



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**SUCCESSION CAUSE NO. 71 OF 2015**

*[Formerly Machakos High Court Succession Cause No.687 of 2014]*

**IN THE MATTER OF THE ESTATE OF RAMAITA SOLITEI (DECEASED)**

**BETWEEN**

**JUDITH NAIYAI RAMAITA & ANOTHER.....ADMINISTRATORS/APPLICANTS**

**AND**

**JAMES KOOTE RAMAITA.....PROTESTOR**

**RULING**

**Introduction**

The deceased in this matter, Ramaita Solitei died intestate on the 17<sup>th</sup> April 1985 domiciled in Kajiado. He was a polygamous man and left behind 16 children from two widows, Rikoine Ene Ramaita Solitei the first wife and Tepenoi Ene Ramaita Solitei. The two houses of the deceased were as follows:

1<sup>st</sup> House: Rikoine Ene Ramaita Solitei - Widow.

1. James Koote Ramaita - Son.
2. Nkoisaen Ramaita Solitei - Son.
3. Morgan Mpoke Ramaita - Son.
4. Solitei Ramaita - Son.
5. Ann Nguyana Ramaita - Daughter.
6. Duncan Lera Ramaita - Son.
7. Sipare Ramaiah - Daughter
8. Ruth Khate Ramaita Daughter
9. Jonathan Kanamo Ramaita - Son.
10. Mark Partimo Ramaita - Son.

2<sup>nd</sup> House: Tepenoi Ene Ramaita Solitei - Widow

1. Judith Nyayiai Ramaita - Daughter.

2. Micah Ramaita Solitel - Son.
3. Caroline Katito Ramaita Daughter.
4. Fred Sorora Ramaita Son.
5. Robert Ramaita - Son.
6. Edith Nkoi Ramaita Daughter

The estate of the deceased comprised a parcel of land known as Kajiado/ Kaputiei South/10 measuring about 777 Ha. and Plot No. 7 Sultan Hamud. A grant of Letters of Administration of the estate of the deceased was made on the 14<sup>th</sup> May, 2015 to Judith Nayiai Solitei, Micah Ramaita Solitei, James Koote Ramaita and Nkoisaen Ramaita Solitei.

The Applicants sought to confirm the grant by an application filed on 1<sup>st</sup> April 2016 and dated 31<sup>st</sup> March 2016. According to the Applicants, the proper mode of distribution was that the property land parcel Kajiado/ Kaputiei South/10 ought to have been split in two equal shares between the two houses, that is 388.5ha each and each house distribute those shares to its beneficiaries equally.

In response, by an Application filed on 24<sup>th</sup> May 2016, James Ramaita protested against the application dated 31<sup>st</sup> March, 2016. He averred that his two co-administrators Judith Nayiai Solitei and Micah Ramaita Solitei had failed to consult the 1<sup>st</sup> house on the proposed mode of distribution and denied giving consent. The Protestor averred that where an intestate is polygamous, his personal and household effects and the residue of his net estate should, 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. As such, it was averred, the proposed mode of distribution of the estate filed by the Applicant's herein offended this trite principal of law.

According to the Protestor, all beneficiaries of the estate of the deceased ought to get equal shares of the deceased's estate. Therefore, it was proposed that the appropriate mode of distribution be that each dependant should be awarded 43.16667 hectares over Land Parcel No. Kajiado/Kaputiei South/10 and equal shares over Plot No. 7 Sultan Hamud. In the alternative it was proposed that Plot No. 7 Sultan Hamud of the deceased's estate should be sold and proceeds distributed equally among all the beneficiaries.

Judith Nayiai Ramaita on her part testified on behalf of the Applicants that at the time of the demise of the deceased she was in form 2 and about 15 years of age while her brothers James Koote and Morgan Mpoke had already completed college and were working. She averred that at the time the deceased had about 500 bought steers and 400 original cows as well about 300 goats. She further averred that during distribution, her mother and her house were discriminated against as she was given about 60 cows and 30 goats while the widow of the 1<sup>st</sup> house took the rest.

