**In re Estate of Moses Mugo Waweru (Deceased) (Succession Cause 87 of 2010) [2025] KEHC 10415 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10415 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**SUCCESSION CAUSE 87 OF 2010**

**JRA WANANDA, J**

**JULY 18, 2025**

**IN THE MATTER OF THE ESTATE OF THE LATE MOSES MUGO WAWERU**

**BETWEEN**

**FLORENCE NYAMBURA MAINA ..... 1ST PETITIONER**

**PETER MINDO MUGO ..... 2ND PETITIONER**

**AND**

**LUCY WANGUI MUGO ..... 1ST OBJECTOR**

**JAMES WAWERU MUGO ..... 2ND OBJECTOR**

## JUDGMENT

1. This Judgment is on the mode or method to be adopted in distribution of the estate of the deceased herein amongst the beneficiaries of his estate.

2. The background of the matter is that the deceased, Moses Mugo Waweru, died on 18/01/2010 at the age of 77 years. On 29/03/2010, the Petitioners, Florence Nyambura Maina and Peter Mindo Mugo, applying as widow and son of the deceased, respectively, through Messrs Arap Mitei & Co. Advocates, jointly petitioned for Grant of Letters of Administration over the estate of the deceased. In the Petition, about 18 survivors and/or beneficiaries of the deceased, including 2 widows, were listed. The 2nd widow listed is the 1st Objector herein, and also listed is the 2nd Objector, (1st Objector's son).

3. Several properties, including parcels of land, funds held in bank accounts, company shares, and several motor vehicles were listed as comprising the estate.

4. However, before the Petition could be determined, the Objectors, through Messrs Kitiwa & Co. Advocates, filed the joint Objection dated 23/07/2010, Answer to the Petition, and a Cross-Petition of their own. The grounds cited were basically that the Petitioners were strangers to the estate, and

that the deceased had only 1 wife, the 1st Objector, Lucy Wangui Mugo. In the Cross-Petition, they therefore only listed the 1st Objector and her 11 children, including the 2nd Objector as survivors.

5. The Petitioners responded to the Objection by way of the Replying Affidavit sworn by the 1st Petitioner, Florence Nyambura Maina, on 23/11/2010. In the Affidavit, in summary, she deponed that she was married by the deceased in 1977, that she has had a sour relationship with the 1st Objector, her co-wife but the deceased arranged for her to have a separate abode, and that she has 5 children with the deceased all whom the deceased had always catered for. She further deponed that she invited the Objectors to participate in the filing of a joint Succession Cause over the estate of the deceased but they declined.

6. There being no dispute that the 1st Objector was a "wife" of the deceased and that her family was therefore fully entitled to inherit from the estate of the deceased, the preliminary question that arose was therefore whether the 1st Petitioner was also a "wife", and thus whether she, and her children, too, were entitled to inherit from the estate together with the Objectors' family.

7. The matter was then heard and dermined by Hon. Lady Justice H. Omondi (as she then was) by way of a viva voce trial, and who, by her Judgment dated 27/06/2019, held that the 1st Objector was not a "wife" as there was no evidence of her marriage to the deceased. The Judge however held that due to her long cohabitation with the deceased with whom she got several children, her family qualified as "dependents" of the deceased in accordance with the provisions of Section 29 of the *Law of Succession Act*, and was therefore entitled to also inherit from the estate. The Judge then appointed the 1st and 2nd Objectors, and also the 2nd Petitioner, as the 3 co-Administrators, and directed the parties to proceed to the next stage of canvassing the issue of the distribution of the estate.

8. A Grant of Letters of Administration was then issued to the 3 joint Administrators on 16/10/2019 and the parties filed their respective proposed modes of distribution, and Witness Statements, which the witnesses then adopted at the trial as part of their evidence-in-chief.

**Proposed Modes of Distribution**

9. The Petitioners' proposed mode of distribution is dated 17/07/2019 and seems to propose distribution of the estate on almost equal proportions, as between the two houses.

10. On their part, the Objectors filed what, although is titled "Schedule of Distribution", is basically a joint Witness Statement, rather than a proposal on the mode of dfistribution. The same is undated but filed on 17/07/2023. In the "Schedule", the Objectors basically insisted that their side of the family is entitled to the entire estate, and that the Petitioners were not entitled to anything. The Objectors however offered one asset, described as "a plot in "Kamukunji", to the Petitioners.

