



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: NAMBUYE, OUKO & J. MOHAMMED, JJA)

CIVIL APPEAL NO. 221 OF 2007

BETWEEN

CHRISTINE WANGARI GACHIGI.....APPELLANT

AND

ELIZABETH WANJIRA EVANS.....1ST RESPONDENT

PETER GACHEGE NJOGU.....2ND RESPONDENT

MARY WANJIRU GACHIGI.....3RD RESPONDENT

ELIZABETH WAMBUI.....4TH RESPONDENT

MARY NYAMBURA.....5TH RESPONDENT

MARGARET WANJIRU.....6TH RESPONDENT

SALOME NJOKI.....7TH RESPONDENT

ANTHONY GACHIGI.....8TH RESPONDENT

ZAINABU WANJIRU GACHIGI.....9TH RESPONDENT

JOSEPH GACHIGI ZAMBETAKIS.....10TH RESPONDENT

JENIFFER WANJIRU ZAMBETAKIS..... 11TH RESPONDENT

JOHN IRUNGU ZAMBETAKIS.....12TH RESPONDENT

**(An appeal from the Judgment and Decree of the High Court of Kenya at Nakuru (Kimaru,J) Dated
10th July, 2007**

In

Nakuru H.C. Succ. Cause No.96 of 2000

AS CONSOLIDATED WITH

CIVIL APPEAL NO. 222 OF 2009

BETWEEN

ELIZABETH WANJIRA EVANS.....APPELLANT

VERSUS

CHRISTINE WANGARE GACHIGI.....1ST RESPONDENT

PETER GACHENGE NJOGU.....2ND RESPONDENT

MARY WANJIRU GICHIGI.....3RD RESPONDENT

ELIZABETH WAMBUI.....4TH RESPONDENT

MARY NYAMBURA.....5TH RESPONDENT

MARGARET WANJIRU.....6TH RESPONDENT

SALOME NJOKI.....7TH RESPONDENT

ANTHONY GICHIGI.....8TH RESPONDENT

ZAINABU WANJIRU GICHIGI.....9TH RESPONDENT

JOSEPH GACHIGI ZAMBETAKIS.....10TH RESPONDENT

JENIFFER WANJIRU ZAMBETAKIS.....11TH RESPONDENT

JOHN IRUNGU ZAMBETAKIS.....12TH RESPONDENT

AND

MERCY WANJIRU MBURU.....1ST CROSS-APPELLANT

AGNES WAITAKWA.....2ND CROSS-APPELLANT

LUCY MUTHONI.....3RD CROSS-APPELLANT

JANE NYAMBURA.....4TH CROSS-APPELLANT

(An appeal and Cross Appeal from the Judgment and Decree of the High Court of Kenya at Nakuru (Kimaru,J) Dated 10th July, 2007

in

Nakuru H.C. Succ. Cause No.96 of 2000)

JUDGMENT OF THE COURT

The proceedings herein relate to the estate of one **Rahab Wanjiru Evans** (the deceased) who died at Pine Breeze Hospital Nakuru on the 16th day of February 2000.

Christine Wangare Gachigi herein after referred to only as **Christine** filed Nakuru High Court Succession Cause No.96/2000 seeking a grant of letters of administration to the estate of the deceased in her capacity as a daughter of the deceased. She named **Peter**

Njogu Gachigi, Mary Salome Njoki Gachigi, Agnes Waitwika Zambetakis, Mary Wanjiru Gachigi, Lucy Muthoni Gachigi, Elizabeth Wanjira Evans, Jane Nyambura Gachigi and herself as beneficiaries. She enumerated Nakuru Municipality Block 7/491, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 506, 507, 508, 509, 510, 511, 512, 513, 514, 516, 517, 518, 519, 520, 521, 522, 523, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, Nakuru Municipality block 4/258, 259, Nakuru Municipality block 7/536, 539, 540, 541, 542, 543, 544, 545, 546, 547, Nakuru Municipality Block 10/197, Nairobi LR. No.209/11540, shares in Gema at Gilgil, shares in Nyakinyua Farm at Gilgil, Motor vehicles registration numbers Isuzu FTR 10 Tonner, KXF 396, Nissan 7 Tonner KTX 154, Peugeot 504 Station Wagon, Peugeot 404 Pickup K LW 318, BMW KYQ 079, assorted scrap metals, New Massey Ferguson harrow, 12 heads of cattle and unknown amount of money held in the Kenya Commercial Bank, as the property comprising the deceased's estate.

The cause was published in the Kenya Gazette on the 8th day of March 2000. The publication of the cause attracted an objection and a cross application for a grant made under rule 17(5) of the Probate and Administration Rules by one **Elizabeth Wanjira Evans** herein after only referred to as **Elizabeth**. In summary, the objector, cross applicant contended that she, **Elizabeth** was the only rightful heir to the estate of the deceased for the reasons given in the supporting affidavit. She enumerated Nakuru Block 7/921, 505, 524, 538, 501, 502, 503, 506, 508, 509, 510, 511, 512, 513, 514, 516, 517, 518, 519, 520, 521, 522, 523, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 539, 540, 541, 542, 543, 544, 545, 546, 491, 493, 494, 495, 496, 497, 498, 499, 500, Nakuru Municipality Block 4/259, shares in

Gema at Gilgil, Isuzu FTR 10 Tonner KXF 397, Nissan 7 Tonner KTX 151, Peugeot KPW 255, 504 station wagon, Peugeot 404 pick up KLW 318, BMW KYQ 079, assorted scrap metal, new Massey Ferguson plough, Massey Ferguson Tractor, 12 heads of cattle, funds in bank accounts at Kenya Commercial, Grindlays Bank in England A/C No. **[particulars withheld]** in sterling pounds, co-operative savings Account Nakuru and Trans National Bank Savings A/C Nakuru as the estate.

On the other hand liabilities were enumerated as a charge to National Bank of Kenya of shs.3 million, HCCC No.308 of 1996, Dunnan Finance Ltd versus Rahab Wanjiru Evans t/a Volcano Esso Service Station Kshs.1.5 million, HCCC No.44 of 1999, Abdalla Sale Azubedi versus Rahab Wanjiru Evans Kshs.3 million, loan of Kshs.810 million, caution with Agricultural Finance Corporation (A.F.C) Municipality Block 535, 536, 524, 538, 539, 540, 541, 542, 543, 544, 545, 546 and 502.

Preliminaries undertaken by the parties in the disposal of the cause included an agreement and memorandum of understanding endorsed by the Court on the 15.1.02. It reads;

“By consent of the parties to this petition, it is hereby ordered that;

(i) The petitioner, the objector, Peter Gachigi Njogu and Mary Wanjiku Gachigi be and are hereby appointed the joint administrators of the estate of the deceased person.

(ii) The estate of the deceased shall be shared equally between the seven surviving children of the deceased namely;

- a. The four administrators of the estate of the deceased.***
- b. Lucy Muthoni.***
- c. Agnes Waitwika .***
- d. Jane Nyambura.***

(iii) The two lists of the schedule of property of the deceased filed by the petitioner and the objector shall be reconciled by the four administrators of the estate with the assistance of the two counsel appearing for the parties herein.

(iv) The costs of the petition and of the objection shall be paid from the estate.

(v) Mention case on 22.1.02 to ascertain the shares of each of the beneficiaries of the estate of the deceased.

(vi) A temporary grant shall therefore issue in the joint names of the four administrators of the estate of the deceased.”

On the 25th day of January 2002 another consent order was endorsed by the court. The order was in relation to two applications dated 1.2.02 and 18.2.02 which were consolidated and compromised together resulting in the following consent order:-

“(b) The applicants in these applications be and are hereby made the beneficiaries of the estate of the deceased and they shall get as follows

- i. Antony Sabato Gachigi Nku Mun/block 7/530 and Kshs.300,000.00.***

- ii. **Zainabu Wanjiru Nku Mun Block 7/533 and Kshs.300,000.00.**
- iii. **alome Njoki – Nku Mun Block 7/529 and Kshs.212,500/=**
- iv. **Margaret Wanjiru - Nku Mun/Block 7/526 and Kshs.212,500/=**
- v. **Elizabeth Wambui Nku Mun/Block 7/528 and Kshs.212,500/=**
- vi. **Mary Nyambura Nku Mun/Block 7/536 and Kshs.212,000/=**
- vii. **Mercy (Mary) Wanjiru (minor) Nku Mun Block 7/527 and Kshs.250,000/=**
- viii. **John Irungu Zambetakis Nku Mun/Block 7/532 and Kshs.200,000/=**
- ix. **Jenifer Wanjiru Nku Mun/Block 7/532 and Kshs.200,000/=**
- x. **Joseph Zambetakis to get Nku Mun/Block 7/539 and Kshs.200,000/=**

(c) The cash shall only become payable to each of the ten applicants once all the debts owing by the estate of the deceased have been paid and the payment has been confirmed.

