Muthemba v Mungai (Civil Appeal 448 of 2018)
[2021] KECA 118 (KLR) (22 October 2021) (Judgment)

Neutral citation: [2021] KECA 118 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 448 OF 2018

W KARANJA, F SICHALE & KI LAIBUTA, JJA

OCTOBER 22, 2021

BETWEEN

DAVID MUNGAI MUTHEMBA ..... APPLICANT

AND

JANE NJERI MUNGAI ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi Hon. Justice W. Musyoka dated the 12th May 2017 in The High Court (Family Division) Succession Cause No. 2501 of 2003; In the matter of the Estate of Andrew Mungai Muthemba - Deceased)

JUDGMENT

Background

1. This appeal arises from the judgment and decree of Hon. Justice W. Musyoka dated 12th May 2017 in Nairobi High Court (Family Division) Succession Cause No. 2501 of 2003 in which the Appellant, David Muthemba Mungai, had applied for confirmation of the Grant of Letters of Administration intestate given to the appellant and the respondent on 29th March 2004 in the matter of the estate of Andrew Mungai Muthemba (Deceased). The appellants Summons for Confirmation of Grant were filed pursuant to section 71(1) of the *Law of Succession Act* and Rule 41(1) of the Law of Succession Rules.

2. The appellant's Summons were supported by his affidavit sworn on 20th April 2010 accompanied by a copy of the proposed mode of distribution and to which the members of the first house had agreed on the following terms:

   Table I – Appellant's Proposed Mode of Distribution

No.	Description of Property	Proposed Beneficiaries
1.	LR No. 209/10487 — Bomas Property	First House
2.	LR No. 3589/6/42 — Mukinduri House	Second House
3.	LR No. Kabete/Lower Kabete/1275	First House
4.	LR No. Kabete/Lower Kabete/1279	First House
5.	LR No. 209/11508	Equally between First and Second House
6.	53% shareholding in Kentazuga and Second House	Equally between Firstand Second House
7.	KUF 056	Jane Njeri
8.	KYZ 820	David Mungai
9.	KSL 315	John Mungai
10.	KAJ 347	Kevin Chege Mungai

3. In reply to the appellant's Summons for confirmation of grant, the respondent filed her Affidavit of Protest sworn on 22nd October 2010 to which the appellant responded vide his Affidavit in Support of Summons for Confirmation of Grant of Administration Intestate sworn on 24th November 2010, and in which the appellant took issue with the respondent's proposed mode of distribution. In response to the appellant's contentions, which we need not recite here, the respondent filed a Supplementary Affidavit of Protest sworn on 9th May 2011. The gist of her two affidavits of protest is the proposed mode of distribution set out in paragraph 17 of her affidavit sworn on 22nd October 2010, and which is reproduced in Table 2 below:

Table II – Respondent's Proposed Mode of Distribution

No.	Description of Property	Proposed Beneficiaries
1.	LR No. 209/10487 — Bomas Property	Equally between First and Second House
2.	LR No. 3589/6/42 — Mukinduri House	Second House
3.	LR No. Kabete/Lower Kabete/1275	Equally between First and Second House
4.	LR No. Kabete/ LowerKabete/1279	Equally between First and Second House
5.	LR No. 209/11508	Equally between First and Second House
6.	53% shareholding in Kentazuga Hardware	Equally between First and Second House
7.	KUF 056 — BMW	Jane Njeri
8.	KYZ 820	David Mungai
9.	KSL 315	John Mungai
10.	KAJ 347	Kevin Chege Mungai

The Parties

4. The Appellant is the firstborn son of the first wife of the deceased while the respondent was the second wife. The appellant and the respondent represented the interests of the two houses in the High court and in this appeal. The two are joint administrators to the estate of Andrew Mungai Muthemba (Deceased) having been appointed under a Grant of Letters of Administration Intestate issued on 29th March 2004 and confirmed in terms of the Decree issued in High Court (Family Division) Succession Cause No. 2501 of 2003 in terms of the Decree issued on 5th December 2018.

