



In re Estate of Kitela Kioko Kithuma (Deceased) (Succession Cause 298 of 2009) [2024] KEHC 157 (KLR) (18 January 2024) (Judgment)

Neutral citation: [2024] KEHC 157 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 298 OF 2009**

MW MUIGAI, J

JANUARY 18, 2024

IN THE MATTER OF THE ESTATE OF KITELA KIOKO KITHUMA (DECEASED)

BETWEEN

ISAAC MANZA KITELA PETITIONER

AND

FESTUS JACKSON MUSYOKA KITELA DEFENDANT

JUDGMENT

Background

1. Vide a petition received on 20th April, 2009, in which the petitioner Beatrice Mutio Kitela petitioned this Honorable Court for a grant of Letters of Administration intestate of the estate of Kitela Kioko Kithuma (deceased) who died on 30th December, 2003 domiciled in Kenya at Muumandu.
2. Pursuant to the Affidavit in support of Petition for Letters of Administration Intestate, the deceased died intestate and left the following surviving him: -
 - a) Beatrice Mutio Kitela- the only wife
 - b) Festus M. Kitela- Son
 - c) Benard M. Kitela- Son
 - d) Isaack M. Kitela- Son
3. The Affidavit in Support of Petition for Letters of Administration Intestate mentioned full inventory of all assets left by the deceased at the date of his death to be:
 - a) Machakos Konza North Block Agricultural Plot 1/605
 - b) Commercial Plot at kwa Mautio-konza Plot No.846



- c) Agricultural Plot No. 54- Konza Ranch
 - d) Agricultural Plot No. 1452- Malili Ranch
 - e) Commercial Plot No. 956-Malili Ranch
 - f) Plot at Kalama/Muumandu/118
 - g) Plot at Kalama/Muumandu/1163
 - h) Plot at Kalama/Muumandu/2164
 - i) Shares Comprised in Membership No. 1143 Konza Ranch
Total estimated value kshs. one million.
4. By the Chief's letter dated 23rd October, 2008 confirmed that the deceased hailed from his location and had only one wife, and was survived by the following:
- a) Beatrice Mutio Kitela- the only wife
 - b) Festus M. Kitela- Son
 - c) Benard M. Kitela- Son
 - d) Isaack M. Kitela- Son
5. Vide the Gazette notice dated 2nd October,2009,Beatrice Mutio Kitela of P.O Box (particulars withheld) Muumandu in Kenya the deceased's widow was gazetted for grant of Letters of Administration Intestate to the Estate of Kitela Kioko Kithuma, late of Muumandu who died there on 30th December, 2003
6. Grant for Letters of Administration was granted on 29th November,2009 and was issued by this Honorable Court on 7th December, 2009 to, Beatrice Mutio Kitela as personal representative of the deceased's estate to render a just and true account thereof as required by law.

Note: The original Court file was lost/misplaced and Skeleton file opened in 2019/2020 where the application was filed on 28/10/2019 to set aside dismissal of case order and reinstate it and to appoint replacement of the Petitioner/Administrator Beatrice Mutio Kitela (now deceased died on 10/1/2015) widow of the deceased to be replaced by Festus Jackson Musyoka Kitela.

Summons

7. Vide summons dated 12th February,2020 and filed in court on 25th February,2020 by IsaacK Manza Kitela, brought under Rule 75 (1) and Rule 44 of the *Law of Succession Act*, wherein the Applicant sought the orders that:
- a) Issack Manza Kitela be appointed as administrator de bonis non to the estate of Kitela Kioko Kithuma (deceased) who died intestate on 30th December, 2003.
 - b) Beatrice Mutio Kitela (deceased) be replaced with her son Issack Manza Kitela on the schedule property adopted in the Petition for Letters of Administration.
 - c) The costs of this application be costs in the cause.
8. Grounds upon which the Application was premised are on the face of the said Application.



