



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 336 OF 2011

IN THE MATTER OF THE ESTATE OF KAGIRI MUKUA (DECEASED)

JUDGMENT

1. Kagiri Mukua, the deceased, died on 2nd September 2001 and thereafter, Leah Waithera Kagiri and Margaret Njambi Kagiri, widow and daughter of the deceased, respectively, requested for citations to issue upon the other children of the deceased to accept or refuse letters of administration. The proposed citors lodged a petition for grant of letters of administration intestate on 21st February 2011, and a grant was accordingly made to the two of them on 26th October 2011. It was amended on 15th November 2016 to include Nelson Ndung'u Kagiri and Ruth Wanjiku Muiruri, the 1st and 2nd applicants herein, son and daughter of the deceased, respectively, who substituted Leah Waithera Kagiri. The grant is yet to be confirmed but there is a pending summons therefor dated 25th August 2017, amended on 21st June 2018 and filed on 25th June 2018.

2. The petition for grant of letters of administration intestate reveals that the deceased was polygamous, having married three wives, namely: Leah Waithira Kagiri, Ng'endo Kagiri and Wambui Kagiri. Ngendo Kagiri has since remarried. Wambui Kagiri passed away in the year 2006. The deceased is said to have had twenty-one (21) children between the three wives. The children of Leah Waithira Kagiri are Wanjiku Kagiri, Njeri Kagiri, Ndirangu Kagiri, Ndungu Kagiri, Stephen Ngaruiya Kagiri, Margaret Njambi Kagiri, Wanjiru Kagiri and Wambui Kagiri. The children of Ngendo Kagiri are Wanjiku Kagiri and Lucy Nyaguthii. The children of Wambui Kagiri are Wangui Kagiri, Wanjiku Kagiri, Wanjiru Kagiri, Njeri Kagiri, Nelson Ndungu Kagiri, Wangari Kagiri, Boniface Ngaruiya Kagiri, Muthoni Kagiri, Teresia Wanjiku Kagiri, Bairo Mwhaki Kagiri and Kariuki Kagiri. The petition also lists Kagiri Njambi, a grandson, and Waithira Kamau, a daughter-in-law. The deceased is said to have died possessed of three assets, being Githunguri/Kiairia/2132, 2134 and 2136.

3. On 16th May 2012, three sons of the deceased, namely Nelson Ndungu Kagiri, Justus Ndungu Kagiri and Stephen Ngaruiya Kagiri filed a summons for revocation of the grant issued on 26th October 2011 arguing that the administrators were all from the same home and that consents from other survivors had not been obtained nor filed and that not all assets making up the estate had been listed. The court ruled on 10th July 2015 that the non-completeness of the schedule of assets was not fatal to the petition as the defect was curable by updating the schedule of assets by introducing into the list details of the assets omitted. The court further ruled that the administrator, being widow and child, were not bound to comply with Rule 7(7) of the Probate and Administration Rules because, as per section 66 of the Law of Succession Act, they were entitled to take out a grant as matter of priority and preference. The court then made orders amending the grant made on 26th October 2011 to accommodate representatives from each of the houses. The administrators named were directed to work on a comprehensive schedule of assets making up the estate of the deceased.

4. What is for determination is a summons for confirmation of grant. In the amended summons for confirmation of grant dated 21st June 2018, filed on 25th June 2018, by the applicants, it was indicated that the deceased owned the following properties: Kijabe/Kijabe-Block 1/2793 and 2794, Githunguri/Kiairia/972, 2132 and 2136, Githunguri/Rioki/T119, 4 Githurai plots, 4 shares in Kiairia Farmers Company, and 189 shares in Rioki Estate, Kiambu. The said Summons provides for a schedule for distribution of the property as follows: -

