



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 296 OF 2004

IN THE MATTER OF THE ESTATE OF MIRIKWA WERIMO (DECEASED)

JUDGMENT

1. According to the certificate of death on record, serial number 751718, dated 10th December 2003, the deceased herein, Mirikwa Werimo, died on 20th June 1977. A letter from the Chief of Nabongo Location, dated 5th January 2004, indicated that he had married 4 wives, three of whom had died as at the date of the later, and 7 sons. The names of the sons were listed as Wakwanalo Mirikwa Werimo, Joseph Onyango Mirikwa, Peter Makokha Mirikwa, Stephen Omukholi Mirikwa, George Werimo Mirikwa, Francis Ong'ongo Mirikwa and Robert Kulumbani Mirikwa. He was said to have had died possessed of a property known as South Wanga/Ekero/33.

2. Representation to the estate of the deceased was sought by Peter Makokha Mirikwa and Francis Ong'ongo Mirikwa, in their capacities as sons of the deceased, in a petition that was lodged herein on 21st December 2005. The deceased was expressed to have had been survived by 7 individuals, whose relationship with the deceased was not disclosed in the petition, and whose names were listed as Wakwanda Mirikwa Werimo, Joseph Onyango Mirikwa, Peter Makokha Mirikwa, Stephen Omukholi Mirikwa, George Werimo Mirikwa, Francis Ong'ongo Mirikwa and Robert Kulumbani Mirikwa. The deceased was expressed to have had died possessed of South Wanga/Ekero/33.

3. An objection to making of a grant, dated 21st July 2008, was lodged at the registry on 22nd July 2008, by Wakwanalo Mirikwa Werimo and Joseph Onyango Mirikwa, in Form 76, under Rule 17(1) of the Probate and Administration Rules. The grounds upon which the objection was founded were that the petition was based on an untrue allegation of fact, some beneficiaries had been excluded and there was fraud. A notice was given to the two objectors, dated 24th July 2008, in keeping with the relevant provisions. The objectors filed a cross-petition, but an answer, dated 18th February 2009, seeking representation to the estate in their capacity as sons of the deceased. In their affidavit, sworn on 18th February 2009, in support of their cross-petition, they averred that the deceased had been survived by a widow, Loice Lunjalu Mirikwa, and 6 sons, being Wakwanalo Mirikwa Werimo, Joseph Onyango Mirikwa, Peter Makokha Mirikwa, George Werimo Mirikwa, Francis Ong'onga and Colomban Odhiambo Robert. One son, Stephen Mukholi Mirikwa, was said to be deceased.

4. The petitioners filed a replying affidavit in response, sworn on 28th September 2010, where they conceded that the objectors were their brothers, and said that they had listed them in the petition as sons of the deceased. They submitted that the objections were not properly founded, but suggested that they had no objection to the two objectors being listed as petitioners.

5. The objection was resolved by consent of the parties on 9th May 2012, to the effect that the petitioners and the objectors be granted representation to the estate of the deceased. It was further agreed that the new administrators, or any one of them, file for confirmation of the grant within 30 days, with liberty, to whosoever was not to agree with the proposals to be made, to file affidavits of protest. Letters of administration intestate were made on 9th May 2012, and grant was duly issued, dated 24th May 2012, naming Peter Makokha Mirikwa, Francis Ong'ong'o Mirikwa, Wakwanalo Mirikwa Werimo and Joseph Onyango Mirikwa as administrators.

6. In compliance with the consent orders of 9th May 2012, two of the administrators, Peter Makokha Mirikwa and Francis Ong'ong'o, lodged herein a summons for confirmation of grant, dated 26th June 2013, filed on 1st July 2013. It is the said application which is the subject of determination in this judgment. I shall refer to the two, hereafter, as the applicants. They have listed the survivors of the deceased, or the persons beneficially entitled to a share in the estate, in their separate affidavits sworn on 26th June 2013, to be the 8 individuals named in the objection. The property proposed for distribution is South Wanga/Ekero/33. The said summons provides for a schedule for distribution of the property as follows: -

- a) 7 acres, to Wakwanalo Mirikwa Werimo;
- b) 6 acres, to Joseph Onyango Mirikwa;
- c) 7 acres, to Peter Makokha Mirikwa;

- d) 6 acres, to Stephen Mukholi Mirikwa;
- e) 6 acres to George Werimo Mirikwa;
- f) 7 acres, to Francis Ong'ong'o, with the same being held during life interest by Loice Lunjalu Mirikwa;
- g) 6 acres, to Colomban Odhiambo Robert.

