



**In re Estate of John Karuma Mbiyu (Deceased) (Succession Cause 3398 of 2004) [2024] KEHC 7974 (KLR) (Family) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 7974 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**FAMILY**  
**SUCCESSION CAUSE 3398 OF 2004**  
**HK CHEMITEI, J**  
**JULY 4, 2024**  
**IN THE MATTER OF THE ESTATE OF JOHN KARUMA MBIYU (DECEASED)**  
**BETWEEN**  
**MARGARET WANJIKU KIURU ..... APPLICANT**  
**AND**  
**HENRY KIURU TUBANIA ..... RESPONDENT**

**RULING**

1. This ruling relates to the directions issued by Justice M. A. Odero on 20<sup>th</sup> July, 2023 that:  

“The partial mediation agreement dated 15<sup>th</sup> October, 2022 is hereby adopted by the court. Parties to file and exchange written submissions regarding the mode of distribution of the estate.”
2. The partial mediation settlement agreement on record is dated 7<sup>th</sup> October, 2022 where the parties agreed as follows:
  - (a) The three administrators representing the three households to be as follows: Margaret Wanjiku Kiuru, Joyce Waithira Njenga and Margaret Ngina Kiuru.
  - (b) The deceased’s dependants are as follows: Stanley Njenga Tubania, Njenga Tubania, Henry Kiuru Tubania, Jane Wairimu Tubania and Elizabeth Wanjiru.
  - (c) The certificate of confirmation of grant issued on 22<sup>nd</sup> September, 2017 be revoked and all the dependants listed above to be included in the distribution of the deceased’s estate.



- (d) The parties did not agree on the mode of distribution of the deceased's estate and this aspect was referred back to court for determination.
3. Margaret Wanjiku Kiuru has filed written submissions dated 11<sup>th</sup> August, 2023 urging this court to distribute the deceased's estate in line with Section 40 of the [Law of Succession Act](#). She has placed reliance on the following:
- a. Rule 40 (4) of the [Probate and Administration Rules](#) which states, "Where the deceased has died wholly or partially intestate the applicant shall satisfy the Court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined."
  - b. Section 76 of the [Law of Succession Act](#) whose relevant portion states, "A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion:
    - (a) That the proceedings to obtain the grant were defective in substance;
    - (b) That the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case;
    - (c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
  - c. Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR where the court held as follows:

"The only time grand children inherit from their grand parents is when the grand children's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents."
4. There are no submissions on record by the Respondent.

### **Analysis and Determination**

5. 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 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 with each house shall then be in accordance with the rules set out in sections 35 to 38.
6. In [re Estate of Joseph Eric Owino \(Deceased\)](#) [2022] eKLR the court held as follows:
- "11. The issue for determination by this Court is whether the proposed mode distribution of the estate ought to be adopted as proposed by the 1<sup>st</sup> Administrator.  
The Applicable Law
  12. In a case of this nature where the deceased died intestate and was a polygamous man survived by two widows and children the anchor on distribution of his estate is Section 40 of the [Law of Succession Act](#) which primarily provides as



follows; “(1)Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate, shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

- (2) The distribution of the personal and household effects and the residue of the net interest within each house shall then be in accordance with the rules set out in sections 35 to 38”

The basic scheme is in line with the principles expounded in the following cases Rono –v-Rono Civil Appeal NO. 66 of 2002, where Waki J.A stated *inter alia* that;“ 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 children in 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.”

In addition, in the Matter of Re Estate of Benson Ndirangu Mathenge(deceased) Nakuru HCSC NO. 231 of 1998(Ondeyo J), the deceased was survived by his two widows and their children. The first widow had four children, while the second widow had six children. The court stated that the first house was comprised of five units while second had seven units. The two houses of the deceased combined and looked at in terms of units made up twelve units. The court distributed the estate to the children and the widows treating each as a unit. The land available for distribution was forty acres, which was divided by the court into twelve units. Out of the twelve units, five were given to the first widow and her four children, while the remaining seven units went to the second widow and her six children.

Further, *In the Matter of the Estate of Nelson Kimotho Mbiti*(deceased) HCSC NO.169 of 2000, Koome J directed that the estate of a polygamist be divided in accordance with the provisions of Section 40 of the Act. The estate was divided into units according to the number of children in each house with the widows being added as additional units. The same reasoning was also applied by Judge Ali Roni *in the Estate of Ainea Masinde Walubengo (deceased)* (2017) eKLR stating that “I am of the view that Section 40 of the Law of Succession Act will apply to the circumstances of this Case. Meaning that the Court will distribute the estate of the deceased according to each house taking into account the number of children in each unit including the surviving widow.”

7. According to the Margaret Wanjiku Kiuru’s submissions the deceased was survived by 5 children namely Stanley Njenga Tubania (deceased), Beth Wanjiru, Jane Njenga, John Njenga (deceased) and Henry Kiuru Tubania (deceased). Stanley Tubania (deceased) had no children while John Njenga (deceased) and Henry Kiuru Tubania (deceased) had 6 and 7 children respectively.
8. In the mediation agreement dated 7<sup>th</sup> October 2022 the dependants are listed as Stanley Njenga Tubania, Njenga Tubania, Henry Kiru Tubania, Jane Wairimu Tubania and Elizabeth Wanjiru.
9. It is acknowledged that Stanley died without any child or wife and Njenga and Henry have also died.



10. In view of the above scenario the shares due to the two shall therefore go to their estates and their children who are the deceased grandchildren shall be at liberty to apply for the estate of their parents to be effected.
11. There is no evidence that Jane and Elizabeth have children or not and the presumption of this court is that they are also entitled to the share of their late father's estate. This accords well with the provisions of Section 29 of Cap 160.
12. The deceased's only estate is Karai/Gikambura/273 measuring approximately 2.68 acres as per the now revoked certificate of confirmation of grant dated 22<sup>nd</sup> September, 2017.
13. This court therefore holds that the same be divided equally between the deceased children or their estates as the case may be as hereunder.
  - (a) Estate of John Tubania approximately 0.67 acres.
  - (b) Estate of Henry Tubania approximately 0.67 acres.
  - (c) Jane Wairimu Tubania approximately 0.67 acres
  - (d) Elizabeth Wanjiru approximately 0.67 acres.
  - (e) Being a family matter each party shall bear their own costs.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 4<sup>TH</sup> DAY OF JULY 2024.**

**H K CHEMITEI**

**JUDGE**

