



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1725 OF 2006

IN THE MATTER OF THE ESTATE OF JOSPHAT MUTURI NJOROGI (DECEASED)

HANNAH WANJIKU MUTURI.....1ST ADMINISTRATRIX

EDITH NG'ENDO MUTURI.....2ND ADMINISTRATRIX

JOYCE WANJIRU MUTURI.....3RD ADMINISTRATRIX

V E R S U S

EVANS KAMAU MUTURI.....PROTESTOR

JUDGMENT

1. Josephat Muturi Njoroge the deceased person whose estate these proceedings relate died intestate on 12th August 2004. According to the petition application for grant of letters of administration filed by Edith Ngendo Muturi on 26th July 2006, the deceased was survived by:-

- a) Edith Ngendo Muturi (wife)
- b) Irene Wairimu Muturi (daughter) (adult)
- c) Charles Njoroge Muturi (son) (adult)
- d) Evans Kamau Muturi (son) (adult)
- e) Ann Mwihaki Muturi (daughter) (adult)
- f) Susan Njeri Muturi (daughter) (adult)

2. The Petitioner listed L.R Kiambu/Limuru/6782/2 as the only asset comprising the estate. Subsequently, she was issued with a grant of letters of administration intestate on 16th October 2006. Consequently, on 29th March 2007, she applied for Confirmation of Grant. In her affidavit in support of the application for confirmation, the petitioner attached consent signed by all beneficiaries (survivors) consenting to the proposed mode of distribution. Thus, the Petitioner (widow) was to hold the land in trust for her own benefit and on behalf of the other beneficiaries in equal shares.

3. On 26th April 2007, Ann Wanjiku Muturi and Joyce Wanjiru Muturi who also claimed to be widows to the deceased filed Summons for Revocation of the Grant claiming that;

- (1) The proceedings to obtain the grant were defective in substance;
- (2) The grant was obtained fraudulently by making of false statements and representations and concealment from the court of facts material to the cause.
- (3) The grant was obtained by means of untrue allegation of facts essential in points of law to justify the grant.
- (4) Some of the rightful beneficiaries of the deceased were not involved and or informed of the Succession cause and neither were they cited.

4. In their affidavit in support of the application sworn on 25th April 2009 by Ann Wanjiku Muturi on her behalf and that of Joyce Wanjiru Muturi, they listed additional beneficiaries to the estate being children to the deceased as hereunder;

a) Hannah Wanjiku Muturi's children

i) Margaret Wairimu

ii) Mary Wamaitha

iii) Jane Njeri

iv) Stella Njoki

v) Winnie Wanjiru

vi) Moses Karuko

vii) Lucia Wambui

viii) Peter Ndungi

b) Joyce Wanjiru Muturi's children

i) Esther Njeri

ii) Nancy Waithira

iii) Rose Njeri

iv) Moses Njoroge

5. It was their contention that their consent was not sought by the petitioner (respondent) and that their children were left out yet they were all residing and cultivating the property subject of the estate. On 11th May 2007, the two applicants (Ann Wanjiku Muturi and Joyce Wanjiru) filed a joint protest dated 5th May 2007 opposing the application for confirmation filed by the petitioner (Edith Ng'endo) citing similar grounds as stated in the application for revocation.

6. In response to the application for revocation, Edith Ng'endo (petitioner) filed her response by way of affidavit sworn on 22nd November 2007. She claimed that the said asset was her sole property which the deceased had allegedly transferred to her having bought the same jointly.

7. However, on 24th March 2006, the revocation application dated 25th April 2007 was compromised by consent, and the same withdrawn. Directions were then made for a fresh grant of letters of administration intestate to issue jointly to, Hannah Wanjiku Muturi, Joyce Wanjiru Muturi and Edith Ngendo Muturi as joint administratrixes in their capacity as widows. In the said grant, Hannah Wanjiku Muturi appeared as the 1st administratrix, Edith Ngendo Muturi 2nd administratrix and Joyce Wanjiru Muturi (3rd administratrix).

