

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
SUCCESSION CAUSE NO.E95 OF 2021

**IN THE MATTER OF THE ESTATE OF CHRISTOPHER CHERUTICH
KIMELI (DECEASED)**

PIUS KIBUTA CHERUTICH1ST PETITIONER
PATRICK KIPROP BUTIA2ND
PETITIONER

VERSUS

PIUS KIPROP BUTIA1ST OBJECTOR
MICHAEL KIPROTICH2ND OBJECTOR

JUDGMENT

1. This matter relates to the estate of the late **Christopher Cherutich Kimeli** who died intestate on 22/08/2018. The Petitioners herein on 27/08/2021 petitioned the Court for the Grant of Letters of Administration in respect to the estate of the deceased in their capacity as the sons of the deceased and were issued with Letters of Administration on 4/02/2022.
2. Shortly, thereafter, the Objectors herein sought to revoke the grant therein vide an Application by way of a Summons dated 18/05/2022. The Court made in its ruling delivered on 7/07/2023, allowed the Objectors herein to be co-administrators with the Petitioners. The Court then issued fresh Letters of Administration dated 7/07/2023 in that regard. The Court further directed the parties to either jointly or separately file an application or their respective

applications for the Confirmation of Grant taking into account all the rightful beneficiaries and their proposed mode of distribution.

3. Pursuant thereto, the Petitioner filed Summons for Confirmation of Grant dated 12/10/2023. The Application was supported by an Affidavit jointly sworn by the Petitioners of even date wherein they proposed that the estate be distributed as follows;

NO.	BENEFICIARIES	PROPERTY	SHARES
1.	Paul Cherutich & Michael Kiprotich to hold it in trust for themselves and in trust of other beneficiaries being: Tabkili Shokwei Cherutich Joseph Kiprotich Michael Kiprotich John Kipyego Paul Cherutich Daniel Kibotich Grace Cherutich Rosalina Cherutich Kipngetich Cherutich Sharon Cherutich	Tembeleo/Elgeyo Border Block 12 (Tuiyoluk)/22	5.74 Ha
2.	Pius Cherutich and Patrick Butia to hold in trust for	Tembeleo/Elgeyo Border Block 12	5.74 Ha

	<p>themselves and in trust of the other beneficiaries, that is;</p> <p>Margaret Cherutich Monicah Cherutich Joyce Cherutich Gladys Butia</p>	(Tuiyoluk)/22	
3.	<p>Paul Cherutich & Michael Kiprotich to hold it in trust for themselves and in trust of other beneficiaries, that is;</p> <p>Tabkili Shokwei Cherutich Joseph Kiprotich Michael Kiprotich John Kipyego Paul Cherutich Daniel Kibotich Grace Cherutich Rosalina Cherutich Kipngetich Cherutich Sharon Cherutich</p>	<p>Uasin Gishu/Elgeyo Border Scheme/85</p>	1.3 Ha
4.	<p>Pius Cherutich and Patrick Butia to hold in trust for themselves and in trust of the other beneficiaries, that</p>	<p>Uasin Gishu/Elgeyo Border Scheme/85</p>	3.3 Ha

	<p>is;</p> <p>Margaret Cherutich</p> <p>Monicah Cherutich</p> <p>Joyce Cherutich</p> <p>Gladys Butia</p>		
5.	<p>Paul Cherutich & Michael Kiprotich to hold it in trust for themselves and in trust of other beneficiaries, that is;</p> <p>Tabkili Shokwei Cherutich</p> <p>Joseph Kiprotich</p> <p>Michael Kiprotich</p> <p>John Kipyego</p> <p>Paul Cherutich</p> <p>Daniel Kibotich</p> <p>Grace Cherutich</p> <p>Rosalina Cherutich</p> <p>Kipngetich Cherutich</p> <p>Sharon Cherutich</p>	<p>Sergoit/Karuna</p> <p>Block 3 (Tugen)/154</p>	2.489 Ha
6.	<p>Pius Cherutich and Patrick Butia to hold in trust for themselves and in trust of the other beneficiaries, that is;</p> <p>Margaret Cherutich</p> <p>Monicah Cherutich</p>	<p>Sergoit/Karuna</p> <p>Block 3 (Tugen)/154</p>	2.489 Ha

	Joyce Cherutich Gladys Butia		
7.	Paul Cherutich & Michael Kiprotich to hold it in trust for themselves and in trust of other beneficiaries, that is; Tabkili Shokwei Cherutich Joseph Kiprotich Michael Kiprotich John Kipyego Paul Cherutich Daniel Kibotich Grace Cherutich Rosalina Cherutich Kipngetich Cherutich Sharon Cherutich	Elgeyo Border Township Plot No. 106	2 ½ Acres
8.	Pius Cherutich and Patrick Butia to hold in trust for themselves and in trust of the other beneficiaries, that is; Margaret Cherutich Monicah Cherutich Joyce Cherutich Gladys Butia	Elgeyo Border Township Plot No. 106	2 ½ Acres

9.	Paul Cherutich & Michael Kiprotich to hold it in trust for themselves and in trust of other beneficiaries, that is; Tabkili Shokwei Cherutich Joseph Kiprotich Michael Kiprotich John Kipyego Paul Cherutich Daniel Kibotich Grace Cherutich Rosalina Cherutich Kipngetch Cherutich Sharon Cherutich	Sergoit/Karuna Block 3 (Tugen)/67	2.75 Acres
10.	Pius Cherutich and Patrick Butia to hold in trust for themselves and in trust of the other beneficiaries, that is; Margaret Cherutich Monicah Cherutich Joyce Cherutich Gladys Butia	Sergoit/Karuna Block 3 (Tugen)/67	2.75 Acres
11.	Paul Cherutich & Michael Kiprotich to hold it in trust for themselves and in trust	Irong/Kitany Plot No.89	0.75 Acres

