



REPUBLIC OF KENYA



**In re Estate of Ndambiri Kanyatta (Deceased) (Civil Appeal E087 of 2023)  
[2025] KEHC 12429 (KLR) (3 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12429 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E087 OF 2023  
EM MURIITHI, J  
SEPTEMBER 3, 2025**

**IN THE MATTER OF THE ESTATE OF NDAMBIRI KANYATTA (DECEASED)**

**BETWEEN**

**EPHANTUS NJOGU NDAMBIRI ..... 1<sup>ST</sup> APPELLANT  
LEAH WANJA NDAMBIRI ..... 2<sup>ND</sup> APPELLANT  
NANCY WAGUAMA NDAMBIRI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REGINA WARUGURU NDEGWA ..... 1<sup>ST</sup> RESPONDENT  
CHARLES MAINA KARANJA ..... 2<sup>ND</sup> RESPONDENT  
DOROTHY WANJIRU KARANJA ..... 3<sup>RD</sup> RESPONDENT  
WILFRED CHOMBA KARANJA ..... 4<sup>TH</sup> RESPONDENT  
MOSES KAMAU KARANJA ..... 5<sup>TH</sup> RESPONDENT**

*(An appeal from the Judgment of Hon. Wanjiru M.N (S.R.M) in  
Gichugu Succession Cause No. 27 of 2020 delivered on 15/9/2023)*

**JUDGMENT**

1. On 7/12/2020, the 1<sup>st</sup> Appellant and Gichobi Octavious Ndambiri petitioned for grant of Letters of Administration intestate, in their capacity as children of the deceased, which was issued on 4/11/2021. On 20/5/2022, they filed summons for confirmation of grant where, at paragraph 4 of the affidavit in support thereof, they proposed how L.R No. Ngariama/Lower-Ngariama/565 measuring approximately 10 Acres, L.R No. Ngariama/Lower-Ngariama/2819 measuring approximately 4 Acres, L.R No. Baragwe/Guama/320 measuring approximately 5 Acres, L.R No. Inoi/Kerugoya/406, L.R No. Gilgil/Gilgil BLK 1 /1673 measuring approximately 5 Acres, L.R No. Laikipia/sosian Sosian



2/2619 (narok Ranch), L.R No. Laikipia/Sosian Sosian 2/1585 (Narok Ranch), Plot No. 7 Rianjeru, Plot No. 6 Karumandi Market, Co-operative Bank Shares and National Bank Shares (henceforth called the estate properties) were to be distributed.

2. The 1<sup>st</sup> Appellant swore a supplementary affidavit on 17/4/2023 in support of his proposed mode of distribution.
3. The 1<sup>st</sup> Appellant swore a further supplementary affidavit on 19/2/2024 contending that the deceased had subdivided L.R No. Baragwe/Guama/320 into 7 portions as shown by the annexed LCB application and letter of consent.
4. On 29/8/2022, the Respondents filed an affidavit of protest in opposition to the 1<sup>st</sup> Appellant's mode of distribution. They accused the 1<sup>st</sup> Appellant of omitting Plot No. 31A- Karumandi from the schedule of distribution and including beneficiaries who were totally exempted from inheriting any estate property. They proposed at paragraph 8 thereof how the estate properties ought to be distributed.
5. The 1<sup>st</sup> Respondent swore an affidavit on 8/5/2023 in reply to the 1<sup>st</sup> Appellant's affidavit in support of the summons for confirmation of grant.
6. Gichobi Octavious Ndambiri, Justus Kariithi Ndambiri, Dominic Mugo Ndambiri, Leah Wanja Ndambiri, James Mwangi Ndambiri and Agnes Wanjira Geofrey filed their affidavit of protest on 29/8/2022 where at paragraph 8 thereof, they made their own proposal of the distribution of the estate properties.
7. Gichobi Octavious Ndambiri swore a further affidavit on 29/5/2023 where he alluded to various gifts inter vivos by the deceased to some of the beneficiaries.
8. On 18/4/2023, Leah Wanja Ndambiri, Nancy Waguama Ndambiri, Agnes Wanjira Geofrey, Muchira Ndambiri Kanyata and Nicacisius Kithaka Octavious swore an affidavit in support of the summons for confirmation of grant.

