



In re Estate of the Late Koe Arap Sitiene (Deceased) (Succession Cause E021 of 2021) [2025] KEHC 5941 (KLR) (12 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5941 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
SUCCESSION CAUSE E021 OF 2021
JK NG'ARNG'AR, J
MAY 12, 2025**

BETWEEN

DAVID KIPKEMOI SANG PETITIONER

AND

**CHEROTICH CHERUIYOT ALIAS JOAN CHEPNGETICH
SITIENEI PETITIONER**

RULING

1. The Petitioners are all beneficiaries of the estate of Koe Arap Sitiene (deceased). The deceased's estate was KERICHO/KIPSONOI S.S/1438 which is the subject of these succession proceedings. The Petitioners have been unable to agree on a mode of distribution of the deceased's estate.

Background

2. The 1st Petitioner petitioned for Letters of Administration Intestate for the estate of Koe Arap Sitiene (deceased) on 23rd June 2023. Before the Grant could be issued, the 2nd Petitioner filed an Objection dated 17th July 2023 objecting to the making of the Grant as Petitioned by David Kipkemoi Sang (1st Petitioner). It was the 2nd Petitioner's case (Cherotich Cheruiyot alias Joan Chepngetich Sitienei) that she came from the second household and the 1st Petitioner had sidelined her while petitioning for the Grant.
3. On 17th October 2023, the 1st and 2nd Petitioner entered into a consent to compromise the Objection and agreed that a Grant be issued in their joint names. The consent was adopted as an order of the court and a Grant was issued in their joint names on 18th October 2023.
4. The 2nd Petitioner filed Summons for Confirmation of the Grant on 2nd August 2024 together with her preferred mode of distribution which was: -
Kericho/Kipsonoi S.S/1438 (57 Acres)



- i. 45 acres to be shared between David Kipkemoi Sang, Sarah Ngetich, Samwel Koe, Florence Sitienei, Julius Koe and Mercy Chepkemoi.
 - ii. The remaining 13 acres to go to the 2nd Petitioner, Joan Chepngetich Sitienei.
 - iii. The quarry site within Kericho/Kipsonoi S.S/1438 to be shared equally between the 2nd Petitioner and David Kipkemoi Sang, Sarah Ngetich, Samwel Koe, Florence Sitienei, Julius Koe and Mercy Chepkemoi
5. Being dissatisfied with the 2nd Petitioner's proposed mode of distribution the 1st Petitioner filed his preferred mode of distribution through an Affidavit dated 16th September 2024. He proposed the following: -
- Kericho/Kipsonoi S.S/1438
- i. That David Kipkemoi Sang (1st Petitioner), Sarah Ngetich, Samwel Koe, Florence Sitienei, Julius Koe and Joan Chepngetich Sitienei (2nd Petitioner) to each get an equal share of 5.53 acres.
 - ii. Samuel Cheruiyot Koe to get a share of 5.53 acres which he will hold in trust for the heirs of the late Sharon Chepngeno.
 - iii. Easements of 2.74 acres.
 - iv. The quarry site to be shared equally between David Kipkemoi Sang (1st Petitioner), Sarah Ngetich, Samwel Koe, Florence Sitienei, Julius Koe, Mercy Chepkemoi, Joan Chepngetich Sitienei (2nd Petitioner) and Samuel Cheruiyot Koe who will hold in trust for the heirs of the late Sharon Chepngeno.
 - v. The 1st and 2nd Petitioner hold 19.7 acres of the deceased's estate in trust for the liabilities.

