



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2423 OF 2010

IN THE MATTER OF THE ESTATE OF ENK

(DECEASED)

JUDGMENT

1. ENK (the deceased) died on 30th October 2010 and thereafter, a petition was filed and a grant of letters of administration intestate issued to the parties herein on 10th June 2011 to act as joint administrators of the estate of the deceased.
2. BN, SM and PW, hereinafter referred to as The applicants filed, a summons on 30th July 2014 seeking confirmation of the aforementioned grant of letters of administration intestate. They applicants have detailed the beneficiaries of the deceased. The widows are listed as MW (1st wife) and PW (2nd wife); while the sons are PK, BN, GK, SM and JK; and the daughters are LW, NND and EM.
3. According to the applicants the deceased died possessed of Njoro/Ngata/Block 1/1049, Njoro/Ngata Block 1/1048, Nairobi/Block 98/8, Muguga/Jet Scheme/1682, Makuyu/Kimorori/Block 1/1824, Makuyu/Kimorori/Block 1/1825, Makuyu/Kimorori/Block 1/1826, Makuyu/Kimorori/Block 1/1827, Makuyu/Kimorori/Block 1/1828, Makuyu/Kimorori/Block 1/1829, Embakasi Plot L.R No. 24886/45, Chiromo Flat L.R No. 209/73/15, Nairobi/Block 133/12(Flat No. 14) Komarock, Ruai Plot Nos. 209 and 210, Share Certificate No. [xxxx], Njoro/Njoro Block 1/39 (KIKAPU), Gilgil Farm No. A2/280, Kiambogo/Kiambogo/Block 2/683, Makuyu/Kimorori Block 1/1857, KBJ 914N, KAS 872X, KAB 929U, Hotstar Investment Limited (90% shares), Starehe Limited (50 shares), Standard Investment Bank shares (Eveready – 2200, Kengen – 16431, Kengen – Re- 2255 and Safaricom – 42500), Faida Investment Bank (Barclays Bank – 24000, CMC/AI-Futtaim – 6000, Equity – 24000, HFCK – 21000, Centum – 1100, KCB – 26154, Kengen – 10,000, Mumias Sugar – 25000, NIC – 88, NIC Rights – 24 and Safaricom – 50000), Sterling Investment (Eveready – 6,000, Kenya Re – 2,548, Safaricom – 7,400, Family Bank limited share certificate No. [xxxx], Stanbic Uganda Ltd Share Certificate No. [xxxx] – 20,000 and Africindo Industrial Development Corporation), bonds (Kengen – 4,000,000, Treasury bills – 2,000,000 and Treasury Bonds – 14,500,000), Cash in Bank (Standard A/C [xxxx]- [xxxx], [xxxx], [xxxx] and [xxxx]; Family A/C Nos [xxxx], [xxxx], [xxxx], [xxxx] and [xxxx]; CFC Stanbic – A/C Nos[xxxx], [xxxx], [xxxx], [xxxx], [xxxx], [xxxx] and [xxxx]; National Bank – A/C No. [xxxx]; KCB – A/C No. [xxxx]; Murata Sacco – A/C No. [xxxx]and Mpesa Account No. [xxxx].
4. The liabilities were listed as rental Income Tax – Kshs. 804,738.00, valuation costs provision – Kshs. 150,000.00, surveyor professional fees – Kshs. 200,000.00, estate auditor's fees – Kshs. 70,000.00, estate lawyer's fees – Kshs. 565,000.00, administration costs – Kshs. 500,000.00 and provision for unremitted tax (PAYE) for periods between January 2007 – September 2010 – Kshs. 1,210,000.00.
5. The Summons stated that all the beneficiaries, save for PK, had agreed to have the entire estate distributed as follows:
 - (a) Njoro/Ngata/Block x/xxxx (Kxxxxxxx Matrimonial Home) – to MW, 1st wife absolutely;
 - (b) Njoro/Ngata Block 1/1048 – to PK, LW, NN, BN, EM and GK equally;
 - (c) Nairobi/Block [xx/x] ([particulars withheld] Matrimonial Home – to PW, 2nd wife absolutely;
 - (d) Muguga/Jet Scheme/1682 – to MW and PW equally
 - (e) Makuyu/Kimorori/Block 1/1824 – to MW – 1.5 acres and PW – 0.5 acres, respectively;
 - (f) Makuyu/Kimorori/Block 1/1825 – to PW and SM equally;
 - (g) Makuyu/Kimorori/Block 1/1826 – SM – 0.5 acres and JK – 1.5 acres, respectively;
 - (h) Makuyu/Kimorori/Block 1/1827 – PK and LW equally;

