



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**SUCC CAUSE NO. 5 OF 2019**

**(FORMERLY MACHAKOS HC SUCCESSION CAUSE NO. 78 OF 1992)**

**IN THE MATTER OF THE ESTATE OF MASILIA MWAVU (DECEASED)**

**ANNAH MBULA MASILIA.....1<sup>ST</sup> ADMINISTRATOR/PROTESTOR**

**THOMAS MUTHIANI MASILIA.....2<sup>ND</sup> ADMINISTRATOR/PROTESTOR**

**-VERSUS-**

**PETRONILLA WANZA J.M MBINDYO.....3<sup>RD</sup> ADMINISTRATOR/APPLICANT/RESPONDENT**

**JACINTA MUTIO MASILIA.....4<sup>TH</sup> ADMINISTRATOR/APPLICANT/ RESPONDENT**

**JUDGMENT**

1. Thirty-nine (39) years after the demise of the deceased, litigation on his estate is yet to come to an end. The 1<sup>st</sup> Administrator is the 1<sup>st</sup> wife of the deceased while the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Administrators are his children. This court has now been called upon to determine two (2) protests by the 1<sup>st</sup> and 2<sup>nd</sup> Administrators dated 29/04/2019 against the Respondents' summons for confirmation of grant dated 16/04/2019. Before delving into the crux of the protests, a brief history of the litigation will suffice.

2. The deceased died on 24/09/1980. The first grant of letters of administration in respect to his estate was issued to Thomas Muthiani Masilia (2<sup>nd</sup> Administrator) on 05/01/1993 and confirmed on 30/09/1994. The grant was revoked on 23/11/2015 at the instance of his sisters after the High court in Machakos (*Thuranira Jaden J*) ruled that their existence had been concealed as they had neither been listed as beneficiaries nor their consent obtained. Their argument was that prior to his death, the deceased had divided his property amongst his two wives and four sons and did not allocate any land to his daughters as per the Kamba customary laws.

3. The parties went back to the drawing board and on 08/03/2016, the High court in Machakos (*Muriithi J*) adopted as an order of the court a consent dated and filed on 14/01/2016 which was to the effect that letters of administration be issued to;

- a) Thomas Muthiani Masilia
- b) Simon Kyalo Masilia
- c) Petronila Wanza Mutuku
- d) Jacinta Mutio Masilia

4. The grant was issued on 08/03/2016 and confirmed by consent on 21/04/2016. Soon thereafter, one of the beneficiaries by the name Henry Muli Masilia passed on and again all beneficiaries consented *inter alia*,

- a) Appointment of Stellamaris Nduku Muli and Beth Mwikali Muli in place of Henry Muli Masilia.
- b) Issuance of a new confirmed grant as per the schedule annexed therat.

5. The grant was confirmed on 21/09/2016 and revoked on 17/07/2018 at the instance of Annah Mbula the 1<sup>st</sup> Administrator herein. In revoking the grant, the High court in Machakos (*Nyamweya J.*) noted that the Applicant (*Annah Mbula*) was not present in court when the consent appointing the administrators was recorded and being the mother of the Respondents, she ranked higher in priority of persons

entitled to be issued with the grant.

6. The Judge also noted that when the summons for confirmation of grant and another one for rectification came up for hearing, all the beneficiaries other than Annah Mbula were present and it was recorded that she was sickly on both occasions. The other beneficiaries availed her identity card as an indication of her consent to the proceedings.

7. Her case had been that she was misled into signing the consent and availing her identity card but did not know the nature of the proceedings. The learned Judge agreed with her and ruled that her non-participation in the proceedings supported a finding of concealment of material facts and or untrue allegations by the then Respondents.

8. In addition to revoking the grant, the learned Judge ordered as follows;

*“3. The status quo that shall be maintained with respect to the properties of the estate of Masilia Mwavu pending the appointment of new Administrators shall be that the beneficiaries of the estate shall continue to be in possession and occupation of the properties and assets they currently occupy and there shall be no further sale, transfers, dispositions, developments on, wastage of, or any other subsequent dealings of any kind with respect to the said properties.*

*4. The beneficiaries shall within 90 days agree on the new Administrators of the estate of Masilia Mwavu, failing which the court shall be at liberty to appoint the said Administrators in accordance with the applicable provisions of the law.”*

9. The matter was thereafter transferred to this court and on 04/04/2019, the parties dispensed with the summons dated 19/03/2019, for appointment of Administrators, by recording the following consent;

*a) That Annah Mbula Masilia, Thomas Muthiani Masilia, Petronilla Wanza J.M Mbindyo and Jacinta Mutio Masilia be and are hereby appointed Administrators of the estate of Masilia Mwavu.*

*b) The matters do proceed for distribution of the deceased's properties forthwith.*

*c) Any party and/or beneficiary dissatisfied with the mode of distribution be at liberty to file a protest within 14 days of the filing of the distribution.*

*d) As the matter is old and the beneficiaries are old and sickly, the matter be expeditiously disposed off for the benefit of all beneficiaries and those falling under them.*

10. On 25/04/2019, this court was informed that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants had filed summons for confirmation of grant which had been executed by all beneficiaries apart from; Annah Mbula, Thomas Masilia and Joseph Mutuku Masilia. That is the genesis of the protest applications filed by the 1<sup>st</sup> and 2<sup>nd</sup> Administrators, now under consideration.

11. Directions were given that the said applications be canvassed by way of *viva voce* evidence. The Protestors called 5 while the Respondents called 3 witnesses.

#### **The Protestors' case**

12. **PW1 Anastacia Mbula Masilia**, is the deceased's 1<sup>st</sup> wife. She testified that before the demise of the deceased, he had distributed his property between her and the 2<sup>nd</sup> wife, Betty Ndunge, who is now deceased. That the only son of the late Betty (*Henry Muli Masilia*) is also deceased and both of them were buried on Betty's portion. She testified that the 2<sup>nd</sup> family's proposal of how the estate should be distributed is contrary to what *mzee* had said and she could not agree to what the children were saying.

13. In her witness statement which she adopted, she stated that when she moved to Makueni with her husband, they were given land to settle on by the then District commissioner which land was then merged with an adjacent one purchased by the deceased and became known as Makueni/Kako/23. That this land was divided into two portions where the 1<sup>st</sup> house represented by Simion Kyalo Masilia was given 26 acres and the 2<sup>nd</sup> house represented by the late Henry Muli Masilia was given 35 acres. She said the deceased bought another land parcel Makueni/Kako/459 which he gave to the 2<sup>nd</sup> house. That her house was given Makueni/Unoa/224, 470 and 471.

