



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re Estate of Francis Andachila Luta (Deceased) (Succession Cause
875 of 2012) [2022] KEHC 16900 (KLR) (23 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 875 OF 2012**

WM MUSYOKA, J

DECEMBER 23, 2022

IN THE MATTER OF THE ESTATE OF FRANCIS ANDACHILA LUTA

JUDGMENT

1. What is for determination is the application dated November 4, 2015 and any protest to it.
2. The deceased herein, Francis Andachila Luta, died on January 1, 2010, according to death certificate serial numbers 022941 of October 5, 2011 and 074529 of November 7, 2011. Two succession causes were initiated. Kakamega HCSC No. 790 of 2011, by Sabencia Khatonde Andachila, and Kakamega HSCS No. 875 of 2012 by Braxides Shimuli Makotsi . A grant was made in Kakamega HCSC No 790 of 2012 on November 28, 2012 and issued on December 18, 2012. It was not confirmed. In Kakamega HSCS No 875 of 2012 a grant was not made, in that cause, although it had been of gazetted. Braxides Shimuli Makosti filed an application in Kakamega HCSC No 875 of 2012, praying for consolidation of both causes. An order was made in Kakamega HCSC No 875 of 2012 revoking the grant made in Kakamega HCSC No. 790 of 2011 to Sabencia Khatonde Andichila; consolidating the 2 causes, with Kakamega HCSC No. 790 of 2012 as the lead filed; appointing Sabencia Khatonde Andichila and Braxides Shimuli Makosti, as the joint administratrices; and directing the filing of a summons for confirmation of grant within 60 days of issuance of a grant of representation.
3. Thereafter, the parties continued these proceedings in Kakamega HCSC No. 875 of 2012, instead of Kakamega HSCS No. 790 of 2011, contrary to the orders or directions of November 20, 2014. A summons for confirmation of the grant was filed, dated November 4, 2013, and was confirmed on October 11, 2016. Subsequently, a summons for revocation of grant dated October 14, 2016 was filed. That application was compromised by consent of the parties on July 10, 2019. The confirmation orders of October 11, 2016 were set aside, the 2nd administratrix, Praxides Shimuli Makotsi, was given time to file an affidavit of protest and directions were given for disposal of the confirmation application dated 4th November 2015 viva voce.
4. The application that I am, therefore, determining, in this judgment, is the summons for confirmation of grant dated November 4, 2015. It was brought at the instance of Sabencia Khatonde Andichila. In her supporting affidavit, she identifies the survivors of the deceased to be 7 daughters identified as



Sabina Kibisu Bulinga, Regina Shiyayo Mukalasinga, Rita Kasiti Shikuri, Agnes Likhuyechi, Emmah Khakayi Musonye, Margaret Libule and Aidah Khasiala; 1 son, said to be Andrew Muchenditsi; 1 daughter in law, said to be Braxides Shimuli Makotsi; and Wiliyamina Lihabi Ashibanga whose relationship with the deceased is not disclosed. Seven (7) grand children being Vincent Lipanga Lisansa, Cornelius Lisanza, Christabel Shibwani Lisanza, Ashiono Lisansa, Mugohe Lisanza, Edith Mutimba and Mwilitsa Lisanza, some of the minors, are listed as dependents, the deceased is said to have had died possessed of Idakho/Shivakala/1278 and Idakho/Shivakala/2013 and Eldoret Municipality Council Plot No. 15/569. It is proposed that Idakho/Shivakala/2013 be shared equally between Sabina Kibisu Bulinga, Regina Shiyayo Mukalasinga, Ritah Kasiti Shikuri, Wiliyamina Lihabi Ashibanga, Emmah Khakayi Musonye, Andrew Muchenditsi and Agnes Likhayachi. It is proposed that Idakhi/Shivakala/1278 be shared equally between Margaret Libule, Idah Khasiala and Braxides Shimuli Makotsi. It is suggested that Braxides Shimuli Makotsi should hold the share due to her late husband, Henry Lisansa, in trust for his children Vincent Lipanga Lisansa, Cornelius Lisanza, Christabel Shibwani Lisanza, Ashiono Lisansa, Mugohe Lisanza, Edith Mutimba Lisansa and Mwilitsa Lisanza. It is proposed that Eldoret Municipality Council Plot No. 15/569 should devolve wholly upon Sabencia Khatonde Andachila. I shall refer to Sabencia Khatonde Andachila as the applicant

5. Braxides Shimulo Makotsi, the 2nd administratrix, filed an affidavit of protest, sworn on October 29, 2019. She avers to be a daughter of his late so., Henry Lisansa. She explains that the deceased had 2 wives, being Teresina Mutimba and Annah Shibwani. Teresina Mutimba had 7 children, being Sabina Kibisu Bulinga, Regina Shiyayo Mukalasinga, Ritah Kasiti Shikuri, Wiliyamina Lihabi Ashibanga, Sabencia Khatonde Andachila, Emmah Khakayi Musonye and Agnes Likhayachi. The children of Ann Shibwani are said to be 4, being Margaret Lipule, the late Henry Lisanza, Aida Khasiala and Andrew Muchenditsi. The assets are said to be 2 parcels of land and 1 town plot being Idakho/Shivakala/1278 and 2013, and Eldoret Municipality Council Plot No. 15/569. She avers that the first house was settled on Idakho/Shivakala/2013. She avers that the first wife had been separated from the deceased, she remarried, and when she died was buried at her parents' home, and that Anna Shibwani was also buried there. She avers that the late Henry Lisansa had been settled by the deceased on Idakho/Shivakala/2013, together with Andrew Muchenditsi. She avers that the deceased intended that he daughters utilize Idakho/Shivakala/1278 as their inheritance. She avers that the daughters have had exclusive use and benefit of Eldoret Municipality Council Plot No. 15/569, which they have since developed without involving the sons and their families. She proposes that Eldoret Municipality Council Plot No. 15/569 be shared equally between the 2 houses.
6. The oral hearings commenced on November 21, 2019. The protestor, Braxides Shimulo Makotsi, was the first on the witness stand. Her testimony largely revolved around the contents of her protest affidavit. She stated that the deceased and his 2 wives lived on Idakho/ Shivakala/2013, and got their children there. She further stated that the daughters got married and left; while the sons set up homes on the portions showed to them by the deceased, on Idakho/Shivakala/2013. She said that the Eldoret Plot was developed, with residential houses, whose rental income was collected by the applicant. She explained that Idakho/Shivakala/1278 was unoccupied. She said that she had no problem with the daughters using their parents' house, adding that they could inherit what belonged to their mother. She further said that she wanted a share of the money from the Eldoret Plot. She stated that she and Andrew Muchenditsi utilized Idakho/Shivakala/1278. She said that the Chief and elders had sat and agreed on how the land was to be shared. She stated that the daughters should get their share so long as their share was not touched.
7. Andrew Shivachi Aromba followed. He was a nephew of the deceased. He gave details of the family of the deceased. He confirmed that the deceased and his 2 wives had houses on Idakho/ Shivakala/2013, and that no one lived on Idakho/Shivakala/1278. He said the houses of the 2 wives were standing on



