In re the Estate of Joseph Toroitich Cherono (Deceased) (Succession Cause 46 of 2020) [2024] KEHC 10003 (KLR) (9 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10003 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 46 OF 2020

RN NYAKUNDI, J

AUGUST 9, 2024

BETWEEN

PATRICK TOROITICH CHERONO ..... 1ST PETITIONER

KENNETH KIPTOO CHERONO ..... 2ND PETITIONER

AND

RUTH JERONO CHERONO ..... OBJECTOR

RULING

1. What is before me for determination is a chamber summons application expressed to be brought under the provisions of Sections 35, 36, 37, 38 and 40 of the *Law of Succession Act*, Rule 59 and 73 of the Probate and Administration Rules and Section 2, 4, 6 and 9 of the *Matrimonial Property Act*, 2013 and Articles 27(1), 43(3) and 159 of *the Constitution* of Kenya. The applicant seeks reliefs as follows:

    1. In the event the Honourable Court makes a finding that the *Matrimonial Property Act*, 2013 is applicable to this cause, the Objector/Applicant prays for the following orders:

        a. A declaration do issue that all properties/assets acquired between 1967 to date were jointly acquired by Joseph Toroitich Cherono (deceased) and Ruth Jerono Cherono whose estate herein revolves and are therefore matrimonial property with the said Ruth Jerono Cherono being a spouse and half owner of all the said properties/assets.

        b. A declaration do issue that half of all the properties/assets registered in the name of Joseph Toroitich Cherono (deceased) during the period of the marriage between Joseph Toroitich Cherono (deceased) and Ruth Cherono are held in trust for Ruth Jerono Cherono.

        c. A declaration be issued that half of all the properties/assets registered in the name of Joseph Toroitich Cherono (deceased) during the period of the marriage between

Joseph Toroitich Cherono (deceased) and Ruth Jerono Cherono be shared first before the distribution of the estate of Joseph Toroitich Cherono (deceased) to the beneficiaries.

d. A declaration do issue that Ruth Jerono Cherono is the half owner of all movable, all immovable and all the personal assets of the deceased which includes the following:

Land

Parcel of Land No. UASIN GISHU/ILLULA/1

Parcel of Land No. Kaptagat Settlement Scheme/228

Parcel of Land No. Kaptagat Settlement Scheme/214

Parcel of Land No. Tembeleo/Illula Block Munyangwet/74

Eldoret Municipality/Block 21 (King'ong'o)/650

25% shares in Eldoret Municipality/Block 7/26

Kosyin Kabao Area Centre Plot

Kap Apollo Centre Plot.

Kapjagir Land

Kapfrancis Land

Elgeyo Boarder Plot

Farm Beneficiaries.

Motor tractor Reg No. KLR 148 John Deere

Motor tractor Reg No. KSA 734 Ford

Motor tractor Reg No. KLF 984 Massey Ferguson

Motor tractor Reg No. KAE 447 E Same Laser

Class dominator 68 series wheat combine harvester Reg. No. KUX 354

Fertilizer top dressing machine.

Gyro mower.

Two flatbed trailers.

Two scrap trailers.

Wheat planter

Maize planter

Two harrows.

Two chisels

Two tillers

Two farm sprayers

Two water tanks

Two mold board ploughs

Two lister engine.

One semi scrap lorry.

56 cows

20 goats and 30 sheep.

Other Assets

Shares at Kenya airways

Shares at Safaricom Limited

Monies in the Access Bank account no. 0030100000260

Monies in the paramount Bank account No. 060006161187

Monies in the Equity Bank Account No. 0301100092893.

Monies in MPESA No. 0721230117

2. That the honourable court be pleased to give the Objector/Applicant Motor Vehicle Reg No. KCF 646T Toyota Vanguard absolutely.

2. The application is premised on the grounds set out therein and the contents of the affidavit sworn in support of the same by Ruth Jerono Cherono. The applicant deponed as follows:

a. That Joseph Toroitich Cherono (deceased) was married to two wives, the first wife was Rosebella Cherono (deceased) whereas the second wife was Ruth Jerono Cherono, the Objector/Applicant herein.

b. That the applicant is the only surviving widow of Joseph Toroitich Cherono (deceased) having been married to the deceased in the year 1967.

c. That the said marriage was solemnized on 5.12.1975.

d. That the Objector/Applicant settled on the parcel of land No. UASIN GISHU/KAPTAGAT/214 together with the first widow. Rosebella Toroitich Cherono (deceased) and made in their matrimonial home after the said parcel was jointly acquired by Joseph Toroitich Cherono (deceased) and the Objector/Applicant.

e. That in the year 1979, Joseph Toroitich Cherono (deceased) and the Objector/Applicant jointly acquired the parcel of land No. KAPTGAT SETTLEMENT SCHEME/228 and 25% shares in Eldoret Municipality Block 7/26 (town plot) without any contribution from the first widow, Rosebella Toroitich Cherono (deceased).

f. That in the year 1990, Joseph Toroitich Cherono (deceased) and the Objector/Applicant moved to the parcel of land No. UASIN GISHU/ILLULA/1 which was jointly acquired by Joseph Toroitich Cherono (deceased) and the Objector/Applicant in the same year.

g. That the parcel of land UASIN GISHU/ILLULA/1 was jointly acquired by Joseph Toroitich Cherono (deceased) and the Objector/Applicant together with all the farm machineries and livestock in the year 1990 where the deceased and the Objector/Applicant established their matrimonial home, a home the Objector/Applicant lives in to date.

h. That the first wife of Joseph Toroitich Cherono (deceased). Rosebella Cherono (deceased) died in the year 1988 and therefore predeceased Joseph Toroitich Cherono (deceased).

i. That the parcel of land known as UASIN GISHU/ILLULA/1 was bought specifically for purposes of establishing a home for the second house with no contribution from the first wife, Rosebella Cherono (deceased).

j. That at the time Joseph Toroitich Cherono (deceased) and the Objector/Applicant jointly acquired the parcel of land No. UASIN GISHU/ILLULA/1 together with all the farm machinery and livestock in the year 1990, the first wife, Rosebella Cherono was already deceased.

k. That the objector/applicant lived with Joseph Toroitich Cherono (deceased) on the said parcel of land until his demise in the year 2019 and continued to live on the said parcel of land to date.

l. That Rosebella Toroitich Cherono (deceased) did not contribute anything to the acquisition of all the properties forming part of the estate of Joseph Toroitich Cherono (deceased) acquired before her demise in the year 1988.

m. That the parcel of land Registration No. TEMBELIO/ILLULA BLOCK MUNYANGWET/74 was jointly acquired by the Joseph Toroitich Cherono (deceased) and the Objector/Applicant in the year 2013 and ELDORET MUNICIPALITY/BLOCK 21 (KING'ONG'O)/650 in 2006 when Rosebella Toroitich Cherono (deceased) was already deceased.

