



REPUBLIC OF KENYA



In re Estate of the Late John Kiptum Bartilol (Deceased) (Succession Cause 17 of 2001) [2023] KEHC 22829 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22829 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 17 OF 2001
RN NYAKUNDI, J
SEPTEMBER 28, 2023**

BETWEEN

DINAH JEPKEMBOI BARTILOL 1ST PETITIONER

JAPHETH KIPROTICH BARTILOL 2ND PETITIONER

AND

HILLARY KIPRUTO BARTILOL 1ST RESPONDENT

JOYCE CHEMUTAI BARTILOL 2ND RESPONDENT

ALICE CHERONO BARTILOL 3RD RESPONDENT

JUDGMENT

1. This matter relates to the estate of the late John Kiptum Bartilol who died intestate on 8th October, 1998.
2. On 18th May, 1999 Dinah Jepkemboi Bartilol and Japheth Kiprotich Bartilol, the 1st and 2nd Petitioner herein petitioned Court for the grant of letters of administration intestate in their capacity as widow as son of the deceased. They stated that the deceased was survived by the following persons:
 - a. Dinah Jepkemboi Bartilol – Widow
 - b. Dickson Kiplagat Bartilol – Son
 - c. Carolyne Chepkorir Bartilol – Daughter
 - d. Japheth Kiprotich Bartilol – Son
 - e. Geoffrey Kimutai Bartilol – Son
 - f. Margaret Chepkoech Bartilol – Daughter



- g. Ibrahim Kiprono Bartilol – Son
3. However, the Objector Ednah Kangogo by an application dated 17th December, 2019 sought to have the Petitioners summoned before this Court on allegations that they were intermeddling with the deceased's estate. The Objector claimed that she was one of the widows of the deceased herein having gotten married to the deceased under customary law on the 19th of August, 1989. Prior to the formalization of the Objector claimed that she had been cohabiting with the deceased however in the year 1991 after her dowry had been paid, she moved to live on his 50 acres farm in Uasin Gishu/ Illula Settlement Scheme. The Objector further deposed that their union was blessed with four issues namely: Hillary Bartilol, Willy Chebet Bartilol, Joyce Chemutai Bartilol and Alice Cheronon Bartilol.
4. According to the Petition for letters of administration, the deceased's estate is constituted as follows:
- a. Kakamega/ Sergoit/147
 - B. Ndalala Farm Kitale LR No 5
 - C. Illula Settlement Scheme Plot No 4
 - D. Soy Plot LR No 15074
 - E. Tractor KUM 052
 - F. Tractor (broken Down)
 - G. Datsun Pick Up – 1200 KUJ 557
5. From onset I take judicial notice of the fact that the matter herein is an old matter and that there has been a back and forth tussle between the parties herein with regard to the administration of the estate of deceased. As they say litigation must always come to an end and that the sole purposes of succession proceedings is to allow the beneficiaries of the deceased to get and enjoy their just, fair and equitable share of the estate.
6. With that said what is currently pending before Court is the mode of distribution of the estate of the deceased. Both parties filed their respective summons seeking the confirmation of the grant herein.
7. The Petitioners propose that the estate herein be distributed as follows;
- a. Illula Settlement Scheme Plot No 4 Measuring Approximately 60 Acres – entire property to be given to Dinah Jepkemboi Bartilol being a matrimonial jointly acquired with the deceased.
 - b. Ndalala Farm Kitale LR No 5 Measuring Approximately 98 Acres



	NAME	SHARES
1	Dinah Jekemboi	49 Acres
2	Ibrahim Kiprono	6.5 Acres
3	Dickson Kiplagat	6.5acres
4	Carolyne Chepkwony	6.5 Acres
5	Japhet Kiprotich	6.5 Acres
6	Geoffrey Kimuta	6.5acres
7	Maragret Jepkoech	6.5 Acres
8	Hillary Kipruto	2.5 Acres
9	Winnie Jebet	2.5 Acres
10	Joyce Jemutao	2.5 Acres
11	Alice Jerono	2.5 Acres

- c. Soy Plot LR No 15074 Measuring Approximately 0.022353 Acres – entire property to be given to Dinah Jekemboi Bartilol to hold in trust for the children.
 - d. Tractor KUM 053 and the tractor (broken down) – be given to Japhet Kiprotich
 - e. Datsun – Pick Up 1200 KUJ 557 – be given to Dinah Jekemboi Bartilol.
 - f. Kakamega/ Sergoit/147 Measuring Approximately 29.75Acres – to be given to Dinah Jekemboi Bartilol and her children being their matrimonial home.
8. The Respondents on the other hand propose that the estate herein be distributed as follows;
- a. Ndalala Farm Kitale LR No 5 Measuring Approximately 100 Acres



