



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CIVIL APPEAL NO. 29 OF 2019

MICHENI APHAXARD NYAGA.....1ST APPELLANT

CATHERINE KAMBURA NYAGA.....2ND APPELLANT

MARGARET MAITHA KABURU.....3RD APPELLANT

VERSUS

ROBERT NJUE.....1ST RESPONDENT

SILAS KABURU.....2ND RESPONDENT

CATHERINE MUKWANJAGI NTWIGA.....3RD RESPONDENT

(Being an appeal from the Judgment of Hon. Sudi, Senior Resident Magistrate, delivered on the 30th July 2019 at Chuka Succession Cause No.36 of 2016)

J U D G M E N T

INTRODUCTION

1. The appellants have filed this appeal against the Judgment in **Succession Cause No.36/2016 by the Resident Magistrate Chuka** issued on 30/7/2019. The matter relates to the Estate of Nyaga Musa alias Aphaxard Nyaga Musa (deceased) A grant of letters of Administration was issued to Micheni Aphaxard Nyaga on 9/8/2016. He proceeded to file a summons for confirmation of grant dated 6/6/2017. The summons prompted the filings of protests by Silas Kaburu M'Thara, Catherine Kambura Nyaga and Robert Njue Nyaga.

2. The trial magistrate dealt with the protest by Silas Kaburu in a ruling dated 2/7/2019 and held that the protestor was entitled to one acre out of land parcel No. Karimba/344 as the dispute had been determined by the Land Disputes Tribunal.

The deceased was survived by the following beneficiaries:

- i. Jesca Mukwamugo Nyaga - Wife.
- ii. Michemi Alphaxard Nyaga - Son.
- iii. Catherine Kabura Nyaga - Daughter.
- iv. Margaret Maitha Nyaga - Daughter.
- v. Fredrick Marangu Nyaga - Son. (Deceased)
- vi. Robert Njue - Son.
- vii. James Ntwiga - Son (Deceased but survived by the 3rd respondent)
- viii. Kenneth Njagi - Son. (Deceased)

While the property forming the estate of the Deceased herein include the following:

Land:

i. L.R. No. MUTHAMBI/LOWER KARIMBA/344

ii. L.R. No. MWIMBI /MUGUMANGO/733

iii. L.R. No. MWIMBI /MUGUMANGO/1082

Plot:

i. Plot No. 1 Mugumango Kibura

ii. Plot No. 2 Ciamparatia

2. The trial magistrate proceeded and gave a Judgment with regard to the other protests and held that for Justice and equity the estate be distributed as follows:-

MWIMBI/S.MUGUMANGO/733

- Catherine Mukwanjagi Ntwiga - 1.0 acre
- Micheni Aphaxard Nyaga - 3.75 acres
- Margaret Maitha Kaburu
- Jesca Mukwamugo Nyaga - 1.50 acres -jointly

MWIMBI/S.MUGUMANGO/1082

Robert Njue Nyaga - Whole

MWIMBI/LOWER KARIMBA/344

Micheni Aphaxard Nyaga - whole

PLOT NO 1

Micheni Aphaxard Nyaga

PLOT NO. 4

Robert Njue Nyaga - whole

3. The trial court adopted the mode of distribution proposed by the 1st protestor Robert Njue. The appellants were dissatisfied with the Judgment of the trial magistrate and filed this appeal.

By a Memorandum of Appeal dated 22nd /06/2020 the Appellants herein preferred the following five grounds of appeal having been dissatisfied by the judgment issued by the subordinate court as follows: -

(i) The learned magistrate erred in law and facts in awarding to the 2nd respondent, yet he is not a child or dependent of the deceased, one acre out of the L.R. No. MUTHAMBI/LOWER KARIMBA/344, and at the same time awarding the whole of the said parcel to the 1st Appellant, yet the 2nd respondent has his own L.R. No. MWIMBI/MUGUMANGO/1102.

(ii) The learned magistrate erred in law and fact by distributing L.R. No. MWIMBI/MUGUMANGO/733 in such a way that the acreage she distributed totals to 6.25 acres yet that parcel of land measures 5.48 acres only.

