



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**SUCCESSION CAUSE NO. 173 OF 1998**  
**IN THE MATTER OF THE ESTATE OF SHITEMU MOYO (DECEASED)**

**JUDGMENT**

1. The cause herein relates to the estate of Shitemu Moyo, who died on 28<sup>th</sup> September 1994, according to the certificate of death on record, serial number 390171, dated 30<sup>th</sup> May 1995. According to a letter from the Office of District Commissioner, Kakamega, dated 6<sup>th</sup> February 1996, the deceased had married 4 times, and was survived by 2 widows. The surviving widows are named as Susan Khavele and Grace Namalwa Shitemu, and 26 children. The children are listed in terms of their respective houses. The children from the 1<sup>st</sup> house are Ben Makokha, Samuel Lukongo, Ebby Shitemu and Rose Lusiche. The children in the 2<sup>nd</sup> house are Henry Shitemu, Agnes Nechesa, Charles Luvisia, Jacob Nyongesa, Frida Marzala, Alice Naliaka, Rose Nalina, Grace Roda, Alfred Juma, Nathan Barasa, Beatrice Nasimiyu and Timothy Simiyu. From the 3<sup>rd</sup> house, the children are Ruth Nafula and Peter Murabwa from the 4<sup>th</sup> house are Everline Shitemu, Airline Shitemu, Elizabeth Shitemu, Emily Shitemu, Reuben Shitemu, Japheth Shitemu, Jonah Shitemu and Festo Shitemu.

2. Representation to the estate was sought and obtained by the Public Trustee, with a letters of administration intestate being made on 30<sup>th</sup> March 1998, and a grant issued on 1<sup>st</sup> April 1998. The grant to the Public Trustee was revoked on 14<sup>th</sup> June 2012, on an application dated 5<sup>th</sup> August 2011, and a fresh grant was made to the surviving widow, Grace Namalwa Shitemu, issued on 5<sup>th</sup> July 2012. I shall refer to Grace Namalwa Shitemu as the administratrix.

3. What I am called upon to determine is a summons for confirmation of grant, dated 12<sup>th</sup> July 2013, filed by the administratrix, on 17<sup>th</sup> July 2013. She has listed the survivors of the deceased as 25 children and 2 widows. The assets listed for distribution are said to be Kakamega/Surungai/1131, Kakamega/Luandeti/1420, Kakamega/Surungai/821, Kakamega/Surungai/516 and Kakamega/Surungai/463. It is proposed that the said assets be distributed as follows:

- a. Kakamega/Surungai/463 – to John Mang’oli Shitemu and Festus Sifuna Shitemu, equally;
- b. Kakamega/Surungai/516 – to Japheth Wawire Shitemu;
- c. Kakamega/Surungai/821 – Peter Muragwa Shitemu;
- d. Kakamega/Surungai/1131 – Reuben Wambulwa Shitemu; and
- e. Kakamega/Luandeti/1420 – to Reuben Wamalwa Shitemu.

4. Protests to the proposed distribution were filed by Alice Naliaka, Beatrice Nashimiyu Shitemi, Grace Ayako Machanjo, Agnes Nechesa Mulati and Rose Shitemi Barasa. I shall collectively refer to them as the protestors. They are all daughters of the deceased, and their mother is Susan Khavere. They have identified the parcels of land that the deceased died possessed of as Kakamega/Surungai/463, 516, 821 and 913 and Kakamega/Luandeti/1420. They say that the deceased was survived by 2 widows. They have also disclosed the children of the deceased by the 2 widows and a 3<sup>rd</sup> wife who is deceased, Florence Tata. The children of the 1<sup>st</sup> widow, Susan Khavele Shitemi, are listed as the late Henry Shitemu, Agnes Nekesa, Charles Luvisia, Jacob Nyongesa, the alter Fridah Shitemi, Alice Naliaka, Rose Shitemi Barasa, Grace Likuyani, Alfred Shitemu, the late Nashon Barasa Shitemi, Beatrice Nashimiyu Shitemi and the late Timothy Shitemi. The children of the 2<sup>nd</sup> widow, Grace Namalwa Shitemu, are said to be Everline Shitemu, Irene Shitemi, Elizabeth Shitemu, Emily Shitemu, Reuben Shitemu, Japheth Shitemu, John Shitemu and Festus Shitemu. The children of the 3<sup>rd</sup> widow, the late Florence Tata, are said to be Ruth Nafula and Peter Mukabwa. They aver that the deceased had distributed his property before he died, so that Kakamega/Surungai /463 went to the house of Susan Khavele Shitemi; Kakamega/Surungai/516 and 913 to the house of Grace Namalwa Shitemi; and Kakamega/Surungai/821 to the house of the late Florence Tata. They further aver that the deceased and Grace Namalwa Shitemi then disposed of Kakamega/Surungai/913 and bought Kakamega/Surungai/1131. They further aver that Susan Khavele resided on Kakamega/Surungai /1131, and run businesses from Kakamega/Luandeti/1420, which had been bought jointly by the deceased and Henry Shitemi. They propose distribution as follows:

a. Kakamega/Surungai/463 – to Susan Khavele Shitemi, Beatrice Nashimiyu Shitemi, Grace Ayako Machanje, Agnes Shitemi Barasa, Alice Naliaka and Rose Naliaka Shitemi;

b. Kakamega/Luandeti/1420 – to Susan Khavele Shitemi, Beatrice Nashimiyu Shitemi, Grace Ayako Machanje, Agnes Shitemi Barasa, Alice Naliaka and Rose Naliaka Shitemi;

c. Kakamega/Surungai/516 – to Grace Naliaka Shitemi, Everline Shitemu, Irene Shitemi, Elizabeth Shitemu, Emily Shitemu, Reuben Shitemu, Japheth Shitemu John Shitemu and Festus Shitemu;

d. Kakamega/Surungai/1131 – to Grace Naliaka Shitemi, Everline Shitemu, Irene Shitemi, Elizabeth Shitemu, Emily Shitemu, Reuben Shitemu, Japheth Shitemu John Shitemu and Festus Shitemu; and

e. Kakamega/Surungai/821 – to Peter Mukabwa and Ruth Nafula.

5. Directions were given on 24<sup>th</sup> July 2013, for canvassing of the application by way of oral evidence.

6. The oral hearings commenced on 18<sup>th</sup> March 2015, with Susan Khavere Shitemi on the witness stand. She averred that the deceased had 3 wives, one of whom was deceased. She stated that the deceased had given her land before he died, and he was buried on that land upon his demise, being Kakamega/Surungai/463. She stated that the deceased had bought Kakamega/Surungai/516 and 913 for his other wife, Grace Namalwa Shitemi, where she lived with her children. She stated that Peter Murabwa was her father-in-law, and had his own land, being Kakamega/Surungai/821. She said she had no other land apart from where she lived. She said that the plot at Chimoyi had been bought by her son. She said she wanted the court to give her Kakamega/Surungai/463 and the plot at Chimoyi; and that Grace Namalwa should be given Kakamega/Surungai/516 and 913.

7. During cross-examination, she stated that she had 12 children with the deceased, but only 3 were alive as at the date of the hearing; while Grace Namalwa had 6 children with the deceased. She further stated that by the time of his death, the deceased had given out some parcels of land to his older children, and that included all her children, whether those dead or alive. She explained that the children of Grace Namalwa lived on her land, although the deceased had bought for them two pieces of land. He stated that her children had been given title deeds for their own parcels of land by the deceased before he passed on. She said Grace Namalwa had moved to the lands bought for her by the deceased, but she afterwards came back to live on her land. She further testified that the children of Grace Namalwa were all minors as at the time of the demise of the deceased. She said her son, Jacob Nyongesa was given Kakamega/Surungai/471 by his father, and Timothy Shitemi was given Kakamega/Surungai /477. She asserted that it was not true that Grace Namalwa lived on Kakamega/Surungai/463 because she had not been given a place to live. She said that if Grace Namalwa was given Kakamega/Surungai/463, she would have nowhere to live.

