



**In re Estate of Kitua (Deceased) (Succession Cause E021 of 2022)
[2026] KEHC 2879 (KLR) (9 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2879 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE E021 OF 2022**

NIO ADAGI, J

FEBRUARY 9, 2026

IN THE MATTER OF THE ESTATE OF DANIEL MUINDE KITUA

BETWEEN

LUCY WAMBUI MUINDE 1ST PETITIONER

BETHSHEBA NYAKERARIO NYAMWEYA 2ND PETITIONER

AND

ROSEMARY MUINDE KITUA PROTESTOR

JUDGMENT

1. This judgement relates to the distribution of the Estate of Daniel Muinde Kitua (Deceased) who died on the 22nd December 2021 domiciled in Syokimau-Athi River, Machakos County.
2. By Summons for Confirmation of Grant dated 9th May 2023, the 1st and 2nd Administrators/Petitioners petitioned for confirmation of a Grant of Letters of Administration intestate setting out the names and particulars of the beneficiaries of the Estate herein, together with the properties of the deceased available for distribution thereof.
3. In their Petition for letters of administration intestate herein, they left out the Protestor/Objector who claims to be a wife to the deceased and hence a beneficiary to the estate.
4. This court has since established from the letter dated 24th November 2025 by Counsel for the 1st and 2nd Administrators that the inclusion of Rosemary Muinde Kitula, the Protestor as the 3rd Administrator in these proceedings was the view of Hon. Mr. Justice Odunga(as he then was) that since the Protestor was the Biological Mother to two beneficiaries of the Estate, namely, Liz Muthike Mukuzi and Fitzgerald Kitua Muinde, there would have been no harm in including her as the 3rd Administrator so as to protect the interest of her children in the process of Administration of the Estate and distribution thereof, a step that would also expedite the conclusion of this dispute.



5. There was therefore no ruling whether dated 31st May 2022 or otherwise delivered by the named Judge or any other for that matter.
6. The above position has not been controverted by the Protestor/3rd Administrator.
7. The 1st and 2nd Administrators on one hand and the Protestor/3rd Administrator on the other hand, disagreed on the mode of distribution of the estate. The Protestor is opposed to the mode of distribution proposed by the 1st and 2nd Administrators in the Summons for confirmation of grant.
8. The 1st and 2nd Petitioners/Administrators filed the following documents: -
 - i. Affidavit of Lucy Wambui Muinde dated 12th April 2024 in response to the protest.
 - ii. Witness Statement of Joseph Mutuku Kitua dated 12th April 2024.
 - iii. Witness Statement of Alma Njeri Kitua dated 24th February 2025.
 - iv. Supplementary List of Documents dated 24th February 2025.
9. On her part, the Protestor/3rd Administrator filed the following documents:
 - i. Affidavit of Protest against Confirmation of Grant dated 30th May 2023.
 - ii. 3rd Administrator's List and Bundle of Documents dated 20th March 2024.
 - iii. Affidavit and Witness Statement of Justus Solomon Kitua dated 21st March 2024.
 - (iv) Affidavit and Witness Statement of Joseph Mutuku Kitua dated 13th August 2024.
10. The 1st and 2nd Petitioners contend that the following persons are beneficiaries entitled to the estate of the deceased.

FIRST HOUSE

- i. Liz Muthike Mukunzi (daughter)
- ii. Fitzgerald Muinde Kitua (son)

SECOND HOUSE

- iii. Daisy Muthike Kitua (daughter)
- iv. Bella Mumbi Kitua (daughter)

THIRD HOUSE

- iii. Lucy Wambui Muinde (wife)
- iv. Margaret Njeri Matheka (daughter)

FOURTH HOUSE

- iii. Bethsheba Nyakerario Nyamweya (wife)
- iv. Shanoir Mulaa Kitua (daughter/minor)

11. On their part, the 1st and 2nd Administrators contest that the Protestor is a wife to the deceased and hence not a beneficiary.
12. On her part the Protestor maintains that she is a wife of the deceased and thus a beneficiary.



13. The Protestor concedes that the 1st and 2nd Administrators are wives to the deceased but contests the position which they have taken that Margaret Njeri Matheka is a child of the deceased and a beneficiary of the estate.

Evidence adduced

Protestor's evidence

14. The Protestor called three (3) witnesses to support her case.

PW1 was the protestor. She testified that her name is Rosemary Muinde Kitua. She resides in Nairobi and works for United Nations as a programme assistant. She adopted her affidavit of protest dated 30/5/2023 as her evidence in chief on her claim. She also produced in evidence as exhibits PExt.1-6 documents attached to the said affidavit. These were, the chief's letter dated 31/01/2022, Inventory by the police at Makuyu police station dated 22/12/2021 for personal effects of the deceased, Schedule of preferred mode of distribution, Title deed for Machakos/Matuu/7010. She also produced photographs and a certificate of electronic print on her list of documents dated 30/03/2024.

15. She went on to testify that she was married to the deceased. They first met in April 1985 and in November 1986 her late father-in-law and surviving mother-in-law and brother-in-law went with two goats to her parents' home and since she was pregnant, they could not discuss about her dowry as the Kamba custom did not allow the same. Later on, another marriage ceremony was conducted. They gave one goat to complete the earlier ceremony. This was in 2020. She stated that the photographs she had produced were for the last formalization when they killed the goat. They lived in Moi Forces Airbase Eastleigh then moved to Highrise Estate and finally to Hazina Estate in 1992.

They have two children from the marriage. Their first born daughter was born on 16/6/1987 and the second born son on 3/5/1992. These children were listed as beneficiaries in the summons for grant. She stated that she was not named as a wife or a beneficiary. Her name came into the proceedings after Judge Odunga ordered that she be incorporated. She stated that she differs with her co-administrators on the mode of distribution. She did not know where the Petitioners/ co-administrators live. The deceased told her he had a home in Ndithini/Mananja/VII/135. She wished to have that house together with her son and daughter. She stated that her co-administrators were married after her. The mode of distribution had excluded Motor Vehicle KBZ 203G, a Mercedes saloon. She didn't know where the vehicle was. That there are two houses in Syokimau which were constructed by the deceased. She objected to her co-administrators getting the two houses. She stated that if she is given the matrimonial house, she will have no problem with her co-administrators having the Syokimau houses.

She stated that Title Machakos /Matuu/7010 is a gift the deceased gave her daughter on her wedding day and even gave her the original title deed.

16. On cross examination, she stated that her name was Rosemary Muinde Kitua. She then showed her ID card to counsel cross-examining him.

She admitted that on 17/2/1995, she signed a Deed Poll changing names from her husbands to her father's. She stated that her employer United Nations declined to acknowledge the customary marriage. She also confirmed the ID card she had shown counsel in court was for 1/4/ 2009 for number 1735705. That her employer only accepts a marriage certificate. She stated that she met with the deceased in April 1985 and in November 1986 his parents took goats to her parents. That she was pregnant and goats could not be taken. Between 1986 and 2019 they had not done the ceremony and that they did not do it to clear the way for their daughter to get married. She stated that she moved to Hazina Estate because of the nature of her work and that of the deceased. They were not meeting



often. That she had worked for UN for over 30 years. That she consulted the deceased when she was moving to Hazina Estate and he gave her Kshs.200,000/=. The stated that the deceased only shared with her the idea to construct the house at Ndithini.