the Idakho/Shivakala/2013 but that of Anna Shibwani was demolished by her children after she died. He stated that the daughters of the deceased were married, but visit the estate, and whenever they visit they occupy the house of Teresina Mutimba. He said that he did not know who occupied Idakho/Shivakala/1278, and that when the daughters of the deceased raised the issue of inheritance, the elders sat and gave them Idakho/Shivakala/1278, as it was vacant. He said that they were not entitled to the boma as they got married, and custom did not allow it. He said that he had heard of the Eldoret Plot, but said that he knew nothing about it beyond that. He said that Idakho/ Shivakala/2013 was utilized by the protestor and Andrew Muchenditsi alone, and added that the deceased had showed Andrew Muchenditsi and the late Henry Lisanza where to build on Idakha/Shivakala/2012. He said that the deceased had not subdivided the land, for he had only showed the late Henry Lisanza and Andrew Muchenditsi where to put up houses. He said that there was nothing wrong with the daughters of the deceased getting the share that should have gone to their mother.

8. Andrew Muchenditsi Andachila testified on January 28, 2021. He was a son of the deceased. He said that the deceased left him on Idakho/Shivakala/2013. He said that he did not utilize Idakho/Shivakala/1278. He said Eldoret Municipality Council Plot 15/569 was utilized by his sister. There were tenants on Eldoret Municipality Council Plot 15/569, rent was collected by his sister, but he was not getting a share. He described the protestor as his sister –in law, being the widow of his brother, the late Henry Lisansa. He said she occupied Idakho/Shivakala/2013. He said he was not aware of the proposals on the distribution of the land. He stated that the family of the applicant were on Idakho/Shivakala/2013, where their mother’s house stood. He said the deceased had shown hail and his brother where to build on Idakho/Shivakala/2013. He said it was he and the protestor who occupied Idakho/Shivakala/2013. He said that while their parents were alive, the entire family shared a compound on Idakho/Shivakala/2013, and her house still stands on Idakho/Shivakala/2013. He said that the children of the first wife had a separate farm, and that he did not chase them out of the Idakho/Shivakala/2013. He said his own mother had left the deceased a long time ago, and got married elsewhere, and when she died she was buried at her husband’s land. He said that it was he and the protestor who used the whole of Idakho/Shivakala/2013. He said that the deceased had said that the daughters would have Idakho/Shivakala/1278. He said it was the late husband of the protestor who used to utilize Idakho/Shivakala/1278, and upon his demise the protestor continued to utilize the same, saying that he was the one who allowed her to utilize Idakho/Shivakala/1278. He said that the daughters of the deceased did not utilize Idakho/ Shivakala/1278. He asserted that it was not true that the deceased had given him and the daughters Idakho/Shivakala/2013. He also asserted that the protestor had not been given Idakho/Shivakala/1278, saying that that parcel of land had been given to the daughters instead, on the grounds that they were daughters and had gotten married. He asserted that the daughters got married and moved out. He described the daughters as being older than him and that his mother, when she got married to the deceased, found them on Idakho/Shivakala/2013. He said that it was the deceased who gave the daughters Idakho/Shivakala.1278. He said that the deceased had shared out his land before he died. he said that he had not s topped the daughters from accessing their mother’s house on Idakho/Shivakala/2013, and said that the court can give them Idakho/Shivakala/1278 and he would allow them access to Idakho/Shivakala/2013.
9. The case for the applicant opened on July 28, 2021. The applicant was the first to take the stand. She was a daughter of the deceased. She said that her mother’s house stood on Idakho/Shivakala/2013, but she had been stopped from accessing it by the protestor. She testified that her mother did not have sons, but had 7 daughters. She explained that the deceased had 2 wives, and that the protestor and Andrew Muchenditsi were from the 2nd house. She stated that the daughters were not utilizing Idakho/Shivakala/1278, adding that the same was being utilized by the protestor prior to the demise of the deceased. Upon the demise, the protestor moved into Idakho/Shivakala/2013. The deceased had a



plot at Eldoret, which he had left in her hands. She said that he wrote to her a letter asking her to look after it. She said that she was the one who developed the plot, by building houses on it, and that she collected rent from the said houses. She also said that she paid the money for acquisition of the plot, having been given the money by the deceased. She said that none of her sisters, the other daughters of the deceased, had complained about it. She said that the protestor and Andrew Muchinditsi did not complain when she developed the plot. She defended her proposed distribution, saying that she had not left out anyone. She said that she allocated Idakho/Shivakala/1278 to the protestor as that was what the deceased had intended. She had also allocated shares in Idakho/Shivakala/1278 to the 2 daughters from the 2nd house, that is Margaret Lipule and Aida Khasiala. She said that the protestor had been utilizing Idakho/Shivakala/1278 before the deceased died, but after he died, she moved into Idakho/Shivakala/2013 and began to utilize the portion for the applicant's mother. She was using both Idakho/Shivakala/1278 and 2013. She stated that Andrew Muchinditsi had been put in Idakho/Shivakala/2013 by the deceased. She said she was given the Eldoret Plot, while the 2nd house was given Idakho/Shivakala/1278 and a portion of Idakho/Shivakala/2013. She said that the late Henry Lisanza was buried on Idakho/Shivakala/2013, where he had put up a home, and lived with his family. She said he never lived on Idakho/Shivakala/1278, but only cultivated on it. She said she was proposing moving the protestor to Idakho/Shivakala/1278 as that land had been bought for her mother in law. She said that value of the Eldoret Plot did not exceed the shares going to the other survivors.

