In re Estate of the Late Tuitoek Chepkurui (Probate & Administration 54 of 2002) [2025] KEHC 6638 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6638 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PROBATE & ADMINISTRATION 54 OF 2002

JRA WANANDA, J

MAY 23, 2025

IN THE MATTER OF THE ESTATE OF THE LATE TUITOEK CHEPKURUI

BETWEEN

JOSEPH KOSGEI TUITOEK ..... PETITIONER

AND

JAMES KIRWA RUTTO ..... ADMINISTRATOR

AND

EVERLYNE JEBICHII KANGOGO ..... 1ST PROTESTOR

EMMANUEL KEMBOI RUTTO ..... 2ND PROTESTOR

RULING

1. Before this Court for determination is a Summons for Confirmation of the Grant of Letters of Administration issued herein as well as Protests filed in opposition to the Summons.

2. The deceased, Tuitoek Chepkurui, died on 19/06/1994 at the age of 76 years. On 17/04/2002, the Petitioner, Joseph Kosgey Tuitoek, as a son of the deceased, through Messrs J. K. Birir & Co. Advocates, petitioned for Grant of Letters of Administration Intestate in respect to the estate. In the Petition, he stated that the deceased was survived by 6 children, with the Petitioner as the 1st born. The only asset listed as comprising the estate was Plot No. 145 Kaptagat Settlement Scheme.

3. The Petition seems to have remained dormant for a long time until the Petitioner subsequently changed his Advocates to Messrs Ngigi Mbugua & Co. upon whose efforts, the Letters of Administration was eventually granted to the Petitioner on 10/02/2016. However, on 16/01/2017, James Kirwa Rutto, through Messrs Keter, Nyolei & Co. Advocates, filed Summons seeking revocation of the Grant alleging that the same was obtained fraudulently as the Petitioner concealed the material fact that the deceased was polygamous and left other survivors who were not named in the Petition. Fortunately,

by the consent order recorded in Court on 15/10/2018 before H. Omondi J (as she then was), the Summons was settled in terms that the Grant of Letters of Letters of Administration was amended and the said James Kirwa Rutto appointed as a co-Administrator with the Petitioner.

4. Pursuant to the said consent, the Petitioner filed the Summons dated 6/03/2019 seeking Confirmation of the Grant and presented his proposed mode of distribution as follows:

i)	James Kirwa Rutto (grandson)	4.4 Acres
ii)	Emmanuel Kemboi Rutto (grandson)	4.4 Acres
iii)	Charles Kimutai Rutto (grandson)	4.5 Acres
iv)	Emmaculate Jepchichir Rutto (grand-daughter)	1 Acre
v)	Janeth Jebet Rutto (grand-daughter)	1 Acre
vi)	Joseph Kosgei Tuitoek	10.3 Acres
vii)	Regina Jerop Tuitoek	2.5 Acres
vii)	Monica Kosgei	2.5 Acres
Total	30.6 Acres	

5. Before the Summons could be heard, one Everlyne Jebichii Kangogo emerged and through Messrs Mukabane & Kagunza Advocates, filed the Affidavit of Protest sworn on 16/09/2019. The grounds for the Protest were basically that she was a dependent of the deceased since she was 5 years old and that she was an adopted grand-daughter of the deceased. Similarly, the co-Administrator, James Kirwa Rutto, also filed the Affidavit of Protest sworn on 17/04/2023. I will therefore refer to the two as 1st and 2nd Protesters, respectively.

6. It was then directed that the Summons for Confirmation and both Protests be canvassed by way of viva voce trial. I took over the matter when it first came before me on 13/03/2023. I thereafter gave the parties liberty to file Witness Statements and Lists (bundle) of documents. The hearing however failed to take off on several occasions, since, always, one or more parties, particularly the Protesters, would not be ready. After being taken round in circles by the parties for far too long, by the orders I made on 22/07/2024, to save on further delays, I directed that I would determine the matter on the basis of the Affidavits and Witness Statements on record, and gave the parties liberty to file written Submissions. Since none of the parties raised any objection to these directions, I thus admitted the respective Witness Statements and Affidavits into evidence without the necessity of calling the makers thereof.

7. However, thereafter, Mr. Kagunza Advocate, applied and obtained orders for his law firm, Mukabane & Kagunza Advocates, on record for the 1st Protester, Everline Jebichii Kangogo, to cease acting on the ground of the client's failure/neglect to give instructions to the law firm. No new Advocate has been appointed to date, nor any "Notice to Act in Person" filed.

