

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION APPEAL NO E008 OF 2023

PERES CHRISTINE

ACHIENG.....APPELLANT

VERSUS

SHARON AKINYI.....1ST

RESPONDENT

PATRICIA ANYANGO OLUOCH.....2ND

RESPONDENT

VALENTINE ACHIENG OLUOCH.....3RD

RESPONDENT

***(Being an Appeal from Ruling of the Hon. Christine Menya (PM) in
Eldoret Succession Cause No. E073 of 2020 delivered on 14.07.2023,
Peres Christine Achieng Omollo Vs Sharon Akinyi Odour & 2 Others)***

Coram: Before Justice R. Nyakundi

M/s Mukabane & Kagunza Advocates LLP

M/s Oduor Munyua & Gerald Attorneys LLP

JUDGMENT

Background

1. The brief facts of this appeal is that Appellant herein was the petitioner in the trial case relating to this appeal being Eldoret Succession Cause No. E073 of 2020. The Appellant herein petitioned for the grant of letters of Administration intestate of the estate of Samuel Oluoch Oduor who died on 29th August 2019. Subsequently, the Grant of letters of administration intestate were issued and/or granted on 26th June 2021 to the Appellant herein. Later, the Appellant moved the court to rectify the said grant of letters of administration intestate to include shares held at Benki Kuu Sacco and Group insurance held at the central bank of Kenya which

prayers were granted by the trial court and thereafter the trial court ordered that P&A No. 5 be rectified to include the omitted properties/assets on 27th January 2022

2. The 1st, 2nd and 3rd Respondents who were the Objectors at the trial court entered appearance and filed an application dated 4th March 2022 seeking to have the 1st respondent as co-administrator in the deceased's estate. A clear look at the record indicates that the matter was then referred to mediation process wherein on 30th September 2022 the parties agreed on mode of distribution with regards to Benki Kuu shares and Group Insurance. The matter proceeded afterwards for a full trial being the hearing and determination of the Summons of Confirmation of Grant dated 15th February 2022 and the affidavit in opposition of the summons being the affidavit of protest dated 4th March 2022 by the Respondents where the learned trial magistrate heard the parties and their witnesses. Consequently, vide a ruling dated 14th July 2023, the trial Court gave the following orders: -

- a. An Amended Grant be and is hereby issued in the name of PERES CHRISTINE ACHIENG OMOLLO & SHARON AKINYI ODUOR.***
- b. The partial settlement agreement dated and signed 30.9.2022 is adopted to the effect that:***
 - i. Benki Kuu shares be liquidated and each beneficiary to get 20% of the proceeds.***
 - ii. Group Insurance shares be liquidated and each beneficiary to get 20% of the proceeds.***
- c. ELDORET MUNICIPALITY BLOCK 9/973 be liquidated within 6 months and each beneficiary to get 20% of the proceeds.***
- d. The 1st Petitioner shall take all household effects from ELDORET MUNICIPALITY BLOCK 9/973***
- e. Proceeds from account no 01030028094900 shall be distributed equally amongst the objectors only.***

f. The 1st petitioner to provide a true account of the funds collected from NSSF to the court within 3 months from the date of this order and the same shall be distributed equally amongst all five beneficiaries.

g. That each party shall bear their own costs; and

h. That any party aggrieved by the orders I have made herein has the liberty, within thirty (30) days to move the high court appropriately.

3. The Appellant herein being dissatisfied with the Ruling of the Hon. Christine Menya (PM) in Eldoret Succession Cause No. E073 of 2020 read and delivered on 14.07.2023 preferred an Appeal by way of a Memorandum of Appeal dated 4th August 2023 to this Court against the ruling on the finding relating to distribution of land reference ELDORET MUNICIPALITY/BLOCK 9/973 finding with regards proceeds from account No. 01030028094900 and finding on funds and/or pension benefits collected from NSSF on the following grounds; -

a) That the Learned Honourable Magistrate erred in law and fact in failing to find that sharing of LR No. ELDORET MUNICIPALITY/BLOCK 9/973 and funds collected from NSSF between the appellant (spouse) and respondents (children) was repugnant to justice and there are extra ordinary circumstances which makes equal sharing of assets amongst the children and spouse repugnant to justice which circumstances were not considered by the Honourable Magistrate thereby arriving at a wrong decision.

b) That the Learned Honourable Magistrate erred in law and fact in failing to distribute the estate of the deceased more equitably by taking into account all relevant factors and the available legal provision.

c) That the Learned Honourable Magistrate erred in law and fact in pre disposing her mind to a position favourable to the Respondents against the Appellant and thereby arrived at a wrong decision.