8. Alfred Juma Shitemi followed. He testified that he was a son of the deceased by Susan Khavere. He stated that the deceased had married 4 wives. He gave their names, and those of their children. He explained that the deceased shared out his land in 1970 to his 9 sons from the 1<sup>st</sup> and 2<sup>nd</sup> houses only. He remained with Kakamega/Surungai/463. One of his sons, Ben Makokha, complained that he had been given a smaller piece, whereupon the deceased gave him Kakamega/Surungai/821, but after an appeal the property was restored to the name of the deceased in 1971. He explained that by the time his father married Grace Namalwa in 1975, he himself had already married. Grace was then settled on Kakamega/Surungai/463, but the deceased then bought Kakamega/Surungai/490, which he subdivided into two, Kakamega/Surungai/913 and 914. He sold Kakamega/Surungai/914 to a church, and retained Kakamega/Surungai/913, which measured 6 acres. He also bought Kakamega/Surungai/516, which he registered in his name. He stated that all these events happened before Grace was married. He also bought Kakamega/Surungai/1420, located at Chimoyi market, measuring 0.07 hectares. He said that a commercial building stands on that property. He stated that the deceased was assisted by his son, Henry Shitemi, who was working in Uganda, to buy the plot. Construction was done between 1963 and 1964, and it was his mother, Susan, who operated a business on the premises. At the time of giving evidence, he stated that both widows collected rent from different segments of the property, in an arrangement that was worked out after the demise of the deceased. He testified that before his death, the deceased gave Kakamega/Surungai/516 and 913 to Grace Namalwa. He stated that there were no buildings on these parcels of land. Grace leased out Kakamega/Surungai/516, and sold Kakamega/Surungai/913 to the Catholic church, which in turn bought her Kakamega/Surungai/1131, and built a house for her on that piece of land. He said that Kakamega/Surungai/1131 measured 2.4 hectares. The house on Kakamega/Surungai/1131 was rented out, and the Catholic Church put up a permanent building on Kakamega/Surungai/913. He said that all these events happened after the demise of the deceased. The building on Kakamega/Surungai/1131 was put up in 1996. He said that as the older children of the deceased they were not claiming anything from the estate, and that it was his mother and stepmother who were fighting over the estate. He said that none of his sisters were given land. He said that Susan should be given Kakamega/Surungai/463 and Kakamega/Luandeti/1420. He further said that Grace had been given Kakamega/Surungai/516 and 1131, and that since the deceased had given Kakamega/Surungai/463 to the two surviving widows, the two should share it. He stated that Kakamega/Surungai/821 also belonged to the deceased, and proposed that the same be given to Peter and Ruth, who were in occupation. He stated that Ben Makokha had been given Kakamega/Surungai/476. He concluded by saying that Kakamega Surungai/913 was owned by the Catholic Diocese of Kakamega.

9. During cross-examination, he stated that the deceased had given him land, being Kakamega/Surungai/472. He confirmed that he had no claim over the estate, that all his brothers had been settled by the deceased before he died, and were not laying any claim. He stated that his mother lived with her grandchildren, and that none of her children lived on Kakamega/Surungai/463. According to him, the dispute centred around Kakamega/Surungai/463 and 1420. He confirmed that none of the children of Grace had been settled by the deceased before he died. He also confirmed that Grace had been living on Kakamega/Surungai/463, right from when she married the deceased. He stated that Kakamega/Surungai/913 was not part of the estate, and Grace did not reside there. He further confirmed that the deceased had not put up any buildings on Kakamega/Surungai/913. He confirmed that Kakamega/Surungai/913 was registered in the name of the Registered Trustees of the Diocese of Kakamega. On Kakamega/Surungai/1420, he said it was registered in the name of the deceased, and that not all the wives of the deceased benefitted from the rent collected from the plot. He stated that he preferred that Kakamega/Surungai/463 be shared equally between the two surviving widows. He said that there were no issues on the other parcels. He said that he got his share of 2.2 hectares in 1970, and that as at the time the deceased died, the children of Grace were still very young.

