



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 667 of 1984

IN THE MATTER OF THE ESTATE OF PAUL MUTHIANI MUSAU-DECEASED

JUDGMENT

The proceedings herein have been protracted and for this reason the court has found it fit to set out the facts in extensor (greater detail) to serve various reasons. Firstly to try and knit or weave the historical back ground facts underlying the protraction of the litigation and form a basis for the courts reasoning when making the final determination of the matter. Secondly to make the current generation of the beneficiaries of the deceased estate who are the ultimate beneficiaries understand why the matter has been protracted. 3rdly to act as a basis for guidance for future action should any of the participating parties choose further action after the delivery of this judgment. 4thly to act as a source of reference material on the historical background of the litigation considering that it is evident that the record has been mutilated by unknown persons going to the extend of plucking out entries made by the court as proceedings and orders where the said unknown parties appear to have been un happy with the entries made in the said proceedings and the resulting out comes of those proceedings in the form of court orders. 5thly to form a basis of a possible back up information for the reasoning that the court will use in drawing out the final conclusions and or findings to support the final orders made in the determination of this protracted litigation. 6thly as an effort to seal of possible vents, crevices and Panya routes for mischief which has to a greater length contributed to the protraction of the litigation in this matter as discovered by the court in its perusal of the on goings in the file in the course of resolving the competing interests in the application for revocation which is the subject of this judgment. 7thly as a possible attempt made by the court to help the parties resolve this protracted litigation.

The proceedings relate to the estate of one Paul Muthiani who died on the 18th day of September, 1982 at Machakos having been one of few lucky human beings of modern day era to have been blessed by the Almighty God to live up to the commendable age of 140 years (one hundred and forty years) as per the content of the death certificate number 103776 traced on the record which had been issued at Machakos on the 28th day of January, 1983.

This judgment is in respect of an application for revocation filed herein. The application for revocation had been sparked off by the presentation of an application for confirmation and issuance of resulting orders there to which grieved the applicant who has moved the court to seek revocation. The said application for confirmation is dated 19th day of August, 2004 and filed on the 20th day of August, 2004.

The application was presented under section 66 and 71 of the laws of succession Act cap 160 laws of Kenya and rules 4 of the probate and Administration Rules and all enabling Acts and Rules. The following reliefs were sought:

- 1. That the said Benjamin Wambua James, Joseph Kawinzi Muthiani and Antony Musau Muthusi be granted letters of administration of the estate of the said above named Paul Muthiani Musau.**
- 2. That the grant of letters of Administration intestate so made to the said Benjamin Wambua James, Joseph Kawinzi Muthiani and Antony Musau Muthusi in this matter be confirmed.**
- 3. Such further or orders that may be made to meet the ends of justice in the circumstances of the present case.**
- 4. That the costs of this application be in the cause.**

The grounds in the body of the application are that the contentious proceedings were filed way back in 1984; the original petitioners have since all died and some of their sons have also ever since died; that it had transpired that the alleged will was non existent; that on 4th July,2001 a consent order was recorded by all contesting parties herein where all the deceased petitioner were replaced by Charles Mumo Nyumu and Moses Manza Muthusi respectively and that Joseph Kawinzi Muthiani, Charles Mumo Nyumu and Moses Manza Muthiani were appointed the administrators of the estate of late deceased; that when the order of 4th July, 2001 was extracted for approval all the relevant records went missing. Thereafter two of the appointees namely Charles Mumo Nyumu and Moses Manza Muthiani retracted their consent of being appointed administrators which resulted in a stalemate. The reason for seeking confirmation was that a new spirit of understanding had emerged and parties were now ready and willing to have the entire issue touching on distribution and administration resolved amicably by confirming the agreed administrators as well as the distribution.

The application has a supporting affidavit. The beneficiaries listed are as follows:-

First house of Syokwia Muthiani (predeceased the deceased)

1. John Muthusi Muthiani (2) Samwel Musyoki Muthiani (3)David Mutishah Muthiani (all deceased – sons of the deceased) (4)Antony Musau Muthusi (5) Several grand children.

Second House of Katile Muthiani –(deceased) died after deceased)

1. Jonathan Nyumu Muthiani (2) James Maingi Muthiani (all deceased sons of the deceased) (3) Benjamin Wambua James- Grand son aged 60 years.

Third House of Mutindi Muthiani

1. Joseph Kawinzi Muthiani- son- 70 years (2) Wambua Muthiani- son-55 years (3)Muema Muthiani- son.

A perusal of this supporting affidavit form under paragraph 3 and 4, there is mention that the deceased was not survived by any other dependants and no application for provision for dependants was pending under paragraph 5 which deals with the identification and shares of all persons beneficially entitled to the said estate these had been ascertained and determined as follows:-

- 1. Benjamin Wambua James as Trustee for the house of Katile Muthiani who were plot No.774 Komarock.**
- 2. Joseph Kawinzi Muthiani as Trustee for the house of Mutindi Muthiani- land Title No. Matungulu/Sengani/1158.**
- 3. Antony Musau Muthusi as Trustee for the house of Syokwia Muthiani plot No.15A&B Tala market and plot at Katine section Tala.**

The mode of sharing was going to be in equal shares. Also annexed is form 37. Titled consent to confirmation of grant. It is indicated that the consent was in respect of the Estate of Paul Muthiani Musau, John Bosco Maingi, Crispo Mutuku James, Alexander M. Maingi, Patrick Wambua Muthusi, Moses Manza Muthusi, Munyau Nyumu, Robert Musyoki, Roman Muthusi, Libya Musyoki Tilasm, Muthusi Jeremia Nyumu and others in the list as dependants within the meaning of section 29 of the laws of succession Act of the above named Paul Muthiani Musau. It was indicated that they were consenting to confirmation of the grant of probate or letters of administration to Benjamin Wambua, James, Antony Musau Muthusi and Joseph Kawinzi Muthiani. The names against signatures are given as Benjamin Wambua James, Joseph Kawinzi Muthiani, Patrick Wambua Muthusi, Antony Musau Muthusi and Roman Muthusi. There is indication to refer to the next attached list which has 15 names. It is dated 14-7-2004 and the heading indicates that the following were the members of the Muthiani family who had agreed to divide the estate of Paul Muthiani Musau according to the three houses of the deceased.

1. Benjamin Wambua James(2)John Bosco Maingi (3) Crispo Mutuku James (4)Alexanda M. Maina (5) Patrick Wambua Muthusi (6)Antony Musau Muthusi (7)Moses Manza Muthusi (8)Munyao Nyamu (9)Robert Musyoki (10)Joseph Kawinzi Muthiani (11)Roman Muthuji(12)Libya Musyoki (13)Tilas M. Nyumu (14)Jeremia M. Nyumu (15)George M. Nyumu.

Additional affidavit is from Benjamin Wambua James deponed on the 11th day of August and filed on the 20th day of August 2004, in which the deponent Benjamin Wambua James depones that he had been unanimously elected as a representative of the second house and as the eldest grandson of the deceased. That him and the members of his house hold are in agreement that the alleged will was infact a forgery and that they have gone further and agreed to have the property shared equally amongst the three house holds of the deceased.

The affidavit of Benjamin Wambua James has an annexure which appears to be a communication from the deponent to the advocate on record. The central theme therein was that all the sons of the deceased had died; that they as grand children of the deceased had discovered that the deceased five sons had changed the original will which had left the property to the three widows of the deceased and changed it to read that the deceased had left the property to the five deceased sons. That it had now been decided by the family to withdraw the case which had been initiated on the basis of the will in favour of one which recognizes the three houses of the deceased as the ultimate beneficiaries of the deceased estate.

Annexed to that communication is a document containing names of those who had unanimously agreed to the change, a list of 14 names are given namely:-

1. Wambua James-chairman (2)Mumo Nyumu (3)Mukua James (4)Monza Nyumu (5)Wambua Muthusi (6)Musau Muthusi (7)Kawinzi Muthiani (8)Roman Muthusi (9)Musau Muthusi (10)Mutula Samwel (11)Masila Samwel (12)Domnic Libya Musyoki (13)Patrick Monza Musyoki (14)Moses Monza Muthusi.

Out of this list only five signed namely Wambua James, Mutuku James, wambua Muthusi, Kawinzi Muthiani, Roman Muthusi and Musau Muthusi. Also annexed is the list of 15 who had been annexed to the supporting affidavit.

There is also a further affidavit in support deponed by one Joseph Kawinzi Muthiani also deponed on the 19th day of August 2004 and filed on the 20th day of August 2004. The central message in is that the deponent is one of the applicants proposed administrators, the proceedings were commenced in 1984 by Jonathan Nyumu Muthiani, Samwel Musyoki Muthiani, James Maingi Muthiani and John Muthusi Muthiani all of whom had since diversly passed on; that the deponent filed objection and cross petition; he then filed an application to dismiss the petition and when the application came up for hearing on 4th day of July, 2001 all the contesting parties recorded a consent substituting the deceased administrators with the deponent Charles Mumo Nyumo and Moses Manza Muthusi but that days hand recorded proceedings were plucked out from the court record making it impossible for the extracted orders to be approved for enforcement.

The deponent goes further to depone that a son of one of the original petitioners one Patrick

Mukua Muthiani had deponed that the paraded will was a forgery because the original will had named the three widows as the beneficiaries of the deceased. Further that the deponent had visited the chairman of the Musau family namely Benjamin Wambua James that in the spirit of a reconciliation he had agreed that the applicants be appointed administrators and that the estate to be shared equally amongst all the three widows of the deceased; that in the best interests of justice the application should be heard to avoid ill-will and acrimony. Added that one Peter Mwaka Muthiani as one of the deceased sons of the deceased who had filed an application for a dependant is already catered for as he will get a 1/3rd share of their houses inheritance. The estate should be wound up to avoid situations like those of his late wife who had to stay in the mortuary for almost 10 years to await a decent burial following the protracted litigation wars.

The hand written court record shows that the application came up for hearing on 9/11/2004 before Koome J as she then was. The attendance shows that Mr. Oluoch appeared for the applicants. There was no appearance for the respondents. The proceedings read:-

Oluoch: I present the application for confirmation dated 19/8/2004. All the parties have agreed that the estate of the deceased should be distributed according to paragraph 5 of the supporting affidavit sworn on 19/8/2004. The whole family has agreed and filed a family consent filed on 20/8/2004 and the letter dated 14/7/2004 there is no objection we pray the grant be confirmed.

Antony Musau Muthiani

I represent the second house that was objecting to the grant. I confirm we have agreed and I have sworn an affidavit in support of the application. I confirm there is no objection although our advocate is not present.

Court

Let the grant of administration that was issued herein be confirmed and the deceased estate be distributed as per paragraph 5 of the supporting affidavit sworn on 19/8/2004 costs in the cause.

**Signed
Koome J”**

The afore said orders were made on 9/11/2004. Ten days later on the 19th day of November the applicants through Musili & Musili advocates filed the application subject of this ruling dated 18th day of November, 2004. The applicants sought orders that the grant of representation granted to Benjamin W. James and 2 others on the 9th day of November, 2004 be revoked and or annulled on the ground that:-

- (1) No consent was sought from the family members by the petitioners consent was forged. Annexed is the correct family members.**
- (2) The lawyers were not notified of the matter as per the orders of 17th November, 2003.**
- (3) There is still pending case yet to be determined.**
- (4) Affidavit in form 9 rule 40(1) No.3 of it is misleading. There was other defendants.**
- (5) Affidavit of Patrick Mukua Muthiani must be investigated”**

The supporting affidavit does not contain much except to mention that the grant had been confirmed on 9th day of November 2004 to 3 petitioners one a grand son and 2 are unknown.

The supporting affidavit has annexed what the applicant alleges to be the correct family members and beneficiaries entitled to a share of the estate of the deceased otherwise known as the Muthiani family. It is

reproduced for purposes of the record.

“Muthiani family with 3 wives, 5 sons and 33 grand sons.

1. Jonathan Nyumu Muthiani(deceased) (2nd wives son) (11 sons as follows)

(1) Philip Musau Nyumu (2)Monza Nyumu (3)Munde Nyumu.

(2) Alex Muoki Nyumu (family chairman) (3) Mutuku Nyumu (4) Jimmy Nyumu (5) Kioko Nyumu (6) Sila Nyumu (7) Munyao Nyumu (8) Jeremia Nymu (9)Mumo Nyumu.

2. John Muthusi Muthiani (deceased) 1st wife son (4 sons as follows)

(1) Monza Muthusi (2) Tilas Musau Muthusi (3) Nzioka Muthusi (4) Musyoki Muthusi.

3. Samuel Musyoki (deceased)

(1) Dominic Libya (2) Joseph Mutuku (3) Antony Masila (4) Patrick Manza (5)John Mutua (deceased)

4. James Maingi Muthiani (deceased (2nd wives son (5 sons) as follows:

(1) Benjamin Wambua (2) John Bosco Maingi (3) Patrick Mukua (4) Alexander Mwangangi. (5) Crisco Mutuku.

5. David Mutisya Muthiani (Kivatu) deceased

(1) Joseph Manza (2) Cosmas Mutua (3) Machenzie (Makanzie) (4) Mukua (5) Musau (deceased) .

(6) Maweto of Mutindi sons(deceased) 3rd wife sons (2)Peter Mwaka (2)Antony Kiio.

The application was placed before Kubo J as he then was for directions on the 19/11/2004 and the learned Judge made the following observations:-

“On 15/12/2003 Koome J directed this matter to be stood over generally. However on 9/11/2004 there was confirmation of the subject grant to:-

(a) Benjamin Wambua James

(b) Joseph Kawinzi Muthiani

(c) Anthony Musau Muthusi

These are not the persons Rawal J(as she then was) had previously specified as the persons to be issued with the grant of letters of administration to the deceaseds estate hence the present application for revocation of the wrong confirmation of grant. That is the urgency”

On 6/12/2004 Koome J as she then was gave directions that the application dated 18/11/2004 be served on all the beneficiaries and then the same be heard on priority. On 14/2/2005 an application dated 21/7/2003 which had been presented by one Peter Mwaka Muthiani seeking to be recognized as a dependant of the deceased was allowed by consent as follows:-

“By consent Peter Mwaka Muthiani is hereby recognized as a dependant of the deceased. The application dated 21/7/2003 is hereby allowed.

On the same date of 14/2/2005 Koome J as she then was gave the following directions:-

“ Court : In view of the issues in controversy that is the existence of “ a will” by the deceased and whether the co administrators is a son of the deceased, let the summons for revocation dated 18/11/2004 be heard and determined by way of oral evidence. Mean while the status quo in respect of the deceaseds Assets should be maintained pending the hearing and determination of the summons for revocation...”

