



REPUBLIC OF KENYA



In re Estate of Gideon Nthiw'a Mutinda (Deceased) (Succession Cause 650 of 2010) [2023] KEHC 3229 (KLR) (17 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3229 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 650 OF 2010**

MW MUIGAI, J

APRIL 17, 2023

BETWEEN

JOHN MUTISYA NTHIW'A PETITIONER

AND

ROSE MBITHE NTHIW'A 1ST PROTESTOR

MATHEW MUSYOKA NTHIW'A 2ND PROTESTOR

MATHEW MUSYOKA NTHIW'A 3RD PROTESTOR

JUDGMENT

1. The deceased died on 29th March 1988.
2. The Petition was filed on 16/9/2010 and after gazettelement the grant of letters of administration was issued on 10th February 2012 to the Petitioner.
3. The Petitioner filed Summons for Confirmation of grant on 23rd October 2012 and deposed as follows;
The deceased was said to be survived by;
 - a. Anna Waeni Nthiw'a Wife
 - b. Norman Mutiso Nthiw'a Son
 - c. Ferdinand Muuo Nthiw'a Son
 - d. Mathew Musyoka Nthiw'a Son
 - e. Rose Mbithe Nthiw'a Daughter
 - f. Ann Ndungwa Mutinda Daughter in law
 - g. Susan Mumbua Mutua Daughter in law



- h. Regina Nduku Musyimi Daughter in law
 - i. John Mutisya Nthiw'a Son
4. The Properties of the estate were listed as follows and the proposed mode of distribution as follows;
- a. Athi River/ Athi River Block 5/222- to be shared equally among the beneficiaries
 - b. Kangundo/Katitu/1149- to be shared among the listed beneficiaries and taking into account and respecting the beneficiaries existing homesteads
 - c. Kangundo/Katitu/921- to be registered in the name of Regina Nduku Musyimi
 - d. Kangundo/Katitu/644- to be shared equally among John Mutisya Nthiwa, Norman Mutiso Nthiwa Mrs Susan Mumbua Mutu & Mrs Regina Nduku Musyimi.

Affidavit of Protest to Confirmation of Grant

5. Rose Mbithe Nthiw'a on 11th October 2013 filed Affidavit of Protest in which she deposed that the deceased had only one wife who was alive and the proceedings herein were instituted without the consent of the other beneficiaries of the estate and without their knowledge. She deposed that the beneficiaries of the estate were;
- a. Annah Waeni Nthiw'a Wife
 - b. Mathew Musyoka Nthiw'a Son
 - c. Ferdinand Muuo Nthiw'a Son
 - d. Norman Mutiso Nthiw'a Son
 - e. Musyimi Nthiwa son (deceased)
Survived by Regina Nduku Musyimi and children
 - f. Rose Mbithe Nthiw'a Daughter
 - g. John Mutisya Nthiw'a Son
 - h. Japheth Mutua Nthiwa son (deceased)
Survived by children
 - i. Edward Mutinda Nthiw'a Son (deceased)
Survived by Ann Ndungwa Mutinda
6. She contended that the deceased had the following properties;
- a. Kangundo/Katitu/1149
 - b. Kangundo/Katitu/921
 - c. Kangundo/Katitu/644
 - d. Athi River/ Athi River Block 5/222
7. She said the entire family is settled on Kangundo/Katitu/1149 and prior to the deceased's death, the deceased had shared out all his properties on the ground amongst the beneficiaries and they settled and each has developed and utilized their portions over the years. The parcels at Kangundo were distributed



equally/ equitably amongst the beneficiaries taking into account each beneficiaries area of settlement and other developments.

8. She contended that the purported schedule of distribution was unacceptable as it was unilaterally prepared by the Petitioner and she and the other beneficiaries were not served with the Summons for confirmation of grant until her advocates on record managed to get a copy on 10.10.2013.
9. She indicated that she required 45 days to prepare and file an appropriate equitable proposal of distribution, that Athi River/ Athi River Block 5/222 measuring 2.023 ha should be sold on agreement by the beneficiaries and proceeds therefrom shared equitably amongst all the beneficiaries after paying out debts that the deceased's estate is liable to pay.