n. That the two Elgeyo Border plots were also acquired in the year 1980 by Joseph Toroitich Cherono (deceased) and the Objector/Applicant.

o. That the parcels of land known as KOSYIN KABAO AREA CENTRE PLOT, KAP APOLLO CENTRE PLOT and KAP FRANCIS LAND were purchase in the year 1993 by Joseph Toroitich Cherono (deceased) and the Objector/Applicant.

p. That the parcels of land known as KAPJAGIR LAND was purchased in the year 2014 by Joseph Toroitich Cherono (deceased) and the Objector/Applicant.

q. That the Objector/Applicant substantially contributed to the acquisition of all the other properties forming part of the estate of Joseph Toroitich Cherono (deceased) from her income from her farming activities and family obligations.

r. That it is only fair and just that the Objector/Applicant's contribution in acquisition of the assets forming part of the estate of Joseph Toroitich Cherono (deceased) be recognized that she be given 50% of the same.

s. That motor vehicle reg no. KCF 646T Toyota Vanguard which was acquired by Joseph Toroitich Cherono (deceased) and the Objector/Applicant in the year 2015.

t. That the Objector/Applicant was using the said motor vehicle to run her personal errands before the demise of Joseph Toroitich Cherono (deceased) and is still using it to date.

u. That it is only fair and just that the motor vehicle Reg No. KCF 646T Toyota Vanguard is given to the Objector/Applicant absolutely.

v. That no prejudice will be suffered if the application is allowed as prayed.

3. Patrick Cherono and Raymond Cherono through learned counsel Mr. Nabasenge filed grounds of objection under protest in response to the application. They averred that their protest in filing the grounds of opposition is founded on the fact that the two applications have been preferred late in the

day after the matter had been heard and pleadings closed of which parties proceeded to file their final submissions.

4. The Respondents further stated that the applications have raised new issues of which the applicant ought to be cross examined on the same and yet the hearing was concluded and closed and final submissions filed.

5. In the Respondents' view, the applicant Ruth Jerono Cherono has deviated from her earlier pleadings in respect of the deceased estate and she is now claiming matrimonial interest in the deceased estate and yet in her earlier proposed mode of distribution she did not claim any matrimonial interest in so far as the deceased estate is concerned.

6. That the Applicant's claim in respect of matrimonial property interest in the deceased estate has come so later in the day after the pleadings had been closed whereby, she had testified and, in her testimony, she did not lay any claim whatsoever in respect of matrimonial property interest.

7. They stated that the application seeks to amend the Objector's proceedings through backdoor which amendments are untenable since the same have been preferred after the hearings had been closed and parties filed final submissions and hence the Applicant is guilty of laches.

8. That the applicant's proposed mode of distribution vide application dated 14th March, 2023 contradicts her earlier proposed mode of distribution vide her affidavit of the proposed of distribution dated 13th January, 2023.

9. Learned Counsel Mr. Omwenga for the Objector filed supplementary submissions dated 27th March, 2024 in support of the Objector's application dated 14th March, 2023. Learned counsel identified three issues for determination;

    a. Whether the Objector is entitled to half of all the assets forming part of the estate of Joseph Toroitich Cherono (deceased).

    b. Whether the Objector should be given motor vehicle Reg. No. KCF 646T Toyota Vanguard absolutely.

    c. Whether motor tractor Reg. No. KAE 447E same laser forms part of all the assets of the estate of Joseph Toroitich Cherono (deceased and is available for distribution).

10. On the first issue learned counsel Mr. Omwenga maintained that *Matrimonial Property Act* is not applicable in a succession cause as indicated in their submissions dated 20.9.2023. On what constitutes matrimonial property, learned counsel cited the provisions of Section 6 of the *Matrimonial Property Act*. He maintained that all the properties forming part of the estate of Joseph Toroitich Cherono (deceased) were acquired from the year 1969 when the Objector was already married to Joseph Toroitich Cherono (deceased) and the Objector contributed to their acquisition. That the following assets were acquired by Joseph Toroitich Cherono (deceased) and the Objector herein when the first wife, Rosebella Toroitich Cherono (deceased) was alive without her contribution:

    a. UASIN GISHU/KAPTAGAT/214

    b. UASIN GISHU/KAPTAGAT SETTLEMENT SCHEME/228

    c. 25% shares in ELDORET MUNICIPALITY BLOCK 7/26

11. It was counsel's submission that Rosebella Toroitich cherono (deceased) did not contribute anything to the acquisition of the above mentioned assets and therefore the same is jointly owned by the Objector herein and Joseph Toroitich Cherono (deceased) only. That it is also worth noting that

Rosebella Toroitich Cherono (deceased) predeceased Joseph Toroitich Cherono (deceased) and therefore her estate should not be given any share of the assets. According to the Objector, the following properties were acquired after the first wife Rosebella Toroitich Cherono (deceased) had died in the year 1988: -

a. Parcel of land No. UASIN GISHU/ILLULA/1 together with all the farm machineries – Acquired in the year 1990.

b. Parcel of land No. TEMBELIO/ILLULA BLOCK MUNYANGWET/74 – Acquired in the year 2013.

c. ELDORET MUNICIPALITY/BLOCK 21 (KING'ONG'O)/650 – acquired in the year 2006.

d. KOSYIN KABAO AREA CENTRE PLOT – Acquired in the year 1993.

e. KAP APOLLO CENTRE PLOT – Acquired in the year 1993.

f. KAPJAGIR LAND – Acquired in the year 2014.

g. KAPFRANCIS LAND – Acquired in the year 1993.

h. ELGEYO BOARDER PLOT – Acquired in the year 1980.

i. Motor vehicle Reg No. KCF 646 Toyota Vanguard – Acquired in the year 2015.

j. Shares at Kenya Airways.

k. Shares at Safaricom Ltd.

l. Monies in the Access Bank Account No. 0030100000260.

m. Monies in the Paramount Bank Account No. 060006161187

n. Monies in the Equity Bank Account No. 0301100092893.

o. Monies in MPESA No. 0721230117.

12. The Objector agitated that she be given half of all the assets forming part of the estate of the deceased in the event this court finds that the *Matrimonial Property Act* is applicable in succession.

13. It was submitted for the Objector that she has demonstrated her contribution, both monetary from her farming activities and non-monetary by taking care of his family, improving and maintaining the assets from the time of their acquisition to date and therefore entitled to half of the properties forming part of the estate of Joseph Toroitich cherono (deceased). On this, counsel cited the decision in AWM v. JGK (2021) eKLR.

