



REPUBLIC OF KENYA

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

**Succession Cause 508 of 1999**

**IN THE MATTER OF THE ESTATE OF MISHECK NYINGI GATHIORE – DECEASED**

BETWEEN

**PAUL KIRUHI NYINGI ..... 1<sup>ST</sup> PETITIONER**

**JOHN WANJOHI NYINGI ..... 2<sup>ND</sup> PETITIONER**

AND

**FRANCIS WANJOHI NYINGI ..... PROTESTOR**

**R U L I N G**

On 14<sup>th</sup> August 1998 **Misheck Nyingi Gathiore** hereinafter referred to as “*the deceased*” passed on. He was a man of means and also indulged in the practice of polygamy. At the time of his death he had married 5 times out of which only the 4<sup>th</sup> and 5<sup>th</sup> wives were still alive. The deceased died intestate. According to the letter from the local chief dated 16<sup>th</sup> September 1999, the deceased’s entire family consisted of 33 members.

In the fullness of time, **Paul Kiruhi Nyingi**, describing himself as a son of the deceased petitioned for the grant of letters of administration intestate. As expected that petition elicited resistance from **John Wanjohi Nyingi** and **Joseph Gachagua Nyingi**. They were sons of the deceased too but from the 5<sup>th</sup> wife whereas the petitioner was from the 2<sup>nd</sup> wife. On 20<sup>th</sup> February 2001, the matter came before **Juma J** (as he then was) who directed that **Paul Kiruhi Nyingi** and **John Wanjohi Nyingi** be appointed joint administrators of the estate of the deceased. He also proceeded to revoke the limited grant which apparently had been issued to **Joseph Gachagua** alone earlier on.

On 22<sup>nd</sup> October 2003, **John Wanjohi Nyingi** and **Paul Kiruhi Nyingi** hereinafter referred to as “*the Petitioners*” jointly filed an application for confirmation of grant. In the affidavit in support of the application they proposed that the estate of the deceased be distributed as follows:-

**1. JACKSON WANJOHI NYINGI (DECEASED)**

1. Tetu/Muthuaini/265 – 9 acres (already given)
2. Plot No. 9 Kihuyo – (already given)

3. Kshs.57,611.90 being loan paid by the late Misheck Nyingi Gathiore in respect of the late Jackson Wanjohi Nyingi at Kenya Commercial bank, Nyeri Branch.

4. Rent for plot 6 King'ong'o from March 1991 @ 400/= per room for 7 rooms i.e. 33,600/= per year for eleven (11) years Ten (10) months upto and including December 2002 which totals Kshs.397,600/= divided by two (2) equals Kshs.198,800/=.

**NB: Mr. Jackson Wanjohi Nyingi's family should not therefore inherit anything else from the estate.**

**2. MR. FRANCIS NDERITU NYINGI**

1. Tetu/Muthuaini/26e – 7 acres (already given)
2. Gituamba/Muhotetu/Block 2/1518 – 8 acres.

**3. MR. FRANCIS WANJOHI NYINGI**

1. Tetu/Muthuaini/236 – 4.7 acres (already given)
2. Euaso Nyiro/Suguroi/Block VI/317 – 7 acres

**4. MR. STEPHEN KIBICHO NYINGI ALIAS STEPHEN WACHIRA KOORO**

1. Gituamba/Muhotetu/Block 2/301 51 acres (already given)
2. Gituamba/Muhotetu/Block 2350 given)

NB: He should not be given any other land from the estate.

**5. MR. PAUL KIRUGHI NYINGI**

1. Laikipia/Nanyuki West Timau Block 2/234 - 6 acres
2. Laikipia/Nanyuki West Timau Block 2/455 (already given)
3. Nyandarua/Ndaragwa/Block 1/10 – 14 acres