Her son lived in that house in the year 2002. She had never lived there. She never went to the said house with the deceased. Dan and Irene sired two children, Daisy and Bella. There's also Almer a step daughter. When they were cohabiting, she was living with the deceased.

She knew Irene died around 1995. She did not attend her funeral Irene was buried at her parent's home in Nyandarua. Irene was a mistress to the deceased. She maintained that she never left the marriage. She couldn't remember the ages of Irene's daughter when she died. The younger daughter was very young, some months old. She wouldn't know when Lucy Kitua got married to the deceased. She didn't know when the deceased married Bethsheba Nyakerario Nyamweya. She stated that her brother-in-law gave her the names of the beneficiaries for the Chief to include in the letter. The deceased was living in Syokimau with Bestsheba before he died. When he died, she went to his house in Syokimau but she found Lucy. She didn't meet Bestsheba in the house. She stated that there is a Mercedes Saloon which was to be transferred to the deceased and that she had the sale agreement for the same.

17. She stated that when the deceased died, Bethsheba's child was schooling at Shree Sutch Satsang Swaminarayan Academy. Beth went to court to get a provision for the school fees for the child. The school fees was Kshs.100,000/= per term. She wouldn't know if Kshs.100,000/= was enough for the school. She stated that she wanted the house in Ndithini. She had been there more than twice. The house is a farm house; she has never lived there. The deceased had sold 10 acres of Ndithini/Mananja/VII/66 to Josphat Nzau Wambua and Antony Mweu Wambua. He had also sold 4 acres to Theresia Nthyenya Mutuku. She didn't have the evidence of the sale. When asked about why she collected and refused to share the inventory at Makuyu police station, she answered that it contained very important documents. She was unhappy with Lucy and Bethsheba collecting the documents from the police.
18. In re-examination, she stated that the inventory at item 8 referred listed motor vehicle registration number KBZ 203G Mercedes Saloon. An Agreement for the sale and original log book for the same were also listed.
19. PW2 was Justus Solomon Muthusi Kitua. He adopted his witness statement and affidavit dated 21/3/2024 as his evidence in chief. He testified that the deceased is his brother. He was an elder brother to the deceased. He stated that there was a dispute where Lucy and Bethsheba claimed they were married to the deceased. He stated that Rosemary Kitua Muinde was married to the deceased around 1986 and that he participated in the arrangements of the customary marriage. He confirmed that the deceased was married to four wives; 1st-Rosemary Muinde Kitua, 2nd-Irene Nyakaro Muguyi, 3rd - Lucy Wamboi Muinde and 4th- Bethsheba Nyakerario Nyamweya.

He also confirmed that the 2nd wife is deceased. That the deceased had children with the wives. The 1st wife had two children- Liz Muthiku and Fitzgerald Kitua. The 2nd wife had three children- Almer Muthike, Daisy Mumbi Kitua and Bella Kitua. The 3rd wife Lucy had no child and the 4th wife Bethsheba had one child Shenior. He stated that he had at paragraph 10 of his affidavit proposed how the estate should be distributed. The 1st wife to get the Nduthini home, Lucy and Bethsheba should get the Syokimau houses where they reside. He confirmed that when the 1st daughter was getting married, the wedding arrangements and occasion was done at Nduthini farm.
20. On cross examination, he stated that the deceased had 2 wives. He accompanied the deceased for marriage ceremony for Lucy Kitua and Rosemary. They also did for Irene who was a wife too. Lucy and Bethsheba were wives too. He stated that there are two houses in Syokimau belonging to the deceased. He has never been there. That the deceased constructed the Ndithini house for Rosemary but they did



not live there. When asked whether he knew the deceased built the house in Ndithini for Rosemary, he responded that he didn't know if the deceased built the house for Rosemary.

He stated that he didn't know with whom the deceased was living with at the time of his death. He couldn't remember when Irene died but she had very young children. Bella was 2 months old. When Irene was married, Rosemary stopped living with the deceased. He couldn't remember the year. He didn't know whether they ever came to live together again.

21. In 1986, Rosemary was pregnant and the Ceremony could not be done. It was done in the house Rosemary's brother and he was there. He didn't know why the second ceremony took long. He once went with his father to Mutituni and they took care of the children Irene left behind. Lucy came immediately and took care of the said children. The house in Ndithini is where the deceased could do ceremonies. He maintained that the house in Ndithini should go to Rosemary because her daughter was taken there for dowry negotiations.
22. There was no re-examination.
23. PW3 was Joseph Mutuku Kitua. He stated that the deceased was his younger brother. Solomon (PW2) is his younger brother too. On 13/8/2024 he signed an affidavit and witness statement; he knew Rosemary was his brother's wife. Rosemary was the first wife. He denied stating in the affidavit that Rosemary was not married to the deceased. (the witness was referred to the mentioned affidavit and he denied signing the same). He stated that he was among the people who took the dowry to Rosemary's home.
24. On cross examination, he denied ever meeting with the Petitioner's advocate. He denied knowing what the document (affidavit) contained. He admitted that the signature was his but he didn't understand what the document contained. He stated that it was not true that the signature was his. He stated that Rosemary got married around 1993. After marrying Irene, the deceased, the deceased herein separated with Rosemary. He knew the deceased and Rosemary came together in 2009. There was a ceremony to celebrate their re-union. He stated that their daughter Liz could not get dowry before Rosemary her mother's is paid. He stated that the deceased lived with Lucy and Bethsheba before he died. Lucy lives in Syokimau and Bethsheba lived in Langata. He stated that he visited Langata and Syokimau but never visited Rosemary. He said that he resides in Ndithini. When the house in Ndithini was being constructed, Lucy was assisting. Rosemary used to come there with her children. He stated that a husband is allowed to bring another wife in the other wife's house; all the wives can still sleep under one roof.
25. There was no re-examination and the Protestor's case was closed.

Petitioners' evidence

26. DW1 was Lucy Wamboi Muinde. She testified that she stays in Syokimau and is a business lady. She stated that she is a wife to the deceased and one of the Petitioners. She admitted knowing the Petitioner and that she had protested to the confirmation of grant. She adopted her affidavit dated 12/4/2024 as her evidence in chief and produced the documents attached to it as her exhibits. The Gazette Notice dated 17/2/1995 is DExt.1, extract of OB report is DEXt.2 and a copy of Daily Nation newspaper dated 21/9/1996 attached to her supplementary list of documents as DExt.3.
27. On cross examination she stated she is a wife to the deceased she didn't have a child of her own. She was shown the Chief's letter dated 27/12/2021 and she stated that Margaret Njeri Matheka is not her biological daughter but she brought her up. The affidavit of the protest by Rosemary has a letter from the same Chief dated 31/1/2022 under item 3 which has listed her as a wife but has not listed Njeri as



her daughter. Njeri is her step-daughter. She doesn't know her mother's name. She last met her when Margaret Njeri was getting married. Njeri was raised by her and the deceased maintained her. She did not have proof of the same. She denied that Njeri was a witness and that she had chosen to benefit in the estate. She stated that she discussed with her and she is ok to also benefit.