- a) Githunguri/Kiairia/2132 – Margaret Njambi Kagiri and George Ndirangu Kagiri, equally, but with the plot with the permanent house being given to Margaret Njambi Kagiri;
- b) Githunguri/Kiairia/972 – Ruth Wanjiku Muiruri and Ruth Wanjiku Kamau, equally;
- c) Githunguri/Rioki/T.119: (i) eleven shares each to Margaret Njambi Kagiri, Joyce Wangui Kagiri, Josephine Wanjiru Kagiri, Naomi Njeri Kagiri, Evaline Wangari Kagiri, Teresiah Nyokabi Kagiri, Violet Mwhaki Kagiri, Ruth Wanjiku Muiruri, Jane Waithera Kamau, Elizabeth Wambui Kagiri, Beatrice Muthoni Kagiri, Lucia Wanjiku Kagiri, Hannah Njeri Waiharo, Josephine Wanjiru Njoroge and Ruth Wanjiku Kamau; (ii) 6 shares each to Daniel Kagiri Nyaguthii and Joseph Ndungu Nyaguthii for Margaret Njambi (deceased); and (iii) 12 shares to Daniel Kagiri Nyaguthii for Margaret Njambi (deceased);
- d) Shares in Kiairia Farmers Company – to Nelson Ndungu Kagiri, Stephen Ngaruiya Kagiri, Naomi Njeri Kagiri, Boniface Ngaruiya Kagiri, Regina Mumbi Ndungu (administrator for Justus), Gideon Kariuki Kagiri, George Ndirangu Kagiri and Margaret Njambi Kagiri, equally;

e) Plots in Githurai – (i) A59 (125 X 55 sq. ft.) to Josephine Wanjiru Kagiri, Naomi Njeri Kagiri, Violet Mwihaki Kagiri, Evaline Wangari Kagiri, Teresia Nyokabi Kagiri and Beatrice Muthoni Kagiri; (ii) 740 (50 X 50 sq. ft.) to Joyce Wangui Kagiri and Margaret Njambi Kagiri; (iii) 723(50 X 50 sq. ft.) to Elizabeth Wambui Kagiri and Hannah Njeri Waiharo; and (iv) 724 (50 X 50 sq. ft.) to Josephine Wanjiru Njoroge and Lucia Wanjiku Kagiri;

f) Githunguri Kiairia/2136 – to Jane Waithera Kamau for Geoffrey Kamau Kagiri(deceased); and

g) Kijabe/Block 1/2794/2793 – to Josephine Wanjiru Kagiri, Naomi Njeri Kagiri, Violet Mwihaki Kagiri, Evaline Wangari Kagiri, Teresia Nyokabi Kagiri, Beatrice Muthoni Kagiri, Josephine Wanjiru Njoroge, Hannah Njeri Waiharo, Lucia Wanjiku Kagiri, Elizabeth Wambui Kagiri, Daniel Kagiri Njambi (administrator for estate of Margaret Njambi Kagiri), Ruth Wanjiku Muiruri and Ruth Wanjiku Kamau.

5. Margaret Njambi Kagiri and Joyce Wangui Kagiri, hereinafter to be referred hereafter as the protestors, filed an affidavit of protest to the summons of confirmation of grant claiming *inter alia*: -

a) That they were not consulted when the sharing was being proposed;

b) That no documents – such as share certificates, official searches - were given to indicate the deceased's interest in the property being shared out, and neither did the applicants show the size of the shares;

c) That the 1st protestor could not share any land with George Ndirangu Kagiri because he had been hostile and violent towards her in the past, and that she wished to inherit Githunguri/Kiairia/2132 alone;

d) That some of the children of the deceased had already received shares of the deceased's land and therefore they were not entitled to inherit any more of the deceased's land; and

e) That that some of the children of the deceased had been sharing the dividends due to the deceased from Kiairia Farmers Co Ltd and Rioki Estate without both the protestors receiving anything.