**6. ELIZABETH WANJIRU w/o NYINGI**

Tetu/Kihuyo/24 – 6½ acres

**7. MR. SHADRACK NDERITU NYINGI**

Tetu/Kihuyo/24 – 6 acres

**8. MR. FRANCIS MUTURI NYINGI**

Tetu/Kihuyo/24 – 6 acres

**9. MR. JOSEPH KIBICHO NYINGI**

Tetu/Kihuyo/9 – 8.1 acres

NB. He will loose his 8 acres at Euaso Nyiro/Suguroi/Block V/595

**10. STEPHEN NDERITU NYINGI**

1. Tetu/Kihuyo/121 – 2.6 acres
2. Euaso Nyiro/Suguroi/Block V/595 – 9 acres

**11. MR. SAMUEL KAGIKA NYINGI**

Mweiga/Estate Settlement Scheme/126 – 6 acres

**12. MR. CYRUS KINYUA NYINGI**

1. Mweiga/Estate Settlement Scheme/120 – 4.7 acres
2. Euaso Nyiro/Suguroi/Block VI/317 – 7 acres

**13. MR. JAMES KING'ORI NYINGI**

Euaso Nyiro/Suguroi/Block VI/317 – 20 acres

**14. MR. JAMES MIUGO NYINGO**

Euaso Nyiro/Suguroi/Block V/595 – 20 acres

**15. MISS TERESA WAMUCII NYINGI**

Mugunda/Ruirii/Block 1/Muthangira/92 – 20 acres

**16. MRS. MILKA WAMBUI MUTUA (MARRIED)**

Munda/Ruirii/Block 1/Muthangira/92 – 8.5 acres

**17. MR. SIMON GACHIRA NYINGI**

Gituamba/Muhotetu/Block 1/183 – 20 acres

**18. MR. JOHN WANJOHI NYINGI**

Nyandarua/Naragwa/Block 1/10 – 20 acres

**19. MR. JOSEPH GACHAGUA NYINGI**

Nyandarua/Ndaragwa/Block 1/10 – 20 acres

**20. MR. JAMES WAKAHU NYINGI**

Plot No. 731, 732, 733 (1 Com. Plot) Gatami – 20 acres

**21. MR. CHARLES KIBICHO NYINGI**

Plot No. 731, 732, 733 (1 Com. Plot) Gatami – 20 acres

**22. MRS. JANE WANGECHI GICHOHI (MARRIED)**

Euaso Nyiro/Suguroi/Block VI/317 – 6 acres

**NB:** She had bought two (2) shares with the Late Misheck Nyingi Gathiore at the time of buying this land.

**23. MARION WANGUI NYINGI**

1. Ndandarua/Ndaragwa Block 1/10 – 8 acres
2. Plot No. 731, 732, 733 (1 Com. plot) Gatami – 12 acres

**24. MARY MUTHONI NYINGI**

Plot No. 731, 732, 733 (1 Com. plot) Gatami – 20 acres

**PLOTS**

1. Miss Teresa Wamucii Nyingi – Plot 6 King'ong'o
2. 2<sup>nd</sup> House - Plot 206 Ruringu
3. Mr. Simon Gachiira Nyingi - Plot 30 Ruringu
4. 4<sup>th</sup> House - Plot 109 King'ong'o

Phase II

5. 5<sup>th</sup> House - Plot 1 Ruringu

**SHARES & PLOTS**

1. Ndaragwa/Murichu/Block 4/131 – House 2
2. Tetu/Kihuyo/Nyarugumu/9 - House 2
3. Nyamothe Company - House 2
4. Ndaragwa/Kahutha Block II/115 – House 5
5. Tetu/Kihuyo/38 - House 5
6. Muhotetu Company Plots - House 5
7. NDCU Ltd. A/C No. 0284-11-1247 – House 5
8. Pyrethrum Company (Gatemu) No. 183 – House 4
9. NDCU Ltd. A/C No. 1905-07-197 - House 4
10. NDCU Ltd. A/C No. 0284-11 - House 4
11. Kendong Shares - House 4
12. Muhotetu Plot - House 3

13.Co-operative bank shares - House 3

14.Ihururu Plot No. 6 - House 1

15.Kenya Commercial Bank Shares - House 1

**NB:** Money in various bank accounts and general marketing agent to be shared equally among the following heirs:-

1. Elizabeth Wanjiru w/o Nyingi
2. Francis Nderitu Nyingi
3. Francis Wanjohi Nyingi
4. Stephen Kibicho Nyingi alias Stephen Wachira Kooro
5. Paul Kiruhi Nyingi
6. Shadrack Nderitu Nyingi
7. Francis Muturi Nyingi
8. Joseph Kibicho Nyingi
9. Stephen Nderitu Nyingi
10. Samuel Kagika Nyingi
11. Cyrus Kinyua Nyingi
12. James Kingori Nyingi
13. James Miugo Nyingi
14. Teresa Wamucii Nyingi
15. Simon Gachiira Nyingi
16. John Wanjohi Nyingi
17. Joseph Gachagua Nyingi
18. James Wakahiu Nyingi
19. Charles Kibicho Nyingi
20. Marion Wangui Nyingi
21. Mary Muthoni Nyingi

Several affidavits of Protests filed by some of the children of the deceased greeted the application. These were from **John Wanjohi Nyingi, Cyrus Kinyua** and **Francis Wanjohi Nyingi**. There were also affidavits in support of affidavit of protest filed by **Cyrus Kinyua, Stephen Kibicho alias Kooro, James Kingori, Paul Githinji Wanjohi, John Nyingi Ndiritu** jointly, **James Miugo Nyingi, Samuel Kagika Nyingi** and **Teresa Wamucii Nyingi** jointly as well.

From all the foregoing, the dispute herein is about distribution. There is no dispute as to the beneficiaries and or dependants.

On 11<sup>th</sup> March 2004 the cause was placed before **Khamoni J** for directions. By consent of the parties it was agreed that the cause be heard by way of viva voce evidence. When the cause came before me for hearing on 23<sup>rd</sup> April 2009 it emerged that the deceased family was divided down in the middle as to which mode of distribution of the deceased's estate should be adopted. On one hand there were those who were in support of the scheme of distribution proposed in the application for confirmation of grant filed in court on 22<sup>nd</sup> October 2003.

