In re Estate of John Nyambeki Siprian Ondieki (deceased) (Civil Appeal E044 of 2024) [2025] KEHC 1116 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1116 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E044 OF 2024

DKN MAGARE, J

FEBRUARY 27, 2025

IN THE MATTER OF THE ESTATE OF JOHN NYAMBEKI SIPRIAN ONDIEKI (DECEASED)

BETWEEN

ANNAH BOCHERE NYAMBEKI ..... APPELLANT

AND

LUCY NYAMBEKI MACHUKI ..... 1ST RESPONDENT

CYPRIAN ONDIEKI NYAMBEKI ..... 2ND RESPONDENT

(Being an appeal from the ruling and order of the Hon. Mac'Andere (SRM) given on 19.2.2024 in Kisii CMCC P&A No. E041 of 2021 - In the matter of the estate of John Nyambeki Siprian Ondieki)

JUDGMENT

1. This is an appeal from the ruling and order of the Hon. Mac' Andere (SRM), given on 19.2.2024 in Kisii CMCC P&A No. E041 of 2021, in the matter of the estate of John Nyambeki Siprian Ondieki. The Appellant was a Petitioner, while the Respondents were Protestors. The court delivered its ruling distributing the estate as follows:

    a. It is not in contention that the protestors are the biological children of the deceased. The protestors averred that they were the deceased's biological children whom he sired with their late mother, who was the first wife to the deceased. The petitioner herself acknowledged this by referring to them as her children.

    b. Having answered issue number one in the affirmative, the protestors, as a matter of right, are entitled to a portion of the deceased's estate as they fall into the category enshrined under Section 29 of the *Law of Succession Act*, Cap160 Laws of Kenya.

c. From the evidence adduced the following are the properties that belonged to the deceased: - Land parcel numbers, Wanjare/Bogitaa/xxxx (as per the evidence, initially 7 acres but currently 4.5 acres), Wanjare/Bogitaa/xxx (ancestral home measuring 1.7 acres) and Wanjare/ Bokeire xxxx, xxxx, and xxxx, measuring 0.13 ha, 0.24 ha, and 0.36 ha respectively.

d. All the parties concur that the three land parcel numbers xxxx, xxxx, and xxxx should be left to the petitioner and her 6 children since her homestead is in one of them, and that is where she used to reside with the deceased when he was alive. So the three parcels go to the petitioner and her six (6) children.

e. Land parcel number Wanjare/Bogitaa xxx is ancestral land. I propose the same to be divided equally among the two houses. Since the 2nd protestor resides there. When subdividing, his portion should encompass the place where he currently resides.

f. Land parcel number Wanjare/Bogitaa xxxx is bigger than the other three portions left to the petitioner. Also, considering the number of children per household, I propose the same be divided equally among all the siblings.

g. In the mode of distribution, the 1st protestor is to be placed as a beneficiary of the deceased. Parties to agree on the size of land that each beneficiary will get in line with the above-proposed mode of distribution.

h. The petitioner is to file for summons to confirm the grant within 14 days from the date of this ruling. Confirmation of grant on 7/3/2024. All beneficiaries are to be present with their original identity cards.

2. The Appellant set out the following grounds of appeal:-

a. That the learned trial magistrate erred in fact by directing that the three land parcel numbers xxxx, xxxx, and xxxx be left to the Petitioner and her six (6) children when in actual sense the Petitioner herein has only five (5) children.

b. That the learned trial magistrate erred in law and fact by ruling that Land Parcel Number Wanjare/Bogitaa xxx, the ancestral land, be divided equally among the two houses, yet by being divorced, the 1st wife and her children could not consist of a house. A house, per Section 3 of the *Law of Succession Act*, CAP.160, refers to a family unit comprising of a wife, whether alive or dead, at the date of the death of the husband and the children of that wife. Further, a wife includes inter alia a wife who is separated from her husband.

c. That the learned magistrate erred in law by failing to consider Section 35 of the *Law of Succession Act*, CAP.160, on how the estate of the deceased should be distributed.

d. That the learned trial magistrate erred in law and fact by failing to consider the provisions of Section 42 of the *Law of Succession Act*, CAP.160, in which previous benefits should be brought into account. In their ruling, the trial magistrate directed that Land Parcel Number Wanjare/ Bogitaa xxxx be divided equally among all the siblings, yet the 2nd Protestor in the matter had had a previous benefit on the said Land Parcel Number Wanjare/Bogitaa xxxx, a benefit he acknowledged in his statement.

