



**In re Estate of Wanjohi Njagi Wanjohi (Succession Cause 658 of 2004)
[2024] KEHC 16107 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16107 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 658 OF 2004
HM NYAGA, J
DECEMBER 16, 2024
IN THE MATTER OF THE ESTATE OF WANJOHI NJAGI WANJOHI**

BETWEEN

SAMUEL GITHAIGA WANJOHI PETITIONER

AND

WAIRIMU WANJOHI NJAGI OBJECTOR

AND

MARGARET WAMBUI GATHIRUA INTERESTED PARTY

JOHN KIAMA MWANGI INTERESTED PARTY

RULING

1. Wanjohi Njagi Wanjohi, the deceased herein, died intestate on 31st August, 1993 aged 76 years. Following his death, succession proceedings were commenced in the Principal Magistrate Court at Nyahururu where Letters of Administration intestate were issued to the petitioner herein in his capacity as the deceased's son on 14th October, 1997.
2. In the said proceedings, the objector herein raised an objection on grounds inter alia that she was the lawful wife of the deceased, hence she was entitled to Plot No. 216 Kirima together with her children. She further averred that the petitioner herein, having been given his share of inheritance in Nyonjoro Uiguano Farmers Co-operatives Society Ltd, he was not entitled to stake any claim on the estate of the deceased.
3. The 1st interested party claimed that he had purchased 5 acres of Plot No. 1117 Kirima, initially known as Plot no. 216 Kirima from the deceased during his lifetime.



4. The 2nd interested party claimed she had purchased two acres of Land Parcel No. 1109 from the deceased.
5. The interested parties prayer was to be granted their respective shares in the deceased's estate.
6. After considering the matter, the trial court delivered a ruling dated 7.5. 2003 dismissing the objection. The court further issued the following orders: -
 - i. The purchaser John Mwangi Kiama be entitled to and granted 5 acres out of Kirima 1117.
 - ii. It is declared that Margaret Gathirwa be granted parcel 1109 of which she has a title.
 - iii. The objector being a widow be entitled to life interest prior to her remarrying.
 - iv. The remaining portion of land Kirima 1117 be divided to children of deceased excluding married daughters and the children to receive equal shares.
 - v. The grant to be made to the petitioner for execution as above.
 - vi. Each party to be liable to own costs.
7. Dissatisfied with the above ruling, the objector lodged an appeal before this court vide Civil Appeal No. 84 of 2003. However, the Appeal was not conclusively heard and determined as the parties recorded a consent which was adopted as an order of the court in the following terms: -
 - I. That this Appeal be and is hereby allowed and the ruling of the learned Magistrate in Nyahururu Principal Magistrate's Court Succession Cause No. 157 of 1993 and delivered on 7th May 2003 be and is hereby set aside.
 - II. That the certificate of confirmation of grant issued pursuant to the said ruling be and is hereby revoked.
 - III. That the entire succession cause filed in Nyahururu Principal Magistrate's Court Succession Cause No. 157 of 1993 be heard afresh and determined on merits.
 - IV. That the entire succession cause be transferred to the High Court for hearing and disposal.
 - V. That Margaret Wambui Gathirua and John Kiama Mwangi be joined as respondents/ interested parties in the said succession cause.
 - VI. That an inhibition be and is hereby issued to inhibit the respondent and the interested parties by themselves and or others howsoever from registering any documents or any other dealings affecting Land Reference Number Nyandarua/Kirima/1109 until the said Succession Cause is heard afresh and determined on merits.
 - VII. That the costs of this Appeal be in the cause and/or to abide the outcome of the said Succession Cause.
8. Consequently, the matter was transferred here and was registered as Nakuru High Court Succession Cause No. 658 of 2004, which is before me for determination.
9. On 9th February, 2010, the grant of letters of administration intestate was issued jointly to the Petitioner, Samuel Githaga and the objector, Wairimu Wanjohi Njagi.
10. Subsequently, the petitioner filed an application dated 3rd March, 2011 seeking confirmation of the above grant. The Application is supported by an affidavit sworn by the Petitioner, Samuel Githaga Wanjohi, on 8th February, 2011 wherein he deposed that the deceased left the following dependants: -



1st House

- a. Samuel Githaiga Wanjohi- Son
- b. Wairimu Kamau- daughter in law
- c. Eunice Wairimu- daughter
- d. Jane Wahito- daughter.