#### **Statements**

9. The Respondents filed their witness statements dated 12/5/2023 in support of their protest.
10. Upon hearing of the case, the trial court duly considered the gifts inter vivos made by the deceased to various beneficiaries during his lifetime and proceeded to distribute the estate properties.
11. In its impugned judgement, the trial court distributed L.R No. Baragwe/Guama/320 as follows: 0.75 Acres jointly to grandchildren of the deceased namely Dorothy Wanjiru Karanja, Charles Maina Karanja, Wilfred Chomba Karanja and Moses Kamau Karanja, 0.50 Acres jointly to nephews of the deceased namely Muchira Ndambiri Kanyata and Nicasius Kithaka Octavious, Gichobi Octavious Ndambiri – 0.75 Acres, Justus Kariithi Ndambiri – 0.75 Acres, Dominic Mugo Ndambiri – 0.75 Acres, James Mwangi Ndambiri – 0.75 Acres and Regina Waruguru Ndegwa – 0.75 Acres.

#### **The Appeal**

12. On appeal, the Appellants filed their memorandum of appeal on 12/10/2023 raising 4 grounds as follows:
  1. The Learned Trial Magistrate erred in law and fact in failing to uphold the wishes of the deceased on how he had shared out land parcel number L.R Baragwe/Guama/320 amongst his children.



2. The Learned Trial Magistrate erred in law and fact in disinheriting the appellant's rightful share in land parcel number L.R Baragwe/Guama/320.
3. The Learned Trial Magistrate erred in law and fact in failing to find that the appellants had been given land parcel number L.R Baragwe/Guama/320 by the deceased during his lifetime and the appellants have put up their homes on the said land.
4. The Learned Trial Magistrate erred in law and fact in failing to find that none of the parties challenged how land parcel number L.R Baragwe/Guama/320 had been shared out by their deceased father during his lifetime.

### **Duty of the court**

13. This being a first appeal, this court is under a duty to reevaluate the facts presented in the trial court, analyse the same and arrive at its own independent conclusions, giving an allowance that the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).

### **Oral Evidence**

14. Protestor's Witness 1 Regina Waruguru Njagi and the 1<sup>st</sup> Respondent herein adopted her affidavit of protest filed on 8/5/2023 and the statement dated 12/5/2023 as her evidence in chief. She also produced the receipts from the County Government dated 17/8/2022 as exhibits. She testified that, "Ndambiri Kanyata is my father. He had one wife. Ephantus Ndambiri is my blood brother so is Octavious. We are all from one mother and father. I am aware that they have a proposed mode of distribution as administrators. I have disagreed with it. My co-protestor and I's biggest contention is where we were given to inherit. My co-protestors are my late sisters' children. We are four sisters and five brothers. It is only myself and my sisters' children that have been given land in Laikipia where we do not reside. The property should be shared equally to all people."
15. On cross examination by the 1<sup>st</sup> Appellant, she stated that, "I gave Agnes Wanjira a share too. She is our sister. She did not indicate to me she does not want inheritance. My co-protestors belong to our late sister Margaret Wawira. Their father is Simon Karanja. He is our brother in-law. I do not know if Simon has given them inheritance. They live with their father. They have not told me that they have filed a succession cause for their father. You were given land by our father. It has title deed. Others that have titles are Leah Wanja and Nancy Ndambiri. Our father had divided land during lifetime. I know that father gave the plot No 31A Karumande was given to you, Nancy, Leah and Justus."
16. Petitioner's Witness 1 Ephantus Njogu Ndambiri, (the 1<sup>st</sup> Appellant herein) adopted his affidavit sworn on 17/4/2023 as his evidence in chief and produced the list of documents filed therewith as exhibits. He testified that, "Regina is my sister. Ndambiri Kanyata is my father. I am one of the administrators in the estate. I filed an application for confirmation of grant dated 17/5/2023. I gave a proposed mode of distribution to which only two people agreed and signed consent. It was Nancy and Nicasious. I did a further affidavit dated 17/4/2023. It changed what I had proposed initially. That was agreed upon by Leah Wanja, Nancy Waguama, Muchira Ndambiri and Nicasious Kithaka. This is my preferred mode of distribution."
17. On cross examination, he stated that, "Our father took me to the land board consent and gave me the Inoi/Kerugoya land. It was not completed. There are two applications for consent for the board. One is signed by Simon Karanja the other is not. Simon died a long time ago. He was a co-owner of the land



in Inoi/Kerugoya. Simon died before our father. I signed the consent so that title can come out in my name. Simon did not sign.”

