



REPUBLIC OF KENYA



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**In re Estate of Patrick Lemeiruko Ole Marangura (Deceased) (Probate & Administration
1450 of 1991) [2024] KEHC 12028 (KLR) (Family) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
PROBATE & ADMINISTRATION 1450 OF 1991
MA ODERO, J
OCTOBER 4, 2024
IN THE MATTER OF THE ESTATE OF PATRICK
LEMEIRUKO OLE MARANGURA (DECEASED)**

JUDGMENT

1. Before this Court are two applications for determination as follows;-
 - (i) Summons for revocation of Grant dated 8th May 2017 filed by Priscilla Naserian Marangura (the 1st Objector). The application seeks the revocation of the Grant of letters of Administration Intestate made to Samuel Keloï Lemeiruko (the Respondent/Administrator) on the following grounds;-
 1. The grant was obtained by concealment and deliberate non-disclosure of pertinent and material facts from this Honourable Court;
 2. In utter abuse of the Letters made by this Honourable Court, the person to whom the Grant was made has failed and/or neglected to proceed with fair administration of the Estate in manifest effort to deprive the beneficiaries of their estate.
 3. At all material times, the person to whom the Grant was made failed to disclose that he was a Trustee of the other Beneficiaries and has continued to be in breach of that trust.
 4. There has been a manifest and obvious abuse of this Court's process.
 - (ii) Summons for Revocation or Annulment of Grant dated 3rd November 2017 – filed by Issac Mande Lemeiruko (the 2nd Objector) seeking to revoke the Grant of letters of Administration Intestate made to Samuel Keloï Lemeiruko on 10th March 1992. The summons is premised upon the following grounds.
 1. The grant was obtained by concealment of material facts to the cause having failed to provide an exhaustive list of all beneficiaries.



2. The information on the strength of which the grant was issued was misrepresentative since the person to whom the grant was made is construed as a sole beneficiary.
 3. Despite the grant being made, the person has failed to diligently administer and equitably distribute the estate among the beneficiaries who are all adults.
 4. The beneficiaries are apprehensive that they might be deprived of their share of the estate should the grant remain operative.
2. The Respondent opposed both applications through the Replying Affidavit dated 10th July 2017 and the Supplementary Affidavit dated 14th December 2021.
 3. The court directed that the two applications be heard and determined together by way of Vive Voce evidence.

Background

4. This Succession Cause relates to the estate of the late Patrick Lemeiruko Ole Marangura (hereinafter 'the Deceased') who passed away in Kajiado County on 12th November 1988. A copy of the Death Certificate Serial Number 1998 99 is annexed to the Petition for Grant of Letters of Administration Intestate dated 1st November 1991.
5. In that Petition the Petitioner (the Respondent herein) indicated that the Deceased was survived by the following persons;-
 - (a) Annah Siano Lemeiruko - Wife
 - (b) Esther Wambui Marangura - Wife
 - (c) Samuel Kelo Lemeiruko - Son
6. The assets left behind by the Deceased were indicated as
 - (a) Kajiado Lololoitikoshi/Kitengela/1730
 - (b) Kajiado/Ololoitikoshi/Kitengela/1729
7. Following the demise of the Deceased Grant of Letters of Administration Intestate was made to the Respondent on 10th March 1992. A certificate of confirmed Grant was then issued on 30th September 1993 which certificate indicated that the entire estate was to devolve to the Administrator.
8. The Objectors then filed the applications dated 8th May 2017 and 3rd November 2017 seeking to have the Grant issued to the Respondent revoked on grounds that the same was obtained fraudulently and by concealment of material facts.

The Evidence

9. The Objectors called five (5) witnesses in support of their case namely;-
 - (a) Priscilla Naserian Marangura – daughter to Deceased – 1st Objector.
 - (b) Nancy Peresian - a daughter to the one Betty Siparo Lemeiruko who was a daughter of the Deceased. Thus PW2 is a granddaughter to the Deceased and was claiming her late mothers share of the estate.
 - (c) Issac Mande Leimeiruko - a son to the Deceased – 2nd Objector.