5. The first house, which is represented by the appellant is comprised of five children of the deceased and the first wife, Joyce Wairimu Mungai, who died sometime in 2013. These are:

    a. David Muthemba Mungai (the appellant);

    b. Rosalind Wangari Mungai;

    c. John Mungai Muthemba;

    d. Dedan Chege Mungai; and

    d. Evanson Kaburu Mungai.

6. The second house, which is represented by the respondent, who was the deceased's second wife, is comprised of the respondent and four children, namely:

    a. Jane Njeri Mungai (a widow of the deceased);

    b. Ricky Muthemba Mungai;

    c. Mavis Wangari Mungai;

    d. Raymond Kihiu Mungai; and

    e. Kevin Chege Mungai.

7. The Interested Party in this appeal, Evanson Kaburu Mungai, is the last born in the first house. His interest in the appeal is articulated in his written submissions dated 30th September 2021 to which we will shortly return.

Dispute and Findings of the Superior Court

8. A dispute arose between the Appellant, the Respondent and the interested party over and concerning the mode of distribution of the intestate estate of the deceased in the manner settled by the High court vide its Decree issued on 5th December 2018. The impugned mode of distribution is as set out in Table III below:

    Table III – Mode of Distribution under the Decree

No.	Description of Property	Beneficiaries
1.	LR No. 3589/6/42	Jane Njeri Mungai during life interest and thereafter to Ricky Muthemba Mungai, Mavis Wangari Mungai, Raymond Kihiu Mungai and Kevin Chege Mungai, in equal shares
2.	LR No. 209/10487	Jane Njeri Mungai, David Muthemba Mungai, Rosalind Wangari Mungai, John Mungai Muthemba, Dedan Chege Mungai,Evans Kaburu Mungai, Ricky Muthemba Mungai, Mavis Wangari Mungai, Raymond Kihiu Mungai and Kevin Chege Mungai equally
3.	LR No. 209/11508	Jane Njeri Mungai, David Muthemba Mungai, Rosalind Wangari Mungai, John Mungai Muthemba, Dedan Chege Mungai,Evans Kaburu Mungai, Ricky Muthemba Mungai, Mavis Wangari Mungai, Raymond Kihiu Mungai and Kevin Chege Mungai equally
4.	Kabete/Lower Kabete/1275	Rosalind Wangari Mungai absolutely
5.	Kabete/Lower Kabete/1279	Evans Kaburu Mungai absolutely
6.	53%shareholding in Kentazuga Hardwares Limited	Jane Njeri Mungai, Rosalind Wangari

		Mungai, Dedan Chege Mungai, Evans Kaburu Mungai, Ricky Muthemba Mungai, Mavis Wangari Mungai, Raymond Kihiu Mungai and Kevin Chege Mungai equally
7.	Motor Vehicle Registration No. KUF 058	Jane Njeri Mungai
8.	Motor Vehicle Registration No. KYZ 820	David Muthemba Mungai
9.	Motor Vehicle Registration No. KSL 315	John Mungai Muthemba
10.	Motor Vehicle Registration No. KAJ 347	Kevin Chege Mungai
11.	The rest of the properties	Both houses equally

9. In his appeal, the appellant faults the mode of distribution as decreed by the High court on account of what may be summarised as –

    a. the ratio of distribution in respect of certain shares and immovable property;

    b. the court's decision not to consider Joyce Wairimu Mungai (the deceased first wife of the deceased) as a unit in distribution of the assets;

    c. various gifts inter vivos in respect of certain shares and immovable properties; and

    d. the distribution of LR No. 209/10487 (commonly referred to as "the Bomas property") among the surviving widow and children of the deceased in equal shares.