Name	Shares
Dinah Jekemboi	10.67 Acres
Ibrahim Kiprono	10.67 Acres
Dickson Kiplagat	10.67 Acres
Carolyne Chepkwony	10.67 Acres
Japhet Kiprotich	7.27 Acres
Geoffrey Kimuta	10.67 Acres
Maragret Jepkoech	10.67 Acres
Hillary Kipruto	7.27 Acres
Winnie Jebet	7.27 Acres
Joyce Jemutao	7.27 Acres
Alice Jerono	7.27 Acres

b. Illula Settlement Scheme Plot No 4 Measuring Approximately 50 Acres

-	Name	Shares
1.	Japhet Kiprotich	10 Acres
2.	Hillary Kipruto	10 Acres
3.	Winnie Jebet	10 Acres
4.	Joyce Jemutai	10 Acres
5.	Alice Jerono	10 Acres

The Respondents Hillary Kipruto Bartilol, Winnie Chebet Bartilol, Joyce Chemutai Bartilol and Alice Cheronon Bartilol also want to live with their mother Ednah Kangogo and allow to use for subsistence Illula Settlement Scheme Plot No 4.

c. Kakamega/ Sergoit/147 Measuring Approximately 40 Acres



Name	Shares
Dinah Jekemboi	6.6 Acres
Ibrahim Kiprono	6.6 Acres
Dickson Kiplagat	6.6 Acres
Carolyne Chepkwony	6.6 Acres
Geoffrey Kimuta	6.6 Acres
Maragret Jepkoech	6.6 Acres

- d. Soy Plot LR No 15074 Measuring Approxiamtely 0.022353 Acres – wholly allocated and registered equally to Hillary Kipruto Bartilol, Winny Chebet Bartilol, Joyce Chemutai Bartilol and Alice Cheronno Bartilol and or sold and shared among all beneficiaries factoring in directions given by Justice Hellen. Omondi that the Petitioners had used this parcel and Kitale land since the demise of the deceased to the tune of over 40 million shillings.
- g. Datsun – Pick Up 1200 KUJ 557 – be given to Dinah Jepkemboi Bartilol.
- e. Tractor Reg No KUM 052 and unregistered tractor (broken down) be transferred to Japhet Kiprotich Bartilol.
9. The parties were unable to agree on the mode of distribution. As a result, the parties filed written submissions in that regard.

The Petitioners' Submissions

10. Counsel for the Petitioners, Mr. Owuor submitted that the deceased herein married the 1st Petitioner through statutory marriage on 8/1/1966 and that they were blessed with six children namely; Dickson Kiplagat Bartilol, Carolyne Chepkorir Bartilol, Japheth Kiprotich Bartilol, Geoffrey Kimutai Bartilol, Margaret Chepkoech Bartilol and Ibrahim Kiprono Bartilol.
11. That during their marriage they managed to acquire the following properties jointly;
- a. Kakamega/ Sergoit/147
 - B. Ndalala Farm Kitale LR No 5
 - C. Illula Settlement Scheme Plot No 4
 - D. Soy Plot LR No 15074
 - E. Two Tractors
 - F. Datsun Pick Up – 1200 KUJ 557
12. Counsel submitted that the deceased herein allegedly got into another marriage with one Edna Kangogo whom was staying a municipal house in Eldoret. That this marriage was annulled in the ruling delivered by Justice Hellen Omondi delivered on 21/1/2020. Counsel maintained that the said ruling was never appealed nor reviewed. Counsel further submitted that according to Ednah Kangongo's