10. Sabina Kibisu Bulingai followed. She was a daughter of the deceased, from the 1st house. She said that the protestor was a daughter –in –law from the 2nd house. She stated that she would have liked the 1st house to get Idakho/Shivakala/2013 and the 2nd house Idakho/Shivakala/1278. She said that the first wife was buried on Idakho/Shivakala/2013, but the second wife was not buried there. She proposed that the applicant retains the Eldoret plot. She stated that Idakho/Shivakala/1278 was intended for the 2nd house. She said that the deceased, before he died, had advised the protestor's husband to build his house on Idakho/Shivakala/1278, and that the daughters did not oppose, as he was entitled to it. She said the protestor refused to move out of Idakho/Shivakala/2013 to Idakho/Shivakala/1278. She stated that when the protestors mother-in-law got married she found her mother on Idakho/Shivakala/2013, and after she left it was her mother who raised the protestor's husband.
11. Rita Kasiti Shikuri testified next. She was a daughter of the deceased from the 2nd house. She said that the deceased had said that the children of the 1st house should get the land due to their mother, while the children of the 2nd house should get the land due to their mother. She said that the late Henry Lisanza was supposed to move to Idakho/Shivakala/1278, but when he died the protestor refused to move. She stated that the deceased had daughters only, who ought to take Idakho/Shivakala/2013. She said that there was no house on Idakho/Shivakala/1278, and that the same was utilized for cultivation only. She said that the deceased did not call a meeting to distribute his land.
12. At the close of the oral hearings, the parties asked for time to file written submissions. Only the submissions by the applicant are on record, the said submissions are mere recitations of the evidence on record; there is no citation of either statutory provisions on case law.
13. The deceased died in 2010, after the [Law of Succession Act](#), cap 160, Laws of Kenya, had come into force in 1981. By dint of section 2(1), the law to apply to the distribution of the estate is the [Law of Succession Act](#). The protestor and her witnesses made references to customs, but Luhya customary law is not applicable by dint of 2(1), as that provision ousted the application of customary law to estates



of person dying after July 1, 1981. For avoidance of doubt, section 2(1) of the *Laws of Succession Act* provides as follows; -

“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 estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.”

14. Customary law applies, by dint of section 2(2) of the *Law of Succession Act*, to estates of persons dying before July 1, 1981, and since the deceased herein died after that date, section 2(2) would not apply customary law to his estate. The provisions states as follows: -

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

15. The deceased herein died intestate, as no will has been placed before the court, nor proved. Consequently, Part V of the *Act* should apply to the estate. Part V had been exempted from certain estates by virtue of section 32, and customary law has been applied to such estates, by dint of section 33. Unfortunately for the parties hereto, these 2 provisions would not apply to the estate of the deceased herein, for property situated within Kakamega County is not exempt from Part V of the Act. For that reason, the estate herein shall be distributed strictly in accordance with the provisions of Part V of the Act. Sections 32 and 33 provide as follows.

“32 The provisions of this Part shall not apply to—

- (a) agricultural land and crops thereon; or
- (b) livestock, in various Districts set out in the Schedule: West Pokot, Wajir, Samburu, Lamu, Turkana, Garissa, Isiolo, Kajiado, Marsabit, Tana River, Mandera and Narok”

“33 Law applicable to excluded property law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the law or custom applicable to the deceased’s community or tribe, as the case may be.”

16. The discretion to confirm grants is provided for under section 71 of the *Law of Succession Act*. The court confirms the administrators of the estate, if they were properly appointed and had properly administered the estate and would properly administer the estate thereafter. The court also confirms the distribution proposed, or orders distribution in accordance with the law. However, the proviso to section 71(2) of the *Law of Succession Act*, as read with Rule 40(4) of the *Probate and Administration Rules*, is explicit that court should approach the process of confirmation with some degree of caution, for it has to be satisfied that the administrator applying for confirmation of his grant has properly ascertained the persons who are beneficially entitled to a share in the estate, and has also ascertained their respective shares. The two provisions create a duty for the administrator to satisfy the court of such ascertainment. There is a converse duty to the court satisfy itself, from the material on record, and from the parties, that all those beneficially entitled have been ascertained, and the shares due to



them from the estate have been duly assigned to them. The proviso to section 71(2) of the Act and Rule 40(4) states as follows;

“71(2) ... Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”

“40(4). Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.”

17. The first question then is whether the persons entitled to a share in the estate of the deceased have been ascertained. Who are those persons? There are 3 categories – creditors, survivors and dependants. Creditors are those persons to whom the estate owes as debt of some kind or other. Survivors would be the immediate members of the family of the deceased, as set out in section 35, 36, 38 and 39 of the Law of Succession Act, being spouses, children, parents, siblings, and others up to the 6th degree of consanguinity. Defendants would be the individuals named in sections 29 of the Law of Succession Act, who have made applications under section 26, and have been adjudged to be dependants, and provision is ordered for them out of the estate. The relevant provisions in sections 26, 29, 35, 36, 38 and 39 provide as follows.:-

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

“29 For the purposes of this Part, “dependant” means—

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

“35. Where intestate has left one surviving spouse and child or children

- (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.
- (2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.
- (4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—
- (a) the nature and amount of the deceased's property;
 - (b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;
 - (c) the existing and future means and needs of the applicant and the surviving spouse;
 - (d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
 - (e) the conduct of the applicant in relation to the deceased and to the surviving spouse;
 - (f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and
 - (g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.
- (5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon



the surviving child, if there be only one, or be equally divided among the surviving children.”

“36(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—

- (a) the personal and household effects of the deceased absolutely; and
- (b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and
- (c) a life interest in the whole of the remainder: Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person”

“38 Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

“39. Where intestate has left no surviving spouse or children

- (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—
 - (a) father; or if dead
 - (b) mother; or if dead
 - (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
 - (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
 - (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
- (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

83

- (d) to ascertain and pay, out of the estate of the deceased, all his debts;
- (f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses



and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be.”