6. The amended summons for confirmation of grant was disposed by way of oral and affidavit evidence.

7. Nelson Ndungu Kagiri testified first. He stated that the protestors' proposed mode of distribution was not practical and would complicate the matter further. He added that the 1st protestor had failed to attend a family meeting that convened on 8th April 2017, where issues on distribution of the estate were to be discussed. He stated that summons for the meeting had been issued by the area Chief to all administrators who went ahead and called in all siblings to attend the meeting. He stated that seventeen out of the twenty-three family members attended the meeting with the other six failed to attend without an apology or reason. In his testimony, he said that the seventeen were all from the three houses and that some of the 1st protestor's siblings attended. He stated that at the end of the meeting, and after receiving views of all the siblings in attendance, it was unanimously agreed that the estate would be distributed as indicated in the minutes annexed to the affidavit. He stated that Githunguri Kiairia/2136 belonged to Jane Waithera Kamau, the widow to the Geoffrey Kamau Kagiri, who was a son of the deceased. He added that the said parcel had been given to Geoffrey Kamau Kagiri by the deceased in 1998, but the said Geoffrey Kamau Kagiri died before the parcel was transferred to him. He testified that the said parcel of land measured 1.24 of a hectare. On Githunguri/Kiairia/2132, he said that it had been agreed that the same belonged to George Ndirangu Kagiri as the same had been given to him by the deceased in 1998. The said parcel was said to measure 1.24 of a hectare. On Githunguri/Rioki/T.119, measuring ¼ acre, he stated that it was agreed that the same be shared equally among all the 23 beneficiaries as indicated in the schedule. On Kijabe/Block 1/2794, measuring 5 acres, he stated that it had been agreed that the same be shared equally among all the 23 beneficiaries. On Githunguri/Kiairia/972, he stated that the deceased had divided it into two equal portions, one portion was given to Wambui Kagiri and the other portion given to Leah Waithira Kagiri. He added that Wambui Kagiri decided that her portion be given to Joyce Wangui Kagiri and Josephine Wanjiru Kagiri. He stated that he had been informed by the 1st protestor's brothers that the other portion of the land was to go to the 1st protestor. The said parcel measured 1.7 acres, he added. On Kijabe/Block 1/2793, measuring 5 acres, it was agreed that the same be shared equally among the 23 beneficiaries. On the 4 Githurai plots, he stated that they had not been developed and it had been agreed that the same be divided equally among all the 23 beneficiaries. On the four shares in Kiairia Farmers Company, he stated that it was agreed that the dividends be shared equally among all beneficiaries. On 189 shares in Rioki coffee farm estate, he stated that it was agreed that all the 23 beneficiaries receive equal shares, which translated to at least 8 shares each. He stated that most of those who signed the consent for distribution were present in court save for Justus Mburu Kagiri who died in July 2017. He added that the protestors did not sign the consent agreement. He stated that Gideon Kariuki Kagiri has a title deed to Githunguri/Kiairia/2132 and therefore the said property could not be listed as part of the estate of the deceased. He added that Plots 250, 259, 260, 261, 262, 263, 264 and 265 had been distributed by the deceased in his lifetime, had been sold and transferred to third parties hence they did not form part of the estate of the deceased. He cited the 1st protestor's affidavit at paragraph 18, which stated that the said the plots had been distributed already. He totally disagreed with the 1st protestor's proposed mode of distribution. reiterating that the same was not practical as her half-sister, Lucy, had passed on and left two sons, who were likely to be disinherited by the 1st protestor. He further claimed that the 1st protestor's proposal left out her brother who had also died. He added that another sibling who died, Justus Mburu Kagiri, has been allocated shares in the Rioki estate alone and yet he had been survived by a wife, Regina Mumbi. He said that the consent in court reflected the wishes of the majority in the family.

