



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 435 OF 2006

IN THE MATTER OF THE ESTATE OF PETER GITAU KARANJA (DECEASED)

RULING

The background information gathered from the paper work on the record reveals that these proceedings were initiated as succession cause No. 239/1995. Apparently parties were heard inter partes on merit and a judgement to that effect was given on a date not indicated in the judgement. A perusal of the said judgement reveals that the salient features of the same in a summary form are as follows:-

- Both disputants applied for a grant of representation to the estate of the deceased and it was granted to them.
- They disagreed on the issue of distribution necessitating the calling of viva voce evidence from each side.
- The issues for the determination by the court are set out at page 2 of the judgement line 9 from the top as:-

1. Whether or not the objector is entitled to a share of all the assets that had been acquired by the deceased.

2. Whether or not there are assets that were acquired by the deceased and Regina after Lydia had separated with him.

3. Whether property if any should be subdivided by this time between the two widows.

- With regard to land parcel number LOC.2/Kinyona/753 the learned trial magistrate opined that the land which measures 6.0 acres had been purchased jointly by Regina and the deceased after Lydia had been divorced. Then Regina and the deceased established a home on this land and it is where Regina lives to date and that this facts have not been disputed by Lydia the objector. That Regina has developed this land without help from Lydia. She planted tea bushes on this land and she has been tending them ever since a fact not disputed by Lydia.

- That Lydia admitted that she went to this land for the burial of the deceased.

- That Regina is the one who paid all the hospital bills for the deceased and settled interests on an overdraft loans the deceased had without any help from Lydia a fact not disputed by Lydia.

- That the home at Kinyona had been built in 1989 by Regina long after Lydia had separated with the deceased.

- At page 3 line 6 from the top the learned magistrate as she then was had this to say:-

“Surely it would be very unfair for this court to now subdivide this parcel of land which was acquired by Regina and the deceased and other children of Lydia. Therefore I order that the said parcel of land LOC.2/Kinyona 753 be registered in the name of Regina Wambui Gitau as the sole proprietor.) proprietor.

- That the objector contends that the deceased had 6 (six) plots in Kinyona but concedes in cross examination that all of them are in the names of Regina. That it is clear from the evidence on the record that the plots were bought by Regina when she was doing her business of a hard ware shop and therefore the same shall come in her name.

- That from the evidence also adduced in court, the plot in Kwale number Kwale/Diani/33 had been sold to Almash Mukora and the court ordered the two co-petitioners to formalize the transaction in favour of the purchasers.

- That the other parcel of land in Kwale/Diani/129 was to be registered in the joint names of the objector and the petitioner to hold in trust for themselves and the children of the deceased.

- That the other parcel of land is Embu/164 comprising 24 acres and if not sold the same was to be shared equally between the two widows.

- As for the vehicle which Regina claimed to have bought from proceeds of her hard ware shop, and which had been sold the sharing of the proceeds to be excused as the deceased had a huge hospital bill and overdraft which was paid by Regina.

- The other items listed in paragraph 9 were ordered to remain as part of the Kinyona home as Lydia had not demonstrated that the same had been purchased before she was separated from the deceased.

Apparently one Lydia Wambui Gitau appealed against that ruling vide Nairobi High Court HCCC NO. 293 of 2003 citing Regina Wambui Gitau as the Respondent. There is a judgement in respect of that appeal decided by PJ Ransley on the 18th day of December 2003. The court has perused the same and the salient features of the same are as follows.

- **Objection was that the judgement offended the provisions of order 20 rule 3 as the same had not been dated at the end but the appellate court found that the dating was instead set out at the beginning of the judgement and for this reason the appellate court ruled that there was compliance with the rules.**

- **The second complaint was that the learned trial magistrate was wrong in holding that she appellant had been divorced. The courts’ response to this is that an order produced in courts showed that the order issued in maintenance cause number 5 of 1980 dated 15/8/1980 had showed that an order had been given that the appellant was no longer bound to cohabit with the husband and thereafter went on to marry the Respondent under Kikuyu customary law and before the District Commissioners’ office.**

- **That since the appellant had been married under Kikuyu customary law, the order of non cohabitation meant that the deceased was no longer married to the appellant under Kikuyu customary law, and that left the Respondent as the sole wife of the deceased and if this is the case, then it means that it is the Respondent who had the sole life interest of the deceased estate subject to the interest of the children of the deceased whether the same were from the appellant or the Respondent. This could also mean that the appellant would have no interest in the estate of the deceased.**

- **That the issue of whether the appellant and deceased had been divorced under kikuyu customary law or not should have been dealt with at the time of trial in the lower court and for this**

reason the matter was remitted back to the lower court for retrial and determination of this issue.