(d) The pieces of land/plots shall only be transferred into their hands once all debts owing by the estate have been paid and the grant has been confirmed.

(e) The costs of the applications consolidated shall be paid to the said applicants. This is payable from the estate of the deceased.

On the 11th day of July, 2004 an application for confirmation of grant was presented to Court. There appears to have been no consensus reached on the proposals made by the applicant therein as a basis for the confirmation of the grant, as a result on 11th September 2004 the following consent order was recorded:-

“By consent the parties to this cause file their preferred mode of distribution to the estate including identifying the beneficiaries of the said estate. The said list to be filed within fourteen days of today’s date. All orders issued in the interim are hereby stayed.”

The above consent was endorsed by **Juma Kiplenge** advocate for the 1st & 4th administrators, **Waiganjo Mwaura** as advocate for the 3rd administrator, **Githui J.** advocate for the 1st defendant and **Nyangweso G.** as advocate for the 2nd petitioner/ administrator.

In obedience of the Court’s order of 11th September, 2004 **Elizabeth** filed in court her proposal on the mode of distribution in October, 2004. She listed the Assets of the deceased as Nakuru Municipality Block7/511, 504, 524, 538, 504, 506, 508, 509, 510, 492,572,494,51,515,495,517,518,519,520,521,522,523,524,525,526,527,528,529,530,53 1,532, 533, 535,536,259,539, 491, 493,542,546,545,541,496,497,498,499,500,501,502,503, Nakuru Municipality Black 4/258 funds of unknown amount held in KCB, Grindlays Bank in England and Transnational Bank. The movable properties comprised all the motor vehicles as had been previously enumerated in her cross application. Properties not available for distribution were indicated as Nakuru Municipality Block7/544 sold to Jehova Witness Church by the deceased; Nakuru Municipality Block 10/197 passed on to one **Said Abdala Azubedi** pursuant to a Court order in HCCC No. 44 of 1999 **Said Abdala Azubedi versus Rahab Wanjiru and Alice Bomet**, Nakuru Municipality Block7/543 sold by the deceased to **Allan Ngugi**, Nakuru Municipality block7/540 sold by the deceased to **Edward Mwangi Kinuthia**, Nakuru Municipality Block7/513 sold by the deceased to **John Girishom Njoroge Kagui**, Nakuru Municipality Block7/516 sold by the deceased to **Nathaniel Waithaka Wanyangi**. Also sold allegedly by the 1st and 4th administrators were 11 heads of cattle out of twelve as one had died. Household furniture worth around Kshs.500, 000.00 were also not available for distribution as these had allegedly been taken by Christine.

On distribution **Elizabeth** proposed that **Christine** to get Nakuru Municipality Block7/507,508,511 and 512; for herself **Elizabeth** proposed Nakuru Block7/541,491 and Nakuru Block4/258 and 259; **Peter Gachigi** to get Nakuru Municipality Block7/492,493 and **Mavoko** Municipality LR.377/1004; **Mary Wanjiku Gachigi** (a married daughter) to get Nakuru Municipality Block7/496,499,500 and 503; **Jane Nyambura Gachigi** a (a married daughter) to get Nakuru Municipality Block7/509,510,517 and 518; **Agnes Waitwika Zambatakis** (a married daughter) to get Nakuru Municipality Block7/501,502,505 and 506; **Lucy Muthoni Gachigi** a married daughter was to get Nakuru Municipality Block7/520,521,522 and 525.

The grandsons and granddaughters of the deceased namely **John Irungu Zambetakis,, Jeniffer Wanjiru Zambetakis, Joseph Zambetakis, Anthony Sabato Gachigi, Zainabu Wanjiru, Salome Njoki Mburu, Margaret Wanjiru, Elizabeth Wambui, Mary Nyambura** and **Mary Wanjiru Mburu** received the distribution as proposed by consented and endorsed by the Court or **25/5/2002**. **Elizabeth** further proposed that the following properties be reserved for Rahab Wanjiru Memorial School namely: Nakuru Municipality Block7/542,545,546,495,497,498,504,519,534,535,536 and 538. Whereas LR.209/11540 was to be sold to offset its own indebtedness and other indebtedness owed by the estate to 3rd parties as well as retirement benefits to the total tune of Kshs. one hundred and twenty thousand shillings (Kshs.120, 000.00) for one Melenia Otieno an acknowledged employee of the deceased for over thirty years.

Peter Gachigi Njogu on his part recognized the surviving children of the deceased as **Peter Gachege Njogu, Mary Wanjiru Gachege, Agnes Waitwika Zambetakis, Lucy Muthoni Gachege, Jane Nyambura Gachigi, Elizabeth Wanjira Evans** and **Christine Wangari Gachege**; while grandchildren of the deceased whose parents were deceased as **Antony Gachigi, Zainabu Wanjiru Gachigi, Joseph Gachigi Zambetakis; Elizabeth Wambui; Mary Nyambura, Margaret Wanjiru, Jeniffer Wanjiru Zambetakis**.

The list of assets were enumerated as Nakuru Municipality Block7/511,505,524,538,504,506,508,509,510,492,512,494,514,515,495,517,518,510,520,521,522,523, 524,525,526,527,528,529,530,531,532,533, 535,530, 259,539, 491, 494, 542, 546, 545,2585,541,496,497,498,499,500, 502,503 **Peter** also concurred with **Elizabeth** and **Christine** on the properties that had been sold by the deceased during her life time and which were therefore not available for distribution to the beneficiaries.

On distribution Peter proposed that LR.209/11540 within Nairobi Municipality be sold and resulting proceeds used to pay off accumulated rates and rents both to the City Council of Nairobi and the Commissioner of Lands. The balance of the proceeds if any to be shared equally by **Christine, Elizabeth, Peter, Mary, Agnes, Jane** and **Lucy**.

LR.377/1004 Mavoko Municipality, LR. Nakuru Municipality Block4/491 which comprised the homestead and LR.NKu Mun. Block4/258 and 259 which comprised a petrol station and an adjoining plot were to be held by **Christine, Elizabeth, Peter, Mary, Wanjiku, Agnes, Jane** and **Lucy** as tenants in common.

The balance of the estate was proposed to be shared as follows:

Christine Wangari LR.NKu Min. Block 7/507,508,511,512 and 495.

Elizabeth Wanjira Evans LR.NKu Min. Block7/541,542,545,546 and 498.

PETER Gachege Njogu LR.NKu Min. Block 7/492,493,494,497,508 and 519.

Mary Wanjiku Gachigi LR. NKu Min. Block7/496,499,500,503 and 534.

Agnes Waitwika Zambetakis LR.NKu Min. Block7/501,502,505,506 and 535. **Lucy Muthoni Gachigi** LR.NKu Min. Block7/520,521,522,525 and 536. **Jane Nyambura Gachigi** LR.NKu Min

Block7/509,510,517,518 and 538. **Peter** concurred with Elizabeth respecting the consent order endorsed on the Court record of 25th January, 2002 save that he included one additional unit of one Mercy Wanjiru Mburu indicated to have been a minor and who was given LR. No. NKu Mun. Block 7/527. The vehicles and scrap metal were to be sold and resulting proceeds of sale applied to pay off debts owed by the estate. Cash in the bank was also to be utilized to pay off the City council and Commissioner of Land's rents and rates on LR.209/11540 Nairobi, LR.337/1004 Mavoko Municipality, LR.NKu Mun. Block7/491-546. The balance if any to pay off an AFC loan, stamp duty and other contingencies on the dependants awards.

