



**In re Estate of Paul Kimiti Cherutich (Deceased) (Succession Cause 33 of 2022) [2024] KEHC 6644 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6644 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 33 OF 2022**

**JRA WANANDA, J**

**JUNE 7, 2024**

**IN THE ESTATE OF THE LATE PAUL KIMITEI CHERUTICH  
DECEASED**

**BETWEEN**

**SAMSON LAGAT KIMITEI ..... OBJECTOR**

**AND**

**HARON CHEBOI CHERUTICH ..... 1<sup>ST</sup> PETITIONER**

**SELINA JEPTANUI CHERUTICH ..... 2<sup>ND</sup> PETITIONER**

**RULING**

1. I delivered a Preliminary Ruling in this matter on 28/04/2023. In the Ruling, I gave the background to this matter as follows:

- “1. On 27<sup>th</sup> April 2022, the Petitioners obtained Letters of Administration Intestate over the estate in this matter. However, subsequently, the Objector applied for revocation of the Grant on the ground that the same was obtained fraudulently.
2. Later, by a compromise the Objector was appointed a co-Administrator and the parties were then given time to discuss and explore an amicable settlement.
3. The parties were however unable to agree. In the circumstances, the Court directed them to file their respective modes of distribution after which the Court would give a Ruling. Pursuant thereto, the parties have presented their separate proposed modes of distribution and the Court was now to interrogate the same and deliver a Ruling.”



2. I then further stated as follows:

- “ 1. However, in the course of preparing the Ruling, I have noted the following matters:
- a. The 1<sup>st</sup> property referred to by the Petitioners is Karuna/Sosian Block 9 (Cheplasgei/50). The parties are agreed on its existence save that the Petitioner places its size at 28.6 acres while the Objector places it at 20 acres. However, there is copy of a Title Deed in the record showing that the size of the property is 11.45 Hectares. Converted accordingly, this translates to approximately 28.3 acres. I will therefore refer to this property as Karuna/Sosian Block 9 (Cheplasgei/50) measuring 28.3 acres.
  - b. The 2<sup>nd</sup> property referred to by the Petitioners is Irong Block/68 whose size the Petitioners place at 11 acres. There is also a letter from the Chief in the record referring to Irong Block/68. On his part, the Objector refers to Irong Block/67 whose size he similarly places at 11 acres. The parties’ submissions on these property(ies) are strikingly similar. However, the Objector has exhibited a Search Report which refers to Irong Block/67 and shows the size as approximately 4.4 acres.
  - c. The 3<sup>rd</sup> property referred to by the Petitioner is Karuna (Sosiani Block 5 (Kambi Simba/41 whose size the Petitioner places at 7 acres. On his part, the Objector refers to Karuna (Sosiani Block 4 (Cheplaskei/41 which he similarly places at 7 acres. However, none of the parties has presented a copy of any title document. The Chief’s letter on the other hand simply refers to Karura Sosiani Block 5.
  - d. The Objector has referred to a 4<sup>th</sup> property namely, Karuna/Sosiani Block 6 (Kaplolo) measuring 20 acres. The Petitioner has not at all referred to this property nor mentioned anything about it.
5. The above accounts are clearly conflicting and contradictory and it will not be in the interest of justice for this Court to finally decide this matter before the said facts are clarified. In the circumstances, I give directions herein in terms of a Preliminary Ruling as follows: .....
- ”

3. Having pointed out the above conflicting and contradictory accounts, I directed as follows:

- “i) The Petitioners and the Objectors are hereby directed to each file and serve, within 30 days from the date hereof, respective Further or Supplementary Affidavits limited to only the following:
- a. Whether the properties described as Irong Block/67 and Irong Block/68 refer to one and the same property or whether they are different. Additionally, the parties shall exhibit a copy or copies of the title document(s) and/or Search Reports or any other
- ”



supporting document(s) confirming ownership, acreage and/or any other relevant particulars.

- b. Whether the properties described as Karuna (Sosiani Block 5 (Kambi Simba/41 and Karuna (Sosiani Block 4 (Cheplaskei/41 and which both parties place at 7 acres refer to one and the same property or whether they are different. Additionally, the parties shall exhibit a copy or copies of the title document(s) and/or Search Reports or any other supporting document(s) confirming ownership, acreage and/or any other relevant particulars.
- c. Regarding the property described as Karuna/Sosiani Block 6 (Kaplolo)33 referred to by the Objector and stated by him to measure 20 acres, the parties shall exhibit a copy or copies of the title document(s) and/or Search Reports or any other supporting document(s) confirming ownership, acreage and/or any other relevant particulars.