2nd Petitioner's response to the 1st Petitioner's preferred mode of distribution

6. Through an affidavit dated 4th November 2024, the 2nd Petitioner (hereinafter referred to as Joan Chepngetich Sitienei) stated that the mode of distribution as proposed by the 1st Petitioner (1st household) was discriminatory to the 2nd household. She stated that the 1st Petitioner had set aside 19.7 acres for liabilities yet the 2nd household never sold any portion of the land. That should the court be inclined on equal distribution then the said 19.7 acres should be distributed equally among the beneficiaries to enable those who have sold their land to deal with those whom they sold to. She further stated that she was the only surviving beneficiary from the 2nd household.
7. It was the 2nd Petitioner's case that the quarry that is within the deceased's estate should be subdivided into two equal portions between the two houses and not equally among all the beneficiaries. It was her further case that during the lifetime of their father, he had settled them and the 1st Petitioner's proposed mode of distribution went against such settlement.
8. The 2nd Petitioner stated that their father entered into a land agreement between the two houses and in the presence of the 1st Petitioner and the agreement was signed on 22nd November 2019. That in the agreement, the 2nd Petitioner was to be given 10 acres from the estate and that the court should find so.
9. It was the 2nd Petitioner's case that her preferred mode of distribution was not discriminatory as she had proposed 45 acres for the 1st house and 13 acres for the second house. That each of the beneficiaries



of the 1st house would get 7.5 acres after which those who sold their portions would deal with their liabilities.

10. The 2nd Petitioner filed a Further Affidavit dated 4th November 2024 and stated that their father in his lifetime had allocated the 1st house 42 acres, the 2nd house 10 acres and kept 6 acres for himself. That since their father was now deceased, his 6 acres should be divided equally among the 1st and 2nd house and that would lead to her getting 13 acres while the first house would get 45 acres as she had proposed. The 2nd Petitioner further stated that this court should not ignore the agreement that they had with their father.

The 1st Petitioner's written submissions

11. Through his submissions dated 4th February 2025, the 1st Petitioner submitted that Koe Arap Sitienei married two wives i.e. Grace Sitienei in 1963 and Anna Sitienei in 2004 and both were deceased. That the late Grace Sitienei was blessed with David Kipkemoi Sang (1st Petitioner), Sarah Chepkorir Ngetich, Samwel Cheruiyot Koe, Julius Kiprotich Koe, Sharon Chepngen0 (deceased), Mercy Chepkemoi and Florence Sitienei. That Anna Sitienei was blessed with two children i.e. Joan Chepngetich Sitienei and her younger brother (deceased).
12. It was the 1st Petitioner's submission that during his lifetime, their father allocated an equal share of the estate among his children from both the 1st and 2nd house and that the boundary between the two houses was marked with sisal plants and a fence. It was the 1st Petitioner's further submission that the 2nd Petitioner was considered as a beneficiary of the estate and was given an equitable share despite her mother being married later on.
13. The 1st Petitioner submitted that the deceased's estate had an easement registered and this easement created a section of the land opposite the road which formed part of the quarry and was being occupied by other beneficiaries and liabilities. That the remaining share should be divided equally among the beneficiaries. It was the 1st Petitioner's submission that the deceased sold part of the land to third parties who have now become liabilities.
14. It was the 1st Petitioner's submission that the 2nd Petitioner had been given the option to settle but she refused an equal share stating that the estate should be divided according to the houses. That the 2nd Petitioner failed to consider the date when their mother was married and the date when her mother was married to the deceased. It was his further submission that the deceased had advanced his wives their respective portions of land during his lifetime. He relied on sections 28 and 42(a) of the [*Law of Succession Act*](#).
15. The 1st Petitioner urged this court to consider that during the purchase of the deceased's estate, their deceased mother cleared the settlement fund in the year 1985 and the 2nd wife (2nd Petitioner's mother) was married later after the property had been acquired. He further urged this court to adopt his proposed mode of distribution and asked this court to rely on section 40 of the [*Law of Succession Act*](#).

2nd Petitioner's written submissions

16. In her submissions dated 4th November 2024, the 2nd Petitioner submitted that her proposed mode of distribution was fair and non-discriminatory. That she proposed an allocation of 45 acres to the 1st house and 13 acres to the 2nd house, where she was the only surviving child. She relied on section 40 of the [*Law of Succession Act*](#), *Mary Rono v Jane Rono & William Rono* [2002] KECA 198 (KLR) and *Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat* [2015] KECA 650 (KLR).