Further Affidavit of Protest

10. It was filed on 10th October 2016 by Norman Mutiso Nthiwa in which he deposed that the deceased's widow, Annah Waeni Nthiwa had died and her name should be removed from the list of beneficiaries. He listed the deceased properties and beneficiaries as
 - a. Mathew Musyoka Nthiwa's Son
 - b. Ferdinand Muuo Nthiwa's Son
 - c. Norman Mutiso Nthiwa's Son
 - d. Regina Nduku Musyimi -wife of the late Musyimi Nthiwa
 - e. Rose Mbithe Nthiwa's Daughter
 - f. John Mutisya Nthiwa's Son
 - g. Ann Ndungwa Mutinda- wife of the late Edward Mutinda Nthiwa's
 - h. Mutua Nthiwa son (deceased)
Survived by children
11. He proposed distribution of the deceased's estate as follows;
 - a. Athi River/ Athi River Block 5/222 should be sold at current market price and proceeds shared equally among the beneficiaries
 - b. Kangundo/Katitu/921- Regina Nduku Musyimi
 - c. Kangundo/Katitu/644 - Norman Mutio Nthiwa
 - d. Kangundo/Katitu/1149 should be shared out as follows taking into account the development of each of the beneficiaries;
 - i. Family of Japheth Mutua Nthiwa's 1 ½ acres
 - ii. Regina Nduku Musyimi 1 ¾ acres
 - iii. Norman Mutiso Nthiwa's 1 ¾ acres
 - iv. Ferdinand Muuo Nthiwa's 1 ¾ acres
 - v. Family of the late James Simu Nthiwa's 1 ½ acres
 - vi. John Mutisya Nthiwa's 1 ¾ acres



- vii. Mathew Musyoka Nthiw'a 3 ¼ acres
- viii. Rose Mbithe Nthiw'a ¾ acres

Further Affidavit

12. It was filed by the Petitioner John Mutisya Nthiw'a on 7th April 2017 in which he contended that the objectors concur with him as far distribution of Athi River/ Athi River Block 5/222 and Kangundo/Katitu/921 were concerned. He objected to Kangundo/Katitu/644 being given to Norman Mutiso Nthiw'a and proposed that the same be distributed equally among the four beneficiaries as proposed in his affidavit in support of the summons for confirmation of grant. As regards Kangundo/Katitu/1149, he contended that the objectors agreed with him on sharing it equally among all the beneficiaries save that a share of James Simu Nthiwa be made who is deceased and was not survived by any dependent. He further contended that the said property should be distributed to the legitimate beneficiaries equally taking into account the beneficiaries' existing homesteads and there was no justification for some beneficiaries getting a larger share of the said title than others.

Further Affidavit

- 13. The Petitioner also filed a further affidavit on 20th April 2022 reiterating the contents of his earlier affidavit and further stating that all beneficiaries should get equal portions and all the beneficiaries who occupy excess portions should relinquish to other beneficiaries.
- 14. There is a consent for confirmation of grant and distribution of the estate as proposed by the protestor dated 5th March 2018 and signed by Ferdinand Nthiw'a Mutinda, Regina Nduku Musyimi, Mathew Musyoka Nthiw'a, Angelina Mbula Wambua and Rose Mbithe Nthiw'a.
- 15. Mathew Musyoka Nthiw'a filed an affidavit in support of the protest to confirmation of grant dated 10.10.2013 and stated that the proceedings were filed without the consent and knowledge of all the beneficiaries. That the deceased had prior to his death shared out his properties amongst all the beneficiaries and each has developed and utilized them over time. He proposed that the portions allocated to Rose Mbithe Nthiw'a and Norman Mutiso Nthiw'a be distributed to the surviving beneficiaries respectively. He proposed distribution as follows;
 - a. Athi River/ Athi River Block 5/222 should be sold at current market price and proceeds shared equally among the beneficiaries
 - b. Kangundo/Katitu/921- Regina Nduku Musyimi
 - c. Kangundo/Katitu/644 – the family of Norman Mutio Nthiwa
 - d. Kangundo/Katitu/1149 should be shared out as follows taking into account the development of each of the beneficiaries;
 - i. Family of Japheth Mutua Nthiw'a 1 ½ acres
 - ii. Regina Nduku Musyimi 1 ¾ acres
 - iii. Family of Norman Mutiso Nthiw'a 1 ¾ acres
 - iv. Ferdinand Muuo Nthiw'a 1 ¾ acres
 - v. Family of the late James Simu Nthiw'a 1 ½ acres
 - vi. John Mutisya Nthiw'a 1 ¾ acres