(iii) The learned magistrate erred in law in awarding to the 3rd respondent 1.0 acres out of L.R. No. MWIMBI/MUGUMANGO/733 yet she is not entitled to any share, since her (now late) husband, one Eliphelet Ntwiga Nyaga, who was a son of the Deceased was given by the Deceased as a gift inter vivos. L.R. MWIMBI/MUGUMANGO/1665 and she did not claim any additional share in the primary cause.

(iv) The learned magistrate erred in law and fact by denying the 2nd appellant a share from L.R. No. MWIMBI/MUGUMANGO/733 yet she is entitled to 1.0 acre therefrom.

(v) The learned magistrate erred in law and fact in awarding the 1st respondent L.R. MWIMBI/MUGUMANGO/1082, yet it ought to have been distributed to the 3rd appellant because the 1st respondent was given by the Deceased during his lifetime L.R. MWIMBI/MUGUMANGO/1663 as gift inter vivos.

(vi) . The learned magistrate erred in law and fact by awarding to the 1st respondent Plot No. 4 yet it was given to the 1st appellant and is already in his name thereby not being a part of the estate of the concerned Deceased person.

It was the appellant's prayer that the appeal be allowed, the Judgment in the primary cause dated 30/7/2019 and any consequential or subsequent orders be set aside, the certificate of confirmation of grant be issued to the 1st appellant

who is the administrator of the estate and be distributed as follows:-

i. L.R. NO. MWIMBI/S.MGUMANGO/733

- a. Micheni Aphaxard Nyaga - 3 acres
- b. Catherine Kambura - 1.0 acre
- c. Jesca Mukwamugo Nyaga & Margaret Maitha Kaburu (jointly) - 4.8 acres

ii. L.R. NO. MUTHAMBI/LOWER KARIMBA/344

Micheni Aphaxard Nyaga - whole

iii. L.R. NO. MWIMBI/S.MUGUMANGO

Margaret Maitha Kaburu - whole

The appellants pray that they be awarded costs.

4. The appeal was admitted on 25/9/2019 and directions were given that the appeal be canvassed by way of written submissions. The parties complied and filed their respective submissions.

5. For the appellants, submissions were filed by Carl Peters Mbaabu & Co. Advocates. The contention by the appellants in that the distribution of the estate is fatally flawed as the parties were not given an opportunity to present their proposals on the distribution of the estate and that some of the beneficiaries ended up getting unfairly bigger portions of land as opposed to others. It is also the contention by the appellants that the trial magistrate ended up giving a share of the estate to a person who was not a beneficiary entitled to the estate. The appellants further contend that the trial magistrate failed to consider that some of the beneficiaries were given properties during the lifetime of the deceased.

6. The 1st and 3rd respondents filed written submissions. The contention is that the distribution of the estate was fair as it was in accordance with the wishes of the deceased. It is their prayer that the Judgment of the trial magistrate be upheld, the appeal be dismissed and they be awarded costs of the appeal.

7. Submissions were also filed by second Respondent, Silas Kaburu. His contention is that Land Parcel No. Lower Karimba 344 was not part of the estate of the deceased as it was supposed to be shared between him and the deceased. He contends that the land parcel No.344 Karimba was his father's property and the deceased was his brother. He submits there was a dispute between him and the deceased dating back to 1975 but eventually the deceased used unfair means and got a title deed to the land. He submits that the parcel No.344 was not among the assets listed as forming part of the estate of the deceased.

8. I have considered the appeal. As the first appellate Court, the court's role is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**.

Issues for determination:

Having considered the grounds of Appeal, the submissions and the Judgment of the trial magistrate was well as the proceedings, two issues for determination stick out.

These are:-

i. Whether the deceased had during his lifetime distributed his estate by way of gifts 'inter vivos' or gifts 'causa mortis' to some of the beneficiaries and if so, whether they should be taken into consideration when determining the ultimate entitlement of the respective beneficiaries.

ii. Distribution of the estate

9. Analysis and determination

i. Gifts inter vivos

The Law of Succession Act, (Cap 160) Laws of Kenya, to be referred to as "the Act," recognizes testamentary and intestate succession to estates of deceased persons. Under **Section 5(1)** of the **Act** any person who is of sound mind and is not a minor may dispose of all or any of this free property by a **Will**.

Section 9(1) of the Act makes provision for what constitutes a valid Will.

It provides:

- i. No oral will shall be valid unless:
 - a. It is made before two or more competent witnesses.
 - b. The testator dies within a period of three months from the date of making the Will.

