



REPUBLIC OF KENYA



**In re Estate of Samuel Githinji Githitu (Deceased) (Succession Appeal E013 of 2022) [2025] KEHC 10722 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10722 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION APPEAL E013 OF 2022**

**MA ODERO, J**

**JULY 18, 2025**

**BETWEEN**

**ESTHER NJOKI GITHINJI ..... APPELLANT**

**AND**

**LUCY WAMBUI GITHINJI ..... RESPONDENT**

**JUDGMENT**

1. Before this Court is the Memorandum of Appeal dated 20<sup>th</sup> September 2022 by which the Appellant Esther Njoki Githinji seeks the following orders:-

“(a) That the judgment and order of the lower court sitting at Othaya dated 2<sup>nd</sup> September 2022 be set aside and substituted with an order allowing the protest dated 4<sup>th</sup> March 2022.

b. That the costs of this appeal be borne by the Respondent.”

2. The Respondent Lucy Wambui Githinji opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 19<sup>th</sup> March 2025 whilst the Respondent relied on her written submissions dated 20<sup>th</sup> March 2025.

**Background**

3. This matter relates to the estate of the late Samuel Githinji Githitu (hereinafter ‘the Deceased’) who died intestate on 13<sup>th</sup> March 2018. A copy of the Death Certificate Serial Number 056XX58 is annexed to the petition for Grant of letters of Administration Intestate dated 15<sup>th</sup> February 2021.

4. The Deceased was a polygamous man who had two wives and was survived by the following persons.  
1<sup>st</sup> House



- a. Lucy Wambui Githinji - Wife
  - b. Stephen Maina Githinji - Son
  - c. Esther Nyambura Githinji - Daughter
  - d. Alice Wangui Githinji - Daughter
  - e. Susan Wachinga Githinji - Son
  - f. Anthony Ndiritu Githinji - Son
  - g. Carlo Gathoni Githinji - Daughter
- 2<sup>ND</sup> HOUSE
- a. Esther Njoki Githinji - Wife
  - b. Joseph Ndirangu Githinji - Son
  - c. Catherine Nyambura Githinji - Daughter
  - d. Mary Muthoni Githinji - Daughter
  - e. Agnes Mweru Githinji - Daughter
  - f. Monica Murima Githinji - Daughter
5. The estate of the Deceased was said to comprise of the following assets;-
- a. Title Number Nyandarua/Ndaragwa/Kianjogu Block 1/ Muririchua/1X7
  - b. Title Number Nyandarua/Ndaragwa/Kianjogu Block 1/Muririchua/2X5
  - (c) Title Number Mutara/Mutara/2X6
  - (d) Title Number Othaya/Kiahagu/2XX6
  - e. Title Number Othaya/Kiahagu/2XX7
6. Following the demise of the Deceased his two widows petitioned the court for Grant of letters of Administration. A Grant was issued jointly to the two on 21<sup>st</sup> July 2021.
7. Thereafter the 1<sup>st</sup> widow/the Respondent herein filed a Summons for Confirmation of Grant dated 18<sup>th</sup> February 2022. In her summons the Respondent proposed that the estate be distributed as follows:-
- “A. Land parcel No. Nyandarua/Ndaragwa/Kianjogu Block 1/Muririchua/1X7 measuring 12.70 ha acres to be shared as follows;-
- 1<sup>st</sup> House:
- a. Lucy Wambui Githinji - 2.4 Acres Absolutely
  - b. Stephen Maina Githinji - 2.4 Acres Absolutely
  - c. Esther Nyambura Githinji - 2.4 Acres Absolutely
  - d. Alice Wangui Githinji - 2.4 Acres Absolutely



