



REPUBLIC OF KENYA



KENYA LAW

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**In re Estate of Fares Michael Kuindwa (Deceased) (Succession Cause
172 of 2010) [2026] KEHC 1014 (KLR) (29 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 1014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 172 OF 2010
G MUTAI, J
JANUARY 29, 2026
IN THE MATTER OF THE ESTATE OF FARES MICHAEL KUINDWA (DECEASED)
AND
IN THE MATTER OF THE LAW OF SUCCESSION ACT
(CAP 160 OF THE LAWS OF KENYA)**

JUDGMENT

Introduction

1. The deceased, Fares Michael Kuindwa, a former Permanent Secretary in the Office of the President and the Head of Public Service, died on the 11th day of March 2003 at the Nairobi Hospital. He left no will.
2. With a view to having his estate devolve to his beneficiaries, the Public Trustee filed a petition for letters of administration intestate of his estate on 24th June 2010. In the affidavit in support of the petition, Mr George Nyakundi, who was, at the time, an Assistant Public Trustee of the Republic of Kenya based in Mombasa, deposed that the deceased had 2 wives; Eunice Hasango Kuindwa, with whom the decedent had 6 issues, Michael Sharuti Kuindwa, Herbert Kiido Kuindwa, Olympia Habia Kuindwa, Clive Abarhaya Kuindwa, Hillary Kirungu Kuindwa and Steven Maumbi Kuindwa, and Drusilla Josephine Kerubo Kuindwa, with whom he had 4 issues Collins Mayaa Kuindwa, Gabriel Abagalana Kuindwa, Michael Bocha Kuindwa and Meshack Nyakundi Kuindwa.
3. Mr Nyakundi listed the estate of the deceased and its liabilities and gave its net value as Kes 100,442,766.50.
4. Members of the two houses consented to the proposal by the Public Trustee to be appointed as an administrator vide consents to the making of a grant of administration intestate to a person of equal or lesser priority dated 20th April 2005 (in respect of the 1st House), and 30th May 2005 (in respect of the 2nd House).



5. The grant was issued to the Public Trustee on 18th October 2010. By summons for confirmation of grant dated 25th February 2011, the Public Trustee sought confirmation of the grant so that the estate could be distributed to the beneficiaries in accordance with applicable law. In his affidavit sworn on 3rd March 2011, the Public Trustee sought to have the deceased's estate devolve to the beneficiaries in the ratio of 7/12 (to the 1st House) and 5/12 (to the 2nd House).
6. The grant of representation could not, however, be confirmed because Herbert Kiido Kuindwa and Mrs Eunice Hasango Kuindwa filed affidavits of protest. In Herbert Kiido Kuindwa's affidavit, the list of properties was contested. Mr Herbert Kuindwa stated that 4 properties in Tana River and Kajiado had not been included in the deceased's assets list. On her part, Mrs Eunice Hasango Kuindwa (hereafter "Eunice") contested the status of Mrs Drusilla Josephine Kerubo Kuindwa (hereafter "Josephine") as the deceased's spouse and of her children as dependants. She deposed that Josephine wasn't the deceased's spouse; rather, she was his business partner, with whom the deceased owned Life Flowers Ltd.
7. Eunice further averred that not all of the deceased's properties were listed in the summons for confirmation of grant. She questioned the mathematical formula the Public Trustee had proposed for the distribution of the estate and averred that the properties in Kajiado were governed by section 32 of the [Law of Succession Act](#) and thus by applicable customary law.
8. The affidavit of protest filed by Herbert Kiido Kuindwa appears to have been abandoned. The one filed by Eunice was opposed. I will not set out the tenor of the affidavits of the Public Trustee and of Josephine here, as the protest was heard and determined by Mugure Thande, J, vide a ruling she delivered on 26th April 2019.
9. In the ruling I have referred to above, Thande J identified 5 issues and then determined them. These are: whether Josephine was the deceased's wife; whether Eunice is entitled to a 50% share of the deceased's estate as her matrimonial property, which wouldn't be subject to distribution; whether Josephine's children are dependants of the deceased; whether the grant should be confirmed; and how the deceased's estate ought to be distributed.
10. Regarding the first issue, the Court found that, by general repute and long, open cohabitation, Josephine was indeed the deceased's wife. Regarding the second issue, the Court found that Eunice had not adduced evidence showing that she made an equal effort in the acquisition, preservation, or improvement of the estate. Thus, Thande, J, held that Eunice's claim for 50% of the estate must fail.
11. The judge found that Josephine and her children were dependants of the deceased. She held that the deceased expressly recognized and accepted Michael Bocha Kuindwa and Meshack Nyakundi Kuindwa as his own children and voluntarily assumed permanent responsibility for them. Regarding the Public Trustee's capacity to act as administrator of the estate and to apply for confirmation of the grant, the learned judge held that the Public Trustee was the only person with a valid grant. Accordingly, he had the right to apply for confirmation of the grant. The Court declined to revoke the grant issued to the Public Trustee.
12. The Court next considered how the estate should be distributed. It found that the distribution would be governed by Section 40 of the [Law of Succession Act](#). The Court also identified the beneficiaries of the Public Trustee. At paragraph 44(iv) the Court stated as follows:-