- d) *That the Learned Honourable Magistrate erred in fact and law by failing to consider the weighty evidence and affidavit made by the appellant and in particular that the appellant contributed towards purchase of ELDORET MUNICIPALITY/BLOCK 9/973 and development and/or construction of matrimonial house on ELDORET MUNICIPALITY/BLOCK 9/973 in support of her case.*
 - e) *That the Learned Honourable Magistrate erred in law and in fact in considering issues that were neither raised, neither pleaded nor submitted upon by the Respondents.*
 - f) *That the Learned Honourable Magistrate erred in law and in fact in failing to consider the issues pleaded and dealt on extraneous issues thereby arriving at a wrong decision.*
 - g) *That the Learned Honourable Magistrate erred in law and fact by failing to find that the appellant was entitled to whole share of ELDORET MUNICIPALITY/BLOCK 9/973 having contributed towards purchase of the same by virtue of being in gainful employment.*
 - h) *That the learned Honourable Magistrate erred in fact and law by failing to find that the appellant was entitled to whole share of funds and/or pension benefits collected from NSSF.*
 - i) *That the Learned Honourable Magistrate erred in fact and law by failing to find that the proceeds from account number 01030028094900 should have been distributed equally amongst all five beneficiaries to the estate of the deceased.*
4. The Appellant sought the following prayers from this Honourable Court: -
- a. *That this appeal be allowed.*
 - b. *The ruling of the trial magistrate dated 14.07.2023 be set aside and substituted with an order*
 - i. *Whole of ELDORET MUNICIPALITY/BLOCK 9/973 to go to the appellant.*
 - ii. *Funds and/or pension benefits collected from NSSF to go to the appellant.*

iii. Proceeds from account number 01030028094900 to be distributed equally amongst all five beneficiaries to the estate of the deceased.

c. Costs of the appeal to the appellant.

5. The Appeal was canvassed by way of written submissions.

Appellant's Submissions Summary

6. The Appellant filed Written Submissions dated 15th July 2025 in which the Learned Counsel for the Appellant Mr. Kagunza listed 2 issues for determination as follows: -

a. What should be the mode of distribution for ELDORET MUNICIPALITY BLOCK 9/793?

b. Whether proceeds from account number 01030028094900 should be shared equally between the respondents and the appellant.

7. The learned counsel for the Appellant submitted that since this is a first appeal, the Court is obligated to re-evaluate and reconsider all the evidence tendered before the trial court and arrive at its own conclusions, guided by the principles in ***Selle & Another Vs Associated Motor Boat Co. Ltd [1968] EA 123***. He argued that the lower court misapprehended both the facts and the law, leading to erroneous findings.

8. Counsel submitted that Grounds 1-8 of the appeal address the erroneous equal distribution of **ELDORET MUNICIPALITY BLOCK 9/793** between the appellant and the respondents. It was urged that the learned magistrate failed to recognize the appellant's substantial contribution to the acquisition and development of the property, including repayment of the mortgage, renovations and construction of an additional house costing Kshs. 470,000 financed from account number 01030028094900. According to counsel, the trial court ignored photographic evidence and omitted crucial testimony, thereby exhibiting bias and arriving at a flawed decision. The Learned Counsel also submitted that the appellant was the deceased's wife, lived with him since 2002 and was his primary caregiver during his illness, while the respondents are adult, gainfully employed

children. He added that statements of account revealed that the deceased provided the appellant monthly upkeep of Kshs. 20,000/= demonstrating continued support, yet the trial court failed to evaluate these facts properly.

