REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 839 OF 1998

IN THE MATTER OF THE ESTATE OF GACHAU NJOROGE (DECEASED)

JUDGMENT

1. I delivered a ruling herein on 15th August 2016, wherein I noted that the estate herein had been partially distributed through orders made on 19th October 2010 which confirmed the grant. The parties had entered into a consent on distribution of the estate. Two assets, being LR No. 209/7559/75 and Location 15/Mugeka/107, were left undistributed. The parties had been directed to file written submissions to assist the court in the distribution of the remaining assets. I noted that the 3rd and 4th administrators complied with the directions and filed written submissions, but the 1st and 2nd administrators did not. The 3rd and 4th administrators had submitted that the two assets be shared out amongst all the four sons, with the widow taking a life interest.

2. In the course of preparing the ruling dated 15th August 2016, I noted that although the deceased was said to have been survived by a daughter named Rosalind Wahito Gachau, from the pleadings and proceedings it appeared as if the said daughter was not involved in any way in the matter, I therefore directed that before I could decide the matter one way or the other the administrators satisfy me that the daughter had consented to being excluded from the distribution of the estate by having renounced her entitlement to the estate. .

3. The matter was mentioned on 25th January 2017, when the daughter, Rosalind Wahito Gachau attended court, and informed the court that she had not been involved in the proceedings, and that she had also not renounced her entitlement, and desired to get her share. Mr. Kariu, who appeared in the matter for the 1st and 2nd administrators, informed the court that there were two other daughters of the deceased, Beatrice Muthoni Kiarie and Rosemary Wambui Kamau. I directed that the two other daughters be availed in court at a later date to state their position.

4. The two daughters, that is to say Beatrice Muthoni Kiarie and Rosemary Wambui Kamau, were availed in court on 28th February 2017. They said that they did not know why they asked to come to court, adding that they had been unaware that the matter had been in court since 1998. Whereupon, I directed that they be served with the application for confirmation of grant so that they could be brought to speed in terms of what had been going on with regard to the estate.

5. The parties were not able to agree on distribution of the estate. None of the daughters filed any affidavits to address the distribution of the estate. I opted to hear all the parties orally.

6. The oral hearing commenced on 27th June 2017. The first in the stand was Charles Macharia Gachau. He was one of the administrators who had filed the application for confirmation. He stated that the deceased had distributed his property amongst his four sons. Loc 15/Mugeka/560 he alleged was distributed in 1986 between the four sons, pointing out that the widow had not been given anything in that distribution. Loc 15/Mugeka/106, he said, was distributed next in 1987, it was also shared out four ways. Loc 15/Mugeka/T126 was distributed in 1994 amongst three sons, and he developed his portion in 2004. Loc 15/Mugeka/107, he said, was where he had his home, having put it up in 1979 after being shown where to do so by the deceased. The deceased was said to have said that any child of his named after him be given a share in Loc 15/Mugeka/107. He stated that even if he is given a share in Loc 15/Mugeka/107 he shall give it to his son named after the deceased. Regarding LR No. 209/7559/75, he said the deceased had directed that they complete development of the plot by constructing two additional rooms. The rent from the property was to be shared out between three sons and the widow of the deceased. He complained that he and their stepsister had been sidelined in the sharing of the rent. He complained too that he never got a share of the dividends from the firms where the deceased had some shareholding. He said that they had agreed before Nambuye J. on how to distribute the estate, save for the two properties, that is to say LR No. 209/7559/75 and Location 15/Mugeka/107. He asserted that according to the deceased only four persons were entitled to share the property, that is to say the sons, and therefore those are the only persons who ought to be allocated shares. He said that Rosalind Wahito's son was to be allocated a portion of LR No. 209/7559/75 according to the deceased. He asserted that the widow of the deceased was the one who developed Location 15/Mugeka/T126. He said that the widow was to get a portion of Location 15/Mugeka/T126, and so was Rosalind Wahito so long as she was not married. If she did get married the plot was to be shared by the sons equally. He stated that the deceased had said that should Rosalind Wahito get married she was not to be allocated anything out of the estate. She did get married, according to him, to a Francis Muchoki, and for that reason she was not allocated anything out of the estate. He asserted that unmarried daughters were entitled to a share of their father's property but not the married daughters. He stated that any married daughter who got chased away from her matrimonial home by her husband could come back to the estate to live with the widow of the deceased on the land bought by the widow. He further stated that the daughters never came to the deceased during his lifetime to ask for

their share of the land. On the shares in firms he said that the same were not distributed, and that he was waiting for the court to distribute the same.