28. She stated that she excluded Rosemary from being a beneficiary since she had parted ways with the deceased in 1990 or thereabouts and she only resurfaced in 2021 after the death of the deceased. Rosemary was a wife but they parted ways. She didn't know if the deceased divorced her. The witness was shown DExt.2; a statement to the police by the deceased in June 2005 at paragraph 2 that the deceased married Rosemary in 1986 and divorced her in 1992 under Kamba customary laws. She responded that the two were divorced under Kamba customary law. She stated that she then had not been married to the deceased and that she doesn't know how Kamba divorce is undertaken. She stated that as regards the inventory in the affidavit of Rosemary, immediately the deceased passed on, she went to collect documents at the police station and item 8 refers to a Mercedes Benz registration number KBZ 203G and item 13 is its original log book. She did not collect the original log book for the same. She stated that the Mercedes was excluded because it was not for the deceased but for one Titus Dunda. The vehicle was not theirs and she was not driving it. She confirmed that land parcel Machakos/Matuu/7010 was given to Liz Muthike Kitua as a gift.
29. She stated that she was not aware whether 10 acres of Ndithini/Mananja/VII/66 were sold to Josphat Nzau Wambua and Antony Mweu Wambua. She was also not aware 4 acres of the same land was sold to Teresia Nthenya Mutuku by the deceased.

She stated that when the deceased was alive, they lived at Syokimau in a house he constructed. That there is another house adjacent to hers in which her co-wife Bethsheba Nyamweya lives. The deceased had a farm in Ndithini. She lived there frequently. Bethsheba Nyamweya also used to go there. Rosemary never used to go there but her children did. She stated that Rosemary and two brothers of the deceased had proposed that the house in Ndithini be given to Rosemary and she does not agree to the same. She maintained that she will keep both the house in Ndithini and Syokimau. She didn't want Rosemary to be given anything. She denied selling any single item. She stated that Rosemary was allowed to be an Administrator of the Estate and that the Judge clarified that being an Administrator does not mean she has a share.

30. In re-examination, she stated that the two letters from the Chief mention Njeri was a daughter of the deceased. Her mother was not married to the deceased. She was brought home by the deceased and introduced to her as his daughter born in 1981 and they had not seen each other for long. She came when she was about 21-22 years old. She stayed with them until she got married. DW1 stated that when she joined the family, the deceased's first daughter was 13 years old, Daisy was 5 years and Bella was about 4-5 months old. She raised the children. She denied knowing whether the deceased sold any land. None has ever come to her to claim the same. The land in Ndithini is 60 acres. She put up the house in Ndithini in 2005. She still goes to Ndithini till today. She does not find it right to have Rosemary given the Ndithini house as she was never there. The confirmed that the deceased was buried in Ndithini farm.

DW2 was Almer Njeri Kitua. She testified that she stays in Buruburu Nairobi. She is an Administration Assistant. She adopted her witness statement dated 24/2/2025 as her evidence in chief.

On cross examination, she stated that she was brought up by Lucy when her mother died. She was then 13 years old. They were living in Hurlingham. They then moved at Ngong road in Lucy's house. They later moved to South C in her dad's (deceased) house which was registered in the deceased's name. It was a rental house. The deceased later constructed a house in Syokimau. She left home when they were in South C. Njeri joined them in 2004 when they were living with Lucy. She lived with Njeri for about



3 years. She has been in touch with Njeri evening as these proceedings were pending. That Njeri did not indicate if she wanted to claim anything. She confirmed that Rosemary is the mother to Liz and Fitzgerald her step-sister and step-brother respectively. She confirmed that Rosemary was a wife to the deceased before her mother who passed on in 1996. She admitted interacting with Rosemary but has never met her at Ndithini in the farm house.

31. In re-examination, she stated that Margaret Njeri is her sister and pointed at a lady seated in court. She couldn't remember when Njeri moved out. She stated that Rosemary used to bring Liz and Gerald at their home. They only came to visit. They were staying with their mother. That they only visited Rosemary when they were picking Liz and Gerald to go somewhere. She repeated that her mother passed on in 1996 when she was 13 years. She never lived with Rosemary and the deceased in the same house. She testified that she considered Margaret as a beneficiary of her father's estate.
32. Upon close of the Petitioners' case, both counsels filed written submissions. The Protestor's submissions are dated 28th July 2025 filed by the firm of E.K. Mutua & Co. Advocates whilst the Petitioners' submissions are dated 9th September 2025 filed by the firm of Mwangi Kigotho & Co. Advocates.
33. I have carefully considered the Summons for confirmation of grant, the Protest, the Affidavits, the evidence tendered before court as well as the rival submissions by both learned counsels.
34. The pertinent issues I form for determination are;
 - i. Whether the Protest is competent.
 - ii. Whether the Protestor is a wife and beneficiary to the estate;
 - iii. Whether Margaret Njeri Matheka is a beneficiary to the estate.
 - iv. What properties constitute the estate of the deceased and how should the distribution of the estate be done;

(i) Whether the protest is Competent or not.

35. This first issue is likely to determine whether the protest is competent or not. The court record is clear that the Protest herein was instituted by Rosemary Muinde Kitua vide an affidavit of protest against Confirmation of the Grant dated 30th May, 2023. The Summons for Confirmation of Grant is dated 30th March, 2022.
36. Evidence was led by the Petitioners that the Protestor Vide a Gazette Notice No. 843 dated the 9th day of February 1995, a Deed Poll for Change of Name, dated the 7th day of February 1995, duly executed and registered in the Registry of documents at Nairobi as presentation No. 336 in Volume D1, Folio 535/4321, File DXXXVI, by one, Rosemary Mwasya, of P.O Box No. 21812, Nairobi in the Republic of Kenya, formerly known as Rosemary Muinde Kitua, formally and absolutely renounced and abandoned the use of her former name Rosemary Muinde Kitua and in lieu thereof assumed and adopted the name Rosemary Mwasya for all purposes and authorizes and requests all persons at all times to designate, describe and address her by her assumed name Rosemary Mwasya.
37. By abandoning and renouncing the use of the name Rosemary Muinde Kitua in which the last two names belonged to the deceased and taking up her maiden name of Rosemary Mwasya the Protestor ought to have known the legal implication of legally changing one's name.