18. Petitioner’s Witness 2 Gichobi Octavious Ndambiri adopted his affidavit of protest sworn on 29/8/2022 and the further affidavit sworn on 29/5/2023 as his evidence in chief. He also produced the receipt by the County Government, Minutes of 17/7/2012, Notice of Appeal, letter from Mr. Magee Advocate and Bundle of original photographs as exhibits. He testified that, “I am a farmer deceased is my father. Regina is my sister. Ephantus my brother. I am a co-administrator in this case. I did not agree with the initial confirmation application. Ephantus did a supplementary affidavit giving a different proposed mode of distribution on 17/4/2023. I agreed with it. I filed a protest on 29/8/2022. I was with Justus, Dominic, Leah James and Agnes. I have also filed a further affidavit on 29/5/2023. I attached documents on the affidavit.”
19. The Protestor Regina Waruguru Ndegwa had no questions for DW2.

### **Submissions**

20. The Appellants set up a case of gift inter vivos over the disputed land L.R No. Baragwe/Guama/320 and urged that during the deceased’s lifetime, 6 of the deceased children and nephews were residing on the parcel, and it would be an injustice to remove them. They urged that the deceased had obtained Land Control Board Consent to subdivide the land into 7 portions on 27/7/2011, and the impugned judgment was against the said wishes of the deceased.
21. The appellants’ Submissions dated 12/5/2025 drawn by M/S Grace N. Maina Advocate are set in extenso as follows:

“The respondents herein filed an affidavit of protest against the Summons for Confirmation of Grant sworn on the 24th August 2022. In their protest they were only protesting on the proposal mode of distribution with respect to plot No. 6-Karumandi Market, plot No. 31A – Karumandi market, Co-operative Bank shares and National Bank shares.

They did not object to the mode of distribution with respect to land parcel Baragwf/ Guama/320.

The trial court proceeded to hear the protest by way of viva voce evidence where the petitioner and protestors gave their evidence and the court proceeded to give its judgment on 15th September, 2023-where the Learned

Trial Magistrate held that land parcel Baragwf/Guama/320 to be shared as follows:

- a) Gichobi Octavious Ndambiri - 0.75 Acres
- b) Justus Kariithi Ndambiri -- 0.75 Acres
- c) Domenic Mugo Ndambiri - 0.75 Acres
- d) James Mwangi Ndambiri - - 0.75 Acres
- e) Regina Waruguru Ndegwa - 0.75 Acres
- f) Dorothy Wanjiru Karanja)
- g) Charles Maina Karanja)
- h) Wilfred Chomba Karanja)



- i) Moses Kamau Karani) - 0.75 Acres jointly
- j) Muchira Ndambiri Kanyatta and Nicasius Kithaka Octavious - 0.50 acres jointly

Your Lordship, the appellants herein being aggrieved by the said decision filed the present appeal before this Honorable Court. It is the appellant's submission that the trial Court's decision goes against the wishes of the deceased. This is because the deceased during his lifetime had sub-divided the said parcel of land into seven (7) portions and had shown the appellants their respective portions on the said land where they have been living and have developed extensively during the deceased's lifetime until his demise.

The inclusion of the new beneficiaries by the trial court being Regina Waruguru Ndegwa, Dorothy Wanjiru Karanja, Charles Maina Karanja, Wilfred Chomba Karanja and Moses Kamau Karanja and removal of some beneficiaries being Ephantus Njogu Ndambiri, Nancy Waguama Ndambiri and Leah Wanja Ndambiri would mean that some of the beneficiaries who have been on the parcel of land and have developed it extensively would have to be evicted so as to create room for the new corners. The new corners have alternative parcels of land and have been adequately provided for. Dorothy Wanjiru Karanja, Charles Maina Karanja, Wilfred Chomba Karanja and Moses Kamau Karanja are all children of Margaret Wawira Ndambiri (DCD) who was married to Symon Karanja Miano (DCD) were adequately provided for in their father's Estate vide Certificate of Confirmation of Grant issued on 23/8/2022 vide Gichugu Law Court M.C SUCC NO. 118/2020 which copy was annexed to the appellant's supplementary affidavit sworn on 19/2/2024 in his application for stay of execution. The said children have been living on their father's property throughout the lifetime of their parents to date.

