



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Noah Muturi Kinuthia (Deceased) (Succession Cause  
2363 of 2009) [2025] KEHC 5851 (KLR) (Family) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5851 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 2363 OF 2009  
PM NYAUNDI, J  
MAY 9, 2025  
IN THE MATTER OF THE ESTATE OF NOAH MUTURI KINUTHIA (DECEASED)  
JUDGMENT**

1. Before this Court is for summons for Confirmation of Grant dated 26<sup>th</sup> November 2013 in which the Administrators sought the following orders:
  1. That this Honourable court do order that the Administrators do provide reasonable provision and a sum of Kshs. 30,000 per month to Lydia Wanjiku Muturi, widow of the deceased.
  2. That the grant of probate (or letters of administration intestate (or with will annexed) made to the said Peter Kinuthia Muturi and Bernard Kinuthia Muturi in this matter on 26<sup>th</sup> June 2013, be confirmed before the expiry of six months statutory waiting period.
  3. That the costs of this application be costs in the cause.
2. The summons was supported by the Affidavit of even date sworn by the Administrators.
3. Mary Wanjiru Kinuthia and Margaret Njoki Thairu filed an affidavit of protest dated 18<sup>th</sup> March 2014. They averred that they have been left out in the proposed mode of distribution. Their mother, Lydia Wanjiku Muturi separated with the deceased about 48 years before his death. She was not maintained by the deceased during his life time and therefore, the amount of Kshs. 30,000 per month is unmerited and not in the best interest of the other beneficiaries.
4. They deposed that the mode of distribution does not reflect all the assets comprising the estate. Further, they argued that the deceased gifted LR No. Dagoretti/Kangemi/T.103 and LR No. Dagoretti/Kangemi/T.316 to Bernard Kinuthia Muturi and Peter Kinuthia Muturi. The court should take into consideration these gifts when distributing the other assets. They propose that LR No. Dagoretti/Kangemi/94, LR No. Dagoretti/Kangemi/32, LR No. Kajiado/Kitengela/11354, Plot No. D138 Kangemi and money at Barclays Bank should be shared equally among all the surviving beneficiaries.



5. They averred that Bernard Kinuthia Muturi and Peter Kinuthia Muturi collect rent from the properties of the estate and they should account for the same by filing statement of accounts. In the event that they cannot account for the rent collected over the years, rent should be recovered from their share of the estate.
6. Peter Kinuthia filed a response to the protest dated 6<sup>th</sup> June 2014. He averred that Lydia Wanjiku Muturi separated with the deceased 48 years before his demise. She was not maintained by the deceased during his lifetime and therefore, she is not entitled to any provision from the estate. He stated that she is a woman of means as she owns properties in Murang'a where she has planted tea bushes which give her a good income and is able to sustain herself. He argued that the mode of distribution is fair except that the money in the bank should be shared among all the beneficiaries as stated in the affidavit sworn by Mary Wanjiku Kinuthia and Margaret Njoki Thairu.
7. He averred that the deceased gifted him Parcel No. Dagoretti/Kangemi/32 when it was vacant and undeveloped. He singlehandedly developed the property and has been collecting rent and therefore, rent does not form part of the estate of the deceased. LR NO. Kajiado/Kitengela/11354 was registered in the names of Peter Kinuthia Muturi and Bernard Kinuthia Muturi before the deceased died.
8. He averred that Mary Wanjiku Kinuthia and Margaret Njoki Thairu should furnish to this court the particulars of the assets they allege were left out. He argued that Plot No. D 138 Kangemi which has a stall belongs to him and does not form part of the estate of the deceased. According to him, the only available property for distribution is the money in the bank.

### **Background**

9. The deceased herein, Noah Muturi Kinuthia died intestate on 15<sup>th</sup> March 2008.
10. He was survived by the following;
  - 1<sup>st</sup> House.
    - a. Tabitha Wanjiku Muturi-widow (deceased)
    - b. Bernard Kinuthia Muturi- son.
  - 2<sup>nd</sup> House.
    - a. Lydia Wanjiku Muturi – widow.
    - b. Alice Njoki Thairu- daughter.
    - c. Mary Wanjiru Kinuthia- daughter.
    - d. Peter Kinuthia Muturi- son.
    - e. Esther Nyamwitha – daughter (deceased).
    - f. Ruth Waitherero Mutonga- daughter.
    - g. Philip Kinyanjui Muturi – son.
11. As set out in the joint affidavit sworn on 26<sup>th</sup> November 2013 summons for Confirmation of grant, the Estate of the Deceased, comprises of the following properties;
  - a. Plot No. 32- Dagoretti- Kangemi
  - b. Plot No. 94 –Dagoretti-Kangemi.