2nd House

- e. Wairimu Wanjohi Njagi- widow
- f. Harrison Githaiga Wanjohi- Son
- g. Muturi Wanjohi- son
- h. Mumbi Wanjohi- daughter
- i. Kariuki Wanjohi- Son

11. He averred that deceased left behind title No. Nyandarua/Kirima 1117 measuring 4.77 Ha. and he proposed that the same be divided as follows: -
 - I. 2 acres to Margaret Wambui Gathura- purchaser
 - II. 8 acres to Wairimu Wanjohi Njagi for herself, her children and purchasers who bought land from her.
 - III. 6 acres to Samuel Githaiga Wanjohi for the 1st house in equal shares among children in that house.
12. The Petitioner then filed a further Affidavit sworn on 22nd March,2011 and deponed that his proposal set out above was erroneous and made a new proposal as follows: -
 - I. John Kiama Mwangi (purchaser)- 5 acres
 - II. Samuel Githaiga Wanjohi – 5 acres
 - III. Wairimu Wanjohi Njagi- 1.89 acres.
13. He further proposed that Nyandarua/ Kirima 1109 should go to Margaret Wambui Gathirwa.
14. It was his contention that the objector herein received the balance of the purchase price of Ksh. 120,000/= from John Kiama Mwangi after the death of the deceased herein and Ksh. 106,000/= from Maurice Otieno who purchased Nyandarua/Kirima 1108 after the deceased's death, and prayed that the said sums be taken into account in distribution of the net estate.
15. The objector opposed the proposed mode of distribution by the petitioner vide her Affidavit of protest sworn on 7th April,2011. She averred that she and the children of the deceased from the first house i.e. Harrison Githaiga Wanjohi, John Muturi Wanjohi, David Kamau Wanjohi, Lucy Wangari Wanjohi, Mary Wanjiru Wanjohi & Jane Mumbi Wanjohi have not consented in writing to the confirmation of grant and the proposed mode of distribution by the Petitioner.
16. She deponed that Alice Wanjiku Kamau, Eunice Wairimu Wanjohi and Jane Nyakinyua are the deceased's daughter in law and daughters respectively from the 1st house and the only ones who are alive have similarly not consented to the petitioner's mode of distribution of the deceased's estate.



17. She concurred with the Petitioner's listed beneficiaries save for Kariuki Wanjohi whom she excluded as a beneficiary from the second house. She also added the following as the deceased's beneficiaries from the second house: -
- i. David Kamau Wanjohi- Son
 - ii. Lucy Wangari Wanjohi- Son
 - iii. Mary Wanjiru Wanjohi- Daughter
 - iv. Rose Wanjiru Wanjohi- Deceased daughter (died in 2010)
 - v. Margaret Wangui Wanjohi- Deceased daughter (died in 2005)
 - vi. Mary Muthoni Wanjohi- Deceased daughter (died in 1993)
18. She deponed that the late Joseph Kamau Wanjohi from the 1st house is survived by his wife, Alice Wanjiku Kamau and her children, and that Rose Wanjiru Wanjohi, deceased's daughter from the second house is survived by one child.
19. It was her deposition that the deceased's estate comprised of Land parcels Nos. NYANDARUA/KIRIMA/1117 & 1109 measuring 4.77 Hectares and 0.81 Hectares respectively.
20. She contended that the members of the 1st house were given land by the deceased before his demise and as such they are not entitled to inherit from the deceased's net estate.
21. She averred that the petitioner herein was given land by the deceased at Nyonjoro through a transfer of the deceased's shares in Uiguono Nyonjoro Co-operatives Society LTD, which land is now known and described as Plot No. NYANDARUA/NDARAGWA/KAHUTHA/BLOCK C11 (NYONJORO NO.190) and it is where the petitioner resides.
22. She averred that the late Joseph Kamau Wanjohi from the first house was similarly given land by the deceased, to wit, Plot No. 518, Malewa Ranching Company Ltd and that the said Joseph lived on the said plot until his demise, and that his family still lives there. She further stated that his widow one Alice Wanjiku Kamau has indicated herein in writing that she has no interest in the deceased's land for reasons that her deceased husband was registered as the holder of share No. 518 in the aforesaid Ranching Company which initially belonged to the deceased .
23. The objector further contended that petitioner and other members of the 1st house have never occupied, cultivated, worked on or in any other manner utilized the deceased's land at Kirima Scheme, and that save for the petitioner, other members from the 1st house have no claim against the deceased's land at Kirima Scheme. She deponed that the petitioner wants to inherit twice from the deceased and that the 5 acres which he claims is for his sole benefit.
24. She further averred that the properties which were given to the petitioner and the late Joseph Kamau Wanjohi should be taken into account during distribution of the deceased's estate.
25. She contended that the purported sales of the deceased's land to John Kiama Mwangi & Margaret Wambui Gathirwa are invalid and unenforceable for lack of a proper and valid sale agreement of land and consent of the Local Divisional land Control Board.
26. It was her further deposition that the above purported purchasers have never occupied and or taken possession of the portions of land they allegedly purchased from the deceased, and being strangers to the deceased's estate, they should not participate in the distribution of his estate.



