REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 52 OF 2010

IN THE MATTER OF THE ESTATE OF RUTH NYAKANINI RUKWARO-DECEASED

Mary Wanjiru Mwai.....1st Petitioner

Jane Muthoni Wachira.....2nd Petitioner

versus

Joseph Rukwaro Ndiuni.....Protestor

JUDGEMENT

Ruth Nyakanini Rukwaro (herein after referred to as the deceased) died intestate on 13th September 2003 at the prime age of 80 years.

On 21st day of January 2010, her son the late **Francis Ndiuni Rukwaro,** (who died during the pendency of these proceedings and herein after referred to as the **"deceased Petitioner"**) petitioned for letters of administration intestate to the deceased's estate. The **"deceased petitioner"** named the following persons as persons surviving the deceased:-

i. *Francis Ndiuni Rukwaro----------Son*
ii. *Mary Wanjiru Mwai----------Daughter*
iii. *Jane Muthoni Wachira----------Daughter.*

Annexed to the citations referred to above is a letter from the local chief dated 19th January 2010 naming the same persons as survivors of the deceased.

There is a consent pursuant to Rule **26 (2)** of the Probate an Administration Rules alleged to have been signed by *Mary Wanjiru Mwai* and *Jane Muthoni Wachira (but who in their testimony denied ever signing the said consent).* The only properties listed in the affidavit in support of the petition is **Tetu/Kihuyo/231, Tetu/Kihuyo/231 & Shares in Barclays Bank of Kenys Limited, Account no. [particulars withheld]**

On 14th December 2010 *Mary Wanjiru Mwai* and *Jane Muthoni Wachira* filed a caveat in these proceedings. Another caveat was filed by the same persons on 14th June 2011. It's not clear why the aforesaid persons opted to file two caveats in the same proceedings. However, I find it important to point out that caveats are provided for under Rule **15 (1)** of the Probate and Administration Rules and that a caveat cannot be entered for more than one person. Rule **15 (3)** of the Probate and Administration Rules provides that:-

"No caveat shall be entered by or on behalf of more persons than one."

The petition was gazetted on 16th April 2010 and the grant was issued on 22nd November 2010. On 23rd July 2011 the **"deceased petitioner"** applied for confirmation of the said grant and proposed distribution as follows:-

i. *Tetu/Kihuyo/231--------1.375 Ha.---------- --Francis Ndiuni Rukwaro*
ii. *Tetu/Kihuyo/143--------4.,5 Acres---------- Francis Ndiuni Rukwaro*
iii. *7100 Shares in Barclays Bank------- Francis Ndiuni Rukwaro-----3100 Shares*

---------Mary Wanjiru Mwai------2000 Shares

---------Jane Muthoni Wachira-----2000 Shares

No consent by the other beneficiaries was annexed to the said application as required by the rules. On 31st October 2011 ***Mary Wanjiru Mwai*** and ***Jane Muthoni Wachira*** filed separate affidavits of protest whose contents are similar stating that "*That the proposed mode of distribution is not in accordance with the deceased wishes which were that the estate was to be shared equally among the three children, namely the petitioner and the protestors."*

The **"deceased petitioner"** filed a further affidavit on 4th November 2011 in which he introduced totally new issues as follows:-

i. *That his late father had two wives, the deceased (his mother) being one of them and that the deceased herein inherited all his late father's estate namely;* ***Muhotetu/Gatundia/1096, Gatarakwa /Gatargwa B/196*** *and* ***Tetu/Kihuyo/231*** *and that* ***Tetu/Kihuyo/143*** *was bought by the deceased herein with his assistance and that the same was given to him by her and that he entered the said land in 1978, has been living there and has developed the same and that the deceased herein never lived on the said land but she lived on land parcel number* ***Tetu/Kihuyo/231.***
ii. *That the deceased herein gave land parcel number* ***Muhotetu/Gatundia/1096*** *to* ***Jane Muthoni Wachira*** *but she sold it after the deceased's death and also* ***Mary Wanjiru Mwai*** *was given land number* ***Gataragwa/Gataragwa/196*** *which she also sold.*
iii. *That* ***Tetu/Kihuyo/231*** *was given to him by his deceased mother and father and indicated that the same should be given to his first born son.*
iv. *That the distribution of the shares is as per the deceased's wishes.*

I will comment on the contents of this affidavit later in his judgement.