- (d) Teresia Nana Lemeiruko - a daughter to the Deceased
 - (e) Elizabeth Merti Lemeiruko - a daughter to the Deceased.
10. On his part the Respondent called two (2) witnesses namely himself and Esther Ntiiya a daughter of the Deceased.
11. The 1st Objector Priscilla Naserian Marangura told the court that she is a daughter of the Deceased from the 2nd House whilst the 2nd Objector Issac Lemeiruko Marangura stated that he was a son of the Deceased from the 3rd House.
12. The Objectors told the court that contrary to the averments made by the Respondent in the Affidavit in support of his Petition for Grant of letters of Administration Intestate the Deceased was a polygamous man who was survived by three widows namely
- (i) Lois Nkaura Ene Lemeiruko - 1st wife
 - (ii) Annah Siano Lemeiruko - 2nd Wife
 - (iii) Esther Wambui Lemeiruko - 3rd Wife
13. That in fact the Deceased was survived by several children as follows;-
- 1. 1st House
 - i. Kinaiya - Deceased
 - ii. Mututua - Deceased
 - iii. Parsaloi
 - iv. Ntinina - Deceased
 - v. Esther Ndiya Marangura (Ntiiya)
 - vi. Kishayo - Deceased
 - vii. Resiato
 - 2. 2nd House
 - i. Betty Siparo Lemeiruko - Deceased
 - ii. Priscilla Naserian Marangura
 - iii. Elizabeth Ndeati Lemeiruko
 - iv. Samuel Keloi
 - 3. 3rd House
 - i. Samuel Munei - Deceased
 - ii. Teresiah Naana Lemeiruko
 - iii. Issac Mande Lemeiruko
 - iv. Jasan Kimani
 - v. Sitegua



- vi. Katiil
- vii. Saitoti
- viii. Lemarron

14. The Objectors fault the Respondent for failing to include the names of all the wives and all the children of the Deceased in his Petition. They state that the Respondent moved to file Succession proceedings in respect of the estate of their late father without consulting and/or including them.
15. That further the Respondent obtained the certificate of Confirmed Grant by misleading the Court into believing that every person having an equal and/or prior right to Grant of Representation had consented to the mode of distribution of the estate.
16. The Objectors and their witnesses complain that following confirmation of the Grant illegally obtained, the Respondent has since laid claim and seized the three parcels of land being- Ngona/Ngong/441- Kajiado Olootitikishi/Kitengela/1729- Kajiado/Ololitikoshi/Kitengela/1730 to the detriment of the other genuine beneficiaries to the estate. That if anything the Respondent can only hold the said parcels of land as trustees for the other beneficiaries of the estate. The Objectors seek to have the Grant issued to the Respondent revoked and that a fresh Grant be issued which includes all the beneficiaries of the estate. They also pray that all the beneficiaries be included in the distribution of the estate.
17. As stated earlier the two applications were opposed. The Respondent confirms that the Deceased who was his father was a polygamous man who was survived by three (3) wives and several children. He states that some of the daughters of the Deceased namely Ntiyyia, Keshayo, Resciato and Teresia Naana were married and had their own homes.
18. The Respondent told the Court that prior to his demise the Deceased owned one large parcel of land being Kajiado/Kitengela/75. That the Deceased set in motion the process to sub-divide this parcel of land into two portions Kajiado/Kitengela/1729 and Kajiado/Kitengela 1730 but that unfortunately the Deceased passed away before the subdivision was completed and new Titles issued.
19. The Respondent further averred that the Deceased divided his property in accordance with Maasai tradition gifting the Respondent Plot 1730 whilst Plot 1729 was to go to the third wife Esther Wambui and her son Samuel Munei to hold in trust for the beneficiaries in the 3rd House. The Respondents further claimed that the parcel of land known as Ngong/Ngong/441 was also gifted to him by the Deceased. That the said Plot 441 was registered jointly to himself and his mother Annah in the year 1979 which was before the Deceased had passed away and as such this Plot 441 does not form part of the estate of the Deceased.
20. The Respondent denies having commenced the succession cause without consulting and/or involving the other beneficiaries to the estate. He claims that a family meeting was held at which it was agreed that the petition for letters of administration, be applied for.
21. The Respondent concedes that he only named himself and the widows of the Deceased in the petition for Grant because each widow represented her children. The Respondent believes that these applications for revocation of Grant coming several years after the Grant had been confirmed are merely motivated by the compensation being offered to land owners by the National Land Commission for parcels of land taken over by the Government in order to facilitate construction of the SGR.
22. The Respondent further denies having failed to diligently administer the estate. He claims that he has not effected registration of Kajiado/Kitengela/1729 as there is an ongoing dispute with the neighbours



in respect of 70 acres of that parcel of land. The Respondent states that he is willing to surrender the SGR compensation which touches on Plot 1729.

