



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO. 582 OF 2008**

**IN THE MATTER OF ESTATE OF STEPHEN NZAU KOKA (DECEASED)**

**TAVITHA WANZA NZAU.....1<sup>ST</sup> PETITIONER**

**JOSIAH KIILU NZAU.....2<sup>ND</sup> PETITIONER/APPLICANT**

**-VERSUS-**

**JOHN NZIOKI NZAU.....1<sup>ST</sup> OBJECTOR/PROTESTER**

**MUKULU NZAU KOKA.....2<sup>ND</sup> OBJECTOR**

**RULING**

1. The deceased herein, **Stephen Nzau Koka**, died on 10<sup>th</sup> October, 1992. At the time of his death the deceased was survived by two widows, **Tavitha Wanza** (1<sup>st</sup> wife) and **Mukulu Nzau Koka** (2<sup>nd</sup> wife) both of whom are also now deceased. From the 1<sup>st</sup> house, the deceased had two (2) children, **Josiah Kiilu Nzau** (son), the petitioner herein and **Patrick Mutua Nzau**, (son) also deceased but survived by his wife and children. The 2<sup>nd</sup> house on the other hand had 5 children **Mbithe Mutunga (daughter)**, **Grace Musyoka (daughter)**, **Ndinda Maina (daughter)**, **Katuku Nzau (daughter – deceased)** and **John Nzioki Nzau** (son-the protestor/co-administrator).

2. The petition was filed by the deceased's 1<sup>st</sup> wife/widow (**Tavitha Wanza Nzau**) and her son (**Josiah Kiilu Nzau** – the 2<sup>nd</sup> petitioner/applicant herein) and on 7<sup>th</sup> May 2009, a grant of letters of administration of the deceased's estate was made to the said two petitioners jointly. Following the death of the 1<sup>st</sup> petitioner (**Tavitha Wanza Nzau**) on 15<sup>th</sup> April, 2013, the court on 6<sup>th</sup> May, 2014 issued a fresh joint grant of letters of administration to **Josiah Kiilu Nzau** (the 2<sup>nd</sup> petitioner) and **John Nzau Koka** (the protestor herein) after which the petitioner filed Summons of Confirmation of Grant dated 11<sup>th</sup> September, 2015. To that summons, the Protester filed an affidavit of protest to distribution sworn on 22<sup>nd</sup> January, 2016.

3. According to the petitioner, the deceased's estate is comprised of the following assets:-

- a) **Mumbuni/Kasinga/1150.**
- b) **Mumbuni/Kasinga/205.**
- c) **Mitaboni/Mutituni/2023.**
- d) **Mitaboni/Mutituni/1867.**
- e) **Mitaboni/Mutituni/1875**
- f) **Mumbuni/Kasinga/161.**
- g) **Mumbuni/Kasinga/1183.**
- h) **Mumbuni/Kasinga/1331.**

- i) Mumbuni/kasinga/1152
- j) Mumbuni/Kasinga/452
- k) Shares with Kenya Commercial Bank.
- l) Shares with Kenya Breweries Limited.

4. It was the petitioner's proposal that the said properties be distributed as follows:

- a) Mumbuni/Kasinga/1150 (0.02Ha) be registered in the name of Josiah Kiilu Nzau.
- b) Mumbuni/Kasinga/205 (0.69Ha) be registered in the name of Josiah Kiilu Nzau.
- c) Mitaboni/Mutituni/2023 (0.03Ha) be registered in the name of Josiah Kiilu Nzau.
- d) Mitaboni/Mutituni/1867 (0.8Ha) be subdivided equally among the two houses.
- e) Mitaboni/Mutituni/1875 (1.8Ha) be subdivided equally among the two houses as per developments by each house on the ground.
- f) Mumbuni/Kasinga/161 (0.15Ha) be subdivided equally among the two houses as per developments by each house on the ground.
- g) Mumbuni/Kasinga/1183 (0.48Ha) be subdivided equally among the two houses as per developments by each house on the ground.
- h) Mumbuni/Kasinga/1331 (0.48Ha) be subdivided equally among the two houses as per developments by each house on the ground.
- i) Mumbuni/Kasinga/1152 be registered in the name of Josiah Kiilu Nzau.
- j) Mumbuni/Kasinga/452 be subdivided equally among the two houses.
- k) Shares with Kenya Commercial Bank be subdivided equally among the two houses.
- l) Shares with Kenya Breweries Limited be subdivided equally among the two houses.