It was further averred that while the second house became destitute, the first house and its children had all that they needed. That in 1995 when the two houses split and settled in different places within the ranch. The children of the second house were restricted to occupy an area of about 20 acres and cumulatively used only about 40 acres of the deceased's land. According to Judith the house of Rikoine Ene Ramaita and her children had benefitted from the use of the assets of the estate including user of the 1500 out of the 1600 acres of the land comprising the estate and almost all cows and goats for over a period of about 30 years it was only fair and just that the said use be counted as an advancement to the first house.

Judith deponed that any acknowledgement she may have made at different times of the very rare and isolated acts of kindness from her step-brothers did not in any way lessen the pain of abandonment and neither did it demonstrate that they handled the estate of my late father in a just and humane manner.

James Koote Ramaita on the other hand averred that as far as cows and goats of the deceased were concerned, each of the two houses had their own cows and goats. None of the children of the deceased had a say on the number of cows or goats that each house had. He denied there being any bought steers at the time of the deceased's death.

The protestor averred that no restriction had been placed on how much area can be used on the ranch. He denied the claims that the children of the first house had been left destitute upon the demise of the deceased and averred that the deceased did not leave any assets worth being liquidated in order to take of the various responsibilities of his dependants. He averred that Judith Nayiai had on many occasions acknowledged the support she had received from her stepbrothers and it therefore defeats logic for her to claim that she and her siblings were abandoned.

This court commissioned a report on the status of the suit property subject of the distribution on 9<sup>th</sup> February 2018. The report revealed that while members of the first house kept referring to the unoccupied land on the ranch as free land, those from the second house maintained that there was no free land on the ranch. According to them, the unoccupied land was grazing land mainly used by members of the first house. Members of the first house also informed the court that even though Judith Nyayiai is married at Mashuuru she usually brings her cattle to graze at the ranch. While members of the second house alleged that they occupied only approximately 40 acres of the ranch, those from the first house were of the view that members of the second house occupy approximately 500 acres. According to James Ramaita, none of his siblings, from both the first and second house, was shown which part of the ranch to occupy or establish a home. All the portions where they had settled were self-apportioned. However, according to Judith, this only applied to members of the first family. She averred that her siblings, from the second house, unlike members of the first house, have always faced opposition each time they want to establish homes on the ranch. The issue of Robert Ramaita having sold 50 acres of the ranch also arose. The court was informed that a copy of the sale agreement is on record and should be looked at.

The report only approximated the number of acres each member of the family occupies and proposed that a land surveyor be engaged to carry out a survey so as to establish the exact number of acres of occupied and unoccupied land. All members of the family were in agreement with this suggestion. It was observed that the ranch was vast with so much unoccupied space and efforts should be made to have the litigants sort out the conflict amicably.

### **Submissions by the Protestor**

The protestor in his submissions begun by describing the reasons advanced by the 2<sup>nd</sup> House to justify their mode of distribution to be that the cows that were left behind by the deceased only benefited the 1<sup>st</sup> house. That, according to Maasai customary law, the land should be divided to houses. That, their use of the deceased land has been restricted to the use of the land by the 1<sup>st</sup> house. That, the second wife Tepenoi Ramaita was less favoured by the deceased. That, the children of the 1<sup>st</sup> house have benefited from the estate of the deceased for long more than the children of the 2<sup>nd</sup> house.

The protestor further urged that the distribution ought to be that each member of the family get an equal share for the reasons that all of them including the widows were dependants of the deceased. That, if the proposal suggested by the 2<sup>nd</sup> house is granted, it would amount to total discrimination, yet all of them belong to one man. That, there is no uniformity in Maasai land as to how property of deceased polygamous man is distributed.

