



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**IN THE MATTER OF THE ESTATE OF EUNICE WANJERI KIBIA (DECEASED)**  
**SUCCESSION CAUSE NO. 1834 OF 2000**

**RULING**

The proceedings herein have a long history and it is therefore necessary to set out a brief background history from the scanty information from the record. The papers on the record do not seem to have been arranged in any order and for this reason the same will be assessed as and when come across. The first to be encountered are copies of green cards for various titles assessed as here under:-

- (i) Title number Githunguri/Nyaga/680 opened on 9/8/79 in the name of Eunice Wanjeri and on 13/3/96 it changed to Samuel Gathaiya Kibia and on 9/3/99 a caution was placed on it by one John Njau Kibia.
- (ii) Parcel number Githunguri/Githunguri/2062 opened on 21/5/97 on the name of Samuel Gathaiya Kibia. On 22/5/97 the same changed to one Rev. John Kibuka Gitau, Francis Mbugua Karanja, Francis Karanji Githae and the title deed was issued the same day. There is mention of order pending P.B. 142/7/2000.
- (iii) Title number Githunguri/Githunguri/2061 whose register was opened on the 21/5/97 in the name of Samuel Gathaiya Kibia. There is endorsement those order pending PC NO. 142/7/2000.
- (iv) There is title number Githunguri/Githunguri 2010 entry opened on the 21/5/97 in the name of Samuel Gathaiya Kibia with an endorsement pending PB NO. 142/7/2000.
- (v) Title number Githunguri/Githunguri/2059 opened on the 21/5/97 in the name of Samuel Gathaiya Kibia. On 3/7/97 it changed to Kamau Kibia vide succession 206/93 at KBC.RL7 issued. There is indicated that the title deed was issued. On 26/8/97 it changed to John Kamau Kibia by way of change of name. On the same date of 26/8/97 it changed to Joseph Chege Iragi and title deed issued. There is endorsement of order pending P.B. 142/7/2000.
- (vi) Title number Githunguri/Githunguri/2058 opened on the 21/5/97 in the name of Samuel Gathaiya Kibia on 22/7/97. It changed to Muturi Kibia and title deed issued on 19/8/97 it changed into the name of James Karanja Kamunya and the title deed issued. There is an endorsement of order pending P.B. NO. 142/7/2000.
- (vii) Title number Githunguri/Githunguri 2057 opened on 21/5/97 in the name of Samuel Gathaiya Kibia. Title deed was issued the same date on 6/1/2000 it changed hand to Simon Njoroge Kabogo. Title deed in the new name was issued on the same date. There is an endorsement that the same is pending P.B. NO. 142/7/2000.

(viii) Lastly title number Githunguri/Githunguri/1029 opened on 8/12/87 in the name of Eunice Wanjeri Kibia. On 13/3/96 it changed hands to Samuel Gathaiya Kibia. There is an endorsement for entry number 21/5/97 when the title was closed on sub division giving rise to sub division f parcels number 2057-2062 and the same was closed. Parcel number assessed in number (ii)-vii all bear an endorsement that they are resultant subdivisions of parcel number 1021.

There is an order issued in Nairobi succession cause number 926/1997 in the high court Registry Nairobi, issued on the 31<sup>st</sup> day of March 2000 and extracted on the 10<sup>th</sup> day of July 2000. The content reads:-

**1. "That the distribution and sub division of land reference no Githunguri /Githunguri/1029 into LR. NO. Githunguri/2057 Githunguri Nyanga/680 into Samuel Gathaiya Kibia 2058,2059,2060,2061,2062 and the transfer of the LR. No. be and is hereby revoked and the same do revert into the name of the deceased Eunice Wanjeri Kibia pending the filing of a new succession cause.**

**2. That the grant issued to Samuel Gathaiya having been revoked on 18<sup>th</sup> November 1999 the deceased property do revert to her name.**

There is traced on the record in the current file number 1834/2000 a petition for a grant of letters of administration to the estate of the deceased Eunice Wanjeri Kibia filed on 30<sup>th</sup> August 2000. It is supported by supporting affidavit, death certificate, affidavit justifying application for a grant, a letter from the area chief and consent to issuance of the letters of administrator. The consent indicated to have been given by Mary Kanini Kibia, Mary Wambui, John Njiku and Florence Mumbi Gitau.

The list of heirs from the area chief gives the following names:-

1. Samuel Gathaiya Kibia.
2. Mary Wambu John jiku
3. Ruth Wanjiru Kibia
4. Loise Wanjiru Kibia
5. John Kamau Kibia
6. Margaret Wakenyi Wainaina
7. Muturi Kibia
8. John Njau Kibia
9. Mary Kanini Kibia
10. Grace Mwinaki Ngundu
11. Florence Mumbi Gitau.

