



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 38 OF 2007

MICHAEL MUCHOKI NJERU.....APPLICANT

VERSUS

JOHN MACHARIA NJERU.....RESPONDENT

AND

STELLAMARIS NDUNGE MASILA & 6 OTHERS....INTERESTED PARTIES

RULING

1. The deceased in this cause died intestate on 15th August 1975 at Nyahururu. Her estate constituted of the property known as OLJORO OROK SALIENT SCHEME NYANDARUA DISTRICT measuring 2.4 hectares (6.0 acres). She was survived by her children Daniel Mwatha Njeru, John Macharia Njeru, Michael Muchoki Njeru, Zipporah Wangui Njeru, Sarah Muthoni Kariuki and Nyambura Njeru.

2. John Macharia Njeru, the son of the deceased filed a succession cause in the Principal Magistrate's Court in Nyahururu, Nyahururu PMC Succession Cause No. 100 OF 1991, and was issued with the letters of administration intestate on 16th March, 1991 which were confirmed on 29th November, 2000. In that cause, the administrator indicated that he and Daniel Mwatha Njeru were the only survivors of the deceased and the sole property was allocated to the administrator absolutely. Subsequently, the administrator caused the property to be subdivided into various parcels which he then sold to third parties (the interested parties) who are now registered as the owners.

3. The applicant moved court by way of a summons for revocation or annulment of grant dated 25th January, 2007 by which the applicant sought revocation of the grant on the grounds that the proceedings to obtain the grant were defective in substance and that the grant was obtained fraudulently by making of a false statement or by concealment of material facts. The application was allowed by the court on 23rd February, 2012.

4. What is now for consideration are two applications. The first is a summons dated 5th February, 2013 by which the applicant seeks the following orders:

(a) That the applicant be appointed as the administrator of the estate of Wambui Njeru (deceased) in place of the respondent;

(b) That the applicant be issued with a grant of letters of administration intestate and a certificate of confirmation of the grant in terms of paragraph 7 of the supporting affidavit;

(c) That the respondent's registration as proprietor of L.R. No. Nyandarua/Ol'joro Orok Salient 1328 be cancelled and the estate be distributed to the beneficiaries in terms of prayer 2 above;

(d) That the costs of the application be borne by the estate.

5. The second is a further summons filed on 14th April, 2015 which was filed following the subdivision and sale of the suit properties to the interested parties. The applicant sought the following orders:

(a) That the registration of the interested parties as proprietors of Titles No. Nyandarua/Ol'joro'olok salient/23945, 23946, 23947, 23948, 23950, 26401, 26402, 26403, 26404, 26405, 26406, 26407 and 26408 be cancelled together with all the subdivisions of original title No. Nyandarua/Ol'joro'orok Salient/1328

(b) That the costs of this application be provided for

The applicant's case

6. The applicant's prayers were for appointment as the administrator of the estate of the deceased following the revocation of the grant that was issued to the respondent and that the estate be distributed equally to all the beneficiaries who had all agreed to divide it in the manner proposed in the supporting affidavit. In his supplementary affidavit sworn on 26th June, 2014 the applicant refuted the contention that the suit property was purchased by the respondent and that it was the intention of the deceased that the same should be inherited by the respondent solely. He contended that the deceased died intestate and had not bequeathed the property to any of the beneficiaries. That is why the grant was revoked by the court on 23rd February, 2012.

7. He also sought the cancellation of the titles that had been issued to the interested parties. He argued that this amounted to intermeddling with the estate. The transfers by the respondent were made fraudulently and were purely intended to defeat the instant succession proceedings.

8. In his supplementary affidavit dated 27th June, 2014 the applicant refuted the contention that the suit property was purchased by the respondent. He contended that it is the deceased who paid the registration fees and when she resigned her daughter, Sarah Muthoni Kariuki took her place in the company. He argued that there was no evidence that had been adduced by the respondent to show that he paid for the loan taken to purchase the suit land.

9. It was further pointed out that the letter written by the Secretary Manager of Wangambuthi Farmers Co-operative Society which issued the loan for purchasing the suit property was written after the deceased, the allottee of the property had died. He maintained that the deceased died intestate without bequeathing his property to any person.

10. On the contention that the interested parties were innocent purchasers without any notice of the defect in title, the applicant on 16th April, 2011 the applicant and his deceased brother registered a caution against the property. The interested parties were issued with titles on 18th December, 2014 and 2nd February, 2015 and therefore must have had notice of the caution and the applicant's claim.