Supporting Affidavit

9. The application was supported by an Affidavit dated 12th February,2020 and filed in court on 25th February,2020, sworn by Isaack Manza Kitela the applicant herein wherein he deposed that Beatrice Mutio Kitela (deceased), filed petition for letters of administration on 20th February,2009 at Machakos High Court but letters of Administration to the estate were never issued. Deposing that the file went missing and he had therefore filed an application for reconstruction of the same; further Beatrice Mutio Kitela (deceased), who was the intended administrator of the estate of Kitela Kioko Kithuma (deceased) and his mother, died on 10/1/2015 (attached and marked copy of the Death Certificate). He deposed that the estate of the deceased is under attack by some members of the public who have been trespassing on it and want to forcefully transfer the properties to themselves.
10. He lamented that he one of the eight surviving beneficiaries of the estate of the deceased (attached and marked copy of the chief's letter). Lamenting that other beneficiaries have no objection to the letters of Administration being issued to him; further that it is important that he be appointed as administrators de bonis non administratis in place of Beatrice Mutio Kitela (deceased) to help undertake the administration of the said estate.
11. Vide a grant dated 18th November,2020 for letters of Administration intestate of all estate Kitela Kioko Kithuma was issued to Isaack Manza Kitela & Festus Jackson Kitela on 18th January,2021 as personal representative of the deceased's estate to render a just and true account thereof as required by law.

Summons for Confirmation of Grant

12. Vide a summons for confirmation of grant dated and filed in court on 4th March,2021 the Applicants sought orders that:
 - a) Grant of probate (on letters of Administration Intestate (or with will annexed) made to the said Isaack Manza Kitela & Festus Jackson Musyoka Kitela in this matter on 18th November, be confirmed.
 - b) That costs of this application be costs in the cause.

Supporting Affidavit

13. The application was supported by an Affidavit dated 4th March,2021sworn by Festus Jackson Musyoka Kitela, wherein he deposed that their mother Beatrice Mutio Kitela (deceased) was issued with grant of letters of administration in their father's estate whereby she later died on 10th January, 2015 and left the estate undistributed. Deposing that he filed an application for substitution and his brother one Isaack Manza Kitela filed another application for substitution. He deposed that the deceased left the following heirs/beneficiaries surviving him:
 - a) Rose Mbengwa Kitela- Daughter-Married
 - b) Agnes Mbula Maundu- Daughter- married
 - c) David luilu Kitela- Son
 - d) Festus Jackson Musyoka Kitela- Son
 - e) Mary Nzisa Mutavi- Daughter-married
 - f) Isaack Manza Kitela- Son



- g) Rael Syowai Muema- Daughter- Married
 - h) Benard Mutuku Kitela- Son
14. Depositing further that the deceased left the following parcels of land:
- a) Kalama/muumandu/118-Measuring 7.8Ha
 - b) Kalama/muumandu/120-Measuring 1.8Ha
 - c) Kalama/muumandu/2163-Measuring 1.8Ha
 - d) Kalama/muumandu/2164-Measuring 0.4Ha
 - e) Konza North Block 1/605-Measuring 4.0Ha
 - f) Konza North Block 1/606-Measuring 4.0Ha
 - g) Plot No. 884-at Mautio-Measuring 30ft x 80ft
 - h) Plot No. 846-at Mautio-Measuring 30ft x 80ft
 - i) Plot No. 956-at Malili-Measuring 50ft x 100ft
15. He deponed that parcels of land to be shared as follows:
- A. Kalama/muumandu/118-Measuring 7.8Ha to be transferred to:
 - a. Agnes Mbula Maundu
 - b. David luilu Kitela
 - c. Festus Jackson Musyoka Kitela
 - d. Mary Nzisa Mutavi
 - e. Isaack Manza Kitela
 - f. Rael Syowai Muema
 - g. Benard Mutuku Kitela
 - B. Kalama/muumandu/120-Measuring 1.8Ha-to be transferred to Festus Jackson Musyoka Kitela
 - C. Kalama/muumandu/2163-Measuring 1.8Ha to be transferred to Festus Jackson Musyoka Kitela.
 - D. Kalama/muumandu/2164-Measuring 0.4Ha to be transferred to:
 - a. Agnes Mbula Maundu
 - b. David luilu Kitela
 - c. Festus Jackson Musyoka Kitela
 - d. Mary Nzisa Mutavi
 - e. Isaack Manza Kitela
 - f. Rael Syowai Muema
 - g. Benard Mutuku Kitela



