



REPUBLIC OF KENYA



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**Denga v Bharak (Succession Cause 110 of 1998)
[2024] KEHC 14740 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 110 OF 1998
E OMINDE, J
NOVEMBER 27, 2024
IN THE MATTER OF THE ESTAE OF REUBEN ENGA OTIENDE (DECEASED)**

BETWEEN

MARGARET AORO DENGA PETITIONER

AND

AMOS ODHIAMBO BHARAK OBJECTOR

JUDGMENT

1. The brief facts of this cause are that the deceased, Reuben Enga Otiende, died intestate on 20/10/1996. The Petitioner herein, being his wife, applied for a Grant of letters of Administration. The Petition listed the surviving beneficiaries of the deceased Estate as hereunder;
 - i. Beatrice Akinyi Denga (Daughter)
 - ii. Joyce Aoko Denga (Daughter)
 - iii. Carolyne Atieno Denga (Daughter)
 - iv. Linet Aoko Denga (Daughter)
 - v. Pauline Anyango (Daughter)
 - vi. Maurine Adhiambo Denga (Daughter)
 - vii. Everlyne Atieno Denga (Deceased)
 - viii. Margaret Aoro Denga (Widow)
2. The Petition also listed the properties comprising the deceased Estate as follows;
 - i. KISUMU/KASULE/1516



- ii. ELDORET MUNICIPALITY BLOCK 12/365
3. Grant of letters of Administration was issued to the Petitioner and confirmed on 12/07/2013. Subsequent thereto an application for rectification of the grant was made by the Petitioner on 25th November 2013 and an Amended Certificate of Confirmation of Grant was issued on 21/07/2014.

The Objection

4. On 20/07/2015, the Objector filed a Summons for Revocation of Grant seeking that the Grant of Letters of Administration intestate to Margaret Aoro Denga on 26/09/2022 and subsequent confirmation on 21/07/2014 be revoked on the grounds that;
 - a. The proceedings to obtain the grant were defective in substance.
 - b. The grant was obtained fraudulently by making of a false statement and/or concealment from the court of material facts.
 - c. That the grant was obtained by means of untrue allegations of facts essential in point of law to justify grant.
 - d. Spent
 - e. Spent
5. The grounds upon which the Summons is premised are as follows;
 - a. The Respondent/Petitioner/Administrator fraudulently obtained the grant herein and had it confirmed without disclosing pertinent facts to wit;
 - i. That the deceased had other beneficiaries at the time of his death namely, Amos Odhiambo Bharak and Pamela Auma Karira
 - ii. The Petitioner/ Administrator did not mention the deceased properties in the affidavit in support of the petition for letters of administration which was meant to mislead the court.
 - a. That the objector is one of the surviving beneficiaries of the first house.
 - b. The Petitioner/Administrator had even discussed with the objector on how they will administer the estate but secretly moved to court and initiated these proceedings behind the objector's back.
 - c. The proceedings to obtain the grant and have it confirmed were defective in substance in that other beneficiaries were left out.
 - d. That the grant as was requested and granted is materially different from what was confirmed finally.
 - e. The process was tainted with irregularities misrepresented and concealment of material facts from the beginning which renders it null and void.
 - f. That despite the objection to making of grant being on record, the same was not heard
6. The Summons was supported by the facts deposed in the affidavit of Amos Odhiambo Bharak thereto annexed. He deposes that he is a son to the deceased. That his sister, Pamela Auma Karira had not been



- included in the succession proceedings. That he came to know of these proceedings in 1999 when he visited the High Court registry. He annexed a copy of his objection as AOB1
7. That he then filed an Objection to the proceedings alongside his brother who has since passed on. That his Objection the same was never heard. That on 15/07/2015, upon visiting the registry, he discovered that the grant had been confirmed in total disregard of his objection and that he was never served with any Court documents either.
 8. He further deposed that upon perusal of the court file, he discovered that Margaret Aoro Denga the wife, had petitioned for letters of administration and the Grant was issued on 26/09/2002 and confirmed on 21/07/2014. He stated that the Petition by the widow, the grant of letters of administration and confirmation of the same was tainted with fraud, misrepresentation and concealment of material facts. He annexed a copy of the Grant as AOB2 and a copy of the Certificate of Confirmation of Grant as AOB3
 9. The deponent averred that the Petition by the widow for the Grant and the Confirmation of Grant was tainted with fraud, misrepresentation and concealment of material facts to wit; the administrator failed to inform the court that the deceased had other beneficiaries and was in the process of disposing the parcels of land to their detriment; the Petitioner did not indicate the properties that belonged to the deceased prior to his death in Form P&A5. In the Petition for Grant and only listed them in the Summons for Confirmation of Grant.