10. The appellant advanced 26 grounds of appeal set out in his Memorandum of Appeal dated 7th December 2018, which we need not reproduce here. He prays-

    a. That the appeal be allowed with costs.

    b. That the order of the Superior Court made on 12th May, 2017 be set aside and there by substituted an order that —

        i. The redistribution of the Estate do take place before a Judge other than Hon Justice Musyoka; or

        ii. That the said order made on 12th May, 2017 be varied as follows —

    A. That LR No. 209/10487 and LR 3589/6/42 be shared in the ratio of 6:5 by the houses of Wairimu and Njeri;

B. That as an alternative to A. above, the members of the House of Wairimu shall take LR No. 209/10487 whilst the members of Jane Njeri shall take LR No.3589/6/42; Jane Njeri shall have a life interest, her children shall share it equally upon determination of the same;

C. That LR No. 209/11508 be shared by the two houses of the deceased in the ratio of 6:5 and Jane Njeri to have a life interest in the share that comes to her house;

D. That Lower Kabete/1275 and Lower Kabete/1279 be shared by the Houses of Joyce Wairimu and Jane Njeri in the ratio of 6:5;

E. That 53% shareholding in Kentazuga HardwareLimited be shared by the Houses of Joyce Wairimu and Jane Njeri in the ratio of 6:5.

c. That such order as this Honourable Court deems fit to make in the circumstances of this Appeal."

Appeal and Submissions of Counsel

11. Having examined the record of appeal and the grounds on which it is founded, we are of the considered view that the appeal stands or falls on the following issues of law and fact, and on which learned counsel for the appellant, the respondent and the interested party comprehensively submitted. In our considered view, the issues falling to be determined may be summarized as follows:

a. Should Joyce Wairimu Mungai (the deceased first wife of the deceased) be considered as a unit in distribution of the assets in issue?

b. In what ratio should various shares and immovable property comprising the estate of the deceased be distributed?

c. Should the various gifts inter vivos in respect of the specified shares and immovable properties be considered in the distribution of the deceased's intestate estate?

d. How should LR No. 209/10487 ("the Bomas property") be distributed?

e. what orders should this Court make in determination of the appeal?

12. We have considered the findings of the High court, the submissions of the respective counsel, the numerous statutory provisions and authorities cited before us. This being a first appeal, it is also our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others [2015] eKLR* citing the case of *Selle v Associated Motor Boat Co. [1968] EA p.123* where the Court held:

> " An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the

evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

13. Before addressing ourselves to the five issues in contention, we hasten to observe that the respondent does not take issue with the mode of distribution decreed by the superior court. She urged us to find that –

    a. The mode of distribution of the assets by the Learned Judge was fair and in accordance with section 40 of the *Law of Succession Act*, and that the same should not be disturbed;

    b. the applicable ratio of distribution under section 40 of the Act between the two houses is 5:5;

    c. the Learned Judge correctly took into account the gift inter vivos made in favour of the Appellant and the Sons of the 1st House; and

    d. in view of the inter vivos dispositions aforesaid, the most just and reasonable mode of distribution is as proposed by the Learned Judge.

14. Likewise, the interested party submits that "... the honourable court's decision should be upheld to a greater extent save for the issue of division ratio and the award of LR No. 209/10487." According to him, the distribution of all other assets was correct. In his view, "... the learned Judge correctly applied the facts and the law."

Widows as Units of Distribution

15. An issue arose as to whether the first wife of the deceased, Joyce Wairimu Mungai (Deceased), should have been considered as a unit in the distribution of the intestate estate of Andrew Mungai Muthemba (Deceased). The appellant and the interested party contend that she should. We do not agree. Whether or not the deceased widow should be reckoned as a unit in the distribution depends on whether, at the time the Grant of Letters of Administration Intestate to the estate of her deceased husband was confirmed, and on the basis of which the impugned distribution was made, the deceased widow could be said to have survived the deceased.

16. It is not disputed that the deceased's first wife, Joyce Wairimu Mungai, died sometime in 2013 having enjoyed the prospect of a life interest in her house's share of the intestate estate of her deceased husband for a period of four or so years subject, however, to distribution on confirmation of grant. In determining whether Wairimu could be considered as a unit for the purpose of distribution long after her demise three pertinent questions must be answered: First, what is the nature of a widow's life interest in the estate of her deceased husband? Secondly, when does this interest abate? And thirdly, can a widow be considered as a unit of distribution of the intestate estate of her husband notwithstanding her death and termination of her prospective life interest before the mode of distribution of the estate is determined?