10. Beatrice Nashimiyu Shitemi testified next. She stated that the deceased had married 4 times, and she identified the 4 wives and their children. She also mentioned the assets that constituted the estate according to her. She said that Kakamega/Surungai/913 had been given to Grace, while Kakamega/Surungai/821 had been given to Peter Murabwa and Ruth Nafula. She said that her mother, Susan, had been buried on Kakamega/Surungai/463, alongside the deceased. She testified that her family and that of Grace both utilized Kakamega/Surungai/463. She said that during the lifetime of the deceased only her mother used to utilize Kakamega/Surungai/463, and that it was only after his demise that Grace began to use one half of it, while they used the other half. She said that Kakamega/Surungai/516 and 913 were given to Grace, who sold Kakamega/Surungai/913 to the Catholic Church, and bought another parcel of land. The sales happened after the demise of the deceased. She said that her side of the family had no claim on Kakamega/Surungai/913. She stated that Grace bought Kakamega/Surungai/1131, after selling Kakamega/Surungai/913, and the Catholic Church built a house for her on Kakamega/Surungai/1131, which, he said, was occupied by tenants. She proposed that Kakamega/Surungai/913 be given to Grace. She also proposed that Peter Murabwa and Ruth Nafula be given Kakamega/Surungai/821. She said the plot in town, Kakamega/Surungai/1420, was bought by the deceased for her mother, and was partly financed by one of her full blood brothers. She said that the money with the Public Trustee be shared out.

11. At cross-examination, she stated that the deceased had shared out his property according to the houses, and that the property given to the older sons was transferred to their names, and title deeds were issued. She said that the 1<sup>st</sup> house had no complaints. She said that her stepmother, Grace, sold Kakamega/Surungai/913, but that did not expose them to any loss. Kakamega/Luandeti/1420, she said was bought by her brother for their parents. She stated that after Grace was married she used to stay at the shop on Kakamega/Luandeti/1420. Then she was moved to Kakamega/Surungai/463. She was given Kakamega/Surungai/913, which she then sold. She said that Kakamega/Surungai/463 and Kakamega/Luandeti/1420 should go to her mother. She said that each of the 4 houses had daughters. She said that the 1<sup>st</sup> house was given its property, although the daughters there did not benefit. She further said that her brothers were given land, but the daughters were not, and that was why they were seeking the share due to their mother in Kakamega/Surungai/463 and 1420.

12. Grace Namalwa Shitemu testified next. She explained that she was married in 1975, was the 4<sup>th</sup> and last wife of the deceased. When she got married she found the first two wives, the third had died. She named the children of all the 4 wives. By the time of her marriage, the deceased had already given out his property to his sons. She said that she sold Kakamega/Surungai/913, and bought Kakamega/Surungai/1131. She said that Kakamega/Surungai/913 was rather rocky, the missionaries approached her, with a proposal to exchange it with another piece of land, and she agreed. She said that the deceased had only settled the 1<sup>st</sup> and 2<sup>nd</sup> houses, but not the 3<sup>rd</sup> and 4<sup>th</sup> houses. She said that the deceased had said that Kakamega/Surungai/1420 be given to her son Reuben, because it adjoined Kakamega/Surungai/1131. She said both she and Susan utilized the shops at Kakamega/Surungai/1420, and she asserted that she was entitled to it. She said that she was unaware that the same was bought by a son of Susan. She said that there was a Lwandeti plot that the deceased was buying, but died before he concluded the sale. On Kakamega/Surungai/463, she said that she resided there with her children, and that there was also a house for Peter Murabwa on the land, although Peter Murabwa was entitled to Kakamega/Surungai/821. She said that Kakamega/Surungai/463 was given to two of her sons, she said that the protesters, that is the daughters from the 1<sup>st</sup> house, ought to get their shares from their brothers, for it is the children who were young when the deceased died, who should get shares in the estate.

13. During cross-examination, she confirmed that the older sons had been settled by the time she was married, and all the assets had been bought by then. She said that she was initially settled at the shops on Kakamega/Surungai/1420. She said Kakamega/Surungai/516 was registered in 1973, while Kakamega/Surungai/913 was acquired after her marriage, after conclusion of a case that she found going on. She said that she knew that Kakamega/Surungai/913 belonged to the deceased when she sold it to the church, and that it was transferred to the church while the deceased was dead. She explained that she did the transaction on the basis that the land had been given to her son, Reuben. She said that she transferred the property with the assistance of Ben Makokha. She said the late Ben Makokha held Kakamega/Surungai/476, and it was his widow Lucy Nekesa Makokha who was the proprietor. Kakamega/Surungai/478 was held by a widow of one of the sons of the deceased, through succession. Kakamega/Surungai/479 was also in the hands of another widow of a son of the deceased, again through succession. She explained that the children of the 1<sup>st</sup> house got their shares and that was why they were not in court. She said that she did not sell Kakamega/Surungai/913 to the church, for what they did was an exchange of the lands. The church built for her a house on Kakamega/Surungai/1131, which unfortunately collapsed. She said that she never lived on the land, saying that it was her son, Reuben who occupied that house. She said that it was her son who lived on Kakamega/Surungai/516. She said that she did not contribute to the acquisition of the assets, for they had all been bought, and some developed before she was married. She said that she and Susan utilized Kakamega/Surungai/463. She said that the said property should devolve to her house.