8. On 25th November 2015, Edith Ngendo solely moved the court vide Summons for Confirmation of grant dated 23rd November 2015. In her proposed mode of distribution, she again named her children as the sole beneficiaries but distributed the whole share to her absolutely.

9. In response to the application, Hannah Wanjiku and Joyce Wanjiru filed a joint affidavit sworn on 7th October 2016 claiming that on 5th September 2016 the three widows had entered into a consent agreement on how to share the estate. They attached the consent agreement marked "A" in form of a supporting affidavit sworn on 5th September 2016 before Philip Ongondi Commissioner of Oaths.

10. They therefore relied on the mode of distribution as highlighted in the affidavit and therefore urged the court to confirm the grant as per that agreement which provided on the agreed mode of distribution. In the said agreement, beneficiaries were identified and listed as follows:-

1) Hannah Wanjiku (1st widow)

2) Margaret Wairimu (daughter)

3) Mary Wamaitha (daughter)

4) Jane Njeri (daughter)

5) Stellah Njoki (daughter)

- 6) Winfred Wanjiku(daughter)
- 7) Lucy Wambui (daughter)
- 8) Peter Ngugi (son)
- 9) Edith Ngendo (2nd widow)
- 10) Irene Wairimu (daughter)
- 11) Evans Kamau Muturi (son)
- 12) Ann Mwihaki Muturi(daughter)
- 13) Susan Njeri Muturi (daughter)
- 14) Joyce Wanjiru (3rd widow)
- 15) Salome Wairimu (daughter)
- 16) Rose Njeri (daughter)
- 17) Esther Njeri (daughter)
- 18) Nancy Waithera (daughter)
- 19) Moses Njoroge (son)
- 20) Peter Ndungi (brother)
- 21) Njuguna Njoroge (brother)
- 22) Hannah Wanjiku (sister in law)

11. The properties listed as comprising the estate were identified and distributed as hereunder:-

a) L.R. 6782/16 – to be shared amongst:-

i) Hannah Wanjiku (3.65Ha. absolutely)

ii) Edith Ngendo (4.01Ha. absolutely)

iii) Joyce Wanjiru Muturi (4.05Ha. absolutely)

iv) Peter Njoroge Muturi – 0.25Ha. absolutely

v) Peter Ndungi Njoroge – 0.25Ha.

vi) Njuguna Njoroge – 0.45Ha.

vii) Hannah Wanjiku – 0.45Ha.

viii) Edith Ngendo Muturi – 0.45Ha.

ix) Hannah Wanjiku Karanja – 0.45Ha. absolutely

b) Kshs. 550,000/- and interest held by Kiania Njau & Co. Advocates equally amongst the 3 widows;

c) Shares held in Limuru Dairy Farmers Processing Plant to be shared equally amongst the three widows

d) L.R Ndeiya/Nduma/T.516 to be sold and proceeds shared equally amongst the three widows

e) L.R. Ndeiya/Nduma/T.517 to be sold and proceeds shared equally amongst the widows

f) 15 acres of L.R. Longonot held by Ms. Eleri Co. Ltd to be shared equally amongst the three widows.

12. On the other hand, Evan Kamau Muturi a son to Edith Ngendo and the deceased filed his affidavit of protest dated 11th May 2016 contending that he was not consulted when the petition was filed nor was his consent sought regarding the mode of distribution. He invited the court to disregard the consent referred to by Hannah Wanjiku and Joyce Wanjiru as he was not a signatory. He opposed his mother's claim arguing that she(mother) had abandoned his father sometime 1989 and only returned after he had died.

13. He further told the court that L.R. 6782/2 Kiambu does not exist as it had been subdivided into L.R. 6782/16/3 Limuru East measuring approximately 40 acres. That he was entitled to L.R. 6782/16/3 and the mother L.R 6782/16/4.