A citation was taken out for service upon Samuel Gathaiya Kibia, Ruth Wanjiru Kibia, Loise Wanjiru, James Ndugure, John Kamau Kibia, Margaret Wakonyi Kibia, Muturi Kibia and Grace Mwihiatu Kibia all described as being adults. On 12<sup>th</sup> September 2000 one Samuel Gathaiya Kibia entered an appearance to the citation through counsel. On 14<sup>th</sup> September 2000 John Kamau Kibia Muturi Kibia, Ruth Waniru Kibia and Margaret Wanjeri Kibia entered appearance to the citation and endorsed authority to Samuel Gathaiya Kibia to enter appearance on their behalf. The ages of the heirs were filed by counsel on 7<sup>th</sup> December 2002 and for purposes of the record this has been indicated as follows:-

1. Samuel Gathaiya Kibia- 70 years
2. Mary Wanjiru John Njuku- 65 years
3. Ruth Wanjiru Kibia – 64 years
4. Loise Wanjiru JAMES Ndigire -62 years
5. John Kamau Kibia – 60 years
6. Margaret Wakonyi Kibia – 58 years
7. Muturi Kibia – 55 years
8. John Njau Kibia – 53 years
9. Mary Kanini Kibia – 50 years
10. Grace Mwihiatu Ndungu – 49 years
11. Florence Mumbi Gitau – 48 years

There is a grant of representation issued to one John Njau Kibia on the 15<sup>th</sup> day of February 2001.

There is an application for summons for confirmation dated 24<sup>th</sup> day of September 2002 and filed on the 14<sup>th</sup> day of October 2002. The mode of distribution is indicated in the body of the application as here under:-

“(2) The land reference No. Githunguri /Nyaga/680 measuring 0.68 hectares be shared equally by the 6 beneficiaries of the deceased as follows:-

- (i) John Njau Kibia – 0.113 hectares
- (ii) Ruth Wanjiru Kibia – 0.113 hectares
- (iii) Mary Kanini Kibia – 0.113 hectares
- (iv) John Kamau Kibia 0.113 hectares
- (v) Muturi Kibia – 0.113 hectares
- (vi) Samuel Gathaiya Kibia – 0.113 hectares

3. That land reference number Githunguri/Githunguri /2060 comprising 0.53 hectares now registered in the name of the previous administrator Mr. Samuel Gathaiya Kibia BE inherited by Mary Kanini.

4. That land reference number Githunguri/Githunguri/2061 comprising 0.194 hectares now registered in the name of the previous administrator Mr. Samuel Gathaiya Kibia be inherited by:-

- (a) John Njau Kibia- 0.0676 hectares to be sub divided next to his land reference number Githunguri/Githunguri /1051
- (b) Ruth Wanjiru Kibia – 0.676 hectares
- (c) Mary Kanini Kibia – 0.0146 hectares
- (d) John Kamau Kibia – 0.014 hectares
- (e) Muturi Kibia – 0.0146 hectares
- (f) Samuel Gathaiya Kibia – 0.0146 hectares in equal shares.

There is an affidavit of protests deposed by one Samuel Gathaiya Kibia on 4<sup>th</sup> day of December 2003 and filed the same date. The salient features of the same are as follows:-

- Vide paragraph 4 that confirmation should be forestalled pending lifting a ruling in succession cause No. 926/1997 in which some properties have been transferred to 3<sup>rd</sup> parties before the grant had been revoked.

- Vide paragraph 5 thereof that according to him beneficiaries to the estate of the deceased are as follows:-

- (a) Samule Gathaiya Kibia
- (b) John Kamau Kibia
- (c) Muturi Kibia
- (d) John Njau Kibia
- (e) Ruth Wanjiru Kibia
- (f) Margaret Wakanya Kibia
- (g) Mary Kaniani Kibia
- (h) Members of his clan (trustees Samuel Gathaiya Kibia, Kinuthia Kibocha and Waweru Mugo)

- Vide paragraph 6 thereof that the deceased property as at the time of her death were as follows:-

- (a) LR. NO. Githunguri/Githunguri 1029 comprising 0.83 hectares.
- (b) LR. NO. Githunguri/Nyaga/680 comprising 0.68 hectares
- (c) LR. NO. Githunguri/Githunguri T/16/1 measuring 17X 80.

Vide paragraph 7 that upon him being issued with the grant in Kaimbu succession cause No, 206/1993 and had it confirmed, he sub divided land parcel number LR. Githunguri/Githunguri/1029 into parcel number 2057, 2058, 2059, 2060, 2061 and 2062 and had them transferred as here under:-

(i) LR. Githunguri/Githunguri/2057- he inherited land later sold to Noroge Kabugo.

(ii) LR. Githunguri/Githunguri/2058- which he transferred to Muturi Kibia who later sold to Mr. Kaminyi.

(iii) LR. Githunguri/Githunguri/2059 which he transferred to Muturi Kibia who later to transferred to Mr. Iregi.

(iv) LR. Githunguri/Githunguri/2060 to be sold to pay for the deponents former administration costs as well as those of the current administrator.

