



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HC SUCCESSION CAUSE NO 2605 OF 1996 CONSOLIDATED WITH SUCCESSION CAUSE  
NO. 519 OF 1986**

**IN THE MATTER OF THE ESTATE OF BEATRICE NYAKIO MATHIA**

**RULING**

The background information herein is to the effect that there are two succession causes herein which have been consolidated. There is the baby succession cause number 2006/1996 relating to the estate of Mary Wanjiru Muigai (deceased.) The brief summary of the facts relating to this cause are that:-

- The deceased died on the 15<sup>th</sup> day of October 1995.
- One Ngina Manga Mugwe took out succession proceedings in her capacity as a sister of the deceased.
- There is revelation that the said deceased Mary Wanjiru Muigai died intestate leaving no parents or issue.
- There is no mention in the supporting affidavit for the issuance of a grant to the effect that there are other siblings of the deceased who may be interested in the estate of the deceased besides the petitioner.

Form P&A 5 lists the applicant Ngina Mugwe as the only beneficiary whereas the properties are listed as:-

- Madison Insurance shares.
- Intercontinental hotel benefits.
- NSSF benefits.
- Co-operative shares.
- Nation shares
- Alico Insurance
- Account housing finance limited.

The first grant is said to have been issued on the 23<sup>rd</sup> June 1998 but the court has not traced a copy on the file.

That notwithstanding, there is an application for confirmation dated 24<sup>th</sup> day of February 1999, and filed on the 25<sup>th</sup> February 1999. There is a confirmed grant on the record issued by Aluoch J as she then was (now Her Highness Judge of the International Criminal Court) (ICC) . A perusal of the confirmed grant reveals that all the properties of the deceased were adjudged to devolve to the petitioner Ngina Manga Mugwe.

One Josphat Mathia Nyakio became aggrieved by the said proceedings and presented an application by way of summons for revocation of grant dated the 8<sup>th</sup> day of June 2006, and issued on the 13<sup>th</sup> day of June 2006 and filed on the 15<sup>th</sup> day of June 2006. The applicant sought the grant issued either to be revoked and or annulled.

The application is anchored on the grounds in the body of the application and the content of the supporting affidavit. The major complaints are two namely:-

(a) That the administrator who is their elder sister failed to disclose that the deceased had other siblings besides the administrator Ngina Manga Mugwe namely Jane Wangui Ndichu deceased , Margaret Wairimu and Josephat Mathia Nyakio the objector.

Then there is the main cause namely succession cause number 519 of 1986. A perusal through the same reveals that it relates to the estate of one Beatrice Nyakio Mathia. The applicant for the issuance of the grant is one Ngina Mugwe. The application for the first grant is not traced on the record and I think it was just by way of the notice being published and minuted by the Deputy Registrar, the judge endorsing the signature there on, and then a grant issued on 25<sup>th</sup> November 1986.

The application for confirmation is dated 30<sup>th</sup> day of January 1990 and filed on the 13<sup>th</sup> day of February 1990. The supporting affidavit in paragraph 2 thereof mentions the survivors of the deceased. Only one asset namely title No. Ngenda/Gathange/390 is mentioned. The confirmed grant is dated 2nd day of March 1990 and indicates that the subject property was to devolve to Ngina Mugwe in whole. There is an application to amend the grant presented on the 19<sup>th</sup> day of March 1992 seeking to amend the grant for the names to read Ngina Manga Mugwe and to include property number 4953/46/IX as part of the estate. A fresh grant to that effect was issued on 23rd day of June 1998. There is also traced on the record consent to making of the grant dated 5<sup>th</sup> day of August 1986 filed on the 11<sup>th</sup> day of August 1986.

Against the afore said background information the objector presented summons for revocation of grant dated 13<sup>th</sup> day of June 2005, and issued on the 6<sup>th</sup> day of July 2005, on the basis of the statutory grounds prescribed in section 76 of the law of succession Act. The supporting affidavit raises the following salient features in a summary form.

- The deceased had five children namely Jane Wangui, Mary Wanjiku, Margaret Wairimu, Joseph Mathia and Ngina Manga Mungwe.
- Vide paragraph 5, 6, 7 and 8, that paper work in support of the application for issuance of the grant was irregular.
- Vide paragraph 10, that the Respondent/petitioner left out properties belonging to the estate of the deceased namely:-
  - A house at Juja
  - Ruiru plots
  - Gatundu plots
  - Nairobi Dam house

- Thika building
- Kariobangi building
- Kiganjo plots
- Ngundu plots
- ICDC shares
- Thetha group shares
- Kenya Breweries shares
- Standard Bank Account
- HFCK Account
- NSSF dues
- ALICO shares
- Madison shares
- Nation news paper shares.
- Vide paragraph 11, 12 and 13 that the petitioner had all properties registered in her name to the disadvantage of the rest of the siblings including the applicant.

The Respondent/petitioner filed a replying affidavit deponed on the 12<sup>th</sup> day of September 2005 and filed on the 15<sup>th</sup> day of September 2005. A summary of the salient features are as follows:-

- Vide paragraph 4, 5,6,7,8,9,10 and 11 that the grant issued to her was procedurally issued and is proper.
- Vide paragraph 12 that the estate of the deceased has been distributed fairly as specified in the said paragraph as here under:

**(a) Joseph Mathia Nyakio**

- (i) Ngenda house (Ngenda/ Gathage/390
- (ii) Ngenda plot (Ngenda/Gathage/T.385
- (iii) Four plots in Mathare LR NO. 360/18
- (iv) Kiganjo plot
- (v) United Dairy cleaners shares
- (vi) Gathecha Family shares
- (vii) Kamuru shares

**(b) Jane Wangui Ndichu (deceased)**

- (i) Mathare plot ½ shares which has since been forcefully repossessed by the applicant.
- (ii) Thika plot half share
- (iii) Juja house

**(c) Ngina Mugwe**

- (i) Half share Thika plot.
- (ii) Kariobangi housing scheme shares
- (iii) ICDC share
- (iv) East African Breweries limited shares
- (v) Thetha Group shares
- (vi) Mathare plot ½ share which has since forcefully been repossessed by the applicant.

**(d) Margaret Wairimu**

- (i) Gatundu Shop (This was later sold by Josephat Mathia Nyakio without their consent.
- (ii) Githunguri Ranch
- (iii) 1 plot in Mathare which has since been forcefully repossessed by the applicant.

