



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.38 OF 2000

IN THE MATTER OF THE ESTATE OF DANIEL MUTISO KANG'U (DECEASED)

BEATRICE MBWESE MUTISO.....PETITIONER

-VERSUS-

MARTHA WANGENE MUTISO.....OBJECTOR

RULING

1. The deceased herein, **Daniel Mutiso Kangu**, passed away on 8th April, 1999 leaving two wives, **Beatrice Mbwese Mutiso** (1st wife) and **Martha Wangene Mutiso** (2nd wife) surviving him. The deceased had three children with the 1st wife being **Paul Ndunda Mutiso** (son), **Joseph Muthiani Mutiso** (son) and **Tabitha Mbithe Ndeti** (daughter). With the second wife, the deceased had seven children who were **Simon Mulei Mutiso** (son), **Raphael Kang'u Mutiso** (son), **William Mutiso** (son), **Rebecca Mutiso** (daughter), **James Kyalo Mutiso** (son), **Cecilia Ndunge Mutiso** (daughter) and **Wilson Kalei Mutiso** (son).

2. Initially, the petitioner herein, **Beatrice Mbwese Mutiso**, petitioned for grant of letters of administration and the grant was issued to her which grant was subsequently confirmed. However, on an application by the Applicant herein, **Martha Wangene Mutiso**, the said grant was revoked and on 19th June, 2000, a fresh grant was issued jointly to the Protestor and the Applicant. The properties of the deceased were then reverted to the deceased's name.

3. By summons for confirmation of grant dated 13th June, 2009, the Applicant identified the deceased's properties as Mavoko Town Block 2/83, Mavoko Town Block 2/117, Mitaboni/Mutituni/793 and Plot No. 123 – Mutituni Market. According to her, apart from land parcel no. Mitaboni/Mutituni/793 on which herself and her children are settled, and which she proposed that it be given to her wholly, the rest of the deceased's estate should be distributed in accordance with section 40 of the **Law of Succession Act**. She accordingly exhibited a copies of the title documents for Land Parcel Nos. Mavoko Town Block 2/83, Mavoko Town Block 2/117, Mitaboni/Mutituni/793 and Mitaboni/Mutituni/793.

4. On her part the Protestor averred that she got married to the deceased during the Second World War under Kamba Customary Law and they set up their matrimonial home at Kasaini Village in Mutituni Location, Machakos District. Upon the deceased's recruitment as a soldier, the deceased left her behind and during that period, she engaged in the business of trading in cereals and made savings with the income generated. Upon the return of the deceased from the war, they jointly purchased a parcel of land at Kasaini Village which they amalgamated with the said ancestral land and is now part of Land Parcel No. Mitaboni/Mutituni/793 registered in the name of the deceased. After that the Protestor went to live at Athi River with the deceased and she continued with her cereals business as well as other activities dealing in vegetables, chicken, clothing and established a hotel and made substantial savings from the income generated.

5. In order to take care of the home at Kasaini, the Protestor persuaded the deceased to take a second wife and pursuant to the foregoing, the deceased married the Applicant herein and the Protestor even contributed towards the payment of her dowry. Upon her marriage to the deceased, the Applicant occupied the house that the Protestor had built at Kasaini Village where she lives to date while the Protestor continued staying with the deceased at Athi River and while there, the Protestor lost a child and though burial plans were made for the Kasaini Village home, the Applicant objected to the burial and eventually the child was interned at a public cemetery at Athi River.

6. According to the Protestor, it was this conduct on the part of the Applicant that made her resolve to acquire another home. She got information that a land buying company by the name Mitaboni Katani Ltd was selling shares to prospective members and with the use of her savings, she, in 1970, bought shares in the name of her husband at the said company. She averred that the said payments were meant for the acquisition of a large tract of land by the company on behalf of its members from the Government of Kenya. According to her, she used the deceased's name because she had no identification papers as women were not issued with the same at that time. She however paid for the same using her own funds and in 1972, the company subdivided the subject land and, through balloting, allocated to its members land parcels measuring 20 acres. It was her averment that she was allocated Plot Nos. 24 and 83 measuring 50 acres and 20 acres respectively and in support of this contention she exhibited the balloting card. In 1972, she settled on the said parcel, and established her homestead thereon. In 1991, the two parcels were registered at the Machakos District Land Registry as land title Nos. Mavoko Town/Block 2/83 and Mavoko Town/Block 2/117 respectively.

