



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 570 OF 2015**

**IN THE MATTER OF THE ESTATE OF JEREMIAH SECHERO (DECEASED)**

**RULING**

1. I delivered a judgement herein on 26<sup>th</sup> September 2019, wherein I appointed fresh administrators and directed them file for confirmation of their grant within forty-five days. The summons for confirmation of grant dated 5<sup>th</sup> November 2019, filed herein on even date, was so filed in compliance with the said directions.

2. In my judgement of 26<sup>th</sup> September 2019, I established that the deceased had married two wives, and, therefore, his household constituted of two houses. The deceased was not really a polygamist, since the second marriage was contracted after the first wife died. Nevertheless, for purposes of distribution of the estate, section 40 of the Law of Succession Act, Cap 160, Laws of Kenya, which provides for the distribution of a polygamist's estate, should apply. I believe the principle in section 40 is for division of the property of a person who had married more than wife whether through polygamy or otherwise.

3. The affidavit sworn in support of the summons, dated 5<sup>th</sup> November 2019, does not indicate that the deceased had two houses, and has not listed the surviving members of each house. Distribution under section 40 is according to houses, and, therefore, it is critical that the application be clear on the number of the houses and the members of the houses. Otherwise, as currently framed I am unable to apply section 40 without difficulty.

4. For avoidance of doubt, section 40 provides as follows:

*“40. Where intestate was polygamous*

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

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

5. Where any child of the deceased has died, it should be disclosed, and if he or she was survived by children, the names of the children should be listed. Section 40(2) envisages that after the estate is apportioned under section 40(1) as between the houses, the property should thereafter be distributed within the houses in accordance with sections 35 to 38 of the Act. These provisions cannot be applied effectively unless there is complete and accurate disclosure of all the persons who survived the deceased.

6. Sections 35 to 38 provide 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) ...*

(3) ...

(4) ...

(5) *Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.*

36. *Where intestate has left one surviving spouse but no child or children*

(1) *Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—*

(a) *the personal and household effects of the deceased absolutely; and*

(b) *the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and*

(c) *a life interest in the whole of the remainder: Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.*

(2) *The Minister may, by order in the Gazette, vary the amount specified in paragraph (b) of subsection (1).*

(3) *Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the order of priority set out in section 39.*

37. ...

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.”*

7. Section 35(5) makes reference to sections 41 and 42. Section 41 deals with situations where some of the survivors of the deceased are minors, or their own parents, being children of the deceased, were also deceased. Where some of the survivors are minors or are grandchildren of the deceased whose own parents are dead, those facts ought to be disclosed, so that such children can be factored at distribution. Section 42 deals with situations where some of the assets were distributed during the lifetime of the deceased to some of the survivors or beneficiaries. Where there was such distribution by the deceased during his lie time, then that must also be disclosed, so that the said can also be factored in the distribution.

8. Sections 41 and 42 provide as follows:

*“41. Property devolving upon child to be held in trust*

*Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.*

*42. Previous benefits to be brought into account*

*Where—*

(a) *an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*

(b) *property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”*

9. The application dated 5<sup>th</sup> November 2019 as currently framed does not address all those factors. I cannot do justice if I were to proceed to distribute the estate on the basis of the facts placed before me in that application.

10. The final orders that I shall make in this matter are as follows:

(a) That I hereby postpone determination of the summons dated 5<sup>th</sup> November 2019, to allow the applicant file a further affidavit to address all the issues that I have raised in the instant ruling;

(b) That the applicant shall furnish a copy of this ruling to his co-administrator, so that she can, if she is so minded, file her papers with respect to the application on the issues raised in this ruling; and

(c) That the matter shall be mentioned after thirty (30) days, for compliance and for further directions;

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8<sup>TH</sup> DAY OF MAY, 2020

W. MUSYOKA

JUDGE