- (i)** Makuyu/Kimorori/Block 1/1828 – to NN and BN equally;
- (j)** Makuyu/Kimorori/Block 1/1829 – to EM and GK equally;
- (k)** Embakasi Plot L.R No. 24886/45 (Embajo Properties and Development No. 71 - to be valued and sold and proceeds thereof to be shared equally between MW, PW, PK, LW, NN, BN, EM, GK and SM;
- (l)** Chiromo Flat L.R No. 209/73/15 - to be valued and sold and proceeds thereof to be shared equally between MW, PW, PK, LW, NN, BN, EM, GK, SM and JK;
- (m)** Nairobi/Block 133/12(Flat No. 14) Komarock - to be valued and sold and proceeds thereof to be shared equally between MW, PW, PK, LW, NN, BN, EM, GK, SM and JK;
- (n)** Ruai Plot Nos. 209 and 210, Share Certificate No. [xxxx] (Original Title L.R No. 10904/2) together with bonus plots at Kamulu - to MW – 2.1 acres;
- (o)** Njoro/Njoro Block 1/39 (Kikapu) - to be valued and sold and proceeds thereof to be shared equally between MW, PW, PK, LW, NN, BN, EM, GK, SM and JK;
- (p)** Gilgil Farm No. A2/280 - to be valued and sold and proceeds thereof to be shared equally between MW, PW, PK, LW, NN, BN, EM, GK, SM and JK;
- (q)** Kiambogo/Kiambogo/Block 2/683 - to be valued and sold and proceeds thereof shared equally between MW, PW, PK, LW, NN, BN, EM, GK, SM and JK;
- (r)** Makuyu/Kimorori Block 1/1857 – to PWa – 1 acre, absolutely;
- (s)** Motor Vehicle Registration Nos KBJ 914N, KAS 872X and KAB 929U – to be shared equally between MW, PW, PK, LW, NN, BN, EM, GK, SM and JK;
- (t)** 90% shares in Holstar Investment Limited, Certificate of Incorporation No. 89221 – to be shared equally between MW, PW, PK, LW, NN, BN, EM, GK, SM and JK;
- (u)** 50 shares in Starehe Limited, Certificate of Incorporation No. [xxxx] – to be shared equally between MW, PW, PK, LW, NN, BN, EM, GK, SM and JK;
- (v)** The basket of share under the Standard Investment Bank (Eveready – 2200, Kengen – 16431, Kengen – Re- 2255 and Safaricom – 42500) – to MW, PW, PK, LW, NN, BN, EM, GK, SM and JK equally;
- (w)** The basket of shares under Faida Investment Bank (Barclays Bank – 24000, CMC/AI- Futtaim – 6000, Equity – 24000, HFCK – 21000, Centum – 1100, KCB – 26154, Kengen – 10,000, Mumias Sugar – 25000, NIC – 88, NIC Rights – 24 and Safaricom – 50000) – to MW, PW, PK, LW, NN, BN, EM, GK, SM and JK;
- (x)** That basket of shares I Sterling Investment (Eveready – 6,000, Kenya Re – 2,548, Safaricom – 7,400 Family Bank limited share certificate No. [xxxx], Stanbic Uganda Ltd Share Certificate No. [xxxx] – 20,000 and Africindo Industrial Development Corporation) – to MW, PW, PK, LW, NN, BN, EM, GK, SM and JK equally;
- (y)** Bonds - (Kengen – 4,000,000, Treasury bills – 2,000,000 and Treasury Bonds – 14,500,000) – to MW, PW, PK, LW, NN, BN, EM, GK, SM and JK equally;
- (z)** Cash in Bank (Standard A/C Nos. [xxxx-xxxx-xxxxx-xxxx], [xxxx], [xxxx] and [xxxx])(Family A/C Nos. [xxxx]- Fixed, [xxxx] – Fixed, [xxxx] – Savings, [xxxx] – Joint and [xxxx] – Temporal)(CFC Stanbic – A/C Nos. [xxxx], [xxxx], [xxxx], [xxxx], [xxxx], [xxxx] and [xxxx])(National Bank – A/C No. [xxxx])(KCB – A/C No. [xxxx])(Murata Sacco – A/C No. [xxxx]) and (MPesa A/C No. [xxxx]) – to MW, PW, PK, LW, NN, BN, EM, GK, SM and JK equally.

6. PK, hereinafter referred to as the protestor, did not agree with the proposals made in the application, and he placed before the court his own proposals on distribution.

7. A consent agreement dated 31st October 2016 was filed, and was adopted by court as an order on 15th November 2016, effectively partially confirming the grant of letters of administration intestate on 17th November 2016 with part of the deceased's estate being distributed as follows:

- a) Family Bank Limited Account No. [xxxx] – all listed beneficiaries to be granted Kshs. 500,000.00 each;
- b) SGB Securities Ltd via CDS Account No. [xxxx] – All listed beneficiaries to be granted equal shares;
- c) Family Bank Limited Account No. [xxxx] – Kshs 435,560/- to be granted to Phyllis Wangari; and

d) Faida Investment Bank via CDS Account No. [xxxx], Sterling Capital Limited via CDS Account No. [xxxx], Family Bank Limited via Account No. [xxxx], Murata Sacco limited via Account No. [xxxx], Image Registrars limited via Bond Certificate No. [xxxx], Central Bank of Kenya Treasury Bond via Account No. [xxxx] – 1 to be shared equally among all listed beneficiaries.

