



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 527 OF 1981

IN THE MATTER OF THE ESTATE OF MBIYU KOINANGE - (DECEASED)

JUDGMENT

1. The deceased Peter Mbiyu Koinange hailed from Kiambu. He died intestate on 3rd September 1981, having left a rich academic and political history. He served in the governments of Mzee Jomo Kenyatta and Daniel T. Arap Moi as cabinet minister. He was polygamous, and was a wealthy man. The estate he left has been the subject of litigation by members of his family since his death. This succession dispute has been one of the longest running in the judiciary, and a reference point whenever delay in the administration of justice is discussed. What is not appreciated is that most of the cases involving rich polygamous Kenyans who die intestate have followed a similar pattern: lengthy and complicated litigation, attracting many advocates, and less intention on the part of the parties to bring the matter to an end. One wishes that all Kenyans can get into the habit of planning their lives, and especially thinking about what will happen to their families and properties upon their death. It is not too much to ask that the planning be by way of writing Wills.

2. The deceased's first wife was Loise Njeri Mbiyu. She died in 1966. The children of the deceased in the house are David Njunu Koinange; Paul Mbatia Koinange; George Kihara Koinange; Mary Wambui Koinange (who died but was survived by a daughter Stella Njeri); Elizabeth Waruinu (who died but was survived by a daughter Stella Wanjiku Kibaara and son Stephen Mungai Kibaara); and Isabela Wanjiku Mbiyu who died and left no child.

3. The deceased's second wife was Rith Damaris Wambui Mbiyu. She died in 2010. Her children with the deceased are Isaac Njunu Koinange (who died and left a widow Joyce Njeri Njunu and five children); Solomon Kihara Koinange (who died but left a widow Susan Kihara and a daughter Angela Wambui); Karuga Mbiyu (who died and left no issue); Florence Wanjiku Koinange (who died and left a daughter Barbara Wambui Koinange); David Waiganjo Koinange; Geoffrey Karuga Koinange (who died and left no child); and Lennah Wanjiku Koinange.

4. The deceased's third house was that of Margaret Njeri Mbiyu with whom he had no child.

5. The fourth house was that of Eddah Wanjiru Mbiyu who had no child with the deceased.

6. On 22nd March 1993 the court appointed Rith Damaris Wambui Mbiyu (representing the 2nd house), David Njunu Koinange (representing the 1st house), Margaret Njeri Mbiyu (representing the 3rd house) and Eddah Wanjiru Mbiyu (representing the 4th house) as joint administrators of the estate of deceased. When Rith Damaris Wambui Mbiyu became ill, the court ordered her to be replaced by her son David Waiganjo Koinange as an administrator. She eventually passed on.

7. The vast empire of the deceased has the following properties that form his estate:-

- (i) LR No. 8669/3 Mau Narok (Muthera Farm)-4292 acres;
- (ii) LR No.151/3 (Ehothia Farm)-645 acres;
- (iii) LR No.150/16, 3688/1 and 3688/4 Limuru (Waehothia Farm)-198 acres;
- (iv) LR No. 22 (Closeburn Estate);
- (v) Kiambaa/Thimbigua/819-98 acres;

- (vi) LR No.209/8868 (IR No.35231 Lunga Lunga Road, Industrial Area, Nairobi- 0.8768 Ha;
- (vii) LR No.216 (Ikinu Farm)- 13 acres;
- (viii) LR No. 1232/13 Githunguri – 16 acres;
- (ix) Kiambaa/Waguthu/2324(Kiambaa/Kibichiku or Gichiku)-1.214 Hectares;
- (x) Kiambaa/Karuri/T.297- 0.22 acres;
- (xi) Thimbigua plot;
- (xii) Banana Hill plot;
- (xiii) Closeburn plots;
- (xiv) Gathanga plots (Kanunga Farmers Company);
- (xv) Kiambaa Kawaida;
- (xvi) 32,000 shares in Koinange Investment and Development Limited that owns plot No. 209/9099 in the centre of Nairobi City;
- (xvii) 948,480 shares in Koiri Limited;
- (xviii) 508 shares in Kenyattu Trading Company Limited;
- (xix) shares in Limuru Dairy Limited;
- (xx) shares in ICDC Investment Company Limited (now Centum Limited)(share certificate Nos. 019882 and 39629);
- (xxi) shares in Danson Macharia Sawmills Limited (Elburgon);
- (xxii) shares in Mboi-I-Kamiti Limited;
- (xxiii) 165 shares in Gatatha Farmers Company Limited (share certificate Nos.003863) and 016444);
- (xxiv) shares in BAT Kenya Limited;
- (xxv) shares in Oceanic Hotel Limited;
- (xxvi) shares in Kenya Cooperative Creameries Limited (share Certificate Nos. 002326, 3834, 5673, 7345, 010115, 011774, 017141, 027787, 040414, 040579 and 056126);
- (xxvii) shares in Kenya Planters Cooperative Union Limited (share Certificates Nos. 149, 152, 449, 581, 1120, 1801 and 0010003);
- (xxviii) shares in Theta Group Limited;
- (xxix) shares in Horticultural Cooperative Union Limited (share certificate No. 573);
- (xxx) shares in Kenya Grain Growers Cooperative Union Limited (share Certificate No. 003863); and
- (xxxi) Kshs.284,000,000/=.