14. He claimed that his mother (original petitioner) had failed to disclose that there were other properties not disclosed to the court. Vide an application dated 30th May 2016, Evan filed Chamber Summons urging the court to include several properties that were left out as part of the estate;

- a) L.R. 6782/16/3 Limuru East 20 acres
- b) L.R. 6782/16/4 Limuru East measuring 20 acres
- c) Maramba Tea Shares (Limuru) 5000 shares
- d) Unilever Tea shares Limuru 50(thousand)
- e) Limuru Dairy Shares and Shamba 600 acres
- f) Kshs. 450,000/- held by Kiania Njau and Company Advocates
- g) Two Plots in Ndeiya known as Plot No. T15 and T. 16
- h) A go-down in Industrial area
- i) 3 maisonettes houses on Muchai Drive in Nairobi occupied by Kenya Commercial Bank
- j) Growers Account No. 1720 Eden Tea Limuru
- k) A property in Nanyuki at Kinangop which particulars shall be availed to this honourable court at a later stage.
- l) Consolidated Bank of Kenya account
- m) Joint account at Barclays Bank of Kenya

15. However, by a consent order entered before court on 30th May 2018, parties agreed to adopt the list of assets as reflected in the affidavit of the 1st and 3rd administratrixes sworn on 12th March 2018 pursuant to a court direction made on 22nd November 2017. According to Para 4 of the said affidavit, the agreed list of assets is indicated as below:

- i) Ndeiya/Nduma/T.516
- ii) Ndeiya/Nduma/T.517
- iii) 15 acres of all that parcel in Longonot as per share certificate
No. 55 issued by Eleri Company Limited
- v) L.R. 6782/16
- vi) L.R. 6782/8/3
- vii) Shares held in Limuru Dairy Farmers
- viii) Kshs. 550,000/- in Kiania Njau & Co. Advocates

16. According to the 1st and 3rd administratrixes' averments in the said affidavit, L.R. No. 6782/16 and 6782/8/3 were products of L.R. 6782/2. That land parcel No. 6782/16 measuring 13.76 Hectares roughly (34 acres) was to be shared out as follows;

- a) 0.25 Ha. to Peter Njoroge

b) 0.25 Ha. Peter Ndungi Njoroge

c) 0.45 Ha. to Njuguna Njoroge Muturi

d) 0.25 Ha. Hannah Wanjiku Karanja

e) That the balance to be shared out as per the consent or in the alternative each widow to get 10.34 acres to hold in trust of their children.

17. Further, that L.R. 6782/16 now comprises of 3 unequal parcels of land being L.R. No. 6782/23, 24 and 25 which should be amalgamated and then shared amongst the deceased's beneficiaries and relatives.

18. Having agreed on the list of assets, the application dated 30th May 2016 by Evan Kamau seeking to include additional assets in the schedule of assets was spent. In any event he did not adduce any evidence to prove the existence of some of the assets he had listed.

19. During the hearing, Mr. Evan Kamau (PW1) merely adopted the averments contained in his protest. He basically claimed the entire share of L.R. 6782/16 as having been gifted to him by his father.

20. Edith Ngendo (DW1) told the court that she got married to the deceased in 1967. That by then, the deceased's first wife (Hannah) had left their matrimonial home. She adopted as evidence the content of her affidavit in support of her application for confirmation dated 23rd February 2017, a further affidavit sworn on 8th April 2017 and another one dated 22nd February 2018.

21. She claimed that L.R. 6782/2 was bought jointly with her husband at Kshs. 320,000/-. That her contribution was Kshs. 33,000/- being a deposit to Agricultural Finance Corporation. That the balance of the loan repayment was raised from the proceeds realized from the sale of their land at Lari. That she later realized that her husband had subdivided their land (L.R. 6782/2) into three portions to clear some other additional loans he had taken without her knowledge.

