



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

SUCCESSION CAUSE NO.50 OF 2012

IN THE MATTER OF THE ESTATE OF GEORGE CHUMO MIBEI alias GEORGE CHUMO A. MIBEI alias GEORGE CHUMO A. MIBEI (DECEASED)

WESLEY KIPNGETICH KIGEN.....1ST PETITIONER/APPLICANT

VS

ANDREW MIBEI.....2ND PETITIONER/PROTESTOR

RULING

1. These proceedings relate to the estate of the late George Chumo Mibei alias George Chumo A. Mibei alias George Chumo A. Mibey who died intestate on 5th May 2011. The deceased, who was polygamous, was survived by his second wife. His first wife, Sofia Mibei (deceased), had the following children:

- i. John Chumo**
- ii. Elizabeth Sigilai**
- iii. Esther Rono**
- iv. Joseph Chumo (deceased)**
- v. Mary Sang (deceased)**
- vi. Ruth Mibei (deceased)**
- vii. Alice Walei**
- viii. Paul Chumo**
- ix. Grace Kurgat**
- x. David Chumo**
- xi. Joel Chumo (deceased)**
- xii. Rebecca Langat**
- xiii. Stanley Langat (deceased)**

2. His 2nd wife and widow, Grace Mibei, had the following children:

- i. Ann Cherotich (deceased)**
- ii. Richard Langat (deceased)**

iii. Nancy Chepkurui

iv. Alice Chepkemoi

v. Andrew Mibei

vi. Philip Langat

vii. Zeddy Chepkoech

3. An application for grant of letters of administration intestate to the estate of the deceased was made on 13th April 2012 by Stanley Cheruiyot Langat (now deceased) and Andrew Mibei. In form P&A 5 dated 13th April 2012, the petitioners set out the beneficiaries of the estate as set out above. They indicated the assets of the deceased as comprising the following:

i. Kericho/Kipkelion/Chepseon Block II (Sitian)/2

ii. Kericho/Londiani/Joubert/Kedowa Block 12 (Cheseliot) 79

iii. Kericho/Londiani/Joubert/Kedowa Block II (Kimasian) 349

iv. Kericho/Londiani/Joubert/Kedowa Block 12 (Cheseliot)/92

v. Tractor MF/35 Reg No. KLJ004

vi. Datsun Registration No. KAG 323 G

vii. Plot Unsurveyed Light Industry Plot No 47 (Londiani)

viii. Livestock one hundred head of livestock

ix. Toyota 1000 Registration No. KSD 431G

x. Bank Money (National Bank –Nakuru Branch)

4. The total estimated value of the estate was Kshs 205,000,000, and the petitioners indicated that the estate had no liabilities.

5. Letters of administration intestate were duly issued to the petitioners, **Stanley Cheruiyot Langat** and **Andrew Mibei**, on 11th March 2013. The application by the two administrators was made pursuant to a consent order recorded before Gacheche J (as she then was) in Citation Cause No. 20 of 2011.

6. It would appear that there was no harmony in the home, however, despite the consent. Barely a month later, by an application dated 11th April 2013, Andrew Mibei, the 2nd administrator of the estate, sought an order against his then co-administrator, Stanley Cheruiyot Langat, (who died on 16th March 2017) his servants or agents to restrain them from dealing, taking possession, interfering with or otherwise intermeddling with the estate of the deceased pending the confirmation of the grant. Orders to this effect were issued on 22nd May 2013.

7. Thereafter, by an application dated 19th September 2013, the 1st petitioner, Stanley Cheruiyot Langat, applied for confirmation of grant of letters of administration intestate. In his affidavit sworn in support of the application, he proposed that the property comprising the estate of the deceased should be distributed among the beneficiaries of the estate in the manner set out below.

Kericho Kipkelion/Chepseon Block 11 (Sitian)/2 measuring 151.6 ha (Hereafter also referred to as the Sitian land)

8. With respect to this property, he proposed that each of the beneficiaries of the 1st house should get 10.8 ha. These beneficiaries were identified as John Chumo, Paul Chumo, David Chumo, Stanley Cheruiyot Langat, Pauline Chepchumba Irongi and Wesley Kipngetch Kigen. The beneficiaries of the second house, according to the 1st petitioner, should each get 12.6 ha. The 1st petitioner identified these beneficiaries as Grace Mibei, Nancy Chepkurui, Naomi Langat, Andrew Mibei and Philip Langat. He also proposed that Grace Mibei should hold a further 12.6 ha in trust for V C. It appears that V C is a minor granddaughter of the deceased. The record does not indicate who her mother or father is, though from the omission of Zeddy Mibei, she may be her daughter.

