



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 685 OF 2015

**IN THE MATTER OF THE ESTATE THE LATE OF EUGENIO NJAGI CHABARI
(DECEASED)**

JULIUS KINYUA CHABARI.....1ST PETITIONER

DESIDERIO NKONGE KIRIGU.....2ND PETITIONER

VERSUS

MARY MUKWAMUGO NJAGI.....1ST PROTESTOR

SALESIO NKONGE.....2ND PROTESTOR

MARGARET MUKWANYAGA NJAGI.....3RD PROTESTOR

ANN VIOLET MURUGI NJAGI.....4TH PROTESTOR

FAITH MUTHONI NJAGI.....5TH PROTESTOR

J U D G M E N T

1. Julius Kinyua Chabari and Desderio Nkonge Kirigu (hereinafter "the Petitioners") are the brother and nephew, respectively of the late Eugenio Njagi Chabari (hereinafter "the deceased"). They were named as the executors of the last will of the deceased dated 14th April, 1980. In this regard, on 29th January, 1996, they Petitioned for grant of probate and administration of the estate of the deceased which was issued to them by the High Court of Kenya at Nairobi on 11th April, 2010. Pursuant thereto, on the 20th March, 2010, they applied for the confirmation of that grant whereby they proposed to distribute the estate in terms of the said will.

2. On learning of the application, the Protesters, who are the widow and children of the deceased, protested against the said confirmation by way of Affidavits of protests filed on 21st October, 1996. The grounds set out for the protest were that; the will relied on by the Petitioners was not authentic but a forgery; that since the deceased was literate he could not have thumb printed the will; that the deceased was too ill to have made a will on 14th April, 1980; that the filing of the Petition at Nairobi was suspicious; that the will purports to disinherit some beneficiaries; that some of the assets sought to be distributed did not form part of the estate and that some properties of the deceased were left from the proposed distribution. the Protestors also argued that since they had not been informed by the deceased about the will, the same cannot be genuine.

3 In support of their protest, the Protesters filed various affidavits and also testified. Mary Mukwamugo Njagi (PW1), the widow of the deceased, told the court that none of the protestors was aware of these proceedings until a dispute arose regarding one of the properties; that the deceased could not have made the will on 14th April, 1980 because he was very sick at the Aga Khan Hospital; that the deceased had mental confusion and was not in a position to know his properties, was swollen and blood was oozing from his nose. That the will was doubtful as it included properties which did not belong to the deceased whilst it left those belonging him; that it had out one of the deceased's children, Faith Muthoni Njagi. She contended that the Petitioners must have had a hand in the making of the will as they knew the deceased's properties. It was her contention that Mwimbi/Murugi/943 was fraudulently transferred to one of the beneficiaries in 2008. The widow denied that any of the beneficiaries had taken possession of any of the estate assets after the will was read. She told the court that she wanted all her children, including the daughters who were not catered for in the will, to be considered. That of her daughters were living with her at the matrimonial home and that all the protestors live on plot 943 where the deceased had left them. She concluded that when the will was read to the family, she cried and protested against it.

4. Salesio Nkonge Njagi (PW2), the 2nd Protestor, supported the testimony of his mother. He denied having contributed any monies towards the filing of the petition for probate as had been contended by the Petitioners. That although he has a house on plot 943, his brother John Bosco Njeru had cultivated up to the doorstep thereby denying him the use thereof. That although the will was read to the family members by Advocate Kiraitu in 1995, they had disputed the same. He was currently occupying plot Nos. 2 A and 654. Ann Violet Murugi Nyaga (PW3), the 4th protestor, told the court that she visited the deceased in hospital on 15th April, 1980 when she found him critically sick. Blood was oozing from his nose and he could not speak. That he was very sick to have recalled his properties and written the subject will. That the deceased loved his daughters so much. She indicated that she was interested in getting a share of the estate excluding plot No. 943. On her part, Margaret Mukwanyaga Njagi (PW4) told the court that she was a minor when her father died. At the time she testified, she was living on plot No. 943 with her mother (PW1) because she is visually challenged.