Your Lordship, there was a second affidavit of protest filed on 29/8/2022 by Gichobi Octavious Ndambiri, Justus Kariithi Ndambiri, Dominic Mugo Ndambiri, Leah Wanja Ndambiri, James Mwangi Ndambiri and Agnes Wanjira Geoffrey at paragraph 8 they indicate that they wish for the Court to grant the Certificate of Confirmation of Grant as per the wishes of the deceased where at sub- paragraph (iii) they gave their proposal with respect to land parcel Baragwf/Guama/320 where their proposed mode was similar to that of the 1st appellant herein which goes to show that

All the beneficiaries knew the wishes of the deceased with respect to land parcel Baragwf/Guama/320 since he expressed his wishes by subdividing the land during his lifetime and assigning portions to his children with the full knowledge of All beneficiaries.

Your Lordship, it is the appellants humble submissions that if the decision of the Learned Trial Magistrate is upheld to allow new corners onto the land and removing beneficiaries who have been on the land for over 30 years will result in the beneficiaries being evicted from land given to them by the deceased and also loss of the huge investments made such as planting of cash crops and building of their matrimonial homes.

It is a known principal of law that the duty of the Court in Intestate

proceedings is to as much as possible to ensure the wishes of the deceased are actualized and ALL beneficiaries are well provided for. It is the appellant's humble submission that the Learned Trial Magistrate erred in Law and Fact by introducing new people onto land parcel Baragwf/Guama/320 and removing people who have been on the land for over 30 years without sufficient reasons as none of the protestors had an issue with the mode of



distribution given by the appellants as it is conformed to the wishes of the deceased which he had actuated during his lifetime.

Your Lordship we pray that the appellants appeal be allowed and this Honorable Court be pleased to set aside the Orders of the Trial Court in its judgment delivered on 15th September, 2023 and substitute it with the mode of distribution proposed by the 1st appellant in his Summons for Confirmation of Grant dated 17th May, 2022 with respect to land parcel Baragwf/Guama/320.”

22. The Respondents filed submissions dated 9/6/2025 by M/S Ngigi Gichoya Advocates contending that the appellants had failed to prove their case on a balance of probabilities and urged the dismissal of the appeal, as follows:

“ 11. That the present appeal revolves around title number Baragwe/Guama/320 whose approximate area is 5 acres and from the affidavits filed the 1st appellant/petitioner proposed to distribute the Baragwe/Guama/320 same into 8 shares set out as hereunder:-

Nancy Waguama Ndambiri – 0.5 acres

Leah Wanja Ndambiri – 0.5 acres

Gichobi Octavious Ndambiri – 0.7 acres

Ephantus Njogu Ndambiri - 0.7 acres

Justus Kariithi Ndambiri - 0.7 acres

Dominic Mugo Ndambiri - 0.7 acres

James Mwangi Ndambiri - 0.7 acres

Muchira Ndambiri Kanyata)

Nicasius Kithaka Octavious) - 0.7 acres

12. On the other hand from the affidavits filed the respondents/protestors proposed to distribute title number Baragwe/Guama/320 into 11 shares set out as hereunder:-

Baragwe/Guama/320

Nancy Waguama Ndambiri -0.4acres

Agnes Wanjira Geoffrey -0.4acres

Gichobi Octavious Ndambiri -0.4acres

Ephantus Njogu Ndambiri - 0.4acres

Justus Karlithi Ndambiri -0.4acres

Dominic Mugo Ndambiri -0.4acres

James Mwangi Ndambiri -0.4acres

Regina Waruguru Ndegwa - 0.4acres

Leah Wanja Ndambiri -0.4acres

Dorothy Wanjiru Karanja)



Charles Maina Karanja)  
Wilfred Chomba Karanja)  
Moses Kamau Karanja} 0.50 Acres jointly  
Muchira Ndambiri Kanyata)  
Nicasius Kithaka Octavious} 0.50 acres jointly