Kiplenge, Ogola and **Mugambi** advocates filed their proposals on distribution in Court in October, 2004 on behalf of the 1st, 2nd and 4th administrators inclusive of **Peter Gachigi Njogu**. The assets forming the estate of the deceased as proposed by them followed closely what Christine enumerated in the petition namely Nakuru Municipality Block7/511,505,524,538,504,506,508,509,510,492,512,494,514,515,495,5175 22,519,520,521,525,526,527,528,529,530,531,532,533,535,536,259,539,491,493,542,546,545,524,537, 258,541 ,496,497,498,499,500,501,502,503 and LR. No.209/11540.

Peter, Mary and **Christine** concurred with Elizabeth regarding the property that had been sold and were therefore not available for distribution to the beneficiaries save for parcel number Nakuru Municipality Block10/197 indicated to be contested. **Christine** was also in agreement with **Elizabeth** on the inventory for movables. As for funds held in the bank **Christine** only mentioned funds held in Grind Lays Bank in England, A/C No. **[particulars withheld]** in sterling pounds.

On share holding, Christine proposed herself to take Nakuru Municipality Block7/507,508,511,512,531 and 519; Elizabeth Block4/258, 259, Block7/541,258,491,530 and 549; **Peter Gachigi Njogu** to get Nakuru Municipality Block7/492,493,495,535 and 533; **Mary Wanjiku Gachigi** to get Nakuru Municipality Block7/496,499,500,503,526 and 536; **Jane Nyambura Gachigi** to get Nakuru Municipality Block7/509,510,577,518,534,528; **Agnes Waitwika Zambatakis** to get Nakuru Municipality Block7/501,502,505,506,539,504; **Lucy Muthoni Gachigi** to get Nakuru Municipality Block7/520,521,522,525,495,529.

LR.209/11540 was to be sold to offset debts owed on that property; the Mavoko property was to be shared equally by the seven beneficiaries after debts outstanding on that property was paid off by the estate; the Court was requested to accept that whatever income was collected by **Christine** from the LR.209/11540 went to offset legal fees in defence of the estate; the Court was asked in that regard to disallow all the claims laid on to the LR.209/11540 by **Elizabeth**; the Court was also asked to disallow all claims and or awards made in favour of the grandsons and grand daughters of the deceased as these were not immediate dependants of the deceased, and were therefore not beneficiaries of the deceased estate.

The filing in court of proposed modes of distribution by the administrators ushered in the order made on the 15th day of November 2004 as follows:-

“By consent the evidence that shall be taken shall be in respect of the identification of the beneficiaries of the deceased’s estate (i.e. dependants), what is comprised of the estate of the deceased, its liabilities and the proposals as to the mode of distribution of the net assets of the estate.”

In obedience to this order, *viva voce* evidence was tendered through **Margaret Wanjiru Mburu** and **Antony Sabato Gachigi** in defence of the right of the grand children of the deceased to benefit from the estate of the deceased. The second set of evidence came from **Christine; Elizabeth**

and **Peter Gachigi Njogu** in their capacities as administrators of the estate of the deceased. Their testimonies simply centered on giving reasons for proposals made in their proposed modes of distribution set out above.

The learned trial Judge while assessing and analyzing the evidence before him identified eligible beneficiaries of the estate of the deceased as comprising those approved by the consent order of 15th January, 2002 and 25th January, 2002.

Agnes Waitwika Zambetakis, Lucy Muthoni Gachigi and **Jane Nyambura Gachigi** though recognized as daughters of the deceased and therefore beneficiaries of the estate of the deceased were nonetheless excluded from the list of eligible beneficiaries for the reason that the evidence tendered by witnesses on both sides had demonstrated that the three had been married in Europe in the mid 1980s; the three had knowledge of the deceased's death but had allegedly shunned ongoing succession proceedings as they had taken no interest in the said proceedings.

On properties forming the distributable estate of the deceased, the learned Judge accepted the underlisted as the properties to comprise the deceased's estate and which were available for distribution:-

- a. **L.R. No.209/1150 – situated within the City Centre Nairobi.**
- b. **L.R. No.337/1004 Mavoko Municipality.**
- c. **L.R. No. Nakuru Municipality/Block 7/491 where the residential house that the deceased resided before her death is situated. This property measures about 10 acres.**
- d. **Nakuru Municipality/Block 4/258. This property is within the two centre of Nakuru Municipality. There is a restaurant constructed on the said property.**
- e. **Nakuru Municipality/Block 4/259. There is a petrol station constructed on the said property. A twenty (20) year lease was granted to Esso Petroleum Company in 1986. The said lease expired in 2006.**
- f. **L.R. Nakuru Municipality/Block 7/492 – L.R. Nakuru Municipality/Block 7/548 (57 plots each measuring 1/4 of an acre).**
- g. **Motor vehicles i.e.**
 - **Isuzu FTR Lorry Reg. No.KXF 397**
 - **Nissan Lorry – Reg. No.KTX 154**
 - **Peugeot 504 station wagon Reg. No. KPW 255**
 - **Peugeot 404 Pick up Reg. No.KLW 318**
 - **BMWS Saloon Reg. No.KYQ 079**
 - **Massey Ferguson tractor**
 - **Fiat tractor**

- *Plough*
- *Assorted scrap metals*

h. Monies in the Bank

- *Fixed account at Kenya commercial Bank Nakuru Branch – Kshs.20,000,000/=*
- *Current account at Kenya Commercial Bank Nakuru Branch A/C No.[particulars withheld] – Kshs.6,493,950/=*
- *The sum of 7,500 British pounds which was deposited at Grindlay’s Bank, United Kingdom.*

Turning to the liabilities, the learned Judge had this to say:-

“ (a) In respect of LR. No.209/11540 (The City of Nairobi) There was an outstanding land rates owed to the Nairobi City Council of more than Kshs.14,000,000/=. Land rent due to the Ministry of Lands in respect of the said parcel of land was assessed at more than Kshs.65,000,000/- This parcel of land is subject to legal dispute. The said parcel of land was mentioned in the NDUNGU report among the parcels of land that were irregularly allocated. A suit filed by the estate of the deceased is still pending before court.

- a. There was a loan of Kshs.4, 297,452/= owed to the Agricultural Finance Corporation. However, this loan was waived. The estate was required to pay the legal fees which were by then outstanding. The 1st administrator, testified that she paid off two sums of Kshs.425,000/= and Kshs.950,000/= as legal fees to the Agricultural Finance Corporation. According to her, no debt was therefore owed to the Agricultural Finance Corporation.***
- b. There are land rates and land rent owing in respect of the parcels of land at Nakuru which were not specified. According o the 2nd administrator, the outstanding land rates of all the parcels of land at Nakuru was at least Kshs.3,088,731/=***
- c. The land rent and the land rates due in respect of parcel No.337/1004, Mavoko Municipality. Evidence was adduced that there were illegal occupants residing in the said parcel of land. The estates of the deceased had filed a suit at Machakos High Court to secure their eviction. The said suit is still pending for determination by the court.***
- d. A loan which was borrowed from the National Bank of Kenya, Nakuru, Branch, by the deceased the amount now outstanding is Kshs.731,140/85. (It could have increased due to the accrued interest).***
- e. Water bills in respect of parcel No.Nakuru Municipality/Block 4/259 of Kshs.278,000/=***
- f. It was alleged that the deceased’s estate had incurred income tax liability of Kshs.5,083,677/=. This sum was not however established when the beneficiaries testified before court.***
- g. The 2nd administrator alleged that the deceased owed a debt of Kshs.1,000,000/= to the Trans National Bank of Kenya, Nakuru. However, during the hearing of the succession case, it was confirmed that the said debt was actually incurred by the 2nd administrator. I therefore hold that the deceased’s estate does not owe any debt to the Trans National Bank of Kenya, Nakuru Branch.***
- h. During the hearing of the case, each beneficiary suggested that their respective legal fees be paid from the deceased’s estate. I will however hold that each beneficiary will settle his or her own legal charges after the estate of the deceased has been distributed.***

i. It was confirmed during the hearing of the succession proceedings that the deceased had sold several parcels of land at Nakuru municipality before her death. None of the beneficiaries of the deceased's estate objected to the said parcels of land being transferred to the said purchasers. I therefore hold that the following parcels of land shall be transferred to the purchasers whose names appear next to the said listed parcels:-

- **Nakuru Municipality/block 7/516 Nathaniel Waithaka Wanyangi and Paul Kingori Wanyangi**
- **Nakuru Municipality/Block 7/540 – Allan Ngugi Wambui**
- **Nakuru Municipality/Block 7/514 – Chomba's daughter (the name shall be supplied by the administrators).**
- **Nakuru Municipality/block 7/515 – Joseph Mwau.**
- **Nakuru Municipality Block 7/544 – Jehova's Witnesses.**

j. Another debt acknowledged by the beneficiaries of the deceased is the Retirement benefits of Kshs.170,000/= to be paid to Melane Otieno. The beneficiaries have no problem to have this sum paid by the deceased's estate. According to the undisputed evidence which was adduced by all the witnesses who testified before this court, the following parcels of land are still under dispute. The said disputes are yet to be resolved by the court. The said parcels of land are..."

