



the rest of the properties were transferred to the Respondent's name to hold in trust for the family.

[6] Joseph Kanyarati Gichunji, Mary Wanjiku Muhindi, Jane Wangari Gachunji and Grace Wanja Kanyarati filed statements in support of the protest.

[7] In its judgment subject of this appeal, the trial court ruled:

*“The above being the position, it is my finding that the protestor has failed to prove on a balance of probabilities that the house and part of the land was given to him by the deceased as a gift during his lifetime. I also find that the protestor has failed to provide cogent prove that he exclusively constructed the extension now in dispute. In my view and upon considering the evidence on record, it is my finding that the extension forms part of the main house and the court hereby holds that the entire house including the extension is a matrimonial house and it belongs to the petitioner. In conclusion and based on my analysis herein, it is my finding the protest has no merit and is dismissed. Having dismissed the protest, I hereby find that the proposal made by the petitioner is reasonable and fair considering that she is entitled to the entire net estate as per the Law of Succession Act but she has nonetheless proposed to share the estate between herself and the children. The estate will thus be distributed as proposed in paragraph 6 of the petitioner's affidavit dated 1.3.2022 but only as regards deceased's share in LR No.Kiine/Nyangio/1 (2.43Ha), Murang'a Municipality Block 1/25 and LR No.Kiine/Ruiru/884. The petitioner and her two daughters will retain the upper part of LR No. Kiine/Nyangio/1 between the tarmac road and the railway line while the protestor and his two brothers will share the lower part after the railway line. For the avoidance of doubts, the portion of LR No.Kiine/Nyagio/1 given to the petitioner and her two daughters will comprise the entire matrimonial house. The copy of the map produced by the petitioner confirms that LR No.Kiine/Nyangio/1 has only one road of access being the tarmac road on the upper side of the land. The portion (s) given to the three deceased's sons shall therefore be provided with an access road to the tarmac road. In the end and in view of the foregoing analysis, the judgement is entered as follows:- i) The grant of letters of administration intestate made to Polly Wanjiru Maina in this*

*matter on 2<sup>nd</sup> July, 2021 and issued on 11<sup>th</sup> August, 2021 is hereby confirmed.*

*ii) That LR No.Kiine/Nyangio/1 (1/2 share), Murang'a/Municipality Block 1/25 and LR No.Kiine/Ruiru/884 shall be shared as per paragraph 6 of the petitioner's affidavit sworn on 1.3.2022 and filed in support of the summons for confirmation of grant dated 1.3.2022. iii) A certificate of confirmation to issue as per (ii) above. iv) The protest is dismissed.”*

### **The Appeal**

[8] On appeal, the Appellant filed his memorandum of appeal on 22/10/2024 raising 6 grounds as follows:

- 1. The Learned Magistrate erred in both law and fact by unfairly distributing land parcel No. Kiine/Nyangio/1 between the beneficiaries despite the weight and nature of evidence on record.*
- 2. The Learned Magistrate erred in both law and fact in that he did not consider the administrators supplementary affidavit sworn on 19<sup>th</sup> December 2022 and the protest sworn on 28<sup>th</sup> April 2022 which excluded land parcel No. Kiine/Ruiru/150 as part of the deceased's estate.*
- 3. The Learned Magistrate erred in both law and fact by distributing Land Parcel No.Kiine/Ruiru/150 to the appellant which does not form part of the estate.*
- 4. The Learned Magistrate erred in both law and fact by finding that the Appellant was not entitled to a share of Land Parcel No. Kiine/Ruiru/884 against the protestor's supplementary affidavit sworn on 19<sup>th</sup> December 2022 and the evidence on record.*
- 5. The Learned Magistrate erred in both law and fact by distributing the estate unfairly as against the appellant who is not a disputed beneficiary of the estate.*
- 6. The Learned Trial Magistrate erred in law and fact by disregarding the weight of evidence tendered by the appellant thereby arriving on the wrong finding regarding distribution of the estate.*

### **Duty of the court**

[9] This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at

its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others [1968] E.A. 123*).