22. That she lodged a complaint to the area D.C who directed her husband to give her her share amounting to 58^{1/2} acres. She further claimed that she sued her husband at Kiambu Law Courts where an order of injunction was issued against the sale of the said property. She dismissed her son's (Evan) claim that she had separated with the deceased. She urged the court to sub-divide L.R. 6782/2 and give her 1/2 share and the rest be shared out amongst other beneficiaries.

23. She added that Gatundu Mutumbi who bought 30 acres should be given 30 acres so is to Wanjohi another buyer 10 acres and Ndungu a buyer also 12 acres. On cross examination by Ms Ngethe, she stated that L.R. 6782/2 was subdivided fraudulently by her son (Evan the protestor) but she filed a Civil Suit No. 984 of 2004 Kiambu Law Courts where the transfer was cancelled. On further cross examination, she admitted that the co-administratrixes are her co-wives (widows) but who did not contribute anything towards acquisition of the property. She denied signing the consent for distribution of the estate. She confirmed that Hannah who had separated with the husband in 1967 returned in 1997.

24. When cross examined by her son Evan (Protestor) on the consent affidavit on the mode of distribution, she admitted signing because she did not want to fight. She also claimed that the three widows differed after signing the consent owing to some disagreements.

25. DW2 Joyce Wanjiru Muturi 3rd administratrix adopted her affidavit sworn with authority from the 2nd administratrix in opposition to the confirmation application. She also admitted that the three administratrixes were all widows to the deceased. She stated that L.R. 6782 was subdivided and a resultant portion L.R. 6782/23 given to her son Njoroge Anthony Muturi a minor but to be held in trust for him by the deceased father and the mother (DW3). She claimed that original L.R. 6782/16 is occupied by the three wives and their children.

26. She further claimed that sometime the year 2016, they sat as a family and agreed to share the property with Edith taking 11 acres, herself 10 acres and Hannah 11 acres an arrangement she supported. She acknowledged that Josphat the deceased had sold part of the land leaving a balance of 34 acres (L.R. 6782/16). On cross-examination by Evan (Protestor), DW2 stated that L.R. No. 6782/16 is measuring 14 acres while 6782/23 has 20 acres which land was given to her and her son Anthony. She told the court that the two parcels can be amalgamated to make a total of 34 acres which will then be shared out as per the consent. She further told the court she had abandoned HCC No. 984/04 in which she had obtained an injunction against subdivision or interference or any dealings in respect of L.R. No. 6782/23. On re-examination, she asserted that she had given up her claim on L.R. No. 6782/23 so that the other family members can get a share.

Submissions

Protestor's Submissions

27. Evan Kamau who filed his submissions in person on 9th July 2019 reiterated his averments in the affidavit of protest. He claimed that, L.R. 6782/16 was gifted to him and that the deceased signed a transfer in his favour before G. M. Muhoro Advocate and further executed a deed plan dated 21st December 1990. He claimed that the house of Hannah had been gifted through Moses Karuku Muturi with L.R. 6782/11 Tigonu measuring 4.089 Ha.

28. That Edith Ngendo was awarded Kshs. 100,000/- instead of being given land and Joyce Wanjiru was given L.R. 6782/23. He further stated that his consent signature in support of the application for confirmation was forged hence an act of fraud which he has reported to the DCI. He claimed that the subdivision of L.R. 6782/16 was done fraudulently and that an order to cancel the subdivision should issue to the Land Registrar. He also prayed for orders evicting the occupants of the said land whom he referred to as trespassers.

1st Administratrix's Submissions

29. Through the firm of Musyimi and Company Advocates, Edith filed her submissions on 14th October 2019 reiterating her affidavit in support and oral evidence in court. Mr. Musyimi submitted that the averments contained in the affidavit of Edith sworn on 18th April 2017 was not rebutted hence confirming that the property L.R 6782/2 was bought through her joint effort and that of her husband. To support this position counsel quoted the holding in the case of **Mohammed & Another –vs- Haidara [1972] E.A. 166** at page 167 paragraph F - H Spry V.P. quoted with approval in the case of **Republic vs Cabinet Secretary Ministry of Interior & Co-ordination of National Government and 6 Others. Exparte Africa Centre for Open Governance and 7 Others [2017]eKLR**.