5. It was directed that both the summons and the protest be disposed of by way of *viva voce* evidence based on affidavits on record and the statements.

6. In summary, the protestor's case, as gathered from the affidavits and his oral testimony, was that his sisters were left out from the distribution of the estate by the Petitioner despite them being the children of the deceased. It was therefore his wish that the property of the estate be divided amongst all the children equally. Pursuant to section 40 of the **Law of Succession Act** it is his evidence that all the properties of the estate belong to the deceased and should be distributed equally. He refuted the allegation that the 1<sup>st</sup> wife of the deceased is not the owner of some of the properties as suggested by the petitioner and averred that the 1<sup>st</sup> wife who is the petitioner's mother did not purchase any parcel of the land and in particular parcels Mumbuni/Kasinga/1150, 1152, 205 and Mitaboni/Mutituni/2023 since the said properties were registered in the name of the deceased herein. According to him, there was no evidence that the Petitioner's late mother is the one who purchased the said properties.

7. In his evidence, the properties in question were registered into the name of his father during adjudication because he is the owner and no party including the petitioner and his late mother filed any objection of the adjudication process. According to the protestor, some of the title deeds for the aforesaid properties were issued and even the registration was done after the death of the deceased pursuant to the adjudication records and no objection was raised. He noted that Mumbuni/Kasinga/1150 was registered in the name of the deceased on 9<sup>th</sup> September, 1997 after the death of the deceased who died on 10<sup>th</sup> October 1992. By the time of its registration, in the name of the deceased the mother to the petitioner was alive and no objection was raised to the adjudication office or at all.

8. Property number Mumbuni/Kasinga/205, he averred, was registered in the name of the deceased and title deed issued on 9<sup>th</sup> September, 1997 because according to the adjudication records it belonged to the deceased and as the mother of the petitioner who was alive did not raise any objection, it forms part of the estate. With respect to Mitaboni/Mutituni/2023, he stated that the same was registered in the name of the deceased on 21<sup>st</sup> July, 1989 when the deceased was alive and since no person including the mother to the petitioner raised any objection to its registration or at all, it forms part of the estate. It was the protestor's case that Mumbuni/Kasinga/1152 belongs to the estate of the deceased as he did not see any evidence that it was purchased by the mother to the petitioner and it forms part of the estate.

9. According to the protestor, the aforesaid properties are used by all the family members jointly and it is not true that the petitioner is the one in possession as alleged or at all. The Protestor denied that the deceased prior to his death subdivided his properties particularly, Land parcel Nos Mumbuni/Kasinga/161, Mitaboni/Mutituni/1867, Mumbuni/ Kasinga/1183 and Mumbuni/Kasinga/1331 as alleged by the

Petitioner and averred that **Michael Ndonge Koka** who is their uncle is not the owner of parcel number Mumbuni/Kasinga/1331 as alleged by the Petitioner. The same position applied to Mumbuni/Kasinga/452, Mitaboni/Mutituni/1875 and the shares of Kenya Commercial Bank and Kenya Breweries Limited. It was the protestor's case that the petitioner discriminated his sisters who are all beneficiaries as well as his late brother **Patrick Mutua Nzau**.

10. Consequently, the mode of distribution proposed by the Petitioner is not acceptable by the beneficiaries because he has given all the properties to himself and to third party, **Michael Ndonge Koka**, who has no interest in the estate. It was his evidence that the mother to the petitioner was not involved in any form of businesses when she was alive and added that the petitioner intends to disinherit the protestor and the other beneficiaries.

11. The protestor therefore urged the court to subdivide all the properties of the estate in accordance with the section 35 of the **Law of Succession Act**. He however denied that DW2, **Patrick Wambua Katuku** was his uncle or cousin and he denied knowing him.

12. In cross examination he stated that he did not know when the two wives of the deceased were married and he was unaware how the deceased acquired his properties though to his knowledge they were sold to his father by one **Peter** in the 1980s. According to him, he was not aware that the properties were acquired before her mother was married to the deceased though he insisted that the 1<sup>st</sup> wife did not buy the said properties. According to him by the time of his father's death in 1992, he was a conductor with Akamba Bus and the properties had not been shared.