**(e) Mary Wanjiru (deceased)**

- (i) House in Huruma estate
- (ii) Vide paragraph 13,14,15,16,17,18,19,20,21,22 and 23 that some of the properties were not invented because the administrator was not aware of them, they used to share rental benefits from Mathare plots but applicant had appropriated that income to himself, that the proceeds of the deceased bank accounts were utilized for the smooth running of the estate, that a joint account had been opened at KCB Sarit Centre for the benefit of all the children of the deceased but was closed due to misunderstanding with regard to the running of the same.

- Vide paragraph 24 thereof, that some of the assets enumerated therein were not registered in the names of the deceased and as such the deceased had no right over the said properties.

- Vide paragraph 25 that if indeed the properties enumerated by the applicant belonged to the estate of the deceased, the Respondent administrator has no objection having the said properties be included as part of the estate of the deceased through rectification of the grant and for this reason there is no need for the grant to be revoked.

Parties thereafter filed other deponements which will be summarized briefly. There is one deponed by the applicant on 8<sup>th</sup> June 2006, and filed on 12<sup>th</sup> June 2006. The following are highlighted.

- Vide paragraph 3,4,5,6,,7,8,9,10,11,12,13,14,15,16 and 17 that the deponent concedes to have signed consent to the issuance of the grant, laments that he was not involved in the confirmation neither was his consent on distribution obtained, that one sibling died and respondent transferred all the properties of the said sibling to herself to the exclusion of others, that the Respondent included one

Pauline West who is not a beneficiary, that the administrator has given herself all the valuable properties, that applicant was duped into offering property number Ngenda/Gathage/T.385 as security before it was registered into the applicants name. This affidavit was refilled on the 15<sup>th</sup> day of June 2006 for unknown reasons.

There is another affidavit deponed by the applicant on the 25<sup>th</sup> day of September 2006, and filed the same date and the following have been stressed:-

- Vide paragraph 4,5,6,7,8,9,10,12 that the petitioner has included plot Number 36/V/8 which is squatter land and has sold the same, that parcel number Ngenda/Githunguchu/1131 which was purchased by him from a 3<sup>rd</sup> party that the petitioner has some other prime property of her own such as plot number 175 Block 106 situated in Nairobi and lastly that the aim of the petitioner is to enrich herself and not to administer the estate according to law and asked the court to be guided by the annexed proposed mode of distribution.

Another one deponed on the 25<sup>th</sup> day of September 2006 and filed the same date and the following have been stressed:-

- Vide paragraphs 4, 5, 6,7,8,9 and 10 that her deceased sister Jane Wangui left a son namely Mourice Muhugu Ndichu, the petitioner secretly transferred all the properties of a deceased sister Mary Wanjiru to herself to the exclusion of others, a stranger was included as a beneficiary and he has been disinherited.

And lastly one deponed on the 13<sup>th</sup> day of October 2008 and filed on the 14<sup>th</sup> day of October 2008. The following have been stressed:-

- Vide paragraph 3,4,5,6,7,8,9,10,11,12,13 denied ever attending family meetings between 1988-1993, that he moved to court to seek the courts intervention after the respondent frustrated his inheritance efforts, denied that land parcel number Ngenda/Gathege/390 which is a family house used by everyone has not been transferred to him, that Ngenda plot T/385 has not been transferred to him , Ngenda/Githunguchu/1131 does not form part of the deceaseds' estate property, that all the Mathare plots are crown land, concedes Kiganjo Ranch shares and shares in the United Dry cleaners were transferred to him but he has not sold them, Gathecha shares do not form part of the estate property as they were granted to him while a child by his grandmother way back in 1977, the Mathare plots were sold by the administrator, American life Insurance policy payments do not form part of the main estate as him and the mother were the beneficiaries, that the petitioner has allocated herself all the commercial plots hence the unwillingness to distribute the estate and still stands by his mode of distribution set out hereunder.

**(A) Joint property**

1. Land parcel No. Ngenda/Gathege/1390.
2. Land parcel No. Ngenda/Gathage/T.385
3. Pension benefits APN/PC/18944 to be shared equally by Mrs. Ngina Manga Mugwe, Josephat Muthia Nyakio and Margaret Wairimu.

**(B) To Mrs. Ngina Mugwe**

1. Kimuru Ngundu Ranch shares

**(C) To Josephat Mathia Nyakio**

1. Kimuchu Ranch shares Kiganjo

2. Thika plot LR. NO. 4953/46/IX
3. ICDC shares
4. United Dry cleaners shares C.N.N.O.42

**(D) To Maragaret Wairimu**

1. Githunguri Ranch shares
2. K.C.B shares
3. Huruma plot 209/11388/59

**(E) Morris Muhugu Ndichu**

1. Theta shares
2. Kariobangi LR. 209/11383/42
3. Juja plot.

Other affidavits by the Respondent administrator were also filed:-

There is one deponed on the 21<sup>st</sup> day of November 2005, and filed on the 22<sup>nd</sup> day of December 2005. Vide paragraph 4, 5, 6,7,8,9, that the applicant is in exclusive possession of parcel number Ngenda/Gathenge/T.385 but concedes it is still registered in the name of the deceaseds, that the applicant has benefited from the family property.

- Vide paragraph 10 concedes that Ngenda/Gathenge/390, Ngenda/Gathenge/T.385 and L.R. U18C Mathare are still in the deceased's' names, that Kiganjo plot was sold to pay the applicants school fees, while the applicant sold the Kamuru shares himself, asserts that plot number Ngenda/Gathenge/390 is the family home and he has exclusive use of the same.

- Vide paragraph 11 that parcel number LR. Ngenda/Githunguchu/113 1 was purchased and developed by the deceased.

- Vide paragraph 12 that the Mathare plots were shared amongst three sisters namely Jane Ndichu, Mary Wanjiru and Margaret Wairimu but the applicant has chased them away and collects rent all to his benefit.

- Vide paragraph 13 that the Thika property is registered in her name as trustee but proceeds have been used with the consent of everybody to pay income tax rates and insurance for Margaret with the balance used for outgoings.

- Vide paragraph 14 that the shares at Githunguri Ranch were sold to pay fees for a daughter of Margaret Wairimu.