14. As to whether the Objector should be given Motor Vehicle Registration No. KCF 646T, Learned Counsel submitted that the said motor vehicle was jointly bought in the year 2015 by the Objector and Joseph Toroitich Cherono (deceased) and that the said motor vehicle was being used by both Joseph Toroitich Cherono (deceased) and the Objector until his demise in the year 2019.

15. On the final issue, learned counsel submitted that one Christopher Kipkemboi Chereno, a son and beneficiary to the estate of Joseph Toroitich Cherono (deceased) made an application seeking that motor tractor Reg. No. KAE 447E Same Laser be considered not part of the estate for reasons that the deceased has given it to him and transfer forms were signed in his favour. Counsel submitted that

the same should be given to the said Christopher. In supporting this position, the case of Re Estate of Nyanchieo Osindi (deceased) (2019) eKLR was cited.

16. Having given that summary, I find it important to point out that on 12th June, 2023, Raymond Cherono Rotich, a legal representative of the estate of the late Rosebella Toroitich Cherono filed a similar application dated 12th June, 2023. In the said application, he sought reliefs as follows:

    a. That a declaration do issue that all properties/assets acquired between 1962 to 1988 were jointly acquired by the late Rosebella Toroitich Cherono, deceased, the applicant and the late Joseph Toroitich Cherono, deceased, whose estate herein revolves and are therefore matrimonial properties, with the applicant being a spouse and half owner of all the said assets.

    b. That a declaration do issue that half of all assets registered in the name of Joseph Toroitich Cherono deceased during the period of the marriage between the late Rosebella Toroitich Cherono, deceased, and the deceased herein the late Joseph Toroitich Cherono are held in trust of the late Rosebella Toroitich Cherono, deceased, the applicant.

    c. That a declaration do issue that the late Rosebella Toroitich Cherono, deceased, the applicant is; (i) half owner of all movable, all immovable assets, and (ii) of all personal assets of the deceased.

17. The grounds that supported the said application were that the late Rosebellah Toroitich Cherono worked with the deceased to acquire all the assets. That all assets had been acquired by the year 1975 which year Ruth Jerono Cherono was born.

18. It was further a ground that the late Rosebellah Toroitich Cherono contributed to the acquisition and enhancement of the assets through active participation in the family businesses and farming. The applicant stated that Ruth Jerono Cherono, the 2nd wife came into the life of the deceased herein very late when all the assets and properties in question had been acquired.

19. Interestingly, in response to the application, the applicant herein, Ruth Jerono Cherono stated as follows:

    a. That Rosebella Toroitich Cherono (deceased) did not contribute anything in acquisition of any of the assets forming part of the estate of Joseph Toroitich Cherono (deceased).

    b. That the provisions of the *Matrimonial Property Act*, No. 49 of 2013 are not relevant and/or applicable in this succession matter. The only applicable law is the *Law of Succession Act* CAP 160.

    c. That Rosebellah Toroitich Cherono (deceased) did not contribute anything to the acquisition of the properties forming part of the estate of the late Joseph Toroitich Cherono (deceased).

    d. That I still propose that the estate of Joseph Toroitich Cherono (deceased) be shared equally among all surviving beneficiaries in accordance with the law.

    e. That the applicant has not attached any evidence to show the monetary contribution allegedly by Rosebellah Toroitich Cherono (deceased) as the same is mere allegations with no basis.

20. The parties filed their submissions in support of the arguments. Learned Counsel Mr. Omwenga submitted that *Matrimonial property Act* is not applicable in this instance. That Joseph Toroitich Cherono (the deceased) had not divorced Rosebella Cherono (deceased) before she died in 1988. She cited the provisions of Section 7 and 8 of the *Matrimonial Property Act*.

21. Under Section 7 of the Act, ownerships of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

22. Learned Counsel further submitted that the *Matrimonial Property Act* came into operation in 2013. The first wife, Rosebella Cherono died in 1988, way before the act was operational. That this act cannot be applied retrospectively as the same would not only be discriminatory but also against justice. On this she cited the decision in RMM versus BAM (2015) eKLR in which the Court of Appeal judges referred to the Supreme Court decision in Samuel Kamau Macharia versus KCB & 2 others (2012) KLR.

23. Counsel argued that since there is no express provision that the *matrimonial property Act* is to apply retrospectively, then the same should not be applied retrospectively. Doing so would cause grave injustice to the Objector.

24. According to Learned Counsel, if the court finds that *matrimonial Property Act* is to apply, then Objector should also be given a share of the estate of Joseph Toroitich Cherono. Otherwise, the same would amount to discrimination contrary to Article 27 of *the Constitution* of Kenya that guarantees everyone equal protection and benefit of the law.

25. Speaking on the issue of distribution, the Objector submitted that the estate should be divided equally amongst all the beneficiaries of the deceased.

26. The 1st Petitioner through learned counsel Mr. Nabasenge filed written submissions in respect of distribution of the deceased estate. Counsel submitted that the 1st Petitioner suggests a 50% share of the deceased estate be allocated to the 1st widow Rosebella Cherono in respect of the matrimonial property contribution and that the residual 50% share be shared equally amongst all the beneficiaries save for the ancestral land which he has suggested that the same be distributed in accordance with the Keiyo customs. The 1st Petitioners mode of distribution has been opposed by Ruth Cherono, the Obejctor herein. Counsel submitted that at the time, Ruth Cherono never made any application seeking matrimonial interest in the properties herein.

27. On the question of matrimonial property, Mr. Nabasenge submitted that between the two widows, it is only the 1st widow, Rosebella Cherono, deceased through her personal representative, Raymond Cherono, that has laid a claim over matrimonial property interest in the deceased property in view of the application dated 12th June, 2023. That the 2nd widow Ruth Cherono has not laid any claim regarding matrimonial property interest in the deceased estate. Counsel pointed out that throughout her testimony, on cross examination the Objector did not claim any matrimonial interest. It was her testimony that she did not contribute anything towards the acquisition of the deceased properties. She testified further that at the time she got married all the deceased properties had been acquired.

28. Learned Counsel Mr. Nabasenge for the 1st Petitioner in his submissions stated that the *Matrimonial Property Act* is applicable in Succession matters. He submitted that even before the enactment of the matrimonial property, the provisions of Art 45 of *the Constitution* applied to protect the rights of the parties in their marriage which rights include but not limited to the matrimonial property rights and or interests.