On 4/7/2006 Rawal J as she then was gave further directions to the effect that after discussing the matter, she thought the first issue on the revocation of the grant was the capacity of Joseph Kawinzi Muthiani as a family member or a beneficiary. The said issue was to be decided by oral evidence. The bundle of documents to be relied upon by the parties were ordered to be filed and exchanged. The list of witnesses and beneficiaries claims were to be filed and exchanged.

Trial commenced on 31/10/2006 when one witness John Bosco Kioko Mboo gave oral evidence and was fully cross-examined and reexamined. Thereafter the matter was adjourned for further hearing. It is noted that there have been numerous intervening interlocutory applications which derailed the trial. On 3/3/2009 further directions were taken to the effect that parties now do file witnesses affidavits and that the matter do proceed by way of cross-examination of the deponents of those affidavits.

On 15/12/2009 the matter was placed before Nambuye J as she then was for further directions as follows:-

- 1. The estate be and is hereby restored to its original position as in 1984.**
- 2. The court has been informed that the original applicants are deceased. This being the case each side**
 - (a) Is to propose 4 names of possible administrators.**
 - (b) List the beneficiaries according to the original 3 house holds.**
 - (c) List the original deceased properties.**
 - (d) Propose mode of distribution.**
- 3. As an interim protective measure the current letters of administration to stand suspended temporarily.**
- 4. Pending the action in number 1, 2 and 3 above each beneficiary on the estate to have free ingress and out gress to his/her place of abode until further orders.**
- 5. Neither beneficiary is to harass the other through police, sale or other 3rd parties.**
- 6. The order to be extracted and served on all beneficiaries and any body claiming through them.**

Further directions were taken on 15/2/2010, 26/04/2010, 13/07/2010 whereby parties agreed to proceed by way of written submissions on the affidavit evidence.

Several affidavits were filed and will be assessed globally. There is a replying affidavit deponed by one Peter Mwaka Muthiani on the 5th day of May, 2005 and filed on the 6th day of May 2005 in response to the application for revocation. The salient features of the same are that the application for confirmation was never served on to the respondents; not all members of the deceased family were consulted, maintained there is a lawful will duly witnessed by an advocate and gazetted; that Kawinzi had been given notice to quit the deceased land; two of the names included in the confirmed grant namely Patrick Wambua Muthusi and Roman Muthusi are unknown to the family; not all family members entitled to consent consented; some eligible beneficiaries like Mary Kadogo Muthiani; Peter Mwaka Muthinai and Antony Kiiu Muhtiani had been excluded from the inheritance.

There is the replying affidavit of one Benjamin Wambua James deponed on the 16th day of October, 2008 and filed on the 17th day of December, 2008. The salient features of the same are that they have already shared out the deceaseds' estate as per the terms of the court order namely (a) Plot No.774 Komarock, (b) Plot No.15B, Tala; that when they went to subdivide plot No.1158 Sengani is when they met people claiming to be purchasers and upon inquiry is when they were informed that one Peter Mwaka Muthiani together with his agents and cohort are the ones who had sold the said land to 3rd parties. It further transpired that despite plot No.15A and 15B Tala having been shared out into three equal parts the deponent learned that Peter Mwaka Muthiani and Alex Muoki Nyumu had sold the entire plots to 3rd parties. That the same Peter Mwaka Muthiani had also sold plot No.570. The same Peter Mwaka Muthiani had also sold plot No 774 Komarock to 3rd parties. That as a family, they have decided not to block the inheritance of Joseph Kawinzi and wish to abandon proceeding with the inheritance as a testate one with an intestate one. Further deponed that the objection is meant to cover up the illegal sales and illegalities committed by Peter Mwaka.

There is the affidavit deponed by one Alexander Muoki Nyumu on the 9th day of April, 2009 and filed on the same date. The salient high lights of the same are that he had been authorized to depone the same by persons listed in a document annexed as an annexure. The persons who have appended signatures to this document are Peter Mwaka Muthiani, Alex Muoki Nyumu, Joseph Mutuku Musyoka, Manza Muthusi, Tilas Musau Muthusi, Dominic Libya Musyoki, Anthony Masila Musyoki, Patrick Manza Musyoki, John Mutua (deceased) Robert Muthiani Musyoki, Cosmas Mutua Mutisya, Makenzie Mutisya, Mukua Musau Mutisya, Philip Musau Nyumu, Manza Nyumu, Mutuku Nyumu, Jimmy Nyumu, Kioko Nyumu, Sila Nyumu, Munyau Nyumu, Jeremiah Nyumu Mumo, Mumo Nyumu, Crispo Mutuku Maingi and Anthony Kiiio Muthiani. This deponent goes further to state that his late father was one of the original applicants and grantee of the letters of administration to the estate of the deceased; the said late father Jonathan Nyumu Muthiani and his co-applicants are both deceased and by an order made by Rawal J as she then was on the 22nd day of October, 2002 three names were proposed as administrators namely (a) Alexander Muoki Nyumu (b) Peter Mwaka Muthiani (c) Joseph Mutuku Musyoki; that the family had agreed to the three being appointed as administrators but the authority annexure AMN2 is missing from the annexures. According to the deponent those who applied for confirmation are masquaraders of one Joseph Kawinzi who is not a family member of the deceaseds family. They had no authority to act in the manner done; that the deceased left a will which has never been challenged and Joseph Kawinzi is not one of those named in the will.

There is also an affidavit by Peter Mwaka Muthiani deponed on the 9th day of April, 2009 and filed the same date. In it, the deponent depones that he is one of the dependants of the deceased and he depones the affidavit in support of the application for revocation of the grant filed herein. The reason being that the said grant was obtained behind their backs; it refers to the estate of one Paul Muthusi Musau; it is not shown how some members came to be called Trustees. Some members of the family have not been listed as beneficiaries; still maintains that the deceased left a valid will and before his death he had given notice to Kawinzi to vacate his land in Matungulu and proceedings to that effect were undertaken before the DCs office. That some names used as Patrick Wambua Muthusi and Roman Muthusi are not known to the Muthiani family; that to the deponent's knowledge the consent signed was for purposes of sharing out the property amongst three houses and were not aware that the same was to be used in court. That some signatures were forged and other eligible dependants such as Mary Kadogo Muthiani, Peter Mwaka Muthiani and Antony Kiiio Muthiani had been left out of the list of beneficiaries to the deceased estate.

The deponent annexed annexures 1, a list of persons who allegedly consented to share the property into three houses. The original grant issued on 3rd October, 1994 to Jonathan Nyumu Muthiani and John Muthusi Muthiani, the will relied upon aduly witnessed by an advocate, notice dated 11th day of May, 19981 addressed to Kawinzi to vacate the deceaseds' land at Komarock. Annexure 4 are proceedings which appear to have taken place before the District commissioners on office Machakos in a matter involving Kawinzi Paul Muthiani and peter Mwaka. Useful information gathered from the proceedings are that the deceased had subdivided a bigger portion of land into 3 parcels and shared it out to three wives. The other two who had since died had their portions registered in the names of the

deceased wives children leaving parcel number 570 which was the share of Esther Mutindi one of the wives of the deceased. Esther Muthiani had no children but had married three wives under Kamba customary laws. These three wives of Esther Mutindi were (a) Mary Kadogo, (b) Mukii (c) Katutku Mary Kadogo had no child. Mukii had two children namely Peter Mwaka and Antony Kiio while Katutku had three children Kawinzi, Wambua and Muema what Kawinzi wanted was that since plot number 570 had been given to the house of Esther Mutindi who had married his late mother katuku along side Mukii the mother of Peter Mwaka and Kiio and his mothers house (Katukus) house should also have a share of plot number 570. The proceedings however read that the plot belonged to Peter Mwaka.

The parties also filed affidavit evidence. The affidavit of Joseph Kawinzi Muthiani was deponed on the 2nd day of December 2009, and filed on the 4th day of December, 2009. It comprises 37 paragraphs. The court has perused them and in the courts opinion the salient features of the said deponements are as follows:-

- (i) The deponent Joseph Kawinzi Muthiani aged 71 years as at the time he made the deponements. To his recollection he was sired by the deceased in the year 1938 assumed the deceaseds named, was educated by the deceased upto std.6 now std.8. When he became of age to get married the deceased paid dowry for his late wife, gave him land, cattle and goats. He set up a home on the land given to him by the deceased and he has raised all his children some of whom are grown ups on this land.
- (ii) To his knowledge the deceased Paul Muthiani Musau was a polygamist with three wives namely Syokwia Muthiani 1st house, Katile Muthiani- 2nd house and Esther Mutindi- 3rd house. The first two houses had sons while the 3rd house of Esther Mutindi only had 2 daughters. By reason of this, the deceased allowed Esther Mutindi to take on wives under Kamba customary law who would give her sons and on that basis she Esther Mutindi married Katuku Muthiani as her first wife who bore her 3 sons namely Joseph Kawinzi Muthiani the deponent, Wambua Muthiani and Mueme Muthiani. Muki the second wife of Esther Mutundi bore Peter Mwaka Muthiani and Kiio Muthiani where as the 3rd wife Mary Kadogo had no child.
- (iii) It is the deponents' stand that these three wives of Esther Mutindi were recognized during the funeral of the deceased.
- (iv) The deponent is a stranger to allegations of a will which was allegedly made by the deceased excluding him from the inheritance of the deceased as it was never mentioned during the funeral of the deceased.
- (v) It is the deponents assertion that after the death of the deceased, the head of the three house holds were chosen by family members. Him deponent Joseph Kawinzi Muthiani is the head of the house of Esther Mutindi from which Peter Mwaka Muthiani comes from. The house of Syokwia is represented by Benjamin Wambua James. While the house of Katile Muthiani is represented by Anthony Musau Muthusi.
- (vi) That there have been court proceedings demonstrated by the exhibits exhibited to the affidavit in which Peter Mwaka and his group sought to block the deponent from burying his late wife on the land on which he resides which move was unsuccessful. In other proceedings the deceased confirmed that Esther Mutindi had married 3 wives among them the deponenents mother and that the deponent was his son.
- (vii) The deponent takes issue with the purported will alleging that the same is a forgery.
- (viii) That he confirms he was duly elected by the Muthiani family to be an administrator along side the names of the others elected all of whom have come to the conclusion that there is no truth in the alleged will. That his current election as an administrator is not strange as he had previously been elected and so appointed by Rawal j as she then was on 4th day of July,2001 whose proceedings were plucked out from the record.

- (ix) It has knowledge that most of the estate has been distributed amongst the three household units of the deceased on the ground and some of the beneficiaries have even sold their respective portions to 3rd parties.
- (x) The source of problem in the administration of the estate is Peter Mwaka who is behind the forgery of the purported will who has sold half of plot number 570 and half of plot number 1158 Kitunduni Kwa Katulu.
- (xi) It is his assertion that the alleged notice to quit allegedly issued by the deceased to the deponent to quit the land on which he resides is a forgery orchestrated by Peter Mwaka and his group because if his late father had wanted to evict him from the suit land he would have done so. By the time the alleged notice was given his late father was aged over 100 years and there is therefore a possibility of the letter being doctored.
- (xii) It is his assertion that the correct will of the deceased is the one he wrote in his note book to the effect that his estate be shared amongst the three household units of the deceased. Those who moved to court to file the current proceedings were aware of the existence of the will in the deceased's note book but chose to proceed on the basis of the forged one with the aim of excluding the deponent.
- (xiii) The deponent has knowledge that when he learned of the filing of these probate proceedings to his exclusion he filed objection and cross petition but its pendency notwithstanding the grant was issued to the deceased administrators on 3rd October, 1994 but which was subsequently set aside and to his knowledge no other grant was ever issued till one was issued to the deponent and the co applicants on the 9th day of November, 2004.
- (xiv) Contends further that all the beneficiaries of the deceased were catered for in the confirmation and the proceedings are just being prolonged for selfish reasons.

This deponent has annexed exhibits as part of evidence namely the old colonial identity card issued on the 5-3-56 number D 1/18475/MKS bearing the names of Kawinzi Paul Muthiani, extract from the deceased's note books made on 23rd January 1977 which go to confirm the depositions of the deponent with regard to the history of the household of Esther Mutindi and in the process confirming that the byproducts of those households are his children as he had purchased the mothers of those children with his property. It also confirmed that one household of Esther Mutindi did not have children, annexure 3 lists of the family members of the deceased, exhibit 4 the funeral programme. Annexure 6 proceedings in the District Magistrate's court at Kangundo in court case number 21 of 1978. Crucial to these proceedings is the testimony of the deceased Paul Muthiani Musau. Both in his examination in chief and cross-examination, the deceased confirmed that the mother of Peter Mwaka had been married elsewhere and when she came to the deceased's home, the deceased paid dowry to her father Mwala who allegedly refunded the dowry which had been paid for Peter's mother by the previous husband. The testimony also confirms that when Mukii came to the deceased's home she already had two children namely Mwaka and Kiiio. The same testimony goes on to confirm that Esther Mutindi had married 3 women inclusive of Mukii the mother of Mwaka. That the deceased married the said women for Esther. As at the time demands were made for Mwaka he was already a married man with five children. Exhibit 7 is a letter from Peter Mwaka Muthiani addressed to Muoki Nyumu demanding he had allegedly spent in sponsoring certain activities for the first household of the deceased including the succession proceedings. Annexure 8 is an affidavit deposed on the 1st day of June, 2001 whose salient features are that he is the son of one James Maingi Muthiani a son of the deceased who is also deceased. In the content, it is deposed that the late Patrick Mukua Muthiani had been directed by his late father James Maingi Muthiani and his uncles Samuel Musyoki Muthiani, John Muthusi Muthiani and David Mutisya Muthiani to alter the original will of the deceased which original will had made provisions that his estate should be divided equally amongst his widows who are Syokwia Muthiani, Katile Muthiani, and Mutindi Muthiani. The will was altered to portray that only the children of two widows namely Syokwia Muthiani and Katile Muthiani were to inherit. The will was typed and the deponent took the second copy of the will to his late grandfather the deceased to have it executed in the presence of witnesses Munyaka Makundi and Gedian Kisini both of whom are also deceased. This

deponent goes further to depone that he did not take the first copy of the will for endorsement because they did not want the alteration to be detected. Further that Mutula Kilonzo was not present when the said will was endorsed by the deceased and his witnesses. Further that the witness did not even see the deceased append his thumb print nor that of each witnessES as that of the deceased was appended in the home of Peter Mwaka and those of the witnessES by each at each of the witnesses' home.

