



REPUBLIC OF KENYA



**In re Estate of John Owiti Ogaye (Deceased) (Succession Appeal
E033 of 2024) [2025] KEHC 12852 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12852 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
SUCCESSION APPEAL E033 OF 2024**

**DK KEMEL, J
SEPTEMBER 19, 2025**

IN THE MATTER OF THE ESTATE OF JOHN OWITI OGAYE (DECEASED)

BETWEEN

PAMELA AKINYI OWITI APPELLANT

AND

JOCINTER AJWANG OWITI RESPONDENT

*(Being an appeal from the Ruling of Hon. J.P. Nandi (SPM) delivered
on 12th July 2024 in Bondo MSCUCC Case No. E239 OF 2022)*

JUDGMENT

1. The Appellant and Respondent herein, Pamela Akinyi Owiti and Jocinter Ajwang Owiti, respectively, were granted by Hon. J.P. Nandi SPM a Grant of Letters of Administration Intestate in the estate of John Owiti Ogaye (Deceased) on 10th October 2022.
2. John Owiti Ogaye passed away on 30th September 2014 in West Migwena. He was survived by: 1st House- Jocinter Ajwang Owiti (widow), Mary Adhiambo Owiti (Daughter), Beatrice Atieno (Daughter), Syprose Anyango Owiti (Daughter). Alice Omwanda Owiti(Daughter), Rose Apiyo Owiti(Daughter), Jackline Achieng Owiti(Daughter), Moses Odundo Owiti(Son), Veronica Awour Owiti(Daughter); 2nd House-Pamela Akinyi Owiti (widow), Victor Onyango Owiti(Son), Catherine Adhiambo Owiti (Daughter), Mercy Achieng Owiti(Daughter), Joseph Omwanda Owiti(Son), Edith Anyango Owiti(Daughter), Felix Otieno Owiti(Son), Kevin Okoth Owiti(Son), David Ogot Owiti(Son), Geoffrey Ochieng Owiti(Son) Bill Joseph Omondi Owiti(Son), Vincent Owino Owiti (Son).
3. The Respondent filed an application for Confirmation of Grant dated 11th March 2024, while the Appellant filed a similar application dated 24th April 2024. The applications were based primarily



on the contention that the deceased was polygamous, and it had become impossible for the two administrators to agree on a mode of distribution of the estate.

4. The Appellant proposed the following distribution:

Property	Dependant	Share
South Sakwa/Migwena/1502 Measuring 3.0 Ha,) to be divided into three portions	Jocinter Ajwang Owiti and Pamela Akinyi Owiti(Jointly with equal shares-Homestead) Pamela Akinyi Owiti Jocinter Ajwang Owiti	0.93 Ha 1.2 Ha 0.87 Ha
South Sakwa/ Migwena/1567(Measuring 0.67 Ha)	Jocinter Ajwang Owiti	Whole
South Sakwa/Bar Kowino/2764(Measuring 0.07 Ha)	Jocinter Ajwang Owiti Pamela Akinyi Owiti	0.035 Ha 0.035 Ha
South Sakwa/Bar Kowino/2989(Measuring 0.60 Ha)	Pamela Akinyi Owiti	Whole
South Sakwa/Bar Kowino/3486(Measuring 0.02Ha)	Jocinter Ajwang Owiti Pamela Akinyi Owiti (Registered separately but equally with the 1 st Administrator (Jocinter Ajwang Owiti) taking 3 Shop units and the 2 nd Administrator (Pamela Akinyi Owiti) taking 3 Shop units. Same to be shared equally between the two administrators.	0.01 Ha 0.01 Ha

5. The Respondent proposed the following distribution:



Property	Dependant	Share
South Sakwa/Migwena/1502 Measuring 3.0 Ha) to be divided into three portions	Jocinter Ajwang Owiti and Pamela Akinyi Owiti(Jointly with equal shares-Homestead) Pamela Akinyi Owiti Jocinter Ajwang Owiti	0.93 Ha 1.2 Ha 0.87 Ha
South Sakwa/ Migwena/1567(Measuring 0.67 Ha)	Jocinter Ajwang Owiti	Whole
South Sakwa/Bar Kowino/2764(Measuring 0.07 Ha)	Jocinter Ajwang Owiti Pamela Akinyi Owiti	0.035 Ha 0.035 Ha
South Sakwa/Bar Kowino/2989(Measuring 0.60 Ha)	Pamela Akinyi Owiti	Whole
South Sakwa/Bar Kowino/3486(Measuring 0.02Ha)	Jocinter Ajwang Owiti Pamela Akinyi Owiti (Registered jointly with the 1 st Administrator (Jocinter Ajwang Owiti), taking 3 Shop units, and the 2 nd Administrator (Pamela Akinyi Owiti) taking 2 Shop units, and the remaining area being common areas described in paragraph below.	0.01 Ha 0.01 Ha