5. The Petitioners opposed the protest. They filed various Affidavits and testified in support thereof. They stated that the protestors were aware of the will since 1996 when the same was read to them; that while admitted at Aga Khan hospital, the deceased gave instructions to Mr. Kiraitu Advocate who prepared the will and had the same executed by the deceased; that the 2nd protestor gave the deposit of Kshs.10,000/- for the filing of the present Succession Cause. They admitted having transferred plot No. 943 to John Bosco Njeru and that after the will was read, the beneficiaries had taken over their bequests. That Mr. Kiraitu had informed the Protestors that the deceased wish was that Mr. Kiraitu, keeps the will until all the children were through with education. That there were no properties left out by the will and that the will gave the 1st protestor properties with which to take care of the children of the deceased who were minors i.e the daughters. Desderio Nkonge Kirigu (RW1), the 2nd Petitioner, who testified on behalf of the Petitioners told the court that he did not want the spirit of his uncle to disturb him and that is why the will should be effected. He indicated that although the deceased had taken care of Scholastica Karimi, Margaret Gatwiri and Everlyn Kaari, he had no problem if they are excluded from plot No. Muthambi/Kandungu/275. In cross-examination, he admitted that he knew where the properties of the deceased were but not their numbers. That although the deceased was normal, he distributed more than his estate had. That he and his co-Petitioner filed the cause in Nairobi, because the will was written and read at Nairobi. He further admitted that the will had not indicated that it was to be read after all the children had finished education. He further admitted that he had, in his affidavit of 30th March 2016, changed the mode of distribution from that given in the will.

6. RW2 John Bosco Njeru told the Court that he is the 2nd born of the deceased. He used to visit his father regularly while in hospital. He recalled once the deceased telling him that he had made a will. That after the will was read, each beneficiary moved to take what had been bequeathed to him. That he wished to live with his mother alone on plot No. 945. To him, he did not care where his sisters are to go as that was his father's will. He admitted that he was not in any talking terms with his mother but will nevertheless accommodate her in plot No. 943.

7. After the parties had closed their respective cases, the counsels filed their respective submissions which they ably hi-lighted. The court has considered the same together with the authorities relied on. The parties had on 6th November, 2014 agreed on the following as the issues for determination:-

"(a) Whether the deceased left a valid will

(b) If the court finds that there is no valid will;

(i) Who should be the administrator?

(ii) Which assets belong to the estate?

(iii) How should the distribution be done and to who?

iv) Whether Faith Muthoni Njagi is a child of the deceased and whether she is entitled to a share in the estate.

(v) Whether parcel No. Muthambi/Kandungu/303 forms part of the deceased's estate."

However, during the trial, the parties agreed that Faith Muthoni Njagi is a child of the deceased and therefore issue No. (b) (iv) does not fall for consideration.

(a) Did the deceased leave a valid will?

8. A will is but a legal declaration by a person expressing his intention on how his property is to be disposed after his demise. Such a declaration must be executed in accordance with the law. Section 5 of the Law of Succession Act, Cap 160 Laws of Kenya (hereinafter "the Act") gives every person of sound mind and of majority age, freedom to dispose his or her own property as he/she wills. Under section 11 of the Act, a will will be valid if signed by the testator or his mark is affixed thereon or is signed by another person at the testator's direction. That mark or sign should envisage the intention of effecting the will and is attested or witnessed by two (2) competent witnesses attesting to the testator signing or placing his mark on the will.

9. In this regard, the Court of Appeal held in the case of **Beth Wambui and Another - v- Gathoni Gikonyo & Others [1988] eKLR** that a meagre provision to a beneficiary is not a ground to invalidate a will; in **the Matter of the Estate of James Ngengi Muigai [2005] eKLR**, it was held that unless it is proved that at the time of executing the will the testator is of unsound mind occasioned by mental or physical illness, drunkenness or other cause to make him not know what he is doing, the will is to be held to be valid. In the case of **John Kinuthia Githinji Kiarie .v. Githua Kiarie and Others NBI C.A No.99 of 1988** (UR), where the deceased was seriously ill and executed a will while in hospital, it was held that in the absence of evidence that the illness had affected the mind of the testatrix so as not to know what she was doing when she signed the will, the subject will was valid. In that case, the Advocate explained the contents of the will to the testatrix in the presence of the hospital nurse and he seemed to understand the Advocate's explanations. How do the foregoing principles then apply in the present case?

