



REPUBLIC OF KENYA



**In re Estate of James Kibe Ndegwa (Deceased) (Succession Cause E659 of 2021)
[2025] KEHC 13023 (KLR) (Family) (19 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E659 OF 2021
PM NYAUNDI, J
SEPTEMBER 19, 2025
IN THE MATTER OF THE ESTATE OF JAMES KIBE NDEGWA (DECEASED)**

RULING

1. This succession cause relates to the Estate of James Kibe Ndegwa [hereinafter the deceased] who died intestate on 30th August 2017.
2. According to the Petition lodged by the Administrator on 19th March 2024, he was survived by the following;
 - a. Jane Njeri Kibe- surviving spouse
 - b. Samuel Ndegwa Kibe – son.
 - c. Mercy Njeri Kibe – daughter.
 - d. Elijah Ndegwa Kibe – son.
 - e. Robert Kanina Kibe – son.
 - f. Grace Muthoni Kibe – daughter.
 - g. Mikelinah Wambui Kibe – daughter.
 - h. David Muhia Kibe – son.
 - i. Mary Wangui Kibe – daughter.
3. The Estate of the Deceased was said to be comprised of the following properties;
 - i. Gilgil/Gilgil Block 1/1174
 - ii. Gilgil/Gilgil Block 1/5519
 - iii. Plot no. P8924 Embakasi Ranching.



- iv. Plot no. D4 - 138 Kayole
 - v. Plot no. C4 - 183 Kayole.
 - vi. Plot no. 83.
 - vii. Plot no. 315a.
 - viii. Ngomongo Plot no. 533.
 - ix. Ngomongo Plot no. 832.
 - x. Equity Bank Account no. XXXXXXXXXXXXXXXX.
4. Pursuant to judgment of this Court delivered on 12th July 2024 she has presented summons for Confirmation of Grant dated 7th October 2024 seeking the following orders:
- 1. That the Grant of Probate for Letters of Administration intestate made to Jane Njeri Kibe in this matter on 23rd August 2022 be confirmed and the estate be divided in terms of the annexed proposed mode of distribution.
 - 2. That the costs of this application be paid out of the estate.
5. The summons was supported by the Affidavit of even date sworn by the applicant/administrator.
6. Before the Summons for Confirmation of Grant was heard and determined, Samuel Kibe Ndegwa and Mercy Njeri Kibe [the Protestors] filed an affidavit of protest on the proposed mode of distribution dated 4th February 2025. They are opposed to the mode of distribution proposed by the administrator. They argue that the mode of distribution is contrary to the provisions of Section 40 of the Law of Succession Act because the deceased was a polygamous man. They averred that the estate should be shared between the two houses and equally amongst the children of the deceased and the administrator who is the deceased's second wife. That the administrator's proposal that all the properties be transferred to her is preposterous and is contrary to the provisions of Section 40 of the Law of Succession Act. They averred that since the beneficiaries and the deceased's properties have been identified, the estate should be distributed as follows;
- i. Gilgil/Gilgil Block 1/1174 – Jane Njeri Kibe for her own equal share and in trust for her 6 children.
 - ii. Gilgil/Gilgil Block 1/5519 - Samuel Kibe Ndegwa and Mercy Njeri Kibe in equal shares.
 - iii. Plot no. P8924 Embakasi Ranching – Jane Njeri Kibe and all the 8 children to sell and proceeds be shared equally.
 - iv. Plot no. D4 - 138 Kayole - Jane Njeri Kibe for her own equal share and in trust for her 6 children.
 - v. Plot no. C4 - 183 Kayole - Samuel Kibe Ndegwa and Mercy Njeri Kibe in equal shares.
 - vi. Plot no. 83 - Jane Njeri Kibe for her own equal share and in trust for her 6 children.
 - vii. Plot no. 315A - Samuel Kibe Ndegwa and Mercy Njeri in equal shares.
 - viii. Ngomongo Plot no. 533 - Jane Njeri Kibe for her own equal share and in trust for her 6 children.
 - ix. Ngomongo Plot no. 832 - Samuel Kibe Ndegwa and Mercy Njeri in equal shares.