8. The protestor herein filed an application by way of summons dated 3rd February 2017, under certificate of urgency seeking several orders relating to the amendment of the partial certificate of confirmation of grant on various grounds, *inter alia*, possession of postal keys, custody of title deeds, payment of rent and income into a particular bank account, refund of money to himself and occupation of the estate premises. In a ruling delivered on 29th September 2017, the court held that the issues raised in the said application were the subject to a then ongoing oral hearing to enable the court make a comprehensive determination on all critical issues where parties were to give oral evidence and expose themselves to cross-examination. The said application was dismissed by this court save for prayer one, which sought that names of the beneficiaries be correctly amended.

9. From the evidence and pleadings on record there is not contest or dispute on who the beneficiaries of the estate of the deceased are. The main issue that the parties herein seek determination on is the mode of distribution of the assets that make up the estate.

10. As stated before, the beneficiaries entered a consent agreement that distributed some of the property of the estate. I propose to deal with the assets that were not distributed in the partial confirmation of grant.

11. BN, the 1st applicant testified that he was the fourth born son of the deceased and MW, the first wife. He is also the deponent of the affidavit in support of the summons for confirmation of Grant sworn on 30th June 2014. He stated that Njoro/Ngata Block x/xxxx was the 1st wife's matrimonial home where she lived with the deceased and her children, and that the said property should be given to her. He stated that Njoro/Ngata Block x/xxxx was adjacent to Njoro/Ngata Block x/xxxx, and it had been agreed that the same be distributed equally amongst the children of the first wife. He further said that it was the deceased's wishes at a family meeting held on 8th December 2002 that the said property be distributed in that manner. He testified that Nairobi/Block xx/x, located at Nairobi's [particulars withheld] Estate was the matrimonial home of PW, the second widow of the deceased. He opined that the said property be given to the second wife. He stated that Muguga/Jet Scheme/1682 was the ancestral land of the deceased and suggested that the same be divided equally between the two widows. He stated that Makuyu/Kimorori Block 1/1824 was one of six parcels titled up to Makuyu/Kimorori Block 1/1829. Makuyu/Kimorori Block 1/1824 has a development he opined that Plot 1824 should be not be distributed together with Makuyu/Kimorori Block 1/1825 because of the Development. He suggested that Makuyu/Kimorori Block 1/1824 and part of Makuyu/Kimorori Block 1/1825 be given to the widows and the rest of Makuyu/Kimorori Block 1/1825 be divided amongst the other beneficiaries. He further proposed that JK and SM should get additional property, that is 1½ acres each, with the rest of the beneficiaries getting 1 acre each. He stated that LR Number 24886/45, in Nairobi, be valued, sold and the proceeds shared equally amongst the beneficiaries. He proposed that LR Number 209/73/15 be valued, sold and the proceeds shared equally among all beneficiaries. He suggested that Nairobi/Block 133/12, Flat Number 14, in Komarock be valued, sold and the proceeds be shared equally among the beneficiaries as well. The 1st applicant stated that there are two plots in Ruai, numbered 209 and 210 and held under share certificates issued by Embakasi Ranching Company which consists of a commercial building with residential premises at the back. He added that the 1st wife has been living there for 2 years. It had been proposed that the said properties be allocated to the 1st wife. He stated that Njoro/Njoro/Block 1/39 in Njoro area be valued, sold and proceeds shared equally among the beneficiaries; the same for property number Kiambogo/Kiambogo/Block 2/683. On Makuyu/Kimorori/Block 1/1857, the 1st applicant stated that the property is prime and that being the 1st wife was allocated the Ruai property, the said Makuyu property be given to the 2nd wife. He added that the 2nd wife had been living and farming in the property. The 1st applicant testified that the said Makuyu property above has had some ownership disputes involving the deceased, the protestor and one Ngimu Farm Limited. He proposed that the motor vehicles in good and serviceable condition be valued, sold and proceeds shared equally among the beneficiaries; that is KBJ 914N/KAS 872X/ KAB 929U. He testified that Hotstar Investment Limited was owned by the deceased who held 90% shares, and EM 10% shares. He proposed that of the 90% shares held by the deceased, each beneficiary be allotted 9 shares. Hotstar Investment Limited owns the land in which Hotel Starehe Limited is premised which was co-owned by the deceased and EM, on a 50:50 ratio. He alleges interference of the shareholding by the protestor allotting 25% of shares to himself and the 1st wife, taking away some shares from EM. He added that Eunice had donated shares to the 1st wife so she can come on board as an Administrator and that the protestor forged allotment documents to acquire shares and become a director in the company. He proposed that all shares belonging to the deceased be shared equally among the beneficiaries. He concluded his testimony that the property be distributed as proposed in the summons for Confirmation of Grant.

12. On cross-examination, he stated that Makuyu/Kimorori/Block 1/1857 was not listed in the schedule of assets in the initial petition. He further reiterated that the plot 1857 proposal that it be given to the 2nd wife is because she used to farm there before the deceased died. He further stated that the protestor acquired the shares in the companies unprocedurally. He added that the 1st and 2nd Wives are entitled to 20% of the Estate. On the Makuyu Plots 1824-1829, he stated that they comprised on 12 acres and his proposal on distribution is based on equity rather than equality and did not base it on the number of units in the two houses. He stated that since the 1st wife had some property in Nakuru, then the 2nd wife gets the Makuyu plot 1857 which the 1st applicant considered fair. He denied ever being a resolution allotting the protestor shares in Hotel Starehe Limited and that details about shareholding of the protestor in Hotel Starehe Limited are shrouded in mischief. He stated that in as much as Njoro/Ngata/Block 1/1049 is 7 acres and Makuyu/Kimorori/Block 1/1857 is 2 ½ acres, the latter has a higher value than the former. He added that the properties in Embakasi, Chiromo and Komarock proposed for sale all generate income. He stated that Hotstar Investment Limited was not wholly owned by the deceased thus only his shares could be distributed to individual beneficiaries and not houses.