10. The Protestors contented is that the will relied on was not authentic; that the deceased was literate and there was no reason why he should have used a thumb print and further that there was no reason why the deceased appointed the Petitioners as the executors instead of his wife and or children whom he loved so much. The evidence of the Petitioners was that the deceased asked for a lawyer while in hospital whereby the Petitioners presented Advocate Kiraitu who took instructions and prepared the will which the deceased signed by placing a thump print on 14th April, 1980 to which both the Petitioners attested. I have seen the impugned will. To my mind, it prima facie satisfies the provisions of Section 11 of the Act in that, it has a mark which is placed in a manner suggesting the intention to validate the will. The same is also attested by the Petitioners who were therein appointed the executors. As regards the use of thumb print, there was no evidence to suggest that the thumb print was not that of the deceased. It is not

mandatory that a will be signed. A mark shown to belong to the testator suffices. Even a third party can sign on behalf of a testator if it is at his instance and direction. As regards the choice of the Petitioners as the executors, there is nothing in law that prevented the deceased from appointing anyone including the Petitioners, to be the executors of his will. It is not mandatory that the deceased should have appointed any of the protestors. In this regard, I reject the Protestor's contention that the will should be nullified on those grounds.

11. The other grounds upon which the will was challenged was that the deceased was so ill to have made the will on 14th April, 1980. The Protestors contended that, the deceased was so ill before the 14th April, 1980; that he had been in a coma; that when PW3 visited him on both 14th and 15th April, 1980, he was not able to speak and that blood was oozing out of his nostrils. On the other hand, the Petitioners insisted that the deceased was of sound mind, that he properly discussed the will with Mr. Kiraitu Advocate who explained to him its contents before he signed it. That after he signed the will on 14th April, 1980, his condition deteriorated as a result of which he was transferred to the Kenyatta National Hospital where he died on 21st April, 1980.

12. Under section 5 of the Act, there is a presumption that a person making a will is deemed to be of sound mind. The Section provides:-

"5(3)Any person making or purporting to make a will shall be deemed to be sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.

(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges."

13. In his text, the **Laws of Succession, Law Africa 2006** William Musyoka states at page 43:-

"In addition to having testamentary capacity; a testator must know and approve the contents of their will. A testator knows the contents of the will if he is aware and understands the terms of the will. He need not understand the precise legal effect of the terms. A testator approves the terms of the will if he executes it in those terms on his own volition and not because of coercion or undue influence of another....."

At Page 45;

"Similarly, where a person suggested the terms of the will is the testator (sic), that is other than writing the will himself, and takes the testator along to the advocate of that person's choice the circumstances will be regarded as suspicious."

14. In **Re Estate of Gatuthu Njuguna (Deceased) [1998] eKLR**, the court held:-

"As regards the testator's mental and physical capacity to make the will, the law presumes that that the testator was of sound mind and the burden of proof that the testator was not of sound mind is upon the person alleging lack of sound mind, in this case, the applicant (S. 5 (3) and 5(4) of the L.S.A). However paragraphs 903 and 904 of volume 17 of Halsbury's Laws of England show that where any dispute or doubt of sanity exists, the person propounding a will must establish and prove affirmatively the testator's capacity and that where the objector has proved incapacity before the date of the will, the burden is shifted to the person propounding the will to show that it was made after recovery or during a lucid interval. The same treatise further shows that the issue of the testator's capacity is one of the fact which can be proved by medical evidence, oral evidence of the witnesses who knew the testator well or by circumstantial evidence and that the question of capacity of is one of degree, the testator's mind does not have to be perfectly balanced and the question of capacity does not solely depend on

scientific or legal definition. It seems that, if the objector produces evidence which raises suspicion of the testators' capacity at the time of the execution of the will which generally disturbs the conscience of the court as to whether or not the testator had necessary capacity, he had discharged his burden of proof and the burden then shifts to the person setting up the will to satisfy the court that the testator had the necessary capacity."