30. The court was further referred to the decision in **Kenya Akiba Micro Financing Ltd vs. Ezekiel Chebii & 14 Others [2012]eKLR** in which the court held that-

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”

Counsel submitted that the evidence of Edith (DW1) was not challenged hence the claim for the entire portion as the absolute owner. He contended that in 1971 when the property was bought, Joyce had not been married and that Hannah had long been separated with the deceased (1967). Learned counsel submitted that the land in question was held by the deceased in trust for her benefit as a joint purchaser. To support this claim, counsel referred to Section 14 of the Matrimonial Property Act which provides that where Matrimonial Property is acquired during marriage in the name of one spouse, there is a rebuttable presumption that the property is held in trust for the other spouse.

31. Regarding the signed consent, he submitted that Edith did withdraw from the agreement as the 2nd and 3rd administratrixes did not conduct themselves in good faith and therefore not estopped from going back on her consent. It was contended that rules of estoppel do not apply in the circumstances. To support this proposition, counsel referred to **Kenindia Assurance Company Limited –vs- New Nyanza Wholesalers Limited [2017]eKLR** where it was stated that-

“In order for a common law estoppel by representation to arise, the person to whom the representation is made must have changed his position in some way to his detriment. In doing so, he must have relied on the representation, although that need not have been the sole cause of his change of position.”

32. Touching on the transfer of L.R. 6782/23 to the 3rd administratrix to hold in trust for her son, it was contended that the transfer was tainted with fraud hence the reason why it is being surrendered back for redistribution. Counsel submitted that in the alternative, the 3rd administratrix who was not legally married to the deceased has already benefitted through her son.

Submissions by the 2nd and 3rd administratrixes

33. Through Kinyua and Co. Advocates, they filed their submissions on 15th July 2019. Counsel reiterated the content in their affidavits in response to the application for confirmation. Mr. Kinyua submitted that both administratrixes have already recognized each other as co-widows hence the question of marriage is spent. Counsel contended that Edith was estopped from reneging from the joint consent in which the three agreed on the mode of distribution among the three houses.

34. Counsel submitted that the consent contained in the affidavit sworn on 5th September 2016 has a contractual effect. To buttress this proposition, counsel referred to the decision in the case of **Mohammed Shabir Bhola –vs- Rashid Mughal [2014]eKLR** where the court held that-

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property prior to the taking out of letters of administration. What is prohibited by Section 55 is distribution and division of estate property before the grant of letters of administration had been confirmed in terms of Section 71 of the Act.”

35. Counsel submitted that there was no proof that Edith did make any contribution towards the purchase of the property.

Analysis and determination

36. I have considered the protest application herein against the application for confirmation. There is no dispute that the deceased died intestate. There is no dispute either that the deceased left three widows who are now joint administratrixes. From various pleadings filed by each of them, they have been referring themselves as co-wives. The only issues that arise are:-

i) Which property is available for distribution

ii) Was Evan given any share as a gift by the deceased before his death

iii) Who is entitled to what share.

37. Although at the inception of the petition Edith Ng'endo listed L.R. 6782/2 as the sole asset for distribution, parties nevertheless agreed by consent on 30th May 2019 and adopted the list of assets reflected in the affidavit of Hannah Wanjiku Muturi and Joyce Wanjiru Muturi

sworn on 12th March 218 as follows:-

- a) Ndeiya/Nduma/T.516
- b) Ndeiya/Nduma/T.517
- c) 15 acres of all parcel in Longonot as per share certificate No. 55 issued by M/s Ireri Company Ltd
- d) L.R. 6782/16 divided into L.R. 6782/23, 24 and 25
- e) L.R. 6782/8/3
- f) Shares in Limuru Dairy Farmers Plant
- g) Cash Kshs. 550,000/- held by the law firm of Kiania Njau Advocate.