8. I will now recount and recite the Affidavits and Witness Statements filed herein, and which, as aforesaid, were admitted in evidence without calling the makers.

Statement By James Kirwa Rutto (2nd Administrator-2nd Protester)

9. The Statement by James Kirwa Rutto that appears in the Judiciary Case Tracking System (CTS) online portal, filed through Messrs Keter, Nyolei & Co. Advocates, is undated but was filed on 7/10/2024. In the statement, he stated that the deceased was polygamous as he had 4 wives, namely, Clara Soti Taprandich, Mirriam Kimoi, Kimoi Ann Tuitoek and Tapshaurei Tuitoek. He stated that the 1st widow, namely, Clara Soti Taprandich, had 1 child, namely, Alfred Kipruto Tuitoek, who died in 1991 and left 6 grandchildren, including himself (James Kirwa Rutto). Regarding the 2nd widow, Mirriam Kimoi, he stated that she had 6 children. He then stated that the deceased also had other dependents, namely, Everlyne Jabichii and Emmanuel Kiplimo. According to him, the deceased settled 3 of the 4 houses in separate respective parcels of land as follows:

Clara Soti Taprandich's family	Uasin Gishu/Kaptagat Settlement Cheme/145
Mirriam Kimoi's family	Kimoning Farm
Kimoi Ann Tuitoek's family	Katalel Farm

10. Regarding the 4th wife, Tapshaeri Tuitoek, he stated that she separated with the deceased and never lived on Uasin Gishu/Kaptagat/Settlement Scheme/145 and that when she died in 1976, she was buried in her parent's land in Cherangany. He stated further that following the death of Tapshaurei Tuitoek, the 1st wife Clara Taprandich Tuitoek lived with the Petitioner, Joseph Kosgey Tuitoek and his sister Regina Jerop Tuitoek at the Kaptagat Plot as her step-children while the other children were taken elsewhere. He also contended that the deceased and the 1st wife, Clara Taprandich also adopted the said other children, namely, Everlyne Jabichii then 5 years and Emmanuel Kiplimo, then 4 years and lived with them till their demise, that in 1981, the deceased took the said Emmanuel Kiplimo to school and after initiation to adulthood in 1992, gave him a portion of land measuring 5 acres, that in 1995, the 1st wife, Clara Taprandich added the Petitioner 4 acres to settle his sister, Regina Jerop Tuitoek and Monica Tuitoek and to date, has 9 acres. He stated further that the land in issue has both arable and swampy sections and ought to be distributed taking into consideration the nature of the land so that each beneficiary gets both arable and swampy sections, that the wishes of the deceased ought to be respected and, in that regard, he objects to the mode of distribution proposed by the Petitioner. He then proposed the following mode of distribution in respect to the only estate asset, namely, Plot No. 145 Kaptagat Settlement Scheme:

Arable	Swampy		
i)	James Kirwa Rutto	4 Acres	0.5 Acres
ii)	Charles Kimutai Rutto	4 Acres	0.5 Acres
iii)	Betty Jebet Rutto	0.8 Acres	0.2 Acres
iv)	Emmaculate Jepchichir Rutto	0.8 Acres	0.2 Acres
v)	Joseph Kosgei Tuitoek	4.8 Acres	0.2 Acres
vi)	Regina Jerop Tuitoek	1.9 Acres	0.1 Acres
vii)	Monica Kosgei	1.9 Acres	0.1 Acres
viii)	Everlyne Chebichii	1.5 Acres	1.3 Acres
ix)	Emmanuel Kiplimo	1.6 Acres	1.2 Acres
x)	Emmanuel Kipkemboi Rutto	3.4 Acres	1.6 Acres
Total	25.7 Acres	4.9 Acres	

Affidavit of Protest by Everlyne Chebichii (1st Protester)

