



In re Estate of Muinde Mutua Muinde (Deceased) (Succession Cause 275 of 1998) [2024] KEHC 8349 (KLR) (5 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 275 OF 1998**

MW MUIGAI, J

JULY 5, 2024

IN THE MATTER OF THE ESTATE OF MUINDE MUTUA MUINDE (DECEASED)

BETWEEN

MAINGI MUINDE PETITIONER

AND

THOMAS WAMBUA MUINDE OBJECTOR

AND

VERONICA MBULA MUINDE INTERESTED PARTY

JUDGMENT

Background

1. Vide Petition received by this Court on 25th November, 1998 wherein the Petitioner Maingi Muinde petitioned the Court for a grant of Letters of Administration intestate of the estate of Muinde Mutua (deceased) who died on 6th May, 1992 domiciled in Kenya.
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. Maingi Muinde
 - B. Thomas Wambua Muinde
3. The Affidavit in Support of Petition for Letters of Administration Intestate further mentioned full inventory of all assets left by the deceased at the date of his death to be:
 - A. Muputi/kipandini/837
 - B. Muputi/kipandini/890



4. Vide the Gazette Notice dated 12th February 1999, Maingi Muinde of P.O Box 1543 Machakos in Kenya the deceased's son was gazetted for grant of Letters of Administration Intestate to the Estate of Muinde Mutua, late of Muputi Location who died at Machakos Hospital on 6th May, 1992.
5. Pursuant to Grant for Letters of Administration made on 27th April, 1999 and issued by this Court on 29th April, 1999 to Maingi Muinde as personal representative of the deceased's estate to render a just and true account thereof as required by law.
6. Application for Summons for Confirmation of Grant supported by an affidavit sworn by Maingi Muinde dated 14th February, 2000 and filed in court on 11th July, 2000, wherein the Applicant sought orders inter alia for the grant of letters of administration made and issued Maingi Muinde to be confirmed.
7. Grant for letters of Administration intestate was confirmed vide a certificate confirmation of grant dated 11th May, 2001 to the said Maingi Muinde
8. Pursuant to Chamber Summons together with a supporting affidavit dated 10th December, 2001 and filed in court on 3rd January, 2002, Maingi Muinde, the Petitioner/Applicant sought orders that inter alia orders that the Certificate of confirmation be rectified to also include Plot No. 991 (measuring 2.04 acres), situated in Katelembo Athiani Muvuti Farming and Ranching Co-operative Society Limited and Plot No. 2461 (measuring ½ acre), situated in Katelembo Athiani Muvuti Farming and Ranching Co-operative Society Limited.
9. The Petitioner in the said application grounded his application on the basis that he was at the time of filing the Petition herein and obtaining the grants and certificate of confirmation thereof, not aware of the existence and particulars of the deceased's above-mentioned properties.

Summons For Revocation Of Grant

10. 20/7/2002, the Applicant, Thomas Wambua Muinde sought annulment or revocation of grant granted to Maingi Muinde who did not consult other beneficiaries of the deceased and obtain consents to making of grant and confirmation of grant and therefore ALL properties were allocated to Maingi Muinde.

Thomas Wambua Muinde took issue with the following issues with regard to the administration and distribution of the estate;

- a. Syoluu Muli is a beneficiary of the deceased Muinde Mutua, widow of deceased's late son who died earlier and was left out as one of the beneficiaries.
- b. He alleged he bought Muputi/Kipandini/890 from the deceased and resides there and this property is/was not part of the estate available for distribution.
- c. He alleged that he also bought Muputi/Kipandini/837 from 3rd Parties and consolidated with other properties of the deceased for adjudication purposes. Maingi Muinde, Mbula Muinde & Syoluu Muli resided/reside on this property.
- d. The Applicant used Muputi/Kipandini/568 for agricultural purposes; planted coffee trees.
- e. Other properties were alleged to have been sold by Maingi Muinde under the confirmed grant and rectification of grant are Plot 991 (2.04 acres) sold to Beatrice Wanjiku Muiruri & Plot No 2461 (0.5 acre) both on Katelembo Athiani Muvuti farming & Ranching Co-operative Society.