The respondent's case

11. The Respondent swore a Replying Affidavit on 22nd May, 2014 in opposition to the application. His contention was that although registered in the name of the deceased, he was the true owner of the suit property. He explained that the suit property was purchased from the Ol'joro' orok Salient Settlement Scheme. The scheme would only sell the land to its members or employees who were granted loans to be repaid over a period of years to the Ol'joro' orok Settlement Scheme Fund Trust. The deceased being an employee of the Ol'joro' orok Salient Settlement Scheme was eligible to acquire property. The Respondent took this advantage and acquired the property through her. It was his case that he gave the deceased the Kshs. 500 for registration and balloting. It is on this basis that the property was registered in her name.

12. The deceased resigned from her job four months later due to illness. She however introduced the Respondent to the committee and informed them that the property belonged to him and that he would continue making the loan payments for the same. The committee agreed in 1979 after the deceased had passed on to transfer the plot to the Respondent to enable him continue repaying the loan which he completed in the year 2001. He therefore contends that the property belongs to him, and denies the allegation that any of the family members ever resided on the suit property.

13. In support of his case, the respondent annexed to his replying affidavit an affidavit sworn by John Kirathe King'ori who is the secretary of the Committee of Salient Scheme Unit 339. He stated that the deceased balloted for and was registered as the owner of the suit property. Before her death, the deceased introduced the respondent to the scheme as the owner of the property. She later introduced his wife as the person who would continue cultivating the same. It is the respondent who paid the purchase price and title processing fees. The Scheme issued him with title as they were aware of his claim.

14. He contended that his elder brother, Daniel Mwatha Njeru, and sister, Zipporah Wangui Njeru, (both deceased) did not object him being the sole beneficiary of the property as they understood how he came to acquire it. He further contended that the objectors' claim is not sustainable because it is time barred by section 20 (2) of the Limitation of Actions Act and because the property has since been subdivided and sold to third parties. In support of the latter contention he argued that the Land Registration Act is clear that the new titles can only be set aside on account of fraud which has not been pleaded in this case.

15. The respondent filed a replying affidavit on 27th May 2015 in response to the application dated 10th April, 2015. He argued that the application is incompetent because it was filed before the earlier application dated 5th February, 2013 was prosecuted. He also argued that the applicant has no locus to seek any orders against the interested parties. He further contended that the beneficiaries were aware of his claim of ownership and that is why they did not take out any letters of administration or object in the succession cause before the lower court.

The interested parties' case

16. The interested parties are the registered owners of the various parcels that were subdivided from the suit land. They filed a Replying Affidavit sworn on 25th May, 2015 by the 3rd Interested Party on his own behalf and on behalf of the other interested parties with their consent. It was their case that when they entered into agreements for the purchase of the suit properties between 2006 and 2011 they were not aware of any adverse interests.

17. The interested parties admitted that by the time they were issued the titles between December, 2014 and January, 2015, 24th March, 2014

there was already a caution that had been made against the title on 16th March 2011. However it was not registered because the mother title had already been closed. They were not aware of the applicant or the rest of the beneficiaries' claims was closed on 19th April 2011.

18. They further argued that the objector does not have locus to seek the revocation of the interested parties' titles, as he were not a party to the agreement for sale. Further they contended that this court has no jurisdiction to cancel their titles as that can only be done by the Environment and Land Court. In any event they have not shown any fraud or bad faith on their part to warrant the cancellation of the titles.

Submissions

19. It was submitted for the applicant that he has *locus standi* to file both applications as an interested party and as a child and therefore dependant of the deceased. He submitted that he moved this court by way of a summons of revocation of the grant, brought under section 76 of the Law of Succession Act which provides that such an application may be brought by an interested party. He relied on Nairobi H.C. Succession No. 1995 of 1996 **In the Matter of the Estate of Gathima Chege, (deceased)** where the court held that an application for revocation of grant may be brought by any interested party. The court found that the applicants who like the present case were children of the deceased, were not only interested parties but were also persons entitled to the right, title and interest of the net estate of the deceased.