Petitioners' Replying Affidavit

10. In opposition to the Summons, the petitioner filed a Replying Affidavit dated 26/10/2018. She states that the Objector is her stepson by virtue of another marriage to the deceased. That by the time the deceased died, she was his only wife having married him in a monogamous marriage. She annexed her Marriage Certificate as MAD2
11. She deposed that she applied for and obtained Grant of Letters of Administration intestate on 26/09/2022 and that the applicant never objected to the initial grant despite it having been gazetted in the Kenya Gazette as required by law. She stated that the heading of the application and the body are disjointed and thus cannot sustain the prayers sought. She annexed a copy of the Grant as MAD1.
12. She further deposed that the applicant is not being candid by not telling the court the fate of the application dated 19/01/199 together with another party, Benson Caleb. She contended that the application is defective in form and substance as it has been made 19 years after the death of the deceased with no reasonable excuse given for the delay. She deposed that under section 66 of the [Law of Succession Act](#), she ranks higher in preference to the Applicant where the deceased died intestate.
13. The Petitioner averred that the deceased left an estate plagued with liabilities and debt which she has redeemed on her own with the assistance of the children while the applicant stood by and now wishes to reap where he did not sow. She stated that she has been paying rates, rents, water and electricity for plot no. Eldoret municipality Block 12/365 since 1996 to date as that is the matrimonial home that deceased left her in. That it is therefore unfair and unjust for the Applicant to sit and wait for to settle all the liabilities and then demand to be given a share.
14. She stated that by the time the deceased died, he left behind one residential house at Pioneer Estate and 6 rooms for rental which she used to sustain the huge household. That she has since built other additional rooms at her expense which now the Applicant wishes to take away from her.
15. She deposed that all the monies she collects from Eldoret Municipality Block 12/365 Pioneer Estate she used to feed and educate the children of the deceased who she has seen through schools and colleges.



That the applicant used to live and work in Nairobi up to the year 2016 when he lost his job and moved into her house at Pioneer Estate and together with his wife, he has been terrorising her with insults and destruction of property.

16. She urged that the applicant has made strong allegations of fraud and misrepresentation but has not placed any evidence before the court to prove his claims. Thus, he has not discharged the evidential burden to the required standard. She urged the court to dismiss the application for lack of substance and that the Applicant has not demonstrated that he will suffer any prejudice if the existing Grant is upheld.

Applicant's Supplementary Affidavit

17. In response to the Replying Affidavit, the Applicant filed a Supplementary Affidavit dated 30/11/2018. He deposed that he filed an Objection on 29th July 1999 since the petitioner never notified them about the decision to conduct succession on behalf of their late father's estate and further, that she excluded them from the list of beneficiaries, leaving them in the dark until 2009. He stated that the Petitioner deceived him into abandoning the application he had filed in 1999 on the promise that she would amend the grant and include the name of his other siblings which she did not prompting him to file the application in 2015.
18. He deposed that the deceased had two other wives; Bedinah Awiti who married the deceased in the 1940s and Judith Awiti who married the deceased in 1952. Further, that at the time of the alleged marriage of the deceased to the Petitioner, the deceased was still married to his 1st and 2nd wives which marriages were contracted under Luo customary law. That additionally, that the deceased had 3 children with each of these two wives and as such, the marriage to the Petitioner was not valid under Kenyan Law.
19. He urged that the petitioner is the one who delayed this matter by being mischievous and failing to act fairly. That she has lost credibility by listing herself and her children as the sole beneficiaries of the estate yet she knew the deceased had other wives and children. He urged that the deceased had 14 rental houses in Eldoret Block no, 12/365 Pioneer Estate which brings in income of over Kshs. 90,000/- per month and that they were not 6 rooms as alleged. Further, that there were no liabilities apart from the normal rates and rent payable to the government.
20. The applicant deposed that it is not justifiable for the petitioner to say she used Kshs. 90,000/- per month, translating to Kshs. 1,080,000/- per year all on school fees and feeding her children, some of whom do not belong to the deceased and maintained that it is clear from the certificate of confirmation of grant that the petitioner misrepresented the facts by listing her children as the only beneficiaries of the estate yet she knew the deceased had other wives and children.