- E. [Particulars Withheld]-Measuring 4.0Ha to be transferred to;
 - a. Agnes Mbula Maundu
 - b. David luilu Kitela
 - c. Isaack Manza Kitela
 - d. Benard Mutuku Kitela (in trust of KM Minor)
 - F. Konza North Block 1/606-Measuring 4.0Ha to be transferred to:
 - a. Mary Nzisa Mutavi
 - b. Rael Syowai Muema
 - c. Benard Mutuku Kitela
 - d. Festus Jackson Musyoka Kitela
 - G. Konza North/Konza North/55 Measuring 0.8Ha to be transferred to Victor Makau
 - H. Konza North/Konza North/55 Measuring 0.8Ha to be transferred to Denis Kitela Musyoka.
 - I. Plot No. 884-at Mautio-Measuring 30ft x 80ft to be transferred to David Luilu Kitela.
 - J. Plot No. 846-at Mautio-Measuring 30ft x 80ft to be transferred to Isaack Manza Kitela.
 - K. Plot No. 956-at Malili-Measuring 50ft x 100ft to be transferred to Benard Mutuku Kitela
16. He lamented that the said grant be confirmed pursuant to Section 71 (2) (4) Cap 160 Laws of Kenya to enable the land register to issue them with land Certificates.

Partial confirmation of grant pursuant to a mediation agreement

17. Vide a summons for confirmation of grant dated 19th January,2023 and filed in court on 20th January,2023 the Applicants sought orders that:
- a. Grant of letters of Administration Intestate made to the said Isaack Manza Kitela & Festus Jackson Musyoka Kitela in this matter on 18th November, be confirmed.
 - b. That costs of this application be costs in the cause

Supporting Affidavit

18. The application was supported by an Affidavit dated 19th January,2023, sworn by Festus Jackson Musyoka Kitela, wherein he deposed that their mother Beatrice Mutio Kitela (deceased) was issued with grant of letters of administration in their father’s estate whereby she later died on 10th January, 2015 and left the estate undistributed; and that upon the death of his Mother the Honorable court issued orders for him and his brother one Isaack Manza Kitela to substitute her as co-Administrators in the estate of the deceased. Deponing that the family could not agree on the mode of distribution of the estate hence the matter was referred to the mediation by the court; he lamented that all the beneficiaries had mediation and a report dated 16th August,2021 was issued by the Mediation Officer whereby they agreed on how to distribute some of the properties (annexed and marked copy of the mediation report) he deponed that the deceased left the following heirs/ beneficiaries surviving him:
- a. Beatrice Mutio Kitela-wife (now deceased)