13. Asked about Mumbuni/Kasinga/1150, Mumbuni/Kasinga/1152, Mitaboni/Mutituni/2013, Mumbuni/Kasinga/205, he admitted that the same used to be cultivated by the 1<sup>st</sup> wife and being cultivated by the petitioner after her death though he insisted they were not acquired by the 1<sup>st</sup> wife. He however was not aware how long they had cultivated the same though they had done so for a very long time. Regarding Mumbuni/Kasinga/161, he stated that it was being used by both families and was equally divided on the ground. However, Mitaboni/Mutituni/1867 was not being cultivated both house but had coffee planted by the deceased though the protestor claimed that the coffee belonged to them. He further denied that they had sold half of the land. He similarly denied that they had sold their portion in parcel no. Kasinga/161. According to him they were the ones using that land. According to him land no. Mumbuni/Kasinga/1183 was not divided into two by the deceased and parcel no. Mumbuni/Kasinga/1331 was registered in the name of the deceased though it belonged to **Michael Ndonge Koka**. According to him, Mumbuni/Kasinga/452 was not divided on the ground and the two houses were using it in equal portions. In his evidence both families were settled on Mitaboni/Mutituni/1875 where they farm and keep livestock and have their houses thereon.

14. In the protestor's opinion, it would not be fair to divide the properties between the two homes equally. He proposed that each child should get equal share. He stated that the 2<sup>nd</sup> wife had 4 daughters out of whom three were married while one, was unmarried but had two children. He also disclosed that the deceased had shops which they divided into half.

15. However, in re-examination, the protestor stated that **Patrick Mutua Nzau** was his stepfather. His reasons for not using plots nos. 1150, 2023, 205 because the petitioner used to chase them when they were young.

16. PW2, **Fridah Kamanthe**, a granddaughter to the deceased being a daughter to **Katiku Nzau**, the deceased's daughter, testified that her deceased mother who died single, was entitled to a share in the said estate. She therefore claimed her mother's share of the estate and challenged the mode of distribution proposed by the petitioner. PW3, **Mbithe Mutunga**, a daughter to the deceased, similarly disagreed with the proposed mode of distribution. According to her, as a daughter of the deceased, she is entitled to her share in the estate. According to her, all the properties are in the name of her deceased father and form part of the estate as the deceased did not subdivide any of them. PW4, **Grace Musyoka** and PW5, **Ndinda Maina**, the deceased's daughters supported the protest on similar grounds. In cross-examination, they however stated that they are married, and as such they would not know whether and when their father distributed/shared out his property during his lifetime.

17. After the protestor closed his case the petitioner relied on his affidavit and stated that although registered in the deceased's name, land parcel Nos. Mumbuni/Kasinga/1150, Mumbuni/Kasinga/1152, Mitaboni/Mutituni/2023 and Mumbuni/Kasinga/205 were bought/purchased by his mother/the deceased's first wife (**Tavitha Wanza Nzau**), who did various businesses during her life time. In recognition of the foregoing fact, the deceased, during his lifetime and that of both his 1<sup>st</sup> wife (**Tavitha Wanza Nzau**) and the Petitioner herein, gave/gifted the aforesaid four (4) parcels of land to his (the deceased's) 1<sup>st</sup> house and that that the 1<sup>st</sup> house has over many decades exclusively occupied, developed and used the said four (4) parcels of land, which they do up to date, a fact that was supported by the evidence of **Patrick Wambua Katilu**, a senior member of the deceased's family.

18. According to the petitioner, the deceased had, during his lifetime, distributed/shared out some of his parcels of land between his two (2) houses, and that members of each house have fully developed their respective portions by planting hundreds of coffee plants/bushes, which are now mature. According to him, there are clear and established boundaries on the ground, which both houses have respected and observed for ages, a position which in his view was not rebutted by the protestor and was in cross-examination admitted by the protestor. The said parcels were identified as:-

a) Mumbuni/Kasinga/161 (divided by the deceased between the two houses equally, with the 2<sup>nd</sup> house "selling" its share to a third party).

b) Mitaboni/Mutituni/1867 (divided into two equal portions by the deceased with the 2<sup>nd</sup> house "selling" their share to a third party).

c) Mumbuni/Kasinga/1183 (divided equally by the deceased between his two houses).

19. It was the petitioner's evidence that the only properties that the deceased did not distribute and/or gift out during his lifetime were

therefore Land Parcel Nos. Mumbuni/Kasinga/452 and Mitaboni/Mutituni/1875 and the shares he had with Kenya Commercial Bank and Kenya Breweries Limited. These parcels, he prayed be shared out equally between the deceased's two (2) houses as per the developments by each house on the ground; while the aforesaid shares should be shared equally between the two (2) houses.