Turning to L.R No.209/11540–Nairobi City Centre and L.R. NO.307/1004 – Mavoko Municipality, the Judge opined that the said two parcels of land would not be immediately available for distribution to the beneficiaries of the deceaseds' estate as the two were subject to pending litigation; there was no certainty that the Court would rule in favour of the estate and for that reason the Court was inclined to give a provisional order as regards the distribution of the said two properties pending the outcome of the court cases.

Turning to the applicable principles of law, the learned Judge took note of the content of Sections 26,28,38,41 and 42 of the Law of Succession Act Cap 160 Laws of Kenya thereof and then made observation inter alia as hereunder:-

"In the present Succession Cause, the deceased died intestate. She did not leave behind a valid will. She did not give any of the beneficiaries any of her properties as gifts during her lifetime. Neither did she give any of her beneficiaries' gifts in contemplation the death. In the circumstances therefore, I will disregard the testimonies of the 1st and 2nd administrators who claimed that the deceased had indicated to them that certain properties of the deceased would either be sold or be subdivided subject to what this court has decided hereinto before, the guiding principle that this court shall apply when distributing the estate of the deceased shall be as provided by Section 38 of the Act.

.....

This court will therefore distribute the estate of the deceased among the beneficiaries of the deceased more or less equally, after taking into account the relative values of the properties that comprise the estate of the deceased This court shall apply the principle of equal distribution when distributing the said estate of the deceased.

.....

As stated earlier in this judgment, the estate of the deceased shall be distributed to the children

of the deceased, save for the three married children of the deceased, namely Agnes Waitwika Zambitakis, Lucy Muthoni Gachigi and Jane Nyambura Gachigi who are married and are currently residing in Greece and Italy respectively. During the entire proceedings, they did not express any wish that they would like to be considered when the estate of the deceased is distributed. Where any child of the deceased died and left behind spouses and children, the said spouses and children would inherit the share that would have been due to the said deceased son or daughter of the deceased.

.....

The Distribution

Bearing in mind the above principles and applying them to the rival arguments before him, the learned trial Judge finally distributed the deceased's estate as hereunder:-

- i. Parcel No.LR.209/11540 in the City of Nairobi was directed to be sold and the proceeds therefrom used to pay off all the debts that had been incurred by the estate of the deceased in respect of the said parcel of land and the balance if any to be distributed equally among the seven units that comprised the estate of the deceased. Further that in view of the pending suit in respect of this parcel of land, pending its resolution, the court directed that the income from the said plot be deposited in a joint account maintained by all the representatives of the seven units that comprise the beneficiaries of the estate of the deceased, which income would be distributed to the said seven units after all the expenses owed by the estate have been taken into account.
- ii. With regard to L.R. No.337/1004 Mavoko Municipality the Judge noted that the property was subject of litigation, but nonetheless gave it to Christine because the High Court of Kenya at Machakos had made an initial and preliminary finding in favour of the estate of the deceased.
- iii. L.R. No.Nakuru Municipality/Block 4/258 (Petrol Station) was to be inherited by **Elizabeth**.
- iv. L.R. No.Nakuru Municipality/Block 4/491 measuring 10 acres or thereabout was to be distributed as hereunder:
 - (a) 4 acres comprised of the homestead, including the house that is being constructed by Peter Gachigi Njogu was to be inherited by Peter Gachigi Njogu.
 - (b) The remaining six acres were to be sub-divided equally and inherited by each of the remaining six units in the distribution scheme.
- v. The children of the late John Mburu were given L.R. No Nakuru Municipality/Block 7/492, 493, 494, 495, 496, 497, 498, 499, 500 and 501.
- vi. The children of the late Salome Njoki i.e. Antony Sabato Gachigi and Zainabu Wanjiru Gachigi were given LR. NO.NakuruMunicipality/Block7/502,503,504,505,506,507,508,509,510 and 511.
- vii. Joseph Gachigi Zambetakis, Jennifer Wanjiru Zambetakis and the children of the late John Irungu Zambetaki were given properties as hereunder:-

Joseph Gachigi Zambetakis was to get LR. NO. Nakuru Municipality/Block 7/512, 517,518, 519 and 548. **Jennifer Wanjiru Zambetakis** to get LR. NO. Nakuru Municipality/Block 7/520, 521, 522, 523 and 527. The children of the late **John Irungu Zambetakis** were to get LR. Nakuru Municipality/Block 7/525, 526, 527, 528 and 546.**Peter Gachigi Njogu** to get LR. No. Nakuru Municipality/Block 7/529, 530 and 531.**Mary Wanjiku Gachigi** to get LR. Nakuru Municipality/Block 7/532, 533 and 534. **Elizabeth Wanjira Evans** to get LR. Nakuru Municipality/ Block 7/535, 536 and 538. **Christine Wangare Gachigi** to get LR. Nakuru Municipality/Block 7/538, 539, 541,542, 545 and 537.
- viii. All the motor vehicles and assorted scrap metals as invented were to be sold by the four administrators in consultation with other beneficiaries and the proceeds therefrom distributed equally to the seven units that comprise the beneficiaries of the estate of the deceased.

- ix. The cash then held in the fixed deposit account and the current account at Kenya commercial Bank, Nakuru Branch then totaling Kshs.26,493,950/= excluding interest that could have accumulated was ordered to be distributed as under:-
- (a) The retirement dues of Malanie Otieno of Kshs.120, 000/= was to be paid out first from the said account.
 - (b) The outstanding loan of Kshs.731, 140/75 due to the National Bank of Kenya, Nakuru Branch was to be paid out in full to discharge the property used to secure it.
 - (c) The remaining cash balance was to be distributed as hereunder:-
 - (a) Peter Gachigi Njogu- Kshs.3,656,115/70
 - (b) Mary Wanjiku Gachigi- Kshs.3,656,115/70
 - (c) Elizabeth Wanjira Evans- Kshs.3,656,115/70
 - (d) Christine Wangari Gachigi – Kshs.3,656,115/70
 - (e) The children of the late John Mburu – Kshs.3,656,115/70
 - (f) The children of the late Salome Njoki - Kshs.3,656,115/70
 - (g) (i) Joseph Gachigi Zambetakis - Kshs.1,218,705/25
 - ii) Jeniffer Wanjiku Zambetakis – Kshs.1,218,705/25
 - iii) The children of the late Irungu Zambetakis – Kshs.1, 218,705/25

Any interest that may have accrued on the said account was to be distributed on a prorata basis specified above. Each beneficiary was required to settle his or her own legal fees. The land rent and rates, and the water bills that would have accrued in respect of each of the properties distributed to the beneficiaries of the estate of the deceased were to be settled by the affected beneficiary.

(d) The sum of 7,500 British Pounds alleged to be held in Grindlays Bank – United Kingdom was to be distributed equally to the seven units that comprised the beneficiaries of the estate of the deceased. If any of the amount held in Grindlays Bank had been paid out and used by any administrator to his/her benefit, then the value of the said amount was ordered to be deducted from his or her share entitlement of the KCB account. Being succession proceedings each party was ordered to bear own costs.

Christine the appellant in Nakuru Civil appeal No.221 of 2007 was aggrieved by those orders. She moved to this court citing sixteen grounds of appeal namely:

THAT the Learned Judge erred in law and in fact:

1. *in holding that the beneficiaries of the Estate of Rahab Wanjiru Evans (deceased) had been identified by consent which holding is contrary to the proceedings of 5th November 2000 when it was agreed by consent that amongst the evidence to be tendered was in respect of identification of the beneficiaries of the deceased's estate.*
2. *in holding that Agnes Waitwika Zambatakis, Lucy Muthoni Gachigi and Jane Nyambura Gachigi are not entitled to benefit from the deceased's estate.*
3. *when he misapprehended and misapplied the provisions of Section 38 of the Law of Succession Act.*
4. *in recognizing the deceased's grand children as beneficiaries of the deceased's estate and further fell into error in distributing the deceased's estate amongst them contrary to the clear stipulations of Section 38 of the Law of Succession Act and the evidence on record where it was*

clearly established that the said grandchildren were not dependants on the deceased at the time of her demise.