- allegations she married the deceased on 19th August, 1989 when the deceased paid her dowry for her but prior to the formalization of their relationship she had cohabited with the deceased from 1993 and that she moved to live on the deceased farm 50 acres in in 1991 after dowry had been paid. Counsel further submitted that she also claimed Uasin Gishu/Illula Settlement Scheme/ Plot that she had (4) children with the deceased namely; Hillary Bartilol, Willy Chebet Bartilol, Joyce Chemutai Bartilol and Alice Cheronon Bartilol.
13. Counsel further submitted that Honourable Lady Justice Hellen Omondi whilst declaring Edna Kangogo not a wife, not a dependent or a beneficiary of the estate of the deceased, she ruled that her children are children of the deceased and qualify as dependants under Section 29 of the Law of Succession Act, on an equal footing with the other (6) children belonging to the 1st Petitioner. Counsel further maintained that in the said ruling, the Honourable judge directed the parties therein to file their respective modes of distribution excluding the Objector. Counsel argued that with the Objector having been ousted in meant that the parties directed to file their proposals on the mode of distributions were the Petitioners herein and not any other party (ies) whom were not involved in the said objection proceedings.
 14. Counsel further submitted that upon queries on the paternity of the (4) children and a DNA application by the Petitioners, Counsels for the parties herein under the Court's direction met in Chambers on 14th July, 2023 where a compromise was reached and Counsels agreed that the (4) children would be recognized under Section 29 (b) as step-children of the deceased so that the DNA application be marked as settled. Counsel maintained that in order not to shift the burden of proof of dependency to the (4) children parties agreed that they will be give a share of Ndalala property. Counsel further contended that despite the pronouncement by Honourable Lady Justice Hellen Omondi on the position of Edna Kangongo in this Succession Cause, she has been in illegal possession and use of the Illula property. That her children whom are adults do not live on the said property.
 15. Counsel further submitted that the properties known as Sergoit, Ndalala, Illula And Soy were all bought by the deceased and the widow herein during their marriage and therefore, they are considered matrimonial properties. That Sergoit property was bought in 1967 more that two decades before the deceased's affair with the mother of the (4) child ensued. Counsel argued that this is the deceased and the widows first matrimonial home. Further that the Ndalala property was acquired by the deceased and the widow in 1976 and lastly that the Illula property was acquired by the deceased and his widow in 1981. Counsel argued that at the time when the Illula property was being acquired the 1st Petitioner and the deceased had been married for (15) years. Counsel maintained that from the year of acquisition to the year of the annulled marriage stands a gap of at least 8 years from the claim of dowry payment in 1989 and if we go by 1991 it is at least 10 years and 12 years from 1993.
 16. Counsel further argued that the Court having declared that the marriage between the deceased and the mother of (4) children null and void, it therefore meant that the deceased died a monogamous man and only had one wife and thus left behind a spouse and children. Counsel further submitted that it the children of the woman whose marriage to the deceased was nullified that are claiming a stake to the property of the deceased. Counsel maintained that the aforesated properties were acquired between the period 1967 and 1981 even before the first born among the (4) children was born whom was born in 1985. Counsel argued that is it therefore proper for the widow herein to prove contribution in the acquisition of the said matrimonial properties to persons, the (4) children who came into the picture after the properties had long been acquired and who had no knowledge of, he relations and dealing between her and the deceased. Counsel urged the Court to rely on the reasoning by Mumbi Ngugi, J. in Re Estate of the Late George Cheiro Chepkosiom. Counsel argued that the Court therein stated that it only reasonable to impose such burden to a woman in a suit for division of matrimonial property



with husband however it is patently unfair to impose the same burden on a widow against someone who came into the marriage picture decades later.

17. Counsel reiterated that the Illula property was acquired in 1981 as shown from the allotment letter produced by the widow in Court. Counsel submitted that when the allotment letter was being done the deceased herein did not have the required money which was Kshs 6,000/= to pay for the property and that it was the 1st Petitioner herein that gave out the said money to the deceased to pay for that property. Counsel further submitted that the money the widow gave to the deceased herein toward the acquisition of the Illula property was given to her by her father whom at the time was running a hardware shop in Eldoret town. Counsel argued that the purpose of the said money was to buy land and that the widow herein gave the deceased the said money not as loan, but as wife giving her husband. Counsel reiterated that during the acquisition of this property, none of the (4) children claiming it had been born and not even their mother from her own testimony had started a relationship with the deceased. Counsel argued that it is not the widow's burden to prove to the (4) children her contribution towards the acquisition of the Illula property.
18. Counsel further submitted that when the 1st petitioner herein gave the deceased herein the purchase money the Illula property the intention was that the property was to belong to the both of them and for the establishment of their home which they did. Counsel also submitted that this is the property that the body of the deceased was in fact interred. Counsel contended that although it is the deceased name in the title documents, the same was held by the deceased in trust for the widow and by extension their children. Counsel relied on the case of *Karanja v Karanja* [1976] KLR 307 to buttress his submissions on the issue of creation of a trust. Counsel also cited the case of *NWK v JKM & another* [2013].
19. Counsel argued that the property known as Illula is thus not free property of the deceased capable of being willed by the holder or being distributed in a succession cause as of the person holding it. Counsel further argued that now that the deceased and the widow jointly acquired the property and that he was holding it in trust for the widow his interest terminated upon his death. Counsel also argued that whether the property is registered in the name of the widow herein is immaterial when it comes to the resulting trust. Counsel cited the case of *Charles K. Kandie v Mary Kimoi Sang* [2017] eKLR to support his arguments on the issue of registration.
20. Counsel maintained that upon the death of the deceased (the Trustee) Illula property can only devolve to the rightfully intended persons which are the widow and her (6) children. According to Counsel, outsider or stranger to that marriage cannot claim a stake on the said property the strangers' paternity notwithstanding.
20. With regard to Sergoit property, Counsel reiterated that the same was acquired in 1967 and that this where the deceased and the 1st Petitioner put up their first matrimonial home and it measures 30 acres. Counsel argued that the 1st Petitioner herein contributed to the acquisition and development of the said property both directly and indirectly. Counsel argued that the deceased being an active service man in the army, the 1st Petitioner herein was the one doing the domestic work and managing the matrimonial home, caring for the children, giving the deceased companionship, managing the family business and property and also doing farm work. Counsel maintained that all these are contributions towards the acquisition of the matrimonial property as recognized under the *Matrimonial Property Act*.
21. With regard to the properties known as Soy and Ndalala, Counsel submitted that the same were acquired during the subsistence of the marriage of the deceased and the 1st Petitioner herein. Counsel argued that whereas these properties are registered in the name of the deceased the same were held in trust for the widow herein in that they were acquired during the marriage. Counsel cited Section 14



