



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 328 OF 1996

(IN THE MATTER OF THE ESTATE OF JOHN MAKARA MURIUKI (DECEASED))

ROSEMARY WAMBUI MAKARA.....APPLICANT

VERSUS

ANN MUTHONI NDUNGU.....PROTESTOR

JUDGMENT

A certificate of death filed alongside a petition for grant of letters of administration intestate of the estate of **John Makara Muriuki** *alias* **Makara Muriuki** (deceased) shows that the latter died on 9th February, 1987 at Nyeri Provincial General Hospital. The deceased was 65 years old at the time of his demise and he was then domiciled in Kenya at Kamakwa in Nyeri County.

The facts and the history of this cause appear a bit convoluted but I am minded that it is the duty of this court to make as much sense as possible out of the material before it in its bid to resolve dispute between the parties.

The record shows that on 11th December, 1996, **Joseph Muriuki Makara** petitioned for grant of letters for the administration of the deceased's estate in his capacity as the deceased's son. In the affidavit in support of the petition, the petitioner named himself as the sole survivor of the deceased; however, it is also apparent from the same record that this petition was the third and the latest of the three petitions filed by different petitioners for administration of the deceased's estate.

The first petition was filed in **High Court Succession Cause No. 421 of 1994** in which the petitioner is one **John Makara Muriuki** who described himself as the only son of the deceased. This particular petition was filed on 25th November, 1994 and in the affidavit in its support, the deceased's survivors are indicated as the petitioner, the deceased's widow, **Dorcas Wanjira** and his daughter, **Rosemary Wambui**.

The second petition was filed on 8th March, 1995 in **High Court Succession Cause No. 48 of 1995** by **Charles Maina Mwangi** who presented it, yet again, as the son of the deceased. Besides himself, the petitioner named Eustas Ndung'u Mwangi, Hannah Wangari Makara and Mwangi Makara as the deceased's survivors. While the latter two were described as the wife and the son of the deceased respectively, the capacity in which Eustas Ndung'u Mwangi survived the deceased was not disclosed.

From the proceedings in court on 27th October, 2005, it would appear that the three petitions were consolidated on the application of Joseph Muriuki Makara dated 20th December, 1999; prior to that consolidation separate grants of letters of administration of the deceased's estate had incidentally been

made to **Joseph Makara Muriuki** in **High Court Succession Cause No. 421 of 1994** and **Charles Maina Mwangi** in **High Court Succession Cause No. 48 of 1995**. On the material date, both the grants were revoked and a fresh grant was made in the present cause in the joint names of **Charles Maina Mwangi** and **Joseph Ndung'u Makara**. The court further directed that the grant be confirmed on an appropriate application upon expiry of six months after it was made.

By a summons dated 7th September, 2006 the administrators took the initiative and filed a summons for confirmation of grant. Although the summons is said to be supported by the affidavits of the two administrators, it is only the affidavit of Joseph Ndungu Makara that was attached to the summons. In that affidavit the deponent swore that the deceased was survived by six children who were identified as:-

1. Jane Makara
2. Jane Wambui Muriuki
3. Moses Maina Makara
4. Mwangi Makara Mucheru
5. Annah Muthoni Ndungu
6. Joseph Ndungu Makara.

Apart from the children, the deceased is also said to have been survived by the following dependants:-

1. John Maina Wambui
2. Eustus Ndungu Mwangi
3. Charles Maina Mwangi
4. Samuel Maina Muriuki
5. John Makara Ndung'u

The deponent proposed, in the same affidavit, to have the deceased's estate distributed amongst his survivors and dependants as follows:-

- “(a) Kenya Brewery Share-Eustus Mwangi
- (b) Insurance (British American) - Joseph Ndungu Makara & John Maina Wambui
- (c) Nyeri Plot Owner Company-Mwangi Makara
- (d) Matanya Estate Plot No. 1755- Jane Wambui Muriuki
- (e) Othaya/Mahiga/Chinga (shares) No. 1534 –John Maina Wambui
- (f) Othaya/Mahiga/Chinga (shares) No. - Moses Maina Makara
- (g) Kenya Commercial Bank Account-Charles Maina Mwangi
- (h) Cathedral Parish Co-operative Savings and Credit Society Nyeri-Moses Maina Makara
- (i) Tetu coffee society membership no. 3011- Samuel Maina Muriuki & Jane Wambui Muriuki