Kericho/Londiani/Joubert/Kedowa Block 12 (Cheseliot)/79 measuring 3.47 ha (Hereafter also referred to as the Cheseliot land)

9. The 1st petitioner proposed that each of the beneficiaries of the 1st house namely John Chumo, Paul Chumo, David Chumo Stanley Cheruiyot Langat, Pauline Chepchumba Irongi and Wesley Kipngetch Kigen should receive 0.24 ha out of this property. With respect to the 2nd house comprising Grace Mibei, Nancy Chepkurui, Naomi Langat, Andrew Mibei and Philip Langat, his proposal was that each should receive 0.29 ha out of this property. Grace Mibei would also receive a further 0.29 ha to hold in trust for V C.

Kericho/Londiani/Joubert/Kedowa Block 11/Kimasian/349 measuring 2.68 ha (Hereafter also referred to as the Kimasian land)

10. The proposal by the 1st petitioner was that the beneficiaries of the 1st house should each receive 0.191 ha from this property, while those from the 2nd house would receive 0.223 ha. Grace Mibei would hold a further 0.223 ha in trust for V C.

11. The last property, **Kericho/Londiani Joubert/Kedowa Block 12/Cheseliot/92 comprising 1.640 ha** would be shared in the same manner as **Kericho/Londiani/Joubert/ Kedowa Block 11/Kimasian/ 349**. Each of the beneficiaries from the 1st house would receive 0.191 ha, while the beneficiaries from the 2nd hose would receive 0.223 ha. Grace Mibei would hold a further 0.223 ha in trust for V C.

12. With respect to the other properties, the 1st petitioner proposed that the properties set out hereunder should be sold and the proceeds be distributed equally between the beneficiaries, while the funds in the bank accounts should also be distributed equally between the beneficiaries. The properties are:

i. Unsurveyed Plot No 47 Londiani

ii. Tractor No. KLJ 004

iii. Datsun Registration No. KAG 323G

iv. Money National Bank

v. Livestock 100 heads

13. By an affidavit of protest sworn on 11th November 2013, the 2nd petitioner/administrator, Andrew Mibei, protested at the mode of distribution set out in the affidavit of Stanley Cheruiyot Langat. He alleged that as an administrator of the estate, he had not agreed to the proposed mode of distribution, that the proposed distribution is not equitable as it seeks to favour the 1st house, and that it does not take into account the last wishes of the deceased.

14. In his affidavit in reply to the protest sworn on 18th November 2013, the 1st petitioner averred that he had approached his co-administrator with a draft of the proposed mode of distribution but had received no comments or amendments. He had therefore presumed that the proposed mode was acceptable. It was also his averment that the mode of distribution that he had proposed was equitable and would see both houses share the estate equally in line with customs and the law of succession.

15. In his replying affidavit sworn on 29th January 2014, the protestor alleges that the property title number Kericho Kipkelion/Chepseon Block 11 (Sitian)/2 measuring approximately 151.6 ha was purchased through the financial input of the 2nd wife, Grace Mibei. He alleges further that the children of the 2nd house have made a direct financial contribution towards repayment of the loan on the said property while the children of the 1st house made no such contribution. It is also the position of the 2nd petitioner that the deceased had, during his lifetime, distributed his land among his beneficiaries. Title number Kericho Kipkelion/Chepseon Block 11 (Sitian)/2 had been left for Grace Mibei to hold in trust for her children, while the children of the 1st house were to share the remaining property. He annexed to his affidavit copies of documents and drawings which he alleged showed the distribution of portions of land by the deceased to his beneficiaries.

16. The protestor further argues that some of the assets listed as belonging to the estate of the deceased and available for distribution do not belong to the estate. He contends that motor vehicle registration number KAG 323G has never been part of the estate since it belongs to him. Further, that the cows which had been estimated to be 100 in number do not exist, and that the estate has only 8 cows and 7 calves. As for the tractor Registration Number KLJ 004, his contention is that it is co-owned by the deceased and his son, Richard Langat (also deceased).

17. Finally, the protestor contends that two of the persons named by the 1st petitioner as beneficiaries of the estate, namely Wesley Kigen and Cherotich Eunice have never been beneficiaries of the deceased.

18. Another affidavit of protest against confirmation of the grant was filed. It also raises the issue of the right beneficiaries of the estate. This affidavit was sworn on 15th March 2017 by one Geoffrey Langat. In the said affidavit, he alleges that he and his siblings are entitled to a share in the estate of the deceased as they are children of Ann Cherotich Mibei, the 1st born daughter of the second house, who is now deceased. He further avers that he and his siblings are at risk of eviction by their uncle, the 2nd petitioner, who has been harassing him and his siblings. While Geoffrey Langat did not appear at the hearing of this matter or file submissions, I will consider the issue he raises in the course of this judgment.

Procedural History

19. This matter has been pending before the court for a number of years. The parties had initially taken directions before Serгон J on 4th July 2014 to proceed with the matter by way of oral evidence. The matter did not, however, proceed to hearing due to the absence of counsel for the parties or their witnesses. It eventually started before me on 23rd September 2016 when the evidence of the 2nd petitioner/protestor, Mr. Andrew Kipkurui Mibei, was taken. The matter was then adjourned for further hearing on 23rd January 2017.