(v) LR. NO. Githunguri/Githunguri/2061 measuring 0.194 hectares which he was to transfer to Mbari Yaminga but not transferred.

(vi) LR. NO. Githunguri/Githunguri/2062 which he transferred to African independent Pentecostal church of Africa.

- Vide paragraph 8 that the properties in 6 (i) to (iv) were equal in size and measured 0.053 hectares.

- Vide paragraph 9 that the other two properties namely (a) Githunguri/Nyaga/680 and (b) Githunguri/Githunguri/T/16/1 were still intact and in the deponents name of in the name of the deceased.

- Vide paragraph 10 that properties in paragraph 6 (i) (ii) (iii) and (iv) hereof cannot revert to the deceased.

- Vide paragraph 11 the deponent proposed his mode of distribution as hereunder:-

(a)LR. NO. Githunguri/Githunguri 1029 to be inherited as shown in paragraph 6 (i) to (iv) hereof

(b)LR. NO. Githunguri/Nyaga to be inherited by Samuel Gathaiya Kibia, Ruth Wanjiru Kibia, MARGARET Wakanyi Kibia, Muturi Kibia, John Njau Kibia and Mary Kanini Kibia in equal shares.

(c)LR. NO Githunguri/Githunguri/T/16/1 to be inherited by Samuel Gathaiya Kibia, John Kamau Kibia, Muturi Kibia and John Njau Kibia in equal shares.

The affidavit have been deponed on behalf of John Kamau Kibia , Margaret Wakanyi Kibia, Kinuhtia Kibocha and Waweru Mugu.

Apparently parties were heard inter partes on the application for confirmation and Koome J entered judgement on 3/12/2004. A copy f the typed ruling has not been traced on the record but an extracted copy has been annexed to the affidavit in support of the application as annexure A. It is indicated that the orders were issued on the 3<sup>rd</sup> day of December 2004 and extracted on 14<sup>th</sup> ay of September 2005. These read:-

**1. “That land parcel number Githunguri/Githunguri/2060 original Githunguri/Githunguri 2061, Githunguri/Githunguri/2062, Githunguri/Githunguri 1059 and Githunguri/Nyaga 680 be and are hereby transferred to the deceased name.**

**2. That the same be distributed equally among theseven beneficiaries of the deceased estate who are John Njau Kibia, Samuel Gathaiya, Muturi Kibia, John Kamau Kibia, Ruth Wanjiru, Mary Kanini Kibia and Margaret Wakonyo Kibia.**

**3. That it be taken into account that three of the beneficiaries have already appropriated 0.0053 hectares.**

**4. That each party bear their own costs”**

Against the afore set out back ground information the applicant who is John Njau Kibia who is the grant holder has presented an application dated 23<sup>rd</sup> day of August 2007 and filed on the 30<sup>th</sup> day of August 2007. The following reliefs have been sought:-

(a)That paragraph 3 of the order of Lady Justice Koome dated 3/12/2004 be reviewed and the grant of letters of administration granted to John Njau Kibia on 15/2/2001 be re confirmed and shares of the respective heirs be identified.

(b)That the deceased estate be redistributed as follows:-

**1. LR. Githunguri/Nyaga/680 comprising 680 hectares:-**

**(a)John Njau Kibia – 0.971 hectares**

**(b)John Kamau Kibia – 0.971 hectares**

**(c)Muturi Kibia – 0.971 hectares**

- (d) Samuel Gathaiya Kibia 0.0971 hectares
- (e) Margaret Wakanyi Kibia -0.971 hectares
- (f) Mary Kanini Kibia – 0.971 hectares
- (g) Ruth Wanjiru Kibia – 0.971 hectares

**2. LR. Githunguri/Githunguri/2061**

- (a) John Njau Kibia – 0.0580 hectare
- (b) Margaret Wakanyi Kibia – 0.0580 hectare
- (c) Mary Kanini Kibia – 0.0580 hectare
- (d) Ruth Wanjiru Kibia – 0.0580 hectares

**3. LR. Githunguri/Githunguri/2060 comprising 0.053 hectares to Mary Kanini Kibia**

The grounds are set out in the supporting affidavit and in a summary form these are:-

- He is the one who applied for and issued for grant of letters of administration on the 15/2/2001.
- That the said grant was confirmed by Koome J in her ladyships' judgment of 3/12/2004.
- Vide paragraph 4 that parcel number Githunguri/Githunguri/2062 had already been transferred to the African Independent African Church and for this reason it was not available for inheritance.
- That the court added one Margaret Wakanyi Kibia as a heir.
- That the order of 3/12/2004 is defiant as it did not specify the acreage of each person.
- Vide paragraph 7 that the parcels of the deceased which are to be shared out are as follows:-

- (i) LR. Githunguri/Nyaga/680- 0.68 hectare
- (ii) LR. Githunguri/Githunguri/2060 – 0.053 hectare
- (iii) LR. Githunguri/Githunguri/2061- 0.194 hectares.