- (j) Tetu/Unjiru/784- Samuel Maina Muriuki & Jane Wambui Muriuki
- (k) Post Office Savings Account- Jane Wambui Muriuki
- (l) Kagunduini plot No. 12 Joseph Ndungu Makara
- (m) Kanyuaheho & Kairo Group- Joseph Ndungu Makara
- (n) Matanya shares- Mwangi Makara Mucheru
- (o) HFCK Ltd. Savings Account- John Makara Ndungu & Ann Muthoni Ndungu
- (p) Sugurui Plot No. 622- John Makara Ndungu & Ann Muthoni Ndungu
- (q) Plot Tetu/Unjiru/780&783- Charles Maina Mwangi
- (r) Plot Tetu/Unjiru/781- Samuel Maina Muriuki & Jane Wambui Muriuki
- (s) Plot Tetu/Unjiru/782&785- Joseph Ndungu Makara”

On 7th November, 2006, Rosemary Wambui Makara (the applicant herein), swore and filed an affidavit of protest protesting against the confirmation of grant and the distribution of the estate as proposed by Joseph Ndungu Makara. According to her, she was one of the deceased’s children and that their late father had three wives the second of whom was her mother; she shared the same mother with Joseph Ndungu Makara and apparently, the two of them were the only children born in the second house. She deposed that the deceased’s properties which she identified as **LR. TETU/UNJIRU/782, LR. TETU/UNJIRU/785** and **Plot No. 12 KAGUINDINI (MUITWO WA HIGI)** should go to the second house and be shared out equally between herself and her brother Joseph Ndungu Makara.

In response to the protest, Joseph Ndungu Makara filed an affidavit in which he agreed that indeed his deceased father had three wives and that Rosemary Wambui Makara was his sister; however, he contested his sister’s claim for a share of the estate because the property on which she laid claim had been given to him by the deceased in his lifetime. His sister’s share of the estate, according to him, had been given to her son, on John Maina Makara. In any event, so he deposed, **Plot No. 12 KAGUINDINI (MUITWO WA HIGI)**, which his sister identified as belonging to the deceased was not the deceased’s property.

Prior to the hearing and determination of the protest or confirmation of grant, this court, for the second time, revoked the grant that had been made in respect of the deceased’s estate to Joseph Ndungu Makara and Charles Maina Mwangi. The revocation of the grant was apparently informed by the death of Joseph Ndungu Makara, who is indicated to have died on 4th November, 2007. On 16th May, 2008 a fresh grant was made in the joint names of Charles Maina Mwangi, Rosemary Wambui Makara and Ann Muthoni Ndungu. Subsequently, and more particularly on 5th June, 2008, the latter, was substituted in place of Joseph Ndungu Makara in this succession cause in her capacity as his wife.

What followed were two separate summonses by the respective parties herein both seeking the confirmation of the latest grant of letters of administration of the deceased’s estate; the first of these summonses was filed on 7th November, 2008 by Rosemary Wambui Makara, the applicant herein, while the second one was filed by the protestor, Ann Muthoni Ndungu, on 18th November, 2008. This latter summons was withdrawn on 10th March, 2009 with directions that its author was at liberty to file an affidavit of protest against the summons that was filed earlier in time.

In the affidavit in support of the summons of 7th November, 2008, the applicant swore that the deceased was survived by four children and four other dependants; the children were named as:-

1. Mwangi Makara

2. Rosemary Wambui Makara
3. Moses Maina Makara
4. Mwangi Makara Mucheru

The dependants were identified as:-

1. Annah Muthoni Ndungu
2. Charles Maina Mwangi
3. Eustus Ndungu Makara
4. Jane Wambui Muriuki.

The applicant proposed to have the deceased's estate distributed as follows:-

1. LR. TETU/UNJIRU/782

2. LR. TETU/UNJIRU/785

To be shared equally between Rosemary Wambui Makara and Annah Muthoni Ndungu

3. LR. TETU/UNJIRU/780

4. LR. TETU/UNJIRU/783

To be given to Charles Maina Mwangi

5. LR. TETU/UNJIRU/784

6. LR. TETU/UNJIRU/781

To be given to Jane Wambui Muriuki

7. Plot No. 622 Suguroi

To be shared equally between Rosemary Wambui Makara and Ann Muthoni Ndungu.