14. It was her further statement that from the documents filed in court, only the properties given to her house had been subdivided and shared among the beneficiaries while those given to her co-wife had exclusively been given to her co-wife's children. That the only exemption was a portion measuring 26 acres on Makueni/Kako/23 which had been given to her son, Simon Kyalo Masilia. It was her contention that the Respondents' mode of distribution does not affirm the wishes of the deceased.

15. In cross examination, she said she lives with her son Simon who assists her but is not on her side in terms of distribution of the estate. She said she had no information in respect to any Will but has been benefiting from the estate e.g cows, house, land and also getting KShs.30,000/= per month from the shop.

16. She said she is not claiming anything from the 2<sup>nd</sup> family and those supporting the distribution of the estate are all comen save for her son Thomas Muthiani who stands for the truth.

17. **PW2 Thomas Muthiani Masilia** is a son of the deceased and from the 1<sup>st</sup> house. He testified that his late father had shared the land to the wives and sons only and not the daughters. In his witness statement which he adopted, he stated that the deceased was guided by Kamba customary law to will his properties to the two families and gave orders to their mothers to accommodate any daughter that would be unmarried or divorced. That the deceased had started transferring the land to the sons and Joseph Mutuku, the 1<sup>st</sup> born, got his land but the deceased died before transferring to the other 3 sons who already knew their portions.

18. Further, he stated that in 1984, he married and took his family to Makueni/ Unoa/224 and also took possession of Makueni/ Unoa/470 and 471 which were all sharing a common border. It's his evidence that when his step mother died in 1986, she was buried on her portion of land which the deceased had given to the 2<sup>nd</sup> family. He finds it very ridiculous that 39 years since the deceased's death and 35 years since he settled on his portion, the Applicants have now sub-divided it amongst themselves. That if the Applicants are sincere, they would have subdivided even the portions occupied by his other 3 brothers.

19. He has stated that in 1992 his mother Annah called all the sons and informed them of her desire that each of them should get land transfers for the portions they occupied. He was advised by the family members to file for succession and the area chief Mr. Ngwili advised him to get consent from his mother and brothers. He argues that the rest of his brothers are enjoying quiet possession of the portions with their families but the applicants are interested in his portions and their intention is to disinherit him. Finally, that due to what is being done to him he has nowhere to settle his eight (8) children.

20. In cross examination, he reiterated that all the sons had been given land by the deceased before he died. He confirmed that the deceased did not leave a Will, and he was aware of the grant revoked by Nyamweya J. at the Machakos High court. He claimed to have been cheated by his lawyer sister. He agreed that he had only indicated his shares but had not proposed the mode of distribution, though his sisters would get something from their mother's share.

21. In re-examination, he said that his lawyer sister used to show up with uniformed police officers and force them to do a number of things. In other words, she used to intimidate him.

22. **PW3 Josephat Maweo Lelu**, testified that he had no blood relationship with the deceased but knew him as a friend since they originated from Kang'undo. He said the deceased moved to Makueni before him and became the assistant chief. He too moved to Makueni and became the vice national chair of the Githanga clan. The deceased became sick in the 80's and in 1987, he (*deceased*) called him and his (*deceased's*) nephew Martin Nzioka and informed them that he wanted his shambas to be shared between his wives.

23. In his witness statement which he adopted, he stated that the deceased shared Makueni/Kako/23 between his two wives and the 2<sup>nd</sup> wife was given the larger portion as well as Makueni/Kako/459. That Makueni/Unoa/224, 470 and 471 were given to Thomas Muthiani Masilia.

24. From the cross examination and re-examination, he seemed not sure of the exact year the meeting was held. He however remembered that it was held at the 1<sup>st</sup> wife's house while Martin Nzuki plus the deceased's wives were present. He said he was aged between 45-50 years when the meeting was held.

25. **PW4 John Bosco Munyao**, said he was a retired senior chief of Wote Location and was the one who stepped in when the deceased retired as an assistant chief. In 1992, PW2 went to his office and requested for a letter to enable him institute succession for his father's estate. He gave him an agreement dated 08/06/1992 (*PEXB 1*) showing that his brothers had no objection. The witness identified (*PEXB 1*) as the agreement that he stamped. He did not hear of any problem until recently.

26. In his witness statement which he adopted, he stated that in 1976, the deceased informed him of his intention to share his properties between his two wives/houses. He sub-divided his parcels of land and gave to his sons. That the 1<sup>st</sup> family was given the land parcels at Unoa and the 2<sup>nd</sup> family was given the land parcels at Kako, two plots in Wote town and another plot at Kilala market.

27. Upon cross examination, he said that he was aged 80 years old and had been an Administrative police officer from 1962-1971, assistant chief from 1971-1981 having taken over from the deceased and chief from 1981-1997. He said the deceased was his good friend. It was his evidence that the deceased called him for a meeting which was held at the 1<sup>st</sup> wife's home. All the sons were present as well as the two wives, Josephat Maweo Lelu (*PW3*), Mutuku's son and the deceased. That he would not know whether the deceased wrote anything as they were just witnesses and not deliberators. He did not sign what the deceased wrote.

28. He denied writing a letter that enabled PW2 to file a succession cause. He was shown *PEXB 1* which he said was written by the deceased's sons. That back then, the only people required to sign were the sons and wife and not everyone. He also confirmed that he never had any other meeting with them.

29. **PW5 Joseph Mutuku Masilia** the eldest son of the deceased is aged 76 years. He said sometimes he forgets things because of sugar levels in his body. He testified that before the deceased died in 1980, he had distributed his land between his two wives. He identified *PEXB 1* as the document which was endorsed by the chief. In his witness statement which he adopted, he stated that the deceased transferred to him his inheritance while PW2 was given Makueni/Unoa/224, 470 and 471. It was his evidence that before the deceased's death, they all lived happily as a family and they all know the portions given to them by the deceased.

30. Further, he stated that in 1992, they had a family meeting on the need to give permission to PW2 to pursue succession. The following people were present; PW2, Simon Kyalo, their late step brother, (*Henry Muli alias Boniface Kivuva*), the deceased and himself. That the 2<sup>nd</sup> family was given a bigger portion and they as the 1<sup>st</sup> family did not complain. He is now amazed that the Applicants want to go against the deceased's wishes. He didn't know why they were in court as the land had already been distributed.