The Court will then deliver a final Ruling after the above directions have been complied with and the particulars stated submitted.

4. The background to this matter is that one Paul Kimiti Cherutich died intestate on 29/01/2015. By the Petition dated 22/09/2021, the Petitioners (son and daughter of the deceased) through the firm of Magut Kirigo & Co. Advocates sought from this Court a Grant of Letters of Administration for the estate. In the Petition, it was stated that during his lifetime the deceased had married 3 wives and got 16 children. 2 of the widows are however deceased. After going through the usual legal processes, on 27/04/2022 this Court issued the Grant of Letters of Administration Intestate as prayed.
5. On 29/07/2022, a Notice of Change of Advocates was filed appointing Rioba Omboto & Co. as the new Advocates for the Respondents-Petitioners.
6. However, a spanner was “thrown into the works” when on 1/08/2022, the Objector through Messrs Kogo Mutai & Co. Advocates filed Summons seeking Revocation of the Grant. The grounds alleged were, in summary, that the Grant was obtained fraudulently by the making of a false statement or by concealment of material information, that the Petitioners did not seek the consent of the Objector before applying for the Grant, and that the Petitioners presented false documents to the Court including a letter from a Chief.
7. In his Supporting Affidavit attached to the Summons, the Objector confirmed that indeed the deceased had left behind 3 families with 1 surviving widow and 16 children. He also stated that he was from the 2<sup>nd</sup> house. He reiterated the grounds of the Application as already stated and added that after the death of the deceased, attempts to have a meeting with the Petitioners have been futile as they have always declined to attend family meetings, that on or about 5/07/2022 he received a letter from M/S Rioba Omboto & Co. Advocates on a proposed mode of distribution of the estate and that is when he learnt that the Petitioners had secretly moved the Court for letters of Administration, that the documents used in obtaining the Certificate of death are suspect since at the time of the death of the deceased, the Objector was living with the deceased and all his documents were left in the Objector’s custody, that the 2<sup>nd</sup> family had been left out in the administration of the estate and attempts to have the Petitioners on a round-table meeting have been met with hostility, and that the Grant ought be revoked or annulled and a fresh Grant be issued with a nominee from the 2<sup>nd</sup> family.



8. Incidentally, on 12/09/2022 the Petitioners filed their own Summons seeking Confirmation of the Grant. In their Supporting Affidavit, they stated that the deceased left behind 3 properties aggregating 46.6 acres of land, namely, Irong/Bugar/68, Karuna/Sosiani Block 9 (Cheplasgei/50) and Karuna Sosiani Block 5 (Kambi Simba)/41. They then presented their proposed mode of distribution among the 3 houses.
9. On 14/11/2022 by compromise of the parties, the Objector was enjoined as a co-Administrator of the estate. The parties were then given time to discuss and explore an agreement on the mode of distribution. Unfortunately, they were unable to reach a settlement. In the circumstances, on 16/01/2023, the Court directed the parties to tender written submissions on the issue for the Court to make a Ruling.
10. Pursuant thereto, the Petitioners filed their Submissions on 20/01/2023 and the Objector filed his Submissions, together with an Affidavit, on 13/02/2023.

### **Petitioners' Submissions**

11. The Petitioners submitted that the acreage of the 3 properties were as follows:

Irong/Bugar/68	11 Acres
Karuna/Sosian Block 9 (Cheplasgei/50)	28.6 Acres
Karuna/Sosian Block 5 (Kambi Simba/41)	7 Acres

12. They reiterated their preferred mode of distribution and submitted that the proposal is pegged on the current status of where the beneficiaries stay save for adjustments made owing to the size of acreage occupied by some of the dependants, and that the proposal is based on the partial agreement reached by majority of the dependents save for the Objector.