- b. Rose Mbengwa Kitela- Daughter-Married
 - c. Agnes Mbula Maundu- Daughter- married
 - d. David luilu Kitela- Son
 - e. Festus Jackson Musyoka Kitela- Son
 - f. Mary Nzisa Mutavi- Daughter-married
 - g. Isaack Manza Kitela- Son
 - h. Rael Syowai Muema- Daughter- Married
 - i. Benard Mutuku Kitela- Son
19. He lamented that the deceased left the following parcels of land which are known to the Administrators.
- a. Kalama/muumandu/118-Measuring 8.5Ha
 - b. Kalama/muumandu/120-Measuring 1.16Ha
 - c. Kalama/muumandu/2163-Measuring 1.89Ha
 - d. Kalama/muumandu/2164-Measuring 0.16Ha
 - e. Konza North Block 1/605-Measuring 4.0Ha
 - f. Konza North Block 1/606-Measuring 4.0Ha
 - g. Plot No. 884-at Mautio-Measuring 30ft x 80ft
 - h. Plot No. 846-at Mautio-Measuring 30ft x 80ft
 - i. Plot No. 956-at Malili-Measuring 50ft x 100ft
20. He deposed that parcels of land be distributed as follows:
Agreed in mediation report.
- A. Kalama/muumandu/2164-Measuring 0.4Ha to be transferred to Festus Jackson Musyoka Kitela.
 - B. Plot No. 884-at Mautio-Measuring 30ft x 80ft to be transferred to David Luilu Kitela.
 - C. Plot No. 846-at Mautio-Measuring 30ft x 80ft to be transferred to
 - a. Agnes Mbula Maundu
 - b. Rael Syowai Muema
 - c. Mary Nzisa Mutavi
 - D. Konza North/ Konza North/54 Measuring 0.8Ha to be transferred to Victor Makau Manza
 - E. Konza North/ Konza North/55 Measuring 0.8Ha to be transferred to Denis Kitela Musyoka
 - F. Konza North Block 1/605-Measuring 4.0Ha to be transferred to:
 - a. Benard Mutuku Kitela- 4Acres



- b. Agnes Mbula Maundu- 2Acres
 - c. Rael Syowai Muema- 2Acres
 - d. Mary Nzisa Mutavi-2Acres
- G. Konza North Block 1/606-Measuring 4.0Ha to be transferred to
- a. Benard Mutuku Kitela- 4Acres
 - b. Paul Kyama Mutuku- 2Acres
 - c. David Luilu Kitela- 4-Acres

The Mediation Settlement Agreement was adopted as an order of the Court by Hon. G. V.Odunga J (as he the was) on 22/11/2021.

Matters not Agreed in Mediation and proposed mode of distribution

- A. Kalama/muumandu/118-Measuring 8.5Ha- to be transferred to
 - a. Isaack Manza Kitela- 4.586Ha
 - b. David Luilu Kitela-1.21Ha
 - c. Festus Jackson Musyoka Kitela- 1.21Ha
 - d. Benard Mutuku Kitela- 1.21Ha
- B. Kalama/muumandu/120-Measuring 1.8Ha to be transferred to Festus Jackson Musyoka Kitela
- C. Kalama/muumandu/2163-Measuring 1.8Ha to be transferred to Festus Jackson Musyoka Kitela
- D. Plot No. 956-at Malili-Measuring 50ft x 100ft to be transferred to Benard Mutuku Kitela and Isaack Manza Kitela in equal shares.

21. He prayed that the said grant be confirmed pursuant to Section 71 (2) (4) Cap 160 Laws of Kenya to enable the Land Registrar to issue them with Land Certificate.

Hearing

22. PW1 Isaack Manza Kitela stated the deceased in 2003 their late mother and now Co -Administrator filed Petition in 2009 and since their mother was aged and illiterate, Co Administrator sold parcels pf land without their knowledge or consents. He went to Konza Society and found property 1143 and was registered in the name of Co Administrator-Festus.
23. DW1 Festus Jackson Musyoka Kitela stated that he filed Summons for Confirmation of Grant in 2021. They proceeded for Court annexed mediation and came up with Partial distribution of the deceased's estate and other properties listed were for hearing and determination by the Court.
24. DW1 stated with regard to the properties that comprise of deceased's estate that have not been agreed upon as per the Mediation Settlement agreement to be distributed as follows;
- a. Kalam/Muumandu 2163 4.67 acres was given to him/his wife on marriage by his mother
 - b. He was given 118 which he exchanged with Isaack (Co Administrator).
 - c. Konza North 956 -Commercial Plot was to Bernard & Isaack