- c. Plot No. 103- Dagoretti- Kangemi
  - d. Bank Account No. 08XXXXX23- Barclays Bank Queensway Branch Nairobi.
  - e. ICDC Shares.
12. Following the demise of the Deceased, Bernard Kinuthia Muturi cited Peter Kinuthia Muturi to accept or refuse letters of administration to be issued to him. Peter responded to the citation and a grant was issued to him and Bernard Kinuthia Muturi on 26<sup>th</sup> June 2013. Bernard Kinuthia Muturi died and the court revoked the grant issued in both their names and made Peter Kinuthia Muturi the sole administrator on 17<sup>th</sup> January 2024.
13. The matter proceeded by way of oral evidence. The matter was partly heard before Hon. Justice Achode. By consent of the parties, we proceeded from where the previous court stopped on account of the elevation of the Judge to the Court of Appeal.

### **Summary of the Evidence**

14. PW1, Bernard Kinuthia Muturi. He stated that he was the deceased's eldest son. His evidence was that the deceased had the following properties; LR NO. Dagoretti/Kangemi/32 (1/2 an acre); LR NO. Dagoretti/Kangemi/T103; LR NO. Dagoretti/Kangemi/316; LR NO. Dagoretti/Kangemi/94 and account number 08XXXXX23 at Barclays Bank, Harambee Avenue Branch. LR NO. Kajiado/Kitengela /11354 is registered in the names of Benard Kinuthia and Peter Kinuthia. Plot D138 Kangemi is not known to him. Plot No. Dagoretti/Kangemi 32 is in possession of Peter Kinuthia.
15. The deceased gave him Plot No. LR NO. Dagoretti/Kangemi/T103 when he was still alive. He visited the Land Board with the deceased in 1995. The land was not transferred to his name because the council asked for a lot of money from him to effect the transfer. His brothers and sisters did not claim this parcel of land when the deceased was still alive. LR NO. Dagoretti/Kangemi/316 belonged to him but the deceased gave it to Peter Kinuthia and he does not object the same being given to him.
16. He purchased LR No. Dagoretti/Kangemi/94 jointly with the deceased but it is registered in the deceased's name. Wanjiku, his late mother used to cultivate that land when the deceased was alive. The Deceased had a secret diary where he indicated that the land should be gifted to Tabitha Wanjiku because she took care of that land. He produced an entry dated 2/7/1995 marked as PEx 1. His late mother is buried on that parcel of land.
17. During cross examination, he stated that since his mother is deceased, the land should be given to him. He told the court that the money in the account should be shared between the two houses. He contributed towards the purchase of the property in Kitengela. He contributed towards the purchase of Plot No. Dagoretti/Kangemi 32 therefore, the houses on that parcel should be shared. The deceased built three floors on that apartment. The deceased developed Plot No. 94 in 1968 and used the proceeds to build the apartments in Plot No. 32. The fourth floor was built after the deceased died.
18. The deceased told them that the apartment belonged to him and Peter because the girls were married. He is claiming a share from Plot No. Dagoretti/ Kangemi 32 because he developed Plot No. 94 whose proceeds were used to develop it. The deceased and his late mother purchased L.R No. Dagoretti/Kangemi/ 94 from his maternal uncles. The deceased put up rooms made of iron sheets. Currently, there are ten such rooms. The deceased allowed him to put up two rooms while he was still alive. He also claims half of Kshs. 1,700,000 which is in the bank account. According to him, the deceased's daughters are not entitled to inherit anything from the deceased's estate because they are married and settled.