- vii. Mathew Musyoka Nthiwa's 3 ¼ acres
- viii. Rose Mbithe Nthiwa's ¾ acres

Hearing

1st Protestor's Case- on 14/11/2017 before Hon. D.K. Kemei J

16. PW1, Norman Mutiso Nthiwa stated that the deceased herein was his father and the Petitioner is his younger brother. His mother, Annah Waeni Nthiwa is deceased, she died while this case was ongoing as a protestor. The Petitioner had secretly filed this cause and they were alerted by the area chief. He relied on a further affidavit dated 7/10/2016 and in addition stated that his father had nine children, some of them have since died and have families.
17. For instance Mutua Nthiwa's wife was one Susan who had separated with her husband before he died. Mutua's sons now intend to build on the land set aside for their late father.
18. There is also another brother by the name of James Simu Nthiwa who was a primary school teacher and younger than him. They had not seen James Simu's wife since he used to teach at Kinanie area of Athi River and they do not know if he had a family of his own but their father had set aside a piece of land for the said James Simu.
19. They had only one sister Rose Mbithe who has made a proposal on distribution; The Athi River plot 5/222 be sold at market prices and the proceeds be shared equally, parcel Kangundo/Katitu/921 be given to Regina Nduku who is wife to my late brother Musyimi Nthiwa and Parcel Kangundo/Katitu/644 be given to him as the same had been given to him by his late father on a date he couldn't recall.
20. He said he was currently ploughing the land which was given to him in the late 1970. Likewise, Musyimi Nthiwa was given his portion. As regards the parcel Kangundo/Katitu/1149 the whole family members reside thereon with each one occupying their separate portions as shared out to them by their late father way back in 1970 which they all occupied at the time of his death. He said James Simu's portion is still available and Mathew Musyoka occupied the portion where their parents lived while Rose Mbithe was given her portion, she is not married.
21. It was his testimony that the family land parcel Kangundo/Katitu/1149 be shared as proposed vide paragraph 6 (d) of his affidavit. The family of Japhet Mutua Nthiwa is to get 1½ acres which should be shared equally between a surviving son and deceased son who also has a child. The rest of the shares are listed as (i) to (viii). His late brother James Simu Nthiwa's 1½ parcel is still there and his late mother had directed that the said portion be shared equally among five sons as Musyimi, Norman Mutiso, Ferdinand Muuo, John Mutisya and Mathew Musyoka. Each of the five members till their respective portions from the late Simu's land.
22. The Petitioner has his own separate portion of 1¾ acres. Mathew Musyoka's share is ¾ acres as he was the last born son and given by his father. The graveyard for their parents are on Mathew Musyoka's portion. Rose Mbithe has ¾ acre and she is satisfied. He wanted the Court to distribute the assets as he proposed since it was the wish of their late parents.
23. Upon cross – examination he stated that the property involves four parcels of land that belonged to their late father. He has brothers and it is the deceased who knows the question of which child he loved most. As children they obeyed their late father who treated them equally as his children.



24. He was recalled on 20/11/2017, and he opined that he was not demanding parcel Kangundo/Katitu/644 but it was his father's wish that he owns it himself. It is still registered in names of deceased. He said there are family resolutions made by the deceased regarding his ownership of parcel 644. His father died sometimes in 1989 and did not transfer parcel 644 to him, his father's land were not transferred in his lifetime. He indicated that he wanted the properties shared out as per the father's directives. Parcel Kangundo/Katitu/1149 is the family land.

The deceased wrote a will on the division of his properties. They heard their late Brother James Simu had married a certain woman but they did not see the wife or children. Their father made his wishes and the records are in a book at home. Rose Mbithe was given a portion which she later sold to a purchaser. He did not agree with the suggestion that the properties namely parcel 644 and 1149 be shared equally amongst the children of the deceased.

25. Upon re-examination, He said that Parcel Kangundo/Katitu/644 was given to him by the deceased while he was still alive and it was a gift to him as his child. He confirmed that the deceased had not transferred title of the land which he uses to date with my family. Deceased made the gifts in late 1970 and early 1980.

26. He had no dispute over parcel 644 with his siblings during the deceased's lifetime save for the petitioner. He said the Deceased had called the clan chairman during the division of the lands to all of them. He maintained that parcel 644 was a gift *intervivos* made to him by the deceased and the deceased gave parcel Kangundo/Katitu/921 to his late brother Musyimi which his widow Regina Nduku is currently occupying.