**Objector's Witness Statements**

11. As stated, the Objectors made the joint but undated Statement, (though titled "Schedule of Distruibution") filed on 17/07/2023.

12. The 1st Objector, Lucy Wangui Mugo, had also earlier separately made an undated Statement filed on 18/06/2021, but whose content is basically the same as in the "Schedule of Distruibution" refferred to above. In the two Statements, read together, she listed her 11 children (1st house) aged between 62 and 43 years in age, with herself being 81 years although she indicated one of the listed children as deceased. She then also listed 4 children comprising the 2nd house (Petitioner's family) aged between 47 and 37 years. She also listed the 25 assets listed in the Petition (10 parcels of land, shares held in various companies, and funds held in various bank accounts) and stated that all these assets form what she

(1st Objector) and the deceased acquired in their lifetime, and that the Petitioners want to reap where they have not sowed and that the Petitioners ensured that whatever property they acquired with the deceased was registered in the name of their matriarch, and not the deceased. As aforesaid, she offered to give the Petitioners one plot in Kamukunji "out of kindness" and "for the sake of harmony". According to her, the proposal presented by the Petitioners is oppressive as it does not take into account the 1st widow's contribution and that of her children in acquisition of the properties.

13. She stated that the Objectors are not prepared to share the estate with anybody outside the nuclear family, that they (Objectors) would demonstrate at the trial that when the assets were acquired or bought, the 2nd house (Petitioners) was nowhere, was unknown to the Objectors, and thus never contributed to the acquisition. According to her therefore, the Petitioners cannot invite themselves to claim that which they do not know the origin of. She added that during the subsistence of the 1st Objector's marriage with the deceased, the 1st Objector and their 11 children resided both at their two matrimonial homes, the first one situate on the parcel of land known as Kapsaret Block/Simat Block 5(Lemmok)3 where all the 11 children were raised and brought up, and the second one being the parcel of land Eldoret Municipalility Block 5/155/1, where the deceased died, and that the 1st Objector still resides on the two homes to date. She stated that it is only fair that the two properties be distributed to her as per the wishes of the deceased. She stated further that throughout the marriage, she has always practiced farming on the said Kapsaret Block/Simat Block 5(Lemmok)3. In conclusion, she beseeched the Court to interrogate each asset from the time of purchase to titling to find the truth.

14. The 2nd Objector, James Mugo Waweru, too, made a separate but undated Witness Statement also filed on 18/06/2021. He basically, entirely, repeated the contents of the 1st Objector's (her mother) Statement, and of the subsequent joint "Schedule", and added that he is aware that the deceased acquired other properties which were registered in the name of the 1st Petitioner.

**Petitioner's Witness Statement**

15. The 2nd Petitioner, Peter Mindo Mugo, made the Statement dated and filed on 1/02/2024. He listed 5 children, including himself, aged between the ages of 51 and 39 years old, as being the children of the 1st Petitioner (her mother). He then pointed out that their proposed mode of distribution, they proposed 20 assets to be gioven to the Objector's family because they are 11 siblings, exclusive of their mother against 18 assets to the Petitioners since they are 6, inclusive of their mother. According to him, their proposed mode is fair and comprehensive and which leaves the Objectors' family as the major beneficiaries of the estate. He stated further that besides the two mothers, the rest are all children of the deceased whom the deceased never discriminated against and aws always fair and observed equally in his dealings with them, including educating and taking care of all them

**Objectors' Testimony and/or Evidence at the Trial**

16. PW1 was the 1st Objector, Lucy Wangui Mugo. She maintained that the estate should ber distributed only within her "house" and that the Petitioner's family is not entitled to any share whatsoever. She insisted that she contributed to the acquisition of the properties with the deceased, that the deceased was a businessman and also a farmer and that he had a shop which she and her children used to help in running. She stated that she was married to the deceased for 70 years and at no time did she hear about the Petitioners. She also denied that the 1st Petitioner was her husband's employee and stated that some of the properties are jointly owned between herself and the deceased. The next matters she testified about about were in respect to whether the 1st Petitioner was a "wife" and whether she and her children could inherit from the esate, matters which however, as aforesaid, had already been determined by the earlier Judgment of H. Omondi J. She then testified that even at the funeral preparations and burial of

the deceased, she never saw the Petitioners. In cross-examination, she again insisted that she has never seen the Petitioners and does not know them. Regarding her contribution to the acquisition of the propertis forming the estate, she conceded that she had nothing in Court to demonstrate but insisted that all the property belonged to her and her household, and denied any knowledge of the deceased having bought any property, including the "Kamukunji" one referred to eralier, for the 1st Petitioner. In re-examination, she reiterated that she used to assist the deceased in running and operating businesses and farming activities.