7. No consent, in Form 37, was filed, under Rule 40(8) of the Probate and Administration Rules, duly signed by the beneficiaries.

8. An affidavit of protest was lodged herein on 18th September 2013, sworn on 7th September 2013, by Wakwanalo Mirikwa Werimo. I shall refer to him hereafter as the protestor. He avers that South Wanga/Ekero/33 had been demarcated to heirs and that there were boundaries on the land, and any interference with the boundaries would lead to evictions and destruction of homes. He proposed that surveyors visit the land, to confirm the occupancy of the land on the ground.

9. An order was made on 30th October 2013, for the Kakamega District Land Registrar and the Kakamega District Land Surveyor to visit South Wanga/Ekero/33, to establish the acreage of each of the persons beneficially entitled. The visit happened, and a report was filed in court on 3rd November 2015, dated 20th November 2014, done by the District Land Surveyor. It is indicated, in the report, that the boundaries were surveyed to determine what each of the parties was occupying, in terms of acreage. It was noted that the parties living on the land occupied unequal acreages, and that there were boundaries on the ground. The results were as follows:

- a) 2.7 hectares/6.67 acres, occupied by George Werimo, Francis Ong'ong'a Mirikwa and Robert Kulumbani Odhiambo;
- b) 4.3 hectares/10.60 acres, occupied by Joseph Onyango Mirikwa;
- c) 4.0 hectares/9.88 acres, occupied by Wakwanalo Mirikwa Werimo;
- d) 4.45 hectares/10.99 acres, occupied by Peter Makokha Mirikwa; and
- e) 3.60 hectares/8.89 acres, occupied by David Abuti Omukholi.

10. Directions were taken on 30th May 2016. The summons for confirmation of grant was to be disposed of by way of *viva voce* or oral evidence, and parties were directed to file witness statements.

11. There was compliance, as I have seen on record several witness statements and affidavits. I shall not bespeak the contents of the witness statements since the same were meant to guide the witnesses at the oral hearing of the matter, and if the makers did not testify then the said witness statements are of no value, unless they were presented as evidence by consent.

12. I shall, however, recite one affidavit said to be on distribution, sworn on 29th May 2017, by Peter Makokha Mirikwa. The circumstances of its filing are not clear from the record. It was mentioned in court on 31st May 2017, but the court made no order or comment on it, and I shall, therefore, presume that the same was admitted. It proposes a mode of distribution that accords with the occupation of the land on the ground by the survivors of the deceased, as mapped out by the District Surveyor in her report. Peter Makokha Mirikwa appointed advocates to act for him, Messrs. Okeyo Ochiel & Company, and swore a second affidavit, on 30th November 2020, in opposition to the summons for confirmation of grant. He essentially avers that the deceased had distributed his property during his lifetime, and proposes that the estate be distributed as per the occupancy on the ground, as reflected in the District Surveyor's report. He also pronounces to have withdrawn the affidavit that he swore in support of the summons for confirmation of grant.

13. Before I get into the details of the oral hearing, let me mention that some of the administrators and survivors of the deceased passed on, and were replaced by other individuals. The protestor, Wakwanalo Mirikwa Werimo, died on 7th September 2017, and he was substituted as administrator and protestor by Francis Welimo Wakwanalo, vide an order made on 17th July 2018. Francis Ong'ong'a Mirikwa died on 27th May 2018, and was replaced by Hellen Auma Mirikwa, as administrator, vide an order made on 23rd July 2019. Fresh letters of administration intestate were made on 23rd July 2019, and a grant was duly issued, dated 13th August 2019, reflecting those changes.