19. His late mother died before the deceased. The deceased put it in writing that plot No. 94 was to be held jointly by him and the deceased and that plot no. 32 was to be held jointly by him and Peter. Peter had this typed and they all signed it. That is when the deceased changed his mind and told them that these properties belong to Tabitha, his wife. The deceased summoned Peter to inform him about the changes but Peter declined to meet the deceased over this issue. He asked the court to share the deceased's estate equally between the two houses.
20. During re-examination, he told the court that Lydia left in 1954. She was not a dependant of the deceased. When his mother died, his sons went to live with the deceased. According to him, Lydia's children have no claim on L.R Dagoretti/Kangemi/94. Plot No. 32 was erroneously not included in the list of assets. It belonged to his paternal grandmother and was bequeathed to the deceased. Peter lives on this property and collects rent. The deceased's children are aware that the deceased gifted him the two properties. The deceased asked the chief to summon Peter. In a meeting held on 8/1/2005, the deceased allocated him Plot No. 94 whereas Peter was allocated Plot No.32.
21. PW2, Augustine Muturi Kinuthia who is the son of PW1 adopted his sworn affidavit dated 6<sup>th</sup> June 2014. He told the court that the deceased was his grandfather. His evidence was that L.R Dagoretti/Kangemi/32 belonged to PW1. The deceased then gifted it to Peter Kinuthia who lives on that property and has also developed it. His father, PW1 later got Dagoretti/Kangemi/T103. The deceased expressed how he wished his properties to be shared through a journal. He indicated that David Kinuthia also known as Peter Kinuthia should be allocated Plot No.316 Kangemi while Bernard Kinuthia was to be allocated Plot No. 103 Kangemi. The deceased also allocated Dagoretti/Kangemi/94 to Tabitha Wanjiku, the deceased's wife.
22. This was documented in a journal entry dated 2/7/1975. Both entries were signed by the deceased. The deceased, Tabitha and his mother were buried Dagoretti/Kangemi/94. The deceased also allocated Dagoretti/Kangemi Plot No. 32 to Tabitha Wanjiku. The deceased developed that property. Peter Kinuthia collects rent from that property. PW1 assisted the deceased to develop Dagoretti/Kangemi Plot No. 32. PW1 entrusted the deceased to develop Dagoretti/Kangemi 94. The income from Dagoretti/Kangemi/94 was used to develop Dagoretti/Kangemi 32. The deceased supervised the construction while PW1 financed it. Dagoretti/Kangemi/32 has apartments (ground floor and three other floors). Peter utilizes rent from these apartments.
23. PW1 collects rental income from Dagoretti/Kangemi/94 between Kshs. 150,000 to Kshs. 200,000. He lives with his two brothers and PW1 on this property. Dagoretti/Kangemi/T103 belongs to PW1 but is still registered in the deceased's name. The deceased died before he transferred the property to him. Dagoretti/Kangemi/T316 belongs to Peter Kinuthia. According to him, the deceased disposed his properties before he died.
24. During cross examination, he stated that he lived with the deceased. The entry dated 2/7/1975 refers plot no. 32 as kwa mhindi. Plot No. 94 has two units each collecting Kshs. 10,000 per month. There are also three timber structures each collecting Kshs. 7,000 per month. When Tabitha died in 2003, Plot No. 94 transferred to PW1. He is not aware that Plot No. 32 was given to Peter. Since Tabitha is deceased, her portion should go to her children.
25. The deceased had one child with Tabitha, who is PW1. PW1 developed Plot T 103 and collects rent from it. Kajiado/Kitengela/11354 is registered in the names of Peter Kinuthia Muturi and Bernard Muturi. He lived with the deceased in Dagoretti/Kangemi/94 together with PW1. The second wife did not live on that property.



