



REPUBLIC OF KENYA



**In re Estate of Kitur Chepsungulgei (Deceased) (Probate & Administration
E053 of 2020) [2025] KEHC 4100 (KLR) (1 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4100 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION E053 OF 2020
RN NYAKUNDI, J
APRIL 1, 2025**

IN THE MATTER OF THE ESTATE OF KITUR CHEPSUNGULGEI (DECEASED)

BETWEEN

**GEDION KIBITOK 1ST ADMINISTRATOR
BENARD KIPKORIR 2ND ADMINISTRATOR
STEPHEN KIPLAGAT 3RD ADMINISTRATOR
DENNIS KIPLAGAT 4TH ADMINISTRATOR**

AND

**EVANS KIMUTAI KOTUT 1ST OBJECTOR
ESTHER JEPKEMEI KETER ALIAS SORGOR 2ND OBJECTOR**

RULING

1. Vide this court's ruling dated 20th September, 2024, the parties were directed to submit a proposal on the desired model of distribution of the properties forming part of the estate of the deceased.
2. Kennedy Kiptoo, being a beneficiary from the 2nd house swore an affidavit detailing the mode of distribution as follows:
 - a. That I swear this affidavit on my behalf and on behalf of Annah Jemeli, Mary Jeptebkeny, Jackson Bett, Bernard Kipkorir Biwott, David Kipkemboi, Eunice Jepkazi, Norah Kitur, Sammy Kiproop & Stanly Kipkirui who are all in consensus with the below mode of distribution.
 - b. That on the 1st day of November 2022 the court vides a ruling pronounced itself on the best mode for distributing the Estate of the deceased.



- c. That in the said ruling; the court was guided by the provisions of Section 40 of the *Law of succession act*, whereby using the Principle of each house as a unit the court was able to render its ruling which has been regarded by the beneficiaries as the best mode of distributing the Estate.
- d. That on 10th November 2022 Evans Kimutai Kotut and Dennis Kiplagat filed Summons for Revocation and or Annulment of Grant being dissatisfied by the ruling on the grounds that they had been left out of the list of beneficiaries despite being the heirs to the Deceased.
- e. That it was indeed a genuine concern raised by the two protesters; given that the chiefs letter dated 14th July 2020 failed to capture the facts that Jonah Kiptoo Kitur and Rispah Chebet Enock had left behind survivors who were to inherit their Estate.
- f. That during the hearing of the Summons for Revocation and or/Annulment of Grant it was agreed by consent that the two protesters and those who had been inadvertently left out owing to the fact that their spouses and or parents are deceased and their names were not captured out in chiefs letter and the minutes supporting the petition be included in the list of beneficiaries of the Estate, as they had established that they were indeed the beneficiaries of the Estate.
- g. That the below beneficiaries were inadvertently left out owing to the fact that their spouses and parents are deceased and their names were not properly captured out in the minutes supporting the petition be added to the list of beneficiaries.
 - a) Truphena Jeruto kitur -Widow of late Jonah kiptoo kitur
 - b) Norah Kitur- Widow of the late Geoffrey Kiplimo
 - c) Jackson Bett-Son of the late Julius Kibet
 - d) Evans Kimutai Kotut -Son of the late Risper Chebet Enock
 - e) Mary Jепtekeny -inadvertently left out in the Minutes for Succession.
- h. That consequently with the inclusions of the 5 entrant beneficiaries, it is proposed that the Estate comprised of 103 acres be distributed equally among the 19 beneficiaries.
 - 1. 1st House Beneficiaries
 - 1. Jane Jelel ~ 5.42 Acres
 - 2. Gideon Kitur ~ 5.42 Acres
 - 3. Benard Kipkorir Biwott ~5.42 Acres
 - 4. Samuel Kiprop ~5.42 Acres
 - 2. 2nd House Beneficiaries
 - 1. Anna Jemeli ~5.42 Acres
 - 2. Hellen Jepkemboi ~5.42 Acres
 - 3. Pauline Jepkosgei ~5.42 Acres
 - 4. Sophie Jepchumba ~5.42 Acres
 - 5. Truphena Jeruto Kitur ~5.42 Acres
 - 6. Evans Kimutai Kotut ~5.42 Acres



7. Kennedy Kiptoo ~5.42 Acres
8. Mary Jeptekeyen ~5.42 Acres
3. 3rd House Beneficiaries
 1. Stephen Kiplagat ~5.42 Acres
 2. Stanley Kipkirui ~5.42 Acres
 3. Eunice Jepakazi ~5.42 Acres
 4. David Kipkemboi ~5.42 Acres
 5. Jackson Bett {Together with his siblings} ~5.42 Acres
 6. Norah Kitur ~5.42 Acres

- i. That the above mode of distribution is the only fair mode of distribution satisfactory for all the beneficiaries.
- j. That guided by the principles of Section 40 of the *law of succession act*, we beseege the Honourable court to adopt the above mode of distribution which is not only satisfactory but equally fair to the beneficiaries.