- f. The said Grant confirmed on 13/11/2000 had the following properties as assets of the deceased's estate;
- i. Muputi/Kipandani/837 21.5 Ha
 - ii. Muputi/Kipandani/890 2.8 Ha
 - iii. Muputi/Kipandani/568 0.18 Ha

Which were confirmed as beneficial interest of the Respondent Maingi Muinde to the exclusion of other beneficiaries of the estate.

11. The Respondent vide Replying Affidavit of 16/9/2002 stated that they were only 2 beneficiaries; him and the Objector/Applicant, Syoluu Muli was/is not daughter-in-law of the deceased and that the Applicant did not purchase any property from their father the deceased. The daughters of the deceased are/were married.
12. The Respondent applied to the Court that the matter be referred to the Clan for disposition.

Court Order

13. This Court vide its order dated 6/5/2005 issued by Hon. R. Wendoh LJ referred the matter to District Chairman Atui clan to identify the beneficiaries of the deceased's estate and extent of their shares and file a report within 90 days from today's date.
14. On 13th May, 2002 the Court issued a letter to Chief Muvute Location requiring the said party to attend court and show cause why he had not written a letter listing the heirs and beneficiaries of the estate of the deceased Muinde Mutua Muinde.

The Atui Clan Report

15. Vide a report dated 2nd August, 2005, it was reported that the clan committee sitting on 20th July, 2005 was given the undermentioned as the properties of Mr. Muinde Mutua (Deceased):

Muputi/Kivandini Plot No. 837

Plot No. 568

Maanzoni Plot No.

Commercial Plot No.

Ikiwe Plot No.

Katelembo 4 shares 2 ¼ Acre & ½ acre Kyeni Kya Kangundo 1 share.

16. The said report indicated that the committee was made to understand that the only beneficiaries were:

James Maingi Muinde

Thomas Wambua Muinde

That this was supported by the following letters attached to the report:

Assistant Chief Muputi Sub-location dated 15/10/1998

Assistant Chief Muputi Sub-location dated 12/10/1998

Clan Chairman- Kiima Kimwe sub- location dated 17/6/2002



17. By letter of 2/8/2005, to Court through Deputy Registrar, the meeting(s) did not take off as the Applicant refused to participate alleging the Clan members were not registered anywhere by the Government and were rogues.

Grant Issued On 24th September, 2009

18. This Court through Hon. I. Lenaola J on 24/9/2009 issued fresh Grant of Letters of Administration intestate to THOMAS MUINDE and Maingi Muinde as personal representatives of the deceased's estate.

Affidavit Of Distribution Of Estate Of The Deceased

19. Vide the aforementioned affidavit dated 10th December, 2009 sworn by Thomas Wambua Muinde, wherein he deposed that the Deceased was survived by the following:
- a. Maingi Muinde - son
 - b. Syoluu Muli- daughter- in law
 - c. Nzula Muinde- daughter married
 - d. Mbula Muinde- daughter unmarried
 - e. Thomas Wambua- son
20. He proposed the deceased estate be distributed as follows:
- a. Land Parcel No. Muputi/Kipandini/837 measuring 21.5 HA to be registered under both names of Maingi Muinde and Thomas Muinde, and Syoluu Muli to hold for themselves and on behalf of all beneficiaries.
 - b. Land Parcel No. Muputi/Kipandini/890 measuring 2.8 HA to be registered under the names of Thomas Wambua Muinde.
 - c. Land Parcel No. Muputi/Kipandini/568 measuring (0.18 HA) to be registered under the names of Thomas Wambua Muinde and James Maingi Muinde .
21. Depositing that he has discovered the following assets have also been sold without involving all the beneficiaries, Plot Nos. 991,2461 all situate at Katelembo Society Ltd and portion of 837 situate at Muputi he requests the Honorable Court to call for accounts of the assets and this be factored in the distribution.