27. The father gave out the parcels of his own volition and love for his children. Mathew Nthiwa has possession of the land where the remains of their parents were interred, Mathew's wife is called Hellen Kiarie. Nobody has problems with our father wishes except the Petitioner. James Simu's portion of 1½ acres should be shared equally. Rose Mbithe was given ¾ acre from parcel 1149 by the deceased and she sold her portion and he has no problem with that. The properties should be distributed as per the wishes of the deceased and it should be followed. He said he did not know the motive of the Petitioner in going against the wishes of their late father.

28. On 31/10/2022, this Court took over the matter and proceeded with the hearing after proceedings were typed and availed to parties/Counsel.

29. OW2, Matthew Musyoka Nthiwa stated that the deceased herein was his father and he is the last born of the sons. Affidavits in support of the Protest filed on 31/10/2022 were relied on as evidence. He stated that John Mutisya Nthiwa, his brother took the grant and became administrator without their consent and their mother was alive. The Respondent withheld the death certificate from their mother.

30. They did not have a problem with him being administrator. They were worried about the special interest he had over the suit property. Rose Mbithe their sister was their Co-Administrator. Their mother died and they replaced Norman who died and he was appointed to represent the family. They had Kangundo/Katitu/644 and were allocated their land and they built on the land. He said the father gave the land to Norman. After 20 years he gave the land.

31. He said his brother, James Simon Nthiwa was allocated Kangundo/Katitu/1149 and the mother divided the said land amongst all of them as she had died. The Administrator claimed that he assisted the deceased brother very much and therefore he wanted the land allocated to him. The Kangundo/Katitu/1149 should be shared among the family of the deceased. He said they all live on the land. The portion that is in dispute is the one that was allocated James Simon Nthiwa which John wants to take the whole portion and not the rest of the land. Edward Mutinda Nthiwa had been given his portion



during the life of the deceased and it was a gift *intervivos*. Athi River/Athi River 5/222 was to be distributed among the sons and daughters and the children of the deceased and they have no problem. The only basis of his Protest is the part of Kangundo/Katitu/1149 that was for James Nthiwa. The rest they have no problem.

32. Upon cross - examination he said the Petitioner did not leave anyone but took the death certificate and filed the succession cause and their mother was alive. The Petitioner took the death certificate from Edward, he did not ask OW2 for any money to file the succession cause. It is not true that he lived away from Kangundo/Katitu/1149 and that he had rented out the place and ploughs were brought on the land. Their father did share the land out to all of them and he did not have a tape measure, It is their mother who distributed the portion in Kangundo/Katitu/1149 the big land where their father's land is and they all live there.
33. Kangundo/Katitu/921 and Kangundo/Katitu/1149 are tilled by the widow of Musyimi Nthiwa .Kangundo/Katitu/644 by the widow of Norman Mutiso Nthiwa and at the same time on 1149. Athi river Block 5/222 should be sold and it be divided equally.
34. That marked the close of Protestors case.

Petitioner's Case:

35. John Mutisya Nthiwa adopted the Affidavit of 20/04/2022 and relied on Written Submissions of 28/09/2022, Summons for confirmation filed on 23/10/2022. He said the biggest property is Kangundo/Katitu/1149. He said they distribute the land as follows; the land where one is settled like 921 – Musyimi settled 644 with the family of Norman. Kangundo/Katitu/1149 to be shared, those who have another portion elsewhere to get less than what they already have and the others to get equal shares. He contended that in Block 5/222, they include Mrs Anne Ndungwa Edward wife of deceased brother to be included and shared equally.
36. There was no Cross – examination.

Parties Filed Submissions.

Petitioner's submissions dated 28.9.22

38. The Petitioner submitted on two grounds. The first was that a declaration on confirmation of grant be made. It was submitted that the objectors had intermeddled with the property of the estate and did not qualify to be joined in the grant, only he was legible for the grant to be confirmed upon. That no capital assets could be distributed without the confirmation of grant as per section 55 of the LSA. Reliance was placed on section 45 of the LSA and section 6 and 22 *Land Control Act* in support of the contention that the objectors had intermeddled with the property.
39. Secondly, it was submitted that their father never gifted any part of his estate to any of them during his lifetime and he regarded and treated all his children equally.
40. In his further submissions filed on 13.10.2022, the Petitioner reiterated the submissions herein and placed reliance on section 38 of the LSA on equal distribution of the net estate once a deceased dies intestate and *the Constitution*.
41. The Petitioner also filed a supplementary written submission on 25.11.2022 in which he contended that their father never gifted anyone property during his lifetime. What necessitated their father to have his land surveyed was that their elder brother was to travel outside the country and needed security of a title and this cannot be treated as a gift *intervivos*. It was submitted that the total acreage was



