



REPUBLIC OF KENYA



KENYA LAW
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**Mwangangi & another v Mwangangi & 3 others (Succession Cause
746 of 2012) [2023] KEHC 3264 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3264 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

SUCCESSION CAUSE 746 OF 2012

MW MUIGAI, J

APRIL 17, 2023

IN THE MATTER OF THE ESTATE OF MWANGANGI

KIMATU MUUMBWA (DECEASED)

BETWEEN

SIMON MUTHIANI MWANGANGI 1ST PETITIONER

JAMES MWANGANGI 2ND PETITIONER

AND

ROBERT NDETO MWANGANGI 1ST INTERESTED PARTY

JULIUS MUTUA KITINGO 2ND INTERESTED PARTY

STANLEY MUIA MAKAU 3RD INTERESTED PARTY

AND

FLORENCE MUENI MWANGANGI OBJECTOR

RULING

Background

1. The Petition was filed on 27/7/2012 that had /has attached Death certificate of Mwangangi Kimatu Muumwa who died on 30/5/1998 and Lumbwa Chief's letter of 20/7/2012 that outlined sons and widow of the deceased.
2. The beneficiaries of the deceased's estate were listed as;
 - a. Munece Mwangangi Kimathi -widow
 - b. Simon Muthiani Mwangangi-son



- c. Jackson Kimondiu Mwangangi-son
 - d. James Mwangangi-son
 - e. Musyoka Mwangangi-son
3. The assets that comprise of deceased's estate are;
- a. Machakos Konza North Block 1/73
 - b. Kalama/Muumandu/479
4. After gazettelement on 3/8/2012, the grant was issued on 12/9/2012 to Simon Muthiani Mwangangi & James Mwangangi
5. The Certificate of Confirmation of Grant was granted on 7/7/2013 and properties included as part of the deceased's estate were distributed to the beneficiaries.

Summons for Revocation or Annulment of Grant

6. The Applicant, Florence Mueni Mwangangi brought the Summons filed on 10/5/2021, under Section 76 of the *Law of Succession Act* and Rules 43 and 73 of the Probate and Administration Rules seeking the following orders, that
- a. Spent
 - b. Spent
 - c. A prohibitory order be issued against the Petitioners, Interested Parties, their agents and/or servants restraining them from alienating ,selling , transferring , leasing, charging and dealing in any manner with the Deceased's Land Parcel No. Kalama/ Muumandu/479 and Land parcel no Machakos/ Konza North Block1/73 and all parcels of land which may have been transferred and registered unto them by use of the said grant pending the hearing and determination of this Succession cause.
 - d. The grant of letters of administration intestate made on 23.10.12 and the certificate of confirmation of grant made on 6.6. 13 be revoked and/ or annulled
 - e. A fresh grant of letters of Administration intestate be issued in the names of Simon Muthiani Mwangangi, James Mwangangi and Florence Mueni Mwangangi.
 - f. All title deed, transfers and registrations effected by the use of the aforesaid grant of letters of administration intestate and certificate if confirmation of grant be recalled and/ or cancelled
 - g. The Petitioner do give an account / Inventory of the deceased's estate.
 - h. Costs be provided for.
7. The Summons is supported by the Affidavit of Florence Mueni Mwangangi deposed on 10.5.2021 in which it is contended that the deceased herein had the following assets; Land Parcel No. Kalama/



Muumandu/479 and Land parcel no Machakos/ Konza North Block1/73 and had the following surviving him;