Summons For Confirmation Of Grant.

22. Vide the Summons for Confirmation of Grant dated and filed in court on 14th December, 2009 brought under Sections 71 (1) of the *Law of Succession Act* and Rules 40 (1) and 73 of the Probate and Administration Rules, wherein the Petitioner Maingi Muinde sought inter alia orders that:
- a. The Grant of Letters Administration Intestate made to Maingi Muinde on 24th September, 2009 be confirmed.

Affidavit in Support of Summons for Confirmation of Grant of Administration Intestate.

23. In the aforementioned affidavit filed in court on 14th December, 2009 Maingi Muinde , the Petitioner/ Applicant herein deposed that the grant was made to both himself and his younger brother, THOMAS



WAMBUA MUINDE by this Honorable Court on 24/9/2009. Deposing that the deceased is survived by the following:

- a. Maingi Muinde - son
 - b. Nzula Muinde- daughter
 - c. Mbula Muinde- daughter
 - d. Thomas Wambua Muinde- son
24. It was deponed that the deceased's above named daughters, Nzula and Mbula are married and therefore not entitled to share the deceased's estate. It was his deposition that Mbula whom Thomas Wambua Muinde shows as unmarried in his affidavit on distribution sworn on 10/12/2009 is duly married under the Kamba customary law to one Kavoo Mulandi (now deceased) of Kimutwa Location in Machakos. That indeed; Mbula's land is lying idle in Kimutwa.
25. He deponed that Syoluu whom Thomas Wambua alleges in his affidavit sworn on 10/12/2009 to be the deceased's daughter in-law is indeed, Thomas Wambua Muinde's sister-in-law who has lived in Thomas Muinde's house for a long time as an employee. Lamenting that the said Syoluu is a sister to Thomas Wambua Muinde's second wife known as Kaluki (now deceased),
26. Further that Muli Muinde (deceased) who is alleged by Thomas Wambua Muinde to have been the husband of Syoluu, died a bachelor in or about 1980's. Muli Muinde (deceased) never married and never had a family and evidence shall be tendered in that regard.
27. Deposing that there are only two (2) beneficiaries of the deceased's estate and those are:
- a. Maingi Muinde
 - b. Thomas Wambua Muinde
28. That the deceased left behind the following properties:
- a. Muputi/Kipandini/837 (21.5 Hectares).
 - b. Muputi/Kipandini/890 (2.8 Hectares).
 - c. Muputi/Kipandini/568 (0.18 Hectares)
29. He deponed further that these properties ought to be shared out between himself and Thomas Wambua Muinde and according to the deceased's express wishes.
30. That the deceased also left behind Plot Numbers 991 (2.04 acres) and 2461 (1/2 acre), both situated in Katelembo Athiani Muvuti Farming & Ranching Co-operative Society Limited. Opining that these two (2) properties were given to him as gifts by the deceased before his death and he has since sold the same and that evidence shall be tendered in that regard. Stating that issues relating to distribution of the deceased's estate have severally been handled and resolved by the deceased's clan and evidence shall be tendered in that regard.

Affidavits Of Protest To Confirmation Of Grant

31. The Protestor, herein filed Protest on 29/10/2012 and sought to be included as beneficiaries of the estate as daughters of the deceased. Vide affidavit of protest dated sworn by Veronicah Mbula Muinde, wherein she deposed that the deceased in this matter is her father and she is entitled to the estate as a daughter to the deceased together with Nzula Muinde.