“Pursuant to Section 33 of the Act, the following assets in Tana River County shall be distributed to the beneficiaries of the estate of the deceased in accordance with the law or custom applicable to the deceased's Pokomo tribe:-



- a. The deceased shares in LR No 22879 (CR NO 30225), Kurawa Ranch;
- b. LR No 22584, Kipini ex Prison Farm, Allotment No. 1607068/7;
- c. LR No 25165, Kurawa;
- d. Kipini Plot, Allotment Letter Ref 8711/494;
- e. Residential home at Oda, Allotment Letter, Ref 30657/IV; and
- f. Agricultural plot No. 3711/III, Tarasaa.”

Directions Issued by the Court

13. The Court’s ruling is clear. It has not been overturned on appeal, set aside, or reviewed and is thus binding. It resolved most of the issues that arose in this matter, except for the consideration of the applicable customary law of the Pokomo tribe, which, under section 32 of the *Law of Succession Act*, governs the devolution of the properties in Tana River County.
14. The estate has not yet been distributed. The 1st House contended that all the deceased’s properties should be considered together so that no one unit would be disadvantaged. For that reason, this Court opted to hear the matter by way of viva voce evidence so that it could be guided by the evidence adduced during the hearing as to what the applicable Pokomo customary law is. The directions to that effect were issued on 14th December 2023.

Evidence Adduced in Court

15. The matter was heard on 19th February 2024. Each house called 2 witnesses. The Public Trustee did not call any witness. I will state a summary of their evidence below.
16. The customary law expert for the first house was Asser Maewa Nkubfa. Mr. Nkubfa testified that he was a member of the Buu clan, while the deceased belonged to the Kalindi clan. He further testified that the customs of the Pokomo people are similar across clans and geographic locations. Mr. Nkubfa also testified that the “gasa” and “bokoli” committees, which are the Pokomo tribal dispute-resolution bodies, are independent of the provincial administration. The “bokoli” committee considers the decisions of the “gasa” as an appellate body.
17. Mr. Nkubfa testified that his committee, the bokoli, considered the decision of the Kalindi clan “gasa” and found that the Kalindi clan “gasa” had made the right decision. He insisted that, in their finding, the decision by the Kalindi clan “gasa” that there was no marriage between the deceased and Josephine was correct.
18. When cross-examined by Mr. Maliro, Mr. Nkubfa testified that where the deceased was monogamous, the estate would be distributed to the children and the wife. Benefits would be categorized, as not all beneficiaries would receive the same shares. Where the deceased was polygamous, the estate would be distributed according to the number of children in each household. Although he conceded that each clan has its own customs, he testified that there was consultation and knowledge-sharing.
19. The Pokomo customary law expert for the second House was David Enos Jilo. Mr Enos Jilo is an Assistant Chief of the Oda sublocation, Tana River County, where the deceased came from. He testified that he was familiar with the Pokomo customary law. He was the nephew of the deceased and the son of Enos Michael Maya Bocha. Mr Jilo testified that he knew Mr. Asser Maewa Nkubfa. Mr Nkubfa is the chairman of the Buu clan; the deceased, on the other hand, was a member of the



Kalindi clan. He testified that in the case of polygamy estate of the deceased is divided equally among his children.

