



REPUBLIC OF KENYA



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**In re Estate of the Late Angelo Kombanira Wangai (Deceased) (Succession Appeal E011 of 2024) [2026] KEHC 623 (KLR) (26 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 623 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION APPEAL E011 OF 2024**

**DKN MAGARE, J**

**JANUARY 26, 2026**

**IN THE MATTER OF THE ESTATE OF THE LATE  
ANGELO KOMBANIRA WANGAI (DECEASED)**

**BETWEEN**

**PETER GITAHI KOMBANIRA ..... 1<sup>ST</sup> APPELLANT**

**ANN MUGURE KOMBANIRA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FLORA GACHUKA MUCHERE ..... RESPONDENT**

**JUDGMENT**

1. This is an Appeal from the Ruling and Order of Hon. Mathia Okuche, Senior Principal Magistrate dated 21.5.2024 in Nyeri CMCSUCC Cause No. E134 of 2021.
2. The Memorandum of Appeal dated 14.6.2024 raised material Grounds of Appeal as follows:
  - a. The learned magistrate erred in law and fact in allocating to the 1<sup>st</sup> house the engineering workshop with fixtures thereon as well as fixtures in plot no. 5 Mathari Shopping Centre when they were unavailable having been ran into the ground by the Respondent.
  - b. The learned magistrate erred in law and fact in discriminating the first house and cutting them off from the most valuable part of the estate which is Title No. Nyeri/Narumoru/886, ¼ share of plot no. 141, Mathari Self Help Group and Plot No. 162 and 163, which have rental houses as well as residential
  - c. The learned magistrate erred in law and fact in unlawfully distributing the entire parcel title no Nyeri/Narumoru/886 measuring 3.227 ha to the second house to the detriment of the first house.



- d. The learned magistrate erred in law and fact in failing to appreciate the evidence and submissions of the Appellants.
3. In general, the appeal challenges the trial court's distribution of the estate, contending that the learned magistrate erred in law and fact by allocating to the first house assets that were no longer available or had been depleted by the Respondent, while at the same time excluding the first house from the most valuable properties of the estate. It is further alleged that the magistrate unlawfully and discriminatorily awarded the entire parcel Title No. Nyeri/Narumoru/886, ¼ share of plot no. 141, Mathari Self Help Group and Plot No. 162 and 163 to the second house, to the prejudice of the first house, and generally failed to properly evaluate and appreciate the evidence and submissions tendered by the Appellant.

### **Pleadings**

4. The Appellants, together with one Flora Gachuka Muchere, petitioned the lower court and were issued with the Grant of Letters of Administration Intestate dated 3.1.2022. The Appellants were from the 1<sup>st</sup> house, while Flora Gachuka Muchere was from the 2<sup>nd</sup> house.
5. By way of summons for confirmation of the Grant dated 24.7.2024 and filed by the Appellants, the Appellants sought an order that the said grant be confirmed. Flora Gachuka Muchere had also filed her own summons confirmation of Grant dated 22.6.2023. The Appellants filed affidavits of protest to the mode of distribution proposed by Flora Gachuka Muchere in her summons confirmation of Grant dated 22.6.2023.
6. In her summons for confirmation of Grant dated 22.6.2023, Flora Gachuka Muchere proposed the following mode of distribution:
  - a. Nyeri MUN/Block 11/48 – all objectors in equal shares
  - b. Plot No. 9395/127-Kiganjo- all objectors in equal shares
  - c. Nyaki/Thuura/1986- Flora Gachuka Muchere (absolutely)
  - d. Housing Finance Nyeri Branch Account No. 3XXXXXXXXX73- all beneficiaries in equal shares
  - e. Motor vehicle registration no. KWM 914 Datsun- All objectors in equal shares
  - f. Motor vehicle registration no. KRW 561 Toyota
  - g. LR Kwale/Ukunda/3854- all beneficiaries in equal shares
7. In their joint affidavit of protest dated 19.10.2023, the Appellants deposed that the houses had the following beneficiaries:
  - I. The First House
    - a. James Robert Wangai- son
    - b. Peter Gitahi Kombanira - son
    - c. Jacinta Wangui Wangai- daughter
    - d. Anne Mugure Kombanira – daughter
  - II. Second house:
    - i. Flora Gachuka Muchere - wife