32. Deposing that the Petitioners excluded them simply because they are women. Further, the deponent deposed that she lives in the home of her late father and she is not married at all. She deposed that she ranks equally on priority with the Petitioner.
33. Vide affidavit of protest dated and filed in court on 22nd February, 2016 sworn by Milicah Nzula Muinde, wherein, she deposed that her father died intestate on the 6/5/1992 and left behind the following beneficiaries:
- a. James Maingi Muinde - son
 - b. Peter Muli Muinde- son
 - c. Milicah Nzula Muinde- daughter
 - d. Thomas Wambua Muinde- son
 - e. Veronicah Mbula Muinde- daughter and that her father left behind the following properties.
 - i. Muputi/Kipandini/837
 - ii. Muputi/Kipandini/890
 - iii. Muputi/Kipandini/568
34. She deposed further that her brothers have since filed a succession cause at Machakos being Machakos High Court Succession Cause Number 275 of 1998 and have omitted her name from the list of beneficiaries for the reason that she is a woman.
35. She deposed that she is entitled to a share of her father's estate and she rank equally in priority as her brothers and she is entitled to a share of the estate. She protested to the grant being confirmed.

Hearing

36. On 2/11/2023, PW1 was Veronicah Mbula Muinde and she relied on her Affidavit as her evidence. She testified that Muinde Mutua Muinde was her father and as one of the beneficiaries she is entitled to inherit the land and she is not married. PW1 told Court that Milicah her sister died and left 1 child with five (5) grandchildren and they live with in Kasere. PW1 lives in her father's land. She does not know the property of her father's number.
37. In cross-examination, she told court that before her father died he did not give Maingi any land. It was her testimony that she was married but she came back before her father died and her brother Thomas and Veronica were her siblings but she came back before the siblings died.
38. Testifying that her father died and she cannot recall the date but she was cultivating her father's land. It was her testimony that it was a long time ago she cannot recall when she was married and she came back in 1982 to her father's land. She further told Court that Maingi was using the land that he was given by her father and she was also using the land.
39. PW1 claimed that she was not married in the area and if she was away during marriage she would not have known but, the land he was given he was to plant tomatoes. He was given land to plant coffee. That PW1 and Peter Muli's wife were given the coffee land and when their father died the clan manager gave them the land not her father. She testified that they were given land to cultivate by Manager who was not a family member but a Manager. It was PW1's testimony that when coffee was planted she was there. That the children of Peter Muli are adults and have not authorized her to speak/ represent



- their claim on their behalf. PW1 has not brought any claim/Chief's letter to inform the Court that Peter had children.
40. PW1 is not aware of a record that the deceased indicated who and where the land was to be allocated. According to PW1 there was no record/book to that effect. She testified that Thomas Wambua is her brother and she was not aware that the box where her father kept the books are with Maingi Muinde . PW1's father did not tell her to look after the land According to PW1, her father gave her the shamba Kiiwe and the 3 sons and her child and Maingi was there and Maingi planted Sisal.
 41. In re-examination, PW1 did not know of any record/book of his father on the distribution of the estate. PW1's father gave each one of them a portion of land to live and work on. That on 18/12/2003 she was not in court during these proceedings. Testifying that her father died in 1992 and she was at home when her father died.
 42. On 30/5/2023; PW 2 (Petitioner) was Maingi Muinde Mutua. He testified that he is the Applicant in the summons for confirmation of 14/12/2009 and he is the one who swore the supporting affidavit. PW2 adopted the statement further wished to rely on the evidence on record. And that what he said in record on the affidavit in reply to the summons for revocation and affidavit of 14/12/2022 is what he will rely on.
 43. In cross-examination, he testified that Muinde Mutua is their father, Veronicah is his sister and his brother Thomas is deceased and his house/ family is there. That Mbula Muinde is his sister and she is alive. That Nzula Muinde is his sister, she died and she had her home, two (2) children two (2) sons. Testifying that Syoluu Muli was an employee of Thomas his brother and that Muli is his brother and is deceased he did not have a wife. PW2 told court that Syoluu Muli and sister left their home. It was his testimony that his father had the following properties:
 - a. Muputi/Kipandini/ 837 21 Hectares
 - b. Muputi/Kipandini/890 2.8 Hectares
 - c. Muputi/Kipandini/568 0.18 Hectares
 - d. Plot 991- 2.04 acres (Katelembo Athiani)
 - e. Plot 2461- ½ acre (Katelembo Athiani)
 44. He testified further that the affidavit of distribution of the estate of 10/12/2009 included the 5 properties 2 plots and the 3 properties and the proposed mode of distribution. Testifying that this is an affidavit by Thomas Wambua Muinde and not PW2's. It was his testimony that they had 3 properties and 2 plots and he has done the distribution by their parents and he does not want the properties to be distributed again and they cannot change.
 45. PW2 testified that he wants the court to show the protester where they are and that they have sold much of the properties. Testifying that at paragraph 12 he had indicated that he sold the two (2) plots. That they have had cases since 1997 to decide those who are mentioned should not get anything and that Peter Muli died without wife and children.
 46. In re-examination, he told court that his father and mother divided property as follows, Thomas got his share and it was by will/agreement and they are not to consider the same. That Thomas was given 890 property. PW2 was given the property according to where he built.
 47. The matter was canvassed by way of submissions