11. Everlyne Chebichii, in her Affidavit of Protest sworn on 16/09/2019 and filed through Messrs Mukabane & Kagunza Advocates, deponed that she is a beneficiary of the estate of the deceased by virtue of being a dependent of the deceased from the age of 5 years till demise of the deceased, that besides, she is the one who took care of the deceased and the deceased made it clear that she is a beneficiary which information is well within the knowledge of the parties herein. Regarding the mode of distribution proposed by the Petitioner, she deponed that it is likely to prejudice and disinherit a large proportion of the deceased's estate. She then made a raft of other accusations against the Petitioner but which are not directly connected to the issue of distribution. She also did not propose any mode of distribution of her own. She however listed the dependents as follows:

i)	Taprandich Tuitoek	Late wife
ii)	Tapshauret Tuitoek	Wife
iii)	Joseph K Tuitoek	son
iv)	Alfred Tuitoek	Late son
v)	Christine N. Tuitoek	Daughter
vi)	Regina Tuitoek	Daughter
vii)	Monica Tuitoek	Daughter
viii)	Agnes Tuitoek	Daughter
ix)	Sally Tuitoek	Daughter
x)	Everlyne Jebichii Kangogo	Adopted daughter
xi)	James Kirwa Rutto	Grandson
xii)	Emmanuel Kemboi Rutto	Grandson
xiii)	Emmaculate Jepchichir Rutto	Grandson
xiv)	Janeth Jebet Rutto	Grand-daughter
xv)	Betty Chebet Rutto	Grand-daughter
xvi)	Charles Kimutai Rutto	Grandson

Witness Statement by Annah Kimoi Tuitoek (on behalf of 3rd Protester)

12. Although the 3rd Protester does not seem to have filed any express Protest of her own, 2 respective Witness Statements were filed on his behalf by Annah Kimoi and Barnaba Tuitoek.

13. Annah Kiomi Tuitoek, in her Statement dated 16/10/2023 and filed through Messrs Songok & Co. Advocates stated that she is the 3rd wife of the deceased who was polygamous and had 4 wives in total, namely Clara Taprandich Tutoek, Miriam Kimoi Tuitoek, Kimoi Annah Tuitoek and Tapshaurey Tuitoek. She stated that the 1st wife, Clara Taprandich Tuitoek (deceased) lived at Block 145 Kaptagat Scheme, the subject of this Succession Cause, measuring 30 acres, the 2nd wife, Miriam Kimoi Tuitoek Taplilei (deceased) established her home and lived with her children at Katalel and the said parcel of land was in her name and which she has since transferred to her children and is not part of this Succession Cause. She stated further that herself, as the 3rd wife, she was bought for land in which she established her home at Kimoning sub-Location which parcel is in her name and she lives there with her children and it is also not part of this Succession Cause. Regarding the 4th wife, Tapshaurey Tuitoek (deceased), she stated that she never lived with the deceased and had 1 child, namely, Joseph Kosgei Tuitoek (Petitioner) who stayed with the 1st wife and has always lived at the subject parcel Block 145

Kaptagat Scheme. She then stated that during his lifetime, the deceased distributed the said Block 145 Kaptagat Scheme as follows:

i. Allocated his son from the 1st wife, Alfred Kipruto Tuitoek (deceased), a portion measuring 11 acres, which the said Alfred Kipruto Tuitoek fenced and built a house on in 1981, and on which his children live to date.

ii. Allocated to Joseph Kosgei Tuitoek (Petitioner) a portion measuring 5 acres and who planted cypress trees around 1985 as a boundary, but which trees were later cut down but there are still tree stamps to date, and the Petitioner built a house thereon.

iii. The remainder, 15 acres remained in the use of the deceased and the 1st wife, Clara Taprandich Tuitoek, until the demise of the deceased in 1994.

iv. After the demise of the deceased, the 1st wife, Clara Taprandich Tuitoek gave an extra 4 acres to the Petitioner, Joseph Kosgei Tuitoek to hold in trust for his sisters, namely, Regina Tuitoek and Monica Tuitoek and that this was done after a meeting attended by all the 3 wives. She stated that in the meeting, the Petitioner had raised a complaint that her said 2 sisters are under his custody and thus needed additional land to cater for all of them, that the proposal was accepted and the Petitioner was added 4 acres to hold in trust for his said 2 sisters. She stated further that the sisters did not come to occupy the said land and the whole 9 acres is therefore still in the custody of the Petitioner, and that it was agreed that if the sisters do not at all return to claim the same, then the Petitioner can keep it to himself upon which he will have no claim for any further portion of land.

14. She stated further that in the year 1981, the deceased and the 1st wife, Clara Taprandich Tuitoek approached the said Alfred Tuitoek and requested him to give to them his son (their grandson), Emmanuel Kipkemboi Rutto to stay with them so as to take care of them, which request was accepted and the said Emmanuel Kipkemboi Rutto stayed with the deceased since 1981 and went to school while with the deceased and in 1992, after his initiation, the deceased gave him 5 acres of the said Block 145 Kaptagat Scheme which he has been living on to date. She stated her knowledge that she Petitioner has purported to disown the 5 acres allocated to Emmanuel Kipkemboi Rutto and reduced the acreage but according to her, the wishes of the deceased should be respected and no changes should be made.