Hearing of the Application

21. The matter was referred to Mediation but the same was not successful and it was therefore set down for hearing on 03/12/2018. The parties were granted an opportunity to file and exchange witness statements and documents. However, on 25/07/2022, the parties indicated to the court that the Petitioners have since recognised the Objector as a beneficiary of the deceased Estate and it agreed that each party file their proposed mode of distribution of the Estate. Eventually, on 30/10/2023, Counsel for both parties recorded a Consent which compromised the Objection dated 19/01/1999 as follows;
That the Objection dated 19th January 1999 be allowed in the following terms;



- i. Paragraph 1, 2 3 and 4 are allowed. The objector, Amos Odhiambo Barak shall furnish this court with the particulars of the dependants of the houses of Peninah Denga and Judith Denga.
 - ii. P&A5 be amended to include a property known as GEM/MARENYO/765 where the deceased had a share.
 - iii. Subject to (i) and (ii) above determination of distribution of the estate of the deceased do proceed by way of written submissions. Objector to file submissions within 30 days. Upon being served, Objector (sic) shall file and serve her submissions.
22. Subsequently Counsel filed submissions on behalf of the respective parties. In spite of the Consent as herein above summarised a perusal of the submissions reveals that both Counsel submitted on both the Application for the revocation of grant as well as the issue of the distribution of the estate. I will therefore summarise both submissions as relevant and give a determination on the issue under contention which is the distribution of the deceased Estate.

Objector's Submissions

23. The objector filed submissions dated 29/01/2024 through the firm of Messrs Kiproop Luseria & Co Advocates. Citing Section 107(2) of the Evidence Act, he urged that the Petitioner is bound to prove her case on a balance of probabilities and particularly in reference to the allegation, by the Petitioner, that the deceased left the estate with pending debts and liabilities.
24. She urged that during the hearing, the Petitioner did not produce any evidence to support her contention that the deceased left the estate with debts or that she had settled the debts and liabilities at her own expense. Further, that she also failed to prove that she built other rooms at her own expense on the Pioneer plot. She urged that these assertions should remain mere allegations and should not be put into consideration when dividing the property of the deceased.
25. The Objector cited Section 40 of the Law of Succession Act, urging that as the deceased died intestate survived by three widows and children, the provision was the relevant anchor for the distribution of the estate of the deceased. He urged that the direct application of Section 40 of the Law of Succession Act will lead to inequality and injustice to the 1st and 2nd wife. Counsel submitted that this is because the 1st wife was married to the deceased in the 1940s and the 2nd wife was married to the deceased in 1952 under customary law while the 3rd wife was married to the deceased in July 1996.
26. Counsel submitted therefore, that it was the 1st and 2nd wife who worked hard in assisting the deceased acquire the properties whereas the 3rd wife did not assist in any way. That the efforts of the 1st and 2nd wife as the persons who assisted the deceased acquire these properties should be considered.
27. Learned Counsel further submitted that the 3rd wife who is the Petitioner herein was married on July 1996 just two months before the Deceased died and the properties the subject matter of the Estate were acquired before the year 1996. The example was given of the land property known as KISUMU/KASULE/1516 Measuring 0.5 Ha which he states was acquired on 29/5/1989.
28. Learned counsel submitted that the provisions of Section 40 of the Law of Succession Act and their implication for the 1st and 2nd wives of the deceased person have been considered in various decisions of the High Courts in Kenya. That the consensus is that it is unfair that a wife, married decades or more before a second or third wife, is required to share the estate of the deceased equally with subsequent wives, as well as the children of the deceased regardless of whether or not she had contributed to the acquisition of the property comprising the estate. Counsel relied on Succession Cause No. 110 of