20. When cross-examined by Mr Kongere, Mr Jilo testified that in the case of a polygamous home, the estate is shared equally among the houses. He further testified that the “bokoli” could only determine a dispute where there was a total disagreement that the “gasa” was unable to resolve. In such a case, a disputant would appeal to the bokoli. Mr Jilo stated that he was familiar with the customs of the Pokomo people due to his work. Although members of the national government administration don’t sit in “bokoli” or “gasa” meetings, they would ordinarily be notified. He prayed that the property be divided equally among the houses.
21. The second witness for the 2nd house was Josephine. She testified that the Court should determine the distribution of the properties in Tana River. She averred that she was married to the deceased. She denied that she hadn’t been to Tana River and averred that she hadn’t settled there because the land had not been demarcated. Mrs Kuindwa denied that LR No MN/I/10692 was available for distribution. She further averred that the same was sold by the East African Development Bank after the company she and the deceased owned defaulted on a loan granted to them. Mrs. Kuindwa expressed her grievance that her children had no home and could not visit their father’s grave.
22. When cross-examined by Mr. Kongere, Mrs. Kuindwa was unsure whether LR No MN/I/10692 was in her name and that of the deceased. She stated that EADB was still demanding payment.
23. The second witness for the 1st house was Michael Sharuti Kuindwa. Michael relied on his affidavit, which was produced as his evidence in chief. He testified that the 1st family lived in Mombasa. It was his evidence that the Nyali property belonged to their deceased mother as her matrimonial home.

Submissions of the Parties

24. Upon the conclusion of the hearing, the Court directed the parties to file written submissions. I shall give a précis of the respective submissions below.

Submissions of the Public Trustee

25. The Public Trustee, through J E Maliro, Deputy Chief State Counsel, filed written submissions dated 4th April 2025. He submitted on four issues, namely: what is the applicable Pokomo customary law on the distribution of the assets affected by Sections 32 and 33 of the *Law of Succession Act* so as to give effect to the ruling dated 26th April 2019; whether LR No.5271/MN (Nyali Estate) and L.R No.7823/1/MN (English Point) should be transferred to the members of the 1st and 2nd houses of the deceased, respectively; whether the rent collected by the 1st house from L.R No.5271/MN (Nyali Estate) from the date of the deceased’s death to date should be considered in the equitable distribution of the estate; whether LR No.MN/I/10692 Bamburi forms part of the deceased’s estate and, if so, whether it is available for distribution.
26. On the 1st issue, Mr Maliro relied on Section 33 of the *Law of Succession Act* and submitted that the following assets in Tana River County should be distributed to the beneficiaries of the estate in accordance with the law or custom applicable to the deceased’s Pokomo tribe:-
 - a. Deceased’s Share in L.R No.22879, CR 30225, Kurawa Ranch;
 - b. LR No.22584-Kipini Ex-Prison Farm, Allotment No. 1607068/7;
 - c. LR No.25165, Kurawa;
 - d. Kipini Plot, Allotment Letter Ref 8711/494;



- e. Residential House, Allotment Letter Ref 30657/IV; and
 - f. Agricultural Plot, 3711/111, Tarasaa.
27. He submitted that according to the two expert witnesses, in case a deceased person was polygamous, then the properties under Pokomo customs are shared equally amongst the houses, and therefore the same should apply in this case.
28. He submitted that there was no appeal to warrant the deliberations and determination by the Bokoli, thus the alleged decision and by the council of elders is misplaced and of no consequence to the Kalindi clan to which the deceased belonged and to the determination of the issue before the court.
29. On the second issue, counsel submitted that LR No.5271/MN (Nyali Estate) be transferred to the following six children of the 1st house as proprietors in common in equal and undivided shares absolutely;
- a. Michael Sharuti Kuindwa;
 - b. Herbert Kiido Kuindwa;
 - c. Olympia Habia Kuindwa;
 - d. Clive Abarhaya Kuindwa;
 - e. Hillary Kirungu Kuindwa; and
 - f. Steven Maumbi Kuindwa.
30. Further, LR No 78233/1/MN (English Point) be transferred to the widow and her four children, as proprietors in common in equal and undivided shares absolutely;
- a. Josephine Drusilla Kerubo Kuindwa,
 - b. Michael Bocha Kuindwa,
 - c. Meshack Nyakundi Kuindwa,
 - d. Collins Mayaa Kuindwa,
 - e. Gabriel Abagalana Kuindwa.
31. He submitted that the two properties had been valued at Kes 85,000,000 and Kes 60,000,000. Accordingly, the 1st house was entitled to 7/12 of the net total value, equivalent to Kes 84,583,333, and the 2nd house to 5/12, equivalent to Kes 60,416,667. Therefore, the 1st house ought to compensate the 2nd house by Kes 416,667, representing the excess value of LR No.5271/MN (Nyali Estate) over L.R No.7823/1/MN (English Point).
32. On the 3rd issue, he submitted that the allegation that the LR No. 5271/MN (Nyali Estate) had been leased out was raised by the 2nd house in its joint replying affidavit, sworn on 25th October 2021, and confirmed by the land valuer, Lloyd Masika Limited, vide its valuation report. The said property is let out for Kes. 250,000.00 monthly. He urged that the said rent should be factored into the mode of distribution so that the 2nd house is compensated for the rent collected but never shared with it.
33. Regarding the fourth issue, he submitted that the issue was raised by the 1st house in its replying affidavit, sworn on 3rd March 2025. From the documents attached to the affidavit, it is evident that the property is charged to the East African Development Bank and is thus not available for distribution.