27. It was also her averment that she neither received Ksh.120,000/= being balance of the purchase price for the deceased's land from John Kiama nor Ksh.109,000/= being purchase price for Land Parcel No. Nyandarua/ Kirima/1108 from Maurice Otieno as alleged by the petitioner.
28. She contended that the said Maurice Otieno, was a District Officer based at Ol Kalou Town and he transferred the deceased's land into his name without first completing payment of the purchase price for the same, and as such he still owes the deceased's estate a sum of Ksh.105,000/=.
29. She further averred that Land Parcel Nos. Nyandarua/Kirima/ 1117 & 1109 should be inherited by the second house of the deceased, and proposed that the same be registered in her name as life tenant and thereafter be equally distributed to the deceased's children from the second house.
30. She further prayed that registration of the said Margaret Wambui Gathirwa as proprietor of Land Parcel No. Nyandarua/Kirima/1109 and title issued thereto pursuant to the certificate of confirmation of grant which was issued by Nyahururu PMC Succession Cause No. 157 of 1993 and subsequently revoked by this court be cancelled.
31. The 1st Interested party, Margaret Wambui Gathiru through her affidavit sworn on 29th April,2011 averred that she is a purchaser for value of Parcel of Land known as L.R NO. NYANDARUA/ KIRIMA/1109 measuring 0.08 Hectares or thereabouts, having purchased the same from the deceased herein during his lifetime.
32. She further deposed that she doesn't owe the deceased's family any money and that the deceased had showed her the said parcel of land, caused subdivision thereon and she subsequently took possession.
33. She also stated that she has already been issued with a Land Control Board consent and a title deed for the same and that the objector herein subsequently registered a caution over her Land and denied her access thereon despite paying the full purchase price.
34. The 2nd Interested party, John Kiama Mwangi, vide his affidavit sworn on 26th April,2011 deposed that he was a purchaser for value of 5 acres of land having purchased the same from the deceased herein.
35. He deposed that the outstanding balance of the purchase price of Ksh. 120,000/= was subsequently paid to the objector and she acknowledged receipt.
36. He asserted that the objector and Harrison Githaiga Wanjohi executed the sale agreement as vendors and that the deceased had applied for the consent of the Land Control Board but the same had not been granted at the time of his death.
37. The Objector swore a further affidavit on 24th June,2024 and corrected that the persons listed in paragraph 1(a) to (f) of her aforesaid affidavit are from the second house and not from the first house.
38. She averred that the 1st interested party has never possessed or occupied the Land Parcel Nyandarua/ Kirima/1109 as alleged and that the deceased did not execute any transfer of land instrument regarding the same parcel in her favour.
39. She also deposed that the 1st Interested party did not acquire title deed to the said parcel during the deceased's lifetime but acquired the same on 19.6.2003 after the deceased's demise pursuant to the certificate of grant issued in Nyahururu P.M's Court Succession Cause No. 157 of 1993.
40. It was her averment that the said certificate of confirmation of grant was revoked vide the consent order recorded in Nakuru High Court Civil Appeal No. 84 of 2003 and consequently, the 1st interested party's title deed should be cancelled.