13. That it is the appellants' case that their father had intended to sub-divide title number Baragwe/Guama/320 into 7 portions, see the letter of consent dated 216/2011 found in 1st petitioner's list of documents found in pages 125-141 of the record of appeal. That cursory perusal shows that the deceased was granted the letter of consent to sub-divide the suit land into 7 portions of A-0.20Ha, B-F-0.25Ha and G- 0.40Ha and subsequent transfer and/or register the same to himself. That the deceased died on 12/8/2012 which is 1 year and 2 months after the granting of consent, no mutation form was drawn or exhibited, no memorandum and/or agreement was drawn or exhibited setting out the deceased's intentions in regard of transfer of specific share/s to the specific beneficiary/dependant and/or heir.
14. The law on the burden of proof is found in Section 107, 108, 109, 110 and 112 of the *Evidence Act*. The appellants were required in the Lower Court to lead direct or circumstantial evidence tested in cross-examination to enable the court the deceased intended to distribute title number Baragwe/Guama/320 to 7 or 8 beneficiaries/dependants/heirs, unfortunately they miserably failed to discharge the burden as required under the law.
15. In conclusion thereof, it is our humble submissions that title number Baragwe/Guama/320 is a free property as set out under Section 3 of the *Law of Succession Act*.
16. It is in dispute that the deceased died intestate and all the free property are and/or were available for distribution that is; Baragwe/Guama/320, Ngariama/Lower Ngariama/565, Baragwe/Lower Ngariama/2319, Gilgil/Gilgil/Block/1673, Laikipia/Sosian 2/2619, Laikipia/Sosian 2/1585, Plot No. 7 Rianjeru, Plot No. 6 Karumandi, Plot No. 31A Karumandi, Co-operative Bank Shares and National Bank Shares.
17. In the present case, nothing has been brought to the attention of this court to remotely suggest that the trial court was biased, unfair or discriminatory in regard to distribution of title number Baragwe/Guama/320. The 1st and 2nd appellants who occupies approximately 0.5 acres each should vacate the suit land to allow the 11 beneficiaries/dependants/heirs to enjoy the fruits of the judgment as set in the certificate of grant made on 15th September, 2023 - see paragraph 12 of the affidavit sworn on 21st November, 2023 in reply to the Summons dated 9th October 2023, which sets out the current occupation, utilization and/or possession in regard to the suit land.
18. On the 3rd issue, what is the effect of gift inter vivos? We have deliberately failed to mention in our 1st limb of our submissions title number Inoi/Kerugoya/1406, Ngariama/Lower Ngariama/2818, Ngariama/Lower



Ngariama/2820, Ngariama/Lower Ngariama/2817 and Plot No. 31 A-Karumandi as the deceased had in his lifetime advanced the aforesaid properties by way of gifts inter vivos.

19. Section 42 of the [Law of Succession Act](#) provides as follows:-

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.

20. It is a common ground that the deceased had advanced ½ share of title number Inoi/Kerugoya/406 to the 1st appellant/petitioner as a gift in his lifetime. That during the hearing in the Lower Court he produced an application for consent to the land control board (undated), letter of consent dated 31/5/2012 and transfer form dated 16/7/2012, see petitioner's list of documents found in pages 125-141 of the record of appeal.

Your Lordship, in this particular case the deceased's wishes were

clear that he intended to transfer the ½ share in regard to title number Inoi/Kerugoya/406 however, the 1st appellant/petitioner could not complete the transmission process as the co-tenant/ proprietor-Simon Karanja Miano was-deceased.

21. Honourable Wanjiru M.N. Senior Resident Magistrate stated as follows in the Judgment - see page 22 lines 6-13:-

"Three dependants were confirmed to have been given land. Ephantus had been given 5 ½ acres; Leah 3 ½ and Nancy 4 ½ acres of the land during the lifetime of the deceased and they had titles to these parcels. Titles to these parcels were not produced but the dependants themselves acknowledged to have been given the lands inter vivos. Plot No. 31A Karumandi has also been transferred from the deceased's name to some beneficiaries names. Ephantus Njogu, Justus Kariithi, Nancy Waguama and Leah Wanja. Minutes as to when this happened are produced in evidence. It was on 17/07/2012. It was a month before the deceased died."

22. At the interlocutory stage of this appeal, the appellants filed the Summons dated 9th October, 2023 seeking to stay the execution of the Lower Court judgment delivered on 15th September, 2023 pending the hearing and determination of this appeal. The respondents in opposition thereof filed the replying affidavit sworn on 21st November, 2023. The ruling rendered by Justice Richard Mwangi on 13th November, 2024, the Summons dated 9th



October, 2023, the replying affidavit, the annexures thereof forms part of this court's record.