- ii. David Gitonga Kombanira- son
- iii. Linus Maina Kombanira- son
- iv. Ben Gundi Kombanira- son

8. The Appellants also proposed distribution to be done as follows:

1. 1<sup>ST</sup> House

- a. Plot No. Nyeri/Naromoru/886
- b. Plot No. 162, Mathari Self-help Group.
- c. Rental Houses Situated on parts of plot no. 163 & plot no. 278
- d. Plot no. 5 at Mathari Shopping Centre, Mathari Self Help Group.
- e. Deceased's share of Plot No.146 at Mathari (Nursery Area) Mathari Self Help Group.  
(To be registered in the name of Peter Gitahi Kombanira and Ann Mugure Kombanira to hold in trust for the beneficiaries in equal shares, namely:
  - i. James Robert Wangai
  - ii. Peter Gitahi Kombanira
  - iii. Jacinta Wangui Wangai
  - iv. Ann Mugure Kombanira )

2. 2<sup>ND</sup> House

- 1. Motorvehicle registration no. KWM 914 Datsun
- 2. Motor vehicle registration no. KRW 561 Toyota 100
- 3. Kerosine Pump 1 piece installed at plot no.5 Mathari Shopping Centre, Mathari self-help group
- 4. Wood workshop machine (3 phase planner thicknessor) installed on plot no. 5, Mathari self-help group
- 5. Engineering workshop comprising - welding machine heavy duty, 2 piece grinding machines, 1-piece drilling machine, 1 medium lathe machine, 1 valve grinding machine, 1 cylinder head facing machine.
- 6. Plot/Residential house transformer
- 7. Blue valley block no. 2 situated on plot no. 456 market area
- 8. 2 residential houses situated at Mathari on plot no 163 & plot 278 comprised as follows: 4-bedroomed house with master ensuite, 2-bedroomed house with master ensuite.
- 9. Small complex shops at Mathari Hospital gate.
- 10. Electrical shop, winding wires/accessories (fully stocked) located in Nyeri town
- 11. Monies held at Standard Chartered Bank a/c no. 01XXXXXXXXXX00



12. Monies held at Equity Bank a/c no. 01XXXXXXXXXX91
13. Shamba in Meru (Kanyekini area)
14. Rent collected from January 2018 to date for the following properties: plot no. 5, Mathari Shopping Centre, plot/rental house (transformer), residential rental houses at Mathari on plot no. 163 & plot no. 278 mathari self help group, small complex shops at Mathari Hospital gate.
15. Farm animals & structures comprised as follows: cow shed, 4 dairy cows, 2 heifers, 1 bull, 200 chickens, multilevel chicken houses, pig house, 6 pigs, fish pond, fish, 10 merino cross-breed sheep.

(To be registered in the name of Flora Gachuka Muchere to hold in trust for the beneficiaries in equal shares, namely:

- i. Flora Gachuka Muchere
- ii. David Gitonga Kombarina
- iii. Linus Maina Kombanira
- iv. Ben Gundi Kombanira