The **"deceased petitioner"** died on 14th May 2012 and on 18th April 2013, *Joseph Rukwaro Ndiuni* applied and was issued with letters of administration *de bonis non.* On 13th May 2013 the court granted letters of administration to the deceased's estate in this cause to the said *Joseph Rukwaro Ndiuni (hereinafter referred to as the protestor)* and *Mary Wanjiru Mwai* and *Jane Muthoni Wachira (hereinafter jointly referred to as the applicants).*

On 20thNovember 2013 the applicants herein *Mary Wanjiru Mwai* and *Jane Muthoni Wachira* applied for confirmation of the said grant and proposed equal distribution for deceased's estate among the three administrators mentioned above who are *Joseph Rukwaro Ndiuni a son to the "deceased petitioner"* and the applicants herein *Mary Wanjiru Mwai* and *Jane Muthoni Wachira.*

The protestor, *Joseph Rukwaro Ndiuni* filed an affidavit of protest to the said confirmation on 11th February 2014 whose contents are similar to the contents of the affidavits filed by his late father, the **"deceased petitioner"** except that he insisted that the source of his information was his grandmother and introduced a hand written document said to be an agreement in support of his assertion that the applicants sold the land given to them by the deceased.

The applicants herein *Mary Wanjiru Mwai* and *Jane Muthoni Wachira* filed a reply to the said affidavit of protest and exhibited a copy of a green card showing title number ***Tetu/Kihuyo/143*** was a gift to the deceased herein form their late father contrary to the averment by the **"deceased petitioner"** that he bought the land with the deceased and also added that the **"deceased petitioner"** forged their signature while filing these proceedings. They also denied that the deceased ever wished her grandson to inherit the land parcel number ***Tetu/Kahuyo/231***.

Hearing commenced before me on 5th February 2015. The protestor's evidence was essentially a repeat of his above referred to affidavit. He stated that the proceedings herein relate to his grandmother, that he was substituted after his father the **"deceased petitioner"** died, that the applicants are sisters to his late father and daughters to the deceased, he objects to the proposal to distribute the properties equally, because *"his grandmother had given him and his brother the land."*He said he was given no ***Tetu/Kahuyo/231***, that is where he lives and used to live with his grandmother, measuring about 3.8 acres and that *John Muriithi Ndiuni*, his brother was given no. ***Tetu/Kihuyo/143*** measuring about 4.5 acres. He lives there with his mother and their father is buried there.

He insisted that the deceased had given land to his father and the two applicants, that *Jane Muthoni Wachira* was given no. 1096, measuring 3.3/4 acres and that she sold in 2008 as per a hand written sale agreement, that his father was also given land in the same area measuring 8 acres but he did not have the title number.

He also insisted that *Mary Rukwaro* was given ***Gataragwa/ Gataragwa/ BLK 111 / 800*** measuring 1.58 Ha which belonged to his grandmother and that she got a title deed in 1996, this is the land described as 196 in paragraph 5 of his affidavit. As for the shares, these were to be shared equally. (This contradicts the proposal by the **deceased petitioner** in his earlier affidavit where he had proposed 3,100 shares to himself and 2,000 shares each to the applicants, a contradiction that was not explained or justified).

On cross-examination by *Mary Wanjiru Mwai* he admitted he did not know the whereabouts of the land at Gataragwa. Answering questions from the court, he admitted that the deceased never left any will, that there was no family meeting to discuss the alleged distribution nor was he present when the land alleged to have been sold was sold.

The protestor's witness *Epharas Wanjiru Mbau*, a retired teacher testified that she knew the deceased in this case whom she described as her friend of over 50years and an auntie to her husband, and that the deceased was open to her, and that she told her that she would give her land to her children, and indeed she gave each one a piece of land as follows, *Francis Ndiuni* and *Jane* were each given land at Muhotetu while *Mary* was given land at Gataragwa, that the deceased retained 2 portions at Kihuyo and gave it to her two grandchildren. She claimed she was present at one time when the deceased expressed her wishes. With respect I observed this witness as she was testifying, and her demeanour as well and I found her to be totally untrustworthy. Upon cross-examination, she admitted that no family member was involved in the alleged discussions.

Mary Wanjiru Mwai, first petitioner/applicant a daughter to the deceased testified that her brother, the original petitioner forged their signatures in the consent in support of the petition to this court, and that the deceased used to tell them that she had three children and that she would divide her properties among them and while she was alive she gave them land as follows; Herself was given land at Gatargwa while *Jane* and *Francis* were given land at Muhotetu and she left parcel numbers ***Tetu/Kihuyo/ 231*** and ***Tetu/Kihuyo/143*** and her shares in her names arguing that if she gave out everything, we could neglect her. She insisted that her brother now deceased secretly petitioned for the grant and wanted to take everything. Father, she described as a lie her deceased brothers contention that he bought the land with their mother and presented a copy of the green card to court which clearly shows that the land no. ***Tetu/Kihuyo/143*** was a gift to the deceased from her late husband. She also dismissed the possibility of their father having given land to his grandchildren while his son was alive and drew the court to the reality that the deceased brother petitioned for the grant to get the property himself. He never disclosed in the petition that he was claiming the properties to pass the same to his children. This court notes that this is the truth and reality in the court documents. The ***"deceased petitioner"*** filed papers claiming the

properties and did not indicate anywhere the alleged interests of his sons. In fact his proposed mode of distribution was that he gets the above two properties absolutely and nowhere did he mention that he wanted to hold them in trust for his children nor did he offer any explanation as to why he did not propose that the properties be transferred to the children directly if at all the deceased had given them out during his life time.