20. In cross examination, the petitioner told the court that he did not have any evidence that the above listed properties belongs to his late mother. Though he said those who sold them to his mother were deceased, he had no evidence of such sale and was unable to disclose who they were and was unable to prove that they were deceased. As he had no burial permit or death certificates to prove the allegation. He however admitted that some of the said properties were registered in the name of the deceased even after his death and that no person objected during the adjudication process including his mother and the title deed were issued in the name of the deceased. He similarly had no evidence to support the allegation that his mother was doing business.

21. The petitioner admitted that he did not make provision for his sisters in the estate and had no evidence to prove that the deceased had subdivided his properties as he alleged and that the protestor had sold his part and when asked he confirmed that the **Musembi Kamuya** whom he alleged the parcel was sold to was alive but was not his witness. There was no evidence from him that he has planted any coffee plants and bananas in this particular land and he had no evidence to prove that he used the parcel alone as he alleged.

22. Regarding parcel no. Mitaboni/Mutituni/1867 he told the court that he does not have any evidence to prove that the deceased subdivided the parcel when he was alive and had no evidence that he is the one who gave money to his father to survey the land and had no evidence of such survey. Similarly, he had no evidence that Mumbuni/Kasinga/183 was subdivided equally and that he planted 300 trees on the land. Regarding Mumbuni/Kasinga/1331, he had no evidence that it belongs to **Michael Ndonye Koka** who is deceased but conceded that it is registered in the name of the deceased. He however confirmed that Mumbuni/Kasinga/452 and Mitaboni/Mumbuni /1875 belong to the deceased and he had no claim on them. Similarly, he had no issues with the shares.

23. DW2, **Patrick Wambua Kitilu**, a first cousin to the deceased, and, according to him, the senior most surviving member of the Nzau family, testified that some of the properties registered in the name of the deceased were bought by the 1<sup>st</sup> wife since during the process of demarcation wives were not owning properties and where they acquired properties they were being registered in the names of their husbands. According to him, the properties acquired by the 1<sup>st</sup> wife **Tabitha**, were at a times being utilised by her and that at no time did the 2<sup>nd</sup> wife utilise the same. It was his evidence that Tabitha was selling traditional beer from which she bought the said properties. After her death the petitioner took over and was the one working on them.

24. In cross-examination he corrected his earlier statement and stated that he was a second cousin of the petitioner and the protestor since their fathers were the first cousins. According to him, the evidence that the 1<sup>st</sup> wife was the one who acquired the said properties was due to the fact that the 2<sup>nd</sup> wife never worked on the said parcels of land. He however admitted that he was not a party to the sale transactions and he had no evidence that the petitioner's mother challenged the registration in the name of the deceased as there were no objections. In his view, the reason there were no objections was because the family was living as one.

25. In the submissions filed on behalf of the protestor, it was contended that the Petitioner did not prove his allegations contained in his affidavit in support of the summons for confirmation of grant or in the further affidavit. It was submitted that whereas the Petitioner alleged that parcel nos. Mumbuni/Kasinga/1150, 1152, 205 and Mitaboni/Mutituni/2023 do not belong to the estate of the deceased, the Petitioner did not bring any evidence to prove that these properties were purchased by his deceased mother as he alleged or at all.

26. It was submitted that it was confirmed that all the properties are registered in the name of the deceased and they were registered in the name of the deceased during adjudication process and no body objected to them being registered in the name of the deceased. According to certificate of official searches, Parcel Mumbuni/Kasinga/1150 and 205 were registered after the death of the deceased as per the adjudication Records and at that time the mother to the Petitioner was alive and she never challenged the registration of the title during the adjudication process by way of objections. On the other hand, parcel numbers Mitaboni/Mutituni/2023 and Mitaboni/Mutituni/1152 were registered in the name of the deceased when the deceased was alive and no body challenged that registration during the adjudication process or at all.

27. It was therefore submitted that the afore mentioned four properties were registered in the name of the deceased and since the Petitioner failed to prove that his late mother purchased the same as he alleged they form part of the estate and should be subdivided as per the law. In support of his submissions the protestor relied on section 3 of the **Law of Succession Act** which free property to mean in relation to a deceased person means the property of which his interest has not been terminated by his death and submitted that the petitioner did not avail any evidence to prove that the deceased was not legally competent freely to dispose of the aforesaid properties during his life time. Further the Petitioners did not avail any evidence to prove that the deceased's interest has been terminated by his death.

28. The court was therefore urged to find that parcels number, Mumbuni/Kasinga 1150, 1152 and 205 and Mitaboni/Mutituni/2023 form part of the estate and be distributed according to the law.