This court failed to trace the proceedings of the lower court after the referral of the matter back to the lower court. But it has traced a ruling delivered on a date not indicated among the annexures annexed to the supporting affidavit of the application for revocation as annexure LNG7 by SM Mokuia of S.R.M . The salient features of the same are as follows:-

- **The matter had been referred to the lower court by the high court to determine whether there was divorce between Lydia Wambui Gitau and the deceased.**
- **According to a witness Mr. Muchoki who stated that the practice is that if there is a dispute between husband and wife, elders from both sides meet to arbitrate over the issue and if not resolved then the marriage stands dissolved.**
- **That Lydia had asserted that she was married under Kikuyu customary law whereas Regina says that she was the only wife as she had been married under statute.**
- **That according to Muchoki, the dowry paid for Lydia had not been refunded to-date.**
- **That another witness Macharia testified that he had taken dowry to the family of Lydia and that the same had not been refunded.**
- **That Lydia was not aware of any ceremony which had been performed for the marriage of Regina.**
- **That Regina had stated that when she married the deceased in 1979 he did not have a wife.**
- **That Regina said that she came to know of Lydia during the court case between Lydia and the deceased.**
- **That Regina stated that the children (Regina's) did not know those of Lydia.**
- **That John Ngang'a a brother of the deceased had said that late brother had only one wife but was not aware if the deceased brother had divorced Lydia.**
- **That the court had been shown an order for maintenance made on 5/8/1980.**
- **That Lydia's first born son was named after the father of the deceased.**
- **That the court had not been shown a decree for divorce.**
- **There was nothing to show that the arrangement between the deceased and Lydia was brought to an end under Kikuyu customary Law.**
- **The fact that the deceased formalized his marriage with Regina does not mean that it resulted in a divorce in an earlier marriage which had been entered into under customary law.**
- **If the deceased did not divorce Lydia during his life time a 3rd party cannot do so.**
- **On the basis of the afore set out reasoning the learned magistrate made a finding that the deceased did not divorce Lydia Wambui during his life time.**

Against the afore said background information the applicant Lydia Wambui Gitau has approached the seat of justice by way of an application by way of summons for revocation or annulment of the grant dated 28th day of February 2006, and filed on the 1st day of March 2006. It is brought under section 76 of the law of succession Act cap 160 laws of Kenya. The reliefs sought are as follows:-

- (a) That the honourable court be pleased to issue an order staying the execution of the grant of probate dated 7th day of May 2003, and all orders if any sub sequential or related there to.**
- (b) That the said confirmed grant of Lydia Wambui Gitau and Regina Wambui be revoked.**
- (c) That in the alternative the grant of probate into the estate of late Peter Gitau Karanja be amended to include the property LOC.2/Kinyona/753 and that the children of the first wife Lydia Wambui Gitau be included to share equally in the property of the estate of Peter Gitau Karanja.**
- (d) That property number LOC.2/Kinyona/753 forms part of the estate Peter Gitau Karanja and should be included into the list of property to be shared.**
- (e) That all the property that Regina Wambui Gitau misappropriated from the estate be accounted for.**
- (f) Costs of this application be provided for.**

The grounds in support are contained in the body of the application and the supporting affidavit. A summary of the grounds in the body of the application are as follows:-

- That a perusal of the record reveals that the judgement of the lower court made on 14th May 2003 has been compromised and for this reason the grant was issued before the judgement.
- That the grant made on 7th May 2003 has been compromised by the judgement of appeal made on 18th December 2003, in civil appeal No. 293 of 2003.
- That the judgement of 7/5/2003 has been compromised by the judgement of Senior Resident magistrate Thika Hon. S.M. Mokuu of 3rd August 2005.
- That the chief magistrate Thika made an order on 11th February 2006, that the court lacks jurisdiction to hear an application to confirm the grant filed on the 25th November 2005.
- That looking at the proceedings generally the learned magistrate seriously misdirected herself even to the extent of accepting exhibits which ought not to have been accepted.

A summary of the grounds in the supporting affidavit are summarized as follows:-

- That the applicant is the one who made the first move to seek a grant of representation to the estate of their deceased husband which was eventually granted to both widows.
- It is her assertion that employer's benefits were shared equally amongst both widows.
- That when it came to distribution of the other property of the deceased, the assumption was that these too would be shared on equal basis but then the co-widow Regina demanded a bigger share of the estate property and filed objection proceeding.
- That the Respondent on her own and for her own benefits disposed off a motor vehicle Reg. No. KUX 304 Chevrolet, three milk grade cows, 60 pigs and two nurseries of tree seedlings.
- That disagreement on distribution led to them being heard resulting in a judgement delivered on 14/5/2003 by which the applicant became aggrieved and filed an appeal whose result is that the matter was remitted back to the lower court for a determination as to whether the deceased had divorced the applicant or not which court ruled that she applicant had not been divorced by the deceased and by reason of these subsequent proceedings, the judgement on distribution of 14/5/2003 stood compromised.

- That the applicant made a move to have the grant issued herein confirmed and that is when the applicant was shown a grant allegedly issued on 7th May 2003.
- That the Thika court has said it has no jurisdiction to handle the matter.
- That proceedings have shown that the judgement was on 7th May 2003 and not 14th May 2003. That she applicant has made out a case for the revocation and or annulment of the said grant.