7. James Karori Gachau testified next. He stated that the deceased had distributed his property in 1994. He did so in a sitting that he had with two of the sons and the widow. The two sons were said to be Stephen Maina Gachau and himself, James Karori Gachau. He said they were the only persons available at the time. The deceased had allegedly shown each one of them their respective portions, he showed them where to farm. A surveyor was not there so each of them were not given individual titles, and therefore the assets were still in the names of the deceased. He said that Loc 15/Mugeka/560 was showed to Stephen Maina Gachau, James Karori Gachau and Charles Macharia Gachau. Loc 15/Mugeka/106 was, according to him, shared between Margaret Mbere Gachau, James Karori Gachau and Charles Macharia Gachau. Loc 15/Mugeka/T126 was allegedly showed to Stephen Maina Gachau, James Karori Gachau and Charles Macharia Gachau. Loc 15/Mugeka/107, where the homestead was located, was occupied by Margaret Mbere Gachau, James Karori Gachau and Charles Macharia Gachau. Stephen Maina was said to have had moved out and put up a home on the portion of Loc 15/Mugeka/106 that the deceased had showed him, although he continued to farm on Loc 15/Mugeka/107. He stated that those were the assets that the deceased had distributed during his lifetime. Regarding LR No. 209/7559/75, the deceased was said to have had directed that the money received as dividends on his shares in Fig Tree Hotel Limited, Mwea Trading House and New Kiona Hotel Limited be ploughed to complete construction of the remaining rooms in that property. He said Loc 15/Mugeka/560 was distributed in 1995, he was given his portion of Loc 15/Mugeka/106 in 1989, he built on Loc 15/Mugeka/107 in 1980 and began to construct on Loc 15/Mugeka/T126 in 2004. He said that the distribution before Nambuye J was by consent and followed the distribution instructed by the deceased. He conceded that the deceased had three daughters, to whom he did not allocate anything. He had only said that if Rosalind Wahito did not get married then they could get her something following Kikuyu customary law. The deceased allegedly did not talk about the other two daughters, Beatrice and Rosemary, as they were already married by then and lived on their husband's property. He said that if the two were unhappy with the way the deceased shared out his property they ought to have raised it with him during his lifetime. He stated that they were all along aware of the proceedings. He said that according to Kikuyu customary law married daughters could not inherit from the estate of their father. He asserted that the estate ought to be distributed as per the earlier orders of the court. He complained that he had not been receiving his share of the rents collected from the rented assets of the estate and blamed Stephen Maina Stephen Maina for it. He stated that although Rawal J. had made orders for deposit of rents in court, those orders had not been complied with.

8. Stephen Maina Gachau testified next. He said that he was eldest son of the deceased. He explained that Loc 15/Mugeka/560 was ancestral land that the deceased had inherited from his parents, while the other two, Loc 15/Mugeka/106 and 107, was property that he had bought. He stated the deceased had subdivided Loc 15/Mugeka/560, in a year, he could not recall between himself, Charles Macharia and James Karori. The deceased used to grow coffee on the land, and he was also buried there. Loc 15/Mugeka/106 was allegedly shared out between himself, Charles Macharia, James Karori and Margaret Mbere. He put up a permanent home on that parcel of land after it was allocated to him. Loc 15/Mugeka/T126 was a commercial plot that the deceased allegedly gave to him, Charles Macharia and James Karori. He developed a portion of the said plot with his retirement funds, and so did Charles Macharia and James Karori. The deceased had also given directions on LR No. 209/7559/75, the widow was to use the money raised from dividends to complete development on it. Rosalind Wahito and Charles Macharia had been given a servants' quarter on LR No. 209/7559/75 to reside thereon, but they disagreed and fought. He described Loc 15/Mugeka/107 as a small parcel of land, measuring less than an acre, where the sons had their houses. He said that his son was buried there, but he was not claiming a share of it. He said that he was not shown a portion in Loc 15/Mugeka/107 and that was why he was laying no claim to it. He said what was shown to him was in Loc 15/Mugeka/106 and 560. He proposed that as Rosalind Wahito had not married, her son be given a portion of land there.