8. On cross-examination, he said the agreement reached at the meeting of 8th April 2017 was not fake and that all the Chief wanted to do in summoning the meeting of administrators was to simmer the frosty relationship between them. He stated that the Githurai plots were proposed for distribution as per the wishes of the deceased, and that relevant registration documents were with the Land Control Board, but he did not produce them in court. He stated that he listed all the 23 children of the deceased. He added that Justus Mburu and Geoffrey Kamau were also dead. He testified that the 1st protestor lives on Githunguri/Kiairia/2132, with her brother who occupied a store belonging to their mother Leah Waithira. He stated that the 1st protestor had little on the said land, saying that George Ndirangu has 800 coffee plants which had been planted by the deceased. He added that the said parcel of land measures 3 acres. He conceded that there was no summons

issued to the 1st protestor for the meeting of 8th April 2017. He concluded by stating that the family should hold another meeting and that everyone cooperates. On further cross-examination, he stated that the size of Githunguri/Kiairia/2132 was not indicated in the schedule of the amended summons application as the same would be determined by where the permanent house was located. He added that the subdivision may not be registrable as they did not indicate the size of the plots. On property Githunguri/Kiairia/972, he said George Ndirangu would benefit from ½ acres on top of the share in Githunguri/Kiairia/2132, but then the 1st protestor would not get less than George Ndirangu. He stated that the 1st protestor could not be given the whole of Githunguri/Kiairia/2132 as George Ndirangu also lived there. He stated that the chaos has always been instigated by the 1st protestor and not George Ndirangu, and he asked the 1st protestor to cooperate and there would be no problems. He stated that there were 7 sons who were given 3 acres, adding that Lucy Nyaguthii also got 3 acres. That had been done during the lifetime of the deceased. He added that the 1st protestor was never given Githunguri/Kiairia/2132 by the deceased as the same was given to George Ndirangu. He said a case was filed and determined in respect of the said land and that was the beginning of the hostility between the 1st protestor and George Ndirangu. He objected to the 2nd protestor's averment in her affidavit of protest that she has built two houses on Githunguri/Kiairia/972. He stated that the 2nd protestor should share the property with Josephine Wanjiru, as the property had already been subdivided into two equal portions by the deceased and was given to their late mother. He said their mother had indicated that her portion would be shared by the 2nd protestor and the said Josephine Wanjiru. On the Kiairia Farmers Company Limited, he stated that the company was owned by the deceased and 31 others. He added that the company has a building on Kirinyaga Road, Nairobi, but the share certificate was unavailable and all the original shareholders were dead and the company was in the process of restructuring. He said that each of the original members, including the deceased, held four shares in the company. He reiterated that Plot A59 which was part of the Githurai plots did not have title documents but they are in the process of acquiring the same for them. He said there was a company called Githurai-Ting'ang'a which used to own those plots but was dissolved. He added that Plot A59 had been grabbed, but with the help of a surveyor and a Mr. Weru, the applicants were able to reclaim it and it was confirmed that part of it was the deceased's. However, he stated that he had no letter from the said surveyor. On re-examination, he reiterated that he didn't have any title documents for Plot A59; the deceased had only four shares in Kiairia Farmers Company Limited.

9. Margaret Njambi, the 1st protestor, in her testimony, stood by her affidavit of protest sworn on 21st September 2017 and filed on 29th September 2017. She testified that the shares at Kiairia Farmers Company be shared by her and the 1st applicant. On Githunguri/Kiairia/972, she stated that the same be given to the 2nd protestor and George Ndirangu. On Githunguri/Rioki/T.119, which measured approximately ¼ acres, she proposed that it be given to the 2nd applicant. On Githunguri/Kiairia/2132, she stated that she be wholly allocated the property which was 3 acres. On the 189 shares in Rioki coffee farm estate, she proposed that the said shares be shared equally amongst herself, George Ndirangu, Stephen Ngaruiya, the 1st applicant, Boniface Ngaruiya and Kariuki Kagiri. On the Githurai Plot No. A59, measuring approximately 125 X 55 square feet, she proposed that the same be wholly given to her. On Githurai Plot No. 740, measuring approximately 50 X 50 square feet, she proposed that the same be given to the 2nd protestor. On Githurai Plot No. 723, the 1st protestor proposed that it be given to Elizabeth Wambui Kagiri. On Githurai Plot No. 724, she proposed that it be given to Josephine Wanjiru. the 1st protestor averred that the deceased transferred some properties to some beneficiaries *inter vivos*, and she mentioned the affected assets to be Githunguri/Kiairia/2130 – Lucy Nyaguthii Kagiri, Githunguri/Kiairia/2131 – Justus Ndungu Kagiri, Githunguri/Kiairia/2133 – Stephen Ngaruiya Kagiri, Githunguri/Kiairia/2135 – Boniface Ngaruiya Kagiri, and Githunguri/Kiairia/2137 – Nelson Ndungu Kagiri. she stated that those who were given properties as gifts by the deceased *inter vivos* should not be given any more property. In her testimony, the 1st protestor stated that George Ndirangu did not have a house on Githunguri/Kiairia/2132 as he had initially travelled out of the country in 1971 and only came back in 1998/1999. She said that she offered George Ndirangu a place to stay for a short while but he refused to move out soon thereafter. She stated that the deceased was forced to sign transfer documents at the Land Control Board, adding that he was sickly at the time. She stated that the deceased was taken to the Land Control Board by the 1st applicant and six other siblings.