13. PW, the 3rd applicant and co-administrator testified stating that she is a widow of the deceased. She stated that Hotel Starehe Limited is a tenant of Hotstar Investment Limited but doesn't pay rent. She stated that it is the shares and assets of Hotel Starehe Limited that are to be distributed. She proposed that Makuyu/Kimorori/1825,1826 and 1827 be given to her and her two children (JK and SM) and the other children to get plot 1828 and the same be divided equally among themselves. She stated that there was some parcel of land in Nakuru titled Njoro/Ngata Block 1/1047 which is adjacent to plot 1048 and 1049 and totaling 13 acres. She added that she gave 6 acres to the 1st wife with the remaining 7 to be divided among the other children with each child getting 1 acre. She proposed that plot 1049 being the matrimonial home of the 1st wife remain as such and the same be granted to the 1st wife. On the Embakasi property, she stated that there was no title but

registration of the same was ongoing and that the 1st applicant lives there. She stated that Hotstar Investment Limited collects around Kshs. 400,000/- as income but she has no access to that money as all of it goes to the 1st family. On the Makuyu 1857 plot, she stated that the deceased bought the land without informing the 1st family who only got to know about it after his death. She submitted that there is a restriction on land placed by the protestor. She stated that the deceased never acquired Title for the said property in his lifetime and that the property remains the asset of the deceased as no action has been brought by Ngimu farm Limited. She urged this Court to direct the Murang'a Lands Registrar to lift the Restriction and distribute the property accordingly.

14. On cross-examination, she stated that shareholding of Hotel Starehe Limited changed without her knowledge. She disowned the minutes of a meeting held in 2014 saying that the said minutes were not confirmed in 2015. It was her submission that EM obtained Court Orders for purposes of appointing a director(s) in place of the deceased. She further submitted that the Orders did not in any terms suspend regulation 134(b) Table A (1st Schedule) of the Companies Act which required her to send notices to the administrators. There was no evidence of such notices and as such any appointment of directors thereafter was illegal, unprocedural and contrary to the provisions of the Companies Act (now repealed). She submitted that the allotment of shares to the 1st wife and the protestor has effectively reduced the deceased shareholding in the company from 50% to 25%. She cites Section 45(1) of the Law of Succession Act on intermeddling. It was her submission that the alleged illegality and unprocedural activities of appointment of directors be nullified and that distribution be based on the directorship and shareholding as at the date of demise of the deceased. She proposed that the 1st wife holds a life interest in respect of shares in the two companies. She added that the 1st wife is to get property in Ruai measuring 2.1 acres and she gets 6 acres in Murang'a arguing that the Murang'a property is less valuable in any case. She proposed that the said properties be held in trust for the children of both wives. She stated that she ran a joint account with the 1st wife collecting rental income from the Westlands Chiromo flat and Komarock house and that the joint account opened by the administrators was to receive money from the Central Bank of Kenya only. She stated that the joint account run by her and the 1st wife is on behalf of their respective families. She added that neither herself nor her children are directors or shareholders of any of the companies and have never been involved in their operations. She submitted that they are being discriminated in the affairs of the companies and that hurling all beneficiaries in the affairs of the companies will lead to unending dispute even after confirmation of Grant. She made a proposition of getting at least ½ share of the income of the companies. She submitted that the Embakasi, Westlands and Komarock properties should be distributed in a fair and just manner and that the sale of all the rental properties is unnecessary, differing with the proposition of the 1st applicant and protestor. She stated that she was willing to give up her shares in Hotel Starehe Limited and Hotstar Investment Limited in exchange for the rental properties earmarked for sale.

15. SM did not testify and supported the case as stated by PW.

16. PK, in his testimony, was in agreement with the other co-administrators that Njoro/Ngata Block 1/1049 be given to the 1st wife but the same to be held in trust for her six (6) children, that is PK, LW, NN, BW, EM and GK. He added that only one Certificate of Title should be issued in respect of one parcel of land. He was also in agreement with the 1st and 2nd applicant's proposal that Njoro/Ngata Block 1/1048 be distributed equally among the six children of the 1st wife. He added that SM and JK (Children of PW, the 2nd wife) be compensated with Kshs. 1,000,000/- each for not getting any share of the Njoro/Ngata Block 1/1048 property. He further agreed with the applicants that the Nairobi/Block 98/8 [Particulars Withheld] property be given to the 2nd wife to be held in trust for her two children, S and J. On the Muguga/Jet Scheme/1682, he was in agreement with the applicants that the same being ancestral land, be given to the 1st and 2nd wives to be held in trust for their eight children. On the Makuyu/Kimorori Block 1/1824, 1825, 1826, 1827, 1828 and 1829, he stated that each measures 2 acres and he proposed as follows:

- a) Plot 1824 – PK and LW (1 acre each);
- b) Plot 1825 – NN and BW (1 acre each);
- c) Plot 1826 – EM and GK (1 acre each);
- d) Plot 1827 – MW and SM (1 acre each);
- e) Plot 1828 – JK and PW (1 acre each); and
- f) Plot 1829, to be sold and proceeds shared between all the beneficiaries.