My brother Justice Musyoka in **Re- Estate of Evanson Mbugua Thong'ote (deceased) 2016 eKLR** had this to say-

"An oral will is made simply by the making of utterances orally relating to disposal of property. In assessing whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will." The Honourable judge continued "...The other consideration is that the utterance ought to be made in the presence of two or more persons"

This is in line with **Section 9 of the Act** (supra) which provides that a valid oral Will are pronouncements made by the deceased not later than three months prior to his death in the presence of two or more competent witnesses which are not reduced in writing directing how his properties would be disposed of upon his death. The period of three months before the death of the deceased seems to suggest that the person making the will was contemplating his death.

10. The proceedings in the lower court were filed as intestate succession. The respondents have contended that the deceased had said how the estate should devolve concerning 2nd respondent and have relied on the affidavit of John Phares Njeru at page 48 of the record. In my view the averments do not constitute a valid will as it does not meet the threshold under **Section 9 of the Act** supra. It does not state the dates when the meetings were held or who was present. I find that there is no proof that the deceased made an oral will. It follows that the deceased died intestate in the year 2015 and the **Law of Succession Act** is applicable in the administration of the Estate.

11. Gift *inter vivos* are provided under **Section 42 of the Law of Succession Act**. It provides:

"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."

The characteristics of the gifts *inter vivos* are that they are made and settled during the lifetime of the deceased and have been identified, awarded and settled for the person to whom it has been given. It is a gift made to a beneficiary when the deceased was alive and is considered when distributing the net intestate estate so that person who received it may be considered as having received his share and may reduce or diminish any entitlement to the net intestate estate. The gift which is transferred and settled for the beneficiary during the life-time of the deceased, will not form part of his estate but it will be taken into account in determining the share of the net intestate estate finally accruing to that beneficiary.

The concept of gifts is divided into two categories. First gifts *intervivos* and gifts *causa mortis*. Gifts *intervivos* as contemplated in the Law of Succession are such that the owner of the property or asset donates it to another without expectation of death.

In any event the person who makes such a gift must have the capacity and competency to gift the property and the gift must be perfected. In the case of *inter vivos* the gift must go to the donee absolutely during the lifetime of the donor. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts.

Further, it is fundamental to understand the intention of the parties and their acts done sufficient to establish the passing of the gift to the donee.

The test on a gift causa mortis is defined as a gift made in expectation of death. The donor causes the property or goods in his possession to be delivered to another. The general distinction between a gift causa mortis and a gift *intervivos* is that its revocable by the donor and his capacity must meet the requirements under **Section 11 of the Law of Succession** in the making of a Will.

The requirement of the law for such gifts are that they may be settled by a deed or an instrument in writing by delivery, by way of a declaration of trust by the donor or by a resulting trust or transfer and registration. In other words the gift must have passed from the deceased to the recipient for it to be valid. This means that the gift is no longer the property of the deceased but for the purpose of distribution of the estate to the dependants it will be traced and taken into account when distributing the estate with respect to the beneficiary who received the gift.

In **Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67** it is stated as follows with respect to incomplete gifts:

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

Adherence to the rule based-model on transfer of immovable property involves an inquiry on the Law of gifts *inter vivos* or *causa mortis* featuring in **Odunga’s Digest on Civil Case Law and Procedure Vol (III) Page 2417 at paragraph 5484 (d) e – 1** thus:

“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 need 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. (See Shell’s Equity 29ED Page 122 paragraph 3)”

It is evident that where there is an imperfect gift having regard to the requirements, of the necessity for the same must be by way of written memorandum, registered transfer and or declaration of trust in writing, the gift may nonetheless be perfected by the conduct of the parties.

In regard to the matter at hand, there are family members who happened to have been gifted property *inter vivos*; and the beneficiaries seem to all agree on the same. The members are as follows:

- i. Catherine Kambura Nyaga - gifted plot No. 7 A at Kathangwe market.
- ii. Kenneth Ntwiga (survived by the 3rd Respondent in the appeal). – gifted **L.R. No. MWIMBI /MUGUMANGO/1665** which equals 2.33 acres.
- iii. Robert Njue was gifted 2.33 acres, Land Parcel No. Mwimbi/S. Mugumango/1663.
- iv. Margaret Maitha gifted **L.R. No. MWIMBI /MUGUMANGO/1082**
- v. **Alphaxard Micheni** gifted **Plot No. 4.**

In the same breadth, there are beneficiaries who chose not to lay further claim on the Deceased’s estate. They include:

- i. Fredrick Marangu Nyaga.
- ii. James Nyaga (said to be deceased as per the Chief’s letter)
- iii. Keneth Nyaga.

