



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NUMBER 717 OF 2016

IN THE MATTER OF THE ESTATE OF THE LATE RUTH WANJIKU KARUGU (DECEASED)

EUNICE WANJIRU KARUGU.....1ST PETITIONER

AMOS GIKONYO KARUGU.....2ND PETITIONER

VERSUS

ANNE WAMBUI KARUGU.....APPLICANT/BENEFICIARY

RULING

Applicant's Case

1. The Applicant vide Summons for Confirmation of Grant dated 21st November 2018, filed on 22nd November 2018 and brought **Under Section 42 (a) and (b) and 71 (1) of the Law of Succession Act and Rule 40** of the Probate seeks for an order;

(a) THAT the Grant of Letters of Administration intestate issued to the 1st and 2nd Petitioners herein on 12th June 2017 be confirmed and a Certificate of Confirmation be issued detailing the mode of distribution of the deceased's estate. The Summons for Confirmation of Grant is supported by the Applicant's Affidavit that was sworn on 21st November 2018.

2. The Applicant deponed that a Grant of Letters of Administration intestate was issued to the petitioners on 12th June, 2017 yet the Petitioners for one and a half years have not filed Summons for Confirmation.

3. She averred that the Law requires that upon expiry of six months from the date of issuance of the Grant, the Grant Holder(s) should move the Court promptly for confirmation of the said Grant and distribution of the deceased's estate to its rightful beneficiaries and no reasons have been advanced by the petitioners on why they did not do so.

4. She deposed that the inordinate and unexplained delay by the petitioners is detrimental to the beneficiaries who are waiting for their rightful shares of the estate and her act of taking out **Citation Nakuru High Court Succession Cause No. 37 of 2016** between her and the petitioners herein pricked them into filing this cause and unless the petitioners who are enjoying the deceased's estate are pushed around, their indolence and disinterest shall not allow them to move this court for confirmation and distribution of the deceased's estate.

5. The Applicant cited the entire provision of **Section 42 (a) and (b) of the Law of Succession Act** and deponed that prior to the deceased demise on 16th March, 2015, she was the sole registered owner of all that parcel of land known Bahati/Kabatini Block 1/94 measuring 0.65 Hectares as per copy of the extract title's copy which she attached and stated that on 28th October 2009, their late mother subdivided this land into six different portions as per the attached copy of mutation as follows;

- BAHATI KABATINIBLOCK 1/11729
- BAHATI KABATINI BLOCK 1/11730
- BAHATI KABATINI BLOCK 1/11731
- BAHATI KABATINI BLOCK 1/11732
- BAHATI KABATINI BLOCK 1/11733

6. She averred that Land parcel No. Bahati Kabatini Block 1/11729 measuring 0.3480 Hectares was registered in the name of their only brother (2nd petitioner herein) since it was their late father's wish that the 2nd petitioner should construct his house next to their parents' homestead and land parcel No. Bahati Kabatini Block 1/11729 is where she solely constructed a permanent three (3) bedroomed bungalow for her parents so that they could enjoy comfort at their latter days.

7. She deposed that the house she constructed on this land is valued at over 3.5 Million and upon the demise of her mother, who was staying in this house, nobody occupied the said house and their late mother sold and transferred land parcel Nos. Bahati Kabatini Block 1/11730 And Bahati Kabatini Block 1/11731 to third parties who are the registered proprietors thereof and only transferred land parcel No. Bahati Kabatini Block 1/11732 to their late sister's two children.

8. She further deposed that only property numbers Bahati Kabatini Block 1/11733 and Block 1/11734 were left in their late mother's names whereas Bahati Kabatini Block 1/11729 which is a larger portion and where their late parents' home is situated remained in the names of the 2nd petitioner herein who has a house next to their late mother's house.

9. She averred that property No. Bahati Kabatini Block 1/11729 is deemed to be a property of the deceased's properties for distribution to the rightful beneficiaries under **Section 42 of the Law Succession Act** and she proposed the following:

· **Bahati Kabatini Block 1/11733** be shared equally among Eunice Wanjiru Karugu, Anne Wambui Karugu, James Karugu Waithera & Amos Gikonyo Karugu

· **Bahati Kabatini Block 1/11734** be shared equally among Eunice Wanjiru Karugu, Anne Wambui Karugu, James Karugu Waithera & Amos Gikonyo Karugu.