- a. Mune Mwangangi – 1st Wife (deceased)
 - i. Ndulu Mwangangi daughter (deceased)
 - ii. Mutio Mwangangi daughter
 - iii. Ndumi Mwangangi daughter
 - iv. Ndunge Mwangangi daughter
 - v. Kavindu Mwangangi daughter
 - vi. Simon Muthiani Mwangangi son
 - vii. Musyoka Mwangangi son
- b. Mbithe Mwangangi – 2nd Wife (deceased)
 - i. Florence Mueni Mwangangi daughter
 - ii. Jackson Kimondiu Mwangangi son
 - iii. James Mwangangi son
 1. The Objector contended that she learnt with utter disbelief that the Petitioners had petitioned for letters of administration and obtained grant of letters of administration without involving her nor her sisters and no citation to accept or refuse to take letters of administration was issued against them as required by law. The Petitioners concealed from the Hon. Court that the deceased had only one wife and that he had no daughters yet he had two wives and six daughters.
 2. The objector opined that the grant was obtained fraudulently by making false statement and by means of untrue allegations of fact notwithstanding that the allegation was made ignorantly and fraudulently. The proceedings of obtaining the grant were therefore defective in substance.
 3. The Objector contended that she has established that the Petitioners disposed of the portions of the deceased's estate to strangers, the interested parties, without her consent. She deposed that Machakos/ Konza North Block1/559 had been registered in the name of the 3rd interested party.
 4. She said she had not waived her right to equal share in her father's estate and neither had her sisters to the best of her knowledge and were not given any share of the property comprising of deceased's estate.

Replying Affidavit

1st and 2nd Petitioners

12. The Petitioners Simon Muthiani Mwangangi & James Mwangangi filed a joint affidavit on 4.06.2021 in which it was contended that the 1st Petitioner represents the 1st House and the 2nd Petitioner the 2nd House and that the land was divided by their parents even before succession proceedings and all the sisters were aware of the division.



13. It was deposed that the objector is married and lives one kilometer away from the suit land in a place called Lumbwa and she was holding original title deeds before they begun succession and when she was approached to release the titles, she alleged they were lost.
14. It was contended that the objector was acting on the instruction of Jackson Kimondio and that is why the other sisters have not been summoned. The land was shared 20years ago hence several things have changed and the properties are currently in the hands of their children or grandchildren or buyers and reversing the process would be prejudicial to a party who has been quiet all along and antagonize the entire family.

The 3rd Interested Party

15. It was deposed by Stanley Muia Makau, on 2.06.2021 and stated that the Application was made by Jackson Kimondiu and not the objector, a beneficiary who he opines intends to defraud the interested parties of the portions sold to them and it is on record that they are looking for ways of reselling the portions.
16. It was alleged that in April 2021, Jackson Kimondiosold a portion to Keli Mutua Kiambaa and the proceeds are the ones being used to reopen this process.
17. It was opined that a similar application and suit were unsuccessfully made vide suit Machakos ELC No 48 of 2019. Further that the sale and transfer were done in full knowledge of all beneficiaries including the said sisters and their rights were confirmed and consented by the beneficiaries during confirmation of grant.
18. It was contended that at the time of purchase, the parcels had already been subdivided and shared, signed by all beneficiaries, claimed loss of title, O.B No 14/12/15 and 23/14/12/15 , agreement by Musyoka, Mune, Ngali Mutiso and James Mwangangi.
19. It was deposed that the Applicant has been aware of this cause which has lasted over twenty-two years and never filed a protest or objection. Further, that the objector who is married resides in the same village and failure to assert her rights cannot be blamed on the interested parties. It was stated that the mother title 479 and 1/73 no longer exist. It was contended that the grounds for revoking a grant had not been made out.

Supplementary Affidavit Dated 16.06.2021

20. In response, the Objector deposed that the Replying Affidavits are premised on dishonesty, falsehoods and or mendacious allegations with no iota of evidence to support them and are geared toward maligning her name and sanitizing the fraudulent activities perpetuated by the Interested parties herein.
21. She denied that her brother Jackson Kimondiu was the author of the said application and was ready to be cross examined to that effect. She denied the allegation that their parents divided properties as they had not shared any of the properties during their lifetime.
22. She denied lodging a criminal complaint nor an abstract as she has the title deed to Machakos/konza North1/73. She pointed out that the alleged OB Numbers had not been annexed for interrogation. She said she is not aware of Machakos ELC Suit No 48 of 2019 nor a sale between Jackson Kimondiu Mwangangi and Keli Mutua Kiambaa.
23. She contended that the sale without a confirmed grant was unlawful and amounts to intermeddling with the deceased estate which attracts penal sanctions.