	<p>of other beneficiaries, that is;</p> <p>Tabkili Shokwei Cherutich</p> <p>Joseph Kiprotich</p> <p>Michael Kiprotich</p> <p>John Kipyego</p> <p>Paul Cherutich</p> <p>Daniel Kibotich</p> <p>Grace Cherutich</p> <p>Rosalina Cherutich</p> <p>Kipngetich Cherutich</p> <p>Sharon Cherutich</p>		
12.	<p>Pius Cherutich and Patrick Butia to hold in trust for themselves and in trust of the other beneficiaries, that is;</p> <p>Margaret Cherutich</p> <p>Monicah Cherutich</p> <p>Joyce Cherutich</p> <p>Gladys Butia</p>	<p>Irong/Kitany Plot</p> <p>No.89</p>	<p>0.75 Acres</p>
13.	<p>Paul Cherutich & Michael Kiprotich to hold it in trust for themselves and in trust of other beneficiaries, that is;</p>	<p>Elgeyo Border Township Plot</p> <p>No.84</p>	<p>Whole</p>

	Tabkili Shokwei Cherutich Joseph Kiprotich Michael Kiprotich John Kipyego Paul Cherutich Daniel Kibotich Grace Cherutich Rosalina Cherutich Kipngetich Cherutich Sharon Cherutich			
14.	Pius Cherutich and Patrick Butia to hold in trust for themselves and in trust of the other beneficiaries, that is; Margaret Cherutich Monicah Cherutich Joyce Cherutich Gladys Butia	Elgeyo Township No.79	Border Plot	Whole

4. The Petitioners also filed a Further Affidavit dated 31/01/2024 stated to be in response to the Objectors Affidavit dated 18/12/2023. However, upon perusal of the entire Court file, the court was unable to trace the said Affidavit by the Objectors. The same notwithstanding, the court will nonetheless recap the contents of the said Further Affidavit. In the said Further Affidavit.

5. The Petitioner has therein deposed that Paul Cherutich and Michael Kiprotich, the Objectors herein are their co-administrators. The Petitioners contended that the deceased was not survived by Francis Koshom and Sarah Chebet as deposed and that Tabkili Shokwei Cherutich is their step mother and biological mother to their step brothers and sisters listed under Nos. 2-10 and that the persons listed under Nos. 11-16 are their siblings.
6. The Petitioners further deposed that Mr. Francis Koshom is a relative as well as their immediate neighbor and that his parcel of land borders their father's estate comprised in **Title No. Tembelio/Elgeyo Border Block 12 (Tuiyoluk)/22**. The Petitioners maintained that in so far as they are concerned, he is not a creditor to their late father's estate and he should not therefore benefit or be involved in the distribution of the estate because he is a stranger to it. Similarly, the Petitioners contended that Sarah Chebet is a stranger to them and to their father's estate and is therefore not entitled to benefit from it or be involved in the distribution of the same.
7. The Petitioners are therefore opposed to the proposal contained in paragraph 3A. (1) of the 1st and 2nd Objectors' affidavit that 1 acre of land contained in **parcel No. Tembelio/Elgeyo Border Block 12 (Tuiyoluk)/22** should go to Francis Koshom and also further opposed to the proposal by the said co-administrators as contained under paragraph 3A.(2) of the said affidavit, that 5 acres contained in the said parcel of land should go to Sarah Chebet Kimutai for reasons that they are not beneficiaries or creditors to the said estate.

8. The Petitioner are also opposed to the proposal as contained in the said paragraph 3A. (3) of the said affidavit that 7 acres should go to Michael Rotich for reasons that there is no basis for that and that Michael Rotich should provide documents pertaining to **Plot No. 225** and **L.R. No. 9125**.
9. The Petitioners proposed that parcel of land comprised in **Title No. Tembelio/Elgeyo Border Block 12 (Tuiyoluk)/22** measuring 11.48 Ha. be subdivided equally amongst sixteen (16) beneficiaries (that is, including their step mother Tabkili Shokwei Cherutich.
10. The Petitioners agree that **Elgeyo Border Township Plot No. 106** measuring approximately 5 acres be shared equally, that **Elgeyo Border Township Plot No. 89** measuring approximately 1.5 acres be shared equally amongst the said sixteen (16) beneficiaries as proposed under paragraph 4D of the said 1st and 2nd Objectors' affidavit, that **Elgeyo Border Township Plot No. 84** should be taken by Tabkili Shokwei Cherutich, the surviving spouse as proposed under paragraph 4E of the said 1st and 2nd Objectors affidavit, that **Elgeyo Border Township Block No. 79** should be taken by Patrick Kiprop Butia, the 2nd Petitioner herein and that since **Title No. Sergoit Karuna Block 3 (Tugen)/154** is in the name of their brother John Kipyego, the same ought to be excluded from the estate of the deceased herein.

Hearing of the Application

11. The Summons for Confirmation of Grant was canvassed by way of *viva voce* evidence.

The Objector's Case

12.PW1 was **Michael Kiprotich**. He stated that he is the 2nd born son of the deceased and the 4th administrator of the estate. He adopted his witness statement dated 11/10/2024 as his evidence in Chief and stated that his testimony is with respect to **land parcel No. Tembelio/Elgeyo Border Block 12 plot No. 22**. He told the Court that he has lived there for 36 years uninterrupted by his siblings. He urged that the name of the title to the said land parcel be changed to his name.