29. It was submitted that the Petitioner did not avail any evidence to prove that land parcels Mumbuni/Kasinga/161, Mitaboni/Mutituni/1867 and Parcel number Mumbuni/Kasinga/1183 were divided into two equal portions for each House as he alleged. Further the Petitioner did not avail any evidence to prove that the 2<sup>nd</sup> house sold their share of the land as he alleged. In fact, during his cross examination he admitted he had no prove that the deceased had subdivided his property the protestor gave evidence that they use the properties as a family. It was submitted that it was upon the Petitioner to prove on a balance of probabilities what the deceased wishes were and whether he actualized them. While the Petitioner alleged that he had hired surveyor to show that the deceased had subdivided his property, the purported surveyor if he was taken to the land after the death of the deceased cannot prove or is not a proof that the deceased had subdivided his property. Further no evidence has been availed to prove that allegation.

30. In support of his submissions the protestor relied on section 31 of the **Law of Succession Act** which deals with gift in contemplation of death and states as follows.

*A gift made in contemplation of death shall be valid notwithstanding that there has been no complete transfer of legal title if:-*

- a) The person making the gift is at the time contemplating the possibility of death whether or not expecting death, as a result of a present illness or present or imminent danger and,*
- b) A person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will and,*
- c) There is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title therefore and,*
- d) A person makes a gift in such circumstances as to show that he intended it to revert to him should he survive that illness or danger and,*
- e) The person making that gift dies from any cause without having survived that illness or danger and,*
- f) The intended beneficiary survives the person who made the gift to him provided that*
- i) No gift made in contemplating of death shall be valid if the death is caused by suicide.*
- ii) The person making the gift may at any time before his death lawfully request its return.*

31. It was submitted that the Petitioner did not avail any evidence as to when the purposed subdivision was done or at all and who were present. He also relied on section 31 of the **Law of Succession Act** specifically refers to the words “in contemplating of death” unfortunately the Petitioner did not avail any evidence and no evidence was led by any witness to assist the Honourable court to make the above conclusion. It was further submitted that the Petitioner did not avail any evidence to court over the requirements of section 31(a) to (f) of the succession act to show how the same had been fulfilled.

32. It was submitted that though the protestor alleged that land parcel number Mumbuni/Kasinga/1331 belongs to Michael Ndonge Koka, there is no evidence produced to prove this allegation. To the contrary, the Petitioner attached certificate of official search showing that land parcel number Mumbuni/Kasinga/1331 is registered in the name of the deceased **Nzau Koka** and no relative of the said person was availed as a witness to prove the above allegation. It was therefore submitted that land parcel number Mumbuni/Kasinga/1331 forms part of the estate and it ought to be subdivided according to law.

33. As regards the mode of distribution, it was submitted that the **Law of Succession Act** is applicable in this case as the deceased died on 10<sup>th</sup> October, 1992 and did not leave a will and as such this case is within the definition of section 34 of the **Law of Succession Act** which provides that “a person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.”

34. According to the protestor while the Petitioner would like the estate distributed between the two households in accordance with the Kamba customary law after which each house can distribute the property to the children, customary law though is a law that is recognized in Kenya, such law has to be consistent with the constitution contrary to which it will be void to the extent of its inconsistency and in addition, such law must not be repugnant to justice and morality pursuant to article 2(4) of the constitution. According to the protestor, section 40(1) of the **Law of Succession Act** provide verbatim that where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residence 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. According to the protestor, section 40(1) of the **Law of Succession Act** Cap 160 Laws of Kenya disqualifies the Petitioner plea as it is inconsistent with the written laws as mentioned above in the celebrated case of **Rono vs. Rono & Another (2008) KLR** where the judges of the Court of Appeal reiterated the provisions of section 40(1) of the **Law of Succession Act** and held that while the net intestate estate is to be distributed according to each house being treated as I unit, the number of children in each house must be put into and in the end the learned judge took into consideration the wishes of the parties and of written law. The protestor also relied on the case of **Samuel Mithigi King`ori & Another vs. Peterson Mwangi King`ori (2005) eKLR** and submitted that the full application of customary law in this matter would be detrimental to the beneficiaries in myriad ways and would in fact open a Pandora’s box for example. According to them, it is the position of the Akamba people in their traditions that a girl who is married is not entitled to her late father property and reliance was sought from **Succession Cause No. 303 of 1998 - Andrew Manuzyu Musyoka (deceased) (2005) eKLR, Rono –vs- Rono and Another (2008) eKLR** and Article 60(1)(f) of the Constitution. According to the protestor, Kenya has ratified the **Universal Declaration of Human Rights (1948)** and as such that law particularly Article 2 forms part of the Laws of Kenya pursuant to Article 2(5) of the Constitution. He also relied on **Article 1 and 2(a) of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)** and submitted that with this understanding it is only equitable that all the property of the deceased be equally divided amongst the issues since both windows are deceased. He relied on section 29(a) of the **Law of succession Act** which defines dependants to include children of the deceased and averred that since the word “children” is all inclusive of both boys and girls, if the Kamba customary law is applied then it will be detrimental to the girls.