20. On that date, however, Counsel for the 2nd petitioner/protestor was unavailable on grounds of indisposition, though the protestor was present in court. The matter was therefore adjourned to the 23rd of March 2017 for further hearing.

21. When the matter came up for hearing on 23rd March 2017, the parties indicated to the court that they had resolved to adopt the affidavits and witness statements filed in court in support of the respective cases of the parties, and to file written submissions in view of the length of time that the matter had taken to be heard. Counsel for the 1st petitioner also indicated that his client, Stanley Cheruiyot Langat, had died, and it was necessary to substitute him with one Rebecca Langat. This was duly done and directions given for the filing of written submissions.

22. By an affidavit sworn on 27th April 2017, Counsel for the 1st petitioner indicated that Rebecca Langat had declined the appointment as administrator. He therefore sought the appointment of **Wesley Kipngetch Kigen** as administrator in place of Rebecca Langat.

23. This judgment is based on the affidavits of the parties in support of their respective modes of distribution which I have set out above, the witness statements and the written submissions of the parties. The 1st petitioner shall be Wesley Kipngetch Kigen, who was substituted to replace Stanley Cheruiyot Langat (deceased).

The Submissions

24. The position taken by the protestor as is evident from his averments, witness statements and submissions is that the deceased had expressed his wishes and distributed his estate prior to his demise. Consequently, the estate of the deceased should be distributed as the protestor had proposed.

25. The position of the 1st petitioner in the submissions dated 19th November 2013 is that the deceased had not left behind any will. His estate should therefore be distributed equally between the beneficiaries.

Issues for Determination

26. From the pleadings and submissions of the parties, four issues emerge for determination:

- 1. What was the net intestate estate of the deceased?**
- 2. Who are the rightful beneficiaries of the deceased?**
- 3. Had the deceased distributed his estate prior to his demise?**
- 4. What should be the mode of distribution of the deceased's estate?**

The net intestate estate of the deceased

27. In form P&A5 filed by the petitioners in their application for letters of administration intestate, the petitioners listed the following as the assets of the deceased:

- i. Kericho/Kipkelion/Chepseon Block II (Sitian)/2**
- ii. Kericho/Londiani/Joubert/Kedowa Block 12 (Cheseliot) 79**
- iii. Kericho/Londiani/Joubert/Kedowa Block II (Kimasian) 349**
- iv. Kericho/Londiani/Joubert/Kedowa Block 12 (Cheseliot)/92**
- v. Tractor MF/35 Reg No. KLJ004**
- vi. Datsun Registration No. KAG 323 G**
- vii. Plot Unsurveyed Light Industry Plot No 47 (Londiani)**
- viii. Livestock One Hundred heads of Livestock**
- ix. Toyota 1000 Registration No. KSD 431G**
- x. Bank Money (National Bank –Nakuru Branch)**

28. The application was signed by both the protestor and the 1st petitioner, now deceased, confirming that it was a true inventory of the assets of the deceased. In his affidavit of protest to the distribution in the application for confirmation of grant, the protestor does not also dispute that the list constituted a true inventory of the assets of the deceased. However, in his replying affidavit sworn on 29th January 2014, the protestor disputes the inclusion of several properties as forming part of the estate of the deceased.

29. He contends, first, that motor vehicle registration number KAG 323G does not form part of the estate of the deceased. His contention is that he bought the said motor vehicle from one Maurice Otunga. He has produced a copy of a log book in support of his contention. A few

observations can be made with respect to the protestor's contention with regard to the motor vehicle. First, that it is curious that the protestor contests the deceased's ownership of this motor vehicle two years after he appended his signature to a document, on oath, that states that the motor vehicle belonged to the deceased.

30. Secondly, that there is nothing in the log book to show that the vehicle belongs to the protestor. Finally, that the logbook still bears the name of the original owner. Whether it ever belonged to the deceased is unclear, and to that extent, cannot be considered part of the estate of the deceased.

31. On the evidence produced by the protestor, however, it does not belong to him either. Given the observations above, it is more likely that it comprised part of the estate as a vehicle acquired by the deceased but had not been transferred to the deceased. However, the court cannot, on the material before it, consider it part of the estate of the deceased.

32. The protestor also contends in his affidavit sworn on 29th January 2014 that the tractor registration number KLJ 004 was co-owned between the deceased and one of his late sons, Richard Langat. Again, it is curious that the protestor chooses to make this argument at this stage, considering that he had signed documents in which the tractor was identified as one of the assets of the estate of the deceased. The protestor has not produced any evidence in support of his claim. However, given the fact that he had not raised this issue earlier on, and the alleged owners are deceased, it is not possible for the court to give credence to his contention at this stage in time. Consequently, the court will take the contents of form P&A 5, signed by both the protestor and his co-petitioner, as evidencing the most truthful inventory of the assets of the deceased. Accordingly, the said tractor shall be considered part of the estate of the deceased.