8. Regarding the Kshs.284,000,000/=, some background is necessary. Closeburn Estate was initially 640.25 acres. During these proceedings, the court allowed the sale of 291 acres of it to the Aga Khan Group, 100 acres to Centum Ltd and a conveyance of 3 acres to Karura Community Chapel Registered Trustees. The proceeds were variously distributed to the beneficiaries and to their advocates. On 26th July 2011, the record shows, a consent was entered into by all the parties that the balance of Kshs.284,000,000/= was to be deposited into a joint account to be operated by advocate Beatrice Kariuki (representing the 3rd house), advocate Alice Muthoni Wahome (representing the 4th house), advocate Justy Nyaberi (for David Waiganjo Koinange and David Njunu Koinange) and advocate Evans Monari. The money was to be held by counsel and not to be disbursed without the authority of the court after determining or making reservation for the creditors' claims. The advocates opened a joint account at Eco Bank into which the money was deposited.

9. However, the money is no longer available at Eco Bank. The advocates, according to their affidavits, withdrew the money, shared some of it to some of the beneficiaries and applied the balance to cover their fees and fees of other advocates, and other creditors. The record is clear that no order was made authorising the withdrawal of the money, or any part of it. The advocates swore affidavits to say that there was some

ruling by Justice Leonard Njagi that directed that all outstanding debts of the estate be paid from the monies. They said they were unable to trace the ruling in the file. They did not evidence any copy of the ruling. I wonder on what basis Eco Bank released the money to the advocates. Did the Bank see any order of the court authorising the release. I am sure if there was any order of the court authorising the withdrawal it would have been produced.

10. That is all that I would like to say about the money. This is because the advocates are challenging the proposal to prosecute them in relation to the money at the Constitutional Court at Nairobi. For the purposes of this cause, therefore, the money is not available for distribution to the beneficiaries. I have later on in this judgment indicated how the money, if it becomes available, will be shared among the beneficiaries.

11. The estate of the deceased has liabilities and debts. Then there are advocates who act for administrators and/or beneficiaries who have raised huge fee notes they wish that the estate should pay. Some advocates who previously acted for administrators or beneficiaries filed fees notes and/or applications seeking that their matters be determined before the estate is distributed to the heirs. I wish to adopt what Justice W. Musyoka said on this issue in **In re Estate of Mbiyu Koinange (Deceased) [2015]eKLR as follows:-**

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Advocates fees are not debts of the estate. An advocate who acts for an estate or administrator or heir or beneficiary does not become an heir or beneficiary. He (is) therefore not entitled to participate in the distribution of the estate in terms of being catered for as an heir.

168. An advocate comes into a matter by way of being instructed by a particular person. If he is instructed by an administrator, and he acts as the sole advocate for the estate, he would be entitled to costs from the estate. That, however, does not mean that he should participate in the distribution of the estate, by having estate property allotted to him to settle his fees. No. He should agree on his fees with the administrator or otherwise have his costs taxed in the usual manner at the conclusion of the proceedings.

169. Where there are several administrators, and each one of them in their wisdom decide(s) to appoint an advocate to act for them instead of instructing one advocate for the estate, it would be unfair to the beneficiaries and other claimants if the expense of having multiple advocates is passed to the estate. It would only be just that each one of the administrators bears the cost of their advocates. The fees for advocates appointed by the beneficiaries should be settled by the beneficiaries.”

12. There are taxed costs of Kshs.7,678,656/= due to Odera Obar & Co. Advocates and Kshs.15,000,000/= due to M/s Nduati Wamae & Associates for valuation. In respect of the latter, there is an order dated 8th May 2013 for their payment. These two liabilities shall form the first charge on the proceeds of the sale of the estate properties that I will order shortly.

13. David Kangethe Nganga T/a Ruaka Fiest Bar & Restaurant says that he paid to David Waiganjo Koinange Kshs.77,410,000/- for his lease. He was represented by Muriu Mungai & Co. Advocates. Infact, when the court visited the estate on 28th November 2019 it became clear that there were numerous developments on the estate of the deceased by persons who claim to have leases from some of the beneficiaries and/or administrators. It is trite that under **section 45 of the Law of Succession Act (Cap. 160)** any person who has no authority under the **Act**, or under any other written law, or is not an executor or administrator of the estate of the deceased, or has no order of the court, takes possession of or disposes the free estate of the deceased, or does any act that dispossesses the executor or the administrator of the estate, does any act to waste or cause loss or damage to the estate, or makes it impossible for the executor or administrator to administer the estate, is guilty of intermeddling with the free property of the deceased (**Jane Kagige Geoffrey & Another –v- Wallace Ireri Njeru & 2 Others [2016]eKLR; Gitau & 2 Others –v- Wandai& 5 Others [1989] KLR 23; In Re The Matter of the Estate of David Julius Nturibi M’ithinji (Deceased) [2012]eKLR**). Acts of transfer, exchange, paying out, distributing, donating, charging, leasing or mortgaging of any part of the estate without the authority of the court or the executor or administrator of the estate amount to intermeddling (**Benson Mutuma Muriungi –v- C.E.O. Kenya Police Sacco & Another [2016]eKLR**). It is also trite that an intermeddler cannot possibly pass a good title to the buyer, even if the said buyer had no notice of the want of title (**Gitau& 2 Others –v- Wandai and Five 5 [1989]KLR 231**).

14. The estate has four administrators. The law required that all of them jointly authorise the lease of any property of the estate to any third party. The other way of looking at it is that, if any administrator or beneficiary unilaterally sold or leased any part of the estate he will be solely responsible to the claimant. It would not be a liability to be borne by the estate. For the purpose of this cause, it was not clear how the leases were transacted. There is no evidence that either the court or all the administrators authorised them.