29. It was counsel's submissions that in law a spouse has a constitutional right to lay a claim on the matrimonial property that was acquired during the subsistence of the marriage. That the question as to whether such a claim can be made during the succession proceedings of the either spouse was settled

in the case of *Esther Wanjiru Githatu v Mary Wanjiru Githatu (2019) eKLR, C.A at Eldoret Civil Appeal No. 50 of 2016*, when the Court of Appeal at paragraph 30 of the holding held as follows:

> "(30) Mary did not make any financial contribution and therefore no money changed hands. However, her indirect contribution through the management of the family business and the farming, brought in income and this enabled the business to grow, and the deceased to invest through purchase of properties. The non-monetary contribution was equivalent to a financial contribution towards the purchase of the matrimonial property acquired up to 1984. We would agree with the trial judge, that there was a resulting trust arising in favour of Mary, in regard to these properties. Mary having been an active participant in the acquisition of the properties, the apportionment of 50% interest adopted by the learned judge in accordance with the maxim equality is equity cannot be faulted."

30. Counsel for the 1st Petitioner submitted along the provisions of Section 7 of the Matrimonial Property 2014. Mr. Nabasenge submitted that dissolution in this circumstance implies divorce or death. He submitted that the matrimonial property interest is right in rem as opposed to right in personam, which means that it outlives death. In view of the foregoing he stated that a personal legal representative of the estate Section 8 was equally cited which speaks as follows:

> "8. Property rights in polygamous marriages.
>
> 1. If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the –
>
> a. Matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, it the property was acquired before the man married another wife;"

31. In summary, his submissions were to the effect that a question of matrimonial interest in a matrimonial property can be raised during a succession cause of either spouse and the Honourable court can competently deal with it and make a determination in that regard. That *Matrimonial Property Act* is applicable in this succession cause and the question of matrimonial property interests having been raised by the 1st widow herein should be considered by this court and a determination made.

32. The 2nd Petitioner equally filed submissions dated 14th November, 2023 in addressing the issue of Matrimonial property. Learned Counsel Mr. Rutto made submissions to the effect that *Matrimonial Property Act* recognizes equality as well as the equity as far as ownership in any of its forms i.e. whether real or presumed (trust), to property acquired during the subsistence of the marriage. Equally, on the upper plane, and Constitution recognizes the right.

33. Learned Counsel submitted on behalf of the 2nd Petitioner that the *Law of Succession Act* as interpreted by our courts along with the equality rights provided in *the Constitution* recognize the equality and equity of the both male and female beneficiaries to a deceased's net intestate estate.

34. It was submitted for the 2nd Petitioner that the question, in marriage as in succession, is one of property and who is entitled to it. That in marriage, both parties are entitled to a share in equality and equity. Upon the death of a person his or her children or those to whom the person wills the property are

entitled to it. To this end, he submitted that the children of Rosebella Cherono are entitled to half the estate of their late father, Joseph Cherono.

35. The 1st Petitioner submitted on his proposed mode of distribution as follows:

(a) Tembelio/llula Block Munyangwet/74 (89 Acres).

i. 44.5 Acres be registered in the name of the late Rosebella Cherono, deceased. (1st widow to the late Joseph Cherono)

ii. 44.5 acres be distributed equally between the 2 houses.

(b) Kaptagat Settlement Scheme228 (60 Acres).

i. 30 Acres be registered in the name of the late Rosebella Cherono, deceased. (14 Widow to the late Joseph Cherono)

ii. 30 acres be distributed equally amongst all the beneficiaries from the 1 House. These are;

1st House

1. Rael Cherono
2. Erick Kimutai
3. Patrick Toroitich Cherono
4. Kenneth Kiptoo Cherono
5. Sharon Jepkosgei Cherono
6. Caroline Jelimo Cherono
7. Raymond Torotich Cherono

(c) Kaptagat Settlement Scheme/214 (33 Acres).

i. 16.5 Acres be registered in the name of the late Rosebella Cherono, deceased. (Widow to the late Joseph Cherono).

ii. 16.5 acres be distributed equally amongst all the beneficiaries from the 1t House. These are:

1st House

1. Rael Cherono
2. Erick Kimutai
3. Patrick Toroitich Cherono
4. Kenneth Kiptoo Cherono
5. Sharon Jepkosgei Cherono
6. Caroline Jelimo Cherono
7. Raymond Torotich Cherono

d) llula Settlement Scheme/1 (100 Acres) with a family House valued at Kshs. 70,000,000.00 (Kenya Shillings Seventy Million).

i. 50 Acres be registered in the name of the late Rosebella Cherono, deceased. (1 widow to the late Joseph Cherono).

ii. The family House valued at Kshs. 70,000,000.00 (Kenya Shillings Seventy Million) to be given to the 2nd House. (The proceeds thereof to be shared equally amongst the beneficiaries from the 2nd House).

iii. 50 acres be distributed equally amongst all the beneficiaries from the 2nd House. These are;

2nd House

1. Ruth Cherono
2. Christopher Cherono
3. Jackline Cherono
4. Susan Cherono
5. Joceline Cherono
6. Kibiwott Cherono
7. Viola Jepchumba
8. Kibet Cherono
9. Cynthia Cherono

(e) Eldoret Municipality/Block 21 (King'ong'o) 650 ¾ of an Acre (Estimated value is Kshs. 150,000.00).

i. ½ share to be given to the late Rosebella Cherono, deceased. (1st widow to the late Joseph Cherono).

ii. ½ share to be distributed equally amongst all the beneficiaries from the 1# house. These are:

1st House

1. Rael Cherono
2. Erick Kimutai
3. Patrick Toroitich Cherono
4. Kenneth Kiptoo Cherono
5. Sharon Jepkosgei Cherono
6. Caroline Jelimo Cherono
7. Raymond Torotich Cherono

f. 25% shares in Eldoret Municipality/Block 6 (Town Plot) estimated value, Kshs. 150,000.00.

i. 12.5 share to be given to the late Rosebella Cherono, deceased. (1st widow to the late Joseph Cherono).

ii. 12.5 share to be distributed equally amongst all the beneficiaries from the 2nd House. These are;

2nd House.

1. Ruth Cherono
2. Christopher Cherono
3. Jackline Cherono
4. Susan Cherono
5. Joceline Cherono
6. Kibiwott Cherono
7. Viola Jepchumba
8. Kibet Cherono
9. Cynthia Cherono.

(g) Ancestral land at Emsea - Kerio Valley.

To be distributed in accordance with the tenets, traditions and customs of the Keiyo.

(h) Jagir Farm (Plot No. 77) (5.2 Acres)

To be registered in the name of Janet Jepkorir. Daughter Adult. (Beneficiary, born out of wedlock).

(i). Jagir Farm (Plot No. 19) 2.5 Acres).

Was given to lan Kwambai, a dependant, as a gift inter vivos by the deceased.

(j) Movable assets including but not limited to, Tractors, Moto Vehicles and all farm machineries to be distributed as follows;

To be sold and proceeds to be shared equally as follows:

i. 50% of the proceeds to be given to the late Rosebella Cherono.

ii. 50% of the proceeds to be shared equally amongst all the beneficiaries.