- Vide paragraph three beneficiaries names:-

- (1) John Kamau Kibia
- (2) Samuel Gathaiya
- (3) Muturi Kibia

Had been allocated parcels of land which they had disposed of to 3<sup>rd</sup> party as shown hereunder.

- (a) John Kamau Kibia LR. Githunguri/Githunguri/2059 of 0.53 hectares which he sold to Mr. Joseph Chege Iregi.
- (b) Muturi Kibia LR. Githunguri/Githunguri/2058 comprising 0.053 hectares which he sold to Mr. James Karanja Kaminyu.
- (c) Samuel Gathaiya Kibia LR. Githunguri/Githunguri/2057 which he sold to Mr. Simon Njoroge Kabogo.
- Vide paragraph 10 that distribution be effected as follows:-

**A. LR. Githunguri/nyaga/680 comprising 0.68 hectares.**

- (a) John Njau Kibia – 0.0971 hectare
- (b) John Kamau Kibia – 0.0971 hectares
- (c) Muturi Kibia – 0.0971 hectares
- (d) Samuel Gathaiya Kibia – 0.0971 hectares
- (e) Margaret Wakanyi Kibia – 0.0971 hectares
- (f) Mary Kanini Kibia – 0.0971 hectares
- (g) Ruth Wanjiru Kibia – 0.0971 hectares

**B. LR GITHUNGURI/GITHUNGURI/2061 COMPRISING 0.094 HECTARES.**

- (a) John Njau Kibia – 0.0580 hectares
- (b) Margaret Wakanyi Kibia – 0.0580 hectares
- (c) Mary Kanini Kibia – 0.0580 hectares
- (d) Ruth Wanjiru Kibia – 0.0580 hectares

**C. LR. GITHUNGURI /GITHUNGURI/2061 COMPRISING 0.053 HECTARES**

Mary Kanini Kibia – 0.053 hectares.

- Vide paragraph 1, that the shown mode of distribution ensure that each beneficiary will take home 01.1551 hectares out of the deceased 6 pieces of land belonging to the deceased

One Samuel Gathaiya Kibia filed an affidavit of protests deposed on the 10<sup>th</sup> day of September 2008.

- Vide paragraph 2 that Osiemo J as he then was made an order on 23/7/2002 lifting his order of 31/3/2000 thereby excluding LR. Githunguri/Githunguri/2057, 2058, 2059 and 2062 from the estate of the deceased as the same had been transferred to other persons under a grant that was later revoked.
- That parcels NO. LR. Githunguri/Githunguri/2058, 2062 do not form part of the deceased estate.

- Vide paragraph 5 that parcel number LR. Githunguri/Githunguri/2061 does not belong to the estate of the deceased as the same was always held in trust for Mberi-ya-Munga by the deceased.
- Vide paragraph 6 that the rely deponed delis on the proceedings in succession cause No. 88 of 1976 which states clearly that the deceased held one (1.00) acre of land and a half acre (1/2) of land on behalf of East African Independent Pentecostal Church of Africa and Mbari-ya-Munga.
- Vide paragraph 7 that the one acre is contained in parcel number 1062 while ½ acres is contained in LR. No. Githunguri/Githunguri/2061.

One Ruth Wanjiru Kibia , Mary Kanini Kibia and Margaret Wakonyi Kibia confirmed for confirmation as per the content of the application for review.

There is an affidavit by one Muturi Kibia deponed on a date not indicated but filed on the 28<sup>th</sup> day of June 2010. He proposes the following:-

**1. LR. GITHUNGURI/GITHUNGURI/2060**

- John Kamau Kibia – 0.0219 hectares
- Muturi Kibia – 0.0219 hectares
- Samuel Gathaiya Kibia – 0.0219 hectares

**2. GITHUNGURI/NYAGA/680**

- John Njau Kibia- 0.0963 hectares
- John Kamau Kibia – 0.081 hectares
- Muturi Kibia – 0.0781 hectares
- Samuel Gathaiya Kibia – 0.0781 hectares
- Mary anini Kibia – 0.1132
- Ruth Wanjiru Kibia – 0.1132 hectares

**3. GITHUNGURI/GITHUNGURI**

- John Njau Kibia – 0.0567 hectares
- Margaret Wakonyi Kibia – 0.0398 hectares
- Mary Kanini Kibia – 0.0398 hectares
- Ruth Wanjiru Kbia – 0.03881 hectares

Vide paragraph 2 that the following property of the deceased had been left out of the distribution Githunguri /Githunguri/T/16/1

Muturi Kibia

John Kamau Kibia

Samuel Gathaiya Kibia

John Njau Kibia – all joint

**KENYA BREWERIES LIMITED**

- Muturi Kibia – 63
- John Kamau Kibia – 62
- Samuel Gathaiya Kibia – 62
- John Njau Kibia – 62
- Ruth Wanjiru Kibia – 5
- Mary Kanini Kibia – 5
- Margaret Wakanyo Kibia – 5