23. Finally the Respondent submits the estate of the Deceased was administered under the repealed *law of Succession Act* No. 21 of 1990 and the old constitution of Kenya. That the objectors claims are statute - barred under Section 4(4) of the *Limitation of Actions Act*, Cap 26 Laws of Kenya, which provides for a limitation period of twelve (12) years.
24. Upon closure of oral evidence the parties were invited to file and exchange their written submissions. The 1st Objector filed written submissions dated 23rd June 2023, the 2nd Objector filed written submissions dated 29th June 2023 and Elizabeth Nderitu Lemeiruko filed written submissions dated 29th June 2023. The Respondent/Administrator relied upon his written submission dated 20th November 2023.

Analysis And Determination

25. I have carefully considered the applications filed by the two objectors, the reply filed by the Respondent the evidence on record as well as the written submissions filed by the parties. The following are the issues which arise for determination;-
 - (i) Was the Grant issued to the Respondent/Administrator obtained fraudulently.
 - (ii) Is the mode of distribution as set out in the confirmed Grant equitable.
 - (iii) Should the Grant issued to the Respondent/Administrator be revoked.

Was the Grant Obtained Fraudulently

26. The Objectors complain that the Respondent moved to court and commenced succession proceedings in respect of the estate of the Deceased without consulting and/or involving the other children who were also beneficiaries to the estate.
27. The Respondent counters that this entire objection is caught up by the statute of limitations as by dint of Section 4(4) of the *Limitation of Actions Act* the objections ought to have been filed within twelve (12) years of the Grant of Probate. The Grant in issue was made to the Respondent on 10th March 1992 and was confirmed on 30th September 1993. The objections herein were filed in May and November of 2017 being twenty – four (24) years after the Grant had been confirmed. The question then is whether given those circumstances this court has the jurisdiction to entertain said objections.
28. Section 4(4) of the *Limitation of Actions Act* Cap 22 Laws of Kenya provides as follows:-
 - “(h) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgement was delivered or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

29. However precedent and case law has established that the statute of limitations does not apply to succession matters

12. In re Estate of Nathu Khan (Deceased) [2020] eKLR the court stated as follows:



- “11. The 2nd Respondent argues that this Application is caught up by the statute of Limitations. As I understand it, the 2nd Respondent argues that by dint of section 83 of the [Law of Succession Act](#), the Application should have been filed within six months of the grant of probate. He further argues that by dint of section 4(4) of the Limitations of Actions Act, the actions should have been filed within 12 years of the grant probate.
12. The 2nd Respondent’s protestations on limitations are misplaced for two reasons. First as our decisional law has consistently held, the statute of limitations does not apply to succession matters strictu sensu. See, for example, in re Estate of Dechand legadhir Shah (Deceased) [2016] eKLR and in re Estate of Josephine Magdalene Motion (Deceased) [2015] eKLR. Second, even the statute of limitations were to apply, it could be argued that it has not run out since the case pleaded at bar could be said to be a continuing cause of action. This is because the Applicant is demanding for certain rights he believes he has under the Testamentary (irrevocable) Trust created by the will of the Deceased. The Trustees have a continuing obligation to the beneficiaries – including the Applicant – until the Trust is dissolved. Each failure by the Trustees to abide by their obligations or the terms of the Trust, a new cause of action arises. Hence, in as long as the Testamentary trust remains in place, each beneficiary has a right to enforce their rights under the trust and the Statute of Limitations is no bar to such an action against the Trustees.” [own emphasis]
30. Accordingly I find that the objections herein are not statute barred.
31. The grounds upon which a Grant may be revoked are contained in Section 76 of the [Law of Succession Act](#) Cap 160, Laws of Kenya which provides as follows:-
- “A grant of representation whether or not confirmed may at time be revoked or annulled if the court decides either on application by any interested party or its own motion
- a. That the proceedings to obtain the grant were defective in substance;
 - b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
 - c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
 - d. That the person to whom the grant was made has failed, after due notice and without reasonable cause either -
 - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - ii. to proceed diligently with the administration of the estate; or
 - iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or



- iv. that the grant has become useless and inoperative through subsequent circumstances. [Own emphasis]

32. In the case of *Jamleck Maina Njoroge -vs- Mary Wanjiru Mwangi* [2015] eKLR the court set out the circumstances under which a grant may be revoked as follows:-

“The circumstances that can lead to the revocation of grant have been set out in Section 76, law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of a false statement or by or by concealment of something material to the case or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

33. In the case of *Albert Imbuga Kisigwa -vs- Recho Kawai Kisigwa* [2000] eKLR it was held that

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.” [own emphasis]

34. I have carefully perused the Petition for Grant of letters of Administration Intestate dated 1st November 1991 filed by the Respondent. In that petition the Respondent lists only himself and two (2) of the Deceased’s wives as survivors. This despite the Respondent having full knowledge and indeed his acknowledgement before this court that the Deceased was a polygamous man who was survived by three (3) wives and several children.