20.5326 acres consisting of Kangundo/Katitu/1149, Athi River/ Athi River Block 5/222, Kangundo/Katitu/ 921, Kangundo/Katitu/644 and Kangundo/Kangundo/1428. That Ann Ndungwa Mutinda had already surveyed the land and was only entitled to Athi River/Athi River Block 5/222, Mathew Musyoka Nthiwa to Kangundo/katitu/921, Norman Mutiso Nthiwa Kangundo/Katitu/644 and Kangundo/Kangundo/1428 to Regina Nduku Musyimi.

42. He contended that he concurred that those on parcel number Kangundo/Katitu/921 & Kangundo/Katitu/644 to relinquish portion from Kangundo/Katitu/1149 factoring their permanent development and houses unless the occupying beneficiary enters into an agreement with another beneficiary on the mode of compensation, this will cure the conflict.

2nd Protestor's Submissions Filed on 9.12.2022

43. It was submitted that the petitioner and the objectors were in agreement that land parcel Athi River/ Athi River Block 5/222 be shared out equally among all beneficiaries of the estate herein, Kangundo/Katitu/644 be registered in the name of Norman Mutiso Nthiw'a (Deceased) and Kangundo/Katitu/921 be registered in the name of Regina Nduku Musyimi, and this can be confirmed.
44. It was submitted that the Petitioner seeks to have the beneficiaries who have already benefitted from other parcels relinquish their rights in Kangundo/Katitu/1149 considering their developments on the said parcel.
45. The Objector contended that it is not disputed that the deceased's entire family is settled on Kangundo/Katitu/1149 and even has grave yards. It was submitted that it should be distributed equally taking into account where each beneficiary is settled and there are developments thereon.
46. It was also submitted that the parcel known as Kangundo/Kangundo/1428 should be distributed equally amongst all beneficiaries.

Determination

47. The Court considered the Summons for Confirmation by the Petitioner, various Affidavits of Protests to the confirmation of grant, the testimonies of parties and written submissions and finds that the issues for determination are;
- a. Whether there are properties that were gifted intervivos
 - b. What happens to the share of a son who died presumably single
 - c. How the estate property should be distributed.
48. It is not in dispute that the deceased was the father of the Petitioner and 2 of Protesters herein and the husband of the late Annah Waeni Nthiw'a respectively. It is not in contention that the following are estate property;
- a. Kangundo/Katitu/1149
 - b. Kangundo/Katitu/921
 - c. Kangundo/Katitu/644
 - d. Athi River/ Athi River Block 5/222
 - e. Kangundo/Kangundo/1428 – later included in pleadings filed.
49. It is also not in contention that the following are the beneficiaries of the estate



- a. Mathew Musyoka Nthiw'a Son
 - b. Ferdinand Muuo Nthiw'a Son
 - c. Norman Mutiso Nthiw'a Son
 - d. Regina Nduku Musyimi -wife of the late Musyimi Nthiwa
 - e. Rose Mbithe Nthiw'a Daughter
 - f. John Mutisya Nthiw'a Son
 - g. Ann Ndungwa Mutinda- wife of the late Edward Mutinda Nthiw'a
 - h. Mutua Nthiwa son (deceased)
Survived by children
 - i. James Simu (deceased)
50. It is settled that the deceased had 9 children as outlined above. It is not in contention that James Simu died and did not have any beneficiaries.

Gifts Inter Vivos

51. On the issue of distribution of the assets that comprise of the deceased's estate, the issue of intervivos gifts was raised by some of the beneficiaries and hotly contested by other beneficiaries. Section 42 of the *Law of Succession Act* is a proviso on gift intervivos. It provides that:
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.
52. PW1 opined that Kangundo/Katitu/644 was given to him by his father in 1970 and Kangundo/Katitu/921 to the late brother Musyimi Nthiwa. The Petitioner strongly objects to there being any division by the Deceased.
53. The requirements of a gift intervivos are provided in section 31 of the *Law of Succession Act* as follows;
- “A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if-
- (a) the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and
 - (b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and



- (c) there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and
- (d) a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive that illness or danger; and
- (e) the person making that gift dies from any cause without having survived that illness or danger; and
- (f) the intended beneficiary survives the person who made the gift to him:
 Provided that-
 - i. no gift made in contemplation of death shall be valid if the death is caused by suicide;
 - ii. the person making the gift may, at any time before his death, lawfully request its return. the person making the gift may, at any time before his death, lawfully request its return.”