Urging on the law relating to the proceedings, it was submitted that the land in question in these proceedings was registered under the provisions of the then repealed cap 300 laws of Kenya now the Registration of Land Act No.3 of 2012. The other land left behind by the deceased is a plot known as plot number 7 within Sultan-Hamud within a township and therefore by the nature of the properties left behind by the deceased his estate shall be distributed in accordance with **section 40** of the law of succession Act.

Citing Section 40, it was submitted that the properties shall in the first instance be divided among the two houses but taking account the number of children in each house, the 1<sup>st</sup> house has 10 children (units) adding the surviving widow making them 11 units. The 2<sup>nd</sup> house has 6 children (units) plus one surviving widow making a total of 7 units. The total units left by the deceased are 18. It was further submitted that the properties left by the deceased be divided equally among the 18 units surviving the deceased and since the plot at sultan Hamud is a commercial property he same be sold and the proceeds be shared equally among the 18 units.

Reliance was placed on the authority of **In re the estate of George Cheriro Chepkoskei (deceased) Succession Cause No. 16 of 2010** where the court dealt with a unique question of whether the share of the 1<sup>st</sup> widow should be equal to that of the rest of the widows of the deceased or even the children. The court found and held that the first widow did come to the home earlier than the 2<sup>nd</sup> widow and therefore she was entitled to a bigger share of the estate.

Further reliance was placed on **In the matter of the estate of Benson Kagonda Ngururi Succession Cause No. 341 of 1993**, where the court held that where a deceased is a polygamist and his estate is not exempted from the provisions of part (v) of the Law of succession Act, the estate ought to be distributed according to section 40 of the Law of succession Act. Counsel quoted Ondeyo J, noted that the number of children in each house of the deceased is in the first instance a guiding factor in the distribution of the intestate estate of the deceased. The judge in this case divided the land of the deceased into 15 units as each house had had 8 and 7 units respectively. Counsel also cited in **the estate of Benson Ndirangu Mathenge Succession Cause No. 231 of 1988**.

Counsel went on to submit that while the deceased had a herd of cows prior to his death, the actual number is unknown, each of the widows had her own cows during the life and after the death of the deceased, during the distribution of the cows each widow took her cows and that of her children. Further that, Tepenoi Ramaita told the court that what she got on distribution of the cows was her rightful share and that no cow(s) were taken by the 1<sup>st</sup> house and further that she was satisfied in the manner the cows were distributed.

It was further submitted that the applicant had alleged that her mother was given less cows, restricted to a smaller fraction of the farm ranch for use but had not called a single witness to corroborate her story. That she had not called any elder to support her evidence that her mother's house is not being allowed to use part of the land or that her mother (house) got lesser number of cows because she was less favoured by the deceased.

On the use of land it was submitted that the assertion by the Applicant and her mother that they are only utilizing around 40 acres of the 1800 acres of land of the deceased and that they are restricted to use the other part of the ranch was untrue. Counsel cited the report made by the deputy registrar when he visited the land on 9<sup>th</sup> February 2018.

Regarding advancement to the 1<sup>st</sup> house, it was proffered that the applicant in her evidence stated that the protestors benefited so much from the estate to the detriment of the 2<sup>nd</sup> house without providing actual proof for those allegations.

In his further submissions, counsel stated that the applicant had not brought evidence to show that none of the children of the younger wife, benefited from the estate; that the 1<sup>st</sup> house children benefited more than the 2<sup>nd</sup> house from the estate and that the children of the 2<sup>nd</sup> house lacked education and other basic needs of life because of the 1<sup>st</sup> house. It was further submitted that the Applicant cannot conclusively submit that the deceased left behind 700 cows. Similarly, it is not possible at all or even from the evidence of the parties to ascertain fully how many cows each house got.

Regarding the Applicant's reliance on Section 42 of the law of succession Act, it was submitted that, no such evidence was led to show the deceased had gifted some properties during his lifetime and the court was being invited to a wild goose chase without any evidence to support the same. The authority cited by the applicant is totally irrelevant in the material case before the court. It was submitted that the case of estate of Kariuki Kiburu was inapplicable to the instant case as none of the children of the deceased was a minor when the case was filed.