9. On Ground 9, counsel argued that the trial court erred by distributing proceeds from account number 01030028094900 exclusively among the respondents, excluding the appellant without legal basis. It was submitted that this omission resulted from the court's predisposition toward the respondents, as the ruling closely mirrored their submissions, another indication of judicial bias. Counsel relied on **Jackson Mwiti (2020) eKLR**, where the Court discouraged adult children from weaponizing succession rights against surviving spouses. He argued that the respondents' conduct in the present case reflects such an attempt, contrary to constitutional principles reshaping inheritance laws since 2010. He emphasized that matrimonial property attracts special protection and a surviving spouse's life interest cannot be lightly undermined. Further reliance was placed on **Re Estate of Godana Songoro Guyo (Deceased) [2020] KEHC 3970 (KLR)**, where the Court held that equal sharing between a spouse and adult children may be inappropriate in cases where the surviving spouse contributed significantly to the acquisition of the property, raised the children and now requires financial stability in old age. Counsel submitted that these exceptional circumstances apply squarely to the appellant, thereby justifying a departure from the equal distribution principle.
10. In conclusion, the learned Counsel Mr. Kagunza urged the Court to find that the trial magistrate erred in both law and fact, to allow the appeal in its entirety and to award costs to the appellant in both the appellate and lower courts.

Respondent's Submissions Summary

11. The Respondent filed its written submissions dated 5th August 2025 in which the Learned Counsel Mr. Oduor Munyua submitted on two (2) issues for determination as follows: -
- a) *Whether the appeal is merited?*
 - b) *Who bears the costs of the appeal?*
12. On the first issue, counsel submitted that the appellant's contention that equal sharing of LR No. ELDORET MUNICIPALITY/BLOCK 9/973 and funds collected from NSSF is repugnant to justice is unfounded. He argued that the applicable law is Section 40 of the Law of Succession Act, which expressly provides for equal distribution among the units in a polygamous family counting each child and adding the surviving spouse as an additional unit. Relying on ***Re Estate of Joel Mbali Mutie (Deceased) [2023] KEHC 1823 (KLR)*** and ***Re Estate of John Musambayi Katumanga [2014] KLR***, counsel emphasized that the spirit of Part V of the Act is **equal distribution**, not equitable distribution, since the statute consistently uses the term "equally". He further cited ***Re Estate of Christopher Washika Ongoma (Deceased) [2020] KEHC 7352 (KLR)*** where the court stated that under Section 40, all survivors' spouses and children share the estate equally.
13. Counsel submitted that because the deceased had two wives, the respondents' mother (now deceased) and the appellant, the estate comprises two houses with a total of four children plus the surviving spouse five units and that the trial magistrate therefore acted in accordance with section 40 of the Law of Succession Act when she divided the estate equally. On ground 2, counsel reiterated that the appellant's claim that the court should have distributed the estate equitably is contrary to the clear statutory language, again relying on ***Re Estate of John Musambayi Katumanga (2014)*** to affirm that equal not equitable distribution is mandated.
14. On ground 3, counsel submitted that the trial magistrate did not favor the respondents; rather, she applied the correct law. On grounds 4 and 7,

he argued that the appellant failed to prove any contribution to the purchase or development of ELDORET MUNICIPALITY/BLOCK 9/973, noting that the property was registered in the deceased's name on 7.4.1999, well before the appellant claimed to have married him in 2002. Counsel submitted that the magistrate correctly concluded that the land should be liquidated and distributed equally. On grounds 5 and 6, he submitted that although the money in the National Bank account and NSSF funds were not expressly pleaded, they emerged through testimony and formed part of the estate; thus the magistrate properly addressed them to ensure full devolution of the estate. On ground 8, counsel submitted that NSSF funds form part of the estate and were correctly distributed equally. On ground 9, he submitted that the trial magistrate directed the remaining proceeds of the account to the respondents because the appellant withdrew funds without accountability, and therefore the court acted properly. The Learned Counsel Mr. Munyua submitted that based on the evidence and the relevant statutory provisions, the trial court's decision was sound and thus the appeal lacks merit.

15. On the issue of costs, counsel cited section 27 of the Civil Procedure Act, which provides that costs are at the discretion of the court and generally follow the event. He relied on ***Republic Vs Rosemary Wairimu Munene, Ex-Parte Applicant Ihururu Dairy Farmers Co-operative Society Ltd [2014] eKLR***, where the court affirmed that costs compensate the successful party and are not intended to punish the losing party. He therefore prayed that costs be awarded to the respondents. In conclusion, counsel submitted that the trial court properly applied the law governing the estate of a polygamous deceased person, that the appeal lacks merit and that it should be dismissed with costs to the respondents.