5. in distributing the deceased's estate amongst the beneficiaries without first making a provision for all of the estates liabilities.
6. in failing to distribute the deceased's estate equally amongst the rightful beneficiaries thereof.
7. in distributing the estate of the deceased without any consideration of the mode of distribution proposed by the appellant.
8. in failing to appreciate that Lucy Muthoni and Jane Nyambura had duly authorized the appellant to represent them in the succession cause proceedings.
9. in the exercise of his discretion in distributing the homestead in parcel No. Nakuru Municipality Block 4/491 to Peter Gachege Njogu and not to the appellant whereas it had been established in evidence:-
 - i. THAT the appellant resided in the said property
 - ii. THAT **Peter Gachege Njogu** had established his home in another property and
 - iii. THAT most of the beneficiaries of the deceased's estate were agreeable to the said property being distributed to the appellant.
10. in relying heavily on the mode of distribution proposed by **Peter Gachigi Njogu** to the exclusion of the other proposals made by the other beneficiaries, more so the appellant.
11. in distributing parcel LR No.337/1004 Mavoko Municipality to the appellant whereas the same was subject of an ongoing litigation.
12. in failing to make a provision for the loss of Kshs.7 million occasioned to the estate by the respondents' refusal to take advantage of a rates waiver rebate offered by Municipal councils of Nakuru and Mavoko.
13. in distributing the deceased's estate without making any provisions for cases pending against the estate, making it difficult for the administrators to deal with them in the event that such claims succeeded.
14. in failing to deliver his judgment within a reasonable period the same having been delivered 17 months after the close of the case.
15. in the exercise of his discretion in making an order that each party to bear its own costs.
16. in failing to make adjustments in Peter Gachigi Njogu's entitlement in view of the sums withdrawn in his favour as ordered by consent on 8th February 2006.

Elizabeth was also aggrieved by that judgment. She filed Civil appeal Number 222 of 2007 raising nine (9) grounds of appeal. However, at the hearing **Mr. Simiyu** learned counsel appearing for her abandoned grounds 1, 2,4,6,8 and 9 and argued only grounds 3, 5 and 7. These read:

THAT the learned judge erred in law and fact:

3. in distributing the property and/or properties twice to two beneficiaries and/or making double allocations.
5. in omitting to allocate or provide for some of the beneficiaries entitled for distribution for reasons that they were not interested and did not take part in the proceedings the said beneficiaries being **Mary Wanjiru Mburu, Lucy Muthoni, Jane Nyambura and Agnes Waitwika Zambetakis**.
7. by distributing and/or allocating to the beneficiaries property which do not comprise the estate of the deceased.

Mercy Wanjiru Mburu, Agnes Waitakwa (Waitwika), Lucy Muthoni and Jane Nyambura the 1st, 2nd, 3rd and 4th cross –Appellants put in a cross appeal citing five grounds namely that the trial learned Judge

erred in law:

1. by not distributing the estate of the deceased equitably and/or fairly.
2. by referring to the 1st cross-appellant as “the Late **Wanjiru**”.
3. in excluding the 1st cross-appellant from the estate by not apportioning any part thereof to her despite being entitled thereto by virtue of being a beneficiary.
4. in finding that **Agnes Waitakwa Zambetakis, Lucy Muthoni Gachigi, and Jane Nyambura** (2nd, 3rd and 4th cross appellants) all daughters of the deceased were not interested in the estate.
5. in totally excluding the said **Agnes Gachigi Zambetakis, Lucy Muthoni Gachigi and Jane Nyambura** (2nd, 3rd and 4th cross appellants) from the estate of the deceased thereby not distributing the same to them despite being daughters of the Deceased.

On the 30th day of October, 2013 when both appeals came up for hearing, orders were made consolidating the two appeals to be disposed of as one. **Mr. Maingi Musyimi**, learned counsel for **Christine** the appellant in Civil appeal Number 221/2007 and the first respondent in Civil appeal Number 222 of 2007 urged us to fault the learned trial Judge’s findings on the grounds that he fell into an error of law when he excluded **Agnes Zambetakis, Lucy Muthoni** and **Jane Nyambura** who were daughters and therefore dependants of the deceased from their inheritance solely on account of their failure to participate actively in the succession proceedings; the learned trial Judge should have called for valuation reports for each of the property forming the estate, before distribution; there was duplication of distribution of parcel number 527 to **Jennifer, Christine** and **Wanjira** without specifying the mode of share holding; property No. Nakuru Block4/259 though identified to be part of the deceased’s estate does not appear in the distribution list; the learned trial Judge should not have equated the deceased’s grand children with the deceased’s children and given them shares of inheritance on equal basis as the law stipulates clearly that it is only the children of a deceased person who are to receive inheritance on an equal basis; the learned trial Judge should not have ignored consents entered into by the parties in the course of the litigation drawn to his attention and which had not been discharged; the said consents were in compliance with the requirements of Section 28 as read with section 29 of the Act; the Court should have factored the costs of on going litigation over assets forming the estate as liabilities to the estate; the learned trial Judge should not have distributed properties which were not yet free from litigation namely the Mavoko property; considering that parcel number 7/491 though not a gift *inter vivos* had all along been under the occupation of Christine and as all the other beneficiaries had agreed that this property should go to Christine, the learned Judge should not have over looked this.

Mr. Musembi Ndolo, learned counsel for the 3rd respondent in both appeals, **Mary Wanjira Gachigi** urged us to partially allow the appeal on the grounds that the learned Judge was obligated to give effect to the undischarged consent orders entered into by parties herein that the estate be distributed amongst the seven children of the deceased on the one hand and the ten (10) grand children of the deceased be given specific shares as per the consent of 25th January, 2002; **Agnes Zambetakis, Lucy Muthoni and Jane Nyambura** who had never renounced their claims to the deceased’s estate should not have been left out of the distribution of the deceased’s estate; disposal of Nairobi LR.No. 209/11540 was sufficient to clear all the liabilities owed by the estate of the deceased and LR. NKU Mun. Block 4/259 having been sold with the approval of the Court was not available for distribution. The litigation subject of this appeal having been protracted, in the event that this Court were to be inclined to find that there is cause to interfere with the learned trial Judge’s judgment, it should not remit the matter

back to the High Court for disposal. Instead it should finally determine it itself, opined **Mr. Ndolo**.

Mr. Githui for Elizabeth Wambui, Mary Nyambura, Margaret Wanjiru, Salome Njoki, Anthony Gachigi, Zainabu Wanjiru Gachigi, Joseph Gachigi Zambetakis, Jeniffer Wanjiru Zambetakis and John Irungu Zambetakis, the 4th to 12th respondents opposed both appeals on the grounds that two consents were filed first recognizing the 4th – 12th respondents as beneficiaries to the estate of the deceased and second, bestowing upon them certain properties as their share entitlement from the estate of the deceased together with attendant sums of money payable to them also from the estate of the deceased; as at the time of the trial, the 4th- 12th respondents had not yet been given from the estate of the deceased what had been bestowed upon them by the consent orders; the consents purporting to bestow benefits to these respondents were therefore frustrated and for this reason the learned trial Judge was entitled to reconsider the right of inheritance of these respondents along side those of other dependants.

Mr. Githui further argued that since none of the numerous documents filed in court as proof of liabilities owed by the estate to 3rd parties were produced in evidence as exhibits, the learned Judge could not be faulted for making provision that a property forming the estate be sold to offset liabilities owed by the estate; LR. No.7/491 given to **Peter Gachigi** now deceased cannot be rerouted to the appellant as the appeal against the said late **Peter** abated; replication of distribution of a property with no indication as to the mode of holding is an error curable by this Court; he (**Mr. Githui**) agrees with **Mr. Ndolo's** submission that the litigation herein having been protracted, it should not be remitted back to the High Court for rectification of any errors and or omissions that may have been occasioned by the learned trial Judge. Instead, this Court should finally determine this matter after valuation of all the estate property before redistribution.