41. She further deposed that none of the interested parties has legal or lawful right, interest, title or claim to the deceased's land Parcel Numbers Nyandarua/ Kirima/1109 and 1117 or to any other property of the deceased at all.
42. She reiterated that she never received Ksh. 120,000/- being balance of the purchase price for 5 acres of land from the 2nd Interested party.
43. The 1st Interested party swore a supplementary affidavit dated 19th April,2018 wherein she clarified that the 2 acres of the land she purchased was to be excised from the original title of L.R NO. NYANDARUA/KIRIMA/1109.
44. She annexed a letter showing that the objector acknowledged she had cleared all debts and a Land Control Board consent in favour of her transfer. She averred that after Land Control Board consent was executed and registered a title deed and green card were processed in her favour. She prayed that this court finds that she is entitled to the two acres of land, and order release of the same to her unconditionally and that she be allowed to process her title deed again.
45. The 2nd Interested party equally swore a Supplementary affidavit on 19th April,2018 wherein he clarified that the land that he bought is to be excised from the original title of L.R NO. NYANDARUA/ KIRIMA/1109. He annexed sale agreement of the aforesaid land and a letter by the objector acknowledging receipt of the purchase price.
46. He also swore a supplementary affidavit on 9th May,2023 wherein he averred that he entered into a sale agreement with the deceased for a purchase of 5 acres of land which was to be excised from the original title of L.R No. Nyandarua/Kirima/1109 at a consideration of Ksh. 150,000/=. That the said agreement was witnessed by the deceased, objector and their son Harrison Githaiga.
47. He averred that he paid a deposit of Ksh. 30,000/= and they agreed that he will pay the balance on a later date. That on 17th October, 1993 and 7th October, 1994 he paid Ksh. 80,000/= and 40,000/= respectively and the deceased, objector and Harrison Githaiga acknowledged receipt of the said sums.
48. The 2nd Interested party in his further affidavit dated 8th February,2024 averred that the deceased received deposit of the purchase price whereas the objector received the balance thereof. That the objector in turn gave him the KRA pin, passport photo and National ID card to facilitate the transfer process but she later failed to honor their agreement and lodged a caution.
49. He further averred that once he paid the full purchase price of the said land the succession wrangles began necessitating the petitioner herein to give him 1 acre of land which was to be excised from Plot No. NYANDARUA/KIRIMA/1108 and in turn he was to pay his legal fees which he did without any controversy.
50. He further contended that he and the objector entered into a memorandum of understanding on 12th January,2016 where he paid her Ksh.100,000/= being the final payment and settlement of the land dispute, and that the objector acknowledged receipt of the memorandum of understanding by signing it but to his surprise the objector ignored and/or neglected whatever they agreed on and subsequently continued using the said parcel of land for her own beneficial interest. He contended that the objector has employed delaying tactics to ensure that this matter is in court back and forth.
51. He prayed that in the interest of justice and fairness this matter be disposed and he be awarded his parcel of land.



52. The petitioner passed away on 25th May,2018 and his personal representative and son one Godfrey Isaac Wanjohi substituted him. Consequently, a new grant of letters of administration intestate was issued to him and the objector on 11th February,2019.
53. The matter proceeded by way of viva voce evidence.

Objector's Case

54. The Objector, Wairimu Wanjohi Njagi, reiterated the averments contained in her aforementioned affidavits. In addition, she confirmed that the 2nd Interested party bought land and she received Ksh. 120,000/= from him, and that the 1st Interested party purchased plot no. 1109. She stated that the interested parties did not obtain consent from the Land Control Board.
55. On cross examination by the Petitioner's counsel, she stated that that the deceased was married to the 1st wife for over 40 years before he married her. She did not know the acreage of Njonjoro and Malewa land. She said she did not share Ksh. 120,000/= that she received from the 2nd Respondent with her co-administrator. She confirmed that Maurice Otieno bought a plot at Ksh. 106,000/=. She also knew that Wairimu Wanjohi Njagi bought Plot No.1109.
56. On cross examination by the Interested parties' counsel, she admitted that the documents shown to her (MFI-1) were copies of consent of Land Control Board. She suggested that she refunds the purchase money she received from the 2nd interested party.

The Petitioner's case

57. Godfrey Isaac Wanjohi Githaiga adopted the petitioner's affidavit sworn on 8th February,2011, further affidavit sworn on 22nd March,2011 and his witness statement dated 5th February,2024 as his evidence in chief. In his statement, he stated the petitioner was survived by 8 children namely; Simon Peter Macharia Githaiga, Samuel Mwangi Githaiga, Lucy Wanjiru, Alice Wambui, John Kirugi, Mary Wanjiku, Paul Ndungu and him whereas Eunice was survived by Peter Kamunya, Regina Wathima, Samuel Githaiga, Irene Wambui, Cecilia Muthoni, Jane Nyakinyua and Hellen Muthoni. He prayed that the deceased's estate be distributed as set out in the Petitioner's further affidavit dated 22nd March,2011.
58. It was his further testimony that the deceased proposed that the first house gets 5 acres of land while the 2nd house gets 2 acres since at the time he married the objector he had already purchased the land with his first wife. He said the 2nd interested party purchased 5 acres of land but he did not know the size of land that the 1st interested party purchased. He said the land at Nyonjora belonged to the Petitioner.

Interested Parties' Case

59. The 1st interested party basically testified that she purchased land from the deceased in 1993 and paid the full purchase price.
60. The 2nd interested party maintained that he bought 5 acres of land and fully paid for it.
61. The interested parties produced the documents in their respective list of documents as exhibits.