38. As it legally stands, the Protestor no longer exists by the name of Rosemary Muinde Kitua but rather she is Rosemary Mwasya having legally acquired the same through a legal process that has not been disturbed.
39. The Protestor did not adduce any evidence or demonstrate that she later revoked the Gazette Notice, Deed Poll and or regained the deceased's last two names and therefore reverted to the name of Rosemary Muinde Kitua.
40. The Protestor did not adduce in evidence the current identification document that she uses either a Passport or a national identity card. Whatever she showed to Counsel for the Petitioners in court is not part of her evidence before this court.
41. From the evidence on record and as far as this court can ascertain, the person who was then known to be the deceased's first wife was one Rosemary Muinde Kitua who does not legally exist. She now exists as Rosemary Mwasya. The question that this court is struggling to answer is if Rosemary Muinde Kitua legally changed her name to Rosemary Mwasya who then is this Rosemary Muinde Kitua the Protestor herein, does she exist?
42. It would have been expected that the protest and any other pleadings and documents to be filed in this matter by the Protestor be through her proper and legally acquired name of Rosemary Mwasya and not Rosemary Muinde Kitua as it appears.
43. On the above analysis, this court does not only find the Protest to be incompetent, made in bad faith, vexatious, bad in law and abuse of the process of court but also to have been filed by a non-legal person or by a person without locus Standi, thus entertaining the Protest in the manner it is instituted will be a travesty of justice, as the law cannot allow the Protestor to have a double personality.
44. On this issue alone, this court finds the Protest dated 30/05/2023 to be without merit.
45. Without prejudice to the foregoing finding under issue (i) above, this court will proceed to determine the other three issues.

ii. Whether the Protestor is a wife and beneficiary to the estate;

46. The Protestor Rosemary Muinde Kitua claims to be a beneficiary of the Estate of the deceased by virtue of being the 1st wife of the deceased, and the mother to Liz Muthike Mukuzi and Fitzgerald Kitua, the Children of the deceased.
47. The evidence on record shows that the deceased and the Protestor came together in 1986 and started cohabiting, but could not formalize their relationship under Kamba Customary Law as the Protestor was pregnant at the time. In the process, they got two children, namely, Liz Muthike Mukuzi (daughter) and Fitzgerald Kitua (son) respectively.
48. In the year 1992 or thereabout, the deceased and Protestor parted ways/separated. According to the Protestor, the deceased decided to marry one Irene Nyakaro Muguiyi (Now Deceased), the mother to Almer Kitua, Daisy Kitua and Bella Kitua. Further, the Protestor stated that she could not stand the presence of another woman in the relationship between her and the deceased. A situation that was untenable, ultimately compelling her to sever the relationship between herself and the deceased.
49. Having parted ways and in order to ensure that she completely cut her links with the deceased, the Protestor by a Gazette Notice dated the 17th day of February, 1995 (Referred to under issue (i) above) changed her name from Rosemary Muinde Kitua to her maiden name, Rosemary Mwasya by a Deed poll dated the 9th day of February, 1995. In the process, she removed all the names of the deceased from



her name, and reverted to her maiden name thereof. This change being viewed as an intention to sever any association with the deceased and his identity.

50. In defending herself on why, the Protestor applied for change of name, she stated that she had gotten a job and the employer wanted a marriage certificate which she did not have as she had been married under Kamba customary law where none is issued. This clearly confirms that the Protestor changed her name by removing those of the deceased and using her maiden name of Rosemary Mwasya. The Protestor did not state whether she informed the deceased about this change of name and whether she at all attempted to request the deceased if they could formalize their marriage and obtain the said marriage certificate for her to submit to her employer and have her employment details updated.
51. Indeed, from the evidence of all the witnesses, and in particular, Joseph Mutuku Kitua and Justus Solomon Kitua, the brothers to the deceased confirmed that their late brother parted ways with the Protestor in the early 1990s and the two never cohabited together since then until he passed on in the year 2021 almost for a period of thirty-one (31) years.
52. In fact, according to their evidence, when the wife to their late brother, Irene Nyakaro Muguiyi (2nd House) passed away in 1996 and left behind very young children, their late brother almost immediately married Lucy Wambui Kitua (3rd House), who took care of those young children from very tender age until they all matured, as the Protestor had long left the home of the deceased. At the time, the Protestor was nowhere near the deceased. In her own words, it was not her responsibility to take care of the young children left behind by their late mother.
53. According to the Protestor, she did not attend the funeral of Irene Nyakaro Muguiyi, and neither was she indicated as a surviving wife to the deceased, Daniel Muinde Kitua, either in the Newspaper Advertisement or in the Eulogy of the deceased. The reason for the said omission was because she had long parted ways with the deceased, and the two had no intention of resuming cohabitation and marital relationship thereof.
54. In addition, the Protestor and all the witnesses who testified before the Court confirmed that the Protestor never at any one time cohabited with the deceased either at his homes at Syokimau or at his farm home in Ndithini. According to Joseph Kitua and Solomon Kitua, they visited the deceased at his homes in Syokimau where he lived with his two wives, Lucy Wambui and Beth Nyakerario alongside their children, and the same case applied to their residence at Ndithini. The Protestor confirmed to have visited the Ndithini home only three times, the last being during the burial of the deceased herein.
55. It is trite Law that he who alleges has an obligation to prove the allegations which the Protestor failed to do.

Sec. 107 of the Law of *Evidence Act* on the Burden of Proof provides:

1. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
56. The Petitioners submitted that the Protestor has demonstrably failed to establish the existence of a valid marriage; statutory, customary, or otherwise capable of conferring spousal status under Section 3(1) of the *Law of Succession Act*.
 57. Clearly, the Protestor voluntarily abandoned the deceased's household more than thirty years prior to his death and maintained absolute separation throughout that entire period.



58. This prolonged and uninterrupted separation between the deceased and the Protestor, spanning a generation of three decades, conclusively extinguishes any presumption of marriage that could have initially arisen from the said cohabitation. The Law recognizes marriage as a continuing consortium between spouses. However, complete absence of cohabitation, mutual support, communication, or any semblance of a marital relationship for over thirty years fundamentally negates the very essence of a spousal bond in a marriage required for succession rights to accrue to the person surviving.
59. Further, the Protestor's complete and unexplained absence from the life of the deceased for over thirty years constitutes a de facto repudiation of any purported marital bond. Her utter failure to demonstrate any semblance of marital commitment, support, or contact during the lifetime of the deceased fundamentally undermines the good faith basis of her current claim.
60. To permit such a belated assertion of spousal status, after decades of separation, would not only sanction an egregious injustice against the deceased, his loyal beneficiaries and dependents who relied upon him during his lifetime, but would also violate the equitable doctrine of laches, rewarding inaction and disregard. As the *Law of Succession Act* demands a genuine and subsisting marital relationship at the time of death.
61. A marriage is not merely a formality, it is a living, and an ongoing consortium. The utter absence of this consortium, the shared life, mutual obligations, and commitment, demonstrates that any such union had long since ceased to exist in fact and substance long before the deceased passed on.
62. To recognize spousal status based solely on a distant past connection, utterly extinguished by decades of deliberate separation, would be to ignore the fundamental legal reality that a marriage, once repudiated and abandoned, cannot lie dormant only to be resurrected upon death for financial gain to the surviving party.
63. The deceased in his Statement to the Police as attached to the affidavit in response to the Protest sworn by Lucy Wambui Muinde and dated the 12th day of April, 2024 confirms to have divorced the Protestor in 1992 after she threatened to kill the deceased at the time. In view of the foregoing, it is quite apparent that a presumption of divorce can be inferred, as the parties had no intention of ever having to resume cohabitation, and they indeed never resumed during the lifetime of the deceased.
64. In Succession Cause No. 9 of 2018: In the matter of estate of Jecinter Njoki Okoth (deceased) in analysing a long period of non-cohabitation between parties, the Learned Judge had this to say:

“In my view, the objector's cause does not hold water. It is the view of this court that the deceased moved on with her life as she had abandoned the marriage with the objector, engaged in relationships with other men other than the objector, behaved and conducted herself like a single person, a free woman capable of entering into a marriage and actually solemnized the marriage with the petitioner and acquired properties together, after many years of having lived away from the objector. This shows that she had no intention of going back to the objector. These are all indicators that the deceased had moved on permanently. This is distinguishable from adultery in the sense that in adultery does not have an intention to abandon the marriage.