35. The question then is why with this knowledge did the Respondent fail to include as beneficiaries all the wives and children of the Deceased.

36. The persons who qualify as dependants of a Deceased person and therefore beneficiaries to the estate are defined by Section 29(a) of the *Law of Succession Act* 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.

37. The Respondent who had full knowledge of the identities of all the Deceased’s wives and children deliberately failed to name them as beneficiaries his petition for Grant. Indeed under cross-examination the Respondent admits that

“It was not factually correct that the Deceased was only survived by three people. The 3rd widow had eleven children.

My mother end 2nd widow had four children.....”

Further on the Respondent goes on to admit that

“I am not the sole beneficiary of the estate of the Deceased.

I did not include my siblings in my petition for Grant. I did not indicate the names of all the beneficiaries of the estate.



I only included the names of my 2 mothers....” Section 26(1) of the Probate and Administration Rules provide as follows

“Letters of Administration shall not be granted to any Applicant without notice to every other person entitled in the same degree as or in priority to the Applicant.”

38. In the case of Al-amin Abdurahman Hatimy -vs- Mohamed Abdulraehman Mohamed And Another [2013] eKLR the court held that by virtue of Rule 26, the Law of Succession required that any application for issuance of a Grant must be accompanied by a consent duly signed by all persons entitled to the share in the same estate. The Respondent did not give notice to any of the other beneficiaries of his intention to seek a Grant neither did he present a consent signed by all the beneficiaries. He deliberately sidelined them undoubtedly with the aim of inheriting the entire estate himself. It is clear that the Respondent obtained the Grant by way of concealment of material facts, and as such the proceedings leading to the issuance of said Grant to the Respondent were defective in substance.

39. In Re Estate Of Ndinguri Karugia (Deceased) [2017] eKLR Hon. Lady Justice Muigai held as follows;-

“From the detailed chronology of the documents that the Respondent lodged for grant of letters of administration intestate, she did not disclose all the children and family of the Deceased.

The non disclosure of all beneficiaries of the deceased’s estate amounted to concealment of material facts. The Grant and the confirmed Grant were fraudulently obtained by means of an untrue allegation or fact essential in point of law to justify the Grant [Own Emphasis].

40. Finally on this point in Re Estate Of Wahome Mwenje Ngonoro (Deceased) [2016] eKLR Hon Justice Mativo cited the case of Matheka & Another -vs- Matheka [2005] KLR in which the Court of Appeal set out the guiding principles for revocation of a Grant as follows;-

“From the foregoing, it is clear that a grant may be revoked either by application by an interested party or on the Court’s own motion. But even when revocation is by the Court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of a false statement or by concealment of something material to the case, or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate. The grant may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.”

41. In the same case Mativo J (as he then was) held that

“The evident deliberate failure by the Respondent to involve the applicants at the time of filing these proceedings, failing to list them among the beneficiaries or seek their consent or renunciation was in my view bad faith and amounted to concealment of material facts. My conclusion is that the proceedings leading to the issuance of the grant are defective in substance and that material information was not disclosed to the court in that had the court been made aware that there were other beneficiaries who were interested in the deceased’s estate the court would have hesitated to issue the grant” (own emphasis).