26. PW3, Philip Nyanjui Kinuthia told the court that he was the son of the deceased and Lydia Wanjiku. He agrees with the mode of distribution proposed by Peter Kinuthia Muturi and Bernard Kinuthia Muturi. He is aware that Peter put up structures in Kangemi in 1985. His mother, Lydia had a land in Murang'a which was subdivided into three and given to him and his sister, Ruth. The deceased did not leave a will but he had indicated how his estate should be distributed.
27. During cross-examination, he stated that the deceased informed Lydia of the decision that only Peter and Bernard were to inherit from him. His sisters, Mary and Margaret did not get a share from their mother. He stated that he had no interest in the estate of the deceased. His mother has provided for him.
28. PW4, Peter Kinuthia Muturi adopted his affidavit sworn on 26/5/2015 and further affidavit sworn on 10/5/2017 as his evidence in chief. He told the court that he is the administrator and son of the deceased. He stated that, his sisters are opposed to the mode of distribution. His evidence was that, Dagoretti/Kangemi/T.103 is registered in the deceased's name. Dagoretti/Kangemi/T.316 was originally registered in the deceased's name but is currently in the name of Bernard Kinuthia. It was the deceased's wish that he be allocated Dagoretti/Kangemi/T.103 while Dagoretti/Kangemi/T.316 was to be allocated to Bernard. However, Bernard had constructed rentals on Dagoretti/Kangemi/ T.103 and they both agreed to swap their lands. He entered into an agreement with Bernard. He paid him for the house he had built on T.316. Kajiado/Kitengela/11354 is jointly registered in his name and Bernard. Dagoretti/Kangemi/94 is registered in the deceased's name.
29. The deceased had land in Gikambura measuring 100 \*100 m which he exchanged with the original owner of Dagoretti/Kangemi/94. Dagoretti/Kangemi 32 was registered in the name of Peter Thiongo. The deceased was entitled to half of this property. It was subdivided into two; Kangemi 32A and Kangemi 32. He proposes that he retains Dagoretti/Kangemi/32 while Bernard retains Dagoretti/Kangemi/94. Bernard began construction on plot 94 in 1996 while he begun construction on plot no. 32 A in 1998. The deceased lived on Plot No. 94 from 1976 with his wife, Tabitha and PW1's children. The deceased, Tabitha and PW1's wife are buried on plot no. 94.
30. Before 1998, he had put up some structures in 1986 on Plot No. 32. He put up 8 units, each one bedroom using income from his business. He demolished the houses in 2024 January and is in the process of constructing a four-storey flat. In 2000 he constructed four floors and completed construction in 2009. He denied that the deceased financed the construction while he supervised its construction. His sisters did not raise any issue when he started farming on Plot 32A in 1975. He asked the court to distribute the deceased's estate according to their late father's wish. His sisters are only entitled to the deceased's money in the account.
31. During cross-examination, he stated that the deceased wrote his wishes in an agreement dated 8/1/2005. He communicated them orally in 1985 in the presence of PW1, himself and a cousin called Lawrence. The transfer of Plot No. 94 and Plot No. 32 A were not fully effected. He has deposited Kshs. 160,000 as ordered by the court. His proposal is that the money in the bank should be shared equally between all the beneficiaries. The deceased had some rental units in Plot No. 94. Although his mother Lydia wants to be catered for as a dependant, according to him, he will plan on how she will be provided for. His sisters, Ruth, Mary and Margaret are alive. Esther died but she has a family. The deceased was 91 years old when they executed the agreement. The property in Ngong is registered in his name and Bernard. The deceased bought Kajiado/Kitengela and but it is registered in his name and Bernard. The rental income in Plot 32 is around Kshs. 500,000.



## **OBJECTORS' EVIDENCE.**

32. DW1, Mary Wanjiru Kinuthia adopted her affidavits sworn on 26/11/2012, 18/1/2014 and 16/3/2015 as her evidence in chief. She told the court that she was the daughter of the deceased. Her sister, Margaret Njoki Thairu died in July 2024.
33. In cross examination, she stated that she does not agree with the proposed mode of distribution. The deceased gifted 'David' and Bernard during his lifetime plot no. 94 and Plot No. 32 respectively vide an agreement dated 8/1/2005 which the deceased decline to sign. He informed them that they would not get an additional share of the estate. The deceased inherited Plot No. 32, 94, 103, 316 from his parents. The deceased informed her in 2004 that he was constructing a home on Plot No. 32. He applied a loan from Barclays Bank but it was declined. It was then that he asked her brother (Peter) to build it and he would repay him. At the time of the deceased's death, the construction was complete and people were renting it. According to her, the deceased constructed Plot No. 32. She denies that the deceased gifted Peter and Bernard. They have not been provided for in the proposed mode of distribution. The administrator collects rent from Plot No. 32 and does not share it with the other beneficiaries.
34. DW2, Ruth Waitherero adopted her affidavits sworn on 6/6/2014 and 8/9/2015 as her evidence in chief. She told the court that she was the daughter of the deceased. The administrator is her brother. They were six siblings, two have died. She asked to be given a share from the deceased's estate. The deceased did not gift Peter and Bernard Plot No. 32 and Plot No. 94. Peter supervised the construction on Plot No. 32 when the deceased was constructing it. The deceased had a stall in Kangemi which he was renting it out. The deceased had some money in his account.
35. During cross-examination, she stated that during distribution, the gifts should be factored in. The deceased did not sign the purported agreement. The deceased lived on Plot No. 94. He begun construction in 1970s. Bernard gave the deceased Kshs. 80,000 which was used to construct on Plot No. 32 and Plot No. 94 but he refunded it. She is not aware that Peter built structures on Plot No. 32. Construction on Plot No. 32 and Plot No. 94 was simultaneously.
36. None of the parties filed written submissions.