35. As concerns the distribution of the estate the protestor was of the opinion that the parcels of land herein all of them and the shares be equally divided among the beneficiaries and if the division will result in absurdities then the same should be sold and he proceeds divided equally as was the case in **Re Estate of Susan Wakonyo Kahio (2005) eKLR** and prayed that all the properties registered in the name of the deceased and the shares forming the estate of the deceased be divided in an equitable and reasonably just manner among all the children in line with the Constitution of Kenya as Kamba customary law is not applicable in this suit.

36. On behalf of the petitioner, it was submitted that the **Law of Succession Act** recognizes gifts/properties given out by a deceased person

during his life time. Indeed, section 42 of the *Law of Succession Act* relates to “*gifts inter vivos*” and provides as follows:-

“*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 houses; or**
- b) property has been appointed or awarded to any child or grandchild under the provision of Sections 26 or 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grand child or house”**

37. According to the Petitioner, the foregoing statutory provision is stated in in mandatory terms, and is quite clear on the fact that properties given out/shared out by a deceased person during his life time to his child, grandchild or house cannot be taken away from such child, grandchild or house, but ought to be taken into account in determining the share of the net intestate finally accruing to such child, grandchild or house of the deceased. It was therefore submitted that it is against the law for the protester to ask this Court to “take away” from the deceased’s 1<sup>st</sup> house that which the deceased gave to it while he lived but that the same property can only be taken into account in determining the share of the net estate finally accruing to the 1<sup>st</sup> house.

38. It was submitted that section 40 of the *Law of Succession Act* on distribution of a deceased person’s estate amongst his houses depending on the number of units in each house does not, in any way negate (oust) the provisions of section 42 of the said act on gifts *inter-vivos*. To the Petitioner, the protester’s allegation of “discrimination” are without legal basis as the deceased was within his right and within the law to give /gift out, and to distribute his property as he wished during his lifetime. In his view, none of the houses (beneficiaries) was/has been disinherited; and the applicant has not prayed for exclusion of any beneficiary/house from distribution of the deceased’s estate.

39. It was opined that this Court may find it necessary to call for measurements, of each house’s share (on the ground) of properties that have been shown to be occupied by both houses without the size of each house’s share being shown/provided.

40. The petitioner therefore prayed that the protester’s protest be dismissed with costs, and the deceased’s estate be shared out between the deceased’s two (2) houses as shown, demonstrated and prayed by the 2<sup>nd</sup> petitioner/applicant.

#### **Determination**

41. I have considered the issues raised hereinabove. The issues that fall for determination in these summons are as follows:

- 1) What are the properties of the deceased that fall for distribution?**
- 2) What is the law relating to distribution of an intestate?**
- 3) How should the deceased’s estate be distributed?**

42. It is not in dispute that at the time of his death the following immovable properties were registered in the names of the deceased:

43. According to the petitioner, the deceased’s estate is comprised of the following assets:-

- a) Mumbuni/Kasinga/1150.**
- b) Mumbuni/Kasinga/205.**
- c) Mitaboni/Mutituni/2023.**
- d) Mitaboni/Mutituni/1867.**
- e) Mitaboni/Mutituni/1875**
- f) Mumbuni/Kasinga/161.**
- g) Mumbuni/Kasinga/1183.**
- h) Mumbuni/Kasinga/1331.**
- i) Mumbuni/kasinga/1152**
- j) Mumbuni/Kasinga/452**

44. Apart from the said properties the deceased had shares in **Kenya** Commercial Bank and Kenya Breweries Limited. While the protester’s case was that all the said assets were acquired by the deceased and therefore formed part of his estate the petitioner averred that although

registered in the deceased's name, land parcel Nos. Mumbuni/Kasinga/1150, Mumbuni/Kasinga/1152, Mitaboni/Mutituni/2023 and Mumbuni/Kasinga/205 were bought/purchased by his mother/the deceased's first wife (**Tavitha Wanja Nzau**), and therefore were not available for distribution. On the other hand, Land Parcel No. Mumbuni/Kasinga/1331, belonged to **Michael Ndonye Koka** but is registered in the name of the deceased.