Submissions

62. Only the Petitioner's and 1st Interested party's submissions are on record.



Petitioner's Submissions

63. The petitioner's Counsel submitted that the petitioner's mode of distribution seems reasonable and just considering there is evidence the objector benefitted substantially from proceeds of sale from Parcel No. 216 and Nyandarua/Kirima/1118.
64. Citing Section 107 of the *Evidence Act*, the Counsel submitted that the protestor needed to prove who among the children in the first house received property from the deceased before his death and whether receipt of such gift precluded them from inheriting the remainder of the deceased property but she failed to do so.
65. The counsel submitted that whereas it may be true that the petitioner got shares from the deceased in Uiguano Nyonjoro Co-operative Society LTD, the protestor did not adduce evidence of value of the said property so that the court may properly put it into consideration when sharing out the remainder of the estate of the deceased.
66. He posited that the above shares did not form part of the deceased's estate at the time of his death and therefore it is not subject to distribution in this cause.
67. The counsel further submitted that the letter dated 7.6.2002 produced by the protestor to show that one Alice Wanjiku Kamau had renounced her entitlement to plot No. 216 on the basis that her late husband is the registered holder of share No. 518 in Malewa Ranching Co. LTD, doesn't show that Wairimu Kamau is the same person as Alice Wanjiku Kamau. Additionally, the counsel stated that the protestor failed to call the said Alice as a witness to ascertain the above position.
68. Citing Section 35 of the *Law of Succession Act*, the counsel submitted that considering Alice Wanjiku Kamau would only be entitled to life interest in the estate for her late husband, it would have been necessary for the other beneficiaries especially the children of the late Wanjohi Kamau to declare their interest or otherwise in the estate of the deceased herein.
69. He contended that if no provision is made for them in this cause, nothing would stop them from reopening this cause many years later.
70. Referring this court to letter marked as WNN 5 and dated 17.6.2002, the counsel submitted that the alleged renunciation by Alice Wanjiku Kamau over her interest in Plot No. 216 was not voluntary and was influenced by the alleged illegal transfer and or registration of Plot No. 518 Malewa Ranching Co. Ltd.
71. The counsel submitted that the protestor has not given any reason why Jane Nyakinyua Wanjohi and Eunice Wairimu Wanjohi, the daughters of the deceased from the 1st house should not have a share of the estate.
72. He submitted that the protestor's assertion that the interested parties did not obtain the consent of the Land Control Board was based on a technicality rather than substantive law.
73. Citing Article 10(2)(b) and 159(2) (e) of *the Constitution*, the counsel submitted that this court has a duty to apply the principles of equity where the ends of justice require.
74. The counsel further submitted that the courts have held that requirement of Land Control Board is not a legal requirement in certain cases. To this end, reliance was placed on the Court of Appeal case of Willy Kimutai Kitilit v Michael Kibet [2018] eKLR
75. The counsel urged the court to distribute the estate of the deceased as proposed by the 1st Administrator.



1st Interested Party's Submissions.

76. The counsel submitted that 1st interested party is the bona fide purchaser for value of two acres of land to be excised from the original title of L.R No. Nyandarua/ Kirima 1108.
77. She submitted that the objector acknowledged that the debt had been cleared and prayed that this matter be disposed off in a fair and just manner so that justice is delivered.
78. On costs, the counsel for the 1st interested party submitted that the same is discretionary and borne by unsuccessful party.

Analysis & Determination

79. I have considered the summons for confirmation of the grant herein, responses thereof and submissions by counsel. Issues that emerge for determination are;
 - a. Whether the deceased made gifts inter vivos to some beneficiaries and if so, whether those gifts should be taken into account in determining the ultimate entitlement of the beneficiaries in this intestate estate.
 - b. Whether the interested parties are entitled to a share in the estate of the deceased or not.
 - c. Whether any of the proposed modes of distribution of the estate by the petitioner and the protestor are fair and equitable.
 - d. How the estate of the deceased shall be distributed?

Issue No.1

80. Gifts inter vivos are gifts made between living persons. The requirements of law regarding the same 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 resulting trusts or the presumption of. The nature of gifts inter vivos was aptly described by the court in re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR). It was held as follows;

“For gifts inter vivos , 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 resulting trusts. Gifts of land must be 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 this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee.”