- e. Susan Wachinga Githinji - 2.4 Acres Absolutely
- f. Anthony Ndiritu Githinji - 2.4 Acres Absolutely
- g. Carlo Gathoni Githinji - 2.4 Acres Absolutely  
2<sup>nd</sup> House
- a. Esther Njoki Githinji - 2.4 Acres Absolutely
- b. Joseph Ndirangu Githinji - 2.4 Acres Absolutely
- c. Catherine Nyambura Githinji - 2.4 Acres Absolutely
- d. Mary Muthoni Githinji - 2.4 Acres Absolutely
- e. Agnes Mweru Githinji - 2.4 Acres Absolutely
- f. Monica Murima Githinji - 2.4 Acres Absolutely

B. Land Parcel No. Nyandarua/Ndaragwa/Kianjogu Block 1  
Muririchua/2X5 measuring 0.910ha to be shared as follows;

1<sup>st</sup> House

- a. Lucy Wambui Githinji - 0.17 Acres Absolutely
- b. Stephen Maina Githinji - 0.17 Acres Absolutely
- c. Esther Nyambura Githinji - 0.17 Acres Absolutely
- d. Alice Wangui Githinji - 0.17 Acres Absolutely
- e. Susan Wachinga Githinji - 0.17 Acres Absolutely
- f. Anthony Ndiritu Githinji - 0.17 Acres Absolutely
- g. Carlo Gathoni Githinji - 0.17 Acres Absolutely  
2<sup>nd</sup> House
- a. Esther Njoki Githinji - 0.17 Acres Absolutely
- b. Joseph Ndirangu Githinji - 0.17 Acres Absolutely
- c. Catherine Nyambura Githinji - 0.17 Acres Absolutely
- d. Mary Muthoni Githinji - 0.17 Acres Absolutely
- e. Agnes Mweru Githinji - 0.17 Acres Absolutely
- f. Monica Murima Githinji - 0.17 Acres Absolutely

B. Land Parcel No. Othaya/Kiahagu/2XX6 measuring 0.42ha to be shared as follows;

1<sup>st</sup> House:

- h. Lucy Wambui Githinji - 0.08 Acres Absolutely
- i. Stephen Maina Githinji - 0.08 Acres Absolutely



- j. Esther Nyambura Githinji - 0.08 Acres Absolutely
  - K. Alice Wangui Githinji - 0.08 Acres Absolutely
  - l. Susan Wachinga Githinji - 0.08 Acres Absolutely
  - m. Anthony Ndiritu Githinji - 0.08 Acres Absolutely
  - n. Carlo Gathoni Githinji - 0.08 Acres Absolutely  
2<sup>nd</sup> House
  - g. Esther Njoki Githinji - 0.08 Acres Absolutely
  - h. Joseph Ndirangu Githinji - 0.08 Acres Absolutely
  - i. Catherine Nyambura Githinji - 0.08 Acres Absolutely
  - j. Mary Muthoni Githinji - 0.08 Acres Absolutely
  - k. Agnes Mweru Githinji - 0.08 Acres Absolutely
  - j. Monica Murima Githinji - 0.08 Acres Absolutely
- D. Land Parcel No. Othaya/Kiahagu/2XX7 measuring 0.42ha to be shared as follows;
- 1<sup>st</sup> House
- o. Lucy Wambui Githinji - 0.08 Acres Absolutely
  - p. Stephen Maina Githinji - 0.08 Acres Absolutely
  - q. Esther Nyambura Githinji - 0.08 Acres Absolutely
  - r. Alice Wangui Githinji - 0.08 Acres Absolutely
  - s. Susan Wachinga Githinji - 0.08 Acres Absolutely
  - t. Anthony Ndiritu Githinji - 0.08 Acres Absolutely
  - u. Carlo Gathoni Githinji - 0.08 Acres Absolutely  
2<sup>nd</sup> House
  - m. Esther Njoki Githinji - 0.08 Acres Absolutely
  - n. Joseph Ndirangu Githinji - 0.08 Acres Absolutely
  - o. Catherine Nyambura Githinji - 0.08 Acres Absolutely
  - p. Mary Muthoni Githinji - 0.08 Acres Absolutely
  - q. Agnes Mweru Githinji - 0.08 Acres Absolutely
  - r. Monica Murima Githinji - 0.08 Acres Absolutely”