3. They proposed to ask the court to set aside the ruling, allow the appeal, and stay the ruling. They were not interested in costs. Parties proceeded by way of submissions. At the time of fixing the matter for hearing, only the Appellant had filed submissions. On the hearing date parties confirmed that submissions had been filed.

4. From the Memorandum of Appeal, I can distill 4 mini-issues for determination, that is: -

   a. Whether the court erred in directing land parcels xxxx, xxxx, and xxxx be left to the Appellant and her six (6) children when she had only five (5) children.

   b. Whether the 1st house constituted a house within the meaning of the Succession Act so as to inherit Land Parcel Number Wanjare/Bogitaa xxx equally as directed by the court.

   c. Whether distribution was per Section 35 of the *Law of Succession Act*.

   d. Whether the court failed to take into consideration previous benefits in relation to Land Parcel Number Wanjare/Bogitaa xxxx.

Evidence

5. The statement of the 1st Respondent was adopted in evidence. She was not cross-examined. She stated that their father had two wives. Their mother was an elder wife and had 2 children. Their mother was married in 1965 and divorced in 1993.

6. The 2nd Respondent testified that the Appellant had six children while his mother had 2 children. The witness continued that he stays on the ancestral land, being Wanjare/Bogitaa/xxx- 1.7 hectares registered on 04.08.1976. He wanted to be given the father's land. On cross-examination, he stated that he was indicated in the Chief's letter but was not informed. He prayed for Land Parcel Number Wanjare/Bogitaa xxxx as he was using it. The said parcel was bought while the Appellant was not married.

7. The Appellant testified that she knew the Respondents. She stated that she did not refuse to give them land. She wanted to give them equally. She stated that Land Parcel Number Wanjare/Bogitaa xxxx was initially 7 acres. The husband sold 2 acres to educate the 2nd Respondent's children. She noted that all children should get equal portions in Land Parcel Number Wanjare/Bogitaa xxxx and Wanjare/Bogitaa xxx. She prayed to get land parcels Wanjare/ Bokeire/ xxxx, xxxx, and xxxx as she resided therein.

8. On cross-examination, she stated that she was married in 1967, but Land Parcel Number Wanjare/ Bogitaa xxxx had not been bought. She stated that her late brother was given money by the deceased herein to purchase the said parcel. She stated that she has never stayed on Land Parcel Number Wanjare/ Bogitaa xxxx. She conceded that she did not include the 1st Respondent. Her evidence was that all children should get Land Parcel Number Wanjare/Bogitaa xxxx equally.

9. The question of prior entitlement did not arise other than the sale by the deceased of 2 acres. Parties closed their respective cases.

Submissions

10. Mapesa

Analysis

11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself

or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

12. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the judges in their usual gusto, held as follows;-

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

13. The court must remember that it has neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as that of the lower court, as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

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

14. In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

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

15. In the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

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

16. The case turns on the proper understanding of the Succession Act. Parties must understand that succession is not an audit into the affairs of the deceased and his lifestyle. It is neither a question of the source of his wealth nor his usage during his lifetime. Only two aspects of his previous conduct are relevant to succession. These are gifts in contemplation of death, donatio mortis causa, and a gift inter vivos. I shall dwell on these two concepts before applying them to the facts.

17. In the case of Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 others [2021] eKLR. L.W. Gitari J. posited as follows:

> The test on a gift causa mortis is defined as a gift made in expectation of death. The donor causes the property or goods in his possession to be delivered to another. The general distinction between a gift causa mortis and a gift intervivos is that its revocable by the donor and his capacity must meet the requirements under Section 11 of the Law of Succession in the making of a Will.