Analysis and Determination

16. This is a first appeal arising from the ruling delivered on 14th July 2023 by the Honourable Christine Menya (PM) in Eldoret Succession Cause No.

E073 of 2020. The Appellant, being dissatisfied with part of the said ruling, lodged the present appeal. As this is a first appeal, this Court is enjoined to reconsider, re-evaluate and re-analyze the entire evidence on record and draw its own conclusions, bearing in mind that it neither saw nor heard the witnesses testify. This duty was succinctly stated in **Selle & Another Vs Associated Motor Boat Co. Ltd [1968] EA 123** where the Court held: -

“...this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence...”

17. A clear look at the record indicate that the Appellant is the surviving spouse of the deceased, Samuel Oluoch Oduor, who died intestate on 29th August 2019. The Respondents are the deceased’s adult children from a previous marital union. The central dispute relates to the treatment of land parcel ELDORET MUNICIPALITY/BLOCK 9/973, NSSF benefits and funds held in National Bank of Kenya Account No. 01030028094900. Having read and considered the Memorandum of Appeal, the record of Appeal and the rival submissions, this Honourable Court distill the following three (3) issues for determination: -

- a. *Whether ELDORET MUNICIPALITY/BLOCK 9/973 constituted matrimonial property by presumption and occupation?*
- b. *Whether the trial court erred in law by ordering liquidation of the said land ELDORET MUNICIPALITY/BLOCK 9/973?*
- c. *Whether the proceeds from account number 01030028094900 at the National Bank of Kenya should be shared equally between the Respondents and the Appellant?*

Whether ELDORET MUNICIPALITY/BLOCK 9/973 constituted matrimonial property by presumption and occupation?

18. The Appellant contends that land parcel ELDORET MUNICIPALITY/BLOCK 9/973 formed part of matrimonial property on account of her long occupation, contribution towards its development and repayment of the loan allegedly used to acquire the property. The Respondents, on the other hand, argue that the land was acquired and registered in the deceased's sole name on 7th April 1999, long before the Appellant's alleged marriage to the deceased and therefore could not constitute matrimonial property. A close perusal of the certificate of official search indeed confirms that the suit property was registered in the name of the deceased on 7th April 1999. This fact is not disputed. The Appellant further states that she began living on the land together with the deceased on 22nd October 2002, following her marriage to him and that she remained in occupation continuously until his death in 2019.

19. It is prudent to first determine whether the parties were married or could be regarded as cohabitees at the time of acquiring the property. The marriage issue is important because it determines whether the subject suit property can be regarded as matrimonial property. The High Court in the case of **N L S Vs B R P [2016] eKLR**, underscored this point where it is held that;

*"It would be an academic exercise to elaborate on this point in that matrimonial property arises where there is a marriage. It is clear that no presumption of marriage arose and therefore no matrimonial property can be considered. To clear the matter Section 6 of the **Matrimonial Property Act, No. 49 of 2013** defines matrimonial property as:*

(1) For the purposes of this Act, matrimonial property means—

(a) the matrimonial home or homes;

(b) household goods and effects in the matrimonial home or homes; or

(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

Section 2 of the Matrimonial Property Act defines a matrimonial home as: -“Matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.

“It would also be flogging a dead horse if the alleged issue of contribution is considered. Firstly, because no presumption of marriage arises therefore there is no matrimonial property.”

20. A finding on whether a certain property is a matrimonial property or not determines how Courts are to distribute the property in dispute. In the case of the Court of Appeal in **OKN Vs MPN [2017] eKLR** hold that: -

“Not even the presumption of marriage as understood in law could save the situation because the union was in limine nonexistent, contracted without capacity. Such unions present many challenges to those involved and are fraught with legal uncertainties. There being no marriage between the parties, the two properties cannot be shared in accordance with family law.”

21. It is fundamental to note that during the cross examination at the trial Court, the Petitioner who is the Appellant herein stated as follows: -

“I did not avail proof that I was married to the deceased. We did a customary marriage but it was not registered. We had no children with the deceased. The deceased left 4 children, 3 were Biological but Brian was not a child of the deceased but he adopted Brian. There are no

adoption papers. The land in question is registered in the name of the deceased. I contributed to the debt of the land but there is no proof.”