Submissions

The Interested Party's / Protestor's Submissions

48. The Protestor vide her submissions dated and filed in court on 7th November, 2023, wherein counsel for the protestor/ interested party raised the following issues for determination.
 - a. Whether the protestor together with her sister are entitled to inherit from the estate of the deceased.
 - b. Whether the summons for confirmation should be confirmed as it is.
 - c. Who should bear the cost of this application.
49. On whether the protestors are entitled to inherit from the estate of the deceased, counsel submitted that the crux of the Interested Party's case is that the petitioner herein left her and her sister out of the proposed distribution for the reason that they are daughters and are married and therefore are not entitled to inherit.
50. Counsel opined that the Law of Succession Act does not discriminate against children of the deceased intestate on the basis of gender. Counsel placed reliance on Section 3 (2) of Law of Succession Act (LSA) to buttress this position.
51. Further, counsel relied on Section 29 of LSA on the meaning of dependant and submitted that the above provisions specifically provide that for the purposes of operation of the act a female child is considered as child of the deceased for all intent and purposes.
52. Section 35 and 38 of LSA was also relied on by counsel and contended that Section 38 provides for equal distribution of the estate of the deceased person among the children.
53. It was the Interested Party's case that Section 38 is gender neutral as it does not classify children into female and male nor sons and daughters nor men and women. Meaning that sons and daughters of a deceased person are entitled on equal basis to a share in the estate of their dead parent.
54. Further it was argued that Section 38 does not make marriage a factor in the distribution of the estate of a dead parent. Contending that Section 38 should be read together with Article 27 of the Constitution which outlaws discrimination of women based on gender and marital status and that men and women have a right to equal treatment in all spheres of life.
55. Counsel placed credence on the following cases Re Estate of Solomon Ngatia Kariuki (deceased) [2008] eKLR, Re Estate of John Musambayi Katumanga (deceased) [2014] eKLR, Mary Wangari Kihika Vs John Gichuhi Kinuthia & 2 others [2015] eKLR and Peter Karumbi Keingati & 4 Others Vs Dr Ann Nyokabi Nguithi [2014] eKLR, and submitted that the courts has found it necessary to emphasize on the importance of upholding constitutional principles and the provisions of the Law of Succession Act by declaring that all children of the deceased including daughters who are married are entitled to inherit.
56. On whether the summons for confirmation should be confirmed as it is, it was the counsel's submission that the discretion to confirm grants is provided for under Section 71 of LSA and that the court confirms the administrators of the estate, if they were properly appointed and had properly administered the estate and would properly administer the estate thereafter the court also confirms the distribution proposed, or orders distribution in accordance with the law.