12. From the foregoing I find that some of the beneficiaries had benefited from gifts *inter-vivos*. This however does not disqualify them from getting a share of the net intestate estate of the deceased but must be taken into account when distributing the net estate.

13. Distribution of the Estate:

The deceased died intestate as earlier held and was survived by his wife and children. The Act gives the court discretion make provision for the dependants. Section 27 Law of Succession Act provides:

“In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.”

For the purpose of identification of the dependants, the Act proceeds to define the dependants as follows:

Section 29 of the Law of Succession Act.

“For the purposes of this Part, “dependant” means-

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

14. The court in exercising discretion to make provision for dependant must do so judicially. This calls for the fair and equitable distribution of the estate. The gist of dispute in this appeal is the distribution of the estate. I will now consider the grounds.

15. The appellant have faulted the distribution of Land Parcel LR No. Muthambi/Lower Karimba/344 to the 2nd respondent who was not a child or dependant of the deceased. The 2nd respondent is the brother of the deceased. The 2nd respondent does not fall in the definition of a dependant under **Section 29 of the Act**, supra. It is clear from the proceedings that he was claiming land from the deceased on the basis that the land was ancestral land. Evidence was laid before the trial magistrate that the 2nd respondent owns a piece of land which is registered in his name. The 2nd respondent admitted that the deceased was the registered owner of Land Parcel No. MuthambiL/L.Karimba/334. He exhibited a green card showing the land was registered in the name of the deceased. The 2nd respondent did not produce the decision in the Judicial Review matter which the deceased had filed. An inference must be drawn that had he produced the decision in the Judicial Review it would have been adverse to his case. He admitted that the land is in the name of deceased. I find that the trial magistrate erred by awarding the 2nd respondent the estate of the deceased when he was not a dependant or a person entitled to the estate of the deceased. The claim by the 2nd respondent was of a civil nature and was not a claim for beneficial interest. The claim could therefore not be dealt with in a Succession Cause which was dealing with administration of the Estate of the deceased. The claim by 2nd respondent was therefore misplaced and the trial magistrate had no jurisdiction to determine it. The Land Parcel No. Muthambi Lower Karimba/344 was the and remains free property of the deceased and available for distribution to the rightful dependants or beneficiaries. The first ground has merits and must succeed.

The appellant further faults the court on the 2nd ground for distributing Land Parcel No.LR No. Mwimbi/S.Mugumango/733 in a manner that exceeded the acreage as the land measures 5.48 acres and what was distributed amounts to 6.25 acres. I agree with the appellants that the parcel cannot be distributed on the ground as ordered by the trial magistrate as the land is much smaller. The order is incapable of taking effect and can only be a recipe for chaos. This 2nd ground must also succeed.

16. On the 3rd ground the appellants contend that 3rd respondent Catherine Mukwanjagi Ntwiga was awarded one acre from Mwimbi/Mugumango/733 in disregard of the fact that her deceased husband had received land parcel No. Mwimbi/S Mugumango/1665 and she had not claimed additional share in the Succession Cause. This fact of the 3rd respondent having benefited from a gift *inter vivos* is not in dispute. She had not claimed any share in the remaining estate. The trial magistrate did not give reason why she added her one acre other than stating that she agreed with the mode of distribution by the protestor and yet she was contented with the gift *inter vivos*

Indeed from the Judgment of the trial magistrate she had clearly indicated that the 3rd respondent had received her share through her husband. At page 135 of the record the trial magistrate stated:-

“The court notes that the evidence before court was that the men were given shares, but the petitioner was not. The 2 protestors were also given shares which will be taken into account.

I hereby note that the 3 male children of the deceased or their families as mentioned under in the Chief’s letter (FREDRICK MARANGU, JAMES NYAGA, KENNETH NYAGA,) are not claiming any more shares as guided by Section 28 (d) of the Act, having received shares before the deceased demise and as agreed between them. They seem to have received between 2.5 to 3.5 acres).