### **Evidence**

9. At trial, PW1 was Flora Gachuka Muchere. She testified that the deceased was her husband. It was her case that the Appellants' mother divorced the deceased, and her children were not to benefit from the estate of the deceased.
10. Further, she testified that the properties in the list of properties that the Appellants did not exist. The Appellants, according to her had no right over her matrimonial home. On cross-examination, it was her case that plot no. Nyeri/Naromoru/586 was transferred to her by her husband. Plot No. 163 was in her name; she had lived on it for over 40 years. She was not aware of plot no. 146.
11. It was her further case that the deceased was that the deceased died in 2009. The deceased had 4 children with the deceased. She could not tell whether James Robert Wangai was the deceased's son.
12. PW2 was Mathew Irungu Matheri. He testified on cross-examination that the protest had no merit. The deceased had 4 children with the divorced wife, who were entitled to inherit.
13. DW1 was Peter Gitahi Kombanira. He was son of the deceased. The deceased was the chairman of the Mathari Self-Help Group. Plot No. 141, according to him, had nothing to do with Flora Gachuka Muchere. On cross-examination, he stated that he resided in Mombasa. His mother divorced the deceased. He testified that he had evidence of the existence of pumps.
14. DW2 was Raphael Wanyeki, the chief of Mathari. He relied on his witness statement. He testified on cross-examination that he knew the deceased had all the property listed.
15. DW3 was Paul Murage. He was the treasurer of Mathari Self Help Group. He relied on his witness statement. He testified that the self-help group was empowered to allocate land. Mathari self-help group, according to him, bought the land. The deceased bought the land from the Nyeri Archdiocese. They helped the deceased to process title deeds.
16. In its ruling dated 13.5.2024, the lower court distributed the property as follows:



First house

Plot/residential house at transformer.Sunset Kiganjo B103 Parcel No. 511.Shamba in Meru.Small complex shop at Mathari gate.All fixtures on plot no. 5 Mathari Shopping Centre.Plot no.5 at Mathari Shopping Centre.Engineering workshop and all its fixtures.

Second House

Plot No. Nyeri/Naromoru/886.Plot No. 162 Mathari self-help group, together with rental houses erected thereon.Plot No. 163, Mathari self-help group together with the central houses thereon.2 Matrimonial Residential houses situated at the boundary of plot no. 162 and 162.A quarter share of plot no. 141 Mathari self-help group.Farm structures and animals thereon.

17. Aggrieved, the Appellant lodged a Memorandum of Appeal hence this Appeal.

### Submissions

18. The Appellant filed submissions dated 20.6.2025. It was submitted that the learned trial magistrate erred in law and fact in the distribution of the estate of the late Angelo Kombanira Wangai, resulting in an unjust and inequitable allocation of key assets to the detriment of the Appellants.
19. It was also submitted that the trial court awarded the largest property, Plot No. Nyeri/Naromoru/886 when Flora was convicted of forgery in respect to the transfer documents for the parcel in Nyeri CRC No. 1593 of 2019; Republic v. Flora. Reliance was placed on In Re Estate of M'Ngarithi M'Miriti (Deceased) [2017] eKLR, where it was submitted that the High Court held that any person who, without authority of law or confirmed grant, deals with or disposes of estate property commits the offence of intermeddling and any such transaction is null and void.
20. It was submitted that Plot No. Nyeri/Naromoru/886 should be given to the 1<sup>st</sup> house or shared equally between the houses.
21. The Appellants submitted that the trial court failed to appreciate the economic value of Plot 162 and Plot No. 163 – Mathari Self Help Group and so failed to apply the principles of equal and equitable distribution under Sections 38 and 40(1) of the *Law of Succession Act*.
22. The Appellant reiterated their memorandum of appeal and relied on the case of Re Estate of Kipketer Arap Rotich (Deceased) [2023] KEHC 23690 (KLR), where the court upheld the deceased's informal settlements among the houses during his lifetime, affirming that courts should not blindly apply statutory formulas without regard to context.
23. The Appellants relied also on the case of Re Estate of Kipketer Arap Rotich (Deceased) [2023] KEHC 23690 (KLR) in which it was submitted that the court recognized that Section 40 should not be applied mechanically, and that equitable distribution requires the court to account for lived realities, including how property was used, managed, or settled during the deceased's life.
24. The Respondent filed submissions dated 11.9.2025. It was t that the lower court correctly distributed the estate per the legal principles. Reliance was placed on In re Estate of the Late John Kiptum Bartilol (Deceased) [2023] KEHC 22829 (KLR) in which it was submitted that the courts stated at paragraph 59:

Where the intestate is survived either by one spouse or by more than one spouse by dint of the law each is absolutely entitled the matrimonial home, household chattels, movables of that home in exclusion of the other spouses that may be claiming inheritance rights to the deceased



estate..... Neither the probate court nor any other forum of adjudication should deprive a spouse or spouses of their entitlement to the matrimonial home as originally established by the deceased during his lifetime.