18. The court continued as follows:

> In Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:
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> > "Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do."
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> Adherence to the rule based-model on transfer of immovable property involves an inquiry on the Law of gifts inter vivos or causa mortis featuring in Odunga's Digest on Civil Case Law and Procedure Vol (III) Page 2417 at paragraph 5484 (d) e – 1 thus:
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> > "Generally speaking the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate the gift. (See in Re Fry Deceased {1946} CH 312 Rose: and Trustee Company Ltd v Rose {1949} CL 78 Re: Rose v Inland Revenue Commissioners {1952} CH 499 Pennington v Walve {2002} 1WLR 2075 Maledo v Beatrice Stround {1922} AC 330 Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee need no assistance from equity and the gift is complete. It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor. (See Shell's Equity 29ED Page 122 paragraph *3*)"

19. In the case of Shah & another v Shah (Civil Appeal 268 of 2019) [2024] KECA 76 (KLR) (9 February 2024) (Judgment), the Court of Appeal [MA Warsame, KI Laibuta & JM Mativo, JJA] posited as follows in respect of a gift inter vivos:

    20. As observed by Nyakundi J. in Khalifa Abdalla Khamis v Mohamed Abdalla Khamis [2021] eKLR, it is a cardinal rule in our jurisprudence that the right to dispose of property by will or gift is exacting in its requirement as observed by Nyamweya J. (as she then was) in Re: Estate of the Late Gedion Manthu Nzioka (deceased) [2015] eKLR where she stated as follows: "In Law, gifts are of two types (gift inter-vivos and gifts made in contemplation of death (gifts Mortis Causa. For gifts inter-vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing, or by delivery, by a way of a declaration of a trust by the donor, or by way of resulting trusts or the presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of a trust in writing. Gift's inter- vivos must be complete for the same to be valid."

    21. In Munyole v Munyole (Civil Appeal 21 of 2017) [2022] KECA 373 (KLR) (18 February 2022) (Judgment), we held that in order for the court to conclude that a deceased person had made a gift inter vivos to a beneficiary, evidence must be led to this effect.

20. Regarding the settlement of the beneficiaries, Odunga J, as he then was in the case of re Estate of Nzolove Kisuke alias Daudi Nzolove Kisuke (Deceased) [2022] eKLR stated as follows:

    41. ...In my view, unless there is evidence that the deceased intended to cede his control and rights over the distributed properties, the presumption would be that his act of pointing out the portions was just to give a right of user and not to transfer his rights thereon. This position is in tandem with the reasoning in Re Estate of Chesimbili Sindani (Deceased) [2021] eKLR, where the High Court at Kakamega had to say:

        > "...There was no gift inter vivos to any of the children of the deceased, and, therefore, the entire estate of the deceased comprises of free property available for distribution by the court in these confirmation proceedings. I am persuaded that the deceased had only licensed the sons to utilize certain assets, and as a result they had put up structures on those assets, any distribution of the assets ought to take into account those assets, and ensure that the particular sons are allocated shares in the parcels of land where they have put up structures."

    42. That reasoning resonates with the Court's holding in Dan Ouya Kodwar vs. Samuel Otieno Odwar & another [2016] eKLR where the Court stated as follows:

        > "I agree that despite there being the presence of evidence of trees and sisal plants demarcating the land into three portions, that was done for the convenient use of the land which is a common practice in polygamous families but the land remained in the sole control of the deceased.

        Whereas such demarcations are usually very useful in the distribution of land where the beneficiaries readily agree, that may not be the position when the beneficiaries are not in agreement. I therefore find that the land forms the estate of the deceased and that the same was not sub-divided by the deceased in his lifetime and that no portion was owned exclusively by any of the three wives of the deceased. In the circumstances the land shall be distributed in accordance with the Act."