· **Bahati Kabatini Block 1/11729** be shared equally among Eunice Wanjiru Karugu, Anne Wambui Karugu, James Karugu Waithera & Amos Gikonyo Karugu.

· **Bahati Kabatini Block 1/11732** be shared equally among Eunice Wanjiru Karugu, Anne Wambui Karugu, James Karugu Waithera & Amos Gikonyo Karugu.

10. She stated that the aforementioned property **Bahati Kabatini Block 1/11732** that had been transferred to her late sister's two children under **Section 42 (a) and (b) of the Law of Succession Act** is part of the deceased's estate.

11. She deposed that she preferred to be apportioned her share of land in **Bahati Kabatini Block 1/11729** specifically where the house she singlehandedly built for her parents stands.

Petitioners' Case

12. The petitioners opposed the Applicant's Summons for Confirmation of a Grant through their Advocate Sally Njoki Mbeche who swore a Replying Affidavit on 13th February, 2019.

13. The said Replying Affidavit was filed in court on 13th February, 2019.

14. She deposed that the late Ruth Wanjiku Kurugu died intestate on 16th March, 2015 at Gituamba Sub Location and the petitioners petitioned for Letters of Administration Intestate for the estate of the late Ruth Wanjiku Kurugu in their capacity as the children of the deceased.

15. She admitted to the contents of Paragraph 2 of the Affidavit to the extent that this matter was gazetted in **The Kenya Gazette Special Issue Volume CXIX No. 63 of 12th May, 2017** and Grants of Letters of Administration intestate was issued on 12th June 2017 and she annexed a copy of the said Gazette Notice.

16. She deposed that this matter was wrongly gazetted as the deceased's date and place of death was misquoted to read "*...late of Gituamba, who died at Moi Teaching and Referral Hospital in Kenya on 8th April 2005*" whereas the deceased person died in Gituamba Sub-location on 16th March 2015 and stated that the Law requires the errors in names and in descriptions or in the setting forth the time and place of the deceased's death be rectified accordingly.

17. With respect to paragraph 3 of the Applicant's Affidavit, she averred that petitioners have not applied for the Certificate for Confirmation of Grant since the Grant of Letters of Administration contained errors regarding the place and deceased's date of death and further denied the Applicant's contents at paragraphs 5,6,7 and 8 by stating that she has been making frantic efforts to rectify the gazette notice and she attached her letter to the petitioners apprising them of re gazettment of the matter.

18. She denied contents of paragraph 9 of the Applicant's Affidavit and asserted that the Applicant has been ignorant of the aforesaid error in the Grant of letters of Administration as she acquired the said grant and attached it to her affidavit without rectifying the same.

19. She averred that they sent a letter to the Government Printers dated 4th September 2018 requesting for the rectification of the gazettment and it was not until on 14th December 2018 when the matter was finally gazetted under Corrigenda in the **Special Gazette issue Volume**

CXX No. 152 of 14th December 2018 and she annexed a copy of the said gazette notice.

20. She deposed that Law requires that upon expiry of six months from the date of issuance of the grant, the grant Holder may apply to court for confirmation of the said Grant and distribution of the deceased's estate and in this case the six months have not lapsed since the issuance of the Amended Grant of Letters of Administration and therefore the Application herein is premature, frivolous, incompetent and an abuse of the court process and it should be struck out.

21. The 1st petitioner who is the daughter of the late Ruth Wanjiku Kurugu also swore her further affidavit in opposition of Applicant's case on 21st March 2019.

22. The Further Affidavit was filed on 21st March 2019.

23. She deposed that her deceased Mother had five children namely; Eunice Wanjiru Karugu, Amos Gikonyo Karugu, Anne Wambui Karugu, Magdaline Waithera (deceased with two children succeeding her namely James Karugu Waithera and Esther Muthoni) and George Kamau Karugu (deceased).

24. She confirmed the Applicants averments at paragraph 12 of her Affidavit with regards to paragraph 15 of the Applicant's affidavit she asserted that her late mother sold and transferred Land Parcel No. Bahati Kabatini Block 1/11730 only to a third party who is the registered proprietor thereof.