25. They submitted that it was only right that the court allocate the matrimonial property known as Plot No. 163 to the 2<sup>nd</sup> house. Reliance was also placed on Article 21 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) on the Right to Inheritance which states that,

- “ 1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.
2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.

26. It was also submitted that the proposal by the 1<sup>st</sup> Administrator was fair. Reliance was placed on *Esther Wanjiru Githatu v Mary Wanjiru Githatu* [2019] KECA 811 (KLR), where it was submitted that the interest of the surviving spouse alongside the interest of the surviving children was considered and the court gave a fair and equitable distribution.

#### Analysis

27. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. The court must also presume that the record truly reflects what transpired in the court below. The court is also cognizant the fact that an appeal of this nature is final by virtue of section 51 of the *Law of Succession Act*:

- (1) An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate, and the decision of the High Court thereon shall be final.
- (2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and, with the prior leave thereof, in respect of any point

of Muslim law, to the Court of Appeal.

28. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 the court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”



29. The duty of the first appellate court was set out in the case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the court in their usual gusto, held as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

30. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. This was well enunciated in the case of *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth; -

“Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document’s meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

31. In *Gerald Dworkin, Odgers' Construction of Deeds and Statutes* (5th edn, Sweet & Maxwell 1967), the learned author at p. 106 states as follows:

“Parol Evidence and written documents. It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of a deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence.

As it stands this is not a rule of interpretation but of law, and means that the interpretation of the document must be found in the document itself with the addition, if necessary, of such evidence as we have previously seen is admissible for explaining or translating words and expressions used therein”

32. This court’s jurisdiction to review the evidence should be exercised with caution. In the cases of *Peters vs Sunday Post Limited* [1958] EA 424 , the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

33. On dependants, the *Law of Succession Act* (Cap 160 Act defines who is a dependant at Section 29 as follows:-

“(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, grand-parents, grandchildren, step-children, 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) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

34. The Appellants maintained that the 1<sup>st</sup> house was given the engineering workshop with fixtures thereon, as well as fixtures in plot no. 5, Mathari Shopping Centre, when they were unavailable. It was also contended that the distribution of Plot No. Nyeri/Narumoru/886, Plots 162 and 163 and ¼ share of plot no. 141, which were located in high economic areas, were discriminatorily allocated to Flora Gachuka Muchere and the 2<sup>nd</sup> house to the disadvantage of the Appellants.

35. On the other hand, the Respondents' general case is that LR Nyeri/Narumoru/886 is registered in the 1st administrator's name and it is upon Plot No. 162 & 163 that her matrimonial home is built. Further, that the land in Meru being LR Nyaki/Thuura/1986 was a gift from her father to herself and the deceased as a matrimonial gift.

36. In this case, the case presented allegations that were subject to proof. There was property said to have been the deceased's property. The alleging party had the burden of proving the existence of such property. The Court of Appeal in the case of *Mbuthia Macharia v Annah Mutua & another* [2017] eKLR discussed the burden of proof and stated thus:-

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden.

37. The Appellants thus had the burden to prove the property they alleged existed and was available for distribution to them under the rules of intestacy, but which was not granted by the lower court. On the other hand, the respondent was under a duty to prove the assertions made by them. Section 51 of the *Law of Succession Act*, requires a person seeking to administer the estate of a person who died in 1980 to comply with section 51(2)(g) of the *Law of Succession Act* and Rule 7(1)(e) of the Probate and Administration Rules, which require disclosure of all the children and property of the deceased.