14. The oral hearing commenced on 31st May 2017. The late protestor, Wakwanalo Mirikwa Werimo, was the first to take the witness stand. He adopted his statement, dated 25th May 2016, as his evidence in chief. In that statement he had stated that the deceased had married 4 times. His wives were, in order of seniority, Feleria Wamukoya, Kalara Nambilo, Ursula Mwanza and Loice Olunjalu. The first house had 4 children, being Wakwanalo Mirikwa, Joseph Onyango Mirikwa, Peter Makokha Mirikwa and the late Stephen Omukholi Mirikea. The second house had 5 daughters, all of whom were married, 4 died, and only Wilhelmina Nyongesa was alive. The third house comprised of 4 daughters, all of whom married, and out of the 4 only Magdalene Malala was alive. The third house comprised of 3 sons, being George Werimo Mirikwa, Francis Ong'ong'a Mirikwa and Robert Kulumbani Mirikwa. It was averred that the deceased started giving out land to his sons in 1965, when he gave land to Wakwanalo Mirikwa Werimo, before George Werimo Mirikwa, Francis Ong'ong'a Mirikwa and Robert Kulumbani Mirikwa were born, and before land adjudication was done. It was averred that Joseph Onyango Mirikwa was given his share in 1966, again before land adjudication. Peter Makokha Mirikwa and Stephen Omukholi Mirikwa allegedly got their shares in 1974, after land adjudication. It was averred that they were given those portions after they matured and got married. The land that remained was for the fourth house, of Loice Olunjaru, the mother to George Werimo Mirikwa, Francis Ong'ong'a Mirikwa and Robert Kulumbani Mirikwa. It was further averred that the occupation on the ground was based on the said distribution. He proposed distribution as per the surveyor's report. He averred that there was a meeting in 2003 when the family sat and all agreed to be satisfied with the portions they occupied, and

they signed an agreement, attached to the statement, dated 12th October 2003.

15. Joseph Onyango Mirikwa testified next. He confirmed that he had made a witness statement, which he said concurred with the testimony of the protestor. He said that before he died, the deceased had shown each person their share of the land, and since then, each person had been confined to their portion. He said that the land on the ground was as per the surveyor's report, which he went on to produce as an exhibit in the matter. He further testified that they had met before village elders, and agreed as a family, that the property be distributed as per the will of the deceased. He said that happened on 12th October 2002. He said that he did not support the proposals made in the summons for confirmation of grant. He proposed that the land be distributed as per the deceased's wishes. During cross-examination, he said that only the first and the fourth houses had sons, the other two did not, and that only the two houses with sons were entitled to a share in the land. He said that the first house occupied 27 acres, while the fourth house occupied 6 acres. He stated that the widow in the fourth house was still alive, but she had not been involved in the distribution. He stated that the surviving widow was not involved in the agreement dated 12th October 2003.

16. Peter Makokha Mirikwa testified on 3rd December 2020. He affirmed that he swore the affidavit on distribution, on 29th May 2017, and he adopted the same as his evidence. He supported the distribution proposed by the protestor. He confirmed that he was given 10 acres, and he was contented with that. He stated that there were boundaries on the land.

17. From the pleadings, affidavit and oral testimonies, I have identified only two issues for determination, that is whether the grant ought to be confirmed and how the estate should be distributed.

18. In confirmation applications, there are two principal factors for the court to consider, appointment of administrators and distribution of the estate. Section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

“Confirmation of Grants

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

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.”

19. The principal purpose of confirmation is distribution of the assets. The proviso to subsection (2) of section 71 requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules, at Rule 40(4), as follows:

“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all person entitled to the estate have been ascertained and determined.”

20. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? It would appear to me that both sides are in agreement that the deceased had 7 sons. One of the widows survived, and she is listed in the summons for confirmation of grant, and that was confirmed at the oral hearing. It is not clear from the pleadings how many daughters the deceased had in total, for the daughters in the first and fourth houses were not disclosed, with the parties' contented with just disclosing the sons. It transpired that the second and third house did not have sons, but there were daughters. Some have died, and two are surviving, one from each house. They were not disclosed in the Chief's letter, the petition and the summons for confirmation of grant. The first time they are mentioned is in the witness statement that the protestor filed herein. Is their disclosure and involvement in the process critical?