**SHARING OF LAND**

**Githunguri/Githunguri/2059**

John Kamau Kibia – 0.053 ha

**Githunguri/Githunguri/2058**

Muturi Kibia – 0.053 ha

**Githunguri/Githunguri/2057**

Samuel Gathaiya Kibia – 0.053

One John Njau put in a replying affidavit deponed on 8<sup>th</sup> day of 2010 and filed on the 20<sup>th</sup> day of September 2010. It is in response to the Affidavit of Muturi Kibia as follows:-

- Vide paragraph 2 the affidavit of Muturi Kibia stands faulted because:-

(i) He has not shown the acreage of each parcel of land he has not share out the property equally he has allocated less acreage to Margaret Wakonyi Kibia and excluded her from parcel number 680, he has left out a potion of 680 unshared, she has also left out unshared in parcel 2061, he has not annexed a certificate for the Kenya Breweries shows that plot No. T. 16/1 does not belong to the estate as the same was shared out in 1981 to John Njau Kibia- 1611

- (ii) Grace M. Kibia -1612
- (iii) Mary K. Kibia – 1613

The applicant filed written submission dated 8<sup>th</sup> day of October 200 and in a summary form the court is asked to confirm the proposed distribution of the estate by the applicant which complies with the order of Koome J of 3/12/2004 which required the court to take into consideration the portion which had been disposed off by some beneficiaries.

- The court to dismiss the assertion of Samuel Gathaiya sworn n 10/9/2000 that parcels number 2061 is held in trust for Mberi-ya-Munga as the law does not recognize such entity.
- The court is invited to note that this parcel of land is registered in the name of the said Samuel Gathaiya as an administrator of the estate of the deceased and there is no trust created on the said parcel of land.
- The court is invited to note that the order of Koome J of 3/12/2006 that parcel number 2061 be shared amongst the heirs of the deceased is binding on this court.
- The court is invited to ignore and have no regard to the sharing proposed by Muturi Kibia because he did not disclose the acreages of the parcels of land to be distributed on the one hand he did not share out the parcel of land equally amongst the beneficiaries as ordered by Koome J him Muturi also has given a similar share to Margaret wakonyi from one parcel and exuded her from benefiting from one other parcel without assigning any reason, he has also shared out less acreage from parcel 680 and 2061 without assigning reason.
- The court is invited to note that parcels number 2057,2058 and 2059 were sold off by beneficiaries and are no longer available for redistribution.
- The Kenya Breweries shares should be left out of the distribution list as no share certificate has been exhibited to show that they belong to the deceased. According to the applicants the deceased owned no shares in Kenya Breweries as no certificate has been exhibited to that effect. Lastly that parcel number Githunguri/Githunguri/16/1 is not available for distribution as it does not belong to the estate of the deceased but was a sub division of T/16/1 in favour of the named three persons and there is documentary proof to that effect.

No submissions were filed by the Respondents counsel. This court has given due consideration to the rival arguments herein in the light of the orders sought to be reviewed and the court proceeds to make the following findings on the same:-

1. The deceased subject of this proceeding had died on 13<sup>th</sup> day of January 1980 aged 65 years.
2. One Samuel Gathaiya Kibia had commenced succession proceedings in respect to the estate of the deceased vide succession cause No. 926/1997 allegedly upto the confirmation stage whereby the free asset of the deceased namely LR. Githunguri/Githunguri/1029 was subdivided and gave rise to parcel numbers 2057, 2058,2059,2060,2061, and 2062.
3. Some of these subdivisions were disposed off before the grant was revoked by Osiemo J as he then was on the 31<sup>st</sup> day of Marc 2000.
4. The parcels which have been disposed under succession cause number 926/97 were parcel number 2057, 2058,2059 and 2062. Following revelation that these were not available for redistribution Osiemo J as he then was lifted the revocation order affecting them on 23<sup>rd</sup> day of July 2002.
5. Koome J was alive to these events when she made the orders of 3/12/2004 evidenced by the fact that she made observation that it be taken into consideration that the said parcels were not available for distribution.
6. The learned judge identified the beneficiaries of the deceased to be seven in number namely John Njau Kibia, Samuel Gathaiya, Muturi Kibia, John Kamau Kibia, Ruth Wanjiru, Mary Kanini Kibia and Margaret Kibia. There has been no objection to that list and there has been no required that the said list be reviewed and or amended meaning that the contenting beneficiaries are still the same 7 who had been identified by Koome J.
7. From the assessed facts the resultants sub divisions had first of all been transferred into the names of Samuel Gathaiya Kibia the administrator in 926/1997 before disposal to 3<sup>rd</sup> party. The learned judge made orders that parcel numbers Githnguri/Githunguri/2061,2061,2059 and Githunguri/Nyaga/680 be re transferred back into the deceased name and that the same be distributed equally amongst the identified beneficiaries. in ordering equal distribution of the estate the learned judge was in effect applying the principle in section 38 cap 160 of the laws of Kenya succession Act which reads:-  
**“Section 38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall subject to provisions of section 41 and 47 devolve upon the surviving child of there be**