38. The deceased was polygamous with the 1<sup>st</sup> and 2<sup>nd</sup> houses and this is not a disputed fact. Whether or not the deceased was divorced from the first wife is irrelevant to this appeal since she has not laid any claim to the estate. It is the 3 children who have made the claim. The respondent in her testimony posited that she does not know whether or not two of the first wife's children are the children of the deceased. She is the one who asserted that they are not children. By equivocating, then she left the court in a state where the facts are neither proved nor disproved. This then falls within the meaning of section 3(4) of the *Evidence Act*. The said section states as follows:

(4) A fact is not proved when it is neither proved nor disproved.

39. Therefore, the assertion that two of the sons of the first wives were not sons of the deceased was not proved. The court then proceeds on the premise that the children of the first wife are the children of the deceased.

40. The deceased herein was a polygamous man, though the first wife was admittedly divorced. The position regarding polygamous marriages was addressed in the case of *Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat* [2015] KECA ..... (KLR), by the Court of Appeal [Githinji, Musinga & J. Mohammed, JJ.A.] as follows:



(29) ...

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

[30] Section 40 of the Act does not give discretion to a court to deviate from the general principles therein enunciated. Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to make adjustments to the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust. As this Court said in *Mary Rono v. Jane Rono & Another*, Civil Appeal No. 66 of 2002 (Eldoret) [2005] eKLR, section 40 does not provide for equality between houses or that each child must receive the same or equal portion. The application of section 40(1) is illustrated by the case of *Catherine Nyaguthii Mbauni v Gregory Maina Mbauni*, Civil Appeal No. 34 of 2004 (Nyeri) [2009] eKLR where the Court shared the net intestate estate according to a ratio reflecting the number of units in two houses.

41. I dare add that the section equally applies where units arise either out of serial monogamy or children born out of wedlock. Serial monogamy is where a person is married under a system allowing monogamy, but the wife is divorced or dies, and another wife is married. The children of the former wife cannot be excluded; this section also applies in circumstances set out in section 3(5) of the Succession Act. It must be recalled that there is no provision for divorce between children and parents outside the context of adoption. Therefore, with respect to the distribution of the Deceased's estate, this court is guided by Sections 40(1) and 42 of the *Law of Succession Act*, Cap 160, Laws of Kenya. Section 40(1) of the *Law of Succession Act* provides that:

‘Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.’

42. In this case, there is no dispute that the persons listed as beneficiaries are dependents of the deceased person. I do not find a basis for the attempt by the Respondents to assert that the Appellants' mother was divorced and so the Appellants or any of them were not entitled to inherit. It was not proved that



any of the Appellants were not beneficiaries. In Estate of John Musambayi Katumanga (Deceased) [2014] eKLR as follows:

“Under Section 40 of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house, she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the Law of Succession Act, the children would divide the estate equally amongst themselves.”

43. In my view, the succession process cannot be casually done. That is why the law anticipated that the entire estate and its beneficiaries be laid down clearly. The court notes that a number of properties were said to belong to the deceased, but were not proved. The Appellants, however, mainly laid claim to Plot No. Nyeri/Naromoru/886, Plots 162 and 163 and ¼ share of plot no. 141 that were distributed to the Respondents. The Appellants did not controvert the assertion by the 1<sup>st</sup> House that Plot No. 163 was her matrimonial property on which she had stayed for more than 40 years.
44. The Appellants sought that Plot No. Nyeri/Naromoru/886 be transferred to them to the exclusion of the Respondents. This was in addition to Plot Nos 162, 163, 278, Plot No. 5, and the deceased’s share in Plot No. 146 at the Mathari self-help group. It appears that the Appellants then listed, under paragraph 11 of the affidavit of protest, that the Respondents’ 2nd house would be entitled to what mainly consisted of fixtures and movable assets, such as cars.
45. In determining the succession dispute, the lower court granted relief that yielded the certificate of confirmation of grant dated 21.5.2024. The parties’ common position was that some of the properties did not exist. The Appellants, as protestors, did not produce crucial documents to support the property they asserted existed.
46. The parties had the responsibility to demonstrate on a balance of probabilities that the assertions in the supporting affidavit and the affidavit of protest were available as property of the deceased for distribution, or that such property had changed hands, the change was illegal. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
47. The law governing applications for confirmation of grant is section 71 of the Law of Succession Act and Rules 40 and 41 of the Probate and Administration Rules. The proviso to section 71, as read together with Rule 40(4), is that the administrator applying for distribution must satisfy the court that they have properly ascertained the persons beneficially entitled to a share in the estate and have properly ascertained the shares due to such beneficiaries. The effect of it is that the court then incurs a duty to be satisfied, before it confirms the grant, that the administrator asking for confirmation has properly ascertained the persons beneficially entitled to a share in the estate and the shares due to such beneficiaries.