The Respondent responded to the application by way of grounds of opposition dated 10th May 2006, and filed on 12th May 2006 summarized as follows:-

- **Section 76 of the law of succession Act cap 160 laws of Kenya does not cover a situation whereby a party who moved the court for issuance of a grant, for its confirmation can turn round and apply for its revocation and or annulment.**
- **That rule 44(1) and 73 of the probate and administration rules do not import into the succession proceedings orders 21 and 41 of the CPR on stay of execution through rule 63 on stay of execution.**
- **That before the issuance of the grant of confirmation on 7th May 2003, the parties were heard fully and if the applicant was not satisfied with the distribution then she had a right of appeal which the applicant herein exercised and for this reason the current application has no merit and it should be dismissed.**

Simultaneously with the filing of the grounds of opposition was filed a replying affidavit deponed by Regina Wambui Gitau on the 12th day of May 2006, and the following have been stressed by the deponent.

- That it is the applicant who moved the court for a grant of representation and went ahead to apply for confirmation containing a proposal that the contested land LOC. 2 Kinyona/753 be inherited by her biological children.
- This attracted 2 protest affidavits from the Respondent and in a summary form stated that the property had been acquired by the deceased and Respondent in 1985 long after the deceased had separated from the applicant, that she had developed and built a home on it.
- That the biological sons of the applicants also swore an affidavit of protest indicating that they wanted all the agricultural properties including those registered in the names of Regina to be registered in their names.
- That the sons of the applicant had their own advocate appearing for them.
- That directions were given to the effect that parties be heard by viva voce evidence which was to determine the mode of distribution which the court did in its judgement of 7th May 2003 which is the date of the judgement.
- That since then, the finalization of the matter has been hampered by the applicant filing numerous vexatious applications all aimed at divesting parcel number LOC.2/Kinyona/753 from the Respondent well knowing that she applicant and her children have never set foot on this land.

The applicant responded to that replying affidavit by a deponement deponed on the 29th May 2006, and filed on 30th May and the following have been stressed:-

- That according to her, the judgement of Ransley J made orders that parcel number LOC.2/Kanyona/753 is part of the estate of the deceased and that the same should be equitably distributed

to all beneficiaries who include the applicant's children.

- Contends that by reason of the high court remitting the matter to the lower court to determine whether the applicant had been divorced or not which determination was to the effect that she applicant had not been divorced by the deceased before his death and for this reason the judgement of Mary Kiptoo became compromised.
- It is her assertion that it is not true that all the protesters and objectors were heard as the record bears witness.
- That the Respondent has misappropriated estate property.
- That this is a proper case for the court to intervene.

There is an affidavit by one Farida Almas Mukura deponed on 14th day of June 2007 and filed on the 14th day of June 2007, whose central theme is that the deponents father Almas Mukura who died on the 3rd day of August 2002, never purchased land parcel number Kwale/Diani/33 as the administrators have no documents evidencing such a sale.

The applicant filed a further affidavit deponed on the 11th day of May 2009 and filed on the same date in response to a document filed as a statement of account of income accrued from 1995 to 2005 which the applicant allegedly took to her own accountant and whose findings revealed that the Respondent has misappropriated income due to the estate and has even disposed off property to her benefit without consulting the co administrator.

Parties filed written submissions, followed up by oral highlights. The oral highlights simply went to stress and reiterate the content of the written submissions. Those of the applicant are dated 18th day of March 2010 and filed on the 19th day of March 2010 and the following have been stressed:-

- There is a reiteration of the background information to the dispute already set out herein by the court as information gathered from the record as well as deponements of the parties assessed above.
- That the extracted order by the Registrar of the high court, the memorandum of appeal, a ruling in the appellate court filed on a burial of the applicants daughter by G.B.M. Kariuki and the judgement of Ransley J as he then was have all concurred that the judgement of the lower court was on 14/5/2003.
- That Hon. Ransley made a finding that land parcel number LOC.2/Kinyona/753 was to be shared equally amongst all the 12 children of the deceased.
- That the court cannot ignore the rights of the applicant whose status was to be determine by the lower court.
- It is their assertion that by reason of the above events, the judgement of Mary Kiptoo was thereby altered and or varied and for this reason it cannot form the basis of a confirmed grant.
- That upon determination of the status of the applicant by the lower court as directed by the appeal judgement which has not been challenged on appeal, it means that she the applicant is entitled to full sharing of the estate of the deceased.
- The court is invited to note that the following facts are undisputed namely:-

(a)The deceased died intestate on 1st March 1995 leaving 2 wives, (widows), and 12 children enumerated as:-

(a)Charity Wairimu Gitau borne 1967

- (b) Charles M. Karanja Gitau born 1969
- (c) Dominic Macharia Gitau born 1970
- (d) Edward Mulruri Gitau born 1972
- (e) Sarah Njeri Gitau born 1975 (died leaving 2 children)
- (f) Nancy Wanjiku Gitau born 1976
- (g) Sabina Wairimu Gitau born 1974
- (h) Judy Njeri Gitau born 1976
- (i) Nancy Wanjiku Gitau born 1978
- (j) Esther Nyambura Gitau born 1979
- (k) Hellen C. Nunga Gitau born 1980
- (l) Anthony Karanja Gitau born 1982.

- That both widows applied for a grant of representation to the deceaseds' estate and the same was granted to them jointly.

