In re Estate of Emmanuel Lolim Lotimu (Deceased) (Succession Cause E014 of 2022) [2025] KEHC 14540 (KLR) (16 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14540 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPENGURIA

SUCCESSION CAUSE E014 OF 2022

RPV WENDOH, J

OCTOBER 16, 2025

IN THE MATTER OF THE ESTATE OF EMMANUEL LOLIM LOTIMU – DECEASED.

IN THE MATTER OF

GRACE SIKUKU LOREMA ..... 1ST ADMINISTRATOR

HELLEN CHEPKASAN LOTIM ..... 2ND ADMINISTRATOR

JUDGMENT

1. This matter relates to the Estate of Emmanuel Lolim Lotimu who died intestate on 23/5/2016 at Kamatira Sub-location in West Pokot.

2. On 31/5/2023, the court ordered that the grant of representation be issued in the names of Grace Sikuku Lorema (1st Administrator) and Hellen Chepkasan Lotim (2nd Administrator). They were directed to file summons for confirmation of grant.

3. On 9/8/2023, the firm of Philip Magal Advocate filed a summons for confirmation of grant on behalf of the 1st Administrator, dated 3/8/2023, which the court directed be deemed to be the defence.

4. On 26/8/2023 the firm of Lowasikou Advocate filed a summons for confirmation of grant dated 21/9/2023 on behalf of the 2nd Administrator. The court directed the same be deemed to be the plaint.

5. The parties were also directed to file their respective witness statements and documents before ethe matter could proceed to full hearing.

6. Hellen Lotim testified as PW1 (2nd Administrator) PW1 admitted that the 1st Administrator Grace (DW1) is her Co-wife, both being wives of the deceased. She told the court that she had twelve (12) children with the deceased and one is now deceased; that she was settled in and is in possession of a land parcel West Pokot /Chepereria/39; that her husband gave another parcel of land West Pokot/ Chepareria/106, to her son Moses Komole Lotim as a gift and that he has been in possession since 1998; that the 1st administrator was settled in and is in possession of West Pokot/Siyoi 'A'/99, according

to PW1, the only property in dispute is parcel Kaisagat/Makhonge /Mwisho Block 1/228 which is situated in Trans Nzoia and that they should share it equally. She testified that her husband used to farm on the said land to educate his children and provide for the wives. PW1 further testified that the deceased sold five (5) acres of the said land when he was sick to get money for his medical expenses; that the parcel given to her son Chepareria 106 is not available for distribution because it was a gift to her son. She also stated that her husband had sold part of the land Chepareria 39 while she had also sold some to educate her children. PW1 included in her statement the manner in which she had distributed the land on which she resides, Chepareria/39. According to PW1 she has also been farming on land parcel Kaisagat/Makhonge Mwisho 1/228

7. PW2 Moses Komolle Lotim, PW1's son, produced a search certificate in respect of parcel West/Pokot Chepareria /106 (P.Exh.3) on which he has lived since 2000; that the deceased gave the said land to him as a gift and that he will not benefit from the deceased's estate again. He also admitted that he applied for allocation of land at Mwisho Farm and was allocated Kaisagat/Makhonge/Mwisho/157. He stated that plot Mwisho 1/228 belonged to his father and a caretaker used to live on it and only a store was on it; that in 2024 they went to till it and there was a dispute. He denied assaulting the 1st Administrator.

8. PW3 Julius Lotim, a son to the deceased and PW1, testified that plot Chepareria 106 was given to the brother (PW2) as a gift, that parcel Mwisho 228 belonged to his father and that the 1st Administrator only used to assist the deceased. He admitted that in 2024, they ploughed the land but the 1st Administrator planted; that a fight broke out there as a result of which there is an ongoing case in Kitale.

9. DW1 Grace Sikuku (1st Administrator) testified that she was the deceased's second wife since 1980; that he owned four (4) parcels of land West /Pokot Chepareria 39 and 106; Siyoi 'A'99 and Mwisho Farm 228; that she resides on Siyoi 'A'99 which is 6.8HA that PW1 resides on West Pokot Chepareria 39 measuring 25.4 HA; that she and deceased used to reside on Mwisho 228 till he died; that she continued to till the land till 2024 when PW1's son went to plough the Mwisho land and she reported to police and they attacked and beat her up following which she was injured and there a pending court case over the said issue; that when the deceased was selling part of Mwisho/228, she was signatory to the sale agreement with the son, meaning the land was theirs; that when the deceased sold land in Chepareria, he would involve PW1. DW1 urged the court to distribute the deceased's estate as per her proposal i.e that she gets Siyoi 'A'99 and Mwisho 228 while PW1 should remain in Chepareria 39 and 106 in accordance with the deceased's wishes. DW1 admitted that she has never lived at Mwisho Farm save for a caretaker.