15. Monica Wambui Kinuthia (represented by Prof. Sylvia King’ara) bought 2 acres from Lennah Wanjiku Koinange for Kshs.140,000,000/=. The 2 acres are part of the Closeburn Estate. She has taken possession. The transaction was sanctioned by David Njunu Koinange and David Waiganjo Koinange (both being administrators). The other two administrators did not sanction the sale. The sale was during the time when Lennah Wanjiku had illegally transferred 35.85 Hectares of Closeburn Estate to herself. The transfer was nullified on 26th June 2019. For third parties, due diligence should have disclosed that the estate of Peter Mbiyu Koinange (a matter of public notoriety) was the subject of these proceedings that were on-going; that Lennah Wanjiku Koinange (a child of the deceased) was a party; that Closeburn Estate was the property of the deceased; an inquiry of the record would have revealed that there was no court order that supported the transfer to Lennah Wanjiku Koinange; that the estate had four administrators; and an inquiry from the two other administrators would have revealed that Lennah Wanjiku Koinange did not have a good title. In short, Monica Wambui Kinuthia will claim the 2 acres from the amount of benefit that Lennah Wanjiku Koinange will get from Closeburn Estate. She was otherwise neither a beneficiary nor a dependant of the estate of the deceased. Lastly, **section 82(b)** of the **Act** prohibits sale of immovable property of the deceased before confirmation, unless the court has sanctioned the same.

16. Under **section 83(f)** of the **Act**, the administrators of the estate of the deceased who have applied for the confirmation of the joint grant issued to them are required -

“subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be.”

Under **section 83(d)** of the **Act**, the administrators are required –

“to ascertain and pay out of the estate of the deceased, all his debts.”

Under **section 83(c)** all the reasonable expenses relating to the administration of the estate are supposed to be paid. **Section 86** provides that all debts owed by the estate shall be paid before any legacy.

17. These provisions require that before the estate is distributed to the respective beneficiaries, the court should make provision for the payment of the reasonable expenses of the administration of the estate and make payment of all debts that the estate owes. In the instant case, however, not all debts and expenses have been ascertained. The ones ascertained are the Kshs.7,678,656/= owed to advocate Kennedy Obar Odera and Kshs.15,000,000/= owed to Ms Nduati Wamae & Associates. I appreciate that the assets of the deceased do not include ready cash. I will therefore set aside some properties that will be valued and sold and the proceeds used to pay the debts that will ultimately be ascertained.

18. Now that the persons beneficially entitled to the estate of the deceased are known and the estate’s assets have been ascertained, the court’s duty is to determine the amount of benefit that will go to each beneficiary. The parties have made proposals as will shortly be outlined. At this point, however, it is important to deal with the law regarding the distribution of the estate of the deceased.

19. The deceased was polygamous and died intestate. He died on 3rd September 1981. The date of death is important because of the fact that the **Law of Succession Act** came into operation on 1st July 1981. **Sections 1 and 2** of the **Act** provide that:-

“(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.”

It follows that the estate of the deceased is governed by the **Act** and its provisions relating to distribution. Mr Ahmednasir (S.C.) and Mr. Gikandi for the third house (Margaret Njeri Mbiyu) and Mr. Muite (S.C.) and Mr Muriithi Kirera for the 4th house (Eddah Wanjiru Koinange) submitted that the deceased was a prominent Kikuyu polygamous man whose estate should be distributed in accordance with Kikuyu customary law which provided that each house should equally benefit from the estate, notwithstanding the number of children, if at all, in each house. Reliance was placed on **Cotran’s Restatement of African Law** and **Article 11** of the Constitution of Kenya. **Article 11** of the Constitution states as follows:-

“11.(1) This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

(2) The State shall—

(a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage;

(b) recognise the role of science and indigenous technologies in the development of the nation; and

(c) promote the intellectual property rights of the people of Kenya.

(3) Parliament shall enact legislation to—

(a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and

(b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.”

20. It was stated that the deceased was the son of Senior Chief Koinange who had 36 acres of land and 6 households and that each household had been given 6 acres. Therefore, it was argued, the deceased’s estate should be distributed equally among his four houses.

21. The rest of the beneficiaries asked that the estate of the deceased be shared in accordance with the provisions of the **Act**, now that the

deceased had died after the Act had come into operation. I should point out that in **Rono –v- Rono & Another [2005]IEA 363**, it was held by the Court of Appeal that the application of African customary law in succession matters was expressly excluded by **section 2(1)** of the Act.

22. It is further observed that there is nothing unconstitutional about the Act, or its **section 40**. If anything, the provisions of the Act are enriched by the Constitution which came into place in 2010. The Constitution commands that the Act be construed with the alterations, qualifications and exceptions necessary to bring it into conformity with it. I will bear this in mind.

23. All the other parties agree that the estate of the deceased be shared in accordance with **section 40** of the Act. The section provides as follows:-

“40.(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.”

It is already noted that when a polygamous man dies intestate, his estate should be governed by **section 40**, and the court cannot share the estate in any other way. However, this does not take away the court’s discretion to act fairly to the parties during the distribution of the estate (**Rono –v- Rono** above). Counsel for the 3rd and 4th houses cited **Rono’s** case and the decisions in **P & A Cause No. 244 of 2002 Estate of Ephantus Githatu Waithaka; Succession Cause No. 1033 of 1996 In the Matter of the Estate of Mwangi Githure (Deceased)**; and **Succession Cause No. 110 of 2010 In the Matter of the Estate of Samwel Miriti (Deceased)**, and asked that the claims of the two widows should not be equated to the children of the deceased as that would cause them monumental injustice. This was because of the provision in **section 40** that each widow be considered as a unit and to be added to the number of the children of the deceased. To counsel, the widows have a superior claim to the estate.