17. PW2 was the 2nd Objector, James Waweru Mugo, the 1st Objector's son. He reiterated that in the Objector's house, they are 11 children, with one of them, Jane Wangari Mugo, being deceased but left behind 2 boys, and that they are therefore 13 units in their "house", including his mother. He, too, denied knowledge of the Petitioner's family and he, too, insisted that the entire estate belongs only to their "house", and denied that the Petitioner's "house", in any way contributed to acquisition of any estate property. He testified that although a funeral committee was formed when the deceased died, he never saw the Petitioners participating therein. In cross-examination, like his mother, he, conceded that he had nothing to show that he contributed to the acquisition of the estate property. He also conceded that he had, in his Statement, listed children from both families and that in the same Statement, he and his mother had offered to give some property to the Petitioners. He then stated the Petitioner's family can keep any property they acquired with the deceased, if any.

**Petitioners' Testimony and/or Evidence Before The Trial Court**

18. Besides not making a Statement, the 1st Petitioner, Florence Nyambura Maina, did not also testify.

19. DW1 was therefore the 2nd Petitioner, Peter Mindo Mugo, the 1st Petitioner's son, who basically repeated matters already stated in his Witness Statement. In cross-examination, he conceded that it is the 1st Objector who was first married by the deceased before the 1st Petitioner. He then stated that at the moment, his mother resides in a County Government house in Kidiwa estate, for which they pay rent. Regarding the 37 assets that the Petitioners listed, he stated that he does not know how they were acquired them but also stated that their "house" (Petitioners) acquired some of the properties on their own (although registered in the name of the deceased). He gave the example of the motor vehicle registration number KAU 973 Toyota Carina, in respect to which he stated that it is his mother who gave the deceased the funds to purchase. He stated that the deceased used to deal in wholesale business for feeds and also cigarettes both in Kidiwa and in town, and his mother (1st Petitioner) used to assist the deceased in running the Kidiwa shop while her step-mother (1st Objector) used to assist in running the town business. He stated that most of the properties were acquired after 1975 but pressed by Mr. Ngigi Mbugua, he could not pinpoint which specific properties these were. He stated that his proposal for distribution was generally to both houses, not to individuals, but conceded that he had not supplied any valuations and thus, the Court may not have material to determine equity or equitable distribution.

**Written Submissions**

20. The trial was then closed and the parties filed Submissions. The Objectors filed the Submissions dated 11/03/2025 while the Petitioners filed the Submissions dated 20/01/2025.

**Objectors' Submissions**

21. Mr. Ngigi Mbugua, Counsel for the Objector, maintained that the estate properties were acquired by the deceased and the Objector exclusively and as such, the prayers by the Petitioner for the two "houses" to share equally would occasion a great injustice to the Objectors as the Petitioners have no locus over the estate. He referred to the Objectors' testimony that all through the marriage with the

deceased, the 1st Objector and their 11 children resided at their two matrimonial homes, one being Kapsabet Block Simat Block 5 (Lemmok)/3, and the other being Eldoret Municipality Block 5/155/1 where the deceased died and the 1st Objector still resides. He submitted further that the issue of mode of distribution should be a preserve of the Objectors as the deceased never mentioned the existence of another family, and neither were the Petitioners present during the whole life of the deceased, including during his interment, and as such, are complete strangers.