45. It is important to determine which properties belong to the deceased estate. The issue for determination here is the distribution of the estate of the deceased. According to section 3 of the Act "estate" means "the free property of a deceased person" while "free property" "free property", in relation to a deceased person, means "the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death." It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by that time his interests had not been terminated.

46. Therefore, as held in **Mpatinga Ole Kamuye vs. Meliyo Tipango & 2 Others (2017) eKLR**:

**"...before distribution of the estate of the deceased under Section 71 of the Law of Succession Act Cap 160; the Court must satisfy itself that the beneficiaries of the estate are the legitimate beneficiaries of the estate; that there are assets that comprise of the deceased's estate and are available for distribution after settling all liabilities and having the net estate for distribution."**

47. Section 24(a) of the **Land Registration Act** provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 26(1) of the same Act on the other hand provides that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge save for the exceptions provided thereunder. It is therefore upon the person who wishes the court to find otherwise to satisfactorily present evidence to the contrary. In this case apart from mere allegations, the petitioner was not present during the time of the purchase of the properties in question. Whereas some of the properties claimed to belong to his deceased mother were registered in the name of the deceased after the death of the deceased there is no evidence that anyone including his said mother objected to the said registration during the adjudication process which is what one would have expected her to do. In cross examination, the petitioner told the court that he did not have any evidence that the above listed properties belongs to his late mother. Though he said those who sold them to his mother were deceased, he had no evidence of such sale and was unable to disclose who they were and the fact of their being deceased. He similarly had no evidence to support the allegation that his mother was doing business. The only witness called by him, **Patrick Wambua Kitilu**, testified that the evidence that the 1<sup>st</sup> wife was the one who acquired the said properties was due to the fact that the 2<sup>nd</sup> wife never worked on the said parcels of land. With due respect, that is not sufficient to dislodge the legal presumption of ownership. In the premises, there is no concrete evidence on the basis of which the presumption of proprietorship of the said parcels can be dislodged. Accordingly, I find that the properties registered in the name of the deceased were part of his estate" means since they were properties which he was legally competent freely to dispose during his lifetime, and in respect of which his interest had not been terminated by his death

48. The next issue is the law relating to distribution of an intestate.

49. Section 40 of the **Law of Succession Act** provides that:-

**"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."**

50. This provision was extensively dealt with by the Court of Appeal in **Scolastica Ndululu Suva vs. Agnes Nthenya Suva [2019] eKLR** where the Court expressed itself at paras 15-21 as hereunder:

**"In Mary Rono vs Jane Rono & another (supra), Waki JA in the leading judgment, accepted the proposition that the Court had the discretion in ensuring a fair distribution of the deceased's estate but that the discretion must be exercised judicially on sound legal and factual basis. In the same judgment, Omollo JA stated the position more clearly as follows:**

**'My understanding of that section is that while the net intestate estate is to be distributed according to houses each house being treated as a unit, yet the judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that they must be equality between houses they would have been no need to provide in the section that the number of children in each house be taken into account. Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work injustice particularly in the case of a young child who is still to be maintained, educated and generally seen through life. If such a child whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.'**

**In Douglas Njuguna Muigai & vs John Bosco Maina Kariuki & another (supra) this Court noted the absurdity of a blind application of section 40(1) of the Law of Succession Act as follows:**

**'Back to section 40(1) of the Law of Succession Act, that provides that a widow shall be considered as a unit alongside the children of the deceased when it comes to the distribution of the deceased's estate. In this case, Jerioth Wangechi the first**

wife of the deceased who even participated in the dowry negotiations for her co-wives is equated to the last born child of the 3rd wife of the deceased. Her contribution and support to the deceased as a spouse is not recognized and, in our view, that failure to recognize her contribution is tantamount to discrimination.’