20. On the issue of jurisdiction, it was submitted that the court is vested with jurisdiction under **Section 2(1)** of the **Law of Succession Act** which provides that the provisions of the Act shall have universal application to all cases of intestate or testamentary succession in respect of estates of deceased persons dying after the commencement of the Act. Counsel referred the court to the case of **PLR V. JNR & Another**, [2013] eKLR where the court acknowledged that the Environment and Land Court is a special court established under **Article 162 (2) (b)** of the **Constitution and Section 4(1)** of the **Environment and Land Court Act** to deal with matters concerning the environment and the use and occupation of and title to land. However matters of ownership and entitlement to a deceased person's property including land are governed by the Law of Succession Act and are to be determined by the family court. He also relied on **Margaret Nduta Njoroge V. Joseph Maitha & Another**, [2013] eKLR where the court held that all cases under the Law of Succession Act shall continue to be heard by the High Court or the Magistrate's Court.

21. With regard to the claim that the matters were statute barred, counsel argued that the provisions of **Section 20 (2)** of the **Limitations of Actions Act** do not apply to the case because, the proceedings are not in respect to trust property and the respondent was never appointed as a trustee by deed or otherwise. Even if the court were to find that there was a trust created, then the proceedings are exempted from limitation of time by **Section 20 (1) (a)** of the said Act because they relate to fraudulent transfer of estate property.

22. The applicant submitted that by transferring the estate to third parties when he was aware that there was an application for revocation of the grant pending for determination by the court, the respondent intermeddled with the estate. This action was intended to defeat the proceedings and amounts to fraud. It was also submitted that the interested parties did not acquire good titles as at the time of transfer the grant had been revoked and the respondent had not himself acquire a good title that he court pass on to the interested parties. They also failed to conduct due diligence at the time of purchasing their properties because otherwise they would have discovered the disputes surrounding the same.

23. The applicant argued that the overall actions of the interested parties and the respondent indicate a deliberate intention to defeat the rights of the other beneficiaries of the estate. He asked the court to invoke its residual inherent jurisdiction to ensure and prevent an abuse of its court process and ensure that justice is done by cancelling the registration of the applicant as the owner of the deceased's property and further revoking and cancelling the subsequent transfer of the various sub-divisions of the interested parties.

24. It was submitted for the respondent and interested party that since the deceased died on 15th August 1975, before the commencement of the Law of Succession Act in 1981, her estate should be divided in accordance with the Kikuyu Customary Law by virtue of **Sections 2(1)** and **(2)** of the **Law of Succession Act**. The respondent acquired this property pursuant to the customary law as the first born son of the deceased and he sold the property to third parties. Therefore the estate has since been wound up, and there is nothing left for the applicants to contest about.

25. The respondent and interested parties further argued that the respondent was the bonafide owner of the property after purchasing the same from the Ol'joro'orok Salient Settlement Scheme. The deceased was registered as the owner on behalf of the respondent and held the property in trust for her. He maintained that he paid the registration fees and the entire purchase price of the suit property. The property should have been registered in favour of the respondent and not the deceased.

26. The prayer for cancellation of the title deed is now obsolete because it is made after the estate has already been wound up and the property transferred to third parties. The fact that the objector has taken this long to bring fourth his claim to the estate is an indication of bad faith. In addition, his claim is now barred.

27. For the interested parties it was argued as purchasers for value, without knowledge of the adverse interests to the estate as the same had not been registered against the title, they are protected. They are protected by **Section 93 (1)** of the **Law of Succession Act** also relied on the case of **Re: Estate of Aketch Jagalo, (Deceased)** 2011 eKLR it was held- gazetteement of the succession cause is intended to ensure that people are notified of the case and to enable those with objections to raise them beforehand therefore once the matter was gazette they cannot be heard to suggest that the case was handled in secrecy or fraudulently, or that the case was based on concealment of material facts.

28. That the legality of the title of the interested parties cannot be challenged in a succession cause but rather by way of proper pleadings where fraud or misrepresentation has been pleaded and the particulars thereof clearly stated.

Analysis and determination

29. From the pleadings and the submissions of the parties, the following are the issues for determination in this case:

- (a) whether this court has jurisdiction to issue the orders sought;
- (b) whether the interested parties are protected by **Section 92 (3)** of the **Law of Succession Act** against cancellation of their titles;
- (c) whether the applicant should be appointed as the administrator of the estate of the deceased;

Whether the court has jurisdiction to determine the claims herein

30. The question of jurisdiction in this case was in two part. Firstly it arose from the respondent's claim that he was the owner of the suit property. He alleged that he was the owner of the property having purchased the same from Ol'joro'orok Salient Settlement Scheme. He explained that the deceased, who was at the time an employee of the Settlement Scheme and by dint of employment eligible to purchase land from the Settlement Scheme, purchased it on his behalf. He paid the registration fees and the entire purchase price for the parcel of land. Therefore although the same was registered in her name, she did not have proprietary rights over it. Their intention was the deceased would eventually transfer it to the respondent but she passed on before they could realise this intention. At the time of her death the property was registered in her name.