(k) Kenya Airways 10,000 shares

To be shared equally amongst all the beneficiaries.

(l). Safaricom 10,000 shares

To be shared equally amongst all the beneficiaries.

(m) Proceeds from Safaricom Booster/The Booster infrastructure at the llula Farm.

To be distributed as follows:

(b) The pending proceeds to be shared equally amongst all the beneficiaries

(c) The infrastructure in respect of the said Safaricom Booster to be Owned by Eric Kimutai (Deceased) a Beneficiary from the 1st House.

Elgeyo Border Plot, ¼ an Acre.

To be registered in the name of the late Rosebella Cherono, (1st widow of the deceased).

Decision

36. I have read through the instant application, the grounds of objection and the submissions filed by the Objector. I find it proper to first establish whether the *Matrimonial Property Act*, 2013 applies in matters of the *Law of Succession Act* given that it has been an issue raised by both parties. The issues raised majorly revolve around the question of spousal contribution in acquisition of the assets of the estate of the deceased during his lifetime to bring into perspective the application of the *Matrimonial Property Act*, 2014.

37. Intestate succession is a complex area influenced by a host of social and cultural factors that sometimes conflict with established legal principles. The *Law of Succession Act* Cap 160 provides concrete rules governing intestacy, designed to protect the interests of all rightful beneficiaries and ensure a fair distribution of property. This legal framework prioritizes the rights of spouses and children, offering clear directives for estate distribution and addressing the intricacies of both monogamous and polygamous inheritance to mitigate potential conflicts. Intestacy laws play a crucial role in reconciling the recognized principles of succession with Kenya's diverse familial and societal dynamics. They play a crucial role in achieving harmony with *the constitution* of Kenya, 2010.

38. The *Matrimonial Property Act*, 2013 on the other hand came to regularize the parameters of dividing matrimonial property. That in my opinion is the whole purpose of the said Act. Ordinarily, the ultimate beneficiary of the estate is the children of the deceased. However, immediate distribution to the children may dispossess the surviving spouse. To this end, Life interest is meant to safeguard the surviving spouse's position by allowing her to utilize the property during her lifetime.

39. The provisions of section 40 of the *Law of Succession Act* and their implication for the first wife of a deceased person have been considered in various decisions of the High Court in Kenya. Courts have largely agreed that they are unfair to a wife, married decades or more before a second or third wife, yet she is required to share the estate of the deceased equally with subsequent wives, as well as the children of the deceased. This is regardless of whether or not she had contributed to the acquisition of the property comprising the estate.

40. Under section 35 and 37 of the *Law of Succession Act*, the surviving spouse is entitled to deceased's personal household effects absolutely. She is also entitled to a life interest on the residue of the net intestate estate. Section 3(1) of the Act defines personal effects to mean clothing, articles of personal use, furniture, utensils, pictures, and decorations associated to a matrimonial home. The residue net intestate estate means property that remains after all the beneficiaries have their shares. The residue net intestate estate is to be enjoyed by the surviving spouse in her lifetime and on her demise the property passes to the intestates' children.

41. Speaking of a life interest on the residue of the net intestate estate, the court in the case of TAU KATUNGI -V- MARGRETHE KATUNGI & ANOTHER (2014) eKLR, the court in elaborating on the nature of a life interest stated thus;

> " Life interest confers a limited right to the surviving spouse over the intestate estate. He or she does not enjoy absolute ownership over the property. They cannot deal with it as if it

was their own. By virtue of section 37 of the Act, a surviving spouse cannot during the life interest dispose of any property subject to that life interest without the consent of all the adult children, co-trustees and the court. This is meant to safeguard the interest of the children who are the ultimate beneficiaries of the property the subject of the life interest. It is in this respect that the life interest operates as a trust over the property the subject thereof, a trust held by the surviving spouse for the benefit of the surviving children."

42. The Applicant in this case is not the first wife but she opines that she has significantly contributed to the acquisition of the assets of the estate and therefore the estate should have half of the share of the estate. It is her case that she acquired various properties after the first wife had already died in the year 1988. She deponed that the first wife did not contribute anything to the acquisition of all the properties forming part of the estate of Joseph Toroitich Cherono (deceased) acquired before her demise, in the year 1988.

43. The rule of evidence is clear that "He who alleges must prove". The maxim has been grounded in law under Section 107 of the Law of Evidence. The same was enunciated by Justice Majanja in Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR when he said that: "...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya), which provides:

> " 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..."

44. Section 108 of the *Evidence Act* states that 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. For avoidance of doubt, the provision states as follows:

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

45. In addition, section 109 of the same Act states:

> " 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."

46. In this instance, the burden of proof lay with the Objector to prove her contribution towards acquiring the properties forming part of the estate besides humanitarian contribution. The Objector has advanced an argument, which I do not agree with, that she is the one who largely contributed to the acquisition of the properties forming part of the estate of the deceased even when the first wife was alive. She annexed titles to various assets registered in the name of the deceased as evidence that she made contributed to their acquisition. Most importantly, she argued that she should get half of all the properties acquired after the first wife had died in 1988.

47. In Succession Cause No. 1033 of 1996- In The Matter of the Estate of Mwangi Giture (Deceased) (supra), Koome J (as she then was) was called upon to consider the question similar to this one but

in that case, it involved a first widow who had been married in 1939, while the second was married in 1960, 21 years later.

48. The court found that the law applicable to the estate of the deceased was the *Law of Succession Act*, section 40 of which dealt with the distribution of the estate of a person who had been polygamous. While acknowledging the unfairness of the mode of distribution provided under the section, the court observed as follows:

> " Perhaps it is the high time, the commission charged with the responsibility of law reform addressed the issue of the inequality raised under Section 40 of Cap 160. The 1st widow's entitlement vis vis the 2nd widow or subsequent widow who perhaps come into a marriage much later to find that the 1st widow has worked tirelessly and sometimes denying herself tremendous comfort to enable her husband create and accumulate wealth. The 1st widow is then relegated by virtue of Section 40 of the Law of Succession to the same position as the last-born child of the 2nd or subsequent widows. The widow is supposed to be considered as a unit alongside the children.
>
> In this regard the last-born child of the subsequent widow who will have contributed nothing is elevated in law because he will have notarily (sic) absolute rights but will be entitled to an equal share with the 1st widow. The 1st widow is only entitled to a life interest and after the life interest the property devolves to her children in equal shares absolutely. I agree with counsel for the protester 1st widow that this state of affairs bleeds inequalities and inequities in our law and ought to be addressed urgently to enable our courts dispense justice that meets the provisions of *the Constitution* of Kenya and give due regard to the principles of nondiscrimination on the basis of sex which are also the principles of nondiscrimination provided for under the International Conventions especially the Convention Against all forms of Discrimination against women (C.E.D.A.W.) which Kenya has signed and ratified. If the principles laid down in the international conventions were to be applied, the 1st widow would get a share of the property acquired during her marriage to the deceased, leaving the other half share to be shared by all the deceased heirs. If the distribution is of a polygamous intestate, each widow would get a share of what she contributed to."