- of the *Matrimonial Property Act*. Counsel argued that only a spouse can rebut the said presumption during a matrimonial cause where they seek to terminate their marriage and share property. Counsel reiterated that the (4) children herein and their mother were not there during the period of acquisition of those properties. Counsel urged the Court to be guided by the findings in the case of *Esther Wanjiru Kiarie v Mary Wanjiru Gitbatu* [2016] eKLR. Counsel argued that whereas the 1st Petitioner herein did not prove financial contribution towards the purchase of Soy and Ndalala properties, she has proved that she made non-financial contribution towards their acquisition and therefore her joint interest and that of the deceased cannot be easily partitioned. Counsel argued that the 1st Petitioner is thus entitled to half of the properties and the other half is to be shared between the beneficiaries of the deceased's estate.
22. Counsel further submitted that the deceased having died intestate leaving behind one surviving spouse and children, his free estate should be distributed ad per Section 35 of the *Law of Succession Act*.
 23. Counsel argued that following the declaration that Ednah Kangogo was not a wife to the deceased, the deceased was thus in a monogamous marriage with the 1st Petitioner at the time of his death. Counsel submitted that the Court herein should thus be guided by Section 35 of the *Law of Succession Act* when distributing the estate herein in that the deceased died intestate, left one surviving wife the 1st Petitioner and as such she is entitled to life interest in the net intestate estate. Further that the properties Sergoit, Soy, Ndalala, Tractors And Pick-up Datsun should therefore devolve to the widow Dinah Jepkemboi Bartilol wholly and that she will have a life interest and hold the said properties in trust for the 6 children of the deceased and upon her demise or remarriage it shall be shared equally amongst the children. Counsel cited the case of *Eddah Wangu & another v Sicilia Magwi Kivuti (Deceased) Substituted with Ribereta Ngai* [2021] eKLR.
 24. Counsel contended that if the dependants, the (4) step-children herein feel the provision made for them by the 1st Petitioner in Ndalala property is not adequate, they should make application under Section 26 and that the Court do make a reasonable provision for them taking into account the dictates of Section 28 of *Law of Succession Act*. Counsel further argued that in doing so, they should prove their dependency on the deceased. Counsel urged the Court to be guided by the reasoning by Justice W. Musyoka in *Re Estate of Makokba Idris Musindalo* (Succession Cause No 13 of 2017 [2022 KEHC 137655 (KLR) where when the Court was faced with quagmire of the paternity of the alleged beneficiaries ordered for a DNA test to be conducted using the samples from all the alleged children of the deceased.
 25. With regard to the tractors herein, Counsel submitted that the same were handed over to the 2nd Petitioner herein by the deceased and thus no need to disturb the same. That the Datsun -pick up 1200 belonged to the deceased and same should devolve to the 1st Petitioner absolutely.
 26. In the end, Counsel submitted that the property known as Illula due the reasons a forestated is not free property and thus should entirely be given to the 1st Petitioner absolutely. That Sergoit property should be shared between the 1st Petitioner and children as per her proposed mode of distribution. As for Soy and Ndalala properties counsel submitted that the 1st Petitioner is entitled to the said properties wholly and that she enjoys a life interest in them. Counsel submitted that the 1st Petitioner herein has provided for dependants under Section 29 (b) being the (4) step-children of the deceased adequate provision of 2.5 acres each in Ndalala property.

The Respondents' Submissions

27. Counsel for the Respondents Mr. Songok submitted that the deceased herein had two wives and both male and female children. That all the children from house A are using part of the estate for subsistence.