- x. Equity Bank Account No. XXXXXXXXXXXXXXXX - equal shares of all the funds amongst the 9 beneficiaries.
7. The administrator filed a further affidavit sworn on 20th March 2025. She averred that she got married to the deceased in 1980 after the death of the protestors mother. She and the deceased acquired all the properties listed in the schedule for distribution and developed these properties during the subsistence of their marriage. That even after the demise of the deceased, she developed Plot D4 - 138 Kayole by constructing an extra floor and made improvements by putting tiles on the existing rentals. She argued that she contributed financially towards the acquisition and development of the estate properties by taking a loan from her chama especially on Plot No. D4 138 Kayole and C4 183 Kayole.
8. She denied that the deceased was polygamous and that the estate should devolve upon her as the surviving spouse according to Section 35[1] of the Law of Succession Act.

ADMINISTRATOR'S SUBMISSIONS.

9. The administrator submitted that she got married to the deceased after the death of the mother of the protestors and therefore, the deceased was not a polygamous man. Being the surviving spouse, she argued that the estate should be distributed as per Section 35 [1] of the *Law of Succession Act*. She relied on the cases of *re Estate of Jane Wambui Mwangi [Deceased]* [2016] eKLR and *Eddah Wangu & another v Sacilia Magwi Kivuti [Deceased] substituted with Ribereta Ngai* [2021] eKLR where the courts held that the deceased's children are not entitled to the net estate of the deceased where there is a surviving spouse.
10. She submitted that she got married to the deceased in 1980 and she contributed towards the acquisition and development of the properties. Relying on the decision of *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others* [2016] eKLR where the court held that a spouse's contribution should be recognized during distribution of property.
11. It was her submission that all the properties were acquired during the subsistence of their marriage and therefore, she has a greater stake in the deceased's estate. She urged the court to distribute the estate under Section 35 of the *Law of Succession Act*.

PROTESTORS SUBMISSIONS.

12. The protestors herein submitted that the provisions of Section 40[1] of the *Law of Succession Act* provides for guidelines for distribution of the estate of a polygamous intestate. In support of their submissions, they cited the case of in *Re Estate of Joseph Eric Owino [Deceased]* [2022] eKLR.
13. They urged this court to distribute the estate according to paragraph 10 of their affidavit of protest.

ANALYSIS AND DETERMINATION

14. The issue for determination by this court is how the estate of the deceased should be distributed. A related issue is whether or not the deceased was a polygamist. *Black's Law Dictionary* 11th Edition defines polygamy as-
1. The fact, condition, or practice of having more than one spouse simultaneously....
15. It is evident that in the current case the deceased married the Administrator subsequent to the death of the mother of the Protestors. He therefore remarried, he is not polygamous. The Protestors and the Administrator and her children are part of a blended family. The letter of the Chief Kayole Location accompanying the Petition supports this as the status of the family.



16. The deceased therefore had 8 children and is survived by a spouse. The issue is what is the law applicable in determination of his estate. The Administrator urges that in dividing the property the Court should consider that the properties were all acquired during the pendency of the marriage between her and the deceased and after his first wife had died.
17. In considering the proposal by the Administrator I am persuaded by the reasoning of the Hon. Musyoka J in [FEO v ACO \[Sued as Co-Administratrix of the Estate of the Late BPO\] \[Matrimonial Cause E006 of 2023\]](#) [2024] KEHC 14889 [KLR] [28 November 2024] [Judgment] in which the Court was categorical that the applicable regime upon the demise of a spouse is the law of Succession Act and not the matrimonial property Act as urged. If a spouse does not move to determine her rights to matrimonial property prior to the death of the Spouse, he or she cannot seek to enforce them post the demise of the spouse, especially where the properties are in the sole name of the deceased. The safeguards for a surviving spouse are found under Section 35 [1] [b] of the [Law of Succession Act](#), that provides for the conferment of life interest to the surviving spouse that terminates upon remarriage or death.
18. In this case, since the deceased died intestate the applicable law is Part v of the [Law of Succession Act](#), and in particular Section 35 of the Act. It is not disputed that the deceased was survived by the Administrator as the surviving spouse and all his children as listed in the list of beneficiaries. Section 35 of the [Law of Succession Act](#) caters for a situation where the deceased is survived by a spouse and children. The surviving spouse is entitled to the deceased's chattels and a life interest on the residue. The deceased in this case was survived by a spouse and children, although not all her children. Under Section 35 of the Act, upon determination of a life interest the estate should be shared equally between all children.
19. Section 35 appears to apply to children of the deceased and not necessarily children of the surviving spouse. The issue that would arise in the instant case is whether the surviving spouse can exercise life interest over property that ought to devolve to children other than her own. To address this apparent lacuna in the law, the Court of Appeal in [Koech & another v Chemutai & 2 others](#) [2022] KECA 1309 [KLR] whose facts are similar to the current case found that Section 40 of the [Law of Succession Act](#) is applicable. It however departed from the earlier decision in [Catherine Nyaguthii Mbauni v Gregory Maina Mbauni](#) [2009] eKLR urging that the application of Section 40 must safeguard the constitutional principles of equality, equity and non-discrimination.
20. The apparent disparity between Section 35 and Section 40 of the Act can be safely addressed by the application of Article 27 of the [Constitution](#) of Kenya, 2010 which provides-