22. He also urged that from the pleadings, it came out that the "2nd family" (Petitioners), despite knowing that the deceased had another family, lived secretly and registered whatever they got with the deceased in the name of the 1st Petitioner so that when the instant day comes such property shall be insulated from Succession proceedings, while the 1st Objector, on the other hand, who started life with the deceased, allowed him to register all their properties in the name of the deceased. He urged that it is thus only fair that the properties should be given exclusively to the Objectors as the Petitioners should not benefit twice. According to him, the Petitioners planned for this occassion a very long time and only waited for the opportune time to move the Court with the ultimate goal of getting more than it deserves. He reiterated that the properties were acquired out of sweat and hardwork of the 1st Objector and the deceased who toiled from inception of their marriage when they had nothing and at no time did the Petitioner's family feature, not even at the burial of the deceased. Counsel pointed out that during the trial, the Petitioners admitted that they do not know how the deceased acquired his estate. He submitted further that it is suspect that whereas the 2nd Petitioner claims to have been born in 1978 by the 1st Petitioner and the deceased, he never bothered to make her presence known to the other family. He then invited the Court to keenly scrutinize the properties acquired by the Petitioners which have been registered in the 1st Petitioners' name, and none in the name of the deceased. He also invited the Court to ask itself why this is so yet the Petitioners' claim that the deceased was a husband and father to them.

23. He submitted that in the alternative, the Petitioners can be given a reasonable provision provided they prove "dependency". He cited Section 29 of the *Law of Succession Act*. However, on that issue of "dependency", Counsel submitted on matters relating to the marriage status of the deceased, matters which had, as reiterated above, already been determined by H. Omondi J, who as aforesaid, had already determined that the 1st Petitioner was not a "wife" but was, together with her children, a "dependent". Counsel however added that apart from receipt for payment of bills and school fees structure, the Petitioners have not present any tangible evidence before the Court to prove "dependency".

**Petitioners' Submissions**

24. On his part, Counsel for the Petitioners, Mr. Mitei, submitted that unlike the Petitioner's proposed mode of distribution which is balanced, reasonable and takes account of all the dependents in a proportionate, equitable, fair and just manner, the Objectors' proposal caters only for the 1st house and makes no provision for the 2nd house except for a fleeting mention that the 2nd house could be given a plot in Kamukunji. He submitted that from the tone of expression, it would seem that the 1st house's is of the misconceived view that whatever provision should be made for the 2nd house is a matter of sheer tokenism rather than legitimate legal entitlement. According to him, the 1st house's purported proposal is not a mode of distribution at all, but a declaration that the 1st house should, alone, inherit the entire estate. He urged further that the two houses are each entitled to a share of the estate in line with principles of equity, fairness and with a balanced consideration of the factual circumstances of the matter. Counsel submitted that it is only fair and just to share the estate equitably to benefit all the children equally. He insisted that the 5 children of the 2nd house are children of the deceased, same as the children from the 1st house, that there is no doubt or dispute on that issue and further, that

the Petitioner's proposal is comprehensive, inclusive and gives more properties to the 1st house because they are more, unlike the Objectors' which gives the 2nd house only 1 properly in Kamukunji. Her cited Section 71 of the *Law of Succession Act*. He also cited the case of Re Estate of John Makara Muriuki 2017 KLR, and urged that by dint of Section 40 of the *Law of Succession Act*, the net intestate estate should be divided according to the houses following set out parameters. Counsel submitted that the 2nd house is entitled to adequate, substantial provision from the estate just the same way the 1st house is entitled to equitable provision therefrom. He cited Article 27 of *the Constitution* on "equality", and Rule 73 of the *Probate and Administration Rules* on the Court's inherent powers. In conclusion, he submitted that there is no dispute that the widow and 5 children of the second house are "widow" and children of the deceased.

**Determination**

25. Considering the Judgment made herein by my predecessor, Hon. Justice H. Omondi (as she then was), on 27/06/2019 already referred to, the issue remaining for determination in this matter is, in my view, "what mode of distribution the Court should apply in distributing the estate herein".

26. I say so because in her said Judgment, H. Omondi, J, after the conduct of a viva voce trial, held as follows:

> " 18. Whereas I concur with the objector's counsel that the 1st objector is the only surviving widow, it would be myopic to act as though there never were resultant issues from the association the 1st petitioner and the deceased had, those children' whether biologically sired or otherwise not only have the deceased's name entered in their birth certificates as being their birth certificates as being their faith, but the deceased took care of them by paying their school fees and providing for them.
>
> 19. They therefore qualify as dependents under section 29 to the estate and for purposes of fairness the 2nd petitioner is enjoined to the 1st and 2nd objectors as administrators of the estate – .....
>
> .....
>
> They are at liberty to file and exchange joint proposed mode of distribution, or separate proposed modes of distribution within (twenty) days hereof."