48. The only adduced and proved property that constituted the main contention by the Appellants was LR No. Nyeri/Narumoru/886. It was the case of the 2nd House that the deceased gifted this property to Flora Gachuka Muchere, which was registered in her name in 2018. This then brings me to the elephant in the room, what is a gift? to be able to answer this, it must be remembered that the deceased died in 2017. This court has been able to address gifts in the case of Naomi Wanjiru Njoroge & 2 others v Winston Benson Thiru [2018] KEHC 10068 (KLR), where, W. Muigai J stated as follows:

In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). The assets that are the subject of a gift do not form part of the estate and such assets pass directly to the donee as provided for by Section 31 of the Law of Succession Act as follows;

“A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if-

- (a) the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and
- (b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and
- (c) there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and
- (d) a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive that illness or danger; and
- (e) the person making that gift dies from any cause without having survived that illness or danger; and
- (f) the intended beneficiary survives the person who made the gift to him:

Provided that-

- i. no gift made in contemplation of death shall be valid if the death is caused by suicide;
- ii. the person making the gift may, at any time before his death, lawfully request its return.

49. The deceased herein died on 24.1.2017 and LR No. Nyeri/Narumoru/886 was transferred to the said Flora Gachuka Muchere on 14.2.2018. No documents were adduced from which it would be inferred that the deceased had executed all the necessary documents to grant this alleged gift to the Flora Gachuka Muchere before his demise. The court is as such unable to find that this property constituted a gift. It was also not disputed that Flora Gachuka Muchere was charged and convicted of forgery in relation to the acquisition of the said property.

50. Such a transfer was fraudulent and cannot be held to be a land dispute. It is a nullity as the property of the deceased remained intact on the date of death. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every



proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

51. Therefore, I find that the deceased did not gift LR No. Nyeri/Narumoru/886 as a gift in *inter vivos*, and the 2nd House’s claim to the whole of this property is unfounded. The 1<sup>st</sup> house’s claim on the whole of LR No. Nyeri/Narumoru/886 to the exclusion of the 2<sup>nd</sup> house is also declined. The lower court erred in granting it wholly to 2<sup>nd</sup> house to the exclusion of the 1<sup>st</sup> House.
52. The effect of the conviction and the finding that the transfer was made while the deceased was dead, I find that the property LR No. Nyeri/Narumoru/886 shall revert to the name of the deceased. the land registrar should delete every entry made in the register after 24.1.2017 and revert the said parcel to the name of the deceased.
53. There are 4 beneficiaries in each house. Therefore, land parcel number Nyeri/Narumoru/886 shall be divided equally between the two houses. Each of the beneficiaries will have an equal share, with the respondent having a life interest in her house’s share, which shall, on her demise, be divided equally among her children.
54. There were also issues regarding plot numbers
  - i. ¼ share of plot no. 141, Mathari Self Help Group and
  - ii. Plot No. 162 and 163.
55. Plot number 163 was said to be a matrimonial home. It is not clear where the first house’s matrimonial home was. However, there are rental houses in plot number 162. Allegations were that the residential houses and matrimonial home were at the boundary between plots 162 and 163. This was meant to obscure issues and deny the first house rental houses.
56. The Court has no latitude to invoke equitable considerations in the distribution of the estate under section 40 of the *Law of Succession Act*. Accordingly, Plot No. 162 shall devolve to the first house, while Plot No. 163 shall devolve to the second house. The beneficiaries of the first house shall be registered as proprietors in equal shares absolutely, while the beneficiaries of the second house shall hold a life interest therein, with the remainder devolving equally upon their children upon the termination of the life interest. This leaves plot number ¼ share of plot no. 141, Mathari Self Help Group. This was at the centre of the dispute.
57. The rest of the assets should be shared equally between the two houses. There is no basis for using any other formula. Some of the parties variously alleged the existence of several plots. However, none was fully described, and no official searches or documentary proof were filed. For instance, the alleged plot of residential land referred to as “at the transformer” was not shown to exist. There is no record evidencing its existence.
58. There is an indication of a shamba in Meru. The same is not indicated for the purpose of succession. The alleged shamba in Meru was neither defined nor shown to exist. In the absence of proof of its existence, the Court cannot distribute the same. Similarly, the purported plot at Sunset B103, Parcel No. 511, was not proved to exist or evidence was not tendered. The parties must, in their free time, peruse section 3(4) of the *Evidence Act*.
59. There is a dispute regarding a small complex of shops at the Mathari Hospital gate and Plot No. 5 at Mathari Shopping Centre, which were stated to have been sold by the deceased, and no evidence was tendered to demonstrate their continued existence. Consequently, any fixtures alleged to be on