38. Having agreed on the above assets as comprising the estate, I will take them as the identified and free assets for distribution. However, I do not have supporting documents to prove existence of some assets listed among them L.R. No. 6782/8/3 whose distribution I will not deal with as it does not appear to exist.

Who is entitled to what share?

39. The law governing distribution of property in an intestate estate where the deceased has left more than one spouse succeeding him (polygamous marriage) is Section 40 of the Law of Succession Act which provides:-

“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 net 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 as an additional unit to the number of children.”

40. In other words, the children are put together with their mothers as single units and then divided according to each house. See **Kuria and Another –vs- Kuria (2004)eKLR.**

41. However, in scenarios such as the one obtaining in this case, courts have been faced with the challenge of whether Section 40 of the Succession Act should be interpreted alongside the distribution of assets in line with Matrimonial Property Act.

42. The key challenge is whether a wife who got married before the co-wife or wives should get her share first from the property acquired with her husband before the latter wife or wives came into the marriage. In the case of **In the matter of the estate of Mwangi Giture (deceased) Nairobi High Court Succession Cause No. 1033 of 1996** Justice Koome observed that the requirement that the widow be added to the household as an additional unit to the children was unfair to the first wife since she gets treated equally with the latter wives who often come into the picture after the man had acquired all the property, which makes up the estate, often with the support of the first wife.

43. Koome J’s observation against Section 40 of the Law of Succession Act came to pass as a reality when the Court of Appeal in the case of **Esther Wanjiru Githatu –vs- Mary Githatu (2019)eKLR** held that 50% of the property acquired by the first wife with the deceased was not available for distribution to the second wife as the same was held by the deceased for the first wife’s benefit on account of a resulting trust. Only the share of the deceased was available for distribution for the other beneficiaries. In its conclusion remarks at (paragraph 31) the court stated that:-

“We come to the conclusion that in addition to properties acquired by the deceased from 1985 to his death, it is only half of the properties acquired by the deceased between 1968 and 1984 that is available for distribution. Thus, we are in agreement with the learned judge that only half of the immovable properties acquired by the deceased prior to 1984 and all the properties acquired by the deceased thereafter shall constitute the free estate of the deceased to be divided in accordance with the Law of Succession Act.”

44. There is no dispute that L.R. 6782/2 was the mother title from which 6782/16 arose after subdivision and thereafter further subdivided into 6782/23, 24 and 25. The original L.R. 6782/2 was admittedly acquired in 1971 three years after Hannah had separated with the deceased and before Joyce got married to the deceased in 1990. Edith stated that the property was acquired through a loan of Kshs. 320,000/- out of which she contributed a deposit of Kshs. 33,000/- and thereafter through her earnings sourced from sale of milk produce and agricultural products assisted in clearing the loan. Although no evidence of such contribution was tabled, one would infer that she must have made indirect contribution through rendering or discharging domestic responsibilities thereby relieving the deceased husband from other family obligations thus making it easier for him to clear the loan (see **Esther Wanjiru Githatu –vs- Mary Wanjiru Githitu** (supra)).

45. It is trite that, property acquired before the succeeding wife or wives comes on board shall first be divided into two equal portions to sever the first wife’s contribution and share and therefore spare it from the application of Section 40 of the Law of Succession Act and the balance be shared according to that Section.

46. In the instant case, land parcel No. 6782/2 which Edith claims in its entirety does not exist and therefore not available for distribution in that form. The land was subdivided by the deceased before he died having sold some portions. Among the resultant portions is L.R. 6782/16 which the protestor claims to have been gifted by the father hence the claim of being the sole beneficiary and therefore nobody should lay

claim over it.