7. According to the Protestor, when in 1991, the deceased attempted to sell the two parcels to one **Munyao Ndalana**, she moved to court to stop the said sale on the grounds of beneficial ownership in Machakos CMCC No. 373 of 1991 and an injunction was granted to her. However, the suit did not proceed to full trial. According to the Protestor, over the years during the lifetime of the deceased, she has been in exclusive use and possession of the two parcels with the Applicant not making any claim over them. It was not until the death of the deceased that the Applicant started claiming a share of the said parcels of land as a beneficiary of the estate of the deceased. As a result, the Protestor sued the Applicant in Machakos ELC Case No. 276 of 2010 seeking a declaration in her favour over the two parcels. The said suit was however terminated by the Court before full trial and she was directed to ventilate her claim in the Succession Cause.

8. It was averred by the Protestor that prior to his demise the deceased had always advised the Applicant that he had never contributed any money towards the purchase of the subject parcels hence the Applicant never claimed any ownership in the said parcels.

9. The Protestor asserted that the deceased did not make any contribution towards their purchase and he was only registered as her trustee. As regards the land at Kasaini, presently known as Mitaboni/Mutituni/793, It is comprised of inherited ancestral land and the part she purchased jointly with the deceased and though she is entitled to a share of it, she has relinquished her interests therein to the Applicant. She however insisted that the Applicant is not entitled to any share of the two parcels of land at Katani.

10. The Protestor also relied on an affidavit sworn by **Kiilu Wambua**, a founder director of Mitaboni Katani Company Ltd who swore that he had known the petitioner for many years. According to him, he was a treasurer of the said company and was in charge of registration of its members. It was his averment that the Protestor personally paid for membership in the said Company and her share was registered in the name of her late husband, the deceased. However, all other subsequent payments towards the said share were personally made by the Protestor in the deceased's name and that the Protestor was personally involved in all other dealings and transactions with the company relating to the said share while the deceased did not involve himself in the said affairs.

11. It was further disclosed by the Protestor that she also purchased four other parcels of lands and exhibited copies of the sale agreements in respect thereof whose purchase the deceased did not contribute towards. Even after the death of the deceased, the Protestor bought another parcel of land and exhibited a sale agreement to that effect.

12. According to her, she settled in Mitaboni Location in 1986 where she established her permanent home, a land which according to her she acquired using her own money. It was her assertion that all the land parcels that she purchased are registered in her names and are not part of the estate of the deceased. She disclosed that her two sons have purchased their own lands and are not settled on the deceased's property as alleged by the Applicant.

13. The Protestor therefore proposed that plot no. 23 which is registered in the deceased's name be transmitted to her in consideration of her surrendering her interest in the Kasaini Land to the Objector. On the other hand, Land Parcel Nos. Mavoko Town/Block 2/83 and Mavoko Town/Block 2/117, being her rightful properties ought to be transmitted to her.

14. In answer to the protest, the Applicant averred that one of the beneficiaries of the deceased's estate, **Cecilia Ndunge Mutiso**, a deceased's daughter from the second house was erroneously omitted from the list of beneficiaries. It was her averment that all the listed properties of the deceased were acquired by the deceased during his marriage to both the Applicant and the Protestor and referred to the documents of title/register abstracts exhibited by herself. It was her assertion that the deceased and not the Protestor, was a member/shareholder in Mitaboni Katani Company Ltd based on the share certificate no. 40 for 300 shares which gave rise to Land Parcel Nos. Mavoko Town/Block 2/83 and Mavoko Town/Block 2/117. She further disclosed that, on the strength of the same shares, the deceased was also allocated Plot Nos. Mavoko Town Block 2/12406, 12260, 12110, 2/12328 which plots were yet to be registered in the deceased's name as the deceased died before processing appropriate documents at the Lands Office. However, the same form part of the deceased's estate and she exhibited copies of the abstracts. In the Applicant's view, the estimated value of the deceased's estate is well over Kshs 100,000,000.00.