## Submissions by the Applicants

Advocate for the Applicants submitted that the Applicants had established a basis for the deceased estate to be distributed equally between the two houses because at the time of the demise of the deceased, the children of the 2<sup>nd</sup> House were at a younger stage in their development and hence did not have the benefit of having the assets of the estate being used for their benefit.

Counsel went on to rehash the evidence given to show that the 2<sup>nd</sup> family had been discriminated against in the distribution of cattle between the homes. Counsel then discussed the differences in the age of the children of the 1<sup>st</sup> and 2<sup>nd</sup> houses at the time of the deceased's demise, noting that while the members of the first house had enjoyed use of the ranch for nearly twenty years to the exclusion of the 2<sup>nd</sup> family who counsel asserted had been restricted to 40 acres of the vast estate.

It was further submitted that the 1<sup>st</sup> widow was the more favoured wife hence the skewed distribution of resources in both land use and cows during and after the deceased's demise. The court was urged to draw an inference that the 1<sup>st</sup> Widow's family were the major beneficiaries of the status quo in that the larger portion of the cows had been distributed to them and further, that they had access to the larger portion of land available for their use, hence their unwillingness to take out a grant.

Turning to how the estate ought to be distributed, it was submitted that the basis for an equal share division of the parcel of land known as Kajiado/Kaputie/South/10 such that each house got half of the land was under **Section 42** of the Law of Succession Act which provides:

### **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.***

It was then submitted that the 1<sup>st</sup> house widow having benefited from the estate prior to and after the demise of the deceased in a substantially quarter dimension than the 2<sup>nd</sup> house's widow, an advancement should be deemed to have been enjoyed by the 1<sup>st</sup> house widow's family which should be taken into account during the confirmation.

Reliance was placed on **Succession Cause No. 123 of 1999 Estate of Kariuki Kiburu**, where it was held:

***"... Nor do see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly a case of growing child who is still to be maintained, allocated and generally seen through life. If such a child, whether 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 that the Act does not provide for that kind of equality".***

Further reliance was placed on **Succession Cause No. 62 of 1998, Estate of Anjeline Papa** where the court held that any property advanced should be taken into account during distribution. In the said decision, the deceased had settled his sons with inter vivos gifts. The court had no problem making the finding that:

***"...in considering the distribution of an intestate estate, a court may take into account of any advancement or other gifts made to the Dependants during the lifetime of the deceased as provided by section 28 (d) of the law of succession Act".***

Advocate for the Applicant finally urged the court to find that the family of Rikoine Ene Ramaita, the first widow and her children, having benefitted from the estate, more than the second family (Tepenois) the proposed distribution was fair and allow the application as prayed.

## Issue for determination

The only issue for determination is the lawful distribution of the deceased's Estate among his children and spouses from his two houses.

## The Law

This inheritance is by descent. The claims of descent and all existing models and rules are set forth in the law of Succession Act covering both real and personal property. The law of Succession involves an inquiry as to who are the heirs of an intestate. If all children are in equal degree of relationship to the deceased, the distribution shall be in equal shares amongst each of them. The general principle of law is that in testate or intestate succession a person carries his customary distribution of their father's property.

In this succession cause attempts were made to invite the court to consider certain aspects of Maasai customary law and how it impacts on this distribution. It is trite that customary law is not static, but rather evolves, develops and modernizes with the times. Having consideration of the facts of this case customary law is not at war with the constitution or statute governing inheritance of intestate property.

The deceased was polygamous. **Section 40 of the Law of Succession Act** deals with the issue of polygamous families and stipulates as follows: -

Section 40 (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.”***

Section 40 (2):-

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

**Section 3** of the Law of Succession Act, defines the “house” as a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife. There is no discrimination of the children on grounds of their sex. Both wives of the deceased and all their children are therefore entitled to a share of his net intestate estate equally as provided for by section 40 of the Law of Succession Act.