- Plot No. 5 at Mathari Shopping Centre cannot be said to exist in light of the alleged sale. The same reasoning applies to the engineering workshop and its fixtures.
60. The state of Motor vehicle registration numbers KWM 914 and Motor vehicle registration number KRN 561 Toyota 100 are unknown. Nevertheless, the same should be valued and sold on as is, where is basis. the two houses should share equally, with each of the 8 beneficiaries receiving an equal share.
61. Farm animals were not disputed; hence the decision of the court below has not been challenged. As regards any fixtures, they cannot be given independent of the land in view of the doctrine of *Cuius est solum, eius est usque ad coelum et ad inferos*. The doctrine postulates that whoever owns the soil, it is theirs all the way to the heavens and all the way to hell. *Ipsa facto*, whoever gets any parcel of land, the fixtures ought to go with the land.
62. I therefore find that the court gave the first house non-existent assets or worthless. The certificate of confirmation of grant is set aside *ex debito justiae*. In light of the foregoing, a new grant must have regard to sections 35, 38, and 40 of the *Law of Succession Act*. Each house has equal beneficiaries. Therefore, whether an order is made that they all share equally or each house shares equally, there is no practical difference. In light of the life interest that must be created in favour of the surviving spouse in respect of the second house, then each house will share equally. Upon the demise of the second widow, the children of the second house must share their entitlement equally among themselves.
63. Before departing, I note that the alleged non-existent assets are not in *vacuo*. The parties were economical with the truth. The administrator or administrators shall file in the court below within 90 days, evidence of the current status of all the assets that have not been shared. All parties should assist the court in determining those assets and then share equally. Those that cannot be shared must be sold, and the proceeds must be shared equally between the two houses. members of each house will also share their house's share equally. Having regard, however, that the first 10,000/= shall be paid out to the second widow, if she is alive at the time of sale of those assets.
64. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:
- “It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.
65. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Rai & 3 others v Rai & 4 others* [2014] KESC 31 (KLR), as follows:
18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation
22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging



consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

66. In respect to costs, the parties have had a very delicate family life for the last over 48 years. It is my very sincere hope that the family must find a way to accept each other. An order of costs will antagonize the relationships. I order that each party bear its costs.