14. At the close of the oral hearing, I was invited to take the views of the daughters. I did so, by taking their unsworn statements. 4 of them were in court, Elizabeth Shitemi, Emily Shitemi, Irene Shitemi and Everlyne Shitemi. They all said that they wanted to be allocated shares in the estate of their late father.

15. Mr. Khayumbi, for the protestors, opted not to file any written submissions, and left it entirely to me to decide, based on the evidence on record. Mr. Mbaka opted for written submissions, which he did file. I have read through them and noted the arguments made therein.

16. The deceased died on 28<sup>th</sup> September 1994, after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force. His intestate estate is, therefore, for distribution in accordance with the provisions of the Act, specifically Part V thereof. He was a polygamist, having married 4 wives, and was survived by children and two spouses, one of whom died during the course of these proceedings.

17. In confirmation applications, there are two principal factors for the court to consider, appointment of administrators and distribution of the estate. For avoidance of doubt, this is what section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, says:

“Confirmation of Grants

71. Confirmation of grants

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date

of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

- (2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—
- (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
  - (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be administered; or
  - (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or
  - (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

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 such grant shall specify all such persons and their respective shares.”

18. The principal purpose of confirmation is distribution of the assets. The proviso to subsection (2) of section 71 requires that the court be satisfied as to whether the administrator had properly ascertained all the persons beneficially entitled to a share in the estate and properly identified the shares due to them. The proviso is emphatic that the grant should not be confirmed before the court is satisfied on that account. The court, should, therefore, not proceed to address the matters that fall under section 71(2), if what is envisaged in the proviso has not been done. The provisions in the proviso have been reproduced in the Probate and Administration Rules at Rule 40(4) as follows:

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

19. Has the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules been complied with? There is no dispute as to who the survivors of the deceased were. The matter was initiated by the Public Trustee, who made a full disclosure of the family of the deceased in his petition. The administratrix has largely followed that disclosure in her summons for confirmation of grant. There is an attempt to distribute the estate. I call it an attempt since it does not propose distribution to all those listed as survivors of the deceased, and there is no explanation in the supporting affidavit as to why the rest were left out. The administrator did not file affidavits by those left out to renounce or waive their rights, and neither has she filed a consent, in Form 37, as required by Rule 40(8) of the Probate and Administration Rules, duly executed by all the survivors of the deceased. There is only a partial compliance, therefore, with the proviso. Is the default fatal? No. The matter went to full trial, and all the gaps in the application were filled, in the filings by the protestors and in the oral testimonies of those who gave evidence.

20. Part V of the Law of Succession Act governs intestate succession, where an intestacy happens. In intestacy, distribution would take several forms, depending on whether the deceased was survived by a spouse and children, section 35; or by a spouse without children, section 36; or by children but no spouse, section 38; or by no spouse nor children, section 39; or was a polygamist, section 40.

21. The deceased died a polygamist, and the provision which should apply is section 40, as the deceased had 4 wives and children. That would mean that distribution of his estate is to be founded on section 40 of the Law of Succession Act, which provides as follows:

“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.”

22. The estate of a polygamist is distributed, according to the above provision, amongst the houses, and the share going to each house depends on the number of survivors in each house. The number of survivors would include widows and children, irrespective of the gender and marital status of the children. Therefore, to actualize section 40, the administrator, in a case where the deceased died a polygamist, must, therefore, disclose the number of houses that comprise the estate, and the number of children in each house, disclosing whether the wife in each house had survived the deceased or not. Where some of the children are dead, then their children should be disclosed alongside their uncles and aunts. Such would be grandchildren of the deceased, and it is only that category of grandchildren who should be disclosed. Ideally, that is what the administrators should have done in this case.