10. DW2 Kevin Rotich Lotim is DW1's son with the deceased. He confirmed the sale of five (5) aces of Mwisho Farm to cater for deceased's medical expenses. He was a signatory to the sale; that it is his mother who used to till the said land; that a dispute arose in Mwisho Farm when PW1's sons went to plough the land. In cross examination, he confirmed that it is his father who used to till Mwisho Farm.

11. Both Counsel filed submissions, Mr. Lowasikou submitted that it is not in dispute the Siyoi 'A'99 and Chepareria 39 are matrimonial homes. The issues are whether Mwisho Block 1/228 should be shared equally and whether Mose Komole is entitled to Chepareria 106 as a gift.

12. As respects Mwisho Block 1/228, Counsel submitted that it should be shared between the two houses because the deceased never transferred it to the Respondent (DW1) during his life and never shared the estate between the two houses; that the deceased did not leave any express instructions on distribution of his estate and nothing to show that the Respondent is in possession of the said property.

13. As to whether Moses is entitled to parcel Chepareria 106, it was submitted that he was given that portion as a gift during the lifetime of the deceased; that he has been in occupation since 2000 and will

not benefit from the estate again. Counsel urged the court to honour the wishes of the deceased who bequeathed the said parcel to Moses (PW2)

14. The Counsel for the 1st Administrator (DW1) identified the same two issues for determination. On the first issue of whether Moses Komole (PW2) was gifted plot Chepareria /106; Counsel submitted that for an oral will to be valid, it must comply with Section 9(1) of the Laws of Succession Act that it must be made before two or more competent witnesses and the testator dies within a period of three (3) months from the date of making the will. Relying on the decisions of Re. Estate of Evanson Mbugua Thong'ote (2016) eKLR, and HCC 29/2019 Michiri Aphaxard Nyaga -V- Robert Njue & 2 others (2021) eKLR, no will was made by the deceased.

15. As regards gifts, it was submitted that they fell into two categories. 'Gift intervivos' which is made during the lifetime of the deceased and 'Gift Causa Mortis' which is one made in expectation of death and made not less than three (3) months prior to the death; that the 2nd Administrator and witnesses evidence that the land had been given to PW2 does not pass the test of gifts contemplated under the Laws of Succession Act because the specific time the land was transferred was not disclosed; that if the deceased uttered words three months prior to his death, the witnesses were not disclosed and that the deceased never transferred the land to the said Moses Komole and hence the said land forms part of the deceased's estate.

16. On whether parcel Mwisho 1/228 should be shared; Counsel submitted that the said land was purchased by the deceased in 1992 when the DW1 was already married to the deceased; that when the court summoned the Chief of the area during an application to confirm who was utilizing the land, the Chief said that it was the 1st administrator who had been in exclusive use since the deceased's demise.

17. Counsel observed that before PW1's children attacked DW1, the wives and their families had lived peacefully. Counsel cited several cases in application of section 40 of the Laws of Succession Act and Succession 71/2015 Judith Naiyei Renaita & Another -V- James Koote Renaita where the court observed that Section 40 LSA has been the subject of contradictory interpretations on distribution of intestate polygamous estate whether distribution should be equal or equitably; that in Scholastica Ndululu Sura -V- Agnes Nthenge Sura (2019) eKLR, the court held that the court has discretion to take into account the factual circumstances of each case and ensure equitable and fair distribution of the estate.

18. Counsel further submitted that PW1 is ignoring the wishes of the deceased who had settled the two families separately and at a distance; that PW1 was settled in Chepareria /39 and the son using Chepareria /106; that DW1 had been settled on Siyoi 99 and was farming Mwisho /228. Counsel relied on the decision in Succession Appeal E150/2021 RE Daniel Kanzi Mulati in which the court cited Joseph Sigilai Mutai & others -V- Philip Kipyego Lelei where the court had observed that during distribution, the courts should consider where the parties are settled and that courts should not disturb the decisions of the deceased.

19. Counsel submitted that PW1's proposal is unfair and unjust; that the proposal by the 1st administrator reflects the wishes of the deceased and should be adopted.

20. This court has considered the testimonies of the parties and submissions by Counsel.

21. There is no dispute that the deceased had two houses. The 1st wife is Hellen Chepkasan Lotim (PW1) 2nd Administrator, while the 2nd wife Grace Sikuku Lorema (DW1) is the second wife (1st Administrator).