23. Your Lordship, cursory perusal of the paragraph 7 of the replying affidavit sworn on 21st November, 2023 and the annexures thereof, see respondents' annexure "RWN1-4" confirms the deceased had advanced the following gifts during his lifetime:-
- a. Ngariama/Lower Ngariama/2818 - 5.5acres - Ephantus Njogu Ndambiri/1st appellant
  - b) Ngariama/Lower Ngariama/2820 - 3.25acres - Leah Wanja Ndambiri/2nd appellant
  - c) Ngariama/Lower Ngariama/2817 - 4. 5acres - Nancy Waguama Ndambiri 3rd appellant
  - d) Plot No. 31A – Karumandi - Ephantus Njogu Ndambiri, Justus Kariithi Ndambiri, Nancy Waguama Ndambiri and Leah Wanja Ndambiri.
24. That the beneficiaries/dependants/heirs have respected the deceased's wishes as set out above as no one protested, it is our humble submissions that Lower Court in it's judgment properly considered the provisions of Section 42 of the Law of Succession Act and took into account the previous benefits and/or gifts in determining the net intestate estate.
25. On the 3rd issue, how should the deceased's estate be distributed there is no doubt that the deceased died intestate and did not leave a spouse, the applicable law is therefore Section 38 of the *Law of Succession Act* which provides as hereunder:-
38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.
26. It is not in dispute that Margaret Wawira Ndambiri (daughter to the deceased) died leaving 4 children namely:- Dorothy Wanjiru Karanja, Charles Maina Karanja, Wilfred Chomba Karanja and Moses Kamau Karanja. On the other hand the deceased had a sister – Wanjira Kanyata-deceased who left the following children:- Muchira Ndambiri Kanyata and Nicasius Kithaka Octavious, the Lower Court properly considered the aforesaid persons as dependants under Section 29 of the *Law of Succession Act*.
27. Justice Mumbua T Matheka in Re Estate of Florence Mukami Kinyua(deceased) (2018) eKLR - copy attached No.1 in referred to the persuasive decision by Musyoka J in the case of Estate of Veronica Njoki Wakagoto (deceased) 2013 eKLR wherein it was stated:-

"Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument



is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents."

28. That during the hearing the in the Lower Court Agnes Wanjira Geoffrey (daughter to the deceased) relinquished her rights to inherit the deceased's estate.
29. In conclusion, it is our humble submissions that the trial Magistrate properly exercised her discretion as provided under Section 27 of the [Law of Succession Act](#) and took account of all the circumstances required under Section 28 of the [Law of Succession Act](#) during the delivery of the judgment made on 15th September, 2023, see pages 3-28 of the record of appeal.
30. It is our humble submissions that the appellants have miserably failed to prove their claim on balance of probabilities as required under the law and we therefore pray for dismissal of the appeal.
31. On the 4th issue on costs, we place reliance in the case of Jasbir Singh Rai & others VS Tarlochan Rai & others (2014) eKLR and Section 2 of the [Civil Procedure Act](#) which held that "costs should follow events" in absence of "good reasons" for departure. We J: pray that the costs of the Appeal and Lower Court be granted to the respondents."

23. Judgment was reserved.

### **Issue for Determination**

24. From the grounds of appeal, the sole issue for determination is whether the trial court erred in its distribution of L.R No. Baragwe/Guama/320 (hereinafter referred to as the disputed property).

### **Determination**

25. The deceased herein died intestate on 12/8/2012 survived by Nancy Waguama Ndambiri – daughter, Gichobi Octavious Ndambiri – son, Ephantus Njogu Ndambiri – son, Justus Karuthi Ndambiri – son, Dominic Mugo Ndambiri – son, Leah Wanja Ndambiri – daughter, James Mwangi Ndambiri – son, Agnes Wanjira Geofrey – daughter, Regina Waruguru Ndegwa – daughter, Muchira Ndambiri Kanyata – nephew, Nicasius Kithaka Octavious – nephew, Dorothy Wanjiru Karanja – granddaughter, Charles Maina Karanja – grandson, Wilfred Chomba Karanja – grandson and Moses Kamau Karanja – grandson.
26. The Court is mandated by the provisions of Section 42 of the [Law of Succession Act](#) to take into account any bequests made by the deceased to any beneficiary during his lifetime. Section 42 (1) provides that:

“(1) 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.”

27. The Court of Appeal in *Kabata v Mbugua* (Civil Appeal 274 of 2019) [2025] KECA 524 (KLR) (21 March 2025) (Judgment) approved the decision of Nyamweya, J. (as she then was) in *Re Estate of the Late Gedion Manthi Nzioka*(Deceased) [2015] eKLR, as regards the requirement of law on the principle of gift inter vivos that:

“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the [Law of Succession Act](#) provides as follows with respect to gifts made in contemplation of death:... 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 way of a declaration of 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 trust in writing. Gifts inter vivos must be complete for the same to be valid.”