13.On cross-examination, PW1 stated that they swapped that land with his deceased father in 1988. He conceded that there is nothing written to that effect. He told the Court that they swapped **Plot No. LR 225** with one that his father bought from a neighbor and which was the **Tembelio/Elgeyo Border Block 12 Plot No. 22** where he now lives. He conceded that the land is in the name of his deceased father and further that because the deceased was his father, there was no need to write an agreement over the land swap.

14.He stated that he does not work and has not worked. He confirmed the land is registered in the name of my deceased father. He stated that in 1986, he was around 24 years old but conceded that his statement he indicated that he is 23 years old. He told the Court that, the land he swapped with his father was the first piece of land that he bought. That it was 7 acres and he bought it from one Samuel for Ks. 49,000/= . He stated that he had several other pieces of land and he had been working for about 5 years, and that he started working when he was 18 years old after he finished school. He stated that he does not know if his father a rich man and if he had combined harvester.

15.He stated that he knows that his late father had a petrol station but he did not know that he was a wheat farmer in Narok. He however, confirmed that his father had 2 tractors and that he also had a combine harvester in the year 2001, that he was farming before, around the year ninety something he said, which he put at the year 1996. When his father's eulogy was shown to him, he stated that he cannot see well and so he could not read. The court then directed the Court Assistant to read to him the relevant excerpts whereupon he confirmed that indeed his father went to Narok to farm, confirmed as stated in the eulogy that his father was a farmer. He however stated that he could not tell whether or not his father was wealthy. Nonetheless, he testified that his father educated all of them and also confirmed that his mother lives on land that has a house that was built by Europeans. He conceded that the house has been there all along but he does know who built it.

16.He stated that he does not know the total acreage of his father's land but as for him, he uses his 7 acres of land and that the rest is used by the people who bought. He urged that he be given his 7 acres and then they divide the rest amongst them. He confirmed that one John is his 3rd born biological brother but stated that he does not whether he took the Sergoit land for himself. He stated that one of the combine harvesters was sold by Daniel Kibutia who is a child of the 1st house and confirmed that he belongs to the said 1st house. He stated that it is the 2nd house that initiated the succession proceedings. He however refuted claims that they treated the children of the 2nd House unfairly.

17.PW 2 was **Sarah Chebet Kimutai**. She adopted her Witness Statement dated 11/10/2024 as her evidence in chief. She stated that her involvement in this case is because the deceased, Christopher sold her land. She testified that there is an agreement which was written but they wrote it at home and not a lawyer's office. She testified that the value of the land was agreed at Ks. 850,000/= for 5 acres. She stated that this was in the year 2009. She added that it is her child who lives on that land and that she has fenced it, planted maize and trees on it. She urged the Court to look at the agreement.

18.On cross-examination, PW2 stated that the full name of the seller was Christopher Cherutich Kimeli. She confirmed that she does not have a title deed to the land since the year 2009 even as Christopher who sold to her the land died in the year 2018. She stated that the deceased never got to transfer the land to her because she still had a balance of Kshs, 150,000/= to pay. She told the Court that they never got the Consent of the Land Control Board. She stated that she got onto the land after Christopher died. She stated that she has built a house there and that she fenced it off in 2018 after the deceased died and built a house on it. She stated however that she has not brought a photograph of the said house. She stated that she does not want money in lieu of the land and again clarified that the agreement was not drawn before a lawyer.

19.PW3 was **Francis Kimutai Kosiom**. He adopted her Witness Statement dated 11/10/2024 as her evidence in chief. He stated that he is in Court because of the land parcel **LR. No. Tembelyo/Elgeyo Border Block 12 (Tuiyoluk)/22**. He testified that he bought the land at Kshs. 65,000/= in the year 1999 and it was 1 acre. He stated that before buying it, he was living

on his parcel of land next to it and so he just added it to his land. He stated that they did an agreement on 4th April 1999. He told the Court that the original copy of the agreement is at home and that he could bring it but he never did subsequently.

20.He testified that regarding the title, the deceased Christopher was in the process of selling to him another one acre at his request and so they agreed that he would then get a consolidated title but he was not yet ready to sell and he also did not have the money and so he told him to tarry a while. He testified that he has not moved onto the land but he fenced the land when the deceased was still alive and planted blue gum trees and added that nothing stopped him from moving onto the land. He stated that he was on the land when Christopher came. He told the Court that he had 10 acres and he added this one acre because land is never enough one keeps buying.

21.On cross-examination PW3 stated that even as land is never enough, one does not acquire one's land by force. He told the Court that the deceased was a clan member. He confirmed that the deceased had 2 wives and that one is dead one is alive and that the one who is alive is called Shekwe and she lives on land that the deceased bought from a white man, and the house was built by a white man. He maintained that he was born there and he knows that it is the white man who built it. He confirmed that he does not know the acreage of this land but the one he bought an acre from is approximately 30 acres. He confirmed the deceased was wealthy and that he had many children. He told the Court if one wants to sell his land he does. He stated that he cannot tell whether the deceased has a combine harvester

and tractors. He maintained that he bought land from him but everyone lives in his home. He conceded that they never went to the Land Control Board.

The Petitioner's Case

22.DW1 was **Pius Kibutia Cherotch**. He adopted her Witness Statement dated 11/10/2024 together with his Affidavit sworn jointly with one Patrick Kiprop on 31/01/2024 as his evidence in chief. He testified that their father owned a 'Mzungu' house and that it exists up to today and that his step-mother who is also Michael's mother lives there to date. He stated that his father left two combine harvesters at the time of his death, that one got lost immediately their father died and that the 2nd one that was on the farm where his other brother Daniel lived and that it also got lost this year. He told the Court that his father was a large-scale farmer here in Uasin Gishu and also in Narok. He stated that he also had tractors. He told the Court that the other combine harvester was on Michael's land. He testified that his father was well off and that he educated them all well. He testified that Michael finished form 4 in the year 1984 and added that he was not leasing farms to work on as he has alleged. He testified that his father had cars but they all disappeared. He told the Court that his father had a petrol station and that they all worked in it including Michael.

