



In re Estate of Paul Nicholas Tuwei (Deceased) (Succession Cause E101 of 2024) [2025] KEHC 12830 (KLR) (19 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12830 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE E101 OF 2024
RN NYAKUNDI, J
SEPTEMBER 19, 2025**

IN THE MATTER OF THE ESTATE OF PAUL NICHOLAS TUWEI (DECEASED)

BETWEEN

**CHRISTINA CHEPKOSKEI CHESANG 1ST PETITIONER
NELLY KOECH 2ND PETITIONER
LYDIA KOECH 3RD PETITIONER**

AND

**CONSTANTATINA JEPKOSGEI 1ST OBJECTOR
BENARD KOECH 2ND OBJECTOR
BENJAMIN KOECH 3RD OBJECTOR
LOICE KOECH 4TH OBJECTOR
ANN JEMELI 5TH OBJECTOR
NANCY KOECH 6TH OBJECTOR
PHYLIS KOECH 7TH OBJECTOR
HILLARY KOECH 8TH OBJECTOR
ZEDDY KOECH 9TH OBJECTOR
MERCY KOECH 10TH OBJECTOR**

RULING

1. What is pending before this court is summons for confirmation of Grant dated 23rd July, 2025, which was issued on 21st November, 2024 and as amended on 23rd June, 2025. The amended Grant was issued



to Philip Kipkogei, Christina Chepkoskei Chesang, Benjamin Koech and Hillary Koech. The deceased was survived by the following beneficiaries as can be gleaned from the chief's letter dated 27th July, 2024:

1st House

- a. Constantina Jepkosgei – widow
- b. Benard Koech
- c. Benjamin Koech
- d. Loice Koech

2nd House

- e. Christina Chepkoskei Chesang – widow
- f. Nelly Koech
- g. Lydia Koech

3rd House

- h. Ann Jemeli – widow
- i. Nancy Koech
- j. Phylis Koech
- k. Hillary Koech
- l. Zeddy Koech
- m. Mercy Koech

2. The deceased left behind the following properties:

- a. Kaptagat/Lotonyok (Koilel) Block 25 measuring 2.71 ha
- b. Keiyo South/Chepsigot “B”/518 measuring 0.38ha
- c. Keiyo South/Chepsigot “B”/2893 measuring 0.1 ha
- d. Keiyo South/Chepsigot “B”/2895 measuring 0.11ha
- e. Kaptagat/Lotonyok Block 2 (KOILEL)/16 measuring 0.04 ha
- f. Elgeyo Border Settlement Scheme/238 Beneficial interest of 10 Acres.

3. The petitioners through Christina Chepkoskei Chesang in applying for confirmation proposed that the estate be distributed as follows:

Kaptagat/Lotonyok (Koilel) Block 25 measuring 2.71 ha



No.	Beneficiary	Share
	Constantina Jepkosgei	0.903 ha to hold in trust of Benard Koech, Benjamin Koech and Loice Koech
	Christina Chepkoskei Chesang	0.903 Ha to hold in trust of Nelly Koech and Lydia Koech.
	Ann Jemeli	0.903 Ha to hold in trust of Nancy Koech, Phylis Koech, Hillary Koech, Zeddy Koech and Mercy Koech.

Keiyo South/Chepsigot “B”/518 measuring 0.38ha

Constantina Jepkosgei	0.126 Ha to hold in trust of Benard Koech, Benjamin Koech and Loice Koech
Christina Chepkoskei Chesang	0.126 Ha to hold in trust of Nelly Koech and Lydia Koech
Ann Jemeli	0.126 Ha to hold in trust of Nancy Koech, Phylis Koech, Hillary Koech, Zeddy Koech and Mercy Koech

Keiyo South/Chepsigot “B”/2893 measuring 0.1 ha

- a. Constantina Jepkosgei
- b. Christina Chepkoskei Chesang 0.1 Ha to be held jointly
- c. Ann Jemeli Koech

Keiyo South/Chepsigot “B”/2895 measuring 0.11ha

- a. Constantina Jepkosgei
- b. Christina Chepkoskei Chesang 0.1 Ha to be held jointly
- c. Ann Jemeli Koech

Kaptagat/lotonyok Block 2 (Koilel)/16 measuring 0.04 ha

- a. Constantina Jepkosgei
- b. Christina Chepkoskei Chesang 0.1 Ha to be held jointly
- c. Ann Jemeli Koech

Elgeyo Border Settlement Scheme/238 Beneficial Interest Of 10 Acres.



Constantina Jepkosgei	1.3 Ha to hold in trust of Benard Koech, Benjamin Koech and Loice Koech
Christina Chepkoskei Chesang	1.3 Ha to hold in trust of Nelly Koech and Lydia Koech
Ann Jemeli	1.3 Ha to hold in trust of Nancy Koech, Phylis Koech, Hillary Koech, Zeddy Koech and Mercy Koech

4. Benjamin Koech and Hillary Koech proposed that the estate should be distributed in line with section 40 of the *Law of Succession Act*. That the 1st House has 4 units, the 2nd House has 3 units while the 3rd house has 6 units hence the distribution should be according to the number of units upper house hence equitable. Further that the wives of the 1st and 2nd House to maintain their matrimonial homes on property known as Elgeyo Border Settlement Scheme.238 while the wife of the 3rd House to maintain her matrimonial home on the property known as Kaptagat/Lotonyok (Koilel) Block 25.