17. It was the 2nd Petitioner's submission that on 22nd November 2019 in the presence of the deceased and the area Chief, the deceased's family held a meeting and agreed that the 2nd house get 10 acres out of the 58 acres of the deceased's estate.
18. On the issue of purchasers, the 2nd Petitioner submitted that the deceased never sold any part of the estate and that the 1st Petitioner was trying to disinherit her by hiding part of the estate in the name of the purchasers. She further testified that if intermeddling was allowed, the other beneficiaries would be prejudiced as their shares in the estate would be reduced. That intermeddling was unlawful.
19. It was the 2nd Petitioner's submission that this court should not allow the 19.7 acres to be allocated to non-existent purchasers.
20. I have gone through the entire court record including the Summons for Confirmation of Grant dated 2nd August 2024, the parties' respective preferred modes of distribution, the 1st Petitioner's written submissions dated 4th February 2025 and the 2nd Petitioners' written submissions dated 4th November 2024. The only issue for my determination was to come up with a fair and just mode of distribution of the deceased's estate.

Analysis

21. From the record, I have noted that Koe Arap Sitiene (deceased) had two wives (both deceased). His dependants are listed as follows: -
 - 1st House.
 - i. David Kipkemoi Sang Son
 - ii. Sarah Chepkorir Ngetich Daughter
 - iii. Samwel Cheruiyot Koe Son
 - iv. Florence Sitienei Daughter
 - v. Julius Kiprotich Koe Son
 - vi. Mercy Chepkemoi Daughter
 - 2nd House
 - i. Cheruiyot Cherotich alias
Joan Chepngetich Sitienei Daughter
22. Section 40 of the *Law of Succession Act* provides: -
 - (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 intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.



23. The Court of Appeal in *Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat* [2015] KECA 650 (KLR) held: -

“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 has 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 adjustments 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.

As this Court said in *Mary Rono v. Jane Rono & Another*, Civil Appeal No. 66 of 2002 (Eldoret) [2005] eKLR, section 40 does not provide for equality between houses or that each child must receive the same or equal portion...” (Emphasis mine)

24. Similarly, the Court of Appeal in *Scolastica Ndululu Suva v Agnes Nthenya Suva* [2019] KECA 1053 (KLR) stated: -

“In *Mary Rono vs Jane Rono & another* (supra), Waki JA in the leading judgment, accepted the proposition that the Court had the discretion in ensuring a fair distribution of the deceased’s estate but that the discretion must be exercised judicially on sound legal and factual basis.....It is therefore evident, that, although section 40 of the [Law of Succession Act](#) provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”

25. I also concur with the sentiments of Odunga J. (as he then was) in *Estate of Nzolove Kisuke alias Daudi Nzolove Kisuke (Deceased)* [2022] KEHC 1495 (KLR), where he held: -

“It is therefore clear on judicial authority that the strict application of section 40 of the [Law of Succession Act](#) may well lead to an absurdity and I associate myself with the opinion of the Court of Appeal that the said section only provides a general provision for the distribution of the estate of a polygamous deceased person. However, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.....”

26. The 1st Petitioner proposed an equal distribution of the deceased’s estate among the beneficiaries and excluded 19. 7 acres from the estate stating that this share was for the estate’s liabilities. Regarding the quarry in the estate, the 1st Petitioner stated that all the beneficiaries should get an equal share of the quarry. On the other hand, the 2nd Petitioner stated that during the lifetime of their father, he had divided his estate among his two houses i.e. 42 acres for the 1st house where the 1st Petitioner belonged, 10 acres for the 2nd house where the 2nd Petitioner belonged and he kept 6 acres for himself. She proposed that the first house gets 45 acres, the 2nd house gets 13 acres and the quarry site to be shared equally among the two houses. The 2nd Petitioner stated that the deceased’s estate had no liabilities as the deceased never sold any portion of his estate.