33. For the same reason, the contention of the protestor that the estate did not have a hundred head of cattle cannot be given credence. The protestor and his co-petitioner had listed 100 cows among the assets of the deceased in form P&A 5. He then avers in his affidavit sworn on 29th January 2014 that there were now only 8 cows and seven calves, a total of 15 cows. He does not state what happened to the other 92, if one assumes that the 7 calves had not been included in the 100 cows in the inventory in form P&A 5. At any rate, it seems more likely than not that there were indeed 100 cows among the assets of the deceased, and the protestor is under a duty to account to the other beneficiaries of the estate for them.

34. In conclusion, it is my finding that the assets of the estate of the deceased are as follows:

- i. Kericho/Kipkelion/Chepseon Block II (Sitian)/2**
- ii. Kericho/Londiani/Joubert/Kedowa Block 12 (Cheseliot) 79**
- iii. Kericho/Londiani/Joubert/Kedowa Block II (Kimasian) 349**
- iv. Kericho/Londiani/Joubert/Kedowa Block 12 (Cheseliot)/92**
- v. Tractor MF/35 Reg No. KLJ 004**
- vi. Unsurveyed light industry plot no 47 (Londiani)**
- vii. Toyota 1000 Reg. No. KSD 431 G**
- viii. Livestock 100 head of livestock**
- ix. Funds in National Bank –Nakuru Branch)**

The Rightful Beneficiaries of the Deceased

35. The protestor has challenged the inclusion of two persons among the beneficiaries of the deceased. In his affidavit sworn on 29th January 2014, Mr. Andrew Mibei opposes the inclusion of Wesley Kipngetch Kigen and Eunice Cherotich in the summons for confirmation of grant as beneficiaries of the estate. He avers that they are grandchildren of the deceased and have never been his dependants. A second protest dated 15th March 2017 by one Geoffrey Langat also raises the question of inclusion of grandchildren of the deceased as beneficiaries of the estate. The protestor in this latter case states that he is a grandson of the deceased by virtue of being the son of one of his deceased daughters, Anne Cherotich Mibei, a sister of the protestor, who predeceased the deceased. He states that he and his siblings have not been included in the summons for confirmation of grant and they are in danger of being evicted by their uncle, the protestor.

36. In his response to the protest and the argument by the protestor against the inclusion of the grandchildren of the deceased, the 1st petitioner (Stanley Cheruiyot Langat, now deceased) stated that inclusion of the grandchildren of the deceased does not prejudice the distribution of the estate as their names are included in place of their deceased parents who were children of the deceased and were therefore entitled to a share of the estate.

37. I believe that there ought to be no dispute about the entitlement of grandchildren of a deceased person to inherit their parent's share of the estate of their grandparents, should their own parents, children of the deceased, be deceased also. This is clearly contemplated under section 41 of the Law of Succession Act, which provides as follows:

Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children

of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate. (Emphasis added)

38. In addition, judicial decisions have been clear that a grandchild may in certain circumstances inherit directly from a grandparent. In his decision in **Estate of Veronica Njoki Wakagoto (deceased) [2013] eKLR** Musyoka J considered the circumstances under which grandchildren would be permitted to inherit directly from their deceased grandparents and stated as follows:-

“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents. In this case, the applicant’s mother survived the deceased.” (Emphasis added).

39. Musyoka J similarly observed in **Succession Cause No. 399 of 2007- Estate of John Musambayi Katumanga – (Deceased)** that a grandchild of the deceased was not entitled to inherit from the estate of the deceased so long as their own parents, the children of the deceased, are alive and themselves taking a share in the estate.

40. In the present case, there is no dispute that **Eunice Cherotich** and **Wesley Kipnetich Kigen** are grandchildren of the deceased, and that their parents are deceased. They are therefore entitled to inherit directly the share that would have been inherited by their deceased’s parents. **Wesley Kipnetich Kigen** is a son of **Ruth Cherotich Mibei**, a daughter of the deceased from the 1st house. He is therefore entitled to represent his mother on behalf of his siblings. **Eunice Cherotich** is a daughter of **Joseph Chumo**, a son of the deceased who is himself deceased.

41. From the affidavit of protest sworn on 15th March 2017 by **Geoffrey Langat**, it is obvious that he too is a grandchild of the deceased. He and his siblings are the children of the deceased’s daughter, **Ann Cherotich Mibei**, who is deceased. He and his siblings are therefore entitled to inherit directly their mother’s share of the deceased’s estate-see the decision in **Succession Cause No. 273 of 2008 - In the Matter of The Estate Of Onyiego Ogwora (Deceased)** and **Estate of Veronica Njoki Wakagoto (Deceased) (supra)**.