He proposed and was in agreement with the applicants that the Embakasi, Komarock and Chiromo properties ought to be valued, sold and proceeds shared equally among all the beneficiaries. For the Ruai plots 209 and 210 and Kamulu Plots he termed 'bonus plots,' he proposed that all need to be valued, sold and proceeds shared equally among all beneficiaries. He stated that there are two Makongeni plots listed as assets of the estate in the summons for confirmation of Grant but had not been identified. He proposed that every house should share in each and every property. He listed the following properties as non-contentious: LR No. Njoro/Njoro/Block 1/39 Kikapu, LR No. A2/2820/Gilgil, and Kiambogo/Kiambogo/Block 2/882. He proposed that the above properties be valued, sold and proceeds shared equally among all the beneficiaries. On the Makuyu/Kimorori/Block1/1857, he opposed the proposal by the applicants that the same be given to the 2nd wife and instead proposed that the same be valued, sold and proceeds shared among all beneficiaries. He conceded that no member of the 1st family knew about the Makuyu 1857 land. He stated that the Makuyu 1857 farm wasn't fully paid for by the deceased to the initial owners Ngimu farm limited upon inquiry of the same. He added that the property in Title hadn't transferred to the deceased and the protestor expressed interest in buying the parcel. They entered into a sale agreement and he filed a suit at the Environment and Land Court against Ngimu Limited. He stated that had Ngimu limited had any claim against the Estate, they could have filed the same. He further testified that there was a dispute between the deceased and Ngimu Farm limited and that the Land Registrar agreed to transfer the property in the name of the deceased after filing a case against the said Registrar. He added that the property does not have Title and that Ngimu Farm Limited have declined to Consent to the Title Deed being issued. He opined that this property should not be distributed until the said dispute is resolved. He agreed with the applicants that the motor vehicles registration mark and numbers KBJ 914N, KAS 872 X and KAB 929U be valued, sold and proceeds shared among all beneficiaries. He agreed with the applicants that 90% of the shares in Hotstar Investment Limited and 10

shares in Hotel Starehe Limited be distributed equally among all beneficiaries. He added that HCCC No. 76 of 2012 increased the shares of the deceased from 1 share to 10 shares. He proposed that all assets in custody of Family Bank Limited should be transferred to the Equity Bank Account held jointly by the administrators. He further proposes that he be refunded Kshs. 2,327,086.87/- which includes interest after spending Kshs. 1,208,616/- on the estate. It was the submission of the 2nd and 3rd applicants that there is no evidence to support his claim and in any case, no authority was ever given by the protestor's co-administrators thus there is no obligation to refund him this amounts.

17. The estate comprises of some developed assets, commercial assets, income generating assets and others not developed. I note that there is no valuation report from the evidence on record save for values given by the parties which cannot be solely relied upon in determining the approximate values of the various properties. From the evidence and pleadings on record, the following properties and their mode of distribution are non-contentious or have been agreed upon by most if not all the beneficiaries:

- a) Njoro/Ngata/Block x/xxxx (Kiamunyi matrimonial home) – to MW, 1st widow,
- b) Nairobi/Block xx/x([Particulars Withheld] matrimonial home) – to PW, 2nd widow,
- c) Njoro/Ngata Block 1/1048 – to be valued, sold and distributed equally among the six children of the 1st widow/family,
- d) Gilgil Farm LR. No. A2/280 - to be valued sold and distributed equally among all the 10 beneficiaries,
- e) Kiambogo/Kiambogo/Block 2/683 - to be valued sold and distributed equally among all the 10 beneficiaries, and
- f) Motor vehicles registration mark and numbers KBJ 914N, KAS 872 X and KAB 929U.

The rest of the listed properties have been contested in one way or the other by different beneficiaries.

18. The deceased died on 30th October 2010, long after the Law of Succession Act had come into force in 1981, and, therefore, going by section 2(1) of the Law of Succession Act, his estate fell for distribution in accordance with the provisions of the Law of Succession Act. No material was placed before me which would have suggested that he made a will. It is therefore not in dispute that he died intestate. The estate should therefore be dealt with Part V of the Law of Succession Act, which regulates intestate succession.

19. It is not disputed that he died a polygamist, and his estate should therefore be distributed in accordance with sections 40(1) and 42 of the Law of Succession Act. Section 40(1) of the Law of Succession Act provides that:

‘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.’

20. The deceased had two wives, and eight children. The 1st wife had six children, making up a total seven (7) units for the first house; and the 2nd wife had two children, making up a total of three (3) units for the second house. The statutory formula to be applied in distribution of the property should be a ratio of 7:3.

