

4. I take cognizance that the said Mary Gathoni Kinina filed a letter in opposition to the Memorandum of Understanding to this Court which was coached in Kiswahili language as follows: -

KWA JAJI

Mimi Mary Gathoni Kenina nakuandikia kukujulisha ya kwa Mr. Mwangi alipea shilingi elfu hamsini ili niweze kuweka sahii ili aweze kupata title deed na lakini nilikataa hadi nipate mgao wangu au pia bado sijampata ndugu yangu Moses Ketwira Kenina ambaye alipotea.

Analysis and Determination

5. Before I delve into the substantive merits of this Summons for Confirmation of Grant, I note that in the Affidavit in Support of the Petition for the Letters of Administration Intestate dated 16th December 2015, the deceased died intestate and left the following surviving him: -

| | | |
|------------------------------------|-----------------|-----------------|
| <i>a. Rachael Njeri Gitiha</i> | <i>Daughter</i> | <i>77 years</i> |
| <i>b. Leah Muthoni</i> | <i>Daughter</i> | <i>69 years</i> |
| <i>c. Mary Gathoni</i> | <i>Daughter</i> | <i>66 years</i> |
| <i>d. Moses Gituara</i> | <i>Son</i> | <i>61 years</i> |
| <i>e. Bera Wanjiku</i> | <i>Daughter</i> | <i>Deceased</i> |
| <i>f. Ann Wamboi</i> | <i>Daughter</i> | <i>Deceased</i> |
| <i>g. Sammy Kinina Kinuthia</i> | <i>Grandson</i> | <i>50 years</i> |
| <i>h. Patrick Ndigori Mureithi</i> | <i>Grandson</i> | <i>55 years</i> |

6. There are two (2) issues sole for determination by this Honourable Court: -
- Whether the Proposed Mode of Distribution is Lawful*
 - The Memorandum of Understanding and Purchaser's Interest*

Whether the Proposed Mode of Distribution is Lawful

7. The sole asset disclosed for purposes of confirmation is Eldoret Municipality 1/12 formerly Plot No. 7789/666 – Eldoret West. The proposed mode of distribution places the entire property in the names of the two Administrators, Leah Muthoni Kinina and Rachael Njeri Gitiha, in equal

shares to the exclusion of the other beneficiaries. The deceased died intestate. The applicable law on distribution is Section 38 of the Law of Succession Act, which provides that where an intestate has left surviving children but no spouse, the net intestate estate shall devolve upon the surviving children in equal shares. Further, where a child of the deceased is deceased, their share devolves to their own children by virtue of the principle of representation under Section 41 of the Act. Section 38 of the Law of Succession Act which provides as follows;

38. Where intestate has left a surviving child or children but no spouse

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

Section 41 of the same Act provides as follows;

41. Property devolving upon child to be held in trust

Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.

8. In **re Estate of Francis Andachila Luta (Deceased) (Succession Cause 875 of 2012) [2022] KEHC 16900**, the Honourable Court stated as follows;

“Let me revisit section 38 of the Law of Succession Act. It provides for equal distribution of the estate amongst the children. The language of section 38 is gender neutral. It does not classify children into male and female, nor sons and daughters, nor men and women. There is no discrimination nor differentiation nor classification nor categorization along gender lines. That would mean that sons and daughters of a dead person are entitled on equal basis to a share in the estate of their dead parent. Section 38 does not make marriage a factor in the distribution of the estate of a dead parent. Gender and marital status are factors under customary law, but not under the Law of Succession Act. The estate herein is not subject to customary law, for the reasons that I have discussed in paragraphs 13, 14 and 15 a foregoing. The estate is subject to the Law of Succession Act, which is blind on biases founded on gender and marital status.”

9. The law does not discriminate between male and female children. The mode of distribution proposed by the Administrators excludes Mary Gathoni and Moses Gituara, both surviving children and makes no provision whatsoever for the estates of the deceased daughters, Bera Wanjiku and Ann Wamboi, whose children are listed as beneficiaries. This Court cannot sanction a distribution that is discriminatory. Article 27 of the Constitution guarantees equality before the law and freedom from discrimination. It specifically provides as follows: -

Equality and freedom from discrimination.