42. I further note that the petition filed in November 1991 was not accompanied by a chief's letter listing the names of all the beneficiaries of the estate.
43. Although the chief's letter is not a legal requirement it has become acceptable practice to include such letter as one of the best ways to confirm the names and identities of the genuine beneficiaries to an estate.
44. In Re Estate Of Shem Kitanga [2018] eKLR Hon Justice Ngugi (as he then was) stated as follows:-
“A succession cause starts with an introduction letter from the chief of the area where the intended petitioner hails from. Though it is not a legal requirement, it is presumed that the chief is well familiar with the family of the Deceased person and can inform the court of the beneficiaries left behind by the deceased.”
45. In Re Estate Of Ambutu Mbogori (2018) eKLR, Hon Justice Gikonyo stated
“the Petitioner committed other sins; he initiated these proceedings without a letter of introduction from the chief. This letter serves an important purpose in the ascertainment of the deceased, the dependants as well as the properties of the deceased”
46. This court cannot rule out the very real possibility that the failure to include the chief's letter was a deliberate ploy by the Respondent to conceal the names and identities of all the genuine beneficiaries to the estate.
47. Following its issuance the Grant was thereafter confirmed on 20th September 1993. Despite the existence of several beneficiaries the confirmed Grant indicated that the entire estate was to devolve to the Respondent alone. This was a vast estate consisting of several acres of prime land. What did the Respondent do to merit such favour? Why were the other beneficiaries excluded?
48. The objectors have claimed that the Respondent did not consult or include them in this Succession cause. Indeed there is no indication of the involvement of any of the other beneficiaries aside from the two widows. Indeed the only consent appearing in the file is a consent dated 12th November 1991 signed by the two widows Anna Siano and Esther Wambui. As the Petitioner the Respondent was required to give Notice and obtain the consent of all the other beneficiaries before applying for the Grant. To the extent that the consent was not signed by all the beneficiaries to the estate, that consent was defective.
49. The second sin or omission committed by the Respondent was his failure to obtain the written consent of all the beneficiaries before seeking to have the grant confirmed and having the entire estate devolve to him alone. I highly doubt that this would have been agreed to by all the beneficiaries. I have perused the Summons for confirmation of Grant dated 28th July 1993. It is supportedly the Affidavit of even date sworn by the Respondent. In said Affidavit at Paragraph 2 the Respondent lists only himself and two widows as the persons who survived the Deceased. No mention is made of the Deceased's other children. More importantly there is no consent signed by the other beneficiaries agreeing to have the entire estate devolve exclusively to the Respondent.
50. All the beneficiaries who testified state that the Respondent did not consult them nor seek their consent when applying for letters of Administration nor did he consult or seek their consent before applying



for confirmation of the Grant. None of the beneficiaries consented to the entire estate devolving to the Respondent. Pw5 Elizabeth Merti Lemeiruko admitted under cross-examination that

“when the Grant was being confirmed we were not asked to give our consent. No other child (beneficiary) of the Deceased gave consent. The Administrator had the Titles registered in his own name alone not as trustee for the other beneficiaries.....”

51. I have perused the proceedings of 20th September, 1993 the date when the Grant was confirmed. The only person who appeared in court on that day was the Respondent. None of the other beneficiaries nor the two widows were present in court. I find that the administrator, Samuel Kelo Lemeiruko, breached the law in failing to name, list and include all of the deceased’s children in his petition for Grant and Summons for confirmation of Grant.
52. It is quite evident that the catalyst for these objections was the substantial compensation being offered to land owners by the National Land Commission arising from the construction of the SGR. If the mode of distribution as set out in the confirmed Grant was to be maintained then the Respondent alone would receive the compensation to the exclusion of the other beneficiaries to the estate.
53. The Respondent argued that the Deceased had already indicated the mode of distribution of his estate before his demise. The Respondent relied on notes written down by the Deceased in a diary.
54. Firstly the Deceased died intestate. He did not leave a written will indicating how his estate was to be distributed. The notes contained in the notebook do not amount to a written will. Indeed even the Respondent himself in the petition for Grant indicated that the Deceased had died intestate. As such the notes made by the Deceased prior to his demise cannot be given legal effect.
55. Secondly the Respondent argues that the Deceased intended for his estate to be distributed according to Maasai culture and traditions where only male children would inherit and female married children were to be excluded. The Respondent argues that the Deceased had already distributed his estate in accordance with Maa culture. He states that in his diary the Deceased indicated that he wished to divide his land between his two sons Samuel Munei and the Respondent.
56. Maasai culture and traditions do not supercede statutory law which provides that all children irrespective of gender and/or marital status are entitled to inherit. Although the courts in Kenya do recognize and will on occasion give effect to cultural norms there is an important rider that customary law will only be applied where it is “not repugnant to justice morality or inconsistent with any written law”

[see Section 3 *Judicature Act*, Cap 8 Laws of Kenya] To insist that married daughters are not entitled to inherit is in my view repugnant to justice and does contravene statutory law which provides that all children of a deceased irrespective of gender and/or marital status are entitled to a share of the estate.
57. Further even if this court was to accept that the Deceased intended to have his estate distributed in accordance with Masai cultural norms, then the estate ought to have been distributed between the three Houses. There is nothing to suggest that the Deceased intended to disinherit any of his wives and/or children yet by his actions the Respondent effectively locked out the 3rd widow and her family and also disinherited the other children of the Deceased.
58. In Re Estate Of Francis Mwangi Mbaria (Deceased) [2018] eKLR the court stated as follows:-

“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.



While speaking about the existing provisions of the *Law of Succession Act*, made a very strong statement on the issue of discrimination against daughters generally in succession matters and he said;

“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 stake 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.....”