15. The Applicant disclosed that the Protestor who lived apart from the deceased for many years preceding the deceased's death sued the deceased in SRMCC No. 373 of 1991 claiming part of the deceased's property which suit was dismissed with costs on 11th November, 1998. According to her the mere fact that the Petitioner has receipts regarding payments made by the deceased does not confer on her proprietary rights thereon just as the ones in possession of the Applicant. According to her the protestor and her children are not settled on any of the deceased's aforesaid properties and have not developed any of them hence the Protestor's protest has no merit and should be dismissed with costs.

16. It is worth noting that the Protestor herein passed away on 2nd October, 2017 and was substituted by her son, **Joseph Muthiani Mutiso**.

17. PW1, **Beatrice Mbwise Mutiso**, the Protestor herein, reiterated the foregoing and added that she was assisted by her daughter to complete paying for the Katani property. She reiterated that her husband did not pay anything. It was her evidence that receipts were issued to her whenever she paid for the land though they were in the names of the deceased husband since she had no ID and was using the deceased's ID. According to her the deceased wanted to sell the Katani property after being told to do so by the Applicant.

18. In cross-examination, the Protestor stated that at the time she got married to the deceased, the latter had no house. She however married him because she loved him and he taught her business of selling millet. According to her the deceased was working in the Kenya African Rifles (KAR) as a driver at the time she got married to him under Kamba Customary Law. It was her testimony that the deceased went to Mavoko as a driver while she was doing business. While the deceased had a hotel, the Protestor had a butchery which she built by herself and was selling meat thereat while engaging in businesses. She also disclosed that the deceased was a councillor at Masaku County Council after independence after leaving the work of driving. It was at that time that he took a second wife under Kamba Customary Law. According to her the said co-wife stays on the land she bought with the deceased though she could not recall the year when the deceased married the Applicant.

19. According to the Protestor, the deceased's rural home is at Kasaini Village where the Applicant came from. It was the same home where

she married the Protestor and where he took the Applicant after getting married to her.

20. It was her evidence that she got four children with the deceased though one died and was buried at Mavoko while the Applicant has 8 children. According to her one of the Applicant's children Peter, died after getting married and giving birth to a daughter.

21. It was her evidence that she bought property at Katani and had payment receipts for the same from Mitaboni Katani Company though she caused the same to be issued in the deceased's name. By then the Applicant had been married to the deceased for a long time.

22. She confirmed that at the time of the deceased's death she was his wife. She however took him to court over the Katani property in 1991 because she bought the land and he had not contributed any money towards its purchase. According to her, she wanted the court to know that she just used his ID when she bought the land. She confirmed that the deceased wanted to sell the land and she refused. It was her evidence that the titles were in the deceased's name because the shares were in his name. She was however aware that there were other plots which were allocated to the deceased even after he died but have not been registered in his name. She confirmed that the deceased had other plots in Mavoko and Sofia but sold them. He also had a shop at Mutituni in Kasaini but the same was sold by one of his sons.

23. According to PW1, the deceased also informed her that one of the said shops was hers but it was the Applicant who was receiving rents therefrom despite her having paid the rates for it. There was also a plot in Kasaini where the deceased was buried and the same is registered in the name of the deceased.

24. According to the Protestor she was living in Katani and had two homesteads with the other one being in Mitaboni where she is settled and has stayed for over 10 years where her sons also bought lands. She denied that she separated from the deceased. In her evidence, she established her home Katani on the land she bought even when the deceased was alive. She stated that it was the deceased who told her to change the title in her names and that she was the one who gave the Applicant and her children the land where they reside and that she was the one who bought the land. The Protestor stated that the Applicant and her children sold their portion and the remaining portion is hers. She therefore asserted that she was not prepared to release the portion that she sweated to get.

25. In her evidence, the Applicant herein, **Martha Daniel Wangene Mutiso**, stated that she had 8 children with the deceased one of whom is deceased leaving 7 children who are alive. It was her evidence that she was staying in land parcel no. Mitaboni/Mutituni/793 where the deceased was also buried. Apart from that the deceased also had a market plot no. 123 situated at Mutituni Market. The deceased also had other properties in Mavoko Township and two plots in Athi River and was a member of Mitaboni Katani Co. Ltd. She therefore asserted the properties being claimed by the Protestor were the deceased's properties and ought to be distributed in accordance with the law since it was the deceased who bought the shares. She stated that she had the receipts for the same. She disclosed that she was aware that the Protestor sued the deceased claiming the said properties which claim was dismissed.