It is therefore evident, that, although section 40 of the Law of Succession Act provides a 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. In regard to the question whether the respondent contributed towards the purchase of the two (2) properties, the trial judge had this to say:

‘The protester testified that she was married to the deceased in the year 1983 and found the applicant already married to the deceased. She further stated that she found the two properties in issue herein had already been acquired, though she was not sure of the exact year of the acquisition. It was her testimony that at the time of her marriage to the deceased she found him living together with the applicant on the same land. It is thus safe to hold that the protester never contributed to the purchase of the two properties herein. It also emerged that the applicant herein was gainfully employed as a teacher in the year 1973 and retired in the year 2005. It was admitted by the protester and her witness Johnson Musyimi Suva that the applicant was working as a teacher when the deceased bought the parcels, she signed one of the agreements as the purchaser. I accept her evidence that she contributed financially towards the acquisition of the two parcels; Kathekani/76 and Kathekani/730. In the circumstances, it would be unfair to share the proceeds half - half between the two (2) widows of the deceased, or to find that each beneficiary should get equal proceeds of the share.’

On our own evaluation of the evidence, we are entirely in agreement with the conclusion that the trial judge arrived at that the respondent contributed financially to the acquisition of the two properties. We are alive to the fact that what was before the learned judge was a succession cause and not a matrimonial dispute. However, the succession cause was anchored on the matrimonial circumstances of the deceased. The fact that the deceased acquired the two (2) properties during the subsistence of his marriage to the respondent, before the appellant came into the scene, and the fact that the respondent was employed, clearly, supported her allegation that she contributed to the acquisition of the two (2) properties. It would not therefore be fair nor just to treat the appellant and the respondent equally in the distribution of the estate. The following excerpt of the judgment reflects the distribution adopted by the trial Court as follows:

‘All the 13 beneficiaries (including the applicant and the protester) entered into a consent on 10/2/2015 and shared Kshs11,000,000/= equally. The balance from the proceeds of the parcels at Kshs11,908,595/=(sic). In the circumstances of the case, I ask (sic) that 40% of the Kshs11,908,595/= shall go to the applicant Agnes Nthenya. It works to Kshs.4,763,438/=. The protester Scholastica Ndululu Suva, Mark Maweu Suva, Felix Munyoki Suva, Barnaba Iwia Suva, Clement Moki Suva, Jonathan Kaloki Suva, Methussella Kivila Suva, Isaac Ngolano Suva, Roy Silas Suva, Metes Mwonge Suva, Abednego Andrew Munyoki and Sarah Muyoki Suva shall equally share the balance of Kshs7,145, 157/=. Each will get Kshs.595,429/75. Lastly the proceeds of the treasury Bills Nos A0009717 and A0009718 shall be equally shared among all the 13 Beneficiaries.’

From the above it is apparent that apart from the amount of Kshs11,908,595/= of which the respondent received 40 percent, the rest of the proceeds were shared out equally. An arithmetical calculation reveals that the respondent actually got only about 25 percent of the total sum whilst the rest was shared out equally amongst the remaining 12 beneficiaries. In the circumstances the appellant’s contention that the distribution was unfair has no substance.”

51. It is therefore clear that the court has discretion in distributing the estate of a deceased intestate and in doing so various factors ought to be considered are inter alia the age of the beneficiaries, the contributions of the beneficiaries towards the acquisition of the property and whether an intestate had, during his lifetime or by will, paid, given or settled any property to or for the benefit of a beneficiary.

52. In this case, it is clear that the petitioner’s mother was married before the protestor’s mother. Ordinarily one would presume that before the protestor’s mother came into the scene, the petitioner’s mother may have contributed to the acquisition of the property not necessarily in financial terms but in other non-monetary terms. In my view to treat her in the same position as the protestor’s mother would be unfair to her. In my view therefore though this court is not to go strictly by section 40 of the Act, in the circumstances of this case, the fairest and just mode of distribution would be to distribute the estate equally between the two houses.

53. How then should the distribution be undertaken? It is clear that the two houses have been utilising respective properties or portions thereof and it is important that they continue doing so. Accordingly, in the first instance, the two houses will continue occupying and using the properties which are in their occupation and use. However, a valuation of the same is to be undertaken with a view to determining their true value for the purposes of the distribution as aforesaid. Once that is undertaken, the house that has an upper hand in terms of the valuation shall compensate the other house either through payment of the value to its advantage or by transfer of land commensurate with the said value. The other properties which are not in occupation of either house including the shares shall be distributed equally.

54. Once the distribution is done the beneficiaries of each house shall be entitled to equal shares of what belongs to their house including the daughters.

55. It is so ordered.

56. There will be no order as to costs.

Read, signed and delivered in open Court at Machakos this 10<sup>th</sup> day of December, 2019.

G V ODUNGA

**JUDGE**

**In the absence of the parties.**

**CA Geoffrey**