



REPUBLIC OF KENYA



**In re Estate of Evanson Kariuki Amos Ruiru (Deceased) (Succession Cause 1550 of 1993) [2025] KEHC 6026 (KLR) (Family) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6026 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 1550 OF 1993  
HK CHEMITEI, J  
MAY 15, 2025  
IN THE MATTER OF THE ESTATE OF EVANSON KARIUKI AMOS RUIRU (DECEASED)**

**BETWEEN**

**ERICK KINYANJUI KARIUKI ..... PROTESTOR**

**AND**

**DR. REUBEN GATHII KARIUKI ..... RESPONDENT**

**RULING**

1. This ruling relates to the affidavit of protest dated 3<sup>rd</sup> November, 2023 filed by the Protestor, Erick Kinyanjui Kariuki.
2. He avers inter alia that he challenges the proposed mode of distribution outlined in the summons for confirmation of grant dated 24<sup>th</sup> July, 2023. He is a son of the deceased, who died intestate and was survived by 2 wives - Susan Wangari Kariuki and Beatrice Wanjiru Kariuki - both of whom are now deceased. The deceased left behind 19 children (3 deceased), with 7 from the 1<sup>st</sup> wife and 12 from the 2<sup>nd</sup> wife.
3. The estate includes the following properties: LR No 596/ Ndarugu/Gakoe/Kiambu, LR No 198/ Kaharati/Sabasaba – Murang’a, Plot No Loc 17/1 Kaharati/T. I – Residential Plot and Plot No 23B Kaharati Market – Sabasaba.
4. He argues that the proposed distribution, which suggests dividing LR No 596/Ndarugu/Gakoe/Kiambu and LR No 198/Kaharati/Sabasaba – Murang’a equally between the two households, is unfair as it favors the 1<sup>st</sup> house, which has fewer children (5 surviving), while the 2<sup>nd</sup> house has 10 surviving children. As such, the division would result in larger individual portions for the first household’s beneficiaries.



5. He further notes that 0.6 acres from LR No 596/Ndarugu/Gakoe/Kiambu were designated as a gravesite for the deceased, and that he was allocated 1 acre from LR No 198/Kaharati/Sabasaba – Murang’a over 50 years ago, where he has lived since. These facts were omitted by the Respondent in the proposed mode of distribution. He maintains that a fair and practical approach would be to divide the estate equally among all surviving children, rather than by household, to honor the deceased’s wish for equal distribution.
6. The Protestor has filed written submissions dated 14<sup>th</sup> November, 2024 placing reliance on the following:
  - a. *Joyce Kabiti M’Turuchu v David M’Ntiritu* [2016] eKLR where it was held as follows: “Accordingly, as there is no agreement on distribution, I will fall back to the law and the *Constitution*. It would appear that the deceased left no surviving children. Therefore, section 38 of the *Law of Succession Act* Cap 160 of the Laws of Kenya is the relevant guide on this distribution.”
  - b. *Stephen Gitonga M’Murithi v Faith Ngira Murithi* where the court made the following observations: “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 until 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 Section Act by discriminating against the married daughters of the deceased...”
  - c. *In re Estate of John Musambayi Katumanga (Deceased)* [2014] eKLR where the court 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.”
7. The Respondent has filed written submissions dated 24<sup>th</sup> January, 2025 placing reliance on the following:-
  - a. Nyeri High Court Succession Cause No 123 of 1999: *Rahab Njeri Kariuki v Joyce Waruguru Kariuki & 2 others* where the court observed that in sharing the net estate of an intestate polygamous deceased person, the court exercises a discretion and is required to bear in mind the principles of fairness and equity and not equality among the beneficiaries.
  - b. *In re Estate of Peter Gathogo (Deceased)* [2020] eKLR where the court observed as follows: “The deceased herein was evidently a man of Kikuyu ethnic extraction; hence the distribution of his estate would be governed by Kikuyu customary law as tempered or moderated by the *Constitution* and Section 3 (2) of the *Judicature Act* which provides that: The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate courts shall be guided by African customary law in civil cases in which ne or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written