This court fully subscribes to the foregoing pronouncements. It is therefore the person alleging that the testator is not of sound mind to prove it.

15. None of the parties produced any medical records or reports concerning the mental status of the deceased as at the time he made the will. The court has to rely on the evidence on record. The Protestors testified that he was too ill to know or approve the will. PW3 stated that when she visited him on 14th and 15th April, 1980, he could not speak; that blood was oozing from his nostrils and that his tongue was swollen.

16. The person who drew the will was not called to testify on the circumstances under which the will was made. The Petitioners were contented in producing the testimony which Mr. Kiraitu gave before the Principal Magistrate's Court at Chuka in **Criminal Case No. 1425 of 2010**. I have carefully considered his testimony before that court. He never stated that the deceased personally gave him instructions to prepare the Will; he never clarified what the mental or health condition of the deceased was at the time he made the will. His evidence was to the effect that, he received instructions from the Petitioners to prepare the will and that when he together with the Petitioners and two (2) others went to Aga Khan Hospital and he discovered that the deceased could speak, he asked those present to go outside. The relevant portions reads:-

"I am an Advocate of the High Court and the Minister of Energy in Nairobi. I recall the 14/4/1980 as pertains the estate of Eugenio Njagi Chabari as I prepared a will for the late Eugenio Njagi Chabari and I took it to him at Aga Khan Hospital where he signed it in the presence of 2 witnesses. He was unwell and I had known him many years ago as I was a student at Chuka High School and he used to make uniform for us. I received instructions to prepare the will. The witnesses came and saw me so that we prepare the will ie. accused 2 and accused 3 herein. They too were known to me there before. The two were appointed as executors of the will he (sic) deceased. I first took instructions in long hand and I got the same typed by my secretary in form of a will and I took it to Aga Khan Hospital where he signed the same."

17. In cross-examination he stated:-

"I knew the deceased as he sold school uniform to me. I never met with him until the time we went at Aga Khan Hospital. I was contacted by accused 2 and accused 3 and two other people. We went together to hospital. We entered the ward and he was there. When I noted that he could speak I sent the four outside as a will is a secret document. I followed the legal process."

18. While Mr. Kiraitu did not state that he took instructions first at the hospital before preparing the will and later taking it for signature, the 2nd Petitioner stated in paragraphs 12, 13 and 14 of his Replying Affidavit sworn on 9th November, 2010 as follows:-

"12. That while admitted at Aga Khan hospital the deceased gave instructions to his advocate, Mr. Kiraitu who was practicing under the name of Kiraitu & Co. Advocates to prepare his will.

13. That on the day the deceased gave instructions to Mr. Kiraitu, the two of us were with him at the hospital together with the 2nd protestor, Salesio Nkonge and our brother in law to Nachisio Njagi Bauni. We were all requested to step outside and after Mr. Kiraitu had a long talk with the deceased,

he informed us that he had been given instructions regarding the will but he did not disclose to us the intended content of that will. Mr. Salesio Nkonge was with us all that time.

14. *That after preparing the will, Mr. Kiraitu went to the hospital at Aga Khan, and explained to the deceased the contents of the will after which the deceased signed the same by way of appending his thumbprint. Annexed hereto marked "JD3" are photographs taken when Mr. Kiraitu was discussing the contents of the will with the deceased and when the deceased was signing the will.*

19. This court observes that nowhere in his testimony that Mr. Kiraitu indicated that he had explained the contents of the will to the deceased before the latter signed the same. The testimony of the 2nd Petitioner in court was that he and his Co- Petitioner did not know the contents of the will until when it was read by Mr. Kiraitu in his office in 1995 or 1996. That being the case, the Petitioners cannot positively state that the will was explained to the deceased yet none of them was present. If they were present, the RW1 must have lied to the court when he testified that none of the Petitioners knew the contents of the will until 1995/1996 when it was read.

