



REPUBLIC OF KENYA



**In re Estate of Mwaura Gachinga (Deceased) (Succession Appeal
E004 of 2022) [2025] KEHC 12725 (KLR) (17 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12725 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION APPEAL E004 OF 2022
DKN MAGARE, J
SEPTEMBER 17, 2025**

IN THE MATTER OF THE ESTATE OF MWAURA GACHINGA (DECEASED)

BETWEEN

**MARGARET MUTHONI MWAURA 1ST APPELLANT
JOSEPHINE WANJIKU MWAURA 2ND APPELLANT
LUCY WAIRIMU MWAURA 3RD APPELLANT**

AND

**JOSEPH MWANGI MWAURA 1ST RESPONDENT
CECILIA WANJIRU MWANGI 2ND RESPONDENT**

*(Appeal thus arises from the said judgment and decree of Hon. E.N. Angima
(Resident Magistrate) delivered on 14.11.2022 in Nyeri CMCSUCC No. 461 of 2017)*

JUDGMENT

1. On 15.6.2021, the Respondents filed Summons for Confirmation of Grant dated 9.6.2021 in respect of their late father, Mwaura Gachinga alias Mwaura Gichinga, the deceased herein. The deceased died intestate on 3.12.1996. The Respondents described themselves as a son and unmarried daughter of the deceased.
2. Subsequently on 22.6.2021, the Appellants filed an Affidavit of Protest sworn by Margaret Muthoni Mwaura and Josephine Wanjiku Mwaura protesting the confirmation of the grant on the following grounds:
 - a. The proposed distribution of the estate in LR No. Nyeri/Endarasha/488 was unequitable and unlawful.
 - b. The estate should be divided equally among all the 9 dependants.



3. The lower court considered the protest and delivered its Judgment dismissing the protest and adopting the mode of distribution proposed by the Respondents.
4. This appeal thus arises from the said judgment and decree of Hon. E.N. Angima (Resident Magistrate) delivered on 14.11.2022 in Nyeri CMCSUCC No. 461 of 2017.
5. The Memorandum of Appeal dated 29.3.2022 raised the following material grounds of appeal.
 - a. The learned magistrate erred in law and fact in holding that married daughters have a lesser entitlement to their deceased parent's as compared to sons thus offending Section 35 of the [Law of Succession Act](#).
 - b. The learned magistrate erred in law and fact in holding that the Appellants as married daughters of the deceased seemed to be comfortably settled and were likely to inherit under their husbands.
 - c. The learned magistrate erred in law and fact in purporting to exercise discretion to supersede the provisions of the law.
6. In summary the Appellants complained that the magistrate erred by: (a) discriminating against married daughters contrary to Section 35 of the [Law of Succession Act](#), (b): assuming they were adequately provided for through their husbands, and (c): purporting to exercise discretion in a manner that overrode clear statutory provisions.

Evidence

7. PW1 was Josephine Wanjiku Mwaura. It was her case that the deceased was her father. She testified that the deceased did not subdivide the land at all. She prayed that it be subdivided among all the 9 children. On cross examination, it was her case that the 3 Appellants were all married. It was her further case that Cecilia Wanjiru was unmarried and stayed with her parents and continued to stay on the premises up to date.
8. DW1 was Joseph Mwangi Mwaura. He testified that before the demise of his mother, the portion of 0.2593 Ha was divided into 7 plots - each for 5 sons, the widow and Cecilia Wanjiru. That further, 4.5407 Ha was divided among 6 children including 5 brothers and the widow.
9. It was his stated case that the Appellants as married daughters would take over their mother's plot. That the Appellants were collecting rent on their mother's portion. On cross examination, it was his case that it is their mother who came up with the proposal for subdivisions during her lifetime. He testified that no minutes were taken in respect of the meetings with the deceased and the Appellants were not in attendance because they were not invited.
10. DW2 was Francis Kimani Gichuhi. He testified that he was friend to the deceased. After the burial of the deceased, he was called for a meeting. The meeting was organized by the deceased's widow. The proposed distribution was agreed without objection.