law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

### Analysis And Determination

8. I have carefully considered the affidavit of protest and the written submissions filed by the parties; and address them as follows:-
9. The summons for confirmation of grant dated 24<sup>th</sup> July, 2023 proposes the distribution of the deceased’s estate at paragraph 7 of its supporting affidavit sworn by Dr. Reuben Gathii Kariuki on 24<sup>th</sup> July, 2023.
10. The Protestor proposes that LR No 596/Ndarugu/Gakoe/ Kiambu and LR No 198/Kaharati/Sabasaba – Murang’a be divided equally amongst all the beneficiaries as opposed to its equal distribution between the two houses. He submits that 0. 6 acres of LR No 198/Kaharati/Sabasaba – Murang’a be set aside for the deceased’s grave site and 1 acre thereof be allocated to him having been given to him by the deceased over 50 years ago.
11. Both parties agree that the issue for determination is the distribution of LR No 596/Ndarugu/Gakoe/ Kiambu (10. 495 acres) and LR No 198/Kaharati/Sabasaba – Murang’a (11. 9 acres).
12. *In re Estate of Joseph Eric Owino (Deceased)* [2022] eKLR the court pronounced itself as follows:-

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“ 12. In a case of this nature where the deceased died intestate and was a polygamous man survived by two widows and children the anchor 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.

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

The basic scheme is in line with the principles expounded in the following cases *Rono v Rono* Civil Appeal No 66 of 2002, where Waki J.A stated inter alia that;-“ More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.” A “house” in a polygamous setting is defined in section 3 of the Act as a “family unit comprising a wife and children of that wife.”

In addition, *in the Matter of Re Estate of Benson Ndirangu Mathenge (deceased)* Nakuru HCSC No 231 of 1998 (Ondeyo J), the deceased was survived by his two widows and their children. The first widow had four children, while the second widow had six children. The court stated that the first house was comprised of five units while second had seven units. The two houses of the deceased combined and looked at in terms of units made up twelve units. The court distributed the estate to the children and the widows treating each as a unit. The land available for distribution was forty acres, which was divided by the court into



twelve units. Out of the twelve units, five were given to the first widow and her four children, while the remaining seven units went to the second widow and her six children.

Further, *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.”

13. The above authority, in my view is in all fours with the matter at hand. The framers of the Act understood clearly that the units should mean the deceased’s children together with the wife or wives for that matter.
14. Sharing out in the manner proposed in the application will naturally disadvantaged the house with more children as opposed to the ones with less as proposed by the Applicant.
15. At the same time, I do not find any evidence to show that Eric Kinyanjui Kariuki had been given one acre inter vivos comprised in LR No 198/Kaharati/Sabasaba by the deceased. If this is the case and if he has settled there for the period, he has suggested then at the time of subdividing the land he should be allowed to remain therein.
16. I state so because if the deceased had desired so he would have clearly indicated and he would have had an extra share on top of what he had been bequeathed. Nonetheless the family has more knowledge and information of the same and assuming there was no opposition then he be allowed to enjoy.
17. The same goes with the proposal by Dr Reuben Gathii Kariuki in which he has suggested that parcel number Loc/17/1/Kaharati be allocated to him solely. If that is the situation and there is no objection on the part of the beneficiaries then it remains so.
18. In light of the foregoing, it is my considered finding that the two houses be considered as unit i.e. 1<sup>st</sup> House – 8 units and 2<sup>nd</sup> House 13 units. The two parcels of land in dispute, LR No 596/Ndarugu/Gakoe/Kiambu and LR No 198/Kaharati/ Sabasaba – Murang’a – be divided equally into 21 units with the 1<sup>st</sup> house getting 8 portions and the 2<sup>nd</sup> house getting 13 portions.
19. In the premises the application dated 24<sup>th</sup> July 2023 is allowed as hereunder:-
  - (a) Land parcels Number 596 Ndarugu /Kiambu/measuring 10.495 acres and plot LR. 198/ Kaharati/Sabasaba measuring 11.9 acres be divided equally between all the deceased children and or beneficiaries as per paragraph 4 of the affidavit in support of the application dated 24<sup>th</sup> July 2023.
  - (b) Plot number Loc/17/1/Kaharati to Dr Reuben Gathii Kariuki.
  - (c) Plot Number 23B Kaharati Market Sabasaba to Eric Kinyanjui Kariuki
  - (d) Each party to bear its own costs.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 15<sup>TH</sup> DAY OF MAY 2025**

**H K CHEMITEI**



**JUDGE**