8. Kenya Breweries Shares

To be given to Eustus Ndungu Mwangi

9. Nyeri plot owners company shares

To be given to Mwangi Makara

10. Plot No 1755 Matanya

11. Tetu coffee membership No. 2011

To be given to Jane Wambui Muriuki

12. Plot No. 12 Kagunduini

To be shared equally between Rosemary Wambui Makara and Ann Muthoni Ndungu.

The protestor filed an affidavit of protest and opposed the distribution of the deceased's estate as proposed by the applicant. She, however, agreed with the applicant that the **Kenya Breweries** shares, the **Nyeri Plot Owners Company** and **LR. Tetu/Unjiru/783** should be shared out and distributed as

suggested by the applicant. In her own proposal, she did not provide for any share of the estate to the applicant; she also introduced properties which, in her view, comprise the deceased's estate but which were apparently omitted from the list of assets available for distribution as expressed in the applicant's affidavit in support of the summons for confirmation of grant. According to the protestor, apart from the assets whose distribution is not in dispute, the rest of the estate should be distributed as follows:-

1. LR. TETU/UNJIRU/784

To be given to Samuel Maina Muriuki and Jane Wambui Muriuki

2. Suguroi Plot No. 622

To be given to John Makara Ndungu and Annah Muthoni Ndungu

3. LR. TETU/UNJIRU/786

To be given to Charles Maina Mwangi

4. LR. TETU/UNJIRU/782 & 785

To be given to Annah Muthoni Ndungu

5. LR. TETU/UNJIRU/781

To be given to Samuel Maina Muriuki and Jane Wambui Muriuki

Other properties which the protestor identified as comprising the deceased's estate and which should also be distributed are:-

1. Othaya Mahiga/Chinga share number 1534 which the protestor proposed should be given to John Maina Makara

2. Apparently shares **in Cathedral Parish Co-op, Saving and Credit Society** which she proposed should be given John Maina Makara

3. Matanya shares which the protestor proposed should be given to **Mwangi Makara alias Mucheru.**

Directions were taken to the effect both the summons and the protest be heard by way of oral evidence; accordingly, the matter was heard on 18th March, 2015.

The protestor, in her testimony reiterated that the deceased whose estate was the subject of this succession cause was her father-in-law and that the applicant was her sister-in-law. It was her evidence that the deceased had three houses and that she was married in the second house in which her sister-in-law was also born.

As far as the deceased's property is concerned, the protestor testified that the wishes of the deceased as to the distribution of the property were reduced in writing in a book which she exhibited in court in support of her testimony. According to the protestor, land parcels referred to as **LR. TETU/UNJIRU/782 & 785** had been given to the second house. The protestor testified that the two properties together measure one acre and that they are only registered as two parcels because they are separated by a public road. She added that they are developed and that this development was done by her late husband, the deceased's son and his (her husband's) children.

It was also the protestor's evidence that **Suguroi Plot Number 622** should be given to John Makara Ndungu who is her son. She told the court that **Plot No. 12 Kagunduini** was not the deceased's and she

produced a certificate of search to demonstrate that deceased was not the property's registered proprietor. The parcel of land referred to as **LR. Othaya Mahiga/Chinga 1534** was to go to the protestor's son, John Maina Makara allegedly because this was his grandfather's (the deceased's) wish. The protestor testified that the applicant should not be given anything because the deceased did not wish her to get any part of his estate as the relationship between them is alleged to have been frosty.

Stephen Murithi Wanjohi who testified as the protestor's witness confirmed that the deceased had three houses and that in his lifetime, the deceased had bequeathed his property at Kamakwa to John Makara who happens to be the applicant's son. He testified that the deceased had a 'will' which was read in the presence of all the family members including the applicant. It was his evidence that the applicant never contested the 'will'.