The award of one acre to the 3rd respondent cannot be supported as the trial magistrate found as a matter of fact that she had benefit from a

gift *inter vivos* given to her husband and was contented with it.

The act allows a beneficiary to denounce his or her claim. The trial magistrate was dealing with a protest on the proposed mode of distribution. The 3rd respondent did not file a protest nor did she adduce any evidence before the trial magistrate. The parcel No.773 where she was to be added one acre is smaller than what the trial magistrate awarded. From the conduct the 3rd respondent was contented with what her husband was given by the deceased in his lifetime and the trial magistrate had no basis to award her one acre. Furthermore, being a daughter-in-law she is excluded as a beneficiary under **Section 29 of the Act**. She had not taken out letters of administration in the estate of her husband. Her husband had pre-deceased the deceased. 3rd respondent was not a dependant as far as the estate of the deceased in this case is concerned. The trial magistrate therefore erred in law and in fact by awarding one acre to the 3rd respondent. The ground succeeds.

17. The appellant faults the trial magistrate for failing to give the 2nd appellant a share from land parcel No. Mwimbi/S.Mugumango/733. The 2nd appellant is a daughter of the deceased and therefore a dependant as stipulated under Section 29 of the Act. She admitted in her evidence that she was given a plot by the deceased at Kathangari Market which is developed. It is her contention that she should be given a piece of land. The 2nd appellant is Catherine Kambura Nyaga. She gave evidence as can be seen from page 123 of the record. She testified that she is a daughter of the deceased. She claimed one acre from parcels No. Mwimbi Mugumango/733 one acre from Mwimbi/S.Mugumango/582 and one acre from Mwimbi/L. Karimba- 2 acres. During cross-examination she admitted that she was claiming one acre which is what she had deposed in her affidavit at page 97 of the record. She admitted that she was given a plot that was developed at Kathangari market. The plot which was given to 2nd appellant was not a bar for her to get additional share. The court did not give reasons for not awarding the 2nd appellant a share out of Parcel No. Mwimbi/S.Mugumango/733 and yet she was a child of the deceased entitled to a share without proof of dependency. The Petitioner had proposed that she gets half (1/2) an acre, page 54 of the record. There mother Jesca Mukwamugo Nyaga had also conceded that Catherine Kambura should get half, (1.2) an acre out of parcel No.733 since the deceased had given her plot in his lifetime, page 60 of the record. This was also confirmed by other deponents. The trial magistrate may have proceeded on the footing that Catherine Kambura was given some property by the deceased *inter vivos* to deny her the share. The trial magistrate erred as she did not take into account that gift which she was given by the deceased in his lifetime in addition to what she might have been entitled from the estate. It was not fair to deny her a portion without giving reasons. The trial magistrate erred by rejecting the proposal by the petitioner to give her a portion of half (1/2) an acre in recognition that she was a beneficiary.

18. As regards Mwimbi Mugumango/1082 as per the affidavit of the widow of decease should go to Margaret Maitha Kaburu and Catherine Kambura Nyaga. The protestor objects to them getting any portion of the family land because they are women.

The Constitution of Kenya 2010 as well as the Law of Succession Act frowns upon the discrimination of women as far as their entitlements are concerned in inheritance matters. **M. Musyoka, Law of Succession at page 118** in relation to reference to children in the Law of Succession Act states that: -

‘Non-discrimination of daughters’ reference to children does not distinguish between sons and daughters, neither is there distinction between married and unmarried daughters’

Apart from the foregoing, Article 27(3) of the Constitution which specifically provides that:

‘women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres’.

The same was also buttressed in **the Matter of the Estate of M’Ngarithi M’Miriti alias Paul M’Ngarithi M’Miriti (Deceased) [2017] KLR** as follows: -

Discrimination of daughters in inheritance

From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful.

As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases.