24. I appreciate the special place of the widows of the deceased, in relation to the children of the deceased. I have a problem with the Act when it provides that a widow be entitled to only personal and household goods and that she gets only a lifetime interest in regard to immovable property. I have a serious problem where the Act equates a widow to her children when it comes to the sharing of immovable estate of the deceased. These are areas of the Act that require immediate review, and alignment to the Constitution and the **Matrimonial Property Act No. 49 of 2013**. I will, however, be mindful that **Loise Njeri Mbiyu (1st house)** and **Rith Damaris Wambui Mbiyu (2nd house)** were married much earlier than **Margaret Njeri Mbiyu (3rd house)** and **Eddah Wanjiru Mbiyu (4th house)**. I will also bear in mind that this estate was on 25th September 2015 distributed by my brother Justice W. Musyoka in **In re Estate of Mbiyu Koinange (Deceased) [2015]eKLR**. There was an appeal to the Court of Appeal in **Civil Appeal No. 47 of 2016 In The Matter of the Estate of Mbiyu Koinange (Deceased) Margaret Njeri Mbiyu –v- David Njunu Mbiyu Koinange and 13 Others**. The Court of Appeal observed as follows in its judgment that was delivered on 24th November 2017:

“We do not think it necessary therefore to say more regards this ground of appeal which faults the court for failure to distribute the entire estate, save that we do not think there is any room, as argued by Lennah, for application of the principles of matrimonial property in the distribution of the deceased in this case. Neither Margaret nor Eddah argued that they were entitled to any property of the deceased by virtue of their contribution, as wives of the deceased, to its acquisition.”

I wish to add that the Court of Appeal returned this estate for it to be redistributed after it found that **Margaret Njeri Mbiyu** and **Eddah Wanjiru Mbiyu** were the 3rd and 4th widows, respectively, of the deceased. Justice W. Musyoka had found that the deceased had married only **Loise Njeri Mbiyu** and **Rith Damaris Wanjiru Mbiyu** during his lifetime. During the re-hearing of the matter before me no evidence was called to show that either **Margaret Njeri Mbiyu** or **Eddah Wanjiru Mbiyu** had contributed, either directly or indirectly, to the acquisition or development of any of the property of the deceased. There was, similarly, no such evidence in regard to either **Loise Njeri Mbiyu** or **Rith Damaris Wambui Mbiyu**.

25. Before I consider the proposals of the respective houses, I wish to point out that **Tangulizi Ventures Ltd** (represented by Mr. Kamaara advocate) obtained a consent order giving it 4 ½ acres from the share of **Barbara Wambui Koinange** in **Kiambaa/Thimbigua/819** which this court will honour.

26. The third house proposed that, since the proceeds of **Closeburn Estate** sale to the **Aga Khan and Centum Ltd** were shared equally to the four houses, the entire estate of the deceased should be shared equally. It was proposed that **Waehothia Farm** goes to the 4th house absolutely as this was where **Eddah Wanjiru Mbiyu** resides; that **Ehothia Farm** on which **Margaret Njeri Mbiyu (3rd house)** resides be divided into three equal portions (each 215 acres) and **Margaret** given the portion where she resides, and the other two portions to be available for the 1st and 2nd houses; **Kiambaa/Waguthu/2324** and **Kiambaa Gachiku** be allocated to the 4th house if **Eddah Wanjiru Mbiyu** will not lay any claim on **Kiambaa/Thimbigua/819**; **Kiambaa/Thimbigua/819** be shared so that each of the 1st, 2nd and 3rd houses gets 30 acres with the portion for the 2nd house accommodating the 4 acres that **Barbara Wambui Koinange** sold to **Tangulizi Ventures Limited**; **Muthera Farm** to be sold and 25% of the proceeds be retained to pay debts, the rest of the proceeds be shared equally among the four houses, and 60 acres of the farm be reserved for roads and open spaces; **LR 209/8898 IR No. 35231 Lunga Lunga Road**, shares in **Koiri Limited**, shares in **Koinange Investment and Development Ltd** and any other shares that the deceased held be sold and the proceeds be shared at 14.2% for the widows and 7.2% for the children; accrued earnings from **Koinange Investment and Development Limited** be accounted for by **Eddah Wanjiru Mbiyu** who single handedly managed the company; and **Margaret Njeri Mbiyu** and **Eddah Wanjiru Mbiyu** gets 63 acres each from **Closeburn** with each child getting 33.6 acres, and 17 acres be kept for open places and roads, and the shares of each beneficiary on **Closeburn** taking into consideration where each resides.

27. The fourth house asked that since it had been declared that Kiambaa/Waguthu/2324 formed part of the estate of the deceased, Eddah Wanjiru Mbiyu be allowed to keep it now that she was willing to forfeit her claim to other properties; Ehothia Farm where Margaret Njeri Mbiyu resides be subdivided into three equal portions (each measuring 213.3 acres), each share going to the 1st, 2nd and 3rd houses with Margaret keeping the area she presently occupies; Kiambaa/Thimbigua/819 to be shared equally among the four houses with the 2nd house getting the portion on which they have buried their relatives, and 4 acres from their share going to Tangeluzi Ventures Limited; Githunguri land be given to Isaac Njunu Koinange as had been wished by the deceased and this be taken into consideration when sharing the entire estate to the 2nd house; LR No. 216 (Ikinu Farm) that Eddah Wanjiru Mbiyu is occupying should go to her to take care of the 14 acres less that she will get from Ehothia and Waehothia Farms; Closeburn Estate to be shared equally among the four with each house getting 61.5 acres; Muthera Farm be shared equally among the four houses with each house getting 1,050 acres; and Thirstine Estate, Lunga Lunga plot, Dagoretti Karandini, 3 plots in Nakuru, Mbo-i-Kamiti Company shares, BAT shares, ICDC Shares, Kenyattu shares, Theta Group shares and Nyahururu Farm be all sold and the proceeds shared equally among the four houses.