21. I note that the deceased herein died in 1977. The Law of Succession Act came into force in 1981. According to section 2(1) of the Act, the substantive provisions of the Act, which include Part V, which governs intestate succession, are to apply to estates of persons who died after the Act commenced on 1st July 1981. Section 2(2) applies the Act to distribution of estates of persons who died before 1st July 1981, and the applicable law to those estates is the law that was in force as at the date of death. Since death here occurred in 1977, section 2(1) does not apply, and therefore, distribution of the estate of the deceased herein should not be in accordance with Part V of the Act. Section 2(2) applies, and, therefore, the applicable law should be the law that applied in 1977, to the estate of a dead African, and in this case, a Luhya.

22. Section 2(1)(2) of the Law of Succession Act provides as follows:

“(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application in all cases of intestate or testamentary succession to estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

23. Although, from the Act, it is clear, that the estate is to be distributed in accordance with the custom and tradition of the community from which the deceased was part of at the time of his death, neither side made an effort to adduce evidence of the purport of the applicable customary law. Yet, by dint of Rule 64 of the Probate and Administration Rules, and the principle stated in *Ernest Kinyanjui Kimani vs. Muiru Gikanga and another* [1965] EA 735 and *Wambugi w/o Gatimu vs. Stephen Nyaga Kimani* [1992] 2 KAR 292, customary law ought to be established as a matter of fact. I talk about customary law because I have noted that both the applicant and the protestor have not made provision for the daughters of the deceased in their proposals, and I presume that that omission was informed by customary law. An effort should have been made to justify the exclusion, for customary law is not a matter for judicial notice, but proof as a matter of fact.

24. In cases of this nature, the works by Eugene Cotran, restating the customary laws of the African communities of Kenya, are of some help. I have taken the liberty to look at his *Restatement of African Law: 2 Kenya II Law of Succession*, Sweet & Maxwell, London, 1969, on how the estate of a Luhya intestate was handled under customary law. The portion that I have lifted talks about the estate of a monogamist, but it is the principle which is of importance. The relevant part says:

“1. Estate of a married man with one wife, sons and daughters

(a) LAND. The land is shared among the sons so that each son receives a slightly larger share than his immediate junior. The widow is entitled to use or cultivate a portion of the youngest son. Daughters receive no share.

LIVESTOCK. ...”

25. From that bit, it should be clear that daughters of the deceased do not count at distribution of his estate, and it would appear that that could be the reason why the daughters of the deceased herein were not included. That being the case, I shall not press the issue.

26. However, the parties should bear in mind the other part of section 2(2) of the Law of Succession Act, which applies Part VII of the Act, to administration of the estate of a person who died prior to 1st July 1981. Under that provision, whereas distribution of the estate of such a person is not subject to the provisions of the Law of Succession Act on distribution, the estate was subject to the Law of Succession Act, so far as administration is concerned, so long as administration is sought to be done after 1st July 1981.

27. Although the deceased died in 1977, administration of the estate of the deceased was not sought until 2002, that is to say after the Law of Succession Act had come into force. If it had been sought prior to 1st July 1981, then administration would not have to be in accordance with Part VII of the Law of Succession Act. However, since the same was sought after the Law of Succession Act had commenced operation, the same had to comply with the provisions of the Act. One of the provisions that have to be complied with is section 51, which governs applications for grants of representation. Section 51 is housed in Part VII of the Act. Section 51(2) sets out the details of what a petitioner ought to disclose. It says as follows:

“51. Application for grant

(1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) Every 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.”

28. Section 51(2)(g) of the Law of Succession Act is clear that the persons to be disclosed in the application for representation are the immediate survivors of the deceased, that is to say surviving spouses, children, parents, siblings and children of any children of the deceased who are dead. The provision is in mandatory terms; these individuals must be disclosed, regardless of whether distribution will be subject to section 2(1) or section 2(2) of the Act. To the extent that the daughters of the deceased have not been disclosed in the petition, it would mean that section 51 of the Law of Succession Act was not complied with. It is unfortunate that the parties sought representation herein after 1st July 1981. Having chosen to do that, when they had the option of commencing proceedings prior to 1st July 1981, they have exposed themselves to the provisions of the Law of Succession Act, and they should be prepared to comply fully with it.