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

10. Any distribution that arbitrarily benefits two children to the total exclusion of others, without consent on record, offends both the Constitution and the Law of Succession Act. Moreover, confirmation of grant is not a mechanical exercise. Under Section 71(2) of the Act, the Court must be satisfied as to the identities and shares of all persons beneficially entitled. The Court is not so satisfied with the distribution proposed. Accordingly, while the grant itself is valid, the proposed mode of distribution by the Administrators is declined for being inconsistent with Sections 38 and 41 of the Law of Succession Act and Article 27 of the Constitution.

The Memorandum of Understanding and Purchaser's Interest

11. The record contains a Memorandum of Understanding dated 26th July 2022 between Mary Gathoni Kinina and Pastor Samuel Kamau (also referred to as Pastor Sammy). The MOU indicates that the said Pastor claims to be a creditor of the estate and that upon settlement of liability, the sole asset would be transferred to him. There is also a handwritten letter from Mary Gathoni in Kiswahili indicating that she received Kshs. 50,000/= but declined to sign documents transferring title before receiving her rightful share and before tracing her missing brother.

12. From the material before Court, it is apparent that Pastor Samuel Kamau asserts a purchaser's or creditor's interest in the estate. **In the matter of the Estate of Stone Kakhuli Muinde (Deceased) [2016] eKLR**, the case involved an Application by third parties for joinder into a

Succession Cause. In dismissing the Application, the Judge stated as follows:

“27. With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

28. Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.

29. It is the failure to observe the foregoing, and allowing non-survivors or beneficiaries of the estate to prove their claims against the estate within the probate court that has often made succession causes complex, unwieldy and endless. It is by the same token that it had become necessary for the court to allow joinder of persons to the Succession cause who ideally ought not to be party to the cause in the first place.”

13. Similarly, in the case of **In re estate of Solomon Mwangi Waweru (deceased) (2018) eKLR**, A.K. Ndungu J remarked as follows: -

“Therefore, claims by interested third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased person are determined through settlement or where inapplicable through suits against the administrator (s) of the estate and not through an objection like the one before court”

.....

“It is my opinion that the fact that the applicant has laid claim to the estate does not give rise to an automatic right to have the distribution of the property stayed by the succession cause. The applicant ought to disclose a legitimate claim which needs to be determined by the Environment and Land court. The succession court would then proceed with the administration of the estate in respect of other properties not affected by the conservatory order if obtained awaiting the outcome of the suit”.

14. However, the MOU as presently framed does not demonstrate that the entire estate can lawfully be transferred to the alleged purchaser. Administrators hold estate property in trust for all beneficiaries. They cannot, without authority of the Court and consent of beneficiaries, alienate the whole estate to a third party. The alleged purchaser’s interest, if any, must be proved and quantified. It is the duty of the Administrators to account for liabilities of the estate in accordance with Sections 82 and 83 of the Act.
15. In view of the foregoing and in the interest of justice, the Court makes the following orders;
 - a. The Grant of Letters of Administration Intestate issued to Leah Muthoni Kinina and Rachael Njeri Gitaha on 8th June 2016 is hereby confirmed with the following distribution matrix: -

| NAME | DESCRIPTION OF PROPERTY | SHARE OF HEIRS |
|-------------|--------------------------------|-----------------------|
|-------------|--------------------------------|-----------------------|

| | | |
|------------------------|---|-------------------------|
| LEAH MUTHONI KININA | ELDORET MUNICIPALITY 1/12 FORMERLY PLOT NO. 7789/666-ELDORET WEST | TO BE SHARED EQUALLY |
| RACHAEL NJERI GITIHA | | |
| MARY GATHONI | | |
| MOSES GITUARA | | |
| ESTATE OF BERA WANJIKU | | |
| ESTATE OF ANN WAMBOI | | |

- b. That the Administrators shall recognize and address any lawful purchaser's or creditor's interest, including the claim by Pastor Samuel Kamau, subject to strict proof and without prejudicing the statutory entitlements of the beneficiaries.*
- c. That the Administrators are hereby put on notice to ensure due transmission of the estate to the rightful beneficiaries within the confines of section 38 and 41 of the Law of Succession Act.*
- d. That pursuant to Section 83 of the Law of Succession Act, the Administrators shall file a full and accurate Probate Account of Administration within six (6) months from the date of this ruling.*
- e. There shall be no orders as to the costs*
- f. It is so ordered.*

**DATED, SIGNED AND DELIVERED AT ELDORET VIA CTS THIS 18TH DAY
OF FEBRUARY 2026**

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R. NYAKUNDI
JUDGE