25. She stated that the sale of the said parcel of land was purposely to cater for conveyance expenses that would follow regarding the remaining parcels of land and land parcel **Bahati Kabatini 1/11731** was given to the Applicant herein upon which the Applicant transferred it to a third party. She denied the Applicant's averments at paragraphs 13 & 14 and averred that the land parcel no. **Bahati Kabatini 1/11729** was registered under the 2nd petitioner's name on 9th May 2011 and has always been registered under his name and therefore does not form part of the deceased's estate. She annexed a copy of the title deed proving the same.

26. She deposed that the aforementioned land that was transferred to her late sister's children has since been registered under their names and she annexed a copy of the title deed in proof thereof.

27. She further deposed that land parcel no **Bahati/Kabatini 1/11734** was to be transferred to their late brother George Kamau Karugu however the same did not happen as he is deceased with no immediate family succeeding him and only land parcel no **Bahati/Kabatini 1/11733** and **Bahati/Kabatini 1/11734** are registered under their late mother's name and are therefore the only two portions that form part of the deceased's estate in this succession matter. That land parcel No. **Bahati/Kabatini 1/11729, Bahati Kabatini 1/11731** and **Bahati Kabatini 1/11732** do not form part of the deceased's estate as they all have their respective registered owners.

28. She opposed the Applicant's mode of distribution of estate and stated proposed that;

- Bahati Kabatini Block 1/11733 be wholly transferred to the beneficiary the 1st Petitioner herein.
- Bahati Kabatini Block 1/11734 to be sold and the sum to be divided equally among all parties herein, James Karugu Waithera & Esther Muthoni Waithera.

29. The 2nd petitioner swore his further replying affidavit on 21st March 2021 reiterating the entire Averments of the 1st petitioner.

Applicant's Response To The Petitioners' Case

30. The Applicant swore a supplementary affidavit on 24th February 2021. The same was filed on even date.

31. She deposed that with respect to paragraph 7 of the petitioners' further Affidavit, her late mother sold the land therein Bahati Kabatini Block 1/11731 to Josyline Njeri Mwangi on 23rd March 2011 through the firm of Kimatta & Co. Advocates and she attached a copy of the sale agreement in support of this position.

32. She contended that the argument advanced by the Petitioners that her shares to the deceased's estate should be reduced by the value of Land Parcel Number **Bahati Kabatini Block 1/11731** is without merit and in addition the 2nd petitioner benefited from the deceased's estate by receiving a gift *inter-vivos* Land Parcel Number Bahati Kabatini Block 1/11729 from their late mother without her knowledge and she reiterated that she heavily developed the property herein believing that it belonged to their late mother.

Applicant's Submissions

33. The Applicant filed their submissions on the applicability of **Section 42 of the Law of Succession Act** in this cause on 3rd March 2021.

34. The Applicant submitted that it is a clear admission by the 2nd petitioner that the deceased's Parcel of Land **Bahati Kabatini Block 1/94** was subdivided by the deceased during her lifetime and among their subdivision **Land Parcel No. Bahati Kabatini Block 1/11729** was transferred to the 2nd petitioner as can be seen at paragraphs 5 and 8 of his Further Affidavit.

35. The Applicant contended that the 2nd petitioner did not state whether he bought the same for any consideration from his late mother and

as such it was a gift *inter-vivos*.

36. She asserted that **Land Parcel No. Bahati Kabatini Block 1/11729** is where the entire family of the deceased lived and that is where they consider their family home and it is a property that would fall to be registered in the joint names of all the deceased's beneficiaries as joint owners.

37. She contended that she built a permanent humongous bungalow on this land so that the deceased could have a decent home during her lifetime and by the time she did so the 2nd petitioner was still a minor in primary school.

38. Given the above circumstances, she urged this court to find that the gift by the deceased to the 2nd petitioner was unfair, rationale of gifting one child with the largest share of the estate questionable and direct that the title deed for **Land Parcel No. Bahati Kabatini Block 1/11729** be rectified to include all children/beneficiaries as joint proprietors in undivided shares.

