IN THE COURT OF APPEAL
AT ELDORET

(CORAM: WARSAME, ACHODE & MATIVO,

JJ.A.) CIVIL APPEAL NO. ELD 39 OF 2020

BETWEEN

PAUL KORIR SAWE....................................1ST APPELLANT

HARRON KIPKOECH SAWE.............................2ND

APPELLANT AND

SALINA C. SAWE...RESPONDENT

THE COURT OF APPEAL
JUDICIARY
REPUBLIC OF KENYA

JUDGMENT OF THE COURT

1. Gideon Sawe Kipkesio (deceased) died testate on 6th October 2002. In his last will and testament dated 19th July 2001, the deceased appointed Paul Korir Sawe, and Harron Kipkoech Sawe (the appellants herein) as joint executors and trustees of his Will. The deceased's estate comprised of two parcels of land namely Nandi/Cheptil/138 measuring approximately 42 acres and Uasin Gishu, LR. No. 7739/8 measuring approximately 149 acres. A grant of probate of written Will was issued to the appellants on 6th February

2006.

2. By an application dated 21st June 2006, Selina Cherubet Sawe (the respondent) applied for the revocation of the said grant questioning the validity of the Will, citing skewed distribution of the estate which she claimed disfavored the deceased's first wife, and accusing the appellants of failing to disclose that the deceased had two wives and excluding her mother's household from the estate. The respondent invoked section 7 of the Law of Succession Act (the Act) and contended that the purported Will was non-existent and/or was issued through fraud and/or concealment of material facts because the appellants failed to disclose that the deceased was a polygamous man with two wives namely: Tele Bot Kibolony (the 1st wife), who had five children, namely: William K. Sawe (deceased); Charles K. Sawe (deceased); Salina Sawe; John Sawe; and Christine Sawe). The 2nd wife, Elizabeth Sawe's children were: Paul Korir Sawe, David Kimeli, Richard Maiyo, Mathew Kibitok, Harron Kipkoech, Christopher Kiprutto, Everline Jerono and Sally Jepchumba.

3. On record in opposition to the application is an undated replying affidavit sworn by the 1st appellant stating that an advertisement was made in the Kenya Gazette inviting

anyone

who was opposed to the making of the grant to lodge his/her objection within 30 days, and since no objection was raised, a Grant of Probate was issued to the appellant. The 1st appellant averred that the deceased married Tele Bot Kilobony in 1951 and they were blessed with two issues who have since died. However, Tele Bot Kilobony left their father and conceived the respondent and her younger siblings with another man. He contended that Tele Bot Kilobony lived at Ndalat Settlement Scheme until her death in 1974 where she was buried. Further, Willian Sawe and Charles Sawe returned from Ndalat to live with the deceased in 1979. Subsequently, the respondent and her siblings returned to live with their *"half- brothers"* (Willian Sawe and Charles Sawe). Therefore, any bequest to the respondent and her siblings was on humanitarian grounds because they were strangers to the deceased.

4. The respondent maintained that her mother died and was buried in Cheptil in 1978, not Ndalat and that under the Nandi custom, a married woman could not be buried at her parent's home. She also stated that it was not true that her mother separated from her father in 1954 since she was born in 1963.

5. The application proceeded by way of *viva voce* evidence. The respondent testified in support of her case and called George Kirui Tarus, (the area chief from 1996 to June 2017) as her witness. The crux of the respondent's case was that: (a) the distribution as provided in the Will is skewed against their mother; (b) secrecy surrounded the existence of the Will; (c) herself and her siblings were lawful beneficiaries of the deceased, and, (d) they were entitled to get their fair share of the estate.

6. The 1st appellant testified in support of their case and called Ernest Korir Olbara who witnessed the deceased's will as their witness. The substance of the appellant's case was that: (a) the deceased left a valid Will; (b) the respondent's mother had divorced/separated with the deceased; (c) the respondent and her siblings were not sired by the deceased; therefore, they were not beneficiaries of the deceased and any properties given to some of them was strictly on humanitarian grounds.

7. In the impugned judgement dated 14th August 2019, the subject of this appeal, *Omondi, J.* (as she then was) set aside the distribution of the estate provided in the Will and distributed the estate in accordance to section 40 of the

Act

and condemned the appellants to pay costs of the cause. Even though the learned Judge found that it was not proved that the deceased signed the Will due to undue influence nor was forgery proved, she was persuaded that the distribution of the estate as per the Will was skewed to the disadvantage of the first house and that the making of the Will was shrouded by secrecy. The learned Judge also found that no explanation was provided why the deceased after appending his signature on the Will opted to append his thumb print on subsequent transfer documents. Accordingly, the learned Judge concluded that the Will could not stand the test of the law because it did not provide for all deceased's beneficiaries/dependants and that there was no justification why beneficiaries from the first house were denied inheritance while some got so little compared to the beneficiaries from the 2nd house. Consequently, the learned Judge nullified the Will for failing to meet the guidelines set out in section 28 of the Act and distributed the land parcels between the two houses based on the number of the children/dependants in each house and condemned the appellants to pay the costs of the suit.