## **ANALYSIS AND DETERMINATION**

37. The Court has considered the Summons for Confirmation by the Administrators, the Affidavit of Protest to the confirmation of grant and the testimonies of parties and finds that the issues for determination are;
  - a. What assets comprise the estate of the deceased?
  - b. Whether the deceased gifted any assets intervivos to any of the beneficiaries in his life time?.
  - c. Who are the beneficiaries of the Estate of the deceased, entitled to a share of the Estate?
  - d. How the assets of the estate of the deceased should be distributed.

### **A. WHAT ASSETS COMPRISE THE ESTATE OF THE DECEASED**

38. When the administrators petitioned this court for Letters of Administration, the following were listed as properties forming part of the estate of the deceased in the affidavit in support for petition of letters administration;
  - i. LR NO. DAGORETTI/KANGEMI/94.



- ii. LR. NO. DAGORETTI/KANGEMI/T.103
  - iii. ICDC SHARES.
  - iv. BANK ACCOUNT XXXX BARCLAYS.
  - v. L.R NO. DAGORETTI/KANGEMI/316.
  - vi. L.R NO. KAJIADO/KITENGELA/11354.
  - vii. L.R NO. DAGORETTI/KANGEMI/32.
39. Documents were produced to prove ownership of the above parcels. Dagoretti/Kangemi/94 was registered in the name of the deceased on 9<sup>th</sup> April 1975; Dagoretti/Kangemi T.103 was registered in the deceased's name on 26<sup>th</sup> September 1961; Dagoretti/Kangemi/T.316 was registered in the name of Bernard Kinuthia Muturi. No titles have been presented before this court to prove ownership of LR No. Kajiado/Kitengela/11354 and LR No. Dagoretti/Kangemi/32. Parties are however agreed that the property belonged the properties belonged to the deceased and LR No. Kajiado/ Kitengela/ 11354 was registered in the names of Bernard Kinuthia and Peter Kinuthia. There is consensus that the deceased owned LR No. Dagoretti/Kangemi/32. What is in contention is whether or not the deceased gifted Plot No. 94 and 32 to the 1<sup>st</sup> and 2<sup>nd</sup> Administrators. No evidence was adduced to show that the deceased owned plot No. D138 Kangemi.
40. The Properties of the Deceased are therefore as enumerated below.
- i. LR NO. DAGORETTI/KANGEMI/94.
  - ii. LR NO. DAGORETTI/KANGEMI/32
  - iii. LR.NO. DAGORETTI/KANGEMI/T.103
  - iv. ICDC SHARES.
- SUBPARA v.
- BANK ACCOUNT XXXX BARCLAYS.

**B. WHETHER THE DECEASED GIFTED ANY ASSETS INTERVIVOS TO ANY OF THE BENEFICIARIES IN HIS LIFE TIME?**

41. PW1, Bernard Kinuthia, stated that LR NO. Dagoretti/Kangemi/T.103 was given to him by his father. He testified that despite visiting the Land Control Board, the transfer was not completed because he did not have funds to complete the transfer. Further, that L.R No. Dagoretti/Kangemi/94 was gifted to Tabitha before the deceased died. PW2 corroborated the evidence of PW1. PW4 told the court the deceased gifted him L.R NO. Dagoretti/Kangemi T.316 while Bernard was gifted Dagoretti/Kangemi/T.103. DW1 told the court that the deceased did not gift LR No. Dagoretti/Kangemi 94 and portion of L.R No. Dagoretti/Kangemi 32 to Peter and Bernard respectively. DW1 and DW2 whilst conceding that their brothers were gifted L.R NO. Dagoretti/T.103 and LR No. Dagoretti/Kangemi/T.316 submit that the gifts should be factored in when distributing the estate.
42. The requirements of a gift intervivos are provided in section 31 of the Law of Succession Act 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 the 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 thereto; 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 contemplation 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. the person making the gift may, at any time before his death, lawfully request its return.