23. Where it is alleged that some of the members of the family had benefited from *inter vivos* or lifetime gifts, then section 42 would be relevant. It should not be assumed that those survivors or members of the family of the deceased who had benefited from such gifts ought to

be excluded from the process. They must be disclosed, and at confirmation, the gifts they received *inter vivos* or during lifetime of the deceased ought to be disclosed, so that the court can distribute the net or remaining intestate estate with such gifts in mind. This is intended to ensure that there is equity in distribution, to obviate a situation where some survivors benefit twice from the estate, and to shut out such beneficiaries from delaying finalization of administration by later filing applications claiming that they had been left out of the process. They must be brought into the process so that it can be documented that they were members of the family of the deceased, and that they had benefited from the estate previously, through *inter vivos* or lifetime gifts. It is called bringing them into the hotch potch. That was not done, and it only emerged at the oral hearing of the application.

24. Section 42 of the Law of Succession provides as follows:

“42. Previous benefits to be brought into account

Where—

- a. an intestate has, during his lifetime or by will, paid, given or settled any property to 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 of this Act, *that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.*”

25. The Court of Appeal addressed this in *Elizabeth Chepkoech Salat vs. Josephine Chesang Chepkwony Salat* [2015] eKLR, where it said:

“From the consideration of sections 35, 40 and 42 of the Act, the broad principle of law which emerges is that where an intestate was polygamous, the estate, in the first instance, should be divided among the houses according to the number of children in each house adding a surviving wife as an additional unit taking into account any previous benefit to any house. Thereafter the estate devolving on any house is, subject to her life interest distributed by the surviving spouse in exercise of her power of appointment to each beneficiary taking into account previous benefit, if any, to any beneficiary. However, in the event that the life interest is terminated either by remarriage or death, then the net intestate estate devolves upon a house is divided among the surviving beneficiaries equally subject to any previous benefit to any beneficiary.

[30] Section 40 of the Act does not give discretion to a court to deviate from the general principles therein enunciated. Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to make adjustments to the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust.

... The application of section 40(1) is illustrated by the case of *Catherine Nyaguthii Mbauni v Gregory Maina Mbauni*, Civil Appeal No. 34 of 2004 (Nyeri) [2009] eKLR where the Court shared the net intestate estate according to a ratio reflecting the number of units in two houses.’

26. In the instant case, it emerged that the deceased had settled some of his children *inter vivos*, in 1970. These were his older sons, by his first two wives. Was the settlement in terms of house, as argued by the administratrix? I do not think so. The property was registered in the names of the sons directly, and not through their mothers. It would be to stretch it beyond limits to argue that the deceased had settled the first two houses. What emerged from the evidence is that he had only settled the sons in the two houses. The daughters were not settled, and that is why the protestors have come forward. They claim to be after the share due to their mother, however, that right is tenuous, for surviving spouses are only entitled to a life interest. Their mother died, and the life interest terminated. It cannot be asserted after death. The daughters, however, have a right to their father’s estate. The fact that the brothers in their houses were settled, and they were not, does not diminish or extinguish their right to inherit. After all, the *inter vivos* gifts, as said above, were to the sons, rather than to the houses or their mothers.

27. I shall proceed to distribute the estate bearing in mind the provisions of section 40 of the Law of Succession Act. The same may not neatly apply here, but I shall, nevertheless, have them prime in my mind.

28. Let me first start by considering who should inherit. The 1<sup>st</sup> house is not in contention, so I shall leave it entirely. The sons in the 2<sup>nd</sup> house have no claim, so I shall also leave them out. The protestors are from that house, and claim that they were not settled by their father when he settled the sons. I have already said above that they have right to their father’s estate, so I shall take them into account, and so should the 2 children from the 3<sup>rd</sup> house and then the 4<sup>th</sup> house. That would mean that those who ought to benefit are; from the 2<sup>nd</sup> house, Agnes Nekesa, the estate of the late Fridah Shitemi, Alice Naliaka, Rose Shitemi Barasa, Grace Likuyani and Beatrice Nashimiyu Shitemi; and all the survivors in the 3<sup>rd</sup> and 4<sup>th</sup> houses.