- Vide paragraph 15 that the house at Huruma was sold by their sister Mary Wanjiru because it was her share.

- Asserts she has administered the deceaseds' estate faithfully.

- That it is the applicant who misuses the estate property to the detriment of the other beneficiaries.

There is another one deponed on a date not indicated but filed on the 18<sup>th</sup> day of June 2008. The

following has been stressed:-

- Vide paragraph 1,3,4,5,6,7,8 and 9 that she was replying to the affidavit of the applicant for summons for revocation in file number HCCC P&A 2006/96, concedes she is an administrator of the said estate, she has no objection to distribution of the property forming the estate of the said deceased in accordance with directions of the court.
- Vide paragraph 5 thereof that the position of the deceased estate is as follows:-
  - Account with housing finance company had only Kshs.1,050.00, Alico Insurance shares were being pursued by the applicant and he is the proper person to explain the position, that their Madison Insurance and intercontinental co-operative shares were sold and proceeds deposited into the family account at Sarit Centre and the Nation Media group shares still valuable.

There is also a further affidavit deponed on the 24<sup>th</sup> day of November 2008, and filed on the 25<sup>th</sup> day of November 2008 and the following have been highlighted.

- Vide paragraph 2,3,4,5,6,7,8 and 9 that she has been committed and has been attending clan meetings without fail, concedes the concerned properties have not been transferred to him but in accordance with sentiments of clam elders, the same have been distributed to him and they await perfection into his name by way of transfer, maintains it is her late mother who purchased land parcel number Ngenda/Guthunguchu/1131 from one Wanderi.
- That Mathare plots had been given out to various beneficiaries but the applicant has assumed control over the same.
- Vide paragraph 7 that LR. NO. 495/46/IX is no longer available for distribution as the same was sold following a clan meeting. The same was sold to meet medical expenses for now deceased uncle and university fees for the daughter of one Margaret at Kabarak University and what is left is only Kshs. 529,400.00. Maintains that she has run the estate affairs properly.

A perusal of the hand written record of the proceedings reveals that on 19/9/2006, this cause 519/1986 was ordered to be consolidated and heard together with P&A 2006/96 on the 28/4/2009 parties agreed to revise earlier directions of wishing to proceed by way of viva voce evidence to one of hearing by way of affidavits and submissions.

The submissions of the objector are dated 20<sup>th</sup> day of May 2009, and were filed on the same date. The following points have been stressed:-

- That the objector is no longer interested in the annulment of the grant and him being made one of the administrator. All he is interested in is a fair distribution of the estate property of both estates.

- The disputants are a brother and a sister.

- The issues for determination by this court are four namely:-

(a)What are the assets of the two estates?

(b)Who are the rightful beneficiaries of the two estates?

(c)What is the equitable and fair distribution of the assets indentified herein above.?

(d)If some of the assets have been unlawfully disposed off or fraudulently done so then how are the same to be recovered?

- That the assets forming the estate of the deceased are as follows:-

1. Ngenda/Gathage/390
2. Ngenda plot T385
3. Ngenda/Githunguchu/1131
4. Thika building LR NO. 4953/46/IX
5. Juja Ithru form certificate No. 78.
6. Githunguri Ranch certificate No. 534
7. Mathare united Traders on LR. NO. 209/11388/59
8. Mathare valley on LR. NO. 36/V/8
9. Ngundu Kamuru Ranch certificate No. 597
10. Thetha group certificate No. 473
11. ICDC Shares No. PTC/M/Ga No. 14240C and No. 6197
12. Kenya Breweries shares A/C NO. 0078220
13. Pension-APN/PC/18944
14. Kiganjo Ranch shares
15. Gathecha shares
16. United Dry Cleaners shares
17. Kariobangi housing plot No. 197C
18. American Life Insurance life policy.

The estate of Mary Wanjiru on the other hand comprises the following:-

1. Madison Insurance Shares.
2. Intercontinental hotel benefits.
3. Co-operative shares.
4. Nation media group shares.
5. Alico Insurance and
6. Account with housing Finance Company of Kenya.

- That property Kiganjo Ranch shares and United Dry cleaner's shares which were ad hocly transferred to him are available for distribution.

- Contends that land parcel number Ngenda/Githunguchu/1131 is not estate property as the same had been purchased by the objector.

- Contends that the Respondents assertion that the property was purchased by the deceased mother Beatrice holds no water because there are no witnesses to the sale agreement. The agreement is not in the language of the court, and although it is alleged that the seller was alive no affidavit was sourced from him to confirm the allegations.
- On the contrary the objector's assertion that he purchased the said property has been supported by production of a title deed, green card and transfer in his favour.
- Contends the Gathecha company shares have never been owned by the deceased as they were purchased on behalf of the objector by his grandmother.
- The Mathare plots are crown land and they cannot devolve to any beneficiary.
- The American life insurance policy cannot form part of the estate of the deceased because this matured in the year 1997 and since the deceased had named the objector as a beneficiary the proceeds thereto are not available for distribution.
- That by reason of the exclusion of the properties objected to by the objector the only property forming the estate of the deceased are as follows:-

1. Ngenda/Gathage/390
2. Ngenda plot T.385
3. Thika building on LR. NO. 4953/46/IX
4. Juja Ithuri Farm certificate No. 78
5. Githunguri Ranch certificate No. 534
6. Thetha group certificate No. 473
7. ICDC shares certificate No. PTC/M/99, NO, 1420C and NO. 6197.
8. Ndundu kamuru Ranch share certificate No. 597
9. Kariobangi Housing plot No. 197C
10. Kiganjo Ranch hares
11. Mathari United traders LR. NO. 209/11385/59
12. Kenya Breweries shares A/C NO. 0078220
13. Pension APN/PC/18944.

Turning to the estate of Mary Wanjiru the following have been highlighted:-

- The Alico Insurance Policy is not available for distribution because the beneficiaries of the proceeds were the deceased Mary Nyakio and the objector. The objector received the half share while the administrator the other half share and for this reason the proceeds to the administrator should form part of the estate of Beatrice Nyakio.
- With regard to beneficiaries, it is submitted that the deceased was survived by five children but since then two have died, one leaving a son while another left no survivors. The correct identity of beneficiaries to this estate of Beatrice Nyakio are:-

(a)Mrs. Ngina Manga Mugwe.