31. In cross examination, he said that PW3 and PW4 were known to him and that they had met many times as a family even before the

deceased died. He made it clear that he was claiming nothing from the estate as he was satisfied with his share which he was given by the deceased in 1964. That he was sorted out because he was the eldest and married. He didn't know why the deceased did not give to the rest their shares just like he had given him. He claimed that it was his mother who was to give land to the rest and not him or the deceased.

32. Further, he said there had been a full family meeting in 1992 and both houses were represented. Their sisters who are married were not required. In re-examination, he said that PEXB1 was a confirmation of the deceased's wish.

### **The Respondents' case**

33. **RW1** 70-year-old **Benedetta Muthemba Mulwa**, was shown the agreement dated 11/05/06 between the family of Alois Mulwa Makosi and Thomas Muthiani Masilia (*PEXB2*) and said that she signed it because there was a portion of her husband's (*Alois Makosi*) land which had overstretched to Masilia's land. She said that they did not sell any portion to PW2.

34. In cross examination, she said that the map in respect of Makosi's land showed a portion of Masilia's land and they had to return it. The portion was re-transferred and they knew their neighbour to be Masilia.

35. **RW2 Jacinta Mutio Masilia** adopted her witness statement dated 20/05/2019 and proceeded to testify that she had listed 13 properties of the deceased and had placed a value on each. The estimated value of the estate is Kshs.307,112,700/=. She said that when this succession cause started in 2012, they engaged a valuer. She adopted the valuation report marked '**B**'. She said that the proposed distribution was done after sitting as a family save for the protestors and Joseph Mutuku. That there was consensus settlement and nobody was left out.

36. Further, she testified that there was an order from Nyamweya J. to the effect that beneficiaries should not move from the plots they occupied. That they started sub-dividing the titles after the grant was confirmed. She explained that PW1 started receiving rent from one of the shops allocated to her and some of the properties have been fenced off by PW2 and some sold. She is aware of the contempt proceedings against PW2 before Machakos High court. She also said that the proposed mode of distribution is fair and just. Further, she said that all the issues being raised by the protestors were raised and dealt with by Jaden J. and the protest is like an appeal against her ruling.

37. Upon cross examination, she said that she already knew the properties as a daughter in the home and that the properties have titles in the name of the deceased. That after revocation of the 1<sup>st</sup> grant, PW2 transferred some properties in his name. It was her evidence that they got a valuer and all the beneficiaries participated, in the exercise. That the status quo she talked about arose from the 2<sup>nd</sup> annulled grant. She explained that before annulment of the 2<sup>nd</sup> grant, there was denial of access to their properties and that's how they used police to gain access. The contempt proceedings which are still on though unpursued were filed because PW2 had become very uncooperative.

38. She denied knowledge of any issues that the deceased talked about and insisted that he died intestate, despite having distributed property to Joseph Mutuku, their eldest brother. She denied there being any process of distribution of the estate by the deceased. Further, she stated that the relationship in the family was hostile and since the deceased's death, only 4 people had benefited from the estate and some of his grandchildren do not go to school.

39. In answering questions from the court, she said that the 1<sup>st</sup> grant was issued in 1992 and revoked on 23/11/2015 at the instance of the deceased's daughters. The 2<sup>nd</sup> grant was issued to Thomas, Simon, Petronilla and Jacinta on 08/03/2016 and revoked on 17/07/2018 at the instance of PW1. That before annulment of the 1<sup>st</sup> grant, their brothers took possession of the land, shops and started benefitting to the exclusion of the daughters. She confirmed that there was no development on the lands except their homesteads.

40. She told the court that PW1 has never benefitted from the estate and in their proposed distribution, she has a rental shop in Wote town and 2 parcels of land. That they took into account so many things as they considered the shares.

41. **RW3** was **Simon Kyallo Masilia**, a son of the deceased and the 1<sup>st</sup> Administrator. He adopted his witness statement dated 20/05/2019. He referred to the agreement dated 11/05/2006 between the family of Alois Mulwa Makosi and Thomas Muthiani Masilia which he signed (*PEXB2*). He said it was about a portion of land in the deceased's estate which was bought by Masilia. That it was an acknowledgement that the portion belonged to the deceased. He denied knowledge of any meeting by the deceased to distribute his properties as shown in the document PEXB1.

42. He also said that his mother lives on his compound and he takes care of her. He was aware of the proposed mode of distribution and said that there was consideration of where people are staying. That his mother is now a beneficiary as she has been allocated a plot with rental income of Kshs.30,000/= per month. Further, he said that the estate should be distributed equitably to suit everyone. That the hostilities had ceased but there were still disagreements.

43. In cross examination, he said he was a retired teacher and could read and write. When asked about the agreement (*PEXB2*), he explained that the land in question belonged to the estate of the deceased and not PW2. He further stated that he had signed *PEXB2* as No. 7. In respect to *PEXB 1*, he admitted having signed it as No. 4. He even said the contents in the document were true and it was agreeable to them at the time but they later realized they had done wrong. He denied changing his mind because the properties in Wote have become valuable. He agreed that there had been disagreements.

44. Further, he said that there is a plot in Wote town to be distributed to all 14 beneficiaries but PW2 had already transferred it to himself.

He also said that he had reported the attack on his house to the police but no action was taken. He denied that the deceased gave any instructions on how his estate was to be distributed. He said PW5 was given his share and he knows the origin better. On re-examination, he said that *PEXB 1* was written by PW2.

## The Protestors' submissions

45. Mr. Kioko for the Protestors (*1<sup>st</sup> and 2<sup>nd</sup> Administrators*) submitted that the applicable law to the deceased's estate is Kamba customary law. He cited section 2(1) of the Law of Succession Act Cap 160 Laws of Kenya, and the case of **Re Estate of Mbondo Kata (2018) eKLR - Makueni High Court**. It is his submission that each of the deceased's wives had built on the portion allocated to her before the death of the deceased. He referred to the evidence of Simon Masilia (PW5) in cross examination and the fact that the deceased was buried on PW1's (*Annah Masilia*) portion while the 2<sup>nd</sup> wife who died in 1986 was buried on her portion.

46. On the applicable formulae in the distribution of the estate he submits that under Kamba customary law it is distributed equally among the houses. He relied on the case of **Re Estate of Joel Munuve Wambua (deceased) 2018 eKLR Machakos High court** where Muriithi J. stated:

***“Having perused the RE statement of African Law: The Law of Succession, vol. 2 on Kamba at Page 23 by Eugene Cotran, (1969), I do confirm that in accordance with the Kamba customary law, in case of estate of a married man with two or more wives, sons, and daughters – “The general principle here is that the house of each wife gets an equal share of the property, irrespective of the number of children in each house.”***

Relying on section 64 of the Probate and Administration Rules, and section 3(2) of the Judicature Act, counsel contends that the courts may be guided by customary law and materials by renown authors on customary laws and practices.