39. She argued that under the law all beneficiaries are equal irrespective of their gender, marital status, religion and political affiliation and in the event that one child is given a family land by a parent on customs ground the court should intervene and interfere with such arrangement and re-distribute the property equally. She stated the 2nd petitioner has not stated why he was given the land by the deceased during her lifetime.

40. The Applicant cited the provisions of **Section 42 (a) and (b) of the Law of Succession Act** and further in persuading this court to allow her application relied on the below cases;

1. **Meru High Court Succession Cause No. 24 of 2014 Estate of Marete Mbui alias Justus Marete (Hon.F.M.Gikonyo J)** which the court at (**paragraph 5**) stated as follows;

“I note three important matters;

(1) That distribution of L.R NO NYAKI/M?NITHU/446 and 503 was not done by the deceased but by the clan after his death;

(2) There are two houses in this estate; and

(3) Some beneficiaries were awarded land by the deceased *inter vivos*.

The foregoing three are important considerations in this case; and squarely brings section 40 and 42 of the Law of Succession Act into play. Accordingly, I must take into account the property the deceased awarded to his sons in determining the share of the net intestate estate finally accruing to the sons. I take into account the fact the four sons have already shared L.R NO NYAKI/MUNITHU/69' which measures 0.41 Ha. Thus, equity demands and I hereby order that:

(i) Each of the daughters and the widows of the deceased shall receive 1 acre in L.K NO NYAKI/MUNITHU/503 and the balance thereof shall go to the four sons equally.

(ii) L.R NO NYAKI/MUNITHU/446 is very small and may not be viably or legally subdivided into minute portions. The law on land use and other planning regulations cannot allow such subdivision. Thus, I order that L.R NO NYAKI/MUNITHU/446 shall be sold and the funds to be used to carry out survey work and other services needed in order to implement this grant. Any balance of the proceeds thereof shall be divided equally amongst all the beneficiaries herein.

(iii) As there is agreement of the parties, the shares in Barclays Bank and Kenya Commercial Bank shall go to the two widows in equal shares.

(iv) That the grant herein is confirmed on the above terms.

(v) Each party shall bear own costs. It is so ordered.”

2. In the **Estate of the late Mohammed Saleh said Sherman also known as Mohamed Swaleh Sherman (deceased) Mombasa High Court Succession Cause No.145 of 1998**, where His Lordship *Hon.Justice A. Hayanga (J)* stated that;

“The spirit of the Law of Succession Act though section 47 gives wide discretion to the High Court in dealing with test amatory and estate administrative issues”

3. **Re Katumo & Another [2003]2 EA 509 Hon. Justice R. Nambuye (J)** as she then was clearly stated that **section 47** vests the court with power to hear and determine all manner and nature of Applications

4. **Francis Kamau Mbugua & Another vs James Kinyanjui Mbugua Nairobi H.C.C.C NO 11 OF 2004 (OS)** His Lordship *Hon.Nyamu (J)* (as he then was) stated that **section 47 of the Law of Succession Act** empowered the Probate Court to give all necessary orders and that this section gives the dispute brought before it.

41. The Applicant therefore urged this court to invoke **section 47 of the Law of Succession Act** and find that **section 2(a) and (b) of the**

Law of Succession Act is applicable herein.

Petitioners' Submissions

42. The Petitioners filed two submissions. One is dated 1st of March 2021, filed on 3rd March 2021 and it is in respect to the Summons for Confirmation of Grant herein. The other one is dated 5th March 2021, filed on even date and it is on response to the Applicant's submissions on applicability of **section 42 of the Law of Succession Act** in this cause was filed on 5th March 2021.

Petitioners' Submissions Dated 1st March 2021

43. The Petitioners submitted that it is not in dispute that **Land Parcel No. Bahati/Kabatini Block 1/11730** was sold and transferred to a third party to pay for the costs related to division and registration of the land and for school fees for the children of the late Magdaline Karugu which parcel is currently registered in the third party's name as the sole-proprietor, hence does not form part of the deceased's estate.

