REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: AKIWUMI, SHAH & BOSIRE JJ.A)
CIVIL APPEAL NO.213 OF 1997
BETWEEN

JOHN GITATA MWANGI .... IST APPELLANT

JOSEPH NJOROGE MWANGI .... 2ND APPELLANT

STEPHEN NJUGUNA MWANGI .... 3RD APPELLANT

CHRISTOPHER MWAURA MWANGI .... 4TH APPELLANT

AND

JONATHAN NJUGUNA MWANGI .... IST RESPONDENT

PETER KABATA MWANGI ....2ND RESPONDENT

HANNAH WANGARI KINUTHIA .... 3RD RESPONDENT

SAMUEL GATITU .... 4TH RESPONDENT

HELLEN WAMBUI .... 5TH RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Kenya of (Honorable Justice E.C. Githinji) dated 16th April, 1997

in

H.C.C.C. No.494 of 1994)
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JUDGMENT OF AKIWUMI, J.A.

The facts of this case are sufficiently set out in the judgments of Shah and Bosire, JJ.A. The first, second and third Respondents in this appeal namely, Jonathan Njuguna Mwangi, Peter Kabata Mwangi and Hannah Wangari Kinuthia, are the children of the deceased Mwangi Mbothu by his second wife Helen Wambui. The fourth and fifth Respondents Samuel Gatitu and Hellen Wambui are the children of his daughter Wanjiku Gatitu also by his second wife, who predeceased him. All those affected by this appeal belong to the Kikuyu tribe. In his will, the validity of which was not challenged, and that being so, the case of Ndolo v Ndolo, Civil appeal No. 128 of 1995 (unreported) does not apply. Mwangi Mbothu devised and bequeathed land, money and shares valued around Kshs.80,000,000 to each of his four sons

by his first wife Hannah Nyangichuhi who are the Appellants in this appeal. He also devised to three of his daughters by his first wife, land ranging in value from Kshs.4,600,000.00 to Kshs.7,360,000.00. To the first Respondent, he devised 80,868 acres of land valued at Kshs.30,255,000.00 and to each of his two daughters by his second wife, land valued at Kshs.4,600,000.00. Though his second son by his second wife, was not provided for under his will, he devised to him 14 acres of land valued at Kshs.12,000,000.00 to be held in trust by him for his wife and children. Mwangi Mbothu's will also provided that when any of the beneficiaries, like his daughter Wanjiku Gatitu, predeceased him, then her children, the fourth and fifth Respondents, would share equally the land that had been devised to their mother.

This is the backdrop to the application which the Respondents made to the High Court wherein, the four sons of Mwangi Mbothu by his first wife who were appointed the executors of their father's will, are named as respondents therein, and in which the Respondents seek that reasonable provisions as the High Court thought fit, should be made for them out of Mwangi Mbothu's net estate.

An application such as this, if it were to succeed, would not only affect the four executors of Mwangi Mbothu's will and who are also beneficiaries under that will, but also other beneficiaries, such as their mother. However, though she was called to give evidence by the Appellants, she was never made a party to the proceedings. In these circumstances therefore, any order that adversely affects her inheritance under her deceased husband's will, might be improper. Another preliminary issue is the competency of the fourth and fifth Respondents to bring the application before the High Court. Section 26 of the Law of Succession Act under which the application was brought, limits the right to bring such an application to a "dependant" which in respect of the fourth and fifth Respondents, is defined in section 29 (b) of the Act to mean:

"such of the deceased's … grandchildren … as were being maintained by the deceased immediately prior to his death;".

In his ruling on this point, the learned judge of the High Court made the following findings:

"The finding whether or not a member of a class in S.29(b) was being maintained by the deceased will largely depend on the evidence before the court and the appreciation by the court of all the surrounding circumstances of the case including our cultural set up. In the present case, the deceased provided the land (capital) on which Wanjiku Gitata settled with her two children and on which she worked to eke out a living for herself and her two children. It was that land which was her principal source of income on which she maintained her children. The land was the major source of her income and by providing the land, I reckon that deceased was substantially though indirectly maintaining the fourth and fifth applicants. There is also evidence that before deceased allocated the five acre land to his daughter Wanjiku Gitata, she and her children were living in the deceased's Tunini farm and occupying one of the houses in the farm. Lastly, deceased bequeathed the 5 acres of land to his daughter and if she predeceased him, which is the case here, to the two grandchildren. It seems to me from the foregoing that Wanjiku Gitata and her two children were wholly dependent on the deceased for their survival which circumstance is crowned by the gift of land to the two applicants. It is for those reasons that I find that the two applicants were being maintained by deceased immediately prior to his death.".

But are these findings supported by the evidence given during the proceedings before the learned judge? I would say, no. The first and third Respondents were the only ones who gave evidence for all the Respondents. With respect to the maintenance of the fourth and fifth Respondents, the first Respondent, Jonathan, stated that:

> "Wanjiku Gatitu is my late sister and mother of Samuel Gatitu (4th applicant) and mother of Hellen Wambui – 5th applicant Samwel Gatitu 14 years old Hellen is 18 years old. Samwel Gatitu in primary school Hellen is in secondary school. They live with Hannah Wangari in Kabuko farm I pay for their school fees and maintenance …. Wanjiru Gatitu she was living in my father's farm – Tariri farm in Ruaraka before she died. The farm is 105 acres. I was supporting my sister Wanjiru and her children Wanjiru Gatitu had no job …".

Jonathan appears to have sufficient money to spend not only on himself, but also on the school fees and maintenance of his nephew and niece. In her evidence, Hannah Wangari Kinuthia, the third Respondent, briefly but more definitely, as to who was maintaining Samuel Gatitu and Hellen Wambui after the death of her sister Wanjiku Gatitu and at the time her father died, said:

"My sister was looking after Samuel Gatitu and Hellen. After her death I took over the children my step mother Hannah Nyagichuhi was not looking after the children.".

In my view, the direct evidence given by the first and third Respondents do not support the conclusion that immediately prior to his death, the fourth and fifth Respondents were being maintained by Mwangi Mbothu. It is true that he had made a gift of 5 acres of land to his daughter Wanjiku Gatitu which he subsequently devised to her in his will, but just as he could not follow the gift once made, so he could not, cultural set up or no cultural set up, dictate to Wanjiku Gatitu what she should do with the land. If Wanjiku Gatitu chose, as the learned judge concluded to:

> "eke a living for herself and her two children", from this land which as the learned judge held:

> "was her principal source of income on which she maintained her children",

and frankly this was merely an assumption, as there was no evidence in support of this and indeed, the contrary is what appears to have been the position, then what she did was what she chose herself, to do. In short, though it can be said that the land enabled her to maintain her children, it cannot, because of this and the evidence of Hannah Wangari, be said within the context of section 29(b) of the Act, that Wanjiru Gatitu's children were after her death, being maintained by her father immediately prior to his death. Unlike section 33 of the Act which provides that in the distribution of certain categories of property in the case of intestacy, the law or custom applicable to the deceased's community or tribe shall apply, section 29(b) of the Act is not saddled with any such qualifications. Even if it were, there was no expert evidence given to show that a grandfather is under Kikuyu custom, obliged to maintain his grandchildren. It follows then that the fourth and fifth Respondents were not entitled to seek that reasonable provision be made for them out of Mwangi Mbothu's net estate.

I am now left to consider the application for reasonable provisions made by the first, second and third Respondents. But before doing so, it would be necessary to consider the factors which the High Court has to take into consideration when considering whether any order for a reasonable provision should be made and if so, what order. These are set out in the following paragraphs of section 29 of the Act:

> "(a) the nature and amount of the deceased's property;
>
> (b) any past, present or future capital or income from any source of the dependant;
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> (c) the existing and future means and needs of the dependant;
>
> (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
>
> (e) the conduct of the dependant in relation to the deceased;
>
> (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
>
> (g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.".

I had earlier made reference to the provisions of section 33 of the Act which specifically provides that in

certain circumstances in the case of intestacy, the law or custom applicable to the deceased's community or tribe shall apply. No provisions like that which could have been easily made if that was the intention of the Act, have been made to apply to sections 26 to 29 of the Act. Indeed, this omission in the Act is a clear indication that so far as the provisions of these sections of the Act are concerned, they are to be intepreted without being subject to the law and custom of the deceased. True the Judicature Act provides in section 3(2) thereof that:

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

But sections 26 to 29 of the Act as they stand, make the relevant Kikuyu customary law, inconsistent with them.

I would also like to allude to my judgment in the Case of Mary Wambui Kabungua, Legal Representative of Kabugu v Kenya Bus Services Limited, Civil Appeal No. 195 of 1995 (unreported) which dealt with the status of the written law vis a vis the common law, and which I find analogous to the status of the written law in this case the Law of Succession Act vis a vis Kikuyu customary law with respect to the application made by dependants under section 26 of the Act. This what I had to say:

"My last comment relates to the relationship between the common law and the Limitation Act. Salmon, J.A. in his dissenting judgment in Cozens, expressed the view that only very clear words which did not exist in the English Limitation Act 1963, could take away a person's fundamental rights, in the following way:

> 'I start from the point that the general rule of the law is that the courts will not make orders in legal proceedings affecting a party's rights without giving that party an opportunity of being heard … To my mind very clear words would be required to take away fundamental rights which are ordinarily accorded by the law and indeed by natural justice.'.