(b)Morris Muhogu Ndichu on behalf of Mrs. Jane Wangui Ndichu.

(c)Miss Margaret Wairimu

(d)Josephat Mathia Nyakio.

The beneficiaries to the estate of Mary Wanjiru are the administrator, objector and Margaret Wairimu.

- That the mode of distribution for the property of Beatrice Nyakio is as per the mode of distribution suggested by the objector already on the record.

- Whereas the distribution of the property of Mary Wanjiru is as suggested by them namely Mrs. Ngina to get Madison Insurance shares, Margaret Wairimu to get Co-operative shares, and Josephat Mathia Nyakio to get Nation Media Group Shares. The rest of the property namely the intercontinental hotel benefits, Accounts housing Finance Company of Kenya and N.S.S.F benefits to be shared amongst the siblings.

- The court is invited to wind up the estate.

- The court is invited to note that the administrator has not tendered any accounts to court to show what she has done with the property despite her maintaining that she has disposed off properties in one way or the other.

- That one Pauline West be declared an avenue to perpetuate fraud.

- That all proceeds in the deceaseds bank account as at the time of deceased death should be shared equally.

- There is no proof provided that the objector sold the Kamuru shares.

- The court is invited to find that LR NO. 209/11388/59 belonged to the estate of the deceased and then transferred to Mary Wanjiru while very sick, it was sold and then purchased property number Nairobi /Block/106/175 and a trust created in favour of 4 children of the administrator.

- They contend this was a fraudulent deal and the court should order that the said property do revert to the estate of the deceased.

- With Regard to the Thika property LR. NO. 4953/46/IX the court is invited to hold that if any sale of this property has been done, then the same was done fraudulently without the consent of the objector. The court is urged to dismiss the alleged family meeting Okaying the sale as the minutes were signed by the administrator alone and not the alleged family members.

- The court to disallow the purpose for which the property was sold namely to meet medical bills for a sick uncle and Education needs for a granddaughter for a daughter of a deceased, daughter of the deceased because these were not dependants of the deceased in terms of the provisions of section 29 of the law of succession Act cap 160 laws of Kenya.

- Further reason for rejecting the assertion of the administrator is that no proof of the amount realized from the sale and how the same was applied has been provided. Neither is there proof of balance of the said proceeds.

- The court is invited to deal firmly with the conduct of the petitioner as the prime property was disposed off when the court had made orders that the properties be preserved pending determination of the proceedings and if any was sold then the same was sold to defeat the proceedings as well as the fair

distribution of the estate of the deceased.

The administrator filed submission dated 8<sup>th</sup> June 2009, and filed on the 9<sup>th</sup> day of June 2009 and the following have been highlighted.

- The applicant was involved in the process of the grant and the distribution of the estate.
- Contends she has no objection to the properties found to be belonging to estate of the deceased being included in the rectification of the grant.
- Denies being fraudulent in her dealings with the estate property as she has given an account of the same.
- She is ready and willing to effect transfers in favour of the various beneficiaries of the estate of the deceased.

In response to the objectors submissions the administrator filed a response dated 16<sup>th</sup> day of November 2009 and filed on the 23<sup>rd</sup> day of November 2009 and the major points highlighted are as follows:-

- The objector woke up to challenge the grants and then mid stream abandons revocation and opts for redistribution alleged by the consent of the counsels a matter not borne out of the proceedings on record and this gesture should be ignored.
- It is their stand that from the numerous affidavits, there is demonstration that the objectors' case is one premised on uncertainties, untruthful, it creates doubts and it is an afterthought. It is a case of alone-ranger as none of the other beneficiaries has sought to re open the case.
- The objectors turn round to seek rectification of the grant and re distribution confirms the weakness of his assertion and confirms existence of uncertainties' on account of his case.
- The objector has not demonstrated that he has been disadvantaged to the benefits of the other surviving beneficiaries none of who is complaining.
- The objector readily admits to have benefited from the estate in that two assets have been transferred to him adhocly and although he says these are readily available for re distribution, he has not accounted for the income derived from the same.
- It is the administrators stand that she does not wish to have the estate redistributed since none of the other beneficiaries is complaining.
- There is no justification on the part of the objector to discredit the administrator because it is the objector who has failed to account for rents collected from the Mathare plots even if they are crown land, the administrators has not introduced 3<sup>rd</sup> parties into the estate and she has not attempted to disinherit the objector.
- It is her stand that the proposed mode of distribution by the objector save for the property which are unavailable follows the distribution the administratrix had done and there is no justification for saying that the petitioner has enriched herself.
- It is her contentions that property number LR. 4953/46/IX is unavailable as per the clan meeting resolution to dispose of the said plot still stands and the objector has not had any evidence to controvert what the Administratrix tendered. But the administratrix confirms that Kshs. 529,406/= is available for distribution.
- Of the estate of Mary Wanjiru it is her contention that benefits from Madison and Co-operative

shares, intercontinental benefits were paid into the account. She is agreeable that the remainder of the benefits be shared equally amongst the beneficiaries.

- With regard to LR. NO. Nairobi/Block 106/175 the same is not part of the estate and if the objector wishes to pursue it for the estate then he should file a proper suit for its recovery.

No case law or principles of law were cited to court but oral high lights were made by each counsel and a perusal of the same reveals that they are a reiteration of the content of the written submissions already reflected on the record and there is no need to repeat them here.

This court has given due consideration to the facts on the record as well as the content of the rival pleadings and submissions on the record and in its opinion the following are own framed questions for determination in the disposal of this matter:-

- (1)What are this courts general observations on the entire proceedings herein?
- (2)What relief is the objector seeking from the court?
- (3)What ingredients or principles of law are applicable to the granting of the said relief?
- (4)What strong complaints has the objector raised in support of the said grant of the said relief?
- (5)What strong points of opposition has the Respondent raised against the granting of the said relief?
- (6)Is the objectors complaint properly anchored on the applicable ingredients or principles or has it been ousted by the Respondents opposition points.?
- (7)What are this courts final orders in the disposal of this matter?