28. David Waiganjo Koinange of the second house asked for strict compliance with **section 40** of the **Act**. He was represented by Mr. Odhiambo. He proposed that Muthera Farm be shared so that David Njunu Koinange gets 500 acres, Paul Mbatia Koinange gets 500 acres, George Kihara Koinange gets 500 acres, estate of Mary Wambui Koinange gets 200 acres, estate of Elizabeth Wairimu gets 100 acres (after providing for another 100 acres the deceased had given to her), estate of Isaac Njunu Koinange gets 500 acres, estate of Solomon Kihara Koinange gets 500 acres, estate of Florence Wanjiru Mbiyu gets 200 acres, David Waiganjo Koinange gets 600 acres, Lennah Wanjiku Koinange 410 acres, Margaret Njeri Mbiyu 300 acres and Eddah Wanjiru Mbiyu 100 acres; Ehothia Farm be shared so that David Njunu Koinange gets 70 acres, Paul Mbatia Koinange 70 acres, George Kihara Koinange 70 acres, estate of Mary Wambui Koinange 10 acres, estate of Elizabeth Waruini 30 acres, estate of Isaac Njunu Koinange 70 acres, estate of Solomon Kihara Koinange 30 acres, estate of Florence Wanjiku Mbiyu 30 acres, David Waiganjo Koinange 70 acres, Lennah Wanjiku Koinange 65 acres, Margaret Njeri Mbiyu 65 acres and Eddah Wanjiru Mbiyu 65 acres; Waehothia Farm to be shared so that David Njunu Koinange gets 20 acres, Paul Mbatia Koinange 20 acres, George Kihara Koinange 20 acres, estate of Mary Wambui Koinange 6 acres, estate of Elizabeth Waruini 6 acres, estate of Isaac Njunu Koinange 20 acres, estate of Solomon Kihara Koinange 6 acres, estate of Florence Wanjiku Mbiyu 6 acres, David Waiganjo Koinange 20 acres, Lennah Wanjiku Koinange 20 acres, Margaret Njeri Mbiyu 20 acres and Eddah Wanjiru Mbiyu 20 acres; regarding Closeburn Estate, David Njunu Koinange gets 15 acres, Paul Mbatia Koinange 15 acres, George Kihara Koinange 15 acres, estate of Mary Wambui Koinange 3 acres, estate of Elizabeth Waruini 5 acres, estate of Isaac Njunu Koinange 24 acres, estate of Solomon Kihara Koinange 10 acres, estate of Florence Wanjiku Mbiyu 5 acres, David Waiganjo Koinange 45 acres, Lennah Wanjiku Koinange 30 acres, Margaret Njeri Mbiyu 15 acres and Eddah Wanjiru Mbiyu 15 acres; Lunga Lunga plot to be sold and proceeds to be utilised to pay debts; LR No. 216 to go to David Njunu Koinange, Kiambaa/Thimbigua/819 to go to estate of Isaac Njunu Koinange 10 acres, Solomon Kihara Koinange 25 acres, estate of Florence Wanjiku Mbiyu 8.5 acres, David Waiganjo Koinange 30 acres, Lennah Wanjiku Koinange 25 acres, 4.5 acres to be given to Tangeluzi Ventures Limited out of Barbara's share and consider she did not account for the money, and Isaac Njunu Koinange to get less in view of the 16 acres the deceased had gifted him in Githunguri Farm (LR No. 1232/12); Kiambaa/Waguthu/2334 to go to Eddah Wanjiru Mbiyu; Kiambaa/Karuri/T.297 to go to the estate of Elizabeth Waruini; Nyahururu Oljororok 25 acres to be sold and proceeds shared equally to all beneficiaries; Banana Hill plot to go to David Njunu Koinange, Gathanga plots in Kanunga Farmers Company to go to David Njunu Koinange; 10 plots in Closeburn to go each to Paul Mbatia Koinange, George Kihara Koinange, estate of Elizabeth Wairimu, estate of Isaac Njunu Koinange, estate of Florence Wanjiku Koinange, David Waiganjo Koinange, Lennah Wanjiku Koinange, Margaret Njeri Mbiyu and Eddah Wanjiru Mbiyu. The shares in Koinange Investment Development Company and Koiri Limited to be sold and the proceeds shared equally to all the beneficiaries. He distributed the other shares in companies.

29. Lennah Wanjiku Koinange was represented by Mr Ochieng Oduol. Her primary interest was in Closeburn Estate where she stated she had invested heavily. She asked for 40 acres of the estate, and asked to be allowed to surrender commensurate share in other properties. She made a proposal on how the rest of the estate should be shared.

30. David Njunu Koinange of the 1st house made a proposal on how the estate of the deceased should be distributed. He was represented by Mr Mwenda Njagi. Paul Mbatia Koinange (represented by M/s Were) and the estate of Mary Wambui Koinange (represented by Mr Kiarie and Ms Eshaiso) from the first house made representations on the issue of distribution. The three proposals were substantially similar. George Kihara Koinange from the house was represented by M/s Janmohamed. According to him, Margaret Njeri Mbiyu and Eddah Wanjiru Mbiyu were each only entitled to life interest, the latter over Waehothia Farm and the former on the property to be determined by the court. He proposed how the remaining beneficiaries were to inherit.