9. Margaret Mbere Gachau, the widow, followed. She stated that the deceased had shared out his property as stated by Stephen Maina in his evidence. She averred that the sons were given their shares in the firms. She complained that the sons were after the share allocated to her. She said LR No. 209/7559/75 was what she wanted the court to allow to be helping herself with. The deceased had also said that the sons help themselves with the dividends from the shares. She said that the deceased wanted Rosalind Wahito's son to be given the portion of Loc 15/Mugeka/107 where he, the deceased was growing coffee. She stated that she was allocated the bank account at Barclays Bank, which was later changed to her name. She said that she loved her sons and daughters equally and would distribute her property amongst them equally, however the deceased had distributed it in the manner he did and she preferred that the estate be distributed just as he wished. She said the sons ought to go to the portions that were allocated to them. For the daughters she said they should get what belonged to her. She said that she had two assets, being Loc 15/Mugeka/87 and T35. She said that the deceased did not give his daughters any assets, and she did not question him about it. She said distribution should follow the wishes of the deceased, adding that she had asked the sons to begin moving out to the portions of land that the deceased had allocated to them.

10. Beatrice Muthoni Gachau testified next. She stated that although she had heard about the matter she was not involved in it until the court asked that she attend court. She said that the children were never summoned by the widow after the deceased died so that they could agree on distribution. She only used to hear the widow say that the deceased had shared out his estate. She said that she was married with children, and that she used to live with her husband. She confirmed that one other daughter of the deceased was married but the third one was not, and lived in Nairobi. She said that she had gotten nothing out of the estate of the deceased. She said she wanted the shares in the firms to be distributed. She said she had no problem with the way the farms were shared out.

11. Rosalind Wahito Gachau took the witness stand next. She said that she had been given nothing out of the estate, although the sons had been given farms and shares in the estate. She lamented that she did not have any land like the sons, saying that she was not married and had children just like them. She said that the deceased had given her a portion of Loc 15/Mugeka/107 where her mother lived. She stated that she was never involved in what the administrators did, and asked the court to intervene as the deceased never discriminated. She said that if she was given Loc 15/Mugeka/107 she would have no problem as she had no issues with the other portions of land and the way they were distributed to the sons. She stated that although the sons had houses on Loc 15/Mugeka/107 the said structures were temporary, and in any event they had been shown by the deceased where to put up homes. She stated that the only person who farmed on Loc 15/Mugeka/107 was the widow of the deceased. She said that Francis Muchoki Maina was not her husband even though they did have a child between them. She said that her other children were fathered by other men.

12. Rosemary Wambui Kamau was the last to take the witness stand. She averred that she was unaware of what was going on in the matter until the court asked that they be brought to court. She said that although she used to frequently interact with the widow and the sons, none of them ever briefed her about the goings on in the estate. She said she would have liked to get a share of the estate of her father given that

marriages fail, even of elderly women like herself. She stated that the deceased had distributed the ancestral land, leaving only one more, together with shares and LR No. 209/7559/75. She opined that the reason that he did not distribute everything was because he had daughters. She asserted that her father never said that she should not be given any property. She stated that whatever was not distributed should be shared to her. She conceded that she was married and lived with her husband, but complained that there were issues in her marriage which often necessitated that she fled the matrimonial home and sought refuge with her elder brother. She proposed that the remaining land and the shares in the firms be shared out equally. She conceded that she had not brought any application seeking equal distribution. She asserted that she was staking her claim to a share in the estate.