43. In the case of *Naomi Wanjiru Njoroge & 2 Others v Winston Benson Thiru* [2018] eKLR where Hon. Nyamweya L J (as she then was stated as follows;

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). The assets that are the subject of a gift do not form part of the estate and such assets pass directly to the donee.

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.

44. The Court has also considered Odunga's Digest on Civil Case Law and Procedure Vol (III) Page 2417 at paragraph 5484 (d) e – 1, which states as follows:

Generally speaking, the moment in time when the gift takes effect is b 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)

45. In the case for LR. Dagoretti/Kangemi/T.103, an application for consent of Land Control Board and Letter of Consent was produced indicating that the deceased intended to transfer it to Bernard Kinuthia. The same holds through for Dagoretti/Kangemi/T.316, where in fact the land was transferred Peter Kinuthia.
46. It is evident therefore Bernard and Peter were gifted the following parcels of land in the life time of the deceased;
- a. LR NO. Kajiado/ Kitengela/11354
  - b. LR No. Dagoretti/ Kangemi/ T.103
  - c. Dagoretti/ Kangemi/ T.316

In accordance with the law these gifts will be considered in distributing the estate.

47. With regard to LR No. Dagoretti/Kangemi 94 and L.R No. Dagoretti/Kangemi 32, whereas it is contended that these were gifted to the Bernard and Peter, these gifts are not complete. It is evident that both Bernard and the Peter carried on developments on the two properties in the lifetime of the deceased. The mother and wife of Bernard are even buried on Plot LR No. Dagoretti/ Kangemi/94, these are factors to take into consideration when distributing the estate but are not sufficient that the deceased gifted the parcel to Bernard. I therefore find that the gift with regard to PLOT no. 94 and Portion of Plot No. 32 had not yet crystallised.

### **C. WHO ARE THE BENEFICIARIES OF THE ESTATE OF THE DECEASED, ENTITLED TO A SHARE OF THE ESTATE?**

48. Section 29 of the Law of Succession defines a dependant as;
- (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) ...
49. From the reading of Section 29 above quoted, the category of dependants under paragraph (a) is special and automatic in nature. They do not need to prove that they were maintained by the deceased immediately prior to his death. See in re Estate of the late Annelies Anna Graff (2019) e KLR where the court held;

“Section 29 (a) creates as special category of dependants who are dependants due to their relationship to the deceased. Here the wife, wives, former wife or wives and the children of the deceased are automatic dependants and it is immaterial whether or not they were being maintained by the deceased immediately prior to his death”.

50. It is not disputed that Lydia Wanjiku Muturi is a former spouse of the Deceased and therefore a beneficiary of the Estate. The list of beneficiaries of the Estate of the deceased are-
- a. Lydia Wanjiku Muturi
  - b. Estate of Bernard Kinuthia (Deceased)



- c. Estate of Margaret Njoki Thairu (Deceased)
- d. Peter Kinuthia Muturi
- e. Ruth Waitherero Mutonga
- f. Estate of Esther Nyamwitha (Deceased)
- g. Philip Nyanjui Muturi
- h. Mary Wanjiru Kinuthia.

#### **D. HOW THE ESTATE PROPERTY SHOULD BE DISTRIBUTED?**

51. From the outset the proposed mode of distribution as captured in the consent dated 26<sup>th</sup> November 2013 must be rejected as it is only signed by Bernard and Peter. Further it fails to make provision for all the beneficiaries, especially those who have not renounced their interest in the estate.
52. Both Bernard and Peter stated that the reason they excluded the daughters of the deceased is that they were married and further they were distributing the estate in accordance with the wishes of their deceased father. The wishes of their deceased father are said to have been expressed in his diary and minutes of meeting held on 8<sup>th</sup> January 2005. Both documents make no provision for the distribution of the estate to beneficiaries beyond Bernard and Peter.
53. Suffice it to state that the Article 27 of *the Constitution* of Kenya 2010 as well as Parts III and V of the *Law of Succession Act* do not countenance discrimination and exclusion of females in the distribution of estates. It is now settled by judicial precedent dating back to the Court of Appeal decision in *Mary Rono v Jane Rono & another* [2005] KECA 326 (KLR) that the law does not discriminate against children on the basis of their sex or marital status
54. The same was also buttressed in the Matter of the Estate of M’Ngarithi M’Miriti alias Paul M’Ngarithi M’Miriti (Deceased) [2017] KLR as follows:-