**only one or be equally divided among the surviving children”**

**Section 41 deals with creations of trust where the beneficiaries are minors. This section was not and is still not applicable at all. The beneficiaries were adults as at the time the said orders were made section 42 on the other hand was reflected in the learned judges orders not because some of the beneficiaries had benefited directly from the deceased which benefits were to be taken into consideration, but because they had benefited under the revoked grant which benefits have to be taken into consideration.**

8. It is to be noted that one Samuel Gathaiya had filed a protest against the order of distribution suggested by the applicant then which protest was considered by Koome J. these had been contained in paragraph 7 of the affidavit of protests already reflected herein. In the same paragraph 7 of the affidavit of protest it was revealed that him and Muturi had benefited from the estate by reason of him Gathaiya inheriting parcel number 2057 and selling it off and Muturi getting parcel number 2058 and 2059 and also disposing it off. It was also revealed that him Gathaiya had transferred parcel number 2062 to the African Independent Pentecostal Church and was holding parcel 2061 for Mberi-ya Munga and that 2060 was to be sold to pay off administration expenses in succession cause No. 926/1997 and the current expenses.

9. A reading of the learned judges orders reveals that the learned judge upheld the protests in respect of parcel number 2057, 2058, 2059. But did not uphold the protests in respect of parcel number 2060 which was to be sold and the proceeds used to pay off administrations costs, 2061 held on behalf of Mberi-ya Mungu, 2062 which had been transferred to African Independent Pentecostal Church 1059 and 680 are also be availed for redistribution.

10. It is to be noted that neither applicant nor protester appealed against those orders.

11. It was not until 30<sup>th</sup> August 2007 after a period of two years, 9 months and 27 days that review was sought. The provisions under which review was being sought have not been indicated but this court has judicial notice that these are laid under the general provisions rule 49 of the probate and administration rules and Rule 63 of the same rules which import into the succession proceedings. These reads:-

A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these rules shall file a summons supported if necessary by affidavit. Rule 63 (1) save as is in the Act or in these Rules otherwise provided and subject to any order of the court or a register in any particular case for reasons to be recorded the following provisions of the civil procedure rules namely order V,X,XI,XV,XVII,XXV,XLIV AND XLIX together with the high court (Practice and Procedure Rules) shall apply so far as relevant to proceedings, under these rules.

The old order 44 is the order which deal with review and has now been reviewed order 45. A reading of the same reveals the following:-

**“Order XLIV 1(1) Any person considering himself a grieved:-**

**(a)By a decree or order from which an appeal is allowed but from which no appeal has been preferred, or**

**(b)By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could no be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desire to obtain a review of the decree for review of judgement to the court which passed the decree or made the order without unreasonable delay...”**

12. Following up from the above citation this court has judicial notice of the fact that this provision has been construed by case law emanating from the court of appeal and as dutifully followed by the superior court and subordinate courts that in order for the applicant to succeed the following ingredients were to be demonstrated to exist:-

(a)That the applicant is aggrieved by either a decree or an order which order or decree has to be extracted and exhibited or annexed to the application.

(b)The order or decree may be one arising from an order of judgement from which an appeal lies but no appeal has been preferred or one where no appeal lies.

(c)There has to be demonstration of existence of a discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be **produced by him at the time when the decree was passed or made or**

**(ii) Or on account of some mistake or error apparent on the face of the record or**

**(iii) For any other sufficient reason...”**

(d)The application should be presented without unreasonable delay.

13. When the afore set out ingredients are applied to the rival arguments herein, it means that all that the applicant is required to do in order to earn the order for review sought is for the applicant to demonstrate that the facts put forward save within the ambit of any of the ingredients set by the provisions of law. Whereas all that the protesters are required to do is to demonstrate that their assertions go a long way to oust the applicants assertion.

14. This court has applied the yard stick in number 12 o the affidavit of Muturi Kibia filed on 28/6/2010 and finds it ousted for purposes of review for the following reasons:-

(i) Indeed he has disclosed that him Muturi Kibia, John Kmau Kibia, and Samuel Gathaiya Kibia have already benefited from the estate of the deceased vide succession cause number 926/1997 whereby John Kamau Kibia benefited from Githunguri/Githunguri/2059, Muturi Kibia from Githunguri/Githunguri/2058 and Samuel Gathaiya Kiba from Githunguri/Githunguri/2057. But he has not reflected this in his proposed mode of distribution by compensating others in term of the provisions of section 42 of the same Act.

(ii) There has been no indication of the acreages involved in respect of each plot in order to confirm that his mode of redistribution is neither an over or under redistribution.

(iii) He has given preferential treatment to some beneficiaries and not others by giving bigger shares to some and excluding others from some property without showing what error or mistake Koome J made by ordering equal distribution of the said estate.