18. I will start with creditors. These have priority over the survivors. The survivors are entitled to the net intestate estate. Net intestate estate is defined at section 2(1) of the [Law of Succession Act](#), to mean the estate of the deceased less funeral expenses, debts, liabilities and administration expenses. Under section 83 (d) debts of the estate are payable before the grant is presented in section 83 (f) for distribution of the estate. Under 83(f) what is distributed are the assets that remain after payment of expenses and debts of the estate. So, settlement of debts and liabilities ought to take priority over distribution. This category of persons beneficially interested in or entitled out of the state should be ascertained and settled first, followed by survivors.
19. Has the administrator ascertained creditors of the estate? The Chief’s letters on record dated October 17, 2011 and November 14, 2011 do not mention any creditors. The 2 petitions on record do not also identify any creditors. The applicant did not identify any in her application, neither did the protestor refer to or mention any in the protest. At the oral hearings, the issue did not come up. I shall, therefore, presume that the deceased had no debts and liabilities, or that at this stage of distribution, there are no outstanding debts and liabilities.
20. I will consider dependants next, I have not seen on record any application, under section 26 of the [Law of Succession Act](#), for reasonable provision by anyone, and, therefore, there are no orders on record premised on section 26. The effect of it would be that no dependants have been identified and declared by the court, and no provision has been made for anyone. Under section 30 of the [Law of Succession Act](#), the application under section 26 should be brought before confirmation, and therefore, orders for reasonable provision ought to precede confirmation of the grant. If any orders have been made, they ought to be considered before the court decides on the distribution, and the provision made by the court ought, to be considered as required by section 42(b) of the [Law of Succession Act](#). Section 30 and 42(b) of the [Law of Succession Act](#) provide as follows.

“No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 71.”

“Where (a) an intestate has during his lifetime or by Will, paid, given or for the benefit of a child, grandchild or house or (b) Property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or Section 35, That property shall be taken into account in determining the share of the net intestate finally accruing to the child, grandchild or house”
21. I shall presume that no dependants have been pronounced by the court and no reasonable provision has been ordered, and section 42(b) shall be of no relevance.
22. I have defined survivors in paragraph 17 here above. The deceased was survived by children, but no spouse. Where that scenario arises, section 38 applies, so that the estate is distributed equally amongst the children of the deceased. Section 41 is also relevant, to address the situation where some of the children of the deceased are dead but they are themselves survived by their own children. Section 41 says that in that event the children of the dead children of the deceased step into the shoes of their dear parent, to take the share that ought to have gone to such dead parent. One such dead children of the deceased is the late husband of the protestor. He was survived by children, who are the grandchildren



for the deceased. Such grandchildren would step into the shoes of their father, under section 41. Sections 38 and 41 provide as follows: -

“ 38 Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

“41. Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”

23. Let me revisit section 38 of the [Law of Succession Act](#). It provides for equal distribution of the estate amongst the children. The language of section 38 is gender neutral. It does not classify children into male and female, nor sons and daughters, nor men and women. There is no discrimination nor differentiation nor classification nor categorization along gender lines. That would mean that sons and daughters of a dead person are entitled on equal basis to a share in the estate of their dead parent. Section 38 does not make marriage a factor in the distribution of the estate of a dead parent. Gender and marital status are factors under customary law, but not under the [Law of Succession Act](#). The estate herein is not subject to customary law, for the reasons that I have discussed in paragraphs 13, 14 and 15 a foregoing. The estate is subject to the [Law of Succession Act](#), which is blind on biases founded on gender and marital status.

24. Section 38 should be read together with Article 27 of the [Constitution](#), which outlaws discrimination of women based on gender and marital status. It declares that men and women have a right to equal treatment in all spheres of life. These principles and standards set out in Article 27, are drawn from the United Nations Convention on Elimination of All Forms of Discrimination against Women. (CEDAW), to which Kenya is a signatory. Article 27 and CEDAW enjoins the State, of which the courts are part, not to discriminate against any person on the basis of their sex or gender or marital status, Article 2(5)(6) of the [Constitution](#) incorporates and makes the general rules of international law part of the law of Kenya, and it also makes any treaty if or convention ratified by Kenya part of Kenyan law. That would mean CEDAW is part of Kenyan Law by dint of Article 2(5)(6) of the [Constitution](#). Article 2(4) is also relevant, it provides that any law including customary law, that is inconsistent with the Constitution is null and void. Customary law discriminates against daughters so that they are not entitled to inherit from their dead parents, more so daughters who are married. That position is inconsistent with Article 27 of the [Constitution](#) and the CEDAW, and it is void by virtue of Article 2(4) of the [Constitution](#). Of course, customary law does not apply here for the reasons that I have given here above, but I feel it important to point out the position.

25. Articles 2(4)(5)(6) and 27 of the [Constitution](#) say as follows;

“2

(5) The general rules of international law shall form part of the law of Kenya.



- (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

“Equality and freedom from discrimination

27

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms;
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
- (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
- (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

26. Am addressing section 38, Articles 2(4) (5)(6) and 27 of the *Constitution*, and CEDAW, as the protestor and her witnesses implied that the daughters of the deceased had a lesser entitlement to the estate compared with the sons of the deceased. They implied that the daughters were interlopers or intruders, claiming rights over the estate where they did not have similar rights. Andrew Muchenditsi and the protestor, in fact, suggested that it was up to them, as sons, to gift the estate to the daughters. Indeed, they asserted that the estate belonged to them, and the daughters should only access the estate out of the goodness of their hearts. Andrew Muchenditsi and the protestor took that position on grounds that the daughters of the deceased were women and they all had gotten marriage. The provisions that I have discussed above are clear that all the children of the deceased, regardless of gender and marital status, have equal right or entitlement to the estate of their late father. The sons have no superior claim or status to that of the daughters with respect to the same. The act of proposing a distribution which is discriminatory is void and inconsistent with the Constitution.