What is clear from this observation of Salmon, L.J., is the admission that statute can take away or limit fundamental rights or those given by the general rule of law which can also be described as the common law. It cannot therefore, be said that the common law has an unassailable status. If this is so, even where statute law and the common law are held to be of equal standing, then a fortiori, on the assumption that in Kenya, the common law is of a lower standing than statute law, statute law can make greater inroads into the common law. Although no very clear words to that effect, were employed in the English Limitation Act, it was held in Cozens that the clear intention apparent in the Act, and which would do, made inroads into the common law or general rule of law, by providing in sections 1 and 2, an exception to the general rule that a party against whom an ex parte order has been made, can apply to the court which made the order to set it aside.".

To my mind, and having regard to the clear intention of section 26 – 29 of the Law of Succession Act as shown when compared with the provisions of section 33 of that Act, it cannot be said that section 3(2) of the Judicature Act grants unassailable status to Kikuyu customary law that may be regarded as relevant to the issues involved in this appeal.

And so what may not be considered per se in the present case where there is a valid will of Mwangi Mbothu, is the Kikuyu customary law or practices concerning the fair or equal share of a deceased husband's property among the houses of his poligamous marriages. Indeed, if this was not what the law was intended to be as expressed in the Report of the Commission on the Law of Succession, there was nothing to stop PART III of the Law of Succession Act from stating this. As this part of the Act stands, there was, no matter what the Report of the Commission on the Law of Succession had expressed, a clear intention not to incorporate it into the Act. Nothing would have been easier to achieve if Parliament had

wanted to do this.

In order that the court may be enabled to come to a proper conclusion as to what order it should make, a dependent has the duty to give satisfactory evidence as to his past, present or future capital or income and his existing and future needs. Without this, the court will not be able to make any sensible order. Whether the deceased has made any advancement to the dependant and the circumstances of the deceased's other dependants are also factors to be considered. The general circumstances of the case including the deceased's ascertainable reasons for not providing for the dependent must also be considered. Which of these factors will play a vital role in their combined effect, depends on each particular case.

The evidence on behalf of the second Respondent, Peter Kabata, in support of his application was pathetic. Though according to the third Respondent, Hannah Wangari, he was aware of the proceedings and indeed, was the only one who had been left out of his father's will, he chose not to present any evidence himself in support of his application. He left this to the first Respondent, Jonathan, and his sister, Hannah Wangari. None of them gave any worthy evidence as to Peter Kabata's needs and financial standing which will enable the court to come to a sensible decision as to his needs. All that Hannah Wangari whose evidence on this issue was better than Jonathan's, said, was that:

"Peter Kabata lives in Limuru in the same farm. He derives his livelyhood from the farm.".

The ascertainable reason why Peter Kabata was left out of his father's will was given by no less a person than his own sister Hannah Wangari herself. She said that:

"My brother Peter Kabata and Jonathan were not on good terms with my father most of the times. That is specially so with Peter Kabata. Peter Kabata drinks. He had the disagreement with my father because of heavy drinking.".

It does not come to me as a surprise, that Peter Kabata was left out of his father's will as a direct beneficiary. In the very first devise in his father's will, and because Peter Kabata could not be trusted not to dissipate what was devised or bequethed to him, he was made trustee of 14 acres of land at Kabuku Farm in Limuru valued at Kshs.12,880,000.00, in trust for his wife and children. As Jonathan said:

"My brother Kabata started living in that farm before my father died. Three of the children of Peter Kabata live at his house. The other two are at primary school. Kabata has lived in the farm for about 4 years.".

For the reasons give above, no order for reasonable provision should have been made in favour of Peter Kabata.

As for Hannah Wangari, she may appear not to really know what she wanted when she said for inapplicable reasons, that she wanted her children as opposed to herself, to live like other children without stating which children. But her main reason would seem to be a claim by herself and her sister and brothers to half of the deceased's estate, on the grounds, presumably according to Kikuyu customary law, that they were the childrend of the deceased's second polygamous wife. Hannah Wangari stated her posistion as follows:

"I work in the farm. I grow maize, beans, potatoes and the like I also plant nappier grass. I have 5 dairy cows I get school fees from proceeds of the farm. My house is a 3 bedroomed timber house. It was built in 1989 my late father bought the building materials for me. Chege can go to school if I got help. I am claiming half share of the deceased estate as he had two wives (houses) ... I am not claiming the half share alone. It is on behalf of my mothers children ... I do not know how much money I need to live well. My wish is to have my children live well like other children.".

Furthermore, if "the general circumstances of the case" is to be considered, it will be seen that only land was devised to her, her sister and step sisters. The 5 acres of land devised to her and valued at

Kshs.4,600,000.00, is of the same value as the land devised to her deceased sister Wanjiku Gatitu and step sisters Susan Mbaire Maina and Leah Wambui Mwema. Only her step sister, Rose Njoki Mbothu, was devised land which was valued at Kshs.7,360,000.00. In my view, the learned judge of the High Court was not justified in making the reasonable provision order that he made in favour of Hannah Wangari.

As regards the first Respondent, Jonathan, it cannot be said that his deceased father did not make a reasonable provision for him in his will. Jonathan himself, had in his evidence, said that he was paying the school fees for, and maintaining the fourth and fifth Respondents. This may not be true, but he is bound by it. This means that he was even before his father died, in a position without suffering any undue hardship, to maintain these two Respondents. He also owns a car.

Jonathan, had in 1983, emmigrated to Australia where he lived with his Australian wife. He maintained little contact with his father and brothers and sisters. Indeed, he said that he telephoned his father only 3 – 4 times a year. But this is doubtful because he could not even remember his father's telephone number. Yet nine years later, when his father made his will, his father remembered him and devised to him 80,868 acres of land valued at Kshs.30,255,000.00 which can earn him a great deal of money and which Jonathan failed to show was an unreasonable provision. Indeed, in his evidence and that of his sister, Hannah, their reason for bringing their application was not that no reasonable provision had been made for them under their father's will, but simply that they being children of the Mwangi Mbothu's second wife, they should have an equal share of their father's property. This alone, which may have been relevant if their father had died intestate, renders the application of Jonathan and Hannah fatally flawed. Apart from this, there was bad relationship between Jonathan and his father, as narrated uncontradictedly, by his sister, Hannah Wangari, which at one time, had led to his father himself, initiating proceedings that led to Jonathan's internment at a Borstal institution. Furthermore, he cut off contact with his father and the other members of his family after he left for Australia. According to his evidence in cross-examination, he came to Kenya twice and that was only after his father died, no doubt, only to see how much money he could obtain out of his father's estate. He did not even know that his sister, Wanjiku Gatitu, and his own father had died because according to Hannah Wangari, she could not get Jonathan to inform him of these deaths. Indeed, according to Jonathan himself, he learnt of his father's death some three months after the event, "through a person who visited Australia". He certainly had cut off ties with his people in Kenya. In these circumstances it was generous of his father to have left him property worth Kshs.30,255,000.00, which is no mean a devise and which Jonathan has not shown to be an unreasonable provision in the light of his needs let alone his relationship with his father.

I have come to the conclusion that the appeal must succeed and the deceased's will as originally made, restored. By the same token, the cross appeal is dismissed. As Shah JA agrees, the judgment of the court shall be that the appeal be allowed with costs and as Shah and Bosire, JJ.A. agree, the cross appeal is hereby dismissed. However, as regards costs, with respect to the cross appeal, it is, as Shah J.A. agrees, dismissed with costs. It is so ordered.

Dated and delivered in Nairobi this 19th day of April, 1999.

A. M. AKIWUMI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

<u>DEPUTY REGISTRAR.</u>

<u>JUDGMENT OF SHAH, J.A.</u>

Mr. Mwangi Mbothu died on 12th December, 1993. He was a self-made man and by dint of sheer hard work had amassed a considerable fortune which was worth approximately K.shs.440,000,000/= at the time of his death. Just less than a year before his death he had his last will and testament drawn up by M/S K. Mwaura & Company advocates. He had nominated his sons John Gitata Mwangi, Joseph Njoroge Mwangi, Stephen Njuguna Mwangi and Christopher Mwaura Mwangi to be the executors of his estate upon his death. There is no dispute as to the validity of his will.

The respondents to this appeal, by an application dated 27th February, 1995 made by way of a chamber summons taken out under Section 26 of The Law of Succession Act (the Act) and rule 45 of the Probate & Administration Rules, sought the following orders against the present appellants:

> ***"1. That the respondents do furnish to the applicants a list of the assets and liabilities of the estate and accounts pertaining to the same.***
>
> ***2. That no grant of representation of the estate of Mwangi Mbothu who died on 12.12.93 having been confirmed, such reasonable provision be now made for the applicants as dependants of the deceased out of his net estate as the court thinks."***

That application came up for hearing before the superior court (Githinji, J). On 8th June, 1995 the learned judge ordered that the appellants do furnish a list of assets and liabilities of the estate and also accounts pertaining to those assets to be agreed upon between counsel to the parties and he further ordered that viva voce evidence be given in support of the application limited to the conduct of the respondents to the deceased. It is a somewhat unusual order as rule 45(5) of the Probate and Administration Rules provides for the court having regard to the information and particulars referred to in subrule (2) and also to such evidence as may be adduced as to the conduct of the applicant in relation to the deceased as required by paragraph (e) of section 28 of the Act which paragraph envisages that the court shall have regard to (upon the hearing of an application under section 26 of the Act for reasonable provision) the conduct of the dependant (applicant) in relation to the deceased. I say "somewhat unusual" as there appears to be no provision for the taking of such evidence viva voce. The evidence which was taken went beyond the said limit set by the learned judge. There was however no objection thereto and there is no prejudice suffered by any of the parties in regard thereto. There is one golden rule, and that is, that evidence given viva voce and fully tested on cross-examination places the court in a better position to evaluate the same and I see no harm in such evidence being given viva voce.