27. On the issue of "dependency", the relevant provisions of Section 29 of the *Law of Succession Act* referred to above, in respect to inheritance by a "dependant", are premised as follows:

> " (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) ....."

28. The *Law of Succession Act*, in Section 3(2), also contains the following explanations in its interpretation provision:

> "(2) References in this *Act* to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.
>
> (3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock."

29. Omondi J (as she then was) therefore already made the conclusive and binding detrermination that although the 1st Objector was not a "wife", due to her long cohabitation with the deceased, her children are "dependents" of the deceased under the provisions of Section 29 of the *Law of Succession Act*, and are therefore entitled to also inherit from the estate of the deceased, in the same way as the 1st Objector's children. It is on this basis that the Judge then, apart from the 1st and 2nd Petitioners, also appointed the 2nd Objector as a co-Administrator of the estate, and directed the parties to proceed to the next stage of canvassing the issue of distribution of the estate.

30. It is curious that despite the express findings made by H. Omondi J (as she then was), and despite her directions that the parties file their proposed modes of distribution, the Objectors did not propose any such mode of distribution, but instead, chose to engage in a debate on whether the Petitioners are entitled to any share of the estate.

31. Be that as it may, the Objectors have made it clear that they have no intention of sharing the estate, and harbour the strong and uncompromising feeling that the Petitioners are not entitled to any part of the estate whatsoever. As aforesaid, the Objectors only offered to donate to the Petitioners, one unspecified plot in Kamukunji "out of kindness" and "for the sake of harmony".

32. With due respect to the Objectors, the issue of identification of the beneficiaries to the estate was fully and finally determined by the Court by way of the Judgement delivered by H. Omondi J (as she then was) on 27/06/2019, in which she expressly determined that the Petitioners qualify as "dependants" of the estate. That ship has therefore already sailed.

33. On the issue of distribution, it is not in dispute that the while the 1st Objector had 11 children, the 1st Objector had 5. While Mr. Mitei, Counsel for the Petitioners, urged that the estate should be divided in accordance with Section 40 of the *Law of Succession Act*, and thus, the estate should be divided according to the two houses following set out parameters, I do not think that will be correct. This is because Section 40 applies where the intestate was polygamous. In this case however, Omondi J found that the 1st Petitioner was not a "wife". Under these circumstances, although the deceased may be said to have had 2 "houses", he cannot technically now be referred to as having been "polygamous".

34. Considering H. Omondi J's determination that the 1st Petitioner's children are to inherit as "dependents" under Section 29 of the *Law of Succession Act*, which determination was not challenged

on appeal, my view is that the applicable provision in this matter should be Section 26 of the *Act* which provides that:

> "Where a person dies after the commencement of this *Act*, and so far as succession to his property is governed by the provisions of this *Act*, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate."

35. Regarding distribution of the estate of an intestate deceased, although the word often used is "equal", it is generally agreed that it does not mean that "equal" distribution is what must always, in all circumstances, as a mandatory requirement, be applied. If that were the case, it may lead to situations of absurdity in many cases. The existence of this risk was appreciated by Omollo JJ, in the case of *Mary Rono vs Jane Rono & Another* [2005] eKLR, Omollo JJ, in which, although he was dealing with the application of Section 40 of the *Law of Succession Act*, which relates to distribution of an estate in polygamous families, he advanced the spirit that that the *Act* does not provide that "equality" in distribution means necessarily that each child must always receive the same or equal portion. This is how he put it:

> "……
>
> 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."

36. Even if I were to apply Section 40 of the *Law of Succession Act* as though the deceased were polygamous, as suggested by the Petitioners' Counsel, still, the Court would be required to divide the estate "among the houses according to the number of children in each house". The Section 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"

37. In this case, as aforesaid, only the Petitioners submitted a proposed mode of distribution. On their part, the Objectors' stance is that the Petitioners should get nothing. Regarding the assets forming the estate, the Petitioners initially presented a list of 25 assets in the Petition by which they commenced this Succession Cause in 2010, and which list comprised of several parcels of land, shares held in various companies, funds held in various bank accounts, and motor vehicles. However, in their schedule filed on 18/07/2019, they presented a much expanded list aggregating to about 37 assets. Unfortuantely, in respect to the existence of these alleged assets, only a few are supported by supporting documents.