These were:

**John Nyingi**

**Paul K. Nyingi**

**Simon Gachira**

**Joseph Kibicho**

**Joseph Gachagua**

**Shadrack Nderitu**

**Francis Muturi**

**James wakabiu**

**Charles Kibicho**

**Elizabeth Wanjiru and Paul Kiruhi Nyingi**

On the other hand, there were those in support of scheme of distribution contained in the affidavit of protest filed by Francis Wanjohi Nyingi. These included:-

**Francis Wanjohi Nyingi**

**Cyrus Kinyua**

**Stephen Kibicho**

**James King'ori**

**Paul Githinji**

**John Nyingi**

**James Miugo Nyingi**

**Samuel Kagika and Teresa Wamucii Nyingi**

So that from the foregoing, it is clear that distribution should be either as proposed in the application for confirmation of grant or as proposed by the affidavit of protest filed by **Francis Wanjohi Nyingi** hereinafter referred to as "*the Protester*". In his affidavit of protest, the protester had proposed that the estate of the deceased be distributed as follows:-

**“13. That my proposal for distribution is set out herein below, taking into account that the ancestral lands are valued at about one million shillings per acre, while the semi-arid will go for about Ksh.60,000/= per acre and arid lands at about Ksh.30,000/= per acre hence the proposal that 1 acre of Kikuyu Lands is equivalent to very many acres both at the semi-arid and arid lands. So my distribution is that each one gets ancestral, arid and semi arid land.**

**ZONE A – Kikuyu Country – Ancestral (Prime Properties) (1)**

**(a) LR Tetu/Kihuyo/24 - 18.5 Acres**

1. Elizabeth Wanjiru w/o Nyingi (Widow) – 2.0 Acres absolutely
2. John Wanjohi Nyingi - 1.5 Acres absolutely
3. James Wakahiu Nyingi - 1.5 Acres absolutely
4. Charles Kibicho Nyingi - 1.5 Acres absolutely
5. Joseph Gachagua Nyingi - 1.5 Acres absolutely
6. Shadrack Ndiritu Nyingi - 1.5 acres absolutely
7. Francis Muturi Nyingi - 1.5 acres absolutely
8. Simon Gachira Nyingi - 1.5 acres absolutely
9. Stephen Ndiritu Nyingi - 1.5 acres absolutely
10. Mary Nyokabi Ndiritu for Francis  
Ndiritu Nyingi (deceased) - 1.5 acres absolutely
11. Marion Wangui Nyingi - 1.5 acres absolutely
12. Mary Muthoni Nyingi - 1.5 acres absolutely

**18.5 Acres**

**(b) LR Tetu/Kihuyo/9 – 8.1 Acres**

1. Joseph Kibicho Nyingi 2.1 acres absolutely
2. Paul Kiruhi Nyngi 2 acres absolutely
3. Teresa Wamucii Nyingi 2 acres absolutely
4. Paul Githinji Wanjohi &  
Mary Nyawira Wanjohi (For  
Jackson Wanjohi Nyingi – deceased) – 2 acres absolutely

**8.1 Acres**

**(c) LR Mweiga Estates Settlement Scheme/120 – 4.7 Acres**

1. Cyrus Kinyua Nyingi 2.35 acres absolutely
2. Stephen Kibicho Nyingi 2.35 Acres absolutely

**4.7 Acres**

**(d) LR Mweiga Estates Settlement Scheme/126 – 6 Acres**

1. Samuel Kagika Nyingi 2 Acres absolutely
2. Stephen Kibicho Nyingi 2 Acres absolutely
3. Francis Wanjohi Nyingi 2 Acres absolutely

**6 Acres**

**(e) LR Tetu/Kihuyo/121 – 1.7 Acres**

James Miugo Nyingi 1.7 Acres absolutely

**ZONE B – VERY ARID LANDS (2)**

**(a) LR Ndaragwa/Block 1/10 – 62 Acres**

1. Elizabeth Wanjiru w/o Nyingi 6.2 acres absolutely
2. John Wanjohi Nyingi 6.2 acres absolutely
3. Joseph Wakahiu Nyingi 6.2 acres absolutely
4. Charles Kibicho Nyingi 6.2 acres absolutely
5. James Gachagua Nyingi 6.2 acres absolutely
6. Shadrack Ndiritu Nyingi 6.2 acres absolutely
7. Francis Muturi Nyingi 6.2 acres absolutely
8. Mary Muthoni Nyingi 6.2 acres absolutely
9. Paul Kiruhi Nyingi 6.2 acres absolutely
10. Marion Wangui Nyingi 6.2 acres absolutely

**62 Acres**

**(b) LR Uasonyiro/Suguroi/Block V/595 – 21 Acres**

1. James Miugo Nyingi 7.00 acres absolutely
2. Joseph Kibicho Nyingi 7.00 Acres absolutely
3. Stephen Ndiritu Nyingi 7.00 Acres absolutely

**21 Acres**

**(c) LR Uasonyiro/Suguroi/Block VI/317 – 34 Acres**

1. James Kingori 6.5 Acres absolutely
2. Cyrus Kinyua Nyingi 5.5 acres absolutely
3. Francis Wanjohi Nyingi 5.5 acres absolutely
4. Samuel Kagika Nyingi 5.5 acres absolutely
5. Stephen Kibicho Nyingi 5.5 acres absolutely
6. Mary Nyokabi Ndiritu

For Francis Ndiritu Nyingi (deceased) 5.5. acres absolutely

**34 Acres**

**(d) LR Mugunda/Ruirie/Block 1/Muthangira/92 – 20 Acres**

1. Teresa Wamucii Nyingi 8 acres absolutely
2. Simon Gachira Nyingi 6 acres absolutely
3. Paul Githinji Wanjohi & Mary Nyawira

Wanjohi for Jackson Wanjohi Nyingi (dcd) 5.5 acres absolutely

**20 Acres**

**ZONE C SEMI – ARID LANDS (3)**

**(a) LR Gituamba/Muhotetu/Block 1/83 – 20 Acres**

1. Simon Gachira Nyingi 6.5 acres absolutely
2. Paul Kiruhi Nyingi 4.5 acres absolutely
3. Paul Githinji Wanjohi & Mary Nyawira