8. The appellants are seeking to overturn the said verdict

citing

12 grounds in their memorandum of appeal dated 27th

February, 2020. In summation, the appellants fault the trial court for: (a) disregarding the contents of the Will despite finding that there was no evidence of undue influence or other vitiating factors; (b) invalidating the Will without any lawful cause and finding that the transfer documents presented by the appellants were executed after the Will contrary to the evidence; (c) finding that the respondent and her siblings were deceased's dependants contrary to evidence that they were born after their mother had divorced/separated with the deceased and she was buried at her parents' home; (d) ignoring that the respondents' paternity and their mother's marital status was contested; (e) finding that the mode of distribution was skewed against the respondents and improperly distributing the property in accordance with section 40 of the Act without hearing the appellants; (f) imposing costs on the appellants, yet they were merely executing the deceased's Will; and (g) improperly exercising her discretion.

9. The appellants pray that the said judgment be set aside and this Court finds that the deceased's Will is valid and his estate be distributed strictly in accordance with the Will. Alternatively, they prayed that this Court nullifies the mode

of

distribution ordered by the trial Judge and refer the case back

to the High Court for a fresh hearing and determination on the question of the validity of the Will.

10. The respondent was also aggrieved by the impugned judgement. In her cross-appeal dated 19th October 2021, she cited nine grounds of appeal principally faulting the learned Judge for distributing the estate amongst the beneficiaries in a skewed manner, namely: (a) allocating 102 acres out of L.R. No. 7739/8 to 9 beneficiaries from the 2nd house and 46 acres to 5 beneficiaries from the 1st house; (b) allocating the 2nd house 24 acres amongst 9 beneficiaries out of L. R. No. Nandi/Cheptil/138 and 13 acres to 5 beneficiaries in the 1st house (c) the distribution disregards the law. The respondent prays that the cross appeal be allowed and the estate be distributed between the two houses in accordance with Article 27 of the Constitution as read with section 40 of the Act and in a manner that is not discriminative, skewed or biased.

11. At the hearing of this appeal, learned counsel Mr. Kariuki appeared for the appellants while Mr. Nabasenge appeared for the respondent. Both parties relied on their respective written submissions which they briefly highlighted.

12. In support of the appeal, the appellants' counsel Mr. Kariuki combined grounds 1 and 5 and maintained that since the respondent and her younger siblings were born long after their mother had separated with the deceased, and only came to live with their half-brother in 1990, the learned Judge erred in failing to find that they all ought to have proved that they were deceased's dependents or they were maintained by the deceased prior to his demise in accordance with section 29 (b) of the Act.

13. Mr. Kariuki argued that the respondent in her statement dated 21st September 2016 confirmed that at the time their mother died, they were staying with their brother William Sawe and at the time the deceased died, they were living with the said William Sawe and his wife Edna Sawe. Counsel relied on the High Court decision in ***re Estate of Sandislau Murianki Mutwiria (Deceased) (Miscellaneous Succession Cause 49 of 2018) [2022] KEHC 423 (KLR) (16 March 2022) (Ruling)*** in support of the holding that the mere fact an applicant had been using the deceased's land does not make him a dependant of the deceased.

14. Mr. Kariuki stressed that the deceased had the freedom to dispose his property in a manner he pleases (ground 2) and submitted that the learned Judge despite holding that the Will was not tainted by forgery, undue influence or coercion, she nevertheless, held that the Will was skewed in terms of distribution, yet the respondent did not prove that at the time of making the will, the deceased was too ill or mentally incapacitated to know what he was doing. Counsel cited the case of ***re Estate of Wilfred Koinange Gathiomi (Deceased) [2020] eKLR*** in support of the proposition that allegations of incapacity of a testator must be proved before the burden of proof shifts to the person claiming that the testator lacked the necessary capacity.

15. Regarding the ground that the learned Judge redistributed the estate *suo moto* without hearing the parties after invalidating the will, (grounds 7, 10 & 12), Mr. Kariuki maintained that the moment the grant was revoked, the estate was left without administrators because the learned Judge did not appoint new administrators who would prepare a mode of distribution for consideration by all the beneficiaries before presenting it to the Court. Counsel faulted the learned Judge for assuming that

all the beneficiaries were interested in sharing equally.

16. Mr. Kariuki contended that the learned Judge failed to involve both houses before distributing the estate. As a consequence, the distribution was biased and went against the rules of natural justice because the beneficiaries were not accorded a hearing nor did the learned Judge determine the fate of the grant, effectively leaving the estate in a limbo. Counsel cited the High Court decision in ***re Estate of the Late Epharus Nyambura Nduati (Deceased) [2021] eKLR*** which underscored the chronology of events to be followed after a grant is revoked by the Court.

