



In the Matter of the Estate of Simiyu Wasike Walubengo (Deceased) (Succession Cause 17 of 2018) [2022] KEHC 12299 (KLR) (29 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12299 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 17 OF 2018
WM MUSYOKA, J
JULY 29, 2022**

IN THE MATTER OF THE ESTATE OF SIMIYU WASIKE WALUBENGO (DECEASED)

RULING

1. On 19th March 2021, I delivered a judgment, wherein I distributed the estate. Subsequently, the orders made in that judgment were set aside vide a consent, dated 15th September 2021, which I adopted herein on 16th September 2021.
2. The parties agreed on filing proposals on distribution, to form basis for distribution of the estate. Of the two sides in the dispute, only one side filed proposals, through Mr. Samba, Advocate. The side represented by Mr. Momanyi, Advocate, did not. Oral evidence was taken, through Timothy Ngunete Simiyu. The proposal was distribution according to the children of the deceased, he having died a polygamist.
3. Distribution of the estate of a polygamist is according to section 40 of the *Law of Succession Act*, Cap 160, Laws of Kenya. Section 40(1) envisages distribution according to the houses. The distribution according to houses is still dependent on sections 35 to 38 of *Law of succession Act*, and those provisions must be complied with, in terms of disclosure of the members of each house. That is critical, to ensure equity in distribution
4. For avoidance of doubt, section 40 of the *Law of succession Act* states as follows: -

“ 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.”

5. The proposal by Timothy Ngurete Simiyu is intended to be between the houses. He made no attempt to disclose the members of the family of the deceased from each house. Whereas that may be alright for the purposes of section 40(1), it is not sufficient for section 40(2), for sections 35 and 38 will not have been complied with. I am not able to tell the composition in each house, and I cannot, therefore, gauge the equity of the distribution proposed by Timothy Ngurete Simiyu.
6. Let Timothy Ngurete Simiyu file a further affidavit to disclose all the members of the family of the deceased, in each house, be they widows or sons or daughters, married or unmarried, dead or alive. Should any sons or daughters of the deceased be dead, then section 41 of *Law of Succession Act*, should be complied with, by disclosure of the children who will have survived them.
7. The affidavit shall be filed within 30 days. I shall distribute the estate only after there has been full compliance. The matter shall be mentioned for compliance and further directions.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF JULY 2022

W.M. MUSYOKA

JUDGE