22. There was no opposition from the Respondents with regards to the averments made by the Appellant regarding the issue of marriage. It is therefore not in dispute that the Appellant and the deceased cohabited with the deceased as husband and wife from the year 2002 until his demise in 2019. It is equally uncontested that during this period the Appellant lived with the deceased on land parcel ELDORET MUNICIPALITY/BLOCK 9/973. This court takes note that the documents presented before the trial court indicates that the deceased was the registered owner of parcel of land number ELDORET MUNICIPALITY/BLOCK 9/973 and the account holder of account number 01030028094900. Section 14 of the Matrimonial Property Act sets out two rebuttable presumptions in regard to property acquired during marriage as follows:-“

14. Where matrimonial property is acquired during the marriage

-

- a. In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and*
- b. In the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal.”*

23. It is trite law that he who alleges must prove. The Evidence Act places the burden of proof of any fact on the person who wishes to rely on the same section 107 of the Evidence Act Cap 80, Law of Kenya provides as follows: -

“Burden of Proof

- 1. Whoever desires any court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

2. *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*"

24. In the case of **Njoroge Vs Ngari [1985] KLR 480** the court stated that where a property is held in the name of one spouse, even if that property is registered in the name of one person but the other spouse made contributions towards its acquisition, then each spouse has a proprietary interest in said property. The Court in that case held thus, *"Where a property is registered in the name of one spouse only the other spouse is required to prove contribution towards the acquisition of said property in order to establish beneficial interest thereto."*

25. In my considered view, by this holding, the court gave effect to section 14 of the Matrimonial Property Act. In the case of **PWK Vs JKG [2015] eKLR**, the court stated as follows: -

"where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse the beneficial share of each spouse would ultimately depend on their proven respective properties of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim Equality is equity while heeding the caution of Lord Pearson in Gissing vs Gissing [1070] 2ALL ER 780 Page 788"

26. Similarly, **ALM Vs JNN 2022 eKLR** the court held that: -

"Further Section 14(a) of the Act provides that where matrimonial property is acquired during the marriage in the name of the one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse. In the instant case, the suit properties being matrimonial property as it was acquired during the subsistence of the marriage and being registered in the name of the defendant it can only be said that the said was held in trust for the Applicant."

27. Furthermore, in the celebrated case of **Peter Mburu Echaria Vs Priscilla Njeri Ecahria [2007] eKLR** it was held thus: -

*“It is clear from those cases that when dealing with disputes between husband and wife over property the court applies the general principles of law applicable in property disputes in all courts between all parties irrespective of the fact that they are married. Those principles as Lord Diplock said in Petti are those of English law of trusts. The House of Lords specifically decided so in **Gissing Vs Gissing**. According to the English law of trusts it is only through the wife’s financial contribution, direct or indirect towards the acquisition of the property registered in the name of her husband that entitles her to a beneficial interest in the property.”*

28. The Appellant asserts that she was in gainful employment throughout the marriage and that she contributed towards the development of the property, including construction and improvements, evidence of which she annexed in the form of photographs. She further stated that she repaid the loan or mortgage that was used to acquire the land. Contribution under section 2 of the Matrimonial Property Act is broadly defined to include both monetary and non-monetary contribution. Non-monetary contribution expressly includes domestic work, companionship, management of the matrimonial home and family care. The Appellant’s long occupation of the property for over seventeen (17) years, her role as a spouse and her contribution to the maintenance and development of the matrimonial home constitute substantial non-monetary contribution.

29. However, with respect to the alleged repayment of the loan or mortgage, this Court must be guided by evidence. While the Appellant stated that she repaid the loan due to her gainful employment, no documentary proof such as loan statements, bank records or remittance schedules was produced. In the case of **Evans Nyakwana Vs Cleophas Bwana Ongaro [2015] eKLR** it was held that: *“As a general preposition the legal burden of proof lies upon the party who invokes the aid of the*

law and substantially asserts the affirmative of the issue.” Accordingly, while the Court accepts that the Appellant was gainfully employed and that she likely contributed to household expenses and development, the specific claim of mortgage repayment remains unproven for lack of documentary evidence.