47. Was Evan Kamau ever gifted L.R. 6782/16? It is trite that where a beneficiary has been gifted, his share shall be taken into account when distributing the estate. Section 42 gives guidelines regarding gifts *inter vivos* as follows:-

“Where-

(a) an intestate has, during his lifetime or by will, paid, given, or settled any property for 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 finally accruing to the child, grandchild or house.

48. When does a gift accrue for it to be taken into account? In the case of the estate of the late **Gedion Manthi Nzioka (Deceased) (2015)eKLR** Nyamweya, J had this to say-

“In law, gifts are two types. There are the gifts made between living persons (gifts *inter vivos*), and gifts made in contemplation of death (gifts *mortis causa*).

... For gifts *inter vivos* , the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or, by presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts *inter vivos* must be complete for the same to be valid ...”

49. In the instant case, the intention to transfer the gift was by way of acquisition of a consent for transfer and signing of the transfer by the deceased. However, the transaction was not complete as the property was later subdivided by the deceased giving rise to three more parcels one of which was transferred into himself and Joyce as trustees for the benefit of Anthony Njoroge a son to Joyce.

50. In the circumstances of this case, the claim by Evan that the entire L.R 6782/16 was gifted to him does not apply as the transfer of the gift was not complete and the donor had rescinded the intended gift by subdividing it and shared some portions. In any event, to hold that the entire land is his implies that all family members who are in occupation and who have legitimate expectation that they are entitled to inherit the property will be kicked out. Where will they go with all the developments already done i.e houses built and tea bushes planted? For instance, Joyce has been staying in that property since she got married and therefore cannot just be told to move out of her matrimonial home to which she holds a sentimental value and by extension an identifiable share being a gift from the husband or property held by her husband on account of a resulting trust.

51. Having held as such, the property in question then remains free for distribution in accordance with Section 40 of the Law of Succession Act subject to the claim by Edith that the original land was acquired by her jointly with the deceased before Joyce was married and the allegation that the three houses had consented on the mode of distribution.

52. The land that was acquired jointly has since undergone tremendous transformation or change. Some portions are already in the hands of the buyers who are not even parties in this case which is not disputed. Can Edith have her 50% share first before the rest can be shared out in accordance with Section 40?

53. From the pleadings and the testimony of both parties, it emerged that after the court issued joint letters of administration to the three wives by consent, they held a meeting in trying to resolve the dispute amicably (outside court settlement). Consequently, they entered into an agreement by way of an affidavit sworn on 5th September 2016 in which they agreed on how to share the estate amongst the beneficiaries after agreeing to cancel the subdivision of L.R. 6782/16 and thereafter distribute it afresh. Apparently Joyce agreed to have L.R. 6782/23 as well cancelled so that it will be shared out afresh taking into account the interest of the purchasers of L.R. 6782/25 and the deceased's relatives.

54. The 2nd and 3rd administratrixes (Hannah and Joyce) have no objection to this arrangement which will then mean that the estate will first be shared between houses who will in turn share their entitlement amongst their respective children in equal share.

55. However, despite admitting that she voluntarily signed the consent, Edith turned round and disowned it arguing that her co-wives were un-cooperative and that the agreement was not signed in good faith. She did not however explain how un-cooperative they were and how they acted in bad faith. In the case of **Brooke Bond Liebig Ltd v Mallya [1975]EA 266** the court held that:-

“A consent judgment may only be set aside for fraud, collusion or for any reason which would make the court to set aside an agreement.”

56. Similar position was held in **Samwel Mbugua Ikumbu v Barclays Bank of Kenya Ltd (2015)eKLR**. Essentially, the elements applicable in vitiating a normal contract apply to vitiation of an ordinary consent. Technically, consent is a contract which is binding on both parties unless proven that it was obtained by fraud or collusion or by any reason which would enable the court to set aside an agreement. Further, a valid contract must be capable of enforcement or performance, lawful, entered freely by consent of competent people or who have

capacity to enter to such an agreement, the intention that the contract would be attached to certain legal consequences and, of course, offer and acceptance.