57. Counsel contended that the proviso to section 71 (2) of LSA as read with Rule 40 (4) of the Probate and Administration Rules, is explicit that court should approach the process of confirmation with some degree of caution, for it has to be satisfied that the administrator applying for confirmation of the grant has properly ascertained the persons who are beneficially entitled to a share in the estate, and has also ascertained their respective shares. Submitting that the two provisions create a duty for the administrator to satisfy the court of such ascertainment.
58. To bolster the above position counsel placed credence in Section 71 (2) rule 40 (4) of the Probate and administration rules.
59. In light of the above, counsel invoked the inherent powers of this court granted under Article 159 of *the Constitution* and Section 76 of the LSA and make the order to revoke the Letters of Grant of Administration issued to the Petitioner and Subsequent summons for confirmation of grant be dismissed as the said grant was obtained fraudulently by making false statement or by the concealment from court of something material regarding the beneficiaries of the deceased estate.
60. Regarding who should bear the costs of this application, counsel placed reliance in the case of Joseph Anode Vs Kenya Redcross Society, Nairobi HC Civ No. 66 of 2009 (2012) and the Judicial Hits on Civil Procedure, 2nd Ed. (Nairobi: Law Africa 2011), to buttress the point on costs.

Petitioner's Submissions

61. The Petitioner in his submission dated 18th January,2024 and filed in court on 8th February,2024, wherein counsel for the Petitioner submitted that the penultimate function of this Honorable Court sitting as a succession court is distribution of the estate of the deceased. Reliance was made on Sections 47 LSA read with Rule 73 of the Probate and Administration Rules and submitted that court has such powers to consider any application and make any orders for the ends of justice to be met.
62. Counsel relied on the case of Re Estate of Gitere Kahura (Deceased) [2020] eKLR to buttress his argument.
63. It was the counsel's submission that from the Testimony of PW1 it came out at cross-examination that she was indeed married and went back to her father's land in 1982, however PW1, although denying the existence of any records wherein the deceased distributed his estate, confirmed that in her lifetime, the deceased put various beneficiaries, particularly the petitioner herein in occupation and use of various parts and/or parcels of his estate that she too confirmed to have been in use and occupation of a portion of the deceased's estate
64. It was contended that neither of the objectors herein; either through their respective affidavits or oral testimony provided any proposal on distribution of the estate herein save for stating their entitlement to a portion thereof.
65. It was the Petitioner's case that the parties herein are siblings are all beneficiaries of the estate of the deceased herein as captured under Section 29 as read with Section 39 of LSA, notwithstanding what parties maintain on their respective documents, at the hearing hereof it came out quite clearly that the situation as it presents itself on the ground is considerably different.
66. Counsel held the considered view that the facts and circumstances before the court are deserving of more pragmatic approach to their determination so as not only to realize the ends of justice, but further to maintain the sanctity and/or the harmony of the family unit post determination by this Honorable Court.



67. Counsel invited the court to invoke its discretion and powers supplied by Rule 73 and direct that a fresh summons for confirmation of grant be filed taking into account the interests of all beneficiaries and their defined entitlement to estate of the deceased as such directions and/or orders commend themselves as being most appropriate for the ends of justice to be met.

Determination/analysis

68. This Court considered the pleadings, proceedings and submissions filed by parties regarding the estate of the deceased culminating with the Summons for Confirmation filed on 14/12/2009 by Muindi Mutua and the Affidavit of distribution filed by 10/12/2009 by Thomas Wambua Muinde, the Protests by Veronicah Mbula Muinde and Milicah Nzula Muinde.

69. The long-protracted issue that is for determination is how should the estate of the deceased Muinde Mutua be distributed?