67. In the circumstances, the appeal is allowed.

### **Determination**

68. In the upshot, I make the following Orders:

- i. The Appeal is allowed.
- ii. The Certificate of Confirmation of Grant dated 21.5.2024 is set aside. In lieu, therefore, the court makes the following orders:
  - a. Land parcel number Nyeri/Narumoru/886 was not a gift inter vivos. It is still the property of the deceased.
  - b. The county land registrar to delete all entries fraudulently entered in the register after 24.1.2017, including any subdivision in respect to land parcel number Nyeri/Narumoru/886, and revert it to the name of the estate of the late Angelo Kombanira Wangai(deceased).
  - c. The said parcel number land parcel number Nyeri/Narumoru/886 shall be shared equally between the two houses as follows:
    - i. One-half ( $\frac{1}{2}$ ) share of Nyeri/Narumoru/886 shall be registered in equal shares, absolutely, in the names of James Robert Wangai, Peter Gitahi Kombanira, Jacinta Wangui Wangai, and Anne Mugure Kombanira.
    - ii. One half ( $\frac{1}{2}$ ) share of Nyeri/Narumoru/886 shall vest in Flora Gachuka Muchere for life, with a life interest, and upon her death shall devolve in equal shares to David Gitonga Kombanira, Linus Maina Kombanira, and Ben Gundi Kombanira.
  - d.  $\frac{1}{4}$  share of plot no. 141, Mathari Self Help Group to be shared equally between the two houses, registered as follows:
    - i. One-half ( $\frac{1}{2}$ ) share of  $\frac{1}{4}$  share 141, Mathari Self Help Group shall be registered in equal shares, absolutely, in the names of James Robert Wangai, Peter Gitahi Kombanira, Jacinta Wangui Wangai, and Anne Mugure Kombanira.
    - ii. One-half ( $\frac{1}{2}$ ) share of a quarter ( $\frac{1}{4}$  share 141, Mathari Self Help Group shall vest in Flora Gachuka Muchere for life, with a life interest, and upon her death shall devolve in equal shares to David Gitonga Kombanira, Linus Maina Kombanira, and Ben Gundi Kombanira.
  - e. Plot No. 162 to be registered in the names of James Robert Wangai, Peter Gitahi Kombanira, Jacinta Wangui Wangai, and Anne Mugure Kombanira as owners equally, absolutely.



- f. Plot No. 163 shall vest in Flora Gachuka Muchere for life, with a life interest, and upon her death shall devolve in equal shares to David Gitonga Kombanira, Linus Maina Kombanira, and Ben Gundi Kombanira.
- iii. Given changed allocations, the other assets are to be shared as follows:
  - a. Money in the equity bank 01XXXXXXXXXX91 – to be shared equally among the 8 beneficiaries
  - b. Money in the Standard Chartered Bank account no. 01XXXXXXXXXX00 to be shared equally among the 8 beneficiaries
- iv. Any other assets of the deceased not included herein, whenever found, shall be shared equally between the two houses, with beneficiaries in each of the houses getting an equal share.
- v. The state of Motor vehicle registration numbers KWM 914 and Motor vehicle registration number KRN 561 Toyota 100 should be valued and sold on an as-is-where-is basis. The two houses should share equally, with each of the 8 beneficiaries receiving an equal share.
- vi. Farm animals were not disputed; hence the decision of the court below has not been challenged and the same is affirmed.
- vii. Fixtures cannot be given independent of the land in view of the doctrine of Cuius est solum, eius est usque ad coelum et ad inferos . Therefore, whoever gets any parcel of land ought to take the fixtures in it.
- viii. In light of the life interest that must be created in favour of the surviving spouse in respect of the second house, then each house will share equally. Upon the demise of the second widow, the children of the second house must share their entitlement equally among themselves.
- ix. The administrator or administrators shall file in the court below within 90 days, evidence of the current status of all the assets that have not been shared. All parties should assist the court in determining those assets and then share equally. Those that cannot be shared must be sold, and the proceeds must be shared equally between the two houses. members of each house will also share their house's share equally. Having regard, however, that the first 10,000/= shall be paid out to the second widow, if she is alive at the time of sale of those assets.
- x. Each party to bear their own costs.
- xi. Transmission is to be concluded by 26.07.2026.
- xii. The administrators of the second house shall deposit in court the original title by 6.02.2026 for cancellation.
- xiii. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI, VIRTUALLY ON THIS 26<sup>TH</sup> DAY OF JANUARY, 2026. JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Ms. Wambui for Mr. Nduati for the Appellant



Ms. Nanjala for the Respondent

Court Assistant: Michael