### **Oral Evidence**

[10] **PW1 John Gachunji Maina** adopted his affidavit dated 28/4/2022 as his evidence in chief. He testified that, *“I do transport business. The land is 3 acres. I claim 1 ½ acres while my mum and my sisters to get 1 ½ acres.”*

[11] On cross examination, he stated that, *“I have developed the land using my money. My wife has been cultivating on the land. I have used Kshs. 545,000/=to build the house. The subject land KIINE/NYANGIO/1 was shared by elders. I was given 1 ½ acres and that is what I am claiming. My 1<sup>st</sup> wife was cultivating below the coffee. My father left me on 1½ acres. My 2 brothers were given LR. KIINE/RUIRU/884. My proposal of the plot at Murang’a should be shared among myself. My brother and yourself at 20% each while the sisters should share the other 20%. My father gave me the house and the land in 2007. You have a separate 4 bed roomed matrimonial house.”*

[12] In re-examination, he stated that, *“I claim the portion where the house is. The other siblings have not built on that land. My mother has 4 separated 4 bed roomed house. The access road is on the upper side (A) of the road. Part (B) has no access road. Part B proposed by applicant has coffee and is sloppy and no one has built on that area.”*

[13] **PW2 Joseph Kanyarati Gachunji** adopted his statement dated 28/04/2022 as his evidence in chief. He testified that, *“I know LR. NO.KIINE/NYANGIO/1. There is only one access road to that property. There is a rail way line which has cut across the land on the lower side. You cannot access the lower part without passing through the upper part.”*

[14] On cross examination, he stated that, *“Deceased was my brother. I was in good relations with deceased. I did not tie your husband in 1974. You did not call me when you decided to file this Succession. My proposal is that the properties of my brother should be shared equally. Protestor build the house. I also participated in providing materials for ceiling. You are sidelining the protestor. The court will distribute the estate fairly. If you had shared the properties fairly we would not be here. Let the estate be shared as per the law. I have not incited the protestor.”*

[15] In re-examination, he stated that, *“I have said what I witnessed when deceased was alive.”*

[16] **PW3 Mary Wanjiku Muhindi** adopted her statement dated 28/04/2022 as her evidence in chief. On cross examination, she stated that, *“I was given the share which was for my husband. Deceased was a friend. I do not know why deceased did not attend my child’s burial. I used to visit deceased at the hospital. I was present when the house was built. Deceased was unable to complete building the house and he called his children to finish the completion of the house. In February 2017 there was a thanksgiving in my house and after eating you raised the issue of the land. We agreed that the protestor to take the portion which has the house.”*

[17] In re-examination, she stated that, *“The land is supposed to be shared from the top to the bottom. There is no road on the lower part. I have stated what I know since deceased was my immediate neighbour. I have no grudge against the petitioner.”*

[18] **PW4 Jane Wangari Gachunji** adopted her statement dated 24/05/2022 as her evidence in chief. On cross examination, she stated that, *“Deceased was my brother and our relationship was good. Deceased was unable to complete building the house and he called his children to help him. We did not wrote down what deceased told me. I do not know whether Kshs. 60,000/= given by protestor was for you to visit YUSUF HAJI. We had a family meeting where it was agreed that protestor be given a share of KIINE.NYANGIO/1. Protestor did the plastering, ceiling and also fixed the tiles in the disputed house. Deceased constructed the house and even fixed the roof. Kanyarati was refunded the money which he had contributed. I used to find deceased in that house.”*

[19] **PW5 Grace Wanja Kanyarati** adopted her statement dated 29/11/2022 as her evidence in chief. On cross examination, she stated that, *“Deceased was like my son. I have visited deceased even at Mt. Kenya Hospital. I used to talk to deceased. I attended deceased’s burial together with my children. I did not come to your house at 8.00 pm in company of 6 other people. We had a meeting over the house but the meeting did not go through since you stood up wanting to be at protestor. The land is supposed to be subdivided from top to bottom. Let the land be shared according to the law. The deceased told me that he had given protestor the upper part where the house is.”*