81. In the instant case, the objector contended that the members of the first house were given land by the deceased before his demise and as such they are not entitled to inherit from the remainder of his estate.
82. The members of the first house are the petitioner herein (Samuel Githaiga Wanjohi), Joseph Kamau Wanjohi (now deceased), Eunice Wairimu Wanjohi and Jane Nyakinyua Wanjohi.
83. The objector asserted that the petitioner herein was given land at Nyonjoro through a transfer of the deceased shares in Uiguano Nyonjoro Co-Operative Society Ltd. In support of her assertion, she annexed copies of the deceased's membership card in the said society and deceased's application for



transfer of his shares to the petitioner and a letter dated 5.4.2022 from the said society as annexures WWN1,2 & 3 respectively.

84. The petitioner submitted through his counsel that the objector failed to prove that receipt of such gifts precluded him and Joseph Kamau Wanjohi from inheritance of the remainder of the deceased's estate. The petitioner was unable to satisfactorily explain how the property came to be transferred to him by the deceased.
85. I have perused the said documents and I am satisfied that the land at Nyonjoro once belonged to the deceased, from the year 1969 and then the same was transferred some time in 1973 to the late petitioner herein. The late petitioner did not dispute the contents of the letter from the company dated 5th April 2011 which gave history of the property. It is thus my finding that the deceased did give and transferred his land to the late petitioner during his lifetime and is thus deemed to be a gift inter vivos.
86. The position in law in regards to such a gift is provided under Sections 28 (d) and 42 of the [Law of Succession Act](#) and is to the effect that such property should be taken into account in determining the ultimate share of the estate. The sections provide as follows;
28. Circumstances to be taken into account by court in making order In considering whether any order should be made under this Part, and if so what order, the court shall have regard to-
- d. whether the deceased had made any advancement or other gift to the dependant during his lifetime;
42. Previous benefits to be brought into account where
- a. an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- b. property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.
87. Gikonyo J in RE-Estate of Marete Mbui alias M''Marete M'Mbui alias Justus Marete (Deceased), expressed himself as follows in regard to section 42 of the Act;
- “...that Section 42 of the [Law of Succession Act](#) serves two important purposes; One, it fends off selfish tendencies of human beings in seeking for double portion in the estate of the deceased. And two, it enables the court to attain equality in sharing out of the estate property among the rightful beneficiaries.”
88. I agree with the judge entirely. The late petitioner is, in my view, an illustration of the people described by the Judge in that cited case. It is very clear that the land at Nyonjoro came from the deceased to him but he now wants to disregard the same while pursuing a double portion. The court cannot allow such avarice to dwell.
89. Having found that the petitioner was given land by the deceased during the latter's lifetime, then the same qualifies as a gift inter vivos and ought to be taken into account during the distribution of the estate.
90. As regards Joseph Kamau Wanjohi the objector averred that he was similarly given plot No. 518 at Malewa Ranching Company Ltd by the deceased . The objector annexed a letter dated 8.7.2002 by Malewa Ranching Co. Ltd showing that Plot No. 518 was registered in the name of the late Samuel



Githaiga Wanjohi. She also annexed a letter by Alice Wanjiku Kamau, who is the widow, and a chief's letter both dated 17th June 2002 showing that Alice Wanjiru had no interest in Plot No. 216 Kirima Scheme as her late husband had been registered as the owner of Plot No. 518 at the said Company.

91. Unlike the case for the petitioner, the history of the property in question was not given, but the letter from Malewa Ranching Company shows that Kamau Wanjohi was registered as the owner on 17th October 1994, which was after the death of the deceased herein. If that is the case, then the said registration is a nullity, and cannot be upheld by the court. If the registration was as stated above then it matters not what his widow has expressed.
92. From the foregoing, I opine that it is important that Malewa Ranching Company give a detailed history of the said land under membership number 518 before further orders can issue. This will enable the court to determine if the late Joseph Kamau Wanjohi also received a gift inter vivos or if the registration in his name was lawful.
93. The objector seems to suggest that the deceased made gifts to the entire 1st house and thus they all ought to be excluded from the remainder of the estate. Apart from the late petitioner and possibly the late Joseph Kamau Wanjohi, the deceased also had other children who included the daughters from the first house. The gifts to the petitioner and Joseph Kamau Wanjohi does not mean that all the children of the 1st house were catered for.
94. Neither the petitioner nor objector adduced any evidence to prove that the aforementioned daughters from the first house were equally given land by the deceased during his lifetime. In fact, the said daughters have been overlooked completely, alongside those from the 2nd house.
95. I believe that there is need to have more information on the said daughters, who are also by law entitled to the estate. I will give further directions later.