Analysis and determination

5. I have considered the proposed modes of distribution as advanced by the parties and the starting point would be the provisions of section 40 of the *Law of Succession Act* which provides for where an intestate was polygamous. It states 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 within each house shall then be in accordance with the rules set out in sections 35 to 38.”

6. Where a person who dies without a will has been married to multiple spouses under a legal system that allows polygamy, their personal belongings, household items, and remaining estate assets shall initially be distributed among the different family units based on the number of children within each unit, while also counting each surviving spouse as one additional unit when calculating the distribution shares.

7. In the case of Stephen Gitonga M’murithi Vs Faith Ngirumurithi [2015] eKLR the Court of Appeal held that:-

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”

8. The mode of distribution of the estate of a person who dies ‘intestate’ is provided for by Sections 66 and 39 of the *Law of Succession Act* as follows: -



Section 66 of the Law of Succession provides that: -

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the following order of preference –

- a. surviving spouse or spouses, with or without association of other beneficiaries;
- b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- c. the Public Trustee; and
- d. creditors

Provided that, where there is partial intestacy, letters of administration in respect of the intestate shall be granted to any executor or executors who prove the will.

Section 39 of the Act provides:

1. Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority -
 - (a) Father; or if dead
 - (b) Mother; or if dead
 - b. Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none.
 - c. Half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none.
 - d. The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
- (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the state, and be paid into the Consolidated Fund.

9. The deceased Paul Nicholas Tuwei left behind ten (10) children from three houses and three (3) surviving widows. Rather than creating disparate trust arrangements that may work inequities between houses, this court finds it appropriate to adopt a unified approach that ensures equal inheritance rights for all children while preserving spousal protection through life interests.

10. In the Rono Vs Rono Civil Appeal No.66 of 2002 Waki J.A. stated inter alia:

“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. 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.”

“More importantly, Section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the houses according to the number of the children of each house, but also adding any wife surviving the deceased as an additional unit to the number of children. “A house in a polygamous setting is defined in Section 3 of the Act as a ‘family unit comprising a wife and children of that wife.’ There is no discrimination of such children on account of sex.”

11. Regarding “equality” in distribution as mentioned in Section 40 above, Court of Appeal in the case of *Stephen Gitonga M’murithi v Faith Ngira Murithi* [2015] eKLR, observed as follows:

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried.

Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each house hold of a polygamous deceased. Applying the above principles it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the *Law of Succession Act* by discriminating against the married daughters of the deceased...”

12. In the case of *In Re Estate of John Musambayi Katumanga – (Deceased)* [2014] eKLR Musyoka J stated as follows:

“Under Section 40 of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the *Law of Succession Act*, the children would divide the estate equally amongst themselves. Section 40 was not designed for the circumstances of the instant estate, but it would appear more appealing for the purpose of 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.”



13. Having considered the authorities cited above and the evidence before this court, it is clear that the fundamental principle underlying Part V of the [Law of Succession Act](#) is the equal distribution of the intestate estate among all children of the deceased. The court notes that while Section 40 provides for distribution among houses according to the number of children in each house plus the surviving spouse as an additional unit, this does not mandate absolute equality between houses but rather ensures proportionate distribution based on the size of each family unit.
14. In the present case, this court finds that the proposal by Benjamin Koech and Hillary Koech for distribution in accordance with Section 40 based on the unit system is legally sound and equitable. The mathematical computation shows that the 1st House comprises 4 units (3 children plus 1 surviving wife), the 2nd House comprises 3 units (2 children plus 1 surviving wife), and the 3rd House comprises 6 units (5 children plus 1 surviving wife), totalling 13 units. This distribution ensures that each unit receives a proportionate share of the estate while maintaining the integrity of the family structure as envisaged by the Act.
15. With regard to the petitioners' proposal for equal distribution among the three houses irrespective of the number of children in each house, this court finds such an approach inconsistent with the clear provisions of Section 40 of the [Law of Succession Act](#). Such a distribution would disadvantage the 3rd House, which has the largest number of beneficiaries, and would constitute a departure from the statutory framework without justification. The law specifically requires consideration of the number of children in each house, and this court cannot substitute its discretion for the clear mandates of the statute. There are many cases to be found in the superior courts anchoring the distribution on the principle of equal distribution in Kenya's intestate estate clearly stated in Art. 27 of [the constitution](#). The probate Court's aim is for a fair distribution among a surviving spouse or spouses and children with specific provisions for immovable and movable assets survived of the deceased. It is a long-standing maxim that equality is equity as the basis for the distribution of property upon the demise of the deceased.
16. [The constitution](#) of Kenya 2010 in its preamble declares as follows: We the people of Kenya are committed to nurturing and protecting the well-being of the individual, the family, communities and the Nation This same constitution commits the state organs and the citizenry to the goal of achieving equality under Art. 27. It also binds us to the type of society it wishes to create based on equality, dignity, security and also experiencing full enjoyment of the rights in the Chapter 4 of [the constitution](#) (See Articles 26, 27, 28 & 29) of the Charter. The right to equality under Article 27 (1&4) of [the constitution](#) comprises guarantees that the law will protect and benefit people equally and a prohibition on unfair discrimination. It is my view that in the inheritance spectrum of rights applying culture and customs in our multi ethnic communities by ignoring the constitutional provisions under Art. 26-29 may continue leaving deep scars to those discriminated on grounds of sex, gender, marriage, etc. The constitutional court of South Africa in Fraser v Children's Court, Pretoria North and Others 1997(2) SA 261 laid down the importance of the right to equality as reminisced herein in the following extract. " There can be no doubt that the guarantee of equality lies at the very heart of [the constitution](#). It permeates and defines the very ethos upon which [the Constitution](#) is premised. In the very first paragraph of the preamble it is declared that there is a need to create a new order in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms"
17. The inclusion of this article on equality in the 2010 constitution brought to a closure to discrimination against any of the grounds textualized in Art 27 (4) of the Supreme Law of the Land. Therefore, any decision making process by the organs of state, independent institutions, tribunals or courts and persons, vested with powers exercisable under Ar. 10 of the same constitution shall take all appropriate