6. The bone of contention between the Appellant and Respondent was primarily in respect of a parcel of land known as South Sakwa/Bar Kowino/3486(Measuring 0.02 Ha), where shop units have been built. The Respondent is in use of Parts A, B, C, and E, while the Appellant is in use of Parts D, F, and G, which is an extension of F. H was a common toilet used by all tenants.
7. The Appellant averred that the trial Court had the latitude to order that the parcel of land be distributed under Section 40 of the *Law of Succession Act*. The Respondent averred that since the parcel of land is developed, the same could not be subdivided, thus the proposal that the parcel of land be distributed as per the shop units in the manner the parties presently hold on the ground. They both averred that there has been no common agreement on the mode of distribution. Each house has consented to its proposed mode of distribution.
8. In her further affidavit sworn on 26th April, 2024, the Appellant averred that she has children who are still going to school, who are: Joseph Omwanda Owiti(Son), Edith Anyango Owiti(Daughter), Felix



Otieno Owiti(Son), Kevin Okoth Owiti(Son), David Ogot Owiti(Son), Geoffrey Ochieng Owiti(Son), Bill Joseph Omondi Owiti(Son), Vincent Owino Owiti(Son).

9. In her supplementary affidavit sworn on 22nd May 2024, the Respondent averred that the parcel of land Sakwa/Bar Kowino/3486 measures approximately 0.02 Ha on the documentation at the lands office but it is 0.01 Ha on the ground, thus impossible to further divide and therefore only plausible to register it jointly with each party knowing the shop units entitled to; the property cannot be divided equally; as from the year 2015 to date, she held parts A, B and D while the Appellant held parts C and E and the objection from the Appellant was only raised in 2021 when she was served with citation proceedings in Bondo MC Succession Cause No. 3 of 2021; she purchased Sakwa/Bar Kowino/3486 with the deceased in 1993 which had been hived off from parcel of land No. Sakwa/Bar Kowino/2488 owned by Henry Genga Midimo; therefore, the Appellant cannot seek to have the property shared equally.
10. On 31st May 2024, the Respondent's advocate stated that he had been served with a replying affidavit to her application but none is in the court file or that the learned trial Magistrate made reference to while reaching the conclusion in the impugned ruling.
11. In his ruling, Hon. J.P. Nandi (SPM) opined that the issue for determination was whether the distribution would be adopted as proposed by the Respondent or the Appellant. While placing reliance on an agreement showing how much the Respondent contributed to the acquisition and development of the parcel of land and a Settlement Agreement vide the Minutes dated 27th April 2015 where parties had agreed on the distribution, and the fact that the Appellant failed to support the forgery allegations in respect of the agreement, the learned trial Magistrate found the Respondent's proposed sharing of the estate was a fairer and more equitable manner than the one presented by the Appellant, thus exercised his residual discretion to adjust the shares of each house. The Respondent's proposal was adopted whereby a parcel of land South Saka/Bar Kowino/3486 was given to the Respondent and Appellant jointly, with the Respondent taking three shop units (Part A, B, and D) and the Appellant taking two shop units(Part C and E)and the remaining common areas.
12. Consequently, the Grant was confirmed on 12th July 2024 and a Certificate of Confirmation of Grant of even date was issued thereof.
13. Aggrieved, the Appellant has lodged an appeal contending in the Memorandum of Appeal dated 9th August 2024 that:
 - i. The learned trial Magistrate erred in law and in fact in failing to properly interpret Section 40 of the [Law of Succession Act](#) and thereby arriving at a wrong decision.

In directing that the Appellant and the Respondent share property known as South Sakwa/ Barkowino/3486, with the Appellant getting two (2) shop units and the Respondent getting three (3) shop units therefrom, the learned trial Magistrate failed to appreciate that the Appellant had minor children who are schooling and in need of financial support emanating from the proceeds obtained in property known as Sakwa/Barkowino/3486.
 - ii. The learned trial Magistrate erred in law and in fact in failing to appreciate the import and implication of Section 40 of the [Law of Succession Act](#) to the extent that the Appellant's household had more children than the Respondent's household, some of whom were minors.
 - iii. The learned trial Magistrate decision was not based on fair distribution of the deceased's estate in line with the applicable law, and thus exposing the Appellants' children to possible destitution.