3. The 1st Petitioner, 4th Petitioner and 1st Objector swore an affidavit and deposed as follows:

- a. That the deceased was polygamous having married three (3) wives in his lifetime namely Koel Cheboo, Leah Koel and Tabarbuch Kitur who are all since deceased.
- b. That this court is empowered by section 40 of the *Law of Succession Act*, Cap. 160 to distribute a polygamous deceased's intestate estate according to his houses.
- c. That this court is empowered by section 40 of the *Law of Succession Act*, Cap. 160 to distribute a polygamous deceased's intestate estate according to his houses.
- d. That in the foregoing, we propose that the L.R NO. Nandi/Cheptil/24 measuring approximately 103 acres being the sole asset comprising the estate of the deceased herein be distributed equally to his three (3) houses with each house receiving approximately 34.3 Acres.
- e. That we have also discovered that the above parcel of land comprises 12 acres being L.R Nandi/Cheptil/49, which was allegedly illegally declared a trust land on 16th June, 1962.
- f. That the above discovery informed the institution of Kapsabet Environment and Lands court case No. E014/2023.
- g. That the above parcel of land was further illegally registered in the name of the late Malakwen Cheptalam Rotich on 14th August, 2004.
- h. That the deceased herein having taken possession of the alleged L.R Nandi/Cheptil/49, some of his beneficiaries continue to reside on the said parcel of land to-date in the belief that it forms part of L.R Nandi/Cheptil/24.
- i. That in the foregoing, L.R Nandi/Cheptil/49 having been superimposed in L.R Nandi/Cheptil/24, albeit illegally, it is just and expedient that ELC No. E014/2023 be determined first before the estate herein can be distributed.



4. Benard Kipkorir being the 2nd administrator filed his proposed mode of distribution in opposition to the proposal by the 1st and 4th Petitioner. He deposed as follows:
- a. That it is not in dispute that the deceased had (3) wives in his lifetime namely Koel Cheboo, Leah Koel and Tabarbuch Kitur who are all since deceased.
 - b. That property can only devolve to persons who are alive and thus the need to distribute the property equally to the surviving heirs of the Estate.
 - c. That the aspect of consistency of the Nandi Custom and the *Law of Succession Act* has already been outlined under *the constitution* with a disclaimer that I do quote verbatim " Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid"
 - d. That we have further been legally advised by our Counsel on record Merss. Mwangi Kiai which advice we verily believe to be true; that the said custom that supports the distribution that necessitated the filing of Summons for confirmation of grant deposed on 7th June 2021 by the 1st and 4th petitioner is inconsistent with *the constitution* as it deprives off some beneficiaries the right to own property, more particularly Kennedy Kiptoo who had been identified by the court vide a ruling dated 1st November 2022, the said distribution has not captured his share despite the ruling being explicit, hence the mode of distribution is unfair and unjust.
 - e. That in the said ruling; the court was guided by the provisions of Section 40 of the *Law of succession act*, whereby using the Principle of each house as a unit the court was able to render its ruling which has been regarded by the beneficiaries as the best mode of distributing the Estate.
 - f. That the main reason as to why the 1st and 4th administrators are championing for the said distribution dated 7th June 2021 is because they have allocated themselves the largest portion of the property thus depriving the other beneficiaries the rights to equal distribution.
 - g. That the allegation being propounded by 1st and 4th administrators to the effect that certain persons have fraudulently alienated 12 acres of the land comprising the Estate of the Deceased is Not only untrue, misleading but equally frivolous.
 - h. That the said statement and allegation are brought late in the day; by the 1st and 4th Administrators with the sole aim of delaying the proceedings of succession and confirmation of grant so that the 1st and 4th Administrators will continue occupying and leasing the large tracks of land they are currently occupying in the Estate to the Disadvantage of the rest of the beneficiaries.
 - i. That there have been constant remarks by the 1st and 4th administrators to the extent that they do not want the succession proceedings to come to an end; because they are advantageously utilizing the Estate by farming and leasing out to third parties to the disadvantage of the rest of the beneficiaries.
 - j. That on the 10th November 2022 Evans Kimutai Kotut and Dennis Kiplagat filed Summons for Revocation and or Annulment of Grant being dissatisfied by the ruling on the grounds that they had been left out of the list of beneficiaries despite being the heirs to the Deceased.
 - k. That it was indeed a genuine concern raised by the two protesters; given that the chiefs letter dated 14th July 2020 failed to capture the fact that Jonah Kiptoo Kitur and Rispah Chebet Enock had left behind survivors who were to inherit their Estate.