15. She also stated that the deceased and the 1st wife also adopted Everlyne Chebichii (around 1986) and Emmanuel Kiplimo (around 1991) while they were 5 years each, that the 2 took care of the 1st wife until her demise in 2016 and have been utilizing 5 acres to date, which, it is only fair, that they be allocated. According to her, under Keiyo culture, the person who took care of someone until his/her demise inherits that person's property.

Witness Statement by Annah Kimoi Tuitoek (on behalf of 3rd Protester)

16. Barnaba Tuitoek, in her Statement dated 3/08/2023 also filed through Messrs Songok & Co. Advocates, stated that he is a son of the deceased, that the deceased was polygamous and had married 4 wives, namely, Clara Taprandich Tuitoek, Miriam Kimoi Tuitoek, Kimoi Annah Tuitoek and Tapshauri Tuitoek and that he is the son of the said Miriam Kimoi Tuitoek. According to him, the parcel of land known as Block 145 Kaptagat Scheme belonged to the deceased and the 1st wife, Clara Taprandich Tuitoek. Regarding the Petitioner, Joseph Kosgei Tuitoek, he stated that he was brought up by the 1st wife, Clara Taprandich Tuitoek although he was the son of Tapshaurei Tuitoek.

17. He stated that the Petitioner lived with Clara Taprandich Tuitoek since his childhood to date. He reiterated that Block 145 Kaptagat Scheme was given to the 1st wife, Clara Taprandich Tuitoek only,

that later, in 1986, and that the deceased gave 5 acres thereof to the Petitioner, Joseph Tuitoek. He stated further that in 1981, the deceased requested the 1st wife's son, Alfred Tuitoek, to give to them (deceased and 1st wife) his son, Emmanuel Kipkemboi Rutto to stay with them to take care of them and later in the year 1992, the deceased gave Emmanuel Kipkemboi Rutto gave 5 acres of Block 145 Kaptagat Scheme during his initiation pass out. He added that the 1st wife, Clara Taprandich Tutoek, later also gave an additional 4 acres to the Petitioner, Joseph Tuitoek to settle his sisters, Monica Tuitoek and Regina Tuitoek. According to him, the rest of the parcel of land remained with the 1st wife, Clara Taprandich Tutoek. In conclusion, he stated that after the death of Clara Taprandich Tutoek, the family held a meeting and agreed that Everlyne Chebichii and Emmanuel Kiplimo do get a share of the portion held by Clara Taprandich Tutoek.

Written Submissions

18. The Summons and the Protests were then canvassed together, by way of written Submissions. The Submissions filed are as follows:

Party	Name	Law Firm-Advocates	Date
Petitioner-1st Administrator	Joseph Kosgei Tuitoek	Ngigi Mbugua & Co.	4/11/2024
2nd Administrator-2nd Protester	James Kirwa Rutto	Keter, Nyolei & Co.	3/10/2023
3rd Protester	Emmanuel Kemboi Rutto	Songok & Co.	27/9/2024

19. The 1st Protester, Everlyne Jebichii Kangogo, whose Lawyers, Mukabane & Kagunza Advocates ceased acting for her, does not seem to have filed any Submissions.

Petitioner's Submissions

20. The Petitioner, through Messrs Ngigi Mbugua & Co., submitted that in the Chief's letter dated 12/03/2015, 2 widows were identified, namely, Taprandich Tuitoek and Tapshaurei Tuitoek, both now deceased, a total of 7 children were identified as heirs, and that in summary, the plot was to be shared by the 2 households and their respective heirs. He pointed out in his Further Affidavit, the Petitioner took the view that the deceased was a polygamous man who married 4 wives but that for the purposes of the instant proceedings, only the said 2 houses were relevant, as the other 2 were settled elsewhere and have not made any claim to the parcel of land the subject hereof.