29. The other thing to note is the Constitution that was promulgated in 2010. Unlike the Constitution that it replaced, it has no provisions which allow application of discriminatory laws, except to a limited extent with respect to Muslims. The parties herein have delayed disposal of this matter until the Constitution 2010 has caught up with them. It takes a firm position on non-discrimination of women, based on gender, marriage and other considerations, in all spheres of life, including succession. These provisions are in Article 27 of the Constitution. That would then mean that, as I look into the distribution proposed in the matter before me, I have to consider the provisions of Article 27, and if I find that the proposals are discriminatory, I should make such remedial orders as may be appropriate. It does not matter that section 2(2) allows application of customary law, on account of the deceased having died before the Act came into force. What is critical is that distribution is sought after the new Constitution came into force. The provisions of the new Constitution would trump any laws, including customary law, which are found to be discriminatory against women. There should, therefore, be no room to assert customary law, so long as the same is discriminatory against any gender.

30. The other aspect of the proviso to section 71(2) is that the shares of the survivors or beneficiaries identified must be ascertained. In the affidavit sworn in support of the application, I note that the applicant has identified the shares of 7 individuals, all being sons of the deceased. As said here above, none of the daughters of the deceased have been reckoned in the matter. Secondly, although one of the widows of the deceased survives to date, for I have no material before me to suggest that she has since passed on after the completion of the oral hearings, no provision has been made for her. It is my finding that that would mean that the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules have not been complied with. Section 51 of the Law of Succession Act requires the disclosure of daughters and widows, and their involvement in the process. Their non-disclosure and lack of provision for them is fatal. Rule 40(6) of the Probate and Administration Rules provides for filing of affidavits of protest, these can only be filed by those who are aware of the proceedings, through their being involved in it. Rule 40(8) of the Probate and Administration Rules provides for execution, by the persons beneficially entitled, that is to say the individuals to be listed under section 51(g), of a consent on distribution in Form 37. I have not seen any such form, duly executed by the daughters of the deceased and the surviving widow. The law expects that none of the immediate members of the family of the deceased be sidelined from the process of administration and distribution of the estate. Let everyone be brought on board, it should be up to them to state whether or not they intend to take or not take the shares due to them, and thereafter the court makes a determination.

31. It is common ground that the deceased died a polygamist. Both customary law and the Law of Succession Act provide for distribution of the intestate estate of a polygamist. In such cases, the family of the polygamist is divided into houses according to the number of wives, and distribution is according to the houses. After devolution to the houses, the assets are then shared out amongst the survivors in each house. To facilitate that, it is only logical that the survivors be grouped into houses, and the assets shared out to the houses. That has not been done in this case. The distribution proposed takes no heed of the houses. The law on distribution of the estate of a polygamist is designed to ensure equal or equitable distribution to all the survivors of the deceased.

32. I have noted that the family is divided right in the middle on the distribution. Whereas the survivors in the fourth house favour equal distribution, or a distribution which is more or less equal; the first house would like the property shared based on how the survivors occupy the land on the ground. The mode of distribution proposed by the first house is skewed against the fourth house, and is in favour of the first house. According to that proposal the three sons in the fourth house would share between them the 2.7 hectares or 6.67 acres that they occupy. The four sons in the first house on the other hand would share between them 16.35 hectares or 34.07 acres. Each of the sons in the first house occupy a parcel of land much larger than the parcel occupied by all the three sons of the fourth house. The probate court is a court of equity, and a distribution of the kind proposed by the first house is, to say the least, unconscionable or unacceptable. Equity is equality.

33. It is important for the parties who approach the probate court to understand that the succession cause is not in the nature of a land matter or land dispute or a land suit. Succession is not determined on the basis of how much each of the survivors occupy on the ground. That is a principle in land law, with respect to acquisition of land by occupation under customary law. Succession is not about acquisition of land. It is about rights to inherit or succeed into the rights of the dead property owner. Those rights have nothing to do with occupation of land. It is about how the survivor is related to the deceased, and the right to inherit accrues from that. It does not matter how much land a survivor occupies, for ultimately the property is to be distributed in accordance with what each survivor is entitled to under the law of inheritance or succession. The doctrine of adverse possession does not apply at all in succession law, to entitle a survivor who has been in possession of his late father's land, for a lengthy period, to claim entitlement to it on the basis of the longevity of his stay on the land.