44. They submitted that the **Parcel No. Bahati/Kabatini Block 1/11731** was issued to the beneficiary Anne Wambui Karugu, who proceeded to sell and transfer it to a third party. The sale of this land has been confirmed by the Local Area Chief, Jones N. Kariuki, of Kiamaina Location (*where the land in question is located*), in his letter dated 29th October 2016, where he stated that the land had been subdivided and issued to the beneficiaries, after which Anne Wambui sold her share.

45. It was their position therefore that the same parcel does not form part of the deceased's estate, and that the Applicant/Beneficiary herein has no right to demand for equal share of the remaining parcels belonging to other beneficiaries.

46. They submitted that **Parcel No. Bahati Kabatini Block 1/11732**, was issued to the orphans of the late Magdaline Waithera Karugu, James Karugu Waithera and Esther Muthoni Waithera and the same is fully registered under their names therefore cannot form part of the deceased Estate and so is the parcel no. **Bahati/Kabatini Block 1/11729** which is registered under the 2nd petitioner's name.

47. They contended that it is fair that **Bahati Kabatini Block 1/11733** should be solely transferred to the 1st petitioner since she is the only one who has not benefited from the deceased's estate.

48. They averred that the mode of distribution proposed by the Applicant is misguided and is meant to enrich her to the detriment of other beneficiaries and that the parcels of land issued to the beneficiaries as stated above and as confirmed by the area chief vide his letter dated 13th June 2016 and 29th October 2016 respectively, represent the deceased's wishes during her lifetime.

49. On whether the land shared and registered under a legal title still form part of the Deceased's estate by virtue of **section 42(a) and (b) of the Law of Succession Act**, the Petitioners cited the provisions of the said **section 42** and relied on the dictum of *Justice F. Gikonyo* in **Re-Estate of Marete Mbui alias M'Marete M'Mbui alias Justus Marete (Deceased)**, where the Honourable Judge stated as follows:

"...At this point I feel obliged to state, and I have stated in other cases, 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."

50. The petitioners thus argued that **Parcel No. Bahati Kabatini Block 1/11729** and **Bahati/Kabatini Block 1/11732**, cannot form part of the deceased Estate by virtue of **Section 42**, as the same were given during the lifetime of the deceased and legal titles were issued. Consequently, this is proof that ownership of the said property already shifted to the said beneficiaries, who are now legal proprietors of the land and any orders to the contrary may unjustly disturb their quiet possession of the said parcel of land.

51. The petitioners relied on **Section 24(a)** of the **Land Registration Act Cap 300** which provides that;

"(a) The registration of a person as the proprietor of lands on of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

and submitted that this provision be considered in protection of Proprietary rights of the 2nd Petitioner and Beneficiaries with Legal Titles, and in the interest of justice that only the Estate Registered under the Deceased's name be shared among the Beneficiaries as per the petitioners proposals.

Petitioners' Submissions Dated 5th March 2021

52. The Petitioners debunked the Applicants claim that the 2nd petitioner herein was given a bigger share of the entire homestead **Bahati/Kabatini Block 1/11729** measuring 0.3480 Hactares and submitted that the decision to transfer the said parcel to the 2nd Petitioner was not meant in any way to unfairly deprive other beneficiaries, but just as a fulfillment of the deceased wishes while she was still alive.

53. They contended that there is no record of any complaint that was ever raised by the applicant or any other beneficiaries on the manner in which the deceased sub-divided and distributed the said land complete with Title Deeds, hence any complaints raised now over the same comes as an afterthought and to destabilize quiet possession of other beneficiaries.

54. They concurred with the Applicant's claim that she built her deceased mother a house on the land **Parcel No. Bahati Kabatinini Block 1/11729** during her lifetime but strongly opposed her claim over the same on grounds that the intentions of building the same were never premised on a promise that she will claim it after the death of her mother.

55. They argued that the house was gifted to the mother and she had the right to transfer it to whoever she wished as stipulated by law and that the house is not benefiting any of the Petitioners in this matter.

56. They averred that the orphaned children James Karugu Waithera and Esther Muthoni Waithera are currently using the said house and any orders granting the Applicant possession of the same will unfairly displace the said orphans in addition to interfering with the 2nd Petitioner's rights over quiet possession of the said parcel of land.