(iv) Indision of the Kenya Brewires shares has not been supported inhibition by a share certificate to show that indeed the deceased held the said shares in her favour .

(v) Indision of plot number Githunguri/Githunguri/T.16/1 has not been supported by documentary proof and this has been effectively esponded to by annexure A to the reply by applicant which shown that the deceased had died on 13<sup>th</sup> January 1980 as per the death certificate exhibited herein whereas the allocation of the plots were done vide minute No 78/81 whereby the plot was sub divided into parcels number 16/1 whereby John Kibia retained 16/1, Grace M. Kibia/16/2 and Mary K. Kibia 16/3. There is nothing to show that this was free property of the deceased.

15. As for Samuel Gathaiya Kibia his protest based on fact that parcel number 2061 and 2062 do not form part of the estate of the deceased because these had been freed by the order of Osiemo J of 23/7/2002. Meaning that their disposal by the protester vide succession cause No. 926/1997 stood. The said Samuel has annexed the order of Osiemo J of 23/7/2002 and proceedings in succession cause No. 88 of 1976 to show that parcel number 2061 was the property of Mberi-ya –Munga that first application for confirmation was filed on 14/10/2002 and the same Samuel had filed an affidavit of protests in a similar manner which. The protest had deponed on 4<sup>th</sup> December 2003 and filed the same date. There were no annexures to the said protest. The property sought to be shielded from distribution are the same ones namely 2060,2061 and 2062. This protest was considered by Koome J in her Ladyship judgement of 3/12/2004. This court has revisited that judgement and perused the same and finds that the issue of the protests of Samuel Gathaiya was considered by the learned judge at page 45.

At page 5 line 7 from the top the learned judge made the following observation and or findings:-

**“ Both the applicant and the protester are in agreement that by virtue of section 93 of cap 160, this property which was distributed and transfer effected to innocent purchasers after value without notice of any defect in title should not revert to the estate”**

Accordingly I am in agreement that those three parcels should be treated as shares of the beneficiaries who sold them and the rest of the estate should be distributed equally to all the beneficiaries bearing in mind that Samuel Muturi, and John Kamau have appropriated 0.053 hectares each.

At page 5 line 2 from the bottom the learned judge went on:- “ It is clear from the record that the following are the indisputed property of the deceased.

(a)Githunguri/Githunguri (original)/2060

(b)Githunguri/Githunguri/2061

(c)Githunguri/Githunguri/2062(1059)

(d)Githunguri/Nyaga/680

Then the judge directed that the four parcels to be transferred back to the deceased name and that the same be distributed equally amongst the beneficiaries.

It is on record that the protester Samuel Gathaiya Kibia did not appeal against that judgement but filed an application for review dated 19<sup>th</sup> day of January 2005 seeking review of the courts orders of 3/4/2004. Prayer 1 thereof sought orders that the review sought be effected to exclude LR. NO.

Githunguri/Githunguri/2062 and LR. NO. Githunguri/Githunguri/2061 from the deceased estate. The supporting affidavit to that application annexed the ruling of Otieno J of 31/3/2000, plus the extracted order as well as the annexure currently annexed of orders in succession cause No. 88 of 1976. The application was subsequently amended by an application amended on the 24<sup>th</sup> day of June 2005 and filed on the 21<sup>st</sup> July 2005. The amendment introduced in prayer 2 to the effect that 1/3<sup>rd</sup> of LR. NO. Githunguri/Githunguri/T.16/1 be inherited by Samuel Gathaiya Kibia, Kamau Kibia, Muturi Kibia and John Njau Kibia equally. Prayer 2A stated that LR. NO. Githunguri/Githunguri/2060 to be sold to meet costs of this case and expenses incidental to the administration of the estate.

A perusal of the record reveals that application was heard by Rawal J on 29/5/2006 but along the line the learned judge deferred the ruling. It is not clear from the record whether the ruling was ever delivered or not. In the absence of a ruling to that effect this court has no alternative but to revisit the issue.

It therefore follows that in order for this court to review and exclude the two properties protested by Samuel and the one excluded the backup information could not have been availed to the court as at that time.

With regard to parcel number 1062 the green card annexed to the application for grant showed that indeed the same had been transferred by Samuel Gathaiya in 1997 or 1992 as the card is not very clear. This is therefore covered by the provisions of section 93 of the L.S.A.

Parcel number 2061 is not covered because no explanation has been given as to why the information regarding it was not availed to Koome J as that 2004 when she heard the case.

The requirement in order 44 now 45 that demonstration be given that the said information is of paramount importance to the decision, that if the same had been availed to the court as at the time the decision was made the decision would have been along the lines of the review sought, that due diligence was exercised by the applicant with a view to avail the same but it was not possible then, the factors demonstrating existence of the exercise of due diligence also has to be demonstrated to exist. When these ingredients are applied to the affidavit of protest by Samuel Gathaiya it is clear that they have not been satisfied.