21. He referred to Section 3(2) of the *Judicature Act*, Article 11(1) of *the Constitution*, and Rule 64 of the Probate and Administration Rules, which he, submitted, permits the Court to apply customary law in civil cases in which one or more parties is subject to, or affected by it. He then referred to the renown "Restatement of African Law 2-The Law of Succession by Justice Eugene Cotran, London Sweet & Maxwell 1969, at pages 124-131 Chapter 14- The Elgeyo, Marakwet and Tugen sub-Tribes" and submitted that according to that book, landed property among the Keiyo sub-tribe was distributed among women, if done in the deceased's lifetime, and no special regard was given to the number of children, and that in case of intestate, or after death, the property is distributed to the sons in equal shares. He pointed out that in this matter, the deceased was survived by his 2 wives and their

children, and that the Protesters are grandchildren of the 1st house of Clara Taprandich Tuitoek and wish to be treated like their uncle (Petitioner) and be regarded as units of their own. He stated that on the Petitioner's part, he proposes that the land be shared equally between the 2 households, at 15.3 acres each, and the Protesters can then approach their respective households that welcomed them, for any gratuitous consideration. According to him, this is the proposal that satisfies the statutory and customary requirements of equity and equality among the heirs and the proviso to Section 71(1)(d), and Section 35-38 and 40 of the *Law of Succession Act*. Further, according to him, the deceased determined that the 2 households of Taprandich Tuitoek and Tapshaurei Tuitoek shall share the Kaptagat land equally, he showed the sons from both houses where to build in separate locations and even built the homesteads of the 2 widows apart, and that as much as the gifts were not perfected, they form a reasonable presumption of the intention of the deceased to settle the two units separately.

2nd Protester's Submissions (James Kirwa Rutto)

22. The 3rd Protester, through the Submissions filed through Keter, Nyolei & Co. Advocates, submitted that the parcel of land measures 30.6 acres and reiterated that it consists of both arable and swampy sections, the arable part being 25.7 acres and the swampy section being 4.9 acres. He then reproduced the mode of distribution proposed in his Affidavit of Protest.

3rd Protester's Submissions (Emmanuel Kemboi Rutto)

23. The 3rd Protester, through Messrs Songok & Co. Advocates, submitted on revocation of the Grant, which submission is clearly misplaced, first because he has not filed any Summons for Revocation and secondly, the only Summons for Revocation that was filed in this matter was the one by the 2nd Administrator-2nd Protester and which was settled by consent. The matter is therefore currently at the advanced stage of distribution and I will therefore not consider the portion of the Submissions seeking revocation of the Grant.

24. Regarding distribution, Counsel reiterated that the 3rd Protester is a beneficiary of the estate of the deceased by virtue of being a dependent of the deceased since he was 5 years old until the demise of the deceased and that the deceased gave him 5 acres of the subject land as a gift during his right of passage. On the legality or validity of gifts inter vivos, he cited Section 42 of the *Law of Succession Act* and also the case of Micheni Aphaxard Nyaga & 2 Others v Robert Njue & 2 Others [2021] eKLR. He then presented the 3rd Protester's proposed mode of distribution which, as he pointed out, is the same as the one presented by the 2nd Administrator-2nd Protester.

Determination

25. It is evident that the issue for determination herein is "who are the beneficiaries of the estate herein, and what mode of distribution should the Court apply in distributing the estate".

26. It is not in dispute that the deceased herein was a polygamous man and, in his lifetime, he married 4 wives. It is also not in dispute that among the 4 wives, 2 were settled elsewhere and seem contented. They have therefore not made any claims herein.

27. Regarding the law on distribution of the estate of a polygamous intestate, Section 40 of the *Law of Succession Act* 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 shall, in the first instance, be divided among the houses according

to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children;

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38".

28. As was stated by Hon. Justice J.K. Karanja in the case of In re Estate of Michael George Tendwa Said (Deceased) [2020] eKLR, Section 40 above is the applicable law where there is no agreement on distribution of the estate and that:

> " any proposed mode of distribution ought to be compatible with and in accordance with the provision thereby leaving no room for distribution based on the whim of the holder of the grant or his/her sentimental feelings."

29. Regarding "equality" in distribution as mentioned in Section 40 above, the Court of Appeal in the case of Stephen Gitonga M'murithi –v- Faith Ngira Murithi [2015] eKLR, observed as follows:

> " Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried.
>
> Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each house hold of a polygamous deceased. Applying the above principles ..... it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the *Law of Succession Act* by discriminating against the married daughters of the deceased ..."

30. Further, in the case of In Re Estate of John Musambayi Katumanga – (Deceased) [2014] eKLR, Musyoka J stated as follows:

> " Under Section 40 of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the *Law of Succession Act*, the children would divide the estate equally amongst themselves. Section 40 was not designed for the circumstances of the instant estate, but it would appear more appealing for the purpose of distribution of the said estate than Section 35. 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."