23.Regarding the 7 acres of land, he stated that as far as he is aware this is his father's land. He testified that it is only at the beginning of the year that they saw a house being built on that land but he did not check whose house it was and that he only came to hear later that it is Sara who built the house. He confirmed that trees are planted on the other land and that it is Michael who

lives there but he cannot tell who planted them and that other person does not live on that land. He stated that it is Michael who lives there.

24. On cross-examination DW1 stated that the registration numbers of the harvesters were KAE 583B and KAA 215X. He however did not know in whose name the KAE one was registered but it was in their home. He stated that KAE was registered in the name of their deceased father but conceded that he did not bring the logbook to court. He stated that his brother Daniel Kibutia sold the other combine harvester this year and that he reported to the Chief who advised him to come and tell court. He confirmed that he swore an affidavit in support of the Summons for Confirmation of Grant dated 2/10/2023. He conceded that the properties do not include combine harvesters and it is just land. He also conceded that he has no evidence to show that their father also had tractors, petrol station and others that he has alluded to. He told the Court that he lives on Land Reference Number **Elgeyo Border Settlement Scheme Plot No. 85** and that it is 16 acres. He stated that his brother Paul Cherutich of the 1st house lives with him on that land and stated that it is not true that they have divided unto ourselves 8 acres each. He stated that he lives on 4 acres and that he farms on that land for financial gain.

25. He confirmed that he knows where Michael lives and added that he used to visit but of late say like 3 years ago after they filed this case, he has not because, he told him not to. He stated that he moved there in the year 1992 and that Michael completed school in the year 1984. He confirmed that he was born in the year 1973 and so he was 11 years old. He stated that he knew that Michael had no job even at that age and that he also knew what

job he was doing. He told the Court that he was born where he currently lives and that Michael lived on another shamba 5 kilometers away.

26. He maintained that his father had businesses even in Narok and he even stayed there in 1976 and that in the 90's he still had them because they even used to go there. He stated that he was a middle child. He told the Court that in the year 1999, he was working in Iten around 10km from the boarder scheme where he lived. He told the Court that on **Tembelio Elgeyo Border 12 (Toiyoluk/22)** it is Michael who lives there alone, Francis is a neighbor and that there is a fence separating them. He however mentioned that he cannot say with certainty that the fence was erected after Francis bought the land.

27. He told the Court that in 1999, the deceased was living on Plot 106 but before that he was on Plot 85. He added that 106 is the one with the 'Mzungu' house. He confirmed that he was not born there. He stated that historically it is known that it was a mzungu house and that it even looks like one. He conceded that because his work was 10 kilometers away from where he lived and he would not know what was happening at home. He told the Court that in 2009, he was at home which was 5 kilometers away from where Michael lived but explained that at the moment something happened he would not know immediately but he would get to know later.

28. He confirmed that, there are things about his father's property that he did know but there are those he would tell him and so he knew. He confirmed that the Tembelio Farm 1/3 of it is swampy and 2/3 of it is not. He told the Court that Michael has not built on the swampy part. He confirmed that they

had not reached the point of deciding which area we wanted the swampy one or the non-swampy one. He added that the shamba's end is at the main road and it is not that there is a road reserve within the Shamba. He however conceded that he does not have a survey plan to that effect. He stated that land where he lives was pointed out by his father just as he did for all of them and apart from where Michael lives and he added that there is no other land that was pointed out to him.

29.DW2 was **Margaret Cherutich**. She stated that she wrote her statement on 14/10/2024. She sought to have paragraph 17 amended to have the land parcel read **Iten/Irong/89** from **Elgeyo Boarder Township Plot No. 89**. She then adopted her statement as her evidence in chief. She testified that her mother died in the year 2003 and that she was sick and had been sick from 1991. She stated that it was her father and her who were taking care of her. She testified that on Plot 106 it is "Mama Mkubwa" who lives there and that it is a Mzungu house. She stated that their father was a farmer at Elgeyo Markwet in Uasin Gishu, Moiben and also in Narok but Narok she did not know well.

30.She testified that her father had more than 2 combine harvesters and tractors but now she does not see them. She stated that he left 2 combine harvesters when he died but does not know about tractors. Regarding the land Sergoit/Karura/ Block 3 (Tugen Estate)/154, she told the Court that it is said that it is in the name of John Kibyegon their step brother but before it was in their father's name. She added that John already has a shamba that is 12 acres and he should not inherit any part of the remaining estate. She also

stated that she relies on the Eulogy of her late father. She confirmed that her father had 2 wives and that she belongs to the 2nd house.

31. On cross-examination, DW2 stated that she does not know when **Sergoit Karuna Block 3** was transferred from her father to John. She confirmed that there was a green card that came out showing the land belonged to her father and that the same was for 2024, but she delayed in availing it to court. Regarding the averments at paragraph 17 of the Affidavit of Pius Kibutia Cherutich and Patrick Kiprop Butia 31/01/2024 in respect of the title to Karuna, she told the Court that she does not understand the difference at said paragraph.