30. The absence of documentary proof does not negate the Appellant’s matrimonial interest in the property altogether. It merely affects the extent of that interest. Under section 14 of the Matrimonial Property Act, once contribution monetary or non-monetary is established, a presumption of trust arises in favour of the non-registered spouse. That presumption does not require proof of exact sums expended. Applying the law to the facts before this Honourable Court, the following conclusions emerge that the suit land was registered in the deceased’s name prior to the marriage, the property was nonetheless used as the matrimonial home from 2002 until the deceased’s death, the Appellant made non-monetary contributions by occupation, companionship and management of the home, the Appellant also demonstrated some level of development contribution through photographic evidence and that the claim of mortgage repayment was not sufficiently proved and therefore cannot be fully credited without further inquiry. In the premises, the land parcel ELDORET MUNICIPALITY/BLOCK 9/973 cannot be treated as exclusively belonging to the deceased’s estate without recognizing the Appellant’s beneficial matrimonial interest. The Appellant’s long occupation, undisputed use of the property as a matrimonial home and evidence of developments through photographs are sufficient to establish a beneficial interest, even though the precise quantum of financial contribution cannot be mathematically ascertained at this stage.

31. In conclusion, while the suit property was acquired and registered in the deceased’s name prior to the marriage, its subsequent use as a matrimonial home for over seventeen years, coupled with the Appellant’s occupation, non-monetary contribution and demonstrated developments,

brings it within the ambit of matrimonial property as contemplated under sections 2, 6 and 14 of the Matrimonial Property Act, 2013. The Appellant's matrimonial interest subsists notwithstanding the lack of documentary proof of mortgage repayment. This Court therefore finds and holds that ELDORET MUNICIPALITY/BLOCK 9/973 constituted matrimonial property by presumption, long occupation and use, at the very least to the extent of the portion occupied by the matrimonial home.

Whether the trial court erred in law by ordering liquidation of the said land ELDORET MUNICIPALITY/BLOCK 9/973?

32. From the record before this Court, the learned trial magistrate proceeded to issue an order directing the liquidation of ELDORET MUNICIPALITY/BLOCK 9/973 within six months and distribution of the proceeds. With that respect, that order reveals a fundamental misapprehension of the role of a probate court vis-à-vis the statutory powers of Administrators and/or Personal Representatives under the Law of Succession Act. The jurisdiction of a probate court is primarily supervisory and distributive not managerial or executive. Its role is to identify the estate, determine beneficiaries, ascertain respective shares and supervise distribution in accordance with the law. The actual administration, management and realization of assets is a statutory function reserved to personal representatives.

33. Section 79 of the Law of Succession Act provides for Property of deceased to vest in personal representative and states as follows, *"The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative."* Vesting of property is not symbolic as it confers legal authority upon the administrator to possess, manage, preserve and where necessary,

dispose of the estate property in accordance with the Act. In **Re Estate of Julius Mimano Deceased (2019) eKLR** it was observed;

“According to Section 79 of the Law of Succession Act. The Estate of a Deceased Person vests in the personal Representatives. In this case, the deceased died testate.

He named executors in his will who have obtained probate to the will. It is the said Executors in whom the assets of the Estate are vested by virtue of Section 79 of the Act. By virtue of the vesting the said Executors (Personal Representatives) became entitled to exercise the powers that are set out in Section 82 of the Law of Succession Act, which are akin to those of an owner of the property. They can sue or be sued over the property. They can sell or enter into contracts in respect to it, among others. The personal representatives have authority from the grant of representation they hold, whether it is one of probate or of letters of representation, to handle the Estate property.”

34. The Law of Succession Act provides a comprehensive framework for understanding the powers and responsibilities of administrators. Section 82 empowers personal representatives to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate. However, this authority must be exercised within the constraints of the law, including the explicit prohibition against selling immovable property before confirmation of grant under section 82(b)(ii). Section 82 of the Law of Succession Act provides for the powers of the personal representatives and states as follows: -

82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;*

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

- (i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and*
- (ii) no immovable property shall be sold before confirmation of the grant;*

(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

Provided that, except so far as otherwise expressly provided by any will—

- (i) no appropriation shall be made so as to affect adversely any specific legacy;*
- (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal*

representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.

35. This provision makes it unequivocally clear that the power to sell or liquidate estate assets is statutorily vested in the administrators not in the court. The role of the court is limited to granting authority, supervising compliance and intervening only where abuse, waste or breach of duty is demonstrated. Indeed, section 83 of the Law of Succession Act further imposes duties upon personal representatives, including the duty to ascertain assets, pay debts and distribute the estate. These duties presuppose managerial discretion on the part of administrators, including decisions on whether sale of assets is necessary.