Annexture 9 is the result of appeal number 40 of 1995 between Jonathan Nyumu Muthiani and John Muthusi as appellants and Joseph Kawinzi Muthiani as the respondent. The result was that the appeal was dismissed. Annexure 11 are the orders made by Rawal J as she then was on 4th July, 2001 following an alleged consent on the choice of administrators whose hand draft proceedings were plucked out of the court record making it impossible to have the said consent orders extracted and effected. Since they were overtaken by events, they will be reflected here on the record for purposes of the assessment:

- 1. That the late Jonathan Nyumu Muthiani deceased and the late John Muthusi Muthiani be replaced and substituted by Charles Mumo Nyumu and Moses Manza Muthusi.**
- 2. That grant of letters of Administration of the estate of the late Paul Muthiani Musau be and is hereby given to Joseph Muthiani Charles, Mumo Nyumu and Moses Manza Muthiani and who are hereby appointed as joint Administrators.**
- 3. The said names of Joseph Kawinzi Muthiani, Charles Mumo Muthiani be published in the Kenya gazette on priority basis.**
- 4. That the remaining matters in issue in connection with the estate of the late Paul Muthiani Musau deceased be determined at the hearing of the confirmation of the grant herein.**

Others are new papers cutings concerning proceedings relating to the burial rights of his late wife of the deponent. Other documents assessed are court proceedings of 10/9/2001 in these proceedings before Rawal J as she then was , list of Muthiani family members who had agreed to share out the deceased's' estate according to the three house hold units of the deceased, a letter from Benjamin Wambua James to Kalekye Nganga informing the addressee that the land which had been sold to the addressee by one of the grand sons of the deceased had been illegally sold and the addressee stood to loose his money, charge sheet in criminal case No.815 against Joseph Mutuku Musyoki, a list of persons who had allegedly purchased portions of the deceaseds' estate, copy of the objection to the making of the grant herein made by Joseph Kawinzi Muthiani dated 27th day of February 1985, and a copy of the confirmed grant issued on the 9th day of November 2004 sought to be revoked herein.

The next affidavit of evidence is one deponed by Benjamin Wambua James deponed on the 2nd day of October, 2009 and filed on the 4th day of December, 2009. The salient features of the same are that:-

- (i) He represents the house of Katile Muthiani and he is the eldest grandson of the deceased subject of these proceedings and the eldest son of the late James MAINGI Muthiani who was one of the petitioners for the issuance of the grant of representation herein.
- (ii) That before his death, his late father confided in him that the alleged will had been doctored by some members led by one Peter Mwaka Muthiani to deny Joseph Kawinzi Muthiani his rightful share of the inheritance.
- (iii) One Patrick Mukua Muthiani confided in the deponent that he is the one who was used to doctor the said will.
- (iv) He has personal knowledge of the deceased who had been a colonial administrator who believed in justice and fairness and he had intimated in one of the family meetings which the deponent was present that he intended his estate to be distributed according to Kamba customary law to his three

house holds signified by the three wives the deceased had.

(v) The deponent has knowledge that the house of Esther Mutindi is one of those house holds of the deceased which are recognized. He also had knowledge that this house hold of Esther Mutindi in turn had three units namely that of Katuku Muthiani forming the first house comprising:-

1. Joseph Kawinzi Muthiani (2)Wambua Muthiani (3)Mwema Muthiani.

The second unit of Mukii Muthiani forming the 2nd house hold unit comprising Patrick Mwaka Muthiani and Antony Kiio Muthiani And lastly the 3rd unit of Mary Kadogo Muthiani comprising her alone.

(vi) The deponent witnessed the deceased give Joseph Kawinzi Muthiani a portion of land on to which he put up a home which action the deceased would not have not done if Kawinzi was not his child.

(vii) That the deceased recognized other children as his own inclusive of one Peter Mwaka Muthiani whose pertanity is indoubt.

(viii) Joseph Kawinzi has buried his late wife and his late children on to this land.

(ix) The entire Muthiani family headed by this deponent has resolved to share out the deceased's estate amongst the three house hold units that the deceased had and this has been effected on the ground.

(x) That by reason of what has been stated above, the objection should be dismissed as the same is ill motivated and aimed at denying Joseph Kawinzi Muthiani of his inheritance.

The deponent has also annexed exhibits namely Kangundo DMCCC No.21/1978 Peter Mwaka Muthiani versus Stephen Mathuku kavuu, Machakos HCCA NO.40 of 1995 between Jonathan Nyumu Muthiani and John Muthusi Muthiani versus Joseph Kawinzi Muthiani, list of family members of the Muthiani family who had agreed to have the estate distributed amongst the three houses of the deceased dated 16th day of August,2004, agreement of the estate of the deceased, letter from Benjamin Wambua James to Kalekye, charge sheet against Joseph Mutuku Musyoki, list of persons alleged to have purchased portions of the deceaseds' estate all assessed. When dealing with the deponement of Joseph Kawinzi Muthiani. And a letter written by Benjamin Wambua James to G.E.O.Oluoch & Co. advocates whose control themes is that the original will had been forged, all the sons of the deceased are now deceased and they as grand children of the deceased are willing to share out the estate amongst the three houses of the deceased.

There is also an affidavit of evidence of one Anthony Musau Muthusi deponed on the 2nd day of December,2009 and filed on the 4th day of December,2009. The salient features of the same are that:-

(i) The deponent is the son of late John Muthusi Muthiani and a representative of the house of Syokwia Muthiani.

(ii) The deponent has personal knowledge that the deceaseds' late father disclosed to the deponent before he died that the will which was relied upon by them to seek the grant herein had in fact been doctored by some of the family members of the deceased and for this reason a meeting of the entire Muthiani family was called and they dismissed that will as it was doctored with the sole aim of disinheriting Joseph Kawinzi Muthiani.

(iii) Maintains the family members have elected him to represent the house of syokwia, Benjamin Wambua James the house of Katile and Joseph Kawinzi Muthiani the house of Esther Mutindi.

(iv) Joseph Kawinzi Muthiani is also a representative of Peter Mwaka, his brother Kiio and the surviving widow Kadogo.

- (v) That upon being issued with the grant of representation issued on the 9th November 2004, they summoned the Muthiani clan members which shared out the estate of the deceased into three equal parts amongst the three house holds of the deceased.
- (vi) He confirms the estate comprise of plot No.774 Komarock, plots 15A, 15B Tala market and plot at Katine section Tala.
- (vii) That the exercise would have ended smoothly had Peter Mwaka and his Ca-hoots not objected to the survey of the land Title number Matungulu/Sengali/1158 which objection was aimed at protecting the illegal purchasers of the suit land.
- (viii) Contend that no legitimate beneficiary was left out of the distribution and interests of justice dictate that these proceedings be wound up.
- (ix) That one Alexander Muoki Nyumu has withdrawn his objection leaving Peter Mwaka and his brother Kiio whose Paternity is in doubt as the only contenders against the grant of representation issued herein.
- (x) The court is invited to note that the said peter Mwaka is the only one enjoying the benefits of plot number 570 meant to be enjoyed by the entire house of Esther Mutindi..

The deponent has also annexed exhibits namely list of members of the Muthiani family who agreed to have the estate shared out amongst the three house holds of the deceased dated 16/8/2004, another one of 16/01/2005, another of 18/07/2005 and a letter from the surveyor instructed to survey the land at Sengani.

There is the affidavit of one Mary Katoko Muthiani deponed on the 28th April, 2010 and filed on the 29th day of April, 2010. The salient features of the same are that:-

- (i) She is one of the deceaseds wives having been married by Esther Mutindi.
- (ii) The deponent has knowledge that Esther also married Teresia Mukii Muthiani the mother of Peter Mwaka Muthiani, Antony Kiio Muthiani, Mutungi Muthiani deceased and Ndinda Muthiani.
- (iii) The deponent knew Katuku Munyeze who was a farm worker and when she died she was buried in a public cemetery.
- (iv) That Joseph Kawinzi has two brothers settled elsewhere.

The deponent annexed an ID card showing that the deponent was wife of the deceased.

There is also an affidavit of one Beatrice Waeni Nyumu, wife of the first born son of the deceased.

- (ii) When she married into that family the deceased was already married to his three wives Syokwia Katile and Esther.
- (iii) The deponent confirmed that Esther only had daughters and since the deceased wanted her to have sons and so he permitted her to marry Mary Katoko who never had children forcing Esther to take on Teresia Mukii Muthiani who had three children namely Peter Mwaka, Antony Kiio and Ndinda Muthiani.
- (iv) It is the deponents stand that the said Joseph Kawinzi had never been referred to as a son of Muthiani as his mother was only a worker and when Katuku died she was buried in a public cemetery.

There is also a replying affidavit of one Peter Mwaka Muthiani whose date of deponing has been changed by free hand from 9th April, 2005 to 9th April.2009 and refilled on the 9th day of April, 2009. The court has perused the same and finds that it is similar in material particulars with the one filed in May 2005

already assessed herein save that the current one has more annexures than the sister which had been filed earlier on. The content will not be reassessed save the documents will however be re assessed as the annexures are more than what had been annexed to the earlier affidavit. The annexed documents comprise the initial grant dated 3rd October,1994 issued to Jonathan Nyumu Muthiani and John Muthusi Muthiani, the purported will of the deceased, alleged notice to Joseph Kawinzi to vacate plot 774 Komarock dated 11th day of May,1981, English translation of the notice, proceedings of case number 211/2003 between Kawinzi Paul Muthiani and Peter Mwaka over plot No.570 Nguluni; replying affidavit of one Alexander Muoki Nyumu deponed on the 9th day of April,2009 and filed the same date, authority to represent signed by some members and not others. Affidavit of Peter Mwaka Muthiani deponed on the 22nd day of January,2009 and filed on the same date being in support of an application for contempt; the orders on the certificate of urgency for the hearing of the application for revocation, the affidavit of Peter Mwaka Muthiani deponed on a date not indicated but filed in May,2005 whose content is similar to the affidavit by the same deponent under assessment indicated to have been deponed on the 9th day of April 2009, and filed the same date, letter of appointment of the deceased as a head man by the district commissioner Machakos dated 22nd June,1935, affidavit of Mary Katoko Muthiani deponed on the 28th day of April,2010 and filed on the 29th day of April,2010 together with a copy of her ID card ; affidavit of Beatrice Waeni Nyumu deponed on 29th April,2010 and filed on the same 29th day of April,2010, certificate of urgency which accompanied the application for revocation, summons for revocation, all of which have been assessed in connection with other affidavits.

The documents not assessed else where are a replying affidavit by one Moses Manza Muthusi which had been deponed on the 31st day of January, 2005, and filed the same date. The salient features of the same are that the deponents signature as well as the signatures of Robert Musyoki, Tilas M. Muthusi, Jeremiah M. Nyumu are all forged; no such meeting ever took place; no agreement was reached to subdivide the deceaseds' estate according to three houses holds of the deceased; there is a will in place to which Joseph Kawinzi filed a cross petition which is still pending in court; the said will never gave Joseph Kawinzi Muthiani anything because he was never and he is still not a member of the Muthiani family. The deponent goes further to state that the deceased had divided land and given all his sons. None was given to Kawinzi because Kawinzi's mother was a servant of Esther Mutindi. That at no time did the deceased ever marry mother of Kawinzi either under Akamba customary law or otherwise and to the deponent Joseph Kawenzi is an imposter. This is further confirmed by the fact that when his mother died during the life time of the deceased, the deceased never buried her; she was buried by the government. The court is urged to believe the deponents' assertions that the deceased will is valid and it should be enforced, that the said will excluded Kawinzi and his two brothers who are not claiming the deceaseds' property. This deponent had annexed the documentation which showed there was existence of opposition to the deceaseds' will which had not been disposed off. These had been filed by one Joseph Kawinzi Muthiani and one Beatrice. These were not prosecuted culminating in an application dated 27th day of May, 1994 by the petitioners seeking to have them dismissed for want of prosecution.

In the same annexures there is found an affidavit by one Stephen Savano Maveke deponed on a date not indicated but filed on the 9th day of July,2010. The salient features of the same are that, the deponent had been a senior chief having jurisdiction over the deceaseds' family. He has personal knowledge that the mother of Joseph Kawinzi Katuku was never married by the deceased. She was only a worker of Esther Mutindi onc of the deceaseds' wives. She had been accommodated by the deceased as an employee of Mutindi and when she died, She was buried in a public cemetery. The deponent goes further to state that Joseph Kawinzi had two brothers Wambua Palusi and Muema Palusi all of whom went back to their fathers land where Wambua died in 2005 and was buried while the other brother is still living on the same fathers land . The deponent also had knowledge that the deceased served notice to quit on to Joseph Kawinzi to quit Komarock land and if he had any issues then he should take up the matter in court which Kawinzi never did.

Parties also filed skeleton arguments. Those of the applicant are dated 19th November, 2010 and filed the same date. The salient features of the same are that:-

1. The proceedings relate to an application for revocation dated 18th day of November, 2004 and filed on the 19th day of December, 2004 seeking to revoke a grant issued to Mr. Benjamin Wambua James.

(2) Mr. Joseph Kawinzi

(3) Mr. Anthony Musau Muthusi

2. That a revisit to the background information to the protracted litigation initiated way back in 1984 reveals that the proceedings herein were initiated as a testate proceeding with an alleged will of the deceased annexed, the applicants were initially five namely Jonathan Nyumu Muthiani, John Muthusi Muthiani, James Maingi Muthiani, Samuel Musyoki Muthiani and David Mutiso Muthiani all of whom had been named as the beneficiaries of the alleged will. The cause was gazetted on the 16th day of November, 1984. The proceedings culminated in the issuance of a grant dated 3rd day of October, 1994 to two namely Jonathan Nyumu Muthiani and John Muthusi Muthiani.

3. The court has been informed and it is undisputed that both the named would have been beneficiaries of the will and those who were granted the initial grant of representation have all since died.

4. It is undisputed that two persons challenged the presentation of the said petition namely Beatrice Musyoki and Joseph Kawinzi Muthiani. These were filed on the 8th day of January, 1985 and 8th day of February, 1985 respectively. It is the stand of the applicants that both of these objections and cross-applications or petitions were dismissed for want of prosecution.

5. The applicant contends that the two original administrators have never been substituted as there has never been an application presented for substitution.

6. By reason of failure to present an application for substitution, the application by Mr. Benjamin Wambua James, Mr. Joseph Kawinzi and Mr. Anthony Musau Muthusi cannot hold as the same was presented on misrepresented facts. Secondly no proper procedures were taken before presenting the same.

7. Turning to dependency the applicant contends that the presentation of facts relied upon by them have gone along way to demonstrate that one Joseph Kawinzi Muthiani is not a son of the deceased because:-

(a) He was a son of a servant of Esther Mutindi called Katuku who when she died was buried in a public cemetery at Kangundo.

