In re Estate of Kimaru Arap Tireito (Deceased) (Probate & Administration 342 of 2014) [2025] KEHC 15466 (KLR) (31 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15466 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PROBATE & ADMINISTRATION 342 OF 2014

JRA WANANDA, J

OCTOBER 31, 2025

IN THE MATTER OF THE ESTATE OF KIMARU ARAP TIREITO (DECEASED)

BETWEEN

MARY CHEPKOSKEI TIREITO ..... PETITIONER

AND

LEAH CHEPKORIR ..... ADMINISTRATOR

AND

PAUL SUGUT ..... 1ST ADMINISTRATOR

PRISCAH KEMEI ..... 2ND ADMINISTRATOR

RULING

1. The deceased, Kimaru Arap Tireito, died on 9/10/1999 at the age of 75 years, and on 18/09/2014, Esther Cheruto Tireito and Mary Chepkosgei, claiming as his 1st and 2nd widows, petitioned for Letters of Administration over his estate. 21 family members were listed as beneficiaries, and the parcel of land Nandi/Koylat/207 measuring 28.5 acres (approximately 71.425 hectares), identified as the sole asset comprising the estate. The Letters of Administration was then granted to the Petitioners on 17/12/2014, as joint Administrators.

2. The Summons for Confirmation of Grant dated 11/02/2016 was then filed but the hearing thereof seems to have stalled after the Petitioners apparently fell out. However, after Esther Cheruto Tireito (1st widow) herself died on 22/12/2020, the matter was referred to Court Annexed Mediation which culminated into the Partial Mediation Settlement dated 12/09/2024, agreeing on appointment of Paul Sugut, Mary Tireito, Leah Jepkorir, and Priscah Kenei, as joint Administrators, and leaving distribution for determination by the Court. While Paul Sugut and Priscah Kenei (2nd and 3rd Administrators) are from the 1st house (children of the late Esther Cheruto Tireito), Mary Tireito and

Leah Jepkorir, (3rd and 4th Administrators) represent the 2nd house. The Partial Settlement was then adopted by the Court on 30/10/2024, and an Amended Grant of Letters of Administration issued (though erroneously typed as 16/12/2024). The Petitioners were then directed to file Summons for Confirmation.

3. Pursuant to the above directions, through Chebason Bett & Co. Advocates, the 2nd house (1st and 2nd Petitioners) filed the fresh Summons for Confirmation, dated 21/11/2024. The same was however amended on 24/03/2025 by the 1st and 2nd Petitioners' new Advocates, Messrs K. W. Nakitare & Co., In her Affidavit in support of the Summons, the 2nd Petitioner, Leah Chepkorir, proposed that the estate parcel of land be distributed equally amongst all the beneficiaries with each getting 2.871 acres, save for one Kibore Sonet who should get 13 acres. According to her, the proposal is in accordance with the provisions of Section 40 of the *Law of Succession Act*.

4. The 3rd and 4th Petitioners (1st house), in response, through Messrs Kesse & Kesse Advocates, filed the Affidavit sworn on 24/04/2025 by the 3rd Administrator, Paul Kiprono Sugut, who deponed that the parcel of land was acquired jointly by her late mother Esther Cheruto Tireito (1st wife), and the deceased, and that her said late mother contributed from proceeds of sale of her cattle. He urged that out of the 24.5 hectares comprising the parcel of land, 13 acres was sold to the said Kibore A. Sonet, 29 acres belonged to her late mother, as she had contributed to acquisition thereof, and therefore, it is only the remaining 29 acres that is available for distribution amongst the 21 beneficiaries, with each getting 1.435 acres.

5. The parties then filed written Submissions. The 3rd and 4th Petitioners' (1st house) Submissions is dated 4/07/2025, while the 1st and 2nd Petitioners' (2nd house) is dated 28/07/2025.

6. Counsel for the 3rd and 4th Petitioners (1st house) submitted that the proposal by the 2nd house fails to capture the reality that the late 1st widow contributed to acquisition of the parcel of land. He submitted that Section 71 of the *Law of Succession Act* mandates the Court to satisfy itself as to the identity and shares of persons beneficially entitled to the estate before confirming the Grant, that Section 40 requires the estate of a polygamous person who dies intestate to be divided amongst the houses according to the number of children in each house, and that the 3rd and 4th Petitioners' proposal is the one that represents such distribution mode since a "house" in a polygamous setting, is defined in Section 3 as a "family" unit comprising the wife and children of that wife. He cited the Court of Appeal case of Scholastica Ndululu Sura Vs Agnes Nthenya Sura [2019] eKLR, in which, he submitted, it was held that Section 40 is a useful guide and provides for a general distribution of the estate of a polygamous deceased person, and that the Court has wide discretionary power over the issue of distribution, and shall take into consideration the factual circumstances and peculiarities of the particular case, relevant in ensuring equitable and fair distribution of the estate. He cited Rule 73 of the Probate and Administration Rules.