36. In **re Estate of Agwang Wasiro (Deceased) [2020] eKLR** the learned Judge had this to say and which I am in agreement: -

'However, there are limitations. In the first place, the grant-holder is not an absolute owner of the property in question. The property does not belong to him, but to the estate, and he holds it as a personal representative of the deceased. He holds the property for the purpose of administration and management only, with the ultimate objective of the same being distributed to the persons' beneficially entitled to it under the law of inheritance, depending on whether the deceased person died testate or intestate. His powers over the property are, therefore, limited. There are certain things that an owner of such property can do that a grant-holder cannot. He cannot sell it at will, for example. Section 82(b) (ii) of the Law of Succession Act, is specific that, whereas the grant-holder does have a power to sell estate property, immovable property can only be sold after confirmation of grant.

37. While the probate court retains supervisory powers under section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules, such powers are not intended to supplant the statutory mandate of administrators. It is true that the mandate of a Probate and Administration Court is to determine the assets of the deceased, identify the rightful beneficiaries of the estate, ascertain their respective shares and finally distribute the estate accordingly. This has been restated in a plethora of decisions including for instance, the case of **re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR**, in which W. Musyoka J held that: -

“The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”

38. In the present case, there was no finding that the administrators had acted fraudulently, negligently or in breach of trust so as to warrant judicial intervention. The order for liquidation was therefore not remedial; it was substitutionary, improperly replacing the administrators’ statutory discretion with that of the court. The Law of Succession Act does not require that distribution must follow sale or liquidation of assets. Distribution may be effected in specie, particularly where land is involved. In the matter at hand, the trial court in the present matter did not inquire whether distribution could be achieved without sale, whether subdivision was feasible, or whether the administrators could otherwise equitably allocate interests.

39. Applying the above principles to the facts before this Court, it is evident that the learned trial magistrate exceeded the proper bounds of

probate jurisdiction by ordering liquidation of ELDORET MUNICIPALITY/BLOCK 9/973. The power to determine whether sale was necessary lay with the administrators, subject to accountability to the court. The court's intervention at that stage was premature, unwarranted and contrary to sections 79, 82 and 83 of the Law of Succession Act.

Whether the proceeds from account number 01030028094900 at the National Bank of Kenya should be shared equally between the Respondents and the Appellant?

40. Where a polygamous man dies without a will, his estate is required to be distributed in terms of Section 40 of the Law of Succession Act. It provides that the same be distributed equally among the houses according to the number of children in each house. It further adds that the surviving wife in each house is added as an additional unit. In **Re Estate of Ainea Masinde Walubengo (deceased) 2017 eKLR** the Honourable Court stated as follows;

“Having stated as above I am of the view that Section 40 of the Law of Succession Act will apply to the circumstances of this Case. Meaning that the Court will distribute the estate of the deceased according to each house considering the number of children in each unit including the surviving widow.”

41. Article 27 of the Constitution provides for equality and non-discrimination. The provisions of Section 38 of the Law of Succession Act provide for equal distribution among the children of the deceased. This means Courts must endeavor to provide for the dependants of the deceased in equal measure. In **Re Estate of John Musambayi Katumanga - (Deceased) [2014] eKLR** Justice Musyoka stated 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.”

42. I take note that the learned Magistrate stated as follows with regards to the distribution of the money in the National Bank of Kenya in her judgement;

“With regard to the distribution of account No. 01030028094900 from the statement of account from National Bank of Kenya account No. 01030028094900 dated 16/03/2022, it is clear that the 1st petitioner did indeed contrary to her statement before this Honourable Court’s record, withdrew funds from the said bank account on diverse dates between 7/04/2019 and 23/08/2019, totaling to kshs. 444,398/=. It also came out from the evidence tendered before this Honourable Court that the 1st Petitioner’s number is 0721465125, which number made the said withdrawals.

The 1st Petitioner alleged that the funds were collected for her upkeep and payment of school fees for the 5th beneficiary. The 1st Petitioner and the 5th beneficiary therefore cannot be allowed to benefit from the proceeds in the bank account which totaled to kshs. 221, 318/= as at 16.3.2023, the same therefore shall be distributed equally amongst the objectors.”