21. The Court of Appeal, in the case of *Elizabeth Chepkoech Salat vs. Josephine Chesang Chepkwony Salat* [2015] eKLR, held that:

‘From the consideration of sections 35, 40 and 42 of the Act, the broad principle of law which emerges is that where an intestate was polygamous, the estate, in the first instance, should be divided among the houses according to the number of children in each house adding a surviving wife as an additional unit taking into account any previous benefit to any house. Thereafter the estate devolving on any house is, subject to her life interest distributed by the surviving spouse in exercise of her power of appointment to each beneficiary taking into account previous benefit, if any, to any beneficiary. However, in the event that the life interest is terminated either by remarriage or death, then the net interstate estate devolves upon a house is divided among the surviving beneficiaries equally subject to any previous benefit to any beneficiary.’

[30] Section 40 of the Act does not give discretion to a court to deviate from the general principles therein enunciated. Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to make adjustments to the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust.

*As this Court said in *Mary Rono v. Jane Rono & Another*, Civil Appeal No. 66 of 2002 (Eldoret) [2005] eKLR, section 40 does not provide for equality between houses or that each child must receive the same or equal portion. The application of section 40(1) is illustrated by the case of *Catherine Nyaguthii Mbauni v Gregory Maina Mbauni*, Civil Appeal No. 34 of 2004 (Nyeri) [2009] eKLR where the Court shared the net intestate estate according to a ratio reflecting the number of units in two houses.’*

22. The Court of Appeal in the case of *Scolastica Ndululu Suva vs. Agnes Nthenya Suva* [2019] eKLR held that:

*‘[15] In *Mary Rono vs Jane Rono & another* (supra), Waki JA in the leading judgment, accepted the proposition that the Court had*

the discretion in ensuring a fair distribution of the deceased's estate but that the discretion must be exercised judicially on sound legal and factual basis. In the same judgment, Omollo JA stated the position more clearly as follows:

“My understanding of that section is that while the net intestate estate is to be distributed according to houses each house being treated as a unit, yet the judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that they must be equality between houses they 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 injustice particularly in the case of a young child who is still to be maintained, educated and generally seen through life. If such a child whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.”

[16] In *Douglas Njuguna Muigai & vs John Bosco Maina Kariuki & another (supra)* this Court noted the absurdity of a blind application of section 40(1) of the Law of Succession Act as follows:

“Back to section 40(1) of the Law of Succession Act, that provides that a widow shall be considered as a unit alongside the children of the deceased when it comes to the distribution of the deceased's estate. In this case, Jerioth Wangechi the first wife of the deceased who even participated in the dowry negotiations for her co-wives is equated to the last born child of the 3rd wife of the deceased. Her contribution and support to the deceased as a spouse is not recognized and, in our view, that failure to recognize her contribution is tantamount to discrimination.”

[17] *It is therefore evident, that, although section 40 of the Law of Succession Act provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.’*

23. This Court is guided by the aforementioned statutory guidelines together with the principles of fairness and equity, in distribution of the property of the deceased.

24. On *Makuyu/Kimorori/Block 1/1824,1825,1826,1827,1828 and 1829* parties appreciate that there are developments in them especially on Plots 1824 and 1825. It is my opinion that the two plots 1824 and 1825 be valued, sold and distributed equally between all beneficiaries who will get at least 10% of the proceeds translating to the first family getting 70% and the second family getting 30% of the proceeds of sale. I further suggest that each of the children get an acre of the remaining Plots 1826, 1827, 1828 and 1829 measuring a total of eight acres. That the same shall be subdivided accordingly. On the *Muguga/Jet Scheme/1682* ancestral land, the same be shared equally between the two wives as tenants in common and be held in trust for their children. I find it fair that the 2nd wife be given *Makuyu/Kimorori Block 1/1857* and the two *Ruai* plots 209 and 210 be given to the 1st wife with both of them enjoying life interest in the property and holding them in trust for their children. On the two companies, *Hotstar Investment Limited* and *Hotel Starehe Limited*, it should be noted that no person can interfere with the free property of a deceased save for such succession proceedings or as provided by law.

25. In *In Re the Matter of the Estate of David Julius Nturibi M'Ithinji(Deceased)* [2012] eKLR, this court held as follows:

‘According to Section 45 of The Law of Succession Act, Cap.160 anyone who has no authority under this Act, or by any other written law, or has grant of representation under this Act takes possession or dispose of or otherwise intermeddle with any free property of a deceased person for any purpose is guilty of an offence under the said Section.

In the case of Gitau and 2 others vs. Wandai & 5 others (1989) KLR 23, Tanui J, as he then was stated as follows: -

“According to Section 45 of The Law of Succession Act, Cap.160 intermeddling with the property of a deceased man consists of taking possession, disposing or otherwise intermeddling with any free property.”

26. In *In re Estate of M'Ngarithi M'Miriti* [2017] eKLR, this court cites the case of *Benson Mutuma Muriungi vs. CEO Kenya Police Sacco & Another* [2016] eKLR where the court observed that:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

See also the case of Machakos High Court Civil Case No. 95 of 2001 John Kasyoki Kieti vs. Tabitha Nzivulu Kieti & Another it was held that doing anything affecting the estate of a deceased person amounts to intermeddling. In the case cited, the court considered commencing a suit on behalf of the estate before obtaining a grant of representation to be an act of intermeddling with the estate.