### **Objector's Submissions and Proposed mode of distribution**

13. On his part, in his said Affidavit, the Objector deponed that during his lifetime, the deceased had 4 parcels of land as follows:

Irong/Bugar/67	11 Acres
Karuna/Sosian Block 9 (Cheplasgei/50)	28 Acres
Karuna/Sosian Block 4 (Cheplasgei/41)	7 Acres
Karuna/Sosian Block 6 (Kaplolo/33)	20. Acres

14. He added that to date, each family resides in the parcels as allocated by the deceased and no one has encroached on anyone's portion, that their late brother, Lazarus Kimitei owned 6 acres from Karuna/Sosian Block 9 (Cheplasgei)/50 which leaves 22 acres, that the 6 acres were fenced off and utilized by the family of the late Lazarus Kimitei during the lifetime of the deceased, that there is a dam in the same property Karuna/Sosian Block 9(Cheplasgei)/50 covering an area of 1 acre and which is normally used to harvest water during the rainy season,



15. He deponed further that during his lifetime, the deceased had distributed his estate and all beneficiaries took over their respective portions during his lifetime and the distribution remains to date with distinct boundaries. He deponed further that when they were young, the 1<sup>st</sup> family came from Kerio Valley and settled in Karuna (Sosian Block 6 (Kaplolo)/33, however they learnt that the 1<sup>st</sup> Petitioner had registered the parcel in his name and evicted his brother Joseph Kiptanui Cherutich from the parcel, and attempts to settle the matter during the lifetime of the deceased were futile as each time there was a family meeting the 1<sup>st</sup> Petitioner would walk out on them.
16. He deponed further that his proposed distribution has factored that the 1<sup>st</sup> family has 20 acres already in the name of the 1<sup>st</sup> Petitioner, that during his lifetime, the deceased took the Objector's brother, one Wilson Kiptoo Kimitei to live in Irong/Bugar Block 67 and allocated him 3 acres which he occupies to date, that his proposed mode of distribution is based on the current prevailing market value of the properties as well as the climatic conditions, and that Karuna (Sosian Block 9 (Cheplaskei)/50 is arid land hence unproductive and lags behind Irong/Bugar Block 67 and Karuna (Sosian Block 9 (Cheplaskei)/50.
17. In the written Submissions, the Objector's Counsel submitted that during their negotiations, it was unanimously agreed that 6 acres in Karuna (Sosian Block 99 (Cheplaskei)/50 belonged to one Lazarus Kimitei (deceased) having bought it however it was consolidated with that of the deceased during registration, that it was agreed by all parties that the 6 acres was fenced off in 1980s and is being utilized by the family of the said Lazarus Kimitei, that the 1<sup>st</sup> Petitioner, Harun Cheboi Cherutich registered Karuna/Sosiani Block 6 (Kaplolo)/33 as his property under unclear circumstances, that the property was occupied by the 1<sup>st</sup> family when they first came from Keiyo Valley and registration of the 1<sup>st</sup> Petitioner as the proprietor was the major issue that led to total disagreement by all the parties/beneficiaries, and that the 1<sup>st</sup> Petitioner has 20 acres already registered in his name and has completely refused to acknowledge that fact.
18. He urged the Court to be guided by Section 42 of the *Law of Succession Act* which requires that in distributing an estate the Court should take into account previous benefits granted to the beneficiaries by the deceased during his lifetime, that during his lifetime the deceased settled all his 3 wives in their respective portions and none encroached and/or utilized the other's parcel, that the deceased moved from house to house and at no particular time did he have all the 3 wives reside in one parcel, that when the deceased saw the unproductive nature of Karuna/Sosiani Block 9 (Cheplaskei)/50, he decided to settle one of his sons from the 2<sup>nd</sup> house at Irong/Bugar Block 67 and allocated him 3 acres which he occupies to date, that the deceased settled the 1<sup>st</sup> family at Karuna/Sosiani Block 6 (Kaplolo)/33 where the 1<sup>st</sup> wife had her home and was buried upon her death, that the 1<sup>st</sup> Petitioner through dubious means had the property registered in his name and attempts by the deceased to settle the issue were met with resistance by the 1<sup>st</sup> Petitioner, that the 2<sup>nd</sup> family was settled at Karuna/Sosian Block 9 (Cheplaskei)/50 where the 2<sup>nd</sup> wife lived until her death, that this was also the farm where the deceased lived during his old age till his death and was also buried there, and that the 3<sup>rd</sup> family was settled at Irong/Bugar Block 67 and the 3<sup>rd</sup> widow lives there together with her children.

### **Additional Affidavits**

19. Pursuant to the directions that I gave in the Preliminary Ruling as aforesaid requiring the parties to make some clarifications, the 1<sup>st</sup> Petitioner filed his Further Affidavit on 26/05/2023 while the Objector filed his Supplementary Affidavit on 4/10/2023.