On her part, the applicant more or less repeated her depositions in the affidavit in support of the summons for confirmation of grant but added that she lived at Naromoru. She also testified that the properties in dispute are **LR. TETU/UNJIRU/782 & 785, Suguroi Plot Number 622** and **Plot No. 12 Kagunduini** and that she wanted them distributed as indicated in her affidavit. The applicant disputed the contention that her deceased father had expressed his intentions on how the property should be distributed in a 'book' which was purportedly produced as evidence by the protestor.

This is the evidence that the Court was confronted with; as far as I can gather, much as the dispute revolves around the distribution of the deceased's estate, it also has to do, in equal measure, with the extent of the estate and the identities of persons beneficially entitled to it. These issues emerged in the course of confirmation proceedings and so it would be appropriate if the search for their resolution is considered from this perspective.

The law on confirmation of grants is found in **section 71** of the **Law of Succession Act**, it states as follows: -

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares. (Underlining mine).

Of particular interest in this cause is the proviso to **section 71** which is clear that the court must be satisfied as to the identities and shares of all the persons beneficially entitled to a deceased person's estate before a grant is confirmed.

The requirement that the court must be certain of the identities and shares of all persons beneficially entitled to an estate is based on the presumption that the deceased died intestate. I have understood the protestor to say that the identity and the shares of the persons entitled to the deceased's estate is a question that should not overly concern this court ostensibly because the deceased's wishes on disposition of his property were reduced into writing. In other words, the protestor appears to argue that the deceased died testate. This position has been contested and in the face of this contestation, the immediate question that must be resolved at the very outset is whether the distribution of the deceased's estate is subject to testate rather than intestate provisions of the Act.

To find the answer to this question I have had to go back to the petition out of which the grant sought to be confirmed was made. It is clear from the petition that was lodged in this court on 11th December, 1996 that it was a "*petition for letters of administration intestate*" meaning that upon the grant of the letters of administration, the administration of the deceased's estate was subject to intestacy provisions of the Law of Succession Act.

For avoidance of doubt, when the petition was lodged in court no will was filed alongside the petition or annexed to it; where it is alleged that a will exists **section 51(3)** of the Act requires of the petitioner to annex it to the petition. It states:-

51. Application for grant

(1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) ...

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...

(i) ...

(3) Where it is alleged in an application that the deceased left a valid will—

(a) if it was written, the original will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either—

(i) an authenticated copy thereof shall be so annexed; or

(ii) the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;

(b) if it was oral, the names and addresses of all alleged witnesses shall be stated in the application.

The petition was filed by the protestor's husband and as noted she was substituted in his stead after his death. If a will existed, there is no reason why the protestor's husband could not comply with the law and annex it to the petition. In any event, nobody, including the petitioner objected to the petition either under **section 68 of the Act** or under any other provision of the law on the ground that the deceased died testate. It is also not lost to this court that the protestor herself is a joint administratrix to the grant of letters of administration intestate that was subsequently made.

The document alleged to have encapsulated the deceased's wishes and which the petitioner sought to rely upon falls short of what in law amounts to a will; at very basic, it does not meet or comply with the formalities of a written will as prescribed under **section 11** of the Law of Succession Act which states as follows:-

11. Written wills

No written will shall be valid unless—

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

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

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

For the foregoing reasons, it is not in doubt and it is legitimate to conclude that the deceased died intestate and therefore the administration and distribution of his estate are subject to intestacy provisions of the Act.

The other issues for determination are, as noted, the extent of the deceased's estate and the persons beneficially entitled to the estate.

Again, apart from the testimony of witnesses, I have had to go back to the three petitions lodged separately for administration of the deceased's estate to find the answers to these questions. As far as the petition filed by Joseph Muriuki Makara is concerned, only two assets are listed as comprising the deceased's estate; these assets are:-

1. LR. TETU/UNJIRU/784 which is stated to be measuring 0.44 ha; and

2. LR. TETU/UNJIRU/781 that is said to be measuring 0.108 ha.

Copies of the extracts of the respective titles filed with the petition show that these parcels of land are registered in the name of **Makara son of Muriuki** who, in the absence of any evidence to the contrary, is assumed to be the deceased.

The person listed as the only survivor of the deceased in that petition is the petitioner himself.