31. The question of jurisdiction was also raised by the interested parties. They argued that this court does not have powers to cancel their titles. Such orders can only be issued by the Environment and Land Court after being moved by proper pleadings, not a summons for revocation of the grant. They also argued that the applicant did not have any locus to seek orders against them as he was not a party to the sale agreements between them and the respondent.

32. **Section 2 (1)** of the **Law of Succession Act** places the estate of a deceased person under its realm and pertains to the succession and administration of the estate. The term "**estate**" is defined at **Section 3** of the **Law of Succession Act** to mean *the "free property" of the deceased* which is then defined to mean "*that property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not terminated by his death.*"

33. Therefore although the Environment and Land Court is a special court created by **Article 162 (2) (b)** of the **Constitution and Section 4 (1)** of the **Environment and Land Court Act** to hear disputes concerning the environment, use and occupation of, and title to land, the High Court retains jurisdiction over the succession of the estate of the deceased. Its jurisdiction is limited to overseeing the transmission of the estate of the deceased, as defined above, to her rightful beneficiaries.

34. In **PLR V. JNR & Another**, supra, the court expounding on the jurisdiction of both courts held:

"The Environment and Land Court is a special court established under Article 162 (2) (b) and section 4 (1) of the Environment and Land Court Act No. 9 of 2011 and it is meant to deal with matters concerning the environment, use and occupation of, and title to land. However matters of ownership and entitlement to a deceased person's property including land are governed by the Law of Succession Act and are to be determined by the Family Court."

35. The court proceeded that a will does not confer an interest in land that is actionable. The dictum of the court was that its jurisdiction arises once it has been confirmed and a grant of letters of administration issued by the Probate and Administration Court:

"It is only at this juncture when an interest which has been conferred by transmission is created and it is this interest that is actionable before this court."

36. In **Rubo Kipngetch Arap Cheruiyot V. Peter Kiprop Rotich**, Civil Appeal No. 128 of 2008 [2013] eKLR the Court of Appeal reiterated that the succession causes:

"are for purposes of determining and appointing the legal representatives of deceased persons and also for ascertainment of the deceased's heirs and their respective shares."

37. Any claims challenging the proprietary rights of the deceased over property can only be determined by the Environment and Land Court. Therefore the respondent's claim that he is the owner of the property should be made against the administrators before the land court. It is only after that court has ascertained the interest of the deceased and whether the property constitutes part of her estate that the succession court may then oversee the transition of that interest to the beneficiaries.

38. In any event the respondent implied that the suit the property did belong to the deceased. Upon her death, the respondent instituted a succession cause and in his application to be appointed as the administrator of the estate of the deceased, he listed the suit property as the sole property of the estate of the deceased. He subsequently acquired the title to the property by way of transmission in his capacity as a beneficiary and dependant of the deceased. This can be reasonably construed as an admission that she was the rightful owner of the property and that his only claim to it has as a beneficiary. His assertion to the contrary contradicts the direct representation he made to this court.

39. Therefore, on account of the direct representation made by the respondent, and in the absence of a finding by the environment and land court to the contrary, I find that the suit property constitutes the net estate of the deceased which should be administered in accordance with the Law of Succession Act.

40. Having found that the suit property constituted the net estate of the deceased, it follows that this court has jurisdiction to oversee that the same is administered in accordance with the Law of Succession Act and to this end it may cancel any titles that have been taken by beneficiaries or by third parties in contravention of the act. The respondent acquired it in his capacity as a beneficiary of the estate of the

deceased. The legality of the titles of the interested parties is tied down to the legality of the title of the respondent which this court has the powers to inquire into. (See Santuzza Bilioti alias Mei Santuzza (Deceased) V. Giancarlo Falasconi, [2014] eKLR)

Whether the claim is statute barred

41. The respondent and interested parties pleaded limitation of time and argued that the claim is barred by **Section 20 (2)** of the **Limitation of Actions Act** which provides that an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued.