22. It is also not disputed that PW1 had twelve (12) children with the deceased. One child is now deceased and eleven (11) are alive. On the other hand, DW1 has eight (8) children with the deceased.

23. It is common ground that the deceased's estate comprises the following properties

    1. LR. West Pokot/Chepareria/39 measuring about 25.43 HA

    2. LR. West Pokot/Chepareria/106 measuring about 7.87 HA.

    3. L R. West Pokot/Siyoi 'A'/99 measuring about 6.8HA

    4. LR. Kaisagat/Makhonge/Mwisho Block 1/228 measuring about 8.094 HA.

    The four (4) properties are still registered in the deceased's names.

24. I must point out at this stage that LR. Kaisagat/Makhonge Block/Mwisho/157 is not part of the deceased's estate. It is registered in the name of Moses Komole Lotim and the title issued to him way back in 1996 as by evidenced by the search certificate D. Exh.2.

25. All parties are agreed that PW1 was settled on LR West Pokot/Chepareria/39 on which she has been farming and lives with her children. DW1 does not have a claim to that parcel of land has no dispute the same remaining with the 1st house. On the other hand, DW1 has been settled on West Pokot Siyoi 'A'/99 on which she farms and resides with her children. PW1 does not have any objection to the property remaining with DW1.

26. The only issues left for determination are whether parcel West Pokot/Chepareria/106 is available for distribution and to whom should it be distributed to.

27. Secondly, whether Kaisagat /Makhonge Mwisho Block 1/228 should be shared equally between the two houses.

28. Before I go ahead to consider the above issues, I must deal with the issue of whether the deceased left an oral will or not. Section 9 of the Laws of Succession Act provides for oral wills.

    It provides 'Oral Wills'

    "No oral will shall be valid unless: - and

    a. It is made before two or more competent witnesses; and

    b. The testator dies within a period of three (3) months from the date of making the will.

    Provided....."

29. There was no shred of evidence to the effect that the deceased talked to anyone on division of his estate on any given date within three (3) months before his death. He therefore died intestate.

30. Section 40 of the *Law of Succession Act* provides for the division of the estate of an intestate polygamous deceased person Section 40 LSA provides as follows:-

    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 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.

31. The courts have pronounced themselves on the purport of section 40 of the Laws of Succession Act in various decisions. In Mary Rono -V- John Rono & Another (2008) I KLR 803, the court confirmed that the court has discretion in ensuring a fair distribution of the deceased's estate and that discretion must be exercised judicially on sound legal and factual basis. Judge Omolo had this to say

32. 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 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.

33. In the decision of Judith Naiya 'Supra' and Scholastica Ndululu (Supra) the courts have generally agreed that the court during distribution of an intestates estate retains the discretion to take into account the factual circumstances of each particular case that may be relevant in ensuring the equitable and fair distribution of the estate.

34. In the instant case, it is apparent that the deceased had settled the two families on two separate properties that he owned. It was probably to maintain peace which he seemed to have achieved during his lifetime as confirmed by the witnesses.

35. The first question is whether the deceased had given Chepareria /106 to his son Moses Komole or it still forms part of the estate.

36. The concept of gifts is divided into two categories i.e gifts intervivos and gifts causa mortis.

'Gift intervivos' is provided for under Section 42 of the Laws of Succession Act which reads as follows: -Where—

(a) 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."

37. Gifts intervivos are made out, settled during the lifetime of the deceased. They have to be identified, and awarded and settled for the person to whom it is given. It is made to the beneficiary when the deceased is still alive and it is taken into account during distribution of the net estate so that the recipient is considered to have received his share. Such gift does not form part of the deceased's estate but is taken into account in determining the share of the net estate.

> 'Gifts Causa mortis' is defined as a gift made in the expectation of death. It has to have been made not later than three (3) months prior to deceased's death in the presence of two or more competent witnesses.

38. PW2 claimed to have been given the land in 2000 when he took possession. It follows that if it was a gift, it was not made in expectation of death of the deceased because the deceased died in 2016. The question then is whether it meets the characteristics of gifts made under Section 42 Laws of Succession Act.

39. Halsbury's Laws of England 4th Edition Vol. 20 (1) para.67 discusses the issue of gifts as follows; -

> Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's

subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do."