Submissions

11. The Appellants submitted heavily that they were discriminated in the manner the Respondents purported to subdivide the estate of the deceased. The Appellants cited among others, Sections 35 and 45 of the [Law of Succession Act](#) and Article 27 (3) of [the Constitution](#) based on which they argued that they were discriminated on the basis being married.



12. On their part, the Respondents submitted that the subdivision was based on the wishes of the deceased as well as the wishes of their mother and ought not be interfered with. It was submitted that the Appellants were only entitled to the plot they were given by their mum. What was lost on the parties was that the said parcel of land did not belong to their mother.

Analysis

13. Being a first appeal, the court relies on the principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 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. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

14. It is thus established that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or the court has clearly failed on some material point to take into account of particular circumstances. This was the finding in *Mwangi vs Wambugu* [1984] KLR 453 where the court observed that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

15. This court’s role is also to establish whether the lower court’s finding was based on the evidence. The Court of Appeal in *Kiruga vs Kiruga & Another* [1988] KLR 348, observed thus:

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

16. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

17. The Respondents’ case was largely that the estate was distributed according to their deceased father’s wishes, which wishes were adopted by their mother. The said wishes were not documented in minutes and appear to have been anchored on the existence of wishes. The said wishes were treated as a will. However, there were no testate succession or any will propounded. Parties must decide a fortiori whether they are dealing with testate succession or intestate. Once an intestate succession is filed, it does not make sense to tender evidence of an oral will without trying to propound the same.

18. The Appellants on the other hand anchored their protest on the ground that the estate of the deceased ought to have been distributed equally among all the 9 children.



19. It is clear and uncontroverted that the Appellants did not attend the meeting in which the shares are alleged to have been given. This was admitted by DW1 who also testified that the Appellants were not invited.

20. Under Section 9 of the *Law of Succession Act* it is provided as doth:

- No oral will shall be valid unless: a. It is made before two or more competent witnesses and
- b. The testator dies within a period of three months from the date of making the will.

21. While discussing the requirements of a valid oral will, Musyoka J in *Re Estate of Evanson Mbugua Thong'ote (Deceased)* [2016] eKLR stated thus:

An oral will is made simply by the making of utterances orally relating to disposal of property. In asserting whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will. The other consideration is that the utterance ought to be made in the presence of two or more persons.

22. To this court, the allegations of the Respondents do not justify a conclusion that there was an oral will. There was no evidence of an oral will. DW1 confirmed that there were no minutes of the meeting recorded. Although DW2 testified in support of the fact that there was a meeting, the said meeting cannot amount to the wishes of the deceased herein in the circumstances since the testimony of the said DW2 was that the deceased's wife Beatrice Nyambura Mwaura decided to share the land. This was after the deceased had died. It cannot be a foundation of an oral will. However close the parents were, the will can only be written by a deceased whose estate parties were concerned with.

23. The Appellants are no doubt beneficiaries of the estate by virtue of being a daughter of the deceased and their status as such is not in dispute. What is in dispute is merely that they should not share equally because they were married and their parents wished that they should not share equally. On dependants, the *Law of Succession Act* (Cap 160 Act defines who is a dependant at Section 29 as follows:-

- “(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) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- (c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

24. As the Appellants are undisputedly beneficiaries, under Section 28 of the *Law of Succession Act* it is provided as follows, it is provided as follows:

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

- a) the nature and amount of the deceased's property;
- b) any past, present or future capital or income from any source of the dependant;



- c) the existing and future means and needs of the dependant;
- d) whether the deceased had made any advancement or other gift to the dependent during his lifetime;
- e) the conduct of the dependant in relation to the deceased;
- f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
- g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

25. According to the Grant confirmed on 14.3.2022, out of the sole estate of the deceased, LR No. Nyeri/Endarasha/488, there is a portion of 0.2593 Ha which was distributed to all the 9 children of the deceased. Except the Appellants, the remainder 6 children received one equal share each. The Appellants received 1 share but to be shared among the 3 of them and maintain that they were discriminated.