- 2010- In The Matter of The Estate of Samwel Miriti (Deceased) MMM'M vs AIM in support of this submission.
29. Additionally, she cited Section 8 of the Matrimonial Properties Act, [Act No. 49 of 2013](#), urging that in trying to solved the inequality in Section 40 of the [Law of Succession Act](#) provides that;
- (1) If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the—
 - (a) matrimonial property acquired by the man and the first wife shall he retained equally by the man and the first wife only, if the property was acquired before the man married another wife; and
 - (b) matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives ."
30. Counsel further referred the court to the finding of Justice Mumbi Ngugi in In re the Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] eKLR where the Judge held that the first wife was married 21 years before the second wife and had significantly assisted the Deceased in acquiring the properties be given 10 acres out of the 56 acres comprising the estate in recognition of her contribution to the acquisition of the land.
31. Counsel therefore submitted that in distributing the deceased Estate, the 1st and 2nd wives should be given $\frac{1}{4}$ of the land property to share among themselves for the efforts and hard work they put in helping the Deceased to acquire the land properties before the 3rd wife got married to the Deceased. That the $\frac{1}{4}$ of the properties should be shared equally between the 1st house and the 2nd house. The remaining $\frac{3}{4}$ of the land property should then be divided in accordance to Section 40 of the [Law of Succession Act](#).
32. She submitted that the $\frac{3}{4}$ share of the property be divided in accordance to Section 40 of the [Law of Succession Act](#) as follows; The 1st wife is Deceased and had 3 three children, this means that the 1st house has 3 units. The 2nd wife is still alive and has three children, this means that the 2nd house has 4 units and that the 3rd wife is still alive and has 6 children, this means that the 3rd house has 7 units. The total number of units is 14. The $\frac{3}{4}$ of the land property will be divided into 14 units each, after which the 14 units shall be shared out between the three houses in the ration 3:4:7. The portion devolved to each house shall, thereafter, be shared equally between the children in each house in accordance with Section 38 of the Law of Succession.
33. In conclusion, counsel urged that the Objector has proved his case on a balance of probability as required by law hence the estate of the deceased should be divided as submitted and that the successful party be awarded the costs of the suit.

Respondent's Submissions

34. The Petitioner/Respondent filed submissions dated 17/07/2024 through the firm of Ngigi Mbugua & Company Advocates. Counsel for the Petitioner submitted that the allegation that the deceased was survived by three wives is strongly opposed. He reiterated that as at the time of death of the deceased, the petitioner was the only wife of the deceased having married him in a monogamous marriage.
35. He urged that it is alleged that the 1st wife was married to the deceased in the year 1940s' while the 2nd wife was married to the deceased in the year 1952 under Luo customary law but the objector did not



provide any evidence of the existence of marriage between the deceased and the alleged 1st and 2nd wife under customary law. There was no evidence of dowry payment and ceremony conducted.

36. Counsel cited Section 107 (I) and (2) of the *Evidence Act* Cap 80 LOK in support of this submission and that section provides as follows;
- 1) Whoever desires any court to give Judgment ns to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exists.
 - 2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
37. Further, Counsel submitted that Section 108 of the same Act is also to the effect that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. He stated that Section 109 states that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
38. Counsel restated the Petitioners' deposition that the deceased left an estate which was plagued in debt and liabilities as already herein above summarised and reiterated the assertion that the applicant has failed to recognize all the efforts of the petitioner but is only keen to share the net assets without bearing or shouldering any of its liabilities that had accrued over the years.
39. Counsel urged that the ratio of 3:4:7 as regards distribution of the estate proposed by the applicant shall thus result to unfairness on to part of the petitioner. He submitted that in the unlikely event that the honourable court is inclined to find the alleged 1st and 2nd wife as legally entitled to the deceased's estate, the court be guided by the wise words of the court in Succession cause no. 123 of 1999, Rahab Njeri Kariuki vs Joyce Waruguru Kariuki & 2 others (2016) eKLR where the court held that:-
- In sharing the net estate of an intestate polygamous deceased person, the court exercises a discretion and is required to bear in mind the principles of fairness and equity and not equality among the beneficiaries”
40. Counsel urged that the deceased estate be distributed equitably and not equally and further, that Section 40 of the *Law of Succession Act* is not to be invoked in this succession cause. In support of this final submission, counsel cited the decision of the Court of Appeal in Scholastica Ndululu Suva vs Agnes Nthenya (2019) eKLR where the court observed that
- “ a blind application of section 40 of the *law of succession Act* may lead to absurdity. That section Provides for a general distribution of the estate of a polygamous deceased person, factual circumstances of the particular case that many be relevant in ensuring equitable and fair distribution of the estate. ”
41. In conclusion, counsel submitted that should the court be inclined to find the other alleged beneficiaries entitled to the deceased's estate, the Petitioner invites it to consider the facts and circumstances of this matter so that the mode of distribution is equitable and not equal.