In response to own framed question one (1) the following are this courts general observations on the proceedings this far:-

- (i) The proceedings relate to HCCC P&A 519/1986 relating to the estate of one Beatrice Nyakio who is the mother of the disputants and P&A 2006/1996 relating to the estate of Mary Wanjiku a sister of the disputants.
- (ii) Both causes had one sole administrator who is the Respondent herein Ngina Manga Mugwe.
- (iii) There was no consent to administrator in HCCC P&A 2006/96 but there is evidence and admission by objector that indeed a consent to appointment of administrator was obtained in HCCC P&A 519/1986 save that he alleges that he was a youth and did not understand what was going on.
- (iv) There is no dispute that the Respondent named herself as the sole beneficiary to the estate of Mary Wanjiru who died leaving no parents or children and the grant to this estate was granted and confirmed as such.
- (v) That from the deponements of the Respondent on record regarding this estate as well as submissions, it is clear that out of the property forming the estate of this deceased Mary Wanjiku, there is mention that certain properties namely Madison and Co-operative shares , Intercontinental benefits and NSSF benefits were paid into the account but there is no disclosure of how much was realized from each transaction and how the same was applied.
- (vi) The court has been informed that the family account had been opened at KCB Sarit Centre but was later closed due to disagreement on how the same should be operated. An assertion that the objector is aware is not sufficient what would have satisfied the court would have been a rendering of a statement of how much was realized and applied in addition to an audited account of the family account at KCB

Sarit Centre.

(vii) It is undisputed that all the siblings of the deceased Mary Wanjiru qualified to be beneficiaries to her estate in the absence of her deceased parents and own children, a fact admitted by the Respondent and for this reason, they qualify as joint beneficiaries in equal shares.

(viii) With regard to the estate of Beatrice Nyakio, it is undisputed that although consent to appointment of administrator was given by all the surviving children of Beatrice that the Respondent be given a grant of representation to the estate of the deceased mother, there is no evidence that during the application for confirmation consent on the mode of distribution was obtained from all the beneficiaries on board. Neither is there proof that the application was served on each of the contending beneficiaries as it is required by law.

(ix) It is also clear that although the Respondent has not disputed the enumeration of property forming part of the estate of the deceased Beatrice Nyakio and also not denying the entitlement to the said estate by the other children of Beatrice Nyakio, she has not disputed the fact that only one property was declared at the confirmation stage namely Tile number Ngenda/Gathage/390 which devolved to her in whole.

(x) That there is no dispute that the Respondent at a later stage of the proceedings applied for the rectification of the grant to correct her names and the inclusion of property number LR. 4953/46/IX as part of the properties forming the estate property.

(xi) That there is no proof that the summons for rectification was brought to the attention of all the beneficiaries entitled on board and they gave their consent. It is also evident that no move was made by the Respondent to rectify the grant to include the other beneficiaries’.

(xii) Despite failure to include other beneficiaries on board in the distribution of the estate, the Respondent has maintained that she has distributed the late mothers estate on the basis of the succession proceedings but has not tabled a detailed account backed up by documentary proof of application for transfers and transfers effected.

(xiii) It is agreed by both sides that the beneficiaries to the estate of Mary Wanjiru are:-

(a)Mrs. Ngina Manga Mugwe

(b)Margaret Wairimu

(c)Josphat Mathia Nyakio.

While those to the estate of Beatrice Nyakio are:-

(a)Mrs. Ngina Manga Mugwe

(b)Margaret Wairimu

(c)Josphat Mathia Nyakio

(d)Morris Muhogu Ndichu son of a deceased daughter Jane Ndichu.

(xiv) It is undisputed that one Margaret Wairimu and Morris Muhugu Ndichu have not filed any affidavits herein in one way or the other. All that the court has is the deponement and submissions of the Respondent that these received their rightful shares and they have no complaint.

(xv) That there is an apparent approval of some aspects of the objectors mode of distribution by the Respondent as shown by her deponements and submissions.

(xvi) That there has been no amendment of the summons for revocation in both causes to read rectification and redistribution only.

(xvii) It is undisputed that the alleged sale of property LR 4963/46/IX was done during the pendency of the revocation proceedings evidenced by the fact that in the Respondent's replying affidavit to the summons for revocation in P&A 519/86 she had deposed that the property was available but registered in her name as a sort of trustee and that it was yielding income which was being applied towards the estate expenses but no account was furnished with regard to the same.

(xviii) It is undisputed that the minutes allegedly providing proof of a clan meeting to dispose of the said property were signed by the Respondent alone and none of those alleged to have been present at the said clan meeting have filed supporting affidavits showing that indeed they were present at the said meeting and okayed the sale during the pendency of the revocation proceedings. Neither has the Respondent exhibited the sale, nor agreement to show how much was realized from the said sale exhibited documents to show how the same was applied as alleged in the deponent's affidavit.

(xix) It is evident that issue will arise as to whether the daughter of Margaret Wairimu and a male brother of the deceased qualify to be dependants in terms of the provisos of section 29 of the law of succession Act in order for them to be direct beneficiaries of the proceeds of sale of a property belonging to the estate of the deceased in priority to the objector.

(xx) That the objector has laid claim to LR Number Ngenda/Githunguchu/1131, Gathecha company shares, Mathare plots and the American life insurance policy as properties not forming part of that estate and annexed documents to the effect to some and not others. While the Respondent has maintained that the said properties form part of the estate of the deceased.

(xxi) Although it has been contended by the Respondent administrator that the sold properties were sold with the consent of all the beneficiaries, the said consents have not been exhibited and all that the court has are assertions and denials by either side.

With regard to own framed question 2,3,4,5 and 6, it is evidently clear that the objector filed summons for revocation in both causes. The grounds relied upon are the statutory ones which are set out in section 76 of the law of succession Act.

“ 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 the 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 inadvertently;

(d) That the person to whom the grant was made had 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 provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) That the grant has become useless and inoperative through subsequent circumstances.

It is on record that the objector did not move to have the said summons amended to read rectification and redistribution has gone a head in his submission to submit that he has abandoned revocation and now pursues rectification of the grant and redistribution of both estates.

As submitted by the Respondents counsel, there is no jurisdiction to amend a pleading through submissions. A proper way of going about this should have been for the objector to withdraw the summons for revocation and then file an application for rectification. The reason for suggesting so is because both reliefs are accessed through different rules of the probate and administration rules. The ingredients required to be established before one can earn the said reliefs are different. Revocation of grant is accessed under section 76 of the L.S.A. cap 160 laws of Kenya. Whereas rectification of the grant is accessed under section 74 of the Act and rule 43 of the probate and administration rules.