[20] **AW1 Rose Wangui Peter** adopted her statement dated 13/12/2022 as her evidence in chief. On cross examination, she stated that, *“Protestor is deceased’s son.*

*The subject land has an access road. There is a railway line on the lower part of the road. There is a path through the homestead of that leads to the portion on the lower part after the railway line. Protestor contributed money for building of the house. We also contributed towards the building of the house. LR. KIINE/RUIRU/884 is supposed to be shared among the 3 sons. MURANG'A/MUNICIPALITY BLOCK 1/25 should be sold and half of the proceeds to go to our mother while the other half should be shared by 5 of us LR KIINE/NYANGIO/1 should be shared as follows (ie) the upper part to be given to the daughters and our mother while the lower side after the railway line to be shared by our brothers. There is a road which accesses the lower part of the land.”*

[21] **AW2 Polly Wanjiru Maina**, and the Respondent herein adopted her statement dated 30/05/2022 as her evidence in chief, and produced the p3 form as an exhibit. On cross examination, she stated that, *“Protestor is my biological son with deceased. I wish to rely on my proposal dated 19/12/2022. Parcel No. KIINE/NYANGIO/1 is 3 acres from the top to the bottom. There is a road after the railway line. Protestor has a share of parcel 1. Parcel 1 has 1 one house which has an extension. Initially we had 3 bedroom house built in 1991 when Mutugi and Kanyarati were small. Later I built a timber house for Mutugi but Kanyarati was left in the main house. Deceased started building the house. Deceased did not call the children. Three children contributed money to complete the house. I did not refund any money. After completion of the house the protestor his wife occupied the extension. John and his wife used to spent a night in the extension but would not lock it when he went back. Rose was never been married. We started building the extension in 2001. There was peace during the deceased’s lifetime. I have never chased anyone. Protestor has never cultivated on the subject land. Protestor’s wife used to pick coffee. Deceased gave protestor Ruiru Land. I was at Mary’s house in February 2017 but we did not discuss the issue of the land. I have never asked protestor not to come to the land. Protestor has beds in the house. There is also a meko gas, tables, fridge and many items belonging to protestor. Rose has items in the extension house. Tonny has meko in the house. There are 4 meko in the house.”*

[22] **AW3 Tonny Mutugi Maina** adopted his statement dated 14/12/2022 as his evidence in chief. On cross examination, he stated that, *“I left home to look for employment in 1997. I used to sleep in off cut house built for me after circumcision. My parents had 3 bedroom house. I left my house to Michael. When protestor came home. I*

would give him my off cut house and seek accommodation from my friends. My father started another project of building another house which was self contained. Our father did not call for a meeting. My father did not call. Me. There is a day during Christmas when I met Michael, Rose, John and Lucy discussing how they would help my father to complete constructing the house. I was told the amount contributed by my sibling. My father did not use the extension and did not sleep there. The protestor has spent a night in the extension. Protestor locked the extension after the death of my father. I do not know why protestor locked the house. John, Rose and Lucy bought a sofa set for the extension protestor brought a fridge, water dispenser and oven. Beds were bought by our father. I do not know whether there are meko in the house. I have no meko but my mother has meko. I have never met protestor's wife using parcel No. KIINE/NYANGIO/1. Deceased had given protestor Ruiru land to cultivate and build. They were to share that land with us. They grew coffee on that land. There is a road on the lower part of KIINE/NYANGIO/1. The lower part after the railway line has coffee."