Jane Muthoni Wachira, the second applicant stated that in addition to what her above sister testified, she would add the following, that their deceased brother was a drunkard and wanted to sell the land, hence that was the reason why the deceased gave *Mary* the titles for ***Tetu/Kihuyo/ 231*** and ***Tetu/Kihuyo/143*** for safe keeping, and that they were to divide the 3 properties equally.

The issues for determination is "w*hether the deceased distributed his properties prior to her death as alleged by the protestor and the entitlements of each of the three beneficiaries."*

It is important at this point to comment on the contents of the affidavit of the **deceased petitioner** that he contributed in purchasing title number ***Tetu/Kihuyo/143***. The green card clearly shows how the deceased herein got the said land. Further, no evidence was tendered to support the alleged contribution by the deceased petitioner towards the purchase of the said land. The **"deceased petitioner"** was at pains in his affidavit to explain that his father had two wife's and the deceased herein inherited the properties from his father's estate. I find the said argument to be totally irrelevant and un helpful in these proceedings *because this cause relates to the estate on the late "**Ruth Nyakanini Rukwaro**"* and *pertains to properties that formed part of her estate which were listed by none other than the "deceased petitioner" in the petition he filed in court and he never disclosed any other interested person or liability.* In any event, no evidence was tendered to show that the properties in question did not form part of the estate.

On whether the deceased distributed her properties during her lifetime, all the parties are in agreement that the deceased petitioner and the two daughters each got a parcel of land, one at Gataragwa and two at Muhotetu as explained above. These properties were given out during the life time of the deceased. Whether the applicants sold the land given to them is immaterial to these proceedings because if at all they sold as alleged, then they sold what had already been given to them by the deceased. Curiously, the deceased petitioner and her son the protestor herein are silent on what became of the portion given to the deceased petitioner.

There is no evidence that the deceased distributed her two properties namely ***Tetu/Kihuyo/143*** and ***Tetu/Kihuyo/* 247** during her lifetime and the shares during her life time.

The **"deceased petitioners"** averments that land was given to his children is not only unsupported by any tangible evidence, but also contradicts his earlier position whereby he sought to be allocated the two titles *"absolutely."* Further, the protestors testimony that the deceased gave the parcels of land to him and his brother is not only improbable, but is not supported by any concrete prove. I hasten to support my view by noting that while it is possible for a person to distribute properties during his/her lifetime, there are certain elements which must be demonstrated as prove that indeed the deceased gave out a gift *inter vivos*.

The above position brings into play the provisions of Section **42** of the Law of Succession Act[1] which provides:-

> *“42. Where-*
>
> *(a) an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate.*
>
> *That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house.”*

In my view this Section of the law seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. They are to honoured and effected.[2]

Section 42 provides that during the distribution of the estate, previous benefits or gifts *inter vivos* be taken into consideration when determining the share of each child. My understanding of this provision is that whatever property belonged to the deceased, and which had not yet been transferred to the individual children during the deceased's lifetime, had to be subject to the provisions of this **Act** and the court would then take cognizance of the gifts given during the deceased's lifetime. If indeed the deceased had already given the other beneficiaries their share, then that would be taken into account at the time of distribution. But it must be proved beyond doubt that indeed the deceased gave out the property or gift during his/her life time.

Halsburys Laws of England ***[3]***dealing with incomplete gifts, states as follows:-

> *"…. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do."*

Three conditions must be met for a gift *inter vivos* to be valid.[4] ***(a)****The first one is that the individual making the transfer actually intends to make a gift; it must be demonstrated that the donor's objective was to make a gift when he or she transferred the property*.[5] There is nothing in the evidence to support this position.

(b)*The second condition is that the donee accepts the gift made to him or her; the donee must agree to the transfer of property that the donor made in his or her favour.****[6]***There is nothing to show that the protestor ever received or accepted the alleged gift *inter vivos*. **(c)** delivery of the property that is the subject-matter of the transfer by the donor to the donee. This has not been proved either.