However, since the existence of thse assets has not been challenged or controverted by the Objectors, I will presume that the assets, indeed, exist and form the estate of the deceased.

38. There is also no major challenge that the 1st Objector (1st house) was married by the deceased sometime in mid-1950s, while the 1st Petitioner's (2nd house) co-habitation with the deceased began sometime in the mid-1970s. This is therefore an approximate 20 years' difference.

39. As for acquisition of the properties, there is no clear evidence submitted about when they were acquired. A perusal of the few Search Reports produced in respect to some of the parcels of land cited however reveals that most may have been acquired between the 1980s and 2010 when the deceased died. Although the Objectors claim that the deceased acquired more assets but which the 1st Objector registered in her sole name as owner, this allegation has not been supported by any evidence.

40. Further, although both the Petitioners and the Objectors claimed to have contributed to acquisition of the properties, neither side presented any evidence to demonstrate these allegations.

41. The other relevant observation I made in this matter is that neither of the parties has presented valuation Reports for the respective parcels of land to give to the Court an indication of the value of each. Even on the acreage, it is only in a few that the same can be discerned, the few supported by copies of Search Reports. The motor vehicles have also not been valued and the amount of the funds held at the respective banks accounts has also not been disclosed.

42. I have agonized whether I should send the parties back to go and first source for and supply the Court with the said "missing" material (title documents, valuation Reports, statements, share certificates), but then, I have considered the long and protracted litigation that the parties have already gone through since 2010 when this Succession Cause was filed, and the resources spent so far, not forgetting the emotional and psychological instability that they must already suffered over the years concerning the uncertainty of the eventual verdict that shall be made, and made the decision to soilder on.

43. Be that as it may, my understanding of the Objectors' argument is basically that the 1st Objector, having been married to the deceased way back in the 1950s when they started, stuggled and toiled together through life before they eventually stabilized and finally began acquiring properties, or setting the stage thereof, it would be unfair and unconscionable to put the 1st Objector at the same level as the 1st Petitioner who came into the picture about 20 years later in the 1970s, long after the 1st Objector had contributed to making the deceased the man he had become, a successful financially stable man, entrepreneour, and the owner of several substantial properties.

44. This nature of argument is not new and has been considered by Courts on various occasions over the years. For instance, Koome J (as she then was), our current the Honourable Chief Justice, in the case of *Estate of Mwangi Giture (Deceased)* 2004 eKLR, dealt with a question almost similar to this instant one, which involved a 1st widow who had been married in 1939, and the 2nd widow married much later in 1960, more than 20 years later. In analyzing the fairness of Section 40 of the *Law of Succession Act*, or lack thereof, in such a situation, she observed as follows:

> " Perhaps it is the high time, the commission charged with the responsibility of law reform addressed the issue of the inequality raised under Section 40 of Cap 160. The 1st widow's entitlement vis vis the 2nd widow or subsequent widow who perhaps come into a marriage much later to find that the 1st widow has worked tirelessly and sometimes denying herself tremendous comfort to enable her husband create and accumulate wealth. The 1st widow is then relegated by virtue of Section 40 of the *Law of Succession* to the same position as the

last-born child of the 2nd or subsequent widows. The widow is supposed to be considered as a unit alongside the children.

In this regard the last-born child of the subsequent widow who will have contributed nothing is elevated in law because he will have notarily (sic) absolute rights but will be entitled to an equal share with the 1st widow. The 1st widow is only entitled to a life interest and after the life interest the property devolves to her children in equal shares absolutely. I agree with counsel for the protester 1st widow that this state of affairs bleeds inequalities and inequities in our law and ought to be addressed urgently to enable our courts dispense justice that meets the provisions of *the Constitution* of Kenya and give due regard to the principles of nondiscrimination on the basis of sex which are also the principles of nondiscrimination provided for under the International Conventions especially the Convention Against all forms of Discrimination against women (CEDAW) which Kenya has signed and ratified. If the principles laid down in the international conventions were to be applied, the 1st widow would get a share of the property acquired during her marriage to the deceased, leaving the other half share to be shared by all the deceased heirs. If the distribution is of a polygamous intestate, each widow would get a share of what she contributed to."