8. The 2<sup>nd</sup> wife (the Appellant herein) did not support the mode of distribution as proposed by the 1<sup>st</sup> wife. She filed an Affidavit of protest dated 4<sup>th</sup> March 2022 and proposed that instead the estate ought to be distributed as follows:-

- “(i) Land Parcel No. Nyandarua/Ndaragwa/Kianjogu Block 1/Muririchua/1X7 - to be transferred to Esther Njoki Githinji (in trust for herself and Joseph Ndirangu Githinji, Catherine Nyambura Githinji, Mary Muthoni Githinji, Agnes Mweru Githinji and Monica Murima Githinji in equal shares);
- (ii) Land Parcel No. Nyandarua/Ndaragwa/Kianjogu Block 1/Muririchua/2X5 - to be transferred to Esther Njoki Githinji (in trust for herself and Joseph Ndirangu Githinji, Catherine Nyambura Githinji, Mary Muthoni Githinji, Agnes Mweru Githinji and Monica Murima Githinji in equal shares);
- (iii) Land Parcel No. Othaya/Kiahagu/2XX6 - to be transferred to Esther Njoki Githinji (in trust for herself and Joseph Ndirangu Githinji, Catherine Nyambura Githinji, Mary Muthoni Githinji, Agnes Mweru Githinji and Monica Murima Githinji in equal shares);
- (iv) Land Parcel No. Othaya/Kiahagu/2XX7 - to be transferred to Lucy Wambui Githinji in trust for herself and Stephen Maina Githinji, Esther Nyambura Githinji, Alice Wangui Githinji, Susan Wachinga Githinji, Anthony Ndiritu Githinji and Carlo Gathoni Githinji in equal shares.
- (v) Land Parcel No. Othaya/Kiahagu/2Xx8 - to be transferred to Lucy Wambui Githinji in trust for herself and Stephen Maina Githinji, Esther Nyambura Githinji, Alice Wangui Githinji, Susan Wachinga Githinji, Anthony Ndiritu Githinji and Carlo Gathoni Githinji in equal shares.
- (vi) Land Parcel No. Mahiga/Kihome/2X3 - to be transferred to Lucy Wambui Githinji in trust for herself and Stephen Maina Githinji, Esther Nyambura Githinji, Alice Wangui Githinji, Susan Wachinga Githinji, Anthony Ndiritu Githinji and Carlo Gathoni Githinji in equal shares.”

B. The protest was heard at Othaya Law Courts and vide a judgment delivered on 2<sup>nd</sup> September 2022, Hon N. W. WANJA, Resident Magistrate, entered judgment in the following terms:-

- “(i) The grant of letters of administration intestate made to Lucy Wambui Githinji and Esther Njoki Githinji in this matter on 21<sup>st</sup> July 2021 be and is hereby confirmed.
- (ii) That Land Parcel No. Othaya/Kiahagu/2XX6 be and is hereby awarded to the 2<sup>nd</sup> house (the household belonging to Esther Njoki Githinji) to be shared in accordance to provisions of subsection 35(1) of the *Law of Succession Act* Cap 160 Laws of Kenya.
- (iii) That each of remaining properties of the estate of the deceased namely; Land Parcel No. Nyandarua/Ndaragwa/Kianjogu Block 1/Muririchua /1X7 measuring 12.70ha; Land Parcel No. Nyandarua/Ndaragwa/Kianjogu Block 1/Muririchua/2X5 measuring 0.910ha; and Land Parcel No. Othaya/Kiahagu/2XX7 measuring 0.42ha shall be divided in the ratio of 7:6



between the two houses, that is, the household belonging to Lucy Wambui Githinji: Esther Njoki Githinji taking each child as a unit.