31. David Njunu Koinange asked that any beneficiary who had intermeddled with the estate be made to pay and, if possible, his/her share be reduced accordingly. In regard to Muthera Farm he asked that he, Paul Mbatia Koinange and George Kihara Koinange do get 572 acres each, estate of Mary Wambui Koinange, estate of Elizabeth Wairimu, estate of Florence Wanjiku Koinange do get 300 acres each, estate of Isaac Njunu Koinange gets 510 acres, David Waiganjo Koinange gets 400 acres and estate of Solomon Koinange, Lennah Wanjiku Koinange, Margaret Njeri Mbiyu and Eddah Wanjiru Mbiyu each gets 300 acres; in Closeburn Estate, David Njunu Koinange gets 24 acres, Paul Mbatia Koinange 22 acres, George Kihara Koinange 22 acres, estate of Mary Wambui Koinange 16 acres, estate of Elizabeth Wairimu 12 acres, estate of Isaac Njunu Koinange 14 acres, estate of Florence Wanjiku Koinange 16 acres, David Waiganjo Koinange 14 acres, estate of Solomon Kihara Koinange 14 acres, Lennah Wanjiku Koinange 12 acres, Margaret Njeri Mbiyu 16 acres and Eddah Wanjiru Mbiyu 13 acres; Waehothia Farm to be shared so that David Njunu Koinange gets 23 acres, Paul Mbatia Koinange 21 acres, George Kihara Koinange 21 acres, estate of Mary Wambui Koinange 10 acres, estate of Elizabeth Wairimu 10 acres, estate of Florence Wanjiku Koinange 10 acres, estate of Isaac Njunu Koinange 20 acres, David Waiganjo Koinange 20 acres, estate of Solomon Kihara Koinange 10 acres, Lennah Wanjiku Koinange 10 acres, Margaret Njeri Mbiyu 15 acres and Eddah Wanjiru Mbiyu 15 acres; for Ehothia Farm, David Njunu Koinange gets 75 acres, Paul Mbatia Koinange 73 acres, George Kihara Koinange 74 acres, estate of Mary Wambui Koinange 31 acres, estate of Elizabeth Waruini 31 acres, estate of Florence Wanjiku Koinange 31 acres, estate of Isaac Njunu Koinange 47 acres, David Waiganjo Koinange 66 acres, estate of Solomon Kihara Koinange 31 acres, Lennah Wanjiku Koinange 31 acres, Margaret Njeri Mbiyu 42 acres and Eddah Wanjiru Mbiyu 42 acres; Ikinu Farm (LR No. 216) to go to David Njunu Koinange; Kiambaa/Waguthu/2324 to be shared equally among David Njunu Koinange, Paul Mbatia Koinange and George Kihara Koinange; Kiambaa/Thimbigua/819 to be shared so that David Njunu Koinange gets 11 acres, Paul Mbatia Koinange 11 acres, George Kihara Koinange 10 acres, estate of Mary Wambui Koinange 7 acres, estate of Elizabeth Waruini 7 acres, estate of Florence Wanjiku Mbiyu 7 acres, estate of Isaac Njunu Koinange 10 acres, David Waiganjo 10 acres, estate of Solomon Kihara Koinange 7 acres Lennah Wanjiku Koinange 7 acres, Margaret Njeri 7 acres; Nyahururu Oljororok, Bibirioni Limuru, Oceanic View Beach Hotel, Koiri Investments, Koinange Investment Development Limited, Koiri Investments Limited, Mbo-i-Kamiti Ltd, Danson Macharia Saw Mills Ltd, BAT and Limuru Dairies be sold and the proceeds shared equally among all the beneficiaries.

He made proposals for the other properties.

32. Stella Wanjiku Kibaara and Stephen Mungai Kibaara are children of the late Elizabeth Waruinu and were represented by Mr Kiarie and Ms Eshaiso. Their proposal was that each of the large properties be shared equally among the 12 beneficiaries, and the shares and smaller properties to be sold and the proceeds be shared equally.

33. I have considered these proposals, and all the proposals made in the filed sworn affidavits.

34. The distribution of the estate of the deceased is not an easy exercise. One reason is that the extensive estate has properties whose values are not known. That presents a challenge when the court seeks to be fair and equitable to the beneficiaries. One can easily tell, however, that Closeburn Estate is the flagship property of the estate. Its value can be discerned from the amount that was generated from the sale of portions of it, including the recent sale of 2 acres by Lennah Wanjiku Koinange. And yet, it is basically the 2nd house that has settled on the estate. There is, however, general agreement that each of the large properties be benefited by all the beneficiaries. These are Muthera Farm, Closeburn Estate, Ehothia Farm, Waehothia Farm and Thimbigua Farm. What is not agreed is how much of each they will each get.

35. Secondly, the beneficiaries have extensively developed the portions they respectively occupy, or have leased some of these portions to 3rd parties who have done extensive developments. This will make the actual sharing on the ground a painful and messy exercise. Some of the beneficiaries undertook extensive developments with the intention of influencing the distribution of the estates.

36. Thirdly, quite a substantial portion of the estate will have to be set aside for sale so that the liabilities and administration expenses are paid from the proceeds.