In addition to the above, this court has judicial notice of the fact that it is now trite that a party is bound by its own pleadings and that a court of law has no jurisdiction to grant a relief which a party has not prayed for. The exception to this general rule is the granting of an auxiliary relief granted under the usual general clause in the reliefs of:- “ **Such other relief as the court may deem fit to grant**” But with a caveat that the auxiliary relief should be one which could have been prayed for in addition to the other words reliefs prayed for, in other categorized into those other reliefs specifically pleaded.

The afore set out findings on the caveat on lack of jurisdiction on the part of the court to grant a relief not prayed for notwithstanding, this court has judicial notice that when disposing of an application for revocation, the court has jurisdiction to finally determine the issue of representation to the estate, in other words who is a suitable administrator, can go ahead and distribute or redistribute the estate and make final orders with regard to the winding up of the estate of the deceased. I think the facts demonstrated herein and considering that the winding up of the estate of the deceased has been pending since 1986, and that the position of the disputants is polarized, it is prudent on the part of the court to wind up the estate and put the matter to rest.

The ingredients required to be established by an applicant by way of summons for revocation have now been crystallized by the court of appeal in the case of **MATHEKA AND ANOTHER VERSUS MATHEKA (2005) IKLR 455** in which the following guidelines were provided:-

**(1) A grant may be revoked either by application by 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 a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or 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) The court has 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 on intestacy with priority according to their respective beneficial interests as provided by part V of the law of succession Act.**

**(c)The public , trustee and**

**(d)Creditors.**

These ingredients have been applied onto the rival arguments herein and the court proceeds to make the following findings on the same:-

1. The objector has rightly moved to court to seek revocation of both grants in that he is an interested party in both estates as a beneficiary, a fact not denied by the respondent.
2. There was concealment of material particulars by the Respondent with regard to the estate of Mary Wanjiru in HCCC P&A 2006/1996 in that the Respondent described herself as the only beneficiary of the said estate knowing that this was not the correct position as the other siblings of the deceased were equally entitled to benefit from the said estate. This has been confirmed by the Respondents' acceptance of the error and then accepting the rectification of the position by having all her siblings benefiting from the estate of the said deceased.
3. With regard to the estate of Beatrice Nyakio in P&A 519/1986, concealment of material facts has been established in that although consent to apply for the grant was given by other beneficiaries to the Respondent, there has been no demonstration that the Respondent obtained their consent with regard to presentation of the application for confirmation and mode of distribution contrary to the provisions of section 71 L.S.A .

1. After the expiration of a period of six months, or such short periods 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.

2. Subject to subsection (2A) the court to which application is made, or to which any dispute in respect thereof is referred, may:-

(a)If it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b)If it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or

(c)Order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d)Postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.

(2A) Where a continuing trust arises and there is only one surviving administrator, if the court confirms the grant, it shall, subject to section 66, appoint as administrators jointly with the surviving administrator not less than one or more than three persons as proposed by the surviving administrator which failing as chosen by the court of its own motion.

3. The court may, on the application of the holder of a grant of representation , direct that the grant be confirmed before the expiration of six months from the date of the grant if it is satisfied:-

(a). That there is no 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 provisions of this section and section 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, immediately, issue a confirmed grant of representation.

5. Deponements from both sides have gone to demonstrate that there was concealment of material particulars with regard to the extent of the deceaseds' estate in that only one property was invented and one other added at the rectification of the confirmed grant stage. Although the Respondent has deponed that she is willing to have the properties forming the late mother's estate included in the rectified grant and when it is brought to her attention, there has been no clear denial on her part that as at the time she sought confirmation of the grant, she was unaware of the existence of these properties on the one hand and also unaware that her other siblings were entitled to a share in the same.

(5) Apart from deponements in her affidavit, the Respondent has not furnished a true statement of account of her dealings with the estate property.

(6) By reason of the Respondent admitting to have disposed off estate property and paid proceeds into an account but has failed to render a true account of how the said proceeds were applied on the one hand, and on the other hand by disposing off a prime property during the pendency of revocation proceedings, namely the Thika plot knowing that the objector was interested in the same and failing to furnish documents to court with regard to the said transaction, and also by failing to disclose the accounts into which the alleged balance is being held can safely be stated that the conduct of the Respondent has been deliberately calculated with the aim of defrauding the objector of his rightful entitlement and fair share of the deceased's' estate.

(7) Unprocedural and irregularity with regard to the Respondents dealings with the estate property has been established by reason of the fact that despite knowledge that only two properties formed the confirmed and rectified grant subject of these proceedings, the Respondent went ahead to purport to distribute other properties outside the confirmed grant without first of all having the grant rectified and they be included. It is therefore proper that these be included and reflected in the said grant.

(8) Despite the Respondents' assertion that her dealing with the deceased estate is blameless, fair, straight forward the findings of this in number 1-7 above negative that assertion.

By reason of what has been stated above, in respect of both estates, it is the findings of this court that the objector has brought himself within the ambit of the ingredients for granting of the relief sought because there is no requirement that all ingredients be established before the relief is earned. It is sufficient if one is established. Herein the objector has established nearly all of the ingredients. Both grants are therefore proper candidates for revocation.

Upon revocation, the estate cannot be left in a vacuum, somebody has to step in. Herein there are only two contenders who have taken polarized positions. The other two are bystanders. Despite the fact that the objector appears to have softened his stand though in procedurally considering the fact that he will have to pursue the issue of the Thika property and the Nairobi Dam property, there is no way he can do that if he has no grant of representation. Further if adverse orders are made to the interests of the Respondent whereby the status quo prevailing as at now with special reference to the Thika property and

Nairobi Dam property, the court is doubtful if the Respondent can take measures to effect the court orders if any. For this reason it is important that the objector too be included in the grant as an administrator.