In the event that compensation for the same is paid, it was urged that the proceeds be distributed in the ratios directed by the court.

34. In conclusion, he submitted that the properties affected by Pokomo customs be shared equally between the 1st and 2nd house and that LR No.5271/MN (Nyali Estate), and LR No.7823/1/MN be distributed as per his submissions above. Regarding rent income, the 1st family is to compensate the 2nd family for their share of 5/12 of all income/rent collected from the property, LR No. 5271/MN (Nyali Estate), from the date of lease to date. That in case compensation of LR No.MN/1/10692 Bamburi is paid to the administrator the same is to be distributed to the heirs in the ratios directed by the court.

Submissions of the First Family

35. The first family, through their advocates, Muriu, Mungai & Company Advocates LLP, filed written submissions dated 23rd April 2025. Counsel submitted that they agreed with the Public Trustee's conclusions on two of the four issues he raised for determination. Counsel submitted on the other two issues as follows.
36. Regarding how Pokomo customary law distributes affected assets, counsel referred to the ruling of 26th April 2019 and submitted that the court must be presented with credible evidence of Pokomo customary law. It was urged that the Public Trustee did not call any evidence; however, the two families did, even though the evidence adduced was at variance. Mr Kongere, learned counsel for the 1st house, contended that customary law is proved through expert evidence. He submitted that the parties called two expert witnesses: Davis Enos Jilo, Senior Assistant Chief, Oda Sub-location, called by the second family, and Mr Asser Maewa Nkubfa, a Pokomo by birth and chairperson of the council of elders of Ngao village, called by the 1st family. Regarding the first witness, counsel submitted that his expertise was based on his being a Senior Assistant Chief. Regarding the second witness, counsel submitted that he has the expertise to advise on the very law he applies in resolving disputes, and that the criticism leveled against him by the Public Trustee, due to his being from a different clan than that of the deceased, is misplaced.
37. Counsel urged the court to uphold the evidence of the second witness as expert evidence and also find that the assets to which section 33 of the Law of Succession Act applies be distributed to the 1st family to the exclusion of the 2nd family.
38. On rent supposedly collected from the Nyali property, counsel submitted that the claim that the 1st family has let the property, deriving Kes. 250,000.00 per month, which is not being shared with the 2nd family, is hearsay as no evidence was presented before the court on the same.
39. In conclusion, counsel stated that it was the 1st family's wish for the Public Trustee to take charge of the distribution process, for the properties in Tana River to be distributed to them to the exclusion of the second house, and for the other assets to be distributed in the manner proposed in the affidavits.

Submissions of the 2nd Family

40. The 2nd family, through their advocates, Amolo & Gacoka Advocates, filed written submissions dated 23rd April 2025. Counsel submitted on four issues for determination namely; the applicable customary laws according to the Pokomo tribe in regards to the distribution of the assets whose distribution is governed by Section 33 of the Law Succession Act; distribution of L.R No.5271/MN (Nyali) and LR No 7823/1/MN (English Point) property; if the rent collected by the 1st family from LR No 5271 / MN (Nyali) should be taken into consideration in the equal distribution of the estate of the deceased



to the beneficiaries; whether LR No MN/I/10692, Bamburi forms part of the estate of the deceased and if the same is available for distribution.