24. On 17/6/2021, Hon. D.K. Kemei J gave directions that the Summons for revocation of grant would be determined through viva voce evidence.
25. On 21/6/2022, Ndumi Kimondiu Ndeto sought to be joined to these proceedings as one of the daughters of the deceased. In her Supporting Affidavit she deposed that the Objector/Applicant did not consult the rest of the family before coming to Court. She further deposed that their parents had distributed the estate between the 2 houses.

Hearing

Objector Proceedings

26. Florence Mueni Mwangangi testified that she is a retired civil servant who lives in Machakos. On 10/05/2021 they filed for revocation of grant with supporting affidavit and also filed a supplementary affidavit on 16/06/2021 which she indicated she wished to rely on. She said her relationship with the deceased was that she was his daughter. That her father had 2 wives; Muneo Mwangangi and Mbithe Mwangangi. The 1st house had 7 children and 3 children in 2nd house. He had six daughters and one (1) is deceased – Ndulu Mwangangi. She said her brothers did not involve her when they filed petition in court, she did not sign any consent to making of grant. They heard of the confirmation of grant and the brothers did not involve her at all. She stated that she did not sign consent for confirmation of grant.
27. It was her testimony that her father had 2 shambas; No. Kalama/muumandu/479 and No. Machakos/konza North Block 1/73. In the confirmed grant she had not obtained any share of the properties and was asking the court to revoke/annul the grant and the title deeds to be cancelled and to be included in the administration of her father's estate. There were those who bought the land and they should not sell or transfer the same.
28. Upon Cross examination, she stated that when the property was sold she was not involved/consulted. She said she had the original title and she told James Mwangangi to call the whole family for a meeting and decide who will be administrators. She contended that the administrators are chosen when the deceased is not there. She also stated that she has other sisters and they were alive, about 5 of them. She contended that she had not involved the other sisters in the matter in court. She said that if one is not interested one cannot come to court. She said she had not served the other sisters and if they were to distribute, they should be called as a family and determine the administration and proceed with distribution of the estate.
29. She indicated that she had the title deed of 1 shamba. She told them to call all family members. This is a matter of 2011 and she refused with the title documents then in 2021, 9 years later after they proceeded with succession on their own without them. They did not come back and call them for a meeting and she stayed with the title deed. They went to get title deed without the original. For the last 9 years she did not do anything until now. Her father did not choose anyone. Her brother came to her house and she asked them to call all of them as a family. The petitioners who are in court should have them all.
30. It was her testimony that she was not far off from where they live; what happened at home she did not know. She had been in Nairobi, working. Her father had 2 wives, and each widow had her home and their father kept them there and their home was the 2nd house. James Mwangangi was the representative of their house and he appointed himself as administrator when their father showed the wife/widow where one was to stay. Her father did not distribute the shamba to all of them per house. She was not aware that the shamba was divided through houses. Her mother died a long time ago when she was a small kid. Kimondiu Mwangangi is her brother and he participated in this matter.



31. Upon further cross-examination by the court, she stated that the summons of confirmation of grant on 4/07/2013 Kimondiu Mwangangi Jackson is the one who signed and he obtained a portion. That she wanted all the distribution to be cancelled. She was complaining that the shambas were sold by James Kimondiu to other purchasers. James Mwangangi, Stanley Makau bought from James Kimondiu that is not true. She said she had done a search and found it was not indicated how they were distributed. She wanted all portions of land to be cancelled 479 & 1/73.
32. Upon Re-examination, the objector indicated that her father did not distribute land at the time before his death to the family. She stated that she did not get any portions. Her father died in 1988 and he could not have appointed anyone as administrators. It was her testimony that she was not told anything at all, they came for the title deed and she told them to call a family meeting we choose administrators from both houses. They did not appoint James Kimondiu as administrator. She filed the application and they knew of this matter and her sisters said they do not want anything. The purchasers bought land from James Mwangangi, her little brother, the last born. She contended that the land was not sold by her father but by her youngest brother. Two title deeds are to be cancelled.