26. In cross-examination, the Applicant stated that the Protestor was married to the deceased after the Second World War and at the time she got married to the deceased, the Protestor was staying at Mutituni so they stayed together upon her marriage in one house that had a bedroom and a kitchen. She was however that the Protestor would go to the husband's place at Athi River but could not remember the last time she visited Mutituni. She however denied that the Protestor left the home permanently. She admitted that Mutituni is her home because the deceased is buried there though she could recall the Protestor losing an infant while staying at Athi River who was buried there upon agreeing with the deceased to do so. She however denied that she disagreed with the burial at Mutituni.

27. According to her the deceased had a butchery and a shop and was also a councillor with the County Council. As for the Protestor, she denied that she was doing any business at Mutituni and that the Hotel in Athi River was owned by her. In her evidence the Protestor used to far at Athi River and was unaware that she was trading in cereals. She testified that she had stayed with the deceased at Athi River and her children were born and brought up there since they were staying at Sofia and Makadara in the same house but were occupying different rooms.

28. The Applicant stated that the Protestor had no home at Mutituni since she had built a house in Mitaboni where the deceased bought a plot and it is where she was buried. According to her she was not aware that the Protestor bought other plots from other people. She was however unaware that the deceased attempted to sell land to **Munyao Ndalana** though she was aware that the Protestor filed a case seeking to stop the deceased from selling land. She insisted that the deceased never sold any land. In her evidence it her who brought the Protestor to court and was not aware that the Protestor sued her in Civil Case No. 276 of 2010.

29. The Applicant stated that she was not asking for the property at Katani since the Protestor's children live there and she lives in Mutituni. She however denied that the Protestor used Tabitha's dowry to acquire the Mitaboni Katani property since she was only aware of two goats which were paid as dowry. It was her evidence that they were in a good relationship before the Protestor died.

30. In re-examination she clarified that the Protestor was married before the deceased went to war and that she was married after the deceased returned from the war thought she could not recall the years. It was her testimony that she and the Protestor would go to the restaurant and the butchery interchangeably since the businesses belonged to the deceased. However, by the time of the death of the deceased, the Protestor was not living with him since she was staying in Mitaboni. She however could not say that they were separated since to her the Protestor was the deceased's wife. She reiterated that she has no interest in the land occupied by the Protestor and her children at Mitaboni since she does not know to whom it belongs. Neither is she interested in the properties registered in her names.

31. On behalf of the Applicant it was submitted that According to the deceased had two (2) wives/houses and while the first house now has three (3) beneficiaries the second house has eight (8) beneficiaries. It was submitted that the deceased's estate is comprised of the following properties: -

i) Land Parcel No. Mavoko Town Block 2/83 (8.101 hectare).

ii) Land parcel No. Mavoko Town Block 2/117 (20.07 hectares).

iii) Mitaboni/Mutituni/793 (2.2 hectares).

iv) Market plot No. 123 – Mutituni market.

v) Plot No. Mavoko/Town Block 2/12406 (0.0660 hectares).

vi) Plot No. Mavoko Town Block 2/12260 (0.1195 hectares).

vii) Plot No. Mavoko Town Block 2/12110 (0.0438 hectares).

viii) Plot No. Mavoko Town Block 2/12328 (0.0718 hectares).

32. Since these properties are not at the same place (spot) and the value thereof is not the same, each of the deceased's two (2) houses should have a share of each, in accordance with section 40 of the **Law of Succession Act**. According to the Applicant, since the petitioner (deceased's 1st wife) had a life interest in the deceased's estate, and the same determined upon her death on 2nd October, 2017, none of her children can purport to claim her already determined interest in the deceased's estate.

33. According to the Applicant, the petitioner's allegations that "she owned some of the properties though registered in the deceased's name" is untenable in law. Indeed, evidence adduced and documents filed herein by both parties had it that a suit that the petitioner had filed against the deceased (Machakos SRMCCC NO. 373 of 1991) was dismissed by the court (with costs) on 11th November, 1998.