- (iv) Each party will bear its own costs as this is a family matter.”
9. Being dissatisfied with the judgment delivered by the lower court the Appellant filed this Memorandum of Appeal which is premised upon the following grounds:-
- (a) THAT the learned magistrate erred in law and fact in failing to take into account the provisions of Section 42 of the Law of Succession Act Cap 160 Laws of Kenya.
- (b) THAT the learned magistrate erred in law and fact in finding that LR No. Othaya/Kiahagu/2Xx8 and Mahiga/Kihome/2X3 did not form part of the estate of the deceased despite evidence to the contrary.
- (c) THAT the learned magistrate erred in law and fact in finding that the residual of the estate of the deceased be shared in the ratio of 7:6 between the Respondents and the Appellants without considering the properties gifted to the Respondent’s house during the deceased’s life.
- (d) THAT the learned magistrate erred in law and fact in failing to find that the registration of LR No. Othaya/Kiahagu/2Xx8 in the name of the Respondent’s daughter Esther Nyambura Githinji and LR No. Mahiga/Kihome/2X3 in the name of the Respondent was suspect and unlawful and ought to have been reversed for distribution.”

### **Analysis And Determination**

10. I have carefully considered this memorandum of appeal as well as the record of Appeal filed in this matter.
11. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions [see PETERS -VS- SUNDAY POST LIMITED [1958] E.A 424]
12. In SELLE and Another -vs- ASSOCIATED MOTOR BOAT COMPANY LTD & Others [1968] 1 E.A 123 it was stated as
- “.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence.”
13. Likewise in GITOBU IMANYARA & 2 Others -vs- ATTORNEY GENERAL [2016] eKLR, the Court of Appeal stated as follows:-
- “An appeal to this court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
14. Therefore the appropriate standard of review in cases of appeal can be summarized in the following principles:-



1. On first appeal the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions.
2. In reconsidering and re-evaluating the evidence the first appeal court must bear in mind and give due allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses.
3. It is not open to the first appellate court to review the findings of a trial court simply on the basis that it would have reached a different conclusion had it been hearing the matter for the first time.
14. It is common ground that the Deceased Samuel Githinji Githitu passed away on 13<sup>th</sup> March 2018. It is likewise not in dispute that the Deceased died intestate. The parties are all in agreement that the Deceased was a polygamous man who had two (2) wives. That the 1<sup>st</sup> wife Lucy Wambui had six (6) children whilst the 2<sup>nd</sup> wife Esther Njoki had five (5) children. The names and identities of the beneficiaries of the estate are not in any doubt.
16. The point of divergence between the Appellant and the Respondent is the mode of distribution of the estate. The assets forming the estate of the Deceased are not agreed upon by the parties.
17. The 2<sup>nd</sup> wife Esther Njoki Githinji was the protestor in the lower court. In her Affidavit of protest the Appellant gave the following as the reasons why she was opposed to the mode of distribution proposed by the Respondent. Firstly the Appellant claimed that the Respondent had fraudulently transferred the property known as LR No. Othaya/Kiahagu/2Xx8 to herself. Secondly that the Respondent had fraudulently transferred the property known as LR No. Mahiga/Kihome/2X3 to one Esther Nyambura Githinji, a beneficiary from the 1<sup>st</sup> House.
18. According to the Appellant the value of land in Nyandarua was approximately Kshs. 300,000 per acre whilst the value of land in Othaya was approximately Kshs. 3,000,000 per acre.
19. The Appellant claimed that the Respondent had been directed by the Assistant County Commissioner to restore the transferred properties to the estate. She states that prior to his demise the Deceased had sold two (2) acres out of LR Nyandarua/Kianjogu Block 1/Muririchua/1X7.
20. On her part the 1<sup>st</sup> wife (the Respondent) insisted that LR No. Mahiga/Kihome/2X3 did not form part of the estate of the Deceased. She stated that she and the Deceased had purchased that parcel of land together and that the Deceased had gifted this parcel 2X3 to her but that unfortunately the Deceased passed away during the process of transferring the said land to the Appellant.
21. Further the Respondent asserted that LR No. Othaya Kiahugu/2Xx8 did not form part of the estate of the Deceased as the said property had been gifted by the Deceased during his lifetime to her daughter Esther Nyambura.
22. The Respondent proposed that the remaining assets which formed the estate of the Deceased be divided equally between the two Houses.
23. The question for determination here is whether the Deceased had made the two gifts to the Respondent and Esther Nyambura as alleged by the Respondent.