(b) Joseph Kawinzi Muthiani has two brothers who went back to their father Palusi one who had since died while the other one lives peacefully on their fathers land.

(c) He is not a son of the deceased and that is why he was not named in the will as a beneficiary of the deceased.

(d) He had been given a notice to vacate the deceaseds' plot 774 Komarock.

(e) Indeed when his late wife died the beneficiaries of the deceaseds' estate took him to court to stop the burial. They lost in the lower court and they moved to the high court on appeal but the appeal was dismissed on a technicality because the defending advocate failed to turn up leading to the dismissal of the appeal.

(f) Evidence tendered goes to demonstrate that Esther Mutindi only married two women as deposed Mary Katoko who had no child and Beatrice Waeni Nyumu both of whom have deposed affidavits to the effect that Katuku the mother of Joseph Kawinzi was not married by Esther but was an employee of Esther and that is why when she died she was not buried in the deceaseds home but in a public cemetery. The evidence shows that the only woman married by Esther Mutindi who had children was Lucia Mukii who had two sons Peter Mwaka Muthiani and Anthony Kiio Muthiani.

8. The court is invited to take note of the deponements on the record that the three persons who were unlawfully issued with the grant have abused and misused them by selling portions of the estate property to 3rd parties.

9. The applicants' disputes the list of beneficiaries filed as some eligible beneficiaries were left out.

10. Still contend that signatures of those who illegally consented to the issuance and the confirmation of the grant were forged.

11. That since Esther Mutindi married wives to bear children for Muthiani, then in reality the deceased had five wives or house holds and not three.

12. From the deponements on the record, the court is invited to accept the names proposed by family members as would be administrators namely:-

(a) Alex Muoki Nyumu (b) Joseph Mututku Musyoki (c) Peter Mwaka Muthiani (c) Cosmas Mutua.

The reason for choosing them is because they are impartial and they can be trusted with the administration of the estate by the other beneficiaries.

13. The court is invited to bear in mind the revelation demonstrated by the back ground information in the deponements which is to the effect that the real cause of the problem in the administration of the deceased's estate is Joseph Kawinzi Muthiani and if, he is dropped from the list of the administrators of the deceaseds' estate the rest of the beneficiaries will come up with an agreement on how to administer the estate of the deceased.

The respondent filed two sets of submissions. The first set is dated 15th day of February, 2010 and filed on the 11th day of March, 2010. The second set is dated 16th day of December, 2010. Both will be assessed as one.

1. That the proceedings were initiated as a testate proceedings. The cause was gazetted as such with the will annexed; the will was meant to benefit the sons of the first two houses of the deceased namely the house of Syokwia, and Katile comprising Jonathan Nyamu Muthiani, John Muthusi Muthiani, John Maingi Muthuiani, Sameul Musyoki Muthiani and David Mutisya Muthiani. The house of Esther Mutindi had been completely disinherited by that will.

2. That it is only the Respondent Joseph Kawinzi Muthiani who filed objection under section 69 of the law of succession Act together with Beatrice Mwikali.

(ii) That notwithstanding the presence of the objection a grant was issued on 26th day of September, 1994 extracted on 3rd day of October, 1994.

(iii) The grant issued on 3rd October, 1994 was set aside on the 27th day of February 1995, and since then no other grant had ever been granted till the one sought to be revoked was made.

3. When the Respondents late wife passed on, two of the original applicants moved to the lower court at Machakos and filed a suit to stop the burial of the respondent's wife on the land he has been living but the case was dismissed and the resulting appeal was also dismissed with costs.

(ii) The Respondent also lost a daughter and the same objection was filed in these proceedings but was dismissed.

(iii) No appeals were filed against the decision afore mentioned meaning that the objectors have now conceded that their afore mentioned objections were misconceived and unmerited.

4. Regarding the alleged will, it is the contention of the Respondent that after the death of all the original beneficiaries of the will who were also the original applicants had passed on, the entire Muthiani clan sat down to deliberate on the issue and that is when it was discovered that the alleged will had been forged. They resolved not to go by it and they decided to share the deceased's estate according to the three house holds the deceased had. The same meeting resolved on who would be administrators of the estate.

(ii) The renewed spirit of reconciliation led to the making of consent orders made by Rawal J as she then was on 4th day of July, 2001 on how to share the deceaseds' estate amongst his three house holds and also to appoint new administrators who were ordered to be gazetted.

(iii) That the said consent orders were plucked out from the record before the order was approved in the process rendering the said consent orders in executable.

5. Years went by and to avoid a state of confusion, the family sat again and resolved to settle the issue of distribution of the deceaseds' estate and the appointment of fresh administrators. The three who were appointed Benjamin Wambua James representing the house of Syokwia, Antony Musau Muthiani representing the house of Katile and Joseph Kawinzi Muthiani representing the house of Mutindi.

(ii) That the applicant Peter Mwaka in his replying affidavit filed on the 9th day of April, 2009, concedes that indeed the Muthiani family sat, agreed on how the estate was going to be distributed save that he alleges that the said agreement was not meant to be used in court . Whereas the Respondent contends that the said consent was meant to be used in court to facilitate the distribution of the estate of the deceased through the appointment of administrators to wind up the estate.

(iii) That the estate had been distributed on the ground and it is only when the surveyors moved in to make permanent boundaries is when objections were raised by Peter Mwaka and some beneficiaries.

(iv) That the administrators of the estate left the internal distribution of the deceaseds' estate amongst the members of each house hold to the members of that house hold.

(v) That members of the first two houses have completed the exercise and it is only members of the 3rd house who have not completed the exercise because of issues raised by Peter Mwaka.

6. With regard to the status of the will, it is contended by the Respondent that the alleged will is a forgery because:-

(i) The communication from Peter Mwaka dated 4th December, 1999 exhibited herein shows clearly that he is the one who engineered the originating of the will and caused it to originate the succession proceedings because he had been Promised Land in return.

(ii) Patrick Mokuia Muthiani in an affidavit filed on 5th June, 2001 has deponed that he was dictated by his late father and uncles to alter the alleged will on the 4th day of June, 1981 which alteration altered the will from reading that the estate was to be distributed according to his 3 house holds to one of the same being distributed according to the sons of the deceased first two house holds of Syokwia and Katile.

(iii) The said will has never been proved. There has been no attempt to prove it and for this reason it is as good as being dead. It is not being pursued and it is deemed to have abated since the death of the last beneficiary the proceedings relating to it abated; the parties have been proceeding with the succession as if it was intestate and parties are estopped from contending that the proceedings have been testate. Further if upheld, then the 3rd house will be left out of the inheritance. Even Peter Mwaka who never filed objection and a cross petition will be left out of the inheritance and only Joseph Kawinzi Muthiani who has a cross petition and objection on the record will have his cause heard and determined.

7. The respondent contends that there is in existence another will or wish of the deceased that his estate

should be distributed in accordance with Akamba customary law to his three house hold units equally, a matter several witnesses who have made depositions herein have alluded to and was also proved by production of documentary exhibits.

8. Once the purported will has been discounted, what the court is left with is an intestate estate whose issues can be resolved by the court determining who the administrators are, the beneficiaries, the property of the estate and mode of distribution.

(i) The court is invited to approve the proposed names of Antony Musau Muthiani, Benjamin Wambua James and Joseph Kawinzi Muthiani as the administrators as these comply with the criteria set in section 56 and 57 of the law of succession Act which prohibits minors and persons of unsound mind from being appointed as administrators.

(ii) The other two house holds of the deceased have no objection to the set of administrators appointed.

(iii) The administrators have already administered 2/3^{rds} of the estate of the deceased to the satisfaction of the rest of the beneficiaries with the exception of Peter Mwaka.

(iv) Joseph Kawinzi Muthiani is the only survivor of the original parties to the cause and therefore the only proper party to contend for the position of an administrator.

(v) The applicant objectors have no locus standi to object because once the original petition is struck out, then what will be left will be the cross petition of the Respondent Joseph Kawinzi Muthiani and unless and until that cross-petition is struck out there is no way there can be contention against him as an administrator as the only person who could oppose it are the original petitioners who are all deceased now.

(vi) That by reason of what has been stated in number (i)-(v) above, the interest of justice herein demands that the three named persons be confirmed as administrators of the estate of the deceased.

9. With regard to the list of beneficiaries, the court is urged to adopt the list of beneficiaries comprising the house hold unit of Syokwia Muthiani and Katile Muthiani as proposed by the Respondent and admitted by the applicant.

(ii) As for the house of Esther Mutindi where there are disputes the court is invited to be guided by the documentation and depositions filed herein and find that:-

(i) Esther Mutindi had only 2 daughters and no sons and in accordance with Akamba customary law she was allowed to marry wives in order to give her sons. The first Mary Katoko (Kadogo) who had no children. Followed by katuku Munyenze who was married in 1936 and had three sons Joseph Kawinzi Muthiani and Muema Muthiani. Followed by the 3rd Unit of Mukii who had two sons Peter Mwaka Muthiani and Kiio Muthiani.

(ii) That the first house hold of Syokwia Muthiani and Katile Muthiani have no problem and have no objection to the composition of the house holds of Mutindi. Even Joseph Kawinzi Muthiani the Respondent has no objection to the composition of the said house. It is Peter Mwaka who is disputing the eligibility of the house hold of Katuku Muthianis right of inheritance of the deceaseds' estate.

(iii) It is the contention of the Respondent that the house hold of Katuku Munyenze is entitled to inherit the deceaseds' estate and the objection of Peter Mwaka which is the major objection to the inheritance of the said house hold stands ousted because the alleged purported will which the said Peter Mwaka Muthiani sponsored in order to block the inheritance of the house of Katuku has been confirmed to be a forgery.

(b) It is apparent the said alleged will was instigated by Peter Mwaka in return for land and or cash.

(c) The first two house holds which Peter Mwaka intended to conspire with to disinherit the house hold of Katuku have backed out of the conspiracy and now support its inheritance.

(d) One Rael Loko Maingi a wife to one of the original petitioners deponed an affidavit denouncing those objecting to Joseph Kawinzi, inheritance and confirmed that members of her house hold are no longer objecting to the said inheritance.

(e) The deceased in his own note books whose contents have not been disputed by Peter Mwaka recognized the inheritance rights firstly of his three major house hold units of Syokwia, Katile and Mutindi and secondly the three house holds units of Mutindi (namely of Katoko (Kadogo) Katuku and Mukii. The deceased also confirmed in the said note book that he is the one who gave out land to Kawinzi to built on. The note book entries were made way back in 1977 and were not instigated in any way.

(f) Other proofs of Joseph Kawinzi's right to inheritance are that in the year 1979 he was listed as one of the sons of the deceased who contributed to the hospital bill of his late father; in 1956 Joseph Kawinzi Muthiani was issued with the first colonial id card bearing the name of the deceased; the Respondents assertion that the deceased showed him land where to built and paid dowry for him is uncontroverted. Court proceedings initiated to block the burial of his deceased late wife and children on the land he had been given by the deceased all were decided in the Respondents favour.

(g) The deceased himself in proceedings in Kangundo DMCC No.21/1978 instituted by Peter Mwaka to determine which of the two men Stephen Kavuu and Paul Muthiani Musau was his biological father reveals that the deceased Paul Muthiani Musau testified that when Esther Muthiani married Mukii the mother of Peter Mwaka, she already had two sons namely Peter Mwaka and Kiio Muthiani, and he took them as his own children. He also confirmed that Esther married Katuku for him and he had three sons with Katuku namely Kawinzi, Wambua and Muema.

(h) Concedes that indeed proceedings were taken out through the land dispute tribunal with regard to the ownership of land parcel number 570 Nguluni. It is undisputed that this was a subdivision of a bigger portion of land which the deceased subdivided into three portions. Pot 570 was given to Esther Mutindi, 607 to Syokwia and number 611 to Katile. The beneficiaries of parcel numbers 607 and 611 have no problem as they shared them out amicably. It is parcel number 570 which has problems because Peter Mwaka took the issue to the land disputes tribunal and despite cogent evidence being adduced to the effect that the Respondents house of Katuku was entitled to its share, the tribunal ruled in favour of Peter Mwaka.

(ii) By reason of what has been stated above, the court is invited to rule that all the members of the house hold of Esther Mutindi are entitled to share the property shared out to that house hold.

10. With regard to property forming the estate of the deceased, and the mode of distribution, the Respondent confirmed that the properties comprise plot 774 Komarock, plot 1158 Kitunduni Katilu which is a coffee farm, plot 15 at Tala Market, plot No. Katine section behind plot No.15 Tala market. The Respondents added Heads of cattle and house hold goods.

(ii) The law applicable is section 32, 33 and 35 of the law of succession Act whereby land is distributed according to Akamba customary law; the cattle the same way if still identifiable while house holds should go to Mary Katoko (Kadogo) who is the only surviving widow.

11. The court is invited not to lose sight of the evidence which has gone along way to demonstrate that the deceased made gifts *inter vivos* which should be respected namely land parcel number 607 Nguluni where the first widow Syokwia was settled and buried and the deceased also buried in accordance with Kamba customary law. Parcel number 611 Nguluni on which Katile was settled and buried when she died. These two *inter vivos* gifts should be respected. Whereas parcel number 570 meant for the house of Esther Mutindi should be ordered to be shared amongst the house hold members of that house.

(ii) The court is invited also to note that the portion on which the Respondent was settled on parcel

number 774 Komarock was a gift inter vivos and it should be respected as such.

(iv) The court is also invited to take note that the widow Mary Katoko who is settled on parcel No.1178 should have her settlement respected.

12. With regard to the general complaints raised by the applicants with regard to the entire proceedings the Respondents have this to make in response:-

(i) It was the business of those who were pursuing the testate petition who should have pursued the substitution of the deceased administrators and since no substitution was done the main petition abated.

(ii) Upon the abatement of the main petition, what is left for consideration is the cross-petition of the Respondent.

(iii) There is no way the petition could have been filed without annexing a death certificate.

(iv) Contends that the appointment of the current administrators sought to be ousted was regular and was with the consent of all the beneficiaries of the estate of the deceased. The minutes of the meeting during which the consensus was reached have been exhibited. Peter Mwaka himself concedes there was such a meeting, minutes were taken, signatures appended and only disputes that these were meant to be used in court. His objection alone does not hold as all the other beneficiaries confirm that the minutes and the consent were for purposes of use in court.

(v) It is not correct as contended by the applicants that some beneficiaries were left out of the entitlement. This does not hold because all that the administrators were expected to do was to share out the estate equally between the three house holds of the deceased who were then in turn were to go to share out their respective share entitlements amongst the members of their respective house holds.