The donor has to divest him or herself of the property; he or she has to place it in the possession of the donee. Nothing was said in evidence that satisfies this requirement nor is there anything to confirm the deceased's intent to make the alleged gift[7]. It must be shown that the action was not voluntary. No evidence to this effect was adduced. The act in question must be shown to be immediate, unequivocal and irrevocable, even if the donee can only benefit from it at a later date.[8] This test was not proved either.

In the instant case, the deceased expressed his intention in a very clear manner. She gave each child a piece of land and transferred. She left the two parcels of land in her name. No explanation was offered while she did not transfer to the alleged beneficiaries at the time she gave out her other lands to each child. This adds credence to the applicants evidence that the deceased left the two parcels of land and the shares in her name and these are the properties that form the estate of the deceased. I find nothing in the protestors' evidence or the affidavits of the "deceased petitioner" to negate this clear intention.

Another relevant issue to consider is the requirements among the Kikuyu and indeed among many African communities where a person desires to give out properties during his lifetime. The case of *Karanja Kariuki vs Kariuki*[9] illustrates this point. **Madan, Potter** and **Kneller JJA** held that *'property of a Kikuyu man could be distributed during lifetime to his children, or he could give directions on the administration and distribution of his property shortly before his death.'*

Kneller JA put it more clearly when he stated:-

> *"Now, by custom, Kikuyu father has to distribute his land among his sons during his lifetime if possible, and usually does so. This often happens where a son marries and it counts as that son's share if his father has not revoked the gift before he dies. .....He may make a will in old age or on his death bed and the only formalities required are that he must say before the elders of his family (Mbari) and of the clan (Muhiriga) and close friends who will be administrator (Muramati) of his estate and to whom each item of it shall go..."*

No evidence was adduced to show that the above formalities were followed and the evidence of PW2 in this area is totally wanting. Its highly improbable that the deceased could entrust such important issues to a none relative and fail to involve close family members or even elders. In any event, it is already in evidence that the deceased entrusted her titles to her daughters as opposed to her son or grandchildren.

On the question of distribution, the starting point is to refer to the relevant applicable law. Section **38** of the Law of Succession Act[10] provides that:-

> *"Where an interstate 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 be equally divided among the surviving children"*

In my view, the spirit of Part **V** of the Law of Succession Act[11] is equal distribution of the estate amongst the beneficiaries of the deceased. My reading of these provisions is that they envisage equal distribution. The word used in Section **35 (5)** and **38** is *"equally"* as opposed to *"equitably."**[12]*This is the plain language of the provisions. The provisions are in mandatory terms-"*the property shall.....be equally divided among the surviving children*." Equal distribution is envisaged. Guided by the above provisions I find that the deceased petitioner now represented by the protestor and the applicants herein are entitled to equal shares of the deceased's estate.

I find the protest has no merits. I accordingly dismiss the protest and order as follows:-

a. ***That*** *the Protest filed herein by* ***Joseph Rukwaro Ndiuni*** *on 11th February 2014 be and is hereby dismissed.*

b. ***That*** *the certificate of confirmation of Grant of letters of Administration to the deceased's estate issued jointly to* ***Joseph Rukwaro Ndiuni, Mary Wanjiru Mwai*** *&* ***Jane Muthoni Wachira*** *on 13th May 2013 be and is hereby confirmed.*

c. ***That*** *Title number* ***Tetu/ Kihuyo/231*** *measuring approximately* ***1.376 Ha****. be divided into three equal portions to be shared equally among the following:-*

   i. Joseph Rukwaro Ndiuni & John Muriithi Ndiuni... 0.4586 Ha. jointly

   ii. Mary Wanjiru Mwai..... 0.4586 Ha. absolutely.

   iii. Jane Muthoni Wachira..... 0.4586 Ha. absolutely.

d. ***That*** *Title number* ***Tetu/ Kihuyo/143*** *measuring approximately* ***4.5 acres*** *be divided into three equal portions to be shared equally among the following:-*

   i. Joseph Rukwaro Ndiuni & John Muriithi Ndiuni.....1.5 acres jointly

   ii. Mary Wanjiru Mwai.....1.5 acres absolutely.

   iii. Jane Muthoni Wachira.....1.5 acres absolutely

e. ***That*** *shares in Barclays Bank of Kenya Limited, Account number* ***30318*** *be shared equally into* ***three equal shares*** *among the following* ***(i). Joseph Rukwaro Ndiuni & John Muriithi Ndiuni*** *jointly,* ***(ii). Mary Wanjiru Mwai, (iii). Jane Muthoni Wachira.***

f. *No orders as to costs.*

Right of appeal 30 days

Dated at Nyeri this **29 th** day **February** of 2016

John M. Mativo

Judge