Mr. Simiyu learned counsel for **Elizabeth** the appellant in CA. No.222/2007 and the first respondent in Civil Appeal No. 221/2007 supports the appeal partially on the grounds that Plot No. Block 7/527 and 538 were distributed to more than one beneficiary with no indication as to the mode of shareholding; the error of double distribution of estate property is curable. This Court can either confirm distribution of the properties to one of the beneficiaries to whom they were distributed and then compensate the other beneficiary with alternative equivalent property or alternatively the Court may direct that these be sold and proceeds shared equally as directed; he submitted that the three daughters of the deceased and one **Mercy Mburu** a daughter of the late Mburu erroneously left out of the distribution by the High Court should be catered for; Nakuru Block7/548 which had long been sold to Crater Automobiles should not have formed part of the distributable estate of the deceased.

In response to the submissions of **Mr. Ndolo, Githui** and **Simiyu. Mr. Maingi Musyimi** reiterated his earlier submissions and then added that **Elizabeth** has not given a basis for seeking to benefit from land parcel No. Nakuru Block4/ 258 and 259 and that plot 4/258 had already changed into the name of Peter now deceased.

This being a first appeal, our mandate is as set out in Article 164 (3) of the Constitution 2010; Section 78 of the Civil Procedure Act, Cap 21 Laws of Kenya, section 3 of the Appellate Jurisdiction Act Cap 9. Laws of Kenya and rule 29(1) of this Court's Rules. It is to re-appraise the facts before us and draw inferences of fact. See the case of

Selle and another versus Associated Motor Boat Company Ltd & others [1968] EA 123.

where it was observed thus:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally”

Being guided as above, we embark on the re-evaluation of the evidence presented at the trial and the consideration of the grounds argued before us in the consolidated appeals. The deceased died intestate as she left no will capable of taking effect (see the definition in Section 34 of the Law of Succession Act). In the absence of proof of any positive steps that the deceased may have taken during her life time to actualize her wishes to bequeath the entire estate to Elizabeth and or the homestead to **Christine**, the learned trial Judge was justified in discounting such claims and then proceeding to treat the entire estate as being available for distribution.

The consent of 15th day of January, 2002 brought on board **Christine, Elizabeth, Peter Gachigi Njogu** and **Mary Wanjiku** as joint administrators. Over twelve years today the four (4) administrators have not managed to distribute the estate and bring the litigation to a close. We therefore agree with the submissions of **Mr. Githui** that the litigation has been protracted because the administrators have been unable to agree on anything. In the same consent of 15th day of January 2002 it was agreed that the four (4) administrators together with **Lucy Muthoni, Agnes Waitwika and Jane Nyambura** were recognized as children of the deceased who had survived the deceased. Item 2 of this consent stipulated clearly that the estate of the deceased was to be shared equally amongst the seven units symbolizing the seven children who had survived the deceased. It however transpired later on as observed by the learned trial Judge in his assessment of the evidence before him that the deceased had had eleven (11) children in total from two unions. Nine of these, the **Gachigi's** were from the union of the deceased and one **Joram Gachigi** which union had ended in a divorce. The second union between the deceased and one **Arthur James Evans** subsisted till the death of the said Evans in 1989 leaving behind two issues **Elizabeth** and late **Susan**.

It is also evident from the record that four of the eleven children had predeceased the deceased. **John Mburu** died in 1998 leaving behind a widow and children; **Mary Salome Njoki** died in the year 2002 leaving behind two children namely a son **Antony Sabato Gachigi** and a daughter **Zainabu Wanjiru Gachigi**. We note from the record that the learned Judge had made an observation that **Zeverio Kiboi** who passed on way back in 1967 left no issue. However, in an affidavit deposed by **John Irungu Zambetakis** on the 18th day of February 2002 in support of the application seeking recognition of him and his two siblings as beneficiaries of the deceased's estate in their capacity as children of a deceased daughter of the deceased. He deposes that the said **Zeverio Kiboi Zambetakis** was the first child of the deceased; he died way back in 1967 leaving behind three issues namely the deponent **John Irungu Zambetakis; Jennifer Wanjiru Zambetakis** and **Joseph Zambetakis**. This deposition was never rebutted. It means that it is not true as observed by the learned trial Judge that **Zeverio Zambetakis** left no issues who could have been considered for inheritance. It has also been demonstrated that **John Irungu Zambetakis, Jennifer Wanjiru Zambetakis** and **Joseph Zambetakis** are not one and the same as **Agnes Zambetakis**. It is however clear that it is in fact late **Susan Evans** who died without leaving any issues.

Of the four deceased children of the deceased only **Mary Salome Njoki** had been named as a beneficiary in the petition filed by **Christine Wangare**. The estates of **Zeverio Kiboi, Zambetakis John**

Mburu and **Susan Wanja** had not been indicated as beneficiaries to the said estate. The cross petitioner **Elizabeth** also never mentioned them because according to her she was the sole heir to the deceased's estate. Failure to recognize the estates of the deceased children of the deceased is what led to the presentation of two applications one dated 1st February, 2002 and 18th February, 2002 respectively. These were consolidated and compromised by the consent order of the 25th day of January, 2002. This consent brought on board the children of **Mary Salome Njoki** namely **Antony Sabato Gachigi** and **Zainabu Wanjiru Gachigi**; the children of late **Mburu** and **Susan Wanja** namely **Salome Njoki**, **Margaret Wanjiru**, **Elizabeth Wambui**, **Mary Nyambura** and **Mary Wanjiru** and the children of **Zaverio Kiboi Zambetakis** namely **John Irungu Zambetakis**, **Jennifer Wanjiru** and **Joseph Zambetakis**. These form the 4th to the 12th respondents and the first cross-appellant, **Mercy Wanjiru Mburu**.

The consent of 25th January, 2002 bestowed on the above named grandchildren of the deceased specific identifiable properties and cash benefits. Two of the administrators namely **Elizabeth** and **Peter** recognized those benefits in their proposed lists of distribution of the deceased's estate. **Christine Wangare** however made no provision for grand children of the deceased arguing that these were not dependent on the deceased as at the time of the deceased's death.

Three versions have been put forth to us for our consideration with regard to the effect of the court's orders of 11th September, 2004 on the orders of the Court of 25th January, 2002. The first version is that by "**stayed**", meant "**suspended**" hence the learned trial Judge was entitled to reconsider the right to inheritance of the deceased estate by the grand children while the second is that in the absence of a discharge or variation of the said order, the learned trial Judge should not only have not ignored them but should have also confined the shares of the grandchildren of the deceased to those specified in the order of 25th January, 2002.

We are in agreement that, indeed the learned trial Judge made no mention of the effect of the order of 11th September, 2004 on the orders of 25th January, 2002. Failure to so comment notwithstanding, the learned Judge went ahead and recognized the status of the aforementioned grand children of the deceased as beneficiaries in their own right and distributed portions of the deceased's estate to them.

Notwithstanding knowledge that **Agnes Waitwika Zambetakis**, **Lucy Muthoni Gachigi** and **Jane Nyambura Gachigi**, the 2nd, 3rd and 4th cross-appellants had been recognized by the petitioner **Christine**, in the consent order of 15th January, 2002 and the lists of proposed mode of distribution by three of the administrators **Peter Njogu Gachigi**, **Christine Wangare** and **Elizabeth Evans** and that the three had not renounced their claims to the estate of the deceased, the learned trial Judge disinherited them on account of lack of interest and active participation in the succession proceedings. As to whether the learned Judge was right in his action will be determined by our construction of the relevant law.

Complaint was raised on submission that the learned trial Judge failed to call for valuation reports before distribution. We note from the entries on the record of 11th

September, 2004 and 15th November 2004 that the parties themselves did not make that request. Lack of request on the part of the parties notwithstanding, we find it should have been prudent on the part of the learned Judge to call for such valuation reports before distribution to establish the value of each property unless if he was satisfied with the terms of the order on distribution.

We note however that the numbering of the parcel numbers clearly indicate that the properties appear to have resulted from a subdivision of one large parcel of land that had formed Block7. We therefore assume that property located in the same area is likely to attract the same value save where its character distinguishes it from the rest by reason of development and size. Herein, all that the learned

trial judge was confronted with and what we have also been confronted with are parcel numbers with the exception of the mention of developments on two plots namely plot No. Block4/258 on which a petrol station stands and plot No. Block 4/491 where the deceaseds' homestead stood. We therefore find that by reason of the location of the estate property in the same locality, no beneficiary stood or still stands to be prejudiced if the deceaseds' estate is redistributed or the learned Judges distribution is in fact if confirmed in the condition in which it was during distribution by the learned trial Judge and as it is to be redistributed by us.