47. Still on customary law application counsel states that the evidence of **PW2 (Josephat Maweu Lelu)** and **PW3 (John Bosco Munyao Ngwili)** both points to Kamba customary law. Further that PW3 a long serving senior chief confirmed that a meeting of sons and mother was sufficient to discuss and distribute the estate of a deceased person. This he said is evidenced by the document PEXB2.

48. He argues that from the evidence of the protestors and their witnesses, the estate had been distributed in the following manner.

### **Annah Mbula Masilia 1<sup>st</sup> wife (surviving spouse)**

- i. A portion of land parcel Makueni/Kako/23 measuring 26 acres.
- ii. Land parcel Makueni/Unoa/224.
- iii. Land parcel Makueni/Unoa/471.
- iv. Land parcel Makueni/Unoa/470.
- v. Plot no. 73 situated at Wote town.
- vi. Plot no. 2 Unoa market.
- vii. Plot no. 19A situated at Wote town.

### **Beth Ndunge Masilia a 2<sup>nd</sup> wife (deceased)**

- i. A portion land parcel Makueni/Kako/23 measuring 35 acres.
- ii. Land parcel Makueni/Kako/459.
- iii. Plot no. 4 situated at Wote town.
- iv. Plot no. 12 situated at Wote town.
- v. Plot no. 125 situated at Wote town.
- vi. Plot no. 129 situated at Kilala market.

49. He dismissed the proposed distribution by the 3<sup>rd</sup> and 4<sup>th</sup> Administrators as being unfair. He said it did not reflect the wishes of the deceased and failed to adhere to the Kamba customary law, applicable herein. He pointed out that the 3<sup>rd</sup> and 4<sup>th</sup> Administrators had not distributed the whole estate among all the beneficiaries but had only distributed the estate currently occupied by the 1<sup>st</sup> family. He contends that the property that was given to the 2<sup>nd</sup> family had not been distributed by them.

50. On whether Makueni/Unoa/3467 forms part of the deceased's estate he submits that the 2<sup>nd</sup> Administrator Thomas Masilia owns the said land. Relying on sections 64 and 116 of the Evidence Act and section 24 of the Land Registration Act, he argues that the 3<sup>rd</sup> and 4<sup>th</sup> Administrators did not produce any evidence in court to show that the land had been registered in the names of the deceased. That being the case, the land could not form part of the deceased's estate. He cited Rule 41(3) of the Probate and Administration Rules 1980 and **Estate of**

**Mary Gachuru Kabogo Nairobi High Court Succession Cause No. 2830 of 2001 (UR).**

51. Mr. Njagi for the Respondents in his submissions states that the proposed mode of distribution by the Respondents is a replica of the one that had been consented to by all the beneficiaries. He submits that the 1<sup>st</sup> and 2<sup>nd</sup> protestors contradicted each other in their evidence on the alleged distribution of the estate by the deceased. Further that none of their witnesses corroborated their evidence and moreover the said witnesses (PW3, PW4 and PW5) never came out clear to state which properties were given to the alleged households.

52. On whether the Kamba customary law is the one applicable in this case, he submits that it is not as it was not proved. He relies on the case of **Kimani –vs- Gikanga (1965) E.A 735 at page 739 where Duffus J.A** expressed himself as follows; on proof of customary law

*“To summarize the position; this is a case between Africans and Africans customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya, of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law as would prove the relevant facts of his case”*

53. He argues that the Protestors did not adduce any evidence or any materials to prove the said Kamba customary law, yet this is provided for under section 51 of the Evidence Act and Rule 64 of the Probate and Administration Rules. He further cited the case of **The Estate of Mugo Wandia Succession Cause No. 320 of 2007 where Justice Koome (as she then was)** addressed the issue. That the 2<sup>nd</sup> Protestor in his proposed mode of distribution purports to give each of his married sisters from his mother’s house three (3) plots while allocating himself and his mother properties. This counsel says is contrary to his evidence in court.

54. He therefore submits that the applicable law is the Law of Succession Act Cap 160 Laws of Kenya. He referred to the petition of letters of grant in **Machakos Succession Cause No. 78 of 1992** which was filed under the Law of Succession Act. He also refers to the ruling by Jaden J while revoking the grant in the said matter. She said the 2<sup>nd</sup> Protestor ought to have followed the procedural requirements since he had come to court. Since he had said the deceased died intestate he was bound by that.

55. On PEXB 1 he contends that the document was executed by the 1<sup>st</sup> Protestor and the deceased’s sons only. The said document had been used by the 2<sup>nd</sup> Protestor to obtain the initial grant which was revoked by Jaden J.

56. Counsel further submits that land parcel No. Makueni /Unoa/3467 forms part of the deceased’s estate. The reason being that the document relied on is not a sale agreement and no consideration is indicated. Further that it’s only the 2<sup>nd</sup> Protestor and RW3(*Simon Kyalo*) of the Masilia Mwavu’s family who executed it. He has referred to the evidence of RW1 – **Bendetta Mulwa Makosi** a signatory in the said agreement and a widow of the late Mulwa Makosi.

57. RW1’s evidence is that the land Makueni/Unoa/3467 was excised from land Makueni/Unoa/569 and given back to Masilia Mwavu. That it was never sold or given to Thomas Muthiani Masilia. It was reverted through Thomas Muthiani Masilia to Masilia Mwavu. He said this position was confirmed by RW3 and it was never challenged. Further that the property has long been subdivided into 18 plots and distributed to the beneficiaries of the deceased.

58. He further submits that land Makueni/Unoa/471 has been subdivided into 73 plots (No.s 2583 – 2656) and distributed to the beneficiaries (F) while Makueni/Unoa/224 has been subdivided into 140 plots and also distributed (G). He contends that the proposed distribution by the 3<sup>rd</sup> and 4<sup>th</sup> Administrators is the most equitable and fair.

59. He argues that the proposed distribution by the 2<sup>nd</sup> Protestor is very unfair as he purports to allocate to himself and his mother property worth Ksh.244,546,000/= out of an estate of Kshs.301,112,700/=. Further that he purports to distribute the remainder of the deceased’s estate to the 3<sup>rd</sup> and 4<sup>th</sup> Administrators for redistribution among the beneficiaries falling under the 2<sup>nd</sup> house. He submits that each beneficiary has a right to be given her/his rightful share.