43. To that extent, I agree with the opinion of the Court in Re Estate of Biruri Kihoria (Deceased) [2019] eKLR, where the Court while determining the rights of a purchaser who allegedly obtained title from the property gifted to the Respondent by the Deceased during his lifetime but without the passing of the title held that:

> "(12) There is no gainsaying that the Suit Property belonged to the Deceased and that he was legally competent freely to dispose of it during his lifetime. The question to pose, however, is whether the Deceased's interest in the Suit Property was terminated by his death. A look at the Title Deed for the subject property, annexed to the Supporting Affidavit as Annexure "PRM 3a" shows that the property is still in the name of the Deceased; and that, since 23 September 1996 when the Title Deed was issued to the Deceased, no transaction has ever taken place in respect of the proprietorship of the property. What that means, to my mind, is that the Deceased's interest in the Suit Property was not terminated by his death; and that the property naturally became part of the Estate for administration purposes in line with the relevant provisions of the *Law of Succession Act*.
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> .....
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> (13) There may have been a clear intention on the part of the Deceased to give the Suit Property as a gift inter vivos to Teresiah Wambui Njiri, and he may have, for all practical purposes, done so, noting that he handed over the Title Deed for the property to Teresiah Wambui Njiri. However, that gifting process was not completed during the Deceased's lifetime; the effect thereof being that, as at the date of his death, the property remained part of the Deceased's Estate.

21. The deceased is recorded as having died on 7.07.2019 at the ripe old age of 85. The beneficiaries are also not so young. The Appellant was born in 1948.

22. In a subsequent mode of distribution proposed by the Appellant, she distributed the entire estate among her children to the exclusion of the first house. The 1st Respondent is not included at all in the proceedings.

23. The court shall then deal with the issues seriatim.

a. Whether the court erred in directing land parcels xxxx, xxxx, and xxxx be left to the Appellant and her six (6) children when she had only five (5) children.

24. The issue of the number of children the deceased had was not in doubt. The deceased has seven children, five from the second wife and two from the former wife. It is, therefore, correct that the Appellant had five and not six children. What, then, does the evidence show? The Appellant filed the petition herein on 20.1.2021, stating that the deceased left the following beneficiaries:

a. Syprian Onieki Nyambeki – Son

b. Annah Bochere Nyambeki – Wife

c. Josephine Moraa Nyambeki – Daughter

d. Joash Ondieki Nyambeki – Son

e. Metta Cyrus Ondieki – Son

f. Benson Keboga Ondieki – Son

g. Isabellah Kwamboka Ondieki – Daughter

25. She also stated that the deceased left the following properties, whose value she gave was 1,800,000/=.

a. Wanjare/Bokeire/xxxx

b. Wanjare/Bokeire/xxxx

c. Wanjare/Bokeire/xxxx

d. Wanjare/Bogitaa/xxx

e. Wanjare/Bogitaa/xxxx

26. No liability or other interest was declared while filing the petition for letters of administration intestate. The Chief's letter indicated that the first wife had only one son and the second wife had five children. He did not indicate the number of daughters in the first wife's house. Official searches indicated the above properties were measured as follows:

a. Wanjare/Bokeire/xxxx – 0.36 hectares registered on 25.8.1992

b. Wanjare/Bokeire/xxxx – 0.24 hectares registered on 22.08.1985

c. Wanjare/Bokeire/xxxx – 0.13 hectares registered on 22.08.1985

d. Wanjare/Bogitaa/xxx – 1.7 hectares registered on 04.08.1976

e. Wanjare/Bogitaa/xxxx – 1.86 hectares registered on 04.02.2015

27. The evidence showed that Annah Bochere Nyambeki had the following children

a. Josephine Moraa Nyambeki – Daughter

b. Joash Ondieki Nyambeki – Son

c. Metta Cyrus Ondieki – Son

d. Benson Keboga Ondieki – Son

e. Isabellah Kwamboka Ondieki – Daughter

28. There is no doubt that the Respondents are not interested in land parcels Wanjare/Bokeire xxxx, xxxx, and xxxx. Therefore, the three parcels shall be distributed equally to the five children of the Appellant. The Appellant shall have a life interest therein and, thereafter, be devolved to the children of the Appellant. I therefore set aside the order for 6 to share and replace it with 5 to share. Therefore, each of the five children shall get 0.0146 acres out of the three parcels.