37. Fourthly, there were a lot of complaints that either the administrators or some of the beneficiaries had intermeddled with parts of the estate by either selling, leasing and managing without authority and not accounting to the estate. For instance, there are many third parties occupying Closeburn Estate on the basis that they are tenants. One does not know how much rent is paid, and there is no account. There was evidence that David Njunu Koinange, George Kihara Koinange, Margaret Njeri Mbiyu and Eddah Wanjiru Mbiyu each has leased portions of either Ehothia Farm or Waehothia Farm. How much rent has been got remains known only to themselves. It was said that Oceanic Hotel and Ocean View Hotel have been sold by Eddah Wanjiru Mbiyu and Margaret Njeri Mbiyu. It is not known where the proceeds went. Koinange Investments and Development Limited operates prime space in the City of Nairobi and only Eddah Wanjiru Mbiyu knows how much money comes from the business and how it is applied. David Waiganjo Koinange sold a property at Dagoretti and did not account to the estate. Barbara Wambui Koinange sold a property to Tangulizi Ventures Limited from Kiambaa/ Thimbigua/819, and has leased portions of Closeburn Estate. The list is long. All that I wish to say is that, if the court were asked to demand for accounts from each of these beneficiaries the resultant applications and counter applications would further delay and complicate the distribution of the estate of the deceased.

38. The beneficiaries of the estate of the deceased are twelve (12) as follows:-

First house:

- a) Loise Njeri Mbiyu, (widow) (deceased);
- b) David Njunu Koinange-son;
- c) Paul Mbatia Koinange-son;
- d) George Kihara Koinang-son;
- e) estate of Mary Wambui Koinange (survived by Stella Njeri); and
- f) estate of Elizabeth Waruinu (survived Stella Waweru Kibaara and Stephen Mungai Kibaara);

Second house:

- a) Florence Wanjiku Koinange (survived by Barbara Wambui Koinange);
- b) estate of Isaac Njunu Koinange (survived by widow Joyce Njeri Njunu and five children Barbara Wambui, Belinda Tati, Cedric Mbiyu, Shirley Wanjiku and Wendy Wanjiru);
- c) David Waiganjo Koinange;
- d) estate of Solomon Kihara Koinange (survived by widow Susan Kamani Kihara and child Angel Wambui Kihara); and
- e) Lenah Wanjiku Koinange.

Third house

- a) Margaret Njeri Mbiyu

Fourth house

a) Eddah Wanjiru Mbiyu

39. The children of the deceased have equal worth, irrespective of their sex or marital status. This is important because the various proposals by the male children appear to indicate that they are entitled to more benefit from the estate when compared to their sisters. First, **section 40** makes no reference to the sex of the children. It makes no reference to their marital status. Infact, **section 38** expressly decrees equal sharing by the children. But more important **Article 27(1)** of the Constitution provides that every person is equal before the law, and is entitled to equal treatment. **Article 27(4)** prohibits discrimination on the basis of sex or marital status.

40. In sharing the estate, I will consider where each beneficiary is presently settled and the developments being undertaken thereon so that there is minimum disruption.

41. When the proposals were being made, the court was asked to preserve land for roads, open spaces, police stations and other amenities. Particular amounts of land were proposed to be set aside for these amenities. As far as possible, I will make provision for them. Where what has been provided will be more than the required, the extra land will be proportionately shared among the beneficiaries. Where it turns out to be less, the beneficiaries will proportionately contribute to the required acreage.

42. The first charge on the estate of the deceased are liabilities and the costs of administration of the estate. I direct that LR 209/8868 IR 3521 Lunga Lunga Road, 800 acres of Muthera Farm, 10 acres of Ehothia Farm and 5 acres of Wehothia Farm shall be sold and the proceeds banked into a joint account to be opened and operated by the four administrators. From that account the liabilities and the costs of the administration of the estate, as will be determined by the court, shall be paid. The balance of the proceeds shall be shared equally by all the 12 beneficiaries of the estate of the deceased.

43. Muthera Farm (LR No. 8669/3 Mau Narok) is 4292 acres. 800 acres of it shall be sold to cover liabilities, debts and costs of administration of the estate. 150 acres shall cover roads, police station, a school and other common amenities. That will leave 3342 acres which shall be shared equally among the 12 beneficiaries. That means, each beneficiary shall get 278.5 acres.

44. Ehothia Farm (LR No. 151/3 is 645 acres. 10 acres will be sold as stated above. 10 acres will go to roads and police station. The balance is 625 acres. Margaret Njeri Mbiyu lives here. David Njunu Koinange and George Kihara Koinange (basically the 1st house) occupy portions of this land. I ask that Margaret Njeri Mbiyu get 70 acres, David Njunu Koinange 60 acres, Paul Mbatia Koinange 60 acres, George Kihara Koinange 60 acres, estate of Mary Wambui Koinange as represented by Stella Njeri gets 60 acres and estate of Elizabeth Waruini as represented by Stella Wanjiku Kibaara and Stephen Mungai Kibaara shall each get 60 acres. The balance of 255 shall be equally shared by estate of Florence Wanjiku Koinange as represented by Barbara Wambui Koinange, the estate of Isaac Njunu Koinange as represented by Joyce Njeri Njunu, David Waiganjo Koinange, estate of Solomon Kihara Koinange as represented by widow Susan Kihara, Lennah Wanjiku Koinange and Eddah Wanjiru Mbiyu. Each will get 42.5 acres.

45. LR No. 150/6, 3688/1 and 3688/4 (Waehothia Farm) is 198 acres. 5 acres will be sold to pay liabilities. 5 acres shall be preserved for roads and common facilities. Eddah Wanjiru Mbiyu occupies part of this Farm. She will get 20 acres of the Farm. That leaves 168 acres. David Njunu Koinange, Paul Mbatia Koinange, George Kihara Koinange, the estate of Mary Wambui Koinange as represented by Stella Njeri and the estate of Elizabeth Waruini as represented by Stella Wanjiku Kibaara and Stephen Mungai Kibaara shall each get 18 acres. That leaves 78 acres which shall be shared equally among Margaret Njeri Mbiyu, the estate of Florence Wanjiku Koinange as represented by Barbara Wambui Koinange, the estate of Isaac Njunu Koinange as represented by Joyce Njeri Njunu, David Waiganjo Koinange, the estate of Solomon Kihara Koinange as represented by Susan Kihara and Lennah Wanjiku Koinange. Each will get 13 acres.