41. Counsel referred to the ruling of 26th April 2019 on the distribution of certain assets of the deceased. Counsel submitted that the expert witness, Mr Asser Maewa Nkubfa, was unable to establish that he had the authority to represent the Council of Elders of the Kalindi clan, from which the deceased hailed. The minutes of the meeting held on 5th June 2023 do not indicate that the Kalindi clan was represented. Counsel further submitted that the expert witness was not conversant with the affairs of the Kalindi clan and was in no position to represent the views of the Kalindi clan. It was urged that he was also unable to establish that the Kalindi clan had met to deliberate on the distribution of the deceased's estate herein to warrant a direct appeal to the Bokoli. Ms Maina submitted that Mr Asser Maewa Nkubfa, together with Bokoli and the council of elders, lacked authority to deliberate on matters of the Kalindi clan, especially on the deceased's estate herein.
42. Counsel submitted that customary must be consistent with *the Constitution*, accurate, and be definitely established, which was not the case with the 1st family witness.
43. On the second issue, counsel submitted that there is no dispute that the two properties are to be distributed between the two families; the issue is how the excess is to be equally distributed according to the valuation of the said properties. Counsel urged the court to adopt the proposals by the 2nd family.
44. Regarding the third issue, counsel submitted that the 1st family has been receiving some proceeds from the deceased's estate without the consent or approval of the Public Trustee and the 2nd family. The monthly rent collected, said to be Kes. 250,000, had not been accounted for or shared with the 2nd family and should therefore be taken into account, reckoned from the date of the ruling, if not from the time of the deceased's death or from the time the lease took effect.
45. On the fourth issue, counsel submitted that the said property is charged to the East African Development Bank and therefore not available for distribution, and should it later become available, then the same is to be distributed in equal shares amongst all the beneficiaries to the estate.
46. In conclusion, counsel urged the court to uphold the position of the 2nd family.

Analysis of the Facts and the Law

47. As earlier stated, the ruling of Thande J deals with most of the issues in dispute in this matter. What remains is consideration of the Pokomo law governing property in Tana River County. The said ruling made a definitive finding on the following issues:-
 1. The status of Josephine as a wife of the deceased and her children as dependants;
 2. The extent of the estate of the deceased and how the same should be divided; and
 3. The claim by Eunice that 50% of the estate of the deceased belonged to her as a spouse. In the case of this latter matter, the Court dismissed the same.
48. This Court is of the same rank as Thande J and thus cannot sit on appeal from her judgment, even if it disagrees with it. Accordingly, the issues cannot be reopened in this ruling. Accordingly, the Court considers Josephine and her children to be the deceased's wife and children, respectively, and holds that all the properties listed in Thande J's ruling belong to the estate absolutely. In my view, the decision of the "gasa" or "bokoli," purporting to make contrary findings regarding Josephine's status, cannot overrule the Court. In any case, such a holding would be repugnant.



49. Section 32 of the *Law of Succession Act*. excludes the application of the provisions on intestacy (Part V) to Tana River County. Section 33 of the *Law of Succession Act* provides that:-

“The law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the law or customs applicable to the deceased’s community or tribe, as the case may be.”

The excluded properties are agricultural land, crops, and livestock.

50. The properties listed in paragraph 44(vii) fall into the said category. The same must thereto devolve in accordance with the Pokomo customary law.

51. I have considered the matter carefully. In my view, the issues for determination are the following: -

- a. What does Pokomo customary law provide regarding the devolution of the estate of a deceased person;
- b. Whether this Court, having previously determined that Josephine is a wife of the deceased, could revisit the issue while considering the issue of the properties situated in Tana River;
- c. The burden of proof applicable when the Court considers the question of customary law;
- d. What orders the Court may issue in this case; and
- e. Whether LR NO MN/I/10692, Bamburi, is part of the estate of the deceased.

The Burden of Proof of Customary Law

52. In the decision of this Court that I have referenced. Thande J stated as follows in paragraph 23:-

“23. .A person who seeks to propound customary law must call evidence to prove that customary law. In *Sakina Sote Kaitany & another v Mary Wamaitha* [1995]eKLR, Gicheru, J.A. (as he then was had this to say concerning proof of customary law and practices:

...the onus of proof to establish a particular customary law rests on the party who relies on that law in support of his case. call evidence to prove that customary law, as would prove the relevant facts of his case.”