42. This claim of laches was not properly articulated or argued in the submissions or pleadings. Their argument seems to be that the applicant cannot recover the property that has since passed on to the interested parties because he has been guilty of *laches* and is therefore barred by statute.

43. An application for revocation of grant under **Section 76** of the **Law of Succession Act** may be brought at any time, and the law of limitations does not apply. In Patrick Mwangemi Wanjala & 3 others V. Jackson Ngoda Jumwa, [2016] eKLR the court held as follows-

“There is therefore no limitation as to the time for filing summons for revocation of Grant. The law does not even provide that a party must explain any delay in seeking revocation of a grant. Consequently, this Court makes nothing of the fact that the Summons herein was filed 8 years after the grant was issued”

44. Similarly in Jane Wambui Wahuga & 4 others V. Ruth Njoki Mwangi [2016] eKLR, it was stated-

“The said section states that a grant of representation, whether confirmed or not, may at any time be revoked by the court if it was obtained by fraud, or concealment. It may also be revoked if the proceedings were defective in substance and/or it was obtained by means of untrue allegation of facts essential in point of law to justify the grant. An application for revocation of grant cannot therefore be claimed to be time barred. Thus, the Applicants’ grounds for revocation of grant as set out in the summons for the revocation or annulment of the grant cannot be dismissed based only on the ground of limitation. The court has an obligation to determine the application on the basis of the provisions of the law.”

45. In re Estate of Charles Ngotho Gachunga (Deceased), [2015] eKLR the court also rejected the argument that the claim was statute barred holding that Section 76 of the Act does not impose any time limitations within which an application for revocation of grant ought to be filed. It also held that the office of administrator is for life and he can be called to account at any time so long as he is still alive.

46. It follows that if the court has powers to revoke a grant at any time, it has the powers to issue such orders as it deems necessary to meet the ends of justice including cancelling of titles and ordering that the property reverts back to the deceased or to the administrators. In any event a proper reading of **Section 20** of the **Limitation of Actions Act** discloses that actions involving fraud or where the trustee converts the property to his own use are exempted. This case falls squarely within the exemption because the respondent registered the property in his name and subsequently sold it to third parties for his benefit.

47. Therefore I find that this claim is not barred by **Section 20 (2)** of the **Limitation of Actions Act**.

Whether the interested parties are protected by Section 93(1) of the Law of Succession Act

48. The interested parties also sought refuge against cancellation of their titles in **Section 93 (1)** of the Act which protects a purchaser to whom, property has been transferred by a personal representative. They argued that they are innocent purchasers for value without any knowledge of fraud or mistake on the part of the respondent. They also conducted due diligence and found that the Respondent held a confirmed grant. Therefore, they are protected under **Section 93 (1)** of the **Law of Succession Act**. The said section provides:

“(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

49. **Section 55** prohibits the distribution or division of the capital assets of the deceased before the grant is confirmed. However in exercise of the powers conferred upon him under **Section 82 (b)** the personal representative may find it prudent to sell off some of the assets of the deceased in order to settle the liabilities of the deceased or to protect the interests of the estate . In my opinion, the above provision was intended to protect a person who acquired property from the personal representative in such circumstances. Therefore, the person must show that the personal representative was acting in good faith and for the interest of the estate and the beneficiaries.

50. In Re: Estate of Christopher Jude Adela (Deceased), [2009] eKLR the court also opined that the above provision to exclude instances when the personal representative acts in pursuit of his own interest. It stated:

“These provisions shall have to be closely looked at. As per my considered view, section 93(1) of the Act talks of “Interest” for immovable or moveable property and section 93(2) refers to transfer of immovable property. Obviously both provisions talk of different types of transfer and section 93(2) protects a purchaser of the immovable property only if he was aware of some liabilities or expenses of the estate which are not met or paid and still got the property transferred in his names. The correct reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be

commensurate with provisions of section 23 of the RTA (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a Carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal actions prejudicing the interests and rights of right beneficiaries of the estate.”

51. The court of appeal in **Musa Nyaribari Gekone & 2 Others V. Peter Miyienda & Another**, [2015] eKLR upheld the above finding holding that the above provision does not afford an absolute protection to a purchaser. It is imperative that the circumstances surrounding the sale be considered-

“Those decisions support the position taken by the learned judge of the High Court in this matter when he stated that while under Section 93 of the Law of Succession Act a revocation or variation of the grant does not invalidate a transfer by the personal representative, other considerations, such as the disposal of the property in contravention of the confirmed grant, may invalidate the transfer.”