20. The total sum of the foregoing is that this court was not favoured with any medical evidence on the mental or physical state of the deceased at the time he executed the will on 14th April, 1980. What was established was that the deceased was very ill having been transferred from Chogoria Hospital on 25th March, 1980; that his condition deteriorated on or after 14th April, 1980 leading him to be transferred to the Kenyatta National Hospital on 16th April, 1980 where he died on 21st April, 1980 and that when PW3 visited him on 14th April, 1980, the deceased could not speak because of the illness. This leaves the court with no option but to scrutinize the Will to and the circumstances surrounding it to consider its efficacy.

21. It was admitted by all the parties that the deceased did not mention Faith Muthoni in his Will yet she is his daughter. The Will does not state why the deceased made this fundamental omission yet this is supposed to be his last will. Further, although the will identifies the daughters of the deceased as his family members, it does not state why they were not provided for. As regards the assets, the will excluded Mwimbi/Murugi/654 although it was acquired by the deceased in or about 1969. Also excluded was plot No.2 A Marima. To the contrary, the will also included a plot No. 3 Marima which the deceased did not own. Further, there was no explanation why the deceased identified his three farms at Karigini measuring 10 acres as being under demarcation but ended up distributing in paragraph 5 (3) (1) and (4) of the will a total of 19 acres therefrom.

22. The Petitioners contended that Mwimbi/Murugi/654 was not excluded and that it was the one identified as the farm at Kathima measuring approximately 8.5 acres. However, at the trial, the evidence established that the said property is situated in Kigioni and not Kathima and that it measures 2.336 Ha (approximately 5.8 acres). The difference both in location and size is surely too wide to have been referring to one and the same property. The court saw the witnesses testify while the protestors seemed to be firm, consistent and truthful, RW₁ and RW₂ came out as evasive and untruthful witnesses. The court found it difficult to believe the latter.

23. This court is alive to the principle that where there is a mistake relating to a part of the will, that partial mistake may be corrected. See **In re Goods of Hunt [1875] LR P & D 250 and Re Morris [1970] 2 WLR 805.** In this case however, although the mistakes pointed out above are partial, the other surrounding circumstances compel the court to move further than partial correction of the will. The pertinent question is, if the deceased was in his right mental state, would he have forgotten his daughter as one of his family members? Would he have forgotten to include his properties in the Will or would he have included properties that were not his and purport to distribute them? He is said to have loved all his children including the daughters. Indeed one of the daughters, PW3 used to visit him regularly while in hospital. Will he have failed to provide for them? There were no answer forthcoming. The circumstances surrounding the alleged execution of the will, and the mistakes contained in the will itself, raise not only suspicion, but prick the court's conscience. To my mind, the errors or mistakes pointed out in the will not only point towards a possibility that the deceased was not only confused, but that he was not in a proper frame of mind to identify and will his property. That he was not in a position to know and approve the

contents of the will when he executed it.

24. In the view of this court, the will was not only made under suspicious circumstances, but the Petitioners sought to effect its alleged "intentions" in a very suspicious manner. The Petitioners are the ones who went looking for the advocate to write the will; it is not stated when Kiraitu took instructions from the deceased if at all he did, nor the mental and physical condition of the deceased. Mr. Kiraitu's testimony in the criminal court stated that he took instructions from the Petitioners; RW₂ a beneficiary, states that his father talked to him about having made the will which was in the hands of the Petitioners. It is not clear how this would have been possible as the evidence on record shows that after the 14th April, 1980, when the deceased is alleged to have executed the will, his condition deteriorated fast that he was unable to speak thereafter until his death on 21st April, 1980. The evidence at the trial showed that neither the Petitioners, nor RW₂, (John Bosco) nor Advocate Kiraitu mentioned anything about the will after the demise of the deceased until fifteen (15) years later, in 1995/1996. Ordinarily, a will of a deceased person is disclosed immediately before or shortly after the burial then propounded later. This one took 15 years after the death of the deceased to be disclosed! The explanation that the deceased's instructions to Mr. Kiraitu were that he does not disclose it until after the children had finished education does not hold. If there was any such an instruction, nothing would have been easier than to state so in the will itself.

25. The other issue is the taking of photographs during the alleged execution of the will. Why was it necessary to take the photographs? Was it that the Petitioners knew that the issue of the deceased making a will would be contested later? Was it a ceremony that ordinarily people would take photographs to keep memories? The are prickly questions. The act itself leave many questions unanswered. In any event, from the photographs produced, there is nothing to show that it was the will that was being thump printed.