Having laid out the statutory basis for distribution in the current proceedings, let me now examine the case law on the subject. My point of departure is the comments attributable to Omollo J.A in the celebrated case of ***Eldoret Civil Appeal No. 66 of 2002, Mary Rono versus Jane Rono & William Rono (2005) eKLR*** where quoting Section 40(1) of the Act, he held that: -

***“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 discretion to take into account 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 a case of 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 that the Act does not provide for that kind of equality.”***

Referencing the court’s decision in ***Rono vs Rono (supra)***, the court in ***Succession Cause No. 123 of 1999; In Re The Matter of the Estate of Kariuki Kiburu (Deceased) Rahab Njeri Kariuki v Joyce Waruguru Kariuki & 2 Others [2016] eKLR*** took the position below:

***“The learned judges essentially espoused the principal of fairness and equity in distribution of a deceased’s estate between or amongst persons beneficially entitled to such an estate in a polygamous family set-up. 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 considerations 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 path of life; on the contrary, the deceased’s survivors are all adults who are settled in life and therefore the question whether some 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.”***

In ***The Matter of The Estate of Samwel Miriti (Deceased) M M M’M vs A I M Succession Cause No. 110 of 2010 [2014]*** Makau J held:

***“16. In the instant application the 1st petitioner is opposed to equal distribution while the interested party/2nd petitioner seeks and favours 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”.***

In ***re Estate of Joel Mulove Wambua (Deceased) Succession Cause 928 of 2009 [2018] eKLR*** the court described the application of **Section 40** of the Law of Succession Act as follows:

***“The Law of succession is clear as to how to deal with the succession of Estate in which there are two or more houses of beneficiaries 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.*

*The formulae under section 40 the Law of Succession Act therefore requires two tier application as follows:*

- 1. "In the first instance, be divided among the houses according to the number of children in each house"; and*
- 2. Secondly "adding any wife surviving him as an additional unit to the number of children."*

*For example, as I understand the Law, in a Deceased's family made up of two houses, A and B, each with one child and one house, A, with the spouse surviving the Deceased, the two tier process of distribution will occur as follows:*

*Step 1: Each child gets a share - there are two heirs so two units of distribution shares; and*

*Step 2: Add one share for the spouse in house A, making three units of shares in the Estate.*

*The Estate of the Deceased in this example will, therefore, be divided into three equal parts, but as between the houses, they will have taken two units of the shares to house A and house B, where there is no surviving spouse one unit of share to the Estate. Naturally, more shares in the Estate, and therefore a larger share thereof, will go where there are more children in one of the houses, or where there is a surviving spouse in case of equal number of children for two or more houses."*

Discussing the issue of distribution under **Section 40**, Onyiego J **In re Estate of Elijah Kipketer Misoi (Deceased) Succession Cause 401 of 1999 [2018] eKLR** had this to say:

*"25. What does that mode of distribution entail" In the case of John Musambayi Katumanga (deceased) (Supra), J. Musyoka held that Section 40(1) 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.*

*26. In the case of Re estate of Ikubu Kinyungu Mwaga (deceased) 2017 eKLR Justice Matheka 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".*

*Similar position was also held in the case of Saweria Wamuruoma Muchanji vs Jimano Ngare (2008) eKLR where the court held that:*

*"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 unit. It does not say that the estate should first be shared equally among the children within each house".*

*27. There are several authorities in our legal system including Rono v Rono (Supra) in which courts have authoritatively held that Section 40(1) does not mean equal distribution amongst the houses. 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 Article 27 of the Constitution as alluded by Mr. Arusei. To the contrary, to share the estate in accordance to houses will even be more offending to Article 27 of the Constitution in that there will be inequality and discrimination amongst the children."*