57. As stated above, Edith has not attempted to convince the court why she is running away from the contract which she admits she voluntarily signed on behalf of her house. She admitted as such on cross examination. To generally state that she is withdrawing from the agreement because her co-wives were uncooperative is not sufficient enough to set aside the contract. It is incumbent upon her to prove that the consent was not lawfully or legally entered and therefore not enforceable. I do not find any ground to justify setting aside the consent.

58. The contract was signed by the three widows allegedly representing their respective houses who are already in occupation of the property. The mode adopted in the consent agreement is most equitable leading to almost equal share to the three houses which I find to be fair. The widows will hold their respective shares for their benefit and that of their children in their respective houses in equal share. The rest of the properties have also been shared amongst the three houses. Nothing would be fair than the mode of distribution adopted in their consent.

59. Bearing in mind that both parties as family members have already settled and done their respective developments among them planting tea bushes and building houses, it would be unjust to evict them and disregard their developments already done. For instance, Joyce has been in occupation of her house in L.R. No. 6782/16 since she got married in 1990. Where does she go if evicted? Curiously, it is only L.R. 6782/2 which is contested. I will hold that the proposed mode of distribution for the other properties is acceptable as per the consent agreement.

60. The protest by Evan does not hold water and the same is hereby dismissed. The fact that he denies signing the consent for distribution does not make any difference in terms of distribution of the estate which I find to be fair to all parties.

61. Having held as above, I am inclined to make the following orders:-

- a) That the protest by Evan Kamau Muturi filed on 11th May 2016 is hereby dismissed.
- b) That the application for Confirmation of Grant filed by Edith dated 23rd November 2015 is hereby disallowed.
- c) That the grant of letters of administration issued on 26th March 2009 which is by mistake indicated as issued on 26th March 2006 be corrected to read issued on 26th March 2009 and the same be and is hereby confirmed.
- d) That the Land Registrar Kiambu to cancel the sub-division of L.R. No. 6782/16 and the same to revert to its original position to enable fair distribution as per the consent agreement herein entered on 5th September 2016 as follows:-

Name of Heir	Description of Asset	Share of Heirs
Hannah Wanjiku Muturi	All that parcel of Land known as L.R. No. 6782/16, Kiambu	3.65Ha. Absolutely
Edith Ngendo Muturi		4.01Ha. Absolutely
Joyce Wanjiru Muturi		4.05Ha. Absolutely
Peter Njoroge Muturi		0.25Ha. Absolutely
Peter Ndungi Njoroge		0.25Ha. Absolutely
Njuguna Njoroge Muturi		0.45Ha. Absolutely
Hannah Wanjiku Muturi		0.40Ha. Absolutely
Edith Ng'endo Muturi		0.45Ha. Absolutely
Hannah Wanjiku Karanja		0.25Ha. Absolutely
Hannah Wanjiku Muturi		Kshs. 550,000/- and interest thereon held by Kiania Njau & Co. Advocates.
Edith Ng'endo Muturi	1/3 Share Absolutely	
	1/3 Share Absolutely	

Joyce Wanjiru Muturi		
Hannah Wanjiku Muturi	Shares held in Limuru Dairy Farmers Processing Plant	1/3 Share Absolutely
Edith Ng'endo Muturi		1/3 Share Absolutely
Joyce Wanjiru Muturi		1/3 Share Absolutely
Hannah Wanjiku Muturi	- All that Parcel of Land known as Ndeiya/Nduma/T.516	To be sold and proceeds shared equally
Edith Ng'endo Muturi	- All that Parcel of land known as Ndeiya/Nduma/T.517	
Joyce Wanjiru Muturi	- 15 acres of all that parcel of land at Longonot held by Mrs. Ireri Co. Ltd	

e) That the property held in the name of each widow shall be for the benefit of each one of them and that of the children in their respective houses in equal share.

f) This being a family dispute each party shall bear own cost.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF JANUARY, 2020.

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J. N. ONYIEGO

JUDGE