32. She explained that in her statement she said that her father fell sick and from 1998, he started to develop memory loss. She clarified that it is not on 1998 that he sometimes used to call her at night but in the year 2008. She confirmed that she knows where Pius Cherutich lives and added that the land is 15 acres and that it belonged to her father. She explained that he did not build there, he moved into the house that belonged to her mother. She told the Court that her Step brother Bor Cherutich also lives on that shamba and it is not shared equally, Bor has the bigger portion. She stated that it is her father who pointed out the land and allowed Pius to live there. She mentioned that Patrick lives separately, that he lives on 1 and that it is her father is the one who permitted him to live there just the way he showed everyone. She however refuted that is not the case with Michael. She explained that traditionally, for adults the Mzee would just show them land to use but not that they own the land permanently.

33. She stated that in 1999, she was living on **land Ref. No. Elgeyo Border No. 85** and that **Tembelio Elgeyo Border Block 12** is different. She stated that it is approximately 5 km from number 85 and that she would go there when her grandmother lived there. She told the Court that Michael was not living there then and that he was living at the Township with her mother. She however did not know when he came to Block 12. She confirmed that she knows Francis who is a neighbour. She stated that she does not know Sara. She stated that in 2009 when Sara says she bought the land, she was just at home. She confirmed that she never contributed to her father's treatment.

34. She further confirmed that her father had a lot of property but she does not know where it went and she did not know how he used it and she cannot tell if he sold his property to treat himself. She conceded that she has availed evidence to show that the combine harvesters and tractors were in her father's name. She stated that she has not said that John should not be given any further property but clarified that it should be noted that he already has 12 acres and he took that land when her father was sick and so these issues should be considered.

35. At the close of the viva voce proceedings, the parties filed submissions. The Objectors filed submissions their dated 23/05/2025 while the Petitioners filed theirs dated 23/06/2025.

The Objectors' Submissions

36. Counsel for the Objectors gave a brief summary of the parties' pleadings and testimonies herein as already herein captured and thereafter framed only one issue for determination, and that is whether the portions of land held by

PW1, PW2 and PW3 form part of the estate of the deceased or whether they are liabilities. Counsel submitted that the legal burden lies on the party asserting a fact as stipulated under **Section 107 (1) and 109** of the **Evidence Act**.

37.Counsel maintained that the PW1, credibly demonstrated that he exchanged his own parcel of land, **Plot 225 Tugen** for 7 acres from the deceased. Counsel urged that although their agreement was not formalized in writing, his testimony, supported by documents proving ownership and occupancy was not rebutted. He submitted that the opposing Counsel failed to challenge the authenticity of this arrangement and instead relied on conjecture unrelated to the actual facts of the case. In submitting that the Objector had sufficiently discharged the burden placed upon in to raise a presumption in his favour and thereby shifting the burden to the Petitioners to rebut, Counsel relied of the case of **Place v City Council of Nairobi [1978] KLR 130** and urged that this principle equally applies to PW2 and PW3, who established their positions as bona fide purchasers through valid sale agreements and consistent testimony. Counsel maintained that their claims were not effectively challenged by the opposing Counsel who merely speculated about the deceased's wealth but failed to substantiate this assertion with evidence. Counsel thus submitted that PW1, PW2 and PW3 have sufficiently discharged their evidential burden and that the 1st and 2nd Petitioners have failed to rebut their claims.

38.In conclusion, Counsel urged the Court to find that PW1, PW2 and PW3 have each demonstrated a legitimate and protected interest in the respective parcel they occupy, that the portions they claim do not form part of the estate

for distribution having been previously alienated by the deceased and that the remaining estate be distributed equally among the children of the deceased.

The Petitioners' Submissions

39. Counsel for the Petitioner too gave a brief background of the case and also equally framed only one issue for determination and that is whether the 2nd Objector, Sarah Jeber Kimutai and Francis Kosiom have legally founded claims over the estate of the deceased.

40. Counsel submitted that the deceased was a polygamous intestate, that the distribution of his estate therefore follows **Section 40 of the Law of Succession Act, Cap. 160 of the Laws of Kenya** and that in that regard, deceased's assets are supposed to be shared out among the houses according to the number of children in each house, but adding any wife surviving as an additional unit.

41. Counsel observed that each house has come up with its own proposed mode of distribution and that the 1st house is proposing that the 2nd Objector, Francis Kosiom and Sarah Chebet Kimutai have a share in LR No. **Tembleleo/Elgeyo Border Block 12 (Tuiyoluk)/22**, a parcel of land measuring approx. 11.48 Ha.

42. In regard to the alleged swapping between the 2nd Objector and the deceased, Counsel Counsel took issue with assertion that a loving father in this instance, the deceased can take away land belonging to his child as alleged by PW1. Counsel further submitted that PW1 completed his Secondary School Education (Form 4) in the year 1984 and that in the year 1986, when he purports to have bought the alleged seven (7) acres of land at Tugen

Estate, he was only 23 years old and un-employed and there is no evidence that by that time he was an independent child of the deceased and that he was in the process of starting a family to necessitate him moving away from his father's land. According to Counsel, PW1's stories do not add up and that the same is not possible at all.

43.Counsel added that the 1st Petitioner's (DW1's) evidence that PW1 did his Secondary Education from 1981-1984 and that he was never employed, and further, that he never leased any farm was uncontroverted and further that there is no contrary evidence to his testimony that PW1 together with his siblings used to run the deceased's petrol station.

44.Counsel urged that the 2nd Objector's alleged claim ought to fail because of these reasons and further because PW1 did not produce any documentary evidence to support his alleged land exchange transaction. Counsel submitted that it was incumbent upon him by dint of **Sections 107 and 109** of the **Evidence Act**, to prove the alleged exchange but he completely failed to do that and so his claim must therefore fail.