But, things changed when RONO vs. RONO [2008] 1 KLR 803deliveredthe downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement the Constitution- which state categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and the Constitution. More specifically I am content to cite the proclamation by the Court of Appeal in the case of STEPHEN GITONGA M’MURITHI vs. FAITH NGIRAMURITHI [2015] eKLR that: -

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”

Therefore, a son will not have priority over a daughter of the deceased simply because he is male; all- male and female siblings- are equal before the law and are entitled to equal protection of the law. See article 27 of the Constitution. Accordingly, the 3rd Administrator and her children who are claiming the inheritance of late Festus K. M'Ngaruthi, the son of the deceased are only entitled to the share of their late father. They are not, in the circumstances of this case entitled to more share than the distinct share of each of the two daughters of the deceased simply because the late Festus M'Ngaruthi was the son. The three children of the deceased are entitled to share the net intestate estate of the deceased equally.

Generally, the distribution of the deceased's estate should be at par between his sons and daughters. Comparatively, the Law of Succession Act requires that the property of a deceased person be distributed equally between the beneficiaries of a deceased person. There should thus not be such wide disparity in the distribution that would work an injustice on some beneficiaries, which is what would result from the mode of distribution proposed by the protestor.

It would appear that in dividing the estate of such a deceased person the court should be guided by the provisions of both **Sections 35** and **40** of the Act.

Section 35 of the **Law of Succession Act** caters for a situation where the deceased is survived by a spouse and children. The surviving spouse is entitled to the deceased's chattels and a life interest on the residue. The deceased in this case was survived by a spouse and children. Under **Section 35** of Act, upon the determination a life interest the estate should be shared equally between all the children.

On the ground No.5 the appellant faults the trial magistrate for distributing Land Parcel No.Mwimbi/Mugumango/1082 to the 1st respondent instead of the 3rd appellant. Petitioner Alphaxard Nyaga in a replying affidavit had sworn that 1st respondent was given Land Parcel No.Mwimbi/S.Mugumango/1663. A certificate of official search at page 57 of the record shows that the 1st respondent owns this land parcel which is registered in his name. The search constitutes credible evidence that the land parcel No.1663 was registered in the name of 1st respondent and did not therefore form part of the estate of the deceased see definition of the estate under **Section 2 of the Act**. Property which is not registered in the name of the deceased is not available for distribution among his dependant. Land parcel No.1082 was distributed during the lifetime of the deceased to the 3rd Appellant. The trial magistrate erred by distributing Land Parcel No.1082 to the 1st respondent and yet he had received Land Parcel No.1663 as gift *inter vivos*.

19. With regard to ground No.6 parties are in agreement that plot No.4 was given to the 1st appellant during the lifetime of the deceased and is already in the name of the 1st appellant. Property which is not owned by the deceased does not form part of his estate and was therefore not available for distribution. It could only be taken into account when distributing the net intestate estate of the deceased to the dependants. I find that the trial magistrate erred in distributing plot No.4. and yet it did not form part of the estate of the deceased. This ground has merits. From the foregoing analysis. I find that the trial magistrate erred in her Judgment by:-

1. Distributing land parcel No. Mwimbi/L.Karimba/344 to the 2nd respondent who was not beneficially entitled to the estate of the deceased.
2. The distribution of land parcel No. Mwimbi/S.Mugumango/733 could not take effect as what was distributed exceeded the acreage on the title deed and on the ground.
3. The trial magistrate awarded one acre to the 3rd respondent and yet she had received her share through her husband and was not a dependant under **Section 29 of the Act**.
4. Failing to award 2nd appellant a portion of land when she was a beneficiary of the deceased.

For these reasons I find that the appeal has merit. I allow it and I order that the Judgment be set aside.

I order that the estate be distributed and the grant be confirmed as follows:-

1. The order awarding the 2nd respondent a portion of one acre in land parcel No. Mwimbi/Lower Karimba/344 is set aside.
2. Land Parcel No. Mwimbi/Mugumango/733 shall be distributed as follows:
 - Micheni Aphaxard - 3 acres
 - Catherine Kambura - 1.0 acre
 - Jesca Mukwa Nyaga & Margaret Maitha -1.48 acres, with the interest of Jesca Mukwamugo being a life interest only.
3. L.R. No.Mwimbi/Mugumango/1082 –
 - Margaret Maitha Kaburu- whole share
4. Land Parcel No. Muthambi/Lower Karimba/344 be shared equally between Micheni, Alphaxard and Robert Njue.

I make no orders as to costs as the parties involved are family members.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 12TH DAY OF JULY 2021.

L. W. GITARI

JUDGE