26. Further, the said parcel also constitutes 4.5407 Ha. The initial 0.2593 Ha was described to constitute plots while the other 4.5407 Ha was described to constitute farm land and was distributed equally among 6 children excluding the Appellants. The Appellant's case is that the entire parcel ought to be shared equally among all the 9 children, including the Appellants. While addressing this issue as raised herein, I will not reinvent the will. I have not changed and the law has not changed since I stated as follows in the case of *In Re Estate Nyamoringo Okinyi (Deceased)* [2024] KEHC 3001 (KLR)

Article 27 of *the Constitution* is not a decoration. It is an article with full force of the grundnorm of the country. It is consonant with various declarations starting with the Universal Declaration of Human Rights. There has never been a law in this country barring girls from inheriting. It was also in the mind. The decision of *Mary Rono -vs- Same Rono*, (2002) eKLR.

59. In the said decision of *Mary Rono v Jane Rono & another* [2005] eKLR, the court of Appeal, sitting at Eldoret, stated as doth: -The deceased in this matter died in 1988, while the Succession Act which was enacted in 1972, became operational by Legal Notice No. 93/81, published on 23.06.1981. I must therefore hold, as the Act so directs, that the estate of the deceased falls for consideration under the Act. Section 2(1) provides: -2.(1)Except as otherwise expressly provided in the Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”The application of Customary law, whether Marakwet, Keiyo or otherwise, is expressly excluded unless the Act itself makes provision for it. The Act indeed does so in Sections 32 and 33 in respect of agricultural land and crops thereon or livestock where the law or custom applicable to the deceased's community or tribe should apply. But the application of the law or custom is only limited to “such areas as the Minister may by Notice in the Gazette specify.” By Legal Notice No. 94/81, made on 23.06.1981, the Minister specified the various districts in which those provisions are not applicable. The list does not include Uasin Gishu district within which the deceased was domiciled. So that, the law applicable in the distribution of the agricultural land in issue in this matter is also written law. Does the Act provide for the manner of distribution? Partly, yes.

60. The Court made a bold statement for those days. The lead decision by justice Waki JA as the he was, stated as doth: -“I find no justification for the superior court whittling that proposal



down to 5 acres to each daughter. More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.” A “house” in a polygamous setting is defined in section 3 of the Act as a “family unit comprising a wife ... and the children of that wife”. There is no discrimination of such children on account of their sex. I think, in the circumstances of this case there is considerable force in the argument by Mr. Gicheru that the estate of the deceased ought to have been distributed more equitably taking into account all relevant factors and the available legal provisions. I now take all that into account, and come to the conclusion that the distribution of the land, “

27. Even before the promulgation of *the Constitution* in 2010, Makhandia J (as he then was) in *Re Estate of Solomon Ngatia Kariuki (Deceased)* (2008) eKLR stated as follows:

“The *Law of Succession Act* does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to state a claim to the deceased’s estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu customary law. Like most other customary laws in this country, they are always biased against women and indeed, they tend to bar married daughters from inheriting their father’s estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father’s inheritance because they are likely to enjoy inheritance of their husband’s side of the family.”

28. Considering the nature and amounts of the deceased’s estate as one of the factors this court should consider under Section 28 of the *Law of Succession Act*, I am of the considered view that the Appellants are entitled to equal share in 4.5407 Ha farm land. However, the apportionment of 0.2593 Ha in respect of the plots was fair and I find no basis to interfere with it. The Appellants shall retain one share to be shared equally among them.

29. Applying the above principles and the reasoning of the above-cited case, I find the learned magistrate fell into an error when she failed to accord equal distribution to all the children of the deceased in violation of section 38 of the *Law of Succession Act*. The effect of the order was to punish those who succeeded in getting married and rewarding men notwithstanding their marital status. The unmarried girls were equally advantaged. Such an order is discriminatory and contrary to the constitutional order and cannot be justified in an open and democratic state.