As evidenced by the precedents referred to above, distribution under Section 40 has always been a touchy issue subject to contradictory interpretations. For the most part, the controversy stems from whether in such a situation, the estate of a deceased ought to be distributed equally or equitably. The arguments put forth by the Applicants in the instant case strongly suggest the application of equity in the distribution of the estate of the deceased. The position taken by the Applicant's is apparently informed by the alleged injustices faced by the 2<sup>nd</sup> family. It was argued extensively that the 2<sup>nd</sup> family had been discriminated against in the distribution of cattle between the homes. Further, Counsel for the Applicant then discussed the differences in the age of the children of the 1<sup>st</sup> and 2<sup>nd</sup> houses at the time of the deceased's demise, noting that while the members of the first house had enjoyed use of the ranch for nearly twenty years to the exclusion of the 2<sup>nd</sup> family who counsel asserted had been restricted to 40 acres of the vast estate. It was further submitted that the 1<sup>st</sup> widow was the more favoured wife hence the skewed distribution of resources in both land use and cows during and after the deceased's demise. The court was urged to draw an inference that the 1<sup>st</sup> Widow's family were the major beneficiaries of the status quo in that the larger portion of the cows had been distributed to them and further, that they had access to the larger portion of land available for their use, hence their unwillingness to take out a grant.

According to the Applicant, the benefits enjoyed by the 1<sup>st</sup> family ought to be treated as falling under **Section 42** of the Law of Succession Act. The protestor on the other hand dismissed the averments made by the applicants, citing the lack of evidence to buttress the claims of abandonment and restriction on the use of the ranch, it was submitted that the distribution of the estate be done in accordance with **Section 40**.

In order for this Court to be enjoined to apply the principles of equity to the distribution of the estate of the deceased, it has to be satisfied that distribution in the strict terms of Section 40 would occasion an injustice. I am not convinced that this is the case here. A lot has been said

about the distribution of the cattle owned by the deceased. To this, my answer is that each community has its particular traditions and ways of doing things. While some actions may be as a result of poor judgement, not every such action amounts to an illegality that the court ought to arrest. While it may very well be that the cattle were unfairly distributed, I believe and it is my finding that this in itself does not warrant the courts intervention, especially as the body of evidence on this particular allegation was right.

On the issue of favouritism of the first widow, the only person who could sufficiently respond to such allegations was the deceased. As it were, the court does not have the benefit of his testimony and therefore cannot purport to put itself in the mind of the deceased and adjudge why he chose to dot on one spouse at the expense of the other.

Turning to the age of the dependants, while at the time of the deceased's death some of the beneficiaries and in particular members of the 2<sup>nd</sup> house were minors, by the time the succession proceedings begun, all the dependants were adults. The court cannot be asked to retrospectively apply equity for the benefit of the members of the 2<sup>nd</sup> house.

Finally, on the unequal use of the vast estate, it was brought to the fore by the deputy registrars report that large swathes of the suit property still remain unoccupied. Despite the accusations and counter accusations by the members of both houses as to the use of the land, the fact remains that a substantial amount of the land is unoccupied. No injustice would occasion were such land to be distributed equally.

Against the backdrop described above, I find it difficult to find in favour of the Applicants argument for the application of equity and their proposed mode of distribution. I draw inference from In **Re The Estate of John Musambayi Katumanga Succession Cause 399 of 2007 (2014) eKLR** where Musyoka J opined that:

***“27. 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.”***

I reiterate that no evidence was led to show that the deceased in his lifetime had gifted any property to any of the beneficiaries in the manner contemplated under **Section 42**. This court takes into account the Deputy Registrar's report that was calculated to provide prima facie evidence on the nature of the assets or interests in the estate of the deceased. The report pointed out various aspects, which this court found relevant in coming up with the final orders on this cause. A claim for actual discrimination or real possibility of unfair treatment undoubtedly did not come out in the open from a clear reading of the report. I therefore find no merit to the applicant's proposition that the alleged enjoyment of the estate by the members of the 1<sup>st</sup> house be treated as an advancement to them. From where I stand, the reasons as adduced by the applicants are not compelling enough to warrant this court to disturb the law on distribution of the estate of a polygamist.