17. On whether the learned Judge erred in law by condemning the appellants to pay costs, Mr. Kariuki contended that no explanation was provided to support the said order. Further, the appellants acted in good faith and in the interests of the estate in accordance with section 92 of the Act.

18. In opposing the cross-appeal, Mr. Kariuki submitted that section 40 of the Act requires property to be divided among the houses according to the number of children, but it does not expressly mention equal provisions, therefore, it is sufficient if each child gets a share of the estate. To

buttress this submission, counsel cited this Court’s decision

in ***Mary Rono***

vs. Jane Rono & Ano. ***[2005] KECA 326 (KLR)*** in support of the holding that equality in distribution does not necessarily mean that each child must receive equal portion. In addition, counsel dismissed the cross-appeal for raising no new grounds and being repetitive in nature. Lastly, counsel argued that the appellant failed to file and serve the notice of appeal within 14 days as required under Rule 77 of the Court of Appeal Rules. Further, that the cross-appeal was filed out of time without leave of the court.

19. On his part, the respondent's counsel Mr. Nabasenge maintained that the notice of cross appeal dated 19th October 2021 was filed on 29th October 2021 as prescribed by Form G and in accordance with Rule 93 of the Court of Appeal Rules, 2010 and bearing in mind that the respondent had 30 days to file a cross-appeal before the hearing of the appeal, the notice of cross-appeal was filed within the prescribed period which is three years and seven months prior to hearing of the appeal.

20. Regarding the validity of the Will and whether the distribution was within the law, Mr. Nabasenge submitted that the will remained a secret and it was the area chiefs'

testimony that it might have been prepared after the deceased’s demise. He also

submitted that the witnesses never saw the testator append his signature on the will, nor did the advocate sign the will. Also, it was difficult to ascertain whether the deceased signed the Will because he affixed his thump in subsequent transfer documents. Further, the Will was not signed on both pages as was held by *Lenaola, J.* (as he then was) in ***Re Estate of G.K.K (Deceased) [2013] eKLR.*** He urged this Court to adopt the reasoning of the trial Judge and uphold the nullification of the Will because the 1st house was completely left out of the Will while the distribution in the Will was skewed to the disadvantage of the 2nd house.

21. Addressing the argument that the respondent and her siblings were not *bona fide* beneficiaries of the deceased, Mr. Nabasange maintained that her mother was blessed with five children. However, the appellants did not mention them in their pleadings. Instead, they relied on the impugned Will which left out the beneficiaries from the 1st house. Also, the Chief's letter did not mention all the beneficiaries. Counsel contended that the 2nd house has only 7 beneficiaries, therefore, Jonathan Sawe, Everline Jerono and Sally Jepchumba were improperly included as

beneficiaries.

22. Mr. Nabasenge dismissed the argument that the appellants were not heard before the Will was nullified and maintained that the parties were given an opportunity to present their case. Further, counsel opposed the prayer seeking to have this case remitted back to the High Court urging that it took 15 years for the case to be finalized before the trial court, therefore, a retrial will be a travesty of justice since they may have to wait for another 20 years for another verdict.

23. Counsel maintained that the distribution discriminates beneficiaries from the 1st house and urged that the estate be distributed equally amongst all the *bona fide* beneficiaries from the two houses.

24. Lastly, regarding costs, Mr. Nabasenge submitted that costs follow the event unless the court for good reasons otherwise orders and maintained that the trial court having upheld the respondent's objection, it had no obligation to justify an award of costs save to give reasons for its decision and cited ***BKN & Ano. vs. TNW [2019] eKLR*** where this court was of a similar view.

25. Our duty in a first appeal is to re-evaluate the evidence

tendered before the trial court and the judgment to arrive at

our own independent conclusions. This effectively amounts to conducting a retrial which involves conducting a fresh, exhaustive scrutiny of the entire evidence while recognizing that we did not see or hear the witnesses testify. (See ***Selle & Ano. vs. Associated Motor Boat Co. Ltd.& Others [1968] EA 123).*** This Court should only interfere with the trial court's findings of fact if they are based on no evidence, failed to consider relevant considerations, or are based on wrong principles. (See ***Mwangi vs. Wambugu [1984] KLR page 453*** and ***Peters vs. Sunday Post Limited [1958] E.A. page 424).*** The duty to re-appraise evidence is also empowered by Rule 31 (1) of the Court of Appeal Rules, 2022.