17. A life interest may be described as a right to property that a person holds for life, but cannot dispose of further. In the context of the appeal before us, it is the interest in property forming part of a deceased's intestate estate that lasts for a surviving widow's lifetime and extinguishes at death or, in the case of a widow surviving her deceased husband, upon remarriage. Section 35(1) (b) of the *Law of Succession Act* provides that:

    " "subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to ... a life interest in the whole

residue of the net intestate estate: provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person."

18. Where the intestate has married more than once under any system of law permitting polygamy, section 40(1) of the Act provides that: "... 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." In our considered judgment, the division of the estate "among the houses according to the number of children in each house," and the addition of "... any wife surviving him as an additional unit" is dependent on the widow's survival at the moment of such division.

    We find the words "division of the estate" and "surviving him" to be decisive of whether or not a widow is reckoned as a unit in the division of the intestate estate. To understand this, one has to ask himself two questions. The first question is: when does the division take place? The second is: What does it mean to survive one's husband?

19. We have no doubt in our minds that distribution or division of the intestate estate of an intestate as contemplated in section 40 of the Act can only take place upon confirmation of the Grant of Letters of Administration Intestate. Section 71(1) of the Act reads:

    > " "After the expiration of a period of six months, or such shorter period as the court may direct under sub-section (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets."

20. For the avoidance of doubt, it is noteworthy that section 55(1) of the Act bars the distribution of any capital assets of an intestate, or to make any division of property, unless and until the grant has been confirmed as required under section 71. What this means is that distribution of one's intestate estate in accordance with section 40 of the Act can only take place after the grant is confirmed as required by section 71(1). It is only then that a surviving spouse or widow, as is the case here, may benefit from such distribution.

21. Back to our question – who is a surviving spouse? The words "surviving spouse" are self-explanatory. They can only mean a spouse who lives on after the demise of his or her spouse. Such a spouse can only benefit from the distribution of the capital assets or net intestate estate and, in the case of a widow, enjoy a life interest therein if, but only if, she is alive at the time of distribution. It follows, therefore, that, for a widow in a polygamous marriage to be considered as "an additional unit" for the purpose of distribution, she must necessarily be alive during the distribution. This means that death prior to distribution, as was the case here, extinguishes the widow's life interest and the right to be reckoned as an additional unit. If this were not the case, one would only wonder what benefit would be conferred to a deceased widow while the law creates a life interest for her, and for her benefit only. The short answer is "none".

22. Two authorities cited by counsel for the appellant confirm our finding to this end. In *Musa Imbiakha Khatimba v Bella Khayanga Imbiakha [2015] eKLR*, this Court cited with approval the High Court decision in Kakamega HC Succession Cause No. 749 of 2007 (Chitembwe, J), where the learnedJudge took into account that there were ten children from the first house and fourteen children from the second house, with the respondent making up the land available and comprising approximately 72 Acres into 25 units. The reason for this decision was that the widow in the first house had pre-deceased the intestate. In our considered view, what matters is that the deceased widow had died before the distribution. It is immaterial that she had predeceased the intestate. Either way, she could not be

considered as an additional unit in the first house by reason of her demise prior to the division in accordance with the confirmed Grant.

23. We also affirm the Nairobi High Court decision in *SMK v EWK [2010] eKLR*, which Dr. Kuria for the appellant invited us to consider. In that case,the first house had 2 units (comprised of two children of the first deceased wife) while the second house had 7 units (comprised of 6 children and a surviving widow). The High Court distributed the intestate estate in the ratio of 2:7with the first house getting 2/9 and the second house getting 7/9 of the assets. The reasoning, by which we stand, is that a deceased widow cannot be reckoned as a unit in distribution, unless she is alive at the time of distribution. That is the import of section 40 read together with sections 55 and 71 of the *Law of Succession Act*. We agree with learned counsel for the respondent that the High Court rightly excluded Joyce Wairimu Mungai (Deceased) from the distribution and hold that Joyce Wairimu Mungai (the deceased first wife of the intestate) could not be considered as a unit in distribution of her deceased husband's intestate estate.

24. In view of the foregoing, we find and hold that Joyce Wairimu (Deceased) cannot lawfully be considered as an additional unit in the first house of the intestate, having died prior to the confirmation of grant that empowered distribution. We find no reason to interfere with the High Court's decision in this regard. That settles the first issue in this appeal.