28. This court has on several occasions considered section 42 of the [Law of Succession Act](#) and emphasized the need for the court to take into account during distribution of an intestate’s estate such gifts as made by the deceased in his life time to any of the beneficiaries.

29. The Court also respectfully notes the decision of the Court (F. Gokonyo J.) in *re Estate of Marete Mbui alias M’Marete M’Mbui alias Justus Marete* (Deceased) [2017] eKLR on the usefulness of the provision of section 42 of the [Law of Succession Act](#), as follows:

“At this point I feel obliged to state- and I have stated in other cases- that section 42 of the [Law of Succession Act](#) serves two important purposes; one, it fends off selfish tendencies of human beings in seeking for double portions in the estate of the deceased; and two. It enables the court to attain equity in the sharing out of the estate property among the rightful beneficiaries. Thus, that is the law which I will apply in this case. Another thing; I must state that as a matter of [the Constitution](#) and the law, daughters of the deceased are as entitled to inherit their father’s estate in equality with the sons. I need not overemphasize this constitutional reality.”

30. The 1<sup>st</sup> Appellant has exhibited an application for consent of land control board to subdivide the disputed property into 7 portions duly executed by the deceased on 2/6/2011, subsequent to which the deceased obtained the letter of consent on 27/7/2011.

31. However, despite opportunity to do so as submitted by the respondent during the 1 year 2 month period after the grant of consent, the deceased did not take any step to complete the transfer. The alleged gift with respect to the suit property Baragwe/Guama/320 did not materialise and the Court is not able to find that the deceased had during his lifetime gifted the appellants any portions of the



land as urged by the appellants. Consequently, it fell to be distributed in accordance with the law of intestate distribution.

32. While the Succession Court should strive to give effect to the wishes of a deceased person, so far as they can be ascertained on the evidence in the particular case, in intestate succession without express provisions of a Will, oral or written, there must be cogent evidence to support a finding on a balance of probabilities the wishes of the deceased to distribute his estate or part thereof in a certain way. In this case, the possible intention to gift his land to his children as alleged did not crystallize, and it is possible that the deceased redoubled his after grant of the consent to subdivide the land and register the same into his name. Of his own volition the deceased, despite opportunity to do so, did not complete his alleged gifts.

33. In trying to establish the deceased wishes, the trial court rightly observed as follows:

“Are the deceased's wishes determinable?”

The petitioner states that the father had intended to subdivide his land and he had done so on parcel number Baragwe/Guama/320. A letter of consent dated 02/06/2011 is produced as a document. It does show that the land was to be divided into 7 portions. The consent is duly signed.

The portions were to be registered in the deceased's own name as per part 2(d)(ii). He died on 12/08/2012, over one year- and two months from the date of the consent. By then, the mutation had not happened. No reason was given as to what stopped this by the petitioner. The protester indicated it was because the deceased had changed his mind in order that he can give inheritance to her and the sister. This is a possibility in the circumstances. The petitioners in their proposal for distribution of this parcel, distributed it into eight portions. Not in compliance with what they say was the deceased's wishes. Given that these transfers have not been shown to have been to specific beneficiaries by the deceased and the fact that he did not complete the transfer over a year after showing intention to subdivide, the court is not able to determine that there was a specific way he intended to distribute this land other than its division in 7 portions.

The 1st petitioner also says that the deceased intended to bequeath him 1/2 portion of the land INOI/KERUGOYA/406 that is registered in two names. A transfer document has been produced in evidence one dated 16/07/2012. It is allegedly signed by the deceased and the co-owner Simon Karanja Miano. There is also produced an application for consent to the land board (undated), a letter of consent dated 31/05/2012 and application for registration of the same land dated 19/07/2012. The petitioner confirmed that he is the one that signed on the part for the co-owner as he was already long dead. It is only recently in 2020 in succession file no 118 of 2020 when the family of the co-owner filed a succession cause over the co-owner's estate. In that case, it is clear that the transfer cannot be said to have been the deceased's wishes.”

34. There were other assets which the Deceased had completed transfers to the beneficiaries, and these in accordance with the section 42 principle of gift inter vivos must be taken into account in determining the shares going to the beneficiaries.

35. The trial court's Judgment commendably observed in its conclusion that “the proposal in the protest and the petitioner are not reflective of equity as none has taken into consideration the gifts inter vivos” and proceeded to make distribution in accordance with section 42 of the *Law of Succession Act*. The Court cannot be faulted on this account for discharging its statutory obligation notwithstanding that



the protesters had as pointed out by the Appellant not challenged the manner of distribution of the particular asset as proposed by the Petitioner/Appellant.