13. At the close of the oral hearing the parties were directed to file and exchange written submissions. The record reflects that the only written submissions on record were filed by the firm of Messrs. Njeru Nyaga & Company, the advocates on record for the 1st and 2nd administrators. I have read through and noted the arguments advanced in the said submissions.

14. It is not in dispute that the deceased herein died in 1995, long after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force. The sons of the deceased and the widow took the position that the estate ought to be distributed amongst the sons in keeping with Kikuyu customary law, and that according to that law daughters are not entitled to a share in the estate of their dead father except where they remain unmarried. I was not pointed to any case law or a treatise on the subject by a renown author on the subject nor was any expert in Kikuyu customs in that area called as a witness, but Kikuyu customary law on these matters is fairly notorious, and the positon stated by those parties is the correct position. Unfortunately, the same is of no application in this case, as the estate herein is subject to the provisions of the Law of Succession Act, and not Kikuyu customary law for the said customary law was ousted by section 2(1) of the Act, which states as follows –

> *'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 and testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.'*

15. The Law of Succession Act commenced operation on 1st July 1981, and the application of section 2(1) kicked in as from that date. From then onwards the estate of any person of Kikuyu descent dying would be subject to the provisions of the Act rather than Kikuyu customs. Kikuyu customs were not ousted altogether, however, for they remained relevant to the limited number of cases of estates persons who had died before 1st July 1981, and whose estates fell for administration after that date, by virtue of section 2(2) of the Law of Succession Act, which provides as follows –

> *'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.'*

16. Did the deceased die testate or intestate? That question is relevant for the purpose of determining which provisions of the Law of Succession Act on distribution would, be of application in the present case. The petition that was lodged herein on 27th April 1998 was for letters of administration intestate, and the grant made on 12th June 2007 was for letters of administration intestate. If the deceased had died testate, having made an oral or written will, the petitioners would have sought probate of the oral or written will of the deceased. After the grant of 12th June 2007 was made no application was placed before the court for admission of any will of the deceased. The grant that was sought to be confirmed through the application dated 27th June 2007 was that of the letters of administration dated 12th June 2007, and no mention was made in that application of any will having been made by the deceased.

17. I raise this issue because in the written submissions of the 1st and 2nd administrators, dated 19th September 2018, it is argued that the deceased had made an oral will, which hadcomplied with sections 5 and 9 of the Law of Succession Act, and was urged that the decision in *Banks vs. Goodfellow* (1870) LR 5 QB 549 was relevant. That submission was apparently founded on the claim that the deceased had sat with three members of his family whereat he distributed his estate. I was not directed to any case law but the 1st and 2nd administrators had in mind the position stated in *Re Rufus Ng'ethe Munyua (Deceased) Public Trustee vs. Wambui* (1977) KLR 177 and *Wambui & another vs. Gikonyo & another* (1988) KLR 445. However, the facts as presented did not establish the making of any valid oral will. In the first place, none of the witnesses were able to identify a particular date when the utterances that allegedly constituted the oral will were made. Yet the particular date is critical as the life of an oral will is only three months, according to section 9 of the Law of Succession Act, from the date when the utterances were made. The oral will is only valid if the deceased died within three months of his making the said utterances. Clearly, without a specific date as to when the utterances were made it would be impossible to compute the three months within which the deceased should have died for the alleged oral will to be valid. What is more, it would appear from the testimonies that several such utterances were made at diverse dates over diverse parcels of land, which would suggest, if the sons are to be believed that the deceased made several oral wills, and yet for all these alleged oral wills no specific dates were given.

18. The second issue is that no evidence was led to suggest that whatever wishes or desires or intentions expressed by the deceased were intended to take effect only after his demise. The individuals who testified about being present when the same were expressed appeared to suggest that the same were to take effect immediately. Indeed, it was suggested that some of the parties began to put up structures on or to utilize the portions allocated to them according to those alleged pronouncements. What constitutes a will is defined in section 3 of the Law of Succession Act to mean 'the … declaration by a person of his wishes or intentions regarding disposition of his property after his death'. There is nothing in the material that was placed before me which suggested that if the deceased made any statements or pronouncements concerning disposal of his property the same were intended to take effect only after his death.