60. He finally asked the court to dismiss the protest and uphold the Respondents’ proposed mode of distribution which is fair, equitable just and all-inclusive and agreed upon by all beneficiaries save for the two Protestors.

61. Having considered the summons for confirmation of grant, the affidavits of protest, all annexures thereto, the evidence on record and rival submissions and authorities cited, I find the following issues to fall for determination: -

- a) Which law is applicable to the deceased’s estate.
- b) Whether land parcel No. Makueni/Unoa/3467 forms part of the deceased’s estate.
- c) Whether there is any justification for setting aside 47 plots valued at approximately Kshs.53 million for purposes of paying valuers, surveyors and lawyers.
- d) Identification of the properties for distribution and how they should be distributed.

**Issue (a) Which law is applicable to the deceased’s estate.**

62. The deceased Masilia Mwavu had two houses. They are represented as follows: -

**1<sup>st</sup> house**

**1. Anah Mbula Masilia – 1<sup>st</sup> wife**

- a) Joseph Mutuku Masilia – son
- b) Sophia Mukui Masilia – daughter
- c) Thomas Muthiani Masilia – son
- d) Simon Kyalo – son
- e) Josephine Kanini Reuben – daughter
- f) Matronah Mutheu M asilia – daughter
- g) Jennifer Munyiva Kioko – daughter

**2<sup>nd</sup> house**

**2. Beth Ndunge Masilia – 2<sup>nd</sup> wife – deceased**

- a) Henry Muli Masilia – son (deceased and represented by widows Stellamaris Nduku Muli and Beth Mwikali Muli).
- b) Susan Kavuo Nzove – daughter
- c) Petronella Wanza J. Mbindyo – daughter
- d) Jacinta Mutio Masilia – daughter
- e) Georgina Nthuka Masilia – daughter
- f) Catherine Nzilani Masilia – daughter
- g) Jane Ndanu Masilia – daughter – (*deceased represented by Christine Ndunge Muli and Daniel Mutinda Muli, daughter and son respectively*).

63. The Protestors testified that though the deceased did not leave behind a Will he had made known his wishes on how he wanted his estate distributed. **PW5 Joseph Mutuku** was given his share of the deceased's property in 1964, which was transferred to him. There was no transfer of property done for the rest of the beneficiaries.

64. PW1 – PW5 have insisted that the deceased had held meetings with the family represented by his two wives, sons, PW3 and PW4 among others. In the said meetings he told them how he wanted his properties distributed. On the other hand, the Respondents have denied the holding of any such meetings or discussion of the deceased's properties.

65. From the materials before me it is clear that the deceased did not leave behind any WILL whether written or oral. However, going by his conduct and what has been stated before this court he had intentions of distributing his properties among his wives and sons. I am fortified in this for the following reasons: -

- i. Joseph Mutuku Masilia was given his share.
- ii. Simon Kyalo has settled on Makueni /Kako/23 on 26 acres.
- iii. Henry Muli's family has settled on Makueni/Kako/23 on 35 acres AND Makueni/Kako/ 459 on 15 acres.
- iv. Thomas Muthiani has settled on Makueni/Unoa/224.
- v. Mzee Masilia Mwavu died on 24<sup>th</sup> September 1980.

66. The persons occupying the above parcels did not have issues until 2012 when the application by the deceased's daughters to have the grant issued to Thomas Masilia revoked came up. This was 32 years after the deceased's death. All these are issues to be taken into consideration during the distribution.

67. It is also clear that the deceased died before the enactment of the Law of Succession Act in 1981. Does it then follow that the applicable law to his estate is the Kamba customary law? Section 2(1) and (2) of the Law of Succession Act provides:

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

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

68. Further Article 27 of the Constitution outlaws all forms of discrimination by stating as follows: -

#### **Equality and freedom from discrimination**

**1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

**2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**

**3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**

**4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**

**5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause 4.**

69. To fortify the above section 3(2) of the Judicature Act provides for the manner in which courts in this country apply African customary law. It provides thus:

***“The High court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”***

70. It therefore follows that for any African customary law to be effectively applied the party relying on it must adduce sufficient evidence before the court to clearly show that to have been the intention of the parties or deceased person. I fully agree with the sentiments of Lady Justice Martha Koome (*as she then was*) in the decision of **Re Estate Mugo Wandia (2009) eKLR** where she expressed herself as follows: -

***“The petitioner had a duty to adduce expert evidence on Kikuyu customary law to establish that the Applicant is not entitled to her father’s estate. In the absence of such evidence I find the submissions that the Applicant should be left out discriminatory and the existence of such custom and its requirement would not pass the threshold of the provisions of the Judicature Act. Besides the Judicature Act there is the constitution of the Republic of Kenya. Under section 82 of the constitution discrimination on the basis of sex is prohibited. Upholding and affording unsubstantiated custom that offers differential treatment to the petitioner is unconscionable. It would also go against the reasonable expectation by the Applicant that when she comes to a court of law she will be afforded equal treatment and access to justice. Kenya amongst other countries under the United Nations is party to several human rights conventions and treaty which prohibit discrimination against women. Key among them is the Universal declaration of Human rights especially Article 1 and the Convention on all forms of discrimination against women (CEWDA). It is for those reasons that at this day and age when the government has made a lot of efforts to eradicate poverty and embrace equitable policies and programmes of development a court of law cannot pronounce a judgment that goes against that spirit. The Applicant is entitled to a share of her deceased father’s estate even if he died in 1976 and his property was distributed in the year 2004.***

71. From the above, my finding is that the African customary law may only be applicable in a case of this nature in the following instances: -

- i. Where a Will whether written or oral was left behind by the deceased. The same could still be challenged if its discriminatory or if some dependants are left out.
- ii. Where there is a consensus on the said customary law distribution.
- iii. Where the application of the said customary law is not repugnant to justice and morality.

72. From the foregoing it can be seen that the law is against any form of discrimination of persons. None of the instances I have stated at paragraph 71 has been proved in this case. In his further affidavit of protest dated 31<sup>st</sup> July, 2019, PW2 has in his proposed mode of distribution offered the deceased’s married daughters from his mother’s side three (3) plots each. It’s a recognition that they too are beneficiaries of the deceased’s estate. My finding on this issue is that the applicable law in the distribution of the deceased’s estate is the

Law of Succession Act Cap 160 Laws of Kenya as it makes provision for every beneficiary.