7. On his part, Counsel for the 1st and 2nd Petitioner (2nd house), too, urged that the 1st house (3rd and 4th Petitioners) comprises of 12 children, while the 2nd house (1st and 2nd Petitioners) has 7, and that in total, there are 21 beneficiaries. He reiterated that the said Kibore Sonet, purchased 13 acres out of the parcel of land measuring 24.5 hectares (approx. 71 acres), leaving 58 acres which should be distributed equally amongst all the beneficiaries. He insisted that the proposal is in accordance with the provisions of Section 40 of the *Law of Succession Act*. He cited Waki JJA, in the case of Rono v Rono Civil Appeal No. 66 of 2022, and also cited the case of In the Matter of the Estate of Nelson Kimotho Mbithi (Deceased), HCSC No. 169 of 2000, and also the case of Aineah Masinde Walubengo (Deceased) 2017 eKLR.

8. Regarding the allegation that the 1st widow, Esther Cheruto Tireito contributed in the acquisition of the parcel of land from proceeds of sale of her cattle, Counsel submitted that no sale agreement or evidence of sale of the cattle has been produced.

Determination

9. The issue in this matter is basically the determination of the appropriate mode of distributing the remainder of the sole asset (parcel of land) comprising the estate amongst the 2 houses, comprising in aggregate 21 agreed beneficiaries.

10. Regarding the law on distribution of the estate of a polygamous intestate, Section 40 of the *Law of Succession Act* provides as follows:

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

11. As was stated by Hon. Justice J.K. Karanja in the case of In re Estate of Michael George Tendwa Said (Deceased) [2020] eKLR, Section 40 above is the applicable law where there is no agreement on distribution of the estate and that:

> "any proposed mode of distribution ought to be compatible with and in accordance with the provision thereby leaving no room for distribution based on the whim of the holder of the grant or his/her sentimental feelings."

12. In respect to "equality" in distribution as referred to in Section 40 above, the Court of Appeal in the case of Stephen Gitonga M'murithi –v- Faith Ngira Murithi [2015] eKLR, observed as follows:

> "Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried.
>
> Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each house hold of a polygamous deceased. Applying the above principles ..... it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the *Law of Succession Act* by discriminating against the married daughters of the deceased ..."

13. Further, in the case of In Re Estate of John Musambayi Katumanga – (Deceased) [2014] eKLR, Musyoka J stated that:

> "Under Section 40 of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their

respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the *Law of Succession Act*, the children would divide the estate equally amongst themselves. Section 40 was not designed for the circumstances of the instant estate, but it would appear more appealing for the purpose of distribution of the said estate than Section 35. The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is "equally" as opposed to "equitably". This is the plain language of the provisions. The provisions are in mandatory terms - the property "shall ... be equally divided among the surviving children." Equal distribution is envisaged regardless of the ages, gender and financial status of the children."

14. However, in the case of Esther Wanjiku Burugu Vs Margaret Wairimu Burugu, Civil Appeal No. 319 of 2002, the Court of Appeal guided that the Section 40 does not stipulate that the division of the estate must be "equal", and stated that although the distribution of the estate of a polygamous person is in the first instant to be among the houses, nonetheless distribution would be done according to the number of children in each house. The Court stated that the language adopted in Section 40 negates any argument that the division must necessarily be "equal" between or among the houses, for to say so, would ignore the fact that in most instances, the number of children in each house is never equal.

15. In the case of Elizabeth Chepkoech Salat Vs Josephine Chesang Salat [2015] eKLR, another Court of Appeal case, the Judges reiterated and fortified the fact that Section 40 of the *Law of Succession Act* does not provide for "equality" between houses, or that each child must receive the same or equal portion. The Court held as follows:

> " 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 had 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 adjustment 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".

16. Similarly, in the other Court of Appeal case of Mary Rono Vs Jane Rono & Another [2005] eKLR, Omollo JJ stated that if Parliament had intended that there must be "equality" between the houses, then there would have been no need to provide in Section 40 above that the number of children in each house be taken into account. This is how he put it:

> " 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.

Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in 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 the Act does not provide for that kind of equality."

17. The above views, read together, give rise to the generally agreed position that Section 40 does not give blanket discretion to a Court to deviate from the general principles stipulated therein. Thus, where a matter is contentious and the parties have not reached a consent, the Court is bound to apply the statutory provisions. In other words, the Court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. It is however also agreed that a Court has some level of limited residuary discretion within the statutory provisions to make adjustment to the share of each house or of a beneficiary. This was the view adopted in the case of Re Estate of Chesimbili Sindani (Deceased) [2021] eKLR.

18. In this case, the sole property comprising the estate is the parcel of land known as Nandi/Koylat/207 which, according to the Search Report on record, measures 28.5 hectares (approximately 70.425 acres). It is however agreed that 13 acres (5.261 hectares) thereof was purchased by a third party, one Kibore A. Sonet and therefore, the acreage remaining is about 57.425 acres (23.239 Ha). The 3rd and 4th Petitioners (1st house), have however come up with the contention that the estate parcel of land was acquired jointly by their late mother Esther Cheruto Tireito, (1st wife), and the deceased, and that their late mother contributed from proceeds of sale of her cattle. They therefore urge that out of the said remaining 57.425 acres, ½ thereof, approximately, belonged to their late mother as of right, and is thus not available for distribution.