54. In the case of *Naomi Wanjiru Njoroge & 2 Others v Winston Benson Thiru* [2018] eKLR where Hon. Nyamweya L J (as she then was 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). The assets that are the subject of a gift do not form part of the estate and such assets pass directly to the donee.

55. Hon R. Nyakundi J *in Re Estate of Godana Songoro Guyo (Deceased)*[2020] eKLR referred to;

“In Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67 it 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 comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”

.....

In the case of intervivos the gift must go into immediate and absolute effect. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts. Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee.”

56. The deceased died intestate and the Petitioner filed Petition for Grant of Letters of Administration intestate and not for Grant of Probate with Will annexed. Therefore, the estate of the deceased herein is to be distributed as per the provisions of intestacy under *Law of Succession Act*.



57. It is trite law as espoused by section 107-112 of the *Evidence Act* that he who alleges must prove. From the evidence on record, the gift was not complete. There is no evidence to substantiate the alleged acts of the deceased save that the said donees are tilling the land. The elder who was said to have been present during the allocation/gifting was not called as a witness and the book where it is alleged that the deceased wrote down the distribution was not presented to court as evidence and for interrogation by the other beneficiaries. I therefore find that from the evidence on record there was no gift *inter vivos* in this case to any of the beneficiaries by the deceased.

Distribution of Deceased's Estate

58. On distribution of estate property, section 38 of the LSA provides that;

Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

59. *In Re Estate of John Musambayi Katumanga – (deceased)* [2014]eKLR Hon. W. Musyoka 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.

60. Against the Petitioner's proposed mode of distribution as outlined in the Summons for Confirmation, the Protestors made alternative proposed modes of distribution as follows;

a. Rose Mbithe Nthiwa-

- i. Kangundo /Katitu/1149 – distributed equally amongst beneficiaries considering each beneficiary's settlement and development on the land.
- ii. Athi River/Athi river block 5/222 2.023Ha- to be sold on agreement by the beneficiaries at current market price and proceeds shared equitably amongst all beneficiaries after paying debts the deceased's estate maybe liable to pay.

b. Norman Mutiso Nthiwa –

- i. Land Parcel Athi River/Athi River Block 5/222- to be sold at current market price and proceeds shared equally amongst all beneficiaries.
- ii. Kangundo /Katitu/921 – Regina Nduku Musyimi
- iii. Kangundo/Katitu/644- Norman Mutiso Mthiwa
- iv. Kangundo/Katitu/1149- shared out as follows;
Japheth Mutua Nthiwa -1 ½ acres
Regina Nduku Musyimi-1 3/4 acres
Norman Mutiso Nthiwa 1 3/4 acres



Ferdinand Muuwo Nthiwa 13/4 acres

James Simu Nthiwa 11/2 acres

John Mutisya Nthiwa 13/4 acres

Matthew Musyoka 3 1/4 acres

Rose Mbithe Nthiwa-3/4 acres

c. Matthew Musyoka Nthiwa-

- i. Land Parcel Athi River/AthiRiver Block 5/222- to be distributed amongst sons, daughters, children of the deceased, all beneficiaries. The portion in dispute is the one allocated to James Simon Nthiwa (Deceased) no family of his is known, It is alleged Petitioner wants this portion and it should be distributed to all beneficiaries if family is not disclosed/traced/known.
- ii. Kangundo /Katitu/921 – Regina Nduku Musyimi
Kangundo/Katitu/644- Norman Mutiso Nthiwa
- iii. Kangundo/Katitu/1149- shared out among the family of the deceased as they all reside on the land.

d. John Mutisya Nthiwa-

- i. Athi River/Athi River Block 5/222-shared by all beneficiaries
- ii. Kangundo /Katitu/921 – Regina Nduku Musyimi
- iii. Kangundo/Katitu/644- Norman Mutiso Nthiwa
- iv. Kangundo/Katitu/1149- shared out equally among the family of the deceased as they all reside on the land. He excluded James Simu Nthiwa who is deceased and family was not identified. He also contended that the beneficiaries who occupy excess portions shall relinquish to the other beneficiaries.