It is unfortunate that despite having *the constitution* in place for over 6 years and numerous pronouncements by the courts on the issue of discrimination of married daughters and inheritance from their parents, it is still considered evil in some quarters for a daughter who is considered to be happily married and to having property of her own, to express any interest in her parents’ estate. She is accused of being selfish, of acting in bad faith, of wanting to fuel a family feud yet she does not live in the ‘home’, of harassing those who only have their parents’ inheritance to look up to and nothing else.

Those doing so miss the point. That the fact of marriage per se for both sons and daughters, does not change the fact of being born in a certain home to certain parents.....

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. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which has a tendency of once in a while rearing its ugly head to be forever buried. The ghost has long cast its shadow on our legal system despite 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 person on the basis of their sex, marital status or social status, among others, the time has now come for those discriminative cultural practices against women be buried in history.....”

More specifically I am content to cite the proclamation by the Court of Appeal in the case of Stephen Gitonga M’huriithi Vs. Faith Ngiramurithi [2015] eKLR that:-

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried....”

Therefore a son will not have priority over a daughter of the deceased simply because he is male; all – male and female siblings – are equal before the law and are entitled to equal protection of the law. (See article 27 of *the Constitution*).....(see also the judgment of Judge Kasango in Samson Kiogora Rukunga V Zipporah Gaiti Rukunga [2011] eKLR)

It is evident from the foregoing that this court would be failing on its constitutional mandate to uphold a disputed mode of distribution that is based on an open discrimination of the grounds of gender, sex and status. The fact of the equality of the children in the inheritance of their parents’ property, the norm. Any exception must have a basis. In this case the sharing



of property among the sons only or men only has not been given any legal basis. The same is not tenable.” [own emphasis]

59. The Respondent claims that during his lifetime the Deceased gifted to him Plot 1730 to enable the Respondent set up and establish his cultural home. The Respondent states that he had already occupied Plot 1730 and established his home there by the time the Deceased passed away.
60. In other words the Respondent is alleging that the Deceased made to him a ‘gift ‘inter vivos’ of this Plot 1730. 14. In re Estate of Godana Songoro Guyo (Deceased) [2020] eKLR the court stated as follows:

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

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

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

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

In Halsburys? Laws of England? 4th? ? Edition Volume 20 (1) of paragraph 67 I is stated as follows with respect to incomplete gifts:?

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property and which it was in his power to do” It may be noted that the concept of gifts is divided into two categories. First gifts intervivos and gifts causa mortis. Gifts intervivos as contemplated in the law of Succession are such that the owner of the property or asset donates it to another without expectation of death. In any event the person who makes such a gift must have the capacity and competency to gift the property and the gift be perfected. In the case of intervivos the gift must go into immediate and absolute effect. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts. Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the done.

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



61. There is no evidence that the Deceased during his lifetime effected the transfer of this Plot 1730 to the Administrator (or indeed to any other party). As such the gift *intervivos* remains incomplete and cannot be given effect by this court.
62. From the record and the available documents it is apparent and is not disputed by the Respondent that Plot 1729 and 1730 both belonged to the Deceased. No doubt this is why the Respondent included the two parcels of land as assets belonging to the estate in his supporting Affidavit to the petition for Grant of letters of Administration Intestate dated 1st November 1991.
63. Similarly the same two parcels of land were listed by the Respondent as assets belonging to the estate available for distribution in his Affidavit in support of the Summons for confirmation of Grant dated 28th July 1993. All this amounts to a concession by the Respondent that the two parcels of land in fact belonged to the Deceased.
64. From my own perusal of the documents presented in court I note that the registered proprietor of Kajiado/Ololoitikoshi/Kitengela 1729 was the Deceased Patrick Ole Marangura. A copy of the Title Document appears at Page 93 of the 1st Objectors Bundle of documents.
65. Upon obtaining a confirmed Grant it would appear that the Respondent had both parcels of land transferred into his own name relying on the confirmed Grant in which he had named himself as the sole beneficiary of the estate. Indeed the Respondent confirmed in his evidence that both parcels of land are now registered exclusively in his name.
66. A copy of the Title document for LR Kajiado/Kitengela/1730 in which the Respondent Samuel Kelo Lemeiruko is named as the sole proprietor of that piece of land appears as annexure 'SKL-101 at page 128 of Respondents bundle)
67. The transfer of Plots 1729 and 1730 to the Respondent were not the result of a legally sound or legitimate basis. The Respondent relied on a Grant which he had obtained fraudulently by misrepresenting himself to the court as the sole beneficiary of the estate to have two parcels of land transferred into his own name. This court cannot sanction these transfers.
68. The fact of the matter is that the two parcels of land belonged to the Deceased at the time of his death and therefore form part of the estate of the Deceased. As stated earlier the Respondent has not exhibited in court any transfer document signed by the Deceased in his favour. More pertinently I note that the transfer of Plot 1730 into the Respondents name was effected on 18th April 2002 and Title Document issued on the same day. It is quite obvious that this transfer took place AFTER the death of the Deceased and therefore could not have been sanctioned and/or authorized by the Deceased.
69. I therefore find that the two parcels of land
 - I. Kajiado/Ololoitikkoshi/Kitengela/1729.
 - II. Kajiado/Kitengela/1730belonged to the Deceased at the time of his Death. The two parcels of land form part of the estate of the Deceased and are available for distribution to the beneficiaries of the estate. Accordingly I direct that the title document held by the Respondent for Plot 1729 and Plot 1730 be cancelled and the two parcels of land revert back into the name of the Deceased Patrick Lemeiruko Ole Marangura.