31. However, in the case of Esther Wanjiku Burugu Vs Margaret Wairimu Burugu, Civil Appeal No. 319 of 2002, the Court of Appeal guided that the Section 40 does not stipulate that the division of the estate must be "equal" and stated that although the distribution of the estate of a polygamous person is in the first instant to be among the houses, nonetheless distribution would be done according to the number of children in each house. The Court stated that the language adopted in Section 40 negates any argument that the division must necessarily be "equal" between or among the houses, for to say so, would ignore the fact that in most instances, the number of children in each house is never equal.

32. In the case of Elizabeth Chepkoech Salat Vs Josephine Chesang Salat [2015] eKLR, another Court of Appeal case, the Judges reiterated and fortified the fact that Section 40 of the *Law of Succession Act* does not provide for "equality" between houses, or that each child must receive the same or equal portion. The Court held as follows:

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

33. Similarly, in the other Court of Appeal case of Mary Rono Vs Jane Rono & Another [2005] eKLR, Omollo JJ stated that if Parliament had intended that there must be "equality" between the houses, then there would have been no need to provide in Section 40 above that the number of children in each house be taken into account. This is how he put it:

> " My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.
>
> Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied the Act does not provide for that kind of equality."

34. The above views, read together, give rise to the generally agreed position that Section 40 does not give blanket discretion to a Court to deviate from the general principles stipulated therein. Thus, where a matter is contentious and the parties have not reached a consent, the Court is bound to apply the statutory provisions. In other words, the Court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. It is however also agreed that a Court has some level of limited residuary discretion within the statutory provisions to make adjustment to the share

of each house or of a beneficiary. This was the view adopted in the case of Re Estate of Chesimbili Sindani (Deceased) [2021] eKLR.

35. In this case, the only estate property agreed to be available for distribution is the parcel of land described as Plot No. 145 Kaptagat Settlement Scheme. No Search Report or copy of the title has been presented to the Court but there is the letter dated 12/04/2002 from the Ministry of Lands confirming that the same was, at least as at that date, registered in the name of the deceased. The acreage is however not indicated in the letter but the parties are generally in agreement that it is approximately 30.6 acres. I will refer to the house of Clara Taprandich Tuitoek as the 1st house, and the house of Tapshaueri Tuitoek as the 2nd house. It is also agreed that the 1st house had only 1 child, the late Alfred Kipruto Tuitoek) who left children (including the 2nd Administrator/2nd Protester-James Kirwa Rutto), while the 2nd house had 6 children. As both the wives referred to above are now also deceased, there would therefore be 7 units to inherit. If what the parties have presented is correct, then the 7, divided from the 2 families are as follows:

1st House – Clara Taprandich Tuitoek		2nd House – Tapshaurei Tuitoek	
i)	Alfred Kipruto Tuitoek	i)	Joseph Kosgei Tuitoek
ii)	Regina Jerop Tuitoek		
iii)	Christine Jelagat		
iv)	Monica Jemutai		
v)	Agnes Jepng'etich		
vi)	Sally Jerono		

36. The starting point would therefore be to decide whether to share out the said parcel of land equally between the two houses, at approximately 15.3 acres for each house or in the alternative, whether to share the land equally between the 7 heirs, with each survivor getting 4.37. I however notice that all the parties seem to favour the first option, namely, distribution between the 2 houses. However, there are also the following separate claims:

    i. Claims by Everlyn Jebichii (1st Protester) and by one Emmanuel Kiplimo that they are "dependents" of the deceased, being his alleged informally "adopted children".

    ii. Claim by Emmanuel Kipkemboi Rutto (3rd Protester), a son of the said Alfred Kipruto Tuitoek, and thus a grandson of the deceased, on the alleged ground that being the grandson who lived with the deceased and the 1st wife, Clara Taprandich Tuitoek since he was 5 years old, and having therefore taken care of them until their old age, they gifted him 5 acres separately before their demise.

37. Regarding the claim by Everlyn Jebichii (1st Protester) and the said Emmanuel Kiplimo that they are "dependents" of the deceased, the right to inherit under the ground of "dependency" is addressed in Section 29 of the *Law of Succession Act* which provides that a "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, grandparents, 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) ....."