[23] **AW4 Wilson Kiama Gachunji** adopted his statement dated 30/05/2022 as his evidence in chief. On cross examination, he stated that, "Protestor is my brother. I used to visit protestor in LR. NO. KIINE/NYANGIO/1. I have never met him in any family meeting. Protestor told me about the money for construction of the house. My sister Rhoda also told me about the money. Protestor used to visit his parents. Protestors' wife has never cultivated coffee on KIINE/NYANGIO/1. When one is shown a place to stay or cultivate there are no written records. I cannot tell what protestor and his father talked about since I was not there."

[24] In re-examination, he stated that, "In Kikuyu customs I have never seen a man being given the parent's house or going to stay in a parent's house."

[25] **AW5 Lucy Wairimu Maina** adopted her statement dated 13/12/2022 as her evidence in chief. On cross examination, she stated that, "One can access the extension from another outside door or through the parent's house. The extension has a toilet and a table room plus a garage. LR. NO.KIINE/NYANGAIO/1 has an access road from the lower side. My mother's proposal is that she retains the ½ acre upper part with the daughters while the lower part should be shared by our 3 brothers."

[26] In re-examination, she stated that, "I and my sister's have agreed to have ½ acre share of parcel NO.KIINE/NYANGIO/1."

### **Submissions**

[27] The Appellant lamented that he was shortchanged because at paragraph 6 of the affidavit of 1/3/2022, Kiine/Nyangio/150, Kiine/Sagana/388/216, and Karatina Township/Block 1/118 are not part of the estate of the deceased, and he urged the court to consider the evidence that he was entitled to the upper part of Kiine/Nyangio/1.

[28] The Respondent urged the court to dismiss the appeal, as the estate was distributed fairly, and cited **Bob Njoroge Ngarama v Mary Wanjiru Ngarama & another (2014) eKLR.**

### **Analysis and Determination**

[29] From the grounds of appeal, the singular issue for determination is whether the trial court's decision was grounded in law.

[30] It is clear that the deceased died intestate, survived by the spouse, the Respondent herein and 5 children, namely Rose Wangui Peter, John Gachunji Maina, Lucy Wairimu Maina, Tonny Mutugi Maina and Michael Kanyarati Maina. The provisions of section 35 of the Law of Succession Act come into play, which stipulate that -

***“(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—***

***(a) the personal and household effects of the deceased absolutely; and***

***(b) a life interest in the whole residue of the net intestate estate:***

***Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”***

[31] This Court has considered the constitutionality of the proviso to section 35 on the consequences of re-marriage of a widow but nothing turns on this finding in this suit. See ***Ripples International v Attorney General & another; FIDA (Interested Party)*** [2022] KEHC 13210 (KLR).

[32] In addition, the action of the respondent widow may very well amount to an act of appointment under section 35 (2) of the Law of Succession Act, that is ***“power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children”***. See explanation as to

the rationale of the provision in *Tau Katungi -vs Margrethe Thorning Katungi & another* [2014] eKLR (Musyoka, J.)

[33] The uncontested evidence on record is that L.R Nos. Kiine/Nyangio/150, Karatina Township/Block 1/118 and Kiine/Sagana/388/216 do not form part of the estate of the deceased, and are thus not available for distribution.

[34] The estate properties are therefore L.R No. Kiine/Nyangio/1, Kiine/Ruiru/884 and Murang'a Municipality Block 1/25. The Appellant appears to have acquiesced to the manner in which L.R. No. Muang'a Municipality Block 1/25 was distributed, and this court will not belabour that issue.

[35] The dispute in this appeal is the distribution of the ½ share of L.R No. Kiine/Nyangio/1 and L.R. No. Kiine/Ruiru/884. As regards L.R No. Kiine/Ruiru/884, the Appellant conceded on cross examination that L.R No. Kiine/Ruiru/884 was given to his 2 brothers by the deceased as follows, **“My 2 brothers were given LR. KIINE/RUIRU/884.”** That evidence was corroborated by the Respondent, who stated that, **“Deceased gave protestor Ruiru Land.”**, while AW1 stated that, **“LR. KIINE/RUIRU/884 is supposed to be shared among the 3 sons”**, and AW3 stated that, **“Deceased had given protestor Ruiru land to cultivate and build.”**

[36] The Court accepts that this evidence supports, on a balance of probabilities, a finding that the said land ought to have been shared equally and exclusively amongst the 3 sons of the deceased.