61. As regards division of the alleged portion of late James Simu Nthiwa, PW2 contends that their mother divided the said land amongst all of them as the father had died and then contradicts himself by saying that she gave Edward Mutinda Nthiwa (Deceased) as he had taken care of her. On the other hand, PW1 stated that their late mother had directed that the said portion be shared equally among five sons as Musyimi, Norman Mutiso, Ferdinand Muuo, John Mutisya and Mathew Musyoka. This then makes the contention on the alleged portion belonging to James Simu (deceased) unclear. This court therefore cannot rely on what the Protestors allegation without concrete evidence.

62. However, this Court notes that Land Parcel Kangundo/ Kangundo/1428 was a property that only came up in the Petitioner's submissions and had never been mentioned before or included in the Petition/Summons for Confirmation of grant or in any other pleading. It is not clear whether this is estate property and if indeed it is, there is need for it to be included in the list of assets and confirmed accordingly.

Disposition

63. Having considered the law on the matter and all the proposals on the distribution of the estate that have been placed before me and as outlined hereinabove, this Court is inclined to distribute the estate of the deceased as follows: -



1. Land Parcel Athi River/Athi River Block 5/222- All beneficiaries including Petitioner and Protestors agree that the parcel ought to be shared amongst the beneficiaries whilst Protestors take view the parcel be sold expenses/liabilities to the estate to be paid then the remainder shared amongst beneficiaries. It shall be valued, sold and proceeds shared after payment of expenses distributed to beneficiaries equally.

It is noted from the evidence on record that Edward Mutinda Nthiwa (deceased)son of the deceased survived by Ann Ndungwa Mutinda had their property surveyed and allocated to them during the deceased's lifetime. However, with regard to the above-mentioned property after the sale they are entitled to a share of the proceeds.

2. Land Parcel Kangundo /Katitu/921 – With regard to the parcel of land herein referenced, I find that none of the parties contests the same being registered in the name of Regina Nduku Musyimi widow of late Musyimi Nthiwa son of the deceased. It is so granted.
3. Land Parcel Kangundo/Katitu/644- The Petitioner proposed the same is shared amongst to be shared equally among John Mutisya Nthiwa, Norman Mutiso Nthiwa, Mrs Susan Mumbua Mutu & Mrs Regina Nduku Musyimi. No explanation or criteria was given to explain/justify some of the beneficiaries allocating themselves the said property to the exclusion of others.

Norman Mutiso Nthiwa claimed the portion as gift intervivos and Matthew Musyoka Nthiwa supported the claim. This Court found no such evidence of Gift intervivos to Norman

This claim is not supported by all beneficiaries. The Property be shared equally /equitably amongst beneficiaries considering Section 42 LSA, any beneficiary with gift intervivos the portion to be taken into account in the instant distribution.

4. Land Parcel Kangundo/Katitu/1149- The land is estimated at 15 acres or so, All beneficiaries, including Petitioner and Protestors agree on distribution of the parcel to All beneficiaries. The point of departure is how? Should it be equally or equitably/If equitably what is the justification of the acreage proposed by Norman Mutiso Nthiwa that some beneficiaries have 3 ½ acres others ¾?

The Beneficiaries concede that they all reside on the said property and have permanent structures and developments. In line with the law the property shall be distributed amongst the beneficiaries considering their permanent settlements. There was contention that the portion of James Simu Nthiwa ought to be made however, there contention that his family/dependent was/is not identified. If the family traces James Simu Nthiwa's family /dependent then they are entitled to a portion of the land. The Property be shared equally/equitably amongst beneficiaries considering Section 42 LSA, any beneficiary with gift intervivos the portion to be considered in the instant distribution.

5. Land Parcel Kangundo/ Kangundo/1428- As earlier mentioned, this property was not included in the Petition and Summons for Confirmation of Grant. If the property exists and is in the name of the deceased as introduced during trial, then it maybe distributed equally/ equitably amongst beneficiaries of deceased's estate.

Judgment accordingly.

**DELIVERED SIGNED & DATED IN OPEN COURT AT MACHAKOS ON 17TH APRIL 2023.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W.MUIGAI



JUDGE

IN THE PRESENCE OF:

No. Appearance - For The Petitioners

Mr. B. M. Nzei - For The Protestors

Geoffrey - Court Assistant