(vi) As mentioned earlier on the other two house holds of Syokwia and Katile have no complaint, the complaint arises only in the house of Esther Mutindi because Peter Mwaka does not want to recognize the entitlement of the entire house hold of Katuku mother of the Respondent.

(vii) The presence of an ID card issued in 1956 which nobody has claimed that it belonged to any other person coupled with the Respondents success in the litigation arising from objection to the burial of the respondents late wife which decisions have not been upset all go to solidify the Respondents claim of entitlement to inheritance.

(viii) With reference to the affidavit of Mary Katoko Muthiani, the court is urged to treat her deponement with caution considering that she is in her 90s sun set years and could be taken advantage of; there has been no demonstration that the content had been translated to Akamba her mother tongue; also to consider that she never objected or cross petitioned for a grant and yet the will had disinherited her completely and lastly the content is Resjudicata as the issue of inheritance of the Respondent has already been solidified by the court proceedings.

(ix) As for Beatrice Waeni Nyumu the content of her deponement stands ousted because she has waited for over 30 years to speak out ; it is doubtful if she participated in the payment of dowry considering that she was a daughter in law to the deceased; she has been contradicted by the testimony of the deceased himself in the proceedings where Peter Mwaka had sued his biological father and the deceased wherein the deceased testified on oath that he had purchased the mother of the Respondent just as he had done the mother of Peter Mwaka; the deceased also confirmed in his note books that he had paid dowry for all the wives under the house of Esther Mutindi; this affidavit is therefore Resjudicata.

(x) As for the affidavit of Alexander Muoki Nyumu he has withdrawn his objection.

(xi) That the best interests of justice demands that the wishes of the deceased be respected by giving the three house holds he left behind an equal share of his estate.

(xii) The court to make efforts to bring this matter to an end which has prolonged its stay in court not due to the fault of the court but due to disappearance of the file, court proceedings and the filing of unnecessary applications by the applicants.

(xiii) The respondent's submissions contain annexures. The court has perused the same and finds that these form common annexures to other deponements already assessed and for this reason these annexures will not be reassessed.

This court has given due consideration to all the rival deponements. Filed annexures exhibited, thereto, all the paper work which has so far been filed herein, all the court entries made by the court with a view to trying to resolve the dispute herein as well as the rival submissions filed for the guidance of the court and the court proceeds to make findings on the same. The findings will be on two fronts. The first front being on the undisputed facts of the dispute. The second front deals with the applicable principles of law on the facts front followed by final findings.

1. The proceedings herein relate to the estate of one deceased by the name of Paul Muthiani Musau who died at age of 140 years.

(ii) Although the initiating papers which originated the proceedings and on which the death certificate had been annexed are not traced on the record due to the age of the litigation a copy of the death certificate has been traced on the record confirming that indeed the deceased died at the age of 140 years (one hundred and forty years.)

(iv) The court has not traced any medical certificate on the record to show the state of the deceased mental faculties as at the time he died or shortly before his death considering that some of the transactions complained of herein like the notice issued to the respondent to quit the Komarock land were issued shortly before the deceased's death.

2. It is undisputed that the deceased had a family. He was polygamous.

(a) **His first wife was one Syokwia Muthiani** (deceased) who had three sons namely John Muthusi, Samwel Musyoka Muthiani and David Mutisya. The three were deceased as at the time the application for revocation proceedings were being disposed off.

(ii) It is however undisputed that these three left dependants behind. The documentation on the record has enumerated three sons descendants as hereunder:-

1st son John Muthusi Muthiani.

1. Patrick Wambua Muthusi (2) Antony Musau Muthusi (3) Roman Muthusi (4) Moses Manza Muthusi (5) Musau Muthusi (6) Musyoki Muthusi (7) Paul Nzioka Muthusi.

2nd son Samwel Musyoki Nyumu (deceased)

1. Libya Samwel (2) Mutuku Samwel (3) Monza Samwel (4) Masita Samwel (5) Robert Samwel (6) Mutua Samwel (deceased)

3rd Son David Kavatu (deceased)

1. Mutua Kavatu (2) Manza Kavatu Mutisya (3) Mukua Kavatu Mutisya (4) Makanzi Mutisya.

(b) **Second house of Katile** who had two sons. The paper work assessed has enumerated the descendants of the two sons as here under:-

1st son Jonathan Nyumu Muthiani (deceased)

1. Jimmy Nyumu (2) Musau Nyumu (3)Muoki Nyumu (4) Mutuku Nyumu (deceased) (5)Monza Nyumu (6)Kioko Nyumu (7)Sila Nyumu (8)Muinde Nyumu (9)Mumo Nyumu (10)Jeremiah Nyumu (11)Munyao Nyumu.

2nd Son James Maingi Muthiani (deceased)

1. Benjamin Wambua James (2)Mukua James (3)Mutuku James (4)Alex James (5)Peter James.

(c)3rd house of Esther Mutundi-(Deceased).

(a) Two biological daughters who have not featured in the succession proceedings.

(b) Iweto Unions- (wife to wife marriage) According to the applicant there are only two Iweto Unions namely that of

(i) Mary katoko (Kadogo) alleged to be still living as at the time of the disposal of the application for revocation proceedings but had no biological children of her own.

(ii) Mukii who had two sons namely Peter Mwaka one of the applicants and Kiio Muthiani.

(iii) According to the Respondent Esther Mutindis' Iweto Unions were three. The two mentioned in number (i) and (ii) above and the first one of Katuku Munyanze who was the eldest who had three sons who are still contending the inheritance namely Joseph Kawinzi Muthiani respondent Wambua Muthiani and Muema Muthiani.

(iv) The applicants have contended and have been supported by the deponements of Mary Katoko (Kadogo) and Beatrice Waeni that the house hold of Katuku Munyenze is not a Muthiani as Katuku was not an Iweto but an employee of Esther Mutundi. Whereas the Respondent and as supported by deponents of affidavits from the 1st and 2nd house of the deceased have stated that Katuku was an Iweto of Esther Mutindi and her three sons belong to the Muthiani family.

3. It is undisputed that the deceased had property which formed his estate. According to the purported will which has featured prominently in the proceedings, these properties are plot number 774 Nguluni Komarock, plot 1158 Kitunduni kwa Katuku, plot number 15 shop premises at Tala market, plot at Katine section behind Tala market.

(ii) Both sides have agreed that these form the distributable estate of the deceased.

4. It has transpired from the assessment of facts on the record that the deceased had another piece of land which was situated in the same area of Nguluni which apparently was subdivided during the life time of the deceased and it resulted into three subdivisions namely plot number 607,611 and 570. Parcel number 607 was given to the house of Syokwia, 611 was given to the house of Katile and 570 to the house of Esther Mutindi.

(ii) It is on record that the first two parcels namely plot number 607 and 611 have no pending disputes.

(iii) Plot number 570 which had been given to the house of Esther Mutindi though it was not part of the Estate has featured in the assessment. It was the subject of a land case before the Machakos land disputes tribunal case number 211 of 2003 heard before the District commissioner Machakos. The dispute was between Joseph Kawinzi Muthiani as the plaintiff and Peter Mwaka Muthiani as the defendant. It was resolved in favour of Peter Mwaka who contends the elders decision was in order as the same was supported by evidence. Whereas the stand of the Respondent is that the Respondent gave consent evidence and produced witnesses who confirmed that this plot number 570 was the share of Esther Mutindis gift intervivos from the deceased and the same was supposed to be shared equally between the three Iweto families of Esther but the elders ruled otherwise.

(v) The position of the plot on the ground is clear that it is Peter Mwaka who is using it. It is not clear whether the elders decision was made into a judgment of the Court and executed or not. It is however clear that it does not form part of the invented estate property liable for distribution.

5. It is undisputed that upon the death of the deceased, the five sons of the deceased forming the first and second house holds moved to court and filed the current proceedings as testate proceedings with an alleged will of the deceased annexed.

(i) The alleged will of the deceased named all the five sons as beneficiaries and executors namely Jonathan Nyumu Muthiani, John Muthusi Muthiani, James Maingi Muthiani, Samwel Musyoki Muthiani and David Mutisya Muthiani.

(ii) The will bears a purported thumb print of the deceased Paul Muthiani Musau and two thumb prints of witnesses namely Munyoka Mukindya and Gedion Kisini.

(iii) The court has been informed that the cause was gazetted as a testate probate in the year 1984/85 with all the five named beneficiaries as executors.

(iv) It is evidently clear that no grant was issued to the five.

(v) It is also clear that upon gazettment of the probate, two objections were filed, one by Beatrice Mwaka alleged to be a daughter of the deceased and another by Joseph Kawinzi Muthiani both filed in 1985. There have been conflicting versions with regard to the status of these objections with the applicant's version being that these were dismissed for want of prosecution while those of the Respondent asserting that these are still on the record and are alive. A revisit to the court record reveals that the objection by Beatrice Mwikali was filed on the 18/1/85 while that of Joseph Kawinzi Muthiani was filed on 28/2/85.

(vi) Despite the existence of these objections on the record a grant was issued on the 3rd day of October, 1994 to Jonathan Nyumu Muthiani and John Muthusi Muthiani after the objections filed on 3rd and 4th April, 1985 were dismissed with costs for want of prosecution.

(vii) There is an entry on the record made by E. Owuor J as she then was now (JA rtd) on 20(25)/2/95. It was by consent of both parties as the respondent was represented by Mr. Oluoch while the petitioners were represented by Mr. F.M. Mulwa. The orders made on 26/9/94 which had given rise to the grant extracted on 3/10/94 were set aside. The petitioner was given leave to amend the petition within 14 days of that order and the objector/ cross-petitioner was given liberty to amend their cross petition. With cost in the cause.

(viii) On 27/2/96 the respondents counsel informed the court that he had filed an amended objection and cross-petition. Orders were made to have the issue of the validity of the will determined by way of viva voce evidence.

6. It is undisputed that the viva voce evidence hearing to determine the validity of the will was never undertaken till 6/11/2000 when the court was informed that all the petitioners had all since died.

(ii) The death certificates of all the five original executors of the deceased will as well as beneficiaries have not been exhibited by any of the contending parties. But it is common ground on both sides that indeed the original petitioners who were also the beneficiaries of the purported will have all since died.

(iii) None of the dependants of the said five have ever moved the court in these proceedings to be substituted in the place of the said original petitioners.

(iv) In spite of the issue of the five having passed on not being disputed, this court has not been informed or shown any grants of representation having been granted to the personal representatives of the estates of the said persons. Instead it appears that the beneficiaries of the said five simply stepped forward to seek

inheritance rights in their capacity as grand sons of the deceased.

(v) It therefore means that the alleged will of the deceased has never been proved or disproved.

7. The failure to undertake proceedings to prove or disprove the existence of the will led to a state of limbo in the administration of the estate until parties allegedly appeared before Rawal J as she then was on the 4th day of July, 2001. The learned judge allegedly made orders by consent to the effect that the late Jonathan Nyumu Muthiani (deceased) and the late John Muthusi Muthiani be replaced and substituted by Charles Mumo Nyumu and Moses Manza Muthusi; that the grant of letters of administration of the estate of the late Paul Muthiani Musau be and is hereby given to Joseph Muthiani, Charles Mumo Nyumu and Moses Manza Muthiani and who are hereby appointed as joint administrators, that the said names of Joseph Kawinzi Muthiani Charles Mumo Nyumu and Moses Monza Muthiani be published in the Kenya gazette on priority basis and lastly that the remaining matters in issue in connection with the estate of the late Paul Muthiani Musau deceased be determined at the hearing of the confirmation of grant herein.

(ii) The court has been informed that the hand draft proceedings of the learned Judge were plucked out of the court record and in the process incapacitating the extraction of the afore mentioned orders for enforcement. The named therefore never assumed the role of administration of the Estate.

(iii) Thereafter the estate fell into a state of Limbo and stelemate until the Respondents presented the application dated 19th day of August, 2004 and filed on the 20th August 2004.

8. The application of 20th August, 2004 gave rise to the orders made on the 9th day of November, 2004 appointing Benjamin Wambua James as representative of the house of Katile, Joseph Kawinzi Muthiani as Trustee of the house of Mutindi Muthiani and Anthony Musau Muthusi as Trustee for the house of Syokwia Muthiani. The properties forming the estate are the same ones afore mentioned and the mode of distribution; equal sharing amongst the three house holds of the deceased.

(ii) It is the stand of the applicants in the said application for confirmation of grant sought to be upset by the application for revocation subject of this judgment that as assessed herein that the application for confirmation and appointment of administrators as well as the distribution was on the basis of consensus of all the beneficiaries of the deceased estate.

(iii) The existence of an alleged consensus amongst all the beneficiaries of the estate of the deceased allegedly consenting both to the persons to be appointed as administrators as well as on the mode of distribution of the estate property has been confirmed consistently by the deponements as well as affidavit evidence of the three persons who had been appointed as administrators namely Benjamin Wambua James, Joseph Kawinzi Muthiani and Antony Musau Muthusi as well as affidavits of those supporting this stand as assessed.

(v) This position has been reinforced by the documentary exhibits annexed to the several deponements as well as affidavit evidence and the content of the two sets of submissions filed by counsel on behalf of the Respondent.

9. The application for revocation as well as its supporting affidavit are presented using the statutory forms made under the laws of succession Act. It is expressed to have been presented by the firm of advocate of Musili and Musili advocate. It is however shown to have been signed for by either a person or an advocate for Musili and Musili advocates. The name of the person signing for Musili and Musili advocate is not disclosed.

(ii) The application is indicated to have been presented on behalf of one Moses Manza Muthusi the deponent of the supporting affidavit for seeking revocation and the content of the supporting affidavit have already been assessed. Reliance has been placed on a list of alleged family members who are supposed to have met and consented to the appointment of both the administrators and on the mode of distribution.

(iii) It is however noted that the list of the purported family members only has bear names. It does not have ID card numbers of the said members nor their signatures.

10. The assessment has revealed the existence of an affidavit titled Reply to replying affidavit deponed by one Moses Manza Muthusi on the 31st day of January, 2005, and filed the same date. The content has already been assessed and reflected elsewhere in this judgment but in a summary there is insistence of the existence of a valid will which left out Joseph Kawinzi from the inheritance and insistence that no family meeting took place in which the three were mandated to act as administrators for purposes of confirmation. It is also to be noted that the greater opposition to the confirmation grant made herein and support for the application for revocation has come from one Peter Mwaka Muthiani.

(i) Peter Mwaka Muthiani filed a replying affidavit deponed on the 6th day of May, 2005 and filed the same date which was replicated and shown to have been deponed on the 9th day of April 2009 after crossing out 2005 and then filed on the 9th day of April, 2009. The contents of these two affidavits purportedly deponed twice are similar both in paragraphing and content save that the annextures to the affidavit deponed in 2005 are fewer than those of the affidavit deponed in 2009.