Interested Party Evidence

33. Stanley Muia Makau, one of the interested parties in this case stated that he bought Machakos Konza North Block/1599 and has a title. He bought it from Jackson Kimondiu Mwangangi son of late Mwangangi Kimatu Muumbwa. They had ELC No.48 of 2019 Stanley Muia Makau –vs- Jackson Kimondiu Mwangangi & Kimatu Kimondiu and judgment of 28/08/2019 and the Defendants were to vacate the land within 45 days of the judgment in default eviction to issue. The judgment was not challenged and he indicated that he has the title to date.
34. Upon cross examination he said Jackson Kimondiu sold him and Stanley Muia land and he did not produce any sale agreement. He had not joined Kelly Mutua Kiamba to this case. ELC 48 of 2018 was between him, Jackson Kimondiu Mwangangi & Kimatu Kimondiu. The Objector Florence Mwangangi was not a party to the case in ELC 48 of 2018 and is not party to the sale. He bought from Jackson Kimondiu Mwangangi in 2006. The deceased died in 1998. He did not buy from the deceased but from Jackson Kimondiu Mwangangi when the grant was not confirmed. He bought when the succession process was on and each of the sons of the deceased had been given their portions. The certificate of confirmation of grant on 14/07/2013, the grant was issued on 12/09/2012. He said the deceased had shared property with his family but he was not present during the sub-divisions.
35. Upon Re-examination, he opined that they made their application through court through the Administrators in the succession proceedings in this court and then obtained titles.

Petitioners Case also on Behalf of James Mwangangi

36. Simon Muthiani Mwangangi relied on the witness statements of 4/11/2021 by himself and the co-administrator James Mwangangi and further stated that his late father divided the shamba and they came to court and obtained grant on 12/09/2012 and confirmed grant of 4/07/2013 distributing the land amongst themselves. Jackson Kimondiu got his land and he sold to Stanley, interested party and he called his mother to witness. They had a case with Stanley and the judgment was delivered. Florence Mueni Mwangangi brought this case and yet when they distributed the land she was aware.
37. Upon Cross – examination, he stated that there were 2 houses and each house got land, he was from the 1st house and they got their share. James Kimondiu is from the 2nd house. Florence Mwangangi is from the 2nd house, same mother and that is where problems are. He said they went to Syokimau and informed Florence and she refused 2 times and they came to court. She was aware and she was given



the title deed by Jackson Kimondiu to hide it. He contended that their late father divided the shamba and it was not them.

38. In addition, he said they filed petition and indicated only their mother Mune Mwangangi. The deceased had 7 daughters who did not sign anywhere on the succession documents. Florence knew of the matter in court and she did not sign anywhere, she refused with the title deed and they initiated the proceedings without her. Florence is at their home where she is married and she was not to be included. None of the daughters signed any documents to renounce any share. He said his father divided his land about 17 years to 20 years ago to his sons, that he used the clan to divide the land but the minutes of the clan are not available to court. He did not present any minutes of the clan dividing the land with my late father.
39. It was his testimony that the deceased did not sell any land to anyone while he was alive. The purchasers were not sold land by the deceased in this case.