49. Similarly, Makau J in Succession Cause No. 110 of 2010- In the Matter of The Estate of Samwel Miriti (Deceased) M M'M vs A I M was faced with a similar question on whether the estate of the deceased should be distributed in accordance with section 40 of the *Law of Succession Act*, or whether the first widow should get a larger share. The court expressed the following view:

> 16. "In the instant application the 1st petitioner is opposed to equal distribution while the interested party/2nd petitioner seeks and favors distribution according to Section 40 of the *Law of Succession Act*. This court is bound by Section 40 of the *Law of Succession Act* and has no discretion. The section clearly provides that the estate be divided between the houses taking into account the number of children in each house. It is fortunate that the two houses have equal number of children. However, this court shall not shut its eyes to unfairness meted on a deceased's widows who are not allowed to take an extra share and whose efforts in acquisition of the properties are ignored and treated merely like children of the deceased not withstanding having been equal partners with the deceased. It is further unfortunate when the first wife who sacrificed a lot of her energy and who participated in the acquisition of the greater part of the deceased estate and even in situation where the properties are solely acquired by the first wife but registered in husbands have ended up being shared equally among all the wives not taking into account of less contribution by the younger wife who is married after acquisition

of the bulk of the properties if not all the estate and who has contributed very little or nothing towards the acquisition of the estate. It is the court's hope that the unfairness to widows, and discrimination on first wife as reflected under Section 40 of the *Law of Succession Act* will soon be corrected so that the distribution of the deceased estate takes into account the contribution of the first wife and that of the 2nd wife or any other wife and the shares of the wife or wives is calculated differently from that of children who are treated as the same as their mother.

50. Let me also highlight that in the case Rono v Rono (2005) eKLR the deceased died intestate leaving behind two wives and nine children (six daughters and three sons). The two widows and a son petitioned the court for letters of administration with the consent of the other family members. The contention arose over the distribution of the deceased's estate where sons and the 1st wife were allocated large shares while the 2nd wife and daughters wanted 50:50 share of the estate. The 1st wife argued that prior to the deceased marrying the second wife; she had contributed to the development of a farm therefore entitled to larger share. The sons argued that since they were sons and the daughters were married, they were entitled to a larger share than their sisters. The court ruled that both the sons and daughters have rights to inherit their father's estate and proceed to share the property equally. The court did not consider the argument on spousal contribution since it was not a factor under Section 40. The learned judges embraced the principal of fairness and equity in distribution of a deceased's estate between or amongst persons beneficially entitled thereto.

51. My considered view is that a spouse should automatically be allocated matrimonial home and household goods. When an intestate leaves a surviving spouse and children then the property will no absolutely devolve to the children, the surviving spouse will hold it in trust for them. According to Section 35, the surviving spouse left with the children will be entitled to personal and household effects of the estate and a life interest in the net estate and residue estate. Section 37 of the Act, defines the powers of a life interest establishing that they do not have any possession of the estate but rather to use the estate for their maintenance and if need be, they can sell the property with consent from the trustees and the children who are of age. Regarding the children, the net intestate estate will be divided equally among them.

52. In determining the share including in polygamous unions, the court is to be guided by fairness and equity as decided in Sophia Wangechi Mugo v Geoffrey Wambugu Mugo & another [2016] eKLR. This argument was shared by Kiage JJA in his concurring judgment in P.N.N –vs-Z.W.N (2017) eKLR where he observed that marriage is a relationship of equals and that equality in *the Constitution* doesn't mean Matrimonial Property should be divided equally but "...division and distribution of Matrimonial Property should be on a basis of fairness and conscience and not a romantic clutching on the 50:50 mantra..."

53. In the case of JOO v MPO (2023) KESC 4 KLR the Supreme Court reset the button on matrimonial property distribution as earlier settled in Rono vs Rono by the following dicta:

> " That the guiding principle in determining whether Art. 45(3) of *the Constitution* conferred proprietary rights is that apportionment and division of matrimonial property may only be done where the parties fulfil their obligation of proving what they are entitled to by way of contribution. The court stated that the status of the marriage does not solely entitle a spouse to a beneficial interest in the property registered in the name of the other, nor is the performance of domestic duties, or the fact that the wife was economical in spending on housekeeping. Therefore, a party must prove contribution to enable a court to determine the percentage available to it at distribution. This safeguards a blanket expectation that the principle of equality will be applied generally in distribution of matrimonial property

irrespective of contribution. The court went on to uphold that Art. 45(3) deals with equality of the fundamental rights of spouses, the provision does not lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married.

54. The question of whether the deceased husband widow is entitled to a portion of the assets is a matter which has occupied the minds of the two legal counsels representing the 1st and 2nd house for some time now. In the nature of the judicial process in Kenya, there is a trending conversation within the superior courts making an attempt to pierce the marital estate governed by the *Matrimonial Property Act* 2013 and have Section 7 of the Act apply mutatis mutandis to the intestate estate governed by section 35, 36, 37, 38, 40 and 42 on distribution of the assets to the beneficiaries who qualify under Section 29 of the aforesaid Act. I consider this area of a hybrid system of distribution of the estate survived of the deceased under the Succession Act being at the very infant stage of jurisprudential development. There is a general rule that courts should take cognizance of the parameter of contribution during the lifetime of the marriage so as to apportion a greater share of the estate to the surviving widows or spouses at the expense of the children. The scheme of distribution prescribed by the *Law of Succession Act* as contemplated and postulated by the legislature is on testate estate under Section 5 & 11 of the Act and Intestate estate expressly provided for in Section 35, 36, 37, 38, 40 & 42 of the aforesaid statute. A more plausible explanation which may be gleaned from a perusal of both statutes is that if this country wants to make an entry point by incorporating the provisions of the Matrimonial Property of 2013, it essentially means that it will addressing intestate estate posing a substantial threat to the inheritance rights of children from either a single family unit or in a polygamous entity. The *Law of Succession Act* enacted by the legislative assembly provides for and recognizes the making of the testamentary of the testator providing clause after clause on how his testate estate should be shared among the dependants or other would be beneficiaries to his/her estate. I consider correctly that in matrimonial causes action, such a question on distribution of the marital estate is evidence led between one spouse against another vindicating their propriety rights upon resolution of the marriage. Therefore, the typology of applying the provisions under the *Matrimonial Property Act* means that the surviving spouse may be relying substantially on the status of marriage to adjudicate the claim with exceptions where each of the spouses to that marriage had independently acquired separate assets registered specifically in their own names. The latter case is easier to be appreciated by a probate court but in the case where the only continuum of evidence is the aspect of marriage, it will cause a great danger in exercising judicial discretion to distribute the estate within the imperatives of *the constitution* in Art. 20(7) and 40(5) of our supreme law. In considering the words used by parliament in both statute which are the primary sources of distribution of property within the family circle, nothing would have been easier than parliament to state that certain relevant statutory provisions would further apply mutatis mutandis to the other independent statutes namely the Succession Act.