Again, consider the case of *GITAU AND TWO OTHERS -vs- WANDAI AND FIVE OTHERS (1989) KLR 231* where it was held that entering into an agreement to sell estate property before getting a grant or without such a grant is an act of intermeddling.’

27. The Court of Appeal, in the case of *MNM vs. DNMK & 13 others [2017] eKLR* held that:

‘It is trite that a transaction that is declared by law void for all purposes and the furtherance of which constitutes a criminal offence cannot be enforced by a court of law, irrespective of how the illegality is brought to the attention of the court. In *Heptulla v. Noormohamed [1984] KLR 580* this Court held that:

“No court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality.”

See also *Mistry Amar Singh v. Serwano Wofunira Kulubya [1963] EA 408* and *Mapis Investment [K] Ltd v. Kenya Railways Corporation [2006] eKLR*.

Section 75, 78, and 79 of that Act (repealed companies Act cap 486) provided as follows:

“75. The shares or other interest of any member in a company shall be movable property transferable in manner provided by the articles of the company.

76...

77...

78. A transfer of the share or other interest of a deceased member of a company made by his personal representative shall, although the personal representative is not himself a member of the company, be as valid as if he had been such a member at the time of the execution of the instrument of transfer.

79. On the application of the transferor of any share or interest of a company, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee.”

It is therefore not correct that the Companies Act does not provide for transfer of shares by nomination. To determine whether the shares of the deceased in the company could be transferred to E as his next of kin, one had to look at the articles of association of the company. Where the articles of association provide for transfer of the shares to the next of kin, that would constitute, by dint of section 75, a transfer of the shares by operation of the law, so long as the transfer is by the personal representative of the deceased. The personal representative of the deceased has power to transfer the shares of the deceased as if it were the deceased himself and upon transfer of the shares, the transferee is entitled to be registered in the register of members. What we are saying is that upon death of the shareholder, his shares vest in his personal representative...’

28. From the above holding of the appellate court and references to the evidence on record by the protestor, it is my opinion that the transfer and increment of the deceased’s shares was regular being that the protestor was a personal representative of the deceased. There is evidence on how the shares were increased and transferred to the protestor, and I have found no evidence to support the claim of fraud. I find that the estate had 10 shares in Hotel Starehe Limited. I thus agree with the protestor that each of the ten beneficiaries be allotted one (1) share of the estate of Hotel Starehe Limited. I am also in agreement the protestor that the 90% shares of the estate in Hotstar Investment Limited (being the holding or flagship company of the deceased) be distributed among the 1st and 2nd families on a 70:30 ratio so that 63 shares are transferred to the first family and 27 shares to the 2nd family.

29. The properties in Chiromo, Komarock and Embakasi, should be valued, sold and the proceeds shared equally among all the beneficiaries. I am in agreement with the applicants that the funds being held at Standard Chartered Bank, Faida Investment Bank, Family Bank, KCB Bank, CFC Stanbic Bank and Murata Sacco Accounts, including any amount being held by the Unclaimed Assets Authority, be distributed equally among all the ten (10) beneficiaries. It is not necessary that the amounts be transferred to the account being held and operated by the administrators. I am in agreement with the parties that the shares being held in Stanbic Bank Uganda Limited under Certificate Number xxxxx be transferred equally to all the beneficiaries.

30. On the issue of the amounts owed to the protestor by the estate, it is worth noting that the applicants never protested against such expenditure between the material years of 2011-2017. The protestor adduced evidence of expenditures he incurred on behalf the estate that were not controverted by the applicants to a large extent, save for the land rates payment for the [Particulars Withheld] home and legal fees to Kihara Ndiba & Co. Advocates. The applicants contended that these expenditures were not authorized or agreed upon by the other co-administrators and that the protestor failed to give them notice of such expenditure. From the receipts/evidence of expenditure filed by the protestor, Kshs. 1,166,895.00 have been verified and can be directly attributed to him as expenses incurred on behalf of the estate. The hospital bills and the personal bank loan facility the protestor took out cannot be credited to the estate and thus cannot be listed as expenses to the estate. The sum of Kshs. 1,166,895.00 is to be refunded to the protestor, being expenses incurred on behalf of the estate.