27. I have looked at the affidavit evidence on record and I have noted that the 2nd Petitioner annexed a Family Land Agreement dated 22nd November 2019 as “CC-1”. The said Agreement stated that the



deceased's family had agreed that Cheruiyot Cherotich alias Joan Chepngetich Sitienei from the second house be allocated 10 acres and the same should not be sold. The Agreement stated that those present in the said meeting were Koe Sitienei, Rusi Ngeno, David Koe (1st Petitioner), Julius Koe, Recho Sitienei and Joan Chepngetich (2nd Petitioner). I have also noted that the Agreement was dated 22nd November 2019 and this was before the death of the deceased which was 10th February 2020.

28. It is trite law that he/she who alleges must prove. The 2nd Petitioner provided evidence in the form of the Family Agreement to buttress her case that the deceased had in his lifetime divided his estate among his children. There was no rebuttal from the 1st Petitioner on this point in the form of an affidavit and this meant that the 2nd Petitioner's evidence on the occurrence of the said family meeting was uncontroverted. It is my finding therefore that the family meeting occurred and that the deceased shared his estate between his two houses and allocated the 2nd house, 10 acres of his estate.
29. On the issue of the liabilities, the 1st Petitioner alleged that the deceased's estate had liabilities in the form of purchasers and set aside 19.7 acres of the deceased's estate to cover such purchasers. On the other hand, the 2nd Petitioner denied that their father sold part of his estate and that the 1st Petitioner wanted to disinherit her. I have keenly gone through the record and there was no evidence that the estate had liabilities. At the very least, the 1st Petitioner could have filed an affidavit or affidavits from such purchasers to indicate that they had purchased part of the deceased's estate. In any event, such a sale would be illegal because the current succession proceedings had not terminated and any interference with the deceased's estate before completion of succession proceedings would amount to intermeddling under section 45 of the [Law of Succession Act](#), which is a criminal offence.
30. Flowing from the above and in the absence of evidence, it is my finding that the deceased's estate had no purchasers.
31. I have noted that there was an easement on the deceased's estate to the tune of 2.74 acres. Easements do not confer proprietary ownership of land, they only create legal rights to use the land which means that the easement still remains the property of the registered owner which in this case was the deceased, Koe Arap Sitienei (deceased).
32. On the issue of the quarry site, the 1st Petitioner wanted it to be divided equally among the beneficiaries while the 2nd Petitioner wanted it to be shared equally among the two houses. As guided by the authorities above and section 40 of the [Law of Succession Act](#), the division of this quarry shall be done equally among the two houses. However, without the benefit of a Surveyor's Report on Kericho/Kipsonoi S.S/1438, it is difficult for this court to decipher what acreage the quarry site occupied within the deceased's estate.
33. I have already referred to the Family Agreement in relation to the division of the deceased's estate and this court sees no need to interfere with as it treats the said Agreement as the deceased's wishes in relation to the subdivision of his estate.
34. In the best interest of justice and taking into consideration the parties' interests, I am inclined to agree with the 2nd Petitioner's mode of distribution as it captured the contents of the Family Agreement and represented a fair and just distribution. The following is the court's finding on the mode of distribution of the deceased's estate: -

Kericho/Kipsonoi S.S/1438 (58 acres)

1st House. 45 acres.

2nd House 13 acres.



Quarry Site Within Kericho/Kipsonoi S.S/1438

To be divided equally among the 1st house and the 2nd house

RULING DELIVERED, DATED AND SIGNED THIS 12TH DAY OF MAY, 2025.

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J.K.NG'ARNG'AR

JUDGE

Ruling delivered in the presence of Koech for the 1st Petitioner, No appearance for the 2nd petitioner. Siele/
Susan (Court Assistants).