34. Secondly, the succession process does not operate to sanction the wishes of a deceased person, so long as those wishes do not amount to a valid will. If the deceased expressed any wishes regarding distribution of his property upon death, which wishes do not qualify to be a

written or oral will, whether under statute or customary law, such wishes would not be available for honouring or validation by the court. I understand the first house to say that the estate ought to be distributed according to the wishes of the deceased. They did not demonstrate that any such wishes existed, and, if they did, that the same amounted to a valid will. If they were persuaded that the deceased had expressed wishes which amounted to a valid will, then they ought to have sought probate of the alleged will, so that the estate could be distributed in accordance with the said will.

35. Thirdly, I understood the first house to be making a case that the deceased had settled them on the subject lands prior to his death. Some of these settlements were allegedly done, in the 1960s, before the exercise of land adjudication was done which culminated in the creation of South Wanga/Ekero/33. Some were allegedly done after the registration. These activities were allegedly done after the sons in that house came of age and married. Such claims are not unusual, for it is common at distribution, when property is placed before the court, registered in the name of the deceased, for some of the survivors or beneficiaries to claim that the same was theirs on grounds that the deceased had made lifetime gifts of it to them. This is usually the case with land, where the deceased, during lifetime, shows portions of his land to his children, especially sons, to put up houses, and to till or graze their animals, without transferring title in such property to them. In most cases, when he dies, the children then claim that they had been gifted with those assets during the lifetime of the deceased, and argue that the said assets ought not to be made available for distribution to anyone but themselves.

36. Arguments such as the one in the foregoing paragraph would essentially be that the property in question was not estate property, for it had been gifted to the beneficiaries by the deceased during his lifetime. The probate court, in such case, would not be invited to share out the property, for the same had already been shared out by the deceased prior to his demise. Instead, the invitation to the court would be for it to sanction the alleged gift. A probate court has no jurisdiction to do such a thing in succession proceedings, for a property that is properly the subject of a lifetime or *inter vivos* gift is not available for distribution in succession proceedings.

37. What amounts to a lifetime gift was defined in *In re Estate of Gedion Manthi Nzioka(Deceased)* [2015]eKLR (Nyamweya J) as a gift between living persons. For such gift to be effective, it must be granted by deed or an instrument in writing, or by delivery, or by way of declaration of trust by the donor, or by way of resulting trust or presumption of gift of land by registered transfer, or by a declaration of trust in writing. For such gift to be valid it must be complete. The court, in *Lucia Karimi Mwamba vs. Chomba Mwamba* [2020]eKLR (Gitari J), amplified that definition by stating that properties, which the deceased had given to beneficiaries during his lifetime, no longer formed part of his estate, for such gift were settled for the beneficiary, and it did not accrue to the estate. It was added that there ought to be evidence that the gift was granted by deed, payment or execution of a transfer. On the facts of that case, the court held that the deceased had not given his estate to the sons during lifetime. He had applied for subdivision of his land, but never transferred the land to them, and although he had pointed out where each of the sons could occupy, the land remained in his name. The same therefore, was not a gift *inter vivos* to them. And the property remained the free estate of the deceased, available for distribution in intestacy.

38. In *in restate of Nyachieo Osindi(Deceased)*[2019] eKLR(Ougo J), the court found that there was sufficient proof of a gift *inter vivos* where the deceased had given possession of a piece of land to another and signed a transfer form in his favour, but died before the transfer was registered. In *in re Estate of Muchai Gacguika (Deceased)*[2019]eKLR (Gikonyo J) it was established that the deceased had registered three assets in the names of some of his sons during his lifetime, and it was held that those gifts were complete and the assets in question did not form part of the estate of the deceased. See also *William M'Arimi M'tuambae vs. Rosemary Karamuta for estate of George Gatimi*[2017] eKLR (Gikonyo J) *In re estate of Monicah Wambui Nguthiru (deceased)*[2020] eKLR (Ongeri J) in *re estate of Osoro Motari (deceased)* [2020]eKLR (Ougo J), *in the estate of M'Raiji Kithiano (deceased)* [2017] eKLR (Gokonyo J), *Evans Onguso & 2 Others Vs. Peter Mbuga & 4 others* [2020] eKLR (J.M.Mutungi J) *Margaret Mumbi Kihuto vs. Peter Ngure Kihuto & another* [2017]eKLR,(Onyiego J), *In re Matabo Sabora (Deceased)* (2019) eKLR, (Mrima J) *Naomi Wanjiru Njoroge & 2 others – vs. Winston Benson Thiru*(2018) eKLR (Muigai J) and *in re- Estate of Japhet M'tuamwari M'ikandi (Deceased)* (20190)eKLR (Gikonyo J)