Wanjohi for Jackson Wanjohi Nyingi (dcd) 4.5 acres absolutely

4. Teresa Wamucii Nyingi 4.5 acres absolutely

**20 Acres**

**(b) LR Gituamba/Muhotetu/Block 2/1518 – 8 Acres**

1. Stephen Ndiritu Nyingi 4 Acres absolutely
2. Joseph Kibicho Nyingi 4 Acres absolutely

**8 Acres**

**(c) LR Gatami Plots 731, 732 & 733 – 72 Acres**

1. Francis Wanjohi Nyingi 4.5 acres absolutely
2. James Kingori Nyingi 4.5 acres absolutely
3. Cyrus Kinyua Nyingi 4.5 acres absolutely
4. Samuel Kagika Nyingi 4.5 acres absolutely
5. Stephen Kibicho Nyingi 4.5 acres absolutely
6. Elizabeth Wanjiru w/o Nyingi 4.5 acres absolutely
7. John Wanjohi Nyingi 4.5 acres absolutely
8. James Wakahiu Nyingi 4.5 acres absolutely
9. Charles Kibicho Nyngi 4.5 acres absolutely
10. Joseph Gachagua Nyingi 4.5 acres absolutely
11. Francis Muturi Nyingi 4.5 acres absolutely
12. Mary Muthoni Nyingi 4.5 acres absolutely
13. Marion Wangui Nyingi 4.5 acres absolutely
14. Mary Nyokabi Ndiritu for  
Francis Ndiritu Nyingi (deceased) 4.5 acres absolutely
15. James Miugo Nyingi 4.5 acres absolutely
16. Shadrack Ndiritu Nyingi 4.5 acres absolutely

### **72 Acres**

#### **ZONE D Money in various bank accounts and held by General Marketing Services**

To be shared equally amongst the 22 beneficiaries.

1. Nyeri District Co-operative Union (Now Taifa Sacco) A/C 1247 & A/C 197.
2. Barclays Bank of Kenya Ltd. – Nyeri – A/C 3840850
3. Co-operative Bank Ltd. – Nyeri – A/C 316093
4. Pension and Death Gratuity No. 308538 to Elizabeth Wanjiru Nyingi w/o Deceased (widow) (Only surviving widow)

#### **ZONE E – PLOTS**

(The all developed plots herein below listed are all in Nyeri Municipality and are managed by the proposed heirs since the demise of the deceased and I have also taken into account the number of people in one property/plot and the amount of rent collected from each plot/property).

- (a) The half plot 6 King'ong'o – 80 ft x 40 ft – Developed Paul Githinji

Wanjohi and Mary Nyawira Wanjohi for Jackson Wanjohi Nyingi

(deceased)

**(b) Plot No. 109 King'ong'o (50 x 100) (Fully Developed**

**Formerly Tumaini School)**

1. Elizabeth Wanjiru Nyingi w/o Nyingi (Widow)
2. John Wanjohi Nyingi
3. James Wakahiu Nyingi
4. Charles Kibicho Nyingi
5. Joseph Gachagua Nyingi
6. Shadrack Nderitu Nyingi
7. Francis Muturi Nyingi
8. Marion Wangui Nyingi
9. Mary Muthoni Nyingi

**(c) Plot NO. 19 and 206 Ruringu (Fully Developed)**

1. Mary Nyokabi Ndiritu for Francis Ndiritu Nyingi (deceased)
2. Francis Wanjohi Nyingi
3. Stephen Kibicho Nyingi
4. Paul Kiruhi Nyingi
5. Joseph Kibicho Nyingi
6. Stephen Ndiritu Nyingi
7. Samuel Kagika Nyingi
8. Cyrus Kinyua Nyingi
9. James Kingori Nyingi
10. James Miugo Nyingi

**(d) Plot No. 30 Ruringu (developed) & Plot No. 6 Ihururu (Not developed)**

1. Teresa Wamucii Nyingi
2. Simon Gachira Nyingi

**ZONE F SHARES & UNDEVELOPED PLOTS**

Distribution of shares and other undeveloped plots household of 1<sup>st</sup> wife Nyagithua w/o Nyingi

**The Co-operative Bank of Kenya shares to be distributed to:**

1. Paul Githinji Wanjohi

Mary Nyawira Wanjohi – For Jackson Wanjohi Nyingi (dcd)

2. Teresa Wamucii Nyingi

**HOUSEHOLD OF 2<sup>ND</sup> WIFE WAIHUINI NYINGI**

1. Nyamothe Company )

2. Tetu Kihuyo Plot 38 ) to be distributed to:

1. Mary Nyokabi Ndiritu for Francis Ndiritu Nyingi (deceased)

2. Joseph Kibicho Nyingi

3. Paul Kiruhi Nyingi

4. Stephen Ndiritu Nyingi

5. James Miugo Nyingi

**HOUSEHOLD OF 3<sup>RD</sup> WIFE WANJIRU w/o NYINGI**

Simon Gachira Nyingi – KCB shares & 1 Muhotetu Company plot.