Coming back to evidence viva voce, as recorded, it becomes obvious that the respondents were claiming not on the basis of there being no reasonable provision made for them but on the basis that the testator ought to have divided the estate equally between the two houses, that is, between the children of both the wives of the deceased including the widow who is living.

Sections 26, 27 and 28 of the Act cater for provision for dependants of the deceased not adequately provided for by will or an intestacy. This section reads:

> ***"26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on an application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased estate effect by his will, or by gift in contemption of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for the dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.***
>
> ***27. In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependants, or to make such other provision for him by way of periodical payment or a lump sum, and to impose such***

conditions as it thinks fit.

28. In considering whether any order should be made under this part, and if so what order, the court shall have regard to -

(a) The nature and amount of the deceased's property;

(b) Any past, present or future capital or income from any source of the dependant;

(c) The existing and future means and needs of the dependant;

(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;

(e) The conduct of the dependant in relation to the deceased;

(f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

(g) The general circumstances of the case, including, so far as can be ascertained, the testator's reason for not making the provision for the dependant."

The deceased was polygamous. He had two wives. The first one is Hannah Nyagichuhi also known as Ziporah Nyagichuhi (Nyagichuhi). The second one was Hellen Wambui (Wambui) who died in 1974 leaving two sons Jonathan Njuguna Mwangi (Jonathan) and Peter Kabata Mwangi (Kabata) and two daughters Hannah Wangari Kinuthia (Hannah) and Wanjiku Gitata (Wanjiku). Jonathan and Peter were the first two applicants, respectively, before the superior court. Hannah is the third applicant. Wanjiku died in 1993. She was unmarried. She left two children Samuel Gatitu and Hellen Wambui who were the 4th and 5th applicants respectively, before the superior court.

The deceased was living with his two wives in Kericho before the declaration of Emergency in Kenya in 1952. He was detained. These two wives were repatriated to Kiambu during the Emergency. They both lived in one house in Kiambu until July, 1957 when the deceased was released from detention. The deceased prospered. He bought a three acre farm in Ting'ang'a and later constructed a shop at Ndumberi. He did not live for long with Wambui who left home with her four children. She worked at a coffee estate in Muthaiga where she lived with her four children. Later she sent her two sons Jonathan and Peter to their father and she herself went to live in Mathare Valley with her two daughters, brewing alcohol. The deceased's relatives persuaded him to bring Wambui back home and she lived with the deceased from 1963 until 1965. She was allegedly expelled by the deceased after two years and returned to Mathare valley. Once again the deceased's relatives requested him to bring Wambui back, but instead he bought her a 20 acre farm near Mangu. She died on that farm in 1974 and deceased later sold that farm. The deceased left the following assets when he died:

<u>FARMS</u>

(a) LR. NO. KABUKU/LIMURU/164/9 and LR KABUKU/LIMURU/164/19. This farm is at Limuru Red Hill and measures 42 acres. It is valued at shs.38,640,000/=

(b) LR. NO. 9816 (Ngurunga farm). This is a 236 acres coffee farm on which deceased's matrimonial home stands. It has a coffee processing factory and other related buildings - like labour lines; coffee and irrigation systems. It is valued at shs.130,980,000/=

(c) LR/11088/2 Ruaraka - Nairobi. It is 105 acres and used for coffee growing - (25 acres) and dairy farming. It is valued at 115,200,000/=

(d) LR. 6209/8 - (Kiihu farm) - Kiambu Municipality. It measures 80.68 acres used for coffee growing. It has coffee and irrigation systems and is valued Shs.60,510,000.

(e) LR 6217/8 - Bahati Nakuru. This agricultural land of 42 acres was not inspected for valuation but interim valuation is shs.6,300,000/=

(f) LR. NO. Ndumberi/Ndumberi/10110 - 7.3 acres coffee farm valued at shs.5,110,000/=

UNDEVELOPED PLOTS

(g) LR NO. 7980 - Ruaraka - 0.513 acres, valued at shs.1.2 million.

(h) LR NO. 7785/738 (Karura) - Muringa estate - Nairobi 0.4692 of an acre - valued at shs.600,000/=

(i) LR. NO. 7785/379 - (Karura) Muringa estate - o.7413 of an acre valued at Shs.1.1 million.

BUILDINGS

(j) LR. NO. 209/2731 - Sheikh Karume Road Nairobi, a three storey Commercial building valued at shs.21,260,000/=

(k) LR NO. 209/6592 - Jericho Estate - Commercial-cum residential building with shop on the ground floor and two bedroomed flat on the upper floor which is rented to a tenant and is valued at Shs.2,460,000/=

(l) LR. NO. 36/VII/129 - Eastleigh Section VII Nairobi, a three storey block with 17 flats rented to tenants and valued at Sh.17,550,000/=

(m) Half share in LR NO. 36/vii/130 - Eastleigh section vii - single storey building with 8 rooms, (servant quarter rented) and valued at 3,450,000/= (half share - shs.1,725,000)

(n) LR NO. 36/vii/135 Eastleigh section vii - Three storey block with 17 flats let and valued at shs.17,550,000/=.

(o) One - third share in LR No.209/6599 - Jericho Estate - Commercial cum residential building valued at

shs.2,460,000/= 1/3 share shs.820,000)

(p) LR 209/6016 - Maringo Estate - Commercial-cum residential building occupied by 2nd respondent and valued at Shs.3,300,000/=

(q) LR No. 36/vii/317 - Eastleigh section vii - single storey building with five self contained rooms with living room, bedroom, Kitchen, toilet and registered in the name of Mwangi Mbothu investments Ltd. It is valued at Shs.4,250,000/=

(r) LR No.209/4345 - Muindi Mbingu/Monrovia street - Housing Garden Hotel - is a two storey Commercial-cum Hotel building valued at shs. 39,835,000

currently not being used and registered in the name of Mwangi Mbothu Investment ltd.

(s) Plot No. 37 Ndumberi Township - Single storey commercial building typical of a rural trading center valued at Sh.1,230,000 rented to two tenants who pay a total of shs.1,800 monthly.

(t) LR. No. Ndumberi/Ndumberi/T323 - Bungalow with 8 rooms occupied by two tenants and valued at Sh.518,800/=

As pointed out by the learned judge,the deceased's other assets included 4,368 shares in BAT(K) LIMITED, 1498 Shares in NATION PRINTERS, 1140 shares in KENYA BREWERIES, six motor vehicles and two tractors.

The deceased bequeathed his 42 acre Limuru farm as follows:

(a) LR NO. 164/9 and 164/19.14 acres to Kabata Gatitu (the second respondent) in trust for his wife and children.

8 acres to Rose Njoki Mbothu

5 acres to Wanjiku Gatitu (the mother of 4th and 5th respondents.

5 acres to Mrs. Leah Wambui Mwema.

5 acres to Mrs. Susan Mbaire Maina.

(b) Land parcels numbered NDUMBERI/TINGANGA/1010 and NDUMBERI/ NDUMBERI/T.323 to Nyagichuhi.

(c) Land parcel number 6217/8 at Nakuru as follows:-

(i) 15 acres to Peter Ndungu Ngae which legacy was conditional upon his relinquishing any claim and that he may have on the 4 acres of land owned by his late father in Kiganjo/Gachika/534. In the event that Peter Ndungu Ngae was not to accept the said bequest the legacy would revert to the estate.

(ii) 7 acres to Nahashon Njuguna which legacy was conditional upon him relinquishing any claims that he may have on the 4 acres of land owned by his late father in Kiganjo/Gachika/533 and Kiganjo/Gachika/534 in favour of Mrs. Wahu Ngae and her family.

(iii) 5 acres to John Gitata Mwangi

(iv) 5 acres to Stephen Njuguna Mwangi

(v) 5 acres to Christopher Mwaura Mwangi.

(d) Land parcel number 98/6 at Kiambu to the following beneficiaries in equal share:

(i) John Gitata Mwangi

(ii) Christopher Mwaura Mwangi.

(iii) Josphat Njoroge Mwangi

(e) Land parcel at Kiambu (Kiihu estate) LR. NO. 6909/7 to the following beneficiaries in equal shares.

(i) Stephen Njuguna Mwangi.

(ii) Jonathan Njuguna Mwangi.

(f) Land parcel at Karura forest (Maringa) LR. NO. 7785/379 to the following beneficiaries in equal shares:

(i) John Gitata Mwangi

(ii) Josphat Njoroge Mwangi

(iii) Stephen Njuguna Mwangi

(iv) Christopher Mwaura Mwangi

(g) Land parcel No.11088/2 at Ruaraka currently under subdivision to be dealt with as follows:

(i) 20 plots (10 acres) to be reserved and registered under the names of John Gitata Mwangi, Josphat Njoroge Mwangi, Stephen Njunguna Mwangi and Christopher Mwaura Mwangi each to get 4 plots.

(h) John Gitata Mwangi, Josphat Njoroge Mwangi, Stephen Njuguna Mwangi, Christopher Njuguna Mwangi to inherit equally his shares in the following companies:

(i) BAT Kenya Limited

(ii) KCC Kenya Limited

(iii) Nation Printers

(iv) Kenya Breweries Limited.

(v) KPCU

(vi) Menengai Farmers.

(i) Cash at hand and in bank bequeathed equally among John, Josphat, Stephen, Christopher and Nyagichuhi.

