>st</sup> Protester who was with them in the said photographs. This is in conflict with their own testimony that they never met Lilian Wanjiru, the 1<sup>st</sup> Protester, during the deceased's lifetime.

47. The children are therefore entitled to share in the estate of the deceased as dependants. A dependant is defined under **section 29** of the **Law of Succession Act** to include children whom the deceased had taken into his family as his own and maintained by the deceased immediately prior to his death.

48. It is also important to determine whether Lilian, the 1<sup>st</sup> Protester, can qualify as a dependant and therefore share in the deceased's estate. In **Succession Cause No. 78 of 2010, Milena Bora vs. Liana Tamburelli [2016] eKLR**, Chitembwe J, while deliberating on a similar issue, opined thus:

**“The dispute herein revolves around the issue as to whether the objector can qualify to be the deceased’s beneficiary. Black’s Law Dictionary defines a beneficiary as a person for whose benefit a property is held in trust, especially, one designated to benefit from an appointment, disposition, or assignment (as in a will, insurance policy etc), or assignment...or to receive something as a result of a legal arrangement or instrument.**

**-A person whom another is in a fiduciary relation, whether that relation is one of agency, guardianship or trust.**

**...Under section 29 of the Succession Act, a dependant or a beneficiary need not be a close family member. Any person who the deceased took care of during his lifetime can qualify to be a dependant. In the case of EVES VS. EVES [1975] WLR 1338, [1975] 3 ALL E.R 768, a couple cohabited whilst married to other persons and they sired children before their respective divorces were finalized. Subsequently, their relationship broke down and the “wife” was kicked out together with her children. The woman had greatly contributed to the improvement of their home though not financially. The court held that a constructive trust had arisen. Mr. Eves was declared to hold the legal estate on trust for the benefit of the parties.**

In the case of **COOKE VS. HEAD [1977] 1 WLR 518**, the court stated the following:

**“whenever two parties by their joint effort acquire property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust. This does not need any writing. It can be enforced by an order for sale, but in a proper case the sale can be postponed indefinitely. It applies to husband and wife, to engaged couples, and to man and mistress, and maybe to other relationships too.”**

**...The objector may qualify to be the deceased’s dependant if she can be given an opportunity to explain her position before the court...Upon hearing the objector’s evidence, the court will decide as to whether there is a constructive trust as this line of claim can be implied from the objection, as well as whether the objector was the deceased’s dependent even if she was not the deceased’s wife.”**

49. The evidence presented before this court demonstrates that both Lilian and her children depended on the deceased when he lived. While this court has found that Lilian does not qualify as a wife, she nonetheless qualifies as a beneficiary entitled to share in the deceased's estate. Lilian and her children are therefore entitled to share in the estate of the deceased as dependants.

50. The third issue is whether Phylis Wambui, the 2<sup>nd</sup> Protester, is entitled to a portion of the land parcel known as Loc.2/Kanderendu/685. Phylis testified that she is entitled to 1.5 acres out of the land parcel, and urged that Tabitha Waithira and Lilian Wanjiru had both agreed that the land parcel belongs to her.

51. Lilian Wanjiru, the 1<sup>st</sup> Protester, did not contest Phylis' claim but only testified that she became aware of Phylis' claim after the deceased's death. On the other hand, Tabitha Waithira, the 1<sup>st</sup> Administrator, maintained that Phylis did not claim any land during the deceased's lifetime nor did she produce any documentation that the land was held in trust for her, and as such, she is not entitled to a portion of Loc.2/Kanderendu/485.

52. Of importance is the testimony of the 2<sup>nd</sup> Administrator, Amos Maina, who stated that Phylis' claim can only succeed against her brother William Nganga, PW1 herein. He urged that his late father's half-sisters got land from his late grandfather through William Nganga, who transferred the land to them. In light of this, it can be inferred that Phylis could have only obtained her share from her brother who is the deceased herein. As such, I find that she is entitled to get 1.5 acres from Loc.2/Kanderendu/685.

53. The estate in issue is comprised of Loc.2/Kanderendu/685 which measures approximately 2.5 acres and Loc.2/Kanderendu/415 which measures approximately 16.5 acres. I note that the mode of distribution filed by the Administrators also failed to include Tabitha Waithira's daughters namely: Naomi Waruchu, Joyce Nyambura and Mercy Wangechi. Both the constitution and the Law of Succession Act do not discriminate against beneficiaries on a gender basis.

54. In **the Matter of the Estate of John Musambayi Katumanga (Deceased) [2014] eKLR**, Musyoka J while deliberating on a similar issue observed thus:

**“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 section 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.”**

There should therefore be no form of discrimination in sharing the estate based on gender. Tabitha's female children are therefore entitled to share in the estate of their deceased father unless they choose to renounce their shares which they have not done in the instant case.

55. In light of this, and noting that there was no increment in the deceased's estate after Lilian came into the picture, and also having regard

to the fact that Tabitha has nine (9) children while Lilian has four (4), I am disposed to distribute the estate of the deceased in the following terms:

1. That Loc.2/Kanderendu/415 shall be distributed as follows:

(a) 12.5 acres - Tabitha Waithira to hold a life interest.

(b) 4.0 acres – Lilian and her children under section 26 of the Law of Succession Act on dependency.

2. That Loc.2/Kanderendu/685 shall be distributed as follows:

(a) 1.5 acres to Phylis Wambui Maina.

(b) Remaining portion devolves to Tabitha Waithira in which she shall hold a life interest.

Tabitha Waithira shall hold a life interest on the share devolved to her on behalf of her six children who include her daughters.

It is so ordered.

**SIGNED DATED and DELIVERED in open court this 31<sup>st</sup> day of July 2018.**

.....

**L. A. ACHODE**

**JUDGE**

**In the presence of.....Advocate for the 1<sup>st</sup> Protester.**

**In the presence of.....Advocate for the 2<sup>nd</sup> Protester**

**In the presence of.....Advocate for the Administrators.**