52. The same court sitting in Nyeri in **Jane Gachoki Gathecha V. Priscilla Nyawira Gitungu and another**, [2008] eKLR faced with the question whether a purchaser who claimed that he was not aware of, and was not a party to, the fraudulent dealings with the title in issue and was therefore protected under **Section 93 (1) of the Law of Succession Act (Cap 60)** stated thus:

“We think, with respect, that there is a fallacy in invoking and applying the provisions of Section 93(1) of the Law of Succession Act and the superior court fell into error in reliance of it. The section would only be applicable where, firstly, there is a “transfer of any interest in immovable or movable property”. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable.”

53. At the time of the sale the estate had already been wound up as the grant had been confirmed and therefore, the protection accorded by section 93 is not available to the interested parties. In addition, at the time when the transfers were effected, between December, 2014 and January, 2015 the grant issued to the respondent had already been revoked. Therefore the respondent who was now a beneficiary without powers to deal with the assets of the deceased did not have capacity to effect transfer to the interested parties nor did he have an interest that he could transfer to the interested parties. Further, disposing of the property amounted to intermeddling contrary to **Section 45 (1) of the Law of Succession Act**.

54. In addition the circumstances show that the respondent acted with a clear intention to defeat the interests of the rest of the beneficiaries. When he transferred the property to himself in the year 2010 he was aware that the beneficiaries also laid a claim to the estate. This is evidenced by the various correspondence between himself and the Ministry of Lands as well as the affidavit of service showing that he was served with the application for revocation of the grant. Allowing the sale to stand is tantamount to endorsing the fraudulent actions of the respondent.

55. For the above reasons, the titles issued to the interested parties must be cancelled because they are issued by a person who did not have capacity to effect the transfer and an interest to pass to them. They can only claim that share which the respondent is entitled to.

Whether the applicant should be appointed as the administrator of the estate and the proper mode of distribution

56. The beneficiaries and dependants of the deceased, save for the respondent, did not object to the applicant being appointed as the administrator of the estate. In addition, they agreed to distribute the estate in the manner indicated in the consent to confirmation of grant dated 9th September, 2015. The manner proposed takes into account all the beneficiaries, including the respondent. They have proposed to divide the properties equally between the children of the deceased and where the child is deceased, the grandchildren have shared the property that their parent is entitled to equally.

57. The Court of Appeal in **Justus Thiora Kiugu & 4 others V. Joyce Nkatha Kiugu & another**, [2015] eKLR held that the court is duty bound to by article 159 (c) of the Constitution to promote *alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional disputes resolution mechanisms*. Therefore, where parties agree on a mode of distribution, notwithstanding that there are statutory provisions that provide for the same, the parties have no choice but to adopt that consent and make it an order of the court. Short of a written consent on the mode of distribution, then the court must follow the law.

58. Guided by the above decision, I uphold the consent of the beneficiaries more particularly because it is inclusive of all the beneficiaries and provides for an equitable mode of distribution.

Determination

59. For all the above reasons, I make the following orders:

- (a) The applications dated 5th February 2013 and 14th April 2015 are hereby allowed.
- (b) A grant of letters of administration intestate be and is hereby issued to Michael Muchoki Njeru.
- (c) The grant be and is and is hereby confirmed in terms of paragraph seven (7) of the supporting affidavit.

(d) That the registration of the interested parties as the proprietors of titles no Nyandarua/OlJOROROK Salient/23945, 23946, 23947, 23948, 23950, 26401, 26402, 26403, 26404, 26405, 26406, 26407 and 26408 be and is hereby cancelled together with all the sub-division of original title number Nyandarua/OloJOROROK Salient/1328.

(e) The Land Registrar is hereby directed to rectify the register of land titles No.Nyandarua/Ol jor orok/salient/23945, 23946, 23947, 23948, 23950, 26401, 26402, 26403, 26404, 26405, 26406, 26407 and 26408 together with all the sub-divisions of original title No.Nyandarua/Ol jor orok salient/1328 by deleting the names of the respective owners and registering the names of the deceased to for distribution in the manner provided at (c) above.

(f) being a family matter, each party shall bear their own costs.

Dated, Signed and Delivered at Nakuru this 22nd day of February, 2017.

A. K. NDUNG'U

JUDGE