65. The Learned Judge further observed that where parties stay for a long period without cohabitation, even though no formal proceedings for divorce are initiated and granted, a presumption of divorce can be inferred. He stated:

“The marriage between the deceased and the objector was founded upon the basis of presumption of marriage and it is logical to say if the same is applied mutatis mutatis to the circumstances of this case, a presumption that they divorced suffices. The circumstances that the deceased find herself in can safely satisfy a presumption of divorce.

Divorce is not the procedure of filing for a decree nisi in court per se. On a much broader perspective, divorce pertains to the intention and conduct of parties. If parties in a marriage shows an intention not to continue with their marriage or conduct themselves as unmarried persons, then the same should be treated as such. The law cannot attach obligations upon persons who have decided to part ways but fail to formalize the same, because that is not the true reflection of what they want. In that regard the objector stopped being the deceased’s husband when they separated and moved on.

For all intents and purposes, I find the marriage between the objector and the deceased to have been overtaken by events. The Petitioner must have reasonably believed that the deceased was a single person with capacity to marry. And such a marriage entered by two adults, voluntarily cannot be said to be invalid. Therefore, the objector has not satisfied neither the parameters set out in terms of section 76 nor section 29 of the *Law of Succession Act*, Laws of Kenya. He is neither a spouse nor a dependent of the deceased.

66. Guided by the above decision, in the instant case, any form of a marital relationship that could have been inferred between the deceased and the Protestor was extinguished by the long period of non-cohabitation with no intention of ever having to resume cohabitation.
67. In view of the foregoing, this court finds that the Protestor has failed to prove that she was a wife of the deceased at the time of his demise and therefore a beneficiary to his estate who should be counted as a unit in the first house.

(iii) Whether Marqaret Nieri Matheka is a beneficiary to the estate

68. In her submissions, the Protestor contended that Margaret Njeri Matheka is not a child of the deceased and should be excluded from the list of beneficiaries thereof.
69. It is trite law that evidence cannot be adduced through submissions as the Protestor purports to do. The Protestor did not in her pleadings deny that the said Margaret Njeri Matheka was not a child of the deceased. This issue cannot be introduced at the level of submission. See Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”



70. I have read the Affidavit of Protest against Confirmation of the Grant dated the 30th day of May, 2023 and nowhere has the Protestor disputed the fact that Margaret Njeri Matheka is not a child of the deceased.
71. In fact, in her own Affidavit of Protest to Confirmation of the Grant dated the 30th day of May, 2023 the Protestor attached a copy of a letter from the Chief dated the 31st day of January, 2022 which confirms that the deceased had seven children, whose names are listed therein including Margaret Njeri Matheka as a step-child.
72. Similarly, the letter from the Chief dated the 27th day of December, 2021 attached to the Petition for Letters of Administration equally states that the deceased had seven children, amongst them, Margaret Njeri Matheka, who is listed in the said letter.
73. Further to the above, the Protestor in her Affidavit of Protest to Confirmation of the Grant dated the 30th day of May, 2023, attached a copy of her own schedule of distribution, in which the names of the beneficiaries listed, amongst them, is Margaret Njeri Matheka.
74. In their evidence before the Court, both Joseph Kitua and Solomon Kitua confirmed that Margaret Njeri Matheka was a child of their late brother, and hence a beneficiary of his Estate. Both Lucy Muinde and Almer Kitua confirmed the same position in their evidence.
75. In view of the foregoing, it is trite law that admitted facts ought not be proved at the hearing. In the instant case, the Protestor never ever denied in her pleadings that Margaret Njeri Matheka was not a child of the deceased so as to necessitate the calling of evidence to prove otherwise.
76. In *Isuzu East Africa Limited (Formerly General Motors East Africa Limited) vs Nairobi City County Government (2020) eKLR* the court held that:-
- “Section 61 of the *Evidence Act* applies to whether facts ought to be proved in the conduct of civil proceedings. In instances where parties have admitted facts at the hearing and in writing agreed on admitted facts or by law deemed to be admitted facts based on their pleadings, there will be exemption from proving these facts in the proceedings.”
77. Also, in *Kisilu & 2 others v Kiluva & Another (Commercial Appeal E037 of 2024) [2024]* reference was made to Section 61 of the *Evidence Act* which states that:-
- “No fact need be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing, or which before the hearing agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings. Provided that the court may in its discretion require the facts admitted to be proved otherwise than by such admissions.’ The above provisions of the law are unequivocal and clear that admitted facts are not required to be proved. It is my position and the position of the law, that where a claim is admitted, it does not matter whether the other part of the claim stands on strong rock foundation or a quick sand. An admission does not call for any proof.”
78. It is my considered view that the contention by the Protestor that Margaret Njeri Matheka is not a child of the deceased and therefore should be excluded from the list of beneficiaries thereof is misplaced and an afterthought. The evidence on record confirms otherwise and in particular that she is a daughter of the deceased and a beneficiary thereof.



iv. What properties constitute the estate of the deceased and how should adequate distribution of the estate be done;

a. What properties constitute the estate of the deceased

79. In the Summons for Confirmation of Grant the 1st and 2nd Administrators listed the following properties as constituting the estate of the deceased: -

1. LR No. Machakos/Matuu 7090-0.045 Ha.
2. L.R No. Machakos/Matuu 7088-0.045 Ha.
3. L.R No. Machakos/Matuu 7091 -0.045 Ha.
4. LR No. Machakos/Matuu 7092-0.045 Ha.
5. L.R No. Machakos/Matuu 7094-0.045 Ha.
6. L.R No. Machakos/Matuu 7095-0.045 Ha.
7. L.R No. Machakos/Matuu 7096-0.045 Ha.
8. L.R No. Machakos/Matuu 7098-0.101 Ha.
9. L.R No. Machakos/Matuu 7105-0.045 Ha.
10. L.R No. Machakos/Matuu 7109-0.045 Ha.
11. L.R No. Machakos/Matuu 71 1 1-0.045 Ha.
12. L.R No. Ndithini/Mananja Block 7/136-2.0235 Ha.
13. L.R No. Ndithini/Mananja Block 7/139-2.0235 Ha.
14. L.R No. Ndithini/Mananja Block 7/140-2.0235 Ha.
15. L.R No. Ndithini/Mananja Block 7/141-1 .619 Ha.
16. L.R No. Ndithini/Mananja Block 7/135-15.9 Ha.
17. L.R. No. Ndithini/Mananja Block 7/66 34.804 Ha.
18. LR No. Ndunyo Sabuk Komarock Block 1/7585-0.030 Ha.
19. L.R No. 12715/4836 (IR. IRN/CR/CRN. 105369/1)
20. A/C No. 1 1 1 1075409- Kenya Commercial Bank
21. A/C No. 3004143700-National Bank of Kenya
22. KCG 704K- Pick Up White
23. KBL 91 6L-X-trail Silver
24. KTU 806- Ford Tractor