45. Similarly, Makau J, in the case of *M M'M vs A I M* [2014] eKLR, stated as follows:

'16. ....., this court shall not shut its eyes to unfairness meted on a deceased's widows who are not allowed to take an extra share and whose efforts in acquisition of the properties are ignored and treated merely like children of the deceased not withstanding having been equal partners with the deceased. It is further unfortunate when the first wife who sacrificed a lot of her energy and who participated in the acquisition of the greater part of the deceased estate and even in situation where the properties are solely acquired by the first wife but registered in husbands have ended up being shared equally among all the wives not taking into account of less contribution by the younger wife who is married after acquisition of the bulk of the properties if not all the estate and who has contributed very little or nothing towards the acquisition of the estate. It is the court's hope that the unfairness to widows, and discrimination on first wife as reflected under Section 40 of the *Law of Succession Act* will soon be corrected so that the distribution of the deceased estate takes into account the contribution of the first wife and that of the 2nd wife or any other wife and the shares of the wife or wives is calculated differently from that of children who are treated as the same as their mother.

46. On her part, Mumbi-Ngugi J (as she then was), in the case of *In re the Estate of the Late George Cheriro Chepkosiom (Deceased)* [2017] eKLR, obseved as follows:

" 33. To equate the widow to children, or the first widow to widows who enter the home decades later, who may be the age of the first widow's children and made no contribution to the acquisition of the estate registered in the name of the deceased, is to perpetrate an injustice against women that cannot be justified under any circumstances. For the courts to perpetuate the perpetration of the injustice on the basis of section 40 of the *Law of Succession Act* is to abdicate their constitutional responsibility to do justice. The principle of equality and non-discrimination is at the core of the sovereign law of this land, *the Constitution*. For a court, therefore, to apply any law in a manner that is discriminatory on the basis of sex, or any of the prohibited grounds of discrimination, or to apply a provision of the law that

> is discriminatory, as section 40 admittedly is, or to consider itself bound by such discriminatory law, is to fail to meet the constitutional demands imposed on it."

47. I agree with the sentiments advanced by the Judges in the above cases, and my view is that, in this case, it will be wholly unfair, in distributing the estate between the two houses, to treat the 1st Objector, who was married to the deceased in the 1950s at the same or equal level as the 1st Petitioner who came in to the life of the deceased much later in the 1970s, about 20 years later. In any case, in the earlier decision made in this matter, the 1st Petitioner was declared by H. Omondi J (as she then was) as not being a "wife", although the Judge allowed her (1st Petitioner) and her children to receive reasonable provision in accordance with Section 29 of the *Law of Syuccession Act* as "dependents". The 1st Objector's and her children's contribution to acquisition or development of the estate properties, whether directly or indirectly, is definitely much more than that made by the 1st Petitioner and her children. The 1st Objector's house" obviously deserves to get more, and I so hold.

48. Taking into account all the matters and principles set out in the various provisions of law and authorities cited hereinabove, being alive to the fact that the spirit advanced by the *Law of Succession Act* on distribution of an estate is fairness and equity, taking into account the number of children and/or "units" in each of the two houses, and considering the peculiar circumstances of this case, I find the fairest and most justiciable way to distribute the estate is to use, as a starting point, the only mode of distribution proposed herein, the one by the Petitioners, which basically advances an almost 50:50 division of the estate, but then taking a few more assets from the list of those proposed in the Petitioner's (2nd house) proposal to be allocated to the Petitioner' side, and adding them to the Objector's side (1st house) such that the final distribution would be at about 70:30 in favour of the Objectors' family.

49. I have also taken into account the Objectors' testimony that during the subsistence of the 1st Objector's marriage with the deceased, the 1st Objector and their 11 children always resided in two matrimonial homes, the first one being Kapsaret Block/Simat Block 5(Lemmok)3 where all the 1st Objector's 11 children are said to have been raised and brought up, and the second one being Eldoret Municipalility Block 5/155/1, where the deceased died, and that the 1st Objector still resides in the two homes to date, and that throughout the marriage, the Objectors have always practiced farming on the said Kapsaret Block/Simat Block 5(Lemmok)3. This piece of testimony, not having been challenged nor controverted by the Petitioners, I will accept it and apply it as proposed by the Objectors.