38. It is therefore settled that, unlike Section 29(a) of the *Law of Succession Act*, proof of "dependency" is a condition precedent to the exercise of the Court's powers under Section 29(b) thereof. In respect to the meaning ascribed under Section 29(b), Mabeya J, in the case of Beatrice Ciamutua Rugamba. vs. Fredrick Nkari Mutegi & 5 Others, 2016 eKLR, held as follows:

> "From the foregoing, a dependent under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency."

39. Regarding the claim by Everlyn Jebichii (1st Protester) and the said Emmanuel Kiplimo that they are "dependents" of the deceased, only Everlyn Jebichii came forward and made a claim. She also swore an Affidavit although she did not make a demand for any specific size of acreage. Further, her Advocate ceased to act midway through the proceedings and no Submissions was thus filed on her behalf. As for Emmanuel Kiplimo, he did not at all participate in these proceedings and it is the 2nd Administrator/2nd Protester and the 3rd Protester who purported to advance his case on his behalf. The Court has not been told the whereabouts of Emmanuel Kiplimo. It has also not been alleged that he is incapacitated in any way or that he is a minor. In any event, the deceased having himself died 31 years ago in the year 1994, and Emmanuel Kiplimo having been alive by that date, it means that he is currently above 31 years in age, and thus he cannot be a minor. In the circumstances, Emmanuel Kiplimo, having himself not come out to make any claim in his own right, I have no basis to consider the same.

40. The relationship, if any between the deceased and the said Everlyn Jebichii (1st Protester) and Emmanuel Kiplimo (3rd Protester) has also not been disclosed. The two claims therefore both fail at the preliminary stage of failing to demonstrate that they are "the deceased's parents, step-parents, grandparents, 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 per the list contained in Section 29(b) above. To sustain a case as a "dependent" the 1st and 3rd Protesters had to first show that they fall within any of the categories of the relatives listed above. This they have failed to do. Although the two claims were supported by one of the wives of the deceased, namely, Anna Kimoi Tuitoek and also by one Barnaba Tuitoek, one of the sons from another wife, presumably Mirriam Kimoi, in their Witness Statements, the claims did not, in my view, meet the statutory threshold.

41. It is also not lost on me that the 2nd Administrator/2nd Protester and the 3rd Protesters, who as aforesaid, are the two parties who purported to advance the 1st Protester and Emmanuel Kiplimo's claims of "dependency" on their behalf, are in fact siblings as they are both sons of the said Alfred Kipruto Tuitoek, the only child from the 1st house whose mother is Clara Taprandich Tuitoek. Since it is they

who claim that their mother, Clara Taprandich Tuitoek, in conjunction with the deceased, "adopted" Everlyn Jebichii (1st Protester) and Emmanuel Kiplimo (3rd Protester), I see no reason why members of their said 1st house should not cede a portion of their share to the said 1st and 3rd Protesters. They are at liberty to do so.

42. Regarding the claim by Emmanuel Kipkemboi Rutto (3rd Protester), a son of the said Alfred Kipruto Tuitoek, and thus a grandson of the deceased with the 1st wife, Clara Taprandich Tuitoek, on the alleged ground that being the grandson who lived with the deceased and the 1st wife, Clara Taprandich Tuitoek since he was 5 years old, and having therefore taken care of them until their old age, they gifted him 5 acres separately before their demise, I also find this claim to be unconvincing and short of the threshold of proof on a balance of probabilities.. Apart from the bare allegations, nothing cogent has been presented to prove the claim. Again, although the two claims were supported by one of the wives of the deceased, namely, the said Anna Kimoi Tuitoek and also by the said Barnaba Tuitoek, one of the sons from another wife, Mirriam Kimoi, in their Witness Statements, the claims did not satisfactorily establish the 3rd Protester's gift inter vivos claim. Again, I note that the "support" came from family members who may themselves be interested parties in one way or another. Evidence by independent witnesses who were not members of the family may have been more persuasive. In any case, none of the "supporters" explained the exact manner in which such gift inter vivos was conveyed or communicated or what made them form the opinion that the deceased had given out the subject portion of land as such gift inter vivos. They do not even claim to have been present when the deceased allegedly gave out the gift. In the circumstances, I find their" support" to comprise of mere hearsay and unsubstantiated assumptions.

43. Since, like the 1st and 3rd Protesters, the said Emmanuel Kipkemboi Rutto (3rd Protester) is a son of Alfred Kipruto Tuitoek, and thus a grandson of the deceased with the 1st wife, Clara Taprandich Tuitoek, he, too, is a scion of the 1st house. He, too, should get his share within the 1st house's larger share as the 1st house shall agree.