26. First, we will address the appellants' contestation that the respondent and her siblings were not sired by the deceased, therefore, they do not qualify to be dependants/beneficiaries of the estate. For starters, section 29 of the Act which defines a dependant as follows:

> ***"29. For the purposes of this Part, "dependant" means –***
>
> ***(a) the wife or wives, or former wife or wives, and the children of the***

deceased whether or not maintained by the deceased immediately prior to his death;

> ***(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half- brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and***
>
> ***(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."***

27. The gravamen of the appellants' argument is that the respondent's mother divorced/separated with the deceased long before the deceased's death. It is the appellant's contention that the respondent and her other siblings were born after the deceased had divorced/separated with their mother. In support of this ground, they argued that the respondent's mother lived and died while at her parents' home in Ndalat Settlement Scheme where she was buried, which, according to the appellants is conclusive prove that the divorce/separation between the deceased and their mother was complete. The appellants also contend that the respondent and her younger siblings were bequeathed properties from the estate purely on humanitarian grounds because the respondent and her siblings after their mother

died returned to live with their half-brother Charles Sawe on LR. No. 7739/8 and they were never under the care of the deceased. On the other hand, the respondent maintained that the deceased was their biological father and that their mother was not buried at her parents' home as alleged but on the deceased's land.

28. It is a fundamental principle of law that courts determine cases on the basis of the evidence adduced by the parties. Notably, the appellants' use of the words "divorced/separated" in their attempt to advance their argument that the respondent and her siblings were not dependants of the deceased is quite telling. The two words have totally different meanings and implications in law. Divorce means legal dissolution of marriage while separation is defined as state in which a husband and a wife remain married but live apart. (See Concise Oxford English Dictionary). These two words cannot be used together as has happened in this case nor can they be used interchangeably. If they were divorced as alleged, the appellants were obligated to adduce evidence to prove the dissolution of the marriage either through a court process or by the applicable customary law or practice. If they

were

separated as alleged, evidence ought to have been adduced to

establish this fact. A court cannot be left to guess what a litigant seeks mean. The uncompromising requirement for evidence to be clear emphasizes the necessity of unambiguous evidence to establish facts and ensure fair adjudication. Litigants bear the burden of presenting clear, and reliable evidence to support their claims. This is because a court must base its decision on the proven facts and law, not on conjecture or speculation. Evidence presented in court must meet standards for clarity and reliability. Evidence must be relevant to the case, admissible and must possess sufficient weight to support a finding of fact. It was incumbent upon the appellant, subject to rules of pleadings and evidence, to formulate their case and adduce cogent evidence. The appellants never proved by evidence that the deceased and his first wife were divorced or separated.

29. Notably, despite alleging that the respondent and her siblings were not sired by the deceased, the appellants never moved the trial court formally to have the questioned paternity determined. In any event, it is settled law that a child born during a valid marriage is presumed to be the husband's child. (See the Supreme Court decision in

Mwawasi and 2 Others). This presumption, as clearly provided by section 118 of the Evidence Act is conclusive prove of fatherhood unless parties had no access to each other. The appellants did not prove on a balance of probabilities by way of cogent evidence that the appellant and Tele Bot Kilobony who was lawfully married to him did not have access to each other when the respondent and her younger siblings were conceived. The definitive moment in such a situation is at the time of conception. It is not enough to allege separation or divorce. Therefore, the party disputing paternity must provide strong evidence to prove non-access, rather than conjecture and speculation. In ***Njenga vs. Njenga*** ***[1985] eKLR.*** *Madan, JA* (as he then was) cited with approval the English case of ***Gordon vs. Gordon and Granvile Gordon*** ***[1903] 141*** that:

> ***"The law says what has to be proved is that the husband did not have intercourse which might have led to the birth of the child. It does not allow the fact that another person had intercourse with the wife to be a material consideration. That is, I think, a proposition of the utmost importance in such cases as this. It was recognized in the opinion of the judges in Banbury Peerage Case (1812) 57 ER."***

30. Therefore, the appellants' argument faulting the learned Judge for failing to appreciate that the respondent and her siblings were not sired by the deceased collapses.

31. The next question is whether the learned Judge rightly held that the mode of distribution in the Will was skewed to the disadvantage of the first house. To answer this question, it is only fair we highlight briefly the mode of distribution provided in the impugned Will. As for LR. No. 7739/8 comprising of 149 acres, as per the Will, the first house only got 2 acres (that is, the respondent 1 acre and her brother 1 acre) compared to 146 acres allocated to the second house as follows: Paul Sawe- 26 acres; David Kemeli- 20 acres, Richard Maiyo- 20 acres, Mathew Kibitok- 25 acres, Harun Kipkoech- 20 acres, Christopher Kipruto- 23 acres, Eklizabeth Sawe- 10 acres and Roda Chekering- 3 acres. As for L.R. Number Nandi/Cheptil/138, measuring 37 acres, the respondent and her siblings got anything. It was shared among members of the second house as follows: Paul Korir- 4 acres, David Kimeli- 4 acres, Richard Maiyo- 4 acres, Mathew Kibitok- 15 acres, Harun Kipkoech- 5 acres, Christopher Kipruto- 5 acre and Elizabeth Sawe- 5 acres.