- That death benefits from the deceaseds employer were shared equally between both widows.

- That the properties left by the deceased are as follows:-

(a) Land parcel number LOC.2/Kinyona/753

(b) Kwale/Diani/129

(c) Kwale/Diani/33

- The subject matter has been heard by the lower court in succession cause number 239/1995 and appeal number 293/03.

- The court was invited to take note of the following facts as being undisputed the properties disposed off by the Respondent to the exclusion of the applicant namely motor vehicle Reg. NO. K VX 304 Cheurolet, 60 pigs, 3 grade cows, nursery seedlings land parcel number Mavulia/Gicheche 164 Embu 9 settlement scheme measuring 24 acres, land parcel number LOC.Kengari/2577 which the Respondent shared with her children, tea picked on LOC.2/Kinyona/753 whose account the Respondent unilaterally changed into her own name and has been appropriating the proceeds to her own benefit to the exclusion of the applicant.

- That by reason of what has been stated above, there is no way the judgement of Mary Kiptoo can be left to stand.

- That the court should intervene to prevent the deceaseds' estate from going to further wastage.

The Respondent submissions are dated 21st May 2010, and filed on the 24th day of May 2010, and the following have been stressed:-

- The dispute centres on land parcel number LOC. 2/Kinyona/753.

- Lydia the applicant married the deceased under Kikuyu customary law rites in 1973 and they have

6 children between them. They resided at a plot in Kahawa West fully constructed. The applicant uses a portion and lets out the spare rooms from which she earns income. The plot is registered in the name of Lydia.

- The applicant and deceased became estranged in the late 1970s culminating in separation orders being made on 15th August 1980 and since then the two never resumed cohabitation.
- The plot sought was acquired in 1985 and a house constructed on it in 1986.
- That the deceased married Regina in 1979 under Kikuyu customary law but was later formalized at the District commissioners office. They too have 6 children between them.
- When deceased and Regina married, they lived in a mortgage house in Thika which they sold and acquired land parcel number LOC.2/Kinyona/753, and put up a home on it in which they settled with their children being assisted by the biological mother of Regina who was a business woman.
- That Regina has lived on this plot to the exclusion of any other person.
- That she solely developed the Tea plants on the land which she tends and sales and earns a living.
- That Lydia and her children set foot on this land on the day of the burial of the deceased.
- Reiterated the history of the succession proceedings in case number 239/95 as already set out in the background information, deponements assessed and the undisputed facts in the applicant's submissions.
- In a summary, the protest on distribution lead to the parties being heard fully, their respective counsels and the lower court presided over by Mary Kiptoo delivered a judgement stating that the disputed parcel of land should solely go to Regina and her children and the court gave reasons. The other properties were also shared and reasons were given for the mode of distribution made by the court.
- Thereafter a certificate of confirmation was issued dated 7th day of May 2003.
- Contends that by reason of what they have stated above, the application has no merit and the same should be dismissed with costs and the matter put to rest.

This court has made due consideration of the afore set out rival arguments and in this court's opinion, the facts of the case are clear and for this reason there is no need to repeat them here. The court will proceed to make findings on each relief sought. The first relief is for stay of the grant issued by the lower court on 7/5/2003. It is undisputed that an issue arose with regard to the exact date when the learned trial magistrate of the lower court delivered the judgement on distribution. The argument by the applicant was that the judgement was read on 1/5/2003. This court recalls making an observation that indeed the judgement does not bear a date at the end. This issue was raised on appeal in Appeal number 293/2003 and the appellate court ruled that judgement was on 7/5/2003 because the learned trial magistrate wrote that date in free hand above the word judgement and for this reason the appellate court was satisfied that the judgement of the lower court was read on 7/5/2003. There is no appeal that was preferred against that appellate court judgement and for this reason, this court has no alternative but to go by that finding that the judgement of the lower court was delivered on 7/5/2003.

As for the merits of the relief, it is evidenced from the argument that its sole purpose was to forestall the execution of the said order pending finalization of the arguments and determination of this application. This court has judicial notice that issues of stay of execution are procedures known in the civil procedure process. The court also has judicial notice that the proceedings herein relate to succession proceedings and this court can only be called upon to avail this relief if the same has been imported into the succession proceedings, Via rule 63(1) of the probate and administration rules. As submitted by the Respondents counsel order 41 CPR which deals with stay of orders mainly pending appeal is not one of the orders imported into the succession procedures vide rule 63 (1). This court is however alive to the content of the

provision of rule 73 of the probate and administration rules which donates the inherent powers of the court to make orders for ends of justice to be met to both parties and to prevent abuse of the due process of the court. Due to the availability of this inherent power, this court has jurisdiction to stay the execution of the confirmation order pending the determination of the application if the court would have been satisfied that the ends of justice demanded so. In the circumstances of this court in view of the directive of the appellate court that the status of the applicant as to whether she had been divorced by the deceased before his death be determined, it was prudent for the applicant to seek this relief to forestall the execution on of the grant confirmed by the lower court pending determination by the court as to whether such a determination was going to have any impact on the mode of distribution earlier done by the lower court or not. This measure could therefore last the determination of the application only at the end of which fresh directions would be given on the matter.