53. In *Sugut v Jemutai & 3 others* [2023] KECA 202 (KLR), Kiage, JA, of the Court of Appeal stated as follows:-

“30. To summarize the position, this is a case between Africans, and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity, the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done, but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of the present apparent lack in Kenya of authoritative text books on the subject, or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove that customary law, as he would prove the relevant facts of his case.”



54. The two houses called what they considered to be expert witnesses. The evidence of the “experts” differed on what they considered to be applicable law. Before considering this question in detail, I must address Josephine’s capacity.

Is Josephine a Wife Under the Pokomo Customary Law?

55. As earlier stated, this matter was considered by Thande J. Since it has been raised again, I must determine whether Josephine could be a wife for purposes of the non-customary law properties situated outside Tana River and not a wife for the purposes of those in Tana River. In my view, such a finding. If it were to be made, would be offensive for a number of reasons:-

1. Firstly, it would amount to this Court sitting on appeal regarding the decision of Thande J, as she made what this Court has already determined to be a definitive finding on Josephine Kuindwa’s status as a wife. The learned judge found Josephine to be a wife under the customary law of the Pokomo; that decision has not been appealed, overturned, or set aside. It is binding. This Court, having equal jurisdiction as Thande, J, cannot sit on appeal against her decision, in any case; and
2. Secondly, the decision of the “gasa” that the first house seeks to rely on was made by the said clan committee without hearing the second house. It went against the rules of natural justice.

56. Under the circumstances, I reiterate the findings of Thande J and find and hold that Drusilla Josephine Kerubo Kuindwa is indeed the wife of the deceased and thus entitled to a share of his estate in Tana River.

57. I must state that, having found that Josephine is a wife, there would be no reason to deny her a share of the Tana River property. Our Constitution, with its progressive ethos, protects her right to it as a spouse.

What is the Applicable Pokomo Customary Law Where a Deceased Person was Polygamous?

58. The expert witnesses’ evidence contradicted each other regarding how the shares or the estate are divided when a deceased person was polygamous. In their submissions, the parties questioned whether the opposing party’s expert witness was, in fact, an expert witness.

59. Based on the evidence of Mr. Jilo and Mr. Nkubfa, I am persuaded that Mr. Nkubfa is the expert in this case. He is the chairman of the Buu clan “gasa” and also sits on the “Bokoli,” which determines appeals from “gasa” decisions. I agree with the 1st House’s submissions that it would be unlikely that a person sitting on an appellate body would lack knowledge of the customs and practices of the various clans whose decisions he had the obligation to consider and determine.

60. In *Mistry Jadva Parbat & Co Limited v National Oil Corporation of Kenya* [2023] KEHC 21609 (KLR), where the Court relied on the decision of the Court of Appeal in *Kagina v Kagina & 2 others* [2021] KECA 242 (KLR), wherein it was stated that:-

“We agree with the appellant’s observation that no other expert evidence was called either by the court or the 1st respondent to controvert the testimony of the expert called to testify on his behalf. The record is also however explicit that the reason why the Judge discounted the said evidence was not only because the same had been controverted by any other evidence tendered through another expert witness opinion to the contrary but because the expert witness called by the appellant, although he gave evidence on the nature of trainings he had undergone and where he had under taken those trainings, he failed to tender any proof



with regard thereto in the form of academic testimonials or his expertise. Our take on the above undisputed factual position is that without proof and submission of the witnesses' credentials to the court, there was nothing to demonstrate that the said witness was indeed a forensic expert.” (emphasis added).

61. Being so persuaded by the evidence of Mr Nkubfa on the applicable customary law regarding division of the assets of the deceased situated in Tana River County, I find and hold that the properties held under customary law of the Pokomo people in Tana River shall be divided to the respective houses on the basis of the number of children in each houses. This finding, in the view, is fair, as it leads to an equal distribution of the Tana River properties among all beneficiaries.

Whether LR NO MN/I/10692 Bamburi Forms Part of the Estate of the Deceased?

62. In her testimony, Josephine appeared to concede when cross-examined that the said property was in her name and that of the deceased. Taking into account her concession that the same belongs to the estate, I find and hold that it does and should be distributed in accordance with Section 40 of the Law of Succession Act once the same is discharged and is free from encumbrance, or compensation of whatever nature is received in regard to the same.