19. The written submissions also make a pitch that the deceased had made gifts *inter vivos*, or, in ordinary parlance, lifetime gifts. I was referred to an excerpt from the *Halsbury's Laws of England* on the subject, as well as a decision in *Karanja Kariuki vs. Kariuki* (1983) eKLR. The excerpt from *Halsbury's Laws of England* says -

‘ … if a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.’

20. It is critical to observe that in *Halsbury’s Laws of England* it is envisaged that the donor ought to have taken steps that would have facilitated transfer of the property from himself to the donee. For movable property that would involve transfer of possession from the donor to the donee. For property subject to registration, which would be the case with respect to immovable property, that would involve preparation of documentation that would facilitate transfer on paper of the property from the donor to the donee. In the instant case, the subject property was land registered under the Registered Land Act, Cap 300, Laws of Kenya (now repealed). For an *inter vivos* transfer to be effective there must have been preparation of documents that would have facilitated transfer. That would involve survey work, subdivision or mutation, consents from the Land Control Board in accordance with the provisions of the Land Control Act, Cap 308, Laws of Kenya, and transfer documentation. That would, in my view, amount to the donor doing ‘everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property.’

21. All what was done in this case was that the deceased allegedly showed the sons portions of his land which he desired them to occupy and use. He did not take any further steps beyond that that would have helped the sons to transfer the property to their names. No survey work was done, no mutation or subdivision was done by a surveyor, no consents were sought and obtained from the relevant Land Control Board and the sons did not have in their hands any transfer documents duly executed by the deceased, so that they could say that the deceased had gifted to them the portions in question and that all what remained was registration of the transfers to enable issuance of title deeds in their names. For registered land it is not enough for one to just say that they were allocated land which was marked on the ground without more. For it to be an *inter vivos* gift there must have been actual transfer of the land to the donee or the doing of everything by the donor that would have facilitated transfer of the property to the donee without more. As it is there is nothing before me that suggests that the deceased made any *inter vivos* gifts to his sons. He might have had an intention to do so, but those intentions were not carried to effect, and therefore what I have before me could be described as a mere desire to make such a gift.

22. The decision in *Karanja Kariuki vs. Kariuki* (supra) was founded on Kikuyu customary law. The court found that under Kikuyu custom a father could distribute his estate during his lifetime to the children or he could give directions on the administration and distribution of his estate shortly before his death. The lifetime distribution would usually be where a son marries and is allocated a place to till or put up a home. The same would count as his share if the father did not revoke the gift before death. It was noted that the oral will would be made in the presence of elders of the family or *mbari* and the clan or *muhiriga* and close friends, and he would appoint an administrator or *muramati*, and would distribute his property item by item. The position stated in *Karanja Kariuki vs. Kariuki* (supra) was not similar to the facts before me. The pronouncement by the deceased was not before *mbari* and *muhiriga*, and he did not appoint a *muramati*. In any case, *Karanja Kariuki vs. Kariuki* (supra) was about an estate of a person who died before 1st July 1981, and therefore before the Law of Succession Act became operational. It is therefore of no application to the facts of the instant case. What is more is that customary Law was meant to deal with land held under customary tenure, but not registered land as in the instant case.

23. The material placed before me point to the fact that the deceased died intestate after 1st July 1981 without having make a valid will, whether orally or in writing. His estate therefore fell for distribution under Part V of the Law of Succession Act. He was survived by a widow and children, and therefore his estate was to be distributed amongst the said widow and children. He had three sons and three daughters. Children for the purpose of the Act refers to both male and female, sons and daughters. The Act, and Part V in particular, makes no distinction between the children as being male or female, sons or daughters, married or unmarried. They are all treated collectively, equally. None of them has a superior or prior right over the other, and none has a stake lesser than that of the other, whether based on gender or marital status or age. The provisions of Part V of the Act pitch for equal distribution amongst the children, in particular sections 35 and 38 of the Act. The underlining spirit of these provisions is equity in distribution between the children of the intestate regardless of their status. The said provisions say as follows –

‘35(1) …

(2) …

(3) …

(4) …

(5). Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, remarriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or equally divided among the surviving children.