##### Discrimination of daughters in inheritance

From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when *RONO vs. RONO* [2008] 1 KLR 803 delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement *the Constitution*- which state categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and *the Constitution*. More specifically I am content to cite the proclamation by the Court of Appeal in the case of *STEPHEN GITONGA M’MURITHI vs. FAITH NGIRAMURITHI* [2015] eKLR that: -

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”



- a. Therefore, a son will not have priority over a daughter of the deceased simply because he is male; all- male and female siblings- are equal before the law and are entitled to equal protection of the law. See article 27 of *the Constitution*. Accordingly, the 3<sup>rd</sup> Administrator and her children who are claiming the inheritance of late Festus K. M’Ngaruthi, the son of the deceased are only entitled to the share of their late father. They are not, in the circumstances of this case entitled to more share than the distinct share of each of the two daughters of the deceased simply because the late Festus M’Ngaruthi was the son. The three children of the deceased are entitled to share the net intestate estate of the deceased equally.

55. As stated earlier in arriving at my decision I have in mind that Patrick and Bernard have received gift inter vivos from the deceased. Further they have over the years benefitted solely from the rental income from Plot No. 94 and Plot No. 32. In addition, I am guided by the provisions of Sections 26, 27 and 28 of the *Law of Succession Act* which provide as follows-

Section 26. Provisions for dependants not adequately provided for by will or on intestacy

Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.

27. Discretion of court in making order

In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

28. Circumstances to be taken into account by court in making order

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

- (a) the nature and amount of the deceased’s property;
- (b) any past, present or future capital or income from any source of the dependant;
- (c) the existing and future means and needs of the dependant;
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
- (e) the conduct of the dependant in relation to the deceased;
- (f) the situation and circumstances of the deceased’s other dependants and the beneficiaries under any will;
- (g) the general circumstances of the case, including, so far as can be ascertained, the testator’s reasons for not making provision for the dependant.



56. The deceased herein was polygamous and I am therefore guided by Section 40 of the *Law of Succession Act* which provides

40. Where intestate was polygamous

- (1) 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 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.
- (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

57. I find that Philip Nyanjui Muturi renounced his share in the estate in his evidence in Court no provision therefore will be made for him. With regard to Lydia Wanjiku Muturi, her children, Peter, Philip Nyanjui and Mary Wanjiru all stated that she did not require provision from the estate as she had been divorced for over 48 years from the deceased and was not dependant on him and further she was a woman of means. Lydia Wanjiku did not participate in these proceedings neither did she counter these averments, I find therefore that under Section 28 there is no need to provide for her.

58. We are therefore left with,

- a. Estate of Bernard Kinuthia (Deceased)
- b. Estate of Margaret Njoki Thairu (Deceased)
- c. Peter Kinuthia Muturi
- d. Ruth Waitherero Mutonga
- e. Estate of Esther Nyamwitha (Deceased)
- f. Mary Wanjiru Kinuthia.

as the beneficiaries for whom provision ought to be made.

59. In *Dadhialla v Chaudri (Sued as Executor of the Estate of Gurdip Kaur Sagoo) & 2 others* [2025] KECA 728 (KLR), the Court of Appeal pointed out that ‘reasonable provision does not mean equal provision for those who were excluded, or those who were left out.’

60. Omolo JA, expresses the same sentiment in the *Rono v Rono* (supra) where he states

I had the advantage of reading in draft form the judgment prepared by WAKI, JA, and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned Judge to be laying down any principle of law that the *Law of Succession Act*, Cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr. Gicheru. I can find no such provision in the Act. Section 40 (1) of the 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 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.” 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 there must be equality between houses, there 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 an injustice particularly in 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 the Act does not provide for that kind of equality. What I understand WAKI, JA, to be saying is that in the circumstances of this particular case, there was no reasonable factual basis for drawing a distinction between the sons on the one hand and the daughters on the other hand. Subject to what I have said herein, I agree with the judgment of WAKI, JA and the orders proposed by him.