34. It was therefore submitted that the petitioner's protest herein is without basis, and the same should be dismissed with costs to the applicant, and the deceased's estate be distributed in accordance with section 40 of the **Law of Succession Act**.

35. In support of her submissions the Protestor relied on **Re Estate of Josphat Irungu Kanyi (Deceased) 2019 eKLR, Succession Cause No. 1033/1996 - In the Matter of the Estate of Mwangi Giture – Deceased** and Succession Cause No. 110 of 2010- **In The Matter of the Estate of Samwel Miriti (Deceased) M M M'M vs. A I M.**

36. It was therefore submitted that it is very clear from the above-quoted authorities section 40 of the **Law of Succession Act** cap 160 of the laws of Kenya is discriminatory in nature. It advocates for equal distribution of the deceased estate as per the number of houses. It however does not give the parties the right to show how they contributed to the acquisition of the properties of the estate. In the current case, the objector is hiding behind the provisions of this section. She very well knows that the deceased did not in any way contribute to the acquisition of the two properties being Mavoko Town Block 2/83 and Mavoko Town Block 2/117.

37. The Petitioner has provided receipts showing that she actually paid for the purchase of the said shares but that the properties were registered in the names of the deceased since she did not have a national identity card and that ordinarily land was registered in the names of the men. The petitioner has been in possession and use of the Katani parcels of land and has demonstrated that even after the demise of her husband she continued to purchase more properties particularly in Mitaboni.

38. It was therefore submitted that the petitioner purchased Mavoko Town Block 2/83 and Mavoko Town Block 2/117 from her savings and the same should be transmitted to her. The land in Kasaini being Mitaboni/Mutituni/793 be transmitted to the objector while plot number 23 in Mutituni registered in the name of the deceased be transmitted to the petitioner.

Determination

39. I have considered the issues raised hereinabove.

40. Section 40 of the **Law of Succession Act** provides that:-

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the next intestate estate shall in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

41. This provision was extensively dealt with by the Court of Appeal in **Scolastica Ndululu Suva vs. Agnes Nthenya Suva [2019] Eklr** where the Court expressed itself at paras 15-21 as hereunder:

“In Mary Rono vs Jane Rono & another (supra), Waki JA in the leading judgment, accepted the proposition that the Court had the discretion in ensuring a fair distribution of the deceased's estate but that the discretion must be exercised judicially on sound legal and factual basis. In the same judgment, Omollo JA stated the position more clearly as follows:

‘My understanding of that section is that while the net intestate estate is to be distributed according to houses each house being treated as a unit, yet the judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that they must be equality between houses they would have been no need to provide in the section that the number of children in each house be taken into account. Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work injustice particularly in the case of a

young child who is still to be maintained, educated and generally seen through life. If such a child whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.'

In Douglas Njuguna Muigai & vs John Bosco Maina Kariuki & another (supra) this Court noted the absurdity of a blind application of section 40(1) of the Law of Succession Act as follows:

'Back to section 40(1) of the Law of Succession Act, that provides that a widow shall be considered as a unit alongside the children of the deceased when it comes to the distribution of the deceased's estate. In this case, Jerioth Wangechi the first wife of the deceased who even participated in the dowry negotiations for her co-wives is equated to the last born child of the 3rd wife of the deceased. Her contribution and support to the deceased as a spouse is not recognized and, in our view, that failure to recognize her contribution is tantamount to discrimination.'

It is therefore evident, that, although section 40 of the Law of Succession Act provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate. In regard to the question whether the respondent contributed towards the purchase of the two (2) properties, the trial judge had this to say:

'The protester testified that she was married to the deceased in the year 1983 and found the applicant already married to the deceased. She further stated that she found the two properties in issue herein had already been acquired, though she was not sure of the exact year of the acquisition. It was her testimony that at the time of her marriage to the deceased she found him living together with the applicant on the same land. It is thus safe to hold that the protester never contributed to the purchase of the two properties herein. It also emerged that the applicant herein was gainfully employed as a teacher in the year 1973 and retired in the year 2005. It was admitted by the protester and her witness Johnson Musyimi Suva that the applicant was working as a teacher when the deceased bought the parcels, she signed one of the agreements as the purchaser. I accept her evidence that she contributed financially towards the acquisition of the two parcels; Kathekani/76 and Kathekani/730. In the circumstances, it would be unfair to share the proceeds half - half between the two (2) widows of the deceased, or to find that each beneficiary should get equal proceeds of the share.'