(j) The residue of his estate was to be divided equally among John, Josphat, Stephen and Christopher with a rider that should Peter Njuguna Ngae and Nahashon Njuguna Ngae did not accept the legacy bequeathed then 11 acres of land parcel number 6217/8 was to go to Wahu Ngae and her family and the balance of 11 acres was to revert to the residue of the estate to be dealt with accordingly.

The monetary value of the bequests to the beneficiaries as bequeathed in the will was put by valuers as follows:-

(1) Nyagichuhi - Shs.62,076,000/00

(2) John Gitata Mwangi - Shs.82,048,625/00

(3) Josphat Njoroge(The

second appellant) - Shs.80,916,625/00

(4) Stephen Njuguna Mwangi

(the third appellant) Shs.68,663,625/00

(5) Christopher M. Mwangi

(the fourth appellant) Shs.82,068,625/00

(6) Rose Njoki Mbothu(the

daughter of Nyagichuhi) Shs.7,360,000/00

(7) Susan Mbaire Maina(the

daughter of Nyagichuhi) Shs.4,600,000/00

(8) Leah Wambui Mwema(the

daughter of Nyagichuhi) Shs.4,600,000/00

(9) Mary Wangari and

Margaret Wanjiku -

the daughters of

Nyagichuhi Shs.Nil

(10) Jonathan N. Mwangi(the

first respondent, son of

Wambui) Shs.30,255,000/00

(11) Peter Kabata - the

second respondent Shs.Nil

(12) Peter Kabata's wife and

children - 14 acres

from LR NO.164/20

Kabuku Farm Shs.12,880,000/00

(13) Hannah W. Kinuthia -

the third respondent

5 acres from LR NO.164/9

and LR No.164/20(Kabuku

Farm) *Shs.4,600,000/00*

(14) Wanjiku Gatitu(deceased)

5 acres from LR.No.164/9

and LR No.164/120, Kabuku

Farm *Shs.4,600,000/00*

(15) Grandchildren - via

Wambui, namely Samuel

Katitu and Hellen Wambui

4th and 5th Respondents *shs.nil*

(16) Peter Ndungu Ngae (not in

the immediate family) 15

acres from LR No.6217/8

Nakuru valued at

Shs.6,300,000/= *Shs.2,250,000/00*

(17) Nahashon Njuguna(not in

the immediate family) 7

acres from LR No.6217/8

Nakuru *Shs.1,050,000/00*

It is common ground that Josphat Njoroge's figure is lower than those of John and Christopher because under the will he gets 11 3/4 shares whilst each of the others get each of the others gets 12 3/4 shares in Mwangi Mbothu Investments Limited from the deceased's 50 shares as per clauses 3(g) and (h) of the will read together with pages 194 and 205 of the record of appeal.

It is also common ground that Stephen's share is smaller than any of the other three because his share of Kiihu farm is worth Ksh.30,255,000/00 whilst the 1/3 share given to each of his brothers over the Nguruga Farm is worth Ksh.46,660,000/00.

As a result of the ruling of the learned judge the bequests(as changed by the learned judge) stand as follows:-

1. Nyagichuhi - Shs.59,966,000/00

2.　　John Gitata Mwangi

(first respondent)　　　Shs.64,788625/00

3.　　Josphat Njoroge

(second appellant)　　Shs.64,136,625/00

4.　　Stephen Njuguna Mwangi

(third appellant)　Shs.64,788,625/00

5.　　Christopher M. Mwangi

(the 4th appellant)　　Shs.64,788,625/00

6.　　Rose Njoki Mbothu　　Shs.7,360,000/00

7.　　Susan Mbaire Maina　　Shs.4,600,000/00

8.　　Leah Wambui Mwema　5 acres from LR.164/9

9.　　Mary Wangari,

Margaret wanjiku -

all daughters

of Nyagichuhi　　　　　Nil

10.　Jonathan N. Mwangi

(1st respondent)

(a)　1/2 of LR No.6909/7,

180.868 acres.

(b)　1/2 of LR.NO.36/VII/135

(c)　1/2 of LR NO.7785/379

(d)　1/2 of LR No.7980

Ruaraka　　　　　　　Total - Shs.40,180,000/00

(ii)　Peter Kabata

(1st Respondent)

(a) ½ of L.R. No. 6909/7;

80.868 acres total area.

(b)　½ of L.R. No. 7785/379

(c) ½ of L.R. No. 36/V11/135

(d) ½of L.R. No. 7980

Total Shs. 40,180,000/00

(12) Kabata's wife

2 children Total Shs. 12,880.000/00

(13) Hannah W. Kinuthia

3rd Respondent

(a) 5 acres from L. R

164/9 and L.R. No

164/20 (Kaluku farm)

(b) Ndumberi/Ndumberi/10/10

(c) Plot No. 37 - Ndumberi

Township - Kiambu

Municipality Total Shs.10,940,000/00

(14) Wanjiru Gatitu

(deceased)

To H. Wambui

5 acres from L.R. No.164/98

L.R. No. 164/20 (Kabuku Farm) Value Shs.4,600,000/00

(15) Samuel Gatitu

(4th Respondent)

Grandchild of Wambui

(a) Kshs. 1,000,000/=

(b) ½ share of the Mother's

five acres Total Shs.3,300,000/00

(16) Hellen Wambui

(5th respondent -

grandchild of

Wambui

(a) Kshs.1,000,000/=

(b) 1/2 share of the share

of mother's 5 acres Total Shs.3,300,000/00

(17) Peter Ndungu Ngae (Not a

member of immediate family)

15 acres from LR No.6217/8,

Nakuru Shs.2,250,000/00

(18) Nahashon Njuguna(Not a member

of the immediate family) 7

acres from LR No. 6217/8 Nakuru- Shs.1,050,000/00

It can be seen straight away that the learned judge, instead of making a reasonable provision, where and if necessary, has re-written the will of the deceased. In my view it is not the function of the court to re-write the wills of deceased persons. Section 26 of the Act provides only the power to make reasonable provision for a dependant who has not adequately been provided for in the will of the deceased, for which purpose section 27 of the Act gives discretion to the judge even to give a specific share of the estate to the dependant or to make such other provision for him by way of periodical payments or a lump sum and to impose such conditions as the court thinks fit subject to the guidelines laid down in section 28 of the Act.

I will first deal with the case of Jonathan Njuguna Mwangi, the first respondent, and in doing so I will keep in mind the testamentary freedom of the testator. Jonathan is the first son of the deceased by Wambui. Jonathan inherited some 45 acres of Land parcel No. 6909/4. In his affidavit filed in support of the application for reasonable provision he does not say that he has emigrated to Australia, is an Australian citizen or that his Australian wife is a pharmacist. He is talking on behalf of the House of Wambui complaining that the House of Nyagichuhi has had a more favoured inheritance from the estate of the deceased.

He is a citizen of Australia, he works in Australia as a fabrics printer and also as a forklift driver. His wife who is a pharmacist earns about 45,000/= Australian dollars a year. He confirmed that the deceased accumulated most of his wealth when his (Jonathan's) mother was away. He left for Australia in 1983 and since then had never contributed to his Kenyan family's welfare. From the tenor of his evidence it is clear that he had not kept in enough touch with his family. His evidence is to the effect that his mother's House ought to get half of the deceased's estate. The claim for reasonable provision, for himself, is to my mind, is contrived. A man who is an Australian citizen working in Australia, married to an Australian pharmacist and still getting a share of farm worth more than Shs.30,000,000/= cannot complain of being unreasonably provided. He needs, he says, 100,000 Australian dollars a year in addition to what his wife earns. The true purpose of his application was to achieve equality in inheritances by the two houses. He says so, as much. For the purposes of arriving at a reasonable figure for reasonable provision under section 26 of the Act it must be considered (in Jonathan's case) that he had not really kept in touch with his father (save for sending some medicines, allegedly) and in my view the learned judge was not entitled, the on facts before him, to decide that the deceased's failure to bequeath to Jonathan properties equal to what he bequeathed to sons of Nyagichuhi, amounted to no "reasonable provision". It is for the testator to decide what to give to his recalcitrant son. Looking at the matter in any manner Jonathan had no basis for saying that his father made no reasonable provision for him. The deceased was generous enough to bequeath to him a coffee farm worth more than Shs.30,000,000/= in all the circumstances. In saying so I

take into account the length of separation between Jonathan and the deceased and other factors, I have already gone into. Jonathan's application for a reasonable provision, amounts to greed rather than search or quest for justice to seek reasonable provision for maintenance as an alleged dependant.