As for the assertion in the submission that since the appeal against late **Peter Njogu** had allegedly abated whatever benefits the judgment sought to be impugned bestowed upon the said late **Peter** could not be reversed, our opinion is that we do not agree that this is the entire correct position. We agree indeed in the absence of substitution for the late **Peter** with a legal representative the appeal against him lapsed. However, we do not agree that whatever had been distributed to him cannot be touched. Our reason for saying so is that in view of the peculiar nature of these proceedings being succession in nature, no proprietary rights had crystallized in his favour of the said late **Peter** as at the time of his death. All that had taken place was a distribution exercise carried out by the Court which action could only crystallize rights in favour of late **Peter** upon confirmation of the grant which had not yet been done. We therefore find that a part from the properties acknowledged to have been sold, the rest of the properties forming the estate are before us for distribution.

The provisions of law that have featured both in the learned trial Judges judgment and the rival arguments herein are **Sections 2, 26, 28, 29 38, 41 and 42** of the **Law of Succession Act**. (supra).

Section 2(1) (2) of the **Act** reads:-

***“2(1) Except as otherwise expressly provided in this Act, or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.*”**

There is no evidence on the record to demonstrate that any of the married children of the deceased ever received any gifts *inter vivos* from the deceased which could have formed the basis of their consideration as direct benefits from the deceased's estate capable of forming property of the respective estates of any of the deceased children of the deceased.

Section 26 of the Act guides a court of law on principles applicable to the making of provision for a dependant out of a deceased person's estate. This is one of the avenues that the grandchildren of the deceased used to bring themselves on board in the proceedings culminating in this appeal; a position accepted by the administrators then on board and all the other beneficiaries and that is why the orders of 25th January, 2002 were made with the consent of all the persons concerned. We are alive to arguments partly correctly advanced by **Christine** that the said consents were stayed. We however do not agree that the stay order wholly robbed the grandchildren of the deceased the benefits that had been bestowed on them by the Court. Indeed the order of 11th September, 2004 stayed all the previous consents but as observed herein above, these were never discharged and or varied. They thus remained in *situ* throughout the trial. To us, all that the effect of the stay order had on those consents was to forestall any intended execution that may have resulted from those consent orders before the trial Court's determination of the cause. It had no intention of rendering them useless and of no consequence. Second, since they had not been executed, their presence on the record did not operate to bar the court from looking beyond them in terms of either confirming the consent distribution as per the said consent, varying them or giving additional benefits to the beneficiaries, considering that there was no attendant

rider to those orders that they were final in so far as the claims of the grandchildren of the deceased to the deceaseds estate were concerned. Most importantly the learned trial Judge was entitled to consider whether these were in tandem with the provisions of the law or not. We therefore find that the learned trial Judge rightly exercised his discretion in bearing them in mind, in so far as these had recognized the entitlement of the affected grand children to the estate of the deceased on the one hand; and on the other hand recognizing that the Judge was not bound by the said consent orders. The stay was simply to enable parties suggest their respective modes of distribution to pave the way for the court to consider the issue of distribution of the deceased's estate in accordance with the law.

Section 29 (b) recognizes children and grandchildren of a deceased person as dependants. One of the complaints raised by Christine was that the grandchildren were not dependent on the deceased as at the time of the deceaseds' death and should not have been considered as such. Secondly, the grandchildren were entitled as of right as dependants of the deceased. In any case it had been deposed in the supporting affidavits to the compromised applications that the grand children were sons and daughters of the children of the deceased who had predeceased her. **Antony Sabato Gachigi** deposed that him and **Zainabu** were the children of **Salome**, a deceased daughter of the deceased. While **Margaret Wanjiru Mburu** deposed that she, **Salome Njoki, Maragaret Wanjiru, Elizabeth Wambui, Mary (Mercy) Nyambura** and **Jane Wanjiku** were daughters and a widow of the deceased **Mburu** respectively. **John Irungu Zambekatis** on the other hand deposed that him and two siblings **Jennifer Zambekatis** and **Joseph Zambekatis** were children of **Zeveio Kiboi**, the first born of the deceased. These depositions were not rebutted.

Although Sections 35 and 38 of the Laws of Succession Act is silent on the fate of surviving grandchildren whose parents' pre-deceased the deceased, the rate of substitution of a grand child for his/her parent in all cases of intestate known as the principle of representation is applicable. The law on this is section 41. If a child of the intestate has pre-deceased the intestate then that child's issue alive or *en ventre sa mere* or that date of the intestate's death will take in equal shares *per stirpes* contingent on attaining the age of majority. *Per stirpes* means that the issue of a deceased child of the intestate takes between them the share their parents would have taken had the parent been alive at the intestate's death.

We therefore find that there was sufficient justification to warrant the learned trial Judge considering the subjects of the consent of 25th January, 2002 as proper dependants of the deceased.

The High Court handled the matter pursuant to the power donated by **section 47** of the Act. We are seized of this matter pursuant to the power donated to us by Article 164 (3) **section 3(2)** of the Appellate Jurisdiction Act (supra). It is our most considered opinion that bearing in mind the history of this matter, interest of justice to all the parties involved demand that it be finally determined in this forum. In proceeding to so determine, we stand guided as hereunder:- .

1. Under **section 38** of the Act; all that one needed to establish in this cause was to show that they were either children or grandchildren of the deceased. Matters of failure to participate actively in the litigation proceedings should not have been a disentitling consideration in respect of the 2nd, 3rd and 4th cross appellants, in the absence of their renunciation of respective claims to the estate.
2. We affirm the learned trial Judges decision that the beneficiaries of the estate of the deceased herein comprised all the deceaseds' children surviving as at the time of distribution and the grandchildren of the deceased children of the deceased who had either predeceased her or died shortly after presentation of the Succession Proceedings to court.

3. The principle of equality as enshrined in **section 38** of the Act is the key principle which ought to have guided the learned Judge in the distribution exercise. We affirm that it is the same principle that will guide our redistribution exercise. In doing so, we find it fit not to treat the eligible grandchildren of the deceased as single units, but to reroute them back to benefit as such through their deceased parents house hold units.
4. We affirm the learned trial Judges decision to exclude the property sold to non beneficiaries as property not forming the deceaseds' estate and therefore not available for distribution. We however proceed to rectify the error of the learned trial Judges' failure to reflect such beneficiaries in the distribution on the record for purposes of confirmation of the grant. In the absence of such a reflection being made for such beneficiaries there will be no way they could have featured in the confirmed grant.
5. Double allocations are curable. Properties so bequeathed may be held by the respective beneficiaries as tenants in common or be sold and the proceeds shared equally.
6. We are also in agreement that litigation costs over assets forming the estate are a liability incurred on behalf of the estate and should have been provided for as such.
7. We agree that when carrying out the distribution exercise the learned trial judge should have balanced the competing interests as suggested by the administrators and thereby allow as much as possible instances in which there was concurrence. Likewise we are enjoined to do so in the exercise of our redistribution mandate.

REDISTRIBUTION.

A. Discounted Alleged Sales.

Mr. Musembi Ndolo informed the court that parcel number Block4/259 had been sold with the approval of the court but did not point out to us the specific court order authorizing the said sale. Likewise **Mr. Simiyu** also indicated to us that property number NKU Mun. Block7/548 had also allegedly long been sold to Crater Motors. Our response to this is that had this been the position, then nothing prevented the four administrators of the estate from revealing this as the correct position in their lists of proposed mode of distribution as they did for the other properties acknowledged by them to have been disposed of by the deceased during her life time. We find that in the absence of proof as indicated above, the learned trial judge rightly included these two properties as property forming the estate of the deceased and therefore available for distribution. We affirm that stand and we accordingly retain them in the redistribution list.

B. Confirmed Approved List of Sales.

The properties listed below were acknowledged by the four administrators to have been made by the deceased during her life time, a fact accepted by the learned trial Judge. They are not therefore available for distribution.