measures to eliminate discrimination which threaten, infringe, or violate rights of other citizens alike. To that extent, any litigation on intestate estate including probate testamentary estate anything done to promote an fair discrimination under Art. 27(4) would be deemed to have violated the constitution. The drafters of the Law of Succession Act in 1981 attached great importance to the doctrines of equity and equality. There is so much hue and cry from some of our communities who hold the view that it is a doctrine fashioned and infused in the constitution 2010. That is far from the truth.

18. Based on the foregoing analysis and in accordance with Section 40 of the Law of Succession Act, this court hereby orders that the estate of the late Paul Nicholas Tuwei be distributed as follows. The estate shall be divided among the three houses in the proportion of their respective units bearing in mind the provisions of Section 38 of the same Act. with the 1st House receiving 4, the 2nd House receiving 3 of the estate, and the 3rd House receiving 6 units. A certificate of confirmation shall be extracted in the following terms:



NO.	PROPERTY	BENEFICIARY	SHARE
Kaptagat/lotonyok Block 25 (2.71 ha)	Constantina Jepkosgei, Benard Koech, Benjamin Koech, Loice Koech, Christina Chepkoskei Chesang, Nelly Koech, Lydia Koech, Ann Jemeli, Nancy Koech, Phylis Koech, Hillary Koech, Zeddy Koech, Mercy Koech	Equal share	
Elgeyo Border Settlement/238 (10 acres)	Constantina Jepkosgei, Benard Koech, Benjamin Koech, Loice Koech, Christina Chepkoskei Chesang, Nelly Koech, Lydia Koech, Ann Jemeli, Nancy Koech, Phylis Koech, Hillary Koech, Zeddy Koech, Mercy Koech	Equal share	
Keiyo South/ Chepsigot "B"/518 (0.38 ha)	Constantina Jepkosgei, Benard Koech,	Equal share	



		Benjamin Koech, Loice Koech, Christina Chepkoskei Chesang, Nelly Koech, Lydia Koech, Ann Jemeli, Nancy Koech, Phylis Koech, Hillary Koech, Zeddy Koech, Mercy Koech	
Keiyo Chepsigot (0.1 ha)	South/ "B"/2893	Constantina Jepkosgei, Benard Koech, Benjamin Koech, Loice Koech, Christina Chepkoskei Chesang, Nelly Koech, Lydia Koech, Ann Jemeli, Nancy Koech, Phylis Koech, Hillary Koech, Zeddy Koech, Mercy Koech	Equal share
Keiyo Chepsigot (0.11 ha)	South/ "B"/2895	Constantina Jepkosgei, Benard Koech, Benjamin Koech, Loice Koech, Christina Chepkoskei Chesang, Nelly Koech,	Equal share



	Lydia Koech, Ann Jemeli, Nancy Koech, Phylis Koech, Hillary Koech, Zeddy Koech, Mercy Koech	
Kaptagat/lotonyok Block 2/16 (0.04 ha)	Constantina Jepkosgei, Benard Koech, Benjamin Koech, Loice Koech, Christina Chepkoskei Chesang, Nelly Koech, Lydia Koech, Ann Jemeli, Nancy Koech, Phylis Koech, Hillary Koech, Zeddy Koech, Mercy Koech	Equal share

19. For emphasis purposes, each beneficiary including the surviving widows, receives their individual share as absolute owners with the surviving widows holding a life interest over their allocations, which shall devolve to their children upon remarriage or death.
20. This Court recognizes that certain smaller or unique properties may not be practically divisible among thirteen beneficiaries without creating economically unviable portions that diminish these estate's value. In such cases, beneficiaries may pursue alternative arrangements including sale with equitable distribution of proceeds, buyout arrangements, or other mutually agreed commercial solutions.
21. Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 19TH DAY OF SEPTEMBER, 2025

.....

R. NYAKUNDI
JUDGE