29. To address issues 2 and 3, I shall tackle issue 4. This will give us an indication of what constitutes the deceased's net estate. There was postulation that the deceased sold 2 acres to educate the children of the 2nd Respondent. Even if this were true, it would not constitute a gift inter vivos. The sale disposal and dealing with property is irrelevant for succession. We do not know what else he sold to educate others.

30. What the deceased did with his money while he was alive was his business and his only. The court is interested in the net estate. The 2 acres allegedly sold do not form part of the deceased's estate; they are not available for distribution. They were not given to the 2nd Respondent.

31. The right to use, and waste land goes to the proprietary rights. It is thus irrelevant whether part of the land was sold either to treat or educate anyone. Succession is not an entitlement flowing from the right

to property. It arises by virtue of being a dependent. Indeed, the sale could be strong evidence that the children so educated were directly dependent on the deceased to over and above the 2nd Respondent's entitlement. It cannot be used against the 2nd Respondent. It should be used in favour of the 2nd Respondent's children. I shall thus dismiss this ground of appeal as untenable. Section 44 of the *Law of Succession Act* provides as follows:

> 42. Previous benefits to be brought into account 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, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

32. In this case, the property was not awarded or settled in favour of a child or grandchild. It was sold by the deceased. In the circumstances, it does not constitute a previous benefit. The court shall shortly review the implication of this finding.

c. Whether the 1st house constituted a house within the meaning of the succession act to inherit Land Parcel Number Wanjare/Bogitaa xxx equally as directed by the court

33. This issue has two sub-issues. The first is whether the first house constituted a house for the purpose of succession. The second is whether the court erred when it equally divided Land Parcel Number Wanjare/Bogitaa xxx between the two houses. Section 40 of the Law of Succession answers the first issue. Section 40 of the *Law of Succession Act* provides as hereunder:

> "Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the next 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."

34. The deceased was polygamous until 1993 when the Appellant differed with the first wife. The first wife was either separated or divorced. It is at this stage not clear what process occurred. No evidence was led to whether this was a divorce or separation. Whichever way it is, the first house remains. The question is, who constitutes the same? That is whether the first wife is a member or not. Even if there was divorce, the same does not take away the existence of the first wife's family.

35. Section 38 of Succession Act provides as follows:

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

36. Ipso facto, the law does not explain where the spouse could be. She could have been divorced or predeceased the deceased. She could also be at large or unknown. Whichever the case, the law provides for subdivision equally among the children. Further, the deceased is said to have divorced in 1993 or separated. The question of matrimonial property was not addressed at all. Though parties attempted to give evidence around it, it is futile at this stage. The first wife was not said to be deceased. She still constituted a former wife for the purpose of a section of the Succession Act.

37. It provides as follows: -

> For the purposes of this Part, "dependant" means-
>
> (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
>
> (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
>
> (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

38. The first wife is a dependant for purposes of succession. Both parties did not address the issue in spite of being alive. The question was live in the proceedings but sidestepped. That is the essence of the evidence of whether properties were bought prior to or after death. The second house thus consists of 6 units, that is, the widow and her five children, while the first house consists of 3 units. That is the respondents and their mother, a former wife. There was no evidence of actual divorce proceedings. What came out was separation. Separation has no impact on succession proceedings.

39. The court found that the 2nd Respondent resided in land parcel number Wanjare/Bogitaa/xxx. The parties were willing to have the same subdivided. The most ideal could have been the first house to retain where they were residing and the second house to keep where they were. The court, however, exercised discretion. That discretion was judicious. The court cannot interfere with the same. The first house is thus entitled to half of the land parcel number Wanjare/Bogitaa/xxx. However, while subdividing, the current residence of the Respondents and any permanent establishment should be had regard to. An appeal in respect thereof is thus untenable and is dismissed.

c. Whether distribution was per Section 35 of the *Law of Succession Act*

40. The last question was whether the court erred in distribution. The court directed sharing among houses and beneficiaries. The impugned Section 35 of the *Law of Succession Act* covers where the intestate has left one surviving spouse and child or children. The said section is irrelevant in this matter as there are 2 houses herein.