57. It was the petitioners position that under the provisions of **Section 42 of the Law of Succession Act**, which provides that; Previous benefits to be brought into account where:

- *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*
- *Property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act.*

58. Petitioners stated that this section provides further that the property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

59. They averred that all the subdivisions and registration of the parcel of land herein were done by the deceased herself during her lifetime and no beneficiary with registered titles have portrayed unfair and unjust conduct over the said properties.

60. They argued that the transfer that was made in the parcels of land mentioned herein amounted to gift *inter vivos* and cannot be reverted for distribution under the deceased's Estate.

61. They submitted that **In Halsbury's Laws of England 4th Edition Volume 20(1) at paragraph 67** it is stated as follows with respect to such gifts:

"Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift was necessary to be done by him in order to transfer the property and which it was in his power to do."

62. They stated that according to the decision of *Nyamweya J* in the case of **Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR**, the Honourable Justice gave guidance as to the requirement of law as far as a gift *inter vivos* is concerned. The learned Judge stated as follows:

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

....For gifts 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 declaration in trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in Writing: by a declaration of trust in writing. Gifts inter vivos must be complete the same to be valid,"

63. They therefore submitted that was effectuated by way of registration of title and that the gift *inter vivos* was complete and valid and they referred this Court to **Odunga's Digest on Civil Case Law and Procedure Vol (III) Page 2417 at paragraph 5484 (d) e - 1** where the learned Justice said this about transfer of immovable property as gifts *inter vivos* or *causa mortis*:

"Generally speaking the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate the gift. (See in Re Fry Deceased (1946) CH 312 Rose: and Trustee Company Ltd v Rose (1949) CL 78 Re: Rose v Inland Revenue Commissioners (1952) CH 499 Pennington v Walve (2002) 1WLR 2075 Maledo v Beatrice Stround (1922} AC 330, Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee needs no assistance from equity and the gift is complete. It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor."

64. The petitioner prayed that this Honorable Court do find that **Section 42 of the Law of Succession Act** apply in this matter, and the deceased's Estate to be distributed as per the wishes of the deceased as expressed/proposed by the Petitioners.

Issues For Determination.

65. Having considered the instant application, affidavit in support and affidavits in opposition, parties' submissions, and authorities relied on, and the relevant provisions of the law cited. In my view, five main issues arise for determination:

1. ***Whether the petitioners from the date of issuance of the grant failed to apply for confirmation of the grant within 6 months.***
2. ***Whether the Applicant should be apportioned the land where she specifically built the house in land parcel no. Bahati/Kabatini 1/11729.***
3. ***Whether the land parcels no. Bahati/Kabatini 1/11729 and Bahati/Kabatini 1/11732 form part of the deceased's estate.***
4. ***Whether the land parcel no. Bahati/Kabatini 1/11731 was sold and transferred to a third party.***
5. ***How the estate of the deceased should be distributed.***

1. **Whether the petitioners from the date of issuance of the grant failed to apply for confirmation of the grant within 6 months.**

64. **Section 71 of the Law of Succession Act** provides:-

“71(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.”

“71(3) the court may on the application of the holder of a grant of representation, direct that the grant be confirmed before the expiration of six months from the date of the grant if it is satisfied-

65. It is not disputed that the letters of Administration intestate was issued to the petitioners on 12th June 2017. As per the above section of the law the petitioners ought to have applied for its confirmation on or before the 12th November 2017.

66. This did not happen. The petitioners explained that failure to do so was occasioned by the error contained in the gazette dated 12th May 2017 which stated that the deceased died at Moi teaching and Referral Hospital on 8th April 205 whereas the correct position is that she died in Gituamba Sub-location on 16th March 2015.

67. The petitioner demonstrated that they applied for rectification of that the same which was done and the matter finally gazetted on 14th December 2018 and therefore the required Grant of Letters of Administration should emanate from the latter notice which from the date of its issuance six months have not lapsed.

68. The Applicant filed a supplementary Affidavit but did not controvert this averment. The same is therefore plausible.

2. **Whether the Applicant should be apportioned land where she specifically built the house in land parcel no. Bahati/Kabatini 1/11729**

66. The Applicant contended that she singlehandedly developed this property and erected a permanent humongous bungalow so that the deceased could have a decent home during her lifetime and urged this court to apportion her specifically where the house she singlehandedly built for her parents stands.