32. After considering the above mode of distribution, the learned Judge held that the Will could not stand the test of the law because it did not provide for all deceased's beneficiaries/dependants and that there was no justification why beneficiaries from the first house were denied inheritance while some got so little compared to the beneficiaries from the second house. As was held by the High Court in ***re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR*** the Act and the Rules made thereunder are designed in such a way that they confer jurisdiction to the probate court to determine the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribute the assets amongst the survivors and the beneficiaries. Testamentary discretion is subject to one key limitation, the obligation to make reasonable provision for dependants. Courts maintain oversight specifically in this area and may intervene if a testator fails to adequately provide for their dependants as required by the Act. Beyond this specific requirement, the courts generally respect and uphold the testator's expressed wishes regarding the distribution of their estate. This reflects the understanding that testators

possess intimate knowledge of their family circumstances,

relationships, and the specific needs of potential beneficiaries, making them best suited to make these important decisions about their estate. (See ***Re Estate of Alice Mumbua Mutua (supra).***

33. This limitation of a testator's testamentary freedom was subtly recognized by this Court in ***Elizabeth Kamene Ndolo vs. George Matata Ndolo*** ***[1996] eKLR*** in which it stated:

> ***"…This Court must, however, recognize and accept the position that under the provisions of Section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled, the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is expressly recognized by Section 26 of the Act…"***

34. Testamentary freedom is often regarded as the first principle of the law of Wills. However, Will-makers should not be lulled into a false sense of security. Successful dependants' provision claims can undo the terms of a validly executed will, even when the Will-maker's intentions

are very clear. (See ***The inheritance provisions – an affront to testamentary***

freedom? 16th January 2019, by Ben Lafferty LL.B., Queen's University Belfast).

35. Cognizant of the limitation of the testamentary freedom, this Court in ***Erastus Maina Gikunu & Another vs. Godfrey Gichuhi Gikunu & Ano. [2016] eKLR*** observed as follows:

> ***"…it is important to say here that, although there is this freedom, Section 26 of the Act enjoins the testator to make reasonable provision for his dependants. The court is permitted, on application and where it is satisfied that the testator has not done so to intervene by making what it deems reasonable provision. The desire of society to protect the family of a testator is the main reason for, not only allowing testamentary freedom, but also imposing certain limitations and protection against disinheritance."***

36. This Court in ***Elizabeth Kamene Ndolo vs. George Matata Ndolo (supra)*** underscored the statutory underpinning of the testamentary freedom embodied in section 26 of the Act as follows:

> ***"This section clearly puts limitations on the testamentary freedom given by section 5. So that if a man by his will disinherits his wife who was dependant on him during his lifetime, the court will interfere with his freedom to dispose of his property by making reasonable provision for the disinherited wife. Or if a man at the point of his death gives to his mistress the family's only home and makes no reasonable provision for his children who were dependent on him during***

his lifetime, the court may well follow the mistress, under section 26, and make reasonable provision for the dependent children out of the house given

> ***to the mistress. So that though a man may have unfettered freedom to dispose of his property by will as he sees fit, we do not think it is possible for a man in Kenya to leave all his property for the maintenance and up-keep of an animal orphanage if the effect of doing so would be to leave his dependants unprovided for."***

37. It is now clear that section 26 of the Act enjoins the testator to make reasonable provision for his dependants and on application, where the court is satisfied that the testator has not done so to intervene by making what it deems reasonable provision. (See ***<u>Erastus Maina Gikunu & Ano. vs Godfrey Gichuhi Gikunu & Ano.</u> [2016] eKLR).*** The factors to be considered by the court while making an order for provision of dependants are clearly provided in Section 28 of the Act as follows:

> ***28. In considering whether any order should be made under this Part, and if so what order, the court shall have regard to –***
>
> ***(a) the nature and amount of the deceased's property;***
> ***(b) any past, present or future capital or income from any source of the dependant;***
> ***(c) The existing and future means and needs of the dependant;***
> ***(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;***
> ***(e) the conduct of the dependant in relation to the deceased;***

> ***(f)*** ***the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;***
>
> ***(g)*** ***the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.***

38. We have already concluded that the respondent and her siblings are all children of the deceased. Accordingly, they are all dependants within the meaning section 29 (a) of the Act. Therefore, contrary to the assertions made by the appellants, in terms of section 118 of the Evidence Act, the burden fell upon the appellants to dislodge the presumption of paternity. As stated earlier, they miserably failed to rebut this presumption. Therefore, the respondent and her siblings were entitled to reasonable provision of the deceased's estate. Our analysis of the distribution of the estate contained in the Will leaves us with no doubt that the distribution is impermissibly skewed in favour of the appellants to the disadvantage of the respondent and her siblings. Accordingly, we agree with the learned judge that the distribution in the Will tilted in favour of the first house. We can only add that this is a clear case where the court properly interfered with the deceased's testamentary freedom. Therefore, the ground challenging the

trial court’s finding on this issue fails.