Equality and freedom from discrimination.

27.

- [1] Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- [2] Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- [3] Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- [4] The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or



social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

[5] A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause [4].

21. In the *Koech Case* cited above the Court took time to inquire into the historical context of Section 40 observing thus-

The history of section 40 of the *Succession Act* can be deduced from the Report of the Commission on the Law of Succession 1968 as cited by Lenaola, J [as he then was] *In re Estate of John Muia Kalii- [Deceased]* [2008] eKLR: “In customary law, on the other hand, the matter is complicated by the rules of division amongst the “house” by which there is an equal division amongst the “houses” irrespective of the number of children in each” house”. We believe this rule to be highly unfair and discriminatory...

We think that is necessary, for the purpose of determining beneficial interests, to make a division of the net estate between the “houses”. This accords with customary law and will work out well in practice since the property of each “house” is normally treated as independent and separate from the other. As to the mode of division, we have already stressed that the present system of equal division irrespective of the number of children in each “house” is inequitable. We believe that the fairest division would be one based on the number of children in each “house” but also adding to the number of children, the wife as an additional dependent especially to cater for the wife who has no children.

22. The Court proceeded to divide the property equally between all the beneficiaries. The Protestors as step children of the deceased appear to not favour the administrator holding the property in trust for them. I would have liked to cede to their wishes but in the absence of evidence as to the value of the assets it seems that the best way to resolve the matter is to proceed to distribute the estate in accordance with Section 35, having determined that under Section 40 of the Act, the children are entitled to equal share of the estate.

23. Accordingly, this is the final order on distribution of the estate-

- i. Gilgil/Gilgil Block 1/1174 – Jane Njeri Kibe in trust for all the 8 Children of the deceased in equal shares
- ii. Gilgil/Gilgil Block 1/5519 - Jane Njeri Kibe in trust for all the 8 Children of the deceased in equal shares
- iii. Plot no. P8924 Embakasi Ranching – Jane Njeri Kibe in trust for all the 8 Children of the deceased in equal shares.
- iv. Plot no. D4 - 138 Kayole - Jane Njeri Kibe in trust for all the 8 Children of the deceased in equal shares
- v. Plot no. C4 - 183 Kayole - Jane Njeri Kibe in trust for all the 8 Children of the deceased in equal shares
- vi. Plot no. 83 - Jane Njeri Kibe in trust for all the 8 Children of the deceased in equal shares
- vii. Plot no. 315A - Jane Njeri Kibe in trust for all the 8 Children of the deceased in equal shares
- viii. Ngomongo Plot no. 533 - Jane Njeri Kibe in trust for all the 8 Children of the deceased in equal shares



- ix. Ngomongo Plot no. 832 Jane Njeri Kibe in trust for all the 8 Children of the deceased in equal shares
- x. Equity Bank Account no. XXXXXXXXXXXXXXX - the account is said to be held in the joint names of the deceased and the Administrator. I direct that the proceeds be released to the administrator solely.

24. This being a family matter, I make no order on costs.

25. Leave to appeal is granted. Party intending to exercise right of appeal to do so within 30 days.

26. It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 19TH DAY OF SEPTEMBER, 2025.

P M NYAUNDI

JUDGE

In the presence of:

Fardosa Court Assistant

Ms. Ondimu for Administrators/Respondents

Gitau Mwara for Protestors/Beneficiaries