24. It is trite law that he who alleges must prove. In law the burden of proof lies upon the party who asserts the existence of a fact or set of facts. Section 107 of the Evidence Act Cap 80 Laws of Kenya provide as follows:-

“Burden of proof

107(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

25. In the case of EVANS NYAKWANA -VS- CLEOPHAS BWANA ONGARO [2015] eKLR, it was held that:-

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the Evidence Act Chapter 80, Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of the law of proof of that fact shall lie on any particular person.....” [Own emphasis]

26. Therefore the burden lay on the Respondent to satisfy the court that the Deceased had in fact gifted the two parcels of land.

27. The Respondent is in effect claiming that the Deceased made to her a ‘gift inter vivos’ In re Estate of Godana Songoro Guyo (Deceased) [2020] eKLR the court stated as follows:

“..... However, the court is tasked to investigate whether the applicants claim suffices to be gift inter vivos or causa mortis?

What is the requirement of law as far as a gift inter vivos is concerned? I find guidance in Nyamweya J in her decision in the case of Re Estate of the late Gedion Manthi Nzioka (Deceased) [2015] eKLR where she stated as follows:

“In law, gifts are of two types. There are the gifts made between living persons (gift inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the law of Succession Act provides as follows with respect to gifts made in contemplation of death:

.....For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid”?

In Halsburys? Laws of England? 4<sup>th</sup>? Edition Volume 20(1) of paragraph 67 1 is stated as follows with

respect to incomplete gifts:?

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed



is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property and which it was in his power to do” It may be noted that the concept of gifts is divided into two categories. First gifts *intervivos* and gifts *causa mortis*. Gifts *intervivos* as contemplated in the law of Succession are such that the owner of the property or asset donates it to another without expectation of death. In any event the person who makes such a gift must have the capacity and competency to gift the property and the gift be perfected. In the case of *intervivos* the gift must go into immediate and absolute effect. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts. Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee.

Secondly, the test on a gift *causa mortis* is defined as a gift made in expectation of death. The donor causes the property or goods in his possession to be delivered to another. The general between a gift *causa mortis* and a gift *intervivos* is that it is revocable by the donor and the capacity must meet the requirements under Section 11 of the law of succession in the making of a will.” [Own emphasis]

28. Regarding the parcel of land known as LR No. Mahiga/Kihome/2X3 the Title Document (which appears as Annexure E2 to the Affidavit of Protest dated 4<sup>th</sup> March 2022) is registered in the name of Lucy Wambui Githinji (the Respondent herein). The Respondent relies on this Title Deed as proof that the land in question belongs to her and therefore does not form part of the estate of the Deceased.
29. The Appellant argued that Title in Plot 2X3 was issued to the Respondent on 22<sup>nd</sup> March 2018 which was about nine (9) days after the demise of the Deceased who died on 13<sup>th</sup> March 2018. According to the Appellant the fact that title was issued in the name of the Respondent after the death of the Deceased amounts to proof that the transfer of this parcel of land to the Respondent was fraudulent.
30. Firstly it is trite law that an allegation of fraud must be specifically pleaded and proved. In the case of *Vijay Mojarina -vs- Nansingh Madhusingh DarbaR & Another* [2000] eKLR, Hon. Justice Tunoi (as he then was) stated as follows:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently.