41. The next question to test is the subdivision of Wanjare/Bogitaa/xxxx. The said parcel measures 1.86 hectares and was registered. The total acreage for the estate is 4.29 hectares. So far, the first house has shared 0.85 hectares out of Wanjare/Bogitaa/xxx. The second house has 1.58 hectares out of land parcels xxxx, xxxx, and xxxx and Wanjare/Bogitaa/xxx. Only 0.58 hectares are not provided for in the first house and 1.28 for the second house. This totals 1.86 acres constituted in Wanjare/Bogitaa/xxxx. Therefore, for the equality of arms, land parcel number Wanjare/Bogitaa/xxxx shall be divided into 2 as follows; -

    a. First House - 0.58 hectares to be registered in the names of the Respondents.

    b. Second house- 1.28 Hectares to be divided equally among the five children of the first house. The Appellant shall have a life interest.

42. The adjustment is made on the acreage in view of the reduction of the beneficiaries of the second house as per issue number 1 and the earlier exclusion of the first widow.

43. Given that the court had already ordered the sharing, the order for the confirmation of the grant to be filed is not tenable. The grant is thus confirmed in terms of the orders herein.

44. Award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. They are discretionally. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– those costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

45. The appeal was largely unsuccessful. However, being a family matter, it is important to foster relationships, even where they do not exist. The order commending itself is that the parties bear their own costs.

46. Before I depart, I note that the matter involves a family of elderly persons. Given that life interest has been created, it is crucial to have other administrators. I appoint the 2nd Respondent as a Co-administrator. The administrators shall administer the estate and conclude by 24.8.2025.

Determination

47. The upshot of the foregoing, is that the appeal is partly allowed in the following terms:

    a. The Appellant Annah Bochere Nyambeki has the following children:

        1. Josephine Moraa Nyambeki – Daughter
        2. Joash Ondieki Nyambeki – Son
        3. Metta Cyrus Ondieki – Son
        4. Benson Keboga Ondieki – Son
        5. Isabellah Kwamboka Ondieki – Daughter

    b. The estate be subdivided as follows:

        i. The Appellant shall have a life interest on land parcel numbers Wanjare/Bokeire/xxxx, Wanjare/Bokeire/xxxx and Wanjare/Bokeire/xxxx. Thereafter the said parcels be subdivided as a unit, equally between the 5 children of the Appellant.

ii. The appeal in regard to land parcel Wanjare/Bogitaa/xxx is dismissed. The said parcel is to be divided equally between the first house and the second house. The first wife/ former wife to have a life interest. Thereafter the same is to be shared equally between the Respondents, Lucy Nyambeki Machuki, and Cyprian Ondieki Nyambeki.

iii. The appeal as to whether the respondents constitute the first house, is dismissed. For the avoidance of doubt, the first house constitutes the first wife/former wife, Lucy Nyambeki Machuki and Cyprian Ondieki Nyambeki.

iv. The appeal in regard to Section 35 of the *Law of Succession Act* is dismissed.

v. There was no prior benefit with respect to the land parcel number Wanjare/Bogitaa/ xxxx. The award in respect of the said parcel of land is set aside. For the equality of arms land parcel number Wanjare/Bogitaa/xxxx shall be divided into 2 as follows; -

    1. First House - 0.58 hectares to be registered in the names of the Respondents. Their mother has a life interest in this portion.

    2. Second house - 1.28 Hectares to be divided equally among the five children of that house. The Appellant shall have a life interest.

vi. Given creation of life interests, I appoint the 2nd Respondent as a co-administrator. The administrators shall administer the estate and conclude by 24.8.2025.

vii. Each party to bear its costs.

viii. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF FEBRUARY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by: -

Mr. Omandi for the Appellant

No appearance for the Respondents

Court Assistant – Michael