30. Such orders must now be consigned to the dustbin of history as a joke taken too far. Succession is neither a right nor a privilege; it is an entitlement. It is only a deceased person who could affect the shares through a will which he did not write. By not writing the will he surrendered the power to distribute to the court. Without being disrespectful, whereas the deceased’s widow retained the rights to life interest, she had no power whatsoever to distribute the estate without an order of the court. The arrangements in meetings after death, remain that, the beneficiaries’ aspirations.

31. Therefore, by discriminating against the Appellants on the basis of being married daughters, the court fell into an error. It is anathema to Article 27 of *the constitution*, which reference was made above. For avoidance of doubt, the Article stipulates as follows:

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.



- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
 - (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
 - (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
 - (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
 - (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
 - (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
 - (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.
32. The lower court had a duty to protect, promote and fulfil the rights of the Appellants. This duty is not only when sitting as a constitutional court. Article 3(1) of *the constitution* provides as follows:
- (1) Every person has an obligation to respect, uphold and defend this Constitution.
33. The court thus fell into error by issuing an unconstitutional order. There will always be temptation to note that the married daughters are comfortable. That has no relevance in the succession cause. The only marriage that matters for purposes of the Act, is the widow's. By making married wone qua married women have less shares, the court departed from the established legal principles in succession.
34. The net effect is that the appeal is merited and is accordingly allowed. The next question is which order to substitute the former orders with. In succession cause, equality is the default mode. Equity is subsidiary and only occurs in respect of very narrow principles, where equality will lead to a manifest injustice. This includes gifts inter vivos. Equity follows the law and not vice versa. In the case of *Gitu Geoffrey & another v Britam General Insurance Co K. Ltd & another* [2020] KEHC 9843 (KLR), Kasango J, stated as follows:

It follows that the attempt to rely on doctrine of estoppel by the plaintiffs will not succeed in the light of those statutory provisions. The equitable maxim "equity follows the law" will apply. In the case *N-Krypt International Corp. v. LeVasseur*, 2018 BCCA 20 (CanLII) the court stated:

"The relationship between equity and the common law is sometimes described by the maxim "equity follows the law": J. McGhee, ed., *Snell's Equity*, 31st ed. (Toronto: Carswell, 2005). The author of *Snell's Equity* elaborates on the meaning of the maxim at 95:



Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it.”

35. Then what is the law? The law is set out in sections 35 and 38 of the Law of Succession as follows:
35. Where intestate has left one surviving spouse and child or children (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-
- (a) the personal and household effects of the deceased absolutely; and
 - (b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.
38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.
36. There was a surviving spouse whose life interest terminated upon her death. The interest reverted to all children equally and not one particular child. The deceased widow could not distribute her life interest. In the case of *Re Estate of the Late Magayu Kiama Alias Magayu S/O Kiama Alias Peter Magayu Kiama Alias Magayo Kiama (Deceased)* [2024] KEHC 14059 (KLR), this court had this to say:
- In my view, the spirit of Part V of the *Law of Succession Act* is equal distribution of the estate amongst the beneficiaries of the deceased. My reading of these provisions is that they envisage equal distribution. The word used in Section 35 (5) and 38 is "equally" as opposed to "equitably." See *Musyoka J in Succ Cause No 399 of 2007, In the Estate of John Musambayi Katumanga-Deceased*. This is the plain language of the provisions. The provisions are in mandatory terms-"the property shall.....be equally divided among the surviving children." Equal distribution is envisaged. Guided by the above provisions I find that all the children of the deceased are entitled to equal shares of the deceased's estate.
37. The foregoing had been discussed at length by the Court of Appeal [Waki, Nambuye & Kiage, JJ.A] in the case of *Stephen Gitonga M'murithi v Faith Ngira Murithi* [2015] KECA 347 (KLR):
- Applying the above principles to both the learned trial Judges' reasoning and distribution, it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the *Law of Succession Act* by discriminating against the married daughters of the deceased. See *Rono versus Rono & another* [2008] 1KLR (G&F) 803.
- As for the issue of the widow having been given an outright tangible shareholding in the net intestate estate of the deceased as opposed to a life interest, we find nothing in section 40 of the *Laws of Succession Act* that can prevent a court of law from looking at the peculiar circumstances of each case and then determine whether to apply strictly the rule on life interest or temper with it in the interests of justice to all the affected parties.
38. There was no other scientific formula for arriving at the sharing of the estate. Unfortunately, the parties did not value the estate to enable the court distribute among themselves different shares. I find and hold that there are no special circumstances calling for differential treatment among the beneficiaries.