- l. That during the hearing of the Summons for Revocation and or/Annulment of Grant it was agreed by consent that the two protesters and those who had been inadvertently left out owing to the fact that their spouses and or parents are deceased and their names were not captured out in chiefs letter and the minutes supporting the petition be included in the list of beneficiaries of the Estate, as they had established that they were indeed the beneficiaries of the Estate.
- m. That consequently with the inclusions of the 5 entrant beneficiaries, it is proposed that the Estate comprised of 103 acres be distributed equally among the 19 beneficiaries.
 1. 1st House Beneficiaries
 1. Jane Jelel ~4.9 Acres
 2. Gideon Kitur ~4.9 Acres
 3. Benard Kipkorir Biwott ~4.9 Acres
 4. Samuel Kiprop ~4.9 Acres
 5. Emmy Chesang ~4.9 Acres
 6. Rodah Ngetich[Deceased] ~4.9 Acres
 7. Rebecca Kimeto[Deceased] ~4.9 Acres
 2. 2nd House Beneficiaries
 1. Anna Jemeli ~4.9 Acres
 2. Hellen Jepkemboi ~4.9 Acres
 3. Pauline Jepkosgei ~4.9 Acres
 4. Sophie Jepchumba ~4.9 Acres
 5. Truphena Jeruto Kitur ~4.9 Acres
 6. Evans Kimutai Kotut ~4.9 Acres
 7. Kennedy Kiptoo ~4.9 Acres
 8. Mary Jепtebkeny ~4.9 Acres
 3. 3rd House Beneficiaries
 1. Stephen Kiplagat ~4.9 Acres
 2. Stanley Kipkirui ~4.9 Acres
 3. Eunice Jepkazi ~4.9 Acres
 4. David Kipkemboi ~4.9 Acres
 5. Jackson Bett {Together with his siblings} ~4.9 Acres
 6. Norah Kitur ~4.9 Acres
- n. That guided by the principles of Section 40 of the *law of succession act*, we besiege the Honourable court to adopt the above mode of distribution which is not only satisfactory but equally fair to the beneficiaries.



Decision

5. In navigating this litigation landscape the court must take cognisance of the following applicable provisions of the law:

29. For the purposes of this Part, "dependant" means—

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

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

- (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to —
 - (a) the personal and household effects of the deceased absolutely; and
 - (b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.
- (2) A surviving spouse shall, during the continuation of the life interest provided by subsection
 - (1) , have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.
 - (4) Where an application is made under subsection
- (3) , the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—
 - (a) the nature and amount of the deceased's property;
 - (b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;
 - (c) the existing and future means and needs of the applicant and the surviving spouse;
 - (d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
 - (e) the conduct of the applicant in relation to the deceased and to the surviving spouse;



- (f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and
- (g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

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

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

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

It is worth mentioning that Section 38 should be read conjunctively with Art 27 of *the constitution* which provides for equality before the law and non-discrimination on any of the grounds provided for in sub section 4 & 5 that states as follows: “ (4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status health status ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4) *the constitution* also in Art. 2(5) & (6) our constitutional democracy and Rule of Law has entrenched International Law as part of our sources of law applicable in the decision making by a court as provided for in Art 10 on National Values and Principles of Governance of the same constitution.

It is clear from these constitutional imperatives that traditional customs and culture as since outlived its usefulness as the primary source of law applicable to enforce inheritance rights. The age of discrimination based on sex is long gone and globally the world is now in the stage of full equality of Human beings irrespective of their sex, creed, birth, race, colour, ethnic background, gender, and etc. Time has come for communities still holding unto customary law on distribution of the estate in which sons are given primacy to inherit the property of their deceased's parents whatever it is kind or origin as against their sisters or daughters of the deceased to bury such repugnant clauses aimed at limiting the fundamental rights and freedoms on the basis of sex, gender, or birth. Daughters like sons have equal right to inherit ancestral land owned by their deceased parents.



