



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
SUCCESSION CAUSE NO. 375 OF 2011
IN THE MATTER OF THE ESTATE OF PETER KONGONI MULUPI (DECEASED)

JUDGMENT

1. According to the certificate of death on record, serial number 93231, dated 16th August 2010, the deceased herein, Peter Kongoni Mulupi, died on 24th December 2008. A letter from the Chief of Matioli Location, dated 19th July 2010, indicates that the deceased had married two wives, being the late Rabecca Nanyama and Susana Weyela Kongoni. He was said to have had been survived by Susana Weyela Kongoni, the widow, and five sons and five daughters. The sons were said to be John Manyali Mulupi, Jomo Mmasava, Kennedy Wekulo, Chevui Kongoni and Injendi Zabloni Kongoni. The daughters were listed as Alice Metah Kongoni, Veronica Chimoso, Khayikwa Kongoni, Florah Kongoni and Veronicah Bushamba. He was expressed to have had owned a property known as North Kabras/Malava/1694, which was subsequently subdivided and its register closed. The subdivisions were registered as North Kabras/Malava/2927, 2928, 2929, 2930, 2931, 2932, 2933 and 2934. North Kabras/Malava/2928, 2929, 2930, 2931, 2932 and 2934 were registered in the names of the deceased; while North Kabras/Malava/2927 was registered in the names of Susana Wayela and Chevui Kongoni, and North Kabras/Malava/2933 in the name of Chevui Kongoni.

2. Representation to the estate of the deceased was sought by Kennedy Wekulo Mulupi, in his capacity as son of the deceased, in a petition that was lodged herein on 9th June 2011. The deceased was expressed to have had been survived by the eleven individuals stated in the Chief's letter, with an addition of Francis Mumia, whose relationship with the deceased was not disclosed. The deceased was expressed to have had died possessed of four parcels of land, being North Kabras/Malava/2927, 2928, 2929 and 2932. He was expressed to have had died without debts and liabilities. Letters of administration intestate were eventually made to Chibuyi Kongoni and Kennedy Wekulo Mulupi, on 23rd July 2012, and a grant was duly issued, dated 13th September 2012. I shall hereafter refer to Chibuyi Kongoni and Kennedy Wekulo Mulupi as the administrators.

3. What is for determination is a summons for confirmation of grant dated 5th November 2012, filed on 9th November 2012, by the Kennedy Wekulo Mulupi, who I shall refer hereto after as the applicant. He has listed the survivors of the deceased to be the twelve individuals named in the petition. The property proposed for distribution is North Kabras/Malava/2927, 2928, 2929, 2930, 2931, 2932, 2933 and 2934. The said summons provides for a schedule for distribution of the property as follows: -

- a) North Kabras/Malava/2927 – John Manyali Mulupi and Susan Wayela Mulupi, equally;
- b) North Kabras/Malava/2928 – Francis Mumia, absolutely;
- c) North Kabras/Malava/2929 - Veronicah Chimoso, absolutely;
- d) North Kabras/Malava/2930 – John Manyali Mulupi, absolutely;
- e) North Kabras/Malava/2931 – Jomo Mmasava Kongoni, absolutely;
- f) North Kabras/Malava/2932 – Kennedy Wekulo Mulupi, absolutely;
- g) North Kabras/Malava/2933 – Chevui Kongoni, absolutely; and
- h) North Kabras/Malava/2934 – Injendi Kongoni, absolutely.

4. The said application was filed simultaneously with a consent in Form 37, filed under Rule 40(8) of the probate and Administration Rules, duly signed by John Manyali Mulupi, Francis Mumia, Jomo Mmasava Kongoni, Kennedy Wekulo Mulupi and Veronicah Chimoso Kongoni. Susan Wayela Kongoni and Chivui Kongoni did not execute the consent.

5. On 21st November 2012, Chibuyi Kongoni, hereinafter to be referred hereafter as the protestor, filed an affidavit of protest, sworn on 21st November 2012, to the summons of confirmation of grant. He states that he was objecting to the heirs identified and the mode of distribution proposed. He avers that George Peter Kongoni and Janet Kongoni were survivors who had been omitted. He states that the administrators had distributed assets that did not form part of the estate. He states that North Kabras/Malava/2927 belonged to him, the protestor, while North Kabras/Malava/2929 had been subdivided into North Kabras/Malava/3401 and 3402, that North Kabras/Malava/2930 belonged to John Manyali Mulupi, and North Kabras/Malava/2933 belonged to him, the protestor. He adds that the deceased had sold North Kabras/Malava/3401 to Anne Khavere Muchika. On Peter Mumia, he avers that he was the rightful beneficiary of North Kabras/Malava/3256. He proposed that the estate be disposed of as follows:

(a) North Kabras/Malava/2928 – to Veronicah Chimoso Kongoni;

(b) North Kabras/Malava/2931 – to Jomo Mmasava Kongoni;

(c) North Kabras/Malava/2932 – to Kennedy Wekulo Mulupi;

(d) North Kabras/Malava/1696 – to John Wafula Luvembe;

(e) North Kabras/Malava/2934 – to Mildred Mbira, to hold in trust for Becky Injendi, Sayia Injendi and Felister Wanyona Injendi, all minors; and

(f) North Kabras/Malava/3401 – to Anne Khavere Muchika.

6. He has attached several documents to his affidavit. A title deed for North Kabras/Malava/2927 shows that the same was registered in the name of the deceased on 7th June 2011. A title deed for North Kabras/Malava/3402 to show that the property was registered in the name of Nicholas Lusiola Zisala on 22nd May 2008. A certificate of official search for North Kabras/Malava/2930 to show that as at 15th June 2010 the said property was registered in the name of John M. Mulupi. A title deed for North Kabras/Malava/2933 to demonstrate that the same was registered in the name of Chebuyi Kongoni on 10th September 2008. There is copy of a sale agreement between the deceased and Annah Khavere Avakalwa, dated 4th June 2008, to dispose of North Kabras/Malava/3401. There is also copy of a judgment in Butali DMLC No. 3 of 1969 between the deceased and another, delivered on 17th July 1969. Finally, there is copy of a document from the Ministry of Lands, with respect to a boundary dispute over North Kabras/Malava/3709 and 3256.

14. He swore a further affidavit on 20th January 2020, filed herein on 26th January 2020, to confirm that North Kabras/Malava/3256 was registered in the name of Peter Mumia, while North Kabras/Malava/4214 was registered in the name of Kutondo Peter. He has attached certificates of official searches to support that contention.

15. Directions were given on 21st November 2012, for disposal of the said summons for confirmation of grant, on the basis of oral evidence.

16. The oral hearings kicked off on 27th July 2015. The first on the witness stand was the applicant. He stated that the deceased had three wives, who are all now deceased. He explained that the deceased had initially owned North Kabras/Malava/103, which was later subdivided into three portions, being North Kabras/Malava/1694, 1695 and 1696. Subsequently, North Kabras/Malava/1694 was subdivided in 2000, into eight portions, being North Kabras/Malava/2927, 2928, 2929, 2930, 2931, 2932, 2933 and 2934. He stated that the said portions were all in the name of the deceased. He also stated that the deceased had been survived by six sons and nine daughters. Subsequently, North Kabras/Malava/1695 was sold to Lucheli Sasala. He stated that he could not state who owned North Kabras/Malava/1696, but said that there were people living within the property, from the family of Lubembe Chevui. He proposed distribution as per his proposal in the application, as recited in paragraph 3 of this judgment. He stated that he was not aware that North Kabras/Malava/2929 had been subdivided into North Kabras/Malava/3401 and 3402. He said that he had no information on North Kabras/Malava/3401 having been sold to Anne Khavere Muchika. He stated that the sale to the family of Lubembe was done by the deceased when he and his siblings were yet small children. He confirmed that North Kabras/Malava/2927 was registered in the name of the protestor. He stated that he was unaware that the deceased had sold land to Nicholas Lusiola. He stated that no one lived on North Kabras/Malava/2929, nor that John Manyali Mulupi had title to North Kabras/Malava/2930. He also stated that he was not aware that the protestor had title to North Kabras/Malava/2933. He explained that Peter Mumia was a son of Wayela with the deceased, and that he already had title to property that had belonged to his mother. He could, however, not tell which property that was. Neither could he tell from which parcel of land that piece of land came. He said that North Kabras/Malava/1696 was occupied by the family of the late Lubembe Chivui since 1968, but he did not know whether the property was registered in the name of the deceased, and he had no objection to the said property going to the family of the late Lubembe Chivui. He confirmed that Veronicah Chimoso was his sister, who lived in town.

17. Francis Mumia Peter, national identity card number 0935692, testified next. He described himself as a son of the deceased, and indicated that he supported the distribution proposed by the applicant. He stated that Veronicah Chimoso lived on estate property, although she carried out business at Gilgil. He said that she was unmarried. He stated that the deceased had given land to each of his sons and to Veronicah Chimoso. He stated that his mother never got any land from the deceased, adding that the land she got through the land case, was from her former husband. He stated that he was not given land by the deceased. He said he had been given North Kabras/Malava/2928 but it was the protestor who lived on the land. He said that Veronicah Chimoso lived on North Kabras/Malava/2927.

18. Veronicah Chimoso followed. She supported the distribution proposed by the applicant. She stated that she lived on North Kabras/Malava/2927. She said that the deceased had by the time of his death, promised to give her North Kabras/Malava/2929, but she could not tell whether the deceased had sold it. She testified that the deceased had given North Kabras/Malava/2928 to Francis Mumia Peter. She explained that Mumia had siblings, being a brother and a sister, who, she said, were all children of the deceased. She could not tell whether the deceased had given land to those children.

19. The case for the protestor opened on 24th May 2017. He stated that North Kabras/Malava/2927 had been given to his mother in 2004 by the deceased. The matter was taken to the land control board and the property was registered in her name. He proposed that North Kabras/Malava/2928 be given to Veronica Chimoso Kongoni, who he described as an unmarried daughter of the deceased. He stated North Kabras/Malava/2929 had been sold by the deceased to Nicholas Lusiola Tsisala and Anna Khavere Muchika. The sale was done after North Kabras/Malava/2929 had been subdivided into North Kabras/Malava/3401 and 3402. He explained that North Kabras/Malava/3402 was registered in the name of Nicholas Lusiola Tsisala, but North Kabras/Malava/3401 was still in the name of the deceased, although it was due to Anna Khavere Muchika. He stated that the deceased gave North Kabras/Malava/2930 to John Manyali Kongoni, a son of the deceased from the first house. The said John Kongoni had since died, but had adult children. He went on to state that North Kabras/Malava/2930 was being used by the family of the late John Manyali Mulupi. He stated that North Kabras/Malava/2932 belonged to the applicant, even though it was still in the name of the deceased. He stated that North Kabras/Malava/2933 was in the name of the protestor, having been given to him by the deceased as a gift. He stated that the family of Eliana Oyundo Mulupi was not entitled to a share in the estate. He explained that she had sued the deceased in Butali DMCLC No. 3 of 1969, and was awarded 13.0 hectares out of North Kabras/Malava/146. He stated that Eliana Oyundo Mulupi had the said parcel of land registered in her name. He stated that the land was subdivided, and what remained was some 5.8 hectares in what is now North Kabras/Malava/3256, which is in the name of Francis Mumia Peter, a son of Eliana. He stated that the other bit of that land was known as North Kabras/Malava/4214, which was in the name of Kutondo Peter. He explained that Eliana took the deceased to court after she realized that he was selling land. She sued to secure her interest and that of her children. He said that she had died, and was survived by two sons and a daughter, who were still alive.

20. During cross-examination, the protestor explained that a Plot No. 1 Butali was registered in his name, he stated that the deceased had sold it to him, and had it transferred to his name. He also confirmed that the deceased had transferred North Kabras/Malava/2927 to his name and that of his mother, and that it was, as at the date of his testimony, in his name. He explained that his mother had taken him to the land control board and had the property transferred to his name. He stated that George Peter Kutondo and Janet Kongoni were his siblings from Eliana. He stated that they had no interest in the estate of the deceased because they had been given their share of the estate in 1969. He stated that Rebecca Nanyama Kongoni was the first wife of the deceased. She died and was buried on North Kabras/Malava/2927. He explained that North Kabras/Malava/1694 was the original property of the deceased, which had been excised from North Kabras/Malava/103. He stated that North Kabras/Malava/103 had "given birth" to North Kabras/Malava/1694, 1695 and 1696. He said that the deceased had transferred various parcels of land to some people. He said that on his part, he got Plot No. 1 Butali, and North Kabras/Malava/2927 and 2933. North Kabras/Malava/2927 and 2933 measured 4.9 hectares and 4.87 hectares, respectively. He stated that the same were given to him by the deceased as gifts. He stated that while the deceased died on 24th December 2008, North Kabras/Malava/2927 was transferred to him on 24th April 2004, although he collected the title on 19th June 2008. He stated that the deceased ailed for three months, of urinary blockage, before he died. He stated that Rebecca Nanyama died in 1973, and that was before the land was subdivided.

21. Murasi Shikunyanga, national identity card number 5103091, followed. He testified that the deceased, who was his relative, had stated in 2003 how his land was to be shared out. He said that he attended that meeting in his capacity as village elder. He stated that all the children of the deceased were satisfied with the distribution. He said that he was not aware of any land cases affecting the land. He said that the applicant had wanted to take all the land, and that that was what prompted the deceased to share out his land.

22. Alfred Wafula Lubembe, national identity card number 9379311, was the next witness. He stated that the deceased was his uncle, being a brother of his own father. He mentioned that the applicant, the protestor and Charles Munange were some of the children of the deceased. He mentioned Charles Shikote as among some of the persons who bought land from the deceased. He identified his father as Charles Lubembe Chibui, as a brother of the deceased, who had bought land from the deceased, being North Kabras/Malava/1696. He stated that he and his family lived on North Kabras/Malava/1696 since 1972. He explained that the deceased had subdivided his land into eight pieces, out of which he gave out five to his sons, and retained three. He gave North Kabras/Malava/2927 to Susan Aiyera and Chibuyi Kongoni, North Kabras/Malava/2928 to Veronica Shimoso and sold North Kabras/Malava/2929 to Nicholas Lusiola and Khavere Kutondo. He said that he witnessed the sale transactions between the deceased and Nicholas Lusiola and Khavere Kutondo. He stated that North Kabras/Malava/1696 and 2927 were in the name of the deceased.

23. The final witness for the protestor was Nicholas Lusiola Zisala, national identity card number 24090250. He stated that North Kabras/Malava/3402 was his property, having bought it from the deceased.

24. At the close of the oral hearings, the court directed that the parties file written submissions. Both sides have complied.

25. In his written submissions, dated 7th July 2020, filed herein, on even date, the protestor has introduced other beneficiaries to the original list of survivors of the deceased, the new names being of George Kutondo Peter and Janet Peter. He, however, indicates that he has no objection to the said inclusion. He reiterates that the property that was in the names of the deceased was North Kabras/Malava/2928, 2931, 2932 and 2934. He also reiterates that North Kabras/Malava/2927, 2929, 2930 and 2933 were previously in the name of the deceased but had been subsequently transferred to the names of other persons, being the protestor (2927, 2933), Nicholas Lusiola Zisala (2929, 3402) and John Manyali Mulupi (2933). He indicates that the protestor had benefited from 20 acres of the estate's land, which translated to roughly 1/3 of the estate. He submits that he had reservations about how the protestor came to be the registered proprietor of the two parcels of land, saying that he might have had taken advantage of the medical condition of the deceased to unduly influence him. He submits that North Kabras/Malava/2927 ought to be declared to be estate land, which he proposes to be shared out between Veronica Chimoso, Jane Nanjala and Mildred Mbwira, based on the fact that the same was where the family homestead had been for generations. He would like the two to hold the property in trust for their respective houses. He submits that he doubted about the subdivision of North Kabras/Malava/2929 by the deceased. He further submits that there was no evidence that North Kabras/Malava/1696 belonged to the estate. He submits that Flora Kongoni, initially indicated to be a beneficiary, was forced by the protestor to declare that her father was the late Motochi Makuto, and her dowry was paid to the said Motochi Makuto, who gave her a plot. He submits that the interests of Veronica Vushamba and Khaikwa were to be catered for by Jane Nanjala and Mildred Mbwira; and that of Alice Meta's was to be catered for by Veronica Chimoso. Finally, he proposes distribution as follows:

(a) North Kabras/Malava/2930 – to Hellen Mulupi (widow);

(b) North Kabras/Malava/2927 – Veronica Chimoso;

- (c) North Kabras/Malava/2931 – to Jomo Mmasava Kongoni (Jane Nanjala Muremi – widow);
- (d) North Kabras/Malava/2932 – to Kennedy Wekulo Mulupi;
- (e) North Kabras/Malava/2933 – to Chebuyi Kongoni;
- (f) North Kabras/Malava/2934 – to Injendi Zablani Kongoni (Mildred Mbwira – widow);
- (g) North Kabras/Malava/2929 – Veronica Chimoso;
- (h) North Kabras/Malava/2928 – to Francis Mumia Peter; and
- (i) North Kabras/Malava/2927 – to Veronica Chimoso, Jane Nanjala and Mildred Mbwira, to hold in trust for their respective houses.

26. On his part, the protestor submits that the deceased had three wives, and seven daughters and seven sons, whose names are listed in the submissions. All the widows are said to be dead, while some of the sons and daughters of the deceased have also died. He submits that the deceased had died possessed of five parcels of land, being North Kabras/Malava/2928, 2931, 2932, 2934 and 3401. He submits that the deceased had transferred North Kabras/Malava/2927 to Susan Wayela Kongoni and Chibuyi Kongoni; North Kabras/Malava/2930 to John Manyali Kongoni; North Kabras/Malava/2933 to Chibuyi Kongoni, Kakamega/Malava/3402 to Lusiola Zisala; North Kabras/Malava/3256 to Francis Mumia Peter and North Kabras/Malava/4214 to Kutondo Peter. It is submitted that the deceased was indebted to Ann Khavere Muchika, and the decision in *In re Estate of Kagiri Mukua (Deceased)* [2019] eKLR, was cited to support the contention that the deceased had made a gift to her, which the estate was obliged to perfect. He proposed that the estate be shared out as follows - North Kabras/Malava/2928 to Veronica Vushamba Kongoni, North Kabras/Malava/2931 to Jane Nanjala Muremi the widow of Jomo Mmasava Kongoni to hold in trust for the children, North Kabras/Malava/2932 to John Wekulo Mulupi, North Kabras/Malava/2934 to Mildred Mbwira the widow of Zablani Injendi Kongoni to hold in trust for their children, and North Kabras/Malava/3401 to Ann Khavere Muchira.

27. From the pleadings, affidavit and oral testimonies, I have identified only two issues for determination, that is whether the grant ought to be confirmed and how should the estate be distributed.

28. In confirmation applications, there are two principle 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.”

29. 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 person entitled to the estate have been ascertained and determined.”

30. 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 a letter on the record from the Chief, which indicates that deceased was survived by eleven individuals. In the petition, twelve individuals are listed as survivors of the deceased. It is the same twelve individuals who are listed in the summons for confirmation of grant as survivors. When the protestor filed his witness statement, on 23rd May 2017, he listed eleven survivors, among them being married daughters of the deceased. At the oral hearing it, transpired that there was a third house that the applicant had not factored in the petition and in the application, but was identified by the protestor in his witness statement. Indeed, according to the protestor, the deceased had fourteen children, yet not all fourteen were disclosed in the confirmation application.