36 …

37 …

38 Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.’

24. The tenor of the position taken by the sons and the widow in this case is that the estate ought to be distributed only amongst the sons. They say that the daughters are only entitled where they do not marry, and even then the share ought to go to their sons rather than to the daughters themselves. That is the classic customary law position. That position does not hold here as it has been overtaken by the coming into force of the Law of Succession Act, which provides for equal distribution. Besides the Law of Succession Act, there is also the Constitution of Kenya, 2010. Under Article 27 thereof every person is equal before the law and has a right to equal protection and equal benefit of the law. Under Sub-Article (3) men and women have the right to equal treatment. The parties hereto appear to still cling to a

position which belongs to a bygone era, where daughters were treated as children of a lesser god, where daughters ceased to be treated as children of their fathers once they got married, and the estates of their fathers would be distributed as if the daughters did not exist or were never born or did not matter. That is no longer the positon. Daughters have equal rights with sons when it comes to distribution of their father's estate, whether the daughters they are married or single. The fact that some are married does not matter at all. They are children of the deceased, just like the sons.

25. The daughters in the instant cause have treated in a very shabby manner. They have been subjected to discrimination and unequal treatment. They have been treated as if they did not exist or were never born or did not matter. The deceased had and was survived by three daughters, yet when representation was sought in the matter the administrators only disclosed one daughter, Rosalind Wahito Gachau, the existence of the other two, Beatrice Muthoni Kiarie and Rosemary Wambui Kamau, was suppressed or concealed. They were treated as if they did not exist or were never born. The non-disclosure was despite the very clear provisions of section 50(2)(g) of the Law of Succession Act and rule 7 (e)(i) of the Probate and Administration Rules, which require that in cases of intestacy the application for representation should disclose all the surviving children of the deceased. That should be all the children of the deceased whether they be male or female, or sons or daughters, whether married or not.

26. The daughters were treated similarly when the summons for confirmation of grant dated 27th July 2007 was presented before the court. None of the three daughters of the deceased were disclosed, not even the one disclosed in the petition, Rosalind Wahito Gachau. The deceased was said to have been survived by only four individuals, three sons, being Charles Macharia Gachau, Stephen Maina Gachau and James Karori Gachau, and the deceased's widow. The application no doubt violated rule 40(3)(a) of the Probate and Administration Rules, which requires that the affidavit in support of the application for confirmation of grant ought to contain information and particulars relating to the names, ages and addresses of all the children of the deceased by whom he was survived. Section 71 of the Act provides for confirmation of grants, and the proviso to section 71(2) states that the grant shall not be confirmed until the court was satisfied as to the respective identities of all the persons entitled and their respective shares. This ought to place a burden on administrators to make a disclosure to the court of all the persons beneficially entitled, and propose the shares allocated to them, see rule 40(4) of the Probate and Administration Rules. According to summons herein the daughters did not exist. Their existence was suppressed and concealed. A consent was recorded on 19th October 2010 before Nambuye J. where the estate was distributed amongst the three sons and the widow of the deceased to the exclusion of the three daughters. The three daughters were not disclosed to the Judge, whereupon the court proceeded as if the three did not exist or were never born or did not matter. Then there is rule 40(8) of the Probate and Administration Rules, which requires the administrators to obtain the written consents of the persons who are beneficially entitled, to support the application for confirmation of grant. The daughters were persons who were beneficially entitled and their consents ought to have been obtained. As it is, they did not count, and their consents were considered unnecessary.

