

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
FAMILY APPEAL NO. E009 OF 2025

IN THE MATTER OF THE ESTATE OF THE LATE JAMES ALAL ABALA
(DECEASED)

MATHEW ABONYO ALAL 1ST APPELLANT

ROSA JUMA ALAL 2ND APPELLANT

VERSUS

MARY ALOO ALAL 1ST RESPONDENT

WILSON ONYANGO ALAL 2ND RESPONDENT

J U D G M E N T

1. The deceased was a polygamous man with three wives at the time of his death in 1994 namely, **Angelina Osir Alal** (the 1st appellant’s mother), **Mary Aloo Alal** and **Rose Juma Alal**.
2. Following the deceased’s demise, the 1st respondent moved the trial court and obtained Letters of Administration Intestate on the **19/9/2017**. She detailed that the deceased’s estate only constituted of **LR no. Kisumu/Nyalenda “A”/156** (hereinafter referred to as the “suit property”) which she sought to have distributed between herself and the 2nd appellant.
3. Vide Summons for confirmation of grant dated **22/3/2018**, the 1st respondent sought to have the grant made out to her on the **19/9/2017** confirmed. Before the confirmation, the appellants filed objections sworn on the **14/11/2018**.

4. The matter proceeded by way of viva voce evidence and on the **10/3/2025**, the trial court delivered its judgment in which it dismissed the objections presented by the appellants and proceeded to order that **land parcel no. Kisumu/Nyalenda “A”/156** be shared equally between the 1st respondent and 2nd appellant.
5. Aggrieved by the said decision, the appellants filed a memorandum of appeal dated **9/4/2025** in which they raised seven (7) grounds as follows: -
 - a) *That the learned trial magistrate erred in law and in fact when she dismissed the objector’s case and yet on the same judgement she distributed the suit property in dispute to the 2nd objector whose objection was dismissed.*
 - b) *That the Honourable trial court erred in law and in fact by ignoring and treating the submissions of the 1st appellant on his share to the suit property Land Parcel Kisumu/Nyalenda “A”/156 superficially thereby arriving at the wrong conclusion denying the estate of Angelina Osir Alal’s house their equal share.*
 - c) *That the learned trial magistrate erred in law and misdirected herself to the extent that the 1st appellant is the only son of the late Angelina Osir Alal the first wife and as such he was entitled under Luo customary law to inherit the house of his mother on the suit land so that he could take care of the house and grave of his deceased parent.*
 - d) *That the learned trial magistrate erred in fact and law in failing to consider the six rental units built by the late Angelina Osir Alal to feed her family for their livelihood.*
 - e) *The honourable trial magistrate erred in law and fact by considering the 1st appellant only land parcel Kisumu/Nyalenda A/1299 and*

Kisumu/Nyalenda B/403 leaving out the respondents jointly gifted Land Parcel no. Kisumu/Nyalenda/2840 and the 2nd respondent being the eldest son was gifted land parcel Kisumu/Nyalenda/138 which he sold hence the mode of sharing by the trial magistrate was unfair.

f) The Honourable trial magistrate failed to consider that by the time the late James Abala Alal passed on in the year 1994, he had already settled the three wives by giving them three portions of Land Parcel Kisumu/Nyalenda A/156 and no wife complained about their respective portions on the suit hence the reason why the late Angelina Osir Alal lived and was buried on her respective portion of land parcel Kisumu/Nyalenda A/156 next to her homestead which is still there up to date.

g) The Honourable trial court decision on mode of distribution is plainly wrong and is against the weight of evidence tendered by the appellant.

6. In accordance with the duty expected of a first appellate Court, I have carefully considered this appeal and re-evaluated the evidence in light of the submissions made before me. See the case of Selles & Another vs. Associated Motor Boat Company Ltd (1968) EA. The facts are not substantially in dispute.
7. **Mathew Abonyo Alal**, the 1st appellant testified that the deceased, his father died in **1994**. That the deceased had 3 wives prior to his death, his deceased mother, **Angelina Osir Alal**, **Mary Aloo**, the 1st respondent and the 2nd appellant **Rosa Juma Alal**.
8. That prior to his death, the deceased bequeathed **LR No. Kisumu/Nyalenda/1299** to his mother, another parcel to the 1st respondent

and the suit property to the 1st appellant. That he currently occupies his mother's portion while the 2nd appellant has built on her portion of land all the while the 1st respondent sold her parcel to one **Jaugenya**.