Issue No.2

96. Based on the evidence on record it is not in doubt that the interested parties purchased land from the deceased during his lifetime.
97. The 1st Interested party's case is that the deceased entered into a sale agreement with her husband Harrison Githaiga for purchase of 2 acres of land to be excised from Plot No. 1109 and he paid the full purchase price. That subsequently the land was transferred and registered in her name. She produced a letter whereby the deceased acknowledged receipt of the full purchase price for the said plot. She produced a copy of title deed of Nyandarua/Kirima/1109 registered in her name. She also produced a consent from Ol Kalou Land Control Board dated 30th April, 1993 executed and registered in favour of her transfer.
98. The 2nd Interested party on his part testified that he bought 5 acres of land from the deceased at a consideration of Ksh. 150,000/=. He said he paid a deposit of Ksh. 30,000/= to the deceased and a balance of Ksh.120,000/= to the objector. He produced a sale agreement showing that he purchased the 5 acres of land in Plot No. 1108 previously known as Plot No. 216 from the deceased. It was his case that the deceased died before he could transfer the land to him and that the delay in the transfer process has been orchestrated by the objector who lodged a caution against the said land.
99. The objector during hearing conceded that the interested parties purchased the aforesaid respective parcels of land from the deceased but contended that the agreements entered into by the deceased and the interested parties were null and void for want of consent of the Land Control Board.



100. The Objector in her further affidavit of 24th June, 2024 contended that the deceased did not execute any transfer of land instrument regarding Land Parcel Nyandarua/Kirima/1109 in favour of the 1st interested party. However, a perusal of the Land Control Board consent dated 30.4.1993 clearly shows that the same was executed by the deceased in favour of the 1st interested party.
101. Therefore the 1st interested party had fully paid the purchase price and obtained the requisite consent.
102. With regard to the 1st interested party, I opine that she has satisfied the court that her late husband is a purchaser for value of 2 acres of land of Plot no. 1109 and having obtained the requisite consent and she is entitled to the same.
103. I will now turn to the claim by the 2nd interested party.
104. The 2nd interested party's claim is that he purchased 5 acres from the deceased. By his own admission, he only paid Ksh. 30,000/- to the deceased out of the total consideration of Ksh. 150,000/-. Therefore, it cannot be true that he paid the entire consideration to the deceased. The rest of the money was paid to the objector, who was not an administrator of the estate herein and as a surviving spouse did not obtain consent from the court as required under section 37 of the Law of Succession Act. The same provides as follows;

Powers of spouse during life interest

A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the consent of all co-trustees and all children of full age, or with the consent of the court shall, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:

Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.

105. It follows that the sale by the objector was unlawful for want of authority as an administrator or want of consent of the court as a spouse. It is thus an invalid, null and void transaction. Such contract is ex facie illegal and is unenforceable; no person can maintain an action based on or recover on the basis of a contract which is prohibited by statute. Quoting *Mcfoy Vs. United Africa Co. Ltd* (1961) 3 All ER 1169 it is true of this case, that:

“... If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay here. It will collapse.”

106. The transaction by the 2nd interested party also faces another hurdle.
107. Section 6(1)(a) stipulates that the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area; is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.



108. With regard to the key question of consent the Court of Appeal has addressed the issue severally. In the case of *Onyango & Another Vs. Luwayi* 1986 KLR 513 Nyarangi, JA as he then was held:

“The appellant admitted that no consent for the proposed transaction concerning agricultural land had been given by the divisional Land Control Board. The transaction was therefore void for all purposes under section 6(1) of the *Land Control Act* Cap 302, because the transaction was not excluded by section 6(3). An application for consent in respect of the proposed sale of the material parcel of land had to be made to the appropriate land control board within six months of the making of agreement between SAMSON LUWAYI and JAVANS BUTEMI, NO such application was made. That agreement therefore is of no effect and no question of specific performance can lawfully arise.”

109. In the case of *Hirani Ngaihe Githure Vs. Wanjiku Munge* 1979 KLR 50 Cheson, J as he then was held thus:

“The position is simple and clear; section 6 of the *Land Control Act* is an express provision of a statute. It is a mandatory provision and no principle of equity can soften or change it. The courts cannot do that; for it is not for us to legislate but to interpret what parliament has legislated. So in this case that agreement between the parties having been entered in June 1969 became void for all purposes, including the purpose of specific performance at the expiration of three months from the date of making it; and since no consent had been obtained within that time, nothing can revise or resurrect such agreement. Failure to obtain the necessary Land Control Board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a Land Control area unless the consent of Land Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes.”