42. Geoffrey Langat and his siblings had not been included in the summons for confirmation of grant filed in this matter. It is the finding of this court that they ought to have been, as grandchildren of the deceased whose parents, children of the deceased, have passed away, and must be considered in the distribution of the deceased’s estate.

Whether deceased had distributed his estate

43. The crux of the protestor’s case is that the deceased had distributed his estate during his lifetime. Associated with this contention is that the bulk of the deceased’s estate, parcel number **Kericho/Kipkelion/Chepseon Block II (Sitian)/2** measuring approximately 151.6 ha (approximately 374.6 acres) was purchased by the deceased on a loan repayment of which was contributed to by the 2nd wife and her children, and was therefore left to her and her children (or, more precisely as argued by the protestor and his mother, it was left to her three sons). He states that the deceased left to the family of the 1st wife three parcels, namely **Kericho/Londiani/Joubert/Kedowa Block 12 (Cheseliot) 79**, **Kericho/Londiani/Joubert/Kedowa Block II (Kimasian) 349** and **Kericho/Londiani/Joubert/Kedowa Block 12 (Cheseliot)/92** which measure 3.47 ha (8.57 acres) 2.68 ha. (6.6 acres) and 1.640 ha (4.05 acres) respectively. I consider, first, the evidence before the court in support of this position.

44. The protestor testified before the court on 23rd September 2016. In his oral testimony, the protestor, **Andrew Kipkurui Mibei**, told the court that when the deceased was alive he had settled the protestor and his two brothers on the land at Sitian, while he allocated the land at Kimasian to Stanley Langat and Joel Chumo. The land at Cheseliot had been allocated to John Chumo and Paul Chumo. According to the protestor, this had been the case for a number of years.

45. While conceding that the deceased had not left a will, the protestor alleged that they had found some documents which showed the distribution of the estate. It was also his testimony that it was not possible to realise the mode of distribution proposed by his co-administrator as the land had been allocated and some of the beneficiaries have already sold the portions allocated when the deceased was alive, that there are permanent structures on the land and each has built a house, while others were carrying on zero grazing or leased the land. The protestor also reiterated the contents of his affidavit sworn on 29th January 2014 with respect to one motor vehicle and the cows that had been included in the application of grant.

46. In cross-examination, Mr. Mibei stated that the deceased used to live with his two wives in Kabianga before he sold the land and bought the land in Londiani. He confirmed that the first house had 13 children and the second 7 children. He denied that he was discriminating against the first house.

47. The protestor also confirmed that the land in Sitian, **Kericho/Kipkelion/Chepseon Block 2 (Sitian No. 2)** is 151.6 acres and he occupies it with his brother, Phillip Langat, and the family of his other brother, Richard Langat, who is deceased, all from the 2nd house. He stated that they occupy the 375 acres, and confirmed that the land is still in the name of the deceased.

48. The protestor further confirmed that **Kericho/Londiani/Jourbet/Kedowa Block 12 Cheseliot No. 79** is 3.47 ha and is occupied by Paul Chumo, John Chumo and David Chumo, sons of the 1st house. It is also in the name of the deceased.

49. **Kericho Londiani/Jourbet/Kedowa Kimasian/349**, comprising 2.68 hectares, approximately 7 acres, was occupied by Stanley Langat

and Joel Chumo, sons of the deceased from the 1st house. Finally, it was his evidence in cross-examination that **Kericho/Londiani/Jourbet/92** which measures 1.46 ha, (though the certificate of official search indicates that it is 1.640 ha.) is occupied by one of the sons of the 1st house. Altogether, according to the protestor, all the children of the deceased from his 1st house occupy about 15 acres, while he and his brother and the family of his deceased brother occupy 375 acres.

50. As indicated earlier, the parties later agreed to adopt all the witness statements on record and not to give oral evidence. The evidence in support of the protestor's case was set out in the witness statements of 6 other persons. The evidence of his mother, the deceased's second wife, Grace Mibei, and a clansman of the deceased, one Samuel Cheriro, was similar. It is to the effect that the Sitian land was bought from the proceeds of sale of land in Kabianga on which the deceased had settled with his first wife, and where he lived for a time with both wives after his marriage to the second wife. He had also obtained a loan from Agricultural Finance Corporation (AFC). Later the deceased got a loan from National Bank to repay the loan to AFC. The collateral for this loan was a parcel of land which belonged to the 2nd wife's brother (according to Cheriro) or cousin (according to Grace Mibei.)

51. These witnesses also claimed that shortly before he died, the deceased had given all his children their share of land and none of them should move from their portions. According to Grace Mibei, her co-wife's sons were allocated the Kimasian land and Cheseliot farms while her sons were allocated the Sitian farm in three equal portions.