**HOUSEHOLD OF 4<sup>TH</sup> WIFE RACHAEL WANGECHI w/o NYINGI**

**Muhotetu Company Plots (Kendongo Shares) to be distributed to:**

1. Francis Wanjohi Nyingi

2. Stephen Kibicho Nyingi

3. Cyrus Kinyua Nyingi

4. James Kingori Nyingi

5. Samuel Kagika Nyingi

**HOUSEHOLD 5<sup>TH</sup> WIFE ELIZABETH WANJIRU w/o NYINGI**

1. Ndaragwa/Murichu/Block 4/131

2. Ndaragwa Kahutha Block 11/115 To be distributed to:-

3. 1247 Account Shares with NDCU

4. Tetu/Kihuyo Nyarugumu/9

1. Elizabeth Wanjiru Nyingi

2. John Wanjohi Nyingi
3. James Wakahiu Nyingi
4. Charles Kibicho Nyingi
5. Shadrack Ndiritu Nyingi
6. Francis Muturi Nyingi
7. Joseph Gachagua Nyingi
8. Marion Wangui Nyingi
9. Mary Muthoni Nyingi

**1<sup>ST</sup> WIFE – KIRIGO w/o NYINGI & BENEFICIARIES**

Teresa Wamucii Nyingi

Mary Nyawira (widow) &

Paul Githinji (son of Jackson Wanjohi Nyingi – (deceased))

**2<sup>ND</sup> WIFE – WAIHUINI w/o NYINGI & BENEFICIARIES**

Mary Nyokabi Ndiritu for Francis Ndiritu Nyingi (deceased)

Joseph Kibicho Nyingi

Paul Kiruhi Nyingi

Stephen Ndiritu Nyingi and James Miugo Nyingi.

**3<sup>RD</sup> WIFE – WANJIRU NYINGI AND BENEFICIARIES**

Simon Gachira Nyingi

**4<sup>TH</sup> WIFE – RACHAEL NYINGI AND BENEFICIARIES**

Francis Wanjhi Nyingi

Stephen Kibicho alias Kooro

Cyrus Kinyua Nyingi

James Kingori Nyingi

Samuel Kagika Nyingi

**5<sup>TH</sup> WIFE – ELIZABETH WANJIRU NYINGI & BENEFICIARIES**

Elizabeth Wanjiru Nyingi

Marion Wangui Nyingi

John Wanjohi Nyingi

James Wakahiu Nyingi

Charles Kibicho Nyingi

Joseph Gachagua Nyingi

Shadrack Ndiritu Nyingi

Mary Muthoni Nyingi

Francis Muturi Nyingi

**TOTAL BENEFICIARIES – 22**

**Summary of beneficiaries of the deceased five wives from first to fifth wife**

HOUSEHOLD	NO. OF BENEFICIARIES	ACREAGE IN ANCESTRAL LANDS	ACREAGE IN ARID LANDS	ACREAGE IN SEMI-ARID LANDS	TOTAL ACREAGE
1 <sup>ST</sup> WIFE – KIRIGO NYINGI	2	4	14	9	27
2 <sup>ND</sup> WIFE – WAIHUINI NYINGI	5	8.8	32.7	21.5	63
3 <sup>RD</sup> WIFE – WANJIRU NYINGI	1	1.5	6	6.5	14
4 <sup>TH</sup> WIFE – WANGECHI NYINGI	5	10.7	28.5	22.5	61.7
5 <sup>TH</sup> WIFE – ELIZABETH W. NYINGI	9	14	55.8	40.5	110.3
<b>TOTAL</b>		<b>39.0</b>	<b>137</b>	<b>100</b>	<b>276</b>

When the hearing commenced before, the first person to take the stand was the Protestor. He testified that the deceased was his father who died on 14<sup>th</sup> August 1998. He had 5 wives, **Kirigo w/o Nyingi, Waihuini w/o Nyingi, Wanjiru w/o Nyingi, Wangechi w/o Nyingi and Wanjiru w/o Nyingi**. However at the time of his death only the 4<sup>th</sup> and 5<sup>th</sup> wives were alive. The respective wives had children as follows:-

1<sup>st</sup> Wife – 6 girls, 1 boy

2<sup>nd</sup> Wife – 5 boys, 2 girls

3<sup>rd</sup> wife – 1 boy, 2 girls

4<sup>th</sup> wife – 5 boys, 2 girls

5<sup>th</sup> wife – 6 boys, 2 girls

He was protesting on his own behalf and on behalf of the following – **Cyrus Kinyua, Samuel Kagika, Stephen Kibicho, James Kingori, John Nyingi, Paul Githinji** and **Teresa Wamucii**. The estate of the deceased consisted of 39 acres of ancestral land which he proposed that it be shared equally between the 22 beneficiaries of the 5 houses. There were also 137 acres of arid land. The same should equally be distributed between the 22 beneficiaries. Finally these were 100 acres of semi arid land as well which should be shared equally between the 22 beneficiaries. He had captured these schemes of distribution in his affidavit of protest. In his scheme of distribution he had taken into account the fact of the residence of the beneficiaries which he did not wish to be disturbed. The 5 wives of the deceased were staying on the ancestral land. He denied having been given land by the deceased in his life time. He conceded however that **Jane Wangechi** and **Wamucii Muhia** were given 6 and 8.5 acres respectively by the deceased in his life time. That the deceased had developed 5 plots at King'ong'o and Ruringu whose rent was being collected by General marketing services who had never rendered an account of the same. He was also unaware of any will by the deceased regarding the distribution of his estate. He concluded by stating that the distribution by the Petitioners was unfair as it is in accordance with houses and thus discriminatory.

Cross-examined by **Mr. Wagiita**, learned counsel for the 1<sup>st</sup> Petitioner, he stated that the distribution proposed by the petitioner was not proper as it was discriminatory. It was unfair for one to get 6 acres in ancestral land whereas he gets 7 acres in arid and semi arid land. He did not wish to have the properties distributed according to houses. It should go to beneficiaries directly.