Applicable Ratio of Distribution

25. The second question is what ratio should apply to the distribution of various shares and immovable property between the two houses? Citing numerous authorities, learned counsel for the respondent submitted that two main issues fall to be determined in this regard:

    a. whether the learned Judge erred in failing to distribute the estate of the deceased in accordance with sections 35 and 40 of the *Law of Succession Act*; and

    b. whether this Court should interfere with the High Court's distribution of the estate. According to him, the learned Judge correctly appreciated that the deceased was a polygamist.

    Paragraph 14 of the impugned judgment reads:

> " The deceased was a polygamist, and therefore the estate should be divided in terms of section 40 of the *Law of Succession Act*, where the overriding principle is equality amongst all survivors."

26. The appellant faults the ratio of distribution applied by the High Court and submits that that ratio does not conform to sections 35 and 40 of the Act.

    According to learned counsel for the appellant, "... those sections required that the estate be distributed in the ratio of 6:5 and the respondent gets a life interest in the part of the estate coming to her house." While we do not find fault in the submission that the respondent was entitled to a life interest in that part of the estate that devolves to her house, we do not agree that the same interest accrues to Joyce. The learned counsel's submission in this respect is premised on the misperception that Joyce Wairimu Mungai (deceased) survived the intestate within the meaning of section 40(1). Her death prior to the confirmation of grant that empowers distribution disqualified her from acquiring such an interest, the effect being that she could not, in law, be considered as a unit in the distribution of the estate so as to result in the proposed ratio of 6:5.

27. Addressing itself to the effect of sections 35 and 40 of the Act, this Court had this to say in *Francis Mwangi Thiong'o and 4 others v Joseph Mwangi Thiong'o [2015] eKLR* to which learned counsel for the respondent drew ourattention:

> "Section 40(1) aforesaid states that it is any wife surviving the deceased that would be considered as an additional unit in the number of children .... The provision addresses succession and survivorship and there is no portion for the dead among the living. This is more so considering that a surviving spouse obtains a life interest under sections 35, 36 and 37 of the Act. It is co-terminus with life unless sooner ended by remarriage. This is not at all altered or in any way effected by the section 3 definition of 'house' which is merely descriptive and not at all distributive. The learned Judge was therefore wrong to hold that the prior demise of the wife in the first house was of no consequence. It was."

28. As was the case in Francis Mwangi Thiong'o (ibid), there can be no portion for Joyce Wairimu Mungai. Her demise prior to the distribution of her deceased husband's estate was consequential. Her prior death affects the ratio of distribution which, in our considered judgment, cannot be 6:5 as proposed by the appellant. Accordingly, we find that the learned Judge was correct in holding that the ratio applicable to the distribution of the deceased's intestate estate is 5:5 taking account of:

    a. the 5 children of the deceased's first house;

    b. the 4 children of the deceased's second house; and

    c. the respondent, who constitutes an additional unit in the second house on account of being the only widow who survived the deceased at the time of distribution.

    By so holding, we are mindful of the principle that section 40(1) of the Act does not take away the discretion of a court in determining an equitable and fair mode of distribution. This Court so held in *Scholastica Ndululu Suva v Agnes Nthenya Suva [2019] eKLR* where the learned Judges observed that:

> "...although section 40 provides the general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate."

    That answers the second question.

Effect of Gifts Inter Vivos

29. The third question is whether the various gifts inter vivos in respect of the specified shares and immovable properties may be considered in the distribution. Our answer is in the affirmative. Section 42 of the *Law of Succession Act* requires previous benefits to be brought into account. The section reads:

> "42. Where –
>
> a. an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
>
> b. property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken

into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house."

30. The term "house" is defined in section 3 of the Act as "... a family unit comprising a wife, whether alive or not at the date of the death of the husband, and the children of that wife." It is common ground that 47% of the shares in Kentazuga Hardware Limited had been appointed or awarded to the appellant and John Mungai Muthemba, who are children of the first house. These shares were given or settled in favour of the two children during the life of the deceased. In his testimony, John Mungai Muthemba claimed that he got 23.5% while the appellant got 23.5% shares in Kentazuga from their deceased father. The appellant claimed that the 47% shares in the company given to him and his brother John "... through a commercial transaction." It is noteworthy that the two beneficiaries did not adduce any evidence of a commercial transaction in consideration for which the shares aforesaid were allegedly given so as to exclude them from distribution as gifts inter vivos.