- Counsel further submitted that the children of house B are humbly asking for part of the deceased's like the children in house.
28. Counsel submitted that the applicable law in respect of the estate where the deceased was polygamous is Section 40 of the *Law of Succession Act* and that the Court has no discretion in the matter. Counsel urged the Court to be guided by decision of the Court in *Samuel Miriti (Deceased) MMM'M v AIM* [2014] eKLR.
 29. With regard to the mode of distribution that was proposed by the Petitioners herein, Counsel submitted that the law is explicit that there is no distribution between male and female children of the deceased person, regardless of their marital status unless they expressly renounce their interest in the estate in accordance with Section 38 of the Law of Succession. Counsel further submitted that Section 3 (2) of the *Law of Succession Act* defines a child without any discrimination on the account of gender.
 30. Counsel submitted that the 1st Petitioner herein had separated with deceased for over (10) years which led him to remarry the mother of the Respondents in this case and have lived in the property known as Illula Settlement Scheme Plot No 4 up to date which is approximately 37 years of residence on the said plot. Counsel argued that the 1st Petitioner herein has always emphasized that she contributed during the purchase of the said property but has never been in a position to substantiate the same.
 31. Counsel further submitted that Objector has for along time agonized for not being recognized as bona fide wife to the deceased even though the deceased paid dowry and lived for a long time and spend his last moments with her and sired (4) children with her.
 32. Counsel argued that the deceased herein allowed access to the Objector to 50 acres of his land at Illula Settlement Scheme Plot No 4 and that he clearly indicated that the same was to be inherited by her and the children. That despite all these, the Objector and her children conceded to hiving out 10 acres at Illula Settlement Scheme Plot No 4 to be allocated to Japhet Kiprotich Bartilol, the fist born son of the 1st House who lives in Kakamega/ Sergoit parcel.
 33. Counsel further contended that the Objector herein did not appeal against the ruling dated 21st January, 2019 with the hope that since her children will benefit, they will accommodate her in her sunset years.
 34. Counsel maintained that the 1st House have lived all their lives apart from Japhet Kiprotich Bartilol, in Kakamega/ Sergoit land and never at Illula and should thus get the land they occupy in order to maintain status quo. Counsel further submitted that Kitale Ndalala Farm measuring 100 acres had never been occupied by the Respondents herein but has solely been used by the Petitioners and the beneficiaries of the 1st House at the exclusion of the beneficiaries in the 2nd House. The Respondents propose that during distribution they should get a share therein since 10 acres was reduced form the Illula to compensate the 1st House. Counsel further submitted that the difference in acreage between beneficiaries of the 1st house who they propose to get 6.6 acres in Kakamega/ Sergoit and the beneficiaries in the 2nd House plus Japheth Bartilol from the 1st who get they propose get 10 acres in Illula is actually 3.4 acres. Counsel proposed that to make up the difference, the beneficiaries in the 1st House to get a bigger share in the Kitale Farm being 10.67 acres whereas the Respondents get 7.27 acres.
 36. Counsel further submitted that the Respondents propose to Soy Plot No 15074 as compensation for unfair benefit use by the 1st House of the said plot and Kitale Farm to the tune of Kshs 18,000,000/= as captured in the ruling dated 21/1/2019.



37. Counsel reiterated that the Respondents thus urged the Court to distributed the estate herein as follows;

Illula Settlement Scheme Plot No 4 Measuring Approximately 50 Acres

Name	Shares
Japhet Kiprotich	10 Acres
Hillary Kipruto	10 Acres
Winnie Jebet	10 Acres
Joyce Jemutai	10 Acres
Alice Jerono	10 Acres

38. The Respondents Hillary Kipruto Bartilol, Winnie Chebet Bartilol, Joyce Chemutai Bartilol and Alice Cheronon Bartilol also want to live with their mother Ednah Kangogo and allow to use for subsistence Illula Settlement Scheme Plot No 4.

Kakamega/ Sergoit/147 Measuring Approximately 40 Acres

Name	Shares
Dinah Jekemboi	6.6 Acres
Ibrahim Kiprono	6.6 Acres
Dickson Kiplagat	6.6 Acres
Carolyne Chepkwony	6.6 Acres
Geoffrey Kimuta	6.6 Acres
Maragret Jepkoech	6.6 Acres

Ndalala Farm Kitale LR No 5 Measuring Approximately 100 Acres



Name	Shares
Dinah Jekemboi	10.67 Acres
Ibrahim Kiprono	10.67 Acres
Dickson Kiplagat	10.67 Acres
Carolyne Chepkwony	10.67 Acres
Japhet Kipkorir	7.27 Acres
Geoffrey Kimuta	10.67 Acres
Maragret Jepkoech	10.67 Acres
Hillary Kipruto	7.27 Acres
Winnie Jebet	7.27 Acres
Joyce Jemutao	7.27 Acres
Alice Jerono	7.27 Acres

39. Soy Plot LR No 15074 Measuring Approximately 0.022353 Acres – wholly allocated and registered equally to Hillary Kipruto Bartilol, Winnie Chebet Bartilol, Joyce Chemutai Bartilol and Alice Cheronno Bartilol.
40. Counsel further submitted that the reasons for the distribution of Soy Plot LR No 15074 as above is that the Court ordered in the ruling dated 21/1/2019 were that the figure of Kshs 14,400,000/= and 3,880,000/= as explained in paragraph 26 of the said ruling should guide the Court in determining what portions to be allocated to each beneficiary. The Respondents propose that instead of the Petitioners refunding the said amount for leasing out and using Ndalala Farm Kitale LR No 5 and Soy Plot LR No 15074, they propose that Soy Plot LR No 15074 be given to them being the children of the Objector and that the same be registered in their names and that of the Objector to continue using the said portion.
41. Counsel submitted that Datsun – Pick Up 1200 KUJ 557 – be given to Dinah Jekemboi Bartilol and further that tractor Reg No KUM 052 and unregistered tractors (broken down) be transferred to Japhet Kiprotich Bartilol.
42. According to Counsel, each beneficiary plus the wife of the house minus the wife of the second house (the Objector) gets cumulatively 17.27 acres which is equitable and fair distribution in the spirit of Section 40 of the *Law of Succession Act*.
43. Counsel further argued that the 1st Petitioner purports that her matrimonial home is in Illula Plot No4 yet her matrimonial home is actually on Kakamega/ Sergoit. According to Counsel, the 1st Petitioner herein has made a misrepresentation that Illula parcel is of higher value than Sergoit yet the difference is negligible. Counsel proposes that the Petitioners and beneficiaries from the 1st House be compensated