(ii) By the content of both the deponement and the annextures, Peter Mwaka objects to the inclusion of Joseph Kawinzi Muthiani both as an administrator and beneficiary of the estate of the deceased because of the following:-

(a) The said Joseph Kawinzi Muthiani was not included as a beneficiary of a valid will which is in existence.

(b) The mother of Joseph Muthiani Kawinzi Katuku was not an Iweto of Esther Mutindi but just a worker/employee.

(c) The deceased subject of these proceedings had given notice to the said Joseph Kawinzi Muthiani to quit his land.

(d) There are supporting deponements from Mary Katoko (Kadogo) Muthiani and Beatrice Waeni to confirm that the said Joseph Kawinzi Muthiani is not a family member of the deceased.

(e) Litigation between Peter Mwaka Muthiani and Joseph Kawinzi Muthiani over plot number 570 Nguluni ended in favour of Peter Mwaka Muthiani.

11. To oust the assertions of Peter Mwaka Muthiani in number 10 above, the Respondent Joseph Kawinzi Muthiani relies on the following:-

(a) The purported will has turned out to be a forgery as per the content of an affidavit deponed by one Patrick Mukua Muthiani on the 15th day of June, 2005 and filed on the 21st day of June, 2005 to the effect that he was dictated by the original beneficiary of the will to change the will from reading that the estate should be shared equally between the three house holds of the deceased to read the five sons of the first and second house holds.

(b) He has been supported by the deponements of Patrick Mukiwa Muthiani being a further verifying affidavit deponed and filed the same date, the general and affidavit evidence of Benjamin Wambua James and Antony Musau Muthusi.

(c) The alleged notice to vacate the land purportedly thumb printed by the deceased dated 11th May 1981 was instigated by Peter Mwaka.

(d) He gave cogent evidence in his favour and called witnesses to confirm his version in the land disputes tribunal proceedings No. 211/2003 but does not know how the tribunal ruled against him.

(e) The deceased Paul Muthiani Musau acknowledged him as a son and family member and his mother Katuku as a wife to Esther Mutindi in a note book entry made on the 23rd day of January, 1977, proceedings in civil case number 21 of 1978 in the District Magistrates Court at Kangundo, he was successful in the litigation undertaken against him by Jonathan Nyumu Muthiani and John Muthusi Muthiani in Machakos Principal Magistrates Court case number 766 of 1994 giving rise to Machakos HCCCA Number 40 of 1995. In both of which he was successful against the move of the two plaintiffs and appellants to bar him from burying his late wife on the land he had been given and settled by the deceased.

(f) The letter of 4th November, 1999 from Peter Mwaka Muthiani to Muoki Nyumu and copied to some other family members goes to demonstrate that it is Peter Mwaka Muthiani who has been fighting to deprive him of his inheritance.

(g) He was the only objector and cross petitioner and once the main petition abates the only contender for the issuance of the letters of representation to an intestate estate is him Joseph Kawinzi Muthiani. But for the sake of harmony within the family which has been afflicted by this prolonged succession proceedings he is willing to have the other two chosen administrators participate in the administration.

(h) The court has been invited to disregard the depositions of Mary Katoko (Kadogo) Muthiani and Beatrice Waeni because although they are family members they are aged and in their sunset years of the 90s and they can be taken advantage of.

(i) The assertion in number (h) above notwithstanding the said depositions cannot oust the entry in the deceased's diary made in 1977 and the evidence tendered in the Kangundo District Magistrates Court that him Respondent is a son of the deceased. Further they cannot oust the judgment in Machakos SPMCC No. 766/1994 and civil appeal Number 40/1995.

Turning to the legal front, the court proceeds to make the following findings on the same:-

1. It is undisputed that the proceedings herein were initiated as testate proceedings. Reliance was placed in an alleged will which has been exhibited by both sides. It is in writing and for this reason in order for it to pass the first legal hurdle it has to be demonstrated that it complied with the requirements of the law. These are set out in section 11 of the Law of Succession Act cap 160 Laws of Kenya. It provides:-

“No written will shall be valid unless

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

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

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

When construed and applied to the rival argument herein with regard to the validity of the will relied upon by the applicants, the court makes the following findings:-

(a) It has a mark in the form of a thumb print against the name of the deceased and the presumption is that that mark was made by the deceased.

(b) It has thumb prints of two witnesses namely Munyaka S/o Mukindia Gedion Kisini.

(c) It is mandatory that the will be attested by two witnesses who must have seen the testator affix his mark on the will. Herein the court has been informed that both alleged attesting witnesses are deceased. It is not clear as to whether they were alive in 1984 when the executors moved to court to file the succession proceedings. It is however clear from the content of the affidavit of Patrick Mokuu Muthiani deponed on the 15th day of June, 2001 and filed on the 21st day of June, 2001 that he is the one who facilitated the changing of the content of the will to read that the properties are given to the five sons of the senior houses as opposed to the three widows. Further that none of the witnesses not even the advocate saw the deceased affix his thumb print. Likewise neither the deceased nor the commissioning advocate saw the witnesses affix their thumb prints.

(ii) This deponement of Patrick Mokuu Muthiani has not been countered by any other deponement that, that was not the correct position.

(iii) It is on record and as assessed herein that directions were given to the effect the validity of the alleged will be proved by way of viva voce evidence which was never undertaken.

(iv) The beneficiaries of the will are the five sons of the two senior house holds of the deceased of Syokwia and Katile. They are named in the alleged will as (1) Jonathan Nyumu Muthiani (2) John Muthusi Muthiani (3) James Mwangi Muthiani (4) Samwel Musyoki Muthiani (5) David Mutisya Muthiani. They are all deceased.

(iv) Being the beneficiaries of the will and having been deceased, their interests in pursuing the right of benefitting from the said will could have been taken on by their personal representatives. As mentioned earlier on elsewhere, this court has not been shown any letters of representation to the estates of the named five either in the names of Peter Mwaka and Moses Manza or any other family member of the named persons. In the absence of a grant of letters of representation being granted in favour of the named original beneficiaries, there is no locus in Moses Manza or Peter Mwaka to pursue the realization of the fruits of the will in the absence of the alleged will having been proved, and in the absence of any of the descendants of the original beneficiaries showing interest in pursuing the rights of the original beneficiaries and execution the alleged will becomes now purported will.

(v) Further to number (iv) above, the validity and usefulness in the passing of the rights of inheritance stemming from the said alleged will could only be cemented on its passing the test of proof of which process was never undertaken.

(vi) Representatives from the houses which were to benefit from the said will namely the house of Syokwia and Katile namely Benjamin Wambua James and Antony Musau Muthusi are no longer pursuing the enforcement of the alleged will on behalf of the original beneficiaries.

2. Upon complying with the requirements under section 11 of the Act, the executors named were required to have complied with the provisions of rule 13(2) of the probate and administration rules with regard to presentation of an application for proving the same. It provides:-

“13(1) An application for proof of an oral will or of letters of administration with a written record of the terms of an oral will annexed shall be by petition in form 78 or 92 and be supported by such evidence on affidavit in form 4 or 6 as the applicant can adduce as to the matters referred to in rule 1 so far as relevant together with evidence as to-

(a) The making and date of the will.

(b) The terms of the will.

(c) The names and addresses of any executors appointed.

(d) The names and addresses of all the alleged witnesses before whom the will was made.

(e) Whether at the respective dates both of the making of the will and of his death the deceased was a member of the armed forces or merchant marine engaged in the service period of active service.

(f) Whether the deceased at any one time executed or caused to be executed a written will.

2. Subject to the provision of sub rule (1) the provisions of these rules relating to applications for probate of written wills or letters of administration with such wills annexed shall apply in relation to application for the proof of oral wills”

(ii) It is common ground that directions given by this court to the effect that the will be proved by adduction of viva voce evidence was not complied with. In the premises, the alleged will was never proved firstly to be a will in terms of the requirement of the law, and secondly that it had in fact originated from the deceased that it contained what the deceased intended to express and lastly that it is enforceable.

3. It is common ground that all the five beneficiaries of the alleged will were the same ones appointed as executors. It is common ground that indeed all the five presented the petition and were gazetted as such. The grant was not however extracted for use because one Beatrice Mwikali and Joseph Kawinzi Muthiani filed objections. It is also on record that these objections were to be disposed off by way of viva voce evidence but this procedural step was never taken.

(ii) It is on record that indeed a grant was issued to two of the five executors namely Jonathan Nyumu Muthiani and John Muthusi Muthiani following an order dismissing the objections and cross-petitions proceedings for want of prosecution on 26/9/1994.

(iii) It is also on record and as assessed herein that the said orders of 26/9/2004 were set aside by the orders of 27th day of February, 1995 whereby the petitioner was given liberty to amend his petition and application within 14 days of that order with the objection and cross petitioner being given liberty to amend the gross petitions.

(iv) The setting aside of the grant issued on 3/9/2004 left the estate without an executor.

4. It is common ground that the said named two persons namely Jonathan Nyumu Muthiani and John Muthusi Muthiani passed on before the petition and cross-petition had been heard and determined.

(ii) Upon the setting aside of the orders of 26/9/94 on which the grant dated 3rd October, 1994 had been anchored, the grant dated 3/10/1994 could no longer hold. It ceased to exist and therefore could not be acted upon.

(iii) This court has not traced a grant of representation to the estate of the above named two. It is only a person who holds a grant of representation to the estate of the said named two who can champion the issue of the revival of the grant issued on 3/10/1994.

(v) In the absence of any action having been taken as in number (iv) above the grant of 3/10/94 ceased to exist and no other grant exists herein besides the one which is under challenge. Upon the orders on which it could be anchored being set aside, it ceased to exist and issues of substitution of the grant holders thereto could not arise.

5. Upon the death of Jonathan Nyumu Muthiani and John Muthusi Muthiani the provisions of rule 20 of the probate and administration rules is called into play. It provides:-

“Where an executor has predeceased the testator or has survived the testator but has died before a grant is applied for and without having renounced a certificate or evidence acceptable to the court of the death of such executors shall unless the court for reasons to be recorded otherwise the

making of the grant”

(ii) Herein no such procedural step was ever taken. As such in the absence of proof of applications to substitute the deceased original executors the proceedings can be said to have been left hanging.

(iii) This court has not traced any rule in the probate and administration where succession proceedings could be said to have abated. It is safe to say that the petition filed herein in the absence of an order striking it out, it is still a live on the record. Save that as mentioned earlier on, it is only the holders of the grant of representation to the estate of the said original beneficiaries and executors who can champion the interests of these proceedings and none has been shown to exist.

6. The absence of a person or party with locus standi to champion the interests of the petition filed, brings to the fore the right of the objector and cross petitioner to proceed.

(ii) It is on record as assessed herein that orders were made that these be determined by way of viva voce evidence. A step not taken.

(iii) It is also the finding of this court that the party charged with the obligation to prosecute the cross-petition was the Respondent. His cross-petition was based on intestacy. The Respondent was not obligated to have his right to prosecute determined upon the taking of viva voce evidence because he is the original of the said objection and cross-petition.

(v) Nothing prevented the court from invoking its inherent power under rule 73 of the probate and administration rules to ensure that ends of justice is done to the parties. It provides:-

“Nothing in these rules shall limit or otherwise affect the inherent power of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”

This provision could be invoked by the court to determine whether the cross petitioner could be issued with the grant either alone or jointly with the others. It therefore follows that Rawal J as she then was, was right in accepting the consent which lead to the issuance of the orders of 4th July, 2001 which were allegedly removed or ripped off from the court record.

(v) Nothing prevented the revival of that spirit consensus leading to the filing of the application for confirmation giving rise to the orders of 9/11/2004 sought to be up set. It is therefore correctly submitted by the Respondents’ counsel that the only pleadings capable of being prosecuted in this cause objection and cross-petition.

7. The content of the entries of the orders made on 23rd January 1977 have no legal force on their own. If anything, this would have cited as the deceased wish on how he wished his estate to be distributed. The weight to be attached to them has to take cognizance of the other evidence available on distribution as tendered by both sides of the divide as well as the best interests and fairness to all the beneficiaries. These form the basis of the factual findings of the dispute.

8. The proceedings in tribunal appeals case number 211/2003 as represented by the proceedings exhibited have the factual evidential value as assessed here in. They have no legal force as there is nothing to show that these were originated by a court order and upon their conclusion the result was filed in court and made an order of the court for purposes of enforcement. However as submitted by the Respondents’ counsel, these related to the ownership of plot number 570 Nguluni which Peter Mwaka Muthiani, the current occupant has not disputed that it was a resulting subdivision of a bigger portion of land previously owned by the deceased and that the resulting subdivisions had been shared out to the three house holds of the deceased.

(ii) Peter Mwaka has not disputed that this was the share of Esther Mutindi. His contention is that the Respondent Joseph Kawinzi Muthiani is not a member of the deceaseds’ family and as such he could not inherit any of the deceaseds’ property.

(iii) It is however clear that as submitted by the Respondents' counsel this forms what has been termed as gifts intervivos. It does not form part of the distributable estate of the deceased and for this reason claims to it can be pursued in another appropriate forum.

9. Court proceedings in Kangundo District Magistrates Court case number 21 of 1978 have a force of law.

(i) It is noted that although Peter Mwaka was their initiator, he did not annex them among his annexures to his affidavits filed herein. The deceased gave evidence as PW2. A reading of the content of the deceased evidence reveals clearly the deceased recognized the three house hold units of Esther Mutindi as his family members. He testified both in the examination in chief and cross-examination that he paid dowry for each woman and they were his wives. He also confirmed that when he took on Mukii as Mutindis Iweto Mukii already had two sons namely Peter Mwaka and Kiio. He also confirmed that Katuku had three sons when he took her on as Mutindi's Iweto. She had three sons Kawinzi, Wembua and Muema. He paid dowry for Katuku and for this reason the sons of Katuku were his children.

(ii) There is also the court proceedings in Machakos SPMCC number 766 of 1994 with a resulting appeal number 40 of 1995. The court was informed and it has not been disputed that these related to proceedings whereby members of the first and second family as well as Peter Mwaka sought to prevent the Respondent from burying his late wife on the land on which he resides and they ended in his favour. These fell into the category of evidence provided for under section 84 of the evidence Act cap 80 laws of Kenya. It provides:-

“Whenever any document is produced before any court purporting to be a record or memorandum of any evidence given in a judicial proceeding or before any officer authorized by law to take such evidence and purporting to be signed by a judge or magistrate or any such officer as afore said the court shall presume that.