31. In conclusion, I order that the estate of the deceased be distributed as set out hereunder:

PROPERTY	1 ST FAMILY	2 ND FAMILY
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Njoro/Ngata/Block x/xxxx	MW	-
Nairobi/Block xx/x		- PW
Njoro/Ngata Block 1/1048 <i>To be valued, sold and the proceeds of sale applied to settle debts and liabilities, with the surplus being distributed equally among the 6(six) children of the 1st family</i>	PK LW NN BN EM GK	
Gilgil Farm LR. No. A2/280 <i>To be valued, sold and the proceeds of sale applied to settle debts and liabilities, with the surplus being distributed equally among all 10(ten) beneficiaries</i>	MW PK LW NN BN EM GK	PW SM JK
Kiambogo/Kiambogo/Block 2/683 <i>To be valued, sold and the proceeds of sale applied to settle debts and liabilities, with the surplus being distributed equally among all 10(ten)beneficiaries</i>	MW PK LW NN BN EM GK	PW SM JK
Motor Vehicles Registration Number: KBJ 914 N, KAS 872 X, KAB 929 U <i>To be valued, sold and the proceeds of sale applied to settle debts and liabilities, with the surplus being distributed equally among all 10(ten)beneficiaries</i>	MW PK LW NN	PW SM JK

	BN EM GK	
<p>Makuyu/Kimorori/Block 1/1824 and 1825</p> <p><i>To be valued, sold and the proceeds of sale applied to settle debts and liabilities, with the surplus being distributed equally among all 10(ten)beneficiaries</i></p>	MW PK LW NN BN EM GK	PW SM JK
<p>Makuyu/Kimorori/Block 1/1826,1827,1828 and 1829</p> <p><i>To be valued, sold and the proceeds of sale applied to settle debts and liabilities, with the surplus being distributed equally among 8(eight)beneficiaries.</i></p>	PK LW NN BN EM GK	SM JK
<p>Muguga/Jet Scheme/1682</p> <p><i>To devolve equally to the widows during lifetime and thereafter to their respective children equally</i></p>	MW	PW
Makuyu/Kimorori Block 1/1857	-	PW
Ruai Plots 209 and 210	MW	-
<p>Hotel Starehe Limited</p> <p><i>The 10 shares to be distributed equally among all 10(ten) beneficiaries</i></p>	MW PK LW NN BN EM GK	PW SM JK

<p>Hotstar Investment Limited</p>	<p>MW PK LW NN BN EM GK</p> <p><i>To receive 63 shares</i></p>	<p>PW SM JK</p> <p><i>To receive 27 shares</i></p>
<p>LR Number 24886/45(Embakasi property)</p> <p><i>To be valued, sold and the proceeds of sale applied to settle debts and liabilities, with the surplus being distributed equally among all 10(ten)beneficiaries</i></p>	<p>MW PK LW NN BN EM GK</p>	<p>PW SM JK</p>
<p>Chiromo Flat Number 209/73/15(Westlands property), Nairobi</p> <p><i>To be valued, sold and the proceeds of sale applied to settle debts and liabilities, with the surplus being distributed equally among all 10(ten)beneficiaries</i></p>	<p>MW PK LW NN BN EM GK</p>	<p>PW SM JK</p>
<p>Nairobi/Block 133/12, Flat Number 14, in Komarock</p> <p><i>To be valued, sold and the proceeds of sale applied to settle debts and liabilities, with the surplus being distributed equally among all 10(ten)beneficiaries</i></p>	<p>MW PK LW NN</p>	<p>PW SM JK</p>

	BN EM GK	
<p>Kiambogo/Kiambogo/Block 2/683</p> <p><i>To be valued, sold and the proceeds of sale applied to settle debts and liabilities, with the surplus being distributed equally among all 10(ten)beneficiaries</i></p>	MW PK LW NN BN EM GK	PWa SM JK
<p>Standard Investment Bank shares</p> <p>a) Eveready – 2200</p> <p>b) Kengen – 16431</p> <p>c) Kengen – Re- 2255</p> <p>d) Safaricom – 42500</p> <p><i>To be valued, sold and the proceeds of sale applied to settle debts and liabilities, with the surplus being distributed equally among all 10(ten)beneficiaries</i></p>	MW PK LW NN BN EM GK	PW SM JK
<p>Funds being held at Standard Chartered Bank, Faida Investment Bank, Family Bank, KCB Bank, CFC Stanbic Bank and Murata Sacco Accounts</p> <p><i>To be distributed equally among all 10(ten)beneficiaries</i></p>	MW PK LW NN BN EM GK	PW SM JK

32. In the end I hereby dispose of the confirmation application in the following terms: -

- a) That I hereby declare that the deceased was survived by the individuals listed in paragraph 2 of this judgment;
- b) That I declare that the deceased was proved to have died possessed of the assets listed in paragraph 3 of this judgment;
- c) That I declare that the estate had the liabilities and debts listed in paragraph 4 of this judgment, excluding the estate's lawyer's fees;

d) That grant on record is hereby confirmed, for distribution in the manner set out in paragraph 31 hereabove;

e) That the sum of Kshs. 1,166,895.00 found to be owing to the protestor from the estate shall be settled out of the assets that are to be disposed of by way of sale;

f) The summons for confirmation of grant dated 30th June 2014 is hereby allowed in those terms, and the certificate of confirmation of grant dated 15th November 2016 and amended on 27th November 2017, on partial distribution, shall be amended accordingly;

g) That the costs of the application shall be borne by the estate; and

h) That any party aggrieved by the orders made in this judgement shall be at liberty to challenge the same at the Court of Appeal within twenty-eight (28) days.

DATED AND SIGNED AT KAKAMEGA THIS 24th DAY OF April, 2019

W MUSYOKA

JUDGE

DELIVERED DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 10th DAY OF May 2019

A. ONGERI

JUDGE