- iv. The learned trial Magistrate erred in law and in fact in putting emphasis on a purported agreement dated 27th April 2015 which agreement being over nine years old since its purported execution and which agreement was not in alignment with economic realities and situation as at the time of the parties herein giving evidence and thus arrived at a wrong decision.
14. The Appellant prays that the ruling and order be set aside; to grant the Appellant all shop units constructed within the land parcel known as South Sakwa/Barkowino/3486; and the costs of this appeal.
15. The Appellant submits that in respect of land parcel known as South Sakwa/Barkowino/3486, the Appellant was supposed to receive three units while the Respondent two units. The Appellant asserts that her children were still in school while the Respondent had none in school. Reliance is placed on the case of *Mary Rono vs Jane Rono & Another* [2005] eKLR, where Omolo JA observed while interpreting Section 40, that while the net intestate estate is to be distributed according to houses, each house is to be treated as a unit, yet the Judge doing the distribution still has a discretion to take into account and consider the number of children in each house. The learned Judge held that he could not see any provision in the Act that each child must receive the same or equal portion. The learned Judge observed that it would be an injustice if the children being maintained, educated, and generally seen through life were to get equal inheritance with another who is already working and for whom no school fees is being paid. According to the Appellant, the entire parcel of land should be distributed to the Appellant's house, and in a worst-case scenario, three out of five units to the Appellant's House.
16. The Appellant submits that the Settlement Agreement was of little significance as it purported to be an agreement only amongst five beneficiaries of the estate, whereas the estate comprised 21 beneficiaries. Reliance is placed on the case of *In re Estate of Michael George Tendwa Said (Deceased)* [2020] eKLR. According to the Appellant, the Agreement purports to show that the Respondent participated in the acquisition and development of the contested parcel by building a shop at a sum of Kshs. 100,000.00 is a clear forgery and an afterthought since the statement was inserted at a later date from the date of the agreement with the succession cause in mind. The Appellant asserts that there is a variance in the names Jocinta Owiti and Josinter Owiti and the signatures.
17. The Respondent submits that the Appellant took Kshs. 800,000.00 out of the available sum of Kshs. 1,296,326.00 due to the school fees burden, while the Respondent took only Kshs. 496,326.00; therefore, the Appellant cannot claim that there was an unfair distribution of the deceased's assets. According to the Respondent, the Appellant got a larger share of South Sakwa/Migwena/1502; South Sakwa/Migwena/1567 was given to the Respondent, while South Sakwa/Bar Kowino/2989 was given to the Appellant as agreed in the agreement reached on 27th April 2015, as well as in the proposed mode of distribution. It is submitted that South Sakwa/Bar Kowino/2764 was divided equally between the Appellant and Respondent, where the Appellant has seven house units while the Respondent has only two units; thus, the Appellant receives more rent income than the Respondent. Regarding South Sakwa/Bar Kowino/3486, the Respondent submits that it cannot be distributed in isolation from the other assets agreed to be distributed to the Appellant.
18. The Respondent submits that by dint of Sections 35 and 40 of the *Law of Succession Act*, in sharing the net estate of a polygamous deceased person, the court exercises a discretion and is required to bear in mind that the principles of fairness and equity, and not equality among the beneficiaries. According to the Respondent, the parcel of land cannot be divided into two, as the shop units are built on the whole parcel of land, while the toilet amenities are built on one side of the property to serve the entire property. The Respondent submits that the Appellant had been aware of the sale agreement since the year 2015 and had never claimed it was fraudulently acquired, nor has she pleaded particulars of fraud



in the pleadings, and only raised fraud in the written submissions. Reliance is placed on *Kinyanjui Kamau vs George Kamau* [2015]eKLR on the standard required to prove fraud. The Respondent submits that the Appellant consented to the mode of distribution in other assets where she got way more than the Respondent, but now wants this Court to review everything. The Respondent submits that the learned trial Magistrate exercised his discretion properly in distributing the estate based on the prior meeting and agreements the parties entered into. Reliance is placed on *John Maina & Another vs Veronicah Wanjiku Gakuo* [2020] eKLR; *Mbogo & Another vs Shah*[1968]EA; and *Kenya Revenue Authority & 2 Others vs Darasa Investments Limited*[218]eKLR. The Respondent urges this Court to dismiss the appeal and uphold the trial Court’s ruling.