- d. Konza South/Konza South Block 5/1326 were initially their late mother's shares and she gave him. In 2012, he balloted and got Plot 701 and share/title 1144 & 1326 both in his names.
 - e. When Konza was divided 1st time it was 064 & 065. The 2nd time Konza was divided it was into 1143 Dad's share sold by Mom and 1144 that was given to him by their Mom
 - f. He said Plot 120 he was given by late father and Property 118 he got 5 benches from his mother. He denied he was given 120 to move out of 118. his homestead is on 2163 he has built there and planted trees.
25. He stated that he did not sell any property to 3rd parties. His mother sold shares and gave him shares. Some of the properties cited are non-existent.
26. The matter was disposed by written submissions

Submissions

Applicant's Written Submissions (in support of Summons for Confirmation of Grant)

- g. The Applicant's in his submissions dated 12th July, 2023 and filed in court on 21st July, 2023, counsel for Applicant raised the following issues for determination:
 - 1. What are the properties available for distribution to the beneficiaries?
 - 2. What is the best and most fair mode of distribution of the remainder of the estate of the deceased?
- h. On what are the properties available for distribution to the beneficiaries, counsel submitted that under the *Law of Succession Act*, the estate of a deceased person, capable of being inherited by his or her heirs, comprises his "free property" reliance was placed on Section 3 of the Act.
- i. It was submitted that some of the properties listed by the protestor are not available for distribution. Averring that the protestor filed in court certificates of official Search for properties he sought to have distributed but in all this certificates of search the title is in names of other persons other than the deceased herein. It was the counsel's contention none of this persons are even family members and they are not known to the Applicant.
- j. It was the Applicant's case that since most of this titles are registered in the names of persons that are not part of this succession Cause it would be more prudent for the protestor to file claims against this registered person on behalf of the estate before this Court or any other court with competent jurisdiction to enable registered owners to be heard. To buttress this point counsel placed credence in the case of *Re Estate of Stone Katbuli Muinde (Deceased)* [2016] eKLR, where it was observed that:

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the Magistrates court or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. if a decree is obtained in such suit in favor of the claimant then such decree should be



presented to the probate court in the succession Cause so that that court can give effect to it”

- k. Similarly, Counsel relied on the case of *Re Estate of Tumbo Lavu (Deceased)* [2019] eKLR, Kemei J held that:

“Rule 41 (3) and Rule 42 (2) of the Probate and Administration Rules, empowers the Court before confirmation of grant to remove property which is in contest from schedule of assets and have the same determined separately. If the contested property is found to be part of the estate of the Deceased, the same is restored back to schedule of assets of the Deceased’s estate available for distribution. This position was supported by the case of in *Re Estate of Francis Peter Njuguna* [2016] eKLR”

- l. It was opined by the counsel that the Parcel land known as Kalama/Muumandu/118 is registered to Festus Kitela Kioko Kithuma the applicant herein on 4th January, 2007 before the deceased passed on. The deceased himself transferred the same to the Applicant so that he may share it to other siblings when he dies. Contending that the Applicant is willing to have it distributed and has proposed mode of distribution in his supporting Affidavit.

- m. On what is the best and most fair mode of distribution of the remainder of the estate of the deceased, reliance was placed on the case of *Re Estate of John Musambayi Katumanga (Deceased)* [2014] eKLR Musyoka J stated that:

“the spirit of part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in *Sections 35 (5) and 38* is ‘equally’ as opposed to ‘equitably’. 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 regardless of the ages, gender and financial status of the children”

- n. It was submitted further that the beneficiaries have been utilizing the parcels of land that are currently available for distribution for several years and there has been changes overtime on who has been using what part of a certain piece of land. Averting that the main issue is on the four pieces of land that are available for distribution the total acreage of each piece is given in the Applicant’s supporting affidavit and confirmed by certificate of search annexed thereon.