44. Back to the choice of method of sharing out of the estate as between the 2 houses, or as between the children, as aforesaid, all the parties seem to favour sharing out as between the 2 houses and thereafter, each house to then distribute its share amongst the individual heirs within its stable. The only child of the 1st house, Alfred Kipruto Tuitoek being deceased, the surviving members from the 1st house are his 6 children who are therefore grandchildren of the deceased.

45. The entitlement of grandchildren to inherit from their grandfather, their fathers having predeceased them, is recognized under Section 41 of the *Law of Succession Act* which provides that where one of the children of the deceased is himself/herself deceased, and such deceased child is survived by a child or children of his/her own, then the share due to him/her ought to devolve upon his/her said child. The Section is premised in the following terms:

> " 41. Property devolving upon child to be held in trust
>
> 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."

46. On its part, Section 38 provides as follows:

> " 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."

47. The Court of Appeal, in the case of Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others [2014] eKLR, in dissecting the above provisions, held as follows:

> " Although Sections 35 and 38 of the Laws of Succession Act is silent on the fate of surviving grandchildren whose parents' pre-deceased the deceased, the rate of substitution of a grand child for his/her parent in all cases of intestate known as the principle of representation is applicable. The law on this is section 41. If a child of the intestate has pre-deceased the intestate then that child's issue alive or en ventre sa mere on that date of the intestate's death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate takes between them the share their parents would have taken had the parent been alive at the intestate's death."

48. Before I pen-off, I also recall that the 2nd Administrator-2nd Protester, James Kirwa Rutto has also stated that although the subject parcel of land measures 30.6 acres, it consists of both arable and swampy sections, with the arable part occupying approximately 25.7 acres and the swampy section occupying approximately 4.9 acres. According to him therefore, the parcel of land ought to be distributed taking into consideration the nature of the land such that each beneficiary gets both arable and swampy sections. The said statement, and also the suggestion, was not controverted or challenged by any other party. I therefore believe it and will apply it.

Final Orders

49. In the premises, I direct and order as follows:

i. The claim made by Everlyn Jebichii (1st Protester) and the claim purportedly made on behalf of one Emmanuel Kiplimo that they are "dependents" of the deceased, being allegedly his informally "adopted" children, and thus entitled to inherit from the estate of the deceased, are both hereby rejected, their relationship with the deceased not having been disclosed, and in the absence of sufficient proof thereon.

ii. The claim by Emmanuel Kipkemboi Rutto (3rd Protester), that he was separately and individually gifted 5 acres of the parcel of land known as Block 145 Kaptagat Scheme by the deceased before his demise, is also rejected in the absence of sufficient proof thereon.

iii. The Summons for Confirmation dated 24/03/2017 is therefore determined and distribution of the parcel of land known as Block 145 Kaptagat Scheme made as follows:

1st House (wife-Clara Taprandich Tuitoek)	Heirs	Swampy Area	Arable Area
	The late Alfred Kipruto Tuitoek's children, (namely, James Kirwa Rutto, Naomi Jerotich Rutto, Emmanuel Kemboi Rutto, Betty Jebet Rutto, Charles Kimutai Rutto, and Emmaculate Jepchirchir)	12.85 Acres	2.45 Acres
2nd House (wife-Tapshaurei Tuitoek)	Joseph Kosgei Tuitoek, Regina Jerop Tuitoek, Christine Jelagat, Monica Jemutai, Agnes Jepng'etich and Sally Jerono	12.85 Acres	2.45 Acres
Total		25.7 Acres	4.9 Acres

iv. With the above distribution formula now ruled upon, I grant each of the two houses a period of thirty (30) days within which to present to the Court their respective modes of distribution amongst the individuals, within each house. Members of the 1st house are at liberty to cede a portion of their share to the said Everlyn Jebichii (1st Protester) and the said Emmanuel Kiplimo, should they wish or agree to do so.

v. Should there be no agreements within the houses and within the timeline granted above, the Court shall be at liberty to determine, apportion and conclude the distribution amongst the individual heirs.

vi. The parties being members of one family, each shall bear his/her own costs of the Objection.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 23RD DAY OF MAY 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Ngigi Mbugua h/b for Mr. Simiyu for the Petitioner

N/A for other parties

Court Assistant: Edwin Lotieng