40. Odunga's Digest on Civil Case Law and Procedure Vol (III) Page 2417 at paragraph 5484 (d) e – 1 on gifts states as follows: -thus:

> Generally speaking, the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate the gift. (See in Re Fry Deceased {1946} CH 312 Rose: and Trustee Company Ltd v Rose {1949} CL 78 Re: Rose v Inland Revenue Commissioners {1952} CH 499 Pennington v Walve {2002} 1WLR 2075 Maledo v Beatrice Stround {1922} AC 330 Equity will not come to the aid of volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee need no assistance from equity and the gift is complete. It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor. (See Shell's Equity 29ED Page 122 paragraph 3)"

41. From a reading of the above excerpts, a gift may be settled by a deed or instrument in writing or declaration by the doner, or by a transfer and registration. The gift must have passed from the deceased to the beneficiary for it to be valid and it means that the gift is no longer the property of the deceased. However, during distribution of the estate to other dependents, it will be taken into account.

42. In the instant case, the land Chepareria /106 has never passed from the deceased to PW2. The gift could have been perfected by registration of the title into PW'2s name or some steps taken towards transfer of the land into PW2's name, that was not done. My finding is that it remains part of the deceased's estate and is available for distribution as part of deceased's estate.

43. The next question is whether Mwisho 1/228 should be shared between the two houses. From the testimonies of the witnesses, it is clear that the deceased used to carry out farming activities on the said land during his lifetime. Even DW2 confirmed that DW1 has never lived on Mwisho 1/228 farm and it is the deceased who used to till it. It is also apparent that a dispute over the said land erupted in 2024 when PW1's sons went to plough the land for their use and DW1 objected. The Chief of the area confirmed to the court that DW1 had been using the said land. The deceased died in 2016 and I believe the land did not remain fallow. I believe that it is the period that DW1 was utilizing the said land and PW1's house did not raise objection till 2024, eight years after the deceased's death that they seem to have shown in the land. There is undisputed evidence to the effect that the deceased sold five (5) acres of the Mwisho 1/228 land. He did not involve PW1 and her children during the sale but only involved DW1 and her son, who were witnesses to the sale agreement. By that action, the deceased kept PW1 and her house out of the affairs of Mwisho farm which seems to suggest that the deceased wanted to keep PW1 out of the said farm. As observed earlier, I think that the deceased had intentionally kept

and settled his families separate to maintain the peace and that fact cannot be ignored. I agree with the finding of the court in Daniel Kanzi Mulati alias Daniel Kani Mwalabu that where parties have settled is important in distribution and should be taken into consideration. In R.E. Joseph Sigilai Mutai & others -V- Philip Kipyegon, J. Kimaru had this to say;-

44. I am satisfied that the petitioners have established on a balance of probabilities that the deceased had settled his wives in their respective portions of land. The 1st wife was settled at Kericho while the other three wives of the deceased were settled at Transmara. The three wives and their children recognized this fact when they subdivided the Transmara parcel of land among themselves to the exclusion of the 1st wife and her children. I therefore hold that none of the children of the three wives who reside at Transmara, including the objector, are entitled to the parcel of land occupied by the 1st wife and her children at Kericho namely title No. Kericho/Kapkatet/1226."

45. It is my considered view that since the deceased had settled his first family in Chepareria and PW2 claimed to be already in occupation of Chepareria 106, it is only fair that they will remain on the two parcels of land, Chepareria 39 and 106. DW1 will retain Siyoi 'A'99 and Mwisho 1/228.

46. PW1 in her testimony seemed to suggest that the deceased had sold part of Chepareria 39 but no evidence was laid before the court to demonstrate that the deceased sold part of Chepareria 39. If PW1 sold part of the said land after the death of the deceased, it means she was intermeddling with the estate. If there are any Purchasers on the land, they can only claim from PW1. The deceased's estate will be distributed as follows: -

    (1) West Pokot/Chepareria 39,

    (2) West Pokot Chepareria 106, to devolve to Hellen Chepkasan Lotim to hold for herself and her children

    (3) West Pokot Siyoi 'A'99,

    (4) Kaisagat/ Makhonge/ Mwisho 1/228 be transferred to Grace Sikuku Lorema to hold for herself and her children.

    (5) Five (5) acres of Kaisagat/ Makhonge /Mwisho 1/228 be hived off and transferred to the Purchaser, Sitoyo Lopokoyit.

    Being a family dispute, each party to bear its own cost.

    It is so ordered.

DATED, SIGNED AND DELIVERED IN KAPENGURIA 16TH DAY OF OCTOBER, 2025

HON. R. WENDOH

JUDGE

Judgment delivered in presence of : -

Ms. Opondo for 1st Administrator /Respondent

Mr. Lowasikou for 2nd Administrator/Applicant

Juma - Court Assistant