46. Kiambaa/Waguthu/2324 was the deceased's inheritance from his father which the elders gave to Eddah Wanjiru Mbiyu, but the Court of Appeal ruled it belonged to the estate. Eddah Wanjiru Mbiyu will get ½ acre of the parcel and the balance shall be shared equally by the other 11(eleven) beneficiaries.

47. Kiambaa/Thimbigua/819 is 98 acres. 4 acres of it will cover roads and public facilities, and 1 (one) acre will cater for burial/memorial grounds for the 2nd house. David Njunu Koinange and the estate of Isaac Njunu Koinange as represented by Joyce Njeri Njunu will each get 1 (one) acre. Paul Mbatia Koinange, George Kihara Koinange, the estate of Mary Wambui Koinange as represented by Stella Njeri, the estate of Elizabeth Waruini as represented by Stella Wanjiku Kibaara and Stephen Mungai Kibaara, the estate of Solomon Kihara Koinange as represented by Susan Kihara, the estate of Florence Wanjiku Koinange as represented by Barbara Wambui Koinange, David Waiganjo Koinange, Lennah Wanjiku Koinange, Margaret Njeri Mbiyu and Eddah Wanjiru Mbiyu will each get 9.1 acres. From the share of the estate of Florence Wanjiku Koinange, 4½ acres will go to Tangelizi Ventures Limited. David Njunu Koinange and the estate of Isaac Njunu Koinange will be compensated by what they will get in paragraph 50 below.

48. There was no agreement on the acreage of Closeburn Estate. When the deceased died it was 640.25 acres. 291 was sold to the Aga Khan Group, 100 acres to Centum Ltd and 3 acres to Karura Community Chapel Registered Trustees. That should leave 246 for distribution. However, the proposed distributions by David Njunu Koinange, Paul Mbatia Koinange and Stella Njeri state that Closeburn is 242 acres. George Kihara says it is 177 acres. The family of late Elizabeth Waruini says it is 176 acres, David Waiganjo Koinange says it is 200 acres, widow of Solomon Kihara Mbiyu says it is 220 acres and Lennah Wanjiku Mbiyu says it is 176 acres. I have indicated that Closeburn Estate is the most prime property that the deceased left. I will proceed on the basis that, since only the three transactions above were authorised by the court, the Estate measures 246 acres. At the same time I direct that the administrators move with due speed to measure the acreage of the estate using a government surveyor. The purpose will be the recovery of any land that the Estate may have lost, and to cause the prosecution of any guilty party. If the Estate is found to be less than 246 acres, the beneficiaries will proportionately lose their shares. Whatever is recovered will be proportionately shared.

49. From the court's visit, Closeburn has substantially been occupied by the 2nd house and by parties who have leases. It was apparent that

David Waiganjo Koinange and Lennah Wanjiku Koinange have for long controlled substantial portions of the Estate, and benefitted from it to a very large extent. The rest of the beneficiaries from the 2nd house have not been as lucky. I have indicated in the foregoing that all the children of the deceased are beneficiaries of his estate, and that each child has an equal claim. Consequently, the estate of Florence Wanjiku Koinange as represented by Barbara Wambui Koinange, the estate of Isaac Njunu Koinange as represented by Joyce Njeri Njunu, the estate of Solomon Kihara Koinange as represented by Susan Kihara, David Waiganjo Koinange and Lennah Wanjiku Koinange shall each get 30 acres. David Njunu Koinange, Paul Mbatia Koinange, George Kihara Koinange, the estate of Mary Wambui Koinange as represented by Stella Njeri, the estate of Elizabeth Waruinu as represented by Stella Mungai Kibaara, Margaret Njeri Mbiyu and Eddah Wanjiru Mbiyu shall each get 12 acres. 12 acres shall be reserved for roads and public amenities. The sharing of Closeburn Estate shall ensure that each of the 12 beneficiaries gets at least 1 (one) acre touching the Limuru Highway or tarmac road.

50. LR No. 1232/13 Githunguri will go to the estate of Isaac Njunu Koinange as represented by Joyce Njeri Njunu as was decreed by the deceased before his death. LR No. 216 (Ikinu Farm) shall go to David Njunu Koinange.

51. The 32000 shares in Koinange Investments Development Limited, the 508 shares in Kenyattu Trading Company Limited, shares at Limuru Dairy Limited, shares in ICDC, shares in Danson Macharia Saw Mills Limited, shares in Mbo-i-Kamiti Limited, shares in Theta Group Limited shares in KGGCU Ltd, shares in KPCU, shares in Koiri Limited, any other shares, Kiambaa/Karuri/T.297, Banana Hill Plot, Gathangu plots (Kanunga Farmers Company), Kiambaa Kawainda, and any other property not indicated above, shall all be sold and the proceeds shared equally among the 12 (twelve) beneficiaries.

52. If Kshs.284,000,000/=, or any amount of it, becomes available, it shall be shared equally among the 12 (twelve) beneficiaries.

53. Where any part of the estate has been given to the estate of Elizabeth Waruinu, the same shall be shared equally to her children Stella Wanjiku Kibaara and Stephen Mungai Kibaara.

54. In conclusion, the joint grant issued to the administrators of the estate of the deceased is hereby confirmed in those terms.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 7TH day of MAY 2020

A.O. MUCHELULE

JUDGE