39. Where an intestate has left no surviving spouse or children (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—(a) father; or if dead (b) mother; or if dead (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
- Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.
6. In a case of this nature where the deceased died intestate and was a polygamist with three wives and children, the focus on distribution of his estate is Section 40 of the [Law of Succession Act](#) which primarily provides as follows;
- “(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate, shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”
7. Whereas under Section 41 the Act provides as follows:
- Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”
8. The court notes that this matter involves the distribution of approximately 103 acres of land registered as L.R NO. Nandi/Cheptil/24, which constitutes the primary asset of the deceased's estate. Three proposals have been presented before this court: first, Kennedy Kiptoo's proposal for equal distribution among 19 beneficiaries at approximately 5.42 acres each; second, the 1st and 4th Administrators' proposal to distribute the land equally among the three houses at approximately 34.3 acres per house; and third, Bernard Kipkorir's proposal for distribution among 21 beneficiaries (including deceased individuals) at approximately 4.9 acres each. The court must determine which proposal aligns with the provisions of Section 40 of the [Law of Succession Act](#) while ensuring fairness to all rightful beneficiaries.
9. [In the Matter of the Estate of Nelson Kimotho Mbiti \(deceased\)](#) HCSC NO.169 of 2000, Koome J directed that the estate of a polygamist be divided in accordance with the provisions of Section 40 of the Act. The estate was divided into units according to the number of children in each house with the widows being added as additional units. The same reasoning was also applied by Judge Ali Roni in the [Estate of Ainea Masinde Walubengo \(deceased\)](#) (2017) eKLR stating that “I am of the view that Section 40 of the [Law of Succession Act](#) will apply to the circumstances of this Case. Meaning that the Court will distribute the estate of the deceased according to each house taking into account the number of children in each unit including the surviving widow.”



10. In applying these principles to the present case, the court observes that the deceased left behind three houses, each with surviving children and/or their representatives. The initial list of beneficiaries was contested, leading to the inclusion of five additional beneficiaries who had been inadvertently omitted from the original petition. It is imperative that any distribution model acknowledges all rightful heirs of the deceased, as established through the proceedings of this court, particularly following the Summons for Revocation and/or Annulment of Grant filed on 10th November, 2022.
11. The Court *in Re Estate Of John Musambayi Katumanga – Deceased* [2014] eKLR held as follows:

“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is ‘equally’ as opposed to ‘equitably’. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”
12. In the case of *Re the Matter of the estate of Kariuki Kiburu vs Joyce waruguru Kariuki & 2 others* (2016) eKLR, the court pronounced itself as follows:

“The learned judges essentially espoused the principle of fairness and equity in distribution of a deceased estate between or amongst persons beneficiary entitled to such an estate in a polygamous family setup. While the number of children in a particular house is an important factor in the determination of the share to be allocated to each house, it is not the only factor, neither is it the controlling factor. The share each house gets is not contingent upon the number of children in any particular house, there are other consideration which will guide the court’s discretion in the distribution of the estate, for instance the age of the children and their station in life are factors that the court will necessarily take into account. Neither of the surviving children is a school going child or is so young that he has to be taken through the part of life, on the contrary the deceased survivors are all adults who are settled in life and therefore the question whether some of them are entitled to a larger share of the estate than others by virtue of age does not arise, their station or status in life does not count.”
13. Turning to the contentious issue of the 12 acres allegedly forming part of L.R Nandi/Cheptil/49, which the 1st and 4th Administrators claim was illegally declared trust land and subsequently registered under the name of Malakwen Cheptalam Rotich, the court finds this allegation to be a separate matter that should not delay the present succession proceedings. The Environment and Land Court case No. E014/2023 cited by the 1st and 4th Administrators can proceed independently, and any future determination in that case regarding the disputed 12 acres can be addressed through appropriate legal remedies. The court finds favour with the 2nd Administrator's assertion that introducing this issue at this late stage appears calculated to delay the succession process, particularly given that beneficiaries continue to reside on the land in question.
14. After careful consideration of the competing proposals and applicable legal principles, the court finds that Kennedy Kiptoo's proposal most closely adheres to the spirit of Section 40 of the *Law of Succession Act* and the constitutional principle of equality. This distribution model accounts for all 19 surviving beneficiaries who have been properly identified through these proceedings, allocating approximately 5.42 acres to each. The court rejects the proposal by the 1st and 4th Administrators that would divide



the land by houses only, as this would result in inequitable distribution among individual beneficiaries. Similarly, the court finds that Bernard Kipkorir's proposal unnecessarily includes deceased individuals as separate beneficiaries, rather than properly allocating their shares to their surviving heirs as already accounted for in Kennedy Kiptoo's proposal.

15. Therefore, the court adopts Kennedy Kiptoo's distribution model as set out in paragraph 2(b) of this ruling, with each of the 19 identified beneficiaries receiving approximately 5.42 acres from the 103-acre parcel of land. This distribution ensures fairness and equity among all rightful heirs while respecting the principle that each house receives its appropriate share of the estate in accordance with Section 40 of the *Law of Succession Act*. The Administrators are directed to effect this distribution within 90 days of this ruling.
16. The parties shall bear their own costs of these proceedings.
17. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 1ST DAY OF APRIL, 2025

R. NYAKUNDI

JUDGE