39. The next critical issue is whether having found that the distribution of the estate was skewed in favour of the second house and to the disadvantage of the first house, the learned Judge erred in revoking the Will and in failing to appoint administrators, thereby leaving the estate in a limbo. At paragraph 68 of the impugned judgment, the learned Judge had this to say:

> ***"68. Even if the will was to be found to have been properly executed it fails to meet the guidelines set out in section 28 was not strictly followed (sic), therefore some beneficiaries received more and other so little compared to the acreage of land. In view of the above holdings the impugned will and the proposed mode of distribution is set aside set aside. I proceed to make provision for all the dependants and/or beneficiaries equitably in accordance with the law. Having been a polygamous set up I am guided by section 40 of the Law of Succession Act of section 40 of the Law of Succession Act Cap 160 Laws of Kenya which states as follows: …"***

40. The critical question here is whether a Will can be invalidated for failing to make provision for dependants. We are aware that there are several decisions of the High Court holding that failure to make provision for a dependant by a deceased person in his or her will does not invalidate the Will as the court is empowered under section 26 of the Act to make reasonable provision for the dependants. (See for

example ***Emmanuel***

***Julius Nyota & 2 others vs. Agusta Rwamba Thumbi & Ano.* [2020] eKLR Civil Case 25 of 2016).** However, the Court of Appeal in ***Marete vs. Marete & 3 Others* (Civil Appeal E014 of 2023) [2024] KECA 371 (KLR) (22 March**

2024) (W. Karanja, L.K. Kimaru & A.O. Muchelule, JJ.A.) faced with similar issues as in this case aptly settled the law as follows:

> ***"In the circumstances, even if the impugned Will is valid, the mode of distribution is so skewed so as to render the beneficiaries of the first house literally disinherited. The impugned Will failed to meet the guidelines set out under Section 28, leaving some beneficiaries wholly disinherited. Since all of the deceased's free property was distributed in the impugned Will, it is our view that the only way that the Court can make reasonable provision for all the dependants of the deceased, including the respondents, is to invalidate the last written Will of the deceased and distribute the properties that comprised the estate of the deceased under the intestacy laws of the Law of Succession Act."***

41. We can only add that it is notable that section 5 of the Act outlines the requirements for a valid Will and in no uncertain terms states that its provisions are subject to Part 111 of the Act. It reads:

(1) Subject to the provisions of this Part and Part III, every person who is of sound mind and not

a minor may dispose of all or any of his free property by will, and may thereby make any

disposition by reference to any secular or religious law that he chooses.

42. In summation, Part 111 of the Act titled "Intestate Succession" outlines the distribution of an estate when a person dies without a valid will. It details how the estate is divided among the surviving spouse, children, and other relatives, including provisions for situations with a surviving spouse but no children, children but no spouse, and cases where the intestate was polygamous. The Act also ensures that children born out of wedlock or conceived but not yet born are included in the distribution under certain conditions. Consequently, we agree with the learned judge's finding that the impugned Will failed to meet the guidelines set out under Section 28, leaving beneficiaries from the first house disinherited. Therefore, much as the deceased had the freedom to dispose his estate as he pleased, he was not entitled to leave out his children from the first house without reasonable provisions. The freedom exists but it must be exercised reasonably and in accordance with the law. As was held by this Court in ***Erastus Maina Gikunu & Ano. vs. Godfrey Gichuhi Gikunu & ano. [2016] eKLR:***

"…it is important to say here that, although there

is this freedom, Section 26 of the Act enjoins the

testator to make reasonable provision for his dependants. The court is permitted, on application and where it is satisfied that the testator has not done so to intervene by making what it deems reasonable provision. The desire of society to protect the family of a testator is the main reason for, not only allowing testamentary freedom, but also imposing certain limitations and protection against disinheritance." (Emphasis added).

43. Since all of the deceased's free property was distributed in the impugned Will, it is our view that the only way that the Court could make reasonable provision for all the dependants of the deceased, including the respondent was to invalidate the last written Will of the deceased and distribute the properties that comprised the estate of the deceased under the intestacy laws of the Act. This view is supported by this Court's decision in ***Marete vs. Marete & 3 Others (supra).*** Accordingly, we find no reason to fault the learned judge's decision to invalidate the Will. It is also our finding that having ordered the distribution of the estate, it was not necessary for the learned judge to appoint administrators as urged by the appellants. Also, the estate having being distributed, it cannot be said it was left in a limbo as urged by the appellants.