Analysis & Determination

Distribution of estate

36. Section 40 of the *Law of Succession Act* provides as follows on distribution of the estate where a deceased person died intestate;



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.

Priority to Petition for Grant of Letters of Administration

42. Section 66 of the *Law of Succession Act* provides as follows:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference -

- a. surviving spouse or spouses, with or without association of other beneficiaries;
- b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

43. In Re Estate of Chesimbili Sindani (Deceased) [2021] eKLR, where the Court noted the following:

“The estate shall be distributed amongst all the children, regardless of their gender and marital status. There is no consent or consensus amongst the children on distribution, and, in the circumstances, I shall follow the position stated by the Court of Appeal in Justus Thiora Kiugu, & 4 Others vs. Joyce Nkatha Kiugu & Another [2015] eKLR (Visram, Koome and Otieno-Odek JJA), that where the parties filed consents on distribution, the court would have no reason not to endorse the distribution proposed, so long as the same had the concurrence of all the persons beneficially entitled, even if the proposed distribution departed from what the law provided on distribution. However, where there is no consensus, the court strictly applies the law.”

44. In Douglas Njuguna Muigai v John Bosco Maina Kariuki & Another the court noted the absurdity of a blind application of Section 40 of the *Law of Succession Act* and held that:

“(17) it is therefore evident, that, although section 40 of the *Law of Succession Act* provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”



45. Justice Martha Koome (as she then was) in Succession Cause No. 1033/1996 In the Matter of the Estate of Mwangi Gitire – Deceased acknowledged the unfairness of the mode of distribution and stated as follows:-

“Perhaps it is the high time, the commission charged with the responsibility of law reform addressed the issue of the inequality raised under Section 40 of Cap 160. The 1st widow’s entitlement vis vis the 2nd widow or subsequent widow who perhaps come into a marriage much later to find that the 1st widow has worked tirelessly and sometimes denying herself tremendous comfort to enable her husband create and accumulate wealth. The 1st widow is then relegated by virtue of Section 40 of the Law of Succession to the same position as the last-born child of the 2nd or subsequent widows. The widow is supposed to be considered as a unit alongside the children.

In this regard the last-born child of the subsequent widow who will have contributed nothing is elevated in law because he will have notarily (sic) absolute rights but will be entitled to an equal share with the 1st widow. The 1st widow is only entitled to a life interest and after the life interest the property devolves to her children in equal shares absolutely. I agree with counsel for the protester 1st widow that this state of affairs bleeds inequalities and inequities in our law and ought to be addressed urgently to enable our courts dispense justice that meets the provisions of *the Constitution* of Kenya and give due regard to the principles of non-discrimination on the basis of sex which are also the principles of non-discrimination provided for under the International Conventions especially the Convention Against all forms of Discrimination against women (C.E.D.A.W.) which Kenya has signed and ratified. If the principles laid down in the International conventions were to be applied, the 1st widow would get a share of the property acquired during her marriage to the deceased, leaving the other half share to be shared by all the deceased heirs. If the distribution is of a polygamous intestate, each widow would get a share of what she contributed to.”

46. I have considered and addressed my mind at length to the submissions made on the provisions of Section 40 of the *Law of Succession Act* and its implication on the first wife of a deceased person vis a vis a younger wife or wives as the case maybe in that if that section of the law is to be applied strictly, then all the beneficiaries of a deceased wives and children alike would all inherit an equal share of the deceased estate without any consideration being placed on the fact that the 1st wife in most cases did contribute substantially to properties that were acquired before the other wife or wives came into the scene. The consensus has been that this is unfair and so the Courts have moved to distribute estates equitably depending on the contributions made by each wife.
47. Based on then above, Counsel for the Objector then submitted that in distributing the deceased Estate, the 1st and 2nd wives should be given $\frac{1}{4}$ of the land property to share among themselves for the efforts and hard work they put in helping the Deceased to acquire the land properties before the 3rd wife got married to the Deceased. That the $\frac{1}{4}$ of the properties should be shared equally between the 1st house and the 2nd house. The remaining $\frac{3}{4}$ of the land property should then be divided in accordance to Section 40 of the *Law of Succession Act*.
48. Much as I concur wholly and associate myself fully with these decisions cited by Counsel and herein above summarised, it is my considered opinion that these decisions are not applicable in this case for the simple reason that the decisions are about the interest and/or share of wives over their deceased husband’s property. It does not relate to the interest and/or share of children over their deceased father’s property.