- o. It was the position of the Applicant that in sharing the estate of the Deceased person who died intestate whereby the family has not agreed on the sharing mode the court should look at the most equitable method. Opining that the four pieces have different acreage and that they have tried to share it in a manner that four sons get an almost equal share of the land putting into consideration what they have already received previously during the mediation. Further that the daughters have been catered for in other parcels of land that were agreed on during mediation.



- p. It was contended that Kalama/Muumandu/118-Measuring 8.5Ha is the largest of the remaining four parcels in comparison the parcel Kalama/muumandu/2163-Measuring 1.8Ha is almost an eighth of it therefore they proposed that the Applicant gets the Kalama/muumandu/2163 alone as this is where the Applicant has his homestead.
- q. Counsel urged the court to confirm the grant of letters of administration issued as prayed.

The Petitioner's Submissions

- r. The Petitioner in his Submissions dated and filed in court on 10th July,2023, wherein the Petitioner submitted that both their parents called all the family in the year 1999 together with their grandchildren to give some of his Assets the grandchildren are Denis Kitela Musyoka and Victor Makau Manza.
- s. It was the Petitioner's case that their late father instructed their mother to have the share number 1144 allocated to his children as below: -
 - a. Agnes Maundu- 1 ½ Acres
 - b. Rachel Syowai- 1 ½ Acres
 - c. Mary Kitela – 1 ½ Acres
 - d. The rest of the land to Isaack Manza who also took care of Kitela's long ailing son David Luilu Kitela who had a mental challenge.
- t. It was his case that in 2012 Konza Ranching Co-operative Society share 1144 was out officially and their mother took the initiative to fulfill what their father had instructed her to do. Averring that immediately after declaration by Konza to use this land, Festus Musyoka Kitela and Benard Mutuku illegally invaded the land and started clearing trees without the authority of the four children whom the said land had been allocated to.
- u. He averred that the invaders were chased out of the land by their late mother and then told the four of them to fence the entire piece of land, cultivate 1 ½ Acre by each of the three daughters the remaining to be worked on by Isaack Kitela.
- v. It was his contention that Jackson Musyoka Kitela took a title did for No. 1326 illegally and made an attempt to sell this illegally self-allocated land after changing the ownership from Beatrice Mutio Kitela to himself. He averred that he placed a caution on land 1326 at Makueni lands office to block Musyoka Kitela from selling the land.
- w. He submitted that Musyoka reported to the area chief that he had illegally fenced, reared animals and farmed the land. The chief advised that as a family they should have a meeting accompanied by village elders to solve the dispute. Averring that a date was set for the meeting but Musyoka declined to attend on the same sitting family was served with a letter from his lawyer where Musyoka claimed he was the Administrator. The case was in court hence the family meeting was illegal.
- x. It was his contention that the family declared that Musyoka should desist from any operation in the piece of land. The Petitioner contended that Musyoka should leave the piece of land Kalama/Muumandu/2164 (1 ½ Acres) which belongs to the Petitioner/



Protestor herein and where he has currently and forcefully constructed his home. He urged further that Commercial Plot No 956 can't be shared with Mutuku's wife because they sold many plots so hence court should honor the said land to him alone.

- y. It was his submission that their brother after the demise of their father took all their father's documents and transferred them to himself and later to their mother's name without their mother's knowledge because of the old age. Averting that Commercial Plot No. 956 Transferred to the wife of their younger Benard Mutuku Kitela was done without succession and without the consent of other family members.
- z. He prayed that the said grant be confirmed and the Land Registrar to issue them with land Certificate.