LAW

The *Law of Succession Act* Cap 160 Preamble provides that the Act; consolidates the law relating to intestate and testamentary succession and the administration of estates of deceased persons;

70. The Court's mandate is to administer and distribute the deceased's estate.

Before *the Constitution* 2010, the distribution of estates was by Law of Succession provisions. With ushering the new Constitution all laws in force before *the Constitution* if not repealed or amended were/ are to be interpreted and applied in line with the values and principles of *the Constitution* as provided by Schedule 6 Article 7 prescribes that existing laws [as at 2010] shall be construed as follows;

1. All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution

Article 27 of *the Constitution*

- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

Therefore, applying Section 51 of *Law of Succession Act*;

- (g) in cases of total or partial intestacy, the names and addresses of ALL surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

- (h) a full inventory of all the assets and liabilities of the deceased;

Proviso to Section 71 of *Law of Succession Act*;

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares

Section 55 LSA provides;

No distribution of capital before confirmation of grant



- (1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.

Section 42 of LSA on inter vivos gift

42. Where-(a) An intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate. That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house.
71. On the mode of distribution, despite the 1st Administrator Maingi Muinde ; claimed that he distributed the estate based on what the deceased stated as his express wishes and the deceased wrote Agreement/ Note. The same was not produced in this Court, in the absence of a valid Will and Petition for Grant of Probate filed by Executor, this Court finds the estate intestate and shall be distributed in terms of Section 71 LSA.
72. With regard to the alleged claim by 2nd Administrator, Thomas Wambua Muinde that he purchased properties from his late father the deceased properties; Muputi/Kipandini/890 and Muputi/ Kipandini/837 is not borne out by evidence on record. If there was a sale and the issue is contested then it ought to be canvassed before ELC. In the absence of any evidence direct or indirect evidence on the alleged sale I find the said properties are part of the deceased's estate available for distribution amongst the beneficiaries.
73. Applying the above provisions of law; the contention of who are beneficiaries of the estate of the deceased; the Court record confirms pre-2010, the 1st Administrator had noted only the sons of the deceased.
74. It is appreciated that at the time *the Constitution* 2010 had not been passed and therefore the issue of including All children did not arise or was not complied with, but post-2010 there was/is a new mind-shift that all law shall be construed in tandem with *the Constitution* that permeates equality between and among the persons before the law.
75. Therefore, post 2010, ALL the children of the deceased had/have now to be included. Article 27 of *the Constitution* on equality and freedom from discrimination is read together with Section 38 of *Law of Succession Act* that requires where the deceased died intestate and has left surviving children and there is no spouse, the estate of the deceased to be distributed equally amongst the children.
76. In Re Estate of John Musambayi Katumanga – (deceased) [2014] eKLR Hon. W. Musyoka J stated as follows;
 - (27) 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.
77. Veronicah Mbula Muinde and Milicah Nzula Muinde are children and daughters of Muinde Mutua Muinde deceased herein and while the matter has delayed in Court due to a stalemate and deadlock by family members as of now the applicable law is Section 38 of LSA but read in light of Art 27 CoK 2010.



78. In the case of Peter Karumbi Keingati & 4 Others vs. Dr. Ann Nyokabi Nguthi & 3 others C.A. 235 of 2014 (2014) eKLR Mwilu, Kiage & M’Inoti JJA stated as follows:

“As regards 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 of 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 be 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 courts would 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.”

Distribution Of The Estate

79. On the issue of beneficiaries now that the law prescribes ALL children and in this case there is no surviving spouse; the children of the deceased are;

- i. James Maingi Muinde - son
- ii. Peter Muli Muinde- son- (pre -deceased deceased)
- iii. Milicah Nzula Muinde- daughter (deceased)
- iv. Thomas Wambua Muinde- son (deceased)
- v. Veronicah Mbula Muinde- daughter

80. The Objector Administrator Thomas Wambua Muinde included Syoluu Muli as daughter in law – widow of Peter Muli Muinde. On the other hand Petitioner Maingi Muinde excluded Peter Muli Muinde who died before their father the deceased and Syoluu was not his wife/widow as he died without a family. Veronica and Milica make no reference to Syoluu except for their late brother Peter Muli Muinde.