27. So, have the administrators properly ascertained the survivors of the deceased? The protestor has disclosed only 2 individuals in her petition and the letter from the Chief dated November 4, 2011, herself and Andrew Muchenditsi, both claiming the estate as or on behalf of sons, and excluding the daughters of the deceased. The applicant, in her petition, has disclosed that the deceased had married more than once during his lifetime, and she has grouped the survivors according to the 2 houses of the deceased. The 1st house has 7 daughters and the 2nd house has 2 sons and 2 daughters. This disclosure is aligned to that in the Chief's letter of October 17, 2011. It is my finding, therefore, that the persons who are entitled to the estate of the deceased are the sons and daughters disclosed by the applicant in her petition, the Chief's letter and her summons for confirmation of grant. From the 1st house are Sabina Kibisu Bulinga, Regina Shiyayo Mukalasinga, Ritah Kasiti Shikuri, Wiliyamina Lihabi Ashibaga, Sabencia Khatonde Andachila, Emmah Khakayi Musonye and Agnes Likhayachi and from the 2nd house Margaret Lipule, Praxides Shimuli Makotsi Aida Khasiala and Andrew Muchenditsi Andachila.
28. The disclosures by the applicants are in line with section 40 of the *Law of Succession Act*, which provides for how the estate of a polygamist is to be distributed. The assets are distributed among houses according to the number of children in each house, treating the surviving spouse as an additional unit. To comply with section 40, there is need to make the sort of disclosures that the applicant did, by showing the number of the households, and the members of the family in each household. Section 40 provides 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.”
29. One of the sons of the deceased is dead, and that is to say the husband of the protestor. I have mentioned section 41 above, in connection with how the share of a dead child of a deceased parent is to be handled. When a child of the deceased dies, and is survived by offspring, their entitlement is not extinguished or diminished. It should go to their offspring or to his/her estate. Section 41 says that the offspring step into the shoes of their dead parent, and take the share that is due to such dead parent. That share should be equal to the shares taken by the surviving children of the deceased. More importantly, section 41 talks of the offspring of the dead child of the deceased and not the spouse of the dead child. In intestate succession, the state passes to the kindred of the deceased, that is to say the blood relatives of the deceased, except for the surviving spouse of the deceased. In-laws, be they parents-in-laws or children-in-laws, are not blood relatives of their children-in-law or father-in-law. They have no right or entitlement to the intestate estate of their dead in-law. The *Law of Succession Act* does not recognize them or their rights. Indeed, the *Law of Succession Act* does not even mention them. They can only claim on behalf of others. A daughter-in-law, for example, can only claim the share due to her late husband, otherwise she has no direct right. For her to access the share due to her late husband, she has to obtain representation to his estate first, by way of a grant of letters of administration intestate.



Pursuing the interest due to her late husband without first obtaining the grant in his estate would amount to intermeddling, and her activities would run afoul of section 45 of the *Law of Succession Act*. Section 45 of the *Law of Succession Act* provides as follows: -

- “ 45. No intermeddling with property of deceased person
- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall —
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

30. The protestor is not a child of the deceased. She is a daughter-in-law. In terms of rights or entitlement to a share in the estate, she had none at all. She is not in the same league with the applicant nor the son, Andrew Muchenditsi. Nor any of the other daughters of the deceased. She has zero right or entitlement. It is her children, with her late husband, who have right or entitlement to a share of the estate, by dint of section 41, by way of stepping into the shoes of their late father. The protestor can only agitate a claim on behalf of her late husband, and she can only agitate the same upon obtaining a grant of representation to his estate, for it only that grant that would clothe her with authority to speak on behalf of her husband, speaking for her husband without obtaining a grant to his estate amounts to intermeddling into his estate, which is a criminal offence under section 45(2) of the *Law of Succession Act*. The mere fact that she is his surviving spouse clothes her with no authority whatsoever to claim that which accrues to her late husband. The protestor has not provided any proof that she holds such a grant with respect to the estate of her husband.
31. On ascertaining the shares due to each of those individuals that I have identified in paragraph 27 as the survivors of the deceased, I will start by stating that the shares should be in the assets that make up the estate. That would require that I assess whether the administratrices have ascertained assets that make up the estate. The applicant has identified Idakho/Shivakala/1298 and 2013, and Eldoret Municipality Council Plot No. 15/569. She has attached documents which show the said assets to be registered in the name of the deceased. The protestor disclosed only one asset, that is the one that she and Andrew Muchenditsi Andachila are interested in, Idakho/Shivakala/2013. At the oral hearing, both sides were in agreement that the deceased died possessed of the 3 assets identified by the applicant, that is to say Idakho/Shivakala/1298 and 2013, and Eldoret Municipality Council Plot No. 15/569.
32. I will now turn to how the 3 assets ought to be distributed. The principal fight appears to be over Idakho/Shivakala/2013. Why? The certificates of official searches for Idakho/Shivakala/2013 dated October 25, 2011 and March 28, 2012, show that it measures 1.6 hectares; that for Kabras/Shivakala/1278, dated October 25, 2011, shows that it measures 0.17 hectares. Idakho/Shivakala/2013



is the large of the 2, and therein lies the fight for it. The existence of Eldoret Municipality Council Plot No. 15/569 is evidenced by a property rates payment request form dated October 12, 2011. Valuation of the assets was not done, and, therefore, I have no idea of the what each of the 3 is worth.

33. The applicant proposes that Idakho/Shivakala/2013 to be shared out amongst the 6 daughters from the 1st house, excluding herself, with the surviving son, Andrew Muchenditsi also getting a share there. The 7 individuals would roughly get equal share, although Andrew Muchenditsi is allocated a relatively smaller share for reasons that are not explained, for the 6 daughters of the 1st house would get 0.574 acres each, and Andrew Muchenditsi 0.556 acres. Those who should get shares in Idakho/Shivakala/2013, according to her, are Sabina Kibisu Bulinga, Regina Shiyayo Mukalasinga, Ritah Kasiti Shikuri, Wiliyamina Lihabi Ashibaga, Andrew Muchenditsi Andachila, Emmah Khakayi Musonye and Agnes Likhayachi. The explanation that the applicant gives is that Idakho/Shivakala/2013 was the land for the 1st wife, her mother and that of the other six daughters. She argues that Idakho/Shivakala/1278 had been bought for the 2nd wife, the mother of Andrew Muchenditsi and the protestor's late husband. On her part, the protestor proposes that Idakho/Shivakala/2013 be given to the sons in the 2nd house, that is Andrew Muchenditsi and the family of the late Henry Lisanza. Her case, with Andrew Muchenditsi, is that the deceased settled them on Idakho/Shivakala/2013, and had indicated that Idakho/Shivakala/1278 was for the daughters.
34. Regarding Idakho/Shivakala/1278, the applicant proposes that the same be given to the survivors in the 2nd house, except for Andrew Muchenditsi, whose share is given in Idakho/Shivakala/2013. According to her, Idakho/Shivakala/1278 should go to Margaret lipule, Ida Khasiala and Braxides Shimuli Makotsi. Her argument is that Idakho/Shivakala/1278 had been bought by the deceased for the 2nd house, and secondly the deceased had directed the late Henry Lisanza to move into Idakho/Shivakala/1278. According to her the late Henry Lisanza died before moving to Idakho/Shivakala/1278, and the protestor, his widow, refused to move to Idakho/Shivakala/1278 upon the demise of the deceased. The protestor, on her part, argues that Idakho/Shivakala/1278 is for the 1st house, as that was the wish of the deceased, and Idakho/Shivakala/2013 is for the 2nd house, again according to the wishes of the deceased. She asserted that the deceased settled Andrew Muchenditsi and the late Henry Lisansa on Idakho/Shivakala/2013, while the 7 daughters in the 1st house got married and moved out of the estate.
35. On Eldoret Municipality Council Plot No. 15/569, the applicant proposes that the same should devolve wholly upon her, for the deceased had given it to her, and she had developed it extensively. The protestor proposes that Eldoret Municipality Council Plot No. 15/569 should be distributed equally, and if it proves too small for that purposes then it be sold and the proceeds of sale distributed equally amongst all the beneficiaries.
36. Although both sides talked of the wishes of the deceased with regard to the distribution of Idakho/Shivakala/1278 and 2013, and Eldoret Municipality Council Plot No. 15/569, no concrete evidence was led on those wishes. No written will was produced, which carried the alleged wishes. No oral will was alleged, nor proved, which could have conveyed those wishes. No written material in any form or shape was placed before me, to evidence the alleged wishes or intentions of the deceased. No evidence was led as to when, and where, and it whose presence, the wishes or intentions were expressed. Overall, therefore, I have no factual or evidential basis for concluding that the deceased had expressed any wishes or intentions on how Idakho/Shivakala.1278 and 2013, and Eldoret Municipality Council Plot No. 15/569, were to be handled in the event of his death. I shall proceed to distribute the 3 assets on the basis that the deceased had not expressed any wishes on either of them.