Cross-examined by **Mr. Karweru**, learned counsel for the 2<sup>nd</sup> petitioner, he stated that the deceased was knowledgeable though semi-illiterate. That his land **Tetu/ Muthuaini/236** was a first registration. That he purchased the same with his own resources. He had proposed that the plots be distributed to beneficiaries as they cannot be subdivided. His mother and co-wives were all staying at Kahuyo before some of them were relocated to other parcels of land by the deceased. The children of the 1<sup>st</sup> wife were all adults at the time the deceased passed on and were married. They were relocated to other parcels of land but could not tell whether it was the deceased who relocated them. It was possible that they may have bought their portions of land. As at the time of his death only the 5<sup>th</sup> wife was living on **Kihuyo/24** exclusively following the relocation of all the other wives. He denied that the deceased had indicated in writing that he had settled the beneficiaries in his various parcels of land and captured the said distribution in a black book. He denied having burned copies thereof. Shown a copy of the black book, he conceded that he knew his father's signature in the black book. However he entertained doubts regarding its authenticity. He also entertained doubts regarding the contents of the black book as he had never seen them before. He also agreed that himself together with his brothers, **Cyrus Kinyua Nyingi, Paul Kiruhi, Joseph Kibicho, James Miugo** and **Samuel Kagika** had been collecting rent from the plots at Ruringu but could not tell how much rent was so collected although they applied to their own use the said rents. With that the protester closed his case.

The 2<sup>nd</sup> petitioner was the first to take the stand. He testified that the deceased was his father who was married to 5 wives. He came from the 5<sup>th</sup> house. In his lifetime, the deceased had decided as to how his estate should be distributed upon death. That though the 1<sup>st</sup> wife was deceased, her family stay on the land allocated to them by the deceased. The 2<sup>nd</sup> wife and her family too were shown by the deceased where to reside. The same goes for 3<sup>rd</sup> and 4<sup>th</sup> wives. As regards their house, his mother is alive and resides with her family on land given to them by the deceased. The deceased had reduced the distribution aforesaid in 3 black books. One was left with the person who wrote down the said wishes, **Stephen Karanja (DW3)**. The other 2 black books were kept by the deceased in his house. Following his death,

a family meeting was held and **Mr. Kibicho** brought the black book from **Stephen Karanja**. The Protester later told them that there were other two black books. They retrieved the 2 black books from the deceased's house. However the protester snatched them and disappeared. After 2 to 3 hours the Protester came back and burnt the two black books at the gate of the house. One black book however survived the Protester's onslaught. That black book was tendered in evidence. The witness confirmed that whatever was contained in the black book was in tandem with their scheme of distribution. That the alleged parcel of land not indicated in the application was in fact occupied by the 2<sup>nd</sup> house and that **David Wachira Nyingi** was his stepbrother contrary to the allegation by the Protester that he was a stranger to the estate. The Protester resides on land parcel **Tetu/Muthuaini/236** which initially belonged to the deceased but which he fraudulently caused to be transferred and registered in his name by swearing a false affidavit stating that the two names, **Gathiori s/o Nyingi** and his were all his names. As far as he was concerned, the deceased had made his intentions clear, reduced them into writing and placed the beneficiaries in their respective parcels of land. That is the situation obtaining currently. With regard to the monies in banks, he proposed that the same be shared equally between all the beneficiaries. The estate too had been intermeddled with by the Protester, and **Cyrus Kinyua** as they stopped General Marketing Services Ltd from collecting rent from some properties of the deceased. Instead they had been collecting the rent and applying it to their own use to the detriment of the estate. He prayed that the two be ordered to refund the amount so collected to the estate.

Cross-examined by **Mr. Nderi**, learned counsel for the protester, his answers were as follows, that he was born in 1965. It was on land parcel **Tetu/Kihuyo/24** that the family meeting was held following the death of the deceased. He denied that all deceased wives resided on that parcel of land. Only the 4<sup>th</sup> wife had resided on the suit premises. The deceased had dispersed the beneficiaries to various parcels of land to take care of his interests. There were 3 black books. He knew about them from the protester. He saw the protester burn the 2 black books and reported the incident to the police. No action though was taken. He maintained that though the hand writing in the black book was not deceased's, the signature and stamp therein were nonetheless his. The protester stays on the deceased land which he fraudulently caused to be transferred to himself.

The 2<sup>nd</sup> witness to take up the stand was the 1<sup>st</sup> Petitioner. He stated that the deceased was his father. He associated himself fully with the contents of the affidavit sworn in support of the application for confirmation of grant and the evidence so far tendered by the 2<sup>nd</sup> petitioner. He confirmed that in his lifetime, the deceased settled his children in his various parcels of land. He also testified that the protester fraudulently caused **Tetu/Muthuaini/236** to be transferred and registered in his name. He was aware of the black book and their distribution agreed with the contents of the black book.

Under cross-examination by **Mr. Nderi**, he responded that 2 other black books were destroyed in his presence by the protester. The protester's mode of distribution was not practicable nor equitable. He conceded to have received rent from some plots of the deceased which he has not accounted to the estate to date.