9. That following a land dispute, their area chief gave the 1st respondent 5 rooms on the suit property and 6 rooms to the 2nd appellant despite all of the said rooms having been built by the deceased for the 2nd appellant. That his claim was for the 6 rooms built on the suit property that belong to his now deceased mother.
10. In cross-examination, the 1st appellant testified that prior to his death, his father the deceased herein, had built 6 rooms on the suit property while the 2nd appellant had built 11 rooms. That the 2nd appellant and 1st respondent both live on the suit properties each with her own house. That he was not aware of the registration number of the portion given to the 1st appellant. That in addition to the rooms that are used as rentals on the suit property, each of the deceased's widows had their own houses.
11. That on **23/1/2000**, he transferred the suit property to his name but the suit property reverted back to the deceased's name pursuant to a court order issued in **Kisumu Chief Magistrates Land Case No. 80 of 2011**. That the land tribunal and court found that his mother had been adequately provided for by the deceased and that the suit property ought to be shared between the houses of the 2nd appellant and that of the 1st respondent.
12. **Rose Juma Alal** testified as **Pw2**. She adopted her affidavit of objection dated **14/11/2018** as her evidence in chief. She testified that the deceased was her husband and that he had 2 more wives, one being the 1st respondent as well as Angelina Osir Alal, the 1st appellant's now deceased mother.
13. That the deceased left 10 and ½ rooms on the suit property separate from the houses which his widows occupied thereon. That she collected rent from 10

of the rooms. That the deceased also gave each of his widows land prior to his death.

14. That the 1st respondent was not given any of the 10 rooms but has been in possession of 5 of the rooms given to her by the chief, which she wanted her to surrender. That the house that belonged to the 1st appellant's mother on the suit property has been split into 6 rooms from which he collects rent.
15. That the 1st appellant doesn't stay on the suit property as he has his own land, parcel **number 1299** where the deceased used to stay before moving to the suit property. That the 1st appellant received parcel 1299 from the deceased and parcel 403 from his grandmother. That after the deceased's death, the 1st appellant transferred the suit property to himself but she managed to have it transferred back to the deceased's name.
16. In re-examination, **Pw2** told the court that the 1st appellant's mother was buried on the suit property and that after her death, her beneficiaries are entitled to the house where she lived.
17. In her defence, **Mary Aloo Alal** testified as **Dw1**. She adopted her affidavits dated **22/3/2018**, **15/1/2019** and witness statement dated **12/11/2018** as her evidence in chief. She testified that the deceased's 3 widows all had houses on the suit property. That the 1st appellant's mother's house on the suit property has been divided into 6 rooms from which the 1st appellant collects rent which part had been given to the 1st appellant.
18. That there are 11 other houses on the suit property, 6 of which she owns and 5 owned by the 2nd appellant. That the houses were built by the deceased. That the 1st appellant does not stay on the suit property but was given separate land by the deceased prior to his death on which the 1st appellant has 8 houses which she is not claiming.

19. In re-examination, Mary testified that the 5 houses on the suit property were given to her by the chief following a land dispute between the family members.
20. It is based on the aforementioned evidence that the trial court passed the impugned judgment.
21. The deceased died intestate and therefore the administration of his estate is governed by the provisions of the Law of Succession Act. In his lifetime, the deceased had three (3) wives. The 1st wife who was the mother to the 1st appellant died after the deceased had passed on.
22. From the evidence on record, prior to his death, the deceased gave the 1st appellant **LR No. Kisumu/Nyalenda/1299** and also settled his wives on the suit property with each having her separate house. That there were also 11 rental rooms built on the suit property during the lifetime of the deceased. That following the deceased's death, the 1st appellant transferred the suit property to his name but the transfer was reversed. That following the death of the 1st appellant's mother, her house was divided into 6 rooms from which the 1st appellant collects rent. That the only asset that forms part of the deceased's estate is **LR No. Kisumu/Nyalenda A/156**.
23. Section 40(1) of the Law of Succession Act provides for distribution of the estate of a polygamous deceased's person 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.”

24. In Mary Ronoh v. Jane Ronoh & Another, [2005] eKLR, 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.

25. 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.”

26. In Douglas Njuguna Muigai v John Bosco Maina Kariuki & another [2014] Eklr, the Court of Appeal 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.”

27. 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.
28. In the present case, the deceased provided for the 1st appellant prior to his death giving him **LR No. Kisumu/Nyalenda/1299** then moved and settled his wives on the suit property with each having her separate house. The appellant now seeks a share from the suit property based on the fact that his mother had a house on the said land.
29. It is not lost on this Court that the deceased’s other wives and beneficiaries have not been provided for. That being said I also note that the 1st appellant, being the only beneficiary of his mother, who was the 1st wife is entitled to that share that also contains her burial site.
30. However, in as much as **section 40 of the Law of Succession Act** envisions the net intestate estate being distributed according to houses with each house being treated as a unit, I am fortified and bound by the decision of the Court of Appeal in **Mary Ronoh v Jane Ronoh (supra)** that a judge doing the

distribution still has a discretion to take into account or consider the number of children in each house.

31. Consequently, I am inclined to agree with the trial court that having been adequately provided for by provision of **LR Kisumu/Nyalenda /1299**, its only equitable that the suit parcel be divided equally between the houses of the 2nd appellant and 1st respondent, the 2nd and 3rd houses, respectively.
32. As regards Land Parcel no. **Kisumu/Nyalenda/2840** and **Kisumu/Nyalenda/138** alleged to have been given to the respondents, there is no evidence adduced of the same.
33. Accordingly, I find no substance in this appeal and do dismiss the same with no order as to costs having in mind that this is a family dispute.

It is so ordered.

DATED and **DELIVERED** at Kisumu this **19th** day of **December, 2025**.

A. MABEYA, FCI Arb
JUDGE