81. These are contested facts as to whether Peter Muli Muinde had a wife now widow and/or family. In the pleadings save for name mentioned by Thomas, Syoluu as widow of Peter Muinde if true has not filed any document/Affidavit to that effect or proof of her being widow to Peter Muli Muinde. In the absence of any such evidence adduced or pleadings filed I have to exclude her from the List of beneficiaries.

82. As regards the assets that comprise the estate of the deceased; it is alleged by Thomas Wambua Muinde that the Petitioner Maingi Muinde sold without knowledge and consent of other siblings;

- i. Plot 991- 2.04 acres (Katelembo Athiani)
- ii. Plot 2461- ½ acre (Katelembo Athiani) and part of Muputi/Kipandini/ 837 21 Hectares
What remains available for distribution is/are
 - a. Part of Muputi/Kipandini/ 837 21 Hectares



- b. Muputi/Kipandini/890 2.8 Hectares
 - c. Muputi/Kipandini/568 0.18 Hectares
83. The Petitioner alleged the 2 properties he sold were gifts inter vivos the deceased bequeathed him and he sold them. If that be true, why did he not inform and obtain consents from other beneficiaries when he obtained and confirmed the grant that was revoked? Secondly, gifts inter vivos are taken into account and factored in during distribution and included in the share of the Petitioner as prescribed by Section 42 LSA.
84. This Court takes into account that this matter has been in Court since 1998, 26 years now, a lot of events have happened that directly affect the status, size and properties available to the Beneficiaries. This Court has gone through the record, and efforts to resolve the matter out of Court through negotiations with the Clan dismally failed. Looking at the various affidavits there are divergent views strongly held and defended by each beneficiary and of course over the years the family of the deceased Muinde Mutua has grown in leaps and bounds and the family members are mostly settled on the properties and siblings have erected permanent structures, developed the properties and/or engaged in extensive farming. All these factors will affect the distribution of the estate as at now.
85. In the absence of agreement between the parties on the mode of distribution of the estate, the law requires that the estate of the deceased be distributed equally but the reality on the ground is that it will be almost impossible to do so with mathematical precision.
86. The Court is invited to invoke its discretion and powers under Rule 73 and direct that Fresh Summons for confirmation of grant be filed taking into account the interests of all beneficiaries and their defined entitlement to estate of the deceased as such directions and/or orders commend themselves as being most appropriate for the ends of justice to be met.
87. Whereas the Law now provides for Alternative Dispute Resolutions (ADR) and Alternative Justice Systems (AJS) to be employed by virtue of Article 159 of *the Constitution*, this matter has been in Court over the years, some of the beneficiaries are now deceased, Thomas died, Peter died, it is only Maingi Mutua Nzula and Mbula Muinde that are alive and well of the children of the deceased. The conduct of Maingi Mutua with regard to the estate is questionable as he already disposed of some assets part of the deceased's estate without knowledge and/or consent of other beneficiaries.
88. Therefore, the justice of the case demands that the matter comes to a close and doing the best possible to share the estate fairly, equitably and/or equally and taking into account where each sibling resides, on the properties or has a family, cultivates and/or develops which should not be interfered with; the distribution is as follows;
- a. Muputi/Kipandini/837- 21.5 Ha be shared excluding the sold portion by Maingi Mutua and that part be taken as part of his share; be distributed amongst the 5 children of the deceased namely;Maingi MuindePeter Muli Muinde -deceased – if any family left behindNzula MuindeMbula MuindeThomas Wambua-deceased – his family
 - b. Muputi/Kipandani /890- 2.8 Ha Thomas Wambua Muinde
 - c. Muputi Kipandani /568- 0.18 Ha Maingi Muinde & Thomas Wambua Muinde.
 - d. Each party to bear own Costs

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 5/7/2024 (VIRTUAL/PHYSICAL CONFERENCE).



M.W. MUIGAI

JUDGE

In the presence of:

Mr. Mutava For The Protestor – Present

Mr. Mundia For The Petitioner – Present

Geoffrey/patrick – Court Assistant(s)