45.Counsel further submitted that if at all PW1 had a legitimate claim in the deceased's estate, separate from his share as a beneficiary, then he should have approached the Court by filing a protest under Rule **40(6)** of **the Probate and Administration Rules**, or through a **Civil Suit for declaration of proprietary interest in the deceased's estate**. Counsel submitted that without a protest or a suit by PW1 there is nothing worth of consideration by the Court is as far as the alleged claim is concerned. Counsel further submitted that if indeed PW1 had a legitimate claim in the estate, it is trite law that he cannot get a double share of the estate, that is, his

share as a beneficiary and a proprietary interest. Counsel urged that this is because it would violate the principle of equitable or fair distribution of an estate.

46. Counsel observed that PW1 did state that he constructed a house on **LR. Tembleleo/Elgeyo Border Block 12 (Tuiyoluk)/22** and that is where he lives. In this regard, Counsel submitted that he is a mere licensee and so he cannot lay a claim over the said parcel of land or any portion thereof. In this regard, Counsel relied in the case of **re Estate of Chesimbili Sindani (Deceased) [2021] eKLR cited in re Estate of the late Sosing'ot Arap Maina (Deceased) (Succession Cause 216 of 2015) [2023] KEHC 1908 (Ruling)** Neutral citation: [2023] KEHC1908 (KLR) (see paragraph 37 of the latter case), where Hon Justice Musyoka stated thus:

“...the principle that emerges is that any gift inter vivos should be backed by some memorandum in writing, and the gift will be complete once title to the subject property is transferred into the name of the beneficiary of the gift. Difficulties arise where transfer is not effected to the beneficiaries before the death of the deceased, in which case, such property will remain the free property of the deceased, available for distribution at confirmation, the argument being that such gift was founded on a mere promise which the deceased did not carry through prior to his death. Where some preliminary steps were taken towards effectuating his promise, so that all what remained after the death of the deceased was mere registration of the property in the name of the beneficiary, it would be presumed that that the deceased

intended to make a gift inter vivos. The mere fact of being shown a piece of land and given permission to occupy and use it, without more, is not adequate proof for a gift inter vivos. The deceased, as registered proprietor of the land in question, would have the right to license a person to occupy the land and use it. A child who has been shown a piece of land to build own and to till, is not in the shoes of an owner, but a mere licensee. The death of the deceased would not upgrade the license to ownership, if anything the death of the proprietor could mean that the license comes to an end, and the licensee continues to occupy and work the land at the mercy of the administrator."

47.Counsel submitted that even as it is alleged that the swapping of parcels of the land was done in the year 1989, the same was never transferred to the 2nd Objector during the deceased's lifetime. Also, Counsel submitted with regard to **Tugen Estate Plot No. 225**, that PW1 never presented before the Court its ownership document(s) proving that the same forms part of the deceased's estate, and urge the Court to include the same during distribution.

48.Regarding the alleged sale of 1 acre and 5 acres of land comprised in **LR. Tembleleo/Elgeyo Border Block 12 (Tuiyoluk)/22** Counsel submitted that even as in his statement, PW2 alleges that on 4/04/1999, he entered into a locally hand written agreement with the deceased for the sale of 1 acre of land which agreement was attested to by the area chief, the said PW2 did not call any witness or produce any documentary evidence to corroborate his allegations. Counsel submitted therefore that he too failed to discharge the burden of proof that was placed upon him and in this regard, Counsel urged

that there is no element of truth in PW2's and PW1's allegations that the deceased sold an acre of land to PW2.

49. Counsel added that PW2 has not instituted any claim and/or objection with respect to the estate of the deceased. Counsel submitted therefore that having failed to lodge a protest and/or seek an order of declaration of a purchaser's interest, then there is nothing that this Court can do about his alleged claim. He therefore urges the Court to treat his evidence as misplaced and disregard the same. He submitted that the same scenario is applicable to the claim by Sarah Jebet Kimutai who testified as PW3.

50. Counsel further submitted that none of the documents in list of documents dated 11/10/2024 by the 2nd Objector (PW1) were produced in evidence and so they did not have the opportunity to interrogate them. Counsel therefore urged the Court to disregard them in their entirety. He submitted that DW1 and DW2 gave their respective evidence clearly and honestly and urged the Court to accept them as witnesses of truth, and accept and believe their evidence.

51. On the distribution of the Estate, Counsel submitted that the 1st and 2nd Petitioners have in their affidavit in support of Summons for Confirmation of Grant, sworn on 12/10/2023, and in the consent to the proposed mode of distribution of even date, they listed the properties of the deceased that are at the disposal of the Court. Counsel further observed that during the hearing of this cause, DW1 and DW2 did state that **LR. Sergoit/Karuna Block 3 (Tugen)/154** [measuring approx. 4.978 Ha.] is no longer in the name of the

deceased, but in the name of John Kipyego Kibutia, a beneficiary herein. Counsel added that said parcel of land does not therefore form part of the deceased's estate and that same ought to be excluded during distribution.

52. Counsel thus urged the Court to distribute the estate of the deceased as proposed by the 1st Petitioner (DW1), the 2nd Petitioner, DW2 and the 2nd house generally for in the submissions of Counsel, that will amount to a fair distribution.

Determination

53. I have, considered the applicable law in this matter as well as the proposed mode of distribution and in my considered opinion from my summation of the pleadings, evidence and submissions, the only issue for determination is how the estate herein ought to be distributed.

54. Before delving into this issue, I find it prudent to mention that although the Objectors Affidavit is not on record as the court has herein observed, the essence of their proposed mode of distribution was very well canvassed during the *viva voce* hearing as well as in their written submissions and the court has taken all the issues therein raised into consideration. That said, the court notes that from the parties' pleadings, it is clearly apparent and evident that the only bone of contention is with regard to the mode of distribution is with respect to parcel of land known as **Tembeleo/Elegeyo Border Block 12 (Tuiyoluk)**.