80. Save for the assets listed below, the Protestor is in agreement with the list of properties (assets) as provided by the 1st and 2nd Respondent: -

1. L.R No. Machakos/Matuu/7010 left out in the list.



2. 10 acres of L.R Ndithini/Mananja Block 7/66.
 3. 4 acres of L.R Ndithini/Mananja Block 7/66
 4. Motor Vehicle Mercedes Benz Reg. No. KBZ 203G left out in the list.
81. In respect of parcel of land Machakos/Matuu/7010, the Protestor provided the Title Deed to the property as annexed to her Affidavit. Though the said property is registered in the name of the deceased there was no contestation that during his life time the deceased had gifted the same to her daughter Liz Muthike Mukuzi.
82. In respect of motor vehicle Reg. No. KBZ 203G Mercedes Benz the Protestor contended that the Inventory of Goods and items collected by Lucy Wambui Muinde from Makuyu Police Station confirms under item 8 that the same was part of the said goods. Under item 13, it is indicated that she also received the original logbook to the motor vehicle. In the premises, the said motor vehicle constitutes part of the estate of the deceased. I disagree with the Protestor on this as the said motor vehicle was yet to be transferred in the name of the deceased to form part of his estate. The estate may legally pursue the same if they so wish.
83. Whereas the Protestor did not provide any documentary evidence in respect of sale of 10 acres and 4 acres of L.R Ndithini/Mananja Block 7/66 and Ndithini/Mananja Block 7/66 respectively, to third parties, it was necessary to bring the said information to the court's attention. Nevertheless, the Petitioners submitted that the *Law of Succession Act* establishes a mechanism for dealing with third party claims against an estate of a deceased person.
84. The documents in support of ownership of the above properties forming the estate of the deceased are attached to the Petition for Letters of Administration herein. In particular, the Petitioners attached copies of Official Searches in respect to the parcels of land and the motor vehicles thereof.
85. As per the Summons for Confirmation of Grant, the 1st and 2nd Administrators propose the following mode of distribution of the estate:-



| Item | Assets/Property | Proposed Mode |
|------|--|---|
| 1. | L.R No. Machakos/Matuu 7090-0.045 Ha. | To be sold and the proceeds shared by all the beneficiaries in equal share. |
| 2. | L.R No. Machakos/Matuu 7088-0.045 Ha | Liz Muthike Mukuzi |
| 3. | L.R No. Machakos/Matuu 7091 -0.045 Ha. | Bethsheba Nyakerario Nyamweya |
| 4. | L.R No. Machakos/Matuu 7092 -0.045 Ha. | Bethsheba Nyakerario Nyamweya in Trust for Shanoir Mulaa Kitua |
| 5. | L.R No. Machakos/Matuu 7094 -0.045 Ha. | Bella Mumbi Kitua |
| 6. | L.R No. Machakos/Matuu 7095-0.045 Ha. | Gerald Kitua |
| 7. | L.R No. Machakos/Matuu 7096-0.045 Ha. | Daisy Muthike Kitua |
| 8. | L.R No Machakos/Matuu 7098-0.101 Ha. | Lucy Wambui Muinde |
| 9. | L.R No. Machakos/Matuu 7105-0.045 Ha. | Margaret Njeri Matheka |
| 10. | L.R. No. Machakos/Matuu 7109-0.045 Ha. | Alma Njeri Kitua |
| 11. | L.R No. Machakos/Matuu 7111-0.045 Ha. | Liz Muthike Mukuzi |
| 12. | L.R No. Ndithini/Mananja Block 7/136-2.0235 Ha. | Lucy Wambui Muinde |
| 13. | L.R No. Ndithini/Mananja Block 7/139-2.0235 Ha | Daisy Muthike Kitua |
| 14. | L.R No. Ndithini/Mananja Block 7/140-2.0235 Ha. | Bathsheba Nyakerario Nyamweya |



| | | |
|-----|---|---|
| 15. | L.R No. Ndithini/Mananja Block 7/141-1 .619 Ha. | Bathsheba Nyakerario Nyamweya in Trust for Shanoir Mulaa Kitua |
| 16. | L.R No. Ndithini/Mananja Block 7/135-15.9 Ha. | A portion of 2 acres where the family house is erected to be registered in the names of Lucy Wambui Kitua and Bethsheba Nyakerario Nyamweya for themselves and to hold in trust for all the beneficiaries in equal share. The remainder of the land to be shared equally amongst, Margaret Njeri Matheka, Alma Njeri Kitua, Liz Muthike Mukuzi, Gerald Kitua, Bella Mumbi Kitua & Shanoir Mulaa Kitua. |
| 17. | L.R No. Ndithini/Munanja Block 7/66-34.804 Ha. | To all the beneficiaries in equal Shares. |
| 18. | L.R No. Ndonyo Sabuk Komarock Block 1/7585 -0.030 Ha. | Bethsheba Nyakerario Nyamweya holding in Trust for Shanoir Mulaa Kitua |
| 19. | L.R No. 12715/4836 (IR. IRN/CR/CRN. 105369/1 | Lucy Wambui Muinde & Bethsheba Nyakerario Nyamweya for themselves and holding in Trust for the following beneficiaries, namely, Margaret Njeri Matheka, Alma Njeri Kitua, Daisy Muthike Kitua Bella Mumbi Kitua & Shanoir Mulaa Kitua in equal shares. |
| 20. | A/C No. 1 1 1 1075409-Kenya Commercial Bank | To all the beneficiaries in equal Shares |
| 21. | A/C No. 3004143700-National Bank of Kenya | Lucy Wambui Muide & Bethsheba Nyakerario Nyamweya. |
| 22. | KCG 704K-Pick Up White | Lucy Wambui Muinde |



| | | |
|-----|--------------------------|----------------------------------|
| 23. | KBL 91 6L-X-trail Silver | Bethsheba Nyakerario Nyamweya |
| 24. | KTU 806- Ford Tractor | Lucy Wambui Muinde |