Determination / Analysis

- 27. The Court considered the pleadings and proposals by parties Co Administrators on distribution of deceased's estate with regard to properties that were not agreed upon in the partial Confirmation of grant vide the Mediation Settlement Agreement dated 16/8/2021.
- 28. At the outset, this Court shall allay fears that the Petition for Letters of Administration intestate filed on 28th March 2009 that listed the beneficiaries of deceased's estate as widow, Beatrice Muto Kitela (deceased) and sons Festus M.Kitela, Bernard M.Kitela & Isaack M.Kitela and left out the deceased's daughters and ill son David Liulu Kitela was not questioned as it was before the advent of Constitution of Kenya 2010 that outlawed any discrimination based on gender, disability, marriage, age etc as stipulated under Article 27 [CoK](#) 2010 that reads thus;

- 27. Equality and freedom from discrimination

- (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). 29. In the case of [In Re Estate of Francis Andachila Luta](#) Succession cause 875 of 2012 Kakamega High Court 2022 KLR(23) Hon.W.Musyoka J stated as follows;

Let me revisit section 38 of the [Law of Succession Act](#). It provides for equal distribution of the estate amongst the children. The language of section 38 is gender neutral. It does not classify children into male and



female, nor sons and daughters, nor men and women. There is no discrimination nor differentiation nor classification nor categorization along gender lines. That would mean that sons and daughters of a dead person are entitled on equal basis to a share in the estate of their dead parent. Section 38 does not make marriage a factor in the distribution of the estate of a dead parent. Gender and marital status are factors under customary law, but not under the Law of Succession Act..... The estate is subject to the Law of Succession Act, which is blind on biases founded on gender and marital status ...

Section 38 should be read together with Article 27 of the Constitution, which outlaws discrimination of women based on gender and marital status. It declares that men and women have a right to equal treatment in all spheres of life.

30. Therefore, the earlier arrangement allocation disposal or agreement to distribute the deceased's estate to sons of the deceased without daughters and ill son; the family could not foresee the Constitutional dispensation that mandates equality to all without discrimination. Thus, the Chief's letter of 4/11/2019 now included all 9 children of the deceased and the journey to distribution of the estate begun in earnest to ALL beneficiaries in compliance with the Constitution and Law of Succession Act Section 38 and as applied by case-law.
31. Applying the legal principles to the various proposals of distribution of the estate;
32. The Mediation Agreement stipulates the following properties referred back to Court;
 - a. Konza North 956- 50x 100
 - b. Kalama Muumandu 118 -21.1 acres
 - c. Kalama Muumandu 120 -3.95 acres
 - d. Kalam Muumandu 2163 -4.67 acres
 - e. Konza 1326- 10 acres
 - f. Konza North 1279-
33. The Proposed mode of distribution by Festus Jackson Musyoka Kitela- Co Administrator;
 - a. Kalama/Muumandu/118 registered in the name of Festus may be distributed amongst all beneficiaries of deceased's estate as proposed in the Supporting Affidavit as follows;Isaack Manza Kitela- 4.586HaDavid Luilu Kitela- 1.21 HaFestus Jackson Kitela-1.21 HaBernard Mutuku Kitela- 1.21Ha
 - b. Konza South/Konza South Block 5 /1326 is said to be subject of a dispute at Environment& Land Court Makueni in a dispute between Festus & Isaack. The property is currently registered in the name of Festus Jackson Musyoka Kitela. The Court notes that no details of the case, e.g. Case Number or status/progress of the case is given to this Court.
 - c. Kalama/Muumandu 120 to be transferred to Festus J.M.Kitela