19. I have considered the appeal in light of the evidence on record and written submissions filed on behalf of the parties herein.
20. This being a first appeal, the role of this Court is to re-evaluate and subject the evidence to a fresh analysis to reach an independent conclusion as to whether or not to uphold the decision of the trial Court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. (*Selle vs. Associated Motor Boat Co.* [1968] EA 123).
21. *Odunga J.* (as he then was) in *China Wi Yu Company Limited vs Ronald Manthi David* [2021] KEHC 1626 (KLR) stated that this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyze the same, evaluate it and arrive at its independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.
22. Again, in *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR, it was held;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
23. In *Ephantus Mwangi and Another vs Duncan Mwangi Civil Appeal No. 77 of 1982* [1982-1988] 1KAR 278, the Court of Appeal held that:

“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
24. The dispute between the Appellant and Respondent who are joint administrators of the estate of John Owiti Ogaye (Deceased) is in respect of the parcel of the parcel of land South Sakwa/Bar Kowino/3486. The Appellant faults the learned trial Magistrate for placing reliance on the agreement that was not in alignment with economic realities and the situation as at the time of the parties herein were giving evidence and thus arrived at a wrong decision. According to the Appellant, the learned trial Magistrate failed to properly interpret Section 40 of the Law of Succession.
25. It is not in dispute that the deceased was polygamous, thus, the applicability of Section 40 of the Law of Succession in this case. Section 40 of the [Law of Succession Act](#) provides as follows:



Where intestate was polygamous

- (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.
26. It follows, therefore, that division of the net intestate estate shall, in the first instance, be 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. The surviving wife is an additional unit to the children.
27. In *Re Estate of John Musambayi Katumanga – (Deceased)* [2014] eKLR Musyoka J. stated as follows;
- “Section 40 was not designed for the circumstances of the instant estate, but it would appear more appealing for the purpose of the 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.”
28. Again, Joel Ngugi J.(as he then was) in *re Estate of Kamau Rungathu (Deceased)* (Succession Cause 479 of 1994) [2022] KEHC 14417 (KLR) (31 October 2022) (Judgment) was of the view that section 40 of the *Law of Succession Act* is meant to ensure the equitable distribution of the estate, and that he held as follows:
- “50. The literal interpretation of the above provision is that the estate is first distributed among the houses, depending on the number of children in each house, with any surviving spouse being an additional unit. Thereafter, the assets allocated to each house are distributed within the house in accordance with sections 35 to 38 of the Law of Succession.
 51. The Courts have, however, cautioned against the uniform application of Section 40. In *Scolastica Ndululu Suva v Agnes Nthenya Suva* [2019] eKLR, the Court of Appeal recommended a case-to-case application of Section 40 of the *Law of Succession Act* as follows:

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 the factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.



52. The Court of Appeal further observed in *Jane Nyambura Ndungu v Beatrice Wangari Ndungu & 2 Others* [2021] eKLR:

“Section 40 of the *Law of Succession Act* is not a magic pill that can be applied to resolve all issues pertaining to the distribution of a deceased person’s estate. In as much as section 40 LSA talks of “Equal Shares,” the distribution must also be equitable.”

53. The common thread from the above case law is that Section 40 of the *Law of Succession Act* is meant to ensure the equitable distribution of the estate and not necessarily the equal distribution. In arriving at the mode of distribution, the Court is to be guided by the facts of each case, including the circumstances of the beneficiaries at the time of distribution.”

29. In Black’s Law Dictionary, “equitable” refers to fairness, justness, and conformity to principles of natural justice, often involving consideration of individual circumstances, while “equally” signifies a condition of being the same in quantity, degree, or value.

30. In *Mary Rono v Jane Rono & Another* [2005] eKLR, Omolo JA, had this to say:

“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...”

31. On the same note, in *re Estate of M’Ramare Nkunga (Deceased)* [2018] eKLR, F. Gikonyo stated:

“My view is this. Section 40 of the *Law of Succession Act* is an existing law which must be read with such alterations, adaptations, qualifications, and exceptions necessary to bring it into conformity with *the Constitution*. See section 7 of the Transitional and Consequential Provisions, Sixth Schedule of *the Constitution*.”

32. It follows, therefore, that Section 40 of the Law of Succession has to be applied based on the peculiar facts of each case in the circumstances. It cannot be applied in a blanket manner. Kanyi Kimondo J. held in *re Estate of Githumbi Kanyari (Deceased) (Succession Appeal 2 of 2017)* [2022] KEHC 12673 (KLR) (29 August 2022) (Judgment), that:

“Section 40 does not however, take away the discretion of the court to distribute the estate fairly. By dint of sections 26, 27, 28, 29 and 35 of the Act, as read together with Rule 73 of the Probate and Administration Rules, the court has been clothed with complete discretion to provide for dependents or beneficiaries.”