The last witness called by the Petitioner was **John Karanja**, Managing Director of General Marketing Services Ltd. The Company manages properties as estate agents. The deceased was their client from late 1980's. In 1990 he came to their offices with 3 black books and informed him that he wished to distribute his property among his family. He requested the witness to take down his instructions. He did so on diverse days. When done the deceased signed and stamped it in his presence. He testified that he had no interest in the estate. He went ahead to produce the black book as an exhibit. He also testified that his company no longer collected rent on behalf of the estate of the deceased. His instructions were countermanded by **Cyrus Kinyua Nyingi** and the 1<sup>st</sup> Petitioner. He no longer held any money of the estate.

Cross-examined by **Nderi**, he confirmed that the handwriting in the black book was his and that the deceased had signed it before him. He had been left with the original of the black book though the deceased went away with the 2 copies. Following his demise, the witness called the deceased's nephew, a moderator of P.C.E.A. Church, in Nairobi by the name **Rev. Dr. Kibicho** and gave him the original

black book. He denied owing the estate any money. **John Wanjohi Nyingi** and **Paul Kiruhi Nyingi** collected all the money he had on account of the estate of the deceased. That marked the close of the Petitioners' case.

Thereafter respective parties agreed to file written submissions. At this point in time, **Mr. Karweru**, had taken over the brief for the 1<sup>st</sup> Petitioner from **Wagiita Theuri**. Thus he was acting for both Petitioners. The written submissions were subsequently filed and exchanged. I have carefully read and considered them. The issues agreed between the parties for determination by this court in this dispute were two fold;

**(i) Whether the deceased had indicated his wishes on how his estate should devolve upon his death in his lifetime.**

**(ii) Whether the deceased had bequeathed to the beneficiaries portions of his estate as gift inter vivos.**

However I would wish to add my own issue being:

**(iii) Which between the mode of distribution proposed by the Petitioner in the application for confirmation of grant and that of the Protester and in the affidavit of protest should carry the day.**

My determination of the above issues will on the whole turn on the credibility I will attach to the evidence tendered by respective parties and their witnesses. However I must state from the onset that the Protester struck me as very evasive, untruthful and indeed a witness who totally lacks candour. I have no hesitation whatsoever in accepting his evidence with abundant caution. Here was a witness prepared to label his own stepbrother, a stranger to the estate of the deceased when he knew very well that **David Wachira Nyingi** was indeed his step brother. Here is a witness who stated in his evidence in chief that Rents from some plots were at the material time being collected by General Marketing Services Ltd and that he had not been given an account by the said agents yet he knew very well that him and his brothers to wit; **Cyrus Kinyua Nyingi, Paul Kiruhi, Joseph Kibicho, James Miugo** and **Samuel Kagika** had countermanded the agents instructions manage the properties and were in fact the ones collecting rent. Though he denied that no account of rent so collected had been rendered to him by General Marketing Services Ltd, there is unchallenged evidence by DW3 that once those instructions were withdrawn as aforesaid he rendered an account of the rent collected to the Protester and other beneficiaries. He followed it up with a letter to all interested parties dated 8<sup>th</sup> August 2003. Here is a witness who claims to have been born in January 1949 yet in 1964 he had acquired **Tetu/Muthuaini/236** through his own resources. He claims to have bought the suit premises yet my calculation shows that he was hardly 15 years. He does not state in his evidence from whom he bought the suit premises and where he got the money from. Yet again between 1964 when the suit premises were allegedly registered in his name as a first registration, though in the names of **Gathiore s/o Nyingi**, he did not find it necessary to swear the affidavit to say that the name **Gathiore s/o Nyingi** and **Francis Wanjohi Nyingi** refer to one and the same person, him until 30<sup>th</sup> June 1987 yet he obtained his identity card according to his testimony in the 1960s. To my mind the Protester's evidence regarding his acquisition of the suit premises was simply incredible and unbelievable. The affidavit he swore as aforesaid was full of falsehoods. Indeed I am inclined to believe the evidence of the Petitioners on the issue that the Protester fraudulently caused the suit premises to be transferred to himself by cleverly assuming the names of the deceased in whose names the suit premises had been registered. As further prove of the Protester's uncandidness there is a land consolidation fees demand notice dated 20<sup>th</sup> November 1958 addressed to **Gathiore Nyingi**. The demand was for Kshs.70/= in respect of the suit premises. If the Protester was born in 1949, he would have been 9 years then. Where would he have gotten 70/= demanded as aforesaid which was a lot of money in those days and yet he was a child. The Protester also vehemently denied the existence of the black book. Yet there is evidence that the black book existed and was a subject of family meeting culminating in him burning 2 copies thereof. These are but instances in the testimony of the Protester that have led me to disbelieve his testimony completely. If he can brazenly lie on such mundane matters, what else has he not lied about?

Contrasted with the evidence of the Petitioners, I found their evidence credible and truthful. The evidence of the existence of the black books was amply supported by DW3. DW3 was the one who reduced into writing the wishes of the deceased on his instructions. I do not think that DW3 had anything to gain from the estate of the deceased by adducing such evidence. Indeed in his own evidence he categorically stated that he had no interest in the estate of the deceased. That being the case there would be no reason for him to give false testimony. As a sign of good faith, when the deceased passed on, DW1 called the nephew of the deceased who was a moderator of P.C.E.A Church, Nairobi by the name of **Rev. Dr. Kibicho** and handed him the black book. If he had any interest in the estate or a bone to pick with any of the beneficiaries and or if he wanted to side with some of the beneficiaries, he would have perhaps hidden the black book or given it to some of the beneficiaries. As it is he opted to give it to a person of the clothes and an independent and neutral person at that. The entries in the black book indeed in material aspects agrees with what is obtaining on the ground in so far as it relates the relocation and subsequent settlement of most of the beneficiaries by the deceased. The Protester indeed agreed under cross-examination by **Mr. Karweru** that the deceased had dispersed his children to his various portions of land. Even his own scheme of distribution recognises this fact. So much for the credibility of witnesses.