31. These gifts inter vivos left 53% of the shares in the deceased's company, which were available for distribution. Taking account of these gifts, we find no fault in the learned Judge's direction that the remaining 53% shares in Kentazuga Hardware Limited be distributed in equal shares among the respondent and seven children of the deceased to the exclusion of the appellant and John Mungai Muthemba. Accordingly, we find no justification to interfere with the learned Judge's judgment and decree on the distribution of those shares.

32. The other gifts inter vivos include plots or parcels of land known as –

    a. Kabete/Lower Kabete/1275, which John Mungai Muthemba claimed to have purchased in an auction, had it registered in his name, but subsequently distributed to his sister Rosalind Wangari Mungai under the impugned decree;

    b. Kabete/Lower Kabete/1276 given to John Mungai Muthemba;

    c. Kabete/Lower Kabete/1277 given to Dedan Chege Mungai;

    d. Kabete/Lower Kabete/1278 given to the appellant, who claims to have bought it in an auction over a debt owed to a bank, but adduced no evidence to support his claim.

33. It is noteworthy that the four above-mentioned beneficiaries are children of the deceased in the first house. In addition to the four, the fifth child, Evanson Kaburu Mungai, benefited from the plot or parcel of land known as Kabete/Lower Kabete/1279 under and by virtue of the impugned decree. The evidence on record reveals that the five Lower Kabete properties were subdivisions of a larger property forming part of what the respondent refers to as "ancestral inheritance" of the deceased from his father, Simeon Muthemba (Deceased). So much for the Lower Kabete properties, three of which had been given by the deceased to three children of the first house by way of gifts inter vivos and two of which were distributed to two other children under the impugned decree. That leaves us with the issue of the contested distribution of the Bomas property.

34. We hasten to observe that the distribution of the Mukinduri Road property being LR No. 3589/42 to the second house is not contested. According to the appellant, "... the deceased had bought [the Mikinduri Road property] for the second house as a way of separating the two families." This left the first house in possession of the various Lower Kabete properties before and after subdivision into the various portions distributed among the children of that house as aforesaid.

35. The separation of the two houses and their settlement on different properties was, in our considered view, clear demonstration of the wishes of the deceased with which this Court would hesitate to interfere. We are persuaded by the respondent that those wishes must be respected. Learned counsel for the respondent invited us to affirm the principle adopted in the High Court Decision in Paul Kirugi Nyingi and another v Francis Wanjohi Nyingi [2009] eKLR where Asike-Makhandia, J (as he then was) had this to say:

> "Unless it can be demonstrated that those wishes of the deceased ... were illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected ...."

36. In view of the foregoing, we find, as the learned Judge found in the afore-cited case, that nothing has been brought to our attention that remotely suggests that the deceased was biased, unfair or discriminatory against any of the beneficiaries in the manner he wanted his estate shared out on his demise. That leaves us with the contentious issue of the Bomas property.

The Bomas Property

37. The property known as LR No. 209/10487 ("the Bomas property") was also at the centre of controversy between the two houses. The fourth question before us is – how should this property be distributed, and why? The evidence on record shows that the Bomas property comprised the deceased's resident, whose doors were at all times open to the two wives and their children as they visited him from time to time. For good reason, the deceased did not assign this property to any of the two houses. In the circumstances, we can only conclude that this property was available for distribution to the beneficiaries in the two houses in equal shares. Accordingly, we uphold the learned Judge's decision that the Bomas property be distributed among the respondent and the children of the deceased in equal shares. That settles the fourth issue before us.

38. In conclusion, we uphold the judgment and decree of the High Court dated and delivered on 12th May 2017. Consequently, we dismiss the Appellants' appeal in its entirety. This being a succession cause whose outcome is in the interest of all beneficiaries, we make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR