



REPUBLIC OF KENYA



**KENYA LAW**

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**In re Estate of Francis Kimitei Samoei alias Kimitei Samoei (Deceased) (Succession Cause 117 of 2022) [2025] KEHC 4319 (KLR) (4 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4319 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 117 OF 2022**

**JRA WANANDA, J**

**APRIL 4, 2025**

**IN THE MATTER OF THE ESTATE OF THE LATE FRANCIS  
KIMITEI SAMOEI ALIAS KIMITEI SAMOEI (DECEASED)**

**BETWEEN**

**LILIAN CHEPKOECH LELEI ..... 1<sup>ST</sup> PETITIONER**

**JONAH KIMUTAI KORIR ..... 2<sup>ND</sup> PETITIONER**

**AND**

**JOSEPHAT KIPKOSGEI KIMITEI ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH KIPTUM KIMITEI ..... 2<sup>ND</sup> RESPONDENT**

**PAULINE KIMITEI ..... 3<sup>RD</sup> RESPONDENT**

**EUNICE JEPKORIR KIMITEI ..... 4<sup>TH</sup> RESPONDENT**

**MARY KIMITEI ..... 5<sup>TH</sup> RESPONDENT**

**SHADRACK KEMBOI KIMITEI ..... 6<sup>TH</sup> RESPONDENT**

**HELLEN JEMELI KIMITEI ..... 7<sup>TH</sup> RESPONDENT**

**BETTY KIMITEI ..... 8<sup>TH</sup> RESPONDENT**

**JOYCE JEPKOECH KIMITEI ..... 9<sup>TH</sup> RESPONDENT**

**EMMY JEPCHIRCHIR KIMITEI ..... 10<sup>TH</sup> RESPONDENT**

**EVANS KIPNGETICH KIMITEI ..... 11<sup>TH</sup> RESPONDENT**

**BRIAN KIPKEMEI KIMITEI ..... 12<sup>TH</sup> RESPONDENT**



## RULING

1. This Ruling is in respect to a Preliminary Objection.
2. In respect to the background to this matter, in my Ruling dated 6/10/2023, I set it out as follows:

“The deceased herein is stated to have died on 19/10/2022 aged 83 years as a polygamous man with 3 wives. On 15/12/2022, the two Petitioners, through Messrs Kenei & Associates Advocates, filed the Petition dated 13/12/2022 seeking Probate of the Written Will of the deceased, dated 30/08/2018. It was stated that the executors named in the Will are the 1<sup>st</sup> Objector and the two Petitioners .....

”
3. The 1<sup>st</sup> Petitioner is said to be the 3<sup>rd</sup> widow of the deceased and the 5<sup>th</sup> Respondent, the 2<sup>nd</sup> widow. The 1<sup>st</sup> wife is said to be deceased.
4. There has been a plethora of Applications in this matter since it was commenced which have slowed down the progress of the matter. In light of this, with concurrence of the parties, on 23/11/2023, I directed that all pending Applications be held in abeyance, and instead the matter do proceed for viva voce trial in which all pending matters, including those raised in the respective Applications, would be canvassed for determination. However, this direction was relaxed on 16/12/2024 to allow the Petitioner’s Counsel, Mr. Kenei, to prosecute the instant Preliminary Objection as it touched on the jurisdiction of this Court to entertain a claim introduced by the 5<sup>th</sup> Respondent.
5. On the same 16/12/2024, and also on 17/12/2024, I took the 5<sup>th</sup> Respondent’s testimony on the whole case. This was because Mr. Katwa, her Counsel, had earlier successfully requested that in view of his client’s age (over 90 years) and health status, she be allowed to testify in advance.
6. Back to the Preliminary Objection, the same is in opposition to the 5<sup>th</sup> Respondent’s Notice of Motion dated 8/05/2023 and amended on 8/04/2024. The Application is filed through Messrs Katwa & Kemboi Advocates and seeks lengthy list of orders as follows:
  - i. .... [spent]
  - ii. That a declaration do issue that all properties acquired between 1970 and 2017 were jointly acquired by the Applicant/5<sup>th</sup> Respondent, Mary Kimitei, and the deceased, and are therefore matrimonial properties, with herself being a spouse and of 65% owner of all the assets.
  - iii. That a declaration do issue that 65% of all assets registered in the name of the deceased during the period of the marriage are held in trust of the Applicant/5<sup>th</sup> Respondent.
  - iv. That a declaration do issue that the Applicant/5<sup>th</sup> Respondent is (i) 65% owner of all movable, all immovable assets, and (ii) of all personal assets of the deceased, that include:

Land

    - (i) LR 10520 (Kap-daud Sawe) approximately 115 acres, (ii) Kaptagat/Lotonyok Block 3 (Kwen) 26, approximately 11 acres, (iii) Kaptagat/Lotonyok Block 3 (Kwen) 27, approximately 11 acres, (iv) Kapn’gan’ga Farm, approximately 37.5 acres, (v) Kipsinende/Kipsinende Block 8 (Lamaon Farm) Plot No. 50, approximately 109.34 acres (excluding Kipsinende/Kipsinende Blocks (Lamaon



Farm) Plot No. 49 that belongs to my son Josephat Kipkosgei Kimiteui), (vi) Eldoret Municipality Block 7/192, already sold, (vii) Kipsinende/Kipsinende (Lamaon Farm) Commercial Plot No. 12 (viii) Koilel Farm (Commercial Plot), (ix) Farm Machinery, and (x) Cows in Lamaon Farm, Kwen Farm and Kap-Daudi Farm.

The Farm Machinery include:

- (a) Combine Harvester
- (b) New Holland Tractor
- (c) New Holland Tractor
- (d) Motor Vehicle KBT
- (e) Pressure Planter
- (f) Pressure Arrow.

Personal Assets

All personal assets, exclusively

- v. .... [spent]
  - vi. That a declaration do issue that one Lilian Chepkoech Lelei is not and could not be a wife to the late Kimitei Samoei.
  - vii. That a declaration do issue that the “Will” dated 30<sup>th</sup> August 2018 be deemed null and void on account of:-
    - a. “Willing” away assets that belong to the Applicant.
    - b. Not having been made by the late Kimitei Samoei.
    - c. Being an incompetent “WILL” on the fact and law.
  - viii. That any other or further orders do issue in the interest of justice.
  - ix. That costs be provided.
7. In the Petitioner’s Notice Preliminary Objection, the grounds raised are as follows:
- i. The Application is fatally defective having been brought through a wrong instrument and under a wrong procedure.
  - ii. This Honourable Court sitting as a Probate and Administration Court has no jurisdiction to hear and determine the Application being a matrimonial property claim under the *Matrimonial Property Act*.
  - iii. This Honourable Court sitting as a Probate and Administration Court has no jurisdiction to hear and determine the Application being a claim for nullification of a marriage under the *Marriage Act*.

### Hearing of the Preliminary Objection

8. It was then agreed, and directed, that the Preliminary Objection be canvassed by way of written Submissions. However, only the 5<sup>th</sup> Respondent, represented by Messrs Katwa & Kemboya Advocates,



seems to have filed Submissions. The same is dated 5/02/2025. The Petitioners, represented by Kenei & Co. Advocates and the rest of the Respondents, all represented by Messrs Kutto & Kaira Nabasenge Advocates, do not seem to have filed any Submissions as I did not come across any, by the time that I concluded this Ruling, either in the physical Court file or in the Judiciary Case Tracking System (CTS) online portal.

### 5<sup>th</sup> Respondent-Applicant's Submissions

9. Counsel for the 5<sup>th</sup> Respondent submitted that on the issue whether this Succession Court can apply its mind to matrimonial properties, the Court of Appeal already solved the issue in the case of Esther W. Gitau vs Mary W. Githatu (Eldoret H.C.A. No. 50 of 2016 [2019] eKLR, a decision that is binding on this Court. He also pointed out that in its pre-trial directions, this Court had directed that all matters arising herein be decided together at the conclusion of the trial. He recounted the 5<sup>th</sup> Respondent's case and reiterated that as a wife, she contributed to acquisition of the assets alleged to comprise the estate, and her share should be established and excluded from distribution and that she is entitled to 65% thereof. He reiterated that no assets have been acquired since the deceased started living with the 1<sup>st</sup> Petitioner and that the 1<sup>st</sup> Petitioner therefore has no right to the assets and claimed that the 1<sup>st</sup> Petitioner has participated in the sale, alienation and waste of some of the assets. She however clarified that the 1<sup>st</sup> Petitioner's children may inherit from the deceased's share of "free estate".
10. Counsel again cited the Court of Appeal case of Esther W. Githatu vs Mary W. Githatu (supra) and contended that, among others, the Court made findings that a Succession Court is vested with the authority to consider and resolve disputes raised by a spouse regarding their share in matrimonial property, that the Court is to apply consideration of (a) "discretion" on distribution under Section 40 of the *Law of Succession Act*, (b) "law of trust" in common law on assets held by deceased spouse in favour of the living spouse, and (c) "free property" under Section 3 of the said Act available for distribution, and that the Court also made a finding that a Succession Court should identify asset shares of surviving spouse, distribute it and exclude it before distribution. Counsel urged that the Court of Appeal also emphasized that a spouse whose name is used in jointly owned assets holds such property in "trust" for the other spouse and it is crucial to identify and allocate this "trust" share before distributing the deceased's "free estate", and that the death of a spouse does not extinguish the equitable "trust rights" of the surviving spouse.
11. Counsel also cited the case of In re Estate of the Late George Cheriro Chepkosiom (Deceased) (Succession Cause 16 of 2010) [2017] KEHC 7270 (KLR) (Mumbi-Ngugi J-as she then was), and also the case of Margaret Wambui Irungu vs. Agnes Wanjiru Kanyi, Kerugoya Cause No. 25 of 2014 eKLR 2019 (L.W. Gitari J) which, he submitted, reiterated that it is contrary to *the Constitution* to deny women their property rights by lumping their share on property held in "trust" with that of a deceased husband, and that it is unreasonable and discriminatory to ask a widow wife to prove her share of the estate against a party who came later and thus made no contribution to the estate assets. According to Counsel therefore, the Court of Appeal resolved all the issues raised in the Preliminary Objection herein, including whether the 5<sup>th</sup> Respondent's claim can be heard in this Cause by oral evidence rather than a stand-alone Application.
12. He submitted that the above Court of Appeal decision has been followed in various High Court cases, including Succession Cause No. 1033 of 1996-In the matter of the Estate of Mwangi Giture (Deceased) 2004 eKLR (M. Koome J-as she then was), the case of Esther Wanjiru Githatu [2016] KEHC 6524 (KLR), Probate & Administration 244 of 2002 (Kimondo J), the case of Dorcas Wangari Macharia v KCB & 2 Others, Nairobi High Court Civil Case No. 18 of 2003 (K. Rawal J), and the case of In re Estate of Josiah Kipkirui Arap Rono (Deceased) [2021] eKLR, Nakuru P&A 457 of 2006 (J.



Mulwa J). He further cited the case of *In the Matter of the Estate of Samuel Miriti MM vs AIM*, High Court Succession Cause No. 110 of 2010 [2014] eKLR (J. Makau), the case of *Estate of Nahashon K. Mbuthia*, Succession Cause No. 146 of 2017 KEHC (C. Kariuki J). Counsel then clarified that the 5<sup>th</sup> Respondent has not applied anywhere for nullification of marriage but submitted that, in any event, the marriage has been nullified by the death of the deceased. He cited the case of *Esther Wanjiru Kiarie v Mary Wanjiru Githatu* (supra) (Kimondo J).

13. Counsel reiterated that the Court, at pre-trial directions, adopted the consent by the parties at which they agreed that all issues raised in the Succession Petition are to be decided at the end of the hearing of the case, as part of the final Judgment, and not multiple interim Rulings. He listed the issues for determination in this matter and submitted that no reason exists to isolate the issues raised by the 5<sup>th</sup> Respondent from those raised by the other Respondents for an earlier decision, that it is discriminating of the 5<sup>th</sup> Respondent's case to be picked out, elevated and be subjected to trial, and that doing so will violate and breach the agreed consent terms. He also pointed out that the 5<sup>th</sup> Respondent has already testified and cross-examined and that therefore, no prejudice to the Petitioners obtains.
14. He submitted further that the issues raised are not true matters constituting competent preliminary objection as the Court of Appeal has decided that it is a legitimate issue for a Probate Court to consider matrimonial properties in question. He submitted that the authorities relied upon by the Petitioners, namely, the case of *In re Estate of Joseph Toroitich Cheronu (Deceased)* [2024] KEHC 10003 (KLR) (R. Nyakundi J) and the case of *In re Estate of Atibu Oronje Asioma (Deceased)* (Succession Cause No. 312 of 2008 [2022] KEHC 11046 (KLR) (22 July 2022) (Ruling) WM Musyoka, are distinguishable. He contended that in the first place, the cases were High Court decisions, distinct from the binding Court of Appeal decision of *Esther W. Gathitu vs Mary W. Githatu* (supra), that the cases related to the question of the school of thought a Judge would elect to belong to, and that the Judges concentrated on technicalities of the law and not the substantive issues. In the end, he urged that the Preliminary Objection be found to have been raised without due consideration of the applicable law and precedents in since 2019, the study of which would have saved the Court and the parties, delay unnecessary waste of time, finances and other resources.

### **Determination**

15. In my view, the broad issue for determination in this matter is “whether this Court, sitting as a Probate and Administration Court, has jurisdiction to hear and determine, as part and parcel of the Succession Cause, an Application filed within the same Cause, for identification and exclusion of alleged matrimonial property from the deceased's “free estate”, or whether such matrimonial property claim should be placed before a different forum as a separate suit for determination”.
16. Before I delve into the merits of the objections raised, I will first address the question whether the challenge raised meets the threshold for what should constitute a “Preliminary Objection”. The Supreme Court, in the case of *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*, while following the oft-cited decision of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, restated the following:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts



pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

17. The issue raised by the Petitioners being one that touches on this Court’s jurisdiction, there is no doubt that it, indeed, fits well within the circumstances contemplated as constituting a “Preliminary Objection”.
18. Regarding the merits of the objection, in opposing the same, Mr. Katwa, for the 5<sup>th</sup> Respondent, relied to a great extent, on the Court of Appeal case of Esther W. Githatu vs Mary W. Githatu [2019] eKLR. The High Court decision which gave rise to the Appeal was the one made by Kimondo J in the case of Eldoret Probate & Administration Cause No. 244 of 2002, Esther Wanjiru Kiarie v Mary Wanjiru Githatu [2016] eKLR.
19. The High Court (Kimondo J) had issued a grant of letters of administration intestate, for the estate of the deceased to the 1<sup>st</sup> and 2<sup>nd</sup> widow, jointly. Before the grant was confirmed, the 1<sup>st</sup> widow filed an Originating Summons, within the Succession Cause, under Order 36 Rule 1 & 12 of the Civil Procedure Rules, in which she claimed that she was entitled to immovable properties acquired by the deceased, between 1968 when she got married to the deceased and 1984, and that the 2<sup>nd</sup> widow having started cohabiting with the deceased in 1986, had no interest in those properties. The Application moved the Court to determine, inter alia, whether she was entitled to all these properties and the income therefrom, before the deceased’s other properties are presented for distribution during confirmation of the Grant. In his Judgment, Kimondo J found that the 1<sup>st</sup> widow made non-financial contribution to the acquisition of all the immovable properties that were acquired by the deceased prior to 1984, and that there was a resulting trust that arose in her favour. The Judge therefore found that the 1<sup>st</sup> widow was entitled to ½ the properties acquired by the deceased prior to 1984, and that it was only ½ of those properties and the properties acquired after 1984, that constituted part of the deceased’s “free estate” which should be distributed among the beneficiaries. It is that Judgment that provoked the Appeal which was predicated on the grounds that the High Court erred in holding that the 1<sup>st</sup> widow was entitled to ½ the share of the estate, and in addition, to an equal share of the remainder; and that there was a “resulting trust” between her and the deceased.
20. The issue whether it was proper for the Court, sitting as a Probate and Administration forum, to also in the same Cause, hear and determine the Originating Summons by the widow seeking that a portion of the estate constituting her alleged share of matrimonial property be excluded from the estate and be awarded to her before distribution, does not seem to have been raised or expressly canvassed before the High Court. I however note that Kimondo J made the following comment and/or finding which may have some relevance to the matter at hand:

“ 32. Furthermore, the 1<sup>st</sup> widow was not seeking to terminate her marriage to the deceased at any time. An originating summons for division of matrimonial property can only be presented in the course of dissolution of a marriage. The marriage between the parties here has been dissolved by death. I agree with Mr. Momanyi that it leads to a muddled situation where the summons by the objector is partly against herself as an administrator. But her claim falls in the genre of a cestui que trust and can be maintained against the estate of her late husband. See *Dorcas Wangari Macharia v KCB & 2 others*, Nairobi, High Court, Civil Case 18 of 2003 (O.S) (unreported). Accordingly, her rights have to be determined before distribution under the *Law of Succession Act*. Our Constitution in Article 159 (2) (d) also frowns against technical justice.



21. Similarly, the Court of Appeal does not seem to have expressly determined that question as a core issue but I note the following relevant comments made by the Court:

“(26) In addition, we have considered whether Mary’s claim by way of a resulting trust, to half the properties registered in the deceased’s name prior to 1984, ought to have been entertained in the Succession suit, or whether it should have been brought as a separate suit.

(27) Order 36 Rule 1 of the former Civil Procedure Rules, (now Order 37 Rule 1 of the current Civil Procedure Rules), stated as follows:

.....

(28) This rule allows any party including an administrator or an heir or a beneficiary of a trust to bring an originating summons requiring determination of his/her rights. In this case, Mary was one of the administrators. She was also an heir to the estate of the deceased but she also claimed as a cestui que trust to be entitled to property registered in the name of the deceased. It was argued that Mary being an administrator of the estate could not bring a suit against the estate. We do not agree with this contention. As an administrator of the estate, Mary was vested with certain powers to be exercised for and on behalf of the estate. These powers do not however, take away her position as an individual capable of acting in her own rights. So, whereas in one instant she could act on behalf of the estate as an administrator in another situation she could act in her own behalf as a beneficiary or heir of the estate. In bringing the Originating Summons, under the former Order 36 Rule 1 & 2 of the Civil Procedure Rules, Mary was acting in her own personal capacity as an heir of the estate of the deceased and as a cestui que trust arising from the registration of the properties acquired by the deceased between 1968 and 1984.”

22. In my view, the issue that the Court of Appeal determined above was whether it was proper for the 1<sup>st</sup> widow to have maintained a claim over the estate as a heir under her role as a co-Administrator, and at the same time, and in the same suit, also advance a claim against the same estate for exclusion of a ½ share of the estate as her entitlement as matrimonial property entitlement. However, the Court of Appeal being alive to the fact that the 1<sup>st</sup> widow had filed the Originating Summons under the Matrimonial Property Act within the same Probate and Administration Cause, and that the High Court proceeded to determine the said claim within the same Probate and Administration Cause, the presumption will inevitably arise to the effect that the Court of Appeal “saw” nothing wrong with that procedure. Nothing would have stopped the Court of Appeal from ruling otherwise had it found any problem or irregularity with the procedure adopted. Even if therefore the Court of Appeal did not expressly sanction that procedure, it can be said it condoned it.

23. To the above extent, I would agree with Mr. Katwa that the Court of Appeal, being a higher Court, its decision is binding on this Court and this High Court must follow it. In any event, as correctly pointed out by Mr. Katwa, there are many Probate & Administration Causes in which the High Court entertained, within the Probate & Administration Causes, claims by widows in polygamous families, for exclusion of what they claimed to be their share of “matrimonial property” from the estates of their respective deceased husbands, and for removal therefrom from the deceased’s “free property”.

24. Mr. Katwa has also cited various High Court cases which he submits followed the reasoning in *Esther Wanjiru Kiarie v Mary Wanjiru Githatu* [2016] eKLR (supra). Having looked at those authorities



however, I do not find them very helpful in addressing the procedural issue at hand herein. This is because, in none of these other cases was an independent or separate Application, whether by Originating Summons or otherwise, under the *Matrimonial Property Act*, was as herein, filed within a Succession Cause, to advance a widow's claim for exclusion of her alleged matrimonial share from the deceased's "free property". Nonetheless, the authorities would still be helpful in re-affirming the view that a Succession Court is vested with the authority to consider and resolve disputes raised by a spouse regarding her share in matrimonial property.

25. My attention has also been drawn to the decision of my brother R. Nyakundi J, made in the case of *In re Estate of Joseph Toroitich Cherono (Deceased) [2024] KEHC 10003 (KLR) (R. Nyakundi J)* which, admittedly, was on almost all fours with the 5th Respondent's current Application herein. In that case, Nyakundi J declined the invitation to entertain the matrimonial property claim, ruling that it would be improper for the Court to mix a matter being adjudicated under the *Law of Succession Act* with one brought under the *Matrimonial Property Act*. Incidentally, Mr. Nabasenge who acts in this matter for the rest of the Respondents, is the Advocate who acted for the Applicant therein and who argued the claim by a widow for her matrimonial property entitlement and exclusion thereof from the deceased's "free property". In his Ruling, Nyakundi J held as follows:

" 36. .... I find it proper to first establish whether the *Matrimonial Property Act*, 2013 applies in matters of the *Law of Succession Act* given that it has been an issue raised by both parties. The issues raised majorly revolve around the question of spousal contribution in acquisition of the assets of the estate of the deceased during his lifetime to bring into perspective the application of the *Matrimonial Property Act*, 2014.

.....

55. A phrase of passage or in a provision in a statute must be read in the context of the section as a whole and in a wider context of a relevant group of sections in that specific statute. The other statutes also going by the respective preambles and objective provide the relevant text and context. It is somehow inconceivable that the legislature may have intended that if a husband and wife die after the dissolution of their marriage they would have intended to allow an application for succession to be varied so that the settlements be made in that succession does incorporate the contribution made in their marital estate. That is once we let in legal representatives of the husband and wife to claim along that legal scheme of inheritance supplemented by matrimonial property, one may be raising questions as to conflicting rights which will be very difficult to decide without further guidance than what the two respective independent statutes afford. It is instructive to note that the *matrimonial property act* enactment is intended only to authorise the court to act for the benefit of the living persons, to be more precise, the husband and wife. The present applications seek order only for the benefit of the estate of a deceased person and is not within those enactments in the *Matrimonial Property Act*. The court under the *matrimonial property Act* may as it thinks fit by order direct the husband to pay the wife during the joint lives of their unions such weekly, monthly, yearly sum for maintenance and support as evidence and pecuniary endowment can support the claim. In my view the whole of the matrimonial cause legislation right back to 2013, is essentially personal jurisdiction arising between parties to the marriage during to the lifetime, marriage resolved, each



wanting to go separate ways cannot be juxtaposed directly with the regulatory framework under the Succession Act. My reading of the Matrimonial Causes Act in context and at a glance has no provisions for the children of the marriage. It is really a contest between spouses on factors to be taken into account and consideration prescribed in the Act. Whether one has to look to the terms of the Matrimonial Causes Act and on the other hand the provisions of the Succession Act, the language is not similar or identical save for the mention of a surviving spouse entitled to a life interest, immovable properties and other residual net estate be share equally to the surviving children. The continued factors of inheritance is as rooted under Section 29(a) & (b) of the Succession Act. It is against this contextual background of there being a long established legal understanding in the Succession Act one's spousal rights survive the death of either spouse. The construction of the Matrimonial Property Act apparent on the face of it may be having similar terminology which can be interpreted as meaning that on dissolution of a marriage, one's spousal rights survive against while both remained alive. While recognizing the right to equality in marriage and its dissolution under Art. 45(3) of the Constitution, the same constitution also reserves in Art. 40 the Constitutional rights to individuals to own properties either individually or in association with others. That to me may be the inspiration in the dicta by the supreme court in JOO vs MPO (supra).

56. I must also mention briefly another problem which may arise from the interpretation of the two statutes as they relate to the distribution of either the marital or intestate estate. It concerns property acquired during the marriage by one spouse by a gift or succession or as a beneficiary in a partnership, a company which in the Matrimonial Causes Act, there are specific guidelines in which to exercise judicial discretion which are completely distinct with those provided for in the Succession Act.

.....

59. At the heart of this interpretative exercise as advanced by both counsel for the Petitioners and Respondent the consideration of the usual meaning of the language used in both statutes and what areas the court can find an intersection for me is a moot question. It follows from the foregoing discussion that I have not been persuaded by the facts of this case to grant the reliefs sought under the Matrimonial Causes Act 2013. In the first instance, the standard of the burden of proof vested with the claimants fell short of the threshold set by procedural law. In the second tapestry, one must be very careful about applying wholly the provisions on contribution and by analogy to first distribute the matrimonial estate to the surviving spouse and the residue is left for the rest of the dependants to scavenge. The fundamental question is whether the conscience of the recipient from both the Matrimonial Property Act and Succession Act is bound in such a way to justify equity to retain an overreaching and overriding interest over the estate of the deceased. Ultimately, the question of the best model of distribution as proposed by the petitioners and the respondents as come to haunt us as we head to the homestretch of this



decision. This is a polygamous family and I will better seek refuge in the law.  
What is the formulae?

26. I note that the said decision by Nyakundi J was delivered on 9/08/2024, long after the Court of Appeal decision in Esther W. Gitau vs Mary W. Githatu (supra) which was on 4/04/2019. While I also note that the Esther W. Gitau vs Mary W. Githatu case was brought to the Judge's attention, and which he even cited in determining some of the issues, the Judge did not expressly state whether he considered the said Court of Appeal decision in determining the matter at hand, and if so, his reasons for not following the principle of stare decisis by taking a different path from the one "condoned" by the Court of Appeal in the Esther W. Gitau vs Mary W. Githatu case. While the arguments advanced above by Nyakundi J are no doubt well reasoned, weighty and perhaps deserving of further consideration by a higher Court at an opportune time for an express determination to bring the issue to rest, insofar as the Court of Appeal, in the Esther Gitau case advanced a contrary view by not "noticing" anything wrong or any irregularity with the High Court's entertainment of a widow's matrimonial property claim within a Succession or Probate and Administration Cause, under the principle of precedent and stare decisis, I am bound to follow the Court of Appeal position, which I hereby do.

### **Final orders**

27. The upshot of my findings above is therefore that the Petitioners' Objection fails. Accordingly, I make the following orders:
- i. The Notice of Preliminary Objection dated 13/12/2024 is hereby dismissed.
  - ii. The viva voce trial of this matter, including on the issue of the 5<sup>th</sup> Respondent's alleged claim to 65% of the estate as her matrimonial property entitlement, shall now resume on dates to be fixed.
  - iii. Costs shall be in the Cause

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 4<sup>TH</sup> DAY OF APRIL 2025**

.....

**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the presence of:

Ms. Waweru h/b for Mr. Katwa for the 5<sup>th</sup> Respondent

Ms. Chelgoi for Mr. Kenei for the Petitioner

Court Assistant: Brian Kimathi