19. In rejecting the above contention, I observe from the copies of the Search Report and title document on record, that the parcel of land is solely registered in the name of the deceased, Kimaru Arap Tireito. I agree with the 1st and 2nd Petitioners' Counsel's that no evidence whatsoever of the alleged contribution made by the 1st widow, or her alleged joint acquisition of the parcel of land has been presented. The contention is made on the basis of a mere Affidavit with no single annexure, and which contention has, in any case, been vehemently denied. It therefore remains a contested allegation. If the 2nd and 3rd Petitioners wished to pursue such contention, then they ought to have sought for a viva voce trial in which witnesses would have been called, and relevant documentation, where available, produced. The witnesses would then have been cross-examined before the Court makes an informed decision. As it is, there is no material before this Court to consider the said contention.

20. I therefore find that the 2nd and 3rd Petitioners (1st house) have failed to prove their claim that ½ of the 57.425 acres of land remaining after sale of the 13 acres, belonged to the 1st wife, the late Esther Cherutich Tireito, and that the same is therefore not available for distribution as part of the estate of the deceased. I therefore find that save for the 13 acres sold to the said Kibore A. Sonet, the entire remaining acreage is wholly available for distribution.

21. The 21 beneficiaries (inclusive of the late 1st widow) are therefore each entitled to about 2.7345 acres (approximately 1.10667 Ha) comprising the remaining 57.425 acres (23.239 Ha), save that within the 1st house, since the widow, Esther Cheruto Tireito is now deceased, her share shall be re-distributed equally amongst her 12 children.

Final Orders

22. In the premises, I order as follows:

    i. There being no dispute that the entire parcel of land, Nandi/Koylat/207, is registered in the name of the deceased, Kimaru Arap Tireito, and there being no evidence to indicate any joint ownership thereof by the 1st widow as alleged, I find that save for the 13 acres (approx. 5.26 Ha) sold to the said Kibore A. Sonet, the entire remaining acreage is wholly available for distribution amongst the beneficiaries.

    ii. In distributing the parcel of land therefore, the said purchaser, Kibore A. Sonet shall be allocated the 13 acres (5.26 Ha) he purchased, while the remainder shall be distributed equally amongst all the beneficiaries, save that within the 1st house, the share for their late mother, Esther Cheruto Tireito, shall be re-distributed equally amongst her 12 children. The final breakdown of the distribution shall therefore be as follows:

1st House (Widow; The late Esther Cheruto Tireito	Beneficiaries		
	1. Priscah Kemei	2.9623 Acres (1.19889 Ha)	
	2. Josephine Rono	2.9623 Acres (1.19889 Ha)	
	3. Dinah Bett	2.9623 Acres (1.19889 Ha)	
	4. Elizabeth Chepkemboi	2.9623 Acres (1.19889 Ha)	
	5. Loice Chelimo	2.9623 Acres (1.19889 Ha)	
	6. Annah Chepkorio	2.9623 Acres (1.19889 Ha)	
	7. Paul Sugut	2.9623 Acres (1.19889 Ha)	
	8. Philip Maru	2.9623 Acres (1.19889 Ha)	
	9. Estate of David Kipserem	2.9623 Acres (1.19889 Ha)	
	10. Cleophas Ngiserem	2.9623 Acres (1.19889 Ha)	
	11. Wilson Ngelegei	2.9623 Acres (1.19889 Ha)	
	12. Henry Kipleting	2.9623 Acres (1.19889 Ha)	35.548 Acres (14.3867 Ha)

2nd House (Widow; Mary Chepkosgei Tireito)	13. Mary Chepkoskei Tireito	2.9623 Acres (1.19889 Ha)	
	14. Leah Chepkorir	2.7345 Acres (1.10667 Ha)	
	15. Grace Chelagat	2.7345 Acres (1.10667 Ha)	
	16. Caroline Cheptanui	2.7345 Acres (1.10667 Ha)	
	17. Gladys Chebichi	2.7345 Acres (1.10667 Ha)	
	18. Geoffrey Kipkemboi	2.7345 Acres (1.10667 Ha)	
	19. Viola Chepngetich	2.7345 Acres (1.10667 Ha)	
	20. Sham Cheptoo	2.7345 Acres (1.10667 Ha)	21.877 Acres (8.8533 Ha)
Purchaser	21. Kibore A. Sonet	13.0 Acres (5.26 Ha)	13.0 Acres (5.26 Ha)
Total	70.425 Acres (28.50 Ha)		

ii. This being a family matter, each party shall bear his/her own costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF OCTOBER 2025

.....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Ms. Mukanda h/b for Mr. Nakitare for the 1st and 2nd Administrators

N/A for 3rd and 4th Administrators

Court Assistant: Brian Kimathi