Prayer (b) deals with a plea for revocation and or annulment of the grant. It is laid under the provisions of section 76 of the law of succession Act cap 160 laws of Kenya. This court has perused the same and finds that the section has inbuilt ingredients which are required to be established before one can earn this relief. This court also has judicial notice that this provision has been construed by the court of appeal and in the process crystallizing the law on this aspect in the case of **MATHEKA AND ANOTHER VERSUS MATHEKA (2005) IKLR 455**. The court of appeal provided the following guidelines which are binding on this court.

- 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 a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegations 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. When a deceased has died intestate the court shall save as otherwise expressly provided have a final discretion as to the person or persons to whom a grant of letters of administration shall in the best interests of all concerned, be made but shall without prejudice to that discretion, accept as a general guide. The following order of preference:-**
 - (a) Surviving spouse or spouses with or without association of other beneficiaries.**
 - (b) Other beneficiaries entitled 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”**

This court has duly applied the afore set out crystallized ingredients to the applicant’s complaints responded to by the Respondent and the court proceeds to make the following findings on the same:-

- (a) The applicants is not relying on any of the ingredients which are inbuilt in section 76 of the L.S.A. as construed by the court of appeal in the **MATHEKA AND ANOTHER VERSUS MATHEKA CASE (SUPRA)**.**
- (b) The applicant is not attacking the grant as she is a joint grant holder. All that she is complaining about**

is that the crystallization of her status of not having been divorced by the deceased before his death crystallizes her entitlement to the estate of the deceased in equal shares with Regina in essence her complaint hinges on the issue of distribution.

(c) From the reading of the inbuilt ingredients? In section 76 L.S.A. as construed by the cited case law, all go to demonstrate that complaints on unfair distribution of a deceased persons estate is not one of the ingredients for seeking revocation. For the reasons given in number a, b and c above, it is the finding of this court that the relief of revocation and annulment of the grant is not available to a litigant who is complaining about distribution only Khamoni J as he then was ruled so in the case of **RE THE ESTATE OF GITAU (2002) KLR 430**. Although this is a decision of a court of concurrent jurisdiction and not binding on this court, it states the correct position in law as confirmed by the cited court of appeal decision, where complaint on distribution has not been indicated to be one of the ingredients for revocation and annulment. By reason of what has been stated above, the relief of revocation is not available to the applicant.

Turning to prayer (c) (d) and (e) these are inter related and for this reason the rival arguments in relation to them will be assessed together. Starting with prayer (e) on alleged properties allegedly misappropriated by the Respondent being accounted for, as submitted by the Respondents counsel and asserted by them in their deponements, this cannot arise after the distribution exercise has been finalized by the court. It can only arise after the said distribution orders have been upset by either the same lower court or a higher court on appeal and the distribution order set aside and in the process restoring the parties to the position they were in before the order of distribution was made. It is only after such restoration has been made, that parties can be restored to that position before distribution, whereby properties are made available for distribution and that is when the Respondent can be called upon to give an account for the proceeds earned as demanded, with a view to having the same made available for distribution to other beneficiaries. In the absence of such a setting aside and or reopening of the proceedings in the lower court, this courts hands are tied and agrees entirely with the observation of GBM Kariuki J in his Lordship ruling of 5/9/2003 in which the learned judge upheld the rights of the Respondent given by the lower court on 7/5/2003. For this reason no relief is available to the applicant under prayer (e).

Prayer (c) is an alternative to the plea for revocation and annulment. The court has been called upon to make a finding that the lower court's orders of 7/5/2003 stands reviewed and or compromised by the high court order for a retrial and the findings of the retrial by the lower court.

- This court has revisited the lower court judgement and distribution made by the learned magistrate Hon Mary Kiptoo and perused the same and finds that the theme running through the judgement has been summarized on the issue for determination found at page 2 of the judgement. The reasoning on the basis of those issues reveals that the learned trial magistrate did not rule out the applicant Lydia Wambui Gitau as a beneficiary of the entire estate of the deceased. She was excluded only from the sharing in the Kinyona property and the plots which were registered solely in the names of the Respondent. Infact in the property where she was adjudged as a shareholder she was given an equal sharing. It is on record that the learned trial magistrate gave reasons for the exclusion already reflected herein.

This court has also revisited the judgement by the appellate judge and finds that in relation to the issue in controversy herein, the learned judge appears to have been under a misapprehension that if the issue of whether the applicant had been divorced by the deceased before his death had been resolved against her then she would not be considered for inheritance but her children would be considered. This is no doubt the reason as to why the learned judge ordered a retrial on this issue which was carried out and resolved in favour of the applicant.

This court has stated that the learned judge was under a misapprehension that Lydia would not qualify as a beneficiary if found to have been divorced by the deceased before his death because the learned judge as he then was failed to take note of the provisions of section 3(5) and 2(a) of the L.S.A. cap 160 which permits her to inherit as of right. This reads:-

“ Section 3(5) notwithstanding, the provisions of any other written law a women married under a system of law which permits polygamy is where her husband has contracted a previous or subsequent monogamous marriage to another woman never the less a wife for purposes of this Act and in particular, sections 29 and 40 thereof”

Section 29 defines who a dependant of a deceased person for purposes of the inheritance is. It reads.