29. Which assets make up the estate? There is no dispute that Kakamega/Surungai/516, 821 and 463 and Kakamega/Luandeti/1420 are registered in the name of the deceased. These are undisputed assets of the estate. at the time of the death of the deceased, North Kabras/Surungai/913 was in the name of the deceased, but there is evidence that it was exchanged with North Kabras/Surungai/1131, after the deceased’s death, and it is now registered in the name of the Catholic Church. The circumstances of that exchange are suspect, in view of sections 45, 79 and 82 of the Law of Succession Act, for I have not seen any court order that allowed such a transaction pending confirmation of the grant. It would appear that the administratrix and the church engaged in conduct that was contrary to the law. However,

since there is consensus that the administratrix was entitled to that piece of land, and no one is contesting it, I shall leave it at that. It is not clear under whose name North Kabras/Surungai/1131 is registered, but, in view of section 42, I shall take it into account in distribution, that it is a property that went to the 4<sup>th</sup> house.

30. There was contention about Kakamega/Luandeti/1420. The 2<sup>nd</sup> house asserted it belonged to them, as it was bought by a member of that house or he provided the funds used to acquire it. It was acquired prior to the marriage of the administratrix. She was married in 1975, and its acquisition and development appears to date back to the early 1960s. It would also appear that the 2<sup>nd</sup> wife had been utilizing it long before the administratrix came into the picture. I saw no evidence as to how it was acquired, and what is critical to me is that it is registered in the name of the deceased. The 2<sup>nd</sup> wife and the administratrix both utilized it during the lifetime of the deceased. Indeed, it operated for some time as the matrimonial home for the administratrix. After the demise of the deceased, there was an arrangement that the two surviving widows, the 2<sup>nd</sup> wife and the administratrix, collect rent from the property. I am persuaded that both houses are entitled to the property.

31. The other contention is around Kakamega/Surungai/463. Both the 2<sup>nd</sup> and 4<sup>th</sup> houses claim it. It was acquired long before the administratrix married the deceased, and it was matrimonial home for all 4 wives of the deceased. The deceased, his three wives and their children were all buried here. Clearly, neither of the two sides have any superior claim to the property. Indeed, even the 3<sup>rd</sup> house is entitled to claim a right over the same, given that the only son from that house has a home within that property. All the daughters of the 2<sup>nd</sup> house, and the members of the 3<sup>rd</sup> and 4<sup>th</sup> houses are all entitled to this property. It is common ground that the 4<sup>th</sup> house was assigned Kakamega/Surungai/516 and 913 by the deceased, while the 3<sup>rd</sup> house was assigned Kakamega/Surungai/821. The sons from the 2<sup>nd</sup> house benefitted from *inter vivos* gifts. So all the houses have benefits elsewhere, and none of them can claim exclusive right to this asset.

32. So how is the estate to be distributed? The daughters in the 2<sup>nd</sup> house are 6 in number; the 3<sup>rd</sup> house has 2 children; while the 4<sup>th</sup> house has 1 widow and 9 children. That works out to a ratio of 6:2:10 or 3:1:5. I will take the lowest ratio, that would translate to 9 units. The only immovable asset to be subjected to this would be Kakamega/Surungai/463. It shall be divided into 9 units, and shared out between the 6 daughters in the 2<sup>nd</sup> house, the 2 children in the 3<sup>rd</sup> house and the widow and 9 children in the 4<sup>th</sup> house at the ratio of 3:1:5. The distribution of Kakamega/Surungai/463 on the ground shall take into account, the settlements and developments by either of the three houses. Kakamega/Luandeti/1420 shall also be shared out between the three groups at the same ratio. Kakamega/Surungai/821 shall devolve wholly upon Ruth Nafula and Peter Murabwa, absolutely and in equal shares. Kakamega/Surungai/516 shall devolve upon the surviving widow, Grace Namalwa Shitemu, during life interest, and thereafter to her children, Everline Shitemu, Irene Shitemi, Elizabeth Shitemu, Emily Shitemu, Reuben Shitemu, Japheth Shitemu, John Shitemu and Festus Shitemu, equally. It emerged, at the oral hearing, that the moneys held by the Public Trustee were shared out.

33. In the end, the grant herein is hereby confirmed. The estate shall be distributed in accordance with paragraph 32 here above. A certificate of confirmation of grant, in those terms, shall issue accordingly to the administratrix. The summons for confirmation of grant is disposed of in those terms. Each party shall bear their own costs. Any party aggrieved by these orders is hereby granted leave of 28 days to move the court of Appeal appropriately.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6<sup>TH</sup> DAY OF AUGUST, 2021**

**W MUSYOKA**

**JUDGE**