Submissions

Objector's Submissions Dated 31.08.2022

40. It was submitted that Simon Muthiani Mwangangi testified that the Objector did not sign any consent for petition of letters of administration, she was not given a share of the deceased's estate and she was not issued with a citation to accept or refuse to take a grant. Further that there was no evidence that the deceased herein shared his properties during his lifetime through the clan, PW1 did not produce any clan minutes to that effect.
41. In addition, all the witnesses confirmed that none of the interested parties purchased any portion of land from the deceased. The deceased died on 20.5.98 and the interested party confirmed that he bought his parcel of land Machakos/konza North Block 1/5559 from Jackson Kimondiu Mwangangi in 2006, yet the grant was confirmed in 2013.
42. While relying on Article 27 (3) and (4) of *the Constitution* and the cases of Stephen Gitonga M'Murithi vs Faith Ngira Murithi [2015] e KLR, Nelson Munguti Nguya vs Joseph Mutua Nguya 2 others [2017] e KLR and Re Estate of Angelo Titita Kilungu (DCD) [2020] e KLR, It was submitted that there was male chauvinism wherein the deceased's children were discriminated upon based on gender.
43. As regards whether the prohibitory order should issue, It was submitted that unless the order is granted, the Petitioners and interested parties will sell, transfer and alienate the deceased's land parcel number Kalama/muumandu/479 and Machakos/konza North Block 1/73 while relying on the case of Nelson Munguti Nguya vs Joseph Mutua Nguya 2 others [2017] e KLR and Re estate of Timothy Mbondo Ndolo (deceased) [2021] e KLR.
44. As to whether all title deeds, transfers and registrations effected using the said grant should be recalled and/or cancelled, it submitted in the affirmative. The Objector cited Section 47, 93 (1) of the *Law of Succession Act*, Rule 73 of the Probate and Administration Rules and the case of Monica Adhiambo vs Maurice Odero Koko [2015] Eklr, Re Estate of Angelo Titita Kilungu (DCD) supra and Re estate of Timothy Mbondo Ndolo (deceased) supra.
45. On the issue of whether the administrators should account for the deceased's properties, the Objector relied on Section 83 (e) of the *Law of Succession Act* and the case of Nelson Munguti Nguya vs Joseph Mutua Nguya 2 others supra.
46. It was submitted that the Petitioners should bear the costs of the Application.



Petitioners' Submissions Dated 23.11.2022

47. It was submitted that Kimondiu Mwangangi was using his sister to defraud Makau. They learnt he had filed Machakos ELC 48/2018 to challenge the same but the court confirmed that Makau was the absolute owner of the title. That the land was distributed in 1980s before the Applicant got married and they have settled with their families to date and divided their shares to their children and grandchildren and some have sold part of their portions to cater for their needs including fees and medical expenses. They submitted that they acted in good faith and the objector's claim was belated, made in bad faith and had ulterior motives.

3rd Interested Party's Submissions Dated 24.11.2022

48. It was submitted the delay in making the Application was suspicious and made in bad faith and meant to disorganize the families. Reliance was placed on the case of Wellington Nzioka Kioko vs Attorney General [2018] eKLR.
49. While reiterating on the contents of its Replying Affidavit and the case of Morris Mwiti Mburugu vs Denis Kimanthi M. Mburugu [2016] e KLR, it was further submitted that the summons had not met the threshold required under Section 76 and the same should be dismissed. That Jackson Kimondiu sold his portion share to pay school fees for his children and is shifting blame to the Petitioners who are not party to the transaction. They questioned why only one member of the families was dissatisfied and further that the allegations of mismanagement had not been proved.

Determination

50. I have considered the summons, affidavits on record, the testimonies and submissions on record and find that the issues for determination are;
- a. Whether the grant should be revoked and or annulled
 - b. Whether prohibitory orders should be issued
 - c. Whether all title deed, transfers and registrations effected by use of the grant should be recalled and cancelled.
 - d. Whether the petitioners should give an inventory of the estate.
51. Section 76 of the [Law of Succession Act](#), Cap 160, Laws of Kenya provides as follows:

“76. Revocation or annulment of grant.