### **Petitioners' Further Affidavit**

20. In the Further Affidavit, the 1<sup>st</sup> Petitioner made clarifications as follows:
- a. That regarding the property variously named as Irong/Block/67 and Irong/Block/68, respectively, the correct description is Irong/Bugar/Block 67, measuring 4.4 Ha and registered in the name of the deceased. He attached a copy of the Title Deed
  - b. That the property described as Karuna/Sosiani Block 4(Kambi Simba)/41 measuring 2.7 Ha is registered in the name of the deceased. He attached a copy of the Title Deed.
  - c. That the property Karuna/Sosiani Block 9 (Cheplaskei)50 measuring 11.45 Ha is registered in the name of the deceased and is different from Karuna/Sosiani Block 4 (Kambi Simba)41 aforesaid. He attached a copy of the Title Deed.
  - d. That regarding the property Karuna/Sosiani Block 6 (Kaploplo)59 measuring 20 Acres, the same is not known to him.
  - e. That the property Karuna/Sosiani Block 6 (Kaploplo)51 measuring 6.76 Ha registered on 9/03/1994 belongs to him and does not form part of the estate of the deceased hence not part of the properties meant for distribution. He attached a copy of the Title Deed and a Search Report.

### **Objector's Supplementary Affidavit**

21. On his part, the Objector made the following clarifications:
- a. That the property referred to as Irong/Bugar/67 and Irong/Block/68 refer to Irong/Bugar/67 measuring 4.4 Ha and belongs to the deceased. He too attached a copy of the Title Deed.
  - b. That the property Karuna/Sosiani Block 4(Kambi Simba)/41 was in his Submissions erroneously described as Karuna/Sosiani Block 4 (Cheplaskei)41. He attached a copy of the Title Deed.
  - c. That the property Karuna/Sosiani Block 6(Kaploplo)33 should have been the property described as Moibeki/Moibeki/Simba/4(Kaploplo)51 belonging to the deceased but registered in the name of the 1<sup>st</sup> Petitioner's mother who holds it in trust for the estate of the deceased.

### **Determination**

22. The issues for this Court to determine is “the identity of the property available for distribution of the estate of the deceased, the legitimate beneficiaries of the estate and finally, the fair and/or just mode of distributing the estate amongst the beneficiaries”:
23. As aforesaid, it is not disputed that the deceased was polygamous. It is also agreed that the deceased had 3 wives and 17 children and that the 1st and 2nd wife had 5 children each while the 3rd wife had 6 children. Only the third wife is however still alive. The 1st Petitioner is from the 1st house, the 2nd Petitioner is from the 3rd house and the Objector is from the 2nd house. The parties are also in agreement that all family members from each of the 3 houses are entitled to share in the distribution of the estate. There is therefore no contention on the identity of the beneficiaries.
24. The respective rival proposed modes of distribution are as follows:



Petitioners Proposal

1 <sup>st</sup> House (5 Beneficiaries)	Irong/Bugar/67	11 Acres	3 Acres
	Karuna (Sosian Block 5 (Kambi Simba/41	7 Acres	7 Acres
	Karuna (Sosian Block 99 (Cheplaskei/50	28.6 Acres	6 Acres
2 <sup>nd</sup> House (5 Beneficiaries)	Irong/Bugar/68	3 Acres	
	Karuna (Sosian Block 5 (Kambi Simba/41	Nil	
	Karuna (Sosian Block 99 (Cheplaskei/50	13 Acres	
3 <sup>rd</sup> House (7 Beneficiaries)	Irong/Bugar/68	5 Acres	
	Karuna (Sosian Block 5 (Kambi Simba/41	Nil	
	Karuna (Sosian Block 99 (Cheplaskei/50	11 Acres	

Objector's Proposal



1 <sup>st</sup> House (5 Beneficiaries)	Irong/Bugar/68	11 Acres	7 Acres
	Karuna (Sosian Block 5 (Kambi Simba/41	7 Acres	Nil
	Karuna (Sosian Block 99 (Cheplaskei/50	28.6 Acres	Nil
2 <sup>nd</sup> House (5 Beneficiaries)	Irong/Bugar/68	Nil	
	Karuna (Sosian Block 5 (Kambi Simba/41	2 Acres	
	Karuna (Sosian Block 99 (Cheplaskei/50	22 Acres	
3 <sup>rd</sup> House (7 Beneficiaries)	Irong/Bugar/68	Nil	
	Karuna (Sosian Block 5 (Kambi Simba/41	9 Acres	
	Karuna (Sosian Block 99 (Cheplaskei/50	Nil	