On our own evaluation of the evidence, we are entirely in agreement with the conclusion that the trial judge arrived at that the respondent contributed financially to the acquisition of the two properties. We are alive to the fact that what was before the learned judge was a succession cause and not a matrimonial dispute. However, the succession cause was anchored on the matrimonial circumstances of the deceased. The fact that the deceased acquired the two (2) properties during the subsistence of his marriage to the respondent, before the appellant came into the scene, and the fact that the respondent was employed, clearly, supported her allegation that she contributed to the acquisition of the two (2) properties. It would not therefore be fair nor just to treat the appellant and the respondent equally in the distribution of the estate. The following excerpt of the judgment reflects the distribution adopted by the trial Court as follows:

'All the 13 beneficiaries (including the applicant and the protester) entered into a consent on 10/2/2015 and shared Kshs11,000,000/= equally. The balance from the proceeds of the parcels at Kshs11,908,595/=(sic). In the circumstances of the case, I ask (sic) that 40% of the Kshs11,908,595/= shall go to the applicant Agnes Nthenya. It works to Kshs.4,763,438/=. The protester Scholastica Ndululu Suva, Mark Maweu Suva, Felix Munyoki Suva, Barnaba Iwia Suva, Clement Moki Suva, Jonathan Kaloki Suva, Methussella Kivila Suva, Isaac Ngolano Suva, Roy Silas Suva, Metes Mwonge Suva, Abednego Andrew Munyoki and Sarah Muyoki Suva shall equally share the balance of Kshs7,145, 157/=. Each will get Kshs.595,429/75. Lastly the proceeds of the treasury Bills Nos A0009717 and A0009718 shall be equally shared among all the 13 Beneficiaries.'

From the above it is apparent that apart from the amount of Kshs11,908,595/= of which the respondent received 40 percent, the rest of the proceeds were shared out equally. An arithmetical calculation reveals that the respondent actually got only about 25 percent of the total sum whilst the rest was shared out equally amongst the remaining 12 beneficiaries. In the circumstances the appellant's contention that the distribution was unfair has no substance."

42. In this case the Protestor/Petitioner's case is that plot nos. Mavoko Town Block 2/83 and Mavoko Town Block 2/117 were purchased by her from her savings and the same should be transmitted to her. In my view if, though a property is registered in the name of a deceased person, it is determined that the said property was in fact purchased by someone else whether a spouse or otherwise and therefore the deceased was just a trustee for the beneficial owner, that property cannot be said to be "free property" as defined by section 3 of the *Law of Succession Act*. Under that section, "estate" means "the free property of a deceased person" while "free property", in relation to a deceased person, means "the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death." It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by the time of his death, interests had not been terminated.

43. In this case apart from the word of the Protestor and her witness, there is no other evidence that the properties registered in the name of the deceased was purchased either wholly or in part by the Protestor. To the contrary, the documentary evidence adduced show that the receipts for the purchase were issued in the name of the deceased and that the registration was similarly effected in the deceased's name. In fact, the Protestor did commence legal proceedings against the deceased seeking orders against him in respect of the said parcels of land but the suit was dismissed. Though the Protestor avers that the deceased acknowledged her as the beneficial owner of plot nos. Mavoko Town Block 2/83 and Mavoko Town Block 2/117, in his defence filed in Machakos CMCC No. 373 of 1991, the deceased expressly denied the Protestor's allegations and contended that the said properties were in fact his. Had the Protestor successfully prosecuted the said case and obtained favourable orders, this court would have had no option but to recognise her interests as the proprietor of the said parcels and

removed them from the estate of the deceased herein.