37. Andrew Muchenditsi appeared to argue that the deceased had done an inter vivos distribution of Idakho/Shivakala/2013, to the sons, that is to say himself and the late Henry Lisansa. However, apart from the evidence that the deceased showed the 2 where to put up their houses, no other evidence pointing to an inter vivos distribution was adduced. There was no evidence that the deceased ever approached the local Land Control Board to obtain consent for division of Idakho/Shivakala/2013 into 2 and the subsequent transfer and registration of the subdivisions in the names of his 2 sons. No application to the Land Control Board, by the deceased, for such subdivision, was placed on record. No consent form from land Control Board for such subdivision was tabled. No mutation forms were placed on record as evidence that the deceased attempted to subdivide the land between his 2 sons. No transfer form, duly signed by the deceased, was placed on record as evidence of an attempt to transfer Idakho/Shivakala/2013, subdivided, to the 2 sons. If documentation relating to the above had been tabled, there would have been basis to conclude that the deceased had gifted Idakho/Shivakala/2013 to his 2 sons, during his lifetime, that he had done everything possible to actualize that, and the only this outstanding was registration, but he died before that final step was taken. As it is, there is no evidence that the deceased had made any gifts of Idakho/Shivakala/2013 to his 2 sons, during his lifetime. If he had taken primary steps towards that direction, but died before he could finalize it, would effectively mean that Idakho/Shivakala/2013 is not even estate property, but property that the deceased gifted to his sons during lifetime, and which should be dealt with under section 42, in terms of being brought into the hotchpotch. However, there is no evidence that he ever did anything of that nature, and, consequently, Idakho/Shivakala/2013 remains estate property available for distribution to all. See *In re-Estate of Gedion Manthi Nzioka (Deceased)*[2015]eKLR (Nyamwenya J,), *In re-Estate of Fodana Songoro Guyo (Deceased)*(2020) eKLR (Nyakundi, J), *Licia Karimi Mwamba vs. Chomba Mwamba* (2020)eKLR (Gatari J) and *in re- Estate of Phylis Muthoni M’Inoti(Deceased)* [2019]KLR (Gikonyo,J).
38. Idakho/Shavakala/2013 appears to be where the home of the deceased was. The 2 sides of his family lived here. The 1st wife died here and was buried on the land. The house of the 1st wife, the mother of the applicant and her sisters, still stands on the land. The 2nd wife, the mother of Andrew Muchenditsi and mother-in-law of the protestor, had also been settled here. She left the deceased on the land, and went back to her first husband. She died after she reunited with her first husband, and was buried on the land of that first husband. She left behind her 4 children, the 2 sons and 2 daughters, who were raised by the 1st wife, the mother of the applicant and her sisters. The whole family resided on Idakho/Shivakala/2013, until the daughters got married. The applicant appears to anchor her claim on the fact that her mother was the 1st wife of the deceased, was the first to be settled on Idakho/Shivakala/2013, never separated from the deceased, raised the children of the 2nd wife after she left the deceased and her children, was buried on Idakho/Shivkala/2013 and her house still stands on Idakho/Shivakala/2013. She appears to take the view that Idakho/Shivakala/2013 was somewhat her mother’s matrimonial home and property. She appears to take the view that the 2nd house has a lesser entitlement to Idakho/Shivakala/2013, for the 2nd wife found the 1st wife on the land, and she left the marriage and reunited with her first husband. The protestor’s other case, apart from the aspect on Inter vivos gifts, is that the applicant and her sisters were women, who got married and left the property. Her attitude appears to be that being women, they are not entitled, and if they must be allocated anything, then it should be a small portion, hence she allocates them Idakho/Shivakala/1278.
39. The responses to the issues raised above should be that I am sitting as a Judge in a probate court, to distribute the property; I am not presiding over a family court, to divide matrimonial property. If the applicant desired to agitate matrimonial property rights, in favour of her mother, then she should have mounted a proper suit for determination of those questions, as required by Rule 41(3) of the Probate



and Administration Rules. Secondly, as at the time of the initiation of these succession causes, and at this particular instance, the only survivors of the deceased are his children. Section 38 of the Law of Succession Act applies, the assets ought to be distributed equally between all the children of the deceased, irrespective of their gender or marital status. Article 27 of the Constitution is relevant to the matter at hand. The daughters of the deceased do not have a lesser right, on account of their gender or marital statuses. They are children of the deceased, and they are at par with the sons of the deceased in the eyes of the law. Idakho/Shivakala/2013 was the ancestral home for both houses, and, therefore, it should be available for distribution to both houses.