25. As aforesaid, it has now been clarified that the correct descriptions of the above properties are as follows:

Wrong description	Correct Description	Hectares	Acres (Apprx.)
Irong/Bugar/68	Irong/Bugar/67	4.4	10.87
Karuna/Sosian Block 5 (Kambi Simba)/41	Karuna/Sosian Block 4 (Kambi Simba)/41	2.7.	6.67
Karuna (Sosian Block 99 (Cheplaskei/50	Karuna/Sosian Block 9 (Cheplaskei)/50	11.45	28.29

26. Regarding identification of the property comprising the estate, upon the subsequent clarifications made by the parties as directed by the Court, and also from the copies of the title documents exhibited, the parties are again in agreement in respect to the 3 said properties.
27. The Objector has however come up with a fourth property, namely, Karuna/Sosiani Block 6(Kaploplo)33. He claims that the description of this property should have been Moibeki/Moibeki/Simba/4(Kaploplo)51 belonging to the deceased but which is registered in the name of the 1<sup>st</sup> Petitioner's mother and who holds it in trust for the estate of the deceased. On his part, the 1<sup>st</sup> Petitioner states that the property Karuna/Sosiani Block 6 (Kaploplo)51 measuring 6.76 Ha and registered on



9/03/1994 belongs to him and does not form part of the estate of the deceased hence not part of the properties available for distribution. Both parties have attached title documents.

28. Regarding this fourth property, Karuna/Sosiani Block 6(Kaploplo)33 alleged by the Objector to comprise part of the estate, the parties are in agreement that the same is registered in the name of the 1<sup>st</sup> Petitioner. The allegations made by the Objector regarding its ownership, apart from bare allegations, have not been supported by any evidence whatsoever. There is nothing presented to demonstrate that the property at any time belonged to the deceased or that the same was registered in the name of the 1<sup>st</sup> Petitioner's mother to hold it in trust for the family.
29. The allegation that the property ought to have been or used to be known as Moibeki/Moibeki/Simba/4(Kaploplo)51 is also not backed by any evidence. Granted, the Objector has exhibited a copy of the green card for the Moibeki/Simba/4(Kaploplo)51 which shows that up to the year 1994, the property was registered in the name of one Soti Leboi, presumably the 1<sup>st</sup> Petitioner's mother as the Objector alleges. However, even assuming that Moibeki/Moibeki/Simba/4(Kaploplo)51 is indeed the same property as Karuna/Sosiani Block 6(Kaploplo)33, where is the evidence that the same used to belong to the deceased or that the 1<sup>st</sup> Petitioner's mother was holding it in trust for the family?
30. My doubts that the properties are the same is also emboldened by the fact that while the green card produced by the Objector indicates that the Title Deed was issued on 27/11/1994 in the name of the said Soti Leboi, the Title Deed produced by the 1<sup>st</sup> Petitioner indicates that the Title Deed was issued much earlier on 9/03/1994 and in the name of the 1<sup>st</sup> Petitioner.
31. I also note that the deceased died in the year 2015. That is a whole 21 years after the property was registered in the name of the 1<sup>st</sup> Petitioner in the year 1994 and Title Deed issued in the 1<sup>st</sup> Petitioner's name. If the property indeed belonged to the deceased, how come there is no evidence exhibited to demonstrate that he at any time raised any issue with such registration?
32. It is trite law that he who alleges must prove? This is what is stated Section 107 and 108 of the Evidence Act stipulates in the following terms:

“ 107

- (1). 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.
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

33. In the circumstances, I find that the Objector has totally failed to demonstrate that the alleged fourth property, Karuna/Sosiani Block 6(Kaploplo)33 forms part of the estate of the deceased for purposes of distribution of the estate or that it should be treated as a benefit already received by the 1<sup>st</sup> house from the estate.



34. Regarding distribution of the estate of a polygamous intestate, Section 40 of the [Law of Succession Act](#) 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 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”.