70. I am fully aware of the existence and mandate of the Environment and Land Court which were established under Article 162(2) (b) of *the Constitution* of Kenya 2010.

71. However this Court is sitting as a Probate Court whose mandate is to oversee the distribution of the estate of the Deceased to the genuine beneficiaries. This also includes a mandate to preserve estate assets against intermeddlers and against any form of dissipation. The Court must set out clearly what assets constitute the estate of the Deceased. Therefore the question as to whether or not Plots 1729 and 1730 form part of the estate of the Deceased is one which the Probate Court is fully entitled to determine. In making such declaration the court will not in my view be encroaching upon the mandate of the ELC.

72. In the case of *In Re Estate Of Julius Ndubi Javan (Deceased)* [2018] eKLR the Court stated as follows;-

“The primary duty of the probate court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus where issues on the ownership of the property of the estate are raised in a succession cause they must be resolved before such property is distributed And that is very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation.”

73. Moreover the question relating to the two parcels of land do not involve a dispute between the estate and third parties (e.g. alleged purchasers). The protagonists in this matter are all beneficiaries to the estate and as such this court sitting as a Probate Court has all mandate to determine the status of Plots 1729 and 1730.

74. In the case *Re Estate Of Alice Mumbua Mutua (Deceased)* [2017] eKLR Hon. Justice William Musyoka expounded on this distinction as follows:-

”Article 162 provides for the system of courts in Kenya. Article 162(2) authorizes Parliament to establish courts that are to occupy the same plain with the High Court and whose jurisdiction is to hear and determine disputes relating to employment and labour relations, and environment and the use and occupation of and title to land. Those courts were established by parliament, for the purpose of land disputes relating to use and occupation thereof and title thereto was established ELC. Read together, Article 162(2) and Article 165(5) of *the Constitution* 2010 would mean that the High Court has no jurisdiction whatsoever over matters that fall within the jurisdiction of the courts set up under Article 162(2) of *the Constitution*. In other words, the courts established under Article 162(2) have exclusive jurisdiction over the matters for which those courts have been established. I have not had a chance to peruse through the file in ELC No. 121 of 2009, as the court file in respect of that matter within Article 162(2) of *the Constitution*. In those circumstances, it would mean then that the High Court has no jurisdiction over the matter by virtue of Article 165(5) of *the Constitution*. It may be argued that the subject land is estate property and by dint of that fact the probate court would have jurisdiction thereon. The position is not as simple. The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets. Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of



disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules, which have elaborate rules on suits by and against executors and administrators.” [Own emphasis]

75. Mention has been made of the parcel of land known as LR NO. Ngong/Ngong/441. The said parcel of land transferred by the Deceased to his second wife Anna Siano and the Respondent on 19th July 1979. A copy of the Transfer document appears at Page 82 of the Administrators written submissions. Likewise a copy of the Title Document for Plot No 441 showing that the same was registered jointly in the names of Sammy Kelo Ole Lemeiruko and Annah Siano Lemeiruko on 21st December 1979 appears at Page 99 of the Administrators written submissions. Indeed under cross-examination the 1st Objector Priscilla Naserian concedes that

“In the confirmed Grant Title Number 441 is not listed as an asset of the estate of the Deceased. It is not listed because Title had already been transferred to my late mother and the Administrator Title Ngong 441 did not belong to the Deceased at the time when he died. It did not form part of the estate Title Ngong 441 does not concern my late father

76. Therefore at the time of the demise of the Deceased this parcel of land had already been transferred and was no longer registered in the name of the Deceased. As such I find that this Plot 441 does not form part of the estate of the deceased and is not available for distribution.