Turning to the issue of distribution, it is important for this court to interrogate the principles of law applicable to distribution of both estates. Since there is no mention that Beatrice Nyakio had a spouse and since it is clear that Mary Wanjiru left no spouse, parents or children, the principle applicable to distribution of these two estate are those set out in section 38 and 39 of the law of succession Act cap 160 laws of Kenya and these read:-

*“Section 38, where an intestate has left a surviving child or children but no spouse the net intestate estate shall subject to the provisions of section 41 and 42 devolve upon the surviving child if there be only one or be equally divided amongst the surviving children.*

*Section 39: Where an intestate has left no surviving spouse or children the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority.*

*(a)Father; or if dead*

*(b)Mother; or if dead*

*(c)Brothers and sisters and any child or children of deceased brothers and sisters....*

*Section 41: Where reference is made in this Act to net intestate estate , or the residue thereof devolving upon a child or children the property comprised therein shall be held in trust in equal shares in the case of more than one child from all or any of the children of the intestate who attain the age of eighteen years , or who being female may under that age, and for all or any of the issues of any child of the intestate who predecease him and who attain the age of or so many, in which case the issue shall take through degree, in equal share the share which their parents would have taken had he not predeceased the intestate.*

*42Here “ (a) An intestate has during his life time or by will paid , given or settled any property to or for the benefit of a child, grand child or household or;*

*(b) Property has been appointed or awarded to any child or grand child under the provisions of section 26 or section 35 that property shall be taken into account in determining the share of the net intestate according to the child, grandchild house”*

This court has duly construed the afore set out provisions of law and applied them to the facts herein and the court is satisfied that the following is applicable:-

(a)By virtue of section 39(1) (c ) of the law of succession Act cap 160 laws of Kenya, one Morris Muhugu Ndichu as a son of the late Jane Ndichu qualifies to be a beneficiary of the estate of Mary wanjiru but this depends on whether Mary Wanjiru predeceased Jane Ndichu. This court has no evidence as to when Jane Ndichu died. Neither has Morris Muhugu Ndichu expressed any interest in sharing in the estate of Mary Wanjiru. In the absence of any explanation as to when Jane died in order to know if she predeceased Mary or not there is no basis for this court to say that him Morris should be included as a beneficiary of the estate of Mary Wanjiru. He has rightfully been excluded.

(b)The said Morris Muhugu Ndichu also qualifies as a beneficiary in terms of section 41 and 42 of the Act in relation to the estate of the deceased Beatrice Nyakio in P&A 519/86.

(c)As at the time the proceedings in P&A 519/86 were initiated all the children of the deceased were adults and for this reason the provisions of section 41 and 42 with regard to the creation of trusts do not apply.

(d)The centrol theme in both section 38 and 39 of the Act is that the mode of sharing be equal.

**(e)**The general rule that this court has judicial notice of is that only free property of the estate “**by free property**” meaning property that the deceased could freely deal with and dispose off during his life time is the property to form the basis of distribution to the beneficiaries of the said estate. This means that property contested and proved not to have been free property of the estate of the deceased are to be excluded for distribution. Section 3:- defines **Estate means the free property of a deceased person**”. **And Free property is defined as in relation to a deceased person. Means the property while intestacy under section 34 is defined as:- which that person was legally competent freely to dispute during his life time and in respect of which his interests has not been terminated by his death.**

Section 34: **“Meaning of intestacy means a person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.”**

(f) There has been assertions from both sides to the effect that certain properties have already found their way into the hands of beneficiaries who have allegedly already disposed them off. It is on record that the objector concedes to have been adhocly given certain properties which are still available for distribution. Whereas the Respondent administrator concedes to have been given some property by herself and then disposed off. Others were allegedly given to Margaret Wairimu, late Mary Wanjiru and late Jane Ndichu and or her son and were disposed off. This court is hand capped in that Margaret Wairimu and Morris Muhugu Ndichu on behalf of Jane Ndichu have kept a low profile in these proceedings.

(g)The findings in number (f) above, once the issuance of the grant and the subsequent confirmations are faulted, the status quo ante of the estate property is restored. All the properties whether disposed off or not revert back to the estate and become available for distribution or redistribution afresh. This is the ideal situation to be ordered herein considering that although allegations of disposal by way of sale have been asserted, there has been no proof of the same by production of the sale agreements to show who sold what, how much was realized and who actually realized the proceeds of such sales. It is therefore unsafe for the court to take assertion of such sales for granted and pass them as having taken place without documentary proof.

(h)The faulting of both the original and confirmed grants will not send the parties back onto the drawing table to start a fresh with regard to seeking orders on distribution of both estates. The court has jurisdiction donated by rule 73 of the probate and administration rules as well as section 76 of the law of succession Act, and the attendant’s procedural rules to proceed and redistribute the estates and make appropriate orders in finality herein.

### **DISTRIBUTION OF ESTATE OF MARY WANJIRU MUGAI P&A 2605/96**

1. The grant of letters of administrations to the estate of Mary Wanjiru Muigai made to Ngina Manga Mugwe on the 23<sup>rd</sup> day of June 1998 be and is hereby revoked.
2. The revoked grant is ordered to be returned to court forthwith for cancellation.
3. A fresh grant be and is hereby ordered to be issued in the joint names of Ngina Manga Mugwe and Josphat Mathia Nyakio.
4. The confirmed grant confirmed on the 5<sup>th</sup> day of March 1999 in favour of Ngina Manga Mugwe be and is hereby revoked.
5. The revoked grant is ordered to be returned to court forthwith for cancellation.
6. Fresh distribution of the estate of the said late Mary Wanjiru Muigai is to be done along the following lines:-

(i) Beneficiaries identified to benefit from the said estate are:-

(a)Ngina Manga Mugwe

(b)Margaret Wairimu

(c)Josphat Mathia Nyakio

(ii) The following property is ordered excluded from the properties to be distributed namely Alico Policy number 46002258 and claim No. DO/96001 because as per content of annexure NMM2 to the affidavit of Ngina Manga Mugwe filed on the 18<sup>th</sup> day of June 2008, the beneficiaries of the same are the objector and the deceased Beatrice Mathia.

(iii) The properties forming the estate of the deceased and which are subject of distribution are:-

(a)Madison Insurance shares.

(b)Co-operative shares

(c)Intercontinental Hotel benefits.

(d)Nation media group shares.

(e) Proceeds of bank account with housing Finance K. Limited.

(f) NSSF benefits.

(iv) Mode of sharing is in equal sharing by all the beneficiaries..

7. There is liberty to offset the claims of the objector and the other beneficiaries Margaret in the properties allegedly sold and proceeds appropriated by the administrator against the share entitlement of the Respondent administrator in the property not yet disposed off.