**Issue no. (b) Whether land parcel No. Makueni/Unoa/3467 forms part of the deceased's estate**

73. I have considered the evidence already set out above in respect to this issue. PW2 claims to have bought this parcel of land from the family of Alois Mulwa Makosi who is now deceased while the Respondents claim that the land belongs to the deceased. RW1 the widow to Alois Mulwa Makosi referring to PEXB2 said the agreement was about returning 3 acres to the deceased's family. I have examined PEXB2 which talks about the late Alois Mulwa Makosi's family and Thomas Muthiani Masilia. The deceased was Masilia Mwavu and not Thomas Muthiani Masilia. What was so difficult in putting the deceased's name in the document instead of Thomas Muthiani Masilia if what RW1 and RW3 are saying is true?

74. Secondly, there were no documents produced before this court to show the history of that land or that indeed it belongs to the deceased. Simon Kyalo (RW3) one of the signatories to the document told the court that he signed the document, and with the contents the way they are. That the land is not for Thomas Muthiani. He did not explain why he signed the document showing that the land was Thomas Masilia's. The valuation report indicates that the records at Makueni land registry show that the land is in Thomas Masilia's name. I found RW3 not to be a forthright witness, as I will show later on. The same goes for RW1. She was a signatory to the document and what she told the court is not what is in PEXB2. RW1 and RW3 should have looked for a better lie.

75. I hereby reproduce the document (PEXB2) for ease of reference

**Agreement 11/5/06**

***Agreement Between the Family of Alois Mulwa Makosi and Thomas Muthiani Masilia***

*We the family of Alois Mulwa Makosi we are aware that there is a piece of land about 3 acres belonging to Thomas.M. Masilia which is covered by our title deed Makueni/Unoa/569.*

*The said land was put in our title deed by error when our land was being drawn and subdivided after we bought it from the deceased Mutie Muindi.*

*Physically, the said land is under and used by the real owner Thomas M. Masilia and it is divided from ours by a very clear and wide border (road).*

*Therefore, since it is only in the title deed which covers the same, we as Alois M. Makosi family we are doing every effort together with Thomas Masilia to have the said land subdivided and released to the said Thomas Masilia so that he can have his own title deed.*

*We the Alois family we have no problem with the land and we are all jointly very much aware that the said land about 3 acres belong to Thomas Masilia.*

*Those present;*

*Alois Mulwa Makosi*

*Mrs. Benedeta Mulwa Makosi*

*Father Mulwa Muli*

*Mumo Mulwa*

*Makosi Mulwa*

*Thomas M. Masilia*

*Simon K. Masilia*

*David Kikolya*

76. Mr. Njagi has submitted that the said land has been subdivided into 18 parcels. The said property should not have been subdivided before ascertaining how Thomas Muthiani Masilia came to possess it. Contrary to Mr. Njagi's submissions it is nowhere stated in PEXB2 that the land was being returned to Masilia's family through Thomas Muthiani Masilia. If the Respondents are convinced that this land belongs to the deceased's estate they know what to do to establish ownership.

77. Determination of ownership of title and how it was acquired is not for this court. The totality of the evidence on record leads to the irresistible conclusion that land parcel no. Makueni/Unoa/3467 does not form part of the deceased's estate. The registered owner is Thomas Muthiani Masilia. It has not been shown that he transferred this land to himself by virtue of the revoked grant issued on 30/09/1994. I have confirmed from the documents filed herein in 1992 and the grant issued in 1994 that the land Makueni/Unoa/3467 was not one of the

properties forming the deceased's estate. The subdivisions and any distribution of this land is hereby revoked and the resultant titles cancelled.

**Issue no. (c) Whether there is any justification for setting aside 47 plots valued at approximately Kshs.53 million for purposes of paying valuers, surveyors and lawyers.**

78. In the proposed mode of distribution by the Respondents they have suggested for a preservation of forty-seven (47) identified plots at an approximated value of Kshs.52,200,000/= as liabilities to the estate in terms of administration. It has not been disclosed what these payments are all about. The persons owed money whether they are valuers, surveyors or lawyers are not beneficiaries of the deceased's estate. They cannot earn from the estate more than what the real beneficiaries are entitled to. Such fees or sums owed to them must be agreed on and paid by ALL beneficiaries in equal portions.

**Issue no. (d) Identification of the properties for distribution and how they should be distributed.**

79. This succession cause has had a history since the deceased's death on 24<sup>th</sup> September, 1980.

- In 1992, Pw2 filed this succession cause and a grant issued to him in 1993.

- In 2012, (19 good years thereafter) the deceased's daughters challenged the said confirmed grant. It was revoked by Justice Jaden on 23<sup>rd</sup> November, 2015.

- Yet again another confirmed grant was issued on 21<sup>st</sup> April 2016 by Justice Nyamweya by consent. The same was revoked on 31<sup>st</sup> July, 2018 by Justice Nyamweya vide her ruling in respect to the application dated 20<sup>th</sup> July, 2017 filed by PW1 the deceased's surviving widow. Justice Nyamweya found that PW1 had not been involved or consulted over the consent before confirmation of the grant.

80. I am setting out this background because the Respondents have kept referring to the consent of the second revoked grant as if it forms part of the present application. They claim that the Protestors fully participated in the said consent and cannot turn around, and deny it. They have even submitted that their proposed mode of distribution is a replica of the one in the revoked grant.

81. What I would wish to make clear is that once the grant was revoked it died, with everything in its possession. The grant was challenged, parties were heard and a decision revoking the grant was made by the court. Any person who was not satisfied ought to have appealed against the revocation. This court cannot start referring to the consent in respect to that revoked grant to make another finding and/or its findings on it. Justice Nyamweya made an order for the status quo to remain as directed to await the appointment of new Administrators ONLY. Besides that, everything about the two revoked grants is water under the bridge.

82. The parties herein as a family have been given sufficient time (almost 40 years) to sit down and agree on this distribution but they have chosen not to. The insincerity of RW3 (Simon Kyalo) comes out very clearly in cross examination in respect to the document PEXB1 regarding a family meeting held on 30/05/1992. This is what he said in cross examination, in respect to PEXB1:

***“I can see this letter (PEXB1). I remember this letter. I signed it as no. 4. The contents of the letter are true. It was agreeable to us at that time. We rushed it to conclusion. That was that time in 1992. By that time, we were just a few of us. I realized we had done wrong. It's not true that I have changed my mind because the properties in WOTE have become valuable.”***

83. Since the contents of PEXB1 are true as he says then what made him(RW3) change his mind? The contents of PEXB1 are hereby reproduced.