In the petition filed by Joseph Ndungu Makara in **High Court Petition No. 421 of 1994** the assets listed as belonging to the deceased are: -

1. LR. TETU/UNJIRU/782 (measuring 0.128 ha)

2. LR. TETU/UNJIRU/785 (measuring 0.4 ha)

Again, extracts of the titles filed together with the petition show that these properties are registered in the name of **Makara son of Muriuki**.

The survivors of the deceased are listed as **Joseph Ndungu Makara, Dorcas Wanjira**, his widow, and **Rosemary Wambui**.

In the petition filed in **High Court Succession Cause No. 48 of 1995** by Charles Maina Mwangi the following were listed as the deceased's assets: -

1. LR. TETU/UNJIRU/783 which is indicated to measure **0.52 ha**

2. LR. TETU/UNJIRU/780 that is indicated to measure **0.12 ha**

3. Kenya Breweries Shares; a certificate attached to the petition shows they were 68 shares; and

4. Account No. [particulars withheld] at Kenya Commercial Bank, Nyeri Branch.

Copies of the title extracts for these parcels of land filed alongside the petition show that the properties are also registered in the names of **Makara son of Muriuki**. There is also attached to the petition a copy of the share certificate from East African Breweries Limited and a copy of what appears to be a cover of a savings account bank book for account number **112 144 985** at Kenya Commercial Bank Limited, Nyeri Branch. It is not clear, however, how much money is in that account.

The survivors in this petition are listed as **Charles Maina Mwangi, Eustas Ndungu Mwangi, Hannah Wangari Makara** (described as 'wife') and **Mwangi Makara** (indicated as 'son').

As noted earlier in this judgment, these petitions were consolidated; in their consolidated form, they are apparent on their face, and there is evidence to the effect that that at the time of his demise, the deceased owned the following properties:-

1. LR. TETU/UNJIRU/780 (measuring 0.12 ha)

2 LR. TETU/UNJIRU/781 (measuring 0.108 ha)

3. LR. TETU/UNJIRU/782 (measuring 0.128 ha)

4. LR. TETU/UNJIRU/783 (measuring 0.52 ha)

5. LR. TETU/UNJIRU/784 (measuring 0.44 ha)

6. LR. TETU/UNJIRU/785 (measuring 0.4 ha)

7. 68 shares at East African Breweries Ltd (Kenya Breweries Ltd)

8. A savings account at the Kenya Commercial Bank Ltd, Nyeri Branch.

From these petitions the survivors of the deceased have been listed and respectively described as follows:-

1. Joseph Muriuki Makara (son)
2. Joseph Ndungu Makara(son)
3. Dorcas Wanjira (wife)
4. Rosemary Wambui (daughter)
5. Charles Maina Mwangi (son)
6. Eustas Ndungu Mwangi
7. Hannah Wangari Makara (wife)
8. Mwangi Makara (son).

Of all these people listed as survivors, only the following people have been listed as surviving the deceased and therefore entitled to a share of his estate in the affidavit in support of the summons for confirmation of grant:-

1. Mwangi Makara,
2. Rosemary Wambui Makara,
3. Mwangi Makara,
4. Charles Maina Mwangi; and
5. Eustus Ndungu Makara.

Other people who have been included in the list of survivors or dependants and who have been provided for but who were not included in either of the petitions in those capacities are:-

1. Moses Maina Makara
2. Mwangi Makara Mucheru
3. Annah Muthoni Ndungu
4. Jane Wambui Muriuki.

Apart from the new entrants in the list of persons beneficially entitled to a share of the deceased's estate, new properties were also introduced in the affidavit in support of the summons for confirmation of grant as comprising the assets of the deceased's estate; these assets are:-

1. Plot No. 622 Suguroi
2. Nyeri Plot Owners Company Shares
3. Plot No. 1755 Matanya
4. Tetu Coffee membership No. 3011
5. Plot No. 12 Kagunduini

In the affidavit of protest, the protestor also introduced new properties which she listed as follows:-

1. Othaya Mahiga/Chinga shares number 1534
2. Cathedral Parish Co-operative Savings & Credit
3. Matanya Shares

Both the protestor and the applicant are in agreement that Kenya Breweries Ltd shares should be given to Eustus Ndungu Mwangi and Nyeri Plot Owners Company should be given to Mwangi Makara. They are also in agreement that **LR. Tetu/Unjiru/780** (which the protestor appears to have erroneously listed as **LR. Tetu/Unjiru/786**) and **LR. Tetu/Unjiru/783** should be given to Charles Mwangi Maina. I will not interfere with their agreement and these properties shall be distributed accordingly.