110. In light of the above precedents, it is my considered view that the transaction between the 2nd interested party and the deceased was null and void for want of consent. Having paid some money to the deceased the 2nd interested party may be entitled to seek a refund of the sum paid to the deceased. Such remedy cannot be availed through the succession cause. The dispute between him and estate of the deceased can only be entertained by way of suing the administrators of the deceased estate. On this issue I rely on the case of *In re Estate of William Koike Riyies (Deceased)* [2024] KEHC 4177 (KLR) where the court held as follows;

‘It is my considered view, as stated in *Zakaria Nthiga Matumo* case, above, the jurisdiction of this court, sitting as a Probate Court, is limited to ascertaining what assets form the estate of a deceased person, who the beneficiaries are and how to distribute the assets to the beneficiaries. That jurisdiction does not extend to determining who the creditors are unless such creditors have been acknowledged and listed as such in the Petition for Letters of Administration. Anyone claiming against the estate of a deceased person and whose claim is contested, must first go to the court with the jurisdiction to determine such an issue and once his claim has crystallized, he can return to the Probate Court and lay his claim by presenting the decree/judgment.’

Issue No.3

111. I have looked at the mode of distribution by both the Petitioner and the objector.



112. I am of the view that the objector's proposal is discriminatory and unfair as some of the beneficiaries from the 1st house, namely the daughters, have not been provided for. Further, the objector did not factor in the portion of land purchased by the 1st interested party in her proposal.
113. Equally, the petitioner's proposal is not equitable noting the deceased gave him and possibly his brother land during his lifetime. If the said proposal is allowed it would unfairly enrich the members of the petitioner and his brother at the expense of the other beneficiaries. There is also no signed consent on record from the members of the 1st house to prove that they are in support of the same considering the objector's contention that the 5 acres proposed to be distributed to the 1st house was only meant to benefit the petitioner.

Issue No.4

114. It is the primary duty of the Probate Court to distribute the estate of the deceased to the rightful beneficiaries. In order to distribute the said estate, the Court must determine what properties are available for distribution, to whom they should be distributed and in what portions.
115. From the record, the Petitioner indicated that the deceased was survived by four children from the first wife, himself and his 3 siblings and 5 beneficiaries from the 2nd house, that is the objector and her 4 children.
116. The objector on her part confirmed the beneficiaries from the 1st house as listed by the petitioner and listed 10 beneficiaries from the second house, three of whom are deceased.
117. Having perused the affidavits on record by the petitioner and the objector, I note that the same are devoid of particulars that would assist this court. For instance, none of them disclosed whether Jane Nyakinyua Wanjohi, deceased's daughter from the 1st house and Lucy Wangari, Jane Mumbi, Mary Wanjiru, Margaret Wangui Wanjohi and Mary Muthoni Wanjohi deceased's daughters from the second house, had any children.
118. The importance of this information cannot be overstated. In the absence of the children, then the grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents. If there are no children then the estate devolves among the surviving children. It was therefore crucial that the above information be availed to court.
119. The evidence on record shows that the deceased's estate comprised Nyandarua/Kirima/1117 and 1109 measuring 4.77 Hectares and 0.81 Hectares respectively.
120. The acreage of the plots given to the petitioner and possibly John Kamau Wanjohi is unknown. The size of the land given to Simon Githaiga, is not available for distribution but the evidence on its acreage or value will guide this court in determining the share of the net intestate estate finally accruing to the children, grandchildren or houses.
121. In light of the above, in determining the summons for confirmation, I make the following findings and orders;
- a. Simon Githaiga Wanjohi received land at Nyonjoro vide transfer of shares in Uigano Nyonjoro Co-operative Society as a gift *inter vivos* which shall be taken into account on distribution of the estate.
 - b. The estate of Simon Githaiga Wanjohi to provide the title deed of the property under (a) above within the next 30 days.



- c. Malewa Ranching Company Limited to provide full details of Membership No. 518 from the date of first registration to the date of registration of John Kamau Wanjohi, within the next 30 days.
- d. The administrators should, within 30 days file a detailed list of all the children of the deceased, stating their status (alive or deceased) and where deceased, their respective dates of death and if they left any children, to be listed as well. The list to be approved by the Chief of their location/ sub-county.
- e. The 1st interested party has proven purchase of Land Parcel Known as Nyandarua/Kirima 1109 from the deceased and she is thus entitled to it. The same shall be distributed to her.
- f. The second interested party's claim is hereby dismissed.
- g. There will be no order as to costs.
- h. A mention date to be given to confirm compliance and further directions of the court.

SIGNED AND DELIVERED VIRTUALLY AT MERU THIS 16TH DAY OF DECEMBER, 2024.

H. M. NYAGA

JUDGE.

In the presence of;