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of 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
- (e) that the grant has become useless and inoperative through subsequent circumstances.”
52. The Objector in this case contends that the daughters were left out when the Petition for the grant of letters of administration was made and that she in particular did not consent to the distribution nor was she aware of what her siblings had done. This was confirmed by the Petitioner’s witness during the hearing, he admitted that the sisters did not participate in the succession process neither did they sign a consent nor renounce their shares. The Petitioners on the other hand contend that she was aware, the other daughters were aware and the objector is the one who had the title documents. This has been rebutted by the Petitioner who opined that she only has one title deed which she has never lost.
53. From the record, the petition for letters of Administration intestate filed on 27th July 2012 indicates that the deceased is survived by Muneo Mwangangi Kimathi James Mwangangi, Musyoka Mwangangi, Jackson Kimondiu Mwangangi and Simon Muthiani Mwangangi only. This is repeated in the chief’s letter dated 20.7.2012. The consent to the making of a grant of administration intestate to person of equal or lesser priority is signed by Muneo Mwangangi Kimatu, Jackson Kimondiu Mwangangi and Musyoka Mwangangi.
54. A look the Summons for confirmation of grant, the affidavit filed on 23.05.2013 is also signed by Muneo Mwangangi Kimathi James Mwangangi, Musyoka Mwangangi, Jackson Kimondiu Mwangangi and Simon Muthiani Mwangangi while the consent to confirmation of grant is signed by Muneo Mwangangi Kimatu, Jackson Kimondiu Mwangangi and Musyoka Mwangangi.
55. Section 51 (2) of the *Law of Succession Act* provides that:-
- An application shall include information as to-
- (a) the full names of the deceased;
 - (b) the date and place of his death;
 - (c) his last known place of residence;
 - (d) the relationship (if any) of the applicant to the deceased;
 - (e) whether or not the deceased left a valid will;
 - (f) the present addresses of any executors appointed by any such valid will;
 - (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; and
 - (i) such other matters as may be prescribed



56. From the schedule on the mode of distribution, there is no allocation to the daughters of the deceased which confirms the Objector's contention. It therefore appears that the names of all the daughters was omitted. This was again confirmed by the Petitioner's witness during the hearing. According to him, they were not supposed to inherit and that their parents had divided the properties. This evidence was not presented.
57. These proceedings commenced in 2012, 2 years after promulgation of Constitution of Kenya 2010 whose Article 27 prescribes equality and freedom from discrimination on the basis of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
58. On 4/3/2022, the Administrators admitted in Court that the Objector and other applicants were their sisters.
59. Hon. W. Makhandia J (as he then was) In Re Estate of Solomon Ngatia Kariuki (deceased) (2008) ECLR said the following 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
60. Hon L. Kimaru J (as he then was) in the case Peter Karumbi Keingati & 4 Others Vs. Dr. Ann Nyokabi Nguthi & 3 Others (2014) ECLR stated;
- “as regards to the argument by the Applicants that married daughters ought not to inherit their parents' 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 parents' in-law, 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. ...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 persons 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.”

61. Hon. Gikonyo J in the Matter of the Estate of M’Ngarithi M’Miriti alias Paul M’Ngarithi M’Miriti (deceased) [2017] KLR, stated on the Discrimination of daughters in inheritance;

“From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when Rono vs. Rono[2008] 1 KLR 803 delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement *the Constitution*- which states categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and *the Constitution*. More specifically I am content to cite the proclamation by the Court of Appeal in the case of Stephen Gitonga M’Murithi 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*). Accordingly, the 3rd Administrator and her children who are claiming the inheritance of late Festus K. M’Ngaruthi, the son of the deceased are only entitled to the share of their late father. They are not, in the circumstances of this case entitled to more share than the distinct share of each of the two daughters of the deceased simply because the late Festus M’Ngaruthi was the son. The three children of the deceased are entitled to share the net intestate estate of the deceased equally.”

62. It is trite law that he who alleges must prove. At this juncture, the Objector has managed to prove that she was left out of the succession of the estate herein. On the other hand, the Petitioners contend that the land was divided before the deceased died but this has not been proved. No minutes were produced and the deceased could not have appointed administrators but only through a Will the deceased would appoint executors. The three elders who were alleged to have witnessed the distribution by the deceased were also not called to testify. As it stands, there is no evidence before the court to that effect, this was also not disclosed at the time of petitioning for the grant. To that extent I find that the grant was definitely obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.
63. As regards whether prohibitory orders should be issued, the grant of letters of Administration intestate was issued on 12.09.2012 to Simon Muthiani Mwangangi and James Mwangangi and the certificate of confirmation of grant issued on 6.06.2013. Any transaction in terms of sale or transfer before the said



date was illegal, irregular and unlawful as it is contrary to Section 45 LSA intermeddling with deceased's estate and Section 55 & & 71 LSA which provide as follows;

Section 45 LSA No intermeddling with property of deceased person

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

Section 55 LSA- 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 71 LSA

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.