I came now to the application for 'reasonable provision' by the second respondent, Peter Kabata Mwangi. Peter never swore an affidavit in support of his application for 'reasonable provision'. Nor did he give evidence although he could have done so. It is for an applicant to satisfy the Court that the testator made no reasonable provision for him. Although section 26 of the Act allows an application by or on behalf of the dependant, in my view the words 'on behalf of' are used for the benefit of minor dependants who themselves have no locus standii to so apply not being adults. Looking at the matter in another way, a grown up 'dependant' who does not care to speak for himself is not entitled to any relief. It was not enough for Peter to speak through Jonathan or Anne Wangari Kinuthia. Jonathan, did not, in any event, set out the needs or requirements of Peter. He simply said:

> *"We are asking for a reasonable provision. We would like to have some of the properties producing income so that we can be able to support ourselves."*

Later on, in cross-examination he said:

> *"My brother Kabata has no income. He has leased the farm bequeathed to him. I do not know how much he gets from the lease. We want to share the estate equally with everyone else like the other house. What we want is for our house is to get an equal share with other houses if possible 50:50."*

Anne Wangari Kinuthia, Jonathan's sister, did not talk of any alleged needs of Peter, her brother. She said:

> ***"I am claiming half share of the deceased as he had two wives (houses). I have a brother called Jonathan Njuguna Mwangi. He lives in Australia. I am not claiming half share alone. It is on behalf of my mother's children. Peter Kabata lives in Limuru - in the same farm. He derives his livelihood from the farm. He is married with four children.***

In cross-examination she said:

> ***"My brother Peter Kabata and Jonathan were not in good terms with my father most of the time. That is especially so with Peter Kabata. Peter Kabata drinks. He had disagreement with my father because of heavy drinking."***

So that even if the respondents could file a section 26 application on behalf of Peter Kabata there is nothing on record to show what would have been the reasonable provision for Peter Kabata. It is for a party to prove his case. He or she cannot simply stand by and hope that the court will give him something. Yet the learned judge proceeded to `bequeath' to him lands worth Shs. 40,180,00/-. Obviously the deceased (the testator) was aware of Peter's habits. It must be for that reason that he bequeathed 14 acres of L.R. Nos. 164/9 and 164/19 (Kabuku farm) to Peter Kabata in trust for his wife and children. Land as was given cannot be sold off by the trustee and the testator must have the fact of Peter's drinking habits in his mind. I would set aside the orders made by the learned judge in favour of Peter Kabata, the second respondent.

I come now to the claim in the superior court by Samuel Gatitu and Hellen Wambui. There is evidence from the third respondent that it was their mother who was providing them with their daily needs.

The learned judge said:

> ***"Indeed there is no evidence that deceased was directly maintaining the fourth and fifth***

> ***applicants (fourth and fifth respondents here). After the death of their mother the fourth and fifth applicants have been under the care of the third applicant (Hannah Wangari Kinuthia). The first wife of the deceased concedes that Wanjiku Gitara moved to the 5 acres she was given by the deceased in 1989 and that she had been living in that farm before she died in 1993. The same land was bequeathed to her and as she predeceased the testator, her two children by virtue of clause 3(m) of the will are the beneficiaries of the 5 acres. Even if the deceased had died intestate, Wanjiku Gitara by virtue of S.41 of L.S.A. (the Law of Succession Act) could have been entitled to the share of her deceased father as she predeceased him leaving two children by virtue of the rule of substitution enacted in s.41 of L.S.A. would have been entitled to the share Wanjiku would have been entitled to from the net intestate estate. So, clause 3(m) of the will makes the fourth and fifth some of the heirs of the deceased estate just as they would have been heirs of the deceased estate by the rule of substitution had the deceased died intestate."***

Then the learned judge after considering the effect of the words "were being maintained by the deceased immediately prior to his death" and after not finding any definition of those words proceeded to give a meaning of those words. The learned judge said:-

> ***"The words in our statute are not qualified by such words as, continuous, direct or substantial. The finding whether or not a member of a clan in s.29(b) was being maintained by the deceased will largely depend on the evidence before the court and the application by the court of all surrounding circumstances of the case including our cultural set up. In the present case, the deceased provided the land (capital) on which Wanjiku Gitara settled with her two children and on which she worked to eke out a living for herself and her two children. It was that land which was her principal source of income on which she maintained her children. The land was the major source of her income and by providing the land, I reckon that deceased was substantially though indirectly maintaining the fourth and fifth applicants."***

With the greatest respect to the learned judge, I think he ventured into realms of conjecture. Wanjiku Gatitu died in 1993. She was given land by the deceased during her life time. She maintained her children out of the income of that land. This factor does not suggest, to my mind, in any way, that her children were dependants of the deceased at the time of his death. If one was to stretch the meaning of the word dependant in that manner there would be no end to such dependants. That would mean that if a person gave land, during his life-time to, say, his grand-daughter for use, the great-grand-children would be termed as dependants of the testator before his death. Whilst I appreciate the cultural values of the Kikuyu community I cannot stretch the law to give dependency rights to persons who were in fact not dependants of the testator just before he died. That would bring the concept of the more extended family into the Act which the Act did not intend.

What the learned judge did was, in effect, to act as the testator himself and he substituted for the will what he thought the testator should have done. That cannot be so. I am certain in so doing the learned judge was influenced by the Report of the Commission on the Law of Succession. It is trite law that what is important is the law itself as it stands worded and not the recommendations upon which such law came into existence. The learned judge adopted the idea of "fair distribution" from this report. Now, "fair distribution" cannot be equated to "reasonable provision". I accept Mr. Nagpal's argument to the effect that the court found or invented a new test and therefore varied what the court thought was an irresponsible will. It is not an irresponsible will. The testator appears to have considered all the circumstances in which his children grew up, how they helped him, how his wives helped him or did not.

The circumstances under which a court can interfere with the freedom of testamentary disposition are well set out in the case of Re Inns, Inns v. Wallace & Others (1947) 2 All E.R. 656. In that case the Chancery Division Court in England was considering the widow's plea that the provision made for her by the will was not reasonable because it was insufficient to enable her to live in the matrimonial home as the testator had intended her to do. Wynn-Parry, J. (as he then was) said at page 311:

"The Act is not designed to bring about any

such compulsion. It proceeds on the postulate that a testator should continue to have freedom of testamentary disposition, provided that his disposition as regards dependants should be capable, having regard to all the circumstances, of being regarded by the Court as reasonable. From this it follows that the jurisdiction is essentially a limited jurisdiction .... The previous decisions clearly establish that the jurisdiction is one which should be cautiously if not sparingly used. The main difference between this and earlier cases is that this, so far as the reported cases are concerned, is the first one in which an estate of this magnitude has had to be considered. Notwithstanding the size of the estate, however, the same principles must be applied and, applying those principles, it appears to me impossible to say that the provision which the testator has made for his widow is unreasonable, merely because there appears from the evidence and on the face of the will to be an anticipation by him - or even an intention on his part - that his widow should continue to live in marital home, in which, for the purpose, he gives a life interest followed by a gift income, which in any event, proves insufficient to enable her do so."

I say, especially, in the case of Jonathan, that the testator, has in all circumstances, has been generous to him. The question simply is whether the will or the disposition has made reasonable provision and not whether it was unreasonable on the part of the deceased to have made no larger provision for Jonathan. The deceased was fully aware of Jonathan's 'contribution' to the fortunes of his estate.

I am unable to agree with Dr. Kuria when he suggested that we should deal with a matter such as this one on the basis of North vs South that is the richer world vs the poorer world. We must go by our law. The Act brought all Kenyans within its ambit leaving the option to certain communities to will away their estates as per their religions. We cannot get away from the wording of Sections 26, 27 and 28 of the Act. The concept of two houses or houses introduced by Dr. Kuria can only apply to intestacies. Dr. Kuria relied heavily on the decision of this Court in the case of Ndolo v. Ndolo, (Civil Appeal No. 128 of 1995), (unreported) to say that there should be fair distribution of the estate. The Court said:

"Whilst the deceased was entitled to dispose of his property as he pleased, he was not entitled to leave his first two wives Alice and Rose without any reasonable provision for their maintenance. As we have said elsewhere in the judgment of the Commission of Assize Mr. A. B. Shah, now a member of this Court - made some provisions for the two women but as the learned trial judge pointed out in her ruling those provisions came to naught and Alice was said to have died in terrible poverty. We cannot allow that to continue and the only way we can think of to make reasonable provisions for all of the deceased's lifetime dependants is to do so according to the three houses, each house representing a widow."

The Ndolo appeal was in regard to whether or not the will of the late General Ndolo was forged or not. The learned trial judge (Owuor, J as she then was) held that the deceased never signed the will and that being so the deceased died intestate. The appeal against her decision was limited to upsetting her findings as regards 'forgery' of the will. Having done so the court did not stop there. At the invitation of counsel the Court decided to put an end to the "unfortunate wrangling" and proceeded to divide the estate as it thought fit but nevertheless the Court pointed out:

"This Court must, however recognise and accept the position that under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she see fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime."

I have already pointed out what I think of Jonathan's claims. It was, in all circumstances, just a greedy claim.

Peter Kabata Mwangi gave no evidence as to his alleged entitlements. A court cannot help a litigant who says nothing. Even those who spoke for him did not say what reasonable provision should be made for him.

I have said enough about Samuel Gatitu and Hellen Wambui. They had no locus standii to claim reasonable provision.

The upshot of all this is that I would allow this appeal with costs in its entirety and restore the deceased's will to its original stand. For the same reasons the cross appeal fails. I would dismiss the cross-appeal with costs.

Dated and delivered at Nairobi this 19th day of April, 1999.

A. B. SHAH

....

JUDGE OF APPEAL

JUDGMENT OF BOSIRE, J.A.

The appeal and cross appeal raise a two pronged issue, namely, when and to what extent will a court interfere with testamentary freedom enshrined in Section 5 of the Law of Succession Act, Cap 160, Laws of Kenya (the Act), which, in pertinent part, provides as follows:

> "(1)Subject to the provisions of this part and part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.
>
> (2)...
>
> (3)...
>
> (4)..."

Section 26 of the Act empowers a person who qualifies under Section 29 thereof called dependant, and who considers that a testator did not make reasonable provision for him in his will, to apply to the court for an order making such reasonable provision for him as it thinks fit. Although Section 26, aforesaid, does seem to answer the first prong of the issue therein first framed, its construction is not free from considerable difficulties. Indeed arguments which were presented to us at the hearing were largely confined to the meaning to be attached to the phrase "reasonable provision" as used in the section.

What amounts to or does not amount to reasonable provision is not defined in the Act or rules made thereunder.