52. The protestor also relies on a statement ostensibly from Esther Rono, a sister of the 1st petitioner and a daughter of the 1st wife. Her statement echoes that of the protestor. She states that she is a sister of the 1st petitioner, Stanley Langat, and supports the position taken by the protestor. The court notes, however that the statement alleged to be hers has a name obliterated with white-out and her name inserted by hand. Since she was not called to testify, there is some doubt whether that was indeed her statement.

53. Joseph Tanui, another witness for the protestor, states that he was informed by the deceased that he had divided his land in Sitian between his 3 sons from the 2nd wife. James Kipkorir Meribo, who also filed a statement in support of the protestor's case, stated that he had been the secretary of a clan meeting held in the 1980s at which the deceased had stated that he did not wish to see the children of the 1st wife at the Sitian farm. Meribo was a cousin and friend of the deceased.

54. Finally, Joel Kipkorir Koske, a cousin of Grace Mibei, echoed the statement by Grace Mibei and Samuel Cheriro that the deceased had borrowed money to repay a loan to AFC. The loan was borrowed in the 1970s, on the security of land owned by Joel Kipkorir Koske's mother and two stepmothers. The amount borrowed, according to Koske, was Kshs 30,000. No documents were presented before the court to support the contention that there were indeed loans taken to purchase or repay loans due on the Sitian land.

55. In response, the 1st petitioner, Stanley Cheruiyot Langat, filed his own statement and three other witness statements. One was by Samson Siele Mutai, another by Tapsabei Chesiele Kapketwony, a sister of the deceased, and a third by Matthias Kimutai Ngeno. The gist of these statements is that the clan to which the deceased belonged had agreed that the estate of the deceased be divided equally among the two houses and the children of the deceased. I note from the record that on 17th February 2014, Sergon J. had referred the dispute in this matter to the Chief, Kimugul Location and the clan elders from Kabecherek clan. In the end, the protestor rejected the decision of the clan and the court directed that the matter should proceed to hearing.

56. The question is whether the court is satisfied that the deceased had distributed his property in his lifetime. I note from the evidence of the protestor and his witnesses that they take two positions on the Sitian land. The first is that the deceased had distributed the properties he owned, while the second is that only the house of the 2nd wife is entitled to the Sitian land as it was purchased or a loan in respect thereof repaid with the assistance or contribution of the 2nd wife, Grace Mibei. These are two vastly different arguments, and I will consider them separately.

57. The argument from the protestor is that the Sitian property was purchased with funds from the sale of a property in Kabianga where the deceased used to live with his two families; that later a loan was taken from AFC that was repaid with the assistance of the second house; and that later the deceased borrowed a loan from AFC which was repaid with a loan from National Bank whose collateral was a property registered in the names of the mother and step mothers of Grace Mibei's cousin. One would expect that if this was indeed the case, then there should be documentation to show that indeed there was such a loan, and the manner of its repayment. The court notes from the certificate of official search in respect of the Sitian land that it was registered in the name of the deceased on 5th November 1992 and a title issued on the same date. The witnesses refer to loans taken in the 1970s. On the basis of the evidence before me, I am unable to find that the 2nd wife and her relatives contributed to the purchase of the land. In any event, would such contribution give her three sons the right to inherit the property, to the exclusion of all the other children, including her own daughters?

58. Which brings me to the next question: did the deceased distribute his property during his lifetime, and if he did, should such distribution be taken into account? The protestor annexed several handwritten papers and sketches to his affidavit of protest which, according to the protestor, show the wish of the deceased to share his Sitian farm among the three sons of the 2nd wife.

59. It is the law that if a deceased person had distributed his estate during his lifetime, his wishes should be respected. Section 42 of the Law of Succession Act provides for this. I am guided in this view also by two decisions of the High Court, which are persuasive in nature. In his decision in **Nyeri High Court Succession Cause No. 404 of 2012-In the Matter of the Estate of James Migwi Gakau**, Mativo J noted that the wishes of the deceased, who had distributed his land in his lifetime and fixed clear physical boundaries which none of his beneficiaries had interfered with even after his death, should be respected. Makhandia J (as he then was) in **Paul Kiruhi Nyingi & Another vs Francis Wanjohi Nyingi Nyeri High Court Succession Cause 508 of 1999** also upheld the wishes of the deceased. In that case, the court observed that unless it can be demonstrated that the wishes of the deceased were illegal, unfair or discriminatory to the beneficiaries or some of them, his wishes should be respected.

60. In the present case, I am not satisfied that the deceased did distribute his estate in his lifetime as the protestor alleges. The documents

that the protestor relies on do not assist the court in any manner. They comprise pieces of paper and sketches whose origin and authorship is unknown, and the court only has the protestor's word that they were written by the deceased. Given that they give him and his two brothers the bulk of the deceased's estate, it is difficult to take his word for truth in the circumstances.

61. In any event, suppose the deceased had indeed distributed his estate in the manner that the protestor alleges he had? The deceased had thirteen children by his first wife, and seven by his second. He had an estate comprising in total some 393.39 acres of land. From the averments and oral evidence of the protestor, he had given his three sons from his second house 375 acres, and has given his entire first house some 15 acres.