10. On cross-examination, she stated that George Ndirangu lived in their mother's kitchen in Githunguri/Kiairia/2132. She added that the deceased had shown his brothers, Stephen Ngaruiya and Justus Ndung'u, where they were to put up their houses, but George Ndirangu was not shown where to put up his and lived in their mother's house. She stated that Githunguri/Kiairia/2132 could not be subdivided in the manner proposed by the 1st applicant. She added if it was mandatory that the property be subdivided between her and George Ndirangu, then each of them should get a path on each side and a wall be put up. She opposed the 1st applicant's proposed mode of distribution and asked the court to adopt hers'.

11. The 2nd protestor, Joyce Wangui Kagiri, testified that she was not invited to the family meeting that the applicants' talked about, neither did anyone explain what the document that was to be signed at that meeting was about, and therefore she did not sign it. She stated that she has never received any money from dividends in respect of her share. She stated that she lived on Githunguri/Kiairia/972 which measured about 1 acre and added that she has no problem sharing the property with George Ndirangu but had a problem sharing the property with Josephine Wanjiru. She stated that she has built four houses on the property for herself and children. On cross-examination, she stated that George Ndirangu could take the other portion of Githunguri/Kiairia/972. She said that she was aware of her share in Rioki Estate and that Plot No. 740 had also been given to her. On Kijabe/Block 1/2793 and 2794, she stated that she did not want a share in the two parcels, and said that the same could be given to Josephine Wanjiru.

12. From the pleadings, affidavit and oral testimonies that I have identified only two issues for determination, that is whether the grant ought to be confirmed and how should the estate be distributed.

13. In respect of the distribution of the deceased's estate, this court will be guided by Sections 40(1) and 42 of the Law of Succession Act, Cap 160, Laws of Kenya. Section 40(1) of the Law of Succession Act provides that:

'Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the 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.'

14. The provision above applies in the instant case as the deceased had three wives, and twenty-one children. The 1st wife had eight children, making up a total nine (9) units for the first house; the 2nd wife had 12 children making up a total of thirteen (13) units for the second house;

and the third wife had two children, making up a total of three (3) units. However, the record has it that the third wife, Ngendo Kagiri, remarried and thus her interest in the estate of the deceased was determined, hence the 3rd house can be said to comprise of two (2) units. The statutory formula to be applied in distribution of the property will be a ratio of 9:13:2.

15. Section 42 of the Law of Succession provides that:

‘42. Previous benefits to be brought into account

Where—

- a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*
- b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.’*

16. The Court of Appeal, in *Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat* [2015] eKLR, held that: -

‘From the consideration of sections 35, 40 and 42 of the Act, the broad principle of law which emerges is that where an intestate was polygamous, the estate, in the first instance, should be divided among the houses according to the number of children in each house adding a surviving wife as an additional unit taking into account any previous benefit to any house. Thereafter the estate devolving on any house is, subject to her life interest distributed by the surviving spouse in exercise of her power of appointment to each beneficiary taking into account previous benefit, if any, to any beneficiary. However, in the event that the life interest is terminated either by remarriage or death, then the net interstate estate devolves upon a house is divided among the surviving beneficiaries equally subject to any previous benefit to any beneficiary.