Specific Dispositions of the Estate

63. Having found as above, I now turn to the devolution of the estate. It is a trite law that the Probate and Administration Court has, as its main duty, the distribution of the net estate of a deceased person to the beneficiaries.
64. The first house has 7 beneficiaries. Although Eunice is now deceased, she survived her husband and therefore counts as a beneficiary. The second house, on the other hand, has 5. Using the applicable ratios, the first house is entitled to 7/12 of the estate, while the second house is entitled to 5/12.
65. There was an understanding that the 1st House would get the house in Nyali estate, whose value was given as Kes 85,000,000, while the second house would get the English Point property valued at Kes 60,000,000. Applying the above ratio, I agree with the submissions of the Public Trustee that the 1st house compensates the second house Kes 416,667.
66. The Public Trustee submitted that the rent collected from LR NO 5271/MN be factored into the distribution. Having carefully considered the matter, I am not persuaded that the Court should do so. Although this Court has already found that the contention by the 1st House that the property was matrimonial was determined by Thande J, it is my view that it would be oppressive to ask the 1st House to account for a property they had controlled for a long period of time and used as their home. Such a course of action is unlikely to promote harmony and would seem to fair-minded people as a vengeful exercise. In any case, the late Eunice had been married to the deceased for a very long time before Josephine's marriage.
67. The upshot of the foregoing is that
1. I find and hold that the deceased was survived by the following dependants
 1. Eunice Hasango Kuindwa (now deceased);
 2. Michael Sharuti Kuindwa;
 3. Herbert Kiido Kuindwa;
 4. Olympia Habia Kuindwa;



5. Clive Abarhaya Kuindwa;
 6. Hillary Kirungu Kuindwa;
 7. Stephen Maumbi Kuindwa;
 8. Josephine Drusilla Kerubo Kuindwa;
 9. Michael Bocha Kuindwa;
 10. Meshack Nyakundi Kuindwa;
 11. Collins Mayaa Kuindwa; and
 12. Gabriel Abagalana Kuindwa.
2. The estate shall be distributed equally in the ratio of 7/12 (first house) and 5/12 (second house);
 3. The first house shall have the Nyali House LR No 5271/MN/Nyali Estate in common in equal and undivided shares absolutely;
 4. The second house shall take LR NO 7823/I/MN English Point properties in common in equal and undivided shares absolutely;
 5. The 1st house shall pay to the 2nd house Kes 416,667, being the excess share of the value of the Nyali house over the English Point property;
 6. I decline to order that any rent collected on LR 5271/MN by the 1st House be accounted for and a share given to the 2nd house, as it would be oppressive to do so;
 7. The properties in Tana River being the following: -
 1. Deceased's Share in L.R No.22879, CR 30225, Kurawa Ranch;
 2. LR No.22584-Kipini Ex-Prison Farm, Allotment No. 1607068/7;
 3. LR No.25165, Kurawa;
 4. Kipini Plot, Allotment Letter Ref 8711/494;
 5. Residential House, Allotment Letter Ref 30657/IV; and
 6. Agricultural Plot, 3711/111, Tarasaa.
 8. LR No MN/I/10692, Bamburi shall be divided equally once the title is discharged and is free from all encumbrances, or compensation is made in respect of the same.
68. The deceased died almost 23 years ago. This matter has been in Court for almost 16 years. In my view, it should be concluded without further delay. I therefore order and direct the Public Trustee to transmit the properties I have referred to above to the beneficiaries within 6 months of the date hereof. The Public Trustee must ascertain what amount is payable to the East African Development Bank in respect of the Bamburi Property and endeavor to settle the same. If settlement is not feasible, the property, with the chargee's permission, be sold, and the net proceeds shared in the ratios I have identified.
 69. This is a family dispute over the succession of the estate of a deceased person. Accordingly, it is my holding that each party shall bear its own costs. An award of costs will not restore family ties or promote reconciliation.



70. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 29TH DAY OF JANUARY 2026. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:

Ms Cheruiyot, holding brief for Mr Billy Kongere, for the 1st House;

Ms Maina, holding brief for Mr Gachoka, for the 2nd House;

Mr Maliro, for the Public Trustee, the Appointed Administrator; and

Ms Bancy – Court Assistant.