50. Regarding the funds said to be held in the respective bank accounts and the shares said to be held in respective companies, my view is that these should also be shared at the same 70:30 proportions in favour of the Objector's family (1st house).

**Final Orders**

51. In the end, I rule and order as follows:

    i. The estate of the deceased, the late Moses Mugo Waweru, is hereby distributed between the two "houses" as follows:

| Objector's house (1st house) | | |
|---|---|---|
| 1. | Chinga/Gathera/331 | Whole |
| 2. | Eldoret Municipality/Block 15/1667 | Whole |
| 3. | Eldoret Municipality/Block 15/1675 | Whole |
| 4. | Eldoret Municipality/Block 15/1678 | Whole |
| 5. | Kapsaret/Simat Block 5(Lemook)/3 | Whole |
| 6. | Eldoret Municipality/Block 5/1551/1 | Whole |
| 7. | Eldoret Municipality/Block 7/5 | Whole |
| 8. | Eldoret Municipality/Block 9/522 | Whole |
| 9. | Muguga/Gaitaru/328 | Whole |
| 10. | Yamumbi Farm | 70 per cent |
| 11. | Motor Vehicle Registration No. KAG 176W | Whole |
| 12. | Motor Vehicle Registration No. KYP 072 | Whole |
| 13. | Fiat Lorry Registration No. KXQ | Whole |

| Petitioner's house (2nd house) | | |
|---|---|---|
| 1. | Eldoret Municipality/Block 16(Kamukunji)/1313 | Whole |
| 2. | Eldoret Municipality/Block 16(Kamukunji)/264 | Whole |
| 3. | Eldoret Municipality/Block 6/184 | Whole |
| 4. | Eldoret Municipality/Block 15/868 | Whole |
| 5. | Yamumbi Farm | 30 per cent |
| 6. | Motor Vehicle Registration No. KAU 973W | Whole |

ii. The shares held in companies and funds held in bank accounts as listed hereinbelow, if they indeed exist, and/or any other such shares held in companies and/or funds held in any other of further bank accounts that may be discovered subsequently, shall each be shared out as between the two houses, at 70 per cent in favour of the Objector's house (1st house), and 30 per cent for the Petitioner's house (2nd house):

| Funds held in Bank Accounts | |
|---|---|
| 1. | Funds held at Family Bank |
| 2. | Funds held at Kenya Commercial Bank |
| 3. | Funds held at Barclays Bank Ltd |

| Shares held in companies | |
|---|---|
| 1. | Shares at British American Tobacco |
| 2. | Shares at Nation Media Group Ltd |
| 3. | Shares at Eveready Ltd |
| 4. | Shares at Safaricom Ltd |
| 5. | Shares at Kenya Airways Ltd |
| 6. | Shares at Bamburi Cement Ltd |
| 7. | Shares at Afya Ltd |
| 8. | Shares at Co-Operative Bank Ltd |
| 9. | Shares at Barclays Bank Ltd |
| 10. | Shares at Kenya Commercial Bank Ltd |
| 11. | Shares at Standard Chartered Bank Ltd |
| 12. | Shares at East African Breweries Ltd |
| 13. | Shares at HFCK |
| 14. | Shares at Kengen |
| 15. | Shares at Kenya Re |

iii. Each of two houses is then given a period of sixty (60) days to discuss within itself, the mode of distribution to be applied as within each house, and present the same to the Court for adoption, to be reflected in the Certificate of Confirmation of Grant to be issued.

iv. During the said period, the two houses shall also be at liberty to discuss and mutually agree on any variation of the distribution made above, if any.

v. Noting that the full or accurate or correct descriptions or particulars of some of the properties, companies, bank accounts or properties listed above do not appear to have been supplied, the parties to so supply the same before issuance of the Certificate of Confirmation so as to avoid any future confusion or ambiguity.

vi. This being a family matter, each party shall bear his own costs.

vii. Any party aggrieved by the decision hereinabove has sixty (60) days leave to file an appeal, and which period shall also act as stay against implementation or execution of this Judgment.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 18TH DAY OF JULY 2025**

.....

**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the presence of:

Mr. Ngigi Mbugua for the Objectors

Mr. Mitei for the Petitioners

Court Assistant: Brian Kimathi