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44. The next question is whether the learned Judge rightly distributed the property as per section 40 of the Act which reads:

> ***"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."***

45. Interpreting the above section, *Omollo, J* (as he then was) in ***<u>Mary Rono vs. Jane Rono & Ano.</u> [2005] eKLR,*** stated:

> ***"My understanding of that section (Sec 40(1) of the Act) 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."***

46. Similarly, this Court in ***Scolastica Ndululu Suva vs. Agnes Nthenya Suva* [2019] eKLR** had the following to say regarding section 40 of the Act:

> ***"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."***

47. We have re-analyzed the basis upon which the trial Judge distributed the two properties that comprised the estate of the deceased. We note that when it comes to a challenge touching on the exercise of discretion by a trial court, this Court is slow to upset the decision because under the law, the discretion is vested in the trial court, not in the appellate court. The fact that this Court could have come to a different decision if it was hearing the matter in lieu of the trial court is not sufficient ground for upsetting the decision of the trial court. (See ***United India Insurance Co. Ltd vs. East African Underwriters* (Kenya) Ltd [1985] KECA 39 (KLR)).**

48. The evidence adduced before the trial court clearly shows that the deceased, who died on 6th October 2002 was

polygamous. Just like the trial court, we have dismissed the appellant’s

assertion that the deceased had divorced/separated with his first wife. The deceased was predeceased by his first wife Tele Bot Kilobony, who had five children. The deceased was however survived by his second wife Elizabeth Sawe (who is now deceased) and her children. His first house comprised of:

(a) William K. Sawe (deceased), (b) Charles K. Sawe (deceased),

(c) Salina Sawe, (d) John Sawe (deceased) and (e) Christine Sawe.

49. The deceased's second house comprised of: (a) Elizabeth Sawe

– widow (now deceased), (b) Paul Korir Sawe, (c) David Kimeli,

(d) Richard Maiyo, (e) Mathew Kibitok, (f) Harron Kipkoech, (g) Christopher Kiprutto, (h) Everline Jerono and (i) Sally Jepchumba.

50. The learned Judge distributed the two land parcels between the two houses as follows:

LR. No. 7739/8 measuring 149 acres.

(a) 1st House

a. William K. Sawe (deceased) -12 acres.

b. Charles K. Sawe (deceased)-12 acres

c. Salina Sawe-6 acres

d. John Sawe (deceased)-12 acres

e. Christine Sawe-4 acres

(b) 2nd House

a. Elizabeth Sawe – widow (now deceased)-8 acres (to have a life interest)

b. Paul Korir Sawe-12 acres

c. David Kimeli-12 acres

d. Richard Maiyo-12 acres

e. Mathew Kibitok-12 acres

f. Harron Kipkoech-12 acres

g. Christopher Kiprutto-12 acres

h. Everline Jerono-12 acres

i. Sally Jepchumba-12 acres

(c) The AIC Church – 1 acre.
LR. No. Nandi Cheptil/138 measuring 37 acres.

A. 1st House

a. William K. Sawe (deceased) -3 acres.

b. Charles K. Sawe (deceased)-3 acres

c. Salina Sawe-3 acres

d. John Sawe (deceased)-3 acres

e. Christine Sawe-1 acres

B. 2nd House

a. Elizabeth Sawe – widow (now deceased)-2.4 acres

b. Paul Korir Sawe-2.9acres

c. David Kimeli-2.9 acres

d. Richard Maiyo-2.9 acres

e. Mathew Kibitok-2.9 acres

f. Harron Kipkoech-2.9 acres

g. Christopher Kiprutto-2.9 acres

h. Everline Jerono-2.9 acres

i. Sally Jepchumba-1.3 acres

51. At this juncture, we find it fit to briefly comment on a pertinent issue which in our view was raised casually by the respondent in her submissions. She contended Jonathan Sawe, Everline Jerono and Sally Jepchumba listed among the beneficiaries in the second house never featured in these proceedings nor were they mentioned as beneficiaries in the appellants' pleadings and submissions. She maintained that she is the one who erroneously listed them as beneficiaries in her affidavit in support of her application for revocation of the grant, therefore, they ought to be removed from the list of beneficiaries in the 2nd house leaving on 7 dependants.

52. We have earnestly considered the record. The above three persons were neither listed in the impugned will nor in the

Chief’s letter. However, it is the respondent who listed them as

beneficiaries at paragraph 10 of her affidavit in support of summons for the revocation of grant and on her citation to propound a document as a will. The trial Judge in her distribution, she included them as beneficiaries in the second house.