43. I have read and considered the record with regards to the withdrawals from the deceased Account No 01030028094900, National Bank of Kenya. It is crystal clear from the Statement of Account dated 16th March 2022 covering the statement period from 1st January 2019 to 17th March 2022, that a total of kshs. 444,398/= was withdrawn by the Petitioner using her phone number 0721465124 between diverse dates being 7th April 2019, 25th April 2019, 26th April 2019, 29th April 2019, 13th May 2019, 24th May

2019, 25th June 2019, 24th July 2019 and 23rd August 2019. I also take note that during her testimony at the trial court, the Appellant testified that she used the money for daily upkeep, running a project book in the village and she did not tell the beneficiaries.

44. It is evident that the withdrawals were effected before the issuance of a grant of letters of administration at a time when the 1st Petitioner had no legal authority to deal with the free property of the deceased. Succession proceedings are grounded not only in statutory entitlement but also in equity and accountability. A beneficiary who has already benefited from estate property without authority cannot in law or equity be allowed to benefit again from the same asset. Section 83 of the Law of Succession Act imposes a duty on administrators to account for all dealings with estate property. Where a beneficiary has already appropriated estate funds irregularly, the court is entitled and indeed obliged to take such benefit into account when making final distribution orders. The Law of Succession Act (Cap. 160) governs the administration and distribution of estates in Kenya. Section 51(2) of the Act empowers the Court to ensure the estate is distributed in accordance with the confirmed grant, which reflects the final decision on the distribution of the deceased's estate. Further, Section 83(b) of the Act mandates that the administrator ensures the property is distributed according to the confirmed grant.

45. In my considered view, allowing the 1st Petitioner to share equally in the remaining balance of Kshs. 221,318/=, after having already withdrawn Kshs. 444,398/= would result in a manifestly inequitable outcome and would effectively reward unlawful conduct. While sections 35 and 40 of the Law of Succession Act speak to equality in distribution, such equality is not blind to prior benefits unlawfully taken. Equality under the Law of Succession Act presupposes that beneficiaries approach distribution with clean hands. In the present case, the Respondents had not withdrawn or benefited from the account prior to confirmation, while

the 1st Petitioner had substantially depleted it. Equal sharing of the remainder would therefore be legally indefensible.

46. From the above, I am of the view that the learned Magistrate correctly identified the fact of prior withdrawals, the lack of legal authority at the time of withdrawal, the inconsistency in the 1st Petitioner's testimony and the need to prevent unjust enrichment. The decision to exclude the 1st Petitioner and the 5th beneficiary from further benefit from the remaining balance was therefore not punitive but corrective and restorative aimed at ensuring fairness among beneficiaries. Having already unlawfully benefited from the account, the 1st Petitioner could not in law or equity, be permitted to share equally in the remaining balance of Kshs. 221,318/= . The learned Magistrate therefore committed no error of law in directing that the remaining amount be distributed equally among the objectors only.

47. For the foregoing reasons, this Court finds that the appeal is partially merited. Accordingly, the appeal is partially allowed and the ruling of the magistrate's court delivered on 14th July 2023 is partially set aside, specifically in relation to the order directing liquidation of ELDORET MUNICIPALITY/BLOCK 9/973. In substitution thereof, the following orders shall abide: -

- a) *That an order be and is hereby issued that the County Surveyor, Uasin Gishu County, shall ascertain and file a report on:*
 - a. *The total acreage of ELDORET MUNICIPALITY/BLOCK 9/973*
 - b. *The portion occupied by the matrimonial home.*
- b) *That an order be and is hereby issued that a qualified and independent valuer shall value the current state of the house standing on the said parcel of land.*
- c) *That an order be and is hereby issued that the Appellant shall, within sixty (30) days, render a full account of the NSSF funds collected and their current status and the current balance and status of National Bank of Kenya Account No. 01030028094900.*

- d) That this matter shall be mentioned on 5th February 20226 to confirm compliance with the aforesaid orders and for further directions on distribution consistent with this judgment.*
- e) That each party shall bear their own costs of the appeal, this being a family dispute.*
- f) It is so ordered.*

**DATED, SIGNED AND DELIVERED AT ELDORET VIA CTS THIS 7TH
JANUARY 2026**

.....
**R. NYAKUNDI
JUDGE**