69. It is not disputed that she did develop the property but those were benevolent acts or good will and not a valid ground for allowing her prayer.

70. **The High Court Succession Cause No. 15 of 2015 In the Estate of The Late Gichunge M'itwerandu alias Githungu M'Nthiiri** where *Justice Mabeya* held:

“A person can deal with his property as he wills during his life time. Whoever feels aggrieved on how his/her parent had dealt with his property should at the earliest opportunity question such a person during his/her lifetime. He/She cannot wait until such person dies to raise issues of discrimination or unfairness. Such issues can only validly be raised in cases of a will since wills are kept secret until the testator passes on. However request that are given as gifts inter vivos openly so given and in my view whoever is dissatisfied is at liberty to question the same before the demise of the giftor.”

71. As correctly pointed out by the petitioners, the Applicant did not raise any complaint with regards to this parcel being entirely given to her brother (2nd petitioner) during the deceased's lifetime and she should not do so now.

3. **Whether the land parcels no. BAHATI/KABATINI 1/11729 and BAHATI/KABATINI 1/11732 form part of the deceased's estate .**

72. The Applicant averred that Bahati Kabatini Block 1/11729 which is a larger portion and where their late parents' home is situated are registered in the names of the 2nd petitioner whereas Bahati Kabatini Block 1/11732 was transferred by the deceased to their late sister's two children; James Karugu Waithera and Esther Muthoni.

73. The applicant deposed at paragraph 5 of her Supplementary Affidavit that the 2nd petitioner appeared to have benefitted from the deceased's estate by receiving as a gift *inter vivos* land parcel no Bahati Kabatini Block 1/11729.

74. The petitioners on their part have demonstrated in their further affidavits that land parcels Bahati Kabatini Block 1/11729 & Bahati Kabatini Block 1/11732 were transferred successfully by the deceased during her lifetime to the 2nd petitioner and to her grandchildren respectively and as such do not form part of the deceased's estate.

75. The decision of *Nyamweya J* in the case of **Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR,(supra)** on gift *intervivos* that was cited by the petitioner is relevant while considering this issue. In **Re {1952} Pelington & Another v Waine & Ors {2002} ALL ER. In *Lubberts Estate Re {2014} ABCA 216* the Court emphasized that;**

“An *intervivos* gift exists if the donor, while alive, intends to transfer unconditionally legal title to property and either transfers possession of the property to the donee or some other document evidencing an intention to make a gift and the donee accepts the gift.”

76. For a gift to be valid the donor must intend to make a present gift of the property and he/she must actually deliver the property to the donee and the donee must accept the gift.

77. The deceased grandchildren lost their mother and under the law they are entitled in equal shares to the deceased's estate. **In *The Matter of The Estate of John Kamau Gichuhi (Deceased) NRB. High Court Succession Cause No.833 Of 2003***, it was held that;

“grandchildren are entitled in equal shares to the estate of their deceased grandfather where their own parents are dead.”

78. In the instant case the deceased successfully transferred the parcels in question to the 2nd petitioner and her grandchildren who have valid title deeds in proof thereof.

79. For the above reasons, these parcels do not form part of the deceased's estate.

4. Whether the land parcel no. BAHATI/KABATINI 1/11731 was sold and transferred to a third party

80. The administrators of the estate have deponed that to the best of their knowledge this property was bequeathed to the applicant and she transferred it to a third party. The applicant has deposed that this parcel of land was sold by their deceased mother to a third party and has attached a copy of the sale agreement between the deceased and a third party one Josyline Njeri Mwangi. The administrators have not provided any evidence to support their claim that the applicant was given the land then transferred to another. Search as I did in the court file I did not find the Chief's letter said to be proof that the applicant was bequeathed the property and she transferred it to a third party.

81. It is noteworthy that the transfer the 2nd Petitioner and the other beneficiaries was done in 2011 and title deeds issued then. It has not been explained how it was that the applicant was not also given title to what was transferred to her. It would have been the easiest thing for the administrators to avail a Certificate of Search and the Green Card to demonstrate that the applicant had transferred her share to a third party. As it is the applicant has produced a Sale Agreement to demonstrate that this property was also sold by the owner. There is also no evidence as alleged by the 1st administrator that this property was intended for their deceased sibling by the name George Kamau Karugu. What is clear is that there is no dispute that the parcel is not available for distribution.