55. It is not in dispute the deceased herein was a polygamous man. He was married to one **Tapkili Shokwei** and **Juliana Cherutich** (Deceased) who both had several issues with the deceased.

56. The law that guides this Court is Section **40 the Law of Succession Act** and it 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 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 interest within each house shall then be in accordance with the rules set out in sections 35 to 38”

57. The basic principles expounded in the cases of **Rono –v-Rono Civil Appeal NO. 66 of 2002**, where **Waki J.A** stated inter alia that;-

“ More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.” A “house” in a polygamous setting is defined in Section 3 of the Act as a “family unit comprising a wife and children of that wife.”

58. I have had a keen look at, considered and ruminated at length on the mode of distribution proposed by both the Petitioners as well and I have also noted the proposal therein made with the only bone of contention being parcel of land known as **Tembeleo/Elegeyo Border Block 12 (Tuiyoluk)** which the Objectors contend that 1 acre of the said land was sold by deceased to Francis Koshom and 5 acres were sold to Sarah Chebet Kimutai and that 7 acres were exchanged between the deceased and Michael Kiprotich for another parcel known as **Tugen Estate Plot No.225**.

59. On matters of evidence, suffice it to say that as provided under Section 107, 108 and 109 of the Evidence Act, it is trite law that he who alleges must prove, from my consideration of the evidence tendered in support of the objector's case in its entirety what comes out from the totality of the evidence is that no cogent evidence was availed to support the allegations made. Notably, the 2nd Objector did not tender any documentation to show that land was exchanged between him and his deceased father. In my analysis of the said evidence, what did in fact come out clearly during the hearing was that the deceased did allow the 2nd Objector to stay on the said portion of land during his lifetime but at no time had he given the land to the 2nd Objector for his sole and exclusive benefit. Indeed, if the deceased herein so desired that the said portion be left for the sole and exclusive benefit of the 2nd Objector then he would have transferred title to him as is required by law.

60. On the testimony of the Objector's witnesses, Sarah Chebet Kimutai who testified as PW2 did not avail to court any documentation to show that the deceased sold land to her by way of a sale agreement. From her testimony

she even admitted that the deceased never got to transfer the said portion of land to her because she still had a balance of Kshs. 150,000/= to pay. She also testified that she only came to occupy the land in year 2019 after the demise of the deceased and built a house there and was not able to explain why she waited until the deceased had died for her to gain access to the said land. Her testimony therefore raises doubt as to her interest in the estate herein as an alleged purchaser. In this regard, I find that the evidence of PW2 lacks the requisite necessary credibility sufficient for the court to rely on and find in favor of the 2nd Objector.

61.As for the testimony of PW3, Francis Koshom, he equally did not avail any documentation to show that he purchased one acre from the deceased's estate as alleged. He did not tender in evidence the agreement he purported he entered into between him and the deceased. Further, he did not produce any receipts as proof of any alleged payment. He was also at pains to explain why the alleged sale never culminated to any transfer documents as proof of ownership. In this regard, I also find that the evidence of PW2 lacks the requisite necessary credibility sufficient for the court to rely on and find in favor of the 2nd Objector.

62.Further, the court notes that the 2nd Objector only line of defense is that he exchanged land with his deceased father by giving him his parcel of land known as **Tugen Estate Plot No. 225** in exchange for land parcel **No. Tembeleo/Elegeyo Border Block 12 (Tuiyoluk)**. However, it is imperative to note that in his testimony, he did not tender any evidence to show that he gave the alleged parcel of land to his deceased father. There is also nothing to show that **Tugen Estate Plot No. 225** became part of the deceased's

estate and is available for distribution or even what became of this parcel of land after the alleged exchange.

63. Logically, it follows therefore that without any valid agreement between the Objector and his deceased father, or evidence that the particular portion of the land in contention was transferred to him, and/or title documents to prove ownership of the parcel of land, or even any agreement as between the 2nd Objector and his witnesses who testified that he had sold to them part of the land, the 2nd Objector cannot claim the seven acres of the deceased's estate as he proposes to do to the exclusion of the rest of the beneficiaries.

64. To my mind both PW2 and PW3 are most certainly not a beneficiaries or dependents of the deceased and they cannot also claim a purchaser's interest whereas they were not able to tender any substantive evidence to that effect. If indeed PW2 and PW3 have any claim whatsoever against the estate of the deceased, the only recourse they have is to pursue any claim they may have against the said estate in the Environment and Land Court. In this regard it suffices to cite *Musyoka J In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR* wherein the Hon Judge stated that:

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favor of the claimant, then such decree

should be presented to the probate court in the succession cause so that that court can give effect to it.”

65.For the above reasons, I find that the Land Reference No. **Tembeleo/Elegeyo Border Block 12 (Tuiyoluk)** forms part of the free estate of the deceased herein and is available for distribution.

66.On the issue of how the free estate of a deceased ought to be distributed, the Court in **Re Estate of John Musambayi Katumanga – Deceased [2014] eKLR** held as follows:

“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.”

67.For purposes of this Succession proceedings, the 1st house is made up of 12 units and the 2nd house is made up of 6 units. It must however be noted that Section 40(1) does not mean equal distribution amongst the houses. The clear position is that, the estate of a deceased person who dies while married under polygamous marriage, shall be divided amongst the children with the surviving spouse as an additional unit.