26 Finally, whilst all the beneficiaries were resident and the estate was situated in Meru, the Petitioners decided to file the Petition at Nairobi away from the beneficiaries. The court was not satisfied with the explanation given for this action. Further, there was no evidence to show that after the grant was issued, the Petitioners collected or tried to gather the estate as it is expected of them under the law. Not a single asset was collected, gathered or preserved. To the contrary, the Petitioners rushed to transfer the only prime property of the estate, Mwimbi/Murugi/943, to RW₂ even before the grant was confirmed!

27. After observing the witnesses testify and analysing the evidence on record, the only inescapable findings this court makes are that; the deceased must have been in a state of confusion when he made the will or he did not know or approve of its contents. It is more likely that the instructions to make the will came from RW₂ with the connivance of the petitioners to the Advocate in order to give RW₂ the priced asset of the estate that is the matrimonial home. Indeed RW₁ told the court that the Petitioners and RW₂ knew where the properties of the estate were situated but not their numbers. That explains why all the farms, save for the matrimonial home, were described and/or identified in the will by their locations other than numbers. Mrs Ntarangwi submitted that the Will cannot be sustained for being discriminatory.

28. Whilst, whilst a court is bound not to interfere with the free will of a testator as expressed in his testamentary disposition, the question that arises is, can the court still enforce an unfair, discriminatory and unconscionable will at this age and time. In my view, unless the testator clearly states in his will why he is excluding certain beneficiaries while favouring others, I doubt if an unfair, discriminatory and unconscionable testamentary disposition ons can stand the modern day era and test of equality under Article 27 of our Constitution. This court appreciates the legal principle that a court should not interfere with the express intention of a testator in his disposition of his property, but there is also the constitutional principle of equality to grapple with. Expressing itself on such an eventuality, the Court of Appeal in the case of **Francis Mwangi Thiong'o & 4 Others .v. Joseph Mwangi Thiong'o Nyeri CA. No. 8 of 2015** (UR) delivered itself thus:-

"We are not persuaded that a discriminatory testamentary intent was ever disclosed by the deceased as contended in the memorandum of appeal. If such an intent had been established, the court would have overridden it in the name of the

law and the constitution."

29. This raises the question as to what extent a person can control his property into his grave. If during lifetime, a person has not expressed any discriminatory tendencies towards any member of his family and has treated them equally, lovingly and provided for them fully, why would he then expect them to be treated differently when already he is gone by expressing such tendencies in his will? I think on this ground and on the ground that the deceased was not in his proper frame of mind, and did not know or approve the contents of the will when he executed the same, and the will cannot stand.

30. In view of the foregoing, I have come to a firm and inescapable conclusion that the will dated 14th April, 1980 was not validly made, it cannot stand and the same is hereby nullified.

(b) Now that the will is not valid:

(i) Who should be the administrator?

31. The deceased was legally married to the 1st protestor. All the beneficiaries are but the children of the deceased with the 1st Protestor. In matters succession, the widow ranks in priority. Accordingly, Mary Mukwamugo Njagi should and is hereby appointed the administrator of the estate of the deceased.

(ii) What assets belong to the estate.

32. Having considered all the Affidavits on record and the testimonies of the witnesses, the following are the assets of the estate:-

- (a) Mwimbi/Murugi/943
- (b) Mwimbi/Murugi/654
- (c) Plot No. 5 Marima Iga Murathi
- (d) Plot No.2 A Marima
- (e) Plot No. 4 Karigiri Market
- (f) Motor Vehicle Reg Nos. KKV 071, KRG 755, KUC 920 and High Tank.
- (g) Muthambi/Kandungu/275
- (h) Muthambi/Kandungu/668
- (i) Muthambi/Kandungu/817
- (j) Muthambi/Kandungu/893
- (k) Mwimbi/Murugi/92

There was no evidence that was tendered to show that parcel No. Muthambi/Kandungu/303 is part of the estate of the deceased. The same is hereby excluded and issue no (b) (vi) disposed off.