35. As was stated by Hon. Justice J.K. Karanja in the case of [In re Estate of Michael George Tendwa Said \(Deceased\)](#) [2020] eKLR, Section 40 above is the applicable law where there is no agreement on distribution of the estate. He stated as follows:

“any proposed mode of distribution ought to be compatible with and in accordance with the provision thereby leaving no room for distribution based on the whim of the holder of the grant or his/her sentimental feelings”

36. 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...”

37. Further, 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.”

38. However, in the case of *Esther Wanjiku Burugu v Margaret Wairimu Burugu*, Civil Appeal No 319 of 2002, the Court of Appeal guided that Section 40 does not stipulate that the division of the estate must be equal and states that although the distribution of the estate of a polygamous person is in the first instant to be among the houses, nonetheless distribution would be done according to the number of children in each house. The Court stated that the language adopted in Section 40 negates any argument that the division must necessarily be equal between or among the houses, for to say so, would ignore the fact that in most instances, the number of children in each house is never equal.

39. Similarly, in another Court of Appeal case, namely, *Mary Rono v Jane Rono & another* [2005] eKLR, while concurring with the Judgment of Waki JJ, Omollo JJ stated that if Parliament had intended that there must be equality between the houses, then there would have been no need to provide in Section 40 above that the number of children in each house be taken into account. This is how he put it:

“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.”

40. The above views, read together, give rise to the generally agreed position that Section 40 does not give blanket discretion to a Court to deviate from the general principles stipulated therein. Thus, where a matter is contentious and the parties have not reached a consent, the Court is bound to apply the statutory provisions. In other words, the Court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. It is however also agreed that a Court has some level of limited residuary discretion within the statutory provisions to make adjustment to the share of each house or of a beneficiary. This was the view adopted in the case of *Re Estate of Chesimbili Sindani (Deceased)* [2021] eKLR.

41. Regarding distribution, the Objector states that each of 3 families resides in the parcels allocated to each by the deceased and that no house has encroached on another house’s portion. He alleged further that during his lifetime, the deceased had distributed his estate and all beneficiaries took over their respective portions during his lifetime and that the same distribution remains to date with distinct boundaries.

42. It is also clear that the Objector’s basis for challenging the mode of distribution proposed by the Petitioners is that the 1<sup>st</sup> house family had already been given substantial portions of the estate and should therefore get a lesser share. He therefore urges the Court to be guided by Section 42 of the



Law of Succession Act which requires that in distributing an estate, the Court should take into account previous benefits granted to the beneficiaries by the deceased during his lifetime.