It is desirable that the letter and the spirit of the law of Succession Act be followed in all matters resulting in the distribution of the estate of the deceased. In this judgement many issues were raised by the applicant inviting this court to apply the principles of equity in so far as determining the shares and entitlement of the residual interest in the estate. The borne of contention in the distribution revolved around the conduct of the protester after the demise of the deceased. I give due consideration to the evidence in the context of those factors like distribution of livestock and other movable properties but found no compelling evidence for me to exercise discretion contrary to Section 35, 36, 37, 38 and 40 of the Law of Succession Act.

The arguments by the applicant that seem to indicate a discrepancy of equal opportunities between the 1<sup>st</sup> house and their family did not establish discriminative practices on the part of the deceased or the respondent/protestor. According to the applicant they felt disadvantaged in the manner they were treated whereas their counterpart had corrective measures taken to advance the family in every respect. The facts of this case consciously makes no attempt to go beyond the already settled principles of equality among the heirs to the intestate property. The circumstances of the case are such that the applicants cannot be placed substantially the same position with the first family who allegedly found themselves at the home of the deceased much earlier than the applicants.

As such, my position is and I hold that the distribution of the estate of Ramaita Solitei should be done in accordance with the mode set out in paragraph 15 of affidavit filed by James Koote Ramaita on 24<sup>th</sup> May 2016 pursuant to the provisions of Section 35, 36, 37, 38, 40 and 42 of the law of Succession Act. This court is bestowed with the noble duty and jurisdiction to make appropriate orders to meet the interest of justice of the case.

Regarding prayers sought in the confirmation of letters of grant of administration I find that on the facts of this case it is impracticable to deviate from the provisions of the law on the distribution of the estate. For the purposes of this Succession Cause the residual intestate of the deceased Ramaita Solitei on my part thereof shall be distributed in the following terms:

- a. Plot Number 7 Sultan Hamud be sold and the proceeds be divided equally among the 18 units.
- b. Land Parcel No. Kajiado/Kaputiei South/10 be divided in equal shares as follows:

**1<sup>st</sup> House:**

1. Rikoine Ene Ramaita Solitei – Widow 43.16667 Ha.
2. James Koote Ramaita - Son. 43.16667 Ha.

3. Nkoisaen Ramaita Solitei - Son. 43.16667 Ha.
4. Morgan Mpoke Ramaita - Son. 43.16667 Ha.
5. Solitei Ramaita - Son. 43.16667 Ha.
6. Ann Nguyana Ramaita - Daughter. 43.16667 Ha.
7. Duncan Lera Ramaita - Son. 43.16667 Ha.
8. Sipare Ramaiah – Daughter 43.16667 Ha.
9. Ruth Khate Ramaita Daughter 43.16667 Ha.
10. Jonathan Kanamo Ramaita - Son. 43.16667 Ha.
11. Mark Partimo Ramaita - Son. 43.16667 Ha.

**2<sup>nd</sup> House:**

12. Tepenoi Ene Ramaita Solitei – Widow 43.16667 Ha.
13. Judith Nyayiai Ramaita - Daughter. 43.16667 Ha.
14. Micah Ramaita Solitel - Son. 43.16667 Ha.
15. Caroline Katito Ramaita Daughter. 43.16667 Ha.
16. Fred Sorora Ramaita Son. 43.16667 Ha.
17. Robert Ramaita - Son. 43.16667 Ha.
18. Edith Nkoi Ramaita Daughter 43.16667 Ha.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAJIADO THIS 11<sup>th</sup> DAY OF FEBRUARY, 2019.**

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**R NYAKUNDI**

**JUDGE**

**Representation:**

Mr. Koin for the protestor

Mr. Liko for Maina for the applicants