(iii) How should the estate be distributed

33. In **Eliseus Mbura M'Thara .v. Harriet Ciambaka and Anor [2012]**

eKLR, the Court held that:-

" The Law of Succession Act does not discriminate between gender in matters of succession or inheritance. Under the Law of Succession Act and indeed under the constitution, a child is a child and every person has equal rights under the law irrespective of gender. The Law of Succession Act does not discriminate un married daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person)."

In the case of **Mwongera Mugambi Runturi .v. Josephine Kaarika & 2 Others [2015] eKLR**, the Court of Appeal held:-

"With the greatest respect, such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny; not least because it is plainly discriminatory of itself and in its effect. It is anachronistic and misplaced notwithstanding that it was [once] the norm for a vast majority of Kenya's communities. This Court has long accepted that a child is a child none being lesser on account of gender or the circumstances of his or her birth. Each has a share without shame or fear in the parents' inheritance and may boldly approach to claim it. What RONO-VS-RONO [2005] 1 EA 363] decided about the prohibition of discrimination on grounds of sex under the retired Constitution applies with yet greater force under the current progressive Constitution of Kenya 2010".

34. This court fully subscribes itself to the foregoing pronouncements. In arriving at the following distribution, the court has considered various matters. These includes but not limited to, the preferences of the beneficiaries and their personal status; these include that the widow has her matrimonial home on plot No. 943; that all the children were brought up on the property but that it is not mandatory that they live there forever; that Margaret Mukwanyaga Njagi (PW4) is visually challenged and has been living with the widow on plot No. 943 all her life; that Faith Muthoni Njagi has been taking care of the widow on the matrimonial property; that John Bosco has carried out substantial development on plot No.943;that Salesio Nkonge left Plot 943 at the instance of John Bosco and has been living elsewhere; that Edwin Nyaga is practising medicine in Holland and that each property is of a different value. That the change of the status and positions of the beneficiaries was caused by the wrongful acts of the Petitioners in cahoot with John Bosco in attempting to commit a fraud on the estate by using a false will. The court has also noted that there was no evidence to show that Scholastica Karimi, Margaret Gatwiri and Everlyn Kaari, continued to depend on the family of the deceased. The evidence shows that they left the family long ago and are not in any need of assistance. In any event, they never made any claims on the estate. The estate will therefore be shared as follows:-

(a) Mary Mukwamugo Njagi

Faith Muthoni Margaret Njagi Mwimbi/Murugi/943 - 2 Acres (Jointly.)
Muthambi/Kandungu/275

(b) Ann Violet Murugi Njagi In equal shares but Mary Faith Muthoni Mukwamugo Njagi will only Margaret Njagi have a life interest thereon

(c) John Bosco Njeru Mwimbi/Murugi/943 - 3.8 Acres M.V. Reg. No. KVC 920 Mwimbi/Murugi/654 - 1.7 Acres

Muthambi/Kandungu/817 - 2.1 Acres 1/2 of Plot No. 5 Marima Market

(d) Ann Violet Murugi Njagi 1/2 of Plot No. 5, Marima Market

(e) Salesio Nkonge Njagi M.V Reg. No. KKV 071 Mwimbi/Murugi/654 - 4 Acres Plot No. 2A ,
Marima Chamunga

Mwimbi/Murugi/943 - 2Acres

Muthambi/Kandungu/817 - 1.6 Acres

(f) Edwin Nyaga Njagi Muthambi/ Kandungu/668 Muthambi/Kandungu/893 Posho Mill M. V
Reg. No.KRG 755

(g) Faith Muthoni Margaret Njagi Plot No. 4 Karigini Market- Jointly

(h) Mary Mukwamugo Njagi - High Tank

(i) Mary Mukwamugo Njagi Mwimbi/Murugi/92 - Jointly Edwin Nyaga Njagi

35. This being a family matter each party is to bear own costs.

It is decreed accordingly.

DATED and Delivered at Chuka this 23rd day of June, 2016

A.MABEYA

JUDGE

The Judgment read and delivered in open court in the presence of all parties as represented.

A.MABEYA

JUDGE

23/6/2016