by being added extra acreage in Ndalala Farm in Kitale as compensation. Counsel further contended that the house in Illula land was built by the Objector with the deceased and what the Objector found in Illula was an old timber house, Counsel maintained that the Objector worked with AFC and borrowed loans to build the current permanent house she resides.

44. Counsel reiterated his submissions that Section 40 of the Law of Succession is to be applied in this case and urged that the *Constitution* of Kenya takes hierarchical primacy in the mode of exercising the law and outlaw any law that it discriminatory in itself or in effect.

Analysis and Determination

45. I have considered the entire evidence and the submissions of both Counsel including the authorities they cited.
46. As a result, I find that the following issues arise for determination:
- a. Whether the deceased herein was in a polygamous marriage within the meaning of Section 40 of the *Law of Succession Act*?
 - b. Whether the Respondents are children of the deceased?
 - c. How should the estate be devolved?

Whether the deceased herein was in polygamous marriage within the meaning of Section 40 of the *Law of Succession Act*?

47. Section 40 of the *Law of Succession Act* which primarily provides as follows;
- “(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 interest within each house shall then be in accordance with the rules set out in sections 35 to 38”
48. The Respondents position in matter herein is that the deceased herein was a polygamous having married their mother Ednah Kangongo as a second wife and thus the estate herein ought to be distributed as per the provisions of Section 40 of the *Law of Succession Act*. To my mind the issue at hand was put to rest vide the ruling that was delivered on 21/1/2019 by Honourable Lady Justice Hellen Omondi finding that the said Ednah Kangongo was not a wife to the deceased and thus the alleged marriage between her and the deceased was as such null and void. With that said the contention that the deceased herein was a polygamous man cannot therefore stand. To date the finding of the Court with regard to the alleged marriage between the deceased and Ednah Kangongo has never been challenged and as such, the deceased was as at the time of his death in a monogamous union with the 1st Petitioner herein. Without proof of the existence of the alleged marriage the Respondents cannot therefore claim that the deceased herein was a polygamous man. The provisions of Section 40 of the *Law of Succession Act*, therefore do not apply to the circumstances in this case. There can be no distribution between unit if in the first instance there was no marriage of any kind whatsoever.



49. Counsel Songok's, submission that the one Ednah Kangogo did not appeal against the ruling dated 21st January, 2019 as she hoped that since her children were to benefit, she would benefit cannot therefore stand. I need to remind parties that equity does not aid the indolent but the vigilant.

Whether the Respondents are children of the deceased?

50. Section 3(2) of the *Law of Succession Act* defines a "child" as follows:-

“References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

51. The Court in this matter addressed itself on the issue of the identities of the (4) Respondents herein vide the ruling delivered on 21st January, 2019 when the Court ruled that the Respondents are children of the deceased. The Court was of the view that the birth certificates that been produced in Court were prima facie evidence proof of parentage. The Court went further to state that the if the Petitioners herein were serious about question of who fathered those (4) children, nothing would have stopped them from requesting that the Court orders the (4) to be subjected to DNA profiling. With said, making a contrary view to that made by this Court will only amount to sitting on an appeal on a decision made by this very Court.

How then should the estate herein be devolved?

52. From the record and evidence as a whole, the deceased died intestate as he did not leave a valid will. As such, the rules of intestacy as governed by the *Law of Succession Act*, Cap 160 of the Laws of Kenya (the "Act") are applicable to the distribution of the properties forming this estate. Specifically, the relevant applicable provision in the distribution of this estate is Section 35 of the Act given that the deceased left behind a spouse and (10) children. Section 35(1) of the Act states as follows:

“(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

- (a) the personal and household effects of the deceased absolutely; and
- (b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”

53. My understanding of Section 35 of the Act is that it was expressly stated to cater for the surviving spouse and the children of the deceased. The law also appreciates the position that the deceased surviving children include even those born outside the marriage therein.
54. From the evidence adduced before this Honourable Court it is also clear that all the properties herein constitute what may be termed as matrimonial property as per the *Matrimonial Property Act* 2013 . There is no doubt that the properties forming part of the estate of the deceased herein were all acquired during the subsistence of the marriage between the deceased and the 1st Petitioner herein. This was even



before the alleged relationship between the deceased and one Ednah Kangogo ensued. Accordingly, Section 7 of the *Matrimonial Property Act* 2013, provides:

“Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

55. Contribution is defined by Section 2 to mean monetary and non-monetary contribution. Non-monetary contribution includes:

- a. Domestic work and management of the matrimonial home;
- b. Child care;
- c. Companionship;
- d. Management of family business or property; and
- e. Farm work

“Family business” means any business which -

- a. is run for the benefit of the family by both spouses or either spouse; and
- b. generates income or other resources wholly or part of which are for the benefit of the family;”

56. In view of the above provision it is clear that the 1st Petitioner herein ranks higher in priority when it comes to the distribution of the estate herein. However, when balancing the interests of the spouse herein and those of the deceased’s children, this Court is also alive to the provisions of Article 27 of the *Constitution* 2010 provides that every person is equal in the eyes of the law and before the law; and the Article goes further to state that there should be no discrimination on any ground including gender which encompasses marital status; the *Constitution* does not allow discriminatory rules and customs in matters of personal law, including inheritance.

57. There ought to be no classification into categories of male, female, married or unmarried; there ought to be no discrimination against the male or female children of a deceased person; nor discrimination between the married daughters and unmarried daughters of a deceased person. The Court in *Eliseus Mbura M’thara v Harriet Ciambaka & another* [2012] eKLR to demonstrate the level of non-discrimination that is required in the distribution of a deceased person’s estate as follows:

The *Law of Succession Act* does not discriminate between gender in matters of succession or inheritance. Under the *Law of Succession Act* and indeed under the *Constitution* a child is a child and every person has equal rights under the law irrespective of gender. The *Law of Succession Act* does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person.

58. Failing to provide for the deceased’s children born out of wedlock amounts to discrimination on grounds of the marital status of their parents since unlike the children born to the 1st Petitioner who were duly provided for in the mode of distribution, the children born to the deceased out of wedlock are entitled to an inheritance and their aforementioned entitlement should not be taken away simply because their mothers were not married to the deceased.

59. In determining this protracted intestate estate I bear in mind the following guiding principles. Where the intestate is survived either by one spouse or by more than one spouse by dint of the law each is absolutely entitled the matrimonial home, household chattels, movables of that home in exclusion



of the other spouses that may be claiming inheritance rights to the deceased estate. As matters stand spouses are ranked first among equals upon the death of the deceased. Section 66 of the Succession Act is very prescriptive on this issue. Therefore, where the deceased has died intestate, letters of administration ought to be granted in accordance with the guidelines under this provision of the law. The spouse or spouses to the marriage can only be bypassed from being administrators if they are found to lack capacity or incompetent. Any dependent under Section 29 of the Act contesting the courts Grant of Letters of Administration to the spouse or any of the spouses must show clear compelling and convincing evidence that the so identified spouse or spouses is or are incompetent to administer the estate of the deceased. This court is competent to ordain that any such interference with the surviving spouse or spouses to obtain the necessary instruments for letters of grant of representation by way of a citation or otherwise shall be deemed to be intermeddling with the affairs of the estate. There are various instances experienced over time in adjudicating probate and administrative matters where literally the conduct of other beneficiaries is such that it amounts to harassment, intimidation and abuse of the spouse or spouses survived of the deceased. It will be in my view wrong to unlawfully interfere with the matrimonial home of the surviving spouse or spouses before the net distribution of the intestate estate. Neither the probate court or any other forum of adjudication should deprive a spouse or spouses their entitlement to the matrimonial home as originally established by the deceased during his life time. The principles of construction governing the approach taken by the family court under the *Matrimonial Property Act* and its objects should find its way the distribution of the intestate estate. At the heart of this interpretative exercise is the consideration of the useful meaning of the language used in the definition of marriage. As to how marriage should be defined inspiration can be drawn from Article 45 (1) of the *Constitution* which makes clear the concept of family as a fundamental unit of society. It is also a notion of partnership based on an irrevocable personal consent given by both spouses which establishes a unique and a very special lifelong relationship. The threshold test as to the definition of marriage was profoundly stated by the comparative court in *D.T. v C.T* (2003) 1ILRM 321 consisting a succinct statement thus:

“...marriage itself remains a solemn contract of partnership entered into between man and woman with a special status recognized in the *Constitution*. It is one which is entered into in principle for life. It is not entered into for a determinate period. The moment a man and woman marry, their bond acquires a legal status. The relationship once formed, the law period steps in and holds the parties to certain obligations and liabilities. Even where a marriage is dissolved by judicial decree the laws of many if not most states require that the divorced spouses continue respect and fulfill certain obligations deriving from their dissolved marriage for their mutual protection and welfare, usually of a financial nature. The life-long commitment which marriage in principle entails means that there is a mutuality of an intimate relationship in which singular aspirations in the life of each partner are adapted to mutual life goals. They adapt their lives to live and work together for the mutual welfare of their family which usually, but by no means necessarily so, involves the birth and rearing of children. Husband and wife having mutual duties and responsibilities for the welfare of each other and the marriage, will throughout the marriage make private decision as to the role each of them will play in the support of the marriage, the achievement of their goals and their lifestyle. These decisions are likely to have an effect on their way of life even after the eventuality of a divorce, such as the capacity of one of them at the stage to establish an independent and secure way of life.”