No evidence was provided to prove the existence of certain properties and therefore it will be futile for this court to distribute them as if they exist; these properties are:-

1. Plot No. 622 Suguroi
2. Nyeri Plot Owners Company Shares
3. Plot No. 1755 Matanya
4. Tetu Coffee membership No. 3011
5. Plot No. 12 Kagunduini
6. Othaya Mahiga/Chinga shares number 1534
7. Cathedral Parish Co-operative Savings & Credit

The protestor produced copies of receipts purportedly being evidence of payment for Plot No. 622 Suguroi; I have considered those documents and in my humble opinion there is nothing in them that demonstrates the existence of this particular land or its proprietorship.

I am minded that under the proviso to **section 71(2)** of the Law of Succession Act, the court must be certain not only of the persons beneficially entitled to a share of the deceased's estate but it must also be certain that such estate exists and is available for distribution. It follows that the only assets that have been ascertained to exist and which are therefore available for distribution are those that were listed in the respective petitions or affidavits in support of those petitions.

Of the properties that are available for distribution, the contestants have agreed that **LR. Tetu/Unjiru/780 and LR. Tetu/Unjiru/783** will be given to Charles Mwangi Maina while the shares at Kenya Breweries Limited will be transferred to Eustus Mwangi Ndungu. With this agreement, the properties which this court has to share out amongst the persons beneficially entitled to the deceased's estate therefore are:-

- 1. LR. TETU/UNJIRU/781 (measuring 0.108 ha)**
- 2. LR. TETU/UNJIRU/782 (measuring 0.128 ha)**
- 3. LR. TETU/UNJIRU/784 (measuring 0.44 ha)**
- 4. LR. TETU/UNJIRU/785 (measuring 0.4 ha)**
- 5. A savings account at the Kenya Commercial Bank Ltd, Nyeri Branch.**

At the hearing counsel for the respective parties informed the court that of these properties only the properties listed as items (2) and (4) were in dispute and thereby implying that they were in agreement

with the proposed distribution of the rest of the properties. There is no evidence, however, of such an agreement, at least from the affidavits filed by the respective parties. As noted, it is the applicant's position that **LR. TETU/UNJIRU/781** and **LR. TETU/UNJIRU/784** should both be transferred to Jane Wambui Muriuki while it is the protestor's position that the two parcels should be shared equally between Samuel Maina Muriuki and Jane Wambui Muriuki.

None of the parties proposed as to who should benefit from the proceeds, if any, in the saving bank account at Kenya Commercial Bank. It may be that there are no funds in this account and perhaps it is for this reason that none of the parties is interested in it.

Having identified the net assets comprising the deceased's estate and thus available for distribution, the next task is the identification of the persons beneficially entitled to that estate.

It is a common ground that the deceased had three houses and that the contestants are from the second house; the applicant was born in that house together with the protestor's husband. Apart from their evidence and that of Stephen Muriithi Wanjohi who testified for the protestor, nothing was heard of the rest of the deceased's survivors. Curiously, although this witness introduced himself as one of the sons of the deceased, he was not listed as such in either of the petitions or in the summons for confirmation of grant.

As noted, the persons who were listed in the petitions as surviving the deceased were:-

- 1) Joseph Muriuki Makara (son)-3rd house
- 2) Joseph Ndungu Makara (son)-2nd house
- 3) Dorcas Wanjira (wife)-2nd house
- 4) Rosemary Wambui (daughter)-2nd house
- 5) Charles Maina Mwangi (son)
- 6) Eustas Ndungu Mwangi
- 7) Hannah Wangari Makara (wife)-1st house
- 8) Mwangi Makara (son)-1st house

It is apparent from the petitions that with the exception of Eustas Ndungu Mwangi whose relationship to the deceased was not given, the persons listed in those petitions as surviving the deceased were either his children or wives. While it came out clearly that Joseph Ndungu Makara died while this cause was pending, it was not so clear whether the deceased's wives were alive at the time of hearing of. Besides the applicant and the protestor who hailed from the second house, and the wives who must have been from different houses, it was also not so clear from which of the houses the rest of the survivors hailed.