62. In the **Paul Kiruhi Nyingi** case, the court observed that the wishes of the deceased and the manner in which he had distributed his estate should be respected unless it was shown to be **illegal, unfair or discriminatory** to the beneficiaries or some of them.

63. What is the situation that we have here? The protestor argues that his father gave him and his two brothers a total of 151.6 hectares. If we are to believe the protestor, the deceased did not give his daughters from the second house, some of whom are deceased but have left children, anything at all.

64. From the material before me, the deceased appears to have merely settled his wives and their respective children in various parcels of land. The second wife and her children occupied property title number Kericho Kipkelion/Chepseon Block 11 (Sitian)/ 2 which from the official search measures approximately 151.6 hectares. The 1st wife and her children were left on three parcels of land, namely Kericho/Londiani/Joubert/Kedowa Block 12 (Cheseliot) 79 measuring 2.68 hectares, Kericho/Londiani/Joubert/Kedowa Block II (Kimasian) 349 measuring 3.47 hectares, and Kericho/Londiani/Joubert/Kedowa Block 12 (Cheseliot)/92 measuring 1.640 hectares. The first wife, Sofia Mibei had, according to the protestor in his affidavit sworn on 29th January 2014, protested to the deceased about the unfair manner in which the deceased had allocated land to the two houses. According to the protestor, the deceased stated that she and her children had no claim over the said land, and she never raised the issue again until her death.

65. While this may, to the protestor, signify that she accepted the decision of the deceased, assuming that was the case, it signifies more the unequal relations, and the fact that a married woman of her generation was unlikely to challenge her spouse, however unfair he was.

66. What the protestor wants the court to accept is a purported mode of distribution in which the total acreage for the deceased's first house should be a paltry 8 hectares or less, while he and his two brothers have a total of 151.6 hectares to themselves. It is also telling that from the arguments by the protestor, the deceased did not give his daughters from the first house anything whatsoever, even though some, like their sisters from the second house, are deceased and have left issues, grandchildren of the deceased, who are entitled under the law to inherit their parents' shares of the deceased's estate.

67. The deceased died in 2011. Consequently, his estate is governed by the Law of Succession Act. His actions are also subject to the Constitution, which at Article 27 prohibits all forms of discrimination on any basis. Even had he written a formal, valid will, he could not have properly discriminated against his children in the manner suggested by the protestor. Further, even were the court to find that he had indeed distributed his estate, which I have found not to be the case, the manner of distribution that the protestor alleges had taken place would be unfair and discriminatory. It would not be allowed to stand.

68. Accordingly, it is my finding that the deceased died intestate. He had not distributed his estate in his lifetime.

Distribution of the Estate of the Deceased

69. The Law of Succession Act sets out the manner in which the estate of a person who was polygamous and died intestate should be distributed. It provides at section 40 as follows:

(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. (Emphasis mine)

(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."

70. In **Estate of John Musambayi Katumanga (Deceased) [2014] eKLR**, Musyoka J considered the application of section 40 and stated as follows:

"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."

71. Section 38 provides that:

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving

children.

72. The protestor opposed the mode of distribution set out in the application for confirmation of grant by his co-petitioner on the basis that it would be an affront to justice and would go against the wishes of the deceased. I have already dealt with the issue of the alleged wishes of the deceased, and why, even had such wishes been in place, they would have been unfair and discriminatory, and therefore unacceptable. The 1st petitioner had proposed equal distribution of the estate of the deceased, which in my view is in accordance with section 38 and 40 of the Law of Succession Act.

73. The effect of this section is that the court should consider the children of the first house and the surviving widow of the second house and her children. The first house had thirteen (13) children, some of whom are deceased but, in accordance with section 41 of the Law of Succession Act, their issue are entitled to their share. The first house therefore has 13 units. The second house had 7 children, some of whom are also deceased. Together with their mother, Grace Mibei, they make up 8 units as contemplated under section 40 of the Law of Succession Act.

74. The estate of the deceased is therefore to be distributed among 21 units as provided under section 40. As the first house comprises only the children of the deceased, they shall take their share directly. The widow of the deceased shall have a life interest in the share of the estate to which the second house is entitled. Upon her demise and the cessation of the life interest, the share of the second house shall be divided equally between the children of the second house. For the avoidance of doubt, the issue of any children of the deceased shall be entitled to what their deceased father or mother was entitled to.

75. The estate of the deceased shall therefore be distributed between the two houses of the deceased in accordance with section 40 of the Law of Succession Act, taking into account the parcels which the children of the first house are occupying, which is in accordance with section 42 of the Law of Succession Act.

Disposition

76. Taking into account the law and the evidence before me, I believe that in order to achieve the equality that the law decrees among the beneficiaries of the estate, the properties comprising the estate shall be distributed or otherwise dealt with in the manner set out below.

