



Nyamweya (Suing as the Legal Representative of the Estate of Tabitha Moige Nyamweya (Deceased)) v (Deceased & 9 others (Environment & Land Case 37 of 2015) [2025] KEELC 5018 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5018 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 37 OF 2015**

**M SILA, J
JULY 3, 2025**

BETWEEN

**JOYCE BOCHERE NYAMWEYA PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF TABITHA
MOIGE NYAMWEYA (DECEASED)**

AND

**DORCAS MABERA [SUED AS LEGAL REPRESENTATIVE OF THE ESTATE OF
CHARLES RATEMO NYAMWEYA (DECEASED)] 1ST DEFENDANT
JEMIMAH KERUBO NYAMWEYA [SUED AS LEGAL REPRESENTATIVE OF
THE ESTATE OF HON JAMES NYAMWEYA (DECEASED)] 2ND DEFENDANT
PAUL NYAMWEYA 3RD DEFENDANT
JAMESPARK HOLDINGS LIMITED 4TH DEFENDANT
GEORGE OMARI NYAMWEYA 5TH DEFENDANT
JAMES OGENDI NYAMWEYA 6TH DEFENDANT
CHRISTOPHER NYAMBANE NYAMWEYA 7TH DEFENDANT
MOIGE GARDENS LIMITED 8TH DEFENDANT
TANYA HOLDINGS LIMITED 9TH DEFENDANT
HOTEL PHOENIX LIMITED 10TH DEFENDANT**



JUDGMENT

(Plaintiff filing suit seeking separation of the estate of her mother and her father; plaintiff's father being polygamous and plaintiff being daughter of the first house; properties registered in name of her deceased father; plaintiff's mother passing on before the plaintiff's father; question whether in such scenario the estate of the deceased spouse can seek separation of property from the estate of the spouse who was registered as proprietor; court of opinion that proprietorship in matrimonial property where one person is the registered holder is akin to a joint proprietorship so that if the unregistered proprietor dies, the property devolves absolutely to the surviving spouse who is the registered owner; in any event, in the situation at hand, impossible to separate the properties between the three spouses; court thus not persuaded that the plaintiff's suit should succeed; plaintiff's suit dismissed with costs)

1. The suit herein was commenced by way of a plaint filed on 9 February 2015 by Joyce Bochere Nyamweya (Joyce or the plaintiff), who has filed this suit on behalf of the Estate of her late mother, Tabitha Moige Nyamweya (Tabitha). Tabitha was the first wife of Hon. James Nyamweya (Hon. Nyamweya). Hon. Nyamweya was a prominent politician, Member of Parliament, and Cabinet Minister for a considerable period of time. He was also an advocate of the High Court of Kenya. The plaintiff is daughter to Tabitha and Hon. Nyamweya. The 1st and 2nd defendants are sued in their personal capacity and in their capacity as administrators of the estate of the late Hon. James Nyamweya. The original 1st defendant, Charles Ratemo Nyamweya (now deceased), is his first born son with Tabitha, whereas the 2nd defendant, Jemimah Nyaboke Nyamweya, is Hon. Nyamweya's second wife. He married her in 1978 under Kisii Customary Law. With Jemimah, Hon. Nyamweya had one child, Paul Nyamweya, who is the 3rd defendant in this suit. The 4th defendant is Jamespark Holdings Limited, a company owned by Jemimah and Paul. The 5th defendant is George Omari Nyamweya, the 6th defendant is James Ogendi Nyamweya, and the 7th defendant is Christopher Nyambane Nyamweya. They are sons of Hon. Nyamweya and Tabitha and thus brothers to the plaintiff. The 8th, 9th and 10th defendants are companies associated with the Nyamweya family. The 9th defendant, Tanya Holdings Limited was incorporated on 24 February 1995. The 10th defendant, Hotel Phoenix Limited, was incorporated on the same day i.e 24 February 1995. I could not find the Certificate of Incorporation for the 8th defendant, Moige Gardens Limited, and I am not sure when it was incorporated. In total, Hon. Nyamweya had 8 children with Tabitha, four sons and four daughters. They are ; Charles Ratemo Nyamweya (son), Rebecca Moraa Masese (daughter), Joyce Bochere Nyamweya (daughter), George Omari Nyamweya (son), Kenyalyn Monyenche Makone (daughter), Mary Nyaboke Kimoro (daughter), James Ogendi Nyamweya (son), Christopher Nyambane Nyamweya (son). I have mentioned that with Jemimah, he had one child, a son, Paul Nyamweya, the 3rd defendant.
2. Tabitha died on 18 July 1995. Unfortunately, and sadly to the family, Hon. James Nyamweya died just two months later, on 25 September 1995.
3. After Hon. Nyamweya died, a grant ad colligenda bona in respect of his estate was applied for in Kisii High Court Succession Cause No. 482 of 1995, and issued to Jemimah and George, so as to gather and preserve his estate. Out of this grant, some properties were sold off.
4. The main succession matter in respect of the estate of Hon. Nyamweya was subsequently filed. This is the case Kisii High Court Succession Cause No. 451 of 1996. The succession matter was anchored upon a will dated 3 April 1991 that was prepared by Hon. Nyamweya. In that will, Hon. Nyamweya



had appointed his first wife Tabitha, his second wife Jemimah, and his first born son Charles, as executors. Hon. Nyamweya probably thought that he would die before Tabitha and Jemimah. That did not happen, for Tabitha pre-deceased him, and she was not there to be executor upon his death. Thus, those who were appointed as administrators/executors were Charles and Jemimah.

5. I will try and summarize what is in that will dated 3 April 1991.

1. Land in Matutu Settlement Scheme (about 130 acres)

Hon. Nyameya had a farm in Matutu Settlement Scheme with a house. He bequeathed this house to his wife Tabitha, and if she died, then it would go to his son Christopher Nyambane. Within Matutu, he had one parcel of land, i.e parcel No. 87, though in the will he seemed to have a notion that there are five parcels No. 88,89,90 and 91. I think he was trying to subdivide this one parcel No.87 into five which he identified as plots 87,88,89,90 and 91. He gave them out as follows :

- i. To Christopher his son - plot No. 87 to hold absolutely (which I think this is where the house is);
- ii. To Paul - the plot No.88;
- iii. To James – the plot No. 89;
- iv. To George his son, and his grandson Paulo Nyamweya plot No. 90 to hold jointly absolutely for life;
- v. To Charles – the plot No. 91.

2. Land in Menyinkwa , Gionseri Village i.e Nyaribari/ Chache/B/B/Boburia/2351

this was ancestral land that Hon. Nyamweya inherited from his father and he built a house on it. In the will he stated that Jemimah should be the one to occupy the house and it should not be sold without her consent. Upon her death the same was to devolve to Jemimah's son, Paul Nyamweya, to hold absolutely for life.

3. Land in Trans Nzoia (Kitale) LR No. 4380 (1,403 acres)

In the will this land was assigned various portions. He gave each son a portion of this land as follows :

- i. To his son Charles Ratemo – LR No. 4380/10 to hold absolutely for life;
- ii. To his grandson Paulo Nyamweya Omari (a son to George) – LR No. 4380/4 to hold absolutely for life;
- iii. To his son James Ogendi – LR No. 4380/6 to hold absolutely for life;
- iv. To his son Christopher Nyambane – LR No. 4380/90 to hold absolutely for life;
- v. To his son Paulo Nyamweya – LR No. 4380/2 to hold absolutely for life.

There was further direction that they should farm the same jointly in name of Moige Farm Limited and enjoy the profits in equal shares. A quarter of the profits was to be utilised in education of his grandchildren for their University/professional/or technical training.

4. Plot in Kisii Town : Kisii Town Block III/98

This was bequeathed to the following to hold as tenants in common in equal shares.



- i. To his son Charles Ratemo;
- ii. To his grandson Paulo Nyamweya Omari (son of George);
- iii. To his son James Ogendi;
- iv. To his son Christopher Nyambane;
- v. To his son Paulo Nyamweya.

5. Plot in Kisii Town (Kisii Hotel Land) – Kisii Town/Block III/31

Though in the will he described this land as Kisii Town/Block III/156, the correct description is Kisii Municipality/Block III/31 (and it is probably that it was earlier Kisii Municipality/Block III/6). It was under Kisii Hotel Limited. Hon. Nyamweya in the will stated that he had a 50% share in Kisii Hotel Limited. He bequeathed the 50% shares to all his sons to develop and run the same as a commercial concern. The sons were to endeavour to acquire the other 50% share and develop a reputable hotel, housing estate, and shopping centre with amenities.

6. Plot in Kisii Town – Kisii Town/Block III/139.

This plot was registered in name of three persons, i.e Jackton Ocharo, Samson Nyambati, and Charles Ratemo. He surrendered his interest to his son Charles Ratemo.

7. Plot in Kisii Town – Kisii Town Block III/156.

This land is identified as being located near Kisii District Hospital. He bequeathed it to his wife Jemimah, and his son Paul, to hold as tenants in common in equal shares for life.

8. Plot LR No. 7288/12 Sotik Township (3 Ms property)

This land was registered in name of John Maronga, Mechack Nyachieo Nyaribo, and his wife Tabitha. He surrendered his interest in this land to his wife Tabitha and son Christopher to hold jointly.

There was mention in the will of land in Moi's Bridge but it is not clear to me whether it is the same land as the Kitale land for no particulars were provided.

6. In the will, Hon. Nyamweya did not make any provision for his daughters, save for his unmarried daughters. These unmarried daughters were to benefit from monies payable from his life policies at the rate of 50% in equal shares for their education and maintenance until they marry. It is apparent to me that Hon. Nyamweya was a traditionalist Kisii man who believed that daughters will inherit where they are married and he did not envisage a situation where his daughters would be unmarried.
7. Things did not go as Hon. Nyamweya thought they would when he wrote the will. One of the reasons is that he had debts which needed to be paid and he sold off some land. There was also an issue regarding ownership of the Kisii Hotel land which was held under partnership.
8. A family meeting was thus called on 17 July 1994 at Hon. Nyamweya's Matutu home and minutes were taken. Those noted as present in this meeting were Hon. Nyamweya, his two wives, Tabitha and Jemimah, and his three sons, Charles, George and James. In that meeting he stated that he had given all his sons land at Matutu; Charles 23 acres, George 18 acres, James 18 acres. He stated that Christopher should get 20 acres of the tea, Paul should get 18 acres, and the homestead together with 20 acres he proposed it to have its own title in the joint names of himself and Tabitha, and the other land remaining also be held in their joint names. For Kitale, he disclosed that he had sold some land and may sell some more in order to organise his affairs. He declared that each son to get 100 acres but Charles to get 120



acres. Tabitha was to get 50 acres with the house and Jemimah 50 acres. The remaining land was to remain in his hands and Tabitha, and if they wished to sell they would give first option to the family.

9. For the land in Kitale, the evidence I have shows that on 25 August 1992, he transferred three subdivisions of this land as follows : to Peter Kipchirchir Magut subdivision No. 4380/5 (39.05 Ha) ; to Peter Opande subdivision No. 4380/17 (12.35 Ha) and to Benson Atika subdivision No. 4380/19 (11.65 Ha). On 5 March 1993, he transferred 5 subdivisions of LR 4380/11 to Reuben Njenga in total 59.53 Ha. On 23 March 1993, he got titles to the subdivisions No. 4380/2 (73.26 Ha); No. 4380/3 (59.52 Ha); No.4380/4 (40.88 Ha); No. 4380/6 (73.71 Ha); No. 4380/9 (71.50 Ha) ; No. 4380/10 (79.74 Ha); No. 4380/18 (20.85 Ha). On 26 August 1993 he transferred 8.09 Ha to Parmenus Oroko which was registered as LR No. 4380/20. There were thus significant dealings in the land in Kitale between the time of the will and the time of his death.
10. On 2 June 1995, Hon. Nyamweya subdivided his Matutu land, which measured 52 Ha (about 130 acres), to produce 9 subdivisions. These are the parcels No. 363-371. He proceeded to transfer parcel No. 364 (1.6 Ha), and 371 (7.14 Ha which is close to 18 acres) to his son Charles and his wife Dorcas Mabera on 16 December 1992. He also transferred the parcel No. 365 (7.9 Ha which is about 19 acres) to George on 19 October 1993. The rest he retained in his sole name. It is apparent that he was trying to implement in part what he had discussed in the meeting of 17 July 1994.
11. It will be recalled that the Kisii Hotel land was held in partnership, which partnership was subsequently dissolved. A couple of weeks before his death, a consent was recorded on 2 September 1994, dividing and distributing to the partners this Kisii Hotel land. It was agreed that the part with the built hotel and 3 or so acres to go to the other two partners. From what I see, Hon. Nyamweya was to remain with 6.7 acres of undeveloped land.
12. When he died on 24 September 1995, Hon. Nyamweya still had some debts and pending obligations. I mentioned that upon his death, a grant of letters ad colligenda bona was applied for in Kisii High Court, Succession Cause No. 482 of 1995 with George and Jemimah as administrators. With permission of court some land and other assets were disposed of to pay off the liabilities. Some of the sales were for the Kitale land, including 20 acres sold to Charles.
13. Subsequently, a full grant of probate was applied for under Kisii High Court Succession Cause No. 451 of 1996, with Charles and Jemimah as legal representatives of the Estate of Hon Nyamweya. An application for confirmation of grant dated 31 July 2001 was filed making proposals on selling some assets and how the residue of the estate should be distributed. I think it is this proposal that was confirmed by Wambilyangah J on 27 November 2001. From what I can see the following assets were to be sold :
 - i. 132 acres in Trans Nzoia,
 - ii. Sotik LR No. 7288/12,
 - iii. Kisii Town/Block III/6 (Kisii Hotel property),
 - iv. Shares,
 - v. 1 acre plot in Moi's Bridge.The following was the distribution of the residue :

Kitale Farm

 - i. Paul Nyamweya – LR No. 4380/2 – 110 acres.



- ii. Christopher Nyambane Nyamweya – LR No. 4380/2 (65 acres) and LR No. 4380/3 (45 acres) - Total of 110 acres.
 - iii. James Ogendi Nyamweya – LR No. 4380/3 (80 acres) and LR No. 4380/4 (30 acres) plus homestead - Total of 110 acres.
 - iv. Charles Ratemo Nyamweya – LR No. 4380/6 – 130 acres.
 - v. George Omari Nyamweya – LR No. 4380/6 (52 acres) ; 4380/9 (20 acres) and 4380/4 (38 acres) – Total of 110 acres.
 - vi. 100 acres to be sold from LR No. 4380/9.
 - vii. To squatters in Kitale Farm – 20 acres out of LR No. 4380/18.
 - viii. Seventh Day Adventist Church – LR No. 4380/7 – 0.407 Ha
 - ix. Moige Primary School – LR No. 4380/8 – 4.047 Ha.
- In Matutu Settlement Scheme

- i. Paul Nyamweya – Parcel No. 369.
- ii. Christopher Nyambane – Homestead plus parcel No. 363.
- iii. James Ogendi Nyamweya – parcels No. 366, 367 and 368.
- iv. George Omari Nyamweya – parcel No. 365.

Kisii Town Plots

- i. Kisii Town/Block III/98 – To be sold.
- ii. Kisii Town/Block III/31 (Kisii Hotel Land) – To be divided into 5 equal shares for distribution to the 5 sons.
- iii. Kisii Town/Block III/156 – To Jemimah and Paul Nyamweya.

Nyaribari Chache/B/B/Boburia/2351 (Menyinkwa land)

To Jemimah and Paul Nyamweya – 5.6 acres plus the house.

14. Charles and Jemimah, as administrators, did proceed to confer title to the beneficiaries more or less in accordance with this distribution. There were even sales by some of the beneficiaries to each other and to outsiders. Some transferred to companies where they had interest. For example George Nyamweya transferred the Matutu Parcel No. 365 to Kareha Investments Limited. Thereafter this land was subdivided into 7 parcels being parcels No. 1213-1219. Paul Nyamweya, who was bequeathed Matutu land parcel No. 369 transferred it to Kaleji Limited on 3 September 2013. Neither Kareha Investments Limited nor Kaleji Limited are parties in this case. There were also transfers by Paul and Jemimah to their company Jamespark Limited, the 4th defendant. The parcel Kisii Town/Block III/98 was sold to Kisii Jumbo Hardware Limited, a third party not part of the family. This company is not party in this case. The Kisii Hotel Land, Kisii Municipality/Block III/31 was subdivided into the parcels No. 508, 509, 510 and 511. Plot No. 508 was transferred by Tanya Holdings to Regnol Oil Limited, a third party company, not part of the family, on 6 March 2017. Regnol Oil is not a party in this case. The Plot No. 509 was transferred by Moige Gardens Limited to Pine Tree Real Estate on 9 January 2019. I am not sure about the ownership of Pine Tree Real Estate but it is not party to this suit. Plot No. 510 was transferred to Hotel Phoenix Limited. Plot No. 511 was transferred to Rosalia Okenye who had a half share in the original Plot No. 31. The lease to Kisii Municipality/Block III/156, bequeathed to



Jemimah and Paul, expired on 1 October 2003. Jemimah and Paul procured a new lease in their name for 66 years from 1 October 2003. George Nyamweya sold 60 acres of his land in Kitale to Charles in exchange for some shares in Kisii Hotel. There was however no transfer of the Sotik plot (3Ms) which was actually under the name of Tabitha. The distribution seems to have proceeded without much hitch save for some disputes regarding the sales and/or exchanges of land between some of the siblings.

15. This was until around about 2013, when the plaintiff started raising questions over the manner in which the distribution was done, and also appears not to have been too happy that Paul had sued George over an agreement they had, where Paul agreed to sell to George his shares in the Kisii Hotel Land but he (Paul) claimed that he was not paid by George. The plaintiff then proceeded to file a succession cause in respect of the estate of her mother Tabitha, and on 5 August 2013, she was granted letters of administration ad colligenda bona under Section 67 (1) of the [Law of Succession Act](#), limited for purposes of collecting, getting in, and receiving the estate. Armed with this, she filed, within the succession cause of her father, Hon. Nyamweya, an application seeking orders inter alia that the confirmation of grant made be set aside and be revoked. In a nutshell, what she contended was that her father held the property as trustee for her mother. Within that application she urged inter alia that the distribution of the estate was unfair particularly to the daughters. She also urged that there needed to be a separation of the property so that it is identified what belonged to her father and what belonged to her mother, before any distribution of the estate of her father could be done. This was anchored on the argument that her mother was an equal partner in the investments and properties that her father held, and therefore her father held these properties in trust for her mother.
16. The application was heard by Sitati J, who allowed it in a ruling dated 17 December 2014. She found that the distribution of the estate of Hon. Nyamweya was manifestly in favour of the sons and his companies which situation she found to be “unsatisfactory” and discriminative against the daughters. She had belief that Tabitha contributed to the acquisition of the properties. However, she was unable to separate the properties of Hon. Nyamweya and those of Tabitha. She proceeded to revoke the confirmed grant and ordered that the administration of the estate of Hon. Nyamweya be undertaken afresh. It is after this ruling that the plaintiff filed this case.
17. I need to mention that Charles, the 1st defendant, and who is first born of Hon. Nyamweya and Tabith, died on 22 July 2019. He was substituted with his wife Dorcas Mabera who continues the suit as his legal representative.
18. The plaintiff has of course sued as administrator of the estate of her mother Tabitha. I have already mentioned that she sued her brothers, her step-mother, and the companies associated with the family. She did not sue her sisters and neither did she join them to the suit in any capacity. In the plaint, she contends that her late father, in his will, failed to make provision for her and her sisters, and through it her father purported to bequeath to the plaintiff’s brothers, step-mother (Jemimah) and step-brother (Paul), her mother’s properties which he held in trust for her. She contends that her father held the properties in trust for himself and for her mother in equal shares. It is asserted that her father lacked capacity to dispose of her property to any person including to her children and the 2nd and 3rd defendants. She contends that the 1st and 2nd defendants were obliged to separate the estate of her father and that of her mother. She further contends that the 1st and 2nd defendants were obliged to distribute the estate in a manner that would avoid discrimination against daughters. She further urges that the estate of her mother should be distributed equally amongst all her 8 children. She pleads that the 2nd defendant was married under Kisii Customary Law in 1978 when the properties had already been acquired by her parents and that she (2nd defendant) can only inherit the properties of her late father but not those of her late mother. She urges that the 2nd defendant and her son, the 3rd defendant, cannot inherit from the estate of her late mother.



19. She pleads that the effect of the setting aside of the confirmation of grant vide the decision of Sitati J is to render null and void all transfers made pursuant to it.
20. She pleads that the 1st and 2nd defendant engaged in a conflict of interest, and in breach of trust transferred to the 2nd and 3rd defendants her mother's half share in the land parcel Nyaribari Chache/B/B/Boburia/2351 and Kisii Municipality/Block III/156.
21. She has pleaded that the 8th, 9th and 10th defendants are companies incorporated to serve as vehicles to develop the properties Kisii Municipality/Block III/198, Kisii Municipality/Block III/156, Kisii Municipality/Block III/508, Kisii Municipality/Block III/509, Kisii Municipality/Block III/510. The shareholders of the 8th defendant are said to be George Omari Nyamweya, James Ogendi Nyamweya, Kareha Investments Limited, Barrydale Limited, and Jimmrak Investments Limited. The shareholders of the 9th defendant are said to be George Omari Nyamweya, Christopher Nyambane Nyambane, Charles Ratemo Nyamweya, Tabitha Moige Nyamweya, James Ogendi Nyamweya, Kareha Investments Limited, Barrydale Limited, and Jimmrack Investments Limited. The directors of the 10th defendant are listed as George Omari Nyamweya, Christopher Nyambane Nyamweya, Charles Ratemo Nyamweya, Tabitha Moige Nyamweya, James Ogendi Nyamweya, Kareha Investments Limited, Barrydale Limited and Jimmrak Investments Limited. The plaintiff contends that the 8th, 9th and 10th defendants hold their respective shares upon trust for the estates of Hon. Nyamweya and Tabitha in equal shares.
22. The plaintiff pleads that she has not received inheritance from the estate of her late mother as the same has not been separated from the estate of her late father.
23. It is pleaded that Tabitha was married in 1948 and that at this time, the English Married Women's Property Act of 1882 applied to Kenya as a Statute of General Application and that the Act recognized a married woman's legal capacity to acquire property in her own right during coverture. She asserts that during coverture her mother acquired property rights recognized by the said Act. She contends that her mother and father jointly acquired the following properties with their joint resources and efforts :
 - a. LR No. 4380 – the Kitale farm (Moige Farm) measuring over 1,000 acres and said to be bought in 1974.
 - b. Matutu Settlement Scheme, Ex Nyarondet Estate and Plot Numbers 82, 87, 88, 89, 90, and 91 said to be bought in 1967.
 - c. Kisii Town/Block III/98.
 - d. Kisii Town/Block III/508.
 - e. Kisii Town/Block III/509.
 - f. Kisii Town/Block III/510.
 - g. Kisii Town/Block III/156.
 - h. Kisii Town/Block III/139.
 - i. LR No. 7288/12 jointly with Meshack Nyachieo and John Maronga (the 3Ms Sotik property).
24. It is contended that these properties were registered in name of her father who held the same in trust for himself and her mother in equal shares.



25. It is pleaded that before his death, Hon. Nyamweya subdivided Moige Farm into several parcels, some of which were sold and he remained with 17 subdivisions being LR No. 4380/2 - 18. She contends that her father purported to bequeath portions of LR No. 4380 to her brothers and nephew only, but these portions included her mother's half share. So too for the property in Matutu Settlement Scheme.
26. She adds that the property Nyaribari Chache/B/B/Boburia/2351 was given to Hon. Nyamweya and Tabitha, by her paternal grandfather, Pastor Paul Nyamweya, in the late 1950s, and that the two developed it with a permanent house and they carried out farming on it. She pleads that they were brought up in this land and they hold great sentimental value to it. She claims that in defiance to Kisii customs, which require the 2nd wife to live in her own house, the 2nd defendant lives in her mother's house. She contends that her father could only bequeath a 50% share in this property and was wrong in bequeathing it to the 2nd defendant and her son, the 3rd defendant, and also failed to make provision for all his children.
27. It is further pleaded that her late parents bought shares in companies being British American Tobacco, Kenya Power & Lighting, Coopers Motors Corporation Limited, Kenya Breweries Limited, Industrial and Commercial Development Corporation, East African Breweries Limited, Kenya Cooperative Creameries Limited, Kulia Investments Limited, East African Bag and Cordage Limited, Kenya Planters Cooperative Union, Kenya Grain Growers Cooperative Union Limited, Kenya Farmers Association, Pyrethrum Board of Kenya, and Hotel Pigali Limited. It is also said that Hon. Nyamweya held 3 policies with Jubilee Insurance Company Limited. It is claimed that he held these shares in trust for her mother in equal shares and half of them belong to her late mother's estate.
28. She pleads that the 2nd defendant got married in 1978 and she cannot acquire property rights in properties already acquired before her marriage and she can only inherit the properties that were owned by her father at the time of his death on 25 September 1995. She contends that all dispositions in the will for properties belonging to her late mother are null and void.
29. She pleads that her father's will is invalid to the extent that :
 - a. he purported to dispose of her mother's share in Nyaribari Chache/B/B/Boburia/2351 to the 2nd and 3rd defendants;
 - b. he purported to bequeath to her brothers and step-brother her mother's portions in LR No. 4380 Kitale and Matutu Settlement Scheme Plots No. 82, 87,88,89,90 and 91;
 - c. he failed to make provision for the plaintiff and her sisters, Rebecca, Kenyalyn, and Mary; he discriminated against her and her sisters within the meaning of Section 82 of the former Constitution.
30. She pleads that her father made an oral will on 17 July 1994 which varied the written will made on 3 April 1991 and bequeathed from Matutu Settlement Scheme/363 , 5 acres to Rebecca; 5 acres to Kenyalyn; 5 acres to her; and 5 acres to Mary. Further that he bequeathed 3.9 acres from Matutu Settlement Scheme/364 to Paul; 18.69 acres from Matutu Settlement Scheme/365 to George; 19.25 acres from Matutu Settlement Scheme/366 to James; 15.617 from Matutu Settlement Scheme to Paul; and 18.07 acres from Matutu Settlement Scheme/371 to Charles. She adds that from Nyaribari Chache/B/B/Boburia/2351 measuring 5.436 acres, her father bequeathed 0.463 acres where the homestead stands to be held in trust for Charles, Rebecca, herself, George, Kenyalyn, Mary, James, Christopher, and Paul. Of the balance of 5 acres, 1 acre each to Charles, George, James, Christopher, and Paul. In respect of LR No. 4380 to Charles, 120 acres; to George, James, Paul, and Christopher, 100 acres each; to herself, Rebecca, Kenyalyn, and Mary, 42.5 acres each.



31. She pleads that in February 1995, her mother and father incorporated the 9th and 10th defendants (Tanya Limited and Hotel Phoenix Limited) as vehicles to develop the Kisii town properties. They also directed incorporation of a third company which was not however incorporated during their lifetime but was incorporated in 2006. She contends that Kisii Municipality/Block III/98, 156 and 508 were to go to Tanya holdings respectively to develop an office block, doctor's plaza and a shopping mall. The property Kisii Municipality/Block III/509 to Moige Gardens as a Housing Estate. The property, Kisii Municipality/Block III/510 to Hotel Phoenix as a Hotel. She contends that on 17 July 1994, when her father amended the will, with concurrence of her mother, it was directed that all 8 children acquire equal shares in the 8th, 9th and 10th defendants. It is contended that the 1st and 2nd defendants reneged and did not distribute the property in accordance with these wishes.
32. The plaintiff further pleads that in LR 4380 Kitale, her father and mother carried out commercial farming. After their death, Charles assumed management of the farm and has been receiving the proceeds thereof alone and has not accounted for its revenue or the cows and machinery that were left there. It is also pleaded that after her father's death, well-wishers contributed Kshs. 6 million to the family which was banked but the 1st and 2nd defendants have not accounted for these monies.
33. The plaintiff also pleads that in breach of their duties as executors, the 1st and 2nd defendant have failed to separate the estate of her father and mother; failed to furnish an inventory of assets; have not paid liabilities of the estate; have confirmed the grant without consulting her and her sisters; have illegally transferred Nyaribari Chache/B/B/Boburia/2351 and Kisii Town/Block III/156 to the 2nd and 3rd defendants; and have failed to equally divide LR No. 4380 between the estates of her parents. It is further pleaded that the 5th defendant is an advocate and his firm is owed Kshs. 53, 223,284/= and that in breach of their obligations, the 1st and 2nd defendants have failed to pay his debt.
34. The plaintiff pleads that the 2nd and 3rd defendants transferred the property Kisii Municipality/Block III/156 to the 4th defendant on 7 June 2013. They then took a loan of Kshs. 9,000,000/= from Housing Finance Company and constructed flats. She contends that these developments belong to the estate of her parents and not the 2nd – 4th defendants and that the rent fetched therein belongs to the beneficial owners. It is averred that the 2nd defendant breached her duties by transferring this property to the 4th defendant and proceeding to charge it. She contends that the 4th defendant holds this property in trust for the estate of her parents in equal shares and is obliged to account for the shares of rent fetched from the flats developed thereon.
35. She further contends that all transfers of properties are null and void as this was done before separation of her mother's and father's estates and these transfers should be set aside. It is claimed that the transfers were done fraudulently inter alia in knowledge that her father held the properties in trust for himself and her mother in equal shares.
36. She has pleaded that under a mutual mistake that her father was the sole owner of the properties, various agreements were entered into where the 1st defendant surrendered his interest in Kisii Town/Block III/98 to the 3rd, 5th, 6th and 7th defendants in part exchange for additional acreage in the Kitale land; that the 1st defendant surrendered his interest in Kisii Town/Block III/510 to the 5th defendant in exchange for LR No. 4380/51 in Trans Nzoia (Kitale); that the 3rd defendant surrendered his interest in Kisii Town/Block III/508 and 509, and Kisii Town/Block III/98 to the 5th and 6th defendants for a consideration of Kshs. 5.6 million; that the 7th defendant was to surrender his interest in Kisii Town/Block III/98 and Kisii Town/Block III/509 to the 5th and 6th defendants. She avers that pursuant to these agreements made on 15 June 2007, the parties agreed that Kisii Block III/98 and 508 be transferred to Tanya Holdings Limited; Kisii Block III/509 be transferred to Moige Gardens Limited;



Kisii Block III/510 be transferred to Hotel Phoenix Limited. She pleads that she has filed a suit Kisii ELC No. 262 of 2013 against the 5th, 6th, 8th and 10th defendants to declare these transfers null and void which suit is pending. She adds that on assumption that the confirmation of grant was lawful, the 1st and 2nd defendants transferred the following properties i.e Matutu/Settlement Scheme/366, 367 and 368 to the 6th defendant; Matutu Settlement Scheme/369 to the 3rd defendant; and Matutu Settlement Scheme/363 to the 7th defendant. She contends that these transfers are illegal and null and void given the setting aside of the confirmed grant. She pleads that despite her demand for the defendants to surrender their shares in the estate of Tabitha Moige they have refused to do so hence making this suit necessary.

37. In the plaint, she seeks the following orders :

- i. A declaration that the purported transfers of;
 - a. LR No. Nyaribari Chache/B/B/Boburia/2351 in Kisii Town to the 2nd and 3rd Defendants in 2009,
 - b. Kisii Town/Block III/156 to the 2nd and 3rd Defendants in 2009,
 - c. Matutu Settlement Scheme/B/B/Boboburia/2351 in Kisii town to the 4th Defendants, are null and void to the extent that they include Mama Tabitha Moige Nyamweya's Estate to which they are not entitled
- ii. A declaration that the 3rd, 6th, and 7th Defendants hold Matutu Settlement Scheme/369, Matutu Settlement Scheme/366, Matutu Settlement Scheme/367, Matutu Settlement Scheme/368, Matutu Settlement Scheme/363, upon trust to the estates of Honourable James Nyamweya and Mama Tabitha Moige Nyamweya in equal shares;
- iii. A declaration that the 1st and 2nd Defendants hold the following subdivisions LR No. 4388/40, upon trust for the estates of the Plaintiff's mother and the Plaintiff's father in equal shares:
 - i. LR No. 4380/2
 - ii. LR No. 4380/3
 - iii. LR No. 4380/4
 - iv. LR No. 4380/5
 - v. LR No. 4380/6
 - vi. LR No. 4380/7
 - vii. LR No. 4380/8
 - viii. LR No. 4380/9
 - ix. LR No. 4380/10
 - x. LR No. 4380/11
 - xi. LR No. 4380/12
 - xii. LR No. 4380/13
 - xiii. LR No. 4380/14
 - xiv. LR No. 4380/15



- xv. LR No. 4380/16
- xvi. LR No. 4380/17
- xvii. LR No. 4380/18
- iv. A declaration that the 4th Defendant holds LR No. Nyaribari Chache/B/B/Boburia/2351 in Kisii Town upon trust for the estates of Honourable James Nyamweya and Mama Tabitha Moige Nyamweya;
- v. A declaration that the 4th Defendant holds Kisii Municipality/Block III/156 upon trust for the estates of Honourable James Nyamweya and Mama Tabitha Moige Nyamweya in equal shares;
- vi. A declaration that the 2nd and 3rd Defendants hold their shares in the following companies upon trust for the estates of Honourable James Nyamweya (Deceased) and Mama Tabitha Moige Nyamweya in equal shares;
 - a. British American Tobacco Limited – 622 shares
 - b. Kenya Power and Lighting Company – 309 shares
 - c. Coopers Motor Corporation Limited – 217 shares
 - d. Kenya Breweries Limited -1164 shares
 - e. Industrial & Commercial Development Corporation – 168 shares
 - f. East African Breweries Limited – 1000 Shares
 - g. Kenya Cooperative Creameries Limited – 272 shares
 - h. Kulia Investments Ltd – 150 shares
 - i. East African Bag and Cordage Ltd – 829 shares
 - j. Kenya Planters Cooperative Union – 1000 shares
 - k. Kenya Grain Growers Cooperative Union Limited 500,000 shares
 - l. Kenya Farmers Association – 94 Shares
 - m. Pyrethrum Board of Kenya – 1000 Shares
 - n. Hotel Pigali Limited – 300 shares
- vii. An order that the 1st and 2nd defendants do account for
 - 1. The 402 head of cattle
 - 2. Tractors
 - 3. Ploughs
 - 4. Other farm equipment on LR. No 4380 at the time of the death of the deceased
 - 5. Proceeds of sale of maize for the year 1996
- viii. An order that the 1st and 2nd Defendants do transfer forthwith to the Plaintiff
 - a. Half interest in LR No. Nyaribari Chache/B/B/Boburia/2351



- b. A half interest in Kisii Town/Block III/156
 - c. A half of shares pleaded in paragraph (v) above
 - ix. An order that the 2nd and 3rd Defendants do account to the Plaintiff a half of the dividends received by them in respect of the shares pleaded in paragraph (vi) above
 - x. An order that the properties referred to in paragraph (iii) above LR No. 4380 be partitioned and equal shares be transferred to the estates of Honourable James Nyamweya and Mama Tabitha Moige Nyamweya
 - xi. An order that the 1st and 2nd Defendants do supply to the Plaintiff accounts and inventory in respect of the estates of Hon James Nyamweya and Mama Tabith Moige Nyamweya
 - xii. An order that the appointment of the 1st and 2nd defendants as executor and executrix be terminated forthwith
 - xiii. A declaration that the shares in the 8th, 9th and 10th defendants are held upon trust for the estates of Hon James Nyamweya and Mama Tabith Moige Nyamweya
 - xiv. The costs of this suit.
38. The 1st defendant filed a lengthy five page defence. In a nutshell he pleaded that he together with the 2nd defendant distributed the various properties on the basis of a confirmed grant. He denied that the grant was set aside or that its setting aside renders null and void all the transfers made. He denied that he and the 2nd defendant are holding in trust the estate of his late mother. He denied that they procured the confirmed grant secretly or through fraud and denied any breach of duty as administrators.
39. The 2nd defendant also filed a lengthy 56 paragraph defence. It was pleaded that the will made provision for unmarried daughters and there were none, and that no objection was made during confirmation of the grant. It is pleaded that the properties were registered in name of Hon. Nyamweya. It was pleaded that the plaintiff was entitled to inherit from this estate of Hon. Nyamweya but she never raised issue that she was not provided for and did not have to wait more than 15 years later and that the same is being done in bad faith. She added that in fact Rebecca and Mary had filed affidavits stating that they do not wish to pursue any claim with regard to the estate of Hon. Nyamweya. She pleaded that at the time of her marriage, the properties in issue belonged to Hon. Nyamweya and the same were not listed as being jointly owned together with Tabitha. She disagreed that any property was held in trust by Hon. Nyamweya for Tabitha. It was pleaded that the plaintiff is a shareholder of Barrydale Limited which has interest in the family companies. She pleaded that they distributed the properties in accordance with the confirmed grant and there was no illegal transfer. She pleaded that Tabitha is registered as proprietor of the property in Sotik Town where she holds a 1/3rd share. She averred that she got married in 1978 and also participated in the management of the properties from that year. She pleaded that for one to claim 50% of an estate one needs to prove contribution and that for matrimonial property the surviving spouse inherits automatically in toto. On the property Nyaribari Chache/B/B/Boburia/2351, she pleaded that Hon. Nyamweya was gifted this land by his father and the plaintiff cannot claim that it was jointly owned with Tabitha. She pleaded that she has lived in the property for 36 years and 21 years after the death of Hon. Nyamweya and has renovated the property at great cost. On the property Kisii Municipality/Block III/156 she pleaded that the property was held by Hon. Nyamweya on a 33 year lease which expired in 2003. They (her and 3rd defendant) subsequently got a



letter of allotment and got title in 2005. She averred that transfer to Jamespark Limited (4th defendant) was for purposes of accessing financing. She averred that the property is charged to Housing Finance Company Limited (HFC) who receive all the rent proceeds. On the shares held by Hon. Nyamweya in the various listed companies, she pleaded that they were bought by Hon. Nyamweya using his money and not jointly with Tabitha. She pleaded that as a widow she is also entitled to inherit. She averred that there is no proof that Tabitha owned 50% of the property. She asked that the suit be dismissed with costs.

40. The plaintiff testified, and among the witnesses she called were the Land Registrar, Kisii, the Land Registrar Nyamira, and a representative from the Registrar of Companies. The brief of the Land Registrars was to give evidence on the previous and current status of the properties under the name of Hon. Nyamweya, whereas the brief of the representative from the Companies Registry was to testify on the shareholding of the companies of the 2nd and 3rd defendants. I can categorise their evidence in respect of four blocks of properties being :
 1. The properties in Matutu Settlement Scheme
 2. The properties in Kitale, Trans-Nzoia
 3. The properties in Kisii Town.
 4. The property Nyaribari Chache/B/BBoburia/2351
41. For the properties in Matutu Settlement Scheme, it emerged that Hon. Nyamweya originally held one parcel of land identified as Matutu Settlement Scheme/87. He got registered on 16 December 1981 under a charge by the Settlement Fund Trustee. The title was discharged on 2 June 1992 and Hon. Nyamweya was then issued with a title in his name. On 13 August 1992, he subdivided it into nine portions, being parcels No. 363-371. Parcel No. 363 was transferred to Jemimah and Charles as administrators on 3 April 2003, and later to Christopher as beneficiary. The property is currently registered in name of Christopher. Parcel No. 364 was transferred to Charles and his wife Dorcas on 16 December 1992, by Hon. Nyamweya, and they retain registration thereof. Parcel No. 365 was transferred to George (5th defendant) on 19 October 1993. On 2 May 2008 it was transferred to Kareha Investments Limited. On 5 August 2014 it was subdivided into the parcels numbers 1213-1219. At the time of Hon. Nyamweya and Tabitha's death, there were five subdivisions of the Matutu land registered in the sole name of Hon. Nyamweya. There was no indication of any of these properties being held in trust for Tabitha or anyone.
42. Dorcas, the administrator of the now deceased 1st defendant testified. So too the 2nd, 3rd and 6th defendant. The 5th defendant did not testify. Indeed, he neither filed defence on his own behalf or on behalf of the 8th, 9th and 10th defendants, companies to which he is a director and shareholder. He stated that he is supporting the case of the plaintiff. The witnesses in defence more or less contested the case of the plaintiff. They advanced the position that the distribution was done fairly and that in fact a lot of the properties have been sold to other parties or otherwise dealt with.
43. I have considered all the evidence and also the submissions made by counsel, i.e Dr. Kamau Kuria, Senior Counsel, for the plaintiff, Mr. Naeku and Dr. Abenga, for the 2nd, 3rd and 4th defendants, and Mr. Nyachiro, for the 1st, 6th and 7th defendants. I now proceed to my analysis and disposition.
44. In the pleadings there are various issues raised regarding failure to provide for daughters, unfair distribution of the estate, poor management of the estate, failure to account for the proceeds of the estate, failure to pay some debts owed to the estate, and such like things. However, those are not matters



that I can venture into as they are matters related to the management of the estate. Those matters are subject to determination in the succession matter and I will not go into them.

45. There are also issues related to shares in companies, cattle and other movable assets. Those also are not matters that are related to land and environment and I will ignore the same. I do not have jurisdiction over them.
46. I also see that there are prayers for declarations that some properties are held in trust for the estate of Hon. Nyamweya. At this moment in time, I cannot say what is being held in trust for the estate of Hon. Nyamweya for that will be subject to the succession matter.
47. The sole issue that was isolated for determination, is whether Hon. Nyamweya held the properties that were registered in his name in trust for Tabitha, and if so, whether that share is a 50% share or such other share. Indeed, this is precisely what my sister Onyango J, thought of the case, in her ruling of 1 December 2021, in reaction to an objection raised on the veracity of the suit. In other words, this is a suit where one estate is suing another claiming that the former holds some land in trust for the latter. It would be similar to a suit where two parties who are alive sue each other, with the plaintiff claiming that the defendant holds some property in trust for him/her. The unique nature of this suit is that the two estates belong to persons who were spouses and both are now deceased.
48. The case of the plaintiff is that her father, Hon. James Nyamweya, held the properties that were registered in his name, not only for himself, but also in trust for her mother, Tabitha. She in fact asserts that her mother held a 50% share of the properties. She bases her argument on the theme that her mother worked hard and contributed to the acquisition and maintenance of the properties. She has thus filed suit in order to gather this alleged 50% share of her mother in the properties herein. She contends that the task of this court is to identify this 50% share of her mother which can then be vested in her mother's estate then subjected to succession for distribution to the beneficiaries of her estate. She believes that this court can proceed to nullify and cancel the titles acquired after transmission in order to achieve this purpose.
49. She of course heavily relies on the ruling of Sitati J, dated 17 December 2014 which set aside the confirmed grant. In fact she anchored her case on paragraph 43 of that decision which reads as follows :

It has been elaborated in the affidavits of the applicant, the 4th and 5th respondents on how their parents acquired property. This court believes that the said property was acquired jointly. The late Tabitha Moige Nyamweya contributed to the acquisition of the same as shown and demonstrated in the affidavits afore mentioned. This court finds that the deceased, by dint of the provisions of section 35 of the Act automatically became the beneficiary of the estate of his wife who predeceased him. No letters of administration were taken for the estate of the late Tabitha Moige Nyamweya until recently. If this was done it would have been easy for the administrators to competently set out the full and actual inventory of her assets and liabilities which could have been separated from those of the deceased herein. For now it is very difficult for this court to separate the properties of the deceased and his late wife Tabitha Moige Nyamweya, but that does not mean that Tabitha Moige Nyamweya, did not own property. Since the deceased survived his wife Tabitha Moige Nyamweya, the provisions of section 35 of the Act came into play, and in particular section 35 (2). The deceased died within 2 months of his wife's death and could not therefore comply with section 35 (2). Upon the deceased's death, his estate and part of Tabitha Moige Nyamweya became one and it was incumbent upon the administrators of the estate to note that Tabitha Moige Nyamweya's estate was not buried with her, and to act accordingly.



50. In his submissions, Dr. Kamau Kuria, Senior Counsel, acting for the plaintiff, did offer that this court cannot revisit the ruling of Sitati J and the ruling of Onyango J. The ruling of Onyango J was that this court would proceed to make a determination regarding the separation of the two estates. I have no issue with that because I have inherited the same case and I am also of the same view. This court is however not bound by the decision of a sister court of equal jurisdiction and I am not bound by the decision or reasoning of Sitati J. This court is not a subordinate court to be bound by decisions of the High Court in the same way that decisions of this court do not bind the High Court. Decisions of courts of equal status are only of persuasive value but are not of binding nature. One court ought of course to give healthy respect for the decision of a court of equal jurisdiction but that should not be equated to mean that one court is bound by the decision of the other. Be that as it may, the ratio decidendi of the decision of Sitati J was to nullify the confirmed grant so that distribution can be done afresh. She never proceeded to determine what was belonging to the estate of Tabitha within what was registered in name of Hon. Nyamweya. That she left for determination in a separate dispute which is this dispute. I am going to chart my own path in making this determination.
51. The key question still remains whether there are properties that ought to be regarded as belonging to Tabitha but which were held in name of Hon. Nyamweya and thus need to be regarded as not forming part of the estate of Hon. Nyamweya, but instead be deemed as forming part of the estate of Tabitha.
52. In his submissions, Dr. Kuria made some significant submissions to contend that the 1st and 2nd defendants breached their fiduciary duties as administrators. I am afraid that that the issue of whether the 1st and 2nd defendants acted properly as administrators would be something in the purview of accounting for the estate which is a matter to be canvassed at the succession court as I have elaborated earlier. I remain focused on the one issue, i.e the question of separation of the estates of Hon. Nyamweya and Tabitha.
53. On this point, Dr. Kuria went to great lengths to demonstrate that Tabitha was instrumental in the acquisition of the properties in dispute. He urged that the suit by the plaintiff falls under two models. The first is that anchored on Section 17 of the Married Women's Properties Act. He urged that under this section a married woman could bring a suit for division of properties acquired during coverture after the breakup of the marriage. He referred me to various decisions including *Echaria v Echaria* (2007) eKLR and *I vs I* (1978) EA 278; The second model, he submitted, is where a widow brings a separation suit against the estate. He urged that this is under Section 2 of the *Law Reform Act* which provides that the rights of a deceased survive in favour of his/her estate. He submitted that in our case, Tabitha died in July 1995 while Hon. Nyamweya died in September 1995 and therefore her property rights survived. He urged that it is now settled law that even if a spouse's name does not appear in the title deeds held by her husband, the spouse is a beneficiary and the properties are held in trust for her. He referred me to various authorities supporting distribution of estates between spouses including the case of *Githatu vs Githatu* (2019)eKLR and *AKM v NNN* where a 50% distribution was made. He also referred me to various ELC decisions to assert that this court has jurisdiction and also to press the point regarding separation of estates between spouses.
54. I have no issue regarding the jurisdiction of this case on separation of Matrimonial Property and support the position taken by Kemei J in the case of *BWM vs JMC* (2018) that this court would have jurisdiction. She stated thus :
18. For avoidance of doubt, the Court notes that the *Matrimonial Property Act* does not define the Court that disputes relating to the Matrimonial property disputes should be referred for determination. It is thus the current legal position that concurrent jurisdiction is given to various Courts to hear disputes relating to matrimonial property rights including this Court.



The only limitation applicable to this Court is that it can only hear such dispute if they involve or relate to occupation use and title to land. I find nothing to oust the jurisdiction of this Court and I proceed to determine the Preliminary objection.

55. I also have no issue with a spouse filing suit within his/her lifetime seeking a separation of matrimonial property following the Matrimonial Property Act and no issue with the decided cases on this point such as *Echaria v Echaria*.

56. I however have an issue regarding the argument of separation of estates after death of the spouse who was not registered as proprietor of the matrimonial property. Dr. Kuria in his submissions referred me to Section 2 of the Law Reform Act, Cap 26, which provides as follows :

2. Effect of death on certain causes of action

(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate: Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

(2) Where a cause of action so survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—

(a) shall not include any exemplary damages;

(b) in the case of a breach of promise to marry, shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry; and

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

57. Now, Section 2 above is not carte blanche that all causes of action survive the death of a deceased person. In fact, under subsection 2, the Section is careful to provide ‘where a cause of action so survives’ meaning that the law is cognisant that some causes of action do not survive death. Let me elaborate this in regard to holding of property.

58. Property is held in different forms. For land, property can be held singly or together with others. Property can also be held in trust. We will look into these.

59. First, where property is held solely by one proprietor, without any encumbrance of a trust, then that property belongs to that person and that person alone. It is his/hers absolutely. When he/she dies what he/she will have left behind will be distributed to his/her beneficiaries in accordance with the Succession Act, Cap 160, Laws of Kenya, as his free property.

60. The second holding is a property in trust. When a property is held in trust the title holder holds the legal title but he holds it for the cestui que trust or beneficiary, who has the equitable interest. For example, Jane may have a daughter called Mercy. Jane is not in the country and has travelled abroad for treatment. She is apprehensive that she may not live very long and in any event she is not present to manage her property. Her daughter is below 18 years and she cannot transfer the property to her. She however has a brother in Kenya, called John. Given the uncertainties surrounding her life, she could



transfer her property to John on the understanding that he will hold this property for the benefit of her daughter. John will have the legal title but in reality this is not his property; it is property belonging to Mercy. Thus, John cannot deal with it as he would deal with his own property, for this is not his free property, given that he is only holding it on behalf of Mercy. There is no issue here if Mercy on attainment of majority sues John to have him transfer the property to her. John will be obliged to transfer the property to her. Neither can this property be inherited by the beneficiaries of John, for this is not the free property of John.

61. The third holding in property law is where two or more people hold property together. Here, there are two ways of holding property together. The property can be held in common or jointly. Let us look at this first holding of property held in common. Here the two parties have different independent shares in the property. It could be a 50-50 share, or a 40-60 share, or a 30-70 share and so on. When one proprietor dies, his share in the property does not automatically devolve to the surviving proprietor. His share will now be regarded as part of his estate and will be subject to distribution as any other of his free property. The survivor's share remains intact as it is. This is affirmed in Section 90 (5) of the [Land Registration Act](#), which provides as follows :

90

- (5) If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.

62. The second holding is where property is held jointly. Here, the proprietorship is tied to the hip. There are no individual shares. The two persons actually hold the property as if the two persons were one, and there is no distinction between what one holds individually. If one of the proprietors die, the whole of the property automatically vests in the survivor. The beneficiaries of the estate of the deceased proprietor cannot sue to assert that the deceased had a share in the property. In essence, one proprietor does not hold the property in trust for the other, in which case the survivor cannot be said to be holding any share for the estate of the deceased proprietor. The above is acknowledged in Section 90 (4) of the [Land Registration Act](#), which provides as follows :

90

- (4) If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—
- (a) dispositions may be made only by all the joint tenants;
 - (b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; and
 - (c) each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.

63. However, during their lifetimes, the joint owners can seek a separation of their jointly held property in which case there will be a division into individual shares. They can determine their shares and hold the property in common, or they can determine their shares and have a partition, in which case each party will end up with an individual title and the joint ownership will come to an end. This is covered in Section 91 (7) of the [Land Registration Act](#), as follows :

91



- (7) Joint tenants, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joint ownership and the severance shall be complete by registration in the prescribed register of the joint tenants and tenants in common.
64. Now, if within their lifetimes there is no application for separation of the jointly held property, then as I have elaborated above, the property will wholly devolve to the survivor and the beneficiaries of the estate of the deceased proprietor cannot at that stage seek a partition. The right of separation of joint property thus only exists while the joint owners are alive and it gets extinguished once any one of the proprietors dies.
65. What I am driving it is that there are some property rights that do not survive upon death.
66. Now, what about matrimonial property ? Let us start with *the Constitution* which provides as follows at Article 45 :
45. Family
- (1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.
 - (2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.
 - (3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
 - (4) Parliament shall enact legislation that recognises—
 - (a) marriages concluded under any tradition, or system of religious, personal or family law; and
 - (b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution.
67. The general presumption is that spouses hold properties in trust for each other and even where one spouse is the one registered as proprietor, there is a presumption that he holds it in trust for the other spouse depending on the contribution.
68. This is established by Section 14 of the *Matrimonial Property Act*, which provides as follows :
14. Presumptions as to property acquired during marriage
- Where matrimonial property is acquired during marriage—
- (a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
 - (b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.
69. Matrimonial property can be separated and this is provided for under Section 7 of the Act which provides as follows :
7. Ownership of matrimonial property



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

70. In polygamous marriages, Section 8 applies. It provides as follows :

8. Property rights in polygamous marriages

(1) If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the—

(a) matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife; and

(b) matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives.

(2) Despite subsection (1)(b), where it is clear by agreement of the parties that a wife shall have her matrimonial property with the husband separate from that of the other wives, then any such wife shall own that matrimonial property equally with the husband without the participation of the other wife or wives.

71. The *Matrimonial Property Act* contemplates a division of property on dissolution of marriage whether the marriage be monogamous or polygamous. It can of course be argued that Section 17 of the Matrimonial Properties Act, 1882, was used to separate property even without dissolution of marriage. But that is not what is before me. What is before me is a novel question, which is, whether upon death, the legal representatives of the estate of the deceased spouse, can sue the surviving spouse or his estate, for a division of the property on the basis that it is matrimonial property.

72. Neither counsel provided me with any direct authority and I consider this a new legal issue.

73. I have already demonstrated above that there are some property rights that are only exercisable by a person when he/she is alive. This is particularly so for property that is held jointly. If the person does not seek a division of the property during his lifetime, this right is lost upon death and the property automatically devolves to the survivor absolutely.

74. I would think that it is the same with matrimonial property. There is a latent trust during marriage and one spouse can certainly seek a division of matrimonial property when he is alive. But upon death of that spouse, this latent trust, in my humble view, gets extinguished, and cannot be revived by the estate of the unregistered deceased spouse. In essence, it is my view, that the right to sue for division of matrimonial property dies with the death of the unregistered spouse and there can be no attempt at separation of an estate after the death of such spouse.

75. Indeed this, in my humble opinion, is the interpretation I can give to Article 45 (3) of *the Constitution* and Section 7, 8 and 14 of the *Matrimonial Property Act*. If you read Article 45 (3) carefully, you will see that it provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. I do not see any mention of equal rights after death. Even the cases referred to me, by Dr. Kuria are all cases where spouses have sued when they are alive. I have not seen any one case where a spouse's estate has sued the other spouse or the other spouse's estate after death.



76. When the marriage is subsisting, and the property is held in name of one of the spouses, this spouse holds it in trust for the unregistered spouse depending on the contribution. That is why the registered spouse may not be able to enter into dealings with the property without the consent of the unregistered spouse (spousal consent). Now, if the spouse whose name is not registered dies, then the surviving spouse must be deemed to be holding the property absolutely, in the same way when a joint owner dies, then the property automatically vests in the survivor. This right of division, in my opinion, is only one that is capable of being exercised by the unregistered spouse when he/she is alive in the same way that the right to divide jointly owned property, only exists during the lifetime of the joint owners. This can be the only deduction because in marriage the two spouses become one. They are joined in the same way that two joint owners own property. When one dies, the property will devolve to the survivor absolutely. If this is not the case, then it would mean that the survivor cannot deal with the property without consulting the estate of the deceased spouse. It would also mean that after every death of one spouse then there will be filed a cause for separation of estates, in the same way that there is filed a succession cause for every death, which I do not think would augur well for society. There is potential for all children so sue their surviving parents for separation of what they think would be vested in the estate of the deceased spouse. And all this is completely unnecessary for the succession laws provide for the manner of inheritance where one spouse dies and leaves a surviving spouse or spouses, with or without children. You do not need to have spouses sue each other's estates after death and in fact you would wish to avoid such situation at all costs.
77. It is my holding that there can be no separation of property of spouses after death of the unregistered spouse. If the one who was not registered dies first, then the property remains absolutely to the surviving spouse and the spousal trust is extinguished. If the one who is registered dies first, then the property will now be subjected to succession in the usual manner. Within the succession cause, it will be determined who should hold what share and that includes what share the surviving spouse should hold.
78. This, I think, is what would be reasonable in society and in our socio-cultural setup. It is also a reasonable conclusion when matrimonial property is assessed vis-à-vis a holding in joint proprietorship. I will elaborate. Let us assume that property is held jointly by spouses i.e they are both registered and they hold the property as joint owners in a joint proprietorship. Wouldn't the death of one spouse vest the property absolutely to the surviving spouse? A fortiori, when the property is registered in the name of one spouse. In our case, let us assume that all the property was registered jointly in the name of Hon. Nyamweya and Tabitha. Tabitha died first and in such event, then all the property would have devolved automatically and absolutely to Hon. Nyamweya. Now, why would the situation be detrimental to Hon. Nyamweya where the property was wholly registered in his name? If the property would devolve absolutely to him if it was jointly owned, then there is a stronger reason that it should devolve to him absolutely if he was sole proprietor. He cannot be worse off where the property was wholly registered in his name as compared to the situation where the property is jointly registered. In such case, as I have explained, the property would divest absolutely to him and the spousal trust would stand extinguished.
79. Now, this has nothing to do with effort made in acquisition of property. Even in joint ownership, both parties may have worked equally in acquiring the property but it does not change the legal position that upon death, the property will vest absolutely to the name of the surviving proprietor. Thus, the arguments made by the plaintiff, that her mother was deeply invested in the property, or worked hard towards their acquisition do not hold water.
80. Assuming I am wrong in my hypothesis that the death of the unregistered spouse extinguishes any right of separation of estate, I still wouldn't separate any property between Tabitha, Hon. Nyamweya,



and Jemimah so that we have 3 distinct estates that ought to be inherited differently. The Menyinkwa property was inherited by Hon. Nyamweya. I do not see how it can be claimed that this property now belongs to the estate of Tabitha. It is the property of Hon. Nyamweya to be inherited by his dependants in accordance with his wishes and the law relating to succession. The Kitale and Kisii Town properties may have been acquired before Jemimah was married in 1978. However, before Tabitha and Hon. Nyamweya died, Jemimah had been in the family for about 16 years. The property may have been bought before she came to the marriage but you cannot discount that while in the marriage she may have worked hard to maintain those properties and see to it that they are not lost. We cannot hypothesise what would have happened to the properties if she was not in the marriage. Her effort in safeguarding the property Kisii Municipality/Block II/156 is apparent to see. She cannot therefore be ignored when looking at these properties. Prominently, the Matutu property, which is significant, was purchased in 1981 after Jemimah had already been married into the family. She can as well claim to have been the one who led to its acquisition and maintenance. Now that it was bought in 1981 when both Tabitha and Jemimah were married to Hon. Nyamweya, what then will you separate from it as solely belonging to the estate of Tabitha? In other words, in our circumstances, there is no possibility of separating what one spouse owned to the exclusion of the other. Even assuming that separation of estates would be permissible on the death of one spouse, the situation we have here is not one that is capable of separating the properties between the two and/or three married persons.

81. In any event, what is aimed to be achieved in children separating the estates of their mothers and fathers? They are the same beneficiaries. If we say that Tabitha's estate be separated, the beneficiaries are the same as the beneficiaries of the estate of Hon. Nyamweya. The same people to inherit the estate of Tabitha are the same people to inherit the estate of Hon. Nyamweya. The only difference, and this is pursuant to the argument of the plaintiff, but a highly debatable and controversial point, which I do not agree with, would be the exclusion of Jemimah and Paul from the estate of Tabitha. But on what basis would we wish to exclude Jemimah and Paul yet they are part and parcel of this polygamous family? I see no basis.
82. I am perplexed, if not entirely shocked, that part of what the plaintiff wants to snatch away from Jemimah and Paul is the property Kisii Municipality/Block III/156. This is a property that was indeed held by Hon. Nyamweya during his lifetime. In his will, he bequeathed it to Jemimah and Paul. The lease to this property expired in 2003. Jemimah and Paul caused the lease to be renewed in their names after the property was distributed to them. They took a loan from HFC to develop it. They are now paying the loan using the proceeds of rent. On what motivation can the plaintiff now claim that this property should be taken away from Jemimah and Paul, and the rents thereof not be for their benefit, but be to the benefit of the plaintiff? Words simply fail me.
83. For the other plots in Kisii Town, they have been sold and/or transferred to third parties who are not parties to this suit. This court cannot affect the title of persons who have not been heard. I see in her pleadings that the plaintiff mentioned that she sued in the case Kisii ELC No. 262 of 2013 for these plots. I will not prejudice that case and it can proceed to its logical conclusion. But I cannot, within this suit, affect titles of persons who are not parties herein.
84. I am also disturbed that the other property that the plaintiff appears very keen on is the property Nyaribari Chache/B/B/Boburia/2351, which we know was inherited by her father. In the will, her father mentioned that it should be occupied by Jemimah until her death after which it should devolve to Paul. There is a way that he had settled his two wives. Initially, this was his only home and he lived here with Tabitha when she was sole wife. Later in life, the property in Matutu was acquired. He built a house there and moved Tabitha there. He tried an experiment that did not work by trying to keep both wives under one roof here in Matutu. A decision was thus made that Jemimah needs to



settle at Menyinkwa where this property is located. This must have been in concurrence with Tabitha, because when the will was being varied, she had no issue. It was the wisdom of both Hon. Nyamweya and Tabitha to have the family settled in this fashion. I wonder if the plaintiff is trying to allege that her parents were not wise enough when they arrived at such a decision. I would imagine that in a polygamous union, before consensus is reached among the spouses on where each spouse is to be located, a lot of thought has gone into it, and a lot of factors have been considered. I do not see the place of the plaintiff in questioning why her parents made the decision to settle Jemimah in Menyinkwa and Tabitha in Matutu. They had their reasons in arriving at this decision and it was their prerogative to do so. It was also the prerogative of Hon. Nyamweya to give this Menyinkwa land to Jemimah and her son if he so wished for this was his property.

85. A lot of the land in Matutu and Kitale Farms were in fact distributed when both Tabitha and Hon. Nyamweya were alive. How can it now be said that Tabitha was shortchanged ?
86. Now, I am not saying that the plaintiff cannot question the will or seek provision from the estate of her late father if she feels that he did not make adequate provision for her. That is her right. She will certainly be heard within the succession cause relating to the estate of her late father. What I am telling her is that she cannot separate the estates of her mother and her father. What was in name of her father falls to be succeeded within the estate of her father. What was registered in name of her mother falls to be succeeded within the estate of her mother. She cannot separate what two people held together, with no intention of separation, at a time when they are dead. Maybe I should remind the plaintiff of the words of the Bible in Mark 10 : 9 : What therefore God has joined together, let no man put asunder. An individual should not take advantage of the death of spouses to try and separate them in death.
87. I find what the plaintiff is attempting to do to be abhorrent and wholly antithetical to the way in which her mother and her father lived and conducted their affairs. They conducted their affairs jointly. What one held in his/her name, the other felt comfortable in that holding and it could devolve wholly to him or her. At no point did Tabitha raise a finger or complain that the properties are registered in the name of her husband Hon. Nyamweya. At no point did Tabitha file a suit during her lifetime seeking separation of her property and that of her husband. She never filed for separation or divorce. This was a couple that was in harmony even in relation to ownership of property. You would expect that a legal representative would take the path and pursue those rights which the deceased person would have taken or pursued during their lifetime but not take advantage of their departure to now pursue personal interests that are divergent to those held by the deceased. An administrator should not sue over rights waived by the deceased that he represents. I would think that Tabitha would turn in her grave if she had capacity to hear that the plaintiff is now seeking that her property be separated from that of her husband.
88. And no, I am not persuaded that the plaintiff has come to court with any clean hands or come to court with a genuine intention of division of property between her mother and her father. Neither do I think that there is any genuine case in pursuance of inheritance for the daughters save for herself. I say so because I see no blessings from her sisters in pursuing such a cause. This is the plaintiff's own cause but it is not her sisters' cause. Her sisters have not come before this court to support her case. Inheritance is a personal thing. One can choose to be comfortable with a distribution or choose not to, and this is irrespective of gender. Where one is not comfortable, such person has a right to raise an objection. I do not see how one can raise an objection on behalf of others without their authority or their blessings. Indeed, you could have a situation where a dependant has not gotten any inheritance from the parent and such dependant has no issue. One cannot now say that he/she is complaining on behalf of a dependant who has capacity to raise an objection but opts not to.



89. And for the avoidance of any doubt, I am not in any way saying that daughters have no right to inherit. Both sons and daughters have rights to inherit. What I am saying is that it is the prerogative of such son or daughter to raise any issue regarding distribution of the estate. Such person is free to agree to a distribution as put forth in a will or such person can choose to contest the will. We cannot assume that there is a beneficiary who is uncomfortable; they could very well be comfortable. That is why I do not buy the argument that this is a case aimed at purposes of pursuing inheritance for her sisters. The plaintiff of course has a right to raise an objection within the succession proceedings in her own capacity, or if she has authority from another person, but she cannot purport to act for her sisters without their authority and permission.
90. As far as I can see, the plaintiff's intention is to settle personal scores with Jemimah the second wife of his father, and her son, Paul, who is her step-brother. I have absolutely no idea what gripe she has against Jemimah and Paul, since from the evidence, the impression I got was that Tabitha embraced Jemimah as her co-wife and there was good balance and harmony between them. On this course that I am unable to understand, the plaintiff has an able partner in her brother the 5th defendant. Within the hearing of this case, I could see that the plaintiff has absolutely no support in pursuit of her cause from the rest of the family save from her brother George. Now, it doesn't surprise me that George is in support of her. He stands to benefit immensely if the plaintiff succeeds. In fact, there were undercurrents that this suit was filed because George had failed to meet his obligations to his brother Paul, who now wished to assert their rights, and peeved by this action, the plaintiff opted to train his guns on Paul and Jemimah, by trying to wrestle what they received from the estate, by coming up with this thought of separation of the two estates.
91. Whatever the case, I have not been persuaded by her legal arguments or even her cause.
92. It will clearly be seen that I find no merit in the case of the plaintiff. It is hereby dismissed.
93. The last issue is costs which I have agonised over given that the parties are family. I have given it deep thought. I am persuaded that costs will need to follow the event for reason that I am not persuaded that this was a suit filed in good faith. This suit is hereby dismissed with costs to the defendants save that there will be no costs awarded to the 5th, 8th – 10th defendants who appeared to be in support of the plaintiff's cause.
94. Judgment accordingly.

DATED AND DELIVERED THIS 3RD DAY OF JULY 2025.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Dr. Kamau Kuria, Senior Counsel, for the plaintiff

Mr. Naeku for the 3rd & 4th defendants and h/b for Dr. Abenga for the 2nd defendant

Mr. Nyachiro for the 1st, 6th and 7th defendants.

Mr. George Nyamweya present in person as the 5th defendant and also as Director of the 8th, 9th and 10th defendants.

Court Assistant ; Allan Angwenyi.