64. As per the mode of distribution and the affidavit in the summons for confirmation on grant apart from the Administrators of the deceased's estate the Proposed distribution of the estate included Purchasers
 - a. Justus Mutunga Kitungo 0.1 Ha
 - b. Robert Ndeto Mwangangi 0.09 Ha
 - c. Stanley Muia Makau 1.3 Ha
65. The distribution ought to have been done with full consent and participation of all the beneficiaries of the estate but there was non-disclosure of material facts that there were other beneficiaries left out of the proceedings. There is therefore need to preserve the estate pending taking out of a fresh grant that will be fair to all parties.
66. In the case of Johnson Muinde Ngunza –vs- Michael Gitau Kiarie & 12 others [2017] eKLR the Court considered;

“The Law of Succession Act recognizes the purchaser's rights and in support of these submissions the said (sic) the law of succession defines a “purchaser’ purchaser according to the Act means a purchaser for money or money worth.”
67. The Properties even if sold status quo shall be maintained pending issuance of a new grant and the Purchasers right protected under Section 93 of Law of Succession Act as these sale of land parcels comprising of deceased's estate were disclosed during the Confirmation of Grant proceedings and reflected in the Certificate of Confirmation of Grant.
68. As regards whether the petitioners should give an inventory of the estate, Section 83 of the Law of Succession Act provides as hereunder:



Personal representatives shall have the following duties—

- (a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;
- (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
- (c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
- (d) to ascertain and pay, out of the estate of the deceased, all his debts;
- (e) within six months from the date of the grant, to produce to the court 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;
- (f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
- (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;
- (h) 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;
 - (i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

69. In Re Estate of Eliud Njoroge Kuria (Deceased) [2015] eKLR the court stated that:

“On the income collected by the estate agents, it must be stated that such agents are trustees. The income collected by them should be accounted for. It is not their property and they collect it on behalf of others. They must account for it. Of course, the relationship between them and the estate is founded on agency, but on all accounts it is one of trust. They are bound to account for what they have collected and for how they have applied the funds.”

70. It is therefore clear that the administrators are under legal obligation to, within six months from the date of the grant, produce to the court 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. I therefore find that the full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings including proceeds of sale of land, therewith up to the date prepared and filed within 60 days from the date of this ruling.

71. The Court grants the following orders;



Disposition

- a. A prohibitory order be issued against the Petitioners, Interested Parties, their agents and/or servants restraining them from alienating, selling, transferring, leasing, charging and dealing in any manner with the Deceased's Land Parcel No. Kalama/ Muumandu/479 & Land parcel no Machakos/ Konza North Block 1/73 and all parcels of land which may have been transferred and registered unto them by use of the said grant pending the hearing and determination of this Succession cause.
- b. The grant of letters of administration intestate made on 23.10.12 and the certificate of confirmation of grant made on 6.6. 13 are revoked and/ or annulled.
- c. A fresh grant of letters of Administration intestate is issued in the names of Simon Muthiani Mwangangi, James Mwangangi and Florence Mueni Mwangangi.
- d. The Purchasers disclosed during the Confirmation of grant proceedings and included in the Certificate of Confirmation of grant are protected under Section 93 of *Law of Succession Act* until or unless the sales are confirmed to be illegal irregular and unlawful in ELC Court.
- e. The Petitioners to give an account / Inventory of the deceased's estate.
- f. Parties/Beneficiaries of the deceased's estate may pursue confirmation of grant and proposed mode of distribution and include ALL children of the deceased excluding the portion under sale until resolved.
- g. Any aggrieved Party may apply.

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

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

THE PETITIONERS IN PERSON - ABSENT

MR. MULWA - FOR THE OBJECTOR

MR. TAMATA - FOR THE INTERESTED PARTIES

PATRICK - COURT ASSISTANT