55. A phrase of passage or in a provision in a statute must be read in the context of the section as a whole and in a wider context of a relevant group of sections in that specific statute. The other statutes also going by the respective preambles and objective provide the relevant text and context. It is somehow inconceivable that the legislature may have intended that if a husband and wife die after the dissolution of their marriage they would have intended to allow an application for succession to be varied so that the settlements be made in that succession does incorporate the contribution made in their marital estate. That is once we let in legal representatives of the husband and wife to claim along that legal scheme of inheritance supplemented by matrimonial property, one may be raising questions as to conflicting rights which will be very difficult to decide without further guidance than what the two respective independent statutes afford. It is instructive to note that the *matrimonial property act* enactment is intended only to authorise the court to act for the benefit of the living persons, to be more precise, the husband and wife. The present applications seek order only for the benefit of the estate of a deceased

person and is not within those enactments in the *Matrimonial Property Act*. The court under the *matrimonial property Act* may as it thinks fit by order direct the husband to pay the wife during the joint lives of their unions such weekly, monthly, yearly sum for maintenance and support as evidence and pecuniary endowment can support the claim. In my view the whole of the matrimonial cause legislation right back to 2013, is essentially personal jurisdiction arising between parties to the marriage during to the lifetime, marriage resolved, each wanting to go separate ways cannot be juxtaposed directly with the regulatory framework under the Succession Act. My reading of the Matrimonial Causes Act in context and at a glance has no provisions for the children of the marriage. It is really a contest between spouses on factors to be taken into account and consideration prescribed in the Act. Whether one has to look to the terms of the Matrimonial Causes Act and on the other hand the provisions of the Succession Act, the language is not similar or identical save for the mention of a surviving spouse entitled to a life interest, immovable properties and other residual net estate be share equally to the surviving children. The continued factors of inheritance is as rooted under Section 29(a) & (b) of the Succession Act. It is against this contextual background of there being a long established legal understanding in the Succession Act one's spousal rights survive the death of either spouse. The construction of the *Matrimonial Property Act* apparent on the face of it may be having similar terminology which can be interpreted as meaning that on dissolution of a marriage, one's spousal rights survive against while both remained alive. While recognizing the right to equality in marriage and its dissolution under Art. 45(3) of *the Constitution*, the same constitution also reserves in Art. 40 the Constitutional rights to individuals to own properties either individually or in association with others. That to me may be the inspiration in the dicta by the supreme court in JOO vs MPO (supra).

56. I must also mention briefly another problem which may arise from the interpretation of the two statutes as they relate to the distribution of either the marital or intestate estate. It concerns property acquired during the marriage by one spouse by a gift or succession or as a beneficiary in a partnership, a company which in the Matrimonial Causes Act, there are specific guidelines in which to exercise judicial discretion which are completely distinct with those provided for in the Succession Act.

57. Again and again on my part, by culture and custom in law as stipulated in the Preamble is that we are proud of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation.

58. It is also incumbent to appreciate the role of customary law which tend to define the domestic responsibilities between a man, his wife and children. It is ordained that the proceeds of any joint effort of a man and his wife or children and any property acquired by whichever means or proceeds which accrue by culture and customary law, each individual property/asset is that of the man of the house. I agree with this statement for I am yet to find substantial clusters of joint property registered in the name of the man of the house, his wife and children. If there be any discussion about the marital estate, it will be for purposes of the spouse and children in need of meeting their wants and demands for maintenance. The husband has never held the property in trust for his family. Although those who profess Christianity can relate to the Solomonic verse of Proverbs 13:22 which reads "A good man leaves an inheritance to his children's children". As the legal landscape evolves in both matrimonial causes Act and the Succession Act towards a fairer and more nuanced understanding of inheritance rights at the dissolution of marriage and on the other hand at the death of a spouse, the courts will be faced with each case's unique dynamics for a just unequitable distribution of the assets of either estate.

59. At the heart of this interpretative exercise as advanced by both counsel for the Petitioners and Respondent the consideration of the usual meaning of the language used in both statutes and what areas the court can find an intersection for me is a moot question. It follows from the foregoing

discussion that I have not been persuaded by the facts of this case to grant the reliefs sought under the Matrimonial Causes Act 2013. In the first instance, the standard of the burden of proof vested with the claimants fell short of the threshold set by procedural law. In the second tapestry, one must be very careful about applying wholly the provisions on contribution and by analogy to first distribute the matrimonial estate to the surviving spouse and the residue is left for the rest of the dependants to scavenge. The fundamental question is whether the conscience of the recipient from both the *Matrimonial Property Act* and Succession Act is bound in such a way to justify equity to retain an overreaching and overriding interest over the estate of the deceased. Ultimately, the question of the best model of distribution as proposed by the petitioners and the respondents as come to haunt us as we head to the homestretch of this decision. This is a polygamous family and I will better seek refuge in the law. What is the formulae?

60. Section 40 of the Law Succession Act speaks to the polygamous setups as in this case. The section provides as follows:

> "(1) Where an intestate testator has married more than once under any system of law permitting polygamy, his personal and j=household effects and the residue of the net intestate shall, in the first instance be divided among the house according to the number of children in each house but also adding any wife surviving any wife as an additional unit to the number of children.
>
> 2. The distribution of 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 section 35 to 38."

61. Having said so, Section 35 and 38 provides as follows:

> "(35). Where intestate has left one surviving spouse and child or children
>
> 1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
>
> a) the personal and household effects of the deceased absolutely; and
>
> b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.
>
> 2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.
>
> (38) Where intestate has left a surviving child or children but no spouse Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the

surviving child, if there be only one, or shall be equally divided among the surviving children."

62. 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."

63. The Court in RE ESTATE OF JOHN MUSAMBAYI KATUMANGA – DECEASED [2014] eKLR held as follows:

> " 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."