60. It is also legitimate in my view to protect and guarantee property acquired by either spouses during the subsistence of the marriage or before the demise of any one of them as the will of God commands. The question as to the distribution of an intestate estate recognizes a life interest of the surviving spouse.



The relevant legal and factual context can both take into account the contribution made by each spouse in a polygamous family to the extent of not depriving property rights necessarily due to one spouse and not the other. For this purpose, the period the marriage was validly solemnized in accordance with our legal regime is of significance in this case. The practical question in this instance is whether a spouse who joins the family after a long period of companionship by what is commonly referred to as the 1st house or 2nd house would be curious to get an equal share of the estate in equilibrium with her co-wives. I do not think that is the centrality of our succession code. The courts ought to test these foundation principles to protect individual spouses rights sensible and well intentioned or deeply entrenched under the marriage union. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has by the common understanding of the parties created. If then that be the position are the provisions adopted to our matrimonial legal system extinguished by the demise of the one of the spouses. In Kenya, the of marriage is framed on the scale of various categories of solemnization or adjusted to its requirements to give it its legal validity. This is hardly denied as a legal policy. It is therefore purposively suggested that the matrimonial law of this country may be properly applied in the sense intended by the Succession Act on the intestate estate. In conformity with those views the court must decide upon the rights of Succession which it might be proper to accord the issue of distribution in relation to the spouse on the children of the deceased. It may be that such laws of succession affords some kind of superior legitimacy or entitlement by the children in contrast with their surviving parents but those claims can be balanced within the provisions of the *Matrimonial Property Act*. In a male centric society like Kenya when the spouse of a woman dies she is considered to be burdensome by the whole family. Sometimes the residual family members including her own children find no obligation to be caregivers and protectors of the surviving spouse following the death of the head of the family. It is even more sympathetic if the surviving widow comes from marginalized or vulnerable class of a society. In spite of the existence of progressive laws and jurisprudence in Kenya widows are still disadvantaged to access property rights under the scheme of inheritance. No wonder widowhood is a source of trauma and negative impact on the social, economic and psychological tremors. Things therefore began to change for the widow upon the death of her deceased husband. In sum it is sufficient for the purpose of this judgement to say the widow rights to the deceased estate should be infused with the rights derived under the *Matrimonial Property Act*.

61. For the reasons set out above and for equity to be achieved it is my considered view that the mode of distribution that does commend itself to the circumstances of this cause and which I hereby order is as set out below:
 - i. Illula Settlement Scheme Plot No 4 Measuring Approximately 50 Acres – shall devolve as follows:



Name	Shares
Dinah Jekemboi	30 Acres
Ibrahim Kiprono	2 Acres
Dickson Kiplagat	2 Acres
Carolyne Chepkwony	2 Acres
Japheth Kiprotich	2 Acres
Geoffrey Kimuta	2 Acres
Maragret Jepkoech	2 Acres
Hillary Kipruto	2 Acres
Winnie Jebet	2 Acres
Joyce Jemutao	2 Acres
Alice Jerono	2 Acres

- ii. Ndalala Farm Kitale LR No 5 Measuring Approximately 100 Acres



Name	Shares
Dinah Jekemboi	30 Acres
Ibrahim Kiprono	7 Acres
Dickson Kiplagat	7 Acres
Carolyne Chepkwony	7 Acres
Japheth Kiprotich	7 Acres
Geoffrey Kimuta	7 Acres
Maragret Jepkoech	7 Acres
Hillary Kipruto	7 Acres
Winnie Jebet	7 Acres
Joyce Jemutao	7 Acres
Alice Jerono	7 Acres

- iii. Soy Plot LR No 15074 Measuring Approxiamtely 0.022353 ACRES – entire property to devolve to Dinah Jepkemboi Bartilol.
- iv. Tractor KUM 053 and the tractor (broken down) – to devolve to Japheth Kiprotich Bartilol.
- v. Datsun – Pick Up 1200 KUJ 557 – to devolve to Dinah Jepkemboi Bartilol.
- vi. Kakamega/ Sergoit/147 Measuring Approximately 29.75acres – entire property to devolve to Dinah Jepkemboi Bartilol for her life interest and thereafter it shall devolve to her children.
- vii. The grant of letters of administration intestate of the estate of John Kiptum Bartilol (Deceased) issued to Dinah Jepkemboi Bartilol, Japheth Kiprotich Bartilol and Hillary Kipruto on 20th August, 1999 is hereby confirmed.
- viii. Each party shall bear its own costs noting that the claim herein is a succession cause involving members of one family.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF SEPTEMBER 2023

In the presence of:

Mr. Songok for the Objector

Mr Owuor for the Defendant

R.NYAKUNDI

JUDGE