8. There is further liberty on the part of the objector and the other beneficiary Margaret Wairimu to pursue through a civil claim or otherwise and recover compensation for the shortfall from the Respondent administrator if they so wish.

9. A confirmed grant to issue in the joint names of Mrs. Ngina Manga Mugwe and Josphat Mathia Nyakio along the lines of fresh distribution done herein.

**DISTRIBUTION OF THE ESTATE OF BEATRICE NYAKIO MATHIA P&A 519/1986.**

1. The grant of letters of administration to the estate of Beatrice Nyakio Mathia granted to Ngina Mugwe on the 28<sup>th</sup> day of November 1986 and rectified on the 18<sup>th</sup> day of May 1992 to read Ngina Manga Mugwe be and is hereby revoked and ordered to be returned to court forthwith for cancellation.

2. A fresh grant be and is hereby ordered to be issued in the joint names of Ngina Manga Mugwe and Josphat Mathia Nyakio.

3. The grant of representation to the estate of Beatrice Nyakio Mathia confirmed on the 2<sup>nd</sup> day of March 1996 in favour of Ngina Manga Mugwe and rectified on the 8<sup>th</sup> day of May 1992, be and is hereby revoked and ordered to be returned to court and cancelled forthwith.

4. The estate of Beatrice Nyakio Mathia of is ordered to be distributed a fresh along the following lines:-

(i) The beneficiaries of the said estate of Beatrice Nyakio Mathia are:-

(a)Ngina Manga Mugwe.

(b) Margaret Wairimu.

(c) Josephat Mathia Nyakio.

(d) Morris Muhugu Ndichu.

(ii) The following properties have been ordered excluded from distribution:-

(a) Land parcel number Ngenda /Githunguchu/1131 because as per content of a copy of title, green card and search certificate annexed to the objectors further affidavit deponed on the 13<sup>th</sup> day of October 2008, there is demonstration that the objector was registered as owner on the 22/2/1990. It can therefore only form part of the estate property if the same is reclaimed through a civil action.

(b) Gathecha Company shares have been excluded because documents annexed as JMN4 to the affidavit of the objector deponed on the 13<sup>th</sup> day of October 2008, and filed on the 14<sup>th</sup> day of October 2008, show that the objector was indicated as a share holder way back in 1977 and received proceeds of the said share upon the winding up of the company on 7/2/2004. There are no contrary documents exhibited by the Respondent/Petitioner showing that the deceased Beatrice Nyakio Mathia had any connection with those shares.

(c) With regard to the American life Insurance Policy. There has been no documentation from either side showing who the beneficiaries of the proceeds was and for this reason no pronouncement can be made in respect of the same.

(d) LR NO. Nairobi/Block 106/175 alleged to have been robbed from the estate by an alleged fraudulent sale of Mathare/United Traders LR. NO. 209/11388/59 is excluded because it is allegedly currently registered in the names of persons not beneficiaries to the estate of Beatrice Nyakio. It therefore needs to be reclaimed first before it can be distributed.

(e) Likewise by reason of what has been stated in number (d) above since Mathare United Traders LR. NO. 209/11388/59 has been linked to LR Nairobi /Block/106/175 it will not be included in the distributable property until recovery is made for the same.

(iii) The following properties have not been excluded from distribution.

(a) Mathare Valley on LR NO. 36/V/8 because although it is alleged that the title still reads Crown land there is no doubt that the benefits are being drawn and disputed over by beneficiaries to this estate. It therefore has to benefit all beneficiaries till such a time that the government will reposes it. It is agreed from both sides that there has been constructed rental rooms which are yielding revenue on a monthly basis.

(b) Thika plot NO. LR. NO. 4953/46/IX has been admitted by both sides that it belonged to the deceased. As at the time of the initiation of the revocation proceedings it was alleged to be registered in the name of the Respondent /petitioner and in her replying affidavit to the summons for revocation admitted that she was holding it as trustee and the income generated there from was being utilized for the benefit of the estate. It therefore follows that, the alleged sale of the same cannot be defended as the same was done without a court order and as submitted by the objectors counsel, if indeed it was disposed off then the same was done with the sole aim of defeating the revocation proceedings and it cannot be protected. Further the purpose for its disposal cannot be protected because, the same was meant to benefit persons not beneficiaries to the estate of the deceased as deponed. Lastly no documentary proof has been exhibited to prove the sale, prove amount realized, how applied and existence of the short fall if any.

(c) Kamuru shares have not been excluded because of lack of proof of sale of the same and the person who sold as what the court has on the record is the assertion of the Respondent /petitioner that the objector sold the same on the one hand, and on the other hand the denial of the objector that he never did so.

(d)The following properties will now form the distributable properties of the estate of the deceased namely:-

1. Ngenda/Gathage/390
2. Ngenda plot . T/385
3. Thika Building on LR NO 4953/46/IX
4. Juja Ithuri farm certificate No. 78.
5. Githunguri Ranch certificate No. 534.
6. Mathare Valley on LR. NO. 30/V/8.
7. Ngundu Kamuru Ranch share Certificate No. 597.
8. Thetha Group certificate No. 473.
9. ICDC shares certificate No. PTC/M/99, NO. 14240C and NO. 6197
10. Kenya Breweries shares A/C NO. 0078220.
11. Pension APN/PC/18944
12. Kiganjo Ranch shares.
13. Unitd Dry cleaner's shares.
14. Kariobangi Housing plot No. 197C
15. Bank accounts belonging to the deceased.

(iv) The mode of sharing is on equal basis as required by law.

5. The ordering of the mode of sharing as being on mode of equal basis notwithstanding, there is liberty for internal voluntary ceding and swopping of share entitlement amongst the beneficiaries as they so wish.
6. A fresh confirmed grant will issue in favour of Mrs. Ngina Manga Mugwe and Josphat Mathia Nyakio along the above distribution lines.
7. There will be general liberty to apply to either party should need arise.
8. To avoid a situation of stale mate, the court makes an order on its own motion and upon invoking inherent power under rule 73 of the probate and administration rules that the Deputy Registrar of this court be and is hereby directed to execute transfer forms on behalf of any administrator who fails to execute the same in order to make effective the orders of this court.
9. Each party will bear own costs.

**DATED, READ AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF OCTOBER, 2011.**

**R.N. NAMBUYE  
JUDGE**