31. The explanation given at the oral hearing was that the third house was not entitled to a share in the estate nor interested in it, since they were settled in a land case that was determined sometime in 1969 between the deceased and his wife from that house. This cause is about the estate of the deceased herein; it does not matter who is entitled to what out of the estate. The law, at section 51 of the Law of Succession Act, requires that all the survivors of the deceased be disclosed, the issue as to whether they should get a share in the estate, should be determined at the confirmation hearing, in which they are expected to participate. The other survivors who did not play a role at all in the matter were the married daughters of the deceased, presumably because they are married.

32. It is clear from the filings that the proviso to section 71(2) of the Act and Rule 40(4) of the Probate and Administration Rules was not complied with. Some of the survivors of the deceased were left out. What comes out very clearly to me, from the material before me, is that the deceased was survived by another family, with other children, apart from those disclosed by the applicant, and it would appear that there is also other property that was not disclosed. Going by the proviso to 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules, the applicant has not ascertained those individuals, and, therefore, the matter is not ripe for confirmation.

33. It would appear that the daughters of the deceased were left out of the distribution schedule, purely because they are daughters, and it is presumed that they were not interested in taking a share in the estate on account of their gender. The deceased died in 2008, long after the Law of Succession Act had come into force on 1st July 1981. According to section 2(1) of the Law of Succession Act, his estate fell for distribution in accordance with Part V of the Act, which envisaged that sons and daughters are entitled on an equal basis to a share in the estate. Customary law, which excluded daughters from benefit, whether rightly or wrongly, is of no application to the instant estate. Daughters of intestates, dying after 1st July 1981, are entitled to be allocated their shares in the estate. They are to be left out of distribution where they have renounced their share, which they should do by filing a deed of renunciation, or by signing a consent of distribution on Form 37 or 38, or by swearing an affidavit where they express their intention not to take a share, or where they attend court at the confirmation hearing, and address the court, so that their wishes are placed on record, that they did not wish to take a share in the estate. The administrators cannot proceed with confirmation of grant as if the daughters did not exist, by presuming that, as daughters, they were not entitled or were not interested, whilst the law has provided for them, and required that where they are not interested, then they should be involved in the process so that their wishes are made known, and recorded. Where that has not been done, then the court ought not confirm the grant.

34. For emphasis sake, the said proviso, by way of repetition, says:

“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.”

The said provision is reinforced by Rule 40(4), which, I hereby recite once more, for emphasis:

“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.”

35. Part V of the Law of Succession Act governs intestate succession, where 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.

36. The deceased had three wives and children. That would mean that distribution of his estate was 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.”

37. 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 the only category of grandchildren who should be disclosed. Ideally, that is what the administrators should have done in this case.

38. 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 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.

39. 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.”*

40. The Court of Appeal has authoritatively pronounced itself on the above, 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.”

41. In conclusion, I shall make the following orders: -

- a) That the Summons for Confirmation of Grant, dated 5th November 2012, filed on 9th November 2012, is hereby postponed, in terms of section 71(2)(d), for the reasons given in the body of the judgment;**
- b) That the administrators are hereby directed to file a further affidavit in which they shall disclose all the members of the family of the deceased, regardless of whether or not they are entitled to a share in the estate, and all the assets of the estate, regardless of whether they had been given to a particular member of the family or house, to facilitate distribution of the estate in strict compliance with section 40 of the Law of Succession Act;**
- c) That in the said affidavit, the administrators shall also come up with a fresh schedule of distribution, indicating all the members of the family of the deceased, indicating whether or not they receive a share in the estate;**
- d) That in the same affidavit, the administrators shall give reasons as why, if at all any members of the household are not allocated shares in the estate, that is so;**
- e) That orders on the distribution of the estate shall be made only after the administrators comply fully with the directions given above;**
- f) That the matter shall be mentioned, on a date to be given at the delivery of this judgment, for compliance and further directions;**

g) That each party shall bear their own costs this being a family matter; and

h) That any party aggrieved by the orders made herein shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS.....20th.....DAY OF November 2020

W MUSYOKA

JUDGE