39. Were there valid *inter vivos* transfers to the sons in the first house? I do not think so. Firstly, the said sons allege that the property was allocated to them when they got married, and other the same being shown to them, and the settling on it, there is no evidence that the deceased took any steps whatsoever towards having the property, South Wanga/Ekero/33, subdivided to create sub-parcels that he could then transfer to his sons. There is no evidence that any mutations were ever done. There is no evidence that the relevant consents of the land control board, as required under the Land Control Act, Cap 302, Laws of Kenya, were ever sought and obtained, for subdivision and transfer of the land, which is no doubt agricultural land. If the said exercise amounted to gifting of land to the said sons, what the deceased ought to have done was to have the land subdivided and the portions allegedly gifted transferred to the names of the four sons. The court would uphold the same as lifetime gifts if there was an iota of evidence that the deceased had taken such steps, but died before he could complete it, or, at least evidence, that the deceased had done all that needed to be done to effect transfer, save that he died before the transfer was effected. Clearly, there were no lifetime gifts that the probate court can uphold.

40. The other point is that the protestor claims that two of the parcels were gifted in 1965 and 1966, respectively, prior to land adjudication and registration. That leaves one wondering why, if the lands had been gifted to the two sons, the deceased did not have them adjudicated and registered in the names of the two sons allegedly gifted in those two years. Why did the deceased have the two parcels of land he had given as gifts to his sons adjudicated and registered in his own name? If he had really intended to gift the sons with the same, he would have, no doubt, caused them to be adjudicated and registered in their names. After that he went to live until 1977, what prevent him from carving out the two parcels and transferring them to the said sons between 1967 and 1977 when he died, if he had intended to have gifted the two to them. The other two parcels of land for other two sons were allegedly gifted in 1974. If indeed the deceased needed to make a gift of the land to the two, why is it that he never excised them out of South Wanga/Ekero/33 in 1974, when he allegedly made the gifts, or in the intervening period prior to his death in 1977.

41. Should I proceed to distribute amongst the sons, notwithstanding what I have stated above? I believe I should. The deceased died in 1977, when customary law held sway. The application of that law is permitted by section 2(2) of the Law of Succession Act. The daughters of the deceased from the second and third houses all married, and most of them have died. Only two were said to be alive at the time of the hearing. There is no suggestion that they have come back to their father's homestead. I shall accordingly not insist on them being brought into the matrix. Regarding the surviving spouse, I take the view that she must be very old now, and is being taken care of by her sons, given that her husband died in 1977.

42. The final orders to make in this matter are:

a) That the Summons for Confirmation of Grant, dated 26th June 2013, filed on 1st July 2013, is hereby allowed on the following terms:

(i) The administrators appointed through the grant made on 23rd July 2019 and issued on 11th December 2019 are hereby confirmed, and

(ii) South Wanga/Ekero/33 shall be shared out equally between Wakwanalo Mirikwa Werimo, Joseph Onyango Mirikwa, Peter Makokha Mirikwa, Stephen Omukholi Mirikwa, George Werimo Mirikwa, Francis Ong'ong'a Mirikwa and Robert Kulumbani Mirikwa;

b) That a certificate of confirmation of grant shall issue to the administrators in those terms accordingly;

c) That that in the event of any of the said sons of the deceased being themselves deceased, their share shall pass to their respective estates to be distributed in succession causes to be initiated by their survivors in matters of their respective estates;

d) That each party shall bear their own costs, this being a family matter; and

e) That any party aggrieved by the orders made herein shall have leave to move the Court of Appeal, appropriately, within twenty-eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF JUNE, 2021

W MUSYOKA

JUDGE