61. On how the Court should exercise its discretion, the Court stated as follows-

While I do not doubt the discretion donated by the Act in matters where dependants seek a fair distribution of the deceased's net estate I think the discretion, like all discretions exercised by courts, must be made judicially or to put it another way, on sound legal and factual basis

62. It is not disputed that Plot NO. 94 comprised the matrimonial home of the deceased and his second wife Tabitha Wanjiku and they had only one child. The deceased, Tabitha and the wife of Bernard are buried there. It is only reasonable that this property be transferred to the Estate of Bernard Kinuthia. The other beneficiaries are entitled however to a share of the rental income. What is reasonable in the circumstances?

63. With regards to Plot No. 94, Peter Kinuthia has made contribution to the development of this parcel of land. For both parcels of land whereas the scales of justice would tilt towards the transmission of the parcels of land to Bernard and Peter, the interest of the other beneficiaries must be provided for.

64. No valuation has been offered by either side of the value of the assets of the deceased. There is a valuation in the citation of the Peter Kinuthia that stated the total estate of the deceased is Kshs 10 million. Guided by this figure, I find that a lump sum payment by the Estate of Bernard Kinuthia and Peter Kinuthia amounting to Kshs 5 million to be shared equally amongst

- a. Estate of Margaret Njoki Thairu (Deceased)
- b. Ruth Waitherero Mutonga
- c. Estate of Esther Nyamwitha (Deceased)
- d. Mary Wanjiru Kinuthia.

would be reasonable under the circumstances. In arriving at this figure, I have considered the probable value of the two parcels of land, the gifts inter vivos made to Bernard and Peter and the circumstance of the dependants.

65. In addition, the beneficiaries

- a. Estate of Margaret Njoki Thairu (Deceased)
- b. Ruth Waitherero Mutonga
- c. Estate of Esther Nyamwitha (Deceased)
- d. Mary Wanjiru Kinuthia.



Will share equally both the amount in the Barclays account and the ICDC shares and the amount deposited in Court as rental income from Plot No. 32

66. In conclusion therefore, the Estate of the deceased shall be distributed as follows
- a. Plot No. 103- Kangemi Dagoretti gift inter vivos to Bernard Kinuthia Muturi
  - b. LR No. Kajiado/ Kitengela/ 11354 gift inter vivos to Bernard Kinuthia Muturi and Peter Kinuthia Muturi
  - c. Dagoretti/Kangemi/T.316 gift inter vivos to Peter Kinuthia Muturi
  - d. Plot NO. 32 to be transmitted to Peter Kinuthia
  - e. Plot No. 94 to Estate of Bernard Kinuthia Muturi
  - f. Estate of Bernard Muturi and Peter Kinuthia to pay the sum of Kshs 5 million to the account of Counsel for the Protestor -Mary Wanjiru Kinuthia- within 90 days to be shared equally between
    - a. Estate of Margaret Njoki Thairu (Deceased)
    - b. Ruth Waitherero Mutonga
    - c. Estate of Esther Nyamwitha (Deceased)
    - d. Mary Wanjiru Kinuthia.
  - g. The Kshs 160000 deposited in Court by Peter Kinuthia be released to Counsel for the Protestor and shared equally amongst the beneficiaries enumerated in (f) above
  - h. The following beneficiaries to share equally the money held in (a)Barclays Bank Account and (b) the ICDC shares
    - i. Estate of Margaret Njoki Thairu (Deceased)
    - ii. Ruth Waitherero Mutonga
    - iii. Estate of Esther Nyamwitha (Deceased)
    - iv. Mary Wanjiru Kinuthia.
  - i. The Administrator to finalise transmission of the Estate within 120 days. Mention on 14<sup>th</sup> October 2025 to confirm compliance
    - i. This being a family matter each party will bear their own costs.

**SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 9<sup>th</sup> DAY OF MAY, 2025.**

**P M NYAUNDI**

**HIGH COURT JUDGE**

In the presence of:

Osoro for 2<sup>nd</sup> Administrator

Ms. Ndirangu for Protestor (Mary)

Kinyanjui holding brief for Nyambura Kinyanjui for 3<sup>rd</sup> Objector