**PEXB1-**

**Family Agreement meeting in respect of three pieces of land (title deeds no.s Makueni/Unoa 224, Makueni/Unoa 471 and Makueni/Unoa 470.**

*“We as the family of the late Masilia Mwavu jointly and under the chairmanship of his wife Annah Mbula Masilia (and our mother) agree that the above named three pieces of land belong to Mr. Thomas Muthiani Masilia who is also one of our family members. Before our late father passed away he had given every family member of his family his (member) piece (s) of land and the above named pieces of land were given to Thomas Muthiani Masilia as above. We therefore do not have any objection. The family members are as follows: -*

1. Annah Mbula Masilia (mother) signed
2. Joseph Mutuku Masilia (son) signed
3. Thomas Muthiani Masilia (son) signed
4. Simon Kyalo Masilia (son) signed
5. Boniface Kivuva Masilia (son) signed.

Chief's Office Wote

08-06/1992

*This office has no objection to the families' agreement. Please assist to transfer."*

The open denials by RW3 of agreements PEXB 1 and 2 which he participated in portray him as an incredible witness. They did not assist him or the court.

84. The court will therefore undertake a fresh distribution of the deceased's estate as per the law. This will involve all the properties forming the deceased's estate which have been identified as follows:

- i. Makueni/Kako/23 – 69 acres.
- ii. Makueni/Kako/459 – 15.493 acres.
- iii. Makueni/Unoa/224 – 18 acres.
- iv. Makueni/Unoa/471 – 12 acres.
- v. Makueni/Unoa/470 – 3.088 acres.
- vi. Plot no. 73: 1600 square feet in Wote town Makueni pharmacy
- vii. Plot no. 4: 4000 square feet in Wote town – Operating as a salon and barber shop.
- viii. Plot no. 12: 4000 square feet in Wote town near Posta.
- ix. Plot no. 19A: 2500 square feet in Wote town near Kenchic.
- x. Plot no. 125: 2186 square feet in Wote town opposite Makueni referral hospital.
- xi. Plot no. 2: 4000 square feet Unoa market.
- xii. Plot no. 129: 2000 square feet at Kilala market.

85. Having identified the properties, the next step is to undertake the distribution. Before this court are two proposed modes of distribution. The 1<sup>st</sup> proposal is by the 3<sup>rd</sup> and 4<sup>th</sup> Administrators (Respondents) vide the summons for confirmation of grant dated 16<sup>th</sup> April 2019. Its supported by the affidavit of the two Respondents with an annexed valuation report on all these properties by Penwill Properties Limited filed on 16<sup>th</sup> April 2019.

86. It is the Respondents' narrative that their proposal is the best and fairest of them all as it has evenly distributed the property after considering where the parties have settled and the VALUE of each property. It is their submission that the stated value should be considered by this court since the Protestors did not file any valuation report.

87. Finally, that the land has been distributed and allocated to beneficiaries on the basis of a consent of the revoked grant. They oppose the proposed distribution by the Protestors saying it is selective and the 2<sup>nd</sup> house has been left out.

88. On the other hand, the Protestors submit that their suggested mode is most fair since it is in line with the wishes of the deceased Masilia Mwavu. They propose that the shares of the daughters from the second house be registered in the names of the Respondents for further distribution. They wondered why it is only PW2's properties that have been subdivided and those of the 2<sup>nd</sup> house have remained untouched.

89. PW1 and PW2 have insisted that 35 acres from Makueni/Kako/23 and Makueni/Kako/459 were reserved for the 2<sup>nd</sup> family while 26 acres from Makueni/Kako/23 Makueni/Unoa/224,470 and 471 were reserved for the 1<sup>st</sup> family. The Respondents deny that there was ever anything like that.

90. A perusal of the valuation report gives the impression that the parcels in Makueni/Kako are of such low value while those in Makueni/Unoa are of extremely high value. That is where the crux of this matter lies. There is a serious pattern I have observed which I must bring out in this judgment, inasmuch as the Respondents deny that their deceased father never gave anybody land to settle on. I have observed the following:

- Joseph Mutuku Masilia (*eldest son*) was sorted out by the deceased in 1964 and title of his share given to him.
- Simon Kyalo Masilia has all along (*undisturbed*) occupied 26 acres of Makueni/Kako/23. He stays with his mother (*1<sup>st</sup> Administrator*)
- Henry Muli Masilia (*represented by his two widows*) have peacefully occupied 35 acres from Makueni/Kako/23 as well as

Makueni/Kako/459 measuring 15.493 acres. The total comes to 50.493 acres to Henry alone.

- I have also noted that the proposed mode of distribution by the Respondents confirms to the two brothers' houses (*Simon and Henry*) what they have been occupying with no interference at all. i.e. Simon 26 acres and Henry Muli's house 50.493 acres.
- When it comes to PW2 Thomas Masilia, who has been occupying Makueni/Unoa/224 the tone completely changes for whatever reason. He too is a son of the deceased and ought to be treated like the others. From the record and proposed distribution by the Respondents the whole of Unoa 224 has been subdivided into small portions and it is proposed that Thomas gets 10 pieces each measuring  $1/8$  acre =  $1\frac{1}{4}$  acres valued at Kshs.10 million to cover where he has settled. What is  $1\frac{1}{4}$  acres compared to the 50.493 acres and 26 acres of agricultural land allotted to Henry and Simon respectively? The value aside, can this be said to be proportionate?
- It is not clear how Joseph, Simon and Henry found themselves where they are settled which is not the same for Thomas Masilia. The Respondents are all silent on this issue. Even if Unoa is more valuable than Kako  $1\frac{1}{4}$  acres cannot be compared with 50 and 26 acres occupied by Henry's widows and Simon respectively. There is no uniformity in this at all. The disparity is not explained and it cannot be based on the valuation report alone. There is a lot more to it. It is not clear how big Joseph's share is but for him to confirm that he is satisfied and is not claiming anything from the deceased's estate means he is really satisfied.