“ section 29. For the purpose of this part, dependant means:-

(a) The wife or wives or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death”

(b).....

(c).....”

Applying these provisions to the reasoning of Ransley J as he then was, it means that there was no need for the lower court to determine the issue as to whether Lydia had been divorced by the deceased prior to his death as a prerequisite for the determination of her entitlement to benefit in the deceaseds' estate. All that was necessary to be established was a determination that she had been a wife of the deceased married under a recognized system of law and was either still living with the deceased as such or had been separated or divorced. Herein although no law was quoted by the learned trial magistrate Mary Kiptoo, none the less she bears those principles in mind and that is why she considered Lydia and her children for purposes of inheritance.

Issue was raised about failure of the lower court to call evidence from all those who had wanted to be heard and to consider all documentary evidence exhibited. In this court's opinion, these are matters which should have been dealt with on appeal and since they were not so dealt, with the applicant should have applied for review to the appellate court to review them or appeal to the court of appeal for the superior courts failure to make a pronouncement on them. Since this court has not been approached on a review basis or on appellate bass, it cannot revisit the basis of the merits of the lower courts decision. Its mandate is limited on the determination as to whether in view of the findings of the lower court that the applicant had not been divorced by the deceased before his death, the grant issued on 7/5/2003 is to be revoked and or varied. This court has ruled that for the reasons given revocation is not available.

As for the variation, this court is of the opinion that it has jurisdiction to entertain it because it had been sought as an alternative to the revocation order on the one hand, and on the other hand it has its inherent jurisdiction donated by rule 73 of the probate and administration rules to make a pronouncement on the same in order for ends of justice to be met to both sides. Considering that a variation touches on the mode of distribution it will be necessary to consider the applicable principles of law namely section 3(5) and 29 which recognizes Lydia as a former or estranged wife with a right to inherit and section 40 which gives the mode of distribution it reads:-

“ Section 40 (1) where an intestate has married more than once under any system of law permitting polygamous , his personal and household effects and the residue of the net intestate estate shall in the first instance be divided among the houses according to the number of children in each house but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in section 35 to 38”

Section 35-38 simply deal with how the property is to be handled after distribution.

Section 40 of the L.S.A. has been construed by the court of appeal in a land mark decision in the case of **RONO VERSUS RONO AND ANOTHER (2008) 1KLR (G&F) 803** in a summary form the brief facts of the case are that the deceased was polygamous with two wives. The younger wife who had

only daughters came on board long after the property forming the estate had been acquired and developed. The superior court had distributed the estate giving a lesser portion to the younger house with only daughters and a bigger portion to the senior house with more sons. The court held inter alia:-

(3) The fact that the girls would one day get married was not a determining factor when it comes to distribution of the net intestate of the deceased. The court had a duty to exercise its discretion judiciously when it comes to distribution of the estate.

(4) The deceased treated all his children equally and therefore the court should have done the same. There was no indication that the daughters were going to get married as they were at an advanced age. There was therefore no justification for the court reducing their shares. The distribution should have been done according to the number of children in each house”

This court has construed that finding and in its opinion, the following are the guidelines it is supposed to apply herein namely:-

(a) That there is a requirement that there be equality of arms on distribution meaning that when it comes to distribution of a deceased person's estate all children should preferably be given equal treatment.

(b) The way the deceased treated his children is material.

(c) The court exercises a judicial discretion when distributing a deceased person's estate and by reason of this exercise of judicial discretion it is enjoined to exercise the same judiciously.

(d) By exercising the discretion judiciously, it is meant to be exercised with a reason and not capriciously.

When these principles are applied to the scenario herein, it is evidently clear that all that the court has with regard to the deceased treatment of his wives and children is that there was a maintenance order reached by consent in favour of Lydia and her children on the one hand, and that the deceased lived with Regina and her children at Kinyona on the other hand. This being the position, it means that the determining factor here is the court's discretion. The court also has to bear in mind the fact that the exercise of this discretion is not going to be exercised by this court in its original form but by way of variation or non variation of the lower courts; exercise of its discretion and in doing so the court is enjoined to be guided by the same principle and not interfere with the lower courts' discretion where the same had been exercised wrongly and without a reason.

Having been so warned this court proceeds to examine the lower courts mode of distribution and then determine whether those orders are to be varied or not and then give reasons for either varying or not varying. The court will start with the less continuous property.

(a) LR. Number Kwale/Diani 33. This was alleged to have been sold and was awaiting finalization of the sale deed and transfer. There is however a turn of events where by a daughter of the alleged buyer has denounced the sale. The affidavit was filed and it was not countered by the Respondent, Regina. This means that this property is available for distribution. It is noted that the learned magistrate ordered that the balance of the proceeds of sale were to be shared equally between Lydia and Regina. On the same vein this property is to be shared equally between Lydia and Regina.

(ii) Each is to hold her respective share in trust for herself and her children in equal shares.