86. On the other hand, the Protestor proposes that the estate of the deceased be distributed as follows :-



| Item | Property | Size/Acreage/ Quantity | Beneficiary |
|------|---|---------------------------|---|
| 1 | L.R.No. Machakos/ Matuu 7090 | 0.045 Ha | Rosemary Muinde Kitua |
| 2 | L.R.No. Machakos/ Matuu 7088 | 0.045 Ha. | Liz Muthike Mukuzi |
| 3 | L.R.No. Machakos/ Matuu 7091 | 0.045 Ha. | Bethsheba Nyakerario Nyamweya |
| 4 | L.R.No. Machakos/ Matuu 7092 | 0.045 Ha. | Bethsheba Nyakerario Nyamweya In trust for Shanoir Mulaa Kitua |
| 5 | L.R.No. Machakos/ Matuu 7094 | 0.045 Ha. | Bella Mumbi Kitua |
| 6 | L.R.No. Machakos/ Matuu 7095 | 0.045 Ha | Fitzgerald Kitua Muinde |
| 7 | L.R.No. Machakos/ Matuu 7096 | 0.045 Ha | Daisy Muthike Kitua |
| 8 | L.R No. Machakos/ Matuu 7098 | 0.1 01 Ha. | Rosemary Muinde Kitua Fitzgerald Kitua |
| 9 | L.R.No. Machakos/ Matuu 7105 | 0.045 Ha | Lucy Wambui Muinde |
| 10 | L.R.No. Machakos/ Matuu 7109 | 0.045 Ha. | Alma Njeri Kitua |
| 11 | L.R.No. Machakos/ Matuu 7111 | 0.045 Ha. | Liz Muthike Mukuzi |
| 12 | L.R No. Ndithini/ Mananja Block 7/136 | 2.0235 Ha | Lucy Wambui Muinde |
| 13 | L.R No. Ndithini/ Mananja Block 7/139 | 2.0235 Ha. | Daisy Muthike Kitua |



| | | | |
|----|--|--|---|
| 14 | L.R No. Ndithini/ Mananja Block 7/140 | 2.0235 Ha. | Bethsheba Nyakerario Nyamweya |
| 15 | L.R No. Ndithini/ Mananja Block 7/141 | 1.619 Ha. | Bethsheba Nyakerario Nyamweya In trust for Shanoir Mulaa Kitua |
| 16 | L.R No. Ndithini/ Mananja Block 7/135 | 15.9 Ha. | Rosemary Muinde Kitua, Liz Mukuzi & Fitzgera Kitua |
| 17 | L.R No Ndithini/ Mananja Block 7/66 | 34.804 Ha. | To all the beneficiaries in equal Shares plus Buyers |
| 18 | L.R No. Ndonyo Sabuk Komarock Block I /7585 | 0.030 Ha | Bethsheba Nyakerario Nyamweya holding in Trust for Shanoir Mulaa Kitua |
| 19 | L.R No. 12715/4836 (IR. IRN/ CRICRN.105369/1) Syokimau House | Lucy Wambui Muinde & Bethsheba Nyakerario Nyamweya | |
| 20 | Funds in Kenya Commercial Bank A/C No. I 1 11075409 | To all the beneficiaries in equal shares | |
| 21 | Funds National Bank of Kenya A/C No. 3004143700 | Lucy Wambui Muinde, Bethsheba Nyakerario Nyamweya & Rosemary Muinde Kitua | |
| 22 | KCG 704K- Pick Up White | To be sold and funds shared to all the beneficiaries in equal shares | |



| | | | |
|--|---------------------------------|--|------------------------------|
| 23 | KBL 916L-X-trail Silver | To be sold and funds shared to all the beneficiaries in equal shares | |
| 24 | KTU 806- Ford Tractor | To be sold and funds shared to all the beneficiaries in equal shares | |
| To be sold and funds shared to all the beneficiaries in equal shares | | | |
| 25 | L.R No. Machakos/ Matuu/7010 | 0.045 Ha. | Liz Muthike Mukuzi (gift) |
| 26 | KBZ-203G Mercedes Benz white | To be sold and funds shared to all the beneficiaries equally | |

87. This court has discretion in distributing the estate of a deceased intestate and in doing so, various factors ought to be considered such as the age of the beneficiaries, the contributions of the beneficiaries towards the acquisition of the property and whether an intestate had, during his lifetime or by will, paid, given or settled any property to or for the benefit of a beneficiary.
88. Having already found that the Protestor is not a wife and thus not a beneficiary to the estate and further having found that Margaret Njeri Mathaka is a beneficiary, I find the persons hereunder listed to be the rightful beneficiaries of the deceased, namely:-
- a. Lucy Wambui Muinde
 - b. Bethsheba Nyakerario Nyamweya
 - c. Margaret Njeri Matheka
 - d. Almer Njeri Kitua
 - e. Liz Muthike Mukuzi
 - f. Fitzgerald Kitua
 - g. Daisy Muthike Kitua
 - h. Bella Mumbi Kitua
 - i. Shanoir Mulaa Kitua (Minor)



89. As the produced records confirm, all the parcels of land herein were acquired and registered in the name of the deceased as between the year 2002 and the year 2021. This was long after the Protestor had ceased cohabitation with the deceased.
90. Similarly, Motor Vehicle Reg. No. KBL 916L – Nissan X-Trail was registered in the name of the deceased on the 11th day of May, 2010 while KCG 704K – Toyota Hilux was registered in his name on the 16th day of February, 2016.
91. It was in the evidence of the Protestor that she was and is still employed by the United Nations Nairobi Office. According to her, during her brief cohabitation with the deceased, they never acquired any meaningful properties, other than household items. They were indeed either residing at the Barracks within premises provided by the deceased’s employer or in rented premises outside the Military Barracks. However, at the time of her testimony, the Protestor admitted that she has since acquired her own properties after parting ways with the deceased.
92. The Petitioners testified that them and the deceased worked together to generate an income within the farm at Ndithini, and in the process, they were able to take care of the children and acquire properties. It is these properties that are now subject matter of this succession cause.
93. It is on record that Lucy Wambui Muinde got married to the deceased in 1997 or thereabout, soon after the death of Irene Nyakaro Muguiyi. She joined the family and took care of the three very young children, assisting the deceased in caring for them and providing for their needs until they all matured and left the home. The said Lucy Wambui Muinde equally took care of Margaret Njeri Matheka when she joined the family, and brought her up as well. In this regard, at the time of the death of the deceased, she had spent a period of 25 years with the deceased, and all the properties in dispute herein were acquired with her contribution.
94. The Protestor played no role, direct or indirect, in the acquisition, development, or management of these properties. Her absence from the deceased’s life during this transformative period underscores the lack of any contributory nexus between her and the estate now under consideration.
95. In the decades following his separation from the Protestor, the deceased entered into two distinct and recognized marital unions as afore stated, both of which were characterized by stability, mutual support, and shared enterprise. These spouses (Petitioners) played an active and sustained role in the accumulation and development of the deceased’s estate, contributing to household management, business ventures, farm management and long-term financial planning and investments with the deceased.
96. In her proposed schedule of distribution, the Protestor audaciously seeks to allocate to herself several properties forming part of the deceased’s estate including parcels of land, motor vehicles and money in banks which she neither participated in acquiring nor possesses any attachment with. It is not disputed that she only emerged after the demise of the deceased herein.
97. Marriage, whether statutory, customary, or presumed, is fundamentally a union of companionship, mutual support, and shared responsibilities. It is not supposed to be a dormant entitlement to be awakened only upon the death of one party, for the sole purpose of claiming material benefit as a ‘wife’ while the relationship with the deceased during his lifetime portrays a different picture.
98. To recognize and allow such the Protestor’s claim would be to distort the very essence of matrimonial partnership, reducing it to a transactional arrangement devoid of commitment, sacrifice, or reciprocity. To have a share in an estate built by the deceased and other parties after her desertion for over 30 years



would eviscerate Section 6(1)(c) of the Matrimonial Properties Act on exclusion of property acquired after separation and sanction the very inequity the Act tries to avoid.