The foregoing holding notwithstanding it is necessary for the said Samuel to demonstrate as submitted by the applicants counsel that Mber-ya-Munga exists as an entity, that it is capable of bringing land, who comprises it what link it has with the deceased state in order for it to qualify as a partner of the deceased estate and lastly why him Samuel who was allegedly aware of the existence of the judgement in the said succession case of 88/1979 as at the time he was an administrator in succession cause number 926/1997 why he did not transfer this property to the said Mber-ya-Munga as at the time he transferred other portions of the estate property inclusive of himself. As submitted this could be a ploy for Samuel to enrich himself to the detriment of other beneficiaries. For the first reason given and this reason two the protests of Samuel Gathaiya is disallowed.

Coming back to the application itself and the reasons given by the applicant for review the court is satisfied that the basis is sound in that indeed the learned judge had not given specification of the acreage of each beneficiaries. She left it to the applicant to work it out which has now been done.

The applicant has also taken into consideration the learned judge refusal to allow parcel number 2060 to be sold for purposes of meeting administration costs in both P&A 926/1997 and the current proceedings as none had been proved. The applicant has also taken into consideration the learned judges directions that I be taken into consideration that John Kamau Kibia (a) Muturi Kibia and Samuel Gathaiya Kibia had already benefited from the estate which is demonstrated by their exclusion from benefiting from parcel number L.R. Githunguri/Githunguri/2061 and 2060. As mentioned earlier on parcel number Githunguri/Githunguri/2062 has rightly been excluded from the redistribution because it had already been transferred to 3<sup>rd</sup> party as shown by the green card.

For the reasons given on the assessment the court proceeds to make the following final orders:-

1. The protest of Muturi Kibia stands dismissed because :-
  - (a) It has not given acreages of the property to be distributed.
  - (b) It is not in line with Koome J's discretion that the sharing be on equal basis in line with the prescription in section 38 of the L.S.A. cap 160 laws of Kenya.
  - (c) That share certificate for the Kenya Breweries share was not exhibited.
  - (d) Parcel No. Githunguri/Githunguri/R.16/1 has been demonstrated not to have belonged to the estate of the deceased as it was subdivided and allocated to the allottees in 1981 long after the death of the deceased, herein and there was nothing to show that it belonged to the deceased at any one particular time.

2. The protest of Samuel Gathaiya has been allowed in part in so far as it relates to parcel number Githunguri/Githunguri/2062 as the applicant is in agreement with the same on the one hand and on the other hand it has been demonstrated by a perusal of the green card that indeed the same had been transferred to the African Independent Pentecostal Church Ministers way back in 1992 or 1997 in HCCP&A 926/1997 and is covered by section 93(1) of the L.S.A..

(b) Protest over parcel number Githunguri/Githunguri/2061 has been rejected because:-

(a) No demonstration has been given as to why the information in succession cause number 88 of 1999 was not availed to Koome J in 2004.

(b) It has not been demonstrated that Mberi-Ya- Munga is an entity capable of owning land who comprises it and who will benefit from it. In the absence of such a demonstration and considering that no trust is intended to be created over the title and since no explanation was given as to why Samuel Gathaiya Kibia did not transfer it through the confirmation in HCC P&A 926/1997. The only reasonable inference to be drawn from the surrounding circumstances is that Samuel Gathaiya intends to solely benefit from the said parcel to the exclusion of the other beneficiaries.

3. The applicants of application dated 23<sup>rd</sup> day of August 2007 has merit and the same is allowed for the following reason:-

(a) It is in line with the provisions of the old order 44 CPR now order 45 in that there is a genuine error on the face of the record as the acreage entitlement for each beneficiary has not been storm .

(b) The court had included parcel number Githunguri/Githunguri/2062 had already been transferred by Samuel Gathaiya Kibia in P&A 926/1997 as demonstrated by the content of the green card was therefore effected by section 93(1) of the L.S.A. like the other property excluded by the learned judge. Its inclusion as part of the distributable estate was therefore an error.

(c) It is in line with the direction by the judge that that the share holding be equal in line with the principle in section 38 of the L.S.A.

(d) It took into consideration the property already appropriated by Samuel Gathaiya Kibia and John Kamau Kibia by excluding them from a portion of the estate.

4. It is on record that this application for review was filed two years 9 months and 27 days after the decision of the judgement. This looks an ordinate delay but this has been cured by the overriding objective principle in section 1A,1B of the CPA for the reasons that review is necessary for ends of justice to be met herein, which ends of justice is to the effect that the judgement of Koome J of 3/12/2004 be given effect which effect it cannot if rectification is not done along the lines assessed.

5. The protesters Samuel Gathaiya Kibia and Muturi Kibia had no reasonable cause to protests and for this reason they will pay costs to the applicant.

**DATED, READ AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2011**

**R.N. NAMBUÉ**  
**JUDGE**