It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts” [Own emphasis]

31. Likewise in *RG Patel -vs- Lalji Makanji*[1957] EA, the Court of Appeal from East Africa stated as follows:-

“Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

32. Therefore in order to prove her allegations of fraud the Appellant needed to state with specificity what particular fraudulent act the Respondent has committed. To ask that the court infer fraud merely from the fact that the title deed was issued to the Respondent after the demise of the deceased would not suffice.



33. Having said that the Respondent had a legal obligation to prove on a balance of probabilities that the Deceased had in fact gifted her the land in question as a gift *intervivos* or during his lifetime. In order for a gift *intervivos* to be inferred the ‘intention’ of the donor must be clear and the ‘donor’ must have done all acts required to convey this gift to the donee.
34. In Odunga’s Digest on Civil Case Law and Procedure Volume III, Page 2417 at Paragraph 5484 it is stated as follows
- “Generally speaking the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate the gift. (See in *Re Fry Deceased* [1946] CH 312 *Rose: and Trustee Company Ltd v Rose* [1949] CL 78 *Re: Rose v Inland Revenue Commissioners* [1952] CH 499 *Pennington v Walve* [2002] 1WLR 2075 *Maledo v Beatrice Stround* [1922] AC 330 Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee need no assistance from equity and the gift is complete. It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor.” [Own emphasis]
35. In this case the Respondent told the court that the Deceased attended an Ordinary Land Control Board meeting where he presented an application for land Control Board consent for the transfer of Plot 2X3 to the Respondent. A copy of the application for Land Control Board consent dated 6<sup>th</sup> January 2016 duly signed by the Deceased appears at Page 77 of the Supplementary record of Appeal filed on 24<sup>th</sup> July 2024. In the said application the Deceased clearly indicated his intention to transfer the parcel of land to Lucy Wambui Githinji as a ‘Gift’ for no consideration.
36. At Page 90 of the Supplementary record is the Agenda of the Land Control Board dated 21<sup>st</sup> January 2016. Minute 6.1.2016 of that agenda refers to an “Application by Samuel Githinji Githitu to transfer his land 1.17 Ha to Lucy Wambui Githinji by way of gift.”
37. Finally at Page 79 of the Supplementary record is a letter of consent dated 21<sup>st</sup> January 2016 by which the Land Control Board gave consent for the transfer of LR No. Mahiga/Kihome/2X3 by the Deceased to the Respondent. All these activities relating to the Land Control Board occurred in January 2016 during the lifetime of the Deceased.
38. At Page 75 - 76 of the supplementary record is a Transfer document dated 21<sup>st</sup> January 2016 by which the Deceased transferred his interest in LR No. Mahiga/Kihome/2X3 to the Respondent. The Deceased signed the said transfer and his signature was duly witnessed by C. M. King’ori Advocate. The Respondent also thumb-printed the transfer again witnessed by C M King’ori Advocate. Photographs of both the Deceased and the Respondent are affixed on the transfer document. Once again this transfer was executed during the lifetime of the Deceased i.e prior to his demise in March 2018.