(iii) Should the said property for any other reason have been sold by Regina, then the said Regina will have to pay to Lydia and her children the equivalent of half the purchase price paid to her.

(b) LR. Number Kwale/Diani/129. This had been ordered to be registered in the joint names of Lydia and Regina. In view of the apparent poor relationship between the two a severance order is the most appropriate. The order for joint registration is varied to read that the land be shared equally between the two Lydia and Regina.

(ii) Each is to hold their respective portions in trust for themselves and their children.

(c) Land parcel Embu settlement scheme Embu/164. This was to be ascertained but no deponent exhibited documents regarding its current position. The court will therefore confirm the lower courts order that this be shared equally between Regina and Lydia.

(ii) Each is to be registered in respect of the half portion to hold in trust for themselves and the respective children.

(d) With regard Motor vehicle Registration number KUX Cheurolet ,proceeds of sale of Tea on the Kinyona land, sale of 3 grade cattle, chicken and seedlings from 2 nurseries , this court bears in mind the fact that the learned trial magistrate precluded the sharing of these because she observed that Regina paid hospital bills and loans taken out by the deceased. It is this courts view that these had to be paid. As observed by the learned trial magistrate of the lower court, the details of these were not given but there was no dispute from Lydia that these existed and were in fact paid, that it was on record that Lydia and her children never contributed towards the payment of the hospital bills, funeral expenses and the loans which had been taken by the deceased. It is noted in the lower courts judgement that these facts were not disputed by Lydia.

Likewise there is no deponement currently from the said Lydia to the effect that these hospital bills and loans owed by the deceased were not paid by Regina. Neither is there any deponement that she Lydia and her children are willing to contribute towards meeting those expenses. Nor adeponement that her share entitlement from those proceeds be utilized as her share contribution towards those expenses. There is also no justification as to why Lydia and her children should be made only to benefit from the deceaseds' estate but not to be made to share in the expenses incurred towards debts incurred by the deceased or on his behalf. This court is satisfied that the lower court took this into consideration and that is why it declined to order sharing of the proceeds of sale of tea and the proceeds of the sale of the vehicle. This being the case, the court will not order a variation of this order.

(e) As for 6 plots in Kinyona , these were not shared out because these were in the name of Regina, a matter conceded by the applicant Lydia. Since the plots were admittedly in the names of Regina there will be no variation of this order.

(f) As for the contested LOC.2/Kinyona/753 the following facts are not indispute:-

(i) That it is and was registered in the name of the deceased as at the time of the deceaseds' death.

(ii) That there is in place a separation order between the deceased and Lydia effective 15/8/1980 and since then the deceased and Lydia never resumed cohabitation.

(iii) That it is an accepted fact that this property was purchased and developed when the deceased and Regina were living together.

(iv) That indeed Lydia and her children as per the testimony on oath by Lydia never contributed towards the acquisition and developments and improvement of this plot.

(v) Like the other properties of the deceased which have been shared out, there was no mention that either Regina or Lydia was actively involved in their acquisition and yet they have benefited from the same on equal basis.

(vi) That it is counsel on record for Regina who has stated that the mother of Regina who was a business lady who contributed substantially towards the acquisition and developments on this plot. In this court's opinion, this is a statement from the bar and not a deponement and carry's no weight. Those facts should have been presented to the lower court by Reina or alternatively in a deponement but not submission.

(vii) It has to be borne in mind, the fact that upon separation from the deceased, Lydia moved on and

may have acquired and developed property on her own and to her own benefit, property which Regina and her children will have no access to in order to benefit from.

(viii) It has been submitted from the bar by Regina's counsel that the property in Kahawa West where Lydia and her children reside was acquired jointly by Lydia and the deceased though registered in the names of Lydia. Once again this is a statement from the bar. It never found its way before the lower court and cannot be given any weight as the same is not in the form of a deponement

The afore set out findings in number i-(viii) above notwithstanding this court cannot ignore the contribution made by Regina and her children towards the acquisition and the development on the Kinyona farm when ordering variation or no variation. But of paramount importance to this court is the fact that there should be fairness, fair play and justice ensured to both sides. In doing so, the court also bears in mind, that there are properties acquired by Regina on her own from which she and her children will benefit from to the exclusion of Lydia and her children. For this reason this court is inclined to vary the lower courts order on the Kinyona farm and give 4 acres of this land to Regina and her children inclusive of the homestead and then give 2 acres of this land to Lydia and her children. Each will hold their respective portions in trust for themselves and their children.

(g) Household on the Kinyona farm – The law dictates these to belong to the widow in whose house they were as at the time of the death of the deceased and so there will be no order for distribution on this.

(h) Income from the Tea on the Kenyona farm. This court is alive to the orders made by Gacheche J which are on record. The aggrieved party is at liberty to pursue their breach or non compliance in accordance with the relevant applicable provisions of law save that as GBM Kariuki observed in his Lordships' ruling in HCCA 293/2003, an account should have been demanded before distribution by the lower court. After the distribution all the benefit of that plot was solely conferred on Regina and the status quo could only be interfered with after the lower court orders are upset now by the determination in this ruling. For this reason this court will not make any findings with regard to giving of an account for the proceeds of the sale of Tea.