•**The valuer's remarks on Makueni/ Kako/23 are as follows at page 26, of the report:**

- “This is an all arable, large agricultural holding situated **1KM** or less from Machakos/Wote tarmac road.
- The property enjoys an advantage of being situated between two streams Kamunyu and Kiatuni hence has high potential for irrigation farming.
- The land is within close proximity of Wote town and soon will change user from agricultural to residential (building land) as Wote town is rapidly growing towards that direction”

•**This is what he says of Makueni /Kako/459.**

- “This property enjoys close proximity to Wote town.
- Has potential for changing of user from agricultural to building land as Wote town is growing towards this direction.”
- The valuer does not mention how far Kako is from Wote town which may have been deliberate. Kako is less than 10 kilometres from Wote town. Going by all these revelations would one say that the two parcels of land in Kako are not of very high value? Would this justify the invasion of plot no. 224 for subdivision into very tiny plots and as a result denying PW2 of a place to settle compared to those in Kako?
- I have equally considered the proposed allocation of the plots within Wote town. This is what I have noted.

a. Simon Kyalo has been allotted two plots i.e. Plot no. 19 (A) valued at Kshs.2,600,000/= and

Plot no. 73 valued at Kshs.1,700,000/=.

Total = Kshs.4,300,600/=

b. Henry Muli's family has been allotted 3 plots i.e.

Plot no. 125 valued at Kshs.3,605,000/=,

Plot no. 12 valued at Kshs.3,115,200/= and

Plot no. 127 Kilala market valued at Kshs.1,468,000/= . Total = Kshs.8,188,200.

c. Thomas and Joseph Masilia one plot:-

Plot no. 2 in Unoa valued at Kshs.2,856,000/= bringing it to Kshs.1,428,000/= for each.

91. There is no justification for such allocation whereby Henry Muli's family seems to be unfairly favoured against the rest. I have further not found any justification for denying Thomas Masilia a sizeable acreage of land like the rest of the sons.

92. It has been stated that because the surviving widow has been given a plot with a monthly income of Kshs.30,000/= it's such a big deal for

her. It must be remembered that she is the deceased's first wife with whom he went through strenuous life experiences to even acquire the properties the children are now quarreling over. It is therefore not a favour to give her that plot and others.

93. The Protestors proposed mode of distribution could only be applicable if the beneficiaries had agreed to settle this matter between themselves. Now that things are the way they are the provisions of the Law of Succession Act will apply.

94. Section 40 of the said Act provides

**Where intestate was polygamous**

**(1) 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 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.**

**(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.**

A "house" in a polygamous setting as that of the deceased is defined in section 3 of the Act, as a "family unit comprising a wife ... and the children of that wife."

95. In the case of **Mary Rono –vs- Jane Rono & William Rono Eldoret Court of Appeal Civil Appeal No. 66 of 2002** the court distributed the estate of Stephen Rongo Eicherono among his two widows and the children (*both sons and daughters*). The widows got slightly more than double what each of the children got in terms of land.

96. The same principle has been applied to several estates of deceased persons, e.g.

**i. The estate of Joel Muluve Wambua (deceased) – Machakos High Court Succession Cause no. 928 of 2009. (2018) eKLR.**

**ii. The estate of Ngamini Kirira Nyeri High Court Succession Cause No. 100 of 2013 (2016) Eklr.**

**iii. The estate of Mwangi S/O Syomba alias Mwangi Ngamba Succession Cause No. 620 of 2012 (2015) eKLR.**

97. I will therefore distribute the deceased's estate among the children who are fourteen (14) plus the surviving widow making it fifteen (15) units, **less** one (1) unit of Joseph Mutuku Masilia the first born.

98. I have taken into account all the issues raised above plus the fact that the deceased's sons have developed portions of the parcels they now occupy. The portions occupied by them save for Joseph Mutuku are clear from the evidence.

99. I have also considered the fact that for the deceased's ten (10) daughters who do not possess any of the properties to get a share, there is bound to be a real shaking and release of what some of the beneficiaries believe is theirs. In the circumstances, I find the following to be a fairer distribution of the estate in order to accommodate all the deceased's children.

100. **(i) Makueni/Kako/23 measuring 69 acres**

- Simon Kyalo Masilia – 26 acres.
- Stellamariis Nduku Muli & Beth Mwikali Muli – (Widows to Henry Muli Masilia) – 26 acres.
- The balance of 17 acres to be shared equally among the ten (10) daughters of the deceased.

**(ii) Makueni/Kako/459 measuring 15.493 acres-**

Stellamaris Nduku Muli & Beth Mwikali Muli – 5.493 acres. The balance of 10 acres to be shared equally among the deceased's ten (10) daughters.

**(iii) Makueni/Unoa/224 measuring 18 acres.**

- Thomas Muthiani Masilia – measuring 17 acres.
- Annah Mbula Masilia – 1 acre
- All the previous subdivisions and resulting titles are all hereby revoked and cancelled.

**(iv) Makueni/Unoa/471 measuring 12 acres**

- The deceased's ten (10) daughters to equally share 8½ acres.

- Stellamaris Nduku Muli and Beth Mwikali Muli to get 1 acre to be shared equally.
- Simon Kyalo Masilia to get 1 acre.
- Annah Mbula Masilia to get 1½ acres.

**(iv) Makueni/Unoa/470 measuring 3.088 acres.**

- Thomas Muthiani Masilia and Annah Mbula Masilia

**(v) Developed plots in Wote town**

- Plot No. 4 (*operating as salon and barber shop*) valued at Kshs.3,300,000/= - To Annah Mbula Masilia.
- Plot No. 12(*near Posta*) valued at Kshs.3,115,200/= - To Stellamaris Nduku Muli and Beth Mwikali Muli.
- Plot No. 73(*Makueni pharmacy*) valued at Kshs.1,700,000/= - To Simon Kyalo Masilia.
- Plot No. 19A (*near Kenchic*) valued at Kshs.2,600,000/= - To Simon Kyalo Masilia.
- Plot No. 2 (*Unoa market*) valued at Kshs.2,856,000/= - To Joseph Mutuku Masilia and Thomas Muthiani Masilia.
- Plot No.125 (*Opposite Referral hospital*) valued at Kshs.3,605,000/= - To the ten (10) daughters of the deceased in equal shares.
- Plot No. 127 Kilala market valued at Kshs.1,468,000/= - To Stellamaris Nduku Muli and Beth Mwikali Muli.

101. Any land and/or plot allocations must take into consideration the portions settled on by the beneficiaries and provision for access.

102. The Administrators to work on the administrative costs which will then be shared out **equally** among all the beneficiaries (*per unit*) for payment within the shortest time possible.

103. Any party not satisfied has a right of appeal within 28 days.

Orders accordingly.

**Delivered, signed & dated this 13<sup>th</sup> day of February 2020, in open court at Makueni.**

.....

**Hon. H. I. Ong'udi**

**Judge**