39. From the above documentation it is manifestly clear the Deceased fully intended to transfer Plot 2X3 to his 1<sup>st</sup> wife (the Respondent) as a gift. The Deceased did all acts which were required to be done by him in order to facilitate that transfer.
  40. On her part despite alleging fraud the Appellant has not suggested much less proved, that any of the documents exhibited in court were not genuine. There is no proof that the consent from the Land Control Board were fake. Nor is there any evidence to prove that the signature of the Deceased on any of the documents was not genuine.
  41. In her evidence before the trial court the Appellant claims that she reported her allegations of forgery to the DCIO's office and recorded a statement. The court was not told if any investigations were carried out as a result of this report. What was the outcome if any of investigations into these allegations of forgery. There is no evidence that anyone was charged much less convicted for having forged the documents relating to the transfer of Plot 2X3.
  42. There is a maximum that equity that considers as done, that which ought to be done. There is nothing to show that the Deceased at any time prior to his demise, changed his mind and/or revoked his intention to transfer the parcel of land to the Respondent.
  43. As stated in the Odunga's Digest [Supra] and in Halsbury's Laws of England for a gift inter Vivos to be considered valid, the donor must have done everything which was necessary to be done and which was in his power to do to facilitate the transfer the property. The Deceased herein had done all that lay in his power to have Plot 2X3 transferred to the Respondent. All that remained was to have the transfer registered and title issued. These actions did not lie within the power of the Deceased to do.
  44. It is manifest that at the time of his demise the Deceased had done all that he was required to do to facilitate the transfer of this parcel of land to the Respondent. The only activity that remained was the registration of the transfer and issuance of new title in the name of the Respondent. These actions were upon the Registrar of lands to act. I find that the gift of Plot 2X3 to the Respondent had been perfected, by the time the Deceased passed away.
  45. Accordingly I find that notwithstanding the fact that title to Plot 2X3 was issued a few days after the demise of the Deceased, the evidence on record together with the actions of the Deceased make it clear that he intended to gift this property to the Respondent. The Deceased did all that was required on his part to perfect this gift. As such I find and hold that LR No. Mahiga/Kihome/2X3 belongs to the Respondent. It does not form part of the estate of the Deceased and is not available for distribution.
  46. The next property under dispute is LR No. Othaya/Kiahangu/2Xx8. The Respondent asserts that this property also does not form part of the estate of the Deceased as said property was gifted by the Deceased during his lifetime to their daughter Esther Nyambura Githinji.
  47. The Appellant denies that Plot 2Xx8 was gifted to the said Esther Nyambura. Once again the Appellant alleges that this property was fraudulently transferred into the name of Esther Nyambura after the demise of the Deceased.
  48. The Title Document for LR Othaya/Kiahugu/2Xx8 was never produced in court. All that was availed was a copy of the Green card indicating that on 16<sup>th</sup> June 2016 the property was transferred into the name of Esther Nyambura.
- An official search dated 1<sup>st</sup> December 2018 shows that this property was on 16<sup>th</sup> June 2016 registered in the name of the Deceased Samuel Githinji Githitu.



49. Unlike the narration in respect of Plot 2X3 there is no indication of how this Plot 2Xx8 ended up being registered in the name of Esther Nyambura. There is no evidence of the Deceased having attended a Land Board meeting, there is no consent for transfer issued by the Land Board and no transfer document signed by the Deceased.
50. All in all there is no evidence of a clear intention by the Deceased to transfer this property to Esther Nyambura. The Deceased at the time of his death had not done all acts required of him to effect the transfer of the Land to Esther Nyambura.
51. At the time of his demise this LR No. Othaya/Kiahugu/2Xx8 was registered in the name of the Deceased as evidenced by the Official Search dated 1<sup>st</sup> December 2018. This shows that eight (8) months after the death of the Deceased Plot 2Xx8 was still registered in his name.
52. There is no evidence that this particular property was gifted by the Deceased during his life time to Esther Nyambura for that matter to any other person. Accordingly I find and hold that LR Othaya/Kiahugu/2Xx8 forms part of the estate of the Deceased and as such is available for distribution.
53. The next question for determination is how should the estate of the Deceased be distributed. As stated earlier the Deceased was a polygamous man. Section 40 of the *Law of Succession Act*, Cap 160 Laws of Kenya provides for the mode of distribution of the estate of a polygamous man in the following terms:-
- “Where an intestate has married more than once under any system of law permitting polygamy, 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.”
54. It is important to bear in mind that in determining the mode of distribution of the estate the court must take into account any property or gifts allocated to any beneficiary by the Deceased during his lifetime. Section 42 of the *Law of Succession Act* provides as follows:-
- “Where -
- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”
55. I note that in her judgment the learned trial magistrate did take into account the above provision of law. At paragraph 22 of the judgment the magistrate stated as follows:-
- “Accordingly I must take into account the property the deceased awarded to beneficiaries of the estate of the deceased belonging to the 1<sup>st</sup> House in determining the share of the net intestate estate finally accruing to those beneficiaries.”
56. The Appellant has proposed that the estate be divided equally between the two houses. However the law requires that equity and fairness be the bedrock of the distribution of any estate not necessarily equal shares. [case law]