[37] As regards the ½ share of **L.R No. Kiine/Nyangio/1**, the Respondent intimated to the court on 24/11/2023, that she was amenable to an equal distribution of the estate as follows, **“I have decided to share the lands equally. I wish to have the estate shared equally.”**

[38] The Appellant's claim over the matrimonial home is pegged on his admitted contribution to its construction. Nonetheless, there is sufficient evidence on record that the other children of the deceased equally made contributions towards the said construction, yet none of them has laid any claim thereto, save for the Appellant.

[39] The accepts as a matter of public notoriety that in an African set up, children are obligated to assist their parents unconditionally, which assistance does not in any way confer upon them any proprietary rights or expectation of a reciprocal benefit. See, for example, discussion on the point with regard to dependency in personal injury claim, in

*Kenya Breweries Ltd v Saro* [1991] KECA 12 (KLR) where the Court of Appeal citing its own decision in *Sheikh Mushaq v Nathan Mwangi Kamau Transporters & Five others* [1985 – 1986] 4KCA 217, wherein the late Nyarangi, delivered himself as follows:-

**“In general, in Kenya children are expected to provide and to provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian communities in Kenya. This particular custom is broadly accepted, respected and practiced throughout Kenya both by Africans and Asians. I would say the application of the custom at family level is the basis of the national ethos of being mindful others’ welfare.”**

[40] The Respondent proposed at paragraph 6 of her further supplementary affidavit in support of the summons for confirmation of grant, sworn on 11/3/2024, that the property be shared equally among the 6 beneficiaries of the deceased, save for the matrimonial home, which she is entitled to retain as the surviving spouse, by virtue of section 35 of the Law of Succession Act. Needless to state, the obvious bad blood between the parties herein, as evidenced by the reported assault, renders it impracticable for them to reside in the house in harmony, which is factor that the court may properly consider in its decision. See *A.B & another v R.B* [2015] KECA 467 (KLR) of the Court of Appeal from a decision of this court.

[41] The court is satisfied on the test of *Selle v Associated Motor Boat Co. & others*, supra, that the trial court failed to take into account take account of particular circumstances and probabilities from the evidence as to the deceased’ gifting of the parcel of land *LR. KIINE/RUIRU/884* to the sons and the contribution by the other children to the construction of the home on *L.R No. Kiine/Nyangio/1* and thereby misapprehended the evidence on record in distributing the 2 estate properties. There is, consequently, a basis for interference by this Court with the trial court’s decision subject of the appeal.

## **ORDERS**

[42] Accordingly, for the reasons set out above, the appeal is merited and it is hereby allowed in the following terms:

1. **The matrimonial home situated on L.R No. Kiine/Nyangio/1 shall remain the property of the Respondent, as the spouse of the deceased.**
2. **The balance of the ½ share of L.R No. Kiine/Nyangio/1 shall be distributed equally among Polly Wanjiru Maina, Rose Wangui Peter, Lucy Wairimu Maina, Michael Kanyarati Maina, Tony Mutugi Maina and John Gachunji Maina.**
3. **L.R No. Kiine/Ruiru/884 shall be distributed equally among John Gachunji Maina, Michael Kanyarati Maina and Tony Mutugi Maina.**

[43] There shall be no order as to costs.

*Orders accordingly.*

**DATED AND DELIVERED THIS 7<sup>TH</sup> DAY OF OCTOBER 2025.**

**EDWARD M. MURIITHI**  
**JUDGE**

**APPEARANCES:**

Ms. Kimani for the Appellant.

Ms. Poly Wanjiru Maina, the Respondent in person.