40. Idakho/Shivakala/1278 was never developed. It was described as vacant, utilized only for farming purposes. Indeed, the protestor conceded that she is the one who leases the same out. What is clear is that none of the houses of the deceased settled on this property. I do not have any concrete evidence that the property was bought specifically for the 2nd wife. No evidence was tendered as to when it was bought or acquired, and from who, there is no proof of when the 2nd wife was married, and when she left, so as to connect the acquisition of the said property and her marriage. The 2nd wife was never settled on it. So, there is nothing to show that the same was intended exclusively for her side of the family. Consequently, I shall treat it as an asset in the estate, available to both sides of the family.
41. The applicant claims Eldoret Municipality Council Plot No. 215/569 was a gift to her, inter vivos, from the deceased. She claims that she developed the plot. The protestor takes the view that the same is estate property, which should be available to all. So, was it gifted inter vivos to the applicant? No evidence was adduced on the alleged gifting. No paperwork was presented. No evidence was adduced by the applicant to support her allegation that she developed the property. There is a document on record indicating that it is registered in the name of the deceased, and I shall treat it as an asset in the estate.
42. The protestor and her witnesses alluded to getting elders to sit and distribute the assets. It would appear that her mode of distribution is based on the model that was used by the elders. The law that governs the estate of a dead person is the Law of Succession Act. That law confers jurisdiction on the High Court and the Magistrate's Court to distribute estates of such dead persons. The Law of Succession Act, and the Rules, made under its do not assign any role to family elders to distribute the assets of a dead person. Distribution is the exclusive responsibility of the court, unless the said court invites such elders to assist it. I have carefully perused though the papers in these 2 files, and I have not seen any order made by this court, inviting family elders to sit and assist it distribute the estate. If elders did sit, without the sanction of the court, and purported to distribute the assets of the deceased, then they were mere busybodies, purporting to exercise an authority that they did not have. Indeed, interfering with or handling or dealing with the assets of a dead person, without authority amounts to what is called intermeddling with the estate. Purporting to sit and decide on how the estate is to be distributed, when there was no lawful authority under the Law of Succession Act, amounted to interfering with the estate. The elders intermeddled with the estate. They engaged in criminal activity, for which they could be prosecuted, for intermeddling is a criminal offence. Whatever the elders decided amounted to nothing in law, for they had no authority at all in law to do what they purported to do.
43. The law on intermeddling is in section 45 of the Law of Succession Act. No one should handle estate assets without lawful authority. It is provided that acts of intermeddling amount to commonality. The provision states as follows:-

“ 45. No intermeddling with property of deceased person

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act,



no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall

- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

44. What intermeddling entails and its legal consequences have analyzed in a wide variety of cases, which include *Benson Mutuma Mwangi vs. CEO Police Sacco & Another* [2016] eKLR (Gikonyo, J) *Gitau and 2 others vs. Wandai and 5 others* [1989] KLR 231 (Tanui, J) *in Re estate of Harrison Gachoki (Deceased)*[2005] eKLR (Okwengu J,) and *Jane Kanyi Kabara vs. Waweru Titi Michael* [2015] eKLR (Okong’o, J). *In Re the Estate of Harrison Gachoki (Deceased)* (2005) eKLR (Okwengu,J) is of significance here. Clan elders had purported to distribute the estate of a person who had died after 1st July 1981, and the court held that that act amounted to intermeddling with the estate of the deceased, and was unlawful, and the purported distribution was of no legal effect.
45. While still on intermeddling, I was told that the applicant was claiming Eldoret Municipality Council Plot 15/569 was hers. She had developed it and was collecting rent. The document that she has placed on record on Eldoret Municipality Council Plot No. 15/569 shows it to be an asset in the name of the deceased. She provided no proof that he had gifted it to her inter vivos. Being an asset on the deceased, she had no authority to treat it as her own, to the extent of developing it. Whatever rents accrued from the asset ought to have been collected on behalf of the estate, and should have been preserved to await distribution amongst all those entitled. She, ideally, ought to account for it. I note, though, that while she was benefiting exclusively from Eldoret Municipality Council Plot No. 15/569, the protestor and Andrew Muchenditsi were benefiting exclusively from Idakho/Shivakala/1278, by way of farming on it and leasing it out. Consequently, I shall refrain from calling on either side to account for their activities on Eldoret Municipality Council Plot 15/569 and Idakho/Shavakala/1278.
46. The distribution proposed by either side does not conform with the law. As indicated elsewhere, the deceased was survived by children, but no spouse, and section 38, therefore, should apply, for distribution of the estate equally amongst the children of the deceased. The distribution proposed is unequal. The law does allow beneficiaries or survivors to agree or consent to a distribution model which is not even. See *Justus Thiora Kiugu & 4 othes. vs. Joyce Nkatha Kiugu & another* [2015] eKLR (Visram,Koome & Otieno-odek, JJA). However, where there is no consensus or agreement on distribution of the estate in manner that departs from want the law prescribes, then the court will have no option but to resort to the provisions of the *Law of Succession Act* to resolve the matter. See *in re Estate of Juma Shiro (Deceased)*[2016] eKLR (Mwita, J) *In re Estate of Jackson M’ mukindia M’Arangu (Deceased)* [2018]eKLR (Gikonyo, J) and *Justus Thiora Kiugu & 4 others vs. Joyce Nkatha Kiugu & another* [2015]eKLR (Vistam, Koome and Otieno-Odek, JJA). In this case only 3 individuals have come before me, that is to say the applicant, the protestor and Andrew Muchenditsi. The applicant and the protestor swore an affidavit, and presented their proposals. They also took to the witnesses



showed at the oral hearings and testified. Andrew Muchenditsi also testified. However, they are not the only persons beneficially entitled to a share in the estate. The 1st house has 6 other children, while the 2nd house has 2 other children. The voice of a total of 8 children was not heard. It was the duty of the applicant and the protestor to avail those others, who supported their case, so that I could hear them in compliance with Rule 41(1) of the [Probate and Administration Rules](#). The application dated November 4, 2015 was not supported by a consent on distribution, in Form 38, executed by the children who support the proposals in the application, contrary to what Rule 40(8) of the Probate and Administration Rule requires. The protestor did not file a similar consent on distribution executed by any of the other children of the deceased who support her proposals. In the absence of such consent, or other material by the other children of the deceased, I shall strictly apply section 38 of the [Law of Succession Act](#), and share out the assets equally between all the 11 children of the deceased.