36. On the issue of the heirs, its accepted that grandchildren whose parents pre-deceased the deceased are entitled to share their grandfather's estate and those the grand children whose parents die after the deceased will take their parents share in the deceased's property. See section 41 of the [Law of Succession Act](#) as follows:

“ 41. Property devolving upon child to be held in trust

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

37. I respectfully agree with Musyoka J's exposition as to the right of grandchildren to step into the shoes of their parents in re Estate of Imoli Luhitse Paul (Deceased) [2021] KEHC 1389 (KLR) where the Court observes as follows:

“ 3. In the instant case, the applicant, in the summons for revocation of grant, is a child of a dead son of the deceased herein. The applicant is claiming directly by dint of In re Estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR (Musyoka J) and In re Estate of Florence Mukami Kinyua (Deceased) [2018] eKLR (T. Matheka J), and does not require to take out letters of administration to intervene in the estate of her late grandfather, where her own parents are dead. Secondly, apart from case law, the provisions of the [Law of Succession Act](#) cover these situations. Section 39 of the [Law of Succession Act](#) makes grandchildren heirs in intestacy, where their own parents, who are biological children of the deceased, are dead. Section 41 of the [Law of Succession Act](#) is the provision that enables grandchildren to step into the shoes, of their own parents, and to step into those shoes they need not take out letters of administration.”

Only qualification to the statement, in my view, might be that the Court may need to know (by Letters of Administration in the estate of the parent) who of the children, where there are several children, of the deceased parent is to move the Court for the claim of his/her parent's house, especially where the claim is brought by the children together with their living parent, spouse of their deceased heir parent and in-law of the Deceased, who as Musyoka J. *ibid*, correctly observes is not a direct heir of the deceased. But nothing turns on this aspect in this case.

38. It matters not that the grandchildren may, or will, be provided for under their father's side; they are entitled to take the share of their deceased mother from her deceased father subject of the Succession. The appellants' case against introduction to the Estate of 'new comers', if the term refers to the grandchildren and children of the deceased's sister Wanjira Kanyata was is not well founded. The [Law of Succession Act](#) allows provision to be made for dependants in terms of section 26, 27, 28 and 29 of the Act and this Court does not find any error on principle or fact in the trial court's consideration of the matter.



39. However, as regards the disputed parcel, the Respondents acknowledged at paragraph 12 of the Replying Affidavit sworn by the 1<sup>st</sup> Respondent on 21/11/2023 that:

“Currently, the occupation and/or cultivation in regard to title number Baragwe/ Guama/320 is as set up herein below:-

- i. Ephantus Njogu Ndambiri – house – cultivates coffee – approximately 0.5 acres.
  - ii. Leah Wanja Ndambiri and Nancy Waguama Ndambiri – occupies parents’ house – cultivates coffee - approximately 0.5 acres each.
  - iii. Dominic Mugo Ndambiri – house – cultivates coffee – approximately 0.7 acres.
  - iv. Gichobi Octavious Ndambiri – cultivates coffee – approximately 0.7 acres.
  - v. Justus Kariithi Ndambiri – cultivates coffee – approximately 0.7 acres.
  - vi. James Mwangi Ndambiri – cultivates coffee – approximately 0.7 acres.”
40. The Court finds that the Respondents’ admission that the 1<sup>st</sup> Appellant is in occupation and use of a portion of the disputed property may support a request for adequate time for the implementation of the distribution to allow the persons in possession of affected portions to vacate the same for occupation by the relevant heirs. But that is a matter for execution of the judgment of the Court.
41. On the test of *Peters v Sunday Post Limited* (Civil Appeal No. 11 of 1957) [1958] EACA 142 (8 August 1958) , the Court does not find any reason to interfere with the decision of the trial court, and the appeal will be rejected.

### **Orders**

42. Accordingly, for the reasons set out above, the Court finds the appellants’ appeal has no merit and it is dismissed.
43. There is reason to depart from the general rule on costs as guided by the Supreme Court in the *Rai* case, this being a family succession matter, and, consequently, the Court does not make any orders as to costs.

Order accordingly.

**DATED AND DELIVERED THIS 3<sup>RD</sup> DAY OF SEPTEMBER 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Ms. Ndiang’ui for the Appellants.

Mr. Ngigi for the Respondents.