99. Sec. 6(1)(c) of the Matrimonial Properties Act stipulates as follows:

“For the purposes of this Act, matrimonial property means—any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”

100. In *T.M.W. v F.M.C* [2018] eKLR, Nyakundi J. opined that:-

“..for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property”.

101. It is evident that the Protestor exited the matrimonial union well before the deceased commenced acquisition of the subject properties. In line with the principle articulated by Nyakundi J, matrimonial property must be acquired during the subsistence of the marriage. The deceased’s property portfolio was developed exclusively during his unions with the two wives (Petitioners), whose active financial and domestic contributions facilitated the acquisitions. Accordingly, the Objectors’ claim over assets acquired after her departure lacks legal foundation.

102. The Court of Appeal in the case of *EWM v MOM; ANM & Another (Interested Parties)* (Civil Appeal 261 of 2019) [2022] KECA stated:-

“The evidence by the respondent that she had deserted their matrimonial home intermittently, for a period totalling nearly 9 years was not controverted at all. Indeed, even at the time of filing the suit giving rise to this appeal, the appellant had deserted the respondent for a period in excess of 20 years. Section 7 of Part C of the Act provides for a factor to be considered known as Companionship. Without companionship, a marriage is but a mirage since it is the cornerstone. When one spouse leaves a home intermittently for a period totalling 9 years, can it be said that there was companionship that made the respondent to have peace of mind so as to think of acquiring properties? Perhaps the only time that the respondent enjoyed companionship if at all was when she could come back after desertion. This cannot count for much. Thus, her non-monetary contribution was low. The trial court was alive to this fact when it apportioned the property as it did, and cannot therefore be faulted.”

103. In view of the foregoing, it is quite apparent that if the Protestor had filed a suit as against the deceased during his lifetime under the provisions of the Matrimonial Properties Act, the same would have been met by a defence that the properties were acquired by the deceased after he had separated with the Protestor and she therefore had no claim to the properties acquired after the separation.

104. Applying the same principle to this case, it will be unfair to allocate any property of the deceased to the Protestor, considering that all the properties in issue were acquired by the deceased and his two Wives long after the Protestor had deserted the deceased, and she went ahead to acquire her own properties. By allowing her to be allocated any properties of the deceased, the Protestor will be benefiting for the sweat of the deceased and the two Widows, to the detriment of the estate’s lawful beneficiaries.

b. How should adequate distribution of the estate be done;

105. The Petitioners in the Summons for Confirmation of the Grant dated the 9th day of May, 2023 attached a Schedule indicating the assets of the deceased and the proposed mode of distribution of the Estate



- herein. The primary consideration is the principles of equal and or equitable distribution of the Estate to the beneficiaries.
106. Having considered the proposed mode of distribution by the Petitioners and the Protestor, it is my view that the mode of distribution as proposed by the Petitioners appears to have taken into account the principles of equality and equitability.
 107. The said proposed mode of distribution has taken into consideration that the two widows of the deceased (Petitioners) who are entitled to a life interest in the Estate of the deceased to retain their respective homes in Nairobi and also the rural home at Ndithini/Ithanga. In respect to the home in Ithanga/Ndithini, that constitutes the parties' rural home and the burial site of the deceased. It was evident during the hearing that the Protestor is quite hostile to the two widows of the deceased and the other child of the deceased, save for her own children, and were she to be allocated the house in the rural home, the two widows and the other children of the deceased will have no access to the said home and the grave site of the deceased herein, and hence the need to avert such an eventuality.
 108. This court finds that the two widows (Petitioners) are to hold the said matrimonial home at Ndithini in trust for all the beneficiaries of the estate, considering that the deceased was buried on this land, and it is essential that all the beneficiaries have access to this portion of the land. In this regard, all the beneficiaries will have unhindered access to the grave site of the deceased without limitation by any one party thereof, the property is therefore to be registered in the names of the widows, as holding in trust for all the beneficiaries herein.
 109. The property which was given to Liz Mukuzi as a gift by the deceased during his life time has well been considered and also the requirements of the minor beneficiary Shanoir Mulaa Kitula.
 110. This court therefore adopts the mode of distribution as proposed by the Petitioners save that the proposal on the distribution on Account No. 3004143700 at National Bank of Kenya will be altered so that the same can go towards payment of school fees and school related expenses for Shanoir Mulaa Kitua the minor beneficiary herein or be transferred to her own bank account.
 111. In addition, this Court provides for the maintenance and upkeep of the said minor by setting aside a five-acre piece of land from the parcel of land known as L.R NO. Ndithini/Mananja Block 7/135-15.9 HA so that the same can be sold and utilized for the same and also to supplement her Education and other expenses. I am guided by the decision in *Re Estate of Dr. Quintus Ekessa (Deceased) (Succession Cause E011 of 2020) [2025]*, where the learned Judge asked the question; "On whether the estate should be shared equally amongst the children of the deceased, as was the position in *Scolastica Ndululu Suva vs. Agnes Nthenya Suva [2019] KECA 1053 (KLR)(Githinji, Okwengu & Mohammed, JJA*, I argued that there is discretion, which ought to be exercised in cases where some of the children are minors, requiring a larger share than that due to the adult children of the deceased.'
 112. It is not in dispute that during the lifetime of the deceased, he provided the needs of the child herein, and it is only fair and just that the same needs be met from the estate of the deceased herein.
 113. In light of the foregoing analysis and the evidence adduced, the issues for determination as set out have been addressed with clarity and in fidelity to both statutory and equitable principles. The Protestor's claim has to be weighed against the totality of the factual matrix and legal framework governing succession, with due regard to the interests of justice and existing family dynamics.

Disposition

114. The upshot is that the Affidavit of Protest against confirmation of grant dated 30th May 2023 is found to be without merit and the same is dismissed. Distribution of the estate shall be as per the Schedule



in the Certificate of confirmation of Grant dated 9th May 2023 save that that the proposal on the distribution on Account No. 3004143700 at National Bank of Kenya will be altered so that the same can go towards payment of school fees and school related expenses for Shanoir Mulaa Kitua the minor beneficiary herein or be transferred to her own bank account.

115. There shall be no order as to costs, this being a family dispute.

It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 9TH FEBRUARY 2026.

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 9TH FEBRUARY 2026.

In the presence of:

Mr. Mwangi for Petitioners/1st & 2nd Administrators

Mr. Kalii h/b for SC Mr. Mutua for the Protestor/3rd Administrator

26