1. Jehova witness church- NKU Mun. Block7/544.
2. Said Abdalla Azubedi NKU Mun. Block 10/197 through proceedings undertaken in Nakuru HCCC No. 44 of 1999 Azubedi versus Rahab Wanjiru and Alice Bomet.

3. Allan Ngugi- NKU Mun. Block7/543.
4. Edward Mwangi-NKU Mun. Block7/540.
5. John Girishom Njoroge Kagui- NKU Mun. Block7/513.
6. Nathaniel Waithaka Wanyangi NKU. Mun. Block7/516.

(C) Properties Approved for Sale to Pay off the Estate's Liabilities to 3rd Parties .

- a. LR.209/11540- Nairobi
- b. LR.337/1004 Mavoko Mun. Council.

Terms of Sale

- a. Valuations to be done by valuers proposed approved by all or any of the remaining administrators with the approval of the court.
- b. Proceeds of sale of the properties aforementioned in (a) and (b) above to be deposited in a bank account to be opened in a sound financial institution in the joint names of the surviving administrators and the Deputy Registrar, High Court, Nakuru.
- c. Disbursements from the said account to be made in respect of only those claims that shall have been verified and approved by the court.

(iii) Residue of the Proceeds of sale of LR. 209/11540 & LR 337/1004 Mavoko Municipality if any to be distributed equally amongst the following:-

- a. The children of the late Peter Gachigi.
- b. The children of Salome Njoki namely Antony Sabato Gachigi and Zainabu Wanjiru Gachigi in equal shares.
- c. Agnes Waitwika Zambetakis in her own right.
- d. Mary Wanjiru Gachigi in her own right.
- e. Lucy Muthoni Gachigi in her own right.
- f. Elizabeth Wanjira Evans in her own right.
- g. Jane Nyambura Gachigi in her own right.
- h. Christine Wangari Gachigi in her own right.
- i. The children of the **late Zaverio Kiboi Zambetakis** namely late **John Irungu Zambetekis, Jennifer Wanjiru Zambetakis** and **Joseph Zambetakis** in equal shares.
- j. The children of late **Mburu Gachigi** namely **Salome Njoki Mburu, Margaret Wanjiru Mburu, Elizabeth Wambui Mburu, Mary Nyambura Mburu** and **Mercy (Mary) Wanjiru Mburu** in equal shares.

C. Sale of Movable Namely

Isuzu FTR, KXF 397 Nissan Tanner KT4151, Peugeot KPW 255, 504 Station Wagon, Peugeot 404 pickup KLM 318, BMW KYQ079, assorted scrap metal, new Massey Ferguson plough, Massey Ferguson Tractor, proceeds of the sale of twelve (12) heads of cattle. All these to be valued and sold. The proceeds of the sale to be pooled together with the proceeds of sale resulting from the sale of LR.

209/11540 Nairobi and LR 337/1004 Mavoko Municipality and to be applied in a similar manner as in number (E) above. Any residue thereof also to be applied in a similar manner.

E. Properties Approved to be Held in Common.

(a) LR. NKu Mun. Block 4/258, LR. NKu Mun. Block 4/259 to be held as tenants in common by the children of the late **Peter Gachigi**, the children of late **Salome Njoki (Antony Sabato Gachigi and Zainabu Wanjiru Gachigi); Agnes Waitwika Zambetakis; Mary Wanjiru Gachigi; Lucy Muthoni Gachigi; Elizabeth Wanjira Evans; Jane Nyambura Gachigi, Christine Wangare Gachigi**, the children of the late **Zeverio Kiboi** (children of the late **John Irungu Zambetakis, Jenniffer Wanjiru Zambetakis** and **Joseph Zambetakis**); the children of late **Mburu Gachigi (Salome Njoki Mburu, Margaret Wanjiru Mburu, Mary Nymabura Mburu and Mercy (Mary) Wanjiru Mburu)**

Alternatively: The said properties LR. NKu Mun. Block4/258 & NKU Mun. Block4/259 to be sold and proceeds thereof to be shared equally amongst the beneficiaries identified and named above.

(c) LR. NKu Mun. Block7/491 on which the homestead of the deceased was located. The learned trial Judge made observation that this property measures ten (10) acres or thereabouts. There is indication that there are two homesteads on this property. One comprising the homestead of the deceased and another comprising the homestead that the late **Peter Gachigi** had started putting up for himself. The ten (10) acres or so to be shared equally amongst all the living and household units of the deceased children of the deceased namely children of the late **Peter Gachigi** in equal shares. The portion of late **Peter** to be sited where he had already started putting up a homestead; children of the late **Salome Njoki (Antony Sabato Gachigi and Zainabu Wanjiru Gachigi-** in equal shares); **Agnes Waitwika Zambetakis; Mary Wanjiru Gachigi, Lucy Muthoni Gachigi, Elizabeth Wanjira Evans.** The portion of **Elizabeth Wanjira Evans** to be sited where the deceased's' homestead stood. In other words **Elizabeth Wanjira Evans** to inherit the deceased's' homestead **Jane Nyambura Gachigi; Christine Wangare Gachigi;** the children of the late **Zeverio Kiboi** (children of the late **John Irungu Zambetakis, Jeniffer Wanjiru Zambetakis** and **Joseph Zambetakis** in equal shares); the children of late **Mburu Gachigi (Salome Njoki Mburu, Margaret Wanjiru Mburu, Mary Nyambura Mburu and Mercy (Mary) Wanjiru Mburu** in equal shares.

F. Shares in Gema and Nyakinyua at Gil Gil.

These to be sold and the proceeds to be shared equally amongst all the beneficiaries of the estate of the deceased as identified herein above i.e in E above.

G. Proceeds of Bank Accounts held by the deceased in KCB Nakuru, National Bank, Grindlays Bank etc or any other identifiable financial institution upon being ascertained and verification by the Deputy Registrar of the High Court Nakuru.

The funds so held to be shared equally amongst the children of the late **Peter Gachigi** in equal shares; children of late **Salome Njoki (Antony Sabato Gachigi and Zainabu Wanjiru Gachigi** in equal shares). **Agnes Waitwika Zambetakis, Mary Wanjiru Gachigi, Lucy Muthoni Gachigi, Elizabeth Wanjira Evans, Jane Nyambura Gachigi, Christine Wangari Gachigi;** the children of late **Zeverio Kiboi** (children of late **John Irungu Zambetakis, Jenniffer Wanjiru Zambetakis** and **Joseph Zambetakis** in equal shares); the children of late **Mburu Gachigi (Salome Njoki Mburu, Margaret Wanjiru Mburu, Mary Nyambura Mburu and Mercy (Mary) Wanjiru Mburu** in equal shares.

H. Individual Plots

Elizabeth Wanjira Evans- NKu Mun. Block No.7/497,498,499,500 and 577. Christine Wangari Gachigi- NKu Mun. Block No.7/506,507,508,509 and 510. Peter Gachigi. NKu Mun. Block No.7/492,493,494,495 and 496. Mary Wanjiru Gachigi. NKu Mun. Block No.7/501,502,503,504 & 505. Jane Nyambura Gachigi NKu Mun. Block No.7/511,512,517,518 and 519. Lucy Muthoni Gachigi NKu Mun. Block No.7/520,521,522,523 and 525. Agnes Waitwika Zambetakis. NKu Mun. Block No.7/526,527,528,529 and 530. Children of late Zaverio Kiboi Zambetakis NKU Mun. Block No.7/531,532,533,534 and 535. Children of late Salome Njoki NKu Mun. Block No.7/536,537,538,539 and 541. Children of late Mburu Gachigi NKu Mun. Block No.7/542,545,546,548 and 549.

I. COST of Litigation in Cases Involving Property Belonging to the Estate.

These to be ascertained in the same manner as liabilities owed by the Estate to 3rd parties and be paid for in a like manner.

H. Administrators Costs.

These to be ascertained and strictly proved to have been incurred for the benefit of the Estate and then be paid for as any other 3rd party liabilities.

K. Incidentals i.e transfer fees and costs of transfer of property from the Estate to the beneficiaries. These to be met by each individual beneficiary respectively.

L. Court Supervision. This is necessary for the progression of the winding up of the Estate. To be supervised by the Deputy Registrar High Court, Nakuru and the Resident Judge in Nakuru.

M. There will be liberty to apply if need be.

Dated and Delivered at Nairobi this 18th day of December, 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR.



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