77. I will begin with the minor/moveable properties comprised in the estate of the deceased. These properties, which for the sake of clarity are set out below, shall be sold and the proceeds shared equally among the beneficiaries of the estate:

i. Unsurveyed Plot No. 47 Londiani

ii. Toyota 1000 Reg. No. KSD 431 G

iii. Tractor No. KLJ 004

iv. 100 heads of livestock, in respect of which the protestor, Andrew Mibei shall give a full account to the beneficiaries of the estate.

78. The petitioners had indicated that the estate has funds in an account at National Bank, Nakuru Branch. Such funds shall be shared equally among the beneficiaries of the estate.

Distribution of the immovable property

79. The total acreage of the deceased's immovable property is 159.39 ha. In accordance with section 40 of the Law of Succession Act, this is to be divided equally among the 21 units comprising the beneficiaries of the deceased. Out of this total, 1 acre or 0.40 ha is to be excised and transferred to a purchaser, who, according to the protestor, purchased the land from the deceased and is therefore a creditor of the estate, leaving a total of 158.39 ha to be distributed among the 21 units. This works out at 7.54 ha per unit. The first house of the deceased comprises 13 units. Its total entitlement is therefore 98.02 ha. The second house comprises 8 units. Its total entitlement is 60.32 ha. As noted earlier, some of the beneficiaries from the 1st house were already living on various parcels comprising the estate of the deceased. This shall be taken into account in distributing the estate of the deceased. The one (1) acre or 0.40 ha due to the purchaser, one Benjamin Chepkwony Kerembe, shall be excised out of Kericho/Londiani/Joubert/Kedowa Block 12 (Chesliot) 79.

80. The following 3 properties shall remain in the possession of the beneficiaries of the 1st house and this shall be taken into account in distributing the Sitian farm:

i. Kericho/Londiani/Joubert/Kedowa Block 12 (Chesliot) 79-2.68 ha- to be shared equally between Paul Chumo and John Chumo (1.34 ha each).

ii. Kericho/Londiani/Joubert/Kedowa Block II (Kimasian) 34 -3.47 ha- to be shared equally between the heirs of Stanley Langat and Joel Chumo (1.735 ha each)

iii. Kericho/Londiani/Joubert/Kedowa Block 12 (Chesliot) 92 (1.64 ha less 0.40 ha) to be transferred to David Chumo (1.24 ha)

81. The total acreage out of the above three parcels that devolves to the said beneficiaries is therefore 7.39 ha. The five (5) beneficiaries of the first house who occupy the above land parcels, namely John Chumo, Paul Chumo, David Chumo, Joel Chumo and Stanley Langat (or,

where the beneficiary is deceased, his heirs) currently occupy approximately 1.34, 1.735 and 1.24 ha respectively. Given that, from my analysis above, each is entitled to 7.54 ha out of the estate of the deceased, the Sitian land, title no. Kericho/Kipkelion/Chepseon/Block II(Sitian)/2 shall be distributed as follows, taking into account the above shares of the 1st house:

First House

- i. John Chumo 6.2 ha
- ii. Elizabeth Sigilai 7.54 ha
- iii. Esther Rono 7.54 ha
- iv. Eunice Cherotich (in place of Joseph Chumo - deceased) 7.54 ha
- v. Mary Sang (deceased) 7.54 ha (to be shared equally among her children)
- vi. Wesley Kipngetch Kigen- (in place of Ruth Mibei)-7.54 ha (to be shared equally with his siblings)
- vii. Alice Walei 7.54 ha
- viii. Paul Chumo 6.2 ha
- ix. Grace Kurgat 7.54 ha
- x. David Chumo 6.3 ha
- xi. Joel Chumo (deceased) 5.8 ha (to be shared equally among his children)
- xii. Rebecca Langat 7.54 ha
- xiii. Stanley Langat 5.8 ha (to be shared equally amongst his children)

Second House

Grace Mibei shall have a life interest in the 60.32 ha due to the second house. Upon her demise and cessation of her life interest, the property shall be distributed to each of the children of the second house (or their issue, in equal shares, where the child of the deceased is also deceased, that is among the children or grandchildren of the deceased) as follows:

- i. Geoffrey Langat (in place of Ann Cherotich Mibei) 8.61 ha (to share equally with his siblings)
- ii. Nancy Chepkurui 8.61 ha
- iii. Andrew Kipkurui Mibei 8.61 ha
- iv. Richard Langat 8.61 ha (to be distributed to his widow and children)
- v. Philip Langat 8.61 ha
- vi. Alice Chepkemoi 8.61 ha
- vii. Zeddy Mibei-8.61 ha (to be shared equally among her children).

82. As this is a family matter, there shall be no order as to costs.

Dated, Delivered and Signed at Kericho this 30th day of October 2017.

MUMBI NGUGI

JUDGE