Section 28 of the Act does, however, set out circumstances which a court shall have regard to before deciding to make an order. The circumstances are broadly worded, and it would appear to me that the legislature in its wisdom deliberately made them broad to give the court greater latitude in deciding whether or not the applicant was reasonably provided for by the testator. That is a great task which has been entrusted to the courts. The task entails, firstly, an assessment of the facts as a whole to arrive at a finding, as to the extent of the net estate, existing and future means and needs to the applicant, any gifts inter vivos, the conduct of the applicant in relation to the deceased and whether or not it was good, the

situation and circumstances of the deceased's other beneficiaries and dependants under the will, and "the general circumstances of the case, including, so far as can be ascertained, the testator's reasons, if any, for not making provision for the applicant". All those circumstances are spelt out in Section 28, aforesaid. What emerges from the wording of that Section is that the court is not limited to what it may look at subject of course to the test of relevance.

The second part of the court’s task entails the consideration of all the relevant findings as to how to determine whether or not on an objective view of the matter, reasonable provision was made to the applicant. Thirdly, if the court finds that no reasonable provision was made, then it must proceed to consider the question of assessment as to what reasonable provision should be made. In doing so, like the process of determining whether or not reasonable provision was made for him, the court must consider all the relevant circumstances and fix a definite value. Like in cases of assessment of general damages in personal injury cases, the court must do its best to arrive at a reasonable estimate.

But the circumstances to be taken into account, as earlier on stated, are broad. The reason for parliament making them that broad is not difficult to discern. Kenya has at least 42 tribes and sub-tribes; it is a cosmopolitan society with people from different racial backgrounds, with different cultural and religious persuations all which have a bearing on the concept of reasonableness. Because of that each case has to be looked at in the context of its peculiar circumstances. What is reasonable in one case may not be in another. What is reasonable in one ethnic community or race may not be so in another. So reasonableness has to be considered in light of the applicant’s circumstances as at the date of hearing.

In this case Mwangi Mbothu, a Kikuyu, had married more than once. In 1943 he married Hannah Nyagichuhi (Nyagichuhi), presumably under Kikuyu Customary Law, and in or about 1946 he married Hellen Wambui, presumably too, under Kikuyu Customary Law. From the evidence on record, Mwangi Mbothu (the deceased), was then living somewhere in the Rift Valley, but was later, in 1957, repatriated to Central Province. He lost almost all his assets during the repatriation process, so that when he arrived at Ting’ang’a in Kiambu, he was almost destitute. He had no property of his own in Kiambu; but it would appear he was a hard working man.

He soon acquired several properties. When he died on 12th December, 1993 he had vast resources. For purposes of this litigation the net value of his estate was given as Kshs440, million, details of which I will endeavour to set out later as appropriate.

The deceased had nine children with Nyagichuhi, four sons and five daughters. The sons are the four appellants herein. The daughters are all married and presumably happily settled.

I will revert to the sons later on in this judgment. The deceased had four children with his second wife, Hellen Wambui (Wambui), two sons and two daughters. The first and second respondents/cross-appellants are the sons, while the third respondent, Hannah Wangari Kinuthia (Wangari) and Nancy Wanjiku, since deceased, are the daughters. Wanjiku died in 1993 and was survived by two children, Samuel Gatitu, and Hellen Wambui, the 4th and 5th respondents/cross-appellants, respectively.

There is no evidence to show the relationship between the deceased and his two wives whilst he was living at Kericho. I infer that it was good. Too, their relationship as soon as they arrived in Ndumberi, Kiambu before the deceased was detained by the British colonial government. He was released in 1957.

The deceased had a house in Ndumberi in which he lived with both his wives.

Problems between the deceased and Wambui started soon after the deceased left detention. Wambui was forced to leave the matrimonial home with her four children and thereafter settled at a coffee estate at Muthaiga where she engaged in casual jobs to eke for herself a living. However after about a year she sent her two sons back to the deceased and herself moved to Mathare Valley in Nairobi with her daughters.

There she was engaged in brewing alcoholic brews which she sold to earn a living. It is clear from the

evidence on record that she lived a miserable life a fact which constrained the deceased's relatives and friends to successfully plead with him to take her back. Cohabitation resumed in 1963, but again ceased in 1965. By then the deceased was living at Ofafa Maringo, Nairobi, where he was operating a shop business. Before cohabitation ceased for the second time Wambui helped in the business, occasionally; otherwise she would be left at home to mind the deceased's children.

Wambui did not move out of the matrimonial home voluntarily. She was forced out by the deceased. She thereafter returned to Mathare Valley and efforts by the deceased's relatives and friends to persuade him to return her to the matrimonial home failed. The deceased however, decided to buy a 20 acre farm at Mangu, Thika, and moved her there. Although he was then a very rich man he did not build any house for her there. Wambui lived there until she died in 1974. Before her death she was engaged in subsistence farming and generally lived in circumstances which the trial Judge described as abject poverty. Her remains were buried at the farm. The deceased, however, later sold the farm. The applicants contended in the court below that the proceeds were used to buy a farm known as Kihiu farm, a fact Nyagichuhi and her children denied.

On the evidence on record it is not possible to say why the deceased did not seem to like Wambui. However with regard to her children Nyagichuhi testified that both Jonathan and Peter were lazy, and often refused to work. She also testified that at one time Jonathan took his father's car without his permission and caused an accident with it a fact which annoyed his father who caused him to be sent to a borstal institution. He did the same to Peter because he allegedly stole Kshs.40/= from her. Clearly these were isolated cases and without other evidence would not in themselves lead to the conclusion that their conduct disentitled them to reasonable provision in the deceased’s will.

On the other hand the deceased looked after Nyagichuhi and her children well. As at the date of the judgment appealed against each of them was well settled, had independent income of their own and were well provided for in the deceased's will which I now propose to turn to.

The deceased left a will in which he named the appellants, John Gitata Mwangi (Ist appellant); Joseph Njoroge Mwangi (2nd appellant); Stephen Njuguna Mwangi (3rd appellant), and Christopher Mwaura Mwangi (4th appellants), as executors. However, only 3rd appellant applied for and was granted probate of the will. Objection to the grant by the Ist and 2nd respondents lapsed when they failed to file an answer and cross petition within 30 days which were allowed for that purpose in a notice to them by the Registrar of the superior court at its Nairobi Registry, where the petition for grant had been lodged. The grant has not however been confirmed. It could not be confirmed because the respondents in this appeal applied, as they were entitled to, under Section 26 of the Law of Succession Act, Cap 160 Laws of Kenya for an order that such reasonable provision be made to them as dependants of the deceased out of his net estate.

Section 26, aforesaid, provides as follows:

> "Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the Provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate."

"Dependant" is defined under Section 29 of the Act, which, in pertinent part, reads as follows:

> "For the purposes of this part, "dependant" means (a)the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
>
> (b)such of the deceased's parents, step-parents, grandparents, grandchildren, stepchildren, children whom the deceased had taken into his family as his own, brothers and sisters, and

half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c)..."

I earlier attempted to set out the parameters of the phrase reasonable provision. I said, inter alia, that the circumstances of each case must be borne in mind in discerning what would or would not be considered as reasonable provision.

The Act is an attempt to codify generally the Law of Succession in Kenya. It cannot therefore, be applied without qualifications as the circumstances render necessary, more so in cases which involve the various tribes in this country. As I stated earlier paragraph 28(g) of the Act, was included to accommodate the disparities in the cultural backgrounds of the various tribes and their customs and traditions. My view has support of the provisions of Section 3(2) of the Judicature Act, Cap 8 Laws of Kenya, which provides as follows:

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

What the above provision entails is that customary laws may be invoked in certain cases as a guide in determining certain issues in a given civil case provided that it is not repugnant to justice, morality or inconsistent with any written law and also bearing in mind the overriding consideration, namely, doing substantial justice between the parties. Neither the trial Judge nor Counsel for the parties made any specific mention of that wise provision. Wise, because currently most communities in Kenya are still very much attached to their personal laws, customs and traditions, which, to my mind, have many principles of manifest justice and good sense. The application of those principles has been left to the judicial discretion of the courts, and which discretion is limited only by the factors mentioned in Section 3(2) aforesaid. The learned trial Judge appears to have had those principles in mind when he remarked, in his judgment, as follows:

> "Section 26 of the Act as I have attempted to show has its distinct identity and has incorporated the African way of life it would be against the policy of the Act to look behind it. The Kikuyu Customary Law can of course be introduced (see Rule 64) of the Probate and Administration Rules) but not when the intention is to defeat the Provisions of the Statute Law."

The Sanction to be guided by African Customary Law is not rule 64, aforesaid, but Section 3(2) of the Judicature Act, aforesaid, and Section 28 of the Law of Succession Act, more specifically Section 28(g).

In the foregoing circumstances, contrary to the submissions made to us by Mr O.P. Nagpal who with Messrs Kirumba Mwaura, and Githu Muigai, appeared for the appellants, personal laws and customary practices in as far as they are relevant have a bearing in determining the issue of reasonable provision, unless of course they are disqualified on account of repugnance.

The respondents' prayers before the superior court read, in pertinent part, as follows:

> "1.That the respondents do furnish to the applicants a list of the assets and liabilities of the estate and accounts pertaining to the same.
>
> 2.That no grant of representation to the estate of Mwangi Mbothu who died on 12.12.93 having been confirmed, such reasonable provision be now made for the applicants as dependants of the deceased out of his net estate as the court thinks fit."