For the reasons give in the assessment, this court proceeds to make the following final orders with regard to the application dated 28th day of February 2006 and filed on 1st March 2006.

1. That although order 41 of the old now repealed CPR is not one of the orders imported into the succession proceedings, vide Rule 63 (1) of the probate and administration rules, the court had jurisdiction to order a stay of execution of the orders of the lower court made on 7/5/2003 by invocation of the inherent jurisdiction of the court donated by Rule 73 of the probate and administration rules. Save that the stay can only last pending the determination of the application. Hence the stay order lapses with the reading and delivery of this ruling.

2. Prayer (b) on the revocation of the grant is declined by reason that the complaints raised by the applicant relate to distribution of the estate of the deceased. Issues of complaints on distribution are not part of the ingredients required to be raised and demonstrated to exist before one can earn such a relief of revocation.

(ii) The inbuilt ingredients required to be established by section 76 L.S.A. and as crystallized by the court of appeal in the case of **MATHEKA AND ANOTHER VERSUS MATHEKA (SUPRA)** were not demonstrated to exist by the applicant.

3. In the alternative prayer (c) the court finds that there is justification for a revisit by this court to the lower courts' orders and distribution made on 7/5/2005 in line with the directions of Ransley J as he then was and as per the directions carried out by the lower court in determining that indeed Lydia had not been divorced by the deceased before the deceased's death.

(ii) That the said determination was under the learned judge's Misc apprehension that if found to have been divorced then Lydia would not have been entitled to inherit the deceased. This was a

misapprehension on the part of the court because section 29 of the LSA defines an ex wife as a dependant and section 3(5) bestows such a wife the right of inheritance in respect of her legal status with regard to her marriage to the deceased as at the time of his death.

(iii) The findings in (i) (ii) above notwithstanding directions having been given and carried out by courts of competent jurisdiction, it is only proper that these be given effect to by this court revisiting the distribution order and either to confirm or vary the same.

(iv) The right of variation or no variation has been donated by section 76 of the LSA since the plea for variation was an alternative relief to revocation as well as the inherent jurisdiction donated by rule 73 of the probate and administration rules. The variation is effected as hereunder:-

(a) LR. NO. Kwale/Diani/33 varied to set aside the approval of sale and signing of the transfer papers and substituted with an order that this be shared equally between Regina and Lydia. Each is to hold her half share in trust for herself and their respective children. But if for any reason this property has been sold by Regina then Regina is to compensate Lydia with the equivalent of the half share of the total purchase price paid out to her.

(b) The order that LR Kwale/Diani/129 be shared equally between Regina and Lydia is confirmed. Each is to be registered in respect of the half share to hold in trust for themselves and their respective children.

(c) Land parcel number Embu/164 is to be shared equally between Regina and Lydia and each is to hold their respective shares in trust for themselves and their respective children. Since there was no proof that the same had been sold.

(d) There will be no variation on the distribution order on the sale proceeds of motor vehicle and proceeds of Tea earning from Kinyona farm because the court is satisfied with the lower courts findings that these went to pay off the deceased's hospital bills and loans, which hospital bills and loans Lydia and her children were also obligated to contribute towards if the estate was not in a position to meet them a fact not denied by Lydia, but no offer was made by her on her own behalf and on behalf of her children to contribute towards this expenses. It will be unfair for Regina to shoulder all those expenses on her own and then be called upon to give up what she says she used to offset those expenses.

(e) The order declining to distribute 6 plots in Kinyona registered in the name of Regina is confirmed.

(f) The order on LR.LOC.2/Kinyona/753 is varied for the reasons given. Four 4 acres will go to Regina in trust for herself and her children. The 4 acres to include the homestead. Two (2) acres will go to Lydia in trust for herself and her children.

(ii) The households to go to Regina in accordance with the requirements of the law since those belonged to her house hold as at the time the deceased died.

(iii) Income from the Tea which was not ordered accounted for as at the time of distribution by the lower court to remain to Regina's benefit. As for the income after 7/5/2003 also to remain to her benefit as the lower court order was in her favour and the contrary position can only prevail if the order of 7/5/2003 which bestowed that benefit on to her was lifted.

4. Prayer (e) is declined for the reasons given in number 1-4 above.

5. The findings in number 4 above notwithstanding the court is alive to the orders made by Gacheche J on the furnishing of the accounts. Breach of these orders can be pursued in the normal manner with regard to the applicable principles of law.

6. Both co administrators are directed to cooperate and execute relevant documents in order to give effect to this variation.

7. In default of number 6 by any of the co administrators, the Deputy Registrar Family Division is mandated to execute these papers on behalf of the defaulting party in order to give effect to this ruling and bring the litigation to an end.
8. Since there are no pool funds from the estate, each party will meet own costs of transfer of the devolved property into their names as well as attendant costs of rates and other liabilities in equal shares.
9. Likewise since there are no pool funds from which costs of the proceedings can be paid, each party to bear own costs.
10. There will be liberty to apply to either party if need be.

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

**R.N. NAMBUYE
JUDGE**