(a) That the document is genuine.

(b) That any statements as to the circumstances in which it was taken purporting to be made by the persons signing it are true; and

(c) That such evidence was duly taken”

When applied to the all the court proceedings assessed herein, this court makes a finding that they represent a true record of what is alleged to have transpired in the said proceedings as well as the final determination of those proceedings namely that the deceased recognized Joseph Kawinzi Muthiani as his son during the deceased's' life time, and that the court recognized the Respondents right of occupation of the portion of land allegedly given to him by the deceased and that is why the court allowed the Respondent burry his late wife and late children on the same piece of land.

This court has given due consideration to the findings on both factual and legal fronts and the major question to be asked by this court is whether on the basis of those findings the application for evocation filed herein is to stand or not. This court is alive to provisions of section 76 of the law of succession Act cap 160 laws of Kenya which sets the parameters within which an application for revocation should be presented. It provides:- presents.

“A grant of representation whether or not confirmed may at any time be revoked or annulled if the court decides either on application by any interested party or of its own motion.

(a) That the proceedings to obtain the grant were defective in substance.

(b) That the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case.

(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or in advertently.

(d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either.

(i) To apply for confirmation of the grant within one year from the date thereof or such longer period as the court has ordered or allowed or

(ii) To proceed diligently with the administration of the estate; or

(iii) To produce to the court within the time prescribed any such inventory or account of administration as is required by the provision of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particulars; or

(e) That the grant has become useless and in operative through subsequent circumstances”

This provision was construed by the court of appeal in the case of “**Matheka and another versus Matheka (2005) 1KLR 455**” where in the CA laid down the following principles:-

(1) A grant may be revoked either by the application of an interested party or on the courts own motion.

(2) Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance or that the grant was obtained fraudulently by making of false statement or by concealment of something material to the case or that the grant was obtained by means of an untrue allegation of facts essential in point of law or that the person named in the grant for confirmation has failed to proceed diligently with the administration of the estate.

(3) The grant may also be revoked if it can be shown to the court that the person to whom the grant has been issued has failed to produce to the court such inventory or account of administration as may be required.

(4) When a deceased has died intestate, the court shall save as otherwise expressly provided have a final discretion as to the person or persons to whom a grant of letters of administration shall in the best interests of all concerned be made but shall without prejudice to that discretion accept as a general guide the following order of preference.

(a) Surviving spouse or spouses with or without association of other beneficiaries.

(b) Other beneficiaries entitled in intestacy with priority according to their respective beneficiaries interests as provided by part (v) of the law of succession.

(c) Public trustee

(d) Creditors.

This court has applied the afore set out ingredients to the grounds set out in the body of the application for revocation and it is satisfied that although Moses Manza Muthusi as a beneficiary of the deceased can be classified as an interested person entitled to seek revocation, the other grounds cited by the applicant in support of revocation do not fall into the statutory ingredients required to be demonstrated to exist before one can earn a relief of revocation of grant.

The findings above notwithstanding the court on its own motion and invoking its inherent power under rule 73 of the probate and administration rules and invoke ground (e) and revoke the said grant

complained of as having become useless and in operative through subsequent circumstances. The reasons for doing so is that the court which confirmed the grant did not comply with the requirement in sections 71 and 72 of the Act. Under section 71 of the Act, the court moving to confirm a grant was to ensure .

(1) That the person or party applying for confirmation of a grant is a holder of a grant of representation. Herein the three applicants namely Benjamin Wambua James, Joseph Kawinzi Muthiani and Antony Musau Muthusi were not holders of any grant of representation after the one which had been granted by Rawal J as she then was on 4/7/2001 having been ripped off from the court file and in the process preventing the orders from being extracted and issuance of the grant of representation.

(2) Even if the orders of 4/7/2001 had been extracted and a grant to that effect issued, the said grant would not have been valid in so far as it would have gone to purport to substitute the administrators of the grant issued on 3rd October,1994 following the issuance of the orders made on 26/9/1994 because the record shows clearly that the orders of 26/9/1994 had been set aside on 27/2/95 and for this reason no valid grant existed which could have led to substitution of the deceased grant holders.

(ii) Further no such substitution could have held had it been effected the grant of 3/10/94 having been based on a testate petition it could only have been issued to substitute persons who had taken out grants of representation to the estate of the deceased as executors.

(3) The court granting the confirmation of the grant was obligated to ensure that the grant to be confirmed had been rightly made to the applicants. Herein there was no grant in place which had been rightly made to the applicants once the one which would have resulted from the orders of 4/7/2001 was discounted.

(4) No inquiries was made by the court with regard to inquiries into assurances from these new comers that they were going to administer the estate properly such as bonds to be executed by them in order to cushion the estate against mismanagement and want on wastages by the administrators.

(5) In the case of intestates, the court is obligated to ensure that the identities and the shareholding of each beneficiary has been identified. This was not complied with in that although the list of beneficiaries was provided and the administrators made to be Trustees of their respective households, it was necessary to list all the beneficiaries under each Trustee and also to indicate their respective shareholding either individually or as per unit.

(6) In the absence of existence of a grant of representation and in view of the history of the litigation herein, the court should have invoked its inherent power under rule 73 of the probate and administration rules and order issuance of a grant to the approved administrators first, and then simultaneously issue the grant of confirmation specifying clearly the mode of distribution and share holding in the confirmation grant.

(7) Under section 72 of the Act where estate duty is payable, a certificate from the estate duty commissioner confirming that no estate duty is payable, should have been availed. Herein the court did not inquire into the issue of whether the estate duty was payable or not.

Having made findings on the factual and legal aspects of the case, the court also has to move and give directions on the aspects of the case not covered above with a view to finally determining the issues in controversy herein and bring this protracted litigation to rest once and for all in the best interests of all affected persons. There are about three issues to be covered under this aspect. The issue of provision for dependancy under section 29 of the L.S.A. (Supra) which was accorded to one Peter Mwaka Muthiani. Secondly the issue of provision for Mary Katoko (Kadogo) a surviving widow of the 3rd house. 3rdly the issue of intestacy status of the deceaseds' estate which had previously been commenced as a testate proceedings and its affects on the way forward and lastly the issue of purchasers of portions of estate property who have not been brought on board as participants in these proceedings and lastly determine the way forward. The court proceeds to make the following findings on the identified issues.

1. With regard to provision of dependency for Peter Mwaka Muthiani. It is on record that he was not

one of the beneficiaries of the now discounted deceaseds' will. There is a belated application for proviso of a dependant made after the confirmation which has been faulted had been made. As assessed herein, an application presented on his behalf to that effect was allowed by consent on the 14/2/2005. In normal circumstances such an application would be directed to an executor of a will. None was in place here. Had the proceedings leading to the making of this order been for purposes of the execution of the will only, then the faulting of the will would have left Peter Mwaka none suited. But since issues of Peter Mwakas entitlement to inheritance are also issues arising from intestacy as well, the court takes it that in the wake of the existence of the said consent order, the issue of entitlement of Peter Mwaka to a share of the now intestate estate of the deceased are not in issue.

2. As for Mary Katoko (Kadogo) one of the surviving Iweto of the 3rd house of Esther Mutindi, it is correctly submitted by the respondents counsel that she never filed a petition appears not to have applied for provision for a dependant. Very little has come out of the evidence on record as to who has been taking care of her since the deceaseds' death, on which piece of land she was settled by the deceased, who has been taking care of her now that she is in her sun set years. The affidavit she filed which has been assessed was not championing her rights but was in opposition to the entitlement of Joseph Kawinzi Muthiani to a share of the deceaseds' estate. The failure to champion her rights notwithstanding, now that she has been brought on board, the court cannot ignore her. It will have to make provision for her.

3. The issue of purchasers featured because it has been deponed that portions of this estate have been disposed off to purchasers. The correct position in law is as set out in section 79,80,81,82 and 83 of the L.S.A. Act (Supra). In a summary section 79 of the Act makes provision that

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant and subject to any limitation imposed by the grant all the property of the deceased shall vest in him”.

A personal representative is defined by the Act as meaning the executor or administrator of a deceased person” Other relevant related definition are those touching on **“Estate”** meaning the free property of a deceased person” **“Executor” means a person to whom the execution of the last will of a deceased person is by the testamentary appointment confided**” Whereas **“free property”** In relation to a deceased person means the property of which that person was legally competent freely to dispose during his life time, and in respect of which his interests had not been terminated by his death”

Under section 80 of the Act, executors have a right to deal with the estate upon appointment and the moment the validity of the will is established, any actions done by the executors with regard to the property covered by the will which actions are within the parameters of the will stand validated whereas the actions of a personal representative under a grant of letters of administration, these stand validated from the moment the grant is issued. Under section 82, the power to sell the estate property is part of the power donated to an executor or a holder of a grant. While duties for executors and personal representatives are provided for in section 3 of the Act among them safe guarding the property of the deceased.

When the afore set out provisions are applied to the rival arguments herein, it means that in the absence of a grant of representation having been granted to either executors or a grant of representation as none were issued herein, it means that all sales of portions of the deceaseds' estate were done without jurisdiction and the same are null and void and cannot be protected under section 92 of the L.S.A. (Supra) which empowers the court where justification has been shown to exists to protect sales and transfer of estate property executed even before the confirmation of the grant.

4. On the way forward, the court having faulted the alleged will, it means the deceased estate has to be dealt with as an intestate Estate. Section 34 of the Act defines intestacy as:-

“A person is deemed to die intestate in respect of all his property of which he has not made a will which is capable of taking effect” Herein, although there was a purported will, the same is in capable of taking effect by reason of it not having been proved in accordance with section 11 of the Act on the one

hand by reason of the beneficiaries of the original purported and executors failing to take out grants of representation to the estate of the said original beneficiaries and executors of the alleged will in order to pursue those interests under testate proceedings.

Upon determination that the proceedings will now be considered as being intestate, then issues of the correct applicable provision of law arises. Herein the court has been informed that one widow is still alive. She has not contested. She is however a special widow in that she does not directly claim from the deceased because she was an Iweto. She claims directly from her Iweto husband (Esther Mutindi). She therefore has lawful claims to the share of the house hold of Esther Mutindi and she will be packaged as such. The court has not been informed that the deceased was survived by the other three widows. The presumption is that they had predeceased him or that they have since died. It means that the provisions of section 38 of the Act applies. It provides:-

“When an intestate has left a surviving child or children but no spouse the net intestate shall subject to the provision of section 41 and 42 devolve upon the surviving child if there be only one or be equally devised among the surviving children.”

Section 41 of the Act makes provision that where any of the children is a minor then a Trust has to be created for that minor. Where as section 42 on the other hand make provision that where gifts inter vivos have been given these should be taken into consideration.

The provision of section 38 are not mandatory meaning that parties with their own consent can redefine another mode of distribution such as according to houses like in polygamous families like in this case.

5. On appointment of administrators the law is very clear. The first procedural step is that there be consensus amongst the beneficiaries as to who will represent their interests in the administration of the estates. Secondly care has to be taken to ensure that the nominees comply with the parameters provided by the law in section 56 of the L.S.A. (supra) for individuals and section 57 for corporate bodies. Section 56 of the L.S.A. provides:-

“No grant of representation shall be made:-

(a) To any person who is not minor or of un sound mind or bankrupt; or

(b) To more than four persons in respect of the same person

(2) No grant of letters of administration with or without the will annexed shall be made to a body corporate other than the public Trustee or a Trust Corporation”

When applied herein, the court has the consensus of the three appointees and annexures to their depositions that there was consensus as against the assertion of Moses Manza that there was no consensus on the basis of a bare list of names without ID card numbers and signatures. Indeed not all those listed signed but a majority did. The court believes the stand of the Respondents that there was consensus as to who to administer the estate. The list of Moses without ID card numbers and signatures stands ousted.

(6) On smultenous confirmation upon the making of an order for issuance of a grant of representation the court wishes to be guided by the provisions of section 71 (3) and (4). Of the L.S.A. (Supra)

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

Subject to subsection 2A....

(2).....

2A.....

(3)The court may on the application of the holder of a grant of representation direct that the grant be confirmed before the expiry of six months from the date of the grant if it is satisfied that there is not dependant as defined by section 29 of the deceased or that the only dependants are of full age and consent to the application.

(b) That it would be expedient in all the circumstances of the case so to direct.

(4) Notwithstanding the provision of this section and sections 72 and 73 where an applicant files at the same time as the petition summons for the immediate issue of a confirmed grant of representation the court may if it is satisfied that:-

(a) There is no dependant as defined by section 29 of the deceased other than the petitioner;

(b) No estate duty is payable in respect of the estate; and

(c) It is just and equitable in all circumstances of the case to immediately issue a confirmed grant of representation.

(ii) This court has duly construed these provisions and applied them to the entire history of this protracted litigation as well as the rival arguments herein and the court is inclined to make an order that this is a proper candidate for the making of an order of confirmation simultaneously with the making of the grant of representation because:-

(a) The litigation has been protracted leading to a situation whereby the initial intended beneficiaries of the estate of the deceased subject of these proceedings passed on before realizing the fruits of their inheritance.

(b) The incoming beneficiaries are all grown-ups and they too have waited for too long in order to realize the fruits of their subsequent acquired inheritance rights.

(c) There has been proof of existence of admitted acrimony and hostility amongst a section of the beneficiaries and it is the duty of this court to assist the parties to put that to rest.

(d) The provision of law cited above gives this court a discretion to confirm the grant simultaneously upon its issuance so long as the prerequisite or parameters set by the Act have been satisfied. Herein those prerequisites have been satisfied as in number (a) (b) and (c) above firstly. Secondly going beyond the state of affairs displayed herein and considering that. 3rdly parties have already infiltrated the estate in the form of purchasers prolonging the final winding up of the estate will not be in the best interests of the beneficiaries as it may open up a fresh a venue for protraction mischief and possible chaos as well as giving rise to numerous applications herein as well as litigation elsewhere involving 3rd parties.

(e) By reason of what has been stated in (a) (b) (c) and (d) above the court is of the opinion that it is just, equitable, expedient, and in the best interests of all parties on board as well as those whose rights are affected by the rights of all those on board that an order for simultaneous confirmation of the grant. Upon its being issued be made.

For the reasons given in the assessment the court proceed to make the following final orders in the disposal of this long standing and protracted dispute:-

1. An order be and is hereby issued, ordered and declared that the purported will of one Paul Muthiani Musau allegedly executed on the 4th day of June one thousand nine hundred and eighty one be and is hereby declared to be invalid and of no consequence because:-

(a) It was not proved in accordance with the provision of section 11 of the L.S.A. cap 160 laws of Kenya.