43. He deponed further that his proposed distribution has factored that the 1<sup>st</sup> family has 20 acres already in the name of the 1<sup>st</sup> Petitioner, that during his lifetime, the deceased took the Objector's brother, one Wilson Kiptoo Kimitei to live in Irong/Bugar Block 67 and allocated him 3 acres which he occupies to date, that his proposed mode of distribution is based on the current prevailing market value of the properties as well as the climatic conditions, and that Karuna (Sosian Block 9 (Cheplaskei)/50 is arid land hence unproductive and lags behind Irong/Bugar Block 67 and Karuna (Sosian Block 9 (Cheplaskei)/50.
44. Regarding the property, Karuna/Sosian Block 9 (Cheplaskei)/50 said to measure about 28 acres (11.45Ha), the Objector contended that his late brother, Lazarus Kimitei (from the same 2<sup>nd</sup> house as the Objector) owned 6 acres therefrom which leaves 22 acres, that the 6 acres were fenced off and utilized by the family of the late said Lazarus Kimitei during the lifetime of the deceased, and that there is a dam in the same property Karuna/Sosian Block 9(Cheplaskei)/50 covering an area of 1 acre and which is normally used to harvest water during the rainy season. He also stated that his family (2<sup>nd</sup> house) was settled on the said Karuna/Sosian Block 9 (Cheplaskei)/50 where his mother (the 2<sup>nd</sup> wife) lived until her death, that this was also the farm where the deceased lived during his old age till his death and was also buried there. He added that during family negotiations, it was unanimously agreed that the said 6 acres in Karuna (Sosian Block 9 (Cheplaskei)/50 belonged to the said the late Lazarus Kimitei having bought it however it was consolidated with that of the deceased during registration. He contended further that it was agreed by all parties that the 6 acres was fenced off in 1980s and is being utilized by the family of the said Lazarus Kimitei. The Objector therefore takes the position that the 1<sup>st</sup> house should get nothing in this property.
45. Regarding the property, Irong/Bugar Block 67 measuring about 10.9 acres (4.4 Ha), the Objector urged that in light of the unproductive nature of Karuna/Sosiani Block 9 (Cheplaskei)/50, the deceased decided to settle one of his sons from the 2<sup>nd</sup> house at Irong/Bugar Block 67 and allocated him 3 acres which he occupies to date. He added that the 3<sup>rd</sup> family was also settled on the same Irong/Bugar Block 67 and that the 3<sup>rd</sup> widow lives there together with her children. The Objector therefore again takes the position that the 1<sup>st</sup> house should get nothing in this property.
46. Regarding Karuna (Sosian Block 6 (Kaplolo)/51 measuring about 6.6 acres (2.7 Ha), the Objector alleges that when they were young, the 1<sup>st</sup> house family came from Kerio Valley and settled on the property, that however, they later learnt that the 1<sup>st</sup> Petitioner had registered the parcel in his name and evicted his brother Joseph Kiptanui Cherutich (from the same 1<sup>st</sup> house as the 1<sup>st</sup> Petitioner) therefrom, that attempts to settle the matter during the lifetime of the deceased were futile. He alleged that the 1<sup>st</sup> Petitioner registered the property in his name under unclear circumstances, that the property was occupied by the 1<sup>st</sup> family when they first came from Keiyo Valley and registration of the 1<sup>st</sup> Petitioner as the proprietor was the major issue that led to total disagreement in the family. He urged that the 1<sup>st</sup> Petitioner has 20 acres already registered in his name but has completely refused to acknowledge this fact. He alleged further that the deceased settled the 1<sup>st</sup> family at Karuna/Sosiani Block 6 (Kaplolo)/33 where the 1<sup>st</sup> wife had her home and was buried upon her death, and that the 1<sup>st</sup> Petitioner through dubious means had the property registered in his name.
47. Regarding the foregoing matters alleged by the Objector, again I observe that they are all bare allegations with no supporting evidence. The Objector's challenge is heavily hinged on the allegation that the property Karuna/Sosiani Block 6 (Kaplolo)/33 registered in the name of the 1<sup>st</sup> Petitioner should be treated as part of the estate. He then argues that since the property is already in the name of



the 1<sup>st</sup> Petitioner who is from the 1<sup>st</sup> house family, then that house should not receive any share in the properties Irong/Bugar/67 and Karuna/Sosian Block 9 (Cheplaskei)/50. Since I have however already found that the Objector has failed to prove the allegation that Karuna/Sosiani Block 6 (Kaplolo)/33 was part of the estate, this submission by the Objector cannot succeed.

48. I therefore find that the Objector has failed to demonstrate that the Court should apply the provisions of Section 42 of the Law of Succession Act since he has failed to prove that any previous benefits had been granted to any of the beneficiaries by the deceased during his lifetime.
49. Regarding the equitability of the rival modes of distribution proposed, the Objector has submitted that his proposed mode of distribution is based on the current prevailing market value of the properties as well as the climatic conditions, and that Karuna (Sosian Block 9 (Cheplaskei)/50 is arid land hence unproductive. He has not however supported this assertion with any evidence.
50. The Petitioners, on their part, have submitted that their proposal is pegged on the current status of where the beneficiaries occupy save for adjustments made owing to the size of acreage occupied by some of the dependants, and that the proposal is based on the partial agreement reached by majority of the dependents save for the Objector. Similarly, these statements have also been made without any supporting evidence.
51. Although both parties have not backed their arguments with credible evidence, comparing the rival proposals put forward, and considering my earlier findings hereinabove, I find that the one by the Petitioners proposes sharing of the estate in a fairer and more equitable manner than the one presented by the Objector. I therefore accept and adopt the Petitioners' proposal.

### **Final Order**

52. In the premises, I uphold the mode of distribution proposed by the Petitioners and order as follows:
  - i. I allow the Summons for Confirmation of Grant filed by the Petitioners and dated 30/06/2022, together with and/or including the mode of distribution contained at Paragraph 7 of the Supporting Affidavit thereto.
  - ii. The estate shall therefore be distributed in terms of (i) above and a Certificate of Confirmation of Grant issued in accordance thereto.
  - iii. This being a family matter, I make no order on costs.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 7<sup>TH</sup> DAY OF JUNE 2024**

.....

**WANANDA J.R. ANURO**

**JUDGE**

Delivered in the Presence of:

Mr. Omboto for Petitioners

Ms. Kogo for Objector