The end result is that I set aside the entire confirmation as being unlawful. In lieu thereof I order that the entire estate be shared into 9 equal shares over each property. This is buttressed by the decision of Kimaru J as he then was in the case of Peter Karumbi Keingati & 4 others v Dr. Ann Nyokabi Nguithi & 3 others [2014] KEHC 3563 (KLR) where it was stated that:

As regard to the argument by the Applicants that married daughters ought not to inherit their parent's property because to do so would amount to discrimination to the sons on account on the fact that the married daughters would also inherit property from their parent's in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. The issues that the court will grapple with during distribution are the issues anticipated by Section 28 of the *Law of Succession Act*. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. This ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of *the Constitution* 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for these discriminative cultural practices against women be buried in history.

39. In addressing the question whether the law of succession can or does discriminate, Lesiit J, as she then was, in the case of Eliseus Mbura M'Thara v Harriet Ciambaka and Another [2012] eKLR, posited as hereunder:

The *Law of Succession Act* does not discriminate between gender in matters of succession or inheritance. Under the *Law of Succession Act* and indeed under *the Constitution* a child is a child and every person has equal rights under the law irrespective of gender. The *Law of Succession Act* does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person.

40. Having reached the above conclusion that the court was discriminatory, I have no objection other than to do what the law requires, to share the estate equally among all the nine beneficiaries. The matriarch died in 2018, hence her life interest terminated. Parties have to find a way to hold the properties in the shares I have indicated, that is 1/9 for each of the three properties. The deceased left the following nine units of heirs;

- a. Joseph Mwangi Mwaura
- b. James Irungu Muturi
- c. Paul Ndungu Mwaura
- d. Micah Kiratu Mwaura
- e. Gabriel Chege Mwaura



- f. Cecilia Wanjiru Mwangi
 - g. Lucy Wairimu Ndegwa
 - h. Margaret Muthoni Mwaura
 - i. Josephine Wanjiku Mwaura
41. Each of the properties of the deceased, in particular land parcel number LR No. Nyeri/Endarasha/488 be divided equally among all the beneficiaries. Any parcels transferred to the beneficiaries are hereby cancelled. The Land Registrar to issue title deeds to beneficiaries. Should parties designate any portion as a centre, the 9 beneficiaries will share the same equally.
 42. Before I depart, I need to address the purported predicating the succession cause on any of the daughters divorcing. First, that was not proved to have been in any will. Secondly, any of the beneficiaries who witnesses a will, their share falls for determination. The net effect is that the marital or civil status of daughters is irrelevant in succession. They inherit equally, in intestate succession, qua daughters.
 43. Regarding costs, the Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.
 44. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
 18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.
 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.
 45. The parties, who are siblings, have been engaged in a prolonged dispute over a small parcel of land. The ghost of discriminatory customs has long lingered within our legal system, notwithstanding numerous judicial pronouncements declaring such practices backward and repugnant to justice and morality.



Determination

45. In the upshot, I make the following orders:

- a. The appeal is dismissed.
- b. The Certificate of Confirmation of Grant dated 14th March 2022 is revoked.
- c. A fresh Certificate of Confirmation of Grant is issued sharing the property of the estate equally among all the nine units.
- d. Each party to bear their own costs.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 17TH DAY OF SEPTEMBER, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

C.M. King'ori for the Appellants

S.K. Njuguna for the Respondents absent

Court Assistant – Michael