47. The deceased died a polygamist, having married two wives, the 2nd wife left, and went back to her first husband, but she left behind 4 children. I shall treat the deceased to have had 2 households, that of Teresina and that of Annah. Teresina had 7 children, while Annah had 4. Section 40 of the [Law of Succession Act](#) governs distribution of the estate of a polygamist. The assets are initially divided between the 2 houses. Taking into account the number of children in each house, and treating any surviving spouses as an additional units. The 1st house had 7 children, and, therefore, it comprises of 7 units. The 2nd house has 4 children, and, therefore, making up 4 units. The ratio of distribution shall be 7:4. The 3 assets shall be divided into 11 units each, after which the 11 shall be shared out between the 2 houses in the ratio of 7:4. 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 Act](#).
48. For avoidance of doubt, section 40 of the [Law of Succession Act](#) provides 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.”

49. How should the share due to the late Henry Lisansa be handled? I raise this because Henry Lisansa is dead. His interest is being agitated by the protestor. Yet the protestor, in her capacity has no entitlement to a share in the estate of the deceased herein, who was her father-in-law. In intestacy, whether under the [Law of Succession Act](#) or customary law, daughters-in-law are not entitled to a share in the estate of their dead parents-in-law. Indeed, the [Law of Succession Act](#) does not even talk about children-in-law and parents-in-law at all. What the [Law of Succession Act](#) recognizes are the children of such children-in-law. They are entitled to take the share that should have gone to their dead parents. So, the [Law of Succession Act](#) does not grant any rights to the children-in-law, instead in recognizes their children. Their children have direct access to their grandparents' estate, not so the children-in-law. This is provided for in section 41 of the [Law of Succession Act](#). The children step into the shoes of their dead parents, the children-in-law do not. The effect of this would be that since the children-in-law have no right or entitlement to a share in the estate of their late parent –in-law, they cannot stake any claim in it as in-laws. If she



claims as behalf of her late husband, then she must be clothed with legal authority, which comes by way of a grant of representation, so that she can take the share that ought to go to the estate of her late husband. She cannot claim the stake due to her children, given that the children are entitled directly vide section 41 of the *Law of Succession Act*, and, they would not require a legal intermediary to stand in for them. See *In re Estate of Luka Madole (Deceased)* [2019] eKLR (Musyoka J), *In re Estate of Imole Lubatse Paul (Deceased)* [2021] eKLR (Musyoka, J), *Martin Munguti Mwonga vs. Damaris Katumbi Mutuku* (2016) eKLR (Thande, J), *In re Estate of Joseph Gichubi Riunge (Deceased)* [2016] eKLR (Musyoka J), *In re Estate of Venorica Njoki Mwakagoto (Deceased)* [2013] KLR (Musyoka, J) *Elizabeth Wairumu Thimba & 2 others vs. Wilfred Njogu Mbutia & 2 Others* [2014] eKLR (Emukule, J) and *Mutiso Kisivi vs. Kyengo Kisivi & another* (2016) eKLR (Nyamweya, J).

50. For avoidance of doubt, section 41 of the *Law of Succession Act* provides as follows: -

41. "Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate."

51. So, what is the situation here? The protestor is not a child of the deceased. She is, therefore, not entitled to anything out of the estate of the deceased herein. She is a daughter-in-law of the deceased, as she was married to his late son, Henry Lisansa. She has not come out clearly to say who she represents in these proceedings, whether it is her children, the grandchildren of the deceased, or whether she represents the estate of her late husband, Henry Lisansa. She cannot speak for their children, because the said children are entitled to direct access to the estate, vide section 41 of the *Law of Succession Act*. If she purports to be pursuing the interest due to her late husband, then she will require to take out letters of administration in the estate of her late husband, in order to have authority to claim his stake in the estate. She has not claimed to speak on behalf of that estate and she has not purported to hold any form of representation to clothe her with authority to stand in their proceedings to speak on behalf of her late husband. Technically, therefore, she is an intermeddler in the estate of her late husband, as well as in that of the deceased herein. She has no authority to intervene in either estate. She has no legal standing to speak on behalf of her late husband. The mere factor of being as spouse of a dead spouse does not clothe one with standing to intervene their affairs without a grant of representation. See *In Re Estate of Francis Kimani Muchiri (Deceased)* [2018] eKLR (Musyoka J), *Hawo Shanko vs. Mohammed Uta Shanko* [2018] eKLR (Chitembwe J), *Priyat Shah & another vs Myendra Derchand Meghji Shah* [2017] eKLR (N. Mwangi J) and *Elizabeth Ndululu Mathuru & others vs Joseph Mbiuthiani & another* [2008] eKLR (Sitati J).

52. I believe that I have said enough to demonstrate that no portion of the estate of the deceased herein should be devolved to the protestor, either to make on behalf of her children or on behalf of her late husband. If the children had stepped in, under section 41, I would have considered them. In the circumstances, I shall devolve the share due to Henry Lisansa to his estate. Let the protestor initiate proceedings in his estate, so that she and her children can have access to that share through those proceedings, through the persons who shall be appointed administrators of the estate of the late Henry Lisansa.

53. The final orders shall be as follows



- a. That I hereby declare that the deceased herein died a polygamist, his children were, from the 1st house Sabina Kibisu Bulinga, Regina Shiyayo Mukalasinga, Ritah Kasiti Shikuri, Wiliyamina Lihabi Ashibaga, Sabencia Khatonde Andachila, Emmah Khakayi Musonye and Agnes Likhayachi and from the 2nd house Margaret Lipule, Aida Khasiala and Andrew Muchenditsi and the late Henry Lisansa;
- b. That it has been ascertained that he died possessed of Idakho/Shivakala/1278 and 2013, and Eldoret Municipality Council Plot No. 15/569;
- c. That the said assets shall be distributed to the children of the deceased in the manner spelt out in paragraph 47 of this judgment;
- d. That in the event that an asset cannot be subdivided and shared in the manner outlined above, the same shall be valued, sold and the proceeds of sale distributed in the said manner;
- e. That the grant on record is hereby confirmed in those terms, and a certificate of confirmation of grant shall issue accordingly;
- f. That each party shall bear their own costs, this being a family matter; and
- g. That any party aggrieved, has leave of 28 days, to move the Court of Appeal, appropriately.

54. It is so ordered

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 23rd DAY OF December .2022

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Mr. Elung'ata, instructed by Elung'ata & Company, Advocates for the applicants

Braxides Shimuli Makotsi, the protestor, in person