If it is agreed that the deceased's survivors and persons beneficially entitled to his estate are in a polygamous family set up, then his estate can only be distributed pursuant to **section 40** of the **Law of succession Act** which requires such estate to be divided amongst the houses according to the number of children in each house with the wife in each house as additional unit. That section provides:-

40. Where intestate was polygamous

(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.

When I retreated to write this judgment, I noted the gaps relating the particulars of the survivors or persons beneficially entitled to the deceased's estate. I therefore caused this matter to be mentioned in court and issued further directions the compliance of which I thought would assist this court make a final and conclusive determination of this matter for completeness of record. In particular, I directed the parties to file, *inter alia*, the list of the deceased's children specifying the specific houses in which they were born; the surviving wife or wives of the deceased; and evidence of the existence of certain properties alleged to belong to the deceased but whose particulars were not provided at the hearing.

Parties filed separate lists purporting to comply with the directions of this court; however, except for the list of the children from the third house on which they appear to agree, the lists revealed nothing more than the information already on record. In any event, I found these lists to be little evidential value as they were filed as bare lists and not as affidavits; one of them was in fact filed as a letter addressed to the Deputy Registrar.

Be that as it may, this court has to resolve the dispute between parties, one way or the other, and I will proceed to do just that based on the evidence on record and on the applicable law to which I have made reference. Apart from the properties referred to as **LR. Tetu/Unjiru/780** and **LR. Tetu/Unjiru/783** which the parties are in agreement should be given to **Charles Mwangi Maina** representing the first house and the shares at Kenya Breweries Limited which should be transferred to **Eustus Mwangi Ndungu**, I order that the rest of the estate be shared equally between the second and the third houses; in the absence of any evidence regarding the status of the second wife, the applicant Rosemary Wambui Makara and the respondent Ann Muthoni Ndungu shall represent the second house and share equally the share of the estate allocated to that house. Similarly, in the absence of evidence regarding the deceased's third widow, the third house's share shall be transferred in the name of Moses Maina Makara who shall hold it in trust for himself and for the benefit of deceased's children in the third house. For avoidance of doubt the deceased's net intestate estate shall be transmitted as follows: -

1. LR. Tetu/Unjiru/780

2. LR. Tetu/Unjiru/783

Shall be transferred in the names of **Charles Mwangi Maina** absolutely.

3. LR. TETU/UNJIRU/781 (measuring 0.108 ha)

4. LR. TETU/UNJIRU/782 (measuring 0.128 ha)

5. LR. TETU/UNJIRU/784 (measuring 0.44 ha)

6. LR. TETU/UNJIRU/785 (measuring 0.4 ha)

Each of these properties shall be shared equally between Rosemary Wambui Makara and Ann Muthoni Ndungu on the one hand and Moses Maina Makara on the other hand. Each of the shares due to Rosemary Wambui Makara and Ann Muthoni Ndungu shall be registered in their names as proprietors in common. The third house's share be registered in the name of Moses Maina Makara trust for himself and for the benefit of the deceased's children in the third houses:

7. A savings account at the Kenya Commercial Bank Ltd, Nyeri Branch.

Any funds in this account shall be shared equally between Rosemary Wambui Makara and Ann Muthoni Ndungu on the one hand and Moses Maina Makara on the other hand. Moses Maina Makara shall hold

the third house's share in trust for himself and for the benefit of the deceased's children from the third house.

8. Shares at Kenya Breweries Limited shall be transferred to **Eustus Mwangi Ndungu**

The grant made on 16th May, 2008 in the joint names of Charles Maina Mwangi, Rosemary Wambui Makara and Ann Muthoni Ndungu shall be confirmed accordingly.

Considering that this has been a long-drawn family dispute, there shall be no order as to costs. It is so ordered

Dated, signed and delivered in open court this 30th January, 2017

Ngaah Jairus

JUDGE