Jonathan Njuguna Mwangi, the first respondent, and his sister Ann (Hannah) Wangari Kinuthia swore the affidavits in support of that application. The general import of the two affidavits is that the deceased, through the influence of Nyagichuhi, hated Wambui, who was their mother and her children; that because of that hatred he often quarelled with not only Wambui, but also themselves and Peter Kabata whom as I stated earlier was one of Wambui's children; and upon Wambui's death the deceased sold land on which her grave stood; that the deceased arranged for Jonathan and Peter Kabata to be sent to Borstal institutions for some years, presumably, because he did not want to be burdened with them; that although members of Nyagichuhi's house were well established people in their own right nonetheless the deceased willed to them large portions of his estate, while in comparison he willed an insignificant portion of his estate to Wambui's house, and consequently, the disposition to Wambui's house was manifestly unfair. They prayed that the court make reasonable provision bearing in mind the provisions of Section 26 of the Law of Succession Act, aforementioned, and the fact that the deceased had a moral duty to make reasonable provision in his will for their maintenance.

The deceased disposed of his estate heavily in favour of Nyagichuhi's house. As stated earlier, the deceased married more than once implying that he was following the customs and traditions of his forefathers which permitted polygamy. Although that was so he nonetheless chose to dispose of his estate by a written will. He had the liberty to make an oral will as Kikuyu custom permits, or to state in his written will, by dint of the provisions of section 5 of the Act, that his estate would devolve according to Kikuyu Customary Law. However, had he done so it would have meant that his widow, Nyagichuhi, would have become disentitled to a share in his vast agricultural tracts of land. His bequest to her is mainly agricultural land. In all, the known value of her bequest translates to Kshs.62,076,000/=; made up of agricultural land, commercial property, but excluding shares in a limited liability company known as Mwangi Mbothu Investments, and cash in the bank of an unknown amount. I do not propose to reproduce the will here, as I think a summary of the dispositions will suffice.

The other beneficiaries in Nyagichuhi's house benefited as follows: John Gitata Mwangi, Nyagichuhi's son, got both agricultural land comprising of several parcels and plots; shares in the aforementioned family company, and cash in the bank of an unknown sum. The total known value of the bequest to him is Kshs.82,048,625/= which excludes the value of shares and cash. To Josphat Njoroge like to his brother John, the deceased bequeathed land valued Kshs80,916,625/=, shares and cash; To Stephen Mwangi, also John's brother, the deceased bequeathed to him property of an estimated value of Kshs.68,663,625/=; and to Christopher M. Mwangi, also John's brother, the deceased bequeathed an estimated Kshs.82,068,625/= of his estate. The above mentioned five, got quite a substantial part of the deceased's estate and generally he intended that they get almost equal shares of his estate. The deceased did not however, bequeath much to his daughters by Nyagichuhi and infact did not give anything to two of them and likewise his daughters by Wambui as we shall see shortly. However, unlike Wambui's daughters, Nyagichuhi's daughters to whom nothing was provided in the will, there is evidence that they were given some money inter vivos by their deceased's father to start businesses of their own. He also assisted them generally even after their marriage. Nyagichuhi had five daughters all married. To Rose Njoki Mbothu, he bequeathed 8 acres of land known as Kabuku farm; to Susan Mbaine Maina 5 acres of the same farm; to Leah Wambui Mwema, 5 acres of the same farm but gave nothing to both Mary Wangari and Margaret Wanjiru although as earlier stated the deceased assisted them a lot before his death.

The remaining part of Kabuku farm was bequeathed to some of the children of the second house as follows: 14 acres valued at kshs.12,880,000/= to the wife and children of Peter Kabata, which was to be held by Peter Kabata in trust for them; 5 acres valued at kshs.4,600,000/= to Hannah Kinuthia; and 5 acres of the same value to Wanjiku Gatitu. Peter Kabata himself got nothing , while his brother Jonathan N. Mwangi, got half of land known as L.R. No.6909/7 measuring 80.866 acres and valued at Kshs.30,255,000/=. As I stated earlier Wanjiku Gatitu alias Nancy Wanjiku, is deceased, and was survived by the 4th and 5th respondents.

The disparity between the bequests to Peter Kabata’s wife and children with that to Jonathan is unexplained. We were told that Peter Kabata is a drunkard, and that perhaps that is why his father did not give him anything but decided to provide for his wife and children. That is only an assumption, in absence of any explanation in the will itself or clear evidence to that effect. There is also no explanation

in the said will why the children of the first house were given much much more than those in the second house. As I stated earlier the will is silent on the disparities in the bequests, nor is there clear evidence to show a clear basis for the glaring disparities. In her testimony Nyagichuhi stated that Wambui's children were generally lazy and mischievous, and in her view that is why they were given little. There is, however, other evidence which shows, that the deceased chased away Wambui with all her four children when they were young. They went to live in a coffee estate in Muthaiga where they had barely enough for their welfare. The deceased did not provide for them during that time indicating that even at their tender age the deceased did not so much care for them.

The deceased also bequeathed 15 and 7 acres of land known as LR. No.6217/8 Nakuru, valued at Kshs2,250,000/= and kshs.1,050,000/= respectively, to Peter Ndungu Ngae, and Nahashon Njuguna both of them who were distant relatives of the deceased.

The respondents' complaint in the superior court was that the deceased's will did not make reasonable provision for each of them and collectively as members of Hellen Wambui's house. The total agreed value of the deceased's net estate is Kshs.440 million. Their prayer was that the superior court interfere with the deceased's will and make provision to them of at least 45% of the net estate which then would be shared among them in varying proportions. In support of that their counsel, Mr Kamau Kuria, relied on the decision of this court of Elizabeth Kamene Ndolo vs. George Matata Ndolo; Civil Appeal No. 128 of 1995, in which the court apparently relied on the principle of houses to share the deceased's estate in that case among his three widows, with the first one receiving 40% and the remaining two 30% each.

In their evidence Jonathan and his sister Ann Wangari Kinuthia complained that the deceased discriminated against themselves and their brother and sister merely because of his negative and infact hostile attitude towards Hellen Wambui with the result that they have hitherto, and will hereafter lead a stunted life unless the court intervened. It was their evidence further, that the deceased spent little, if any, material and human resources on them during his lifetime, but heavily leaned in favour of Nyagichuhi and her children, helped them to settle down in life by helping them to start businesses and to invest wisely. It was their case and their counsel's submission that the deceased had a special moral obligation to them and that reasonable provision to Wambui's house should be made to compensate them for the disadvantage and suffering they had gone through during his lifetime. On that submission Counsel relied on a passage in, A R Mellows; The Law of Succession, 4th Ed, 1983, P.188, in which the learned author states, inter alia, that a parent may be under special moral obligation where through penury or other disadvantage he was not able to give his child a good start in life. Such a situation does not obtain in our case. The authority is in my view, unhelpful to the respondents' case.

Counsel also cited several authorities from other jurisdictions to support the proposition that the respondents' was a suitable case for the court's intervention. Before us he cited more or less the same authorities. He also cited, the Report of the Commission on the Law of Succession, 1972 in Kenya, among other authorities all which I have read, but which I do not wish to cite here because in my view they do not advance the respondents' case. That, in my view, is so because the law in Kenya is different from that of most common law jurisdictions. Admittedly, there are similarities, but the position as I see it, is that our law has been modified by other legislation more particularly the Judicature Act. I have discussed this aspect before and I do not wish to repeat the argument here. Suffice it to state that because of such legislation the factors in Sections 28 of the Law of Succession Act, which a court has to consider, have to be read to include such customary law principles, subject of course to repugnance, which are relevant in determining the issue of reasonableness.

The crux of the appellants' case in the court below as was also before us, was that the deceased having decided to will his property he thereby excluded the application of customary law and principles of equity; that the will has stated his wishes and a court cannot and ought not to interfere unless the circumstances set out under Section 28, aforementioned, show, which duty of so showing, lay on the respondents, that no reasonable provision was made for him in the deceased's will; that the Act not being ambiguous in the relevant provisions, the court is precluded from seeking the aid of the Report on the Law of Succession in Kenya upon which Parliament acted to enact it; that reasonable provision neither means fair or adequate distribution or whether or not the testator made a responsible will, nor whether

what he hid was reasonable. Mr Nagpal argued forcefully on these matters and cited largely English decisions to fortify his submission.

I entirely agree with him that the court has no right of interfering with testamentary freedom, unless the applicant is able to show that no reasonable provision was made for him in the deceased's will. Too, that a court has no right to take into account factors other than those which the law permits. I do not however, agree with him that customary law principles have no relevance in determining what would be considered as reasonable provision. The customs and traditions of the community from which the testator hails tell a lot about what people from that community consider reasonable or not reasonable provision. It is also important to state here that the concept of reasonableness varies from one community to another, one race to another and even from one jurisdiction to another. That is why decisions of other jurisdictions have to be considered with caution because they were decided against a specific background and circumstances. Even where decisions of other jurisdictions are based on legislation which are in pari materia with ours, yet the background against which they were made may be different. While I enjoyed reading the various decisions which Mr Nagpal and those who were assisting him cited, for the reasons I have endeavoured to give, I did not consider that they advance the appellant's case further.

For the foregoing reasons I am of the view that Githinji, J. properly came to the conclusion that customary law is relevant in determining the issue of reasonable provision. However, the basis for its application is neither the Report of the Commission on the Law of Succession, as that report became spent upon the enactment of the Law of Succession Act, unless of course there is any ambiguity in its provisions when in some cases that may happen, nor any of the rules under the Probate and Administration Rules, made under the Law of Succession Act, as the learned trial Judge held in his judgment, but as stated earlier, it is section 3(2) of The Judicature Act which forms the basis of its application.