77. Indeed all the witnesses admit that Plot 441 forms part of the estate of Anna Siano who was a widow of the Deceased herein. That in fact the issues relating to Plot 441 are being ventilated in Succession Cause No 3553 of 2004. As such this court will not make any orders or direction in respect of LR Ngong/Ngong/441.

78. The duties and obligations of an Administrator are set out in Section 83 of the *Law of Succession Act*.

79. The Grant was confirmed to the Respondent in September 1991. To date the estate has not been fully distributed – this is over twenty (20) years after the Grant was issued. As an Administrator, the Respondent has a mandatory duty to account to the remaining beneficiaries as well as to the court regarding his administration of the estate. There is no indication that the Respondent has ever supplied an account of his administration of the estate from the time of his appointment, as administrator.

80. It is trite law that an Executor or Administrator of an estate is a Trustee and is accountable to the beneficiaries for his/her handling of the estate of a Deceased person. Section 83 of the *Law of Succession Act* sets out the duties of Personal Representatives. Section 83 (e) provides that a personal Representative is required:-

“to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.”



81. The Objector who has been administering the estate must produce to the court a full Statement of Accounts regarding his dealings with the estate. In *Re Estate of Geoffrey Mwangi Chege (Deceased)* Succession Cause No. 905 of 2015, the Court stated that:-

“Beneficiaries have the statutory right to obtain an account from the executors of the estate, and at any time they may For the estate books and documents (In the Matter of the estate of Anthony Gichigi Wairire (Deceased) HCP & A NO. 32 of 1983 at Eldoret). This is because an executor or administrator is a trustee and is accountable to the beneficiaries for his handling of the estate administration.

Further, the executor of personal representative is accountable to the court on how he deals with the estate of the deceased.” [own emphasis]

82. Similarly in *Re Estate of Peter Muigai Ruhiu (Deceased)* [2015] eKLR the Honourable judge stated in part that:-

“.....financial accounting is not limited to just what was collected as rent or revenue. It extends even to how the moneys collected have been utilized. The administrators an office of trust. They are in a fiduciary position to the beneficiaries with regard to the assets. They must, as trustees, account for every single cent that comes into their hands...” (own emphasis)

83. The failure of the Respondent to conclude the administration of the estate 24 years after having been issued with a Grant and his failure to account to the other beneficiaries for his administration of the estate amount to a serious dereliction of duty by the Respondent/Administrator. He has failed to diligently administer the estate.

84. Based on the foregoing I am satisfied that valid grounds have been established for the revocation of this Grant. The Respondent obtained the Grant fraudulently by concealing the names and identities of all the beneficiaries to the estate. He also failed to obtain the consent of all the beneficiaries to the mode of distribution of the estate at the time of confirmation of the Grant. Moreover the Respondent has not diligently exercised his duties as Administrator of the estate.

85. The Deceased was a polygamous man who left behind three Houses. As a rule of practice it is desirable to have each house appoint one person as Administrator to represent the interests of that particular house. Section 40 of the *Law of Succession Act* provides for the manner in which the estate of a polygamous man is to be divided as follows

“40(1) where an intestate was married more than once under any system of law permitting polygamy, his personal and household effects and the residue of ne estate shall in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children”

[see *Grace Muthoni Ndinyinyei -vs- Charles Gitonga Muriuki* [2009] eKLR]. Accordingly I direct that each house nominate one person to be appointed as Administrator, of the estate of the Deceased.

86. Finally I allow the applications dated 8th May, 2017 and 3rd November, 2017 And make the following orders:-

(i) The Grant issued to Sammy Kelo Ole Lemeiruko on 10th March 1992 and confirmed on 20th September 1993 be and is hereby revoked.



- (ii) The Registrar of Lands Kajiado County is hereby directed to cancel forthwith the Title documents in respect of Kajiado/Kitengela/1729 and Kajiado/Kitengela 1730 issued in the name of the Respondent. The said parcels of land to revert back into the name of the Deceased Patrick Lemeiruko Ole Marangura.
- (iii) The beneficiaries to forward within fourteen (14) days names of three (3) Administrators (one from each House) for the estate.
- (iv) A fresh Grant to be issued to the three (3) Administrators nominated by the beneficiaries.
- v. The Respondent to file in Court true and accurate accounts of his administration of the estate with effect 20th September 1993 to date within sixty (60) days.
- vi. Thereafter the three Administrators to file a Summons for confirmation of Grant together with a consent signed by all the beneficiaries to the estate.
- vii. This being a family matter each side will meet their own costs.

DATED IN NYERI THIS 4TH DAY OF OCTOBER, 2024.

.....

MAUREEN A. ODERO

JUDGE