64. My reading of Section 38 of the Succession Act, it does incorporate the provisions of Art. 27 of *the Constitution* on equality and freedom and discrimination. The dictates of it is that all children of the deceased including daughters are entitled equally to the estate survived of the deceased. Luckily enough for this estate it emerges from the evidence that it is not a contested issue. What is more contentious is the appreciation of the character in the text under Section 40(1) & (2) as read with Section 38 of the *Law of Succession Act*. This can be appreciated from the purported draft model of distribution submitted by both the Petitioner and the Respondent. I consider the Succession Act a complete code on matter of succession and inheritance. It is therefore bewilderment that in my practice of law in the public sector I have come across years long-aged litigation on intestate succession when incidentally there is no dispute as to the identity of the beneficiaries under the provisions of Section 29 of the Succession Act. The guidelines on the determinants to achieve equity in the distribution of an intestate estate, is clearly outlined in the provisions of the Act. Some of the contentious issues which emerge over and over again include previous and other receipts of property by the interested party either from the deceased or from the estate. There is also the question of intervivos and transfers, gifts in contemplation of death, property appointed during life interest and any property awarded to any party by the court. I dare say that the battle ground in Succession litigation revolves around this adjudicative issues. In appreciating the various interlocking issues as between the Petitioner and the Respondent, I consider this to be a protracted litigation for the parties are hitherto not in concurrence as to the best model under section 40 which is applicable to the unique circumstances of their family. It is not in dispute that the deceased in this intestate estate died without making a will, he had a polygamous family consisting of two wives and corresponding offspring together with a dependant totalling to 17 beneficiaries. that during his lifetime the deceased acquired both movable and immovable assets as tabulated in the inventory annexed to the Petition and other necessary affidavits by either the Petitioner or the Respondent. The net intestate estate available for distribution can be summed from the affidavit

by the Petitioner and the Respondent. In this category of net estate, the surviving spouse is entitled to a life interest which is held in trust for the children of the deceased by dint Section 35(1)(5) and 38 of the Succession Act. That life interest, terminates upon the remarriage of a widow and the property by effluxion of law passes to children. In the case of Re the Matter of the estate of Kariuki Kiburu vs Joyce waruguru Kariuki & 2 others (2016) eKLR, the court pronounced itself as follows:

> " The learned judges essentially espoused the principle of fairness and equity in distribution of a deceased estate between or amongst persons beneficiary entitled to such an estate in a polygamous family setup. While the number of children in a particular house is an important factor in the determination of the share to be allocated to each house, it is not the only factor, neither is it the controlling factor. The share each house gets is not contingent upon the number of children in any particular house, there are other consideration which will guide the court's discretion in the distribution of the estate, for instance the age of the children and their station in life are factors that the court will necessarily take into account. Neither of the surviving children is a school going child or is so young that he has to be taken through the part of life, on the contrary the deceased survivors are all adults who are settled in life and therefore the question whether some of them are entitled to a larger share of the estate than others by virtue of age does not arise, their station or status in life does not count."

65. The upshot of this estate in relation to distribution can very well fall within the spectrum in Re Estate of Elijah Kipketer Misoi (20180 eKLR and Onyiego J had this to say:

> " What does that model of distribution entail in Section 40? In sub section (1) it means adding children from the houses with the addition of a surviving spouse then share the estate equally and thereafter each house take their share and split it with their surviving mother if any having a life interest."

66. In the case of Re Estate Ikubu Kinyungu (2017) eKLR, the court held that the applicant's contention that the estate of his father ought to be divided into two equal shares between the two houses is unfounded. Consequently, in the case of Saweria Wamuruoma Muchanji vs Ngare (2008) eKLR, the court dealt with the same issues as seen from the following extract statement:

> " This is a plain unequivocal language meaning the estate shall be divided equally amongst the surviving children of the deceased adding surviving spouse as additional units. It does not say that the estate should first be share equally among the children within each house. The clear position is that the estate of a deceased person who dies while married under polygamous marriage shall be divided amongst the children with the surviving spouse as an additional unit. This does not contravene Art. 27 of *the Constitution*. To the contrary, to share the estate in accordance to houses will even be more offending to Art. 27 of *the Constitution* in that that there will be inequality and discrimination amongst the children."

67. So here in my respective view, even with the clarity of the law, heirs to the estate always find fault with section 40 on the model of distribution. The difficulty remains within each of the beneficiaries desirous of applying the statute to meet their respective interest as perceived and conceived in their respective status within the family. The provisions of Section 40 of the Act is the applicable law and the drafters of that statute way back in 1981 did so in compliance with Art. 27 of *the Constitution* 2010. It is not in dispute that the petitioner and the Respondent proposals are not really torn apart except for minimum differentia on interpretation of Section 40 of the *Law of Succession Act*. It follows therefore that underpinning the distribution of this estate within the statutory scheme of Section 38 as

read with Section 40 of the Act an order be an is hereby made that the estate thereof be divided equally amongst the surviving spouse and all the children of the two houses save for those who will voluntarily renounce their inheritance from the estate. For the reasons stated, the matrimonial estate occupied by the surviving spouse shall be protected and given an express life interest and any additional share which accrue as a proprietary interest to the spouse, be so retained without interfering the remedial rights created by virtue of the marriage to the deceased. The specific question as to movable assets, is primarily in reference to their level of appreciation and depreciation since the demise of the deceased. None of the affidavits filed before this court gives the value of the inventoried movable assets in compliance with the Act to enable this court clearly distribute assets and not scrap chattels. Ultimately, the question can only be answered by the administrators subjecting the movable assets to an audit by a mechanical engineer who will then file a report to give effect to the express provisions of the law on distribution. This case from the affidavits raises some profound questions about the nature of the deceased family and the obligations they have had in terms of securing certain rights under the presumption that those were the wishes of the deceased although he did not write a will. Members of the family of a deceased person enjoy fixed rights of inheritance to the estate of the deceased which sometimes if the parties had to adopt mediation under Art. 159 2(d) and apply the provisions of Section 38 and 40 of the *Law of Succession Act*, the court will have a limited scope on the interference on the dispositions of the estate to the beneficiaries. It bears repeating however, that is the nature of law that it permeates and defines the very ethos of a multi-cultural society upon which we are premised as a people.

68. It is noteworthy to state that the surviving spouse will continue to live in the family home as initially established by the deceased so long as she does not remarry. In addition, in allocating the various shares within the intestate estate to the beneficiaries under the espoused provisions of Section 35, 38 and 40 to avoid the resulting confusion, the inheritance shares shall first take into account the current established domiciled and residences of each of the beneficiaries. The law on inheritance is never fresh start but is about rights of inheritance based on the survivorship of the deceased.

69. The upshot of it all, the administrators do generate the distribution matrix within the scope of the Certificate of confirmation of grant for signature and endorsement by this court within seven days from this date.

70. Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 9TH DAY OF AUGUST 2024

.....

HON. R. NYAKUNDI

JUDGE

In the presence of;

Patrick Cherono the Administrator present.

Omwenga & Co. Advocates

T.K Rutto & Co. Advocates

Kutto & Kaira Nabasenge Advocates