Customary Laws and traditions of most communities in Kenya emphasize equitable principles in the distribution of properties amongst those entitled to benefit. Fairness is one of those principles and that cannot be said by any standard to be repugnant. It is the principle of fairness which is incorporated in the Provisions of section 40 of the Law of Succession Act, which deals with the sharing of a polygamous intestate's net estate. The decision of this court earlier on cited of Elizabeth Kamene Ndolo v. George Matata Ndolo, was in my view decided on the basis of what I have stated, above.

In his judgment Githinji J. at some stage used the term "adequate" provision and in effect appeared to suggest that reasonable provision also means adequate provision. I think that was a slip as the learned Judge all along had been talking about principles of fairness as known under Kikuyu Customary Law being relevant in determining the issue of reasonableness.

In submissions before us counsel for the appellants, criticized the learned Judge for his action in redistributing the deceased's estate as in his view he thereby took over the function of testator and wholly interfered with his wishes as shown on his will. That criticism is largely true. However, once a court comes to the conclusion that no reasonable provision was made by a testator to a given applicant what is it supposed to do, more so where the surplus net estate, if any, is insufficient to make reasonable provision for that applicant. The court, is, inevitably, compelled to interfere with other beneficiaries' bequests.

Githinji, J. after coming to the conclusion that the deceased did not make reasonable provision in his will for all the applicants, went on to redistribute the net estate of the deceased in the following manner:

> "1.That half share of land title No.6909/7 (Kiihu farm) bequeathed to Stephen Njuguna Mwangi by the testator be transferred by the executors to Peter Kabata Mwangi.
>
> 2.That the executors do transfer an equal share to Stephen Njuguna Mwangi from land No. 9816 (Ngurunga Farm) to compensate him for the lose of half share in land title No. 6909/7.
>
> 3.That the executors do transfer plots

(i)LR No. 36/VII/135 Eastleigh Section VII;

(ii)LR No. 209/6592 Jericho Estate Nairobi;

(iii)LR No.7980 Ruaraka; and

(iv)LR No. 7785/379 Karura – Muringa Estate to Jonathan Njuguna Mwangi and Peter Kabata Mwangi as tenants in common in equal shares.

4.That the executors do transfer plot No.37 Ndumberi and land title Ndumberi/Ndumberi/10110 – Kiambu to Hanna Wangari Kinuthia.

5.That the executors do pay shs 1,000,000 to Samwel Gatitu and shs 1,000,000 to Hellen Wambui for their maintenance and education. 6.I appoint Hanna Wangari Kinuthia as guardian of Samwel Gatitu and Hellen Wambui and order the said Hanna Wangari Gatitu do open a bank account each for Samwel Gatitu and Hellen Wambui at Housing Finance Company of Kenya (HFCK).

7.That the executors do pay the sum Samwel Gatitu and Hellen Wambui are entitled in the respective bank accounts.

8.That the said sums to be invested into the said account until Samwel Gatitu and Hellen Wambui attain the age of 25 years.

9.That Hannah Wangari Kinuthia the guardian do withdraw accruing interest from time to time for the maintenance and education of the said Samwel Gatitu and Hellen Wambui.

10.That the cost of the application and the valuers charges be paid from the estate.

11.Leave to any party to appeal."

In their cross appeal the respondents complain that the trial Judge did not give them enough. They would want this court to interfere with the above arrangement and give them the equivalent of at least 45% of the estate.

It was submitted that Jonathan who is presently settled in Australia, with his Australian wife, has what the appellants said was a substantial income, had been reasonably provided for in the deceased’s will and did not therefore need more. The will makes provision to him of Kshs30 Million odd worth of property. The learned trial Judge was not of the same view because in his view, what he got when looked at against the backdrop of the deceased's vast estate, and what had been provided for to other beneficiaries, was "but just a crumb". It was not suggested that Jonathan's income and that of his wife is about the same, or exceeds that of other beneficiaries. Jonathan's wife is a pharmacist who earns about 45,000 Australian Dollars, a year. Jonathan himself works in Australia as a fabrics designer and a forklift driver. He said that he earns about 400 Australian dollars per annum. He left Kenya in 1986 to settle in Australia and later became an Australian citizen. Since 1986, he returned to Kenya twice before the deceased died and twice after that. He did not attend the deceased's funeral because, he said, no one informed him about his father's death until long after his burial. It was submitted on behalf of the appellants that his infrequent visits to Kenya were suggestive of the fact that he did not care about his father or other family members. I do not think that was an aspect that could reasonably be taken against him considering the distance involved and in absence of any other substantial evidence to show he was in anyway against his father. Moreover, the trial Judge, apart from the use of the term "adequate" regarding what is provided in the will for Jonathan which I said earlier was a slip, there is nothing else to show he applied wrong principles or misapprehended the law when he came to the conclusion that Jonathan was not reasonably provided for by the deceased in his will.

As regards his brother Peter Kabata, he was said to have been a drunkard before his father’s death and

thereafter.

It was not stated for how long he had been a drunkard or whether his drunken behaviour impaired substantially his general discretion. It was not in dispute that he was over indulging in alcoholic drinks. He did not testify, nor did he swear any affidavit to explain his status as at the time of making the application for reasonable provision. It was submitted that having failed either to file an affidavit or to testify in support of his application it cannot be said that he had discharged the burden which lies on an applicant under section 26 of the Act. It was, however, common ground that the deceased did not make any provision for him in his will. The appellants contended that the bequest to his wife and children was in effect a bequest to him, that the testator in his wisdom feared that if he made provision for him directly, he would squander all of it and leave his family destitute. It is doubtful if that is what the testator had in mind, because had that been so he would not have appointed Peter Kabata as trustee of that bequest. Moreover had that been so there was nothing to preclude him from appointing a person of greater sobriety and social standing than Peter Kabata as trustee.

There is no mandatory requirement for an applicant under section 26 aforesaid, to personally file an affidavit or to testify before he can succeed. It is desirable for him to explain his personal circumstances. However I do not think that there is a general rule in that regard. Where, as here, the facts are clear and undisputed, it is my view that it will be an affront to good sense to disallow an application merely because the applicant did not personally file an affidavit or to orally testify.

The total bequeathed to Kabata's family is about Kshs.12, million odd. Kabata does not have any known income. The appellants conceded he was not provided for and were not able to show what he has. This is a clear case in which the deceased for whatever reason did not make reasonable or any provision at all for Kabata in his will. As I stated earlier the Kshs.40/= he is alleged to have stolen from Nyagichuhi could not of itself without more properly make the testator to deny him any part of his estate. It was an isolated incident and not directly an act against the deceased. Mr Nagpal submitted that the reasonableness of a testator’s behaviour is not a relevant factor. With due respect to him that in my view is relevant to enable the court decide whether his failure to provide for a particular applicant is based on reasonable grounds. To my mind, no reasonable provision was made by the deceased in his will for the benefit of Kabata. On that I agree with the learned trial Judge. Even assuming without deciding that the bequest to his family was made to him, considering the size of the estate, that he has no known income and his circumstances generally, I would still come to the same conclusion.

The third applicant is Anne Wangari Kinuthia also described as Hannah Wangari Kinuthia. She got 5 acres of LR. No 164/9 and LR No. 164/20 (Kabuku Farm), whose value, as stated earlier, was agreed at Kshs4,600,000/=. The trial Judge appears to have considered that not to be reasonable provision for her because in his own words there is no distinction between a son and a daughter under the Act. I have no reason to come to a different finding. Nor do I have a reason to fault him on the finding that the 4th and 5th respondents who were the deceased's grandchildren, were not reasonably provided for.

An issue was raised as to whether or not the two qualified as dependants of the deceased. The trial Judge in dealing with the issue rightly pointed out that the words in the definition of dependant in the Act "were being maintained by the deceased immediately prior to his death" would aptly apply to the 4th and 5th respondents not having been his own children. The phrase in parenthesis, above, are not defined in the Act. Nor do we have locally decided cases on the issue. As the trial Judge pointed out a decision on who, other than a widow, son or daughter of a deceased, who can be called a dependant is a matter dependent on evidence. Furthermore, the maintenance need not be construed as in matrimonial and custody cases. Determination of such matters, has to depend on the circumstances and background of the testator including the relationship between him and the applicant. In this issue, like the issue of reasonableness the cultural background, the customs and traditions of the people concerned and the circumstances of the applicant come into play. In the African context a grandfather is morally obliged to maintain the children of his deceased son or daughter. The deceased gave their mother Wanjiku, a 5 acre piece of land, inter vivos, to live on and to work it to support both herself and the two. He did not transfer the land to her during his lifetime but willed it to her in his last will and testament. Considering the wording of paragraph (m) of the will in which the testator has expressly stated that in the event of death of any beneficiary in

the will his or her share would pass on to his or her spouse or child, I am of the view that by giving 5 acres for Wanjiku's use, the deceased also intended that it be for her children's maintenance. The 4th and 5th respondents therefore clearly come under the category of people the deceased was maintaining as at the time of his death.

On the second prong of the issue herein first adumbrated the trial Judge in varying the bequests was exercising discretionary jurisdiction, which an appellate court has no right to interfere with unless in exercising the discretion the trial Judge erred in principle. In this appeal and cross appeal I have no basis for coming to that conclusion and find no necessity in dealing with the individual bequests as assessed and fixed by him for each beneficiary.

For the foregoing reasons I would dismiss the appeal and cross-appeal, but make no order as to costs.

Dated and delivered at Nairobi this 19th day of April 1999.

S.E.O. BOSIRE

JUDGE OF APPEAL