44. In the absence of any other evidence, this court must consider the said properties as forming the deceased's state and in that event section 40 of the **Law of Succession Act** must apply. I however associate myself with the position taken by **Koome, J** (as she then was) in **Succession Cause No. 1033/1996 - In the Matter of the Estate of Mwangi Giture – Deceased** that: -

“Perhaps it is the high time, the commission charged with the responsibility of law reform addressed the issue of the inequality raised under Section 40 of Cap 160. The 1st widow's entitlement vis vis the 2nd widow or subsequent widow who perhaps come into a marriage much later to find that the 1st widow has worked tirelessly and sometimes denying herself tremendous comfort to enable her husband create and accumulate wealth. The 1st widow is then relegated by virtue of Section 40 of the Law of Succession to the same position as the last born child of the 2nd or subsequent widows. The widow is supposed to be considered as a unit alongside the children.

In this regard the last born child of the subsequent widow who will have contributed nothing is elevated in law because he will have notarily (sic) absolute rights but will be entitled to an equal share with the 1st widow. The 1st widow is only entitled to a life interest and after the life interest the property devolves to her children in equal shares absolutely. I agree with counsel for the protester 1st widow that this state of affairs bleeds inequalities and inequities in our law and ought to be addressed urgently to enable our courts dispense justice that meets the provisions of the Constitution of Kenya and give due regard to the principles of nondiscrimination on the basis of sex which are also the principles of nondiscrimination provided for under the International Conventions especially the Convention Against all forms of Discrimination against women (C.E.D.A.W.) which Kenya has signed and ratified. If the principles laid down in the International conventions were to be applied, the 1st widow would get a share of the property acquired during her marriage to the deceased, leaving the other half share to be shared by all the deceased heirs. If the distribution is of a polygamous intestate, each widow would get a share of what she contributed to.”

45. I also agree with the sentiments expressed by **Makau, J** in Succession Cause No. 110 of 2010- **In The Matter of the Estate of Samwel Miriti (Deceased) M M M'M vs A I M** that:

“In the instant application the 1st petitioner is opposed to equal distribution while the interested party/2nd petitioner seeks and favours distribution according to Section 40 of the Law of Succession Act. This court is bound by Section 40 of the Law of Succession Act and has no discretion. The section clearly provides that the estate be divided between the houses taking into account the number of children in each house. It is fortunate that the two houses have equal number of children. However, this court shall not shut its eyes to unfairness meted on a deceased's widows who are not allowed to take an extra share and whose efforts in acquisition of the properties are ignored and treated merely like children of the deceased notwithstanding having been equal partners with the deceased. It is further unfortunate when the first wife who sacrificed a lot of her energy and who participated in the acquisition of the greater part of the deceased estate and even in situation where the properties are solely acquired by the first wife but registered in husbands have ended up being shared equally among all the wives not taking into account of less contribution by the younger wife who is married after acquisition of the bulk of the properties if not all the estate and who has contributed very little or nothing towards the acquisition of the estate. It is the court's hope that the unfairness to widows, and discrimination on first wife as reflected under Section 40 of the Law of Succession Act will soon be corrected so that the distribution of the deceased estate takes into account the contribution of the first wife and that of the 2nd wife or any other wife and the shares of the wife or wives is calculated differently from that of children who are treated as the same as their mother. (Emphasis added).”

46. In my view based on the reasoning of the Court of Appeal in **Douglas Njuguna Muigai & vs. John Bosco Maina Kariuki & Another** it would have been unjust to treat the Protestor/Petitioner had she been alive in the same way as one would treat any of the children of the Applicant.

47. It is therefore my view that the estate of the deceased ought to be distributed in the manner prescribed under section 40 of the Act.

48. Let the parties value land parcel nos. Mavoko Town Block 2/83, Mavoko Town Block 2/117, Mitaboni/Mutituni/793 and Plot No. 123 – Mutituni Market. However, since the parties agree that land parcel no. Mitaboni/Mutituni/793 is in occupation of the Applicant, the same will be retained by the Applicant and her family but it will be taken into account in determining the Applicant's house's interest in the other properties.

49. Liberty to apply granted and there will be no order as to costs.

50. It is so ordered.

Read, signed and delivered in open Court at Machakos this 22nd day of January, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Muema for Mr Nduva Kitonga for the Petitioner/Protester

Mr B M Nzei for the Objector/Applicant

CA Geoffrey