33. The learned trial Magistrate’s decision was informed by the sale agreement dated 16th November 1993 and the settlement agreement vide the minutes of 27th April 2015 to find in favour of the Respondent’s proposed distribution in respect of the parcel of land South Sakwa/Bar Kowino/3486. In the sale agreement, it is indicated that the Respondent contributed Kshs. 100,000.00 towards the construction



of a shop on the parcel of land. The Appellant asserts that the agreement is a forgery since the names Jocinta Owiti and Josinter Owiti differ, as well as the signatures.

34. Section 107(1) of the *Evidence Act*, Cap 80 provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

35. However, the burden may shift to the Defendant to disprove the alleged claim. This is the evidential burden of proof, which is well captured under Sections 109 and 112 of the *Evidence Act*. See Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334.

36. Mativo J.(as he then was) in *Caroline Wanjiku Ngugi v Republic*[2015] eKLR held that:

“Forgery is the false making or material alteration of a writing, where the writing has the apparent ability to defraud and is of apparent legal efficacy with the intent to defraud. Thus, the elements of forgery are:-

- i. False making of – The person must have taken paper and ink and created a false document from scratch. Forgery is limited to documents. “Writing” includes anything handwritten, typewritten, computer-generated, or engraved
- ii. Material alteration – the person must have taken a genuine document and changed it in some significant way. It is meant to cover situations involving false signatures or improperly filling in blanks on a form or altering the genuine contents of the document.
- iii. Ability to defraud – The document or writing has to look genuine enough to qualify as having the ability to mislead others to think it’s genuine.
- iv. Legal efficacy – the document or writing has to have some legal significance.
- v. Intent to defraud – the specific state of mind for forgery does not require intent to steal, but only intent to fool people. The person must have intended that other people regard something false as genuine. A forgery may be committed either by handwriting, through the use of type typewriter or a computer.”

37. The burden of proof was upon the Appellant, who claimed that the sale agreement was forged. The standard of proof in a forgery claim is higher than that required in ordinary cases, namely, proof upon a balance of probabilities. And not one beyond a reasonable doubt in criminal cases. See *Elizabeth Kamene Ndolo v George Matata Ndolo* [1996] eKLR.

38. W. Musyoka, J. In re Estate of Kimani Kahehu (Deceased) [2018] eKLR held as follows:

“It is the applicant who alleges that the will was a forgery. The burden is on him to establish that fact to the required standard. Forgery is a criminal act, and facts to establish it must make out a case beyond a balance of probability and towards proof beyond a reasonable doubt. See the decision of the Court of Appeal in *Elizabeth Kamene Ndolo v George Matata Ndolo* Nairobi Court of Appeal, civil appeal number 128 of 1995. A charge of forgery would be that the signature on the document was not that of the deceased. To establish forgery, it is usually necessary to subject the impugned document to testing of the impugned signature or signatures by a document or handwriting expert. That was not done in this case. No material



was placed before me by way of evidence that the signature on the document purported to be that of the deceased was forged.”

39. The learned trial Magistrate found correctly that the Appellant claimed the agreement was a forged one, but did not back her allegations with any evidence. I find that no particulars of forgery were pleaded by the Appellant in her pleadings or substantiated to warrant a finding that the sale agreement, where the Respondent is indicated to have contributed to the construction of a shop, was a forgery. The learned trial Magistrate correctly exercised his residual discretion to adjust the share of each house and gave the Respondent three shop units and the Appellant two shop units. The Respondent contributed monetarily towards the building of a shop as per the sale agreement that the Appellant has failed to dislodge. Further, it is noted that the Appellant has already been adequately provided for in other assets. The Appellant’s claim that she still has young children as compared to the Respondent is not sufficient ground to interfere with the distribution that had earlier on been agreed by the parties way back in 2015. I find the distribution as proposed by the Respondent and adopted by the trial court is reasonable and fair to the parties. Hence, the finding by the trial court was proper and must be upheld.
40. Given the foregoing observations, it is my finding that the Appellant’s appeal lacks merit. The same is dismissed. The ruling of the trial court dated 12th July 2024 is hereby upheld. As parties are members of one family, i order each party to bear their own costs of the appeal.

It is so ordered.

DATED, SIGNED, AND DELIVERED AT SIAYA THIS 19TH DAY SEPTEMBER 2025.

D. K. KEMEI

JUDGE

In the presence of:

Siwolo.....for Appellant

Kouko..... for Respondent

Okumu..... Court Assistant