49. This is because it has been held the contribution that a wife made needs to be proved and even if a court were to find that the requirement of proof as required under Section 107 of the Evidence Act places upon a wife an unfair burden as Justice Mumbi Ngugi held in *In re the Estate of the Late George Cheriro Chepkosiom (Deceased)* [2017] eKLR (Supra), then the Court under Section 119 of the Evidence Act can safely presume that a 1st wife did contribute to the acquisition of property that comprises the Estate of a deceased before the marriage to the other wife or wives was contracted. Of note is that this presumption is for the benefit of the wife who has moved the court.
50. Going by the above decisions of the courts, it is not enough for the Objector to state that because the Petitioner got married after the properties were acquired, then they should get a larger share because their mother contributed to their acquisition. Even if the Court were to find that there was contribution by the 1st and 2nd wives, then they ought to have demonstrated that in court by themselves by explaining the nature of the contribution that they made. They did not and as already stated above, such a presumption cannot be made for the benefit of the children.
51. On the other hand, the Petitioner deposed that she has improved the property over time, has been paying land rates and rents and has shouldered all the liabilities of the Estate which she says were many. She further stated that she has built additional units to the property.
52. However, the long and short of this all is that she needed to avail evidence to prove all that she deposed she has done to improve the property. She did not. The Court shall therefore not make any assumptions but shall presume in the absence of evidence that the Estate as it is now is as the deceased left it when he died.
53. Further, the Petitioner has not at all alleged that she did contribute in any way or at all to the acquisition and development of the property that comprises the deceased Estate. The Objector deposed and she did not at all refute and/or deny the Objector's deposition that she got married to the deceased three months before his death.
54. It is common ground that the deceased died on 20/10/1996. Even though the Court is not able to fully discern the date of the marriage of the Petitioner to the deceased for reasons that the photocopy annexed as MAD2 was not well captured, the Court is able to clearly note the month and year as July 1996 thereby confirming the Objector's deposition. It follows therefore that the Petitioner then cannot be treated differentially because there is nothing to show that she put in any extra effort on the property before the deceased died.
55. I have considered the depositions made by the Objector with regard to who the survivors of the 1st and 2nd house are in light of the distribution ratio proposed by Counsel in their submissions. I also take note of the fact that save to urge that the Estate be distributed equitably and not equally, Counsel for the petitioner did not propose any ratio.
56. The Objector stated that each of the 1st two wives had three children. He deposed that the 1st wife and her children have all since died. There was no deposition made to the effect that they left behind any dependants. The Court shall therefore presume that there are none.
57. He further deposed that in their 2nd house, his brother died and he remains with his sister. He did not state that his brother left behind any dependants. The Court shall again presume that there is none. I note also that in the proposed ratio, in their submissions, the Objector has now included his mother even as she did not feature at all in both his affidavits as above summarised and that in actual fact, his Objection was on his own behalf and that of his siblings.



58. Because it is trite law that matters of evidence belong to the purview of the pleadings and cannot be adduced at the stage of submissions, the Court shall disregard this aspect of the Objector's submissions the issue of whether or not his mother is still alive having not been pleaded.
59. In light of my above findings, I am satisfied that Section 40 of the *Law of Succession Act* is the right provision of the law under which the Estate of the deceased ought to be distributed. This is because based on my analysis of the evidence as above, I am very well satisfied that this is a straight forward case of a deceased polygamous man whose other two wives are also deceased leaving the Estate to be distributed among his surviving widow and the surviving children since there is no evidence that his deceased children left behind any dependants.
60. Each of the surviving children and including the widow shall therefore be taken as a single unit. The units contrary to the proposal by Counsel for the Objector shall be as follows; 2 units are the objector and his sister being the children for the 2nd House. 6 units are each of the children for the 3rd House 1 unit is the surviving widow who is the Petitioner. The Estate shall therefore be distributed at the ration of 2:7
61. The upshot of the above therefore is that the Certificate of Confirmation of Grant issued on 12/07/2013 as amended on 21/07/2014 is now hereby revoked with costs to the Objector.

READ DATED AND SIGNED AT ELDORET ON 27TH NOVEMBER 2024

E.OMINDE

JUDGE