68. In the case of **Saweria Wamuruoma Muchanji vs Jimano Ngare (2008)** **eKLR** where the court held that:

“This is a plain unequivocal language meaning the estate shall be divided equally amongst the surviving children of the deceased adding surviving spouse as additional unit. It does not say that the estate should first be shared equally among the children

69. In considering the proposed mode of distribution by the Petitioners, the same appears in my well-considered opinion meets the threshold of a fair and just distribution that has catered for all the beneficiaries. It has taken account of what is it is evident from the pleadings that parties are in agreement that parcel of land known as **Sergoit Karuna Block 3 (Tugen)/154** no longer forms part of the estate herein as the same is in the name of John Kipyego and the fact that the beneficiaries are not opposed to Patrick Kiprop Butia, the 2nd Petitioner herein getting the whole share of all that parcel of land known as **Elgeyo Border Township Block No. 79** and that Tabkili Shokwei Cherutich, the only surviving spouse taking the whole share of parcel of land known as **Elgeyo Border Township Block No.84**

70. In this regard therefore, I find no need for this Court to exercise its discretion to establish a mode of distribution that is in strict adherence to the mode of equal distribution as mandated by **Section 40 of the Law of Succession Act** for reasons that I am satisfied that the proposed mode of distribution

proffered by the Petitioners captures the Spirit of **Section 40 of the Law of Succession, Act** and thus need not be revised.

71. Consequently, I hereby order distribution of the assets of the deceased as follows: -

NO.	BENEFICIARIES	PROPERTY	SHARES
1.	Paul Cherutich & Michael Kiprotich to hold it in trust for themselves and in trust of other beneficiaries, that is; Tabkili Shokwei Cherutich Joseph Kiprotich Michael Kiprotich John Kipyego Paul Cherutich Daniel Kibotich Grace Cherutich Rosalina Cherutich Kipngetich Cherutich Sharon Cherutich	Tembeleo/Elgeyo Border Block 12 (Tuiyoluk)/22	5.74 Ha
2.	Pius Cherutich and Patrick Butia to hold in trust for themselves and in trust of the other beneficiaries, that	Tembeleo/Elgeyo Border Block 12 (Tuiyoluk)/22	5.74 Ha

	<p>is;</p> <p>Margaret Cherutich</p> <p>Monicah Cherutich</p> <p>Joyce Cherutich</p> <p>Gladys Butia</p>		
3.	<p>Paul Cherutich & Michael Kiprotich to hold it in trust for themselves and in trust of other beneficiaries, that is;</p> <p>Tabkili Shokwei Cherutich</p> <p>Joseph Kiprotich</p> <p>Michael Kiprotich</p> <p>John Kipyego</p> <p>Paul Cherutich</p> <p>Daniel Kibotich</p> <p>Grace Cherutich</p> <p>Rosalina Cherutich</p> <p>Kipngetich Cherutich</p> <p>Sharon Cherutich</p>	<p>Uasin Gishu/Elgeyo Border Scheme/85</p>	1.3 Ha
4.	<p>Pius Cherutich and Patrick Butia to hold in trust for themselves and in trust of the other beneficiaries, that is;</p> <p>Margaret Cherutich</p>	<p>Uasin Gishu/Elgeyo Border Scheme/85</p>	3.3 Ha

	<p>Monicah Cherutich Joyce Cherutich Gladys Butia</p>		
5.	<p>Paul Cherutich & Michael Kiprotich to hold it in trust for themselves and in trust of other beneficiaries, that is; Tabkili Shokwei Cherutich Joseph Kiprotich Michael Kiprotich John Kipyego Paul Cherutich Daniel Kibotich Grace Cherutich Rosalina Cherutich Kipngetich Cherutich Sharon Cherutich</p>	<p>Elgeyo Border Township Plot No. 106</p>	2 ½ Acres
6.	<p>Pius Cherutich and Patrick Butia to hold in trust for themselves and in trust of the other beneficiaries, that is; Margaret Cherutich Monicah Cherutich Joyce Cherutich</p>	<p>Elgeyo Border Township Plot No. 106</p>	2 ½ Acres

	Gladys Butia		
7.	Paul Cherutich & Michael Kiprotich to hold it in trust for themselves and in trust of other beneficiaries, that is; Tabkili Shokwei Cherutich Joseph Kiprotich Michael Kiprotich John Kipyego Paul Cherutich Daniel Kibotich Grace Cherutich Rosalina Cherutich Kipngetich Cherutich Sharon Cherutich	Sergoit/Karuna Block 3 (Tugen)/67	2.75 Acres
8.	Pius Cherutich and Patrick Butia to hold in trust for themselves and in trust of the other beneficiaries, that is; Margaret Cherutich Monicah Cherutich Joyce Cherutich Gladys Butia	Sergoit/Karuna Block 3 (Tugen)/67	2.75 Acres
9.	Paul Cherutich & Michael Kiprotich to hold it in trust	Irong/Kitany Plot	0.75 Acres

	for themselves and in trust of other beneficiaries, that is; Tabkili Shokwei Cherutich Joseph Kiprotich Michael Kiprotich John Kipyego Paul Cherutich Daniel Kibotich Grace Cherutich Rosalina Cherutich Kipngetich Cherutich Sharon Cherutich	No.89		
10.	Pius Cherutich and Patrick Butia to hold in trust for themselves and in trust of the other beneficiaries, that is; Margaret Cherutich Monicah Cherutich Joyce Cherutich Gladys Butia	Irong/Kitany No.89	Plot	0.75 Acres
11.	Tabkili Shokwei Cherutich	Elgeyo Township No.84	Border Plot	Whole
12.	Patrick Kiprop Butia	Elgeyo Township	Border Plot	Whole

		No.79	
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Read Dated and Signed at ELDORET on 19th December 2025

E. OMINDE
JUDGE