Turning on issue number 1, I would agree with **Mr. Karweru's** submissions that the deceased was a man of wisdom who foresaw the current mess that the beneficiaries are now mired in. In a bid to obviate such eventuality he decided well in advance and in his lifetime to settle all the beneficiaries including their mothers in different parcels of land he owned and which were scattered all over. The evidence is clear that none of the houses share such parcels of land with each other. Even the Protester was moved from the parcel of land **Tetu/Kihuyo/24** where he was born and relocated to another parcel of land that he currently occupies. The intentions of the deceased were captured by DW3 in the black book. DW3 himself testified as to how over a period of time, the deceased used to visit and ask him to reduce in writing his wishes as to how his estate upon his death should devolve. This evidence was never seriously challenged by the Protester. Though cross-examined by the Protester, the witness did not exhibit anything that will lead me to conclude that he was not the author of the black book or was not a witness of truth. The witness stated that the deceased signed and stamped against the contents of the black book that he had recorded in his presence. There was a feeble attempt by the Protester to challenge the black book on the basis that the handwriting, name and stamp were not the deceased's. Yes, the handwriting was not the deceased. DW3 admitted that much for it was him who wrote the contents on the instructions of the deceased. As for the name of the deceased it was recorded as **Mishark Nyingi Gathiore** instead of **Mischeck Nyingi Gathiore**. However none of the witnesses stated the correct spelling of the deceased's name. Small wonder that the chief in his official addressed to this court for purposes of letters of administration referred to the deceased as **Micheck Nyingi Githiore**, whereas the Petitioners and Protester referred to him as **Misheck Nyingi Gathiore**. Yet in the death certificate he is referred to **Micheck Nyingi Gathiore**. In any event the authenticity or lack of it should have been subject of evidence by a document examiner. Since the Protester was the one challenging the authenticity of the black book, it behoved him to call such evidence. In the absence of such evidence to the contrary I would hold that the black book is authentic. **Mr. Nderi** is right in submitting that the black book did not pass the available test of an oral will known to law. It did not have the effect of becoming a will. Of course the black book fails short of a will for want of proper execution. The Petitioners appreciated that fact and that is why they petitioned for the grant of letters of administration intestate and not grant of probate. To my mind however the black book remains an uncontroverted expression of the deceased wishes. I do not think that the black book was tendered in evidence as a will. Nay, it was to show that the deceased had intentions on the way his estate should be distributed. Unless it can be demonstrated that those wishes of the deceased as captured in the black book were illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected in my view. Nothing has been brought to my attention that remotely suggests that the deceased was biased, unfair and or discriminatory against any of he beneficiaries in the manner he wanted his estate shared out on his demise. In any event, it would appear that some of the beneficiaries were aware of the contents of the black book during the deceased's lifetime. If they were despatched with the distribution they should have taken it up with him. Arising from all the foregoing I would answer issue 1 in the affirmative.

Did the deceased bequeath parcels of land as inter vivos gifts to some of the beneficiaries and if so,

should it be considered in the distribution. I think that the answer to this is pretty obvious. The Protester himself conceded that **Jane Wangechi** and **Wambui Mulua** were given by the deceased land parcels measuring 6 acres and 8.5 acres respectively in his lifetime. It also came out in evidence that the Protester fraudulently caused land parcel **Tetu/Muthuaini/236** to be transferred to himself. Evidence on record does suggest that he could not have been in a position to acquire such suit premises because of age. Ideally that suit premises should therefore be taken into account when it comes to distribution. Of course, the court, when determining the issue of distribution is legally bound to consider these gifts intervivos as per section 42 of the Law of Succession Act. In my view the Protesters categorization of the deceased's estate as ancestral land, arid areas and semi arid areas and using some magic and or formulae that is not apparent on record to subdivide the same among the beneficiaries is not only unreasonable but also self-serving. I have no intention whatsoever of adopting such scheme of distribution. The upshot of this is that Yes, the deceased made to some beneficiaries gift intervivos which must be taken into account when it comes to distribution.

What mode of distribution commends to me. As is already apparent, I am far from being persuaded that the proposal by the Protester is the way to go. It is not only self –serving but impracticable. For my part I would rather go by the wishes of the deceased as amply captured in the black book. In the premises I would adopt the scheme of distribution proposed by the petitioners. Accordingly I will confirm the grant in terms proposed by the Petitioners in their application for confirmation of grant. In other words, the affidavit of protest is dismissed.

As the protester agreed under cross-examination that he together and **Cyrus Kinyua Nyingi** have been collecting from some plots monthly rent which they have put to their own personal use, they shall be required to account to the estate of the deceased all the money so collected since August, 2003 when they terminated the services of General Marketing Services Ltd. The said amount shall thereafter be shared among the beneficiaries in the same manner or fashion as in the application for confirmation of grant. As the protagonists are siblings, I will make no order as to costs.

*Dated and delivered at Nyeri this 22<sup>nd</sup> day of July 2009*

**M. S. A. MAKHANDIA**

**JUDGE**