(b) All the beneficiaries and executors named in the said purported will are all deceased and none of their personal representatives took out letters of representation and came forward to pursue it.

2. The original petition with will annexed originally presented herein by Jonathan Nyumu Muthiani, John Muthusi Muthiani, James Maingi Muthiani, Samwel Musyoki Muthiani and David Mutisya Muthiani who were the original beneficiaries and executors of the will be and is hereby declared to be of no consequence due to subsequent circumstances because:-

(a) It was anchored on a purported existence of a valid will which will has been faulted in terms of the reasoning in number 1 above.

(b) All the named beneficiaries of the said will who were also the executors have all since died.

(c) No grant of representation has been granted to any of the personal representatives of the named beneficiaries and executors with a view to taking over the proceedings and proceeding with them as a testate proceeding.

(d) There appears to be a general consensus by conduct amongst the beneficiaries of the estate of the deceased beneficiaries and executors of the alleged now faulted will that the said mode of procedure (testate) be abandoned and the court declares it to have been abandoned in the alternative .

(e) The court is alive to the assertion of Moses Manza Muthusi the applicant for revocation and Peter Mwaka a supporter for the issuance of the order for revocation that the will is still in place. But the court rules that these assertions do not hold because neither Moses Manza Muthusi nor Peter Mwaka hold letters of administration to the estate of the original beneficiaries and executors of the said will in order to enable them have locus standi to urge this court to uphold the existence of the now faulted will.

3. The court is alive that objection and cross-petition to the testate petition had been filed by one Beatrice Mwikali and Joseph Kawinzi Muthiani. Those of Beatrice Mwikali appear to have been abandoned. Those of Joseph Kawinzi are still being pursued and since these were ordered to be determined by way of viva voce evidence which procedural step was not undertaken and until the court declares otherwise these are deemed to be still alive. In them the objector cross-petitioner sought to fault the will arguing that the deceased estate be distributed according to intestacy rules. Upon faulting the testate procedure as done above, the court makes an order and declares that the mode of procedure and distribution of the deceaseds' estate is one governed by the rules of intestacy.

4. The grant of testate representation which had been issued on the 3rd day of October, 1994 and which had been issued to one Jonathan Nyumu Muthiani and John Muthusi Muthiani was not in existence as at the time it was purported to have been a basis for substitution on the 4th day of July, 2001 or as at the time of the confirmation of the grant confirmed on 9/11/2004 which has been faulted herein because:-

(a) It was based on an extraction of the orders which had been made on 26/9/1994 dismissing the objection and cross-petition for want of prosecution which orders were subsequently set aside on the 27th day of February, 1995 with both parties being given liberty to amend their pleadings.

(b) Its issuance on the basis of the purported alleged will was invalid as the will had not been proved in accordance with section 11 of the law of succession Act.

(c) By reason of what has been stated in number (a) (b) above the said grant was not in existence as at 4/7/2001 or 9/11/2004 and was therefore incapable of forming a basis for substitution in 2001 nor a basis for bar to confirmation in 2004 had the confirmation been procedurally undertaken.

5. By reason of what has been stated in number 4 above, the applicants of the application dated 20th day of August, 2004 were entitled to include a prayer for the issuance of the grant of representation and in fact the court seized of the matter should have made an order for issuance of the grant first and then deter the

confirmation of the grant to another date or for reasons to be given on the record, grant the issuance of the grant of representation first and then simultaneously issue a confirmation order as well.

6. With regard to the application for revocation of the grant confirmed on 9th day of November, 2004, the court proceeds to make the following orders with regard to the same:-

(a) Moses Manza Muthusi was entitled and he rightly and properly and procedurally presented the application for revocation in his capacity as an interested party being a beneficiary of the deceaseds estate through his deceased father.

(b) The grounds advanced by the applicant for seeking revocation do not hold because they do not fall into the category of the statutory grounds set out in section 76 of the L.S.A. namely on account of fraud, misrepresentation of an untrue allegation of fact, defective procedure and failure of the person who has been issued with the grant has failed to administer the estate. When considered in the light of the facts relied upon by the applicant Moses Manza Muthusi and his supporter Peter Mwaka, the issue of lack of consensus of the family members on the issue of appointment of the administrators as well as on the mode of distribution does not hold because the list provided or annexed to the application by Moses Manza only had a list of names with no ID card numbers and signatures. None of the listed persons deponed an affidavit saying they had no consented. Issue of fraud has not been pleaded. Issue of a defective proceedings was based on their assertion that the testate proceedings with the will annexed was still subsisting. This court has ruled otherwise. The inability to administer the estate had not arisen as the objection was raised hardly a week after the issuance of the grant of confirmation on one hand. On the other hand, subsequent to the issuance of the order, there is clear demonstration that inability to administer has been due to hostility between Petr Mwaka and his supports who are opposed to the inheritance rights of Joseph Kawinzi.

7. The findings in number 6 above not with standing, the court on its own motion and under ground (e) of section 76 L.S.A. (Supra) the court revokes the grant issued on the 9th day of November, 2004 because:-

(a) Due to subsequent circumstances displayed in the assessment herein, the said grant has become ineffective.

(b) The court issuing the confirmation order failed to address its mind to prayer 1 where in the applicants had prayed for the issuance of the grant of representation first. The court should have issued this first and then with reasons to be recorded on the record issue a confirmation simultaneously.

(c) It is indicated that some of the administrators were to act as trustees for others. The names of those Trustees were acting for were not included in the grant as it is required by law for purposes of enforcement.

(d) The court did not comply with the prerequisites in sections 71 and 72 before the confirmation was issued as demonstrated in the assessment.

8. Upon revocation of the grant confirmed on the 9th day of November, 2004 the deceaseds estate cannot be left in a vacuum and for this reason the court has to restart the process of identifying the deceased property, isolation of gifts intervivos, identification of administrators, identification of beneficiaries and then deciding on the mode of distribution.

9. An isolation of gifts intervivos, the court makes an order that parcel numbers or plot numbers 607 and 611 and 570 as per the submission of the Respondents counsel were gift intervivos to the three house holds units of the deceased namely Syokwia Muthiani, Katile Muthiani and Esther Mutindi. Parcel numbers 607 and 611 given out to the house hold units of Syokwia Muthiani and Katile Muthiani have no issue or dispute and no pronouncement will be made on them save that they are confirmed as they were given as gifts intervivos.

(b) As for plot number 570 given to the house of Esther Mutindi the proceedings undertaken in land disputes appeal case number 211/2003 and its resulting decision do not amount to a decree which can bar lawful claims by other members of the house hold of Esther Mutindi in appropriate proceedings.

(c) The court therefore makes an order that being a gift inter vivos to the house hold of Esther Mutindi it is ordered to be shared amongst all the house hold members of the house of Esther Mutindi.

(e) The sharing ordered in number (c) above will be undertaken in another forum because the said property is not one of the deceaseds estates herein.

10. With regard to the identification of the properties forming the estate of the deceased order be and is hereby made and ordered that there is consensus amongst the beneficiaries that the deceaseds estate comprises the following properties:-

- (1) Land reference (Plot)No.774 Komarock.
- (2) Land reference (plot)No.1158 Katunduni kwa Katuku.
- (3) Plot No.15 at Tala market.
- (4) Plot No. katine section behind plot No.15 Tala market.

The respondents counsel added house hold goods and heads of cattle. House hold goods and heads of cattle have not featured anywhere in the deponements and annexures assessed in these proceedings and for this reason no pronouncement will be made on the same.

11. With regard to identification of the beneficiaries the court adopts the undisputed list according to the deceased sons of the 1st and second house. Followed by the Iweto houses of Esther Mutindu that katuku and Mukii. These are enumerated as:-

1st House of Syokwia Muthiani- deceased.

(A)1st son of deceased John Muthusi Muthiani (deceased).

1. Patrick Wambua Muthusi (2) Antony Musau Muthusi (3) Roman Muthusi (4) Moses Manza Muthusi (5) Musau Muthusi (6) Musyoki Muthusi (7) Paul Nzioka Muthusi.

2nd son of deceased Samwel Musyoki Nyumu (deceased)

1. Libya Samwel (2) Mutuku Samwel (3) Manza Samwel (4) Masila Samwel (5) Robert Samwel (6) Mutua Samwel (deceased)

3rd son of deceased David Kavatu (deceased)

1. Mutua Kavatu (2) Manza Kavatu Mutisya (3) Mukua Kavatu Mutisya (4) Makanzi Mutisya.

2nd House of Katile Muthiani- deceased

1st son of deceased Jonathan Nyumu Muthiani(deceased)

1. Jimmy Nyumu (2) Musau Nyumu (3) Muoki Nyumu (4) Mutuku Nyumu (5) Manza Nyumu (6) Kioko Nyumu (7) Sila Nyumu (8) Muinde Nyumu (9) Mumo Nyumu (10) Jeremiah Nyumu (11) Munyao Nyumu

2nd son of deceased James Maingi Muthiani (deceased)

1. Benjamin Wambua James (2) Mukua James (3) Mutuku ajmes (4) Alex James (5) Peter James

3rd House of Esther Mutindi-Deceased)

1. 1st Iweto- Mary Katoko (Kadogo) in sunset years- no child.

2. **2nd Iweto
House of Katuku Munyenze.**

(1) Joseph Kawinzi Muthiani (2) Wambua Muthiani (3) Muema Muthiani.

3rd Iweto. house of Mukii.

1. Peter Muthiani (2) Kiio Muthiani

12. On the mode of distribution of the estate property in number 10 above the same is distributed as follows :-

(a) First each plot is to be subdivided into three equal parts.

(i) The first portion to go to the house hold of Syokwia.

(ii) The second portion to go to the house of Katile.

(iii) The 3rd portion will go to the house of Esther Mutindi.

(b) The mode of sharing for the house hold of Syokwia is that the resulting portion will be shared equally between the house holds of John Muthusi Muthiani , Samwel Musyoki Nyumu and David Kavatu.

(c) The mode of sharing for the house hold unit of Katile is that the resulting portion in favour of this house hold will be shared equally between the house holds of Jonathan Nyumu Muthiani and James Maingi Muthiani all deceased.

(d) The mode of sharing for the house hold of Esther Mutindi is that the resulting portion in favour of this house are to be subdivided into two equal portions. The first portion to go to the house of Katuku comprising Joseph Kawinzi Muthiani, Wambua Muthiani and Muema Muthiani.

(ii) The second resulting portion to go to the house of Mukii namely Peter Mwaka and Kiio Mwaka.

(e) Mary katoko (Kadogo) who has not lodged any claim herein but gave evidence in favour of Peter Mwaka and against Muthiani and his brothers will have a life interest in the share given to Peter Mwaka

13. For the reasons given in the assessment Joseph Kawinzi Muthiani is a son of the deceased for purposes of nomination as an administrator as well as a beneficiary of the estate of the deceased.

14. On the basis of the reasons given in the assessment, the court finds that there was consensus by members of the first and second house hold units with regard to the appointment of Benjamin Wambua James and Antony Musau Muthusi as personal representatives of the first and second house holds of the deceased (Syokwia and Katile). There is also no dispute with Joseph Kawinzi Muthiani representing the house of Katuku. There is however objections with Joseph Kawinzi representing the house of Mukii because there appears to be bad blood between Joseph Kawinzi Muthiani and Peter Mwaka. There also appears to be a dispute with regard to Peter Mwaka representing the interests of the house of Katuku for the same reason. Since the first and second house has produced one representative each, this leaves aslot for two which will be filled by a representative from the house of Katuku and Mukii respectively. It therefore follows that the following are appointed as administrators of the estate of the deceased.

1. Benjamin Wambua James.

2. Antony Musau Muthusi.
3. Joseph Kawinzi Muthiani
4. Peter Mwaka Muthiani.

The four are ideal because they are adults and nobody has said that they are of unsound mind.

15.(i) The grant of representation in the names of the persons named in number 14 above will be extracted forth with.

(ii) In view of the protracted history of this matter the court invokes its inherent power under rule 73 of the probate and administration rules and as mandated by section 71(3) and 4 of the L.S.A. (Supra) and for the reasons given in the assessment above on this aspect of simultaneous confirmation an order and is hereby made and ordered that the grant issued in number 15(i) above be and is hereby ordered to be confirmed simultaneously with the issuance of the grant of representation.

(iii) The resulting administrators have liberty to have it gazette if they deem it fit to do so.

(iv) The move to gazette if any will not be a precondition to the appointed administrators moving forth with to administer and wind up the estate finally.

16. The extraction of the grant in number 15 above will be followed by an extraction of a grant of confirmation simultaneously. The mode of distribution to inform the content of the confirmed grant will be as party content in number 10 above for the list of properties forming the estate, number 11 above for the list of beneficiaries and in number 12 above for the mode of distribution of the estate.

17. All previous transactions whereby portions of the estate property are alleged to have been passed on to 3rd parties by persons other than personal representatives duly mandated by a grant of representation to do so be and is hereby are declared to be null and void and of no consequence.

18. The named appointed administrators are duly empowered with powers and duties prescribed in sections 82 and 83 of the L.S.A. (Supra)

19. The administrators are however at liberty to validate any sale transaction done without authority but falling within the share entitlement of the party who has purported to dispose of the said property without being holder of a grant of representation to the estate of the deceased.

20. Family members of deceased beneficiaries are to be assisted to get their rightful share of the grandson/sons of the deceased who have predeceased the winding up and final distribution of the estate.

21. In view of the previous hardship encountered by the would have been administrators in the administration of the estate, the court invokes its inherent power under rule 73 of the probate and administration rules to make these proceedings to be court surprised.

(ii) The administrators are required to file quarterly reports to court for progress on the administration of the estate.

22. All the newly appointed administrators are enjoined to cooperate fully in the administration of the estate.

(ii) In the event of any evidence of existence of irreconcilable difference the administrator causing the problem may be dropped from exercising the power of an administrator with leave of the court.

23. In the alternative to number 22 above, the remaining 3 cooperating administrators are at liberty to seek the assistance of the Deputy Registrar of the family division to execute the necessary paper works for any

transaction that needs to be executed in furtherance of the smooth administration of the estate in the event of default on the part of any administrator to play his role in the administration of the estate.

(ii) Any allegation of default by any one administrator has to be brought to the attention of the party alleged to be in default by the party alleging the de default.

(iii) Each beneficiary will meet the costs of survey for his /their respective portions of land to be allocated to them.

(iv) Each party will meet own costs.

(v) There will be general liberty to apply.

SIGNED AT NAIROBI BY HON. LADY JUSTICE R.N. NAMBUYE-JA

DATED READ AND DELIVERED BY THE HON. JUSTICE MAJANJA ON THE 21ST DAY OF SEPTEMBER, 2012.

JUDGE