[30] Section 40 of the Act does not give discretion to a court to deviate from the general principles therein enunciated. Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to make adjustments to the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust.

*As this Court said in *Mary Rono v. Jane Rono & Another*, Civil Appeal No. 66 of 2002 (Eldoret) [2005] eKLR, section 40 does not provide for equality between houses or that each child must receive the same or equal portion. The application of section 40(1) is illustrated by the case of *Catherine Nyaguthii Mbauni v Gregory Maina Mbauni*, Civil Appeal No. 34 of 2004 (Nyeri) [2009] eKLR where the Court shared the net intestate estate according to a ratio reflecting the number of units in two houses.’*

17. The Court of Appeal further said in *Scolastica Ndululu Suva vs. Agnes Nthenya Suva* [2019] eKLR held that:

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

“My understanding of that section is that while the net intestate estate is to be distributed according to houses each house being treated as a unit, yet the judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that they must be equality between houses they would have been no need to provide in the section that the number of children in each house be taken into account.

Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work injustice particularly in the case of a young child who is still to be maintained, educated and generally seen through life. If such a child whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.”

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

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

[17] It is therefore evident, that, although section 40 of the Law of Succession Act provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular

case that may be relevant in ensuring equitable and fair distribution of the estate.’

18. There is also Rule 73 of the Probate and Administration rules which enshrines the inherent power of the court. It reads: -

‘Nothing in this rule shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court.’

19. In *re Estate of the Late Gedion Manthi Nzioka (Deceased)* [2015] eKLR, it was said that: -

‘In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa) ... For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of trust. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 32 to 51.

In Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:

“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. 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. In *Elizabeth Wangechi Ndegwa vs. Fredrick Joshua Ndegwa & another* [2016] eKLR, it was stated that: -

‘The fact that more than half of all the siblings consent to this portion of land be hived off for their brother and step brother respectively convinces the Court that the deceased actually did allocate him this portion of land during his lifetime ... “The Applicant’s protest is denied as most of the beneficiaries have consented to the mode of distribution; that part of the suit property was bequeathed to the 2nd Respondent as gift inter vivos.’

21. In the case of *Joseph Thurania vs. David Birithia Lauri* [2018] eKLR, Mabeya J held that: -

‘In the present case, the deceased not only obtained the letter of consent from the local Land Control Board, he also signed the transfer in favour of the respondent. The respondent produced sufficient evidence that supported his claim that the deceased intended to transfer the land to him and that he had extensively developed the said land. In this regard, the trial court was right in its decision as the provisions of section 31 of the Act had been complied with ... It should be recognized that, unless ALL the beneficiaries of a deceased person agree to a particular mode of distribution, by signing a consent thereto, a court of law is not bound by any proposition by either the majority of the beneficiaries or otherwise. The court is bound to distribute such intestate estate in accordance with the provisions of Part V of the Act.’

22. Grandchildren can inherit from their grandparents’ estate by virtue of section 41 of the Law of Succession Act. In the case of *re Estate of Joyce Kanjiru Njiru(Deceased)* [2017] eKLR, it was stated that: -

‘My view is that the children are entitled to inherit the share which their deceased parents would have inherited. In persuasive decision by Musyoka J. in the case of *Estate of Veronica Njoki Wakagoto (deceased)* (2013) eKLR it was stated:

“... grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grandchildren inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.” ‘

23. In *Yunes Kerubo Oruta & another vs. George Kombo Oruta & another* [2015] eKLR, it was stated that:

‘With regard to the first question on whether or not grandchildren are beneficiaries to the estate of their grandparents, Musyoka J, in the *Estate of John Musombayi Katumanga – (deceased)* [2014] eKLR rendered himself as follows: -

“... I suspect that she is a daughter to the said heir, and therefore a granddaughter of the deceased. She is described in one of the papers as a dependant of the deceased. The said Laura Mesitsa is not entitled to a share in the estate of the deceased there are two reasons for this. She is not an heir of the deceased for grandchildren are not entitled to inherit from their grandparents so long as their own parents, the children of the deceased, are alive and themselves taking a share in the estate. Secondly, she is not a dependant of the estate. She did not apply, as she should have, for provision under Section 26 of the Act, and there is no court order making her a dependant of the deceased. Under Section 29 of the Act, a grandchild can be a dependant of her grandparent but for her to qualify as such she must demonstrate to the court in an application properly brought under Section 26 of the Act that she was

dependant on the grandparent immediately before his death.”’