5. How the estate of the deceased should be distributed

82. The applicant argues that **Section 42 of the Law of Succession Act** is applicable to all the parcels of land and that this court should ignore the awards made by the deceased and distribute the same equally to the four surviving beneficiaries. **Section 42 provides for 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 of this Act,

That property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

83. This means that one, the wishes of the deceased would be respected as the court would not interfere with what will have been given in the lifetime of the deceased. However, in the distribution of what would have survived the deceased undistributed so to speak the court

would have to take into consideration what the deceased had given to whom. For instance in the present case, say the court were to find that there was property to be distributed among the beneficiaries, then what each has been given would have to be taken into account in determining their share. I agree with the expression of *Gikonyo J* as to the effect of this section **re-Estate of Marete Mbui alias M''Marete M'Mbui alias Justus Marete (Deceased)**.

“...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.”

84. The applicant's view of the application of **Section 42 of the Law of Succession Act** is to dismantle what their mother did in her lifetime and to share the entire estate equally among the beneficiaries. I do agree that that is the import of Section 42.

85. There is no basis for interfering with the clear wishes of the deceased. She died in 2015, four (4) years after she had transferred the two parcels of land to the beneficiaries. Hence land parcels **Bahati Kabatini Block 1/11729, Bahati Kabatini Block 1/11730, Bahati Kabatini Block 1/11731 & Bahati Kabatini Block 1/11732** no longer form part of the deceased's estate and are not available for distribution.

86. The only properties/land parcels due for distributions are **Kabatini Block 1/11733 and Kabatini Block 1/11734**.

87. While **Section 38 of the Law of Succession Act** provides that;

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

88. The administrators have already taken this into consideration by suggesting that the 1st administrator who was not bequeathed anything in the lifetime of the deceased be given **Land Parcel No. Kabatini Block 1/11733**.

89. It is my considered view that taking into consideration the *modus operandi* of the deceased that would be in order.

90. I have also found that there is no evidence that the applicant was given **Kabatini Block 1/11731**. Without evidence to the contrary it would only be fair that she too gets a portion of the estate.

91. Hence the remaining portion Kabatini Block 1/11734 go to the applicant.

92. As I conclude, I find it important to state that I have taken cognizance of the fact that the house where the parents of the beneficiaries herein lived is on the portion that was given to the 2nd administrator in the lifetime of the deceased, **Kabatini Block 1/11729**. It is not in dispute that the house was constructed by the applicant herein. It is currently occupied by the grandchildren of the deceased, children of her deceased daughter and that is as it should be.

93. It is also my understanding that the place where all the beneficiaries would call home as in their parents' home. It is expected in our Kenyan setting that sons still hold a hallowed place in many communities and are seen as the ones who will carry on the name of the family, and provide continuity. The 2nd petitioner being the only son must have been given that parcel of land with the parents' house in that context, and in recognition of the fact that he would stay there and hold over from the parents. He cannot be heard to say that the transfer of the land to him meant that his siblings were stopped from coming home. Coming home must mean to their parents' house. Surely he must be able to accommodate his siblings and their children who might want to visit. It is the sibling thing to do.

94. Having said that I find that the application succeeds only to the extent of the following orders:

- a) **KABATINI BLOCK 1/11733 to go to 1st Petitioner/administrator EUNICE WANJIRU KARUGU.**
- b) **KABATINI BLOCK 1/11734 to go to the applicant ANNE WAMBUI KARUGU.**
- c) **The 2nd Petitioner/Administrator AMOS GIKONYO KARUGU to make provision for the other beneficiaries to access their parents' house.**
- d) **Each Party to bear its own costs.**

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 14TH DAY OF JUNE 2021.

MUMBUA T MATHEKA J

UDGE

Court Assistant Edna

For the Applicant: Karanja Mbugua & Co Advcates

Email: karanjambugua@gmail.com

For the Petitioners: Obura Mbeche & Co Advocates

Email: oburambeche@africaonline.co.ke