- d. Kalama/Muumandu /2163 to be transferred to Festus J.M.Kitela
 - e. Plot 956 at Malili- Bernard Mutuku Kitela & Isaack Manza Kitela.
Festus Jackson Musyoka Kitela confirmed that he is registered as owner of the following;
Konza South/Konza South Block 5/1038
34. The proposed distribution by the Co Administrator; Isaack Manza Kitela on the remaining properties that comprise of deceased's estate that parties did not agree on ;
- a. Kalama/Muumandu/118 to be distributed as proposed by Co Administrator Festus Jackson Musyoka Kitela but in his proposal he excludes Bernard Mutuku Kitela in the proposal
 - b. Kalama/Muumandu/120 to be transferred to Festus Jackson Musyoka Kitela
 - c. Kalama /Muumandu 2163 to be distributed as follows;Festus Jackson Musyoka Kitela- 1.3 ½ HaIsaack Maanza Kitela – 11/2 acres
 - d. Plot 956 at Malili 50ft by 100ft to be transferred to Isaack Manza Kitela
 - e. Konza South South Block 5/1326 transferred toAgnes Mbula Maundu – 11/2 haRachel Syowai Muema- 11/2 haMary Nzisa Mutavi - 1/1/2 haIsaack Manaza Kitela & David Luilu Kitela- 5 ½ ha
35. This Court notes that whereas the Co Administrator Isaack complains of Co Administrator Festus not advocating fair equal or equitable distribution of the estate and having accused him of disposing of estate properties, he has fallen in the same pit both Administrators are hiving off large chunks of land in their respective proposed distribution of the remaining assets that comprise of the estate of the deceased to the detriment/disadvantage of the daughters and one Bernard Mutuku Kitela.
36. At the outset, I wish to bring to the attention of beneficiaries that the widow of the deceased Beatrice Mutio Kitela from 2003 after demise of her late husband Kitela Kioko Kithuma deceased, she enjoyed life interest to the deceased's estate until her demise in 2015. So if properties were sold after the deceased's demise the enquiry would not only target Festus Jackson Musyoka Kitela but also their mother Beatrice Mutio Kitela who had a right under life interest to dispose of property for her sustenance. See-Tau Katungi vs Margrethe Thorning Katungi and another, Succession Cause No. 1040 of 1991.
37. Therefore, properties listed as sold/disposed off ; M/No 1143; Konza North/Konza North 1452/0646; KonzaNorth/Konza North 1310/0645; KonzaNorth/Konza North 1279 ought to be the subject of enquiry as to sale/disposal/use/ownership and title of land in ELC Court that holds the requisite jurisdiction to determine the issue(s)
38. Secondly, in the absence of proof of a valid written or oral Will of the deceased and/or confirmed gift inter vivos, the Court under Law of Succession ought to facilitate administration and distribution of the deceased's estate.

Disposition

39. Therefore, the proposed distribution of the remaining parcels of land/property not agreed upon doing the best in the circumstances to ensure fairness, equity and/or equality is as follows;
- a. Kalama/Muumandu/118 to be distributed as proposed amongst the sons of the deceased equally /equitably;



- i. Isaack Manza Kitela-
 - ii. David Luilu Kitela-
 - iii. Festus Jackson Kitela-
 - iv. Bernard Mutuku Kitela-
- b. Konza South/Konza South Block 5 /1326 to be distributed amongst daughters of the deceased and 2 sons equally/equitably, who will not have specific properties allocated to them; Agnes Mbula Maundu –Rachel Syowai Muema-Mary Nzisa Mutavi -David Luilu Kitela-Bernard Mutuku Kitela
 - c) Plot 956 at Malili 50ft by 100ft to be transferred to Isaack Manza Kitela
 - d) Kalama/Muumandu/120 to be transferred to Festus Jackson Musyoka Kitela
 - e) Kalama /Muumandu 2163 to be distributed as follows equally/equitably; Festus Jackson Musyoka Kitela-Isaack Maanza Kitela –
 - f) Konza South/Konza South Block 5/1038- registered in the name of Festus Jackson Musyoka Kitela, no proposal made as to distribution or claim by beneficiaries.
40. Therefore, wherever each of the beneficiaries reside and they have developed and have permanent structures and/or development farming or livestock; each shall remain on their spot and their respective share determined by Surveyor and ensuring there is access and amenities to all.
41. If any party is aggrieved or by agreement/consensus propose a more practical/ distribution in light of new developments, a party may apply within 30 days to date. Thereafter, Certificate of Confirmation of Grant of distribution of deceased's shall issue.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 18TH DAY OF JANUARY 2024. (VIRTUAL/PHYSICAL CONFERENCE)

M. W. MUIGAI

JUDGE