57. The court must also take into account the contribution made by each spouse to the acquisition of the asset in question, in many situations the 1<sup>st</sup> wife may have married the man when he had little to his name. They work together to acquire assets struggled to clear loans after which the man proceeds to marry 2<sup>nd</sup> and/or third wives.
58. In considering a situation where a 1<sup>st</sup> wife objected to the mode of distribution of the estate of a polygamous man on grounds that she had together with the Deceased acquired the assets and contribution towards repaying loans, after which decades later her co-wife came into the picture. Hon. Lady Justice Mumbi Ngugi (as she then was) in *Re Estate of Late George Cheriro Chepkosioni (Deceased)* [2017] eKLR observed as follows:-
- “.....I am of the view that the unfairness and discrimination that their Ladyship and Lordship Justice Koome and Mabau J decried in their respective judgments, can only be properly addressed by considering the contribution of the widow to the acquisition of property, and taking this contribution into account when determining what she is entitled to in a succession cause to the estate of a polygamous deceased person who dies intestate. To equate the widow to children, or the first widow to widows who enter the home decades later, who may be the age of the first widow’s children and made no contribution to the acquisition of the estate registered in the name of the deceased, is to perpetrate an injustice against women that cannot be justified under any circumstances. For the courts to perpetuate the perpetration of the injustice on the basis of section 40 of the *Law of Succession Act* is to abdicate their constitutional responsibility to do justice. The principle of equality and non-discrimination is at the core of the sovereign law of this land, *the Constitution*. For a court, therefore, to apply any law in a manner that is discriminatory on the basis of sex, or any of the prohibited grounds of discrimination, or to apply a provision of the law that is discriminatory, as section 40 admittedly is, or to consider itself bound by such discriminatory law, is to fail to meet the constitutional demands imposed on it.” [Own emphasis]
59. Similarly in *Re Estate of Josphat Irungu Kanyi (deceased)* 2019 eKLR Hon. Lady Justice Gitari held as follows:
- “The protestor testified that she got married to the deceased in 1975 and they bought land parcels No. 7X7 & 726. The petitioner was not candid as to when she got married. What she stated was that she stated that she was with him from 1986 but she came to live at Murindiko in 1996. This means she came into the union 21 years after the protestor and the deceased married. The protestor was a Teacher and there can be no doubt that she contributed into the acquisition of the two properties. She is entitled to a bigger share of the estate. She has lived on Land Parcel No. Gichugu/Settlement Scheme/7X7 and is where her matrimonial home is. I find that it is fair and reasonable that she gets the whole share of this property Gichungu/Settlement Scheme/7X7”
60. It is not disputed that the 1<sup>st</sup> wife (the Respondent herein) had been married to the Deceased for over Sixty (60) years. The Appellant was married in the year 1978 and lived with the Deceased for roughly forty (40) years before he died. Taking this into account I do agree with the decision of the trial court that the Respondent would be entitled to a larger share of the estate.



61. As stated earlier the property LR Mahiga/Kihome/2X3 does not form part of the estate and is not available for distribution. This property was gifted to the Respondent and is allocated wholly to the Respondent.
62. I have considered the allocation of the remaining estate property as set out by the trial Magistrate. In my view the allocation exhibited both equity and fairness and I am not inclined to interfere with the same.
63. Finally I find no merit in this appeal. The same is dismissed in its entirety. The judgment and orders made on 30<sup>th</sup> September 2022 are hereby upheld. This being a family matter each side will meet their own costs.

**DATED IN NYERI THIS 18<sup>TH</sup> DAY OF JULY 2025**

.....

**MAUREEN A. ODERO**

JUDGE