24. Guided by the Law of Succession Act, case law, evidence on record and the principles cited above, I shall proceed to consider the matter before me on its merits.

25. On property Githunguri/Kiairia/2132, whose distribution was animatedly contested by the 1st protestor as belonging to her and the soaring dispute between her sibling George Ndirangu, it can only be fair and just for the 1st protestor to be given the whole property. The 1st applicant's claim that the property was a gift *inter vivos* to George Ndirangu by the deceased fails for want of proof. There was no deed of transfer produced to show that the deceased transferred or intended to transfer the said property to George Ndirangu in his lifetime. The certificate of official search on record indicates that the property belonged to the deceased at the time of his death and as at 29th November 2010. It is evident the 1st protestor has lived on the land for quite some time and developed it by building her home there. I therefore reject the applicants' proposal and adopt the 1st protestor's proposed mode of distribution on this property. George Ndirangu can share Githunguri/Kiairia/972, in respect of which the 2nd protestor stated that she had no problem with George Ndirangu living there, equally with the 1st protestor.

26. On Githunguri/Rioki/T.119, measuring ¼ acre, consensus seems to have been reached according to the testimony of the 1st applicant that it should be shared between the 2nd applicant and Waithira Kamau, the widow of George Kamau Kagiri. On Githunguri Kiairia/2136, there is consensus between the applicants and the protestors that the same be given to Waithira Kamau, the widow of George Kamau Kagiri. Kijabe/Block 1/2793 and Kijabe/Block 1/2794, measuring 10 acres in total, should be distributed according to the number of units available in the three houses in the ratio aforementioned of 9:13:2 with the 1st House getting 3.5 acres, the 2nd House getting 6 acres and the 3rd House getting 0.5 acres.

27. On the four Githurai Plots (A59, 740, 723 and 724), I note that titles are being processed and once the said titles are out, the said plots can be distributed according to the number of units available in the three houses with the 1st House and the 3rd House getting one plot each and the 2nd House getting two plots (which should include Plot A59 because it is bigger in size and the 2nd House has more units than the other houses). Since the plots cannot be practically subdivided any further, the same should be sold and proceeds be shared. The 1st protestor did not provide any detailed evidence as to the existence of the other plots listed in her affidavit of protest. The 1st applicant contended that all of those properties were disposed by the deceased in his lifetime and that evidence was not controverted by the protestors.

28. On the 189 shares in Rioki coffee farm estate, I agree that the shares should be divided among the daughters of the deceased in equal shares. On the four shares in Kiairia Farmers Company, I direct that the same be distributed between the 1st House and 2nd House in the ratio of 1:3 with the 1st House getting 1 share and the 2nd House getting 3 shares.

29. In conclusion, I shall make the following final orders: -

- a) **That the Summons for Confirmation of Grant dated 25th August 2017, amended on 21st June 2018 and filed on 25th June 2018, is hereby allowed in the terms proposed at paragraphs 32, 33, 34 and 35 here above;**
- b) **That the grant of letters of administration intestate dated 15th November 2016 is hereby confirmed accordingly;**
- c) **That each party shall bear their own costs this being a family matter; and**
- d) **That any party aggrieved by the orders made herein shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.**

DATED AND SIGNED AT KAKAMEGA THIS 24th DAY OF April 2019

W MUSYOKA

JUDGE

DELIVERED DATED AND SIGNED IN OPEN COURT THIS 10th DAY OF May 2019

A ONGERI

JUDGE