53. However, we note that the issue of the *bona fide* beneficiaries in the second house was never raised before the trial court. Therefore, raising the issue by way of submissions amounts to an ambush and cannot be entertained in this appeal. In any event, it is an old truism that a party is bound by his pleadings and in this appeal, we cannot properly entertain the said issue since the issue was not urged before learned judge, therefore, she did not address her mind to the said issue.

54. The respondent in her cross-appeal has challenged the mode of distribution arrived at by the learned Judge. She maintains that the learned Judge had no basis to discriminate the beneficiaries from the first house in distributing the estate. She argued that herself and Christine Sawe got lesser shares from LR. No. 7739/8 measuring 149 acres compared to the beneficiaries from the second house. In particular, the learned Judge allocated

the first house a total of 46 acres out of this

land compared to 96 acres to the second house. Regarding LR. No. Nandi Cheptil/138 measuring 37 acres, all the beneficiaries from the first house got a total of 13 acres while the beneficiaries in the second house got a total of 24 acres.

55. We are mindful of the principle that section 40(1) of the Act does not take away the discretion of a court in determining an equitable and fair mode of distribution. This Court so held in ***<u>Scholastica Ndululu Suva vs. Agnes Nthenya Suva</u> (supra)*** where the learned Judges observed that:

> ***"…. although section 40 provides the 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."***

56. Guided by the clear provisions of section 40 (1) of the Act reproduced earlier which in a nutshell dictates that for a polygamous intestate estate, the personal and household effects and the net intestate estate residue are divided among the deceased's "*houses*". Each "*house*" consists of a surviving wife and her children, with the surviving wife counted as one unit and each child as another. This creates a formula for division where the total "*units*" for each house

(children plus

one wife) determine that house's proportional share of the

estate, ensuring fair distribution within a polygamous family structure.

57. Adhering to the letter and spirit of the above provision, we are persuaded that the justice of this case dictates that we add the 6 beneficiaries in the first house to the 9 beneficiaries in the second house which will aggregating to 14 units. It is common ground that the total acreage of the suit properties is LR. No. 7739/8 measuring 149 acres less 1 acre donated to AIC Church and L.R. No. Nandi Cheptil/138 measuring 37 acres. To ensure a just, fair and equitable distribution of the estate, each parcel ought to be divided equally among the 14 units. This translates to 14 equal portions measuring 10.57 acres from LR. No. 7739/8 and 14 portions measuring 2.64 acres from L.R. No. Nandi Cheptil/138. This means that each of the 14 dependants of the deceased will get two parcels of land, that is, a 10.57-acre parcel of land from LR. No. 7739/8 and a 2.64- acre parcel of land from L.R. No. Nandi Cheptil/138.

58. It is important we underscore that the principle of equality in distributing a deceased's estate under the Act emphasizes fair and non-discriminatory treatment of all entitled beneficiaries, ensuring equal shares for all

children of the deceased

regardless of gender or marital status. This constitutional principle is supported by Article 27 of the Constitution and it overrides any conflicting customary law that would deny or diminish a lawful beneficiaries' inheritance rights. All children are considered equal before the law for inheritance purposes.

59. As mentioned earlier, the appellants questioned the competence of the respondent's cross-appeal. However, the said challenge is being brought very late in the day contrary to rule 84 of the Court of Appeal Rule, 2010 which provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be. We say no more.

60. In the end, we find that this appeal fails save for the issue of costs as ordered below. We allow the respondent's cross-appeal and set aside the entire judgment and decree delivered by *Omondi, J.* on 14th August 2019 in Eldoret High Court Succession Cause No. 369 of 2004 and instead issue the following orders:

    a. The distribution of the deceased's estate ordered by the trial court (Omondi, J.) on 14th August 2019 in Eldoret High Court Succession

Cause No. 369 of 2004 is hereby set aside.

b. ***The two parcels of land comprising of the deceased's estate, namely, LR. No. 7739/8 measuring 149 acres less 1 acre donated to AIC Church and L.R. No. Nandi Cheptil/138 measuring***
37 acres shall be divided among the 14 units comprising of the two houses of the deceased, with each person getting 10.57 acres in LR. No. 7739/8 in Uasin Gishu and 2.64 acres from Nandi Cheptil/138.

c. ***The Land Registrar, Nandi County and the Land Registrar, Uasin Gishu County is hereby directed to forthwith undertake the appropriate sub- divisions in accordance with order (b) above and issue each of the 14 beneficiaries from the two houses with titles for their respective parcels of land.***

d. ***Each party shall bear their own costs in the appeal and in the High Court this being a family dispute.***

Dated and delivered at Nakuru this 21st day of October, 2025.

M. WARSAME

....
. JUDGE OF APPEAL

L. ACHODE

....
. JUDGE OF APPEAL

J. MATIVO

....
. JUDGE OF APPEAL

I certify that this is a true copy of the

original.
Signed.

DEPUTY REGISTRAR.