27. During the oral hearing the sons were clearly indignant that I had caused the daughters to come to the fore and that I had given them a platform to stake a claim to the estate. I must point out that I, sitting as Judge, have a duty to do justice in accordance with the law and the Constitution. The relevant law that I must apply for the purpose of these proceedings is the Law of Succession Act. The matter is at the stage of distribution of the estate. The guiding provision is section 71. The proviso to section 71(2) directs me not to confirm the grant until I am satisfied as to identities of all the persons beneficially entitled and of the shares allotted to them in the estate. When the confirmation application was placed before me, the proposals on the table were that the estate be shared amongst the three sons. Looking at the petition it was evident that the deceased had been survived by a daughter yet that daughter was neither being provided for in the distribution nor involved at all in the distribution process, where she should have been required to either consent to the distribution solely to the sons as proposed, or file a deed renouncing her interest in the estate. Section 71 empowers me to postpone confirmation to ensure that the administrators do the right thing before the grant was confirmed, and that is all I did when I asked that the daughter, Rosalind Wahito, attends court so that she could state her position with regard to the distribution that was being proposed as required by the governing law. It was at her appearance that counsel appearing for some of the administrators disclosed that there were two other daughters whose names did not appear in any of the documents that had been filed in court. I was enjoined by the law to bring them on board so that they would also indicate whether or not they were interested in taking the shares in the estate that were due to them under section 35 in Part V of the Law of Succession Act.

28. It should be emphasized for the benefit of male children, or sons, of deceased persons, that sons do not have a superior right to the estate of their dead parent over the daughters. Both sons and daughters have equal right thereto. The estate is not for the sons to dole out to the daughters as they please. The rights of the daughters to access their parent's estate is not subject to the magnanimity or whims of the sons, it is not something to be given out gratuitously to them by the sons. Distribution should be in accordance with the law, which provides for equal treatment of the children of either gender.

29. The facts of the matter before me brings the case under the provisions of section 76 of the Law of Succession Act. A grant of representation may be revoked by the court on its own motion or on application on any of the grounds set out in section 76, where the process of obtaining the grant was defective or where the same was attended by fraud or misrepresentation or concealment of matter. Failure to disclose certain family members or concealing their existence amounts to a defect in the process to the extent that the same would not be in compliance with section 50(2)(g) of the Law of Succession Act and rule 7 (e)(i) of the Probate and Administration Rules, and would lead to a distribution of the estate to the exclusion of some survivors. It would also amount to obtaining a grant through fraud and misrepresentation to the extent that the court is misled into issuing a grant on the basis of wrong or false or incorrect information. This matter qualifies for revocation of the grant so that the whole process starts afresh where all the survivors would be on board.

30. This is an old matter, the deceased passed on in 1995, the cause was initiated in 1998, and the summons for confirmation of grant has been pending since 2007 when it was filed herein and the distribution outstanding since 2010 when Nambuye J made her orders. I shall refrain from revoking the grant to avoiding setting the parties years back. Instead I shall make orders that shall accommodate the interest of the three daughters of the deceased who were disinherited in the orders made on 19th October 2010.

31. In the consent order recorded before Nambuye J. on 19th October 2010, the four survivors had three landed assets, the shares in three firms and the money in the bank shared out amongst themselves. That left only two assets undistributed. The court required that the parties put in written submissions on the distribution of the said assets, that is to say LR No. 209/7559/75 and Loc 15/Mugeka/107. As the three daughters did not share in the rest of the assets, I shall order that these two assets be shared equally them, that is to say between Rosalind

Wahito Gachau, Beatrice Muthoni Kiarie and Rosemary Wambui Kamau. The grant on record shall be confirmed in the terms of the consent order of 19th October 2010 and of the order aforegoing. A certificate of confirmation of grant shall issue in those terms.

32. Any party aggrieved by the orders that I have just made shall have the liberty to challenge the same at the Court of Appeal within twenty-eight (28) days of the judgement. Each party shall bear their own costs.

PREPARED, DATED AND SIGNGED AT KAKAMEGA THIS 31st DAY OF January, 2019

W. MUSYOKA

JUDGE

DATED, SIGNED and DELIVERED